



LEGAL ANALYSIS · IMMIGRATION LAW · ASYLUM ADJUDICATION

Authorized to Remain, But Not in Status

The Legal Paradox Facing Asylum Seekers in the United States

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The Institute for Migration and Human Rights (IMHR) is a research and educational nonprofit working at the intersection of migration, asylum systems, and human rights, producing policy-relevant legal research that informs legal and institutional frameworks. Its research initiative, Migration, Narrative, and Human Rights, examines how political and legal narratives shape asylum adjudication and access to constitutional protections. This analysis addresses one such narrative problem directly: the gap between the government's own representations that asylum applicants are authorized to remain and the language later used to describe their presence.

When the Government Says “You May Remain,” What Does That Actually Mean?

There is a peculiar category in U.S. immigration law that is familiar to immigration lawyers but almost incomprehensible to everyone else: a person may be permitted by the federal government to remain in the United States, authorized to work, issued a Social Security number when eligible, and protected from accruing unlawful presence for certain statutory purposes, yet still lack lawful immigration status.

For asylum seekers, this distinction is not theoretical. It can define years of their lives.

USCIS's official guidance on Form I-589, Application for Asylum and for Withholding of Removal, states plainly:

“You are permitted to remain in the United States while your case is pending.”¹

¹U.S. Citizenship & Immigr. Servs., Asylum, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (last visited Aug. 19, 2026).

The same instructions explain that an applicant may become eligible for employment authorization while the asylum application remains pending and that, if asylum is not granted and the applicant appears removable or inadmissible, USCIS may refer the application to Immigration Court. The statutory basis for asylum employment authorization appears in the Immigration and Nationality Act.²

At the same time, a pending asylum application does not itself create or extend lawful immigrant or nonimmigrant status. This distinction rests on regulation and longstanding agency guidance. Under the applicable regulation,³ lawful immigration status is limited to a defined set of categories that does not include a pending asylum application. Consistent with this, USCIS policy guidance dating to 1996 has recognized that filing for asylum does not continue or extend an applicant's underlying lawful status.⁴

USCIS's own adjudicators have applied this framework in practice. In a 2021 non-precedent decision, the agency's Administrative Appeals Office found that an applicant was in a "period of authorized stay" while his asylum request was pending, yet held that this did not extend or restore his underlying nonimmigrant status.⁵

These propositions can coexist under the current legal framework. Yet placing them beside one another exposes a fundamental tension in U.S. immigration law.

What does it mean for the government to tell a person that she is "permitted to remain" while simultaneously maintaining that this permission does not constitute immigration status? What should the government be required to tell that person about the legal consequences of accepting its permission to remain? And what happens when a condition that appears temporary lasts not several months, but five, eight, or ten years because the government has not adjudicated the underlying protection claim?

The problem is not simply one of immigration status.

It is a problem of legal language, fair notice, reasonable reliance, administrative delay, and ultimately the rule of law.

²Immigration and Nationality Act (INA) § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2018).

³8 C.F.R. § 245.1(d)(1) (2026).

⁴Memorandum from Louis D. Crocetti, Assoc. Comm'r, INS, Policy Clarification Regarding the Effect of Filing for Asylum on Nonimmigrant Status (Apr. 23, 1996).

⁵U.S. Citizenship & Immigr. Servs., Admin. Appeals Office, Non-Precedent Decision (July 15, 2021), https://www.uscis.gov/sites/default/files/err/A1%20-%20Certification/Decisions_Issued_in_2021/JUL152021_01A1245.pdf. As a non-precedent decision, this matter is cited as illustrative of USCIS's application of its own rule, not as binding authority.

The Problem Is Not “Legal” Versus “Illegal”

Public discussion of immigration often relies on binary categories: legal or illegal, documented or undocumented, authorized or unauthorized.

Federal immigration law is considerably more complicated.

At least four concepts must be distinguished: lawful immigration status, authorized stay, unlawful presence, and employment authorization. These concepts interact, but they are not interchangeable.

Asylum illustrates the distinction particularly well.

Under the statute governing asylum eligibility,⁶ a person physically present in the United States or arriving in the United States may apply for asylum “irrespective of such alien’s status,” subject to the statutory exceptions.

Filing an asylum application, however, does not itself extend the applicant’s existing nonimmigrant status. A visitor admitted in B-2 status does not remain a B-2 visitor indefinitely simply because an asylum application is pending. The distinction traces to regulation and to decades-old policy guidance, and USCIS’s own adjudicators have applied it in individual cases, distinguishing a pending asylum applicant’s “period of authorized stay” from lawful immigration status.⁷

That proposition is relatively straightforward.

The complexity begins with what happens next.

Congress expressly contemplated employment authorization for asylum applicants in the statute,⁸ although an asylum applicant is not entitled to employment authorization merely by filing an application.

Congress also created an important exception to the statutory definition of unlawful presence. Under this exception,⁹ time during which a bona fide asylum application is pending generally is not counted toward unlawful presence for purposes of the three-year and ten-year inadmissibility bars, unless the applicant was employed without authorization during that period.

This distinction is significant.

⁶INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2018).

⁷8 C.F.R. § 245.1(d)(1), *supra* note 3; Crocetti Memorandum, *supra* note 4; Admin. Appeals Office, Non-Precedent Decision (July 15, 2021), *supra* note 5.

⁸INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2018), *supra* note 2.

⁹INA § 212(a)(9)(B)(iii)(II), 8 U.S.C. § 1182(a)(9)(B)(iii)(II) (2018).

The statute separately defines unlawful presence, while USCIS recognizes that an authorized period of stay and lawful immigration status are not necessarily the same thing. A person may therefore lack lawful immigration status while occupying a period that immigration law treats differently from ordinary unlawful presence.

This distinction may be doctrinally intelligible.

The difficulty arises when the government communicates one side of the distinction clearly and leaves the other largely to legal inference.

“You Will Be Permitted to Remain”

Words matter, particularly when they come from the government.

When USCIS tells an asylum applicant that she will be “permitted to remain” while her case is pending, the ordinary meaning of that statement conveys governmental authorization. That language is not an interpretation imposed upon the asylum process by advocates. It appears in USCIS’s own Form I-589 guidance.

The problem is not that this authorization must necessarily become a new immigration status. Congress may choose to maintain a legal distinction between asylum pendency and recognized immigrant or nonimmigrant classifications.

The problem is that the government has created an intermediate legal condition without naming or explaining it coherently.

Consider the position of a typical affirmative asylum applicant.

A person enters the United States lawfully in a nonimmigrant classification and files a bona fide asylum application. USCIS accepts the application. The applicant is told that she is permitted to remain while the case is pending.

Her underlying nonimmigrant status eventually expires.

Her asylum application does not.

She may later receive federal employment authorization pursuant to the asylum employment-authorization framework. She may obtain a Social Security number if eligible. She works pursuant to government authorization. She files required tax returns. She renews her employment authorization. She provides her address to the government. She attends biometrics appointments and interviews.

USCIS knows who she is, where she lives, why she is present, and precisely which proceeding remains unresolved.

Nothing about this resembles clandestine presence.

Nevertheless, if USCIS ultimately does not grant asylum and the applicant appears removable, USCIS's own I-589 guidance states that the asylum office will refer the application, together with the appropriate charging document, to Immigration Court. One potential ground of deportability applies to a noncitizen who, after admission as a nonimmigrant, remains in the United States for a time longer than permitted.¹⁰

The legal system therefore asks the applicant to understand several propositions simultaneously:

- You are permitted to remain while we adjudicate your protection claim.
- Your permission to remain does not mean that you are maintaining lawful immigration status.
- You may be authorized by the federal government to work during this period.
- Your bona fide asylum pendency generally will not count as unlawful presence for purposes of the three-year and ten-year bars, subject to the statutory exception.
- Yet if your underlying immigration status expires and asylum is not granted, that expiration may later provide a basis for removal proceedings.

Each proposition has a doctrinal explanation.

Taken together, they reveal a serious problem of legal coherence and notice.

The abstraction becomes concrete once the actual charging document is examined. A typical Notice to Appear charges the respondent with factual allegations along these lines:

- You are not a citizen or national of the United States.
- You are a native of [country] and a citizen of [country].
- You were admitted to the United States at or near [place], on or about [date], as a nonimmigrant visitor, with authorization to remain in the United States for a temporary period not to exceed [date].
- You remained in the United States beyond [date], without authorization from the Immigration and Naturalization Service or its successor agency, the Department of Homeland Security.

¹⁰INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2018).

These allegations are not merely descriptive. In removal proceedings, the respondent must plead to each numbered allegation individually, admitting, denying, or stating a lack of knowledge sufficient to form a response.¹¹

The fourth allegation is where the paradox this Article describes stops being rhetorical and becomes a pleading problem. The respondent is asked to admit that she remained in the United States “without authorization” from DHS. Yet DHS’s own component agency, USCIS, had already told her the opposite in writing: that she was permitted to remain while her asylum application was pending.

A respondent who answers honestly faces a genuine bind. Admitting the allegation accepts, as a matter of pleading, a characterization that conflicts with the government’s own contemporaneous representation. Denying it risks contradicting what did occur: the underlying nonimmigrant status did expire on its own terms. Neither response captures the actual legal reality, that the respondent’s presence after the visa’s expiration was simultaneously unauthorized as a matter of status and authorized as a matter of stay, which is precisely the distinction this Article develops throughout.

This is not a hypothetical problem for practitioners. It arises at the pleading stage of nearly every asylum case referred to Immigration Court after status expiration, and it illustrates, in the most concrete terms available, why the notice problem identified in this Article is not merely a matter of tone.

This analysis is not advice about how to plead to the fourth allegation, and nothing here suggests a respondent should deny it because of the tension identified above. The problem this paper identifies is narrower than a factual dispute: the phrase “without authorization of DHS” sits uneasily next to USCIS’s own written representation, in its official guidance, that the same applicant was “permitted to remain in the United States” while her case was pending. That is a tension in how the government describes the record, not a dispute over what the record contains. The dates underlying the fourth allegation, the applicant’s admission and the expiration of her underlying status, are ordinarily documented and easily proven, and immigration attorneys very often advise clients to admit the allegation despite this descriptive tension, for reasons independent of whether the government’s language is complete or precise. Denying the allegation rarely changes the outcome on removability itself, and, more significantly, immigration judges are now generally barred by regulation from terminating proceedings so that a respondent can instead pursue an asylum application before USCIS;¹² that option remains available only for unaccompanied children. A respondent who avoids a removability finding does not, as a rule, thereby obtain an adjudication of the asylum claim; the case may simply end without relief. For that reason, conceding the fourth allegation while pursuing asylum as the requested relief is frequently the sounder litigation strategy, whatever the incoherence in the government’s own

¹¹8 C.F.R. § 1240.10(c) (2026).

¹² *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46,742, 46,753 (May 29, 2024)

language. Whether and how to respond to any allegation in a Notice to Appear is a case-specific strategic decision that should be made only in consultation with a licensed immigration attorney.

The Problem Is Not Applicant Confusion

It would be easy to characterize this problem as one of immigrant misunderstanding.

That framing misses the point.

The central concern is not that asylum applicants mistakenly believe a pending Form I-589 automatically extends B-2, F-1, or another nonimmigrant classification.

The more fundamental concern is governmental consistency.

USCIS itself has recognized both sides of the distinction. In a 2021 non-precedent decision, the Administrative Appeals Office explained that an applicant whose nonimmigrant admission had expired was nevertheless in a “period of authorized stay while his asylum request was pending.” The agency simultaneously concluded that the pending asylum application did not extend or restore his nonimmigrant status and that employment authorization based on the pending asylum application did not itself confer lawful immigration status.¹³

That distinction should operate in both directions.

Under the current legal and doctrine framework, an applicant should not be permitted to claim lawful immigration status merely because the government allowed her to remain while an asylum application was pending.

But neither should the absence of lawful immigration status be used rhetorically to suggest that the applicant’s presence was hidden, evasive, unknown to the government, or contrary to an express governmental representation that she was permitted to remain.

These are different propositions.

The term “overstay” may accurately describe the expiration of the immigration classification under which a person was admitted. It does not necessarily describe the factual and legal character of the years that followed.

A person can be out of status without having spent those years evading the immigration system.

¹³Admin. Appeals Office, Non-Precedent Decision (July 15, 2021), *supra* note 5; see also 8 C.F.R. § 245.1(d)(1), *supra* note 3; Crocetti Memorandum, *supra* note 4.

The government knew the applicant was present.

The government was adjudicating the legal claim that explained her continued presence.

The government told her she was permitted to remain while it did so.

In many cases, the government also authorized her to work.

That history should not disappear when the government later describes her immigration circumstances.

When 180 Days Becomes Ten Years

Congress contemplated an asylum adjudication system that would move substantially faster than the system many applicants have experienced.

Under the statutory adjudication timeline,¹⁴ in the absence of exceptional circumstances, the initial asylum interview or hearing is to commence no later than 45 days after filing, and final administrative adjudication, excluding administrative appeal, is to be completed within 180 days.

Those provisions demonstrate the temporal framework Congress placed into the asylum statute. They should not, however, be confused with an unconditional individual entitlement to an adjudication within 180 days. The statute itself limits judicial review of the timing provisions. The point here is narrower: Congress wrote an expedited adjudicatory structure into the INA, while the practical experience of many applicants has been dramatically longer.

During prolonged pendency, applicants do not exist outside the legal system. Quite the opposite. They may interact repeatedly with USCIS and other government institutions. They may receive and renew employment authorization, work lawfully, pay taxes, attend universities, raise children, establish businesses, pursue professional careers, participate in civic institutions, and build lives in their communities.

Children become adults while applications remain pending.

Students complete degrees.

Careers begin.

Families change.

¹⁴INA § 208(d)(5)(A)(ii)–(iii), 8 U.S.C. § 1158(d)(5)(A)(ii)–(iii) (2018).

Communities become home.

The passage of time transforms what immigration doctrine conceptualizes as a temporary procedural condition into a social reality.

That transformation matters.

There is a meaningful difference between telling an asylum applicant that her pending application does not confer immigration status for several months and maintaining that condition for a decade because the government has not resolved the application.

Administrative delay should not be treated as legally or normatively invisible when the passage of time itself magnifies the consequences of the underlying legal classification.

This concern has grown more urgent, not less, since this Article was first drafted. On July 28, 2026, DHS published an interim final rule permitting USCIS asylum officers to refer certain affirmative asylum applications to Immigration Court without conducting an interview, removing prior regulatory language describing an interview as an applicant’s right. DHS’s own preamble to that rule confirms the scale of the problem described here: more than 1.4 million affirmative asylum applications remained pending at USCIS at the end of Fiscal Year 2025, with average wait times exceeding 7.3 years. The rule is framed as a remedy for exactly the kind of prolonged pendency this Article discusses; DHS describes faster referral to Immigration Court as helping applicants “escape prolonged legal limbo.” But removing the interview from more cases does not resolve the notice problem identified here. It makes it more urgent. If a growing share of applicants will be referred to Immigration Court without ever meeting with an adjudicator, the clarity of what they were told at filing, and of what a referral does and does not mean about their immigration history, matters more, not less.¹⁵

The Choice the Applicant Was Never Asked to Make

The problem becomes clearer when viewed from the perspective of a reasonable person attempting to comply with immigration law.

A person who values the rule of law has every reason to rely seriously upon instructions received from the federal agency administering her immigration case.

¹⁵Affirmative Asylum Referrals Without Interview, 91 Fed. Reg. 47,101 (July 28, 2026)

Such a person may understand that asylum has not been granted. She may understand that there is no guarantee she will be allowed to remain permanently. She may even understand that the nonimmigrant classification under which she entered will eventually expire.

What she would not necessarily understand, absent explicit notice, is that many years later the government may characterize the expiration of that status in terms suggesting that her subsequent presence occurred without authorization, despite the government's contemporaneous representation that she was permitted to remain.

Meaningful notice matters because meaningful notice permits meaningful choice.

Suppose the government told the applicant at the beginning:

You may remain while we adjudicate your asylum application, potentially for many years. However, your underlying immigration status will not be extended by the asylum application. If that status expires, DHS may later place you in removal proceedings based on that expiration even though your asylum application remained pending and you were permitted to remain and authorized to work during that period.

A reasonable person committed to complying with immigration law might make different decisions with that information.

Some applicants might investigate whether another immigration classification was available.

Some might seek legal advice specifically concerning the consequences of expiration of their underlying status.

Some might pursue other immigration options while those options remained available.

Some might seek available legal remedies concerning extraordinary adjudicatory delay.

Some might make different educational, professional, financial, or family decisions.

Others might decide that remaining in the United States under such an uncertain legal condition was not a risk they were willing to assume.

The point is not to speculate about what any particular applicant would have done.

The point is that the applicant should have been given enough information to make the choice knowingly.

No legal system committed to voluntary compliance should assume that a reasonable person who respects the rule of law would willingly spend a decade in a condition that the government may later characterize as unauthorized if that consequence was never clearly disclosed.

When the government provides only part of the relevant legal information, reliance upon the government's own language should not later be dismissed as applicant confusion.

Government Authorization Without Immigration Status

Part of the difficulty is that immigration law lacks a coherent public-facing category for this condition.

Scholars outside doctrinal law have already named this phenomenon, even where the law itself has not. Sociologist *Cecilia Menjivar* coined the term “*liminal legality*” to describe the condition of immigrants, including those with pending asylum applications, who occupy a space between documented and undocumented status: physically and socially present, yet legally precarious. That concept captures the lived and social experience of the condition described throughout this Article. What follows is an attempt to give that condition a legal name as well.¹⁶

One possible framework would distinguish among three concepts.

Lawful immigration status would describe a person maintaining an immigrant or nonimmigrant status recognized by immigration law.

Authorized protective stay could describe a person who does not currently maintain an underlying immigrant or nonimmigrant status but whose continued presence is permitted while the government adjudicates a bona fide protection claim.

Unauthorized presence would describe circumstances in which a person lacks both lawful immigration status and a legally recognized governmental basis for continued presence.

This Article is not the first to observe that immigration law lacks adequate vocabulary for this middle ground. *Geoffrey Heeren* has described a broader “*netherworld of nonstatus*” encompassing discretionary, unreviewable categories such as deferred action and parole, in which individuals hold government documentation but few rights and no pathway to permanent status. That account illuminates the structural problem across many forms of executive discretion. The claim advanced here is narrower and more specific: for asylum applicants, the intermediate condition arises not from executive grace but from the government's own explicit representation, in its official guidance, that the

¹⁶Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 Am. J. Soc. 999 (2006).

applicant is “permitted to remain.” That representation, and the reliance it invites, is what triggers the fair notice and retroactivity concerns developed in this Article.¹⁷

The terminology is open to debate. “Authorized protective stay” may not ultimately be the best formulation.

The conceptual distinction is what matters.

Recognizing such a category would not automatically confer adjustment eligibility, permanent residence, nonimmigrant classification, or any other immigration benefit.

It would simply give a public-facing name to a distinction already visible in federal immigration law and agency interpretation. USCIS has itself distinguished a pending asylum applicant’s “period of authorized stay” from lawful immigration status, as reflected in its regulations, its longstanding policy guidance, and its own adjudicative decisions.¹⁸

A person can lack lawful immigration status without her presence being accurately understood, in ordinary language, as wholly unauthorized.

Fair Notice, Reliance, and the Rule of Law

The constitutional dimensions of this problem require care.

The argument advanced here is not that USCIS’s permission to remain automatically creates an immigration status through equitable estoppel. Nor is it that prolonged asylum pendency necessarily creates a constitutional entitlement to permanent residence.

Those are substantially different legal claims.

The narrower issue concerns fair notice, reasonable reliance, settled expectations, and administrative legitimacy.

These concerns have deep roots in the Supreme Court’s retroactivity jurisprudence. In Landgraf v. USI Film Products, the Court explained that the traditional presumption against retroactive legislation reflects concerns about fair notice, reasonable reliance, and settled expectations. The Court instructed

¹⁷Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115 (2015).

¹⁸8 C.F.R. § 245.1(d)(1), *supra* note 3; Crocetti Memorandum, *supra* note 4; Admin. Appeals Office, Non-Precedent Decision (July 15, 2021), *supra* note 5.

that, absent an express congressional command, courts ask whether a new provision would attach new legal consequences to events completed before its enactment.¹⁹

Those principles have particular importance in immigration law.

In INS v. St. Cyr, the Supreme Court applied the presumption against retroactivity to the repeal of discretionary immigration relief. The Court emphasized the significance of reasonable reliance on the legal regime existing when the relevant decisions were made and refused, absent sufficiently clear congressional direction, to attach the new disability to the earlier conduct.²⁰

The Court returned to these principles in Vartelas v. Holder. Applying Landgraf and St. Cyr, the Court held that a later immigration provision could not be applied in a manner that attached a new disability to relevant past conduct absent the necessary congressional direction. Vartelas also clarified an important point for policy analysis: detrimental reliance is not an indispensable prerequisite to application of the antiretroactivity principle, although the likelihood of reliance strengthens the case for prospective application.²¹

These cases do not establish that every future change affecting pending asylum applicants would be impermissibly retroactive.

They establish a more careful principle.

A new statute or rule does not become impermissibly retroactive merely because it affects a person whose circumstances began before the rule changed. The inquiry turns on whether the new rule attaches new legal consequences to completed events or past conduct and, where appropriate, whether Congress has clearly prescribed the temporal reach of the new law.

That distinction matters for the recommendations advanced here.

The argument is therefore not that existing asylum applicants possess an absolute constitutional right to have every future immigration rule frozen as of the date their applications were filed.

The argument is that policymakers should take seriously the very concerns the Supreme Court's retroactivity doctrine recognizes: fair notice, reasonable reliance, settled expectations, and the

¹⁹Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

²⁰INS v. St. Cyr, 533 U.S. 289 (2001). (the habeas-jurisdiction holding was superseded by statute, the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. 302, 310; the retroactivity and reasonable-reliance analysis relied upon here is unaffected, see Nasrallah v. Barr, 590 U.S. 573, 587, 590 n.37 (2020))

²¹Vartelas v. Holder, 566 U.S. 257 (2012). (a separate footnote addressing the distinction between “commission” and “conviction” of a crime involving moral turpitude was not followed in Blanche v. Lau, 609 U.S. ____ (2026); the retroactivity holding and reasonable-reliance analysis relied upon here were not disturbed)

unfairness that may result when government attaches new legal consequences to circumstances established under a different legal framework.

A legal system cannot meaningfully demand compliance with rules that it does not communicate intelligibly.

This principle becomes especially important when the government itself controls much of the duration of the condition.

If an applicant remains pending for six months, the consequences of ambiguity may be limited.

If the government leaves the same applicant pending for ten years, the consequences become profound.

The rule of law imposes obligations on individuals.

It also imposes obligations on government.

Individuals are expected to understand and follow legal rules. Government, in turn, should state those rules clearly, apply them consistently, and avoid retrospectively assigning materially different legal consequences to conduct undertaken under an earlier framework without the clarity the law requires.

The Narrative Consequences of “Unauthorized”

This issue also has a human-rights dimension.

Immigration terminology does more than determine statutory consequences. It constructs public narratives about migrants.

Terms such as “illegal,” “unauthorized,” and “overstay” carry meanings beyond their technical functions. In public discourse, they can imply deliberate noncompliance, evasion, concealment, or disregard for law.

Those implications become problematic when applied without qualification to individuals who affirmatively presented themselves to the government, invoked a protection procedure expressly available under the asylum statute,²² were told by USCIS that they could remain while their claims were pending, received government-issued employment authorization when eligible, complied with immigration procedures, and remained continuously visible to federal authorities.

²²INA § 208(a)(1), 8 U.S.C. § 1158(a)(1), *supra* note 6.

A finding of removability may be legally correct without every narrative commonly associated with “illegal immigration” being factually correct.

That distinction matters.

Legal categories help determine how society understands who migrants are, why they are present, and whether their presence is perceived as legitimate.

Precision therefore has consequences beyond the courtroom.

Policy Recommendations

1. Provide Complete Notice at the Beginning

USCIS should provide every affirmative asylum applicant with a standardized plain-language notice explaining the legal consequences of asylum pendency.

The notice should explain, in one place, that:

- filing an asylum application does not extend an existing immigrant or nonimmigrant status;
- a pending asylum application does not itself create lawful immigration status;
- USCIS nevertheless permits the applicant to remain while the protection claim is adjudicated, subject to applicable law;
- eligible applicants may obtain employment authorization without acquiring immigration status;
- under INA § 212(a)(9)(B)(iii)(II), bona fide asylum pendency generally is excluded from the calculation of unlawful presence for purposes of the applicable three-year and ten-year bars, subject to the statutory employment exception; and
- if the applicant’s underlying status expires and asylum is later referred to Immigration Court, DHS may charge removability under applicable provisions, including INA § 237(a)(1)(B), where its statutory requirements are satisfied.

These consequences should not require an applicant to synthesize statutes, regulations, USCIS guidance, policy manuals, and administrative decisions.

Meaningful notice requires more than technical accuracy.

It requires comprehensibility.

2. Recognize Government–Authorized Presence Without Status

DHS should develop consistent terminology distinguishing lawful immigration status, government-authorized presence without status, and unlawful presence.

The purpose would not be to manufacture a new immigration benefit through terminology.

It would be to describe existing legal conditions accurately.

If “authorized protective stay” is not the appropriate term, another should be developed through rulemaking and consultation with immigration practitioners, scholars, advocates, and affected communities.

What should disappear is the assumption that “not in lawful status” necessarily means “present without governmental authorization” in every context.

The government’s own legal framework is more complicated than that.

Its terminology should acknowledge the complexity.

3. Stop Conflating Status Expiration With Evasion

DHS should ensure that charging language, public communications, agency guidance, and policy documents distinguish expiration of underlying immigration status from unauthorized or evasive conduct.

This ground of deportability applies to a noncitizen who, after admission as a nonimmigrant, remains in the United States longer than permitted.²³ A pending asylum application does not necessarily eliminate that statutory basis for removability merely because the asylum application remains unresolved.

But that legal conclusion does not establish that the applicant hid from immigration authorities.

It does not establish that the government did not know where the applicant was.

It does not establish unauthorized employment where the applicant possessed valid employment authorization.

And Congress itself has directed that bona fide asylum pendency generally not be counted as unlawful presence for purposes of the relevant inadmissibility provision, subject to the statutory exception.²⁴

²³INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), *supra* note 10.

²⁴INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B), *supra* note 9.

Most importantly, it does not erase USCIS's own representation that, while the asylum case is pending, the applicant is "permitted to remain in the United States."

Administrative delay should not transform government-authorized presence into a retrospective narrative of immigrant illegality.

4. Protect Existing Applicants From Retroactive Recharacterization

Any future statutory, regulatory, or administrative reform should expressly address the population already living in this intermediate legal condition.

The governing policy principle should be prospective clarity rather than retrospective recharacterization.

This recommendation draws upon, but deliberately does not overstate, the Supreme Court's antiretroactivity doctrine.

Under Landgraf v. USI Film Products, a court first asks whether Congress has expressly prescribed a new statute's temporal reach. If Congress has not done so, the inquiry turns to whether applying the new rule would have a retroactive effect by attaching new legal consequences to events completed before enactment. If it would, the traditional presumption against retroactivity applies absent clear congressional intent.

In the immigration context, INS v. St. Cyr demonstrates the importance of that principle where a later statutory change withdraws a significant immigration consequence that existed when relevant earlier decisions were made.

Vartelas v. Holder likewise demonstrates that immigration legislation can operate retroactively when it attaches a new disability to relevant past conduct. Importantly, Vartelas explains that proof of actual reliance is not always required, although reasonable reliance can strengthen the case against retrospective application.

These cases do not mean that every future change to asylum law must apply only to applications filed after its effective date. Nor do they establish that an asylum applicant acquires vested immigration status simply by relying on USCIS instructions.

They do, however, provide a serious doctrinal foundation for a policy of prospective implementation and explicit transition rules.

Individuals who entered the asylum process under governmental instructions telling them that they were permitted to remain should not casually be treated as though they received warnings, accepted consequences, or made choices under a legal framework that did not yet exist.

Any new framework should therefore contain explicit transition provisions.

Those provisions should consider:

- the legal rules and governmental instructions applicable when the asylum application was filed;
- the language of notices provided to applicants;
- the length of time the application remained pending;
- whether the applicant complied with biometrics, interview, address-reporting, and other procedural requirements;
- whether the applicant possessed required employment authorization;
- whether relevant delays were attributable to the applicant or to the government; and
- the reliance interests and settled expectations developed during prolonged adjudication.

Congress retains substantial authority to alter immigration law prospectively and, where constitutionally permissible and sufficiently clear, may specify the temporal reach of new legislation.

The policy recommendation is narrower.

Where the government changes the legal consequences of asylum-pending presence, the default should be prospective application accompanied by explicit transition rules for people already placed into the prior framework.

A later policy may change the rules.

It should not silently change the legal meaning of years already lived under the government's earlier representations.

5. Congress Should Address Government-Caused Delay

Better notice solves only part of the problem.

Congress should separately examine whether the immigration consequences of status expiration should remain entirely unchanged when a bona fide asylum application has remained unresolved for many years because of government adjudicatory delay.

Congress itself established an expedited statutory structure, providing for an initial interview or hearing within 45 days and final administrative adjudication within 180 days in the absence of exceptional circumstances.²⁵

The existence of that statutory framework does not automatically create a judicial remedy whenever adjudication exceeds 180 days. It does, however, demonstrate that decade-long pendency is difficult to reconcile with the temporal structure Congress wrote into the asylum statute.

The question need not be framed as whether every asylum applicant should automatically receive lawful immigration status.

Congress could consider narrower alternatives, including a defined protection-pending classification after a specified period, temporary statutory protection after prolonged agency-caused delay, or limitations on particular adverse consequences attributable solely to expiration of an applicant's previous status while the government continues to adjudicate a timely filed protection claim.

Any proposal would require safeguards, eligibility standards, termination rules, and careful coordination with other provisions of the INA.

But the underlying policy question cannot simply be ignored.

When government delay changes a temporary procedural condition into a decade-long legal reality, the law should account for the government's role in producing that reality.

²⁵INA § 208(d)(5)(A), 8 U.S.C. § 1158(d)(5)(A), *supra* note 13.

A Model Notice

A revised USCIS notice could state:

Important Information About Your Immigration Status While Your Asylum Application Is Pending

USCIS has accepted your application for asylum. You are permitted to remain in the United States while your asylum application is being adjudicated, subject to applicable law.

A pending asylum application does not itself extend your current immigration status or give you a new immigrant or nonimmigrant status. If the status under which you entered or otherwise remained in the United States expires while your asylum application is pending, you may no longer have lawful immigration status even though your asylum application remains pending and you are permitted to remain during its adjudication.

You may become eligible to apply for employment authorization based on your pending asylum application. Employment authorization does not itself give you lawful immigration status.

If USCIS does not grant asylum and refers your application to Immigration Court, DHS may charge you as removable based upon the expiration or violation of your previous immigration status.

The terms “lawful immigration status,” “authorized stay,” “unlawful presence,” and “employment authorization” have different meanings under U.S. immigration law. Permission to remain while your asylum application is pending does not necessarily extend your previous immigration status or create a new one.

That notice would not change substantive immigration law.

It would do something more basic.

It would tell people the rules before asking them to live under those rules.

Conclusion

There is nothing inherently incoherent about a legal system creating different categories for different statutory purposes.

Immigration status can serve one function. Unlawful presence can serve another. Employment authorization can serve another. The treatment of an individual while a protection claim remains pending can serve another.

The problem arises when those distinctions become comprehensible only to specialists while the government's own language communicates something materially less complicated to the people whose lives depend upon it.

An asylum seeker should not need years of immigration-law experience to understand what "you will be permitted to remain" means.

If the law insists upon distinguishing permission from status, the government should be equally precise in explaining that distinction.

And if the government tells a person that she may remain, authorizes her to work, knows where she lives, adjudicates her protection claim for years, and permits her to build her life openly within that legal process, it should not later describe those years in language that obscures its own role in authorizing and prolonging that presence.

Existing immigration law may nevertheless permit removal once the applicant's underlying status has expired.

That is a separate question.

The more fundamental question is whether the legal system describes what happened accurately.

A system committed to the rule of law should expect individuals to follow its rules. That expectation carries a corresponding institutional responsibility. Government should tell people what those rules mean before asking them to make life-altering decisions in reliance upon them.

For future asylum applicants, that requires complete and understandable notice.

For applicants who have already spent years in the intermediate condition the government created, it requires serious consideration of reasonable reliance, settled expectations, and the principles governing retroactive changes in law.

And for Congress, it requires confronting a larger question that administrative terminology alone cannot solve: whether a legal condition designed to be temporary should carry precisely the same consequences after government delay transforms months into years and years into a decade.

The law may distinguish status from permission.

It should not confuse either with invisibility, evasion, or defiance of the law.

People whom the government permitted to remain were not hidden from the system.

They were waiting inside it.

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