

*“Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tossed to me,  
I lift my lamp beside the golden door!”<sup>1</sup>*

## Asylum

### Golden Door or Rabbit Hole?

BY MELANIE D. GOLDBERG

**D**edicated in 1886, the Statue of Liberty symbolizes the principle of offering refuge to those fleeing persecution.<sup>2</sup> The United States continues to provide a beacon of hope to those seeking a brighter future for their families and themselves. Around the world, the U.S. is perceived as the land of opportunity, and for many, as a refuge where basic freedoms are guaranteed. Arriving at our shores with hopes and dreams, many are stymied by the complex labyrinth of laws that regulate U.S. immigration and asylum.

U.S. asylum law is derived directly from international law, as the United States signed the United Nations Protocol Relating to the Status of Refugees in 1967.<sup>3</sup> To bring the U.S. into compliance with the U.N. protocol, the Refugee Act of 1980 was signed into law by President Carter on March 17, 1980, and became effective April 1, 1980.<sup>4</sup> This act sets forth the policies and procedures that allow refugees to apply for refugee status from abroad and asylum seekers to apply for asylum from within the United States.<sup>5</sup> The relevant U.S. law is found



primarily in the Immigration and Nationality Act.<sup>6</sup>

The difference between a refugee and asylee is whether the application for protection comes from inside or outside of the United States. The refugee's status is determined

while outside the U.S., and he or she arrives with that status. The asylee is in the U.S., having arrived with another status or no status at all, when he or she makes a request for protection. The basis for both determinations is the same.<sup>7</sup>

A refugee or asylee is a person who is unable or unwilling to return to his or her home country for fear of persecution. The persecution must be committed by government actors or a group that the government cannot or will not control.<sup>8</sup>

#### What is persecution?

“There is no universally accepted definition of ‘persecution,’ and various attempts to formulate such a definition have met with little success.”<sup>9</sup> The lack of a definition is problematic in

one sense. However, it allows the adjudicator to examine the circumstances in each case and determine whether the incidents involved amount to a level of mistreatment sufficient to be persecution. As a result, a number of cases have expanded asylum protection to previously unprotected groups such as children, homosexuals, and women.<sup>10</sup> Caselaw has defined persecution as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”<sup>11</sup>

## The protected grounds

To satisfy the grounds for asylum or refugee status, the persecution must be on account of one of the following protected grounds: political opinion, religion, nationality, race, and membership in a “particular social group” (PSG).<sup>12</sup> By researching country conditions, the viability of a claim based on all grounds except PSG can often be determined.

Most frequently litigated has been a claim that persecution has been because of membership in a PSG. The members of a PSG must have a “common, immutable characteristic,” which cannot be changed (sex, skin color) or should not be required to be changed (such as one’s profession or religion).<sup>13</sup> The PSG must be clearly defined; it should not be so broad as to include everybody and his uncle, but not so tightly defined that it contains only a party of one.<sup>14</sup> The PSG must be socially distinct, meaning it must be perceived as a group by society.<sup>15</sup>

The Board of Immigration Appeals is the tribunal that hears appeals from the immigration court. The Board recently addressed the issue of whether family membership can be considered a particular social group and held that a family member may satisfy the protected ground of PSG depending on the nature and degree of the relationship and how that relationship is viewed by society.<sup>16</sup> The Board further held that the family relationship has to be at least one central reason for the claimed harm.<sup>17</sup>

## Who bears the burden?

Asylum applicants bear the burden of proving they are credible and that there is a reasonable possibility they will be persecuted in the future.<sup>18</sup> Applicants may also demonstrate that they have suffered persecution in the past.<sup>19</sup>

In my experience, often the first determination made by the adjudicator is whether an applicant is credible. Many times, the line of inquiry ends at a finding that the applicant is not credible and therefore the claims of persecution are not to be believed.

The REAL ID Act increased the evidentiary burden on asylum applicants when it became law on May 11, 2005, by implementing clear requirements for credibility determinations and corroborating evidence; applicants for asylum must be able to prove their claims of persecution with documentary evidence.<sup>20</sup> An attorney and his or her client may feel like there is no hope of an asylum grant without a letter from the persecutor.

## You be the judge

Maria is a young mother living in Honduras with her husband and 8-year-old daughter. Crime and violence are rampant in her country and particularly in the neighborhood in which she lives. One morning, after taking her daughter to school, she witnessed an armed robbery that turned into a murder. She hoped that no one saw her or could identify her. Soon, she began to receive threats against her and her family through notes and phone calls. The threats were sent anonymously, but she knew that it must have something to do with her having witnessed the murder. Fearing for her own safety and that of her daughter, she fled north to the border of the U.S., where she surrendered to the officers who approached. Maria was detained and processed by the Department of Homeland Security. She requested asylum.

Nabil was born to and grew up in a Muslim family in Iran. He was a critical thinker. As Nabil continued his studies in college, he began to explore outside his religion and become curious about the ways of the world. After a Christian classmate invited him to attend a meeting at his place of worship, Nabil was taken by the rituals and beliefs of the Christians. After several years of study and soul searching, Nabil realized that the Christian religion resonated within him and took the necessary steps to convert to Christianity. Of course, he had to do this without the knowledge of his parents and the rest of the family. When his family found out, they took Nabil to the Imam to try to “scare some sense” into him so that he would give up the Christian religion. He was threatened, chased down the street, and kidnapped. Once he escaped, Nabil knew that he could no longer return to his family home. In fact, he could not return to his town and did not feel safe in his country. He managed to obtain a visa to visit some friends in the United States. Once in the U.S., he applied for asylum.

Both Maria and Nabil fear for their lives, but only one of them is likely to be granted asylum. Maria’s fear of returning to Honduras is not based on any of the protected grounds.

## FAST FACTS

**The Immigration and Nationality Act is a complex labyrinth of laws.**

**A refugee or asylee is a person who is unable or unwilling to return to his or her home country for fear of persecution.**

**A frivolous finding will forever bar an applicant from any future U.S. immigration benefits.**

Although her fear of the criminals she witnessed is real and there may be a desire to provide her protection, the facts do not meet the definition of asylum under the law and her application will be denied.

Nabil, on the other hand, suffered persecution on account of religion—one of the protected grounds. As long as he can establish with sufficient documentary proof and credible testimony that he has converted to Christianity and has suffered past persecution, he will most likely be granted asylum.

### Reasons asylum can be denied

Before an experienced attorney even considers preparing an asylum application, he or she must ask the client a series of questions to identify any potential statutory bars to or ineligibility for a grant of asylum.

For example, an application for asylum will be denied in most cases if it was not filed within one year of the applicant's arrival in the United States or if relocation to a safe place is possible either within the home country or in a third country where residence has been established.<sup>21</sup> Asylum will also be denied if the applicant is considered a danger to society by having been convicted of a particularly serious crime or by having engaged in terrorist activity.<sup>22</sup>

### Going down the rabbit hole

With increasing unrest all over the world, many people want to follow the path to the golden door that Emma Lazarus wrote about years ago. This desperation for a better life coupled with limited legal opportunities for status in the United States make asylum an attractive option. Even when presented with the risks of a failed application, many are willing to forge ahead.

Based on current asylum office processing times and court backlogs, the time before final adjudication may be approximately three years (or more); this is the case whether the asylum application is filed defensively in immigration court as a means of relief from deportation or affirmatively with the U.S. Citizenship and Immigration Services.<sup>23</sup>

Some will see the long processing time as an opportunity to challenge the system. I have seen some applications for asylum that were filed even though based on weak or nonviable claims. In the most egregious of cases, the applicant may be encouraged to fabricate claims or evidence. This ill-advised practice will lead not only to a denial of asylum, but to a finding of a frivolous application. A frivolous finding will forever bar the applicant from future U.S. immigration benefits.

For applicants with good sets of facts and supporting documents, the asylum process may lead them to their golden door. Conversely, with the wrong advice, applicants can be sent down the rabbit hole. When in doubt, seek the sage wisdom of an experienced immigration attorney. ■



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### ENDNOTES

1. Lazarus, *The New Colossus*, Statue of Liberty National Monument, New York (1903).
2. National Park Service, Statue of Liberty National Monument, *The Immigrant's Statue* (last updated February 26, 2015) <<https://www.nps.gov/stli/learn/historyculture/the-immigrants-statue.htm>>. All websites cited in this article were accessed January 10, 2018.
3. UN General Assembly, *Convention Relating to the Status of Refugees*, 189 UNTS 137 (July 28, 1951) <<http://www.refworld.org/docid/3be01b964.html>> and UN General Assembly, *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (October 4, 1967) <<http://www.refworld.org/docid/3ae6b3ae4.html>>.
4. United States Refugee Act of 1980, Pub L No 96-212; 94 Stat 102 (1980).
5. Collopy, *ALLA's Asylum Primer—Seventh Edition* (American Immigration Lawyers Association, 2015).
6. Immigration and Nationality Act, Pub L No. 82-414, § 101; 66 Stat 163, 167 (1952) (codified as amended at 8 USC 1101).
7. 8 USC 1101(a)(42) and 8 USC 1158.
8. 8 USC 101(a)(42).
9. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992), Chapter III(B)(2)(b)(51) <<http://www.unhcr.org/4d93528a9.pdf>>.
10. Germain, *Asylum Primer—Seventh Edition* (American Immigration Lawyers Association, 2010).
11. *Kovac v INS*, 407 F2d 102, 107 (CA 9, 1969); *Matter of Acosta*, 19 I&N Dec 211, 222 (Interim Decision #2986), decided March 1, 1985, available at <<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2986.pdf>>.
12. 8 USC 1101(a)(42) and 8 USC 1158.
13. *Matter of Acosta*, p 233.
14. *Id.*
15. *Matter of M-E-V-G*, 26 I&N Dec 227, 240 (Interim Decision #3795), decided February 7, 2014, available at <<https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3795.pdf>>.
16. *Matter of L-E-A*, 27 I&N Dec 40, 45-46 (Interim Decision #3893), decided May 24, 2017, available at <<https://www.justice.gov/eoir/page/file/969456/download>>.
17. *Id.*
18. *INS v Cardoso-Fonseca*, 480 US 421, 438-440; 107 S Ct 1207 (1987).
19. *Id.*
20. REAL ID Act of 2005, Pub L No 109-13, § 101(a)(3)(B)(iii); 119 Stat 302 (2005) (codified as amended 8 USC 1158).
21. 8 CFR 1208.14 and 8 USC 1158(b).
22. *Id.*
23. For processing times, see Dept of Homeland Security, US Citizenship and Immigration Services, *USCIS Processing Time Information* <<https://egov.uscis.gov/cris/processTimesDisplay.do>> and US Dept of Justice, Executive Office for Immigration Review, *Statistics and Publications* <<https://www.justice.gov/eoir/statistics-and-publications>>.