

Know Your Rights Manual for the Transgender Community: Immigration Law



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This manual is a project of the National Lawyers Guild San Francisco Bay Area Chapter; many additional individuals and organizations made valuable contributions.

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The National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers, and jailhouse lawyers of America in an organization which shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. The Transgender Know Your Rights Manuals are legal materials designed for transgender community members and their advocates to provide a set of basic, current, and locally-specific legal information about how certain areas of substantive law uniquely affect transgender individuals.

This effort was inspired by Thomas Steel, tireless advocate for the San Francisco Bay Area LGBT community and longtime friend and supporter of the National Lawyers Guild San Francisco Bay Area Chapter. His leadership and vision enabled the work which the Transgender Know Your Rights Manuals seek to further.

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This information was compiled by law students of the National Lawyers Guild, using statutory law, case law, and the work of numerous legal and non-legal organizations across the country, notably, the National Lawyers Guild San Francisco Bay Area chapter. While the information here is up-to-date through June 2013, it is possible that substantive changes have been made to the laws since it was last updated. Please keep this in mind while using this resource. Source and reference information will be provided for most of the content in this manual to help you verify that the information is still good before relying on it.

This manual was created for use by transgender community members and allies, by service providers who work with the transgender community, and by attorneys and legal workers who provide advocacy and legal services to members of the transgender community. For purposes of this manual, the word “transgender” is used as an umbrella term that includes transgender, gender variant, and intersex people who are at any point of self-identification or physical transition. Occasionally, the text will refer to individuals as “he or she” or “his or

her.” This reference does not indicate that a statement applies exclusively to persons who identify as male or female, but instead is used for legibility and accessibility.

The information in this manual does not constitute legal advice; instead, it is meant to serve as a resource to help understand the landscape of transgender law in a particular area, and to help connect readers with the current information needed to verify law or navigate a particular situation. Although we hope that this manual assists service providers and community members in locating information and resources, it is important to note that only licensed attorneys are authorized to give legal advice. If you have a question of law that is outside of the scope of information provided in this manual, you may wish to consult or refer your client to an attorney or, if you are a client, to contact one of the legal support agencies listed in the resource guide in the back. Many of the organizations listed in the resource guide provide referrals to attorneys who are familiar with transgender law and working with the transgender community.

For questions, comments, corrections, and suggestions, please contact carlos@nlgsf.org.

USING THIS MANUAL

This manual was created to be a first-stop reference for lawyers, service providers, and community members who need legal information about a transgender-specific issue or question of law. For ease of use, the content has been divided by common problems or needs. Case law, statutes, print and web resources, and other service organizations can be found embedded throughout the manual, referenced in the footnotes, and listed in the directory at the back of this manual.

This resource was created by and for people in the San Francisco Bay Area, and therefore much of the information is specific to California and San Francisco Bay Area resources and law. We hope that this manual will be a helpful resource to readers outside of California as well because it includes information that is nationally relevant. However, it is important that non-California readers pay close attention to what information appears to be specific to California or the Bay Area, and not presume that the local information contained in this manual will transfer to other cities and states. Non-California readers are encouraged to use the national resources listed in the directory at the back to locate up-to-date information about the laws and precedent in their state or city.

It is important to note that, although the researchers who assembled this information did our best to be accurate on points of both black letter law and how the law tends to play out in the real world, there may be inaccuracies and nothing in this manual should be relied on as legal advice. Legal advice can only come from a lawyer. This manual is, however, a good starting place to understand the law and how it affects transgender people and communities in California and the Bay Area specifically.

FINDING THE LAW FOR FREE

Legal documents, such as cases and statutes, are actually public documents. This means that everyone (members of the public) has the right to research and read these documents. The problem is that sometimes these documents can be hard to find or access.

If a case is cited in this document and a person wants to find and read the actual case, we can find it by following a series of steps. The first step is to avoid getting flustered by the complicated series of numbers, letters, and punctuation that follows the name of the case. The next step is to simply go to <http://scholar.google.com/>, click the “Legal opinions and journals” button and type in the volume number, the journal name, and the page number from the case citation. For example, to find the case of *State v. Jordan*, 742 N.W.2d 149 (Minn. 2007). We would ignore the name of the case (*State v. Jordan*), and copy the volume number (742), then journal name (N.W.2d), followed by the page number (149). Those three things are all that’s needed to find the case on Google scholar. Sometimes the journal name will be different, but as long as the right information is copied into the search bar, Google Scholar should be able to pull it up.

Again, the information in this manual is not legal advice. We hope that transgender individuals and their allies will use this manual as a first step for beginning to understand applicable law, and identify when legal help is needed.

Many transgender people report barriers to accessing legal services for a number of reasons. The cost of hiring a lawyer is a major issue for many, along with fears that lawyers will not be respectful of transgender clients, will not know enough about how laws specifically affect transgender people, or that the court system is prejudiced against transgender people. While all of these fears are justified, attorneys, activists, and advocates across the country are making huge strides in increasing legal services and resources for transgender people. Many states have lesbian, gay, bisexual, and transgender (LGBT) bar associations that can be helpful in locating legal information or finding lawyers who are knowledgeable about transgender law and sensitive to the specific concerns of transgender clients. Many of the organizations listed in the resource section at the end of this manual are happy to assist individuals in finding legal services. Although legal services often seem too expensive, there are a lot of organizations and individual attorneys committed to making justice more accessible. You may be eligible for pro bono (free of charge) representation or fee structures that work for you (such as contingency fees, where you only pay if you win your case). Additionally, many attorneys are happy to meet with potential clients for free to assess your case. This can be a good way to learn more about your options and whether it's worth it to you to pursue legal action.

A NOTE TO PROFESSIONALS

This manual was designed to be a resource to clients, but it is our hope that service providers and legal professionals will also find it useful. Attorneys may find this manual to be a helpful starting point for legal research and a useful tool for locating additional resources. All manuals in this series contain footnotes to case law, law review articles, and statutes that we hope will assist you. As with any compilation of research, attorneys are urged to check all cited law before relying on it to make sure there haven't been substantive changes and that it will apply to your client's particular case. Many of the organizations listed in the resource section of this document provide assistance to attorneys representing clients, and

can be excellent sources for information and insight. When advocating for transgender clients, attorneys can advocate for the use of appropriate name and pronoun for their client in court and other proceedings.

BASIC RIGHTS

Both citizens and non-citizens alike have rights under the United States Constitution. The Fifth Amendment gives every person the right to remain silent – that is, to not answer questions asked by a police officer or government agent. The Fourth Amendment restricts the government’s power to enter and search a person’s home or workplace, although there are many exceptions and new laws have expanded the government’s power to conduct surveillance, as well as the authority for the police to search a person or belongings. The First Amendment protects a person’s right to speak freely and to advocate for social change. These Constitutional rights are absolute, and cannot be suspended – even during wartime.¹ Nonetheless, however, the Department of Homeland Security (DHS) has targeted and continues to target for deportation non-citizens based on political activities.

GETTING STARTED: A NOTABLE TRANSGENDER IMMIGRATION LAW RESOURCE

Because transgender individuals with immigration concerns are doubly vulnerable to unjust actions by police and immigration authorities, there is a strong network of support for transgender community members dealing with immigration issues. This manual aims to be a general and broad resource to answer common and locally-specific questions, but there are many resources on the internet that are also very thorough and helpful. One notable resource was written by Immigration Equality, a national organization, and the Transgender Law Center, an organization based in San Francisco, and published by the American Immigration Lawyers Association. This resource, entitled “Immigration Law and the Transgender Client,” is a lengthy and thorough manual that provides in-depth information about a large scope of transgender-specific concerns. It is available for free online at <http://www.immigrationequality.org/issues/law-library/trans-manual/>.

GOVERNMENT AGENCIES

After September 11, 2001, the U.S. government abolished the Immigration and Naturalization Service (INS) and formed the new Department of Homeland Security (DHS), and re-organized the agencies which oversee immigration. DHS is now the umbrella organization for Immigration and Customs Enforcement (ICE), which is the enforcement and deportation branch; Citizenship and Immigration Services (CIS), which is the immigration service and application processing branch; and Customs and Border Patrol (CBP), which oversees border protection.

IMMIGRATION LAW TRENDS IN SAN FRANCISCO

¹ Know Your Rights!: What to Do if Questioned by Police, FBI, Customs Agents or Immigration Officers, August 2004 California: National Lawyers Guild San Francisco Bay Area Chapter, American Civil Liberties Union of Northern California, and the American Arab Anti-Discrimination Committee, <http://www.nlgsf.org/resources/>, Last visited June 12, 2013.

Immigrant Youth Policy

Former San Francisco Mayor Gavin Newsom had instituted a policy to report allegedly undocumented minors to Immigration and Customs Enforcement (ICE) for deportation immediately after their arrest, without affording them legal counsel.² This ran counter to San Francisco's sanctuary city policy. More than 160 young people were referred to ICE for deportation under this policy.

Immigration rights advocates worked hard to lobby the San Francisco Board of Supervisors, which passed a new policy by a veto-proof majority. This new policy gives arrested minors a hearing and requires that the court find that the minor committed a felony before the individual can be referred to ICE. Mayor Edwin Lee instituted the new policy.³ Although it narrowed the circumstances in which a minor could be referred to ICE, it was criticized for only applying to youth with family in the United States. Unaccompanied minors can still be referred to ICE without being convicted of a felony.⁴

Sanctuary City and "Secure Communities," or "S-Comm"

There has been a major change that affects the previous long-standing "Sanctuary City" policy in San Francisco. Under the 1989 Sanctuary City policy, law enforcement was only required to report felony suspects whose legal status could not be confirmed upon booking to federal officials.

On June 1st, 2010, a new program was implemented called "Secure Communities," or "S-Comm." This new program automatically checked the immigration status of anyone who is arrested and fingerprinted for any crime, even *before* a conviction, regardless of the severity of the crime. All people are checked, whether citizens or non-citizens, and their fingerprints are electronically cross-checked against an ICE database. Individuals whose legal status cannot be confirmed are then held in jail for ICE to detain them. This is a federal program that is being implemented across the United States. Currently, immigrant rights groups are lobbying and protesting to persuade local law enforcement not to participate in this program.

At the time of this writing, local San Francisco police are participating in this program, however, the office is only turning undocumented immigrants over to federal immigration authorities if they have a felony conviction or two misdemeanor convictions, or if they've been arrested on suspicion of domestic violence.⁵ The Department of Homeland Security has announced that Secure Communities is mandatory and there is no way to opt-out.⁶ However, current California Attorney General Kamala Harris contradicted this in December

² Heather Knight, No Sanctuary for Supes' Immigrant Youth Law, San Francisco Chronicle, October 21, 2009, <http://www.sfgate.com/news/article/No-sanctuary-for-supes-immigrant-youth-law-3214182.php>, Last visited June 12, 2013.

³ Joel Streicker, S.F. Victory for Undocumented-Minor Immigrants, New America Media, May 19, 2011, <http://newamericamedia.org/2011/05/local-victory-for-undocumented-minor-immigrants.php>, Last visited June 12, 2013.

⁴ Julianne Hing, San Francisco Narrows Policy on Reporting Immigrant Youth to ICE, Colorlines, May 18, 2011, http://colorlines.com/archives/2011/05/san_francisco_revises_policy_on_reporting_immigrant_youth_to_ice.html, Last visited June 12, 2013.

⁵ Bob Egelko, Sheriffs Divided on Immigration Policy, San Francisco Chronicle, Dec. 6, 2012, <http://www.sfgate.com/bayarea/article/Sheriffs-divided-on-immigration-policy-4098509.php>, Last visited June 25, 2013.

⁶ Id.

of 2012, stating that ICE immigration holds are voluntary, and that local law enforcement officers in California are not required to implement them.⁷

In May 2013, the Trust Act, which would limit detentions under Secure Communities in California to those convicted of serious felonies, passed the California Assembly. In 2012, however, Governor Brown vetoed a similar bill.⁸

Car Impounding in San Francisco

Under current California law, immigrants without a social security number are not eligible for driver's licenses. A bill to allow more immigrants to obtain driver's licenses was passed by the California Assembly in May 2013, but has not been signed as of this writing.⁹ When a driver cannot produce a valid driver's license after being stopped in a vehicle, the car can be impounded. A citywide policy mandates that impounded vehicles are automatically impounded for thirty days, with new fees every day that it is impounded.

Local advocates lobbied the San Francisco Police Department (SFPD), and in 2009 SFPD began a new policy that requires police to give a driver who cannot produce a valid license twenty minutes to get someone else who does have a valid license to arrive and drive the vehicle away to prevent impoundment. Community members report that this new policy is not being observed, and individuals are not being given twenty minutes to get someone else to drive the vehicle and avoid impoundment. In 2012, a similar policy was proposed statewide by California Assembly member Fiona Ma, but it was not acted upon by the Senate.

TRANSGENDER DISCRIMINATION IN IMMIGRATION LAW

Until 1990, openly-LGBT immigrants were banned from immigrating to the United States.¹⁰ Currently, there is no law expressly prohibiting transgender people from visiting or immigrating to the United States. Nevertheless, gender identity and presentation often play a significant role in a person's ability to immigrate.

Transgender immigrants should be able to obtain identity documents in the "outward, claimed and otherwise documented sex of the applicant."¹¹ Unfortunately, it is often not clear what CIS means by "otherwise documented." Furthermore, CIS has applied this rule unevenly, often (but not always) requiring sex reassignment surgery (SRS) and even failing to

⁷ Albert Sabate, Legitimacy of Secure Communities Program Weakened, ABC News/Univision, Dec. 12, 2012, http://abcnews.go.com/ABC_Univision/News/legitimacy-secure-communities-program-weakened/story?id=17921778#.UboJmpyZOQI, Last visited June 13, 2013.

⁸ California Bill Would Limit Local Immigrant Detentions, Chicago Sun-Times, May 16, 2013, <http://www.suntimes.com/news/nation/20157726-418/california-bill-would-limit-local-immigrant-detentions.html>, Last Visited June 13, 2013.

⁹ Chris Megerian, Assembly Bill Would Allow Driver's License for More Immigrants, LA Times, May 29, 2013, <http://www.latimes.com/news/local/political/la-me-pc-california-immigrants-drivers-license-20130529,0,5749446.story>, Last visited June 13, 2013.

¹⁰ LGBT Immigration Highlights, Out 4 Immigration, <http://www.out4immigration.org/history.html>, Last visited June 13, 2013.

¹¹ USCIS Interoffice Memorandum from William R. Yates Re: Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals (Apr. 16, 2004).

correct gender on documents for individuals who have had SRS.¹² If a person wishes to change their name after they have already obtained a permanent resident card or naturalization papers, they must provide the government with a court-ordered name change. If a person changed their name prior to receiving immigration papers, they can request that their correct, changed name be used at the time of issuance.¹³

The Department of State recently issued guidelines for correcting the gender marker on U.S. passports: if all of the required identity documents have the same gender, no medical documentation is required but if there is a discrepancy in the gender marker on required documents, then the applicant must submit a certification from a treating physician.¹⁴

The following resource is a free guide to changing gender markers on California and federal identity documents developed by the Transgender Law Center:

<http://transgenderlawcenter.org/issues/id/id-please>.

BINATIONAL COUPLES

In immigration law, DHS must respect any marriage that is considered valid in the applicant's home country and is not contrary to public policy.¹⁵ In the past, because of the Defense of Marriage Act's (DOMA) provisions recognizing only opposite-sex couples as valid marriages, some transgender individuals were asked to provide immigration officials with proof of having undergone a sex reassignment surgery to be eligible for marriage benefits. However, In June 2013, the Supreme Court struck down Section 3 of DOMA in *United States v. Windsor*, holding that the law violated the Fifth Amendment by denying federal benefits and protections to state-sanctioned same-sex marriages.¹⁶ This means that bi-national couples living in states where same-sex marriage is legal, or couples who have been legally married abroad, will now likely be recognized as married couples for federal immigration purposes.¹⁷ Going forward, the documented sex of a transgender individual will likely be irrelevant with respect to valid marriages and immigration law. In addition, same-sex marriage was re-legalized in California following the Supreme Court's decision in *Hollingsworth v. Perry* to dismiss a challenge to a lower court ruling which found California's state-level ban on same-sex marriage unconstitutional.¹⁸

¹² Transgender Issues. Immigration Equality, <http://www.immigrationequality.org/issues/transgender/>, Last visited June 13, 2013.

¹³ Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities, National Center for Lesbian Rights and the Transgender Law Center, 2003, <http://www.nclrights.org/site/DocServer/transrealities0803.pdf?docID=1301>, Last visited June 13, 2013.

¹⁴ Identity Documents, Immigration Equality, <http://www.immigrationequality.org/issues/transgender/identity-documents/>, Last visited June 13, 2013.

¹⁴ Matter of Lwin, 16 I. & N. Dec. 1 (BIA 1976); Matter of Darwish, 14 I. & N. 307 (BIA 1973).

¹⁶ *United States v. Windsor*, 570 U.S. ____ (2013), available at http://www.supremecourt.gov/opinions/12pdf/12-307_g2bh.pdf.

¹⁷ Immigration and DOMA, Immigration Equality, <http://immigrationequality.org/issues/couples-and-families/doma/>, Last visited June 26, 2013.

¹⁸ *Hollingsworth v. Perry*, 570 U.S. ____ (2013), available at http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf.

DEFERRED ACTION FOR INDIVIDUALS WHO CAME TO THE U.S. AS CHILDREN

On June 15, 2012, the Obama Administration released a memorandum in response to nationwide calls for an alternative path to citizenship for individuals that were brought into the country as children.¹⁹ Though not LGBT-specific, “deferred action” may provide some assistance to transgender individuals that came to the U.S. as children and meet the other eligibility criteria for deferred action. However, there are also several areas of concern with the new policy adopted by the Department of Homeland Security. For instance, the eligibility criteria is very narrow and will likely only apply to a small subset of people. To seek deferred action, the following criteria must be met:

- Came to the U.S. under the age of sixteen;
- Has lived in the United States continuously for at least five years before the date of June 15, 2012, and was present in the U.S. on the date of June 15, 2012;
- Is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- Is not above the age of thirty.²⁰

One of the major areas of concern with deferred action is that it is **not** a pathway to citizenship, as many immigration advocates had hoped. Instead, individuals that meet the above criteria, including members of the LGBT community, might be able to use deferred action as a way to temporarily slow down the removal process and/or receive work authorization during the period of deferred action. The memo clearly states that the new policy does not confer a “substantive right, immigration status or pathway to citizenship.”²¹

Furthermore, even if someone qualifies for deferred action, the memo only encourages the exercising of “prosecutorial discretion,” meaning that cases will be reviewed on an individual basis, giving the Department of Homeland Security wide latitude in deciding who should receive relief and who should not.

The National Lawyers Guild strongly suggests seeking the advice of an experienced immigration attorney before considering submitting an application for deferred action because, in some cases, it could jeopardize an individual’s immigration case.

IMMIGRATION STATUS AND EDUCATIONAL ACCESS

Immigration status and access to higher education can be a serious issue for immigrants, especially individuals who came to the United States as children. Anecdotal evidence seems to indicate that transgender and gender nonconforming youth are disproportionately more

¹⁹ U.S. Department of Homeland Security Memo from Janet Napolitano Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>, Last visited June 13, 2013.

²⁰ *Id.*

²¹ *Id.*

likely to immigrate to the U.S. without the presence of an adult in order to escape the pervasive violence and discrimination they faced in their home countries. However, documented and undocumented students alike also face significant financial barriers and other challenges in pursuing their education once they arrive in the United States, oftentimes due to lack of family support and restrictions on their ability to obtain financial aid and in-state tuition.

However, in California, the passage of the Dream Act of 2011 makes undocumented and documented students in California eligible for in-state tuition (usually much lower than tuition for international students and students from other states) and private scholarships.²² Starting April 2, 2012 (application dates: January 1 – March 2), they may also be able to access educational funding in the form of University of California (UC) and California State University (CSU) grants, California Community College Board of Governor's fee waiver, Cal Grants, and other state-administered financial aid by submitting a Dream Act Application to the state student aid commission.²³

As of June 2013, no version of the Dream Act has yet passed at the federal level. However, sixteen states currently allow undocumented students to attain in-state tuition at public universities. Only three of these states – California, Texas, and New Mexico – allow undocumented students to access state-funded financial aid.²⁴

ASYLUM

Asylum is a legal mechanism for protecting immigrants who know or believe that they will be harmed if they return to their home countries. People who are granted asylum are allowed to stay in the United States, get a work permit, have access to some public benefits, and eventually apply for a green card. In general, serious risks of harm to an individual in their home country because of sexual orientation or gender identity will be recognized by the courts and create a claim for asylum.²⁵ Deciding whether to apply for asylum, however, is sometimes a tough decision. If the applicant is given asylum, that person would be able to stay in the U.S. and to apply for several public benefits. If the applicant does not win asylum, however, the individual might eventually be ordered to leave the U.S. and return to that person's home country. Applying for asylum if the applicant has a weak case can be very risky. For some people, it is better if they do not apply. Ideally, the decision should be made after having spoken to an immigration attorney or accredited representative.

Applying for Asylum

A person can affirmatively apply for asylum before the local asylum office or, if they are in deportation proceedings, before the immigration judge. If the person applies affirmatively

²² California Dream Act of 2011 FAQ's, California Student Aid Commission, http://www.csac.ca.gov/pubs/forms/grnt_frm/cal_grant_dream_act_faqs.pdf, Last visited June 13, 2013.

²³ California Dream Act Application, California Student Aid Commission, <https://dream.csac.ca.gov/>, Last visited June 13, 2013.

²⁴ Undocumented Student Tuition: State Action, National Conference of State Legislatures, <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx>, Last visited June 13, 2013.

²⁵ Hernandez-Montiel v. INS, 225 F.3d 1084, 1099 (9th Cir. 2000).

and the asylum officer does not grant asylum, the person's case is referred to an immigration court which is part of the Executive Office for Immigration Review (EOIR).²⁶

Emilia Bardini, Director of the San Francisco Asylum Office, states that the office weighs each case on its individual merits. It handles around 3,000 cases each year, with 5-10% being claims based on sexual orientation or gender identity, 90 percent of which are from men and 70-80% from Mexico. The most frequent LGBT asylum cases involve forced psychiatric treatments, forced marriage, harms experienced as children and from family members.

There are many resources and legal service providers that can help someone assess the merits of their claims for asylum, withholding of removal, or relief under the United Nations Convention Against Torture. Some names of such providers in California, including the San Francisco Bay Area, are available on the immigration courts' website:

<http://www.justice.gov/eoir/probono/freelgchtCA.pdf>.

To apply for asylum, applicants must prove:

- (1) that she or he has well-founded fear of persecution or has suffered past persecution;
- (2) that such persecution is on account of race, religion, nationality, membership in a particular social group or political opinion, and;
- (3) that asylum should be granted in the exercise of discretion.²⁷

To qualify for asylum, applicants need to prove a well-founded fear of persecution. The U.S. Supreme Court has held that a "well-founded" fear means a "reasonable" fear of actual persecution, which means that someone with only a one in ten chance of persecution may be eligible for asylum.²⁸

In order to prove a **well-founded fear** of persecution, the alien must show:

- (1) that she or he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
- (2) the persecutor is already aware, or could become aware, that she or he possesses this belief or characteristic;
- (3) the persecutor has the capability of punishing the alien, and;
- (4) the persecutor has the inclination to punish the alien.²⁹

The Supreme Court has held that individuals seeking asylum "must prove specific facts through objective evidence to prove either past persecution or good reason to fear future persecution."³⁰ Additionally, the government of the applicant's home country must either be the persecutor or unable/unwilling to offer protections against persecution at the hands of

²⁶ Immigration Court Proceedings, Immigration Equality Asylum Manual, Immigration Equality, 2006, [http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/immigration-court-part-1/](http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/immigration-court-part-1/http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/immigration-court-part-1/), Last visited June 13, 2013.

²⁷ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

²⁸ Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987).

²⁹ *Id.* at 457.

³⁰ Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987).

another. Though not defined expressly by statute, courts have defined “particular social group” to mean that the characteristic that defines the group “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”³¹ The Ninth Circuit has interpreted “social group” to extend broadly to many groups.³²

Courts have determined that sexual orientation qualifies an applicant as part of a particular social group, but have not ruled on whether transgender people meet this requirement.³³ Some transgender people identify as gay or lesbian, and therefore could argue that their persecution is based on sexual orientation. Those who do not identify as homosexual or gay might still present an argument based on sexual orientation, arguing that they are persecuted against because of their perceived sexual orientation. Absent either of these two arguments, transgender people still have a strong argument for proving that being transgender classifies them in a particular social group. In fact, courts have recognized that male-bodied people who sleep with men and have female gender identities constitute a social group and may be persecuted because of this identity.³⁴

Certain factors in an application for asylum might cause a dismissal. An applicant must apply for asylum within one year of that person's last arrival in the United States.³⁵ The DHS requires the applicant to mail in the application before the one year deadline. It is safest to mail it at least several weeks before the deadline. Under certain circumstances, an applicant may still apply for asylum even if it has been more than one year since last entry into the US. If the individual can show either the existence of **changed circumstances** that materially affect eligibility for asylum or **extraordinary circumstances** that justify the delay in filing, the applicant may still be eligible for asylum.³⁶ However, these situations are rare. Some examples may include:

- HIV positive status as a material change in circumstances
- Turning 21 on an asylum application and losing derivative status
- Coming out as LGBT as a material change in circumstances
- Trauma and depression
- A pending immigration visa petition such as an I-140 labor certification can also be an extraordinary circumstance excusing failure to file within the one-year time period.

A criminal record is another factor that might stand in the way of a successful application for asylum. The government will deny asylum to anyone who has been convicted of an “aggravated felony.”³⁷ In this case, the applicant should talk to a lawyer to see if the person

³¹ Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).

³² Sanchez-Trujillo v. Immigration and Naturalization Service, 801 F.2d 1571, 1576 (Ninth Cir. 1986).

³³ Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (BIA 1990).

³⁴ Hernandez-Motiel v. Immigration and Naturalization Service, 225 F.3d 1084 (9th Cir. 1997); see also Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004).

³⁵ 8 U.S.C. § 1158(a)(2)(B).

³⁶ 8 C.F.R. § 208.4(a)(2)(ii).

³⁷ 8 U.S.C. § 1158(b)(2)(B)(i). Whereas the term “aggravated felony” may sound as if it includes only the most serious violent crimes, under the definition provided by the Immigration and Nationality Act, even theft offenses with a penalty of more than one year in prison, illegal gambling, and fraud are generally considered aggravated felonies. 8 U.S.C. § 1101(a)(43).

still qualifies for asylum or the person qualifies for other relief, such as withholding of removal or relief under the UN Convention Against Torture. Ideally, in this situation, the immigration lawyer will communicate with the criminal defense attorney who helped with the criminal case. It is important that the applicant be as forthcoming about his or her criminal past as possible. The lawyer needs to know about every arrest in order to provide the most accurate advice to the individuals. If the attorney is unaware of an arrest, this can negatively impact an asylum case. If the immigration judge denies an application for asylum, the person has the right to appeal this decision to the Board of Immigration Appeals, whose members are also appointed by the Justice Department. In addition, DHS can appeal an immigration judge's decision granting asylum. If the BIA holds that the person is not eligible for or does not merit asylum (or other immigration relief), the person can appeal to a U.S. court of appeals.

Work Permits

To apply for an Employment Authorization Document (EAD), individuals must use Form I-765. It is difficult for applicants to get a temporary work permit during their asylum application period.³⁸ If an applicant has not received a decision after 150 days from the date of filing, the individual can apply for a work permit.³⁹ Most applicants do not get any kind of work permit until after winning asylum. After winning asylum, an individual no longer needs a special Employment Authorization Document to work, and may obtain a social security number that will serve as proof of legal status for work.⁴⁰

Getting Legal Help

Because asylum law is confusing and because everything an applicant says or gives to the DHS may become a part of her or his asylum record, it is strongly encouraged that an applicant talk to a lawyer before sending anything to DHS. If the one year filing deadline for asylum is coming up or has already passed, the applicant should get legal help immediately.

Applicants should be aware that some people who say they are immigration experts are not experts and may not even be lawyers. Sometimes asylum applicants will pay a *notario* or paralegal to help them apply for asylum. Using these kinds of services is often a mistake. Many times these people can ruin a person's chances for asylum. If you want to use one of these businesses or think you were harmed by one of them, call the Anti-Fraud Unit of the Immigrant Legal Resource Center at (415) 255-9499, extension 6263.

The most important thing a person can do for his or her attorney is to be as honest as possible. If an applicant meets with someone from the Asylum Program at the Immigrant Legal Resource Center or hires a private lawyer on his or her own, anything he or she says to that lawyer is confidential. That means that this lawyer is not allowed to tell this information to the U.S. government or to anyone else without the permission of the applicant. Speaking

Iona Bray. When Can Asylum Applicants Get a Work Permit?, Nolo Law for All, <http://www.nolo.com/legal-encyclopedia/asylum-applicants-work-permit-timing-32297.html>, Last visited June 25, 2013.

³⁹ Asylum Eligibility and Applications Frequently Asked Questions (FAQ), USCIS - U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2ca80efdea7fe010VgnVCM1000000ecd190aRCD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCD>, Last visited June 13, 2013.

⁴⁰ Obtaining an Employment Authorization Document, Immigration Equality Asylum Manual, 2006, <http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/obtaining-an-employment-authorization-document/>, Last visited June 13, 2013.

with an attorney is also a good way to calm fears about the risk of applying for asylum. It is very helpful for an applicant to collect documents for the case. Some helpful documents include pictures from when the applicant lived in his or her home country, a birth certificate or identity card, and letters from relatives or friends that will help prove the case. These documents are not necessary, but can be helpful. The Asylum Program at the Immigrant Legal Resource Center is a good resource for obtaining “country packets.” These packets contain information about different countries’ persecution of people based on sexual orientation and/or HIV status.

ALTERNATIVES TO ASYLUM

If an applicant cannot get asylum, there may be other ways for the person to stay in the United States if the individual fears harm upon returning. The applicant should ask a lawyer about “Withholding of Removal” and “The Convention Against Torture.” These other options may allow an applicant to stay in the U.S. legally and get a work permit. The applicant will not get all of the benefits of asylum, but both are potential options if the person does not qualify for asylum.

Withholding of Removal⁴¹

Withholding of removal is an alternative form of relief that might be available to someone facing persecution in his or her home country.⁴² In order to be granted withholding of removal, an applicant must meet a higher standard than for asylum. Courts have held that the applicant must show that there is at least a 51% likelihood of suffering future persecution in the applicant's country of origin, as compared to a likelihood of at least 10% in asylum cases.⁴³ It can only be granted by an immigration judge, not by an asylum officer.

It is common practice for applicants to file for asylum and withholding of removal, both of which can be done with the I-589 form. Unlike asylum, withholding of removal is not subject to a one-year filing deadline and may be available for applicants who have been convicted of an aggravated felony. Further, granting withholding of removal is mandatory if the applicant can show a clear probability of facing persecution in that person's home country.⁴⁴

An applicant who has won withholding does not receive as many benefits as an applicant who was granted asylum. The individual can seek work authorization, but will not be able adjust citizen status to become a legal permanent resident, nor become a citizen. Additionally, a winner of withholding can never travel internationally, and does not have the ability to petition for derivative status for immediate relatives.

Examples of Cases Under Withholding of Removal

⁴¹ Most of the information in this section is taken from Immigration Equality Asylum Manual, Immigration Equality, <http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/>, Last visited June 13, 2013.

⁴² To qualify for withholding, an applicant must show that life or freedom would be threatened in the country of proposed removal because of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3); 8 U.S.C. § 1101(b)(3).

⁴³ Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987).

⁴⁴ Immigration and Naturalization Service v. Stevic, 467 U.S. 407, 430 (1984).

- *Molathwa v. Ashcroft*, the Eighth Circuit found that there was not enough evidence demonstrating that Molathwa, a gay man from Botswana, would more likely than not be subject to persecution if returned to Botswana. Molathwa had missed the one-year filing deadline, and the Court determined that an incident where the police entered Molathwa's apartment without a warrant, the beating of a friend by relatives on the basis of his sexual orientation, and the incarceration of a gay man for two days who was caught engaging in sexual activity with another man did not amount to a pattern of harassment of homosexuals in Botswana.⁴⁵
- In the *Matter of Toboso-Alfonso*, a gay Cuban man who had been forced to report regularly to the government and had been forced to attend a labor camp, did meet the heightened standard for withholding.⁴⁶

The Convention Against Torture⁴⁷

Relief under the Convention Against Torture (CAT) is the third form of relief an individual fearing persecution can seek. An applicant bears the burden of demonstrating that torture is more likely than not if the applicant is removed to the country of origin. The Board of Immigration Appeals has found that torture “must be an extreme form of cruel and inhuman punishment” that “must cause severe pain or suffering” and be intentionally inflicted.⁴⁸ There are no bars to eligibility for relief under CAT. Therefore, since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, an applicant is not required to establish that her fear of torture is on account of membership in a particular social group. However, the United Nations Committee Against Torture has consistently held that the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon return to that country.

Immigration regulations create two separate types of protection under CAT.⁴⁹ The first type of protection is a new form of withholding of removal under CAT. Withholding under CAT prohibits the return of an individual to that person's home country. It can only be terminated if the individual's case is reopened and DHS establishes that the individual is no longer likely to be tortured in his or her home country. The second type of protection is called deferral of removal under CAT. Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely be subject to torture, but who are ineligible for withholding of removal. It can be terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to his or her home country. Additionally, an individual granted deferral of removal under CAT may be detained by the DHS if an individual is deemed to be a threat to the community.

Examples of Cases under CAT

⁴⁵ *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004).

⁴⁶ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990).

⁴⁷ Most of the information in this section is taken from Immigration Equality Asylum Manual, Immigration Equality, <http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/>, Last visited August 1, 2012.

⁴⁸ *Matter of J-E-*, 23 I. & N. Dec. 291, *15, *16 (BIA 2002).

⁴⁹ 8 C.F.R. §§ 208.16, 208.17.

- Lawrence Eneh, a parolee from Nigeria, was convicted of a federal offense, sentenced to 36 months imprisonment, and placed in removal proceedings. Eneh testified that he would be imprisoned upon return and intentionally deprived of necessary medications while in prison as a form of punishment for having AIDS. In *Eneh v. Holder*, the sole issue on appeal to the Ninth Circuit was whether the BIA erred in denying Eneh deferral of removal under CAT. The Ninth Circuit vacated and remanded the BIA's decision, stating that both the Immigration Judge and the BIA had failed to acknowledge and analyze testimony and documentary evidence that Eneh would be individually and intentionally targeted for mistreatment because of his HIV status and associated medical problems.⁵⁰
- In *Reyes-Reyes v. Ashcroft*, the Ninth Circuit ruled that the term “government acquiescence” was broad enough to include the government’s failure to address severe physical abuse inflicted by non-government actors. The case involved a transgender woman who was kidnapped, severely beaten, and raped by a group of men. In addition, she was also threatened by her abusers and feared retaliation if she reported the crimes.⁵¹

Temporary Protected Status and Deferred Enforced Departure

Temporary Protected Status (TPS) may be granted to people who originate from countries that the DHS has designated as having “ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions.”⁵²

TPS is designated for specific and limited periods of time. Individuals who benefit from TPS protection may remain and work in the United States during this time, but may not apply for permanent residence. At the end of the designated period, their immigration status reverts to the same status they held before receiving TPS. As of June 2013, the countries granted TPS are El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria.⁵³

Deferred Enforced Departure (DED) is a temporary and discretionary administrative stay of removal granted by Presidential order to individuals from designated countries.⁵⁴ This rarely-used form of protection allows individuals to remain in the United States and to obtain work permits. Liberian nationals have been granted DED from October 1, 2007, through September 30, 2014.⁵⁵

⁵⁰ *Eneh v. Holder*, 601 F.3d 943 (9th Cir. 2010).

⁵¹ *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004).

⁵² Department of Homeland Security, US Citizenship and Immigration Services, Temporary Protected Status & Deferred Enforced Departure, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=390d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=390d3e4d77d73210VgnVCM100000082ca60aRCRD>, Last visited June 25, 2013.

⁵³ Countries Currently Designated for TPS, Temporary Protected Status, U.S. Citizenship and Immigration Services, June 18, 2013, <http://www.uscis.gov/tps>.

⁵⁴ Department of Homeland Security, *supra* note 62.

⁵⁵ Deferred Enforced Departure, US. Citizenship and Immigration Services, May 20, 2013, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=390d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=390d3e4d77d73210VgnVCM100000082ca60aRCRD>, Last visited June 25, 2013.

HIV EXCLUSION

Prior to July 30, 2008, people with HIV were excluded from immigrating to, or even visiting, the United States. On July 30, 2008, President Bush signed into law the President's Emergency Plan for AIDS Relief, which repealed the ban on HIV-positive tourists and immigrants in the United States. When an HIV positive person wanted to travel to the United States or apply for legal permanent resident status, she or he needed to still obtain a waiver of inadmissibility. On January 4, 2010, the HIV ban was finally lifted, and new regulations published by the Department of Health and Human Services became law.⁵⁶ These regulations officially remove HIV from DHHS' list of "communicable diseases of public health significance." This means that a person can now enter the United States without disclosing his or her HIV status, and there is no longer a requirement for HIV testing of lawful permanent resident applicants.⁵⁷ The website of the National Immigration Project of the National Lawyers Guild contains information of the 2010 change in policy, including government memoranda. See: <http://www.nationalimmigrationproject.org/hivaid.htm>

As this major change is implemented, many questions arise about how this will impact people, and there have been inconsistent results.⁵⁸ Some doctors still use the old medical forms, which do require HIV testing and disclosure, but the Centers for Disease Control are working to ensure that physicians do not test for HIV or request disclosure. Individuals who were denied lawful permanent residency only because the applicant was HIV positive after July 2009 (when the final regulations were published) can move to reopen their applications.⁵⁹

Because there is still a great deal of inconsistency and confusion about what the lifting of the HIV travel ban actually means for individuals, many groups have published FAQs to share the information that is currently known. Immigration Equality, a national organization working to end discrimination in immigration law and reduce the negative impact on LGBT individuals and families, has produced a helpful web document in English and Spanish about what the end of the HIV ban actually means for individuals. It can be viewed online at: <http://www.immigrationequality.org/issues/hiv/the-hiv-ban/>.

CRIMINAL RECORD ISSUES

For Applicants

An applicant is ineligible for a visa or admission if convicted of a crime involving "moral turpitude" or in violation of any law of a State, the United States, or a foreign country related

⁵⁶ Centers for Disease Control and Prevention, Medical Examination of Aliens - Removal of Human Immunodeficiency Virus (HIV) From Definition of Communicable Disease of Public Health Significance, Department of Health and Human Services, 42 CFR Part 34, Docket No. CDC-2009-0003. Available online at: <http://www.gpo.gov/fdsys/pkg/FR-2009-11-02/pdf/E9-26337.pdf>, Last visited June 14, 2013.

⁵⁷ *Id.*

⁵⁸ Immigration Equality, "HIV Issues: The HIV Ban" online summary, available at: <http://www.immigrationequality.org/issues/hiv/the-hiv-ban/>, Last visited June 14, 2013.

⁵⁹ United States Immigration Services, Memorandum: Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection, November 24, 2009, http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/2009%20Memos%20By%20Month/September/HIV_HHS%20Rule.pdf, Last visited June 14, 2013.

to a controlled substance.⁶⁰ The Board of Immigration Appeals has defined *malum in se* crimes (often referred to as crimes of moral turpitude) to be those crimes “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons.”⁶¹ Examples of *malum in se* crimes include serious offenses such as larceny, rape, and murder, but also lesser crimes such as fraud or furnishing false information to a police officer.⁶² An individual currently in the U.S. but ineligible for admission should not apply for naturalization because immigration authorities will start proceedings to have him or her deported.

For Legal Residents

Individuals who have been awarded legal immigration status remain at risk for deportation if they commit a crime. As a general rule, most crimes that are considered *malum in se* (see above) are deportable offenses.⁶³ Legal permanent residents, who would like to travel abroad, need to consider whether reentry would succeed. One of the harshest consequences of changes to the immigration law in 1996 was to apply some of the strictest provisions retroactively.⁶⁴ This means that anyone who has any criminal convictions should speak with an experienced immigration attorney before doing anything which would lead to a review of their immigration record. Actions which can trigger review (and possible removal proceedings), include: international travel, any application with DHS such as applying for naturalization or applying to replace a “green card,” contact with the police (arrests, traffic stops), and contact with border patrol agents within 100 miles of the U.S. Border. Any foreign national who has a criminal conviction is strongly advised to consult with a qualified immigration attorney to determine what effect the conviction(s) may have on their immigration status.

REAL ID CONCERNS

The REAL ID Act is a federal law enacted in 2005. It mandates security, authentication, and issuance procedures standards for state driver licenses and ID cards, which must be followed in order for the ID’s to be considered valid for “official purposes.” The Secretary of Homeland Security defines “official purposes” as presenting state driver licenses and identification cards for boarding commercially operated airline flights and entering federal buildings and nuclear power plants. The REAL ID Act has created potential problems for asylum seekers and transgender people trying to legitimately acquire or change identification.⁶⁵

Asylum

Asylum officers are now given broad discretion in requesting that “the applicant should provide evidence which corroborates otherwise credible testimony,”⁶⁶ including proof of

⁶⁰ 8 U.S.C. § 1182(a)(2)(B).

⁶¹ Matter of Franklin, 20 I. & N. Dec. 867 (BIA 1994).

⁶² Padilla v. Gonzales, 397 F.3d 1016, 1020-21 (2005), (Holding that moral turpitude may be involved whenever a crime entails dishonesty).

⁶³ INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

⁶⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208.

⁶⁵ Information in this section is obtained from The Real ID Act: Bad Law for our Community, National Center for Transgender Equality & Transgender Law Center, <http://www.realnighmare.org/images/File/NCTE%20realid.pdf>, Last visited June 14, 2013.

⁶⁶ 8 U.S.C.S. § 1158(b) (1) (B) (ii) (Lexis Advance 2013)

persecution and additional proof of identification from those in their home country. This kind of proof can be very difficult to obtain. REAL ID gives asylum officers the right to reject asylum based on material inconsistencies. In many cases, inconsistencies in documents, such as different first names or gender references may simply reflect the applicant's efforts to navigate different systems as a transgender person. However, these inconsistencies may be flagged by asylum officers nonetheless. Inconsistencies like these are very common, since people seeking asylum can be fearful and distrust officials, or lack understanding of the system and cultural codes of conduct. Furthermore, the REAL ID system gives Immigration Judges the power to reject an asylum applicant's case based on their demeanor⁶⁷, such as appearing uncomfortable or laughing nervously, which are things people might inadvertently do while recounting serious or traumatic details.

State Identification Documents

REAL ID requires the states to adopt stricter laws regarding the issuance of state ID cards. This could make it more difficult for transgender people to obtain legitimate identification, especially if the state in which they were born does not re-issue birth certificates (such as Ohio, Tennessee, and Idaho).⁶⁸ These requirements force states to make electronic copies of all documents used to support a license or state ID application, and so the state will also make copies of documents used to change the name and/or gender marker on a license. These electronic copies will then be available in a national database to an undefined group of people, which gives rise to privacy concerns.

INDIVIDUAL'S RIGHTS WHEN DEALING WITH DHS⁶⁹

Transgender people frequently report that they are disproportionately stopped on the street by police.⁷⁰ It is extremely important for transgender individuals to not only be aware of their rights when dealing with the police, but also to feel empowered to navigate a dangerous situation as safely as possible. Because police do sometimes unfairly target and harass individuals and retaliate when individuals stand up for themselves, it is important that you make careful and personalized decisions about what to say to the police or ICE officers, and how to say it. Particularly when refusing to provide officers with information, being polite and respectful at all times can help to de-escalate interactions with the police, even when the police are not being respectful to you.

It is important that people assert their rights when dealing with DHS. Failing to demand one's rights or signing papers waiving those rights may lead to deportation before the individual is able to see a lawyer or an immigration judge. Individuals should never sign anything without reading, understanding and knowing the consequences of signing it.

⁶⁷ "Real ID Act of 2005" (PL 109-13, May 11, 2005) *Text from*: Public Law 109-13, 109th Congress, 119 Stat. 303. Available From: U.S. Gov. Printing Office, <http://www.gpo.gov/fdsys/pkg/PLAW-109publ13/pdf/PLAW-109publ13.pdf>, Last visited June 14, 2013.

⁶⁸ Birth Certificate Laws, Movement Advancement Project, http://www.lgbtmap.org/equality-maps/birth_certificate_laws, Last visited June 14, 2013.

⁶⁹ Information in this section is obtained from: Know Your Rights!: What to Do if Questioned by Police, FBI, Customs Agents or Immigration Officers, August 2004, California: National Lawyers Guild San Francisco Bay Area Chapter, American Civil Liberties Union of Northern California, and the American Arab Anti-Discrimination Committee, <http://www.nlgsf.org/resources/>, Last visited June 14, 2013.

⁷⁰ "Quality of Life" or "Zero Tolerance Policing", Incite! Women of Color Against Violence, http://www.incite-national.org/media/docs/6279_toolkit-zero_tolerance.pdf, Last visited June 14, 2013.

Individuals should speak with a lawyer and, if possible, even carry the name and phone number of an immigration lawyer. DHS will not explain the different options available to an individual.

Based on today's laws, regulations, and DHS guidelines, non-citizens usually have the rights enumerated below, no matter what their immigration status. The following information may change, so it is important to contact a lawyer. The rights below apply to non-citizens who are inside the United States. Non-citizens at the border who are trying to enter the U.S. do not have the same rights. A non-citizen inside the U.S. has the right to call a lawyer or family if detained, and has the right to be visited by a lawyer in detention. A detainee has the right to have an attorney at any hearing before an immigration judge, but does not have the right to a government-appointed attorney for immigration proceedings. If the individual has been arrested, immigration officials must provide a list of free or low cost legal service providers.

Immigration Status

Non-citizens are legally obligated to carry their green card or other immigration papers with them. Presenting false or expired papers to the DHS may lead to deportation or criminal prosecution. An unexpired green card, I-94 (*Arrival-Departure Record*), Employment Authorization Card, Border Crossing Card or other papers that prove legal status generally satisfy this requirement. If people do not carry these documents with them, they could be charged with a crime. It is smart to keep copies with a trusted friend or family member who can easily fax the documents if need be.

Everyone has the same rights if a police officer or an officer with Immigration and Customs Enforcement (ICE) stops you on the street. An officer may not request evidence of a person's immigration status in that person's home or other private place unless the officer has a proper warrant. A person is not legally required to show proof of legal presence unless an officer has proof that the person is not a U.S. citizen. A local or state law enforcement officer cannot detain or arrest an individual simply because they believe the person is not legally present in the United States.⁷¹ A person is not required to talk to government officers about his or her immigration history. Once a person has shown evidence of immigration status, the individual does not have to talk to officers further.

You do not have to answer any questions, even if you are arrested. You should not and do not have to say anything about where you were born or how you entered the United States. You do not have to show any documents, unless you were stopped while driving a vehicle, in which case you may get in trouble for failing to produce a valid driver's license or registration. It is extremely important to not show false documents, because doing so is a crime and can make the situation much worse. Note that falsely claiming U.S. citizenship can result in a felony charge and bar you from the United States.

You have the right to demand to speak to a lawyer, and you do not have to say anything to the police before you talk to a lawyer. Don't sign anything, especially an "Order of Voluntary Departure" without first talking to a lawyer. Do not sign anything that you cannot read or do not understand. If you are arrested and charged, ask to have your hearing in the city with an

⁷¹ See *Arizona v. United States*, 132 S. Ct. 2492, 2505-06 (2012) (Holding that Arizona's law requiring local officers to determine the immigration status of any person they stop was pre-empted by federal law).

immigration court closest to where you live, so that your case, and you, are not transferred. If ICE agents come to your house, you do not have to open the door unless they show you a search warrant. The Immigrant Legal Resource Center has produced red cards that you can keep in your wallet and give to police or ICE agents if you are stopped on the street or if agents come to your home. You can order or download and print your own cards online from: http://www.ilrc.org/for_immigrants/red_cards.php.

Hearings

Anyone arrested for an immigration violation has the right to a hearing before an immigration judge to defend himself or herself against deportation charges. In most cases, only an Immigration Judge can order that someone be deported, unless the person has waived his or her rights or taken “voluntary departure,” agreeing to leave the country. Other instances when a person might be deported without a hearing is if the individual has a criminal record, was arrested within 100 miles of the border, came to the U.S. through the visa waiver program or has a prior deportation order. If a person gives up the right to a hearing or leaves the U.S. before the hearing is over, the person could lose eligibility for certain immigration benefits, and could be barred from returning to the U.S. for a number of years.

Note that the Board of Immigration Appeals has ruled that DHS has the discretion to place arriving immigrants in removal proceedings under INA §240, even if they may also be subject to expedited removal under INA §235(b)(1)(A)(i).⁷²

Detention and Deportation⁷³

For service providers, locating a client who has been detained by ICE can be a challenge. It will always be helpful to have your client's alien number (number starting with “A#”). Contact U.S. Immigration and Customs Enforcement’s Enforcement and Removal Operations or use the Online Detainee Locator System, which will be discussed later. If your client is or was on parole, it may be helpful to contact the parole officer. Non-citizens convicted of a crime are generally placed in deportation proceedings while in detention. ICE serves them a “notice to appear” (NTA) and a detainer so they cannot obtain release prior to deportation.

The NTA is the document the government gives the individual and the court to explain why an individual should be removed from the United States. The NTA starts the case against that person. ICE must give the individual the NTA within 72 hours of detention. The NTA is divided into two parts. The first part, “Allegations,” has the person’s name, the country of origin, and the date and manner of entry into the United States. It also gives the factual basis or reason for removal. The second part “Charges,” lists the sections of the law under which the individual may be removed. The individual's first date to see the immigration judge is usually scheduled within one or two weeks after receiving the NTA, though it may be longer.

⁷² Matter of E-R-M- & L-R-M, 25 I. & N. Dec. 520 (BIA 2011).

⁷³ Information in this section taken from: Immigration Detention and Removal: A Guide for Detainees and their Families, Bryan Lonagan & the Immigration Law Unit of the Legal Aid Society, 2006, <http://www.detentionwatchnetwork.org/node/295>, Last visited June 14, 2013; Immigration Court Practice Manual Chapter 4, United States Department of Justice, Executive Office for Immigration Review, April 1, 2008, <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>, Last visited June 14, 2013.

The first appearance before an Immigration Judge is known as the “Master Calendar Hearing.” At the first court appearance, the court will ask the individual if he or she has an attorney or would like time to obtain one, and will then grant time to find an attorney, if necessary. At the beginning of the case the judge will “take the pleadings,” which means that the judge will review the NTA with the individual. The judge will ask if the facts contained in the NTA are true, if the individual admits that he or she is removable, and whether he or she will be applying for any type of relief from removal. The government will need to prove both that the individual is a foreign citizen and that he or she is removable. Transgender people are placed in detention facilities according to genitalia. For example, a transgender woman who has not had SRS would be placed in a men's detention facility. Advocates can petition on behalf of transgender prisoners for release or alternative sentencing on the grounds that the transgender person is in imminent danger while housed in an inappropriate detention facility as a transgender person.⁷⁴

In 2011, The Heartland Alliance National Immigrant Justice Center filed a lawsuit against the Department of Homeland Security alleging that jailers nationwide have deprived gay and transgender detainees of basic rights.⁷⁵ These complaints detail denial of hormone replacement therapy, sexual assault, denials of basic medical care, arbitrary confinement, and severe harassment and discrimination against LGBT immigrants. Almost all facilities holding ICE detainees have implemented the ICE Detention Standards to ensure consistent treatment and care for detainees in immigration custody. However, these standards are not legally enforceable, leaving many detainees without access to phones, adequate medical care, and basic legal materials. To file a grievance related to a situation or event related to a person's detention, first download a complaint form: <http://www.dhs.gov/xlibrary/assets/crcl-complaint-submission-form-english.pdf>. The complaint should be sent to Department of Homeland Security, Office for Civil Rights and Civil Liberties, Review and Compliance, 245 Murray Lane, SW, Building 410, Mail Stop #0190, Washington, DC 20528, or e-mailed to: CRCLCompliance@hq.dhs.gov.

Online Detainee Locator System

One common problem in immigration law is that people who are detained by Immigration and Customs Enforcement (ICE) can be very difficult to track, as they are often transported to different states and facilities. To address this long-standing problem, on July 23, 2010, ICE announced the launch of a new public, internet-based system to help people locating individuals who have been detained in ICE custody. This system is called the Online Detainee Locator System (ODLS), and is on ICE's public website: <https://locator.ice.gov>. This detainee locator program only searches for exact match names, so you have to enter the individual's information as it appears in their detention paperwork; preferred names will not be honored.

⁷⁴ Trans 101 Training, Transgender Law Center, June 20, 2008.

⁷⁵ Civil Rights Complaint for LGBT Immigration Detainees, Heartland Alliance National Immigrant Justice Center, April 13, 2011, <http://www.scribd.com/doc/52956435/Civil-rights-complaint-for-LGBT-immigration-detainees>, Last visited June 13, 2013.

Consulates

Non-citizens arrested in the U.S. have the right to call their consulate or to have the police tell the consulate of their arrest. The police must let the consulate visit or speak with them if consular officials decide to do so. The consulate might help find a lawyer or offer other help. A non-citizen has the right to refuse help from the consulate. For an excellent guide to consular rights and a list of foreign consulates in the United States, see Chapter 2 of “A Jailhouse Lawyer’s Manual: Immigration and Consular Access Supplement”, published by Columbia Human Rights Law Review and available at: <http://www3.law.columbia.edu/hrlr/jlm/ica-section-ii.pdf>

RESOURCES

Below is a brief list of resources that may be especially helpful. This collection is only a small representation of transgender-welcoming services in California and the United States. Searching online for additional resources may yield more specific information or assistance. Resources are divided by California-specific organizations, national organizations, and general resources, which includes legal documents, publications, research tools, and “know your rights” resources. For ease of use, we have specified whether organizations provide direct or support services, and to what extent they serve the LGBT communities, and specifically, to what extent they serve transgender communities. National Lawyers Guild Interns spoke with representatives of almost all of these organizations to ensure that our description of their services is correct and up-to-date, and that they are explicitly welcoming of transgender community members.

Contact a Legal Service Provider or Immigration Attorney

The U.S. Department of Justice maintains a handy list of pro-bono immigration services by state that can be accessed here: <http://www.justice.gov/eoir/probono/states.htm>.

California Resources

AIDS Legal Referral Panel, www.alrp.org

1663 Mission Street, Suite 500
San Francisco, CA 94103
Phone: (415) 701-1100

The ALRP Immigrant HIV Assistance Project (IHAP) provides free immigration legal services to HIV positive immigrants living in San Francisco. IHAP services include assistance with obtaining legal permanent residence (green cards), HIV waivers, political asylum, suspension of deportation, and naturalization.

Asian Law Caucus, www.asianlawcaucus.org

55 Columbus Avenue
San Francisco, CA 94111
Phone: (415) 896-1701

Legal and civil rights organization serving the low-income Asian Pacific American communities in San Francisco & Bay Area region. They offer an immigrants’ rights legal clinic three times a month, and give legal advice to immigrants in removal proceedings.

Asylum Access, www.asylumaccess.org

1611 Telegraph Avenue, Suite 1111

Oakland, CA 94612

Phone: (510) 891-8700

Asylum Access moves beyond band-aid humanitarian assistance to address the root cause of refugees' needs: denial of rights. They work to make refugee rights a reality in Africa, Asia, and Latin America, and specifically focus on Ecuador, Tanzania, and Thailand. They do not provide legal assistance to refugees residing in the United States.

Lawyers' Committee for Civil Rights Asylum Program,

<http://www.lccr.com/asylum.php>

131 Steuart Street, Suite 400

San Francisco, CA 94105

Phone: (415) 543-9444

E-Mail: scontreras@lccr.com

Since 1983, the Lawyers' Committee's Asylum Program has assisted people seeking safety in the United States. The Lawyers' Committee may be able to meet with you to talk about your case and help find you a lawyer for free, or give you a list of lawyers in your area. Everything you say to Lawyers' Committee is confidential and is not shared with anyone without your permission.

Organization for Refuge, Asylum & Migration, www.oraminternational.org

39 Drumm Street, 4th floor

San Francisco, CA 94111

Phone: (415) 399-1701

E-Mail: info@oraminternational.org

ORAM provides much-needed support to refugees around in the world fleeing from persecution based on their sexual orientation, gender identity, and gender. We provide direct representation for a pinpointed set of refugee cases, typically referred to us by our partner organizations based on our expertise on LGBTI issues.

San Francisco Immigrant Legal and Education Network,

www.sfimmigrantnetwork.org

938 Valencia Street

San Francisco, CA 94110

Phone: (415) 282-6209 ext.115

E-Mail: info@sfimmigrantnetwork.org

SFILEN works to achieve immigrants' rights through building grassroots leadership, providing free immigration legal services and comprehensive legal assistance, promoting community education, and organizing to empower the immigrant community. It also offers legal drop-in services (call for an appointment).

Survivors International, www.survivorsintl.org

2727 Mariposa Street, Suite 100

San Francisco, CA 94110

Phone: (415) 546-2080

E-Mail: info@survivorsintl.org

A program of the Trauma Recover Center at the University of California, San Francisco, and San Francisco General Hospital, Survivors International is dedicated to providing essential psychological and medical services to survivors of torture who have fled from around the world to the San Francisco Bay Area. Provides no cost clinical care for trauma survivors, including therapy and case management.

Transgender Law Center, www.transgenderlawcenter.org

870 Market Street, Room 400

San Francisco, CA 94102

Phone: (415) 865-0176

Email: info@transgenderlawcenter.org

The Transgender Law Center (TLC) is a civil rights organization advocating for transgender communities. TLC provides direct legal services, engages in public policy advocacy and education and works to change laws and systems that fail to incorporate the needs and experiences of transgender people.

Nationwide Resources

Department of Homeland Security Office for Civil Rights and Civil Liberties,

<http://www.dhs.gov/office-civil-rights-and-civil-liberties>

Office for Civil Rights and Civil Liberties

U.S. Department of Homeland Security

Review and Compliance

245 Murray Lane, SW

Building 410, Mail Stop #0190

Washington, DC 20528

Phone: (866) 644-8360

Email: crcl@dhs.gov

The office is led by the Officer for Civil Rights and Civil Liberties, who provides advice to the Secretary and the senior officers of the Department on a full range of civil rights and civil liberties issues. Contact this office to file complaints related to immigration detention, racial profiling, inappropriate questioning on entry into the United States, or other civil rights violations.

Immigrant Legal Resource Center, www.ilrc.org

1663 Mission Street, Suite 602

San Francisco, CA 94103

Phone: (415) 255-9499

The Immigrant Legal Resource Center (ILRC) is a national non-profit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people.

Immigration Equality, www.immigrationequality.org

National Headquarters

40 Exchange Place, Suite 1300

New York, NY 10005
Phone: (212) 714-2904
Toll-Free Phone: (888) 403-9669

A national organization that advocates for the equality for lesbian, gay, bisexual, transgender (LGBT) and HIV-positive immigrants. They run a pro-bono asylum project, provide trainings to LGBT immigrants about immigration law, and match up people needing legal services with volunteer attorneys. Immigration Equality specifically provide support and resources to transgender and HIV positive individuals, and their website features written resources in English and Spanish about immigration law for transgender and HIV positive people.

Heartland Alliance's National Immigration Justice Center,

www.immigrantjustice.org

208 S. La Salle Street, Suite 1818

Chicago, IL 60604

Phone: (312) 660-1370

The Immigrant Legal Defense Project serves immigrants applying for permanent residence through a family-based application; permanent residents applying for citizenship; immigrants who are victims of domestic violence or violent crime and seek protection in the United States; and victims of international human trafficking. They provide legal consultations for immigrants living in the Chicago area only.

National Center for Lesbian Rights, www.nclrights.org

870 Market Street, Suite 370

San Francisco, CA 94102

Legal Helpline: (415) 392-6257 (9 am to 5 pm PST)

Toll free: (800) 528-6257 (9 am to 5 pm PST)

NCLR provides free legal assistance to LGBT immigrants nationwide. They help individuals understand various aspects of immigration law and provide direct representation to LGBT immigrants in impact cases and individual asylum claims.

National Lawyers Guild's National Immigration Project,

www.nationalimmigrationproject.org

14 Beacon Street, Suite 602

Boston, MA 02108

Phone: (617) 227-9727

The National Immigration Project is a national non-profit organization that provides legal and technical support to immigrant communities, legal practitioners, and all advocates seeking to advance the rights of noncitizens. The Project is especially committed to working together with people who are marginalized to protect rights and to promote fairness, including battered women, people with HIV/AIDS, children, and noncitizen criminal offenders.

Members of the Project include attorneys, law students, judges, jailhouse lawyers, advocates, community organizations, and other individuals seeking to defend and expand the rights of immigrants in the United States.

Sylvia Rivera Law Project, www.srlp.org

147 W 24th Street, 5th Floor

New York, NY 10011

Phone: (212) 337-8550 ext. 308

Email: info@srlp.org

SRLP provides free legal services to transgender, intersex and gender nonconforming low-income people and people of color in the New York area. SRLP provides advice and referral for a wide variety of legal issues. For immigrants, the Sylvia Rivera Law Project may be able to help with name changes, updating immigration documents, naturalization, asylum, and removal defense. Sometimes, they can also provide more help, such as advocacy, help with a case you are bringing on your own, or, more rarely, representation in a legal action.