

**International Association of Judges
Fourth Study Commission
Response of the United States Delegation to the 2018 Questionnaire**

**Protection Against Violence, Bullying, and Sexual Harassment in
the Workplace**

1. Rights and Obligations

Immigrants or migrants are individuals who leave their country (by choice or by force) and seek residence or citizenship in another country. Refugees are a subset of immigrants who have been forced to leave their country in order to escape war, persecution, or natural disaster.

Specify the following:

- a. The obligations imposed on a migrant (with undocumented status) when applying for access to the territory of your country, whether entering at a border (by air, boat, rail, or road) or being later found to have entered the country illegally.
- b. The rights recognized to a migrant (with undocumented status) seeking refugee status:
 - i. During the period of the regularization procedure following his request to get refugee status;
 - ii. After being accepted as a refugee;
 - iii. After the rejection of his application as a refugee.

A refugee is defined as an individual who “owing to the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable [...] or unwilling to avail himself of the protection of that country.”¹ Asylum seekers are [refugees] seeking sanctuary in a country other than their own and are awaiting a decision about their status.²

Currently, there are more than 65 million people worldwide displaced by conflict and persecution.³ Around 17 million are recognized as refugees and an additional two million are asylum seekers.⁴ The 1948 Universal Declaration of Human Rights provides that “everyone has a right to seek and enjoy in other countries asylum from persecution.”⁵ States are bound by the principle of *non-refoulement* as defined in article 33 of the 1951 Convention relating to the Status of Refugees, which provides that no refugee shall be returned to any country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶

About three million refugees have resettled in the United States since Congress passed the Refugee Act of 1980, which created the Federal Refugee Resettlement Program and is the current national standard for the screening and admission of refugees into the country.⁷

The United States immigration laws are detailed and complex and have been described as more complicated than the tax laws. Asylum seekers must qualify under the definition of “refugee” as provided in the Refugee Convention, ask for asylum at the port of entry, and apply for asylum within one year of arrival in the United States.⁸ A refugee is eligible to apply for asylum regardless of immigration status.⁹ Exceptions to the one-year filing

¹ Convention Relating to the Status of Refugees, art. 1, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

² U.N. High Comm’r for Refugees, *Asylum-Seekers* (2018), <http://www.unhcr.org/en-us/asylum-seekers.html>.

³ Paul Rudnicka and Elizabeth Ferris, *WHEN PEOPLE FLEE: RULE OF LAW AND FORCED MIGRATION* 7, A.B.A. Rule of L. Initiative (2018).

⁴ *Id.*

⁵ G.A. Res. 217(III) A, Universal Declaration of Human Rights art. 14(1) (Dec. 10, 1948).

⁶ *The Michigan Guidelines on Refugee Freedom of Movement*, 39 MICH. J. INT’L L. 7 (2018).

⁷ Refugee Act of 1980 § 101, 8 U.S.C. § 1521 (1980).

⁸ *Questions and Answers: Asylum Eligibility and Applications*, USCIS (Sept. 21, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-and-answers-asylum-eligibility-and-applications>.

⁹ *Id.*

deadline fall into two categories: (1) changed circumstances or (2) extraordinary circumstances.¹⁰ “Changed circumstances” refer to circumstances where conditions in the origin country have changed or there has been a change in personal circumstances within the past year of seeking asylum in the United States.¹¹ “Extraordinary circumstances” refer to circumstances related to mental illness or situations in which the applicant was younger than 18 years of age when they arrived in the United States.¹²

There are two ways of obtaining asylum in the United States: (1) Affirmative Asylum Processing and (2) Defensive Asylum Processing.¹³

To obtain asylum through the affirmative asylum process, the refugee must file for asylum using Form I-589, the application for Asylum and for Withholding of Removal.¹⁴ The form accomplishes two things: (1) it asks the government not to deport the refugee, and (2) starts the process of obtaining a Green Card.¹⁵ A Green Card, or a permanent resident card, gives the holder the legal right to live and work in the United States.¹⁶ Refugees provide fingerprints and undergo a background check.¹⁷ Refugees are also subject to an interview by either an asylum officer or an immigration judge within 60 days after the application has been filed.¹⁸ The refugee is granted an interview if he has been determined not to be in removal or deportation proceedings.¹⁹ Eligibility for asylum is determined following a comprehensive review of the application form, interview, and the results of the background check.

If the refugee is granted asylum, the refugee is authorized to work in the United States through the Employment Authorization Document (EAD).²⁰ The EAD grants refugees access to job search assistance, career counseling,

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *The Affirmative Asylum Process*, USCIS (Jan. 26, 2018), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>.

¹⁵ *Id.*

¹⁶ *Green Card*, USCIS (Feb, 22, 2018), <https://www.uscis.gov/greencard>.

¹⁷ *The Affirmative Asylum Process*, *supra*.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Obtaining an Employment Authorization Document*, IMMIGRATION EQUALITY (2015), https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/obtaining-an-employment-authorization-document/#.Wx6qg-mG_cs.

and occupational skills training.²¹ Refugees also become eligible for social security benefits, derivative asylum status for family members, a Green Card, financial assistance, medical assistance, and English language training.²² When traveling outside the United States, however, refugees must receive prior permission by obtaining a refugee travel document.²³

If the application is rejected, refugees must respond to the Notice of Intent to Deny (NOID), explaining why they should be granted asylum based on the existing application.²⁴ If the refugee's request is denied, the decision cannot be appealed.²⁵ The refugee will be put either in removal proceedings or will be allowed to remain in the United States until his visa expires.²⁶

A defensive application for asylum occurs when the refugee requests asylum as a defense against removal from the United States.²⁷ The defensive application for asylum occurs in one of two ways: (1) the refugee was ineligible for asylum under the affirmative asylum process, or (2) the refugee was apprehended at the United States port of entry without proper legal documents or in violation of his immigration status.²⁸ Eligibility for asylum is determined by an Immigration Judge after a hearing in which the refugee can appear, with or without counsel.²⁹ The government does not pay for counsel for asylum seekers.³⁰ If deemed eligible, the refugee is granted asylum in the United States.³¹ If denied eligibility, then the refugee may file a Notice of Appeal with the Board of Immigration Appeals (BIA) within 30 days of the decision.³² If the appeal with the BIA is denied, then the judge will order the refugee removed from the United States.³³ The immigration judge's decision can be appealed by either party to the Board of Immigration Appeals and then may further be appealed to a federal circuit court.³⁴

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *What To Do If Your Asylum Application is Denied*, AVVO (May 29, 2015), <https://www.avvo.com/legal-guides/ugc/what-to-do-if-your-asylum-application-is-denied>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Obtaining Asylum in the United States*, USCIS (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-asylum/obtaining-asylum-united-states>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Questions and Answers: Appeals and Motions*, USCIS (Mar. 8, 2018), <https://www.uscis.gov/forms/questions-and-answers-appeals-and-motions>.

³³ *Obtaining Asylum in the United States*, *supra*.

³⁴ *Id.*

2. Risk of Modern Slavery

In summary, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons defines human trafficking as the recruitment, transportation, transfer, harbouring or receipt by threat, force or other forms of coercion, fraud, deception, or abuse of power for purpose of exploitation.

The question we are focusing on is not the lucrative business of charging money to a migrant to cross a border, often called alien smuggling. It is about “trafficking human beings,” which consists of the exploitation of a person for profit. In some cases, the human trafficker does extort money for border transit as well.

Trafficking essentially involves the exploitation of people in conditions contrary to human dignity. These people can be legally resident in the host country or be in an undocumented situation, while having to provide for their daily subsistence (food, housing, medical aid, etc...).

Exploitation of the precarious situation in which these migrants find themselves is a form of modern slavery.

It can be of a sexual nature (prostitution for example) but also of an economic nature (exploitation of a person as a worker).

This can be the case, for example, for people working in the construction sector, catering (hotel-restaurant-café), transport, seasonal work, industrial butcher shops, childcare, cleaning companies and domestic cleaning.

This exploitation may also be of a financial nature with regard to the “sleep merchants (merchand de sommeil)” who abuse a person in a vulnerable position (because of his illegal or precarious administrative situation or his precarious social situation).

The intention of these “sleep merchants” is to make an abnormal profit at the expense of these people in a precarious situation by selling, renting or providing them a house, a dwelling, a caravan or a single room in conditions incompatible with human dignity, these people having no other real and acceptable choice than to submit to this abuse.

Human Trafficking Generally

Human trafficking consists of the “recruitment, transportation, transfer, harbouring or receipt of persons by means of [...] coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.”³⁵

Exploitation includes the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.³⁶

Between 14,500-17,500 people are trafficked into the United States each year, with an estimated 57,700 people currently living under conditions of modern slavery in the United States.³⁷ According to the National Human Trafficking Hotline, human trafficking in the United States rose 35.7 percent in 2016.³⁸ Data from the National Center for Missing and Exploited Children documented that 1 in 5 of 11,800 runaways in 2015 were likely sex trafficking victims.³⁹ Data collected in 2012 reveals that 78 percent were victims of labor trafficking, 12 percent were victims of sex trafficking, and 59 percent of the child victims were female.⁴⁰ Among the 7,572 cases reported that year, California was the leading state, harboring three of the FBI’s thirteen highest child sex trafficking areas in the nation: (1) Los Angeles, (2) San Francisco, and (3) San Diego.⁴¹

Following is an overview of key federal laws against trafficking and exploitation, which fall into four broad categories: (1) child pornography, (2) travel, (3) human trafficking, and (4) labor trafficking.⁴² There are multiple other related statutes.

³⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3, ¶ (a), Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

³⁶ *Id.*

³⁷ *The Global Slavery Index 2016*, GLOBAL SLAVERY INDEX (2016)
<https://www.globalslaveryindex.org/country/united-states/>.

³⁸ Allen Cone, *Report: Human Trafficking in the U.S. Rose 35.7 Percent in One Year*, UPI (Feb. 5, 2017),
<https://www.upi.com/Report-Human-trafficking-in-US-rose-357-percent-in-one-year/5571486328579/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *11 Facts About Human Trafficking*, DO SOMETHING (2018), <https://www.dosomething.org/us/facts/11-facts-about-human-trafficking>.

⁴² Virginia M. Kendall & T. Markus Funk, *CHILD EXPLOITATION AND TRAFFICKING: EXAMINING GLOBAL ENFORCEMENT AND SUPPLY CHAIN CHALLENGES AND U.S. RESPONSES* 81 (2d ed. 2017).

Child Pornography

Child pornography statutes prohibit the possession, distribution, and manufacturing of child pornography.⁴³

- 18 U.S.C. § 2256 defines child pornography as any visual depiction that includes computer-generated images of sexually explicit conduct where “(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct, (B) such visual depiction is a digital image, computer image, or computer-generated image that is [...] that of a minor engaging in sexually explicit conduct, or (C) such visual depiction has been created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”⁴⁴
- 18 U.S.C. § 2251, entitled “Sexual Exploitation of Children,” penalizes those who are directly involved in the production and distribution of visual depictions of minors engaged in sexually explicit conduct, and also prohibits the distribution and dissemination of child pornography.⁴⁵
- 18 U.S.C. § 2252, entitled “Certain Activities Relating to Material Involving the Sexual Exploitation of Minors,” prohibits the knowing interstate transportation, shipping, receipt, distribution, sale, or reproduction of visual depictions of minors engaged in sexually explicit conduct.⁴⁶

⁴³ *Id.*

⁴⁴ 18 U.S.C. § 2256.

⁴⁵ 18 U.S.C. § 2251.

⁴⁶ 18 U.S.C. § 2252.

Travel

Travel statutes prohibit the coercion, travel, and transportation in interstate commerce for the purpose of sexual activity or for obtaining a financial reward.⁴⁷

- 18 U.S.C. § 2422, entitled “Coercion and Enticement,” criminalizes efforts to persuade or lure individuals to travel in interstate or foreign commerce to engage in prostitution or illegal sexual activity.⁴⁸ A subsection of the statute targets sexual predators that use the Internet or other devices of communication to persuade minors to engage in illegal sexual activity.⁴⁹
- 18 U.S.C. § 2423, entitled “Transportation of Minors,” proscribes travel in interstate commerce to engage in illicit sexual conduct.⁵⁰

Human Trafficking

Human trafficking statutes prohibit the slavery and transportation of individuals for purposes of slavery or sexual activity.⁵¹

- 18 U.S.C. § 1583, entitled “Enticement into Slavery,” criminalizes offenders who kidnap, entice, or obstruct an individual into slavery.⁵²
- 18 U.S.C. § 1591, entitled “Sex Trafficking of Children [] by Force, Fraud, or Coercion,” concerns forced prostitution and expands criminal liability to *everyone* in the trafficking ring.⁵³
- 18 U.S.C. § 1594, entitled “General Provisions,” requires forfeiture of any property used in the trafficking operations or proceeds that the trafficker received from his crimes.⁵⁴

⁴⁷ KENDALL & FUNK, *supra*, at 81.

⁴⁸ 18 U.S.C. § 2422.

⁴⁹ 18 U.S.C. § 2422(b).

⁵⁰ 18 U.S.C. § 2423.

⁵¹ KENDALL & FUNK, *supra*, at 81.

⁵² 18 U.S.C. § 1583.

⁵³ 18 U.S.C. § 1591.

⁵⁴ 18 U.S.C. § 1594.

Labor Trafficking

Labor trafficking statutes criminalize the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purposes of subjection to peonage or involuntary servitude.⁵⁵

- 18 U.S.C. § 1581, entitled “Peonage; Obstructing Enforcement,” makes it unlawful to hold a person in debt servitude or peonage.⁵⁶
- 18 U.S.C. § 1584, entitled “Sale into Involuntary Servitude,” makes it unlawful to hold a person in a condition of slavery, compulsory service, or labor against his will.⁵⁷
- 18 U.S.C. § 1589, entitled “Forced Labor,” makes it unlawful to forcefully provide or obtain the labor or services of a person.⁵⁸

⁵⁵ 22 U.S.C. § 7102.

⁵⁶ 18 U.S.C. § 1581.

⁵⁷ 18 U.S.C. § 1584.

⁵⁸ 18 U.S.C. § 1589.