

Withholding-Only Proceedings

TOOLKIT

Prepared for the Pennsylvania Immigration Resource Center
(PIRC)

By the Pennsylvania State University Dickinson School of
Law's Center for Immigrants' Rights

AUGUST 2014



PIRC

Pennsylvania Immigration
Resource Center

Educating, advocating, ensuring access to justice.

PENN STATE LAW

PREFACE

About the Authors

The Center for Immigrants' Rights

The Center for Immigrants' Rights (the Center) is an immigration policy clinic at Penn State's Dickinson School of Law. Students in the Center have valuable opportunities to work on behalf of local and national organizations to produce practitioner toolkits, white papers, and other documents on current issues in immigration law. This Toolkit is one such project prepared by Djami Diallo ('14) and Dongdong Zhou (LLM '14) under the supervision and with final edits by the Center's Director, Professor Shoba Sivaprasad Wadhia.

About the Pennsylvania Immigration Resource Center (PIRC)

The Center prepared this Withholding-Only Proceedings Toolkit for the Pennsylvania Immigration Resource Center (PIRC). PIRC works to provide access to justice to vulnerable immigrants in detention and in the community through legal services, education, and advocacy. PIRC seeks to protect immigrants' rights to freedom and to provide free, effective legal representation, and legal services to help immigrants obtain or protect their legal status. Substantive feedback and final edits on this Toolkit were provided by Amara M. Riley, Managing Attorney, Detained Programs.

The authors are grateful to Rebecca Sharpless, Professor of Clinical Education and Director of the Immigration Clinic at the University of Miami School of Law; and Trina Realmuto, Staff Attorney at the National Immigration Project of the National Lawyers Guild for peer reviewing the Toolkit. The authors also thank the several attorneys who provided feedback about their experiences with withholding-only proceedings.

About our Goal

This Toolkit aims to provide new practitioners and pro bono attorneys with an overview of withholding-only proceedings. According to the 2013 Statistical Yearbook, the number of withholding-only cases before immigration courts has significantly increased, due in large part to the number of individuals found to have a "reasonable fear" of persecution or torture in their home countries.¹ In 2009, there were 240 withholding-only cases. By 2013, this number had grown to 2,269. This Toolkit identifies the circumstances in which the Department of Homeland Security (DHS) places an individual in withholding-only proceedings; the remedies available to an individual in such proceedings; the relevant governing law and policy; and practical tips. These tips are marked with an asterisk (*) throughout this Toolkit.

¹ U.S. Department of Justice Executive Office for Immigration Review, FY 2013 Statistical Yearbook, B1 (2014), *available at* <http://www.justice.gov/eoir/statpub/fy13syb.pdf>.

Methodology

To prepare this Toolkit, we reviewed among other things, the Immigration and Nationality Act, Title 8 of the Code of Federal Regulations, and official documentation prepared by USCIS. We also conducted research on case law (focusing on the Third Circuit) relevant to withholding-only proceedings. We drafted a survey to solicit legal strategies for withholding-only proceedings and circulated it to experienced attorneys. We reviewed forms and collected sample documents from attorneys used during the course of withholding-only proceedings. These materials are available upon request by contacting the Center via email at centerforimmigrantsr@law.psu.edu.

Legal Disclaimer

This Toolkit is limited in its scope as it is primarily focused on withholding-only proceedings that have initiated once a noncitizen has received a positive reasonable fear determination. Moreover, it is not a substitute for reading the primary sources of law that pertain to such proceedings. This Toolkit is for informational purposes only and not for the purpose of providing legal advice. Although we have gone to great lengths to make sure our information is accurate and useful, we recommend you conduct further research based on your client's specific circumstances and circuit law governing your client's case. Questions or corrections to this toolkit should be sent to: centerforimmigrantsr@law.psu.edu.

TABLE OF CONTENTS	Page
I. WITHHOLDING-ONLY PROCEEDINGS.....	5
A. Introduction	5
1. Circumstances in which DHS Issues a Final Administrative Removal Order	6
2. Circumstances in which DHS Issues a Reinstatement of Removal Order	6
3. Challenging an Administrative Removal or Reinstatement of Removal Order in Federal Court	7
4. Reasonable Fear Interview	8
B. Remedies Available in Withholding-Only Proceedings.....	10
1. Withholding of Removal	10
a. Past threat to life or freedom.....	11
b. Future threat to life or freedom.....	11
2. Protection under the Convention Against Torture (CAT).....	12
II. RESOURCES	14
A. The Immigration and Nationality Act (2014)	14
B. The Code of Federal Regulations, Title 8: Aliens and Nationality	15
C. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.....	16
D. The United Nations Convention and Protocol Relating to the Status of Refugees	16
E. Understanding Government Forms, the Application Form for Relief, and Documents from the Attorney.....	17
1. Government Forms.....	17
a. From DHS	17
b. From the Asylum Officer	18
2. Documents from the Attorney	19
III. STRATEGIES	20
A. Master Calendar Hearing	20
1. Introduction	20
2. Notification of a Master Calendar Hearing	20
3. Tips for the Master Calendar Hearing	20
B. Individual Calendar Hearing.....	21
1. Tips for the Individual Calendar Hearing.....	21

C. Immigration Judge Decision	22
IV. CASE LAW	23
1. Withholding of Removal	23
2. Protection under the Convention Against Torture	30
3. Detention	33
V. GLOSSARY OF ACRONYMS.....	36
VI. APPENDIX.....	37
A. Forms from the Government and the Attorney (Redacted)	
1. Form I-851–Notice of Intent to Issue a Final Administrative Removal Order.....	
2. Form I-851 A–Final Administrative Removal Order	
3. Form I-213/831–Record of Deportable/Inadmissible Alien.....	
4. Form G-56–Notice of Reasonable Fear Interview	
5. Free Legal Services Providers List (Pennsylvania).....	
6. Form M488–Information about Reasonable Fear Interview	
7. Form I-899–Record of Determination/Reasonable Fear Worksheet	
8. Form I-863–Notice of Referral to Immigration Judge	
9. Form I-898–Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge.....	
10. Form I-589–Application for Asylum and for Withholding of Removal.....	
11. Form G-28–Notice of Entry of Appearance as Attorney or Accredited Representative	
12. EOIR-28–Notice of Entry of Appearance as Attorney or Representative before the Immigration Court	
13. Sample Client-Attorney Consent Agreement	
14. Sample (Pro Bono) Representation Agreement.....	
B. Samples from Attorneys (Redacted).....	
1. Sample Exhibit List	
2. Sample Redacted Briefs	
3. Sample Letters Requesting Prosecutorial Discretion	
C. Secondary Sources	38
Regina Germain, ASYLUM PRIMER, AILA PUBLICATIONS (6 th Ed. 2010).	38
Deborah E. Anker, Law of Asylum in the United States, Thomas Reuters (2014 Ed.).....	38

Guidance Documents from the Department of Homeland Security.....	38
1. IMMIGRATION COURT PRACTICE MANUAL, Chap. 7, Executive Office for Immigration Review.....	38
2. <i>USCIS Revised Fear (Lafferty) Memo, Lesson Plan</i> , LEXISNEXIS LEGAL NEWSROOM: IMMIGRATION LAW.....	38
3. US Citizenship and Immigration Services, Lesson Plan Overview – Credible Fear.....	38
4. US Citizenship and Immigration Services, Lesson Plan Overview – Reasonable Fear....	38
Practice Advisories and Guides.....	38
1. <i>Reinstatement of Removal</i> , National Immigration Project of the National Lawyers Guild and American Immigration Council.....	38
2. <i>Expedited Removal, Reinstatement of Removal, and Administrative Removal Proceedings</i> , University of Miami School of Law Immigration Clinic.....	38
3. <i>What to Do if you are in Expedited Removal or Reinstatement of Removal</i> , Florence Project.....	38
4. <i>Guide to Credible & Reasonable Fear Proceedings</i> , Florence Project.....	39
Charts and Press Releases by Advocacy Groups.....	39
1. In Charts and Numbers: How the US Government Detains Individuals while Delaying their Request for Asylum, American Civil Liberties Union.....	39
2. <i>Detained Asylum Seekers Sue Obama Administration to End Long Waits for Initial Interviews</i> , National Immigrant Justice Center.....	39

I. WITHHOLDING-ONLY PROCEEDINGS

A. Introduction

The Department of Homeland Security (DHS) should refer a noncitizen who receives either an administrative removal order² or a reinstatement of removal order³ to an asylum officer for a reasonable fear determination⁴ when the noncitizen expresses a fear of persecution or torture. When the asylum officer determines that a noncitizen has a reasonable fear of persecution or torture, Immigration and Customs Enforcement (ICE)⁵ places the noncitizen in withholding-only proceedings. In contrast to a formal removal proceeding at which the individual responds to pleadings and may pursue relief from removal in many forms, withholding-only proceedings are more limited and take place after an order of removal has been issued by DHS. DHS takes the position that the only defenses to removal a noncitizen may raise during such proceedings are statutory withholding of removal and protection under the Convention Against Torture, which encompasses withholding of removal and deferral of removal. However, there also is a strong argument that some individuals remain eligible for asylum. Thus, it is important to preserve this issue in immigration court and before the Board of Immigration Appeals even though the actual argument for asylum eligibility will likely happen in a federal court of appeals. The legal premise for asylum eligibility is described by one expert:

Individuals who fear persecution in their home countries may have an argument that they are eligible for asylum under INA § 208 notwithstanding § 241(a)(5)'s bar to relief. The premise of this argument is that Congress intended the asylum statute to apply to “Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status. . . .” INA § 208(a)(1) (emphasis added). In order to harmonize the asylum and reinstatement statutes, individuals must not be precluded from applying for asylum.⁶

In addition to asylum eligibility, the attorney may want to negotiate with DHS to cancel the

² INA § 238(b)(1); 8 C.F.R. § 238.1.

³ INA § 241(a)(5); 8 C.F.R. § 241.8.

⁴ 8 C.F.R. § 208.31; 8 C.F.R. § 241.8.

⁵ ICE is one of the enforcement agencies under DHS and represents the Department during withholding-only proceedings to defend charges against a noncitizen. It is also the largest investigative agency of DHS. See *Overview, ICE*, <http://www.ice.gov/about/overview/> (last visited April 4, 2014).

⁶ Trina Realmuto, *Reinstatement of Removal*, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND AMERICAN IMMIGRATION COUNCIL (Mar. 7, 2014), http://www.nationalimmigrationproject.org/legalresources/practice_advisories/2013-4-29%20Reinstatement%20of%20Removal.pdf.

administrative removal order or reinstatement of removal order and issue a Notice to Appear (NTA) because of a legal deficiency or as matter of prosecutorial discretion.

*⁷Attorneys should navigate the possibility of negotiating with DHS as early in the process as possible, ideally before an administrative order of removal becomes final. The attorney should compile a request that resembles a request for prosecutorial discretion.⁸ After the client has been placed into withholding-only proceedings, it is more challenging for an attorney to seek cancellation of the 238(b) or 241(a)(5) order since the Immigration Judge has jurisdiction.

*DHS has prosecutorial discretion to place a person in either type of removal proceeding so the attorney may consider making all possible legal and PD arguments to get them to place a person in 240 proceedings, particularly when the person would be eligible for relief in 240 proceedings and shut out from relief in 238(b) or 241(a)(5) proceedings.

1. Circumstances in which DHS Issues a Final Administrative Removal Order

DHS has discretion to issue a Notice of Intent to Issue a Final Administrative Removal Order⁹ to a noncitizen who has a final conviction for an aggravated felony¹⁰ and is not a lawful permanent resident (LPR) of the United States.¹¹ The regulations require DHS to advise the noncitizen of his or her right to rebut the charges, and retain counsel at no expense to the government, among other requirements. If DHS determines that a noncitizen is removable, DHS issues a Final Administrative Removal Order.¹² If a noncitizen expresses a fear of return to his or her country of origin or requests to apply for protection in the form of withholding of removal, DHS is required to refer the case for a reasonable fear interview.¹³

2. Circumstances in which DHS Issues a Reinstatement of Removal Order

DHS may issue a reinstatement of removal order to a noncitizen if it finds that the noncitizen “has **reentered** the United States **illegally** after having been **removed** or having **departed voluntarily**,

⁷ Practical tips are marked with an asterisk (*) throughout this Toolkit.

⁸ A full discussion of prosecutorial discretion is beyond the scope of the advisory. *See, i.e.,* Mary Kenney, PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT, AMERICAN IMMIGRATION COUNCIL LEGAL ACTION CENTER (June 24, 2011), *available at* <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>.

⁹ INA § 238(b); 8 C.F.R. § 238.1.

¹⁰ INA § 101(a)(43).

¹¹ INA § 238(b); 8 C.F.R. § 238.1.

¹² INA § 238(b); C.F.R. § 238.1.

¹³ C.F.R. § 238.1.

under an **order of removal**.”¹⁴ In such cases, “the prior order of removal is reinstated from its original date.”¹⁵ The regulations state that DHS shall advise the noncitizen of his or her right to contest a reinstatement determination and that DHS should decide whether a noncitizen’s statement warrants reconsideration of the decision.¹⁶ If the DHS officer ultimately finds that the person is subject to the reinstatement provision under the INA, but the noncitizen also indicates a fear of return, he must refer the noncitizen to an asylum officer for a reasonable fear determination.¹⁷

3. Challenging an Administrative Removal or Reinstatement of Removal Order in Federal Court¹⁸

The timing of when an administrative removal or reinstatement of removal order becomes “final” for purposes of judicial review is an open question in every circuit. One exception is the Ninth Circuit, where a reinstatement order is not final until the conclusion of withholding-only proceedings.

*People who want to challenge their reinstatement or administrative removal orders should file a Petition for Review (PFR)¹⁹ to the relevant court of appeals within 30 days of the order, even if they are in withholding-only proceedings. They should also file a second PFR at the conclusion of proceedings. Thus, a petition for review could be filed in two scenarios: 1) within 30 days of the end of withholding-only proceedings and 2) within 30 days of the issuance of the removal order. Furthermore, the stakes for an individual challenging such orders are very high: if they are able to successfully challenge these orders, they may be eligible for removal proceedings, which provide stronger protections and benefits when contrasted with withholding-only proceedings.

*Possibly, a circuit court will dismiss a petition for review that is filed within 30 days of the administrative or reinstatement removal order as unripe under a theory that the order of removal is not “final” because the client is in withholding-only proceedings. In such cases, the attorney should argue that an IJ has jurisdiction to hear a challenge to an aggravated felony (AF). The attorney should further argue that an AF finding is germane to an IJ’s decision about whether a categorical bar to withholding of removal applies, and for this reason alone must take jurisdiction for making a decision about whether a person is an aggravated felon.

¹⁴ INA § 241(a)(5); 8 C.F.R. § 241.8.

¹⁵ INA § 241(a)(5); 8 C.F.R. § 241.8.

¹⁶ 8 C.F.R. § 241.8.

¹⁷ 8 C.F.R. § 241.8(e).

¹⁸ The specific arguments for challenging an administrative removal order or reinstatement of removal order are beyond the scope of this Toolkit.

¹⁹ INA §§ 242(a)(1)(5), (b)(1).

4. Reasonable Fear Interview

If DHS issues a noncitizen an administrative removal order or reinstatement of removal order and the noncitizen expresses fear of being returned to his or her home country, DHS is supposed to refer the noncitizen to an **asylum officer** for a **reasonable fear determination**.²⁰ The asylum officer will determine whether the noncitizen has a **reasonable fear of persecution and/or torture** in his or her home country. To demonstrate the requisite “reasonable fear,” a person must demonstrate that there is a **reasonable possibility** that he or she would be persecuted based on his or her race, religion, nationality, membership in a particular social group, or political opinion. This standard is a higher standard than “credible fear.” Under the regulations, an individual who is referred to an asylum officer for a reasonable fear interview is required to receive a fear interview within ten (10) days, absent exceptional circumstances. However, in practice, a noncitizen has to wait much longer before an asylum officer interviews him or her.²¹

Once DHS refers the noncitizen’s case to an asylum officer for a reasonable fear determination, the following procedures are the same whether the noncitizen received a final administrative removal order or a reinstatement of removal order.

During the reasonable fear interview, a noncitizen may be represented by counsel or some other representative.²² If the noncitizen’s proficiency in English does not allow for an effective interview, the asylum officer must arrange the assistance of an interpreter.²³ A reasonable fear interview can take place in person or via video conference and, according to one practitioner we surveyed, typically lasts for 2-3 hours. Representatives for the noncitizen may present a statement at the end of the interview.²⁴

At the end of a **reasonable fear interview**, the asylum officer creates a final summary of the interview, and a noncitizen is entitled to review the summary and correct any errors.²⁵ This summary should be reviewed carefully by the individual and the attorney as it can be used as evidence by the government in a later proceeding before the immigration judge.

If the asylum officer makes a **positive reasonable fear determination**, he or she refers the case to an **immigration judge** (IJ) who will determine, during a withholding-only proceeding, whether the noncitizen is eligible for **withholding of removal or protection under the Convention**

²⁰ 8 C.F.R. § 208.31.

²¹ 8 C.F.R. § 208.31.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Against Torture. However, if the asylum officer makes a **negative reasonable fear determination**, the noncitizen may seek **review** by an IJ.²⁶ If the IJ agrees with the asylum officer's finding, the noncitizen cannot seek further review of the decision and will be removed by DHS.²⁷ Conversely, if the IJ finds that the noncitizen does have a reasonable fear of persecution and/or torture, the noncitizen will be placed in a withholding-only proceeding and will have the opportunity to apply for **statutory withholding of removal** and protection under the **Convention Against Torture**.²⁸

The noncitizen's first appearance before an IJ in a withholding-only proceeding is typically at a **master calendar hearing**. Depending on the case, a noncitizen may be scheduled for additional master calendar hearings prior to being scheduled for an **individual hearing**. During the master calendar hearing(s) for a withholding-only proceeding, the IJ advises the noncitizen of his or her rights and determines if the noncitizen will be seeking statutory withholding of removal and/or protection under the Convention Against Torture.²⁹ During a master calendar hearing, the IJ will typically schedule an individual hearing as well as the deadline for submitting a Form I-589 Application for Asylum and Withholding of Removal and related evidence.³⁰ This Form is also used for making an application for protection under the Convention Against Torture.

*Attorneys should always meet with the client prior to the reasonable fear interview (RFI). They should review the history and explain the purpose of the RFI, the types of questions that could be asked during the RFI, and the importance of answering the questions honestly and thoroughly.

*Practitioners representing clients should always be present at the RFI and exercise their right to ask clarifying questions at the end if it would bring out information that is relevant but was not discussed through the course of the RFI. For additional information, practitioners should review materials pertaining to the RFI in the Secondary Sources section below.

*Where appropriate and practicable, practitioners should preserve for appeal, both via oral argument and via written brief, arguments regarding eligibility for asylum.

*It is also very important to share whatever information was not shared during the RFI in front of

²⁶ 8 C.F.R. § 208.31(f).

²⁷ 8 C.F.R. § 208.31(g)(1).

²⁸ 8 C.F.R. § 208.31(g)(2)(i).

²⁹ Executive Office for Immigration Review, Immigration Court Practice Manual, § 7.4(h)(iii) (last revised June 10, 2013), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf#page=131. (The Practice Manual does not carry the force of law).

³⁰ *Id.*

the IJ. If an attorney is retained after the RFI is conducted, the attorney should review the record thoroughly, including the RFI determination, specifically with an eye towards any possible inconsistencies and/or omissions. The attorney should review possible inconsistencies and/or omissions with the client and be prepared to explain to the IJ why that information was not shared with the asylum officer. That being said, it is a bit trickier to bring that new information out in front of the IJ when the client was represented during the RFI, since the attorney should have prepared the client beforehand and should have ensured that all relevant information was shared with the asylum officer.

*Practitioners should be mindful of the manner in which the reasonable fear interview is conducted. Arguably, a noncitizen's ability to correct errors an asylum officer might have made is diminished when the interview is conducted via videoconference.

B. Remedies Available in Withholding-Only Proceedings

In withholding-only proceedings, the IJ considers applications for **statutory withholding of removal** and **protection under CAT**. DHS takes the position that these forms of relief are the only ones available to a noncitizen in a withholding-only proceeding. Again, practitioners should make arguments, and request to brief, claims that persons subject to 241(a)(5) or 238(b) orders are still eligible for asylum. Practitioners should be preserving these arguments for the administrative record.

1. Withholding of Removal

INA § 241(b)(3) provides that, with certain exceptions, “the Attorney General may not remove an alien to a country if [he] decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”³¹ To be eligible for withholding of removal under the INA, a noncitizen bears the burden to prove that it is **more likely than not** that his or her life would be threatened on **account of race, religion, nationality, membership in a particular social group, or political opinion** in the proposed country of removal.³² Withholding of removal is **mandatory** where bars to this form of relief do not apply and the noncitizen has met his burden of proof.³³

There are several **bars** qualifying for withholding of removal. A noncitizen convicted of a **particularly serious crime** while in the U.S., who committed a **serious nonpolitical crime** in another country prior to entry to the U.S., who **ordered, incited, assisted, or otherwise**

³¹ INA § 241(b)(3).

³² 8 C.F.R. § 1208.16(b).

³³ INA § 241(b)(3)(A).

participated in the persecution of others, or who presents a **danger to U.S. security** is ineligible for withholding of removal.³⁴

A noncitizen meets the “more likely than not” standard when he or she shows that he or she faces a clear probability of persecution or torture, which means that there is a more than 50 percent likelihood of persecution or torture. The withholding of removal “more likely than not” standard is more difficult to prove than the “well-founded fear” standard for asylum.³⁵

a. Past threat to life or freedom

A presumption of future harm for a noncitizen exists when it is established that he or she suffered **past persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁶

DHS may rebut this presumption in one of the following two ways. First, the agency may show that there has been a **fundamental change in the circumstances** and the noncitizen’s life will no longer be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁷ Second, DHS may establish that the noncitizen has the possibility to avoid future harm by **relocating** to another part of the proposed country of removal. Such relocation must be reasonable.³⁸ Where “the persecutor is a government or is government-sponsored, . . . it shall be presumed that internal relocation would not be reasonable.”³⁹ Moreover, in determining whether relocation is reasonable, the IJ “should consider, among other things, whether the applicant would face other serious harm in the suggested place of relocation; any ongoing strife within the country; geographical limitations; and social and cultural constraints.”⁴⁰

b. Future threat to life or freedom

When a noncitizen does not establish past persecution, the noncitizen may **prove future harm** if he or she shows that it is more likely than not that he or she would be persecuted on account of one of the five protected grounds if removed to the proposed country.⁴¹

While a noncitizen cannot be removed to the country where his or her life or freedom would be

³⁴ INA § 241(b)(3)(B); 8 C.F.R. 1208.16.

³⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Lukwago v. Ashcroft*, 329 F.3d 127 (2003).

³⁶ 8 C.F.R. § 1208.16(b)(1)(i).

³⁷ 8 C.F.R. § 1208.16(b)(1)(i)(A).

³⁸ *Id.*

³⁹ 8 C.F.R. §1208.16(b)(3)(i); 8 C.F.R. §1208.16(b)(3)(ii).

⁴⁰ 8 C.F.R. §1208.16(b)(3).

⁴¹ 8 C.F.R. § 1208.16(b)(2).

threatened if he or she is granted withholding of removal, removal to a **third country** where his or her life or freedom would not be threatened is allowed.⁴²

It should be noted that a grant of withholding of removal does not entail relief for eligible family members in the United States, does not allow a noncitizen to file a petition to bring eligible family members to the United States, and does not lead to **lawful permanent residence** and/or **citizenship**.

2. Protection under the Convention Against Torture (CAT)

A noncitizen is eligible for relief under CAT when he or she establishes that it is **more likely than not** that he or she would be tortured if removed to the proposed country of removal.⁴³ If a noncitizen suffers a harm that rises only to the level of persecution, they may not qualify protection under the CAT. Some circuits, such as the Third Circuit, have clarified that if the noncitizen is in danger of being subjected to torture by more than one group or entity (involving the government or with acquiescence of the government) in the proposed country of removal, he or she is “entitled to CAT protection if he is able to demonstrate that the *cumulative probability* of torture by the...entities [collectively] exceeds 50 percent.”⁴⁴ Unlike statutory withholding of removal, an applicant for **withholding of removal under CAT** does not need to establish that he or she will be subject to torture on account of one of the five protected grounds. “Persecution” is considered to be a lower level of harm than “torture.” The regulations define torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁴⁵

Withholding of removal and **deferral of removal** are the two types of relief available under CAT. An IJ will grant withholding of removal under CAT unless it is determined that:

⁴² 8 C.F.R. §1208.16(f).

⁴³ 8 C.F.R. § 1208.16(c)(2).

⁴⁴ *Kamara v. Att’y Gen.*, 420 F.3d 202, 213-215 (3d Cir. 2005). (Emphasis added).

⁴⁵ 8 C.F.R. § 1208.18(a). The torture definition has been interpreted further by a number of circuit courts and the Board of Immigration Appeals.

- the noncitizen ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion;
- the noncitizen is a danger to the community of the United States because he had been convicted of a particularly serious crime;
- there are reasons to believe that the noncitizen committed a serious nonpolitical crime outside the United States; or
- there are reasonable grounds to believe that the noncitizen is a danger to the security of the United States.⁴⁶

Many people are ineligible for withholding of removal under the CAT because they have been convicted of a “particularly serious crime” and therefore only qualify for deferral of removal. Deferral of removal is a less desirable form of relief because DHS still has the power to detain a noncitizen who has been granted deferral.⁴⁷ Nevertheless, noncitizens who have been granted deferral of removal under CAT may challenge DHS’s detention post-final order as prolonged and unconstitutional.⁴⁸ Similarly, noncitizens in some circuits, such as the Third and Ninth circuits, may challenge pre-final order detention as prolonged and unconstitutional.⁴⁹

Similar to statutory withholding of removal, a grant for CAT withholding or CAT deferral does not allow a noncitizen to file a petition to bring eligible family members to the United States, and does not lead to lawful permanent residence and/or citizenship. A noncitizen granted CAT relief is, however, eligible for work authorization under an order of supervision.

Beyond the statute and the regulations is a body of case law published by the Board of Immigration Appeals and various federal courts which is vital to representing a person in withholding or CAT cases.

⁴⁶ See, INA § 241(b)(3)(B), 8 C.F.R. § 1208.16. Notably, the bars that apply to CAT withholding of removal are identical to the bars that apply to statutory withholding of removal.

⁴⁷ 8 C.F.R. § 1208.17(c).

⁴⁸ *Zadvydas v. Davis*, 533 U.S. 678 (2001). (Holding that mandatory detention statutes do not permit indefinite detention post removal order.)

⁴⁹ *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011). (Mandatory detention is subject to a reasonableness analysis, though the 45 day and five month time frames given in *Demore v. Kim*, 538 U.S. 510 (2003) may serve as a guidepost.)

II. RESOURCES

The following section presents selected legal provisions and cases that are relevant to a withholding-only proceeding. However, neither the list nor the contents of the sections described are exhaustive. Attorneys should conduct further research when working on a withholding-only case, paying particular attention to the line of case law developed by their circuit's Court of Appeals.

A. [The Immigration and Nationality Act \(2014\)](#)

INA § 101(a)(42) provides the definition of a refugee.

INA § 101(a)(43) provides the definition of an **aggravated felony**. The INA includes some nonviolent offenses as aggravated felonies.

INA § 208 provides that “**any alien** who is present in the United States or who arrives in the United States (...), irrespective of such alien's status, may apply for **asylum**.” The provision further provides exceptions to a noncitizen's ability to apply for asylum.

INA § 237(a)(2)(A)(iii) provides that “any alien who is convicted of an aggravated felony at any time after admission is deportable.”

INA § 238(b)(1) provides that the DHS may determine the removability of any alien who is convicted of an aggravated felony and is not a permanent resident. The statute clarifies that DHS has discretion to place a person into administrative removal proceedings or 240 removal proceedings.

INA § 240 applies to noncitizens who fall under **removal proceedings** in which they may apply for all forms of relief for which they are eligible, as opposed to withholding-only proceedings.

INA § 241(a)(2) provides for the **mandatory detention** of noncitizens ordered removed during the “removal period” if they are inadmissible under 212(a)(2) (noncitizens excluded on criminal or related grounds), 212(a)(3)(B) (noncitizens who committed terrorist activities), or deportable under 237(a)(2) (noncitizens convicted of an aggravated felony).

INA § 241(a)(5) provides that a **prior order of removal** against a noncitizen will be **reinstated** if the noncitizen **reenters** the United States “**illegally**” or “**unlawfully**” (both terms are used in 8 C.F.R. § 241.8) after having been **removed** or having **departed voluntarily**.

INA § 241(b)(3) provides that, with certain exceptions, a noncitizen cannot be removed to a

country where his or her life would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 242(a)(1)(5) & (b)(1) provides that a petition for review filed with a federal court of appeals is the exclusive means of review for a final order of removal and must be filed within 30 after the date of a final order of removal.

B. The Code of Federal Regulations, Title 8: Aliens and Nationality

8 C.F.R. § 1208.16 provides that a noncitizen cannot be removed to a country where his or her life would be threatened or where he or she would face torture. The noncitizen bears the burden to prove future harm or torture.

8 C.F.R. § 1208.17 provides that **deferral of removal** is available to a noncitizen entitled to protection under the **Convention Against Torture**, where such noncitizen has been previously found to be subject to the provisions for mandatory denial of **withholding of removal**.

8 C.F.R. § 1208.18 provides the definition of **torture** for those seeking protection under the United Nations **Convention Against Torture**.

8 C.F.R. § 208.31 governs the procedures applicable to noncitizens who were ordered **removed** under INA §§ 238(b) and 241(a)(5) and who expressed **fear** of returning to the country of removal.

8 C.F.R. § 238.1 provides that DHS may issue a **Notice of Intent to Issue a Final Administrative Removal Order**, a charging document, to a noncitizen if there is sufficient evidence that the noncitizen has not been lawfully admitted for permanent residence and he or she has a **final conviction** for aggravated felony. DHS will issue a **Final Administrative Order** if it finds that the noncitizen's removability is established by clear and convincing evidence. Importantly, the regulations provide a procedure for the noncitizen to challenge a Notice of Intent from DHS and also the opportunity for DHS to place a person in formal removal proceedings.

8 C.F.R. § 241.8 governs the process for **reinstatement of removal**. Noncitizens entering the U.S. unlawfully or illegally (both terms are used in 8 C.F.R. § 241.8) after having been removed or leaving voluntarily under an order of exclusion, deportation, or removal are subject to having their prior orders reinstated. Importantly, the regulations provide a procedure for the noncitizen to challenge a Notice of Intent to Reinstatement.

C. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In October of 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).⁵⁰ The United States then implemented the Convention into its domestic legislation, subject to certain declarations, reservations, and understandings.⁵¹

Article 1 provides the definition of **torture**.

Article 3 prohibits the **removal (nonrefoulement)** of a noncitizen to a state where substantial grounds for believing that he or she would be in danger of being subjected to torture exist (nonrefoulement).

D. The United Nations Convention and Protocol Relating to the Status of Refugees

Article 1 provides the definition of a **refugee**. A refugee is:

Any person who owing to **well-founded fear** of being **persecuted** for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear is unwilling to return to it.

Article 33 prohibits the **removal (refoulement)** of a refugee to a country where his or her life would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

⁵⁰ Report of the Committee Against Torture (1–19 November 2010, 9 May–3 June 2011) 210, U.N. Doc. A/66/44; GAOR, 66th Sess, Supp. No. 44 (2011).

⁵¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

E. Understanding Government Forms, the Application Form for Relief, and Documents from the Attorney

1. Government Forms

a. From DHS

Form I-851–Notice of Intent to Issue a Final Administrative Removal Order

Before DHS issues an administrative removal order to a noncitizen, the agency issues **Form I-851**, the **Notice of Intent to Issue a Final Administrative Removal Order**. The Notice of Intent is a charging document including allegations of facts and conclusions of law. As required by statute, it advises a noncitizen of the right to be represented by an attorney, the right to inspect the evidence supporting the notice, the right to request withholding of removal to a particular country if he or she has a fear of persecution or torture, and the right to rebut the charges mentioned in the notice.⁵² The Notice is served to the noncitizen or his or her attorney. After service, the noncitizen may rebut the charges within ten (calendar) days or thirteen days if the Notice is sent by mail.⁵³ Some of this information also appears in the guiding regulations and statute.

Form I-851A–Final Administrative Removal Order

An authorized DHS officer issues the **Final Administrative Removal Order** (FARO) to the noncitizen.

Form I-871- Notice of Notice of Intent/Decision to Reinstate Prior Order

DHS prepares this form for individuals who it alleges are subject to reinstatement of removal under 241(a)(5).

Form I-213/831–Record of Deportable/Inadmissible Alien

Sometimes accompanied with an administrative removal order or reinstatement of removal order, the **Record of Deportable/Inadmissible Alien** reflects the noncitizen's personal basic information, criminal history, and determinations made by a DHS officer.

⁵² 8 C.F.R. § 238.1(b)(2)(i).

⁵³ INA § 238(b)(3); 8 C.F.R. § 238.1(c).

b. From the Asylum Officer

Form G-56–Notice of Reasonable Fear Interview

If an individual subject to administrative removal or reinstatement of removal expresses fear of returning to his or her country, DHS must refer the individual to an asylum officer for a **reasonable fear determination**. An asylum officer issues a **Notice of Reasonable Fear Interview** to a noncitizen to notify him or her of a date and location for a **reasonable fear interview**.

Form M488–Information about Reasonable Fear Interview

The **Information about Reasonable Fear Interview** usually accompanies the Notice of Reasonable Fear Interview and lists **Legal Service Providers** a noncitizen may consult.

Form I-899–Reasonable Fear Determination

The **Reasonable Fear Determination** is a summary statement the asylum officer creates based on the material facts the applicant provides and after conducting the reasonable fear interview. The document contains the asylum officer's decision.

Form I-898–Record of Negative Reasonable Fear Interview Finding and Request for Review by Immigration Judge

If the reasonable fear interview results in a negative determination as indicated on Form I-899, meaning the asylum officer did not find the applicant to have a reasonable fear of persecution or torture, the applicant may request a review of the asylum officer's determination by IJ.⁵⁴ The Form I-898 is mandatory in order to make a request to the IJ for a **review of the negative reasonable fear determination**.

Form I-863–Notice of Referral to Immigration Judge

If the reasonable fear interview results in a positive determination recognizing the applicant's fear of persecution and/or torture as indicated on Form I-899, the **asylum officer** must inform the applicant and issue a Form I-863⁵⁵, **Notice of Referral to Immigration Judge**. A **withholding-only proceeding** commences upon service of the I-863 to the immigration court. Through this proceeding, the IJ will then determine whether the noncitizen is eligible for **withholding of**

⁵⁴ 8 C.F.R. § 208.31.

⁵⁵ A Form I-863 is also served on the noncitizen when he requests a review of a negative decision by the asylum officer regarding reasonable fear.

removal or protection under CAT.

Application Form for Relief

Form I-589–The Application for Asylum and Withholding of Removal And CAT

The **Form I-589** is the official application form for a noncitizen expressing fear of returning to his or her home country and who wants to apply for asylum, withholding of removal, and CAT relief (both CAT withholding and deferral). DHS takes the position that in withholding-only removal proceedings, a noncitizen is not eligible for **asylum**, but may apply for withholding of removal and protection under CAT.

2. Documents from the Attorney

Form G-28–Notice of Entry of Appearance as Attorney or Accredited Representative

The representative should submit a **Notice of Entry of Appearance as Attorney or Accredited Representative, Form G-28**, signed by the representative and the applicant if the representative intends to represent the applicant before the asylum officer or negotiate with ICE during the course of a withholding-only proceeding. The G-28 provides information to DHS regarding a representative's eligibility to act on behalf of an applicant.

*Sometimes, ICE will not talk to attorneys or share documents unless a G-28 is on file. It is important for the attorney to request copies of all relevant documents from ICE and the referring pro bono agency if appropriate. After filing a G-28 with DHS, counsel may request copies of the relevant orders, notices, and related documentation from ICE as required by 8 C.F.R. § 292.5.

EOIR-28–Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court

The **Notice of Entry of Appearance as Attorney or Representative before the Immigration Court** must be filed with the immigration court in order to represent a noncitizen before an immigration judge. Form EOIR-28 may be filed with the immigration court in paper format.⁵⁶ The representative should also serve a copy of his or her Form EOIR-28 on DHS.⁵⁷

⁵⁶ Executive Office for Immigration Review, IMMIGRATION COURT PRACTICE MANUAL, § 2.1(b), 11.2(f) (last revised June 10, 2013), *available at*

http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf#page=131.

⁵⁷ *Id.*

III. STRATEGIES

Withholding-only proceedings are governed by primary law and key secondary sources, including Chapter 7 (*Other Proceedings before Immigration Judges*) of the Immigration Court Manual (ICM). The ICM states that “Withholding-only proceedings are conducted under the procedures governing removal proceedings” and thereafter cross references Chapter 4 (*Hearings before Immigration Judges*). Thus, practitioners should exercise the same rights and strategies in withholding-only proceedings as they would in regular removal proceedings.

A. Master Calendar Hearing

1. Introduction

Preparing for a master calendar hearing (MCH) associated with a withholding-only proceeding is not very different from preparing for an MCH for a regular removal hearing. For example, a MCH is held for a preliminary assessment of the case. During the MCH, as the statute and regulations require, the noncitizen is advised of his or her basic procedural rights such as the right to seek a representative from a list of legal service providers, the right to present evidence, and the right to appeal to the Board of Immigration Appeals.⁵⁸ Also, during the MCH, the Immigration Judge (IJ) will schedule a specific date, time, and location for an individual hearing, set a deadline for filing the application for relief, the exhibit list and other documents.⁵⁹

2. Notification of a Master Calendar Hearing

In traditional removal proceedings under INA 240, the immigration court notifies a noncitizen to appear in an MCH by serving him or her a Notice to Appear (NTA) (Form I-862).⁶⁰ However, noncitizens in withholding-only proceedings do not receive NTAs; therefore, there are no formal charges to admit or deny. A noncitizen in a withholding-only proceeding may find the specific date, time, and location for his or her master calendar hearing on the Form I-863, the Notice of Referral to Immigration Judge issued by the asylum officer.

3. Tips for the Master Calendar Hearing

*Attorneys should file the I-589 with the immigration court at the MCH or at a possible call up date (prior to the individual hearing). In some cases, the attorney may wish to ask for a continuance in order to prepare and file the I-589 at a later MCH.

⁵⁸ INA § 240(b)(4); 8 C.F.R. §§ 1240.10(a); IMMIGRATION COURT PRACTICE MANUAL at § 4.15(e).

⁵⁹ Immigration Court Practice Manual at § 4.15(e).

⁶⁰ INA § 239(a).

*Attorneys should raise any arguments regarding the unlawfulness of the reinstatement of removal order or an administrative removal order and/or asylum eligibility notwithstanding such order. By raising these challenges, an attorney preserves the issues for the record and provides the IJ with an opportunity to request briefing on these issues.

*Since noncitizens in withholding-only proceedings generally are detained, the likelihood of scheduling a relatively early individual calendar hearing is high.

B. Individual Calendar Hearing

At the withholding-only proceeding the IJ determines whether a noncitizen ordered removed is eligible for statutory withholding of removal or protection under the Convention Against Torture. At the individual hearing, the noncitizen has the right to testify, call witnesses, and submit evidence in support of his or her applications. Further, the DHS attorney will cross-examine the noncitizen and any witnesses. Like with a statutory removal proceeding, the IJ may also question the noncitizen during withholding-only proceedings.

1. Tips for the Individual Calendar Hearing

*Raise potential procedural defects or violations of due process to challenge the admissibility of evidence.

*Be prepared to explain inconsistencies existing in the record. EOIR will receive the Reasonable Fear Determination and Reasonable Fear Interview worksheet along with the Referral to Immigration Judge. DHS might use the inconsistencies contained in these documents to undermine a client's credibility or claim for relief.

*Use corroborating evidence in the form of expert opinion, medical evaluations, witness testimony, etc. to support a noncitizen's case.

*Request an opening statement at the outset of the individual calendar hearing. If the IJ does not inform the attorney that he or she is able to make opening and closing statements, the attorney should nonetheless request the opportunity to make the statements.

C. Immigration Judge Decision

The IJ issues either an oral decision or a written decision.

*In the case where the IJ issues an oral decision, an attorney should ensure that he or she writes down verbatim as close as possible what the IJ says in his decision. The attorney will likely not receive the trial transcript before the Notice to Appeal is due to the BIA. Writing down the IJ's oral decision will help to identify the specific issues the attorney wants to raise on appeal.

IV. CASE LAW

Case law plays an important role in immigration cases and withholding-only proceedings are no exception. This section is limited to select BIA and Third Circuit case law relevant to proceedings involving withholding of removal, Convention against Torture, and prolonged detention. Users of this toolkit are advised to not only review the relevant case law in his or her circuit, but also to be aware of the law relevant to asylum, administrative removal, reinstatement and the finality of a removal order.

1. Withholding of Removal

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)

- Facts: Cardoza-Fonseca overstayed her visa. She claimed that she feared torture in Nicaragua at the hands of the Sandinistas who allegedly tortured her brother. She was also politically opposed to the Sandinistas and feared future torture for that reason.
- Holding: When demonstrating a well-founded fear, an individual seeking asylum is not required to show that it is more likely than not that he or she will be persecuted in his or her own country, which is the burden of proof imposed upon individuals seeking withholding of removal. By contrast, an individual seeking asylum need only show that she is unable to unwilling to return to his or her country because of persecution – past or future – on account of at least one of the five protected grounds. The Court explained that an individual can prove a well-founded fear by showing he or she faces at least a 10% chance of persecution if returned.
- Additional Notes: A respondent may not be removed to his or her home country if the respondent's life or freedom is endangered because of the respondent's race, ethnicity, membership in a particular social group, or political opinion. The correct standard of proof to meet is a "clear probability" standard.

Abdulrahman v. Ashcroft, 330 F.3d 587 (3d Cir. 2003)

- Facts: Abdulrahman was a citizen of Sudan. While there, he was a member of the Southern Student Union, a group with political objectives. He was arrested on three occasions for his membership in the group.
- Holding: Even though the IJ's questioning of and dismissal of his asylum claim did create the appearance of bias, the decision to deny the asylum application was nevertheless supported by substantial evidence.

- Additional Notes: Persecution must have been “committed by the government or forces that the government is either ‘unable or unwilling to control.’”

Matter of C-T-L-, 25 I&N Dec. 341 (BIA 2010)

- Facts: Removal proceedings were initiated on the grounds of marriage fraud. Respondent claimed that he feared torture and persecution after publicly exposing police corruption, criticizing politicians, and refusing to participate in illegal drug-related activities.
- Holding: The “one central reason” standard applicable in asylum applications under § 208(b)(1)(B)(i) also applies to withholding of removal under § 241(b)(3)(A).

Political Opinion and the Nexus Requirement

INS v. Elias-Zacarias, 502 U.S. 478 (1992)

- Facts: Elias-Zacarias was removable for having entered without inspection. While living in Guatemala, a guerrilla organization attempted to recruit him. He refused because he feared that if he joined, the government would retaliate against him. He left the country because he was afraid the guerrillas would return and force him to join.
- Holding: Refusal to join a guerrilla organization does not necessarily constitute a political opinion where the alien did not join the organization out of fear of retaliation from the government.
- Additional Notes: An applicant must provide direct or circumstantial evidence to demonstrate that the motive to persecute arises from the applicant’s political belief.

Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003)

- Facts: Lukwago was a child soldier in Uganda. He was told that if he tried to escape, he would be killed. He successfully escaped, and later feared deportation.
- Holding: Forcible conscription into a guerrilla group may constitute persecution, and a former child soldier who escaped his captors may constitute a particular social group.
- Additional Notes: Persecution may be on account of an actual political opinion or one which is imputed upon the respondent.

Chang v. INS, 119 F.3d 1055 (3d Cir.1997)

- Facts: Chang was a leader of a state technical delegation to the U.S.. He feared returning to China because he broke Chinese law for failing to report that some of his delegation's members wished to stay in the U.S., by meeting with an FBI agent, and by electing to stay in the U.S. and seek asylum as the FBI agent suggested.
- Holding: China's prosecution of the alien under the above facts would constitute persecution on account of political opinion.
- Additional Notes: An anticorruption belief can be expressed both through words and actions.

Matter of N-M-, 25 I&N Dec. 526 (BIA 2011)

- Facts: The respondent was a government worker in Colombia. She was pressured to hire certain contractors outside of the official process, falsify statistical data, and join a political party. She voiced concerns of this corruption, and she was retaliated against by being overworked and was forced to transfer to a different division. In addition, she received threatening phone calls.
- Holding: In evaluating whether opposition to government corruption can amount to a political opinion, an IJ should consider (1) whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs; (2) any direct or circumstantial evidence that the persecutor was motivated by the alien's actual or perceived anticorruption beliefs; and (3) any evidence regarding the pervasiveness of corruption within the governing regime.
- Additional Notes: Opposition to government corruption may amount to a political opinion.

Social Group

Matter of Acosta, 19 I&N Dec. 211 (BIA 1987)

- Facts: Acosta was a native of El Salvador. He was a member and general manager of a taxi co-op which Acosta believed was targeted by guerrilla organizations. The guerrilla organizations attempted to coerce Acosta and the taxi co-op into participating in work stoppages to harm the economy of El Salvador. Members of the co-op were killed by people who identified as members of a guerrilla organization. Acosta was assaulted and received three death threats. He then fled to the U.S. and claimed that he had been

persecuted on account of his membership in a group of taxi drivers that refused to comply with guerrilla organization's demands.

- Holding: Membership in a particular social group means that all members share a common, immutable characteristic. The common characteristic must be one that group members either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.
- Additional Notes: Individual social groups will be evaluated on a case by case basis, but examples of possible social groups could include sex, color, kinship ties, and shared past experience such as military leadership or land ownership. After *Matter of Acosta*, the BIA continued to add additional requirements to the particular social group analysis.

Fatin v. INS, 12 F.3d 1233 (3d Cir. 2005)

- Facts: An educated Iranian woman claimed that she would be persecuted for failing to conform to the cultural norms imposed upon women in Iran.
- Holding: "The alien must (1) identify a group that constitutes a "particular social group," (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership."

Toussaint v. Attorney General of the U.S., 455 F.3d 409 (3d Cir. 2006)

- Facts: Toussaint was a Haitian who was convicted of selling cocaine. She claimed that her father had been tortured in Haiti for being part of the former Duvalier regime and that her life had been threatened by two unknown men in Miami who said that if she returned to Haiti, she would be killed.
- Holding: Criminal deportees do not constitute a social group because each country has a legitimate national interest in protecting citizens against criminal activity.
- Additional Notes: Mandatory relief under withholding of removal requires a "clear probability" that the immigrant's life or freedom would be threatened if deported. The Third Circuit analogized Toussaint's situation to that of the respondent in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

Valdiviezo-Galdamez v. Attorney General of the U.S., 663 F.3d 582 (3d Cir. 2011)

- Facts: Valdiviezo refused to join MS-13, a gang. He was also robbed, kidnapped, and beaten. He claimed to be a member of a social group of people who refused to join gangs.
- Holding: The BIA requirement that social groups meet particularity and social visibility requirements were rejected because such requirements are incompatible with past BIA decisions recognizing social groups that do not meet such requirements.
- Additional Notes: This case was remanded back to the BIA for further proceedings in *Matter of M-E-V-G-*, *infra*.

Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014)

- Facts: M-E-V-G- refused to join MS-13, a gang. He was also robbed, kidnapped, and beaten. He claimed to be a member of a social group of people who refused to join gangs.
- Holding: An applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Secondly, whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.
- Additional Notes: *Matter of M-E-V-G-* is the sister case of *Matter of W-G-R-*, *infra*.

Matter W-G-R-, 26 I&N Dec. 208 (BIA 2014)

- Facts: W-G-R- was a former member of the Mara 18 gang who left the gang after being a member for less than a year. After leaving the gang, he was attacked twice by members of the gang and shot once. He then fled to the United States.
- Holding: Former members of the Mara 18 gang do not constitute a particular social group and there is no nexus between the harm feared and status as a former gang member. The BIA also reiterated the holdings of M-E-V-G.
- Additional Notes: *Matter of W-G-R-* is the sister case of *Matter of M-E-V-G-*, *supra*.

Cases that may be useful to challenge the “particularly serious crime” bar to withholding of removal

* Note: While the case selection below does not pertain specifically to substantive relief under statutory withholding of removal or Convention Against Torture relief, it is included to provide the practitioner with a sampling of case law that may be relevant to challenge whether a crime is subject to a particular criminal bar, such as the “particularly serious crime” bar. This area of law is evolving. As always, it is important for attorneys to be familiar with the case law within their relevant Circuit and at the Supreme Court of the United States.

Descamps v. United States, 133 S. Ct. 2276 (2013)

- Facts: Descamps was convicted for having committed a burglary under California law. The government attempted to use the MCA (modified categorical approach) claiming that the broad California statute was divisible.
- Holding: Courts may not apply the MCA to crimes under the Armed Career Criminal Act (ACCA) when the crime convicted of has an indivisible set of elements. The California statute only criminalized a broader swathe of actions than the corresponding federal statute.
- Additional Notes: The MCA acts as a tool, not an exception to look at the record of conviction. The purpose of which is only to identify which crime the respondent committed so that the court can compare it to the generic offense. Also, advocates can use *Descamps* to explain to courts why it should exercise a more limited MCA pre-*Moncrieffe* and pre-*Descamps*.

Moncrieffe v. Holder, 133 S. Ct. 1678 (2013)

- Facts: Moncrieffe was convicted of possession of marijuana with intent to distribute. He was found with 1.3 grams. The statute he was convicted under was divisible.
- Holding: A conviction of possession of marijuana with intent to distribute that involved only small amounts of marijuana for no remuneration (social sharing) is not an aggravated felony.
- Additional Notes: The court in *Moncrieffe* determined after looking at the record of conviction that the applicant was convicted of the portion of statute criminalizing possession with intent to distribute marijuana. After doing so, the court did not further examine the record of conviction. It only examined the specific crime committed in a categorical sense. The court then determined that the crime committed was broader than the ground the applicant was removable under. Similar to *Moncrieffe*, advocates can argue that the court should delve no deeper than the individual crime committed, and then examine that crime in a categorical sense.

***Garcia v. Attorney General of the U.S.*, 462 F.3d 287 (3d Cir.2006)**

- Facts: Garcia was found with 38 packets of marijuana. He was charged with being deportable for illicit trafficking. The Court summarized the framework it adopted from the BIA for analyzing when a state drug conviction may qualify as an aggravated felony. The two routes are called the "illicit trafficking" route (a felony state drug conviction is an aggravated felony if it contains a "trafficking element") and the "hypothetical federal felony" route (a state drug conviction, regardless of its classification, is an aggravated felony if it would be punishable as a felony under the Federal Controlled Substances Act).
- Holding: Since 35 Pa. Stat. Ann. § 780-113 (a)(30) is divisible, departure from the formal categorical approach is appropriate. Based on the criminal complaint, Garcia pled guilty to delivery and possession with the intent to deliver. Therefore, Garcia's drug conviction constituted an aggravated felony under the illicit trafficking language of the statute.
- Additional Notes: Statutes that criminalize distinct drug related offenses are typically divisible. Many courts (including the 3rd Circuit) will apply the modified categorical approach (MCA) to possession with intent to distribute if the statute is divisible; however, advocates can try to limit the scope of the modified categorical approach through *Descamps* and *Moncrieffe*.

***Jeune v. Attorney General of the U.S.*, 476 F.3d 199 (2007)**

- Facts: Aside from pleading guilty to 35 Pa. Stat. Ann. § 780-113 (a)(30), the court does not refer to any other facts.
- Holding: The Third Circuit applied the modified categorical approach because it determined A30 is a divisible statute citing the *Garcia* reasoning that A30 creates several distinct crimes. It then examined the charging instrument, sentence, and certificate of probation. Since A30 did not classify distribution of a small amount of marijuana for no remuneration as a misdemeanor and the record of conviction did not shed light on any case facts, Jeune's crime was not an aggravated felony.

***In re N-A-M-*, 24 I&N Dec. 336 (BIA 2007)**

- Facts: The respondent was convicted of felony menacing after threatening to kill two people while wielding knives.

- Holding: An offense need not be an aggravated felony to be considered a particularly serious crime for purposes of barring asylum or withholding of removal. Once the elements of the offense potentially bring the crime within the realm of a PSC, all reliable information may be used in determining whether the offense is a PSC, including but not limited to the record of conviction and sentencing information.

Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002)

- Holding: Drug trafficking aggravated felonies are presumptively particularly serious crimes (PSCs), and only the most extenuating circumstances warrant departure from that presumption.
- Additional Notes: *Matter of Y-L-* articulates a six-part test to rebut the presumption that certain convictions are PSCs. The immigrant must demonstrate at a minimum that the conviction involved “(1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.”

*****Request to Practitioners: The National Immigration Project of the National Lawyers Guild is challenging this case nationally, so if you have a client with a drug trafficking aggravated felony who served less than a five-year sentence, please contact Trina Realmuto at trina@nipnlg.org**

2. Protection under the Convention Against Torture

Acts Rising to the Level of Torture

Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005)

- Facts: Auguste claimed that as a criminal deportee to Haiti, he would be detained for an indeterminate amount of time in harsh prison conditions that rise to the level of torture.
- Holding: In order for government harm to constitute torture, the government must have specifically intended for its actions to severe physical pain or mental suffering. *Auguste* also provides the five-part test to determine whether an act rises to the level of torture. The test is as follows: “for an act to constitute torture it must be (1) an act causing severe physical pain or mental suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the

instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.”

Demonstrating that Torture was Intentionally Inflicted or that the Government Acquiesced to Torture

Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003)

- Facts: Amanfi was a Ghanaian citizen persecuted by a cult and by the Ghana Police Service (GPS) because they believed him to be homosexual even though he did not identify himself as one and independent evidence corroborated that perception.
- Holding: An applicant under CAT is not required to show that he or she was tortured on account of a protected ground.

Silva-Rengifo v. Attorney General, 473 F.3d 58 (3d Cir. 2007)

- Facts: Silva-Rengifo was convicted of possession of cocaine with intent to distribute. He claimed that he would be tortured by the government of Columbia, which was responsible for extrajudicial killings, by guerrilla groups, and by paramilitary groups. He also claimed that the government and guerrilla groups were working in concert with one another.
- Holding: For purposes of CAT, acquiescence to torture requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it.
- Additional Notes: An applicant under CAT is not required to show that he or she was tortured on account of a protected ground.

Pierre v. Attorney General, 528 F.3d 180 (3d Cir. 2008)

- Facts: Pierre was removable for having attacked his girlfriend with a cleaver. He was to be deported to Haiti where he claimed he would certainly be detained for being a criminal deportee and that such detention amounted to torture because of harsh prison conditions. Furthermore, Pierre suffered from esophageal dysphagia, a condition requiring him to be fed through a tube. He argued that he would not receive proper medical care in Haitian prisons, amounting to torture.
- Holding: The pain and suffering the alien may experience in a Haitian prison due to lack of sufficient medical care would not be attributable to a specific intent to torture.

- Additional Notes: There is a specific intent requirement for an act to constitute torture. The actor must intend to achieve the act as well as intend to achieve the consequences of that act.

***Roye v. Attorney General of the U.S.*, 693 F.3d 333 (3d Cir. 2012)**

- Facts: Roye is a citizen of Jamaica. He pled guilty to aggravated assault and endangering the welfare of a child. These crimes were in some way connected with his mental illness. Fourteen years later, Roye received an NTA alleging that he was removable due to his past convictions. Roye claimed that he was eligible for deferral under CAT because he would be tortured on account of his mental illness since people with mental illness are indefinitely detained for minor crimes. An expert witness testified that mentally ill persons are frequently physically and sexually abused.
- Holding: Acquiescence to torture can be found where government officials remain willfully blind to torture. The BIA improperly focused on the intent of Jamaican public officials who decided to imprison people with mental illness, instead of on whether the physical and sexual abuse that mentally ill prisoners experienced was intended to cause pain.

***In re J-E-*, 23 I&N Dec. 291 (BIA 2002)**

- Facts: J-E- was a Haitian citizen convicted of the sale of cocaine. He claimed that he would be imprisoned in Haiti as a criminal deportee and subjected to starvation, beatings, choking, burning with cigarettes, and kalot marassa (severe boxing of ears) while in prison.
- Holding: Indefinite detention of deportees by Haitian authorities is not torture, and substandard prisons do not constitute torture unless the alien can show that the authorities intentionally create and maintain the conditions that constitute torture. J-E- failed to show that the Haitian authorities specifically created the harsh prison conditions for the purpose of causing physical or mental suffering that rises to the level of torture.

Torture Arising from Lawful Sanctions

***Ghebrehiwot v. Attorney General*, 467 F.3d 344 (3d Cir. 2006)**

- Facts: Ghebrehiwot feared returning to Eritrea because he had deserted from the army and believed he would be killed when he returns for desertion. The IJ found that Ghebrehiwot failed to meet the burden of proof for asylum and therefore also failed to meet his burden under CAT.

- Holding: Conscription into the Eritrean army does not constitute torture, and the IJ erred in finding that failure to meet the evidentiary burden of asylum precluded relief under CAT.
- Additional Notes: Torture, even if judicially authorized through law, nevertheless is not exempted from the prohibitions of the CAT.

Burden of Proof

***Gambashidze v. Ashcroft*, 381 F.3d 187 (3d Cir. 2004)**

- Facts: Gambashidze was a citizen of Georgia where he was politically active and opposed to the current government. He was allegedly persecuted by the police for his political views. He came to the U.S. on a tourist visa and overstayed that visa.
- Holding: The government failed to meet its burden to show that relocation would be successful and would be reasonable. The government was not able to show that Gambashidze's 8 month stay in Tianeti, Georgia where he was not persecuted shows that he would be able to relocate successfully since the record does not disclose whether Gambashidze was living in hiding or living freely during those 8 months.

***Kamara v. Attorney General*, 420 F.3d 202 (3d Cir. 2005)**

- Facts: Kamara was a citizen of Sierra Leone. She was to be deported for sale of a controlled substance, and feared torture by the government of Sierra Leone as well as the Revolutionary United Front, a rebel militant group opposed to the Sierra Leone government.
- Holding: If the respondent fears torture from more than one source, the respondent may prove that the cumulative probability of torture from all sources collectively exceeds 50%.
- Additional Notes: *Kamara* allows advocates to combine the sources of torture. Even if a court finds that none of the sources of torture are more than 50% likely to result in an immigrant's torture, they may cumulatively satisfy the CAT standard.

3. Detention

***Zadvydas v. Davis*, 533 U.S. 678 (2001)**

- Facts: A final order of removal had been entered against Zadvydas; however, the U.S. was unable to find a country to which Zadvydas could be removed. Zadvydas had a history of

fleeing both criminal and removal proceedings. DHS kept Zadvydas in custody beyond the 90-day removal period.

- Holding: Post-order detention may only continue for a period “reasonably necessary” to effectuate removal.
- Additional Notes: The Court found that six months is presumptively a reasonable period.

Demore v. Kim, 538 U.S. 510 (2003)

- Facts: Kim conceded that he was removable for having committed burglary. He, however, challenged his detention on the basis that ICE did not claim that he posed a danger to society or that he was a flight risk.
- Holding: Mandatory detention of an LPR pending removal is constitutionally permissible.

Diop v. DHS, 656 F.3d 221(3d Cir. 2011)

- Facts: Diop had been granted withholding of removal by an IJ. ICE appealed and declined to release Diop while the appeal was pending. Diop challenged his continued detention at which point he had already been subjected to 17 months of detention.
- Holding: 5th Amendment due process prohibits mandatory detention beyond a “reasonable period of time” and the mandatory detention statute authorizes detention only for that reasonable period.
- Additional Notes: When the period of detention becomes unreasonable, due process demands a bond hearing where the government bears the burden of proof to show that continued detention is necessary to fulfill the purposes of the detention statute. The Court cited to *Demore*, stating that “detention under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked and about five months in the minority of cases in which an alien chooses to appeal.”

Leslie v. Attorney General of the U.S., 678 F.3d 265 (3d Cir. 2012)

- Facts: Leslie had been detained for four years after being granted a stay of removal. He challenged his continued detention by filing for habeas.

- Holding: An immigrant’s detention during a stay of removal is governed by the provision governing initial apprehension and detention of immigrants (8 U.S.C. § 1226), rather than provision governing detention and removal of aliens ordered removed. (8 U.S.C. § 1231).
- Additional Notes: Leslie clarifies that *Diop* governs both the detention of noncitizens in pending administrative removal proceedings and the detention of noncitizens who have obtained a stay of removal pending judicial review of their removal orders.

Sylvain v. Attorney General, 714 F.3d 150 (3d Cir. 2013)

- Facts: Sylvain was a Haitian citizen. He was convicted of 10 drug related offenses in the United States. He was eventually detained by ICE; however, ICE did not detain him until four years had elapsed between his most recent conviction (which he did not serve prison time for) and his detention by ICE.
- Holding: Immigration authorities retain the power to impose mandatory detention upon an immigrant even if they fail to do so “when the alien is released.”
- Additional Notes: Within the Third Circuit, the INA’s mandatory detention provision does not impose a timing requirement that would limit ICE’s ability to detain an immigrant after they have been released from criminal custody.

V. GLOSSARY OF ACRONYMS

AO	Asylum Officer
AF	Aggravated Felony
BIA	Board of Immigration Appeals
CAT	Convention Against Torture
CBP	Customs and Border Protection
CFI	Credible Fear Interview
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
DOJ	Department of Justice
EOIR	Executive Office of Immigration Review
ERO	Enforcement and Removal Operations
FARO	Final Administrative Removal Order
ICE	Immigration and Customs Enforcement
ICM	Immigration Court Manual
IJ	Immigration Judge
INA	Immigration and Nationality Act
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
LPR	Lawful Permanent Resident
Non-LPR	Non-Lawful Permanent Resident
NIFARO	Notice of Intent to Issue a Final Administrative Removal Order
NTA	Notice To Appear
PD	Prosecutorial Discretion
PFR	Petition For Review
RFD	Reasonable Fear Determination
RFI	Reasonable Fear Interview
USC	United States Citizen
USCIS	United States Citizenship and Immigration Services
VAWA	Violence Against Women Act
WOR	Withholding Of Removal

VI. APPENDIX

A. Forms from the Government and the Attorney (Redacted)

- 1. Form I-851–Notice of Intent to Issue a Final Administrative Removal Order**
- 2. Form I-851 A–Final Administrative Removal Order**
- 3. Form I-213/831–Record of Deportable/Inadmissible Alien**
- 4. Form G-56–Notice of Reasonable Fear Interview**
- 5. Free Legal Services Providers List (Pennsylvania)**
- 6. Form M488–Information about Reasonable Fear Interview**
- 7. Form I-899–Record of Determination/Reasonable Fear Worksheet**
- 8. Form I-863–Notice of Referral to Immigration Judge**
- 9. Form I-898–Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge**
- 10. Form I-589–Application for Asylum and for Withholding of Removal**
- 11. Form G-28–Notice of Entry of Appearance as Attorney or Accredited Representative**
- 12. EOIR-28–Notice of Entry of Appearance as Attorney or Representative before the Immigration Court**
- 13. Sample Client-Attorney Consent Agreement**
- 14. Sample (Pro Bono) Representation Agreement**

B. Samples from Attorneys (Redacted)

- 1. Sample Exhibit List**
- 2. Sample Redacted Briefs**
- 3. Sample Letters Requesting Prosecutorial Discretion**

C. Secondary Sources

Regina Germain, ASYLUM PRIMER, AILA PUBLICATIONS (6th Ed. 2010).

Deborah E. Anker, Law of Asylum in the United States, Thomas Reuters (2014 Ed.)

Guidance Documents from the Department of Homeland Security

1. IMMIGRATION COURT PRACTICE MANUAL, Chap. 7, Executive Office for Immigration Review
http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf (last accessed Apr. 14, 2014, 12:03 PM).
2. Daniel Kowalski, *USCIS Revised Fear (Lafferty) Memo, Lesson Plan*, LEXISNEXIS LEGAL NEWSROOM: IMMIGRATION LAW
<http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2014/04/18/uscis-revised-credible-fear-lafferty-memo-lesson-plan.aspx>.
3. US Citizenship and Immigration Services, Lesson Plan Overview – Credible Fear,
<http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Credible-Fear-31aug10.pdf> (last accessed Apr. 19, 2014).
4. US Citizenship and Immigration Services, Lesson Plan Overview – Reasonable Fear,
[http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC Lesson Plans/Reasonable-of-Persecution-Torture-Determinations-31aug10.pdf](http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Reasonable-of-Persecution-Torture-Determinations-31aug10.pdf) (last accessed Apr. 11, 2014).

Practice Advisories and Guides

1. Trina Realmuto, *Reinstatement of Removal*, National Immigration Project of the National Lawyers Guild and American Immigration Council (April 29, 2013)
http://www.nationalimmigrationproject.org/legalresources/practice_advisories/2013-4-29%20Reinstatement%20of%20Removal.pdf.
2. *Expedited Removal, Reinstatement of Removal, and Administrative Removal Proceedings*, University of Miami School of Law Immigration Clinic
<http://www.law.miami.edu/clinics/pdf/2013/immigration-Expedited-Removal-Reinstatement-Removal.pdf> (last accessed Mar. 6, 2014).
3. *What to Do if you are in Expedited Removal or Reinstatement of Removal*, Florence Project (last updated Nov. 2007), <http://www.firrp.org/media/ExpeditedReinstatement-en.pdf>.

4. *Guide to Credible & Reasonable Fear Proceedings*, Florence Project (last updated May 2013), <http://www.firrp.org/media/CF-RF-Guide-2013.pdf>.
5. *Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings*, National Immigrant Justice Center (Jan. 2012), http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual_1_2012.pdf (last accessed July 7, 2014).

Charts and Press Releases by Advocacy Groups

1. *In Charts and Numbers: How the US Government Detains Individuals while Delaying their Request for Asylum*, American Civil Liberties Union, *available at* <http://www.aclusocal.org/reasonable-fear-interviews/> (last accessed July 2, 2014).
2. *Detained Asylum Seekers Sue Obama Administration to End Long Waits for Initial Interviews*, National Immigrant Justice Center (Apr. 17, 2014), http://www.immigrantjustice.org/press_releases/detained-asylum-seekers-sue-obama-administration-end-long-waits-initial-interviews.