



Assisting Afghan Evacuees

Sept. 15, 2022

I. Introduction

More than 70,000 Afghans have been evacuated and are residing in the United States since the takeover of their country by the Taliban. The majority were paroled into the United States. Refugee resettlement agencies and other community organizations are helping them secure access to housing, employment, food, cash and medical assistance programs. Other nonprofit agencies are providing immigration-related assistance, such as filing for humanitarian parole, Special Immigrant Visa (SIV) status, asylum, family-based visas, Temporary Protected Status (TPS), and employment authorization. This practice advisory provides an overview of the various immigration benefits these Afghans might qualify for and the process for obtaining them.¹

II. Explanation of the Immigration Status Evacuees Hold

The following are the three most common immigration statuses that Afghans who recently entered the United States hold:

- SIV status;
- Special immigrant parole (SQ/SI); and
- Paroled into the United States for humanitarian reasons between July 31, 2021, and Sept. 30, 2022.

A small percentage of Afghan evacuees were granted SIV status abroad and entered the United States with immigrant visas issued by the U.S. embassy in Kabul. They entered as lawful permanent residents (LPRs). They are likely to have both an immigrant visa and an I-551 stamp in their passports indicating temporary evidence of LPR status, which also shows the date of admission as an LPR. They have completed all processing and most have received their “green cards,” Form I-551, Permanent Resident Card, in the mail.

¹ In March 2022, the Secretary of Homeland Security announced the designation of Afghanistan for TPS. For more information on Afghans and TPS, see CLINIC’s FAQ, available at <https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure-5>.

Others filed and have received an approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. They can now file for adjustment of status. They entered the United States with an I-94, Arrival/Departure Record, bearing a stamp indicating that that they received SQ/SI Parole.

Most Afghan evacuees have entered the United States with a grant of two-year parole status. The term for these parolees is “Afghan evacuees,” which means their evacuation from Afghanistan to the United States, or to a location overseas controlled by the United States, was facilitated by the United States as part of Operation Allies Welcome. Some parolees bear stamps reading “OAW,” which stands for Operation Allies Welcome, or “OAR,” which stands for Operation Allies Refuge. In the alternative, they might bear a stamp indicating “DT,” which stands for parole granted at a port of entry.

III. Eligibility for Employment Authorization for Afghan Arrivals

Those Afghans who recently arrived on SQ/SI parole or humanitarian parole are eligible for an employment authorization document (EAD), as the regulations provide for the issuance of an EAD for individuals granted parole pursuant to Immigration and Nationality Act (INA) § 212(d)(5).² Parolees must be in possession of a valid EAD in order to work lawfully in the United States. An EAD is valid for the length of the parole period, which for most Afghans is two years.

Most Afghan arrivals filed for employment authorization during their stay on the military bases, also known as safe havens. Some Afghans have had their applications adjudicated during their stay and will be in possession of the EAD upon departure from the bases. Others received their EADs after departing the military bases. The EADs for many Afghans were mailed to the International Organization for Migration (IOM) and then distributed to the local resettlement agencies assisting the Afghan arrivals. All Afghan citizens must maintain their most up-to-date address with USCIS.³

Afghan arrivals who did not complete their employment authorization applications at a safe haven may file the applications directly with USCIS without the need to include a filing fee or a fee waiver request.

² The regulations at 8 CFR § 274a.12(c)(11)) provide for the issuance of an EAD for individuals granted INA § 212(d)(5) parole.

³ Address changes can be filed online with USCIS at uscis.gov/addresschange. It is important to include the receipt number for any pending applications so that the address information is also updated for these pending applications. USCIS also provides an email address for Afghan evacuees with questions about address changes, which is nbc阿富汗coa@uscis.dhs.gov.

In order for an Afghan arrival to file an application for employment authorization based on a grant of parole, the applicant must submit the following documentation:

- Form I-765, Application for Employment Authorization. The relevant employment authorization category in Part 2, Item 27 is (c)(11);
- Copy of Form I-94, passport, or other travel document showing a grant of section 212(d)(5) parole;
- Copy of government-issued ID (such as a passport), visa, national ID, or birth certificate plus photo ID; and
- Two passport-style color photographs.⁴

Afghan nationals will receive priority scheduling at Application Support Centers in order to capture their biometrics, as well as streamlined processing of their EADs.⁵

IV. Application for Adjustment of Status Based on Special Immigrant Visa (SIV)

Many Afghan evacuees are eligible to obtain permanent residency through the SIV process. The more expansive SIV program is found under Section 602(b) of the Afghan Allies Protection Act of 2009, as amended, which authorizes the issuance of SIVs to Afghan nationals who meet certain requirements and who were employed in Afghanistan:

- By or on behalf of the U.S. government in Afghanistan, or
- By the International Security Assistance Force (ISAF), or a successor mission, in a capacity that required the applicant to serve as an interpreter or translator for U.S. military personnel while traveling off-base with U.S. military personnel stationed at ISAF or to perform activities for the U.S. military personnel stationed at ISAF.⁶

The relevant term of service to qualify for an SIV under this program is one year.

⁴ The mailing address for these applications is: USCIS Western Forms Center, Attn: OAW I-765, 10 Application Way, Montclair, CA 91763-1350.

⁵ DHS Announces Fee Exemptions, Streamlined Processing for Afghan Nationals as They Resettle in the U.S., dhs.gov/news/2021/11/08/dhs-announces-fee-exemptions-streamlined-processing-afghan-nationals-they-resettle.

⁶ Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government, travel.state.gov/content/travel/en/us-visas/immigrate/special-immig-visa-afghans-employed-us-gov.html.

Seeking permanent residency through this program has traditionally been a three-step process. First, the applicant must seek Chief of Mission (COM) approval. Second, the applicant must file a Form I-360. Finally, upon approval of that petition, the applicant must file a Form I-485, Application to Register Permanent Residence or Adjust Status. Spouses and minor children are also eligible to file for adjustment of status.

A separate program exists under Section 1059 of the National Defense Authorization Act for Fiscal Year 2006 specifically for those who worked with the U.S. Armed Forces or under COM authority as a translator or interpreter in Afghanistan. This program offers visas for up to 50 persons a year and remains active. It requires a favorable written recommendation from a General or Flag Officer in the chain of command of the U.S. Armed Forces unit that was supported by the applicant, or from the COM from the embassy where the individual worked.⁷ Upon receipt of this favorable written recommendation letter, the applicant may file Form I-360 and, upon approval, file an application for adjustment of status.

In a significant change announced in July 2022, USCIS is transitioning responsibility for adjudication of the I-360 petition to the Department of State (DOS).⁸ Under the new procedure, Afghan SIV applicants must file a signed Form DS-157, Petition for Special Immigrant Classification for Afghan SIV Applicants, with the DOS when applying for COM approval. After the applicant has received COM approval, the Afghan national may move directly to filing for adjustment of status. However, certain applicants must continue to file Form I-360, including those with COM approval dated prior to July 20, 2022, those with pending COM applications who did not submit the DS-157 as part of the COM application, and those who submitted an unsigned DS-157.

Practitioners may encounter Afghans at various stages of the SIV process. Some may be eligible for but have not yet begun the process of seeking COM approval, while others may have completed the first two steps while still in Afghanistan and need only file the Form I-485.

1. Seeking Chief of Mission Approval

⁷ Special Immigrant Visas (SIVs) for Iraqi and Afghan Translators/Interpreters, travel.state.gov/content/travel/en/us-visas/immigrate/siv-iraqi-afghan-translators-interpreters.html

⁸ Policy Alert, USCIS, Legislative Changes and Transition Affecting Afghan and Iraqi Special Immigrant Visas (July 20, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220720-AfghanAndIraqiSIVs.pdf>.

Applicants who can show the relevant period of service can start the process now of seeking COM approval. This process can be completed entirely in the United States. Detailed guidelines outlining the documents required are available through DOS.⁹ Applicants must submit the following documentation as part of their request for COM approval:

- Human Resources Letter verifying employment for at least one year by or on behalf of the U.S. government or the International Security Assistance Force or successor mission in Afghanistan between Oct. 7, 2001 and Dec. 31, 2023;
- Letter of recommendation from a direct, senior supervisor;
- Copy of employment contract if employed by U.S. government;
- Signed Form DS-157, Petition for Special Immigrant Classification for Afghan SIV Applicants;
- Evidence of Afghan nationality (copy of *tazkera* or Afghan passport); and
- Copy of employee badge, if available.

The complete package is submitted over email to AfghanSIVapplication@state.gov. Practitioners report that it is taking many months for the NVC to review submissions and assign case numbers. Submission of the SIV packet should result in an automatic reply indicating that the submission has been received.

Applicants must seek COM approval no later than Dec. 31, 2023.¹⁰ If a request for COM approval is denied, the applicant has 120 days to file an appeal, or the applicant can re-file the application in the future.

2. Filing I-360 Special Immigrant Petition

⁹https://travel.state.gov/content/dam/visas/SIVs/Afghan%20SIV%20Guidelines%20and%20DS157%20Instructions_July_22.pdf

https://travel.state.gov/content/dam/visas/SIVs/Afghan_SIV_Guidelines_and_DS157_Instructions_Oct_2021_1.pdf. In addition, the International Refugee Assistance Project has excellent resources on its website, which are available at refugeerights.org/news-resources/legal-resources-for-afghans. These resources include practical tips for applicants to obtain the human resources letter and supervisor letter, which can often be stumbling blocks for potential SIV applicants.

¹⁰ The State Department notes that at a minimum a name, date of birth, evidence of Afghan nationality, and an email address must be submitted by that date. Applicants who meet that deadline may provide additional supporting documentation at a later date. "Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government," travel.state.gov/content/travel/en/us-visas/immigrate/special-immig-visa-afghans-employed-us-gov.html.

Upon receipt of COM approval, SIV applicants are eligible to file their I-360 petition. This petition must contain the following documents:

- Copy of passport or *tazkera* showing Afghan nationality;
- Copy of the letter of recommendation that was included in the COM approval application;
- Copy of COM approval; and
- If physically present in the United States, a copy of Form I-94.

The I-360 petition can be filed electronically or through the mail.¹¹ If filed electronically, the applicant should include a personal email in order to receive the electronic Form I-797 receipt notice. USCIS will typically issue what is known as a “conditional approval.” That conditional approval is sufficient to move on to the final stage, filing for adjustment of status.

Applicants who receive COM approvals dated on or after July 20, 2022 who already submitted a signed DS-157 as part of the SIV process **do not** need to file Form I-360. Rather, upon receipt of COM approval, they may simply file Form I-485.

3. Filing Form I-485

Upon conditional approval of the I-360 petition, the applicant and any derivative family members (spouse or children under 21) may file their I-485 applications.¹² SIV-based I-485 applications do not require a filing fee or fee waiver request.¹³ SIV applicants should write “OAW” on their I-485 applications, which stands for “Operation Allies Welcome.”

Applicants should submit the following documents in connection with their I-485 applications:

¹¹ The email address for filing the I-360 petition is NSCI360SIVAPP@uscis.dhs.gov. The regular mail or overnight delivery address is : Regular Mail: USCIS/ Nebraska Service Center (NSC), P.O. Box 87485, Lincoln, NE 68501-7485. Overnight deliveries: USCIS/ Nebraska Service Center (NSC), 850 “S” Street, Lincoln, NE 68508.

¹² The Child Status Protection Act applies to Afghan SIV applicants, so even children whose biological age is over 21 may be able to continue with the adjustment process. For more information, see CLINIC’s article on Age Out Rules for Afghan Derivative Children, <https://cliniclegal.org/resources/humanitarian-relief/age-out-rules-afghan-siv-derivative-children>.

¹³ DHS Announces Fee Exemptions, Streamlined Processing for Afghan Nationals as they Resettle in the U.S., dhs.gov/news/2021/11/08/dhs-announces-fee-exemptions-streamlined-processing-afghan-nationals-they-resettle.

- Copy of Form I-797, Notice of Action, approval notice for the principal applicant's special immigrant petition;
- Two passport-style photographs;
- Copy of a government-issued identity document with photograph;
- Copy of birth certificate with certified translation, or Afghan tazkera if no birth certificate is available;
- Copy of passport page with admission or parole stamp (if applicable);
- Copy of I-94;
- Form I-693, Report of Medical Examination and Vaccination Record, if not already completed on base or overseas. Applicants who have already completed medical exams may consider noting as much in the cover letter to the application¹⁴;
- Certified police and court records of criminal charges, arrests, or convictions (if applicable); and
- Form I-601, Application for Waiver of Grounds of Inadmissibility, if applicable. Note that an I-601 application filed in conjunction with an I-485 based on an approved SIV petition does not require a filing fee or fee waiver.¹⁵

In addition, a spouse or child who is filing as a derivative applicant should submit the following:

- Copy of documentation showing relationship to the principal applicant, such as a marriage certificate or adoption decree; and

¹⁴ USCIS has confirmed that it will allow certain Afghan nationals who arrived in the United States under Operation Allies Welcome (OAW) to use a report of a medical examination completed by panel physician outside the United States when they apply to adjust their status, if certain criteria are met. USCIS Policy Manual, <https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-3>. In addition, SIV applicants who were on safe havens may have completed the medical there. If the validity period of the I-693 has not expired, they may submit it with their Form I-485. On December 9, 2021, USCIS temporarily waived the "60-Day Rule" for immigration medical examinations and vaccination records that allows applicants to submit their completed Form I-693 where the civil surgeon signed the form more than 60 days prior to the submission with their adjustment of status application. The USCIS alert is available at <https://www.uscis.gov/newsroom/alerts/uscis-temporarily-waiving-60-day-rule-for-civil-surgeon-signatures>. CLINIC has heard reports that USCIS officers are requiring medical results in a sealed envelope even for those who completed the examination on base. Therefore, clients should be advised that they may need to redo the medical examination.

¹⁵ *Id.*

- Copy of the Form I-797 approval or receipt notice for the principal applicant's Form I-485 or a copy of the principal applicant's permanent resident card (Form I-551), if applicable and not filing together with the principal applicant.

Practitioners may encounter spouse or children applying for adjustment of status as derivatives of a principal applicant who has already obtained LPR status. In order to apply as a derivative of an applicant who has already obtained LPR status, the derivative relationship must have existed at the time the principal obtained LPR status and must continue to exist until the derivative's application is adjudicated. If a derivative is following-to-join a principal applicant and the relationship existed at the time the principal obtained LPR status, there is no need for the principal to file a separate Form I-130, Petition for Alien Relative.

Some Afghan evacuees may have already completed their I-485 applications on the military base. If these were completed on the base, they should have received a receipt notice confirming submission of the application. These individuals simply need to wait for adjudication of their applications. Applicants must be sure to maintain their updated address with USCIS.

V. Family-Based Adjustment

Obtaining permanent residency through a family-based petition may be another option. If the Afghan evacuee was already in the process of applying for an immigrant visa abroad and is now in the United States, he or she may be eligible for adjustment of status. Eligibility to adjust status in a family-based category depends in part on whether the client is classified as an immediate relative (spouse, unmarried child, or parent of a U.S. citizen) or is in one of the preference categories. The preference categories include the spouse and unmarried child/son/daughter of an LPR. They also include the married or unmarried son/daughter and the sibling of a U.S. citizen.

Immediate relatives need only have been inspected and admitted or paroled. Preference category applicants need to have always maintained lawful immigration status (including their parole status) since their entry to the United States before applying for adjustment. Maintaining lawful immigration status requires the applicant not to have overstayed the authorized period indicated on the Form I-94 issued upon entry. The applicant must also not have worked without permission or otherwise violated the terms of admission. All applicants for adjustment must be admissible or have obtained a waiver of inadmissibility.

A client who now resides in the United States and satisfies the eligibility requirements for adjustment of status, but who has a pending immigrant visa application with the National Visa Center (NVC), does not need to seek permission before filing for adjustment. The USCIS will contact the NVC directly and request transfer of the file. To prevent the NVC from terminating the approved petition based on failure to respond to notices, the client should inform the NVC of his or her intention to apply for adjustment of status. This can be done by contacting the NVC via its website.¹⁶ It is recommended that practitioners keep in touch with the NVC on at least an annual basis to avoid receiving termination notices.

The same principle applies if the application for an immigrant visa was pending with the NVC and has now been transferred to the consulate. If the client is now residing in the United States and is eligible to adjust status, simply file the necessary forms with USCIS and inform the U.S. consulate.

The adjustment of status application packet includes the following:

- Form I-485;
- Form I-864, Affidavit of Support under Section 213A of the INA (unless exempt);
- Form I-693, Report of Medical Examination and Vaccination Record, if not already completed on base or overseas;
- I-130 approval notice; and
- Proof of admission or parole.

Most applicants also file Form I-765 and Form I-131, Application for Travel Document. Applicants will need to provide copies of identity documents, such as their government-issued ID and a birth certificate. Practitioners can access a checklist of required supporting documents on the USCIS website at uscis.gov/i-485Checklist.

If the Afghan has already paid the immigrant visa fee to the Department of State, he or she will still need to pay the I-485 fee to USCIS. There is no exemption to paying the I-485 application fee in that case, nor is a fee waiver available to those applying for adjustment of status based on an approved Form I-130, unlike for Afghans applying based on an approved I-360.

¹⁶ The Ask NVC inquiry form is available at travel.state.gov/content/travel/en/us-visas/visa-information-resources/ask-nvc.html.

Clients who have already submitted the Form I-864 and supporting financial documents to the DOS must resubmit them to USCIS. Clients who have already completed the medical exam as part of consular processing should not need to complete it again, as long it was completed within the past four years.¹⁷

VI. Asylum

Many Afghan evacuees will be eligible to apply for asylum in the United States based on their fear of persecution should they return to Afghanistan. While the Taliban's atrocities are well known, it is still crucial that advocates document their client's specific fears of return, including any harm that they have already suffered in Afghanistan. Advocates will also want to include country conditions materials outlining the dire situation in Afghanistan. Commonly encountered claims might involve individuals who have previously worked with the U.S. government or military, family members of those individuals, ethnic and religious minorities, and women/girls.

Applicants for asylum must demonstrate that they meet the definition of a "refugee" as defined in the statute. Thus, the applicant must demonstrate the following:

- Suffered past persecution or have a well-founded fear of persecution;
- The persecution is on account of a protected ground, which includes race, religion, nationality, membership in a particular social group, or political opinion;
- The persecution is by the government or a private actor that the government is unwilling or unable to control; and
- The applicant is not subject to any of the mandatory bars to asylum.¹⁸

1. Past Persecution or a Well-Founded Fear

Advocates applying for a grant of asylum will generally want to make all possible arguments to show that a client has suffered past persecution. If past persecution is established, a regulatory presumption arises that the applicant has a well-founded fear of future persecution on the basis of the original claim.¹⁹ DHS may rebut this presumption if it establishes by a preponderance of the evidence that the applicant's fear is no longer well-founded due to a fundamental change in circumstances or because the applicant could avoid

¹⁷ USCIS Policy Manual, <https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-3>.

¹⁸ INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 CFR §§ 208.13, 240.8(d).

¹⁹ 8 CFR § 208.13(b)(1).

future persecution by relocating to another part of the country and that it would be reasonable to expect the applicant to do so.²⁰

“Persecution” is not defined by statute, but it has generally been interpreted to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.²¹ When evaluating whether persecution has occurred, all events must be considered cumulatively.²²

Many Afghan clients will be able to demonstrate past persecution on account of a protected ground. For example, most Afghan woman who lived in Afghanistan during prior Taliban rule in the 1990s have already suffered past persecution on account of their gender, as the Taliban during that time period forbade women to work, denied them access to health care and education, and forced them to wear burqas. Women were beaten, raped, or even killed for perceived violations of this strict code.²³ When considered cumulatively, this mistreatment likely rises to the level of persecution because it involved economic deprivation, denial of fundamental rights, mental suffering and, in some cases, physical violence based on gender.²⁴ Minority ethnic groups, such as the Hazara, suffered severe oppression under Taliban rule, and individual members of those groups may be able to establish past persecution based on prior abuses by the Taliban.²⁵

Even after the fall of the Taliban in 2001, many Afghans continued to suffer persecution. For example, many Afghans who worked for the U.S. government or military suffered threats by extremists as a result of their work. In many federal judicial circuits, death threats on their own can constitute past persecution.²⁶

²⁰ 8 CFR § 208.13(b)(1)(i)-(ii).

²¹ *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) (noting that persecution may include mental suffering or even severe economic deprivation).

²² *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

²³ Report on the Taliban's War Against Women, Released by the Bureau of Democracy, Human Rights and Labor, Department of State, Nov. 17, 2001, 2001-2009.state.gov/g/drl/rls/6185.htm (describing conditions for women in Afghanistan under the Taliban during prior period of rule).

²⁴ *Acosta*, 19 I&N Dec. at 222; *O-Z- & I-Z-*, 22 I&N Dec at 25-26.

²⁵ *Afghanistan: Taliban unlawfully killed 13 ethnic Hazara people, Amnesty says*, BBC News, Oct. 5, 2021, [bbc.com/news/world-asia-58807734](https://www.bbc.com/news/world-asia-58807734) (describing long history of discrimination and persecution faced by the Hazara community in Afghanistan).

²⁶ *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (noting that nonverbal threats can be persecution); *Doe v. Att'y Gen. of the U.S.*, 956 F.3d 135 (3d Cir. 2020) (finding that imminent threats were sufficient to constitute persecution); *Herrera-Reyes v. Att'y Gen. of the U.S.*, 952 F.3d 101 (3d Cir. 2020) (concrete and menacing threats alone constitute persecution); *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (noting that persecution involves the infliction of threats of

In the event that an applicant cannot establish past persecution on account of a protected ground, he or she may still be granted asylum by establishing a well-founded fear of future persecution.²⁷ To establish a well-founded fear of future persecution, the applicant must establish both a subjective fear of persecution and that the fear is objectively reasonable. An applicant may show either that he or she would be “singled out individually” for persecution in the country of removal or that “there is a pattern or practice...of persecution of a group of persons similarly situated to the applicant.”²⁸ Despite its availability under the regulations, the Board of Immigration Appeals (BIA) has proven reluctant to endorse “pattern or practice” cases; therefore, advocates will want to look for evidence that the applicant will be individually singled out for persecution in the home country.²⁹ Evidence concerning treatment of the applicant’s family or similarly situated individuals who remain in Afghanistan may be probative of a threat against the applicant.³⁰ For example, threats made against Afghan arrivals since they have been in the United States that are communicated electronically or to family members remaining in Afghanistan, any efforts by the Taliban to search for them, or any harm that their families who remain in Afghanistan have suffered will be probative evidence to support a claim of a well-founded fear of persecution, even in the absence of past persecution.

2. Nexus to a Protected Ground

An applicant for asylum must also demonstrate that the persecution he or she fears would be “on account of” his or her race, nationality, religion, membership

death); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (finding that threats of death constitute persecution); *Tairou v. Whitaker*, 909 F.3d 702 (4th Cir. 2018) (finding that multiple, explicit threats of death constitute persecution); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (credible death threats received by gang constitute past persecution); *Arita-Deras v. Wilkinson*, 990 F.3d 350 (4th Cir. 2021) (death threats constitute persecution even in the absence of physical harm); *Bedoya v. Barr*, 981 F.3d 240 (4th Cir. 2020) (a threat of death constitutes persecution); *Diaz de Gomez v. Wilkinson*, 987 F.3d 359 (4th Cir. 2021) (applicant who received death threats was subject to past persecution); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 245 (4th Cir. 2017) (finding that threat of death is persecution); *Kantoni v. Gonzales*, 461 F.3d 894 (7th Cir. 2006) (finding that a credible threat is persecution); *Canales-Vargas v. Gonzales*, 441 F.3d 739 (9th Cir. 2006) (anonymous death threats sufficient to find past persecution).

²⁷ 8 CFR § 208.13(b)(2).

²⁸ 8 CFR § 208.13(b)(2)(iii).

²⁹ The BIA has explained that in order to state a “pattern or practice” claim, an applicant must demonstrate that the persecution against the group in which he or she is included is “systematic and pervasive.” *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005) (finding no pattern or practice of persecution of Chinese Christians in Indonesia).

³⁰ *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990).

in a particular social group, or political opinion.”³¹ The applicant must demonstrate that a protected ground was or will be “at least one central reason for persecuting the applicant.”³² Afghan evacuees may be able to make claims for asylum based on one or multiple protected grounds. For example, Afghans who have worked with the U.S. government will likely be able to make out a claim for protection based both on political opinion and membership in a particular social group.

- **Race or nationality**

As discussed above, the Taliban have a history of persecuting the Hazara, an ethnic minority in Afghanistan. In addition, the Hazara have suffered recent targeted attacks by the Islamic State, leading to fears that they will be persecuted not only by the Taliban but by other extremist groups.³³ Other ethnic minorities in Afghanistan may be similarly at risk.³⁴

- **Religion**

To make a claim for protection based on religion, the applicant must establish that he or she identifies with a particular religion or that others perceive the applicant as an adherent to that religion, but the applicant need not demonstrate detailed knowledge of the religion’s doctrinal tenets.³⁵

The Taliban follow a strict version of Sunni Islam. Therefore, those who hold more liberal beliefs or who are opposed to this strict interpretation of Islam may be able to make out a claim of persecution based on religion.³⁶ Shi’a Muslims in Afghanistan may also be able to establish eligibility for asylum. For example, the

³¹ INA § 208(b)(1)(B)(i); see also *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).

³² *Id.*

³³ *The New York Times*, ISIS Bomber Kills Dozens at Shiite Mosque in Northern Afghanistan, Oct. 8, 2021, [nytimes.com/2021/10/08/world/asia/afghanistan-mosque-attack.html](https://www.nytimes.com/2021/10/08/world/asia/afghanistan-mosque-attack.html).

³⁴ Rhea Mogul, NBC News, Afghanistan’s Religious Minorities Live in Fear of Taliban, brace for persecution, Aug. 29, 2021, [nbcnews.com/news/world/afghanistan-s-religious-minorities-live-fear-taliban-brace-persecution-n1277249](https://www.nbcnews.com/news/world/afghanistan-s-religious-minorities-live-fear-taliban-brace-persecution-n1277249) (describing persecution of religious and ethnic minorities in Afghanistan).

³⁵ *Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006).

³⁶ *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (woman with liberal Muslim beliefs established past persecution on account of her religious beliefs, which differ from her father’s orthodox Muslim views concerning the proper role of women in Moroccan society).

majority of ethnic Hazara are Shi'a Muslims and have faced attacks by both the Taliban and ISIS based on their religious beliefs and practices.³⁷

Non-Muslim religious minority groups in Afghanistan are quite small. However, religious minorities who may have been evacuated from Afghanistan, including Christians, Sikhs, and Hindus, may also be able to establish a claim for asylum based on their religion.³⁸

- **Political opinion**

To establish a claim for asylum on account of political opinion, the applicant must allege specific facts from which it can be inferred that this individual holds a political opinion that is known to the persecutor and that the persecution was or will be on account of that political opinion.³⁹ An imputed political opinion can also constitute a ground of persecution, whether correctly or incorrectly attributed.⁴⁰

Several circuit courts have taken a relatively broad view of what constitutes a political opinion and have found, for example, that opposition to corruption or gang activities can constitute the expression of a political opinion or be perceived as one.⁴¹ The Second Circuit has found that opposition to gender-based violence constitutes the expression of a political opinion.⁴²

Many Afghan evacuees hold a political opinion that is opposed to the current regime in power in their country. Advocates should carefully consider any outward steps that these individuals have taken to express that political opinion through their work in politics, with the U.S. government, NGOs, or with women's rights or human rights organization. In addition to analyzing whether these

³⁷ Rhea Mogul, NBC News, Afghanistan's Religious Minorities Live in Fear of Taliban, brace for persecution, Aug. 29, 2021, [nbcnews.com/news/world/afghanistan-s-religious-minorities-live-fear-taliban-brace-persecution-n1277249](https://www.nbcnews.com/news/world/afghanistan-s-religious-minorities-live-fear-taliban-brace-persecution-n1277249) (describing persecution of religious and ethnic minorities in Afghanistan).

³⁸ *Id.* (describing small population of Hindus and Sikhs in Afghanistan who have been targeted by extremists in Afghanistan).

³⁹ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)

⁴⁰ See *Vumi v. Gonzales*, 502 F.3d 150, 156 (2d Cir. 2007).

⁴¹ *Castro v. Holder*, 597 F.3d 93, 106 (2d Cir. 2010) (noting that to avoid "an impoverished view of what political opinions are, especially within a country where...certain democratic rights have only a tenuous hold," the "broader political context" must be carefully considered in order to properly evaluate an applicant's claim); *Alvarez Lagos v. Barr*, 927 F.3d 236, 255 (4th Cir. 2019) (noting that the agency must focus on whether the persecutor believed that petitioner held an anti-gang political opinion).

⁴² *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020) (finding that act of resisting rape by gang members can be the expression of a feminist political opinion).

individuals have actively expressed a political opinion through their work or activities, advocates should also consider whether these such efforts would be perceived as opposed to the current regime. Such individuals may be able to establish a claim for asylum based on actual or imputed political opinion.

- **Membership in a particular social group**

A particular social group within the meaning of the INA is: (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.⁴³ An immutable characteristic is one that “the members of the group either cannot change or should not be required to change.”⁴⁴ A group is particular if it has “well-defined boundaries” and is composed of a “discrete class of persons.”⁴⁵ A group is socially distinct when there is “evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristics to be a group.”⁴⁶

There may be a range of viable social groups for Afghan asylum applicants. The following is an analysis of some of the most commonly proposed groups.

- **Claims based on past work with the U.S. government, military, or U.S.-based organizations**

Afghans who have worked for the U.S. government or military may form a viable particular social group, as several circuits have specifically endorsed social groups based on prior work with the U.S. embassy or U.S. military.⁴⁷ A proposed social group based on work with the U.S. government or military is defined by possession of a common immutable characteristic of a shared past experience based on former employment. In addition, those who worked for U.S.-based NGOs or media organizations in Afghanistan may have a claim founded on prior

⁴³ *Matter of W- G- R-*, 26 I&N Dec. 208, 210 (BIA 2014).

⁴⁴ *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

⁴⁵ *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

⁴⁶ *Matter of W-G-R-*, 26 I&N Dec. at 217.

⁴⁷ *Al Amiri v. Rosen*, 985 F.3d 1 (1st Cir. 2021) (finding that membership in group of paid contractors for the U.S. army during the Iraq war could constitute a valid particular social group); *Ang v. Gonzales*, 430 F.3d 50, 55-56 (1st Cir. 2005) (employment at the U.S. embassy or support for Americans can constitute social group because membership stems from an “innate characteristic or shared experience”).

work history.⁴⁸ While individuals can choose what work they do in the future, they cannot change work they have previously done, which makes this characteristic immutable. However, advocates will want to avoid framing the particular social group solely as being comprised of individuals who are “westernized or Americanized,” as some circuit courts have rejected formulations of such groups as not sufficiently particular.⁴⁹

Advocates will want to include evidence with the asylum application that the proposed particular group would be perceived differently by society. It is important to remember that determining whether a proposed particular social group is “socially distinct” is a fact-based inquiry that depends on the particular record before the adjudicator.⁵⁰ Thus, it is advisable to include evidence, such as country conditions reports, press articles, or expert declarations, showing that individuals associated with the U.S. government or other U.S. based organizations are indeed perceived differently as a group by Afghan society.

- **Particular social groups based on gender or family ties**

Many circuits and the BIA have endorsed social groups based primarily or in part on gender.⁵¹ Women in Afghanistan may fear gender-based violence by the Taliban. In addition, they may also fear violence in the home. Given Attorney General Garland’s recent decision in *Matter of A-B-*, women who have been

⁴⁸ *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances); *Acosta*, 19 I&N Dec. at 233 (listing a “shared past experience such as former military leadership” as an example of a “shared characteristic” that unites a particular social group); *Koudriachova v. Gonzales*, 490 F.3d 255, 260-62 (2d Cir. 2007) (group of KGB agents who defected may constitute social group and remanding to Board to make determination in the first instance); *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011) (former truckers who have cooperated with Colombian government and refused to cooperate with the FARC are a particular social group); *R.R.D. v. Holder*, 746 F.3d. 807, 809 (7th Cir. 2014) (finding that “effective honest police” in Mexico can be a social group); *Madrigal v. Holder*, 716 F.3d. 499, 505 (9th Cir. 2013) (former Mexican army soldiers who participated in anti-drug activity is social group);

⁴⁹ *Ahmed v. Holder*, 611 F.3d 90, 95 (1st Cir. 2010) (finding that secularized, westernized Pakistanis was not a valid particular social group).

⁵⁰ *Oliva v. Lynch*, 807 F.3d 53, 61-62 (4th Cir. 2015) (remanding case to BIA to determine whether a group is “socially distinct” in light of evidence that former gang members are “perceived as a group by society”).

⁵¹ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); *Juan Antonio v. Barr*, 959 F.3d. 778 (6th Cir. 2020); *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020); *Cece v. Holder*, 733 F.3d. 662, 670-77 (7th Cir. 2013); *Perdomo v. Holder*, 611 F.3d 662, 667-69 (9th Cir. 2010); *Fatin v. INS*, 12 F.3d. 1233 (3d Cir. 1993); *Alvarez Lagos v. Barr*, 927 F.3d 236, 255 (4th Cir. 2019).

the victims of domestic violence may be able to make out a claim for asylum based on relationship violence.⁵²

Afghan evacuees may also be targeted for harm based on their family relationships with those who have worked with the U.S. government or military. During the evacuation, some siblings and parents of SIV holders were also evacuated from the country. If the applicant can show that he or she has been or will be persecuted on account of these family ties, this may also form the basis for a claim for asylum.

In 2021, Attorney General Garland issued a decision in *Matter of L-E-A-* that overturned an earlier, adverse 2019 Attorney General precedent that had called into question whether the “nuclear family” could constitute a valid particular social group.⁵³ Attorney General Garland stated that in overturning this decision he was returning the immigration system to the preexisting state of affairs pending completion of the ongoing rulemaking process. The pre-existing state of affairs is the BIA’s decision in *Matter of L-E-A- I*, 27 I&N Dec. 40 (BIA 2017), which recognizes that members of an immediate family may constitute a particular social group. The majority of circuit courts have also recognized that family membership can form a basis for asylum based on particular social group as long as that family membership is one central reason for the persecution.⁵⁴

⁵² The Attorney General’s decision in *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021) fully vacates the adverse precedents in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021). In issuing *A-B- III*, the Attorney General directed Immigration Judges and the BIA that *Matter of A-R-C-G-* 26 I&N Dec. 388 (BIA 2014) controls until the agency issues a final regulation on the particular social group definition. *A-R-C-G-* held that “married women in Guatemala who are unable to leave their relationship” can constitute a particular social group. Thus, under current law, cases involving relationship violence can be viable.

⁵³ 28 I&N Dec. 304 (A.G. 2021)

⁵⁴ *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (finding that the nuclear family is a viable particular social group); *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (non-citizen’s membership in his family may constitute a valid particular social group); *S.E.R.L. v. Att’y Gen. U.S.*, 894 F.3d 535, 556 (3d Cir. 2018) (noting that kinship can be a defining factor of a particular social group); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (finding family to be a “prototypical” PSG); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (“[M]embership in a nuclear family qualifies as a protected ground for asylum purposes.”); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (“[A] family is a ‘particular social group’ if it is recognizable as a distinctive subgroup of society.”); *Trujillo Diaz v. Sessions*, 880 F.3d 244, 250 n.2 (6th Cir. 2018) (citing *Al-Ghorbani*); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009) (“Our circuit recognizes a family as a cognizable social group under the INA...”); *Gonzalez Ruano v. Barr*, 922 F.3d 346, 353 (7th Cir. 2019) (“We and other circuits have recognized that membership in a nuclear family can satisfy the social group requirement.”); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) (“[P]etitioners correctly contend that a nuclear family can constitute a social group...”); *Aguinada-Lopez v. Lynch*, 825 F.3d 407, 409 (8th Cir. 2016) (assuming petitioner’s proposed family-based PSGs were cognizable and citing to *Bernal-Rendon*);

3. Government Unwilling or Unable to Control

In order to be granted asylum, an applicant must demonstrate that the persecution he or she faced or fears is inflicted by the government or by a private actor the government is unwilling or unable to control. Many Afghan arrivals fear persecution by the Taliban, which has historically engaged in atrocities against the population and has continued to do so since taking control of the country again. In an asylum case where the government is the persecutor, the persecution is presumed to be nationwide.⁵⁵ Indeed, the Taliban currently controls all of Afghanistan.⁵⁶

Other Afghan asylum applicants may fear persecution by extremist groups, such as ISIS, who the Taliban has proven unwilling or unable to control given the recent atrocities committed by this group.⁵⁷ Furthermore, other private actors who engage in persecution in Afghanistan will find that they operate in an environment of complete impunity, as the Taliban rule threatens to undo any progress made in respecting human rights.⁵⁸

4. Procedures for Filing for Asylum for Afghan Nationals

Pursuant to sections 2502(a) and 2502(c) of the Extending Government Funding and Delivering Emergency Assistance Act, certain Afghan nationals are being prioritized for the scheduling of affirmative asylum interviews.⁵⁹ For those Afghan nationals paroled into the United States between July 31, 2021 and Sept. 30, 2022, USCIS is required to conduct an initial interview no later than 45 days after the date the application is filed. In the absence of exceptional circumstances, USCIS is required to issue a final decision within 150 days of the filing of the

Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding immediate family to be a “prototypical” PSG); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (finding family to be a “quintessential” PSG).

⁵⁵ 8 CFR § 208.13(b)(3)(ii).

⁵⁶ FDD's Long War Journal, Taliban completes conquest of Afghanistan after seizing Panjshir | FDD's Long War Journal, 6 September 2021, longwarjournal.org/archives/2021/09/taliban-completes-conquest-of-afghanistan-after-seizing-panjshir.php.

⁵⁷ United States Commission on International Religious Freedom, Factsheet Afghanistan, 28 October 2021, uscirf.gov/sites/default/files/2021-10/2021%20Factsheet%20-%20Religious%20Minorities%20in%20Afghanistan.pdf (describing recent attacks by ISIS in Afghanistan).

⁵⁸ Afghan Women Fleeing Violence Lose Vital Protection, Human Rights Watch, [hrw.org/news/2021/09/24/afghan-women-fleeing-violence-lose-vital-protection](https://www.hrw.org/news/2021/09/24/afghan-women-fleeing-violence-lose-vital-protection) (describing closing of women's shelters and that prosecutors and judges who fought for women's rights are in hiding).

⁵⁹ P.L. 117-43.

application. Applicants should mark their envelope “Attn: OAW” to ensure that their application is expeditiously processed.

The law requires that an asylum applicant demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States.⁶⁰ An applicant may establish an exception to this general rule if changed or extraordinary circumstances are present.⁶¹ The regulations further define “extraordinary circumstances” as those in which the applicant is maintaining Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole until a reasonable period before the filing of the asylum application.⁶² Filing within six months of the expiration or termination of parole or any other lawful nonimmigrant status should be considered “reasonable” by the agency.⁶³

While many Afghans will want to file for asylum as soon as possible, in order to start the process of obtaining a permanent status in the United States, advocates should know that Afghans who file outside of the one-year filing deadline will likely be able to establish an exception to the one year filing deadline based on extraordinary circumstances, as long as they file within six months of the termination or expiration of their parole document.

Similarly, Afghan asylum applicants who are maintaining valid parole status will not be referred to the immigration court if their application is not granted.⁶⁴ Rather, they will first be issued a Notice of Intent to Deny, which will provide them the opportunity to respond to any perceived deficiencies in the asylum application.⁶⁵ After responding to the NOID, the applicant will then either be granted asylum, or the asylum application will be denied.⁶⁶

If the parole document has expired at the time of adjudication of the application and the applicant has no lawful status, the applicant will be referred to immigration court proceedings.⁶⁷ There, the applicant would have the opportunity to renew the application for asylum before an Immigration Judge.

5. Asylum Interviews and Decisions

⁶⁰ INA § 208(a)(2)(B); 8 CFR § 208.4.

⁶¹ 8 CFR §§ 208.4(a)(4), (5).

⁶² 8 CFR § 208.4(a)(5)(iv).

⁶³ *Matter of T-M-H- & S-W-C-*; 25 I&N Dec. 193 (BIA 2010).

⁶⁴ 8 CFR § 208.14(c)(3).

⁶⁵ USCIS Affirmative Asylum Procedures Manual at 26 (2016) (describing procedures for issuing a NOID to an applicant who is maintaining status in the United States).

⁶⁶ *Id.*

⁶⁷ 8 CFR § 208.14(c)(4).

Practitioners report that USCIS is generally prioritizing Afghan cases for interview scheduling and that these cases are being scheduled within a matter of weeks after filing. The approval rate for Afghan asylum applications has been high. However, practitioners do report intense screenings on issues surrounding the mandatory bars to asylum, in particular the persecutor bar and the Terrorism-Related Inadmissibility Grounds (TRIG) bars.

Under the statute, an applicant is not eligible for asylum if it is determined that he or she ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.⁶⁸ Persecutor bar issues may arise for those who have served in the Afghan military, worked for the Afghan police, or who assisted U.S. backed military operations in Afghanistan. Asylum officers will ask questions designed to elicit whether a particular applicant harmed or mistreated others, killed others during their military or police duties, or detained individuals. While some of these activities are a routine part of police or military service, advocates should prepare their clients for intense and probing questions on these topics. The focus of these inquiries is whether a particular applicant harmed civilians, noncombatants, or targeted others on account of a protected ground under asylum law.

Similarly, the asylum office will carefully screen for any issues that may implicate the TRIG bars. The TRIG bars contained in the statute are quite broad. Under the statute, a noncitizen “engages in a terrorist activity” if, among other things, the person commits “an act the actor knows, or reasonably should know, affords material support” (1) for the commission of a terrorist activity, (2) to an individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity, or (3) to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI)(dd). Under the Consolidated Appropriations Act of 2008, Congress mandated that the Taliban be considered a Tier 1 terrorist organization.

The Board of Immigration Appeals (BIA) has held that there is no implicit “duress exception” to applicability of the “material support” bar to asylum and that there is no “de minimis exception.”⁶⁹ Thus, given how broadly the TRIG bars have been interpreted by the agency, the only possibility for relief for individuals who

⁶⁸ INA § 208(b)(2)(A)(i); *see also* INA § 101(a)(42) (defining the term “refugee” as excluding persecutors of others); INA § 241(b)(3)(B)(i).

⁶⁹ *Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018). *Matter of A-C-M-* involved a Salvadoran woman who was forced to cook and clean for guerrillas under threat of death. The BIA found her ineligible for asylum because her actions constituted material support to a terrorist organization, even though the actions were involuntary.

would otherwise be denied all immigration benefits is through the authorized exemptions by the Secretaries of DHS and DOS.

On June 14, 2022, DHS and DOS gave immigration advocates welcome news by announcing three new exemptions to the TRIG bars in order to aid Afghan allies. On June 23, 2022, these exemptions were published in the Federal Register and are currently listed on the USCIS webpage for situational exemptions.⁷⁰

The three exemptions announced in June 2022 are the following:

1. Afghans who supported U.S. military interests by fighting or supporting those who fought in the resistance movement against the Taliban and Afghans who took part in the conflict against the Soviet occupation of Afghanistan. The exemption does not include those who targeted non-combatants or U.S. interests, committed certain types of human rights violations or abuses, or acted on behalf of a designated terrorist organization.⁷¹
2. Individuals employed as civil servants in Afghanistan at any time from September 27, 1996 to December 22, 2001 or any time after August 15, 2021, including teachers, professors, postal workers, doctors, and engineers. However, the exemption does not include individuals who held high-level positions, worked for certain ministries, or directly assisted violent Taliban activities or activities in which the individual's civil service was motivated by an allegiance to the Taliban.⁷²
3. Individuals who provided insignificant or certain limited material support to a designated terrorist organization. These include instances in which the support is incidental to a routine social or commercial transaction; incidental to certain humanitarian assistance; provided in response to a reasonably perceived threat of physical or economic harm, restraint, or serious harassment; and where the support provided is considered minimal and inconsequential.⁷³ Note that this exemption does not apply only to Afghans and is a general exemption that may aid many individuals potentially subject to the TRIG bars. However, it has the potential to aid Afghans who may have paid a small amount to pass through a Taliban checkpoint to flee Afghanistan; paid the Taliban for utilities such as electricity or the telephone; served the Taliban at one's place of business when to refuse would jeopardize one's livelihood; or

⁷⁰ 87 FR 37522; 87 FR 37523; 87 FR 37524; see also Terrorism-Related Inadmissibility Grounds (TRIG)-Situational Exemptions, <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions>.

⁷¹ 87 FR 37522

⁷² 87 FR 37524

⁷³ 87 FR 37523

paid a fee to obtain a passport or other identity documents necessary to flee Afghanistan. This exemption does not include individuals who share the goals or ideology of the Taliban, provided preferential treatment to them, or who intended to support the Taliban through their activities.

In order to benefit from these exemptions, the applicant must fully disclose during the asylum interview and to relevant government entities the nature and circumstances of all activities or associations falling within the scope of INA section 212(a)(3)(B) . USCIS will then make a determination on whether to grant an exemption to the applicant.

VII. Options for Clients Residing Outside of Afghanistan

1. Humanitarian Parole

- **Background and filing process**

Since the summer of 2021, USCIS has received tens of thousands of requests for humanitarian parole for Afghan citizens. Humanitarian parole is a form of parole that allows individuals outside of the United States to enter for urgent humanitarian reasons, such as to receive medical treatment or for family reunification purposes. Many Afghan citizens have filed for parole based on fears that they will be at grave risk if they are forced to remain in Afghanistan.

Anyone may request parole for himself or herself or on behalf of another individual by filing Form I-131, Application for Travel Document.⁷⁴ An applicant may submit the application to request parole on behalf of an individual who is outside the United States. It is also possible to submit a self-petition for parole. Nothing requires the applicant to be a resident of the United States or related to the beneficiary.

Typically, USCIS will require evidence of a sponsor who can provide financial support to the parolee in the United States. Lack of evidence of financial support while in the United States is a strong negative factor that may lead to a denial of parole. The sponsor should typically agree to provide financial support to the beneficiary during the duration of parole, submit Form I-134, Affidavit of Support, and document his or her financial resources. For more information on completing this form, see the section below on public charge.

⁷⁴ Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States, U.S. Citizenship and Immigration Services, uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states.

The applicant must file the parole request with the USCIS Dallas Lockbox. The Lockbox then forwards the parole request to USCIS International and Refugee Affairs Division in Washington, DC for review and issuance of a decision. While USCIS ordinarily strives to adjudicate humanitarian parole applications within three months of receipt, it has been unable to comply with this goal due to the sharp increase in applications filed since August 2021.

There is no appeal of a denied I-131. Some practitioners have reported receiving denials of I-131 applications without the issuance of a Request for Evidence. An applicant may always re-file a request if significant new facts emerge. There is no limitation on the number of parole requests that can be submitted by a particular applicant.

If approved, USCIS notifies the applicant, intending parolee, attorney of record, and the U.S. consulate or embassy closest to the beneficiary's residence so that the beneficiary can obtain the travel document. For Afghans who remain in Afghanistan, the process is slightly different.⁷⁵ USCIS will issue only a "conditional approval" letter to the Afghan citizen and advise that the individual should contact USCIS via email at HumanitarianParole@uscis.dhs.gov once that individual has arrived in a third country and can process the travel document through the U.S. embassy or consulate in that country. USCIS has indicated that it is devoting more resources to humanitarian parole applications for Afghans who are already in a third country, although it is allocating some resources to humanitarian parole applications filed by those who remain in Afghanistan.

Upon approval of the parole request, the approval notice will provide information about next steps. Typically, the approval notice will advise the applicant about the need to complete Form DS-160 and to appear in person at the nearest U.S. consulate for verification of identity.⁷⁶ Any applicant 14 years or older must provide biometrics. Assuming there are no security or criminal concerns, the consulate will issue a travel document for the applicant to travel within 30 days of issuance. At the port of entry, Customs and Border Protection (CBP) will inspect the applicant and make the ultimate decision whether to parole the individual into the United States.

- **Renewing parole**

⁷⁵ Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole, U.S. Citizenship and Immigration Services, uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-humanitarian-parole.

⁷⁶ *Id.*; see also Online Nonimmigrant Visa Application, Department of State, ceac.state.gov/genniv.

While technically parole cannot be “renewed,” it is possible to request re-parole from within the United States for those granted humanitarian parole. A person granted parole initially by USCIS should file a new Form I-131 and write “re-parole” across the top of the application. The form must include the fee or Form I-912, Request for Fee Waiver, and should include materials and evidence to support the request for re-parole. The request should be filed at least 90 days in advance of the expiration of the authorized parole period. As with an initial request for parole to USCIS, this request is submitted to the Dallas Lockbox.

The process for renewal of parole for those Afghan citizens originally granted parole by CBP is not clear. Typically, the agency that initially granted humanitarian parole is the agency to whom parole renewal requests must be directed.⁷⁷ The vast majority of Afghan evacuees currently in the United States were granted port parole, not parole by USCIS. It remains to be seen whether DHS will announce a different procedure for Afghan evacuees granted CBP parole to renew their parole.

- ***Special considerations for humanitarian parole for Afghans***

Generally speaking, parole is not intended to be used to avoid the typical refugee process or to provide protection to individuals at generalized risk of harm around the world. When deciding whether to grant humanitarian parole to an Afghan citizen, USCIS will look to factors like the specific vulnerabilities of the individual seeking parole, such as his or her age, disability or sexual orientation. They will also look at factors like the imminence or severity of potential harm, family ties to the United States, and whether there is already a refugee process that the applicant can access.⁷⁸

If the request for humanitarian parole is based on concerns of imminent harm to the individual, USCIS will require corroborating evidence of that claimed, specific harm. Thus, a statement from the individual outlining the harm they are facing will likely not be sufficient absent corroborating evidence from a third party. USCIS will look for evidence such as reports or other documentation from a credible, third-party source specifically naming the beneficiary and outlining the harm that they face and how imminent that harm is. USCIS has noted that credible third-party sources may include a U.S. government agency, a reputable human rights organization, or a media source.

⁷⁷ Memorandum of Agreement Between USCIS, ICE, and CBP for the Purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary’s Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain Aliens Outside of the United States (2008 MOA), ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf.

⁷⁸ USCIS held a stakeholder engagement on November 5, 2021, where it outlined the factors it considers when determining whether to grant humanitarian parole to an Afghan citizen.

USCIS may look to whether there has been a grant of a protection-based immigration benefit such as asylum, refugee status, or special immigrant status to an immediate family member or same-sex partner of the beneficiary. In the case of a same-sex partner, USCIS will take into account whether the same-sex partner is ineligible for an immigration benefit because they are unable to legally marry. The agency will also look for documentation that the risk of serious harm is so severe and imminent that it would be impossible to wait for the processing of the derivative's application.

USCIS has indicated that it will consider the following to be strongly favorable categories of cases:

- The immediate family of a U.S. citizen (spouse, unmarried children under 21, and parents). However, applicants should also be prepared to explain why they are unable to pursue the typical family-based immigration process;
- The spouse and unmarried children under 21 of an LPR. Similarly, applicants should be prepared to explain why they are unable to pursue the typical family-based immigration process;
- Locally employed staff of the U.S. embassy in Kabul and their immediate family (spouse and unmarried children under 21);
- SIV applicants whose applications have received COM approval; and
- Immediate relatives of Afghan nationals previously evacuated to the United States through Operation Allies Welcome (including the spouse, unmarried child under 21, and, in the case of unaccompanied minors, their primary caregiver, including but not limited to a parent or legal guardian, and the spouse and dependent children under 21 of the primary caregiver).

In the case of Afghan nationals referred to the U.S. Refugee Admissions Program through the P-1 Embassy Referral process or the P-2 group designation process (explained in more detail below) who are also seeking parole, USCIS will consider the following:

- Whether these individuals are at imminent risk of serious, targeted harm in the country outside Afghanistan where they are located;
- Whether these individuals are at risk of imminent return to Afghanistan where they would be at imminent risk of serious targeted harm; and

- Whether these individuals have a specific vulnerability while waiting for resettlement processing.

Generally, USCIS will require evidence from DOS Refugee Coordinator or UNHCR of the imminent risk or specific vulnerability of the individual.

Advocates should carefully consider the unique circumstances of each applicant's case when deciding whether to file a humanitarian parole application. USCIS has wide discretion in determining whether to grant or deny a humanitarian parole application and there are no guarantees of approval, even in compelling cases. Applicants who have a possible pathway to immigrate through the family-based immigration process or the SIV process, for example, may consider pursuing those options instead, given the delays in adjudicating humanitarian parole applications and the high standard that USCIS is applying when considering these applications.

2. Refugee Processing

Information on refugee processing for Afghan nationals is available through the Department of State.⁷⁹ Case processing cannot begin on these applications until the individual is in a third country. The following is a summary on refugee processing for Afghan nationals.

Priority 1: An Afghan national who is well known to a direct-hire American employee of the U.S. embassy in Kabul who faces imminent harm in Afghanistan may qualify for an Embassy P-1 referral. The applicant cannot self-refer to the P-1 program; a U.S. government official seeking to make the P-1 referral must refer the applicant to the P-1 program. The U.S. government official will need to obtain Senior Executive Service/Senior Foreign Service official's approval prior to referring the applicant to the P-1 program. The applicant should reach out to any U.S. government contacts directly to ask about a potential P-1 referral.

Priority 2: As of August 2021, the following Afghans can be referred to the P-2 program:

- Afghans who do not meet the minimum time-in-service for SIV but who work or worked at any time as employees of contractors, Locally Employed (LE) staff, interpreters/translators for the U.S. government, U.S.

⁷⁹ Fact Sheet, U.S. Refugee Admissions Program Priority 2 Designation for Afghan Nationals, state.gov/u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals. Additional information on processing for Afghan nationals is available at the Worldwide Refugee Admissions Processing System, wrapsnet.org/.

Forces Afghanistan (USFOR-A), International Security Assistance Force (ISAF), or Resolute Support;

- Afghans who work or worked at any time for a U.S. government-funded program or project in Afghanistan supported through a U.S. government grant or cooperative agreement; and
- Afghans who are or were employed in Afghanistan by a U.S.-based non-governmental or U.S.-based media organization.

Afghans who worked for sub-contractors and sub-grantees do not qualify for P-2. An individual cannot directly refer themselves and must be referred by a U.S. government agency, U.S.-based NGO, or U.S.-based media organization provided they meet the qualifications. It is recommended that potential P-2 applicants submit the following documents to the relevant government agency, NGO or media organization to request the referral:

- Passport, national ID (tazkera), birth certificates;
- Documents to establish relationships, such as marriage, divorce, death, and/or birth certificates; and
- Documents to establish employment history, such as employment badges, employer declaration.

Priority 3: Afghanistan is currently designated for P-3 processing. The P-3 category of the USRAP affords access to members of designated nationalities who have immediate family members (known as “anchor” relatives) in the United States who entered as refugees or were granted asylum, even if they later became LPRs or U.S citizens. Recently, the program was also opened to Afghan and Iraqi SIV holders to serve as the “anchor” relatives. Parents, spouses and unmarried children under the age of 21 of the U.S. anchor can participate in this program.

The process starts with the filing of an Affidavit of a Relationship (AOR) at a resettlement agency. The anchor relative in the United States and each of his or her biological parents and children listed in Section II of the Affidavit of Relationship (AOR) must submit to DNA testing to confirm their biological relationship. An AOR must be filed within five years of arrival.

VIII. Public Charge

The public charge ground of inadmissibility does not apply to Afghans who are pursuing SIV status, either from abroad or within the United States. These applicants do not need to file an affidavit of support or demonstrate the ability to support themselves. It does not matter if the Afghan was admitted as an SIV or was paroled into the United States with SI/SQ status and is continuing to

pursue SIV. Those who are granted SIV status enter or adjust as LPRs. Should they later apply for naturalization, public charge is not an eligibility consideration, nor is their lawful receipt of any federal or state benefit program.

Asylum applicants, like SIV applicants, are also not subject to the public charge ground of inadmissibility. If they are granted asylum, they are eligible to apply for adjustment of status after one year, as are refugees. Neither asylees nor refugees are subject to public charge when applying for LPR status. They do not need to submit an affidavit of support or demonstrate their ability to support themselves.

Afghans who are outside the United States and applying for humanitarian parole are not seeking “admission,” so the grounds of inadmissibility—including public charge—do not strictly apply. Therefore, parole applicants do not need to submit a Form I-864. However, potential public charge can be considered as part of the discretionary power of the agency, which may ask for an older version of the affidavit of support on Form I-134. That form is used to document the personal finances of a sponsor, which may even include an organization.

While there is no absolute requirement that the sponsor be a U.S. citizen or LPR, USCIS states that an LPR or U.S. citizen “may more readily be able to establish the ability to support the parolee in the United States.”⁸⁰ Therefore, identifying a U.S. citizen or LPR sponsor is advisable in most cases.

The sponsor should submit proof of his or her immigration status and evidence of sufficient income and resources, such as pay stubs, a copy of the most recent year of tax returns, or a letter from the sponsor’s employer. USCIS has acknowledged that many Afghans will be eligible for resettlement benefits if paroled into the United States. USCIS has indicated that it will primarily be looking for proof of financial support, such as a place to stay, until the parolee is able to access these resettlement benefits.

The minimum income requirement for sponsors completing Form I-134 is 100 percent of the Federal Poverty Guidelines (FPG), as opposed to 125 percent of FPG for Form I-864 (100 percent for sponsors who are active-duty members of

⁸⁰ U.S. Citizenship and Immigration Services, *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states (last updated July 25, 2022).

the Armed Forces and petitioning for their spouse or child). The sponsor must demonstrate income of at least that amount for a household consisting of his or her family, the applicant, and any accompanying derivatives. For more information on completing Form I-134 and the legal effects, see CLINIC's answers to Frequently Asked Questions Form I-134.⁸¹ Unanswered, however, are questions relating to measuring household size, use of assets, and the preferred documentation. Since the I-134 is not legally enforceable as a contract against the sponsor, there is also no clear date as to when the sponsorship obligations terminate.

USCIS may also accept proof that a nonprofit organization or medical institution is committed to providing financial support to the parolee for the duration of the person's stay in the United States. The organizational director may complete the I-134 on behalf of the organization or provide a letter on behalf of the organization outlining the commitment to providing financial support to the parolee.⁸²

Afghans previously paroled into the United States may also become eligible to apply for a U visa as the victim of a crime or for relief under the Violence Against Women Act (VAWA) as the victim of domestic violence. The public charge ground does not apply to U visa applicants, U visa recipients seeking LPR status, VAWA applicants, or VAWA recipients at the adjustment of status stage.

The public charge ground of inadmissibility would be applied to those Afghans seeking LPR status based on a family relationship. The USCIS is applying Interim Field Guidance published in the Federal Register in 1999 to define public charge.⁸³ According to the guidance, a non-citizen has become a public charge for inadmissibility purposes if he or she has become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." The term "public cash assistance for income maintenance" includes only three forms of benefits: (1) Supplemental Security Income (SSI); (2) Temporary Assistance for Needy Families (TANF); and (3) state and local cash assistance programs, usually known as general relief or general assistance. It also includes coverage for

⁸¹ cliniclegal.org/resources/asylum-and-refugee-law/frequently-asked-questions-form-i-134.

⁸² U.S. Citizenship and Immigration Services, *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states (last updated July 25, 2022).

⁸³ federalregister.gov/documents/1999/05/26/99-13202/field-guidance-on-deportability-and-inadmissibility-on-public-charge-grounds.

institutionalization for long-term care (e.g., in a nursing home or mental health institution) paid for by Medicaid or other government program.

The government will not consider any receipt by the applicant of food stamps (Supplemental Nutrition Assistance Program, or SNAP), Medicaid (other than for long-term care), the Children's Health Insurance Program (CHIP), federal housing programs, or any other non-cash federal benefit program. The Trump administration attempted to add five federal benefit programs to the "totality of the circumstances" public charge test, but the administration's 2019 public charge regulations were vacated and later withdrawn. The government will not consider any public benefit received by family members who are not applying for adjustment of status, unless the applicants for adjustment are relying on the family member's cash assistance as their sole source of income.

What makes the public charge analysis more complicated is that Afghans who are paroled into the country during the relevant period are eligible for a wider range of federal benefits than other parolees. See below for a list of the most significant programs. Afghan parolees applying for a family-based immigrant visa or adjustment of status will be required to submit an I-864 and demonstrate that they are not likely to become a public charge.

DHS published the final regulation defining the public charge ground of inadmissibility on Sept. 9, 2022, and elected to maintain the traditional interpretation of the term.⁸⁴ The new definition of public charge will go into effect for adjustment of status applicants on Dec. 23, 2022. In the meantime, the agency will continue applying the 1999 Interim Field Guidance. The final rule defines "likely to become a public charge" as "likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense."

The agency will consider receipt of only two federal cash assistance programs in the "totality of the circumstances" analysis: Supplemental Security Income (SSI) and Temporary Assistance for Needy Families (TANF). It will also consider government assistance for long-term institutionalization, such as services received in nursing homes or mental health facilities covered under Medicaid. Finally, it will consider receipt of state, tribal, territorial, or local cash benefit programs for income maintenance (often called "General Assistance").

⁸⁴ 87 FR 55472.

The final rule clarified that receipt of any of the enumerated cash assistance programs while in an immigration status that exempts public charge will not be considered should the recipient later apply for an immigration benefit that is subject to the public charge ground of inadmissibility. This means that Afghan parolees who access TANF or SSI benefits will not have that receipt considered should they later apply for adjustment of status based on a family relationship. Afghan parolees, therefore, should be encouraged to apply for the full range of programs, including Medicaid, SNAP, CHIP, and federal housing, given that their receipt will not impact a public charge determination.

IX. Public Benefit Eligibility

Special federal benefit eligibility is extended to Afghan SIV holders, those granted special immigrant parole (SI/SQ), and those paroled into the United States for humanitarian reasons between July 31, 2021, and Sept. 30, 2022. Eligibility for benefits is also extended to their spouses and children if paroled into the United States after Sept. 30, 2022, as well as to the parents or legal guardians of Afghan parolees classified as unaccompanied minors.

These Afghan parolees are eligible for the same range of federal benefits as refugees, who are classified as “qualified” non-citizens and if otherwise eligible can receive the following, in addition to other programs:

- TANF;
- SSI;
- CHIP;
- Full-Scope Medicaid;
- SNAP;
- Head Start; and
- Women, Infants, and children (WIC).

Afghan parolees who do not qualify for Medicaid or CHIP due to income or other categorical factors can still apply for health coverage through the Health Insurance Marketplace. Or they may be eligible for up to eight months of Refugee Medical Assistance (RMA). RMA is provided through the Administration for Children and Families and administered usually by state Medicaid programs. They are also eligible for the following benefits:

- Refugee Cash Assistance;
- Refugee Support Services;
- Matching Grant Program;
- Preferred Communities Program; and

- Afghan Placement and Assistance (APA) Program.

Benefits eligibility for the Humanitarian (non-SQ/SI) parolees will continue until either March 31, 2023, or until the term of parole ends, whichever is later.

Afghans paroled with SQ/SI status or granted/admitted as SIVs are eligible for these same programs (with the exception of APA), in addition to the Reception and Placement Program. Just like refugees, Afghan SIVs and parolees are exempt from any five-year bar to federal means-tested public benefits that would otherwise apply to LPRs. There is no time limit on their eligibility for most programs, but they may receive SSI for only a seven-year period after being paroled.

Sponsors who execute a Form I-864 — as opposed to a Form I-134 — agree to maintain the sponsored immigrant at 125 percent of FPG, as well as reimburse any agency or entity that provides a federal or state means-tested public benefit program to the immigrant. The specific federal benefits for which sponsors may be liable for reimbursement are limited to TANF, SSI, SNAP, nonemergency Medicaid, and CHIP. The statutory language would seem to permit state welfare administrators to enforce these reimbursement obligations against the sponsors after the intending immigrant has become an LPR. Similarly, Afghan parolees who are encouraged to obtain these federal benefits while here in that status may find their eligibility curtailed after they immigrate. This is because for those who immigrate with a signed I-864 affidavit, the income of their sponsors may be “deemed” to them and could affect their continued financial eligibility. There are some important exceptions to the sponsor deeming rules.

X. Conclusion

Afghan evacuees who are being resettled in the United States will require support and legal assistance over the coming months and years. The majority of evacuees do not have a permanent legal status and will need to take steps to obtain permanent legal status before the expiration of their parole documents. Thus, it is critical for practitioners serving these communities to understand the legal pathways that may be available to them.

LEGAL RESOURCES FOR AFGHANS

Government Resources

The USCIS website has the most up-to-date information on policies and programs for Afghan evacuees, uscis.gov/humanitarian/information-for-afghans.

The Policy Manual is the source of USCIS interpretation of the immigration laws, including eligibility for adjustment of status and employment authorization, uscis.gov/policy-manual.

Information on seeking COM approval can be found on the State Department website:

[https://travel.state.gov/content/dam/visas/SIVs/Afghan%20SIV%20Guidelines%20and%20DS157%20Instructions July 22.pdf](https://travel.state.gov/content/dam/visas/SIVs/Afghan%20SIV%20Guidelines%20and%20DS157%20Instructions%20July%2022.pdf)

Information on Refugee Processing is available through the Worldwide Refugee Admissions Processing System: wrapsnet.org/.

Other Resources

CLINIC has published a Practice Advisory on Parole which may provide helpful background on the legal authority for parole, cliniclegal.org/resources/parole/all-about-parole-practice-advisory.

The International Refugee Assistance Project has resources on the SIV and refugee process, which are available at refugeerights.org/news-resources/legal-resources-for-afghans.

The Center for Gender and Refugee Studies has country conditions toolkits for Afghan asylum seekers, cgrs.uchastings.edu/.