

2.2 Determining Your Noncitizen Client's Particular Immigration Status

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2.2 Determining Your Noncitizen Client's Particular Immigration Status

A. General Considerations

If you conclude that your client is not a citizen, you then must determine your client's particular immigration status. The immigration consequences will vary significantly depending on the client's particular immigration status. Many of your clients will have documentation indicating their immigration status. If possible, you should make arrangements to photocopy any such documents, especially in situations where your client is uncertain of his or her status. Also, have the client complete an immigration intake form. *See infra* Appendix 2-2, Sample Intake Form. Even if the client is not able or willing to answer all of the questions, any information that you gain will be helpful.

You are also likely to encounter clients without any immigration status who are unlawfully present in the U.S. Some of these clients may be able to gain lawful status in the future. Many avenues for status would be foreclosed, however, by certain types of criminal convictions. Additionally, criminal convictions can have other serious consequences, such as mandatory detention pending removal from the U.S. and enhanced criminal sentences for illegal reentry. Consequently, the immigration consequences of conviction may matter to some of these individuals as well.

The discussion below divides noncitizens into four broad categories of immigration status:

- Lawful permanent resident status
- Refugee and asylee status
- Individuals with temporary lawful status or pending applications for status
- Individuals with no status

This list focuses on the immigration statuses you are most likely to encounter, but it is not exhaustive. The immigration consequences of a criminal conviction for each of these categories are discussed *infra* in Chapter 5, Determining Possible Immigration Consequences Based on Your Client's Immigration Status.

B. Lawful Permanent Resident Status

Definition. A lawful permanent resident (LPR) is a noncitizen who has been lawfully admitted to the United States to live and work permanently (though an individual can lose this status). LPRs may travel in and out of the country. An LPR may apply to be naturalized as a U.S. citizen after meeting certain requirements, including a residency requirement. For most individuals, five years of lawful permanent residence is required. *See* INA § 316(a), 8 U.S.C. § 1427(a). *Regardless of numbers of years in the U.S. or U.S. citizen family relationships*, an LPR can be removed or face other immigration consequences because of a criminal conviction (for further discussion of impact of conviction on LPRs, see *infra* § 5.1, Lawful Permanent Resident).

Documentation of Status. An LPR will generally have one of the following:

- A “green card”, which is the colloquial name for Form I-551. In May of 2017, USCIS began to issue a new version of the card. The new version states “PERMANENT RESIDENT” on the top left of the front of the card. The card is personalized with the bearer’s photo on both sides, name, alien registration number (“A” number), date of birth, and laser-engraved fingerprint, as well as the card expiration date. Green cards now expire every ten years, and a replacement must be sought. An LPR does not lose legal status because the card expires or is misplaced. Conditional permanent residents (usually individuals who received their LPR status through a marriage less than two years old) are issued cards that are coded “CR” and that expire after two years.
- An I-551 stamp indicating “temporary evidence of lawful admission for permanent residence,” and accompanying expiration date in a foreign passport.
- Foreign passport with a machine-readable immigrant visa. The machine-readable immigrant visa demonstrates permanent resident status for one year from the date of admission found in the foreign passport.

Sample images of some of these documents appear at the end of this chapter.

C. Refugee or Asylee Status

Definition. A refugee or a person granted asylum is a noncitizen who has been admitted conditionally to the U.S. due to a threat of persecution in his or her country of nationality. *See generally* INA §§ 207, 208, 8 U.S.C. §§ 1157, 1158. Refugee status is granted to an individual who applied from outside the United States. Upon application, he or she is granted a visa and then is allowed to come to the U.S. as a refugee. Asylum is granted to an individual *after* entry into the U.S. Thus, the person entered the U.S. in some other status or unlawfully, but then applied for and was granted asylum. Both refugees and asylees are allowed to work in the U.S. Refugees can apply to become lawful permanent residents after being present continuously for one year in the U.S., and asylees are eligible one year after being granted asylum. *See* INA §§ 209(a)(1), (b), 8 U.S.C. §§ 1159(a)(1), (b). Both refugees and asylees can be removed or face other immigration consequences because of a criminal conviction. *See infra* § 5.2, Refugee (who has not yet

obtained LPR status), § 5.3, Person Granted Asylum (who has not yet obtained LPR status).

Documentation of Status. Refugees and asylees will generally have one of the following:

- Refugees should have an I-94 Arrival/Departure Record stating that they have been “admitted as a refugee pursuant to section 207 of the INA.”¹ Some refugees may also have a Refugee Travel Document.
- Asylees will generally have a letter or other document from U.S. Citizenship and Immigration Services or the U.S. Department of Justice stating that the person has been granted asylum. They may also have a stamp in their I-94 document.
- Additionally, your client may have an employment authorization document indicating that he or she is in category A-3 (refugee) or A-5 (asylee). (Codes on the front of the card indicate the person's immigration status by referring to the applicable subsection of 8 C.F.R. § 274A.12, the regulation authorizing employment.)

Sample images of some of these documents appear at the end of this chapter.

Practice Note: If your client has merely *applied* for asylum, as opposed to having been *granted* asylum, refer to the discussion *infra* in § 2.2D, Individuals with Temporary Lawful Status or Pending Application for Status. Like a person granted asylum, an asylum applicant may also have an employment authorization document, but his or her card will be coded C-8 rather than A-3 or A-5.

D. Individuals with Temporary Lawful Status or Pending Application for Status

The following discussion addresses people who have temporary lawful status in the U.S. or who have a pending application for status. Temporary status authorizes a person to remain in the U.S. for a discrete period, while having a pending application for status does not give a person any permission to remain in the U.S. either temporarily or permanently. All of these individuals can be removed or face other immigration consequences because of certain criminal convictions.

Nonimmigrant Visa Holders. Nonimmigrant visa holders are admitted to the United States on a time-limited temporary visa for a specific purpose (such as tourism, study, or temporary work). They are restricted to activity consistent with their visas. The visas are issued before entry by a U.S. consulate or embassy. It is possible for an individual to enter the U.S. as a temporary visa holder and eventually obtain another temporary or permanent status.

1. The I-94 document used to be issued to almost all noncitizens on entry to the U.S. In April 2013, paper I-94 documents were no longer issued at airports and seaports; instead, they are maintained and can be accessed through the website of the U.S. Customs and Border Protection.

For example, an individual may come to the United States as a student, change to an employment-related temporary visa after graduation, and eventually obtain lawful permanent resident status based on an employment opportunity or a family relationship if he or she has the appropriate U.S. sponsor.

Documentation of Status

- Evidence of nonimmigrant status is documented on an I-94 document (paper or electronic). The expiration date on an I-94 document supersedes the visa expiration date. For example, an individual may have a tourist visa valid for ten years, but periods of stay in the U.S. are usually granted for no more than six months at a time (as indicated on the I-94 document).

Sample images of some of these documents appear at the end of this chapter

Temporary Protected Status. Temporary Protected Status (TPS) establishes a safe haven for and is conferred on an entire nationality based on dire situations such as civil wars, natural disasters, or other extraordinary conditions in their home country. *See* INA § 244, 8 U.S.C. § 1254a. Nationals of that country will not be forced to return there from the U.S. for a designated period of time, can travel outside the U.S. with special permission, and will receive employment authorization.

To acquire TPS status, the applicant must have been in the United States on or before the date of TPS country designation and must have properly registered within the period provided by the U.S. Attorney General. *See* INA § 244(c), 8 U.S.C. § 1254a(c). TPS is usually granted for only a year or 18 months at a time, but is often renewed several times. Since TPS is a temporary designation, the list of designated countries changes frequently. For information about which countries currently are designated for TPS, go to www.uscis.gov and click on Temporary Protected Status in the “Humanitarian” box. As of August 16, 2017, the countries designated for TPS were El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. However, designation for some of these countries has changed recently and may be discontinued in the near future so it is imperative to review USCIS’s website for the most current information.

Individuals with Pending Applications for Status. This category includes individuals with pending applications for status, such as an asylum petition or an application for adjustment of status to a lawful permanent resident. It is important to note that a pending application does not constitute permission to remain in the U.S. Individuals with a pending application may, however, have a temporary employment authorization document and, as a result, erroneously assume that they have lawful status. While a pending application does not confer status, ICE may have more lenient policies with respect to removing such people.

E. Individuals without Immigration Status

These individuals do not have authorization to be present in the United States. This category includes undocumented people who entered the U.S. without inspection (crossed the border without permission), as well as individuals who entered the U.S. on a valid visa but remained past their authorized period of stay (a “visa overstay”). If your client is here unlawfully, he or she may be removed on that basis alone. The immigration consequences of conviction may still matter to some of these individuals because they may be eligible now or in the future to obtain lawful resident status, asylum, deferred action, or other protection from removal.

Certain convictions, such as an aggravated felony, can also result in enhanced criminal penalties should your client reenter the U.S. unlawfully after being removed. Many people who are removed re-enter the U.S. unlawfully after removal to join family members here. If the re-entrant is caught at the border, or picked up for any reason once inside, it is very likely that he or she will be prosecuted for a federal immigration offense. Illegal re-entry following removal is one of the most commonly prosecuted federal offenses today, comprising roughly 26% of all federal convictions in 2012 and resulting in an average sentence of two years. *See* Pew Hispanic Center, [*The Rise of Federal Immigration Crimes*](#) (Mar. 18, 2014).