



An Overview of the Statutory Bars to Asylum: Limitations on Applying for Asylum (Part One)

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Under Section 208 of the Immigration and Nationality Act (INA), codified at [8 U.S.C. § 1158](#), a non-U.S. national (*alien* as the term is used [in the INA](#)) who is physically present in the United States or who arrives in the United States (whether or not at a designated U.S. port of entry) may apply for asylum, regardless of that person's immigration status or whether that person lawfully entered the country. [Asylum](#) is a humanitarian form of relief available to aliens who face persecution in their native countries (or last place of residence if stateless). INA § 208, however, [bars some asylum seekers](#) from asylum. These restrictions fall into two categories: (1) limitations on the ability to *apply* for asylum and (2) limitations on the ability to be *granted* asylum. This Legal Sidebar, which discusses statutory bars to applying for asylum, is the first in a two-part series discussing the asylum bars. The second Sidebar, focused on statutory limitations on the granting of asylum, is available [here](#).

Asylum and Related Protections

INA § 208 [provides](#) that the Secretary of Homeland Security or the Attorney General may grant asylum to an alien who is found to be a “refugee.” A refugee is [defined](#) as a person who is unable or unwilling to return to a country of origin (or last place of residence if stateless) because of past persecution or a well-founded fear of future persecution on account of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

An alien physically present in the United States may “[affirmatively](#)” apply for asylum with the Department of Homeland Security's (DHS's) [U.S. Citizenship and Immigration Services](#) (USCIS). However, if an alien is placed in [formal removal proceedings](#), the alien generally may only seek asylum “[defensively](#)” in those proceedings before an immigration judge (IJ) within the Department of Justice's (DOJ's) [Executive Office for Immigration Review](#). Aliens arriving in the United States may be subject to different procedures. If an arriving asylum seeker is detained at the border and placed in [expedited removal proceedings](#), a USCIS asylum officer initially screens the alien's potential eligibility for asylum. If the alien shows a “[credible fear of persecution](#),” USCIS may [adjudicate the asylum application or refer it](#) to an IJ for adjudication in formal removal proceedings.

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A person granted asylum may lawfully [remain and work](#) in the United States, [travel abroad](#), [receive federal public benefits](#), and apply for [lawful permanent resident \(LPR\)](#) status [after one year](#). If an alien is granted asylum, his or her spouse and children [may also be granted asylum](#).

An applicant for asylum [has the burden](#) of proving his or her eligibility for relief (i.e., that the alien meets the definition of a “refugee”). Because asylum is a [discretionary form of relief](#), an alien who shows eligibility for asylum on the merits may still be denied relief [as a matter of discretion](#).

In some cases, an alien may be statutorily barred from either applying for or receiving asylum (e.g., because the application is untimely filed). If the applicant is subject to removal, the applicant may pursue alternative forms of relief. These include [withholding of removal](#), which has a higher burden of proof requiring the alien to prove that it is more likely than not he will be persecuted because of one of the five protected grounds (of note, there are [statutory bars](#) to withholding of removal, and some overlap with the asylum bars [e.g., an alien convicted of a particularly serious crime]). The alien may also seek protection under the Convention Against Torture (CAT), which requires evidence that it is [more likely than not](#) the alien will be [tortured](#) by a public official or other person acting with the consent or acquiescence of that official. The applicant does not have to establish that the torture would be based on one of the five grounds for which asylum or withholding may be granted. Unlike asylum, withholding of removal and CAT protection are [mandatory forms of relief](#) and may not be denied as a matter of discretion. However, while asylum affords the recipient with an opportunity to [pursue LPR status](#), a grant of withholding or CAT protection provides no path to LPR status and [only prevents removal to the country](#) where the alien fears either persecution or torture (but not necessarily to a third country).

Limitations on Ability to Apply for Asylum

While aliens arriving or present in the United States generally can seek asylum, INA § 208(a)(2) [provides limitations](#) on an individual’s ability to apply for such relief.

One-Year Time Limitation

INA § 208(a)(2)(B) [provides that](#) an alien may not apply for asylum unless the application was filed within one year of the alien’s last arrival in the United States (this deadline [does not apply to unaccompanied alien children](#)). The one-year deadline does *not* apply if the alien shows either (1) changed circumstances that materially affect the alien’s eligibility for asylum or (2) extraordinary circumstances relating to the delay in filing the application.

Federal statute does not define “changed circumstances,” but [DHS](#) and [DOJ regulations](#) list some examples of changed circumstances. These include (but are not limited to) changes in the applicant’s native country or, if the applicant is stateless, the country of last residence (e.g., an armed conflict); changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum (e.g., changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk); or, if the alien was previously included as a dependent on another alien’s pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or upon reaching age 21.

Under [DHS](#) and [DOJ regulations](#), “extraordinary circumstances” (which are also undefined in federal statute) “shall refer to events or factors directly related to the failure to meet the 1-year deadline.” The regulations require the applicant to show that the circumstances were not intentionally created through his or her own action or inaction and that they were directly related to the failure to timely file the application. Under the regulations, these extraordinary circumstances may include (but are not limited to) serious illness or mental or physical disability (including any effects of past persecution or violent harm) during the one-year period after arrival in the United States; legal disability (e.g., the applicant was an

unaccompanied minor or suffered from mental impairment) during the one-year period; ineffective assistance of counsel (provided that the alien meets certain procedural requirements); the applicant's maintenance of [Temporary Protected Status \(TPS\)](#), [lawful immigrant](#) or [nonimmigrant status](#), or [parole status](#) until a reasonable period before filing the application; USCIS's rejection of an improperly filed application that was filed within the one-year filing deadline; and the death, serious illness, or incapacity of a legal representative or immediate family member.

According to regulations, an asylum applicant [must file "within a reasonable period"](#) given these changed or extraordinary circumstances. The [Board of Immigration Appeals \(BIA\)](#), the highest administrative body responsible for interpreting and applying federal immigration laws, [has ruled that](#) an applicant does not receive an automatic one-year extension in which to apply for asylum following changed or extraordinary circumstances. Instead, the BIA has held that to determine whether an application was filed "within a reasonable period," the adjudicator should consider the "[particular circumstances](#)" related to the delay in filing. The [regulations provide](#) that an asylum applicant's delayed awareness of changed circumstances may be considered in the "reasonable period" analysis. The [regulations also require](#) the applicant to show that any filing delay resulting from extraordinary circumstances was reasonable. If an asylum applicant initially had lawful status (e.g., TPS), immigration authorities [have construed](#) a filing delay of six months or longer after expiration of that status as being presumptively unreasonable.

Previously Denied Applications

[INA § 208\(a\)\(2\)\(C\)](#) and [implementing regulations](#) provide that an alien may not seek asylum if the alien had applied for asylum and that application was denied by an IJ or the BIA. As with the one-year time limitation, the statute contains an exception if there are changed circumstances materially affecting the alien's eligibility for asylum. As discussed above, [federal regulations](#) explain the meaning of "changed circumstances" and require filing of the asylum application "within a reasonable period" of those changed circumstances. If the alien is subject to a final order of removal, the alien may pursue asylum only by filing a [motion to reopen](#) the formal removal proceedings. Generally, the motion must be filed within 90 days of the final order of removal, but there is no time limit for motions to reopen to apply for asylum that are based on "[changed country conditions](#)" in the country of nationality or removal.

Safe Third Country Agreements

Under [INA § 208\(a\)\(2\)\(A\)](#), an alien (other than an unaccompanied alien child) may not apply for asylum if that person may be removed, under a "safe third country" agreement (STCA), to a country where the alien would have "access to a full and fair procedure" for seeking asylum. The United States and Canada maintain a longstanding [STCA](#) in which non-Canadian nationals arriving at U.S. ports of entry from Canada (or transiting the United States during removal from Canada) may not seek asylum and related protections in the United States (notably this restriction does not apply to aliens who unlawfully cross the border *between* ports of entry). Instead, they must be returned to Canada to seek protection in that country. DHS [regulations](#) contain exceptions to the U.S.-Canada STCA (e.g., where the alien's family members in the United States have received asylum). Asylum officers and IJs [can determine](#) whether an applicant is subject to an STCA. They [may also decide](#), in their discretion, whether as a matter of public interest an applicant should be allowed to pursue asylum in the United States despite the STCA.

In 2019, during the Trump Administration, DHS [signed](#) STCAs (which the Trump Administration referred to as "Asylum Cooperative Agreements") with Guatemala, Honduras, and El Salvador that allowed the agency to transfer some asylum seekers to those countries rather than evaluate their claims for protection in the United States. An [implementing rule](#) established procedures to determine whether an alien would be subject to one or more of the agreements. The rule contained [certain exceptions](#), including where the receiving country was also the alien's country of nationality, and cases in which DHS determined it was "in the public interest for the alien to receive asylum in the United States." Of the agreements, only the

Guatemalan agreement was implemented. In 2021, the Biden Administration [suspended](#) the three STCAs and initiated the process to terminate them.

Limitation on Judicial Review

INA § 208(a)(3) states that no court has jurisdiction to review “any determination” that an alien is ineligible to apply for asylum. Thus, under this provision, courts generally lack jurisdiction to review a finding that an alien failed to timely file an asylum application, is barred from refiling after the denial of asylum, or is subject to an STCA. The statute similarly precludes judicial review of whether an alien qualifies for an exception to the time and numerical limitations on asylum applications (i.e., because of changed or extraordinary circumstances).

INA § 242(a)(2)(D), however, provides that courts retain jurisdiction to review “constitutional claims or questions of law” raised in a [petition for review](#) of a final order of removal in the [federal circuit courts of appeals](#). [Most federal circuit courts have previously held that](#), while this statute restores jurisdiction over constitutional or legal challenges to the denial of an untimely (or otherwise barred) asylum application (e.g., a claim that an immigration judge applied a legally erroneous standard), INA § 208(a)(3) still precludes judicial review of factual or discretionary findings, including whether an applicant showed changed or extraordinary circumstances to warrant consideration of an untimely application. The U.S. Court of Appeals for the Ninth Circuit, on the other hand, held in 2007 and 2008 that § 208(a)(3) does not bar judicial review of [whether there exists changed or extraordinary circumstances](#) if the factual basis for the alien’s claim of changed or extraordinary circumstances is undisputed. The Ninth Circuit reasoned that the application of a statutory standard (e.g., whether there are “changed circumstances”) to undisputed historical facts presents a reviewable [“mixed question of law and fact”](#) under INA § 242(a)(2)(D). Some [circuit courts have disagreed](#) with the Ninth Circuit, holding that § 242(a)(2)(D) only restores jurisdiction over “pure” legal questions concerning constitutional or statutory interpretation.

In *Guerrero-Lasprilla v. Barr*, which involved a [statutory bar to judicial review](#) of final removal orders of those who have committed certain criminal offenses, the Supreme Court in 2020 held that the phrase “questions of law” found in INA § 242(a)(2)(D) includes the application of a legal standard to undisputed or established facts. The Court explained that, based on § 242(a)(2)(D)’s statutory context and history, the term “questions of law” also includes “mixed questions of law and fact.” According to the Court, because the determination of whether settled facts satisfy a legal standard has both factual and legal elements, it can be “encompassed within the statutory phrase ‘questions of law.’”

Given the Supreme Court’s decision in *Guerrero-Lasprilla*, courts arguably have jurisdiction under INA § 242(a)(2)(D) to consider whether an alien established changed or extraordinary circumstances to warrant an exception to the one-year time limitation for asylum applications (or the prohibition on refiling a previously denied application) if the courts’ review involves the application of those standards to undisputed facts, and the petition consequently raises a reviewable “question of law.”

Recent Legislative Activity

INA § 208(a)(2)’s asylum restrictions are significant because they could bar an alien from pursuing asylum even if the alien might otherwise qualify for relief. Congress has considered various legislative proposals to amend the statute, either by easing or expanding its limitations. In the 117th Congress, bills have been introduced that would, among other things, bar consideration of asylum for those who entered the United States in a “migrant caravan” ([H.R. 7464](#)); transited through a third country before arriving in the United States ([H.R. 1901](#), [H.R. 2022](#), [S. 863](#), [S. 1070](#)); were convicted of a felony or previously removed from the United States ([S. 959](#), [H.R. 8561](#)); or failed to apply within six months of arrival ([H.R. 1901](#), [S. 884](#)). Conversely, some bills would expand access to asylum by repealing the one-year filing

deadline or allowing certain aliens whose applications were previously denied as untimely to reapply in reopened removal proceedings ([H.R. 1177](#), [H.R. 3800](#), [S. 348](#), [S. 1996](#)).

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