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BACKGROUNDER

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Asylum Variations in Immigration Court

Asylum is an important protection available to aliens who are unable or unwilling to return to their country of nationality because of past persecution or a well-founded fear of future persecution. The Executive Office for Immigration Review (EOIR), an office within the Department of Justice, is responsible for deciding asylum applications filed by aliens who are in removal proceedings. An immigration judge decides the case in the first instance. That decision may then be appealed to EOIR's Board of Immigration Appeals (BIA). Asylum cases are judged based upon the law and the facts, and each case is protected by a robust review and appeal process.

Asylum adjudication does not lend itself well to statistical analysis. Each asylum application is adjudicated on a case-by-case basis, and each has many variables that need to be considered by an adjudicator. It is therefore important that any statistical analysis acknowledge these variables and not draw comparisons between substantially different cases.

- **Complexities of Asylum Law**

Each asylum case is unique, with its own set of facts, evidence, and testimony. Each asylum claim is adjudicated on its own merits, case-by-case, according to U.S. immigration law — taking into account each alien's story and home country conditions. The burden of proof is on asylum applicants to credibly establish past persecution or a well-founded fear of future persecution based on the applicant's race, religion, nationality, membership in a particular social group, or political opinion. Applicants also must establish that they merit a grant of asylum as a matter of discretion. Even when persecution claims are valid, applicants may be denied asylum if barred from that relief under the immigration laws. Such bars to asylum include: a failure to timely file an application; having firmly resettled in another country prior to coming to the United States; having persecuted others; or a history of criminal or terrorist activity.

- **Adjudication Process Overview**

Immigration judges seldom see the "easy" asylum cases because those cases are decided before they reach the immigration courts. Until such time as an alien is

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in removal proceedings, that person may file an “affirmative” asylum application with the Department of Homeland Security (DHS). DHS may grant the alien asylum. If DHS does not grant asylum, then that individual is placed in removal proceedings and can ask an immigration judge to consider his or her application. Or, if an alien did not apply for asylum before DHS but wants to raise asylum for the first time in court, the alien may file a “defensive” asylum application before an immigration judge as a defense against removal.

- **Layers of Review**

In either scenario, the alien has an opportunity for the asylum claim to be heard in court and, if unsuccessful, to then appeal the immigration judge’s decision to the BIA. If unsuccessful before the BIA, the alien may then appeal to the appropriate federal appeals court. Moreover, an alien unsuccessful before either the immigration judge or the BIA has other avenues — motions to reconsider and, where appropriate, motions to reopen — to request additional consideration of the asylum claim at either level.

- **Case Appeals**

The BIA may reverse an immigration judge’s decision that either grants or denies an alien asylum. Immigration judge decisions that grant asylum are seldom appealed by DHS. Decisions of the BIA are binding on DHS, and only an alien may file an appeal of an immigration judge or BIA decision to federal court. In other words, the federal courts see only those cases where the asylum claim was unsuccessful. Historically, the vast majority of decisions of immigration judges and the BIA that are appealed to federal court are upheld. According to statistics compiled by the Civil Division of the Department of Justice, decisions of immigration judges and the BIA were upheld in 89 percent of asylum cases in FY 2006.

As part of EOIR’s continuing efforts to ensure quality and further improve adjudications, the agency has moved forward with a number of measures, specified in August 2006 by former Attorney General Gonzales. They include:

- a system to evaluate the performance of immigration judges and BIA members;
- an examination on immigration law for newly-appointed immigration judges and BIA members;
- a “Practice Manual” that describes a set of best practices for persons appearing before the immigration courts;
- new materials, including a revised immigration judge “Bench Book” with up-to-date templates and reference materials;
- a review and feedback system to alert the Chief Immigration Judge of immigration cases that reflect adversely on an immigration judge’s professionalism;
- a link on the EOIR website for the public to file complaints about immigration judges online;

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- a new supervisory position dedicated to reviewing and monitoring all complaints and allegations of misconduct involving immigration judges; and
- aggressive education efforts to inform immigration courts and the BIA about EOIR's Fraud Program referral process, to assure that cases of immigration fraud and abuse are appropriately investigated and prosecuted, and thereby free up judicial resources for legitimate asylum seekers.

While much of the work is ongoing, EOIR has made substantial progress on implementing all of the Attorney General's measures to improve the removal system.

— EOIR —

This backgrounder provides basic information on asylum variations in immigration court. It is intended for general informational purposes only and is not a substitute for legal advice, nor does it constitute any legal opinion by the Department of Justice. This fact sheet is not fully inclusive; does not address all applicable laws including case interpretation; and may be subject to change as new laws and regulations are enacted.

EOIR, an office within the Department of Justice, is responsible for adjudicating immigration cases. Specifically, under delegated authority from the Attorney General, EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings. EOIR consists of three components: the Office of the Chief Immigration Judge, which is responsible for managing the numerous immigration courts located throughout the United States where immigration judges adjudicate individual cases; the Board of Immigration Appeals, which primarily conducts appellate reviews of immigration judge decisions; and the Office of the Chief Administrative Hearing Officer, which adjudicates immigration-related employment cases. EOIR is committed to providing fair, expeditious, and uniform application of the nation's immigration laws in all cases.