

Guide for LGBTQ and HIV asylum and withholding of removal Claims

Is this guide for you?

This guide was created to help you if you are afraid that you will be harmed in your country of origin or home country because of your *sexual orientation, gender identity, or HIV status*. There are many terms for the great diversity of people who fear harm based on their sexual orientation or gender identity, including, people who are gay, lesbian, bisexual, transgender, intersex, queer, and gender non-binary. Rather than trying to create list of all of the many different ways someone might describe their own sexual orientation or gender identity, we will refer to all of these identities together as LGBTQ.

Even if you are not LGBTQ, but you were harmed or fear harm because people *think* that you are LGBTQ, you may be able to seek asylum or withholding of removal on that basis.

This guide is meant to be used along with the Florence Project’s guide entitled: “I’m Afraid to Go Back: A Guide to Asylum, Withholding of Removal, and the Convention Against Torture.” We will refer to this as the “Asylum Guide.” The *Asylum Guide* includes other very important information and requirements that you will need to meet in order to apply for asylum or withholding of removal, so be sure to review it thoroughly.

Here, we discuss parts of an asylum or withholding of removal claim based on your LGBTQ or HIV status (together, we will refer to these two groups as LGBTQ/H). **However, please remember that you must also meet all of the requirements that are explained in the *Asylum Guide*, which also explains how to fill out your application.**

What is Asylum and Withholding of Removal?

“Asylum” is a way to stop your deportation and receive permanent status in the United States. “Withholding of Removal” is similar to asylum. For both withholding of removal and asylum, you will need to show the judge that you are at risk of serious harm if you go back to your country of origin. However, there are some differences between what you need to qualify for asylum versus withholding of removal. There are also differences in the benefits you receive if you win your case. This is explained in more detail in the *Asylum Guide*.

However, for both asylum and withholding of removal, you must show that you have been harmed or will likely be harmed in the future because of your race, religion, nationality,



political opinion, or **membership in a “particular social group.”** The legal term for that harm is “persecution.”

What is a “Particular Social Group”?

“Particular social group” (or “PSG” for short) is a legal term to describe a group of people that share things in common that they cannot change. Some examples of PSGs are:

- gay Russian men
- people living with HIV or AIDS in Honduras
- sexual minorities in Uganda
- transgender women in El Salvador
- women in Guatemala that people in the community think are lesbians

Most LGBTQ/H asylum and withholding of removal claims are based on the harm you have suffered because of your membership in a PSG. The legal term for that harm is “persecution.”

Even if you are not LGBTQ/H, you may be able to qualify for asylum and withholding of removal if you have been harmed or fear harm in the future because people *think* you are LGBTQ/H. This is called an “imputed” PSG. For example, if you are not gay but were forced to have sexual relations with a man and then were attacked by community members who think you are gay, you may be able to prove to the court that you have been harmed because of your imputed membership in a PSG. Or if, for example, you are HIV-positive and people assumed you were gay because they view HIV as a “gay disease,” you may be able to prove you were harmed because you were “imputed” to be gay as well as HIV-positive.

Do LGBTQ/H people also have “political opinion” claims?

Remember, to win asylum or withholding of removal, you must show that you were or would be harmed because of your race, religion, nationality, membership in particular social group or your political opinion.

If you are LGBTQ/H, you may also be able to show harm because of your political opinion. In particular, LGBTQ/H people who are involved with LGBTQ or HIV/AIDS rights group may use political opinion as a ground for asylum or withholding of removal claims. In that case, for example, your political opinion could be your belief that LGBTQ/H people must be treated fairly, or that everyone with HIV should have good medical treatment. Even if you do not hold a political opinion, but people harm you because they *think* you have certain political opinions, you may be able to get asylum or withholding of removal on this basis. This is called an “imputed” political opinion. As with PSG claims discussed



above, you will have to show that you were harmed (or fear harm in the future) *because* of your actual or “imputed” political opinion. However, for most LGBTQ/H applicants the law gives the strongest support for claims based on membership in a PSG, so even where you are claiming persecution based on your political opinion, be sure to also base your asylum claim on your membership in a PSG.

Nexus: you must prove you were harmed or fear harm *because* you are LGBTQ/H.

To prove your case, you will have to prove something called “nexus.” That is a legal term which simply means that you must prove to the judge that the harm you suffered in the past or harm you fear in the future is caused by your LGBTQ/H status. For example, you will have to provide evidence that you were severely beaten by police *because* you are a gay man, or that you were attacked by a family member *because* you are a transgender woman.

If you are also claiming asylum or withholding because of your political opinion, you will also have to show that you were harmed because of that political opinion.

To prove this, you will have to present evidence to the judge on how you know that you were harmed because you are LGBTQ/H or because of your political opinion. For instance, you might submit a declaration to the judge about being brutally attacked in the past.

However, it is not enough to simply say that you were attacked because you are gay. Instead, you also must explain why you believe this to be true. For example, if you were attacked by a group of men that were waiting outside of a gay club, who beat you after seeing you kiss your boyfriend and who yelled insults against gay people as they hurt you, explain this. This information is helpful to show the judge why you were harmed and that it was at least in part because you are gay.

Keep in mind that the fact that you are LGBTQ/H does not have to be the *only* reason that you were harmed, but you need to show that it was one of the *main* reasons you were harmed. For instance, in the example above, if you were also robbed by the men who attacked you outside of the gay bar, they may have had more than one reason for attacking you. But you need to prove to the court that your LGBTQ/H status was one of the main reasons they hurt you. You can do that by showing what happened in the attack. Maybe the men continued to beat you even after they took your wallet. Maybe they yelled anti-gay insults throughout the attack. Even though it is difficult, think about how you can show the judge that they attacked you because you are LGBTQ/H.

Should I apply for Convention Against Torture Relief or “CAT”?



As an LGBTQ/H person, you should apply for Convention Against Torture relief (“CAT” for short) if you can show that your **government will torture or kill you or that your government will ignore it if someone else tries to torture or kill you.**

You will need to show that the person who will harm you is a government official, for example, someone in the police, army, or working as an official. Or, if the person who will harm you does not work for the government, you will need to show that the government will not be able to protect you from the harm.

However, unlike asylum and withholding of removal, you do not need to show that this harm is because of your race, religion, nationality, political opinion, or particular social group. CAT might be the best option for you if, for example, you cannot to show that the reason you were severely harmed was because you are LGBTQ/H. Perhaps you do not know who attacked you or were unconscious during the attack. Although there are similarities between CAT and asylum and withholding of removal, there are some notable differences. Please review the *Asylum Guide* for more information on CAT and the similarities and difference with asylum and withholding of removal.

Evidence for LGBTQ/H Asylum, Withholding of Removal, and CAT Cases

To win asylum or withholding of removal you will have to submit evidence to prove your story. You will do this by filling out an application form titled “I-589, Application for Asylum and for Withholding of Removal” (or I-589 Form). In addition, you should also submit additional evidence to support your claim, meaning documents and statements showing that what you say in your I-589 Form is true. Below is some of the evidence you should provide.

- **A Declaration.** As discussed in the *Asylum Guide*, a declaration is your story in writing that explains to the judge that you are LGBTQ/H and why you are afraid to return to your country. In general, it should include the following:

The reasons why you should win your case for “asylum,” “withholding of removal,” and “CAT.” Your job is to make the judge understand why you are afraid to return to your home country and why the judge should grant your application for “asylum,” “withholding of removal,” and “CAT.” Think about the requirements for your case before you start writing your declaration as laid out in the *Asylum Guide*!

In addition to the requirement that all applicants must prove for their case that are discussed in the *Asylum Guide*, LGBTQ/H applicants must also prove to the judge that they are LGBTQ/H and that the harm they experienced (or that they

fear in the future) is because they are LGBTQ/H. Below are things you should be sure to include in your declaration. There is also a worksheet at the end of the *Asylum Guide* that you can use to help you organize your thoughts.

- ***Information about your childhood and teenage years.*** You should include information on how you were treated as a child and teenager by your family, other children, school, religious or other authority figures because they thought you might be LGBTQ/H. If you experienced problems or harm, describe these problems. Add as much detail as you can about who hurt you, what they did, when, where it happened, and why you think people were harming you. You should also describe the effect the harm had on you. Although you may not have been aware of your sexual orientation or gender identity during your childhood and even teenage years, you may have already felt “different” or preferred the company or activities of the opposite sex. LGBTQ children are sometimes targeted and sexually abused because they are perceived as LGBTQ. If this is the case for you, be sure to explain this in your declaration.
- ***When you realized that you are LGBTQ.*** You should describe how and when you realized or came to understand your sexual orientation, or gender identity. What reactions did this cause in you and others and why? What changes did you make in your life because of this realization or understanding? If your understanding of your sexual orientation and/or gender identity has changed over time, you should explain this in your declaration. For instance, some transgender women initially identify as gay men.
- ***Information about your romantic relationships.*** You should include information and details about your current and past romantic relationships including details about how you met and how you felt about your partners. Including this information is important because it shows that your LGBTQ status is an important part of your life. Even if you feel embarrassed or uncomfortable talking to a judge about your romantic feelings, you need to do so openly and honestly in order for the judge to grant your application on the basis of your sexual orientation or gender identity. You do not need to describe specific sexual acts or show pictures of yourself in sexual situations in order to show the judge that you are LGBTQ, but do provide information about the relationships you have been in and why they were important to you.
- ***Information about adulthood.*** You should include information on how you were treated as an adult by your family, others in your community, religious or other authorities like the police and military, etc., because of

your LGBTQ/H identity. If you experienced problems or harm, describe these problems including: who hurt you, what they did, when and where it happened, and why you think people were harming you. You should also describe the effect the harm had on you. You should include any harm that you suffered directly from the government (such as police, military or other authorities). In addition, you should also include any harm you experienced from family or community members including any violence, sexual assault or threats, as well as being fired from work, called names, or denied medical treatment because of your LGBTQ/H status.

- **Your HIV/AIDS.** If you are HIV-positive and that is part of your claim, you should explain to the judge when and how you discovered that you are HIV-positive and any mistreatment you suffered because of your health conditions, such as being denied employment or being prevented from receiving healthcare. If people in your country believed you to be LGBTQ because of your HIV and you suffered or feared persecution because of this “imputed” LGBTQ identity, be sure to include these facts in your declaration as well.
- **Did you report abuse to the police?** You should explain to the judge if you reported any incidents of harm you experienced because you are LGBTQ/H to the police and what they did about it. If the police refused to help or otherwise mistreated you because you are LGBTQ/H, be sure to include information about that. If you did not go to the police because you were afraid because of your LGBTQ/H status or thought that the police would not help you, provide details about why you thought so.
- **As much detail as possible.** The judge needs to understand what you fear will happen to you. Try to use descriptive words. The judge doesn’t know anything about you and probably has never been to your country. When you describe an important event in your life – for example, a time when you were afraid, threatened, detained, tortured or hurt. You want to use enough detail that the judge feels, sees, and hears what you felt, saw, and heard.
- **Supporting Evidence.** It is very important to collect other evidence to show the judge that what you say in your application and declaration is true. Each person asking for asylum, withholding of removal, and CAT has a different case, so the evidence you need depends on your own case. For example, you might include:
 - Letters or declarations from current and/or past romantic partners who can support your claim. These letters should include information on your relationship and also any other information about the harm you may have

experienced or fear. If you are not able to get letters from people that you mention in your declaration, you will need to explain why you were not able to get letters from those people.

- Other letters or declarations from people who can support your claim of why you are afraid to return to your country. Did a friend or family member see people threaten you or beat you? If so, a letter from that person will help you prove your claim.
- Perhaps you identify as LGBTQ, but have never had a same-sex relationship. This situation is more common than you might think, as many people from countries where being LGBTQ is dangerous are not free to engage in relationships that would provoke suspicion of their sexual orientation. You can still prove your sexual orientation through other means, such as through a declaration or letter from anyone in your life who knows your sexual orientation like a friend, co-worker, medical professional, or anyone in your life that you have confided in.
- Social media and dating profiles showing that you are LGBTQ.
- Photographs of you attending LGBTQ events or documents or pictures showing membership in LGBTQ organizations.
- Police reports if you reported an incident to the police. If you cannot get a copy of a police report, be sure to explain why to the judge.
- Medical records (if you were injured and treated at a hospital or clinic or are HIV-positive and are applying based on your HIV-status). If you cannot get a copy of your medical records, be sure to explain why to the judge.
- Medical records or psychological evaluations from detention or elsewhere that help prove your case. For example, if you were raped because you are transgender and you told a therapist about it while you were detained, you may want to include the medical records from the therapist.
- Photographs that help prove your story (for example, pictures of you with people who have been killed, or pictures of you participating in groups or activities that put you in danger). Remember that you will need to be able to prove who the people in the pictures are.
- Newspaper articles about the issue that makes you afraid to return to your country, or about things that have happened to people you know.
- Reports from national and international human rights organizations and governmental organizations (such as Human Rights Watch and Amnesty International) showing that conditions in your country are very bad for LGBTQ/H people. These reports along with the news articles are often called “country conditions.” Immigration Equality has many country conditions indexes available on its website here: <https://immigrationequality.org/legal/legal-help/resources/country-conditions-index/>.



All documents must be in English. If you receive documents in another language, you must translate them (or have someone translate them for you). Just put your translation in with the original document and attach a signed copy of the “Certificate of Translation” that’s included in the *Asylum Guide*.

When you have gotten all your evidence together, attach a signed and dated copy of “Certificate of Service” at the end of the *Asylum Guide* to the last page of all your evidence. Then make two copies of all your evidence. The original will go to the judge, a copy will go to the government attorney and you will keep a copy for yourself. Check with your detention center to see how you can deliver the evidence to the judge and ICE attorney before your hearing.

Important Issues in LGBTQ Claims

There are some important facts that often need to be explained in LGBTQ/H asylum cases. Immigration judges and government attorneys often look for these issues and may ask you questions about them so it is best to think about these difficult issues first so that you can fully explain the circumstances.

Fear of talking about your sexual orientation or gender identity

Sometimes LGBTQ asylum seekers are afraid to talk to a judge about their LGBTQ identity. Some people feel ashamed about being LGBTQ because of how people or the government in their home country treated them. Some people are afraid that the judge will think badly of them because they are LGBTQ. Being LGBTQ is something to be proud of and you deserve to live a life where you are free to be yourself. Remember, if you can prove that you have been severely harmed in your home country or that you will be harmed in the future because you are LGBTQ, the United States must protect you.

You may have had a “credible fear interview” with an asylum officer just after you entered the U.S. This is the first step in the asylum process. Some LGBTQ asylum seekers are afraid to mention their sexual orientation or gender identity and fear of returning to their country of origin in that interview. If this is the case for you, you will need to explain to the judge why you did not mention your LGBTQ status. For example, if you were afraid to tell an official because you were abused by officials in your home country because you are gay, you need to make that clear to the judge. Or maybe you had to complete the interview in a place where others could hear you and you felt afraid to disclose your identity. Think about what happened that prevented you from explaining your situation.

Marriage

What if you were or are married to someone of a different sex? Will this hurt your application? The answer is maybe. For bisexual applicants, marriage to an opposite-sex

partner is, of course, perfectly consistent with your sexual orientation. However, you may need to remind the judge of this fact. There is a section below about bisexual claims with more information. For others who are not bisexual, you will need to explain your marriage and be prepared to talk to the judge about it honestly.

Marriage in Your Home Country

In some cases, you may have gotten married in your own country to someone of the opposite sex because your family forced you into the marriage. Perhaps they were hoping the marriage would work and would “cure” you of your sexual orientation. Maybe you got married because you believed the marriage would provide you with a “cover” allowing you to continue seeking same-sex relationships. Whatever the reason, you will need to explain this to the judge.

In situations where you tried to be married to someone of a different sex and the marriage failed because of your sexual orientation, the marriage (and possible divorce) itself can become part of the evidence of your sexual orientation. Whatever the situation is it is important, if possible, to provide evidence of the failure of the marriage. For example, you could file:

- a letter from the (ex-)spouse,
- a letter from a friend or family member that you confided in,
- a letter from a therapist who tried to help save the marriage.

The longer the marriage lasted, the deeper the commitment will appear to the judge. For example, if you have children, you will need to give the judge an explanation why. Did your partner or family pressure you to have children? Did you want to appear to your community like someone who was not LGBTQ? Have you always wanted children, and think of this as separate from your sexual orientation? It is important to remember that the judge may not understand sexual orientation or gender identity and may need to be educated about how complicated sexual orientation and gender identity, and coming to terms with it, can be.

Marriage in the United States

If you married a person of the opposite sex in the United States, it may be even harder to explain this to the judge, so you will need to provide good evidence about why you got married. It may be that you did it in hope of “overcoming” your same-sex attraction or the hope that you could please your family. Of course, without the extreme societal pressures in your country of origin, it is more difficult to explain why you would feel the need to marry in the United States. You will need to explain this to the judge. If you have a counselor or social worker you worked with, they may be able to provide a letter about the coming out process and your motivations for getting married.



An even more difficult situation arises if you married a United States citizen or legal permanent resident solely to get legal residency without truly intending the marriage to be real. It is important to remember that you need to be truthful at all times. If the judge catches you in a lie, they may choose not to believe anything else you say and may deny your claim entirely as a result. Please note that if you committed immigration fraud by having a fake marriage to get legal residency, this may have serious consequences for your asylum claim and a judge may determine you are ineligible for asylum and only allow you to apply for withholding of removal/CAT.

You Are Bisexual

If you suffered past persecution because of your bisexuality, you should be sure to talk about this in your application and declaration. In many countries, there is not the same differentiation between being gay or bisexual as there is in the United States and so anyone viewed as outside of societal norms because of their sexuality is targeted for abuse. If this is the case in your country, make sure you explain this.

Judges often want the issues in cases to be black and white. It is not hard to imagine a judge taking the position that if you are attracted to both sexes, you should simply “choose” to be with members of the opposite sex to avoid future persecution. Although this is improper, and a judge should not take this position, not all judges understand bisexual identities. You will need to help them to understand 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. If your case is based on bisexual identity, you should consider including testimony or evidence from a mental health expert who can explain bisexual identities to the judge.

You may be married now or may have married in the past because you identify as bisexual rather than gay or lesbian. This is perfectly consistent with your sexual orientation and you need to explain this to the judge. However, your case may be more difficult if you are currently married to a different-sex partner who would return with you to your country if you are removed. The government will try to show that this means that you will not be harmed since people will not perceive you as LGBTQ. In this case, you should be sure to explain whether you were known to have had same-sex relationships in your country in the past so and will be presumed to be gay or lesbian and face future persecution as a result.

You Don't “Look” LGBTQ

Sometimes judges have their own ideas of what being LGBTQ looks like. This is not supposed to influence the judge's decision, but it sometimes does. If you do not fit what the judge thinks a gay man or a lesbian woman should look like, or you are not presenting



in a way that the judge recognizes as transgender, it may be harder to prove your case. One of the reasons for this is because the judge may not think people in your country will think you are LGBTQ and so you will not be harmed.

If this is true for you, you need prove that you would be recognized as LGBTQ in your country of origin and will be harmed as a result. If you have already been harmed in the past because you are LGBTQ or people thought you are LGBTQ, you should emphasize this. Also, if what makes someone appear LGBTQ in your country is different than in the United States, you should make sure to describe this to the judge and include any additional evidence on this, such as statements and letters from others who can talk about why you are perceived as LGBTQ.

You should also include other evidence of how your sexual orientation or gender identity would become known. For example, in many cultures it is unusual 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 make their neighbors and the government suspicious. If you can find newspaper articles or reports talking about this, you should also include these in your evidence.

You Were Not Out in Your Country

Sometimes LGBTQ people avoid harm for a time in their countries by hiding their LGBTQ status. For example, some people marry or date someone of the opposite sex or do not engage in romantic relationships at all. If this is the case for you, you can explain this to the judge. You should also be sure to explain why hiding your sexual orientation or gender identity is harmful to you and why you cannot continue to do it. For example, if you have been depressed or suicidal because you cannot be who you are, you should describe this in your declaration and to the judge. If you have talked to a psychologist or social worker about this, they may be able to provide a letter on your behalf.

If you have come out since being in the United States, you should explain this to the judge as that fact may put you in greater danger upon return to your country. For example, if you were outed on social media or elsewhere and now people are aware of your LGBTQ status or if you have gotten married to someone of the same sex, you should submit evidence of this to the judge showing how you are now in greater danger.

If you are transgender and have begun transitioning or presenting as your true gender since coming to the United State, you should submit evidence of this to show how you are now more visible in your country. However, because being transgender is something you feel on the inside, you can still claim asylum based on your transgender status even if you have not taken steps to transition. However, you will still have to provide evidence that you will be harmed on account of being trans. Many transgender people are harmed in their country because they are perceived as gay or lesbian. If this is the case for you,



you need to provide evidence of this harm and explain that you are transgender, but that in your country people thought you were gay or lesbian and harmed you because of it (or that you fear that they will harm you in the future because of this perception).

Your Country Has Some Laws that Protect LGBTQ/HIV Positive People

As mentioned above, you will need to submit “country conditions” evidence in the form of reports from national and international human rights organizations like Human Rights Watch, Amnesty International, and news outlets showing that conditions in your country are very bad for LGBTQ/H people. Notably, many countries are very dangerous for LGBTQ/H people, even though there are laws there that are supposed to protect LGBTQ/H people. For example, some Latin American countries have laws recognizing LGBTQ rights.

The judge may view this as evidence that your country is willing and able to protect you. If so, you must explain that there is still widespread homophobia in your country and you are likely to be persecuted because of it. You can do this by pointing to violence, abuse, and harm experience by LGBTQ people in your country because of their LGBTQ status and the government’s failure to take action against it. For example, you can point to instances where you or people you know were harmed because they are LGBTQ and the police refused to help or contributed to the abuse. You may also be able to point to country condition evidence showing that violence against LGBTQ people is rarely, if ever, investigated or prosecuted.

Testimony at Your Individual Hearing

At your final hearing, you will have an opportunity to tell the judge why you are afraid to return to your home country. It is important to practice your testimony in the weeks before your hearing so that you feel comfortable and will remember to tell the judge about the most important parts of your case. If you have a romantic partner, family member, or friend who thinks that you will be harmed in your home country, or another witness who supports your case, ask that person to testify in court. Make sure that your witness tells the judge why they think you would be harmed in your home country. Just like with your testimony, make sure that your witness gives the judge very specific examples of how and why you would be harmed in your home country. Be sure to review the other tips in the *Asylum Manual* about testifying at your hearing.

The Judge’s Decision

In many asylum, withholding of removal, and CAT cases, the judge will give you a written decision after your final hearing. You will receive the decision through the detention center mail a few weeks after the hearing. The decision will explain the reasons why the



judge is approved or denied your case. If you choose to appeal, you must file an appeal to the Board of Immigration Appeals within 30 days of the date on the decision.

In some cases, the judge will give you her final decision at the end of your hearing. The judge will tell you why your case is approved or denied. If the judge denies your case and you want to appeal that decision, you need to tell the judge that you want to appeal. Be sure to write down *everything* that the judge says about why your case was denied. You will need this for your appeal. The judge will give you some paperwork that needs to be mailed to the Board of Immigration Appeals within 30 days.

To file an appeal, you can check out the Florence Project's guide on appealing your case, available at <https://firrp.org/resources/prose/>.

Final Thoughts

Asylum, withholding of removal, and CAT cases are complicated. It is normal to feel nervous or scared about presenting your case to the judge, especially if you will be telling her about frightening things that have happened to you or may happen to you because of your LGBTQ/H identity. As we discussed above, start gathering evidence early to help support your case. Ask your family and friends for help gathering evidence in your home country. Think carefully about the legal requirements for your case. Practice your testimony and give the judge as much evidence as possible to think about. We wish you the best of luck with your case!