

The following excerpts have been included in order to provide more specific information about the process of filing an application based on sexual orientation and gender identity based persecution. The remainder of the National Immigrant Justice Center's packet has not been included as the information provided is already covered in the Defensive Asylum Packet information.

Immigration Basics - Thorny Issues in LGBT /H

Asylum Cases

Some asylum applications are relatively straightforward. The applicant is filing within one year of his last arrival in the United States, he has severe past persecution with documentation to corroborate the abuse, and he has never done anything wrong in the United States or in his native country. Cases such as this are relatively easy to work on, and with careful preparation have a strong chance of winning.

Often, however, clients are not so perfect. When asylum applications include facts that seem to undermine the claim, it is important to address these facts head on. Asylum Officers, Judges, and ICE attorneys will be looking for these issues and will confront your client with them. It is therefore best to have the applicant raise difficult issues first so that he can fully explain the circumstances of the bad fact. There are some issues in particular which arise frequently in LGBT/H asylum issues that require extra thought and preparation.

Marriage

It is essential to remember in preparing a sexual orientation-based asylum claim, that the first element which must be proven to the adjudicator is that the applicant really is lesbian or gay. This can be accomplished by including affidavits, letters and/or testimony from current and/or past romantic partners. Proof of sexual orientation can also be bolstered by including evidence that the applicant is involved in LGBT organizations. And, of course, the applicant's detailed and compelling written and oral testimony about romantic feelings are crucial.

But what if the applicant was or is married? Will this be fatal to a sexual orientation-based asylum application? The answer, as with most asylum issues, is, it depends. It is important when preparing the case to realize that this will be a significant issue and to prepare the client to talk about the marriage honestly.

Marriage in the Home Country

In many cases an asylum applicant will have married in her own country because her family forced her into the marriage, because she was hoping the marriage would work and she could "cure" her sexual orientation, or because she believed the marriage would provide her with a "cover" which would allow her to continue to seek same sex relationships with other women. In situations where the applicant tried to be married and the marriage failed because of the applicant's sexual orientation, the marriage (and possible divorce) itself can become part of the evidence of the applicant's sexual orientation. It is important, if possible, to corroborate the failure of the marriage, whether this is through a letter from the (ex)spouse, a letter from a friend or family member in whom the applicant confided, or a letter from a therapist who tried to help save the marriage.

The longer the marriage lasted, and the deeper the commitment appeared to be, for example,

if the couple had children, the more in depth the explanation the applicant should be prepared to give. Expert testimony from a psychiatrist or psychologist can be essential to a case where the applicant appeared to lead a heterosexual life in the past. It is important to remember that the asylum adjudicator is probably heterosexual and may need to be educated about the complex psychological components that make up a person's sexual orientation.

Marriage in the United States

If the applicant married a person of the opposite sex in the United States, he will be facing an even more difficult obstacle in his asylum application. It is possible that the applicant married an opposite sex spouse in the United States for the same reasons he might have done so in his own country: the hope of "overcoming" his gay feelings or the hope that he could appease his family. Of course, without the extreme societal pressures which may come to bear on the applicant in his own country, it is more difficult to explain why he would feel the need to marry in the United States where, at least in theory, gay people are free to pursue relationships with members of the same sex. In a situation where the applicant marries in the United States, it will be essential to have a mental health expert testify about the coming out process and the applicant's motivations for entering into the marriage.

An even more difficult situation arises when the applicant married a U.S. citizen or legal permanent resident for the purpose of obtaining a "green card" without truly intending the marriage to be bona fide. In dealing with this situation it is important to remember, first, that an asylum applicant must be truthful at all times. There is no more serious wrong an applicant for immigration status can commit than to intentionally fabricate information in an asylum application, so if the applicant never intended the marriage to be real, he must be truthful about this. Admitting that the applicant committed immigration fraud will probably mean that the applicant will be ineligible for asylum and will instead be focusing on his application for withholding of removal. In addition to meeting the elements of the refugee definition, a successful asylum application requires a "favorable exercise of discretion" (See page 21) and it is unlikely that an adjudicator will exercise this discretion if the applicant admits to having committed immigration fraud.

The other danger with admitting that the applicant previously submitted a fraudulent application is that the adjudicator may find that if the applicant lied to the government in the past in an effort to receive an immigration benefit, he may be doing so again with the current asylum application. It is important to work closely with a client in this difficult situation to make sure that he testifies with complete candor about the marriage and his motivations for entering into it so that the adjudicator believes his current testimony. It is also important to focus on corroborating the applicant's homosexual sexual orientation, as well as to provide other evidence of the applicant's good moral character so that the adjudicator can see that the fraudulent marriage was an aberration borne out of desperation rather than that the applicant is generally untrustworthy.

Bisexual Claims

One reason that an applicant may be married now or may have married in the past may be that she identifies as bisexual rather than homosexual. There are no precedential asylum claims recognizing bisexuals as a particular social group. As with any other asylum claim, whether or not the claim of a bisexual applicant will succeed will be very dependent on the particular facts of the case.

If the applicant suffered past persecution because of bisexuality, there is a rebuttable presumption that she will suffer future persecution. If she is currently married to a man who would return with her to her country if she is removed, this change in circumstances may be sufficient for ICE to rebut the presumption of future persecution. On the other hand, if the applicant was known to have had same sex relationships in her country, and will be presumed to be a lesbian and face future persecution as a result, she could argue that the fact that she has had some relationships with men would not protect her from the abuse she would face in the future.

Asylum adjudicators often want the issues in cases to be black and white. It is not hard to imagine an asylum adjudicator taking the position that if the applicant is attracted to both sexes, she should simply “choose” to be with members of the opposite sex to avoid future persecution. In a case which is based on bisexual identity, it will be very important to include the testimony of a mental health expert who can describe for the adjudicator that bisexual individuals do not “choose” whether to fall in love with men or women any more so than anyone else “chooses” whom they fall in love with.

The Applicant Does not “Look Gay”

While it is always necessary for an asylum applicant to prove that he actually is a member of the particular social group of homosexuals, it is especially important to focus on this element of the case if the applicant does not fit the stereotype of an “effeminate gay man” or a “masculine lesbian woman.” Every adjudicator approaches an asylum application with his or her own biases. If the applicant “looks gay” to the adjudicator based on whatever stereotypes or “gaydar” the adjudicator brings to the interview or hearing, it is probably more likely that the applicant will win the case. There are several reasons for this.

First, most LGBT applicants cannot prove their membership in a particular group as clearly as other asylum applicants can prove, for example, their affiliation with a political party or their ethnic group. Asylum adjudicators are often fearful that an applicant has completely fabricated his claim simply to remain in the United States. If, on a gut level, the adjudicator believes the applicant is gay or lesbian, it is much more likely that the adjudicator will believe other aspects of the case.

Second, even if the adjudicator does believe that the applicant is homosexual, the adjudicator will also question how the applicant's government or other members of society will know the applicant's

sexual orientation such that he will be likely to suffer harm in his country. If the applicant is a “flaming queen” it may be easier for the adjudicator to picture the applicant being gay bashed on the street or abused by policemen than if the applicant looks like a professional athlete. If the adjudicator can't tell that the applicant is gay, the adjudicator may question how the applicant's countrymen could tell.

This is precisely the issue in the *Soto- Vega v. Ashcroft*,¹ a case which is currently pending in the Ninth Circuit. In *Soto-Vega*, the Immigration Judge found that although the applicant had suffered past persecution both by the police and the public in his native Mexico, the applicant did not “look gay” to the Judge, so he did not believe the applicant would suffer future persecution. The BIA affirmed the Judge's ruling without opinion, and the case is now in federal court. Of course, having found past persecution, the applicant was entitled to a presumption of future persecution, which the Judge's own informal observations should not have rebutted. The other important lesson from *Soto-Vega*, however, is how important it is to develop the record (which fortunately *Soto-Vega*'s attorneys did) regarding the applicant's sexual orientation. In *Soto-Vega* a witness who was an expert on country conditions in Mexico for LGBT individuals, testified that according to cultural markers in Mexico, *Soto- Vega* was obviously recognizable as a gay man. This testimony in the record is a crucial part of *Soto-Vega*'s appeal.

In cases where the applicant does not fit the U.S. stereotype of gay man or lesbian woman, the applicant's representative must make sure that the record contains as much corroborating evidence as possible that the applicant really is homosexual. (See page 110). The applicant must also be prepared to prove that she would be recognized as a homosexual person in her country and would face persecution as a result. Obviously, if she has already been persecuted in the past, this should be compelling evidence both that she was previously recognized as a lesbian and that her sexual orientation would be known in her country if she returns. Testimony from a country conditions expert that the applicant “looks homosexual” according to the cultural norms of her country can also be very important to the success of the case. It is also important to include other evidence of how the applicant's sexual orientation would become known. For example, in many cultures it is unheard of for a 30 year old man to be unmarried. In other societies the fact that two adults of the same gender are living in the same household would immediately subject them to scrutiny from their neighbors and the government. It is essential to get this evidence into the record, both through country condition reports and expert testimony.

Multiple Return Trips to Country of Origin

The classic factual scenario for an asylum seeker is that the applicant suffers some terrible incident of persecution in his country, flees his country as soon thereafter as possible, and seeks asylum in the United States shortly after arriving here. Cases with this fact pattern are certainly not uncommon, but frequently the realities of asylum seekers' lives don't fit so neatly with this paradigm.

¹ See <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1543>.

Often LGBT/H individuals have no idea that their sexual orientation, transgender identity or HIV -positive status could be grounds for seeking asylum in the United States. Thus many LGBT/H individuals who visit the United States are careful to return to their countries before their authorized stay expires so that they won't lose the ability to return to the United States in the future. This is often especially true for individuals who are HIV -positive and visiting the United States regularly to obtain medication that is unavailable in their home countries.

If the applicant has returned to his home country after leaving the United States, the adjudicator will certainly want to know why the applicant fears for his safety in returning now when he returned of his own volition in the past. In many cases there was one final incident that occurred to the applicant or to someone the applicant knows which made the applicant realize once and for all that it would be unsafe to remain in his country. The representative should always discuss with the client what compelled him to flee to the United States permanently this last time.

The Ninth Circuit has recently addressed the issue of return trips to the home country after having been persecuted and reiterated that that Circuit has “never held that the existence of return trips standing alone can rebut th[e] presumption [of future persecution.]”² In *Boer-Sedano*, the applicant was a gay man with AIDS from Mexico who had suffered past sexual and physical abuse by a police officer because of his sexual orientation. The Court found that *Boer-Sedano*'s several return trips to Mexico to gather enough income to relocate permanently in the United States did not render him ineligible for asylum.

As with most issues in asylum cases, whether or not an applicant's return trips to his country of origin are fatal to his asylum application will depend on the specific facts of the case. It is important for the representative to explore this topic fully with the client and prepare the applicant to explain the reason for the trips to the adjudicator. The applicant should also be prepared to explain (and if possible corroborate) any ways in which he modified his behavior while back in his country. For example, if he remained in his country for a brief time, he avoided gay meeting places and he rarely left his home, these facts may help an adjudicator understand why the applicant was able to escape harm on the trip home.

Be careful, however, that these facts don't backfire into an adjudicator determining that if the applicant does not “flaunt” his homosexuality, he can avoid harm in his country. The applicant (and representative) should be prepared to argue that it is one thing to spend a couple of weeks avoiding the public eye and potential harm, but it is quite another thing to be forced into a life of celibacy to survive. In another recent 9th Circuit case, *Karouni v. Gonzales*, the Court addressed this issue, finding that it was unacceptable to saddle Karouni, a gay, HIV -positive man from Lebanon, with the “Hobson's choice of

² *Boer-Sedano v. Gonzalez*, 418 F.3d 1082 (9th Cir. 2005).

returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts of (2) living a life of celibacy.”³ Thus the applicant should be able to explain why he would fear having to live in his country again, including his fear of persecution if he had a romantic partner or tried to find a romantic partner, even if he was able to escape harm on a brief visit.

Likewise, HIV -positive applicant may be able to demonstrate that they avoided harm on a brief trip to their home country by bringing enough medication to last for the trip. The applicant could argue that by avoiding seeking medical care (something that would be impossible to do if he returned to his country permanently) he was able to conceal his HIV -positive status.

Criminal Issues

The interplay between criminal law and immigration law is one of the most complicated areas in the complicated area of immigration law. As such, it is generally beyond the scope of this manual. However, anyone who is representing an asylum seeker must know a few basics about how criminal convictions can affect eligibility for asylum and withholding of removal. Applicants who meet the heightened standard for relief under the Convention against Torture cannot be removed to the country where they would face torture regardless of their criminal history in the United States, though they can face indefinite detention here if they are deemed to be a threat to the community.

The asylum applicant must answer questions on the 1-589 about criminal convictions and arrests, so the representative must impress upon the applicant the importance of discussing past criminal activity openly. All asylum applicants are fingerprinted multiple times during the application process, and if the applicant was arrested in the United States, it is extremely unlikely that DHS would not know about the arrest.

Applicants for both asylum and withholding are considered statutorily ineligible if they have been convicted of a “particularly serious crime.” For purposes of asylum applications, any conviction for an aggravated felony⁴ will render the applicant statutorily ineligible.⁵ For purposes of withholding of removal, if the applicant has been convicted of one or more aggravated felonies for which the aggregate term(s) of imprisonment are five years or more, he will be statutorily ineligible for having committed a “particularly serious crime.”⁶ Even if the applicant's aggregate prison term was under five years, the

³ *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

⁴ For a definition of aggravated felonies see § 101(a)(43). Aggravated felonies include but are not limited to: murder; rape; drug trafficking; certain firearms offenses; money laundering or crimes of fraud for amounts over \$10,000; crimes of violence for which the term of imprisonment is at least one year; theft or burglary for which the term of imprisonment is at least one year; child pornography offenses; racketeering and gambling; certain prostitution offenses; and certain alien smuggling offenses. INA § 101(a)(43). It is important to understand that even crimes which are not considered felonies under state law can be considered aggravated felonies for immigration purposes.

⁵ INA §208(b)(2)(B)(i).

⁶ INA §241(b)(3)(B).

adjudicator can still make an individualized inquiry as to whether or not the conviction rose to the level of a “particularly serious crime” to determine whether or not the applicant is statutorily eligible.

Even if the applicant's conviction was for a crime that did not rise to the level of an aggravated felony, the conviction can lead to the denial of an asylum application. The leading case on determining whether or not a criminal conviction is a “particularly serious crime” is *Matter of Frentescu*⁷. Additionally, to qualify for asylum, an applicant must merit a favorable exercise of discretion. Thus, even if an asylum applicant's conviction is not found to be a “particularly serious crime” and does not render him statutorily ineligible for asylum, an adjudicator may still deny the application on discretionary grounds. If the applicant committed a crime, it will be crucial to the case for the applicant to fully explain the circumstances of the conviction and (if possible) to express remorse and demonstrate rehabilitation.

If the applicant committed a “serious nonpolitical crime” in her own country or any other country outside the United States, she is also statutorily ineligible for asylum or withholding.⁸ Again, it is important to question the applicant thoroughly about any criminal activity before she arrived in the United States. In many cases, the applicant may have faced arrest or conviction because of her sexual orientation. If the applicant is being prosecuted for engaging in a protected activity, such as having private, consensual sexual relations, such an arrest would not render the applicant ineligible for asylum and would actually be an important part of her claim.

Prior Government Employment

Another issue which a representative should explore with the applicant is whether or not he was employed by the government in his country of origin. In the classic paradigm of an asylum case, where an applicant was a political activist against a dictatorial government, it was reasonable to conclude that employment by that same government would undermine the claim. In most LGBT /H asylum cases, the primary problem that applicants have experienced from the government has been abuse by the police or military, or failure by the police to protect against harm from private individuals. Given this fact pattern, employment as a government clerk or the like should not render an applicant ineligible for asylum, but it may still be an issue that an adjudicator pursues. After all, if the applicant's claim is that the entire country is intolerant of sexual minorities, and sexual minorities face abuse and discrimination, why would the government hire a gay person? If the answer to this question is that the applicant kept his sexual orientation hidden from his employer, then an adjudicator might reasonably question how the police, individuals on the street, or other potential persecutors would be aware that the applicant was gay when those as close to him as his employer remained unaware. Again, the answers to these questions will be specific to the facts of the case, but it is an issue that the representative must prepare the applicant to discuss with the adjudicator.

⁷ 18 I. & N. Dec. 244 (BIA 1982).

⁸ INA §208(b)(2)(A)(iii) and §241 (b)(3)(B)(iii).

Visa Waiver Program

If an applicant entered the United States without a visa under the Visa Waiver Program⁹ (VWP), she is not entitled to an interview with an Asylum Officer. Instead, her application will be heard by an Immigration Judge in asylum only removal proceedings.¹⁰ Most entrants under the VWP, a program which allows foreign nationals from low risk visa violating countries to enter the United States for up to 90 days without first applying for a tourist visa, come from Western Europe and would therefore not be seeking asylum in the United States. The issue does arise at times, however, when the applicant has dual citizenship with a VWP country and enters the United States using the passport of the VWP country. Also, while Argentina has been removed from the VWP list, there are Argentine nationals who entered the United States under the VWP as it existed several years ago who may wish to seek asylum because of their sexual orientation.

Dual Nationality

If an asylum applicant has dual nationality, that is she is a citizen of more than one country and has the legal right to reside in and enjoy full citizenship rights in both countries, this can be a reason to deny the asylum application. The principle behind asylum applications in the United States is not that the application is a way to choose to live legally in the United States but rather that it is an application of last resort to avoid persecution. Thus, if the applicant has a safe alternative in another country, the United States can remove the applicant to that country. Therefore if an applicant is a dual citizen of Venezuela and Spain, it will be very difficult to win an asylum case in the United States since Spain now grants greater rights to gay and lesbian citizens than the United States does. On the other hand, if the applicant is a dual citizen of Venezuela and Colombia, the applicant may be able to prevail on an application based on persecution in Venezuela, but will also have to prove, through country conditions documentation, that Colombia is also an unsafe country for LGBT/H people.

⁹ For more information on the VWP see http://travel.state.gov/visa/temp/without/without_1990.html

¹⁰ 8 CFR §217.4(a)(1).

Preparing the Application - Corroborating Documents Specific to the Applicant

One of the greatest fears that an asylum adjudicator has is that the applicant has fabricated his story and that nothing he is saying is actually true. It is therefore essential to provide as much supporting documentation to corroborate the applicant's claim as possible. Obviously, the most important documentation is that which goes to the heart of the applicant's claim - police records, medical records, affidavits and letters of partners, friends and family who witnessed the harm the applicant suffered - but it is also helpful to provide corroborating documents for other aspects of the applicant's story, including school records, employment records, and proof of community involvement.

It often takes considerable time and effort for an applicant to obtain corroborating documents, especially since such documents generally come from his home country, and he may not be in touch with family members or friends there any more. It is therefore important to begin brainstorming with the applicant almost immediately about what kind of corroborating documentation he will be able to provide.

Until recently, case law has made clear that an asylum applicant's specific, detailed testimony alone could be sufficient to win a claim for asylum.²¹ With the enactment of the Real ID Act, in May 2005, however, asylum applicants will be required to provide corroborating documents for their claims or offer a specific explanation of why it would not be possible to obtain the supporting documents. *See* pages 42-45 for a practice advisory on the Real ID Act.

Supporting Documentation Checklist

Understanding the significance of supporting documentation, the next question is what types of documentation should the applicant include? How can supporting documentation help prove the claim? The following is a "brainstorming" list, but it is not exhaustive. The more supporting documentation the applicant can provide (so long as it's not needlessly redundant) the better.

Proof of the Applicant's Membership in a Particular Social Group

For LGBT Applicants

- Affidavits/letters from the applicant's current and/or former partner(s) to establish sexual orientation and/or transgender identity;
- Affidavits/letters from the applicant's family member(s) or close friends who are aware of the applicant's sexual orientation and/or transgender identity;

²¹ According to the Regulations, an applicant's credible testimony, without corroboration, is considered sufficient to meet the burden of proof. 8 C.F.R. 208.13(a). Also see *In Re S-M-J*, Int. Dec. 3303 (BIA 1997), *In Re B*, Int. Dec. 3251 (BIA 1995).

- Photographs of the applicant with her partner or former partner(s);
- Letters from LGBT organizations that the applicant is/was a member of, volunteers with, etc.
- Letters from therapists or other mental health professionals who can attest to therapy sessions which deal with "coming out" issues, gender identity issues or other LGBT-specific issues.

For Transgender Applicants

- Affidavits/letters from medical and/or mental health professionals describing any steps the applicant has made in "transitioning" anatomical sex.

For HIV -positive applicants

- Affidavits/letters from medical and/or mental health professionals confirming the HIV diagnosis and describing in detail the applicant's treatment regimen. If the medical provider has sufficient knowledge, this letter should include information about the unavailability of treatment in the applicant's home country.

Proof of Past Persecution

- Affidavits/letters from partners, friends, family members or anyone else who was present during the act(s) of mistreatment;
- Affidavits/letters from partners, friends, family members or anyone else who the applicant confided in about the incident. This is particularly important if the witness saw proof of physical harm (injuries, torn clothes, etc.) or mental harm (crying, anxiety etc.);
- Newspaper or other media coverage, or coverage by human rights groups of the particular incident in which the applicant was involved;
- Arrest records. (These are generally not available since most LGBT asylum applicants are never actually charged with a crime);
- Records of police complaints. Sometimes applicants will make an official complaint with the police after an act of violence by a third party. The record of the complaint can help verify that the incident actually happened and corroborate the applicant's account that the police did not protect her if the perpetrator was never caught or if the applicant continued to have problems after seeking police protection.
- Medical records. If the applicant required medical treatment for an act of mistreatment, it is vital to provide the medical records. If it is impossible to obtain the medical records

from the home country, the applicant should document the injury if possible by seeing a medical professional in the United States who can write a letter. For example, if the applicant's nose was broken in a beating, the applicant should provide a letter from a medical professional confirming that his nose has been broken and that the pattern of the break is consistent with being hit by a blunt object.

- Death certificates. If a partner or close friend of the applicant was killed because of her sexual orientation, it is very important to document this, if possible with the death certificate.

Proof of Well-Founded Fear of Future Persecution - Country Conditions

- U.S. State Department Reports on Human Rights;
- Human Rights Reports by Amnesty International, Human Rights Watch, the International Gay and Lesbian Human Rights Commission, or other local human rights or LGBT rights organizations;
- Newspaper or other media stories of human rights abuses against LGBT and/or HIV-positive individuals in the home country;
- Expert affidavits on country conditions. *See* Section # 21 for more information on country conditions.

One Year Filing Deadline

- 1-94 and/or stamped passport. If the applicant is filing within one year of her last entry into the United States and she entered with inspection, she should submit a copy of her 194 and/or stamped passport as proof of the date of entry. Even if she entered using a fake passport, she should submit that if she still has it because it is important evidence of her entry date;
- Other proof of date of entry. If the applicant is filing within one year of his last entry, but entered without inspection (for example, crossing the border), he should provide documentary evidence that proves he was outside the United States within the last year, such as work records or medical records. Additionally, proof of travel (airline tickets, bus tickets, hotel receipts) within Mexico or Canada can be very helpful. Proof of travel from a border state to the final United States destination doesn't hurt, but is not really dispositive since the applicant could have been living in the border state for a long time.
- If the applicant missed the one-year filing deadline, it is essential to submit adequate documentation about the changed or extraordinary circumstances. This could include medical records, affidavits from mental health professionals, reports of substantially

changed conditions in the home country, etc. *See* pages 26-32 on one-year filing deadline exceptions.

Criminal Issues

If your client has ever been arrested in the United States, even if he was never convicted of anything, or even if the case was dismissed and sealed, he must obtain original, certified dispositions of the criminal cases. You can submit photocopies of the dispositions when you send in the asylum application, but by the time of the interview your client must have original, certified dispositions to give to the Asylum Officer.

Proof that the Applicant Merits a Favorable Exercise of Discretion

In addition to meeting the legal definition of refugee, an asylum adjudicator will look at all the relevant facts to determine if the applicant "deserves" asylum. Any documentation of positive factors should be included (especially if there are negative factors, such as arrests to counterbalance.) This proof could include:

- Proof of volunteer work, in the form of affidavits/letters on the organization(s)' letterhead;
- Proof of rehabilitation. If the applicant committed a crime or had a substance abuse problem, proof that the applicant has completed community service or attended a drug rehabilitation program should be included;
- Proof that the applicant has been attending school, or otherwise been productive while waiting for the asylum application to be adjudicated;
- Proof that the applicant is part of the community. This could include an affidavit/letter from a religious leader stating that the applicant regularly attends religious services, or affidavit/letter(s) from LGBT or other community organizations such as HIV/AIDS service providers in which the applicant participates;
- Proof that the applicant has a partner who relies upon him, in the form of an affidavit/letter.

Supporting Documentation Format: Affidavits and Letters

In an affirmative asylum application, sworn or affirmed affidavits are submitted with the application. Asylum Officers will generally allow submission of unsworn letters, but may give them less weight than sworn statements. If the person who wrote the letter was afraid to get the document notarized (in many other countries obtaining a notarization is a much more formal procedure than in the United States), the person writing the letter should explain the basis of her

fear of doing so. The witnesses writing these statements are not required to appear at the asylum interview.

Affidavits from family or friends which are being used to corroborate LGBT /H status should include: 1) the approximate date when the family member or friend first learned of the sexual orientation of the applicant and/or the relationship between the applicant and his partner; 2) how long the family member or friend has known the applicant or partner, and; 3) any sexual minority or HN/AIDS oriented activities in which the applicant participates, e.g. pride parades, support groups, bars, films or other community or relevant cultural events.

In an application for asylum before the Immigration Court, the Judge may not allow the introduction of statements by individuals who are not willing to appear in court to testify unless they are unable to do so because of prohibitive travel costs, or for other compelling reasons. In such cases, the Judge may not admit the affidavits. In general, and as discussed below, Immigration Courts have much stricter rules for admitting evidence than Asylum Officers do. This is one of many reasons that it is important to do the best possible job in preparing the application at the Asylum Office level.

All documentation and affidavits should be submitted with the application, if possible. However, asylum-seekers and their legal representatives who are nearing the filing deadline may be forced to decide whether to file an application without having obtained and reviewed all documentation available. Additional documentation and affidavits obtained after filing may be submitted at the interview. Whenever possible, an exhaustive search for documentation completed before submitting the application can help the asylum-seeker and her attorney to assess the strength of the claim before filing.

Translation of Documents

All foreign language documents must be translated into English or they will not be accepted by the Asylum Office or the Court. Anybody but the applicant herself who can swear that she is competent in English and the foreign language can do the translation and sign the certificate of translation. There is no requirement that the translator have any professional training in translation; she must simply be able to certify in a notarized certificate that she is competent to render the translation.

There is no rule prohibiting the attorney of record from certifying translations. Whenever a foreign language document is being submitted the *entire* document must be translated, not just the relevant sections.

Every foreign language document must have its own certificate of translation attached. For each exhibit, you should attach, first the English version, then the foreign language version, then the certificate of translation.

An example of a typical translation certificate follows:

Sample One - Certification of Accurate Translation

I, Rita Garcia hereby certify that I translated the attached document from Spanish into English and that to the best of my ability it is a true and correct translation. I further certify that I am competent in both Spanish and English to render and certify such translation.

Rita Garcia

Sworn to before me this 7th day of
September 2005

Notary Public

- > *Practice pointer: Sometimes, if the applicant is fluent in English and his native language, you can ask the applicant to do the translations himself (since he may have more time to spend on this then staff in your office) and you can then have a third party who is fluent in both languages review the translation and submit a Certificate confirming that she has reviewed the translation and the translation is accurate.*

An example follows:

Sample Two - Certification of Accurate Translation

I, Rita Garcia hereby certify that I reviewed the attached documents and that to the best of my ability I certify that the English translation of the Spanish document is true and accurate. I further certify that I am competent in both English and Spanish to render and certify such translation.

Rita Garcia

Sworn to before me this 23rd day of
September 2005

Notary Public

Preparing the Application: Corroborating Country Conditions Information

Researching Country Conditions

To win an application for asylum, the applicant must demonstrate that he has a subjective fear of future persecution and that that fear is objectively reasonable. To accomplish this, the applicant should submit proof that the types of harm he suffered or fears suffering in the future are documented in his country.

USCIS and ICE officials often rely heavily on U.S. State Department reports on human rights conditions in the applicant's country. Therefore you should always be familiar with the report for your client's country and generally should submit the report yourself with the country conditions information. These reports can be found at <http://www.state.gov/g/drl/hr/c1470.htm>. More often than not these reports will include little or no information about LGBT/H issues, so you will have to look elsewhere as well. If, however, there is information about human rights abuses or lack thereof of LGBT/H people in the State Department report, this will carry a great deal of weight.

The International Gay and Lesbian Human Rights Commission (IGLHRC) is an invaluable resource for LGBT/H corroborating information. See <http://www.iglhrc.org/site/iglhrc>. They have country condition packets which can be purchased for a nominal fee and their website links to other websites for country condition research. If you purchase an IGLHRC packet, however, be aware that your work is not done. You must carefully sift through the materials for relevance and to be sure that the information is not outdated. Additionally, IGLHRC packets may contain information about some advances in LGBT/H rights, which you may not want to include in your materials.

Another invaluable resource is www.asylumlaw.org that contains country conditions information and a search engine that explores 15 different human rights databases. You should also use www.asylumlaw.org that contains links to numerous human rights websites that you can search. If a leading human rights organization, such as Human Rights Watch <http://www.hrw.org/> or Amnesty International <http://amnesty.org/> has released a report on LGBT/H conditions in the applicant's country, including the complete report will also be very beneficial to the case.

The USCIS website has its own Resource Information Center (RIC) which, somewhat randomly, addresses specific country conditions questions for various countries and issues. It's worth checking this website to see if there have been any reports on LGBT /H issues in the applicant's country. <http://uscis.gov/graphics/services/asylum/ric/>. Andrew Reding has frequently written reports for RIC. In 2003, he authored a *World Policy Report on Sexual Orientation and Human Rights in the Americas*, available at <http://www.worldpolicy.org/globalrights/sexorient/2003-LGBT-Americas.pdf>, which you should review for Latin American and Caribbean cases.

You should also research LGBT media web sites online. Many mainstream LGBT media report regularly on international LGBT/H issues. A non-exhaustive list of useful websites is available at == link to End Chart

Another useful way to find relevant articles for your country conditions packet, is to do a google or yahoo search for "international newspapers" and then search for keywords such as "gay" or "homosexual" within newspapers of the applicant's country.

You can use google to search most websites even if the website doesn't have a google search bar. You do so by going to www.google.com and then entering your search terms followed by site:website. For example, if you want to find search www.365gay.com to find out about arrests in Egypt, you could do the following search on the google website "Egypt arrests [site:www.365gay.com](http://www.365gay.com)".

Indexing Country Conditions

There is no magic number of reports and articles that you need to include. Remember, you want to have enough materials that objectively support your client's fear that an adjudicator will find that fear objectively reasonable. If there is a news report about a particular incident, such as a gay bashing, which led to a person's death, you should find the article from the most credible source and include that. There's no need to include five articles about the same incident. You want to be as thorough as possible with country conditions without being needlessly redundant. You should also focus on country conditions within the last five years, and include few, if any articles that are more than a few years old. If, however, there is a seminal report (such as an Amnesty International report) specifically about LGBT/H issues in the applicant's country, it may be worth including that even if it is outdated. It would be very helpful to also get a letter from the organization that issued the report stating that conditions have not improved since the report.

When you are putting together your country conditions information, your goal is to make the job of the adjudicator as easy as possible. You should arrange the materials in reverse chronological order, so that the most recent news comes first. You should index the materials and attach the originals with exhibit tabs, which correspond to the numbered entries in the index. When you index the materials you should either offer a brief summary of the article/report you are attaching or pull out a quotation or two of sections that are especially relevant or helpful to your claim. The purpose of the index is for the adjudicator to be able to quickly digest the content of the country conditions without having to read them all herself. Additionally, you can use a highlighter pen on the materials themselves to draw the adjudicator's attention to the most relevant passages. If you do this, make sure you use the highlighter pen on all copies *after* you've finished photocopying, otherwise the yellow just photocopies as grey.

If your applicant is applying based on more than one ground, for example sexual orientation and HIV-positive status, it's best to index the conditions thematically. That is, put a bold heading such as "Country Conditions for Gay Men" and then summarize and list the gay-

related articles/reports in reverse chronological order. Then put another bold heading such as "Country Conditions for HN-Positive Individuals" and then summarize and list the HN-related articles/reports in reverse chronological order.

Any article that is not written in English must be translated into English and include a certificate of translation. (See pages 114-115 above). Even if only one paragraph of a two page article is really relevant to your case, the best practice is to translate the entire article since the adjudicator has no way of knowing whether the untranslated portion of the article may contain information which actually undermines the applicant's claim.

Preparing the Application - Indexed Country Conditions Sample

The country conditions index that follows was submitted on a case in which the applicant had received death threats from a skinhead "social cleansing" group. This index does not correspond with the sample declaration and application, although those are also based on a Brazilian case, because "Joao Doe" was not threatened by skinhead groups.

Country conditions should be tailored to the particular claim(s) in your case. For example, lesbian cases should include information about the treatment of women in her country and transgender cases should include information about gender roles. It's always helpful to begin your research with a country condition packet from IGLHRC (<http://www.iglhrc.org/sitelighrc/>) or with the packet another *pro bono* attorney used, but you must also make sure that the conditions cover the issues specific to your client's case.

Brazil: Country Conditions

1. "Brazil: Country Reports on Human Rights Practices" *Us. Department of State*, released by the Bureau of Democracy, Human Rights, and Labor, February 28, 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41751.htm>
- > *Practice pointer: You should always include the U.S. Department of State report even if there is no relevant information or even if there is information which indicates that there are no problems for LGBT/H people in the applicant's country. The adjudicator will always look at this report anyway, so it's better if you submit it and deal with the information in the report head on. There is often little or no information about LGBT/H people in the reports.*

"Afro-Brazilians and homosexuals continued to face societal discrimination and, on occasion, violence." (p. 1)

"The law prohibits discrimination on the basis of sex, race, age, religion, or nationality; however, discrimination against women, Afro-Brazilians, homosexuals, and indigenous people continued." (p. 14)

"On January 13, members of human rights organizations in Sao Paulo held a demonstration to denounce the actions of groups who promote racial superiority and discrimination against Afro-Brazilians, Northeasterners, homosexuals, Jews, punks, and other minorities. Demonstrators also called on authorities to investigate further known racist groups such as Carecas ("Skinheads") do ABC, Carecas do Suburbio, Poder Branco ("White Power"), and Imperial Klans do Brasil. The demonstration was held where skinheads from Carecas do ABC attacked Edson Neris da Silva and Dario Pereira Neto for holding hands in 2000. Silva died from the injuries sustained during the attack." (p. 19)

"According to the Ministry of Health, there were approximately 180 killings of homosexuals during the year." (p.21)

2. "Youth Mistaken for a Thief is Beaten," Folha de Londrina, October 23,2004.

"After establishing that he wasn't a suspect, the Military Police (MPs) initiated a physical assault, possibly motivated by prejudice based on the youth's sexual orientation, because he had invitations to a gay night club in his pockets" (p. 1)

"According to the adolescent, the policemen began to call him "faggot," covered his nose and mouth with their hands, and began to beat him with a nightstick in his stomach. Anderson, who yesterday had hematomas on his two ears and hearing difficulties, said that he ended up falling and then received various blows to the head." (p. 1)

Of 500 complaints made from July of 1999 through December of2000, 18.7% were for physical assault, 10.3% for extortion, and 6.3% for assassinations. (p. 1)

"A study of 416 homosexuals (gay, lesbians, transvestites, transsexuals) revealed that 60% of those interviewed had been victims of some type of aggression motivated by their sexual orientation." (p. 1)

3. "Homophobia Is Still a Principal Problem for LGBT Population in the Region", report emailed by A.T.T.A. (Association of Argentinean Transvestites and Transsexuals), July 2, 2004

> *Practice pointer: If you aren't sure whether or not the evidence is from a source that will be considered admissible, you should generally still include it in your packet. Asylum Officers almost never keep out documents based on evidentiary rules and even Immigration Judges and ICE attorneys may not look at every document in your country conditions packet. Of course, information that comes from known sources, such as established human rights groups or recognizable media carries more weight than information that comes from random websites.*

"Despite the existence of advances in recognizing sexual diversity and the emergence of political proposals and legal norms that introduce the possibility of an improved situation for those persons whose sexual orientation is different from the majority, hundreds of murders are committed every year and the perpetrators enjoy impunity from prosecution." (p. 1)

4. "Brazil: Country Reports on Human Rights Practices" *Us. Department of State*, released by the Bureau of Democracy, Human Rights, and Labor, February 25,2004 available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27888.htm>

"Police violence against homosexuals continued. Gay rights activists in the city of Recife compiled substantial evidence of extortion and the unlawful use of violence against transvestite prostitutes. Police routinely extorted money from transvestites and often beat or killed those who failed to cooperate. Several NGOs documented the existence of skinhead, neo-Nazi, and "machista" (homophobic) gangs that attacked suspected homosexuals in cities including Rio de Janeiro, Porto Alegre, Salvador, Belo Horizonte, and Brasilia (see Section 5). In some cases, these gangs allegedly included police officers." (p. 8)

5. "Human Rights Watch World Report 2003: Americas: Brazil", *Human Rights Watch*, 2004, available at <http://hrw.org/wr2k3/americas2.html>

"Violence against gay men and lesbians was also a cause of concern. Hate crimes against gay men were believed to be especially serious in the states of Sao Paulo, Pernambuco, and Bahia, and in the Federal District." (p. 5)

6. "World Policy Reports: Sexual Orientation and Human Rights in the Americas," Andrew Reding, Project for Global Democracy and Human Rights, World Policy Institute, [excerpt] December 2003 available at <http://www.worldpolicy.org/globalrights/sexorient/2003-LGBT-Americas.pdf>

> *Practice pointer: Andrew Reding has written reports for the INS Resource Information Center <http://uscis.gov/graphics/services/asylum/ric/> in the past so his opinions may be given particular weight by DHS. Although the report is largely based on the same types of documentary evidence (human rights reports, media reports) that you will be submitting anyway, you should always consult his report for Latin American and Caribbean claims.*

"...in the last decade more than a thousand gay men and at least thirty lesbians were murdered in Brazil- one every five days. The real number is surely much higher than the already hideously high number we learn about, because the families of many convince the press not to include scandalous details about the lives and deaths of those murdered for being homosexual. Most of the crimes include extreme violence: castration, burning of the body, hundreds of stab wounds. Only about one in ten of the killers is arrested. The few who are and who go to tribunal frequently claim that they killed the victim because he tried to violate their honor (that is, fuck them)." (pp. 25-26)

7. "Skinheads in Brazil", posted at Stormfront White Nationalist Community, May 2003, available at <http://www.stormfront.org/forum/showthread.php?t=72862>

> *Practice pointer: Even though you will attach hard copies of the articles, whenever possible you should include a website citation so that the adjudicator can learn more about the source organization/publication and determine the weight to give the evidence.*

"The largest concentration of Brazilian neo-Nazi Skinheads is in Sao Paulo ... Three separate groups operate in the city: 1. Carecas do Suburbio (Skinheads of the suburbs), a gang noted for its ultra-nationalism and gay-bashing, which hangs around bars ... 2. Carecas do ABC (ABC Skinheads) ... The ABC Skins are extremely violent and hostile toward Jews, homosexuals, and Northeasterners ... 3. White Power Skinheads, an avowedly Nazi gang that is the most violent of all. They hate Jews, blacks, homosexuals and Northeasterners ... " (p.1-2)

8. "Protest Violent Arrests of Transvestites in Sao Paula, Brazil", *Brazil Action Alert, International Gay and Lesbian Human Rights Commission*, June 11,2003, available at www.iglhrc.org/php/section.php?id=5&detail=437

> *Practice pointer: There is often more news about violence against transgender people than about sexual orientation-based violence. If your client is lesbian, gay, or bisexual, but not transgender, you can include an article or two like this for a sexual orientation-based case (to show general hostility towards LGBT people) but don't overwhelm the adjudicator with articles, for example, about violence against transvestites if your client never dresses as a woman. You don't want the adjudicator to draw the conclusion that only transgender people and not LGB people are targeted for violence.*

Conversely though, with a transgender claim, even if your client does not identify as LGB, you should include information about sexual orientation-based violence because a transgender person is likely to be perceived as LGB by others. For example, an M->F woman who has relationships with men will probably be perceived as a gay man if her government, community, etc., does not recognize her gender as female.

"On May 29 and 31, 2003, officers from Police District 16 in Sao Paulo, Brazil, arrested a total of 145 transvestites in the area surrounding Indianapolis Avenue ... transvestites were beaten and forced into police vehicles." (p.1)

9. "Demand Investigation of Lesbian Murders in Pernambuco, Brazil", *Brazil Action Alert, International Gay and Lesbian Human Rights Commission*, November 3,2003, available at <http://www.iglhrc.org/php/section.php?id=5&detail=477>

"Given the high rates of impunity in crimes where the victims are women, gay men or transgender people, local NGOs are asking for international help to pressure the Recife government to investigate." (p.1)

10. "Human Rights Watch World Report 2002: Americas: Brazil", *Human Rights Watch*, 2003, available at <http://hrw.org/lwr2k2/americas2.html>

"Attacks against and harassment of lesbians and gays were also of concern. The Gay Association of Bahia, a gay rights advocacy group, reported frequent murders of gay men,

claiming that less than 10 percent of such crimes were successfully prosecuted in the courts." (p.5)

11. "Report: Brazil is a Leader in Gay Hate Crimes", *United Press International*, April 23, 2002 available at <http://www.upi.com/view.c:fin?StoryID=23042002-052102-4811r>

"More than 100 gays, lesbians and transsexuals were killed in Brazil last year as a result of hate crimes, the largest number recorded of any nation, a gay-rights group in the northern state of Bahia said Tuesday." (p. 1)

"The GGB report says that only 10 percent of those who commit violence against gays ever serve time for their crimes." (p. 1)

12. "Gay Man Beaten to Death by Skinheads in Sao Paulo", *Action Alert, The International Lesbian and Gay Association*, July 31, 2000, available at http://www.ilga.info/Information/Legal_survey/americas/supporting%20files/gay_man_beaten_to_death_by_skinh.htm

"Edson Neris da Silva, 35, died in the early hours of Saturday (February 5th) after having been beaten severely by a gang of skinheads in the center of the Brazilian city of Sao Paulo. According to a statement given by ... a witness and friend of the victim - the two were walking together through the Praca da Republica (a well known gay cruising area) around midnight on February 4, when a group of around 30 skinheads dressed in black closed in on them." (p.1)

13. "Urgent Action: Members and staff of the Brazilian section of Amnesty International and other human and LGBT rights activists who are under threat from a neofascist group", *Action Alert, The International Lesbian and Gay Association*, June 13, 2000, available at http://www.ilga.info/Information/Legal_survey/americas/supporting%20files/members_and_staff_of_the_brazili.htm

"With [the bomb] was a letter featuring a crude swastika, attacking Amnesty International for its work in defense of gays and blacks." (p.1)

"In the past few months, the F AC has sent letters threatening Amnesty International, human rights activists in general and gay men and lesbians to the human rights organization No More Torture and to a major national newspaper..." (p.2)

14. "Brazil-World Champion in the Murder of Homosexuals", *The International Lesbian and Gay Association*, April 8 1999, available at http://www.ilga.info/Information/Legal_survey/americas/supporting%20files/Brazil_World%20Champion%20In%20The%20Murder%20of%20Homosexuals.htm

"The Gay Group of Bahia, the oldest gay rights group in Brazil, has published another Bulletin denouncing violations of human rights and 116 murders of homosexuals which occurred in that country in 1998." (p.1)

"According to the Human Rights Secretary of the Brazilian Association of Gays, Lesbians and Transvestites, Luiz Mott, who compiled this dossier, "these numbers are only the tip of an iceberg of hatred and blood, since in many cases, owing to the carelessness and failures of the police and pressure from members of the family, the homosexuality of many victims is not disclosed ... Impunity encourages the boldness of the criminals." (p.1)

"On the inside cover of this dossier, the Gay Group of Bahia published '10 tips on how to avoid being murdered. '" (p.2)

