



## Overview of the United States' Asylum System\*

### 1 What arrangements does the US have with its neighbours to stop asylum seekers reaching the border? Do they engage in upstream disruption?

**Canada:** The US and the Canadian governments have implemented a number of initiatives to protect borders and assist in processing asylum seekers.<sup>1</sup> These initiatives include:

- ?? the Safe Third Country Agreement which covers asylum claims made at land border ports-of-entry and allows both countries to manage the flow of individuals seeking to access their respective asylum systems; and
- ?? the visa policy coordination initiative which enhances the cooperation between the US and Canadian embassies overseas to allow their officials to share information on intelligence and specific data concerning high-risk individuals.

The US government has enacted the *Enhanced Security and Visa Entry Reform Act of 2002*, which generally provides for increased security measures and joint inspections at border by Canada and the US.

**Mexico:** In February 2001, President Fox and President Bush engaged in negotiations to find a mutually acceptable response to the issue of border management and illegal immigration. As a result of these negotiations the Mexican and US governments have agreed to cooperate in developing policies which implement the following three core concepts:

- ~~✍~~ a registration program for unauthorised immigrants living in the US followed by an 'earned' legalisation program for those who register;
- ~~✍~~ a broad US temporary worker program for new Mexican workers; and
- ~~✍~~ a new border security arrangement similar to the arrangements in place between the US and Canada.

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<sup>1</sup> US-Canada Smart Border/30 Point Action Plan Update, <http://www.whitehouse.gov/news/releases/2002/12/20021200-1.html>, accessed 20/10/04.

There are two other concepts for the governments to address. First, the need to allow Mexican immigrants to reunify with close family members on an expedited basis. Secondly, the need for the US to work with Mexico to target areas in need of social infrastructure and economic development.<sup>2</sup>

To date, it does not appear that these policies have been implemented.

**The 'Puebla Process':** The Regional Conference on Migration (commonly known as the 'Puebla Process' involves migration and foreign policy officials from the governments of Canada, the US, Mexico and the Central American countries meeting to address regional migration issues jointly. The Puebla Process was launched in 1996.

Instead of leading to an increase in the protection of human rights of migrants, the Puebla Process has led to a 'southward migration' of the Mexico-US border. For example, in the wake of Hurricane Mitch, Mexico and Guatemala turned back tens of thousands of migrants headed for the US. Apparently, there was evidence of intergovernmental cooperation as press reports revealed that the US government paid to rent the buses that transported migrants apprehended near the Mexico-Guatemala border back to El Salvador and Honduras. At the same time Guatemala started requiring nationals from El Salvador, Honduras and Nicaragua to show passports before entering. This restricted access to the Mexican border. Guatemala also amended its immigration laws to provide that criminal sanctions apply to almost all forms of assistance to undocumented migrants.<sup>3</sup>

In recent years, Mexico has implemented more restrictive immigration policies to reduce the number of undocumented migrants reaching the US. It has been alleged by various NGOs that these promises were made during the negotiations with the US over the NAFTA and emergency loans.<sup>4</sup>

## 2 What proactive steps outside its territory does the US take to stop undocumented unauthorised persons reaching the border?

There are a number of proactive steps taken by the US outside its territory. These include:

**Interdictions:** The US Coast Guard is empowered to interdict people on the high seas. Interdicted people are not entitled to asylum screening regardless of whether they are interdicted in international or US territorial waters.

The Coast Guard does, however, provide a minimal level of asylum screening interviews but this is on an ad hoc basis. For example, under the US government's 'wet foot/dry foot' policy, Cubans intercepted at sea are screened for asylum claims. Those whom the US believes have a legitimate claim are brought to the US or resettled in third countries. The others are returned to Cuba. Cubans who arrive on US soil before detection are entitled to apply for permanent residency one year after arriving in the US.

<sup>2</sup> Demetrios Papademetriou, *Converging Realities of the US-Mexico Relationship*, 1 July 2002, [www.migrationinformation.org/usfocus/display.cfm?ID=35](http://www.migrationinformation.org/usfocus/display.cfm?ID=35); accessed 20/10/04.

<sup>3</sup> Melanie Nezer, *The Puebla Process: U.S. Migration Controls Move South of the Border*, [www.refugees.org/world/articles/wrs99\\_migrationcontrols.htm](http://www.refugees.org/world/articles/wrs99_migrationcontrols.htm).

<sup>4</sup> Melanie Nezer, *The Puebla Process: U.S. Migration Controls Move South of the Border*, [www.refugees.org/world/articles/wrs99\\_migrationcontrols.htm](http://www.refugees.org/world/articles/wrs99_migrationcontrols.htm).

Haitians, on the other hand, are generally summarily returned to Haiti and have no right of residency in the US. Following the arrival of 187 Haitians in December 2001, the Immigration and Naturalization Service (INS) district office in Miami began detaining nearly all Haitian asylum seekers even those who were able to establish they had a 'credible fear of persecution' (see answer to Question 3). Prior to December, the Miami INS office routinely released asylum seekers who passed their credible fear interviews (including 96% of asylum seekers from Haiti). However, nearly all of the Haitian asylum seekers who arrived in December 2002 remained in detention at the end of the year. This was so despite 91% of all non-Haitians who arrived in December 2001 being released.<sup>5</sup>

The INS has been criticised by the US Committee for Refugees on the basis that operating instructions for interdictions are prejudicial. The Committee also regards people who have been returned pursuant to the interdiction program to have been denied a fair opportunity to seek asylum given the inadequacy of the screening interviews conducted by the Coast Guard.

**Border patrol initiatives:** The INS has a number of branches which seek to combat illegal immigration through emphasis on overseas deterrence. 'Border Patrol' is the mobile uniformed branch of the Bureau of Customs and Border Protection. Its object is to detect and prevent smuggling and illegal entry of asylum seekers into the US. Patrol agents perform their duties along, and in the vicinity of, the 8,000 miles of US boundaries.

'Inspections' is responsible for enforcing and administering the US immigration and nationality laws by inspecting all persons seeking admission to or transiting through the US at air, land and sea ports-of-entry. The inspectors determine if the applicants qualify for admission and if so under what status. Inspectors look for fraudulent documents, previous overstays, question applicants under oath and may search an applicant and his or her effects without a warrant. The inspectors are charged with intercepting terrorists, asylum seeker and narcotic smugglers, impostors, false claims to US citizenship, criminals and undocumented asylum seekers seeking admission.

The inspection program also pre-inspects passengers overseas in five countries who are destined to the US. Additionally, immigration officers work with foreign governments and carriers to assist them in identifying undocumented and/or unauthorised passengers before they board an aircraft to the US. Inspectors provide fraudulent document training, both domestically and internationally, to airline personnel and foreign government officials.

'Intelligence' is the principal source of immigration-related intelligence.

The 'Overseas Office' unit represents US immigration interests overseas. The mission of the unit is to work with foreign countries and the US missions overseas to enforce the *Immigration and Nationality Act*.

One of the main law enforcement elements of the work of the Overseas Office is 'Operation Global Reach.' This is an extension of the agency's strategy of combating illegal immigration through emphasis on overseas deterrence. It gives the US an important tool to help stem the flow of migrant smuggling at its source.

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<sup>5</sup> US Committee for Refugees Country Report: United States, 2003, [www.refugees.org/world/countryrpt/amer\\_carib/2003/united\\_states.cfm](http://www.refugees.org/world/countryrpt/amer_carib/2003/united_states.cfm), accessed 20/10/04.

INS has 40 overseas offices which provide a permanent presence of immigration officers overseas to work on deterring migrant smuggling in source and transit countries. The Global Reach staff focus on:

- a. training foreign law enforcement and airline officials in identifying fraudulent documents;
- b. improving liaison and cooperation with host country officials to deter migrant smuggling;
- c. developing information for the successful prosecution of asylum seeker smugglers in the US and in host countries; and
- d. strengthening the cooperation of host country migration and law enforcement officials to investigate and prosecute smugglers.

**Overseas refugee-processing facilities:** The US has established 16 overseas refugee-processing facilities. Asylum seekers processed at these facilities and accepted into the US refugee resettlement program are granted entry to the US as a 'refugee'. These facilities were closed following 11 September 2001. By the end of 2001, the US had reopened the facilities in Bangkok, Havana, Vienna and Ho Chi Minh City.

### 3 What arrangements are there at the border to return immediately those who present manifestly unfounded claims for asylum?

Prior to 1 April 1997, an unauthorised person who arrived at a port of entry without proper documents and requested asylum was referred to an exclusion hearing. The *Illegal Immigration Reform and Immigrant Responsibilities Act of 1996* (which became effective on 1 April 1997) gave immigration officers at ports-of-entry the authority to order asylum seekers to be removed, without further hearing or review, if they attempt to enter by fraud or misrepresentation or arrive without proper documents. The only exception is where the person indicates an intention to apply for asylum or that he or she can satisfy officers that he or she has a 'credible fear of persecution or torture'.

These provisions are referred to as the 'expedited removal process'. The process currently only applies to asylum seekers arriving at a port-of-entry and to asylum seekers interdicted at sea and brought to the US. The process involves:

- a. any asylum seeker who asserts a fear of persecution or torture or an intention to seek asylum during the course of the expedited removal process is referred to an asylum officer for an interview to determine if the asylum seeker has a 'credible fear of persecution or torture';
- b. the asylum officer will evaluate the assertions using the 'credible fear of persecution' or 'credible fear of torture' standards. A 'credible fear of persecution' means that the asylum seeker can satisfy the officer that there is a significant possibility (taking into account the credibility of the statements made by the person and such other facts as are known to the officer) that the asylum seeker could establish eligibility for asylum.<sup>6</sup> This is a standard that is broader - and the burden of proof easier to meet than the 'well-founded fear of persecution or torture' standard needed to obtain asylum;

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<sup>6</sup> Section 302(b)(1)(B)(V) of the *Illegal Immigration Reform and Immigrant Responsibilities Act*.

- c. asylum seekers found to have a credible fear are referred to a full hearing before an immigration judge in removal proceedings. This places the asylum seeker on the 'defensive' path to asylum;
- d. those who cannot establish a credible fear are ordered removed from the US under the expedited removal process;
- e. in their discretion, the immigration authorities may allow an asylum seeker to withdraw his or her application for admission in lieu of facing formal removal proceedings. The agency may consider permitting withdrawal of application for admission in less serious cases where there was no fraudulent intent to violate the laws, or where the lack of proper documents is the result of inadvertent error or misinformation, or where other factors indicate the case may warrant this exercise of discretion.

## **4** Is there any appeal or review of this summary procedure?

Expedited removal orders can only be appealed in two circumstances.

First, asylum seekers who claim under oath and under penalty of perjury to be a lawful permanent resident, refugee, asylum seeker, or US citizen, but whose status claim cannot be verified, may be ordered to be removed, but the order will be referred to an immigration judge for review before the asylum seeker is removed from the US.

Secondly, asylum seekers who are found by an asylum officer not to have a credible fear of persecution or torture may request further review of the negative credible fear determination. If they do so, the decision is to be reviewed by the immigration court prior to removal. This review must be concluded within 24 hours whenever possible, but in no case later than 7 days after the initial determination by the asylum officer. The review is limited solely to whether the asylum seeker has a credible fear of persecution or torture. The decision of the immigration court is final on this issue. If the immigration court determines that an asylum seeker does not have a credible fear of persecution or torture, the asylum seeker will be ordered to be removed from the US. See the answer to Question 15 for limited grounds of review and appeal.

## **5** What is the difference in treatment for asylum seekers arriving by land, by sea and by air?

The expedited removal process does not apply to asylum seekers who are natives or citizens of a Western hemisphere country that does not have full diplomatic relations with the US and who arrive at a port-of-entry by aircraft. At present, this exception applies only to Cuban nationals arriving by air at an air port-of-entry.

Cubans intercepted at sea are screened for asylum claims. If the US believes the asylum seeker has a legitimate claims for asylum, he or she is brought to the US or resettled in third countries. All others are returned to Cuba. Those brought to the US may apply for 'asylee' status within one year from the date they arrive in the US. See answer to Question 8 for further information. Asylee status does not convey a right to remain permanently in the US.

However, a person with asylee status may apply for permanent residence once that person has held asylee status for one year.

Whereas Cubans who evade interception and set foot in the US can apply for permanent residency after one year of being in the US.<sup>7</sup>

## **6 How many unauthorised/undocumented arrivals are turned around at the border each year? Does the country have a comprehensive visa system?**

During the 2003 financial year 5,367 people arrived at US ports of entry without proper documentation and requested asylum. Most of these people were referred for credible fear interviews. Asylum officers found sufficient evidence of credible fear in 99% of the cases referred to them in the 2003 financial year.<sup>8</sup>

These figures relate to the number of unauthorised/undocumented arrivals who request asylum. Figures for the total number of unauthorised/undocumented arrivals each year are not presently available. However, the INS estimates that 2.3 million (or 33%) of the 7 million unauthorised immigrants in the US in January 2000 were non immigrant overstayers.<sup>9</sup>

The US has a strict, comprehensive and highly regulated visa system. A person who is not a US citizen is not entitled to enter and remain in the US without a visa (except in limited circumstances). A number of conditions may be imposed on visas, including time limits, restrictions on employment, financial and security conditions.<sup>10</sup>

## **7 Once admitted to the territory, what is the procedures for checking health, security and identity? Is there detention? Is it judicially reviewable? How many are admitted each year?**

Procedures for checking health, identity and security take place once a person applies for asylum. This must be done within one year from the date on which the person arrives in the US.

**Detention:** Since 1996 the INS has been required to generally detain:

- a. asylum seekers with criminal records pending the outcome of the proceedings;
- b. asylum seekers in the expedited removal process until the asylum has established a credible fear of persecution or torture (see answer to Question 3);
- c. all arriving asylum seekers who appear to be inadmissible; and
- d. all persons who have been ordered to be removed must be detained for at least 90 days following the order.

<sup>7</sup> This is referred to as the US government's 'wet foot/dry foot' policy.

<sup>8</sup> US Department of Homeland Security, Yearbook of Immigration Statistics 2003, US Printing Office, Washington DC, 2004, p.48, [uscis.gov/graphics/shared/aboutus/statistics/ybpage.htm](http://uscis.gov/graphics/shared/aboutus/statistics/ybpage.htm), access 28/11/04.

<sup>9</sup> *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, January 2003 [www.immigration.gov/graphics/shared/aboutus/statistics/III\\_Report\\_1211.pdf](http://www.immigration.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf).

<sup>10</sup> For more information see the Immigration Services and Benefits Program webpage of the Bureau of Citizenship and Immigration Services (BCIS), [www.immigration.gov](http://www.immigration.gov).

During the expedited removal process, an asylum seeker may be paroled from custody only for medical emergencies or for legitimate law enforcement purposes.

Once an asylum seeker has been determined to have a credible fear of persecution or torture, the district director may, at his or her discretion, release the asylum seeker on parole pending the asylum hearing. General considerations in assessing whether to grant parole to an asylum seeker include identity verification, community ties, likelihood of appearing for future hearings, medical or humanitarian issues, and whether the asylum seeker may pose a threat if released. Most, but not all, individuals who are found to have a credible fear are released to relatives or community groups.

On 21 December 2000, the INS issued a rule on detention and release procedures for immigrants with final orders for removal but who cannot be returned to their country of origin. The rule allows the government to release those people who prove they are not a danger to public safety or a flight risk but would terminate their right to appeal a denial of release.

In June 2001, the US Supreme Court ruled in the consolidated cases of *Zadvydas v. Underdown and Immigration and Naturalization Service* and *Reno v. Ma* that immigrants and refugees who have committed crimes in the US cannot be detained indefinitely because the government has no place to send them. The Court held that an immigrant could only be detained for a period reasonably necessary to bring about his or her removal from the US. The Court defined the 'reasonable period' as six months but the ruling would not prohibit detaining a person for long in certain cases.

Immediately after the ruling, the Attorney General characterised the Supreme Court's decision as an emergency situation and directed the INS to continue to detain immigrants affected by the ruling unless the detainee could prove there was no significant likelihood that they will be removed. The Attorney General issued a rule authorising the detention of people in these circumstances indefinitely after 11 September 2001.

After 11 September 2001, the Bush administration issued a series of rules concerning the detention and removal of immigrants. Immediately after 11 September, the Attorney General extended from 24 to 48 hours the amount of time a non citizen can be held in custody before being charged with an immigration violation and before a decision is made as to whether or not the detainee should be released. The new rules also gave the Attorney General power to detain a non citizen indefinitely in the event of an emergency or other extraordinary circumstance with or without charges.

**Judicial review:** The detention of the asylum seeker is generally not subject to administrative appeal. The only exception to this is if the asylum seeker claims under oath that he or she has already been lawfully admitted to the US for permanent residence, has been admitted as a refugee or has been granted asylum in the US.<sup>11</sup>

**Statistics:** The US immigration program offers protection to a certain number of people who fall within the meaning of a refugee in the *Refugee Convention 1951* each year under its 'refugee resettlement program' and to a potentially unlimited number of asylum seekers who

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<sup>11</sup> Section 302(b)(1)(C) of the *Illegal Immigration Reform and Immigrant Responsibilities Act*.

arrive in the US and seek asylum each year under its 'asylee protection program' provided the person meets certain criteria.<sup>12</sup>

In the 2003 financial year, the US accepted 25,329 refugees under its 'refugee resettlement program' (an increase of 6,677 on the figure for 2002).<sup>13</sup> The US also approved 11,434 asylum cases (15,470 individuals) under its 'asylee protection program' (a decrease at 7,446 on the figure for 2002). The approval rate was 29% of all adjudicated asylum cases. The approval rate for 2002 was 36%.<sup>14</sup>

## 8 Once health, security and identity are established, what is the procedure for processing an asylum claim? Detention? Residence provided? Social security? Right to work? Legal assistance?

**Classifications:** A person seeking protection from the US based on humanitarian grounds may receive protection under the 'refugee resettlement program' or be granted asylum under the 'asylee protection program'. There are some other humanitarian classifications available. There are discussed in the answer to Question 11.

In the US, a person who enters the US and seeks asylum is referred to as an 'asylum seeker'. Once that person is granted asylum, the person is referred to as an 'asylee'. A 'refugee' on the other than is a person who is granted asylum before that person arrives in the US and arrives in the US with necessary documentation.

**Refugees:** To qualify for admission to the US as a refugee, an application must be made outside the US; meet the definition of a refugee in the *Refugee Convention*; be of special humanitarian concern to the US; not be barred from applying for or receiving protection (these generally relate to criminal conduct and security issues); and not be firmly resettled in any foreign country. Spouses and minor children of persons who qualify as a refugee derive refugee status in the US through their spouse or parent.<sup>15</sup>

The person applies for a visa outside the US by providing details of the facts and circumstances that qualify him or her for refugees status. The US sets limits on how many refugees can be accepted in a given year. The limit for the 2003 financial year was 70,000.<sup>16</sup> Specific allocations are given to different regions of the world.

**Asylum seekers:** A person who is present in the US (whether legally or illegally) and who is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution may apply for asylum. An applicant for asylum must meet the same criteria as a refugee within the meaning of the *Refugee Convention*. The only difference is the location of the person when making the application. An applicant for asylum must apply within one year from the date of the person's last arrival in the US or a relevant exception to this time limit applies. Children must be included in the application and will be given asylee status if the parent's application is accepted.

<sup>12</sup> For further information about the criteria for refugees and asylees see the answer to Question 8.

<sup>13</sup> US Department of Homeland Security, *Yearbook of Immigration Statistics 2003*, US Government Printing Office, Washington DC, 2004, p.50.

<sup>14</sup> Ibid, pp.56-7; note: 'Claims' as distinct from 'individuals' may include more than one person, ie. a family group.

<sup>15</sup> Section 208(b)(3) of the *Immigration and Nationality Act*.

<sup>16</sup> US Department of Homeland Security, *Yearbook of Immigration Statistics 2003*, op cit, p.53.

No numerical ceiling exists for the number of asylees accepted by the US each year. In the 2003 financial year, 42,114 claims for asylum were filed in the US.<sup>17</sup>

There are two processes used for asylum applications: an 'affirmative asylum process' and a 'defensive asylum process'. In the affirmative process, the applicant chooses to apply for asylum and is almost never detained. In the defensive process, the applicant requests asylum as a defence from being removed from the US.

Applicants are generally placed in defensive proceedings once their application for asylum in the affirmative process is rejected or where the applicant is placed in removal proceedings because they do not have documents, or are in violation of their status when apprehended in the US, or were caught trying to enter the US without proper documents and were found to have a credible fear of persecution or torture.

#### **Affirmative asylum process:-**

- a. An asylum seeker is generally eligible to apply for asylee status if he or she is present in the US and files a Form I-589 (Application for Asylum and Withholding of Removal) within one year of the last date on which the person arrived in the US, unless an exception applies.
- b. Every individual who applies for asylee status will be subject to a background/security check. Depending on the results, the applicant will either be referred to the immigration court or placed in removal proceedings. The background/security check involve investigations by the US Department of State, the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). Fingerprints are sent to the FBI for a background/security check.
- c. The applicant will attend an asylum interview generally within 43 days after the date the application form is sent to the relevant service centre. Interviews to be conducted at district officers may take a little longer to arrange.
- d. The asylum applicant has the right to bring an attorney or representative. The asylum applicant must bring an interpreter if he or she is not fluent in English. If the applicant's spouse and/or children who were under 21 at the time the applicant filed the application are included in the asylum application as dependents, they must also appear for the interview and bring any identity or travel documents they have in their possession. Although the applicant is required to list all of his or her family members on the application, the applicant only needs to bring to the interview those that will be included as dependents in the asylum decision. The applicant should also bring the following if available:<sup>18</sup>
  - some form of identification, including any passport(s), other travel or identification documents, or Form I-94 Arrival-Departure Record;
  - the originals of any birth certificates, marriage certificates, or other documents the applicant previously submitted with the Form I-589;
  - a copy of the Form I-589 and other supplementary material that the applicant previously submitted;

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<sup>17</sup> Ibid p.60; note: 'Claims' as distinct from 'individuals' may include more than one person, ie. a family group.

<sup>18</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

- any additional available items documenting the applicant's claim that he or she has not already submitted with the application and certified.
- e. The asylum officer will verify the applicant's identity and ask basic biographical questions.
- f. The asylum officer determine if the applicant is a 'refugee' within the meaning of the *Refugee Convention* and whether any mandatory bars apply on the basis of the information provided in the application and at his or her interview and will consider country condition information from reliable sources.
- g. A supervisory asylum officer reviews the decision to determine if it is consistent with the law.
- h. The decision is generally available within two weeks after the interview and within 60 days from the date of filing the application.
- i. If asylum is granted, the applicant will have 'asylee' status.
- j. The asylum seeker will receive an I-94 Arrival and Departure record documenting that he or she is able to remain indefinitely in the US as an asylee.
- k. The applicant will be authorised to work in the US for as long as he or she remains in asylee status. The applicant does not have the right to work until he or she is granted asylee status.
- l. The applicant will also be able to request derivative asylee status for any spouse or child<sup>19</sup> who was not included as a dependent in the applicant asylum decision and with whom the applicant have a qualifying relationship. This means that the applicant will be able to petition to bring his or her spouse and/or children to the US, or allow them to remain in the US indefinitely incident to his or her asylee status.
- m. The applicant will receive a 'Notice of Intent to Deny' if he or she is currently in valid status and found ineligible for asylum. The applicant will have 16 days to provide a response to the letter. The asylum officer will then either approve or deny the claim.
- n. The applicant will receive a 'Final Denial' of his or her asylum claim if he or she received a 'Notice of Intent to Deny' and either did not provide a response to the letter within 16 days, or the asylum officer determined that the evidence or argument the applicant provided failed to overcome the grounds for denial as stated in the notice.

If a person is granted asylee status the person is entitled to lawfully remain in the US.

**Detention:** See the answer to Questions 7.

**Social services:** Refugees and asylees are eligible for certain social services for 5 years from the date they enter the US (for refugees) or granted asylum (for asylees). The aim of the laws making social services available are aimed at making sufficient resources available for employment training and placement in order to achieve economic self-sufficiency as quickly

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<sup>19</sup> A child must be unmarried and under 21 years of age as of the date you filed the asylum application, as long as his or her asylum application was pending on or after 6 August 2002.

as possible. The services include English language training and ensure that women have the same opportunities as men.

Refugees and asylees are eligible for cash and medical assistance for 8 months from the date they enter the US (for refugees) or granted asylum (for asylees).

**Residence:** Residence assistance is not available if a person is unlawfully present in the US. It appears that residence assistance may be available to asylees and refugees who satisfy relevant eligibility criteria.<sup>20</sup>

**Social security:** Social security is not available if a person is unlawfully present in the US but social security cards are available to refugees and asylees. Refugees and asylees are also entitled to social security if they are otherwise eligible under relevant social security laws.

**Right to work:** Asylum applicants cannot apply for employment authorisation at the same time they apply for asylum. The applicant will be authorised to work in the US only if he or she is granted asylum and as long as he or she remains in asylee status. The applicant are also eligible to apply for employment authorisation if the applicant are given a recommended approval or conditional grant of asylum. The applicant can also apply for work authorisation before a decision is made on his or her claim if 150 days has passed since the applicant filed the complete application and no decision has been made on the application. The BCIS has 30 days to either grant or deny a request for employment.<sup>21</sup>

**Legal assistance:** An asylum applicant has a right to provide his or her own legal representation at an asylum interview and during immigration proceedings before the immigration court, at no cost to the US government. The applicant may also apply for access to pro bono (free or reduced cost) attorneys or community-based, non-profit organisations that may be available to assist the applicant.<sup>22</sup>

**Right to travel:** If the applicant is applying for asylum and wants to travel outside the US, the applicant must receive advance permission before leaving the US in order to return to the US. This advance permission is called 'Advance Parole'. If the applicant does not apply for Advance Parole before leaving the US, the applicant will be presumed to have abandoned his or her application and may not be permitted to return to the US. If the applicant obtains Advance Parole and returns to his or her country of feared persecution, the applicant will be presumed to have abandoned his or her asylum application, unless the applicant can show compelling reasons for the return.

**Defensive asylum process:** A person is generally placed into the defensive asylum process if they are referred to the immigration court by the asylum officer who did not grant the person asylum or they have been placed in removal proceedings because they are undocumented or in violation of their status when apprehended in the US or were caught trying to enter the US without proper documentation and were found to have a credible fear or persecution or torture.

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<sup>20</sup> The *Housing and Community Development Act 1980* as amended by the *Illegal Immigration Reform and Immigrant Responsibilities Act*.

<sup>21</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

<sup>22</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

Applicants request asylum as a defence against being removed from the US. The applications are heard by the immigration court. The proceedings are adversarial. The immigration court hears the applicant's claim and any concerns about the validity of the claim raised by the government and then makes a determination about eligibility. If the applicant is not found to be eligible for asylee status, the immigration court will determine whether the applicant is eligible under any other status. If not, the immigration court will order the individual to be removed from the US.

The key differences between the affirmative and defensive asylum procedures are as follows:

- the applicant is placed in removal proceedings in the defensive asylum process but not in the affirmative asylum process.
- the applicant affirmatively submits an application to an asylum officer and appears before an asylum officer for a non-adversarial interview under the affirmative asylum process. Whereas under the defensive procedures, the applicant must appear before the immigration court in an adversarial court hearing.

## 9 Is there a distinction drawn between those arriving with a visa and those without? Procedures: See answer to Question 8.

**Status:** Asylum granted under the *Immigration and Nationality Act* does not convey a right to remain permanently in the US and may be terminated in certain circumstances. These include the person no longer meets the definition of a 'refugee' due to a fundamental change in circumstances; the person no longer meets the criteria required for a grant of asylum; if the person can be removed to a third country which can provide appropriate protection; or if the person has availed himself or herself of protection from another country.<sup>23</sup>

Otherwise, asylees and refugees have the right to remain indefinitely in the US until the person is granted permanent protection; they are also given authority to work, family reunion rights and travel rights.

On 15 June 2000, asylees were given the same rights as refugees to refugee assistance and services from the date they are granted asylum.

**Permanent protection:** Persons who have been accepted by the US as a refugee or an asylee may apply for permanent residence after the person has held refugee or asylee status for one year.

**Detention:** Persons with refugee or asylee status are generally not detained except where a criminal offence has been committed or for security reasons. See answer to Question 7 for further information on detention.

## 10 Is there a distinction drawn between those arriving directly from a country of persecution, and those engaged in secondary movement? If so, how is this distinction drawn? Who draws the distinction? Is the decision reviewable?

<sup>23</sup> Section 208(c)(2) of the *Immigration and Nationality Act*.

There is a distinction drawn between those arriving directly from a country of persecution and those engaged in secondary movement. Asylum seekers and refugees are barred from being granted asylum under the asylee protection program or being resettled under the refugee resettlement program in the US if the asylum seeker or refugee has 'firmly resettled' in another country prior to arriving in the US.<sup>24</sup>

The term 'firmly resettled' is defined in section 208.15 of the *Code of Federal Regulations* (8 CFR) as a person who prior to arrival in the US was in a country other than that person's country of origin and received from that country an offer of permanent resident status or some other type of permanent resettlement unless he or she establishes that:

- his or her entry into that country was a necessary consequence of his or her persecution and that he or she remained in that country only as long as necessary to make arrangements and did not establish significant ties in that country; or
- the conditions in that country were so substantially restricted that he or she was not in fact resettled.

This decision is made by the asylum officer if the person is in affirmative asylum process and by the immigration court if the person is in defensive asylum process.

The US signed a 'safe third country' agreement with Canada on December 5, 2002. When the agreement is implemented it will remove the 'firmly resettled' exclusion protection for asylum seekers attempting to enter the US from Canada, irrespective of their length of time in Canada, or their ties to it.<sup>25</sup>

## 1 Does one have to be strictly a refugee to be able to remain, or are there other humanitarian classifications available? Is so, who decides, what are the criteria and is the decision reviewable?

No. There are at least three other categories available.

**Temporary protected status (TPS):** The Attorney-General is authorised to designate temporary protected status for foreigners who would be endangered if they returned to their country of origin. This protection is based on any one of the following three circumstances:

- ongoing armed conflict;
- environmental disaster; or
- extraordinary and temporary conditions that prevent safe return.

This protection is granted to all eligible persons from the designated country who register with the US and are present in the US at the date of the designation. It is not decided on an individual by individual basis.

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<sup>24</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

<sup>25</sup> US Committee for Refugees, Country Report: US 2003, [www.refugees.org/world/countryrpt/amer\\_carib/2003/united\\_states.cfm](http://www.refugees.org/world/countryrpt/amer_carib/2003/united_states.cfm), accessed 20/10/04.

Persons with TPS are eligible to remain in the US temporarily until the Attorney General decides that the conditions in the relevant country no longer pose an undue threat.

At the end of 2001, this status was in effect for certain nationals of Somalia, Sierra Leone, Sudan, Burundi, Angola, Nicaragua, Honduras and El Salvador. In 2002, the Attorney General announced the designation of TPS for nationals of Liberia. This enabled 10,000 to 20,000 Liberians whose DED status expired on 29 September 2002 as well as any Liberian national and habitual residents present in the US as at 1 October 2002 to apply for TPS.

The TPS regime has been criticised as having very limited application because the Attorney General tends to make the designation effective as of the date of designation and defines eligibility criteria to apply only to those nationals of the designated country who are physically present in the US at that date. This means a refugee arriving after that date is not entitled to protection.<sup>26</sup>

**Deferred enforced departure (DED):** There is little difference between DED and TPS. Both allow eligible persons to live and work in the US temporarily. Like the TPS, DED is a discretionary mechanism used by the Attorney General to suspend temporarily the removal of a specific population and allow them to work legally while they are protected from removal. Unlike TPS, DED has no specific statutory authority and is not necessarily based on an ongoing armed conflict or specifically defined legal criteria in the country of origin.

**Coercive population control program (CPC program):** The US grants protection under this program to 1,000 applicants per year. An applicant receives a conditional grant of asylum if he or she is found to be eligible for asylum based on past persecution or a well-founded fear of persecution solely on account of resistance to a coercive population control (CPC) program. The applicant will be put on a waiting list to receive a CPC authorisation number. The applicant will not receive a final grant of asylum until a CPC authorisation number becomes available. There is currently a several year waiting period.

**Gender based persecution:** In October 2000, the US government passed the *Violence Against Women Act of 2000* which contains *The Battered Immigrant Women Protection Act of 2000*. This Act significantly expands and improves protections for battered immigrant spouses and children.

In January 2001, Attorney General Janet Reno vacated the Board of Immigration Appeals' decision in the Matter of *R-A*, in which the Board had declined to grant asylum to a Guatemalan victim of spousal abuse on the grounds that it had "*not ... been shown that the government of Guatemala encourages its male citizens to abuse its female citizens.*" The Attorney General remanded the case for the Board to reconsider after the INS finalised a rule that addressed gender-based asylum claims. The proposed rule restates that gender can form the basis of a particular social group and recognises that a victim of domestic violence may be entitled to asylum in certain circumstances.

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<sup>26</sup> Bill Frelick, *Secure and Durable Asylum: Article 34 of the Refugee Convention*, [www.refugees.org/world/articles/asylum\\_wrs01.htm](http://www.refugees.org/world/articles/asylum_wrs01.htm).

## 12 How many asylum and humanitarian claims are decided each year?

### Application and assessment figures - refugees<sup>27</sup>

	2001 financial year	2002 financial year	2003 financial year
Arrivals	28,925	26,839	28,306
Applications for asylum	103,499	89,726	42,705
Determinations/closed	93,489	67,301	74,003
Approvals	66,198	18,652	25,329
Ceiling on approvals	80,000	70,000	70,000

### Application and assessment figures - asylees<sup>28</sup>

	2001 financial year	2002 financial year	2003 financial year
Applications for asylum	62,984	63,197	46,272
Determinations/closed	67,711	82,141	87,516
Approvals	20,290	18,880	11,434

## 13 Does the country take a quota of off-shore refugees each year as well as on-shore asylum seekers? If so, is there a nexus between the numbers?

The US does take a quota of off-shore refugees. These are accepted under the refugee resettlement program. See answer to Question 8 for more information and the answer to Question 12 for the number of refugees accepted under the refugee resettlement program in 2001 and 2002.

There does not appear to be any nexus between the refugee resettlement program and the asylee protection program.

## 14 How long does an asylum claim take?

The time frames below apply only if the applicant is scheduled for an interview at one of the eight asylum offices. Time frames vary for applicants who live far from an asylum office

<sup>27</sup> US Department of Homeland Security, Year of Immigration Statistics, 2003, US Government Printing Office, Washington DC, 2004 pp.50,53.

<sup>28</sup> Ibid., p.56.

because asylum officers must travel to other offices in order to conduct the long-distance interviews.<sup>29</sup>

The initial interview on asylum applications filed on or after 1 April 1997 should take place within 43 days after the date the application is filed. A decision should be made on the asylum application within 180 days after the date the application is filed, unless there are exceptional circumstances.<sup>30</sup>

**Applications for asylum**

Applicant files I-589 at the service centre	Within 21 days of the filing date	Within 43 days of the filing date	Within 60 days of the filing date	Within 180 days of the filing date
The filing date is the date the complete application was received at the service centre.	Applicant receives: receipt notice, details of fingerprint appointment; and interview notice	Applicant is interviewed at one of the eight asylum offices, unless applicant lives at a significant distance from an asylum office.	Majority of applicants return two weeks after the interview to pick up the decisions on their application. An applicant who receives a negative decision may refer the decision to the immigration court for final determination. This review must be conducted within 7 days from the date of the asylum officer's order.	Applicants whose cases have been referred to the immigration court receive a decision on their applications.

# 15 How many levels of appeal are there?

Decisions of the immigration court are subject to:<sup>31</sup>

- administrative review by the Board of Immigration Appeals (Washington, DC) within 30 days from the date of the denial; and

<sup>29</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

<sup>30</sup> Section 208(d)(5) of the *Immigration and Nationality Act*.

<sup>31</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

- judicial review through the US court system. The US Supreme Court is the ultimately appeal court in the US. Although the *Illegal Immigration Reform and Immigrant Responsibility Act* largely eliminated judicial review of immigration decisions, judicial review is still available in asylum cases.

## 16 In what circumstances could a person be held in detention while the claim is processed?

See answer to Question 7.

## 17 How many overstayers a year does the country have?

Yearly statistics are not available. However, the INS estimates that 2.3 million (or 33%) of the 7.0 million unauthorised immigrants residing in the US in January 2000 were non-immigrant overstayers.<sup>32</sup>

## 18 Once an asylum seeker is rejected, are they taken into detention? If so, what are the conditions and is the decision appealable? If not, how do they arrange the removal of persons?

See answer to Question 7.

## 19 What are the terms of a recognised asylum seeker (or humanitarian entrant) remaining in the country? Is there a time limit on the visa? Family reunion? Right to travel? Right to work? Social security assistance?

See answer to Questions 8 and 9 for status of, and rights granted to, refugees and asylees.

**Family reunion**<sup>33</sup>: Once a person is granted asylum, that person may petition to bring his or her spouse and/or children<sup>34</sup> to the US or to allow those already here, who were not included in the person's asylum decision, to remain incident to that person's asylum status.

**Right to travel**: If refugee or asylee status is granted, the refugee or asylee may apply for a 'Refugee Travel Document'. This document will allow the applicant to travel overseas and return to the US.

## 19 How stringent is the law for removal of non-citizens who have committed criminal offences and served their sentences? Is there any appeal from the decision to deport?

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<sup>32</sup> *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, January 2003.

<sup>33</sup> Responses by the US BCIS to Frequently Asked Questions about Asylum, [www.immigration.gov](http://www.immigration.gov).

<sup>34</sup> 'Children' mean people who are unmarried and under the age of 21 as of the date the asylum application was filed, as long as the asylum application was pending on or after 6 August 2002.

Refugee or asylee status may be terminated and the person removed if the applicant commits certain crimes or has engaged in other activity that makes the applicant ineligible to retain refugee or asylee status in the US.

The *Immigration and Nationality Act* requires the Attorney General to take into custody any individual who has committed certain crimes and who has been ordered to be deported. Under the *Illegal Immigration Reform and Immigrant Responsibilities Act*, these people may be detained for an indefinite period after completion of their criminal sentences. The US Supreme Court has ruled that the INS could not apply the right to detain under the 1996 Act retroactively. See also the answer to Question 7 for details of the ability to detain indefinitely. It is not clear whether there is any limitation on the right to administrative review or judicial review of a decision of the INS to detain a person.

In October 2001, the US government passed the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*. The Act contains a number of provisions which affect immigrants. The Act broadened the definition of 'terrorism' and other such terms for the purposes of deportability and inadmissibility of refugees and asylum seekers and gave the Attorney General further powers to detain and deport non-citizens.

The *USA Patriot Act* requires the Attorney General to detain any terrorist suspect even if the person has been granted refugee or asylee status. The Attorney General has 7 days to charge the person with a deportable offence. However, a non-citizen may still be detained even if not charged with a terrorism based ground for removal or deportation. A non-citizen may be detained indefinitely if the release of the person will threaten the national security of the US or safety of the community or any person.

In November 2001, the President Bush issued an order that allows special military tribunals to try non citizens charged with terrorism. The Tribunal has authority to create its own trial procedures, requires only a two-thirds majority to convict and sentence, can impose the death penalty, can conduct proceedings in secret anywhere in the world and there is no right of review by any court.

## **20** How does the country ensure compliance with the Convention Against Torture, the ICCPR, and the Convention on the Rights of the Child before ordering forcible removal of a failed asylum seeker?

Under the US implementing regulations for the *Convention Against Torture*, the US provides a very limited and tenuous form of protection against removal for persons who would be ineligible for non-refoulement under the asylee protection program. The protection provided is only a deferment from removal and persons entitled to the protection may be required to continuously prove their eligibility for non removal.

Further information about compliance does not appear to be available. However, the extensive rights granted to the US government under the *USA Patriot Act* may undermine compliance with the *Convention Against Torture*, the *ICCPR* and the *Convention on the Rights of the Child*.

## 21 Is there any distinctive jurisprudence by the domestic courts or parliaments qualifying or restricting the terms of the Refugee Convention? Make particular reference to 'particular social group', persecution by non-state actors, and Convention reasons being the main cause of persecution or human rights abuse.

Examples of distinctive jurisprudence by domestic courts or parliaments include:

**Gender-based asylum claims:** As at 2000, the US courts had not found that gender alone was sufficient to constitute a social group. For example, the US Court of Appeals for the Second Circuit held in *Gomez v. INS* that persecution based on gender alone does not constitute persecution on account of a particular social group. In that case, however, the Court found her persecution claims were based on religious beliefs which differed from those of her father concerning the proper role of women in Moroccan society.

In March 2001, the US Court of Appeals for the Ninth Circuit found that a 19 year old Mexican women had a well-founded fear of persecution from her abusive father. The Ninth Circuit found that immediate family members constituted a 'particularly social group' within the meaning of the Refugee Convention.<sup>35</sup>

See also the answer to Question 11. Accordingly to Bill Frelick, the director of Amnesty International's refugee program, the US generally has a 'narrower' interpretation of refugee law than Canada. An example is in relation to gender-based persecution claims.<sup>36</sup>

**State responsibility versus private persecution:** The Board of Immigration Appeals does not accept that private acts of violence qualify as government persecution by virtue of the inadequacy of protection provided by the government.

The Board has, however, recognised that young women from a particular African tribe who had not had female genital mutilation as practised by their tribe and who oppose the practice constitute a 'particular social group' for the purposes of US asylum law.

**China's one-child policy:** In the 1989 *Matter of Chang* decision, the Board of Immigration Appeals held that a Chinese national did not qualify for asylum based on his and his wife's desire to have more than one child. The Board held that even forced sterilisation would not constitute persecution in this context because the Changs were not treated any differently than anyone else in China. The Board said that the one-child policy could be persecutory if it was being selectively applied against members of a particular religious group or was being used to punish individuals for their political opinions, for example. The Board rejected the proposition that a 'particular social group' could be comprised of persons who oppose the policy if the only evidence of persecution of that group is that the law is applied to them despite their objection. This matter was clarified by the enactment of the *Illegal Immigration Reform and Immigrant Responsibility Act*, which amended the definition of 'refugee' in the *Immigration and Nationality Act* to provide that a person fleeing forced abortion or sterilisation shall be deemed to have been persecuted or to have a well-founded fear of persecution on account of political opinion.

**Serious non-political crimes:** US law contains a mandatory bar to asylum for individuals who have committed a serious non-political crime outside the US. The laws are comparable

<sup>35</sup> Worldwide Refugee Information, US Country Report, 2001 ([www.refugees.org/world/countryrpt/amer\\_carib/us.htm](http://www.refugees.org/world/countryrpt/amer_carib/us.htm)).

<sup>36</sup> US Committee for Refugees, *Refugee Reports*, September/October 2002, Volume 23, Number 7 at page 3 ([www.refugees.org/world/articles/RR\\_September\\_2002\\_recentdev.cfm](http://www.refugees.org/world/articles/RR_September_2002_recentdev.cfm)).

to the bar in the Refugee Convention. The Board of Immigration Appeals uses a weighing test that is based on the UNHCR's handbook but not entirely consistent with the handbook. The test used is whether an offence's political aspect outweighs its common law character and the Board undertakes two specific inquiries. First, whether there is a gross disproportion between means and ends. Secondly, whether the acts are atrocious. This approach has been approved by the US Supreme Court.

**Terrorism:** In 2001 the INS adopted a policy of denying asylum to Columbians who have made payments to Columbian guerrillas. The US considers the guerrillas to be terrorist organisations and materially supporting a terrorist organisation is a ground under US law for denying asylum. People required to make payments included victims of extortion.

**Temporary protection:** Bill Frelick, the President of Amnesty International's refugee program maintains that Article 1(C) of the *Refugee Convention* "inextricably links "protection" outside the refugee's home country with acquiring "a new nationality", i.e. citizenship rights" and that the Convention does not regard protection outside the country of origin as temporary.<sup>37</sup> He argues that the Convention refugees require protection until a durable solution is found and a solution is only durable if it can only be reversed with the refugee's consent. Refugee or asylee status in the US does not grant the right to remain permanently in the US and may be terminated in certain circumstances. The temporary nature of these rights is not consistent with this interpretation of the obligations of signature countries under the *Refugee Convention*.

**Failure to comply with international refugee standards:** The US repatriates asylum seekers interdicted on the high seas without screening them for refugee eligibility. See answer to Question 2 for further information. See also the answer to Question 22 in relation to the way in which the *USA Patriot Act* may undermine the terms of the *Refugee Convention*.

**22** Is there any distinctive jurisprudence by the domestic courts or parliaments qualifying or restricting the terms of the Refugee Convention? Make particular reference to 'particular social group', persecution by non-state actors, and Convention reasons being the main cause of persecution or human rights abuse.

See answer to Question 9.

**23** How does the country apply the cessation clause once there is a change in the situation of the home country? Does the country insist on the refugees re-establishing their individual claim or does the country permit the refugee to remain pending proof of a substantial durable solution in the home country?

See answer to Question 2.

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<sup>37</sup> Bill Frelick, *Secure and Durable Asylum: Article 34 of the Refugee Convention*, [www.refugees.org/world/articles/asylum\\_wrs01.htm](http://www.refugees.org/world/articles/asylum_wrs01.htm).

## Websites for further information

### US websites:

Carnegie Endowment for International Peace: [www.carnegieendowment.org](http://www.carnegieendowment.org)

Centre for Immigration Studies: [www.cis.org](http://www.cis.org)

US Citizenship and Immigration Services: [www.immigration.gov](http://www.immigration.gov)

Migration Information Source: [www.migrationinformation.org](http://www.migrationinformation.org)

US Committee for Refugees: [www.refugees.org](http://www.refugees.org)

US Department of Justice: [www.usdoj.gov](http://www.usdoj.gov)

US White House: [www.whitehouse.gov](http://www.whitehouse.gov)

### General websites

Amnesty International: [www.amnesty.org](http://www.amnesty.org)

Human Rights Watch: [www.hrw.org](http://www.hrw.org)

Jesuit Refugee Service: [www.jesref.org](http://www.jesref.org)

Refugee Studies Centre, University of Oxford: [www.rsc.ox.ac.uk](http://www.rsc.ox.ac.uk)

United Nations High Commissioner for Refugees: [www.unhcr.ch](http://www.unhcr.ch)

Vera Institute of Justice: [www.vera.org](http://www.vera.org)