Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***One-Year Filing Deadline***
Rev. Date	May 6, 2013
Lesson Description	This lesson describes the statutory bar to applying for asylum more than one year after an alien's date of last arrival. Through discussion of the statute, the implementing regulation, and the review of examples, the lesson explains the standard of proof and exceptions to the one-year filing deadline.
Terminal Performance Objective	Given an asylum application to adjudicate in which the one-year filing deadline or a previous denial is at issue, the asylum officer will be able to properly determine if an applicant is eligible to apply for asylum.
Enabling Performance Objectives	1. Identify to what extent the one-year filing rule is at issue in a given case. (ACRR4)(AA1) 2. Apply the clear and convincing evidentiary standard to determine if an asylum application complies with the one-year filing rule. (ACRR4)(AA1) 3. Explain the exceptions to the one-year filing rule. (AA3)(AIL1) 4. Identify all relevant factors in evaluating credibility with respect to the one–year filing rule. (AAS5) 5. Determine whether an applicant is barred from applying for asylum. (ACRR3)(AA3)
Instructional Methods	Lecture, discussion, practical exercises
Student References / Materials	INA §§ 208(a); 101(a)(42); 8 C.F.R. § 208.4(a); *Matter of Y-C-*, 23 I & N Dec. 286, 288 (BIA 2002); *Vahora v. Holder,* 641 F.3d 1038 (9th Cir. 2011).
Method of Evaluation	Practical exercise, written exam
Background Reading	Joseph E. Langlois. Asylum Division, Office of International Affairs. *Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p. plus attachments. (See Asylum lesson plan, *Mandatory Bars Overview and Criminal Bars to Asylum* and RAIO *Discretion* Training Module)

Critical Tasks

Skill in identifying information required to establish eligibility. (4)
Knowledge of policies and procedures for one-year filing deadline. (4)
Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)
Knowledge of the criteria for establishing credibility. (4)
Skill in determining materiality of facts, information, and issues. (6)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

TABLE OF CONTENTS

I. INTRODUCTION 4

II. OVERVIEW 4

III. APPLICABILITY 5

IV. DETERMINING WHETHER THE APPLICATION WAS FILED WITHIN THE ONE-YEAR PERIOD 5

- A. Calculating the One-Year Period 5
- B. Burden and Standard of Proof 6

V. EXCEPTIONS TO THE ONE-YEAR RULE 9

- A. Changed Circumstances 9
- B. Extraordinary Circumstances 13
- C. Burden and Standard of Proof 21

VI. FILING WITHIN A REASONABLE PERIOD OF TIME 22

- A. Overview 22
- B. Delayed awareness 23
- C. Evaluation of the "reasonable period of time" 23

VII. CREDIBILITY 25

- A. Overview 25
- B. Totality of the Circumstances 25

VIII. SUMMARY 32

- A. Filing Deadline Requirement 32
- B. Calculating the One-Year Period 32
- C. Burden and Standard of Proof for One-Year Period 32
- D. Exceptions -- Changed or Extraordinary Circumstances 32
- E. Standard and Burden of Proof for Establishing a Changed or Extraordinary Circumstance. 33
- F. Reasonable Period of Delay 33
- G. Credibility 33

Presentation | **References**

I. INTRODUCTION

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), eligibility for asylum was not linked to how long an applicant had been in the United States. IIRIRA introduced a new eligibility requirement: an asylum applicant filing after April 1, 1998, must apply within one year of his or her last arrival or April 1, 1997, whichever is later, unless there are changed circumstances that materially affect his or her eligibility for asylum, or extraordinary circumstances relating to the delay in filing. This lesson provides guidance on determining whether an applicant has applied for asylum within one year from date of arrival in the United States and, if not, whether an exception exempting the applicant from this requirement applies.

Pub. L. No. 104-208, 110 Stat. 3546 (Sept. 30, 1996).

See 8 USC § 1158(a)(2)(B); INA § 208(a)(2)(B) (an alien must "[demonstrate] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States");and 8 C.F.R. § 208.4 (a). Exceptions to the rule are provided in INA § 208(a)(2)(D) and 8 C.F.R. § 208.4(a).

II. OVERVIEW

Any asylum applicant who applies for asylum on or after April 1, 1998 (or April 16, 1998, for those applying affirmatively), must establish that he or she filed for asylum within one year from the date of last arrival (or April 1, 1997, whichever is later), or establish that he or she is eligible for an exception to the one-year filing requirement. If an applicant fails to establish either timely filing of the application or that an exception applies, the application must be referred to the Immigration Court. Only an asylum officer, immigration judge or the Board of Immigration Appeals (BIA) is authorized to make this determination. The determination may be made only after an interview with an asylum officer or hearing before an Immigration Judge.

8 C.F.R. § 208.4(a).

See discussion of 14-day grace period in Section III below for April 16, 1998 date.

Note: An applicant who is not eligible to apply for asylum for failure to meet the one-year filing requirement is still eligible to apply for withholding of removal before an immigration judge.

An asylum interview is the method asylum officers use to determine an applicant's last arrival date, basis for asylum claim, and whether any exceptions to the filing deadline apply. No applicant is to be denied a full asylum interview based solely on one-year filing deadline issues. A full and thorough asylum interview includes a pre-interview check of country conditions and post-interview research where necessary.

Decisions by an asylum officer must be supported by the officer's written assessment of the case. Because changed conditions may provide an exception to the one-year filing requirement (as discussed below), all referrals on the basis of the one-year filing deadline must address pertinent country conditions and must analyze whether there has been any change in country conditions.

III. APPLICABILITY

Only affirmative applications with a filing date on or after April 16, 1998, are subject to the one-year rule. Applications with a filing date on or before April 15, 1998, are not subject to the one-year filing deadline as implemented by the Asylum Division. Although April 1, 1998, is the effective date provided by regulation for those who arrived before April 1, 1997, legacy-INS extended an administrative 14-day grace period for applications filed with the INS. This 14-day period only applies to those applications filed in the first 15 days of April, 1998.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A).

The Trafficking Victim's Protection Reauthorization Act (TVPRA) amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children. As of the TVPRA's effective date of March 23, 2009, when you determine that a minor principal applicant is an unaccompanied alien child, you should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply.

Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, (HQRAIO 120/12a) (25 March 2009).

IV. DETERMINING WHETHER THE APPLICATION WAS FILED WITHIN THE ONE-YEAR PERIOD

A. Calculating the One-Year Period

1. Date one-year period begins

The one-year period is calculated from the date of the applicant's last arrival in the United States or from April 1, 1997, whichever date is later. The date of arrival is counted as day zero, so the first day in the calculation is the day after the last arrival.

8 C.F.R. § 208.4(a)(2)(ii); *Matter of F-P-R*, 24 I. & N. Dec. 681 (BIA 2008) (holding that the term "last arrival" refers to the alien's most recent arrival in the United States from a trip abroad).

For example, if an applicant enters the United States on February 2, 2000, leaves the United States on February 25, 2000, and returns to the United States on March 1, 2000, the one-year period begins on March 2, 2000.

Note: The regulations, at 8 C.F.R. § 208.4(a), state that an applicant has the burden of proving that her "application has been filed within 1 year of the date of the alien's arrival in the United States," and that "[t]he 1-year period shall be calculated from the date of the alien's last arrival in the United States . . .". Before the Ninth Circuit's opinion in *Minasyan v. Mukasey*, the Asylum Division counted the day of arrival as "day one" for purposes of calculating the one-year period. In order to maintain a consistent national

See Minasyan v. Mukasey, 553 F.3d 1224 (9th Cir. 2009) ("[T]he statute specifically provides that the one-year period for filing an asylum application commences *after* the date of arrival, meaning that his date

approach--in accord with the INA, the regulations, and *Minasyan*, the Asylum Division now calculates the day of arrival as "day zero."

of arrival does not count as "day one" for purposes of the filing deadline.")

2. Date one-year period ends

The one-year period is calculated from the last arrival date up to the same calendar day the following year. For example, an applicant who arrives on February 23, 2000, and files on February 23, 2001, will have timely filed. Note that for an applicant who last arrived before April 1, 1997, the one-year period is calculated from April 1, 1997.

If the last day for timely filing falls on a Saturday, Sunday, or legal holiday, filing on the next business day will be considered timely. For example, an applicant who last arrives on June 24, 2000, can timely file on June 25, 2001, because June 24, 2001, is a Sunday.

8 C.F.R. § 208.4(a)(2)(ii)
See Jorgji v. Mukasey, 514 F.3d 53 (1st Cir. 2008) (finding that the applicant filed timely where she entered on March 4, 2001 and provided documentary evidence that she filed on *Monday*, March 4, 2002).

3. Filing date

The filing date is found on the Service Center's date/time stamp on the I-589 and on the RAPS "I589" and "CSTA" screens. If any of these dates are different, the earliest date is to be used.

An affirmative asylum application is considered filed when *received* by the USCIS Service Center. However, the application can be considered timely if "clear and convincing" documentary evidence demonstrates that the application was *mailed* within the statutory one-year period. The "clear and convincing" standard is explained in Section IV.B.

8 C.F.R. § 208.4(a)(2)(ii); *see Nakimbugwe v. Gonzales*, 475 F.3d 281 (5th Cir. 2007).

B. Burden and Standard of Proof

There are two different standards of proof that are operative in making determinations related to the one-year filing requirement: a) the standard of proof to establish that an applicant applied within one year and b) the standard of proof to establish that an exception to the requirement applies, if the applicant failed to meet the one-year requirement. This section focuses on the standard of proof required to establishing filing within one year.

1. Applicant's burden

The burden of proof is on the applicant to establish that he or she applied for asylum within one year from the date of last arrival in the United States.

2. Standard of proof

Pursuant to INA section 208(a)(2), the standard of proof required to establish that an applicant filed within one year from last arrival is the ***clear and convincing*** standard.

"Clear and convincing" is that degree of proof that will produce a "firm belief or conviction as to the allegations sought to be established," and "where the truth of the facts asserted is highly probable."

Black's Law Dictionary, 5th and 6th Editions; *Woodby v. INS*, 385 U.S. 276 (1966); *Matter of Carrubba*, 11 I&N Dec. 914 (BIA 1966); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988).

The proof need not be "conclusive" or "unequivocal;" if put on a scale, the clear and convincing standard would be somewhere between the "preponderance of evidence" standard (greater than 50% standard, or "more likely than not") and the "beyond a reasonable doubt" standard used in criminal trials.

Asylum officers should avoid trying to place the clear and convincing standard on a particular point on a percentage scale. Clear and convincing evidence does not fall precisely on any point between the "preponderance of evidence" standard and the "beyond a reasonable doubt" standard. Instead, it is the degree of evidence necessary to create a firm belief that the asserted fact is true.

3. Establishing timely filing

An applicant may establish that an application was filed within one year from the date of last arrival by providing either—

a. clear and convincing evidence that the date of last arrival was within the applicable one-year period, <u>or</u>

b. clear and convincing evidence that the applicant was outside of the United States during the previous year immediately before the date of filing.

In 2008, a Ninth Circuit decision held that, "the BIA erred in concluding that proof of an exact departure date was necessary when other clear and convincing

Khunaverdiants v. Mukasey, 548 F.3d 760, (9th Cir. 2008).

evidence established . . . that [the applicant] was released from prison in Iran less than one year before filing his asylum application."

4. Evidence

The evidence provided may be testimony, documentation, or a combination of both.

a. Testimony

Testimony is evidence. Standing alone without witness corroboration or documentary evidence, when credible, testimony can be sufficiently clear and convincing to lead an asylum officer to a "firm belief" that the applicant arrived within one year before the filing date.

8 C.F.R. § 208.13(a); *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *see* RAIO Training Module, *Evidence*.

b. Documents

Documentary evidence such as passport entries, boarding passes, leases, etc., are probative as to when an applicant entered the United States, when presence outside the United States ended, and when presence in the United States began.

While the INA requires that an asylum applicant provide reasonably available corroborating evidence to establish eligibility for asylum, neither the statute nor regulations specifically address requirements for establishing that the one-year filing requirement has been met. However, consistent with the reasoning of case law addressing corroboration is the premise that corroboration should not be required when there are reasonable explanations for the inability to provide corroborating evidence. Due to circumstances that give rise to a refugee's flight, it generally would be unreasonable to expect a refugee to have documentary proof of presence outside the United States within a year from last arrival. Furthermore, at least one circuit has held that an applicant cannot be required to provide corroborating evidence to show he or she has met the one-year filing deadline.

See RAIO Training Module, *Evidence*.

In *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011) (holding that the requirement for corroborating evidence to establish asylum eligibility added by the REAL ID Act of 2005 does not apply to the statutory provision establishing the one-year filing deadline for asylum applications, but not considering whether, in the absence of credible testimony meeting the clear and convincing standard, an IJ may weigh the lack of corroborating evidence in

<u>Note</u>: There may be instances in which the asserted arrival date is uncertain or not believable. These credibility issues are explored in Section VII.

assessing compliance with the standard).

V. EXCEPTIONS TO THE ONE-YEAR RULE

If an applicant did not apply for asylum within one year from last arrival in the United States, he or she may still be eligible to apply for asylum if the applicant establishes that there are changed circumstances materially affecting the applicant's eligibility for asylum or extraordinary circumstances related to the delay in filing. Once an applicant establishes the existence of such a changed or extraordinary circumstance, the applicant must demonstrate that the application was filed within a reasonable amount of time given those circumstances.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a).

Keep in Mind:

The analysis of whether an applicant qualifies for asylum is not relevant to examining one-year filing deadline issues; rather, the task at this initial stage is to determine whether an exception to the one-year filing deadline applies. If an exception to the one-year filing deadline applies, then the applicant is entitled to a full adjudication of his or her asylum application.

A. Changed Circumstances

1. General considerations

INA § 208(a)(2)(D).

The statute allows for an exception due to changed circumstances that materially affect an applicant's eligibility for asylum. To show that the exception applies, the applicant must establish the following:

a. the existence of a changed circumstance that occurred on or after April 1, 1997, the effective date of the statute;

b. that the changed circumstance is material to the applicant's eligibility for asylum; and

c. that the application was filed within a reasonable period of time after the changed circumstance.

In evaluating whether a delay in filing was reasonable, the asylum officer must take into account any delayed awareness the applicant may have had of the changed circumstance.

Note: An exception may result regardless of when the changed circumstance occurs, so long as it occurred after the effective date of the statute. The changed circumstance need not occur during the period when filing would be timely.

8 C.F.R. § 208.4(a)(4)(ii). This is discussed further in Section VI, *Filing Within a Reasonable Period of Time*, below.

2. Types of changed circumstances

The federal regulations on filing the asylum application provide a non-exhaustive list of the types of changed circumstances that may provide an exception to the one-year filing rule, as long as they materially affect the applicant's eligibility for asylum. These include:

a. changed conditions in the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence

8 C.F.R. § 208.4(a)(4)(i)(A).

b. changes in applicable U.S. law

8 C.F.R. § 208.4(a)(4)(i)(B).

c. changes in the applicant's circumstances, such as recent political activism outside the country of feared persecution, conversion from one religion to another, etc.

8 C.F.R. § 208.4(a)(4)(i)(B).

d. the ending of the applicant's spousal or parent-child relationship to the principal applicant in a previous application.

8 C.F.R. § 208.4(a)(4)(i)(C).

Examples

1) Applicant was forced by her government to undergo an abortion. She arrives in the U.S. in 1992. The 1996 change to the refugee definition related to harm pursuant to a coercive population control program materially affects her asylum eligibility. She files for asylum on April 18, 1998. This applicant is not entitled to the changed circumstance exception because the change did not occur on or after April 1, 1997. If no other exceptions apply, her application will be referred.

Zhu v. Gonzales, 493 F.3d 588, 595 n.25 (5th Cir. 2007) (rejecting Zhu's argument that changed circumstances exist, given that China's family planning laws existed as a basis for eligibility for asylum when Zhu arrived in the US).

2) Applicant is a member of the XYZ party in his country. He is briefly jailed in September 1999. He arrives in the U.S. in November 1999 and files for asylum in December 2000. On the day of the interview, XYZ members are still routinely being jailed. Because there has been no change of country conditions, the application will be referred provided no other exceptions apply.

Mabasa v. Gonzales, 455 F.3d 740 (7th Cir. 2006) (holding that applicant did not show changed or worsened circumstances because the political climate in Zimbabwe remained as oppressive as it was at the time of his departure, and the applicant's renewed political

Note: If conditions for XYZ members worsened after applicant departed his country, he may be eligible for the changed circumstance exception.

In *Vahora v. Holder*, the Ninth Circuit further clarified this point. Vahora had already been subjected to serious physical harm in India because of his religion but, after he left, conditions worsened significantly. The country experienced the worst religious violence in decades and the religious rioting directly affected Vahora's family, property, and safety in India – his home and farm were destroyed and his family members were pursued by the police and went missing. Mr. Vahora did not file his affirmative asylum application within a year of his last arrival in the U.S. The IJ found, and the BIA upheld, no changed circumstance, finding instead that these events and their impact on Vahora were insufficient to show a material effect on his eligibility for asylum because he had already experienced mistreatment in India and should have expected it would continue if he returned.

The Ninth Circuit reversed, finding that there were changed circumstances because the new facts make it substantially more likely that Vahora's claim will entitle him to relief, and that such events did materially effect his eligibility as required by 8 C.F.R. § 208.4(a)(4)(i)(a). Such a material effect is one that increases in a non-trivial way the likelihood of success in an application.

3) Applicant arrived in the U.S. in 1989 and has never left. She was included as a derivative on her mother's I-589, which was filed in September 1998, while Applicant was still a minor. Applicant's mother died in May 1999 before receiving her asylum interview. In June 2000, Applicant filed her own I-589. Due to the change in Applicant's derivative relationship, an exception to the filing deadline would apply provided the asylum officer considered the delay in filing from May 1999 to June 2000 to be a reasonable period of time.

activity in the US was the very activity that caused his original flight); *see also, Ramadan v. Gonzales*, 479 F.3d 646, 657-58 (9th Cir. 2007), *rehearing and rehearing en banc denied by, Ramadan v. Keisler*, 504 F.3d 973 (9th Cir. 2007) (no changed circumstances where applicant expressed her political opinions in the U.S. on women's liberty in Egypt but had already been outspoken on women's issues while in Egypt).

Vahora v. Holder, 641 F.3d 1038 (9th Cir. 2011); *see also Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008) (where there are objectively changed circumstances, "there can be 'changed circumstances which materially affect the applicant's eligibility for asylum' even if the alien always meant to apply for asylum and always feared persecution; a sudden 'Eureka!' state of mind is not necessary.").

Note: The fact that minors customarily leave immigration and other legal paperwork to older family members should be taken into account when evaluating the reasonableness of the delay in filing.

4) Applicant was a derivative on his father's I-589, which was filed in January 1999. In July 2000, Applicant got married. As a result, he lost his eligibility for derivative status in relation to his father. Applicant filed his own I-589 in November 2000. An exception to the filing deadline would apply in the son's case, provided the asylum officer considered the delay in filing from the date of marriage to the I-589 filing date to be a reasonable period of time.

Note: It will be rare that an asylum officer will encounter an applicant who was a derivative on his or her parent's claim and who subsequently filed as a principal because he or she is no longer under 21 years of age. This is because under the Child Status Protection Act, a derivative applicant continues to be considered a child for purposes of the parent's pending I-589, even though the dependent turned 21 years of age.

INA § 208(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208. *See also* Asylum lesson, *Guidelines for Children's Asylum Claims*. Note: reference to the Asylum lesson is accurate as of this date. At a future date, this will reference the RAIO training module, *Children's Claims, Asylum Supplement*.

3. Refugees *sur place*

The term "refugees sur place" refers to those who became refugees after leaving their home country. The changed circumstance exception to the one-year filing deadline reflects the principle that some individuals become refugees after they have left their countries and even after they may have been residing in another country for several years ("refugees *sur place*").

8 C.F.R. § 208.4 (a)(4)(i)(A); UNHCR Handbook, Paragraphs 94-95; *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *See* RAIO Training Module, *Well-Founded Fear*, .

Changes occurring in an applicant's country or place of last habitual residence, and/or activities by an applicant outside his or her country may make the applicant a refugee *sur place*. Examples include but are not limited to:

a. a change of government which is now hostile to an applicant's profession, such as journalists

b. an applicant's involvement in political organizing or other activities in the U.S. that are critical of the applicant's government

c. an applicant's conversion from one religion to another, or abandonment of religion altogether recent antagonism in an applicant's country toward the applicant's race or nationality

d. recent antagonism in an applicant's country toward the applicant's race or nationality

e. threats against an applicant's family member living abroad

Taslimi v. Holder, 590 F.3d 981 (9th Cir. 2010) (finding that the delay between the applicant's conversion ceremony and the filing of her asylum application was reasonable, as religious conversion is a subjective process that may begin on a certain date but takes time to incorporate into one's life).

Example

A Russian citizen of West African ancestry has lived in the United States since 1989. She filed an I-589 in June 2000. Country conditions information shows that since the 1991 breakup of the former Soviet Union, individuals with West African ancestry have been targeted by ordinary citizens in Russia. The police have tolerated this abuse. Depending on the particular circumstances of the case, this applicant could be considered a refugee *sur place.* Provided there are no additional exceptions, because the change in country conditions occurred before April 1997, the applicant's failure to file for asylum within one year of arrival would result in her application being referred. **Note:** If there had been an escalation of violence between ethnic Russians and West Africans after April 1, 1997, the applicant would be eligible for an exception, provided the delay in filing is a reasonable period of time.

See Matter of A-M-, 23 I&N Dec. 737 (BIA 2005) (where applicant entered the U.S. on January 22, 2001, and filed for asylum over 2 years later, the nightclub bombing in Bali, Indonesia on October 12, 2002 did not constitute a material change in circumstances because the bombing did not materially affect or advance applicant's claim: he was from a different island and of a different ethnicity and religion than both those generally in Bali and the specific victims of the Bali bombing).

B. Extraordinary Circumstances

1. General considerations

8 C.F.R. § 208.4(a)(5).

Events or factors in an applicant's life that caused the applicant to miss the filing deadline may except the applicant from the requirement to file within one year of the last arrival or April 1, 1997, whichever is later. To be eligible for this exception, the applicant must:

a. establish the existence of an extraordinary circumstance;

b. establish that the extraordinary circumstance was directly related to the failure to timely file;

c. not have intentionally created the extraordinary

circumstance, through his or her action or inaction, for the purpose of establishing a filing-deadline exception; and

d. file the application within a reasonable period given the circumstances that related to the failure to timely file.

Although an extraordinary circumstance can occur before or after an applicant's arrival in the U.S., and before or after the April 1, 1997, the effective date of the statutory provision, the extraordinary circumstance must directly relate to an applicant's failure to file within the one year period when filing would be timely.

Note: Because an extraordinary circumstance must directly relate to the failure to file, it must occur in the period when filing would be timely for an exception to exist (in contrast with a changed circumstance, which may occur at any time).

2. Types of circumstances that may be "extraordinary"

The federal regulations describe several situations that could fall under the extraordinary circumstances exception. This list is not exhaustive or all-inclusive. There are other circumstances that might apply if the applicant is able to show that those circumstances were extraordinary and directly related to the failure to timely file.

The Asylum Division considers the examples of extraordinary circumstances listed in the regulation as circumstances that, if experienced by an applicant, are likely to relate to the failure to timely file. When an applicant establishes the existence of an enumerated extraordinary circumstance, the officer should verify that the extraordinary circumstance is directly related to the failure to timely file.

Extraordinary circumstances include but are not limited to:

a. serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past

8 C.F.R. § 208.4(a)(5)(i).

The illness or disability must have been present, although not necessarily incurred, during at least part of the one-year period after arrival.

If the applicant has suffered torture or other severe trauma in the past, the asylum officer should elicit information about any continuing effects from that torture or trauma, which may be related to a delay in

Effects of persecution can include inability to recall details, severe lack of focus, problems with eating and sleeping, and other post-

filing. Torture may result in serious illness or mental or physical disability.

traumatic stress disorder (PTSD) symptoms. *See* RAIO training module *Interviewing - Survivors of Torture. See also* RAIO training module *Guidance for Adjudicating Lesbian, Gay, Bisexual and Intersex Claims.*

b. the death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

8 C.F.R. § 208.4(a)(5)(vi).

Applicant's legal guardian, or holder of power of attorney, is also considered a family member.

The degree of interaction between the family members, as well as the blood relationship between applicant and the family member must be considered. For example, an estranged brother with whom the applicant has never had much contact would not qualify, but a grandparent or uncle for whom the applicant has sole physical responsibility would qualify.

c. legal disability

8 C.F.R. § 208.4(a)(5)(ii).

This is best described as an incapacity for the full enjoyment of ordinary legal rights; it includes minors and mental impairment.

Black's Law Dictionary, 5th Ed.

The legal disability must have existed at a point during the one-year period after arrival.

The regulations specifically include "unaccompanied minors" as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance. Keeping in mind that the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations, the Asylum Division's policy is to find that all minors who have applied for asylum, whether accompanied or unaccompanied, also have a legal disability that constitutes an extraordinary circumstance.

8 C.F.R. § 208.4(a)(5)(ii); *see Matter of Y-C-*, 23 I & N Dec. 286 (BIA 2002).

A minor applicant is defined as someone under the age of eighteen at the time of filing. *See* USCIS Memorandum, "Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS," Aug. 14, 2007, p.5.

The same logic underlying the legal disability ground listed in the regulations applies to accompanied minors: minors are generally dependent on adults for

their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

As long as an applicant applies for asylum while still a minor (while the legal disability is in effect), the minor should be found to have not only established the existence of an extraordinary circumstance, but also to have filed within a reasonable period of time given the circumstance, thus meriting an exception to the one-year filing deadline.

See section VI, below, "Reasonableness…."

(i) Unaccompanied Alien Children (UAC)

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 amended the INA to state that the one-year filing deadline does not apply to *unaccompanied alien children*. An unaccompanied alien child is a child who has no legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody. As of March 23, 2009, the effective date of the TVPRA, when an asylum officer determines that a minor principal applicant is an unaccompanied alien child, the asylum officer should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A); S*ee also* Asylum lesson, *Guidelines for Children's Asylum Claims*. Note: reference to the Asylum lesson is accurate as of this date. At a future date, this will reference the RAIO training module, *Children's Claims, Asylum Supplement*.

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(ii) Minors Who Are Not Found To Be Unaccompanied Alien Children

The one year filing deadline continues to be applicable for minor principal applicants in lawful immigration status and minor principal applicants who are accompanied. Such cases should be analyzed according to the general guidance above.

Note: As passage of the TVPRA exempts only unaccompanied alien children from the one-year filing deadline, the deadline still applies to minors who are not found to be unaccompanied alien children. As a result, the examples listed in 8 CFR § 208.4(a)(5)(ii) are still valid.

d. ineffective assistance of counsel (limited to attorneys or accredited representatives)

8 C.F.R. § 208.4(a)(5)(iii)

The following are required for this exception:

(i) the applicant must file a written affidavit explaining the agreement in detail and listing what promises the attorney made or did not

make, and

(ii) testimony or documentary evidence that the accused counsel was informed of the allegation and was given an opportunity to respond, and

(iii) testimony or documentary evidence that indicates whether there has been a complaint filed with the appropriate disciplinary authorities and, if not, an explanation why there has been no complaint.

Note: Regulations and case law that address whether counsel's assistance was ineffective are not relevant here. The asylum officer is not evaluating whether applicant was given poor counsel; rather, the responsibility of the asylum officer is to decide whether the above asylum regulatory elements have been fulfilled and that the counsel's actions were related to the delay in filing. Therefore, a recent ruling of the Attorney General that an alien has no right to effective assistance of counsel in removal proceedings is not relevant in determining whether an extraordinary circumstance exists and if an exception is warranted.

8 C.F.R. § 292.3(a); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *Matter of B-B-*, Int. Dec. #3367 (BIA 1998).

See Matter of Compean, 24 I&N Dec. 710 (AG 2009)

e. maintenance of TPS, lawful status, or parole until a reasonable period before filing an asylum application

8 C.F.R. § 208.4(a)(5)(iv).

The regulations specifically provide that maintaining lawful immigration status during at least part of the one-year period qualify as an extraordinary circumstance. Thus, maintaining lawful status may enable an applicant to establish an exception to the requirement to file within the one-year period. As with all extraordinary circumstances that affect filing, maintaining lawful status excuses the failure to file within the one-year period so long as the application was filed within a reasonable period given the circumstance that relate to the failure to timely file.

The Department of Justice included these possible extraordinary circumstances exceptions to avoid forcing a premature application for asylum in cases in which an individual believes circumstances in his or her country may improve. For example, an individual admitted as a student who expects that the political situation in her country may soon change for the better

See 65 Fed. Reg. 76121, 76123 (Dec. 6, 2000).

as a result of recent elections may wish to refrain from applying for asylum until absolutely necessary.

Given the rationale for the inclusion of legal status as an extraordinary circumstance, the Asylum Division has determined that the "maintaining lawful status" extraordinary circumstance will generally relate to the failure to timely file, even where the applicant does not reference having status as a reason for the delay in filing.

An applicant has not "maintained lawful status" when:

(i) the admission is based on fraudulent documents,

(ii) he or she appears to be in lawful status, but has actually violated that status, or

(iii) the term parole specifically require that asylum be filed within one year.

Note: The applicant is not precluded from establishing an extraordinary circumstance where legal status has not been maintained. Consider if the case involves a "delayed awareness" of the violation of status. *See* section VI.B., *Delayed Awareness*, below.

Although applicants in the above circumstances have not maintained lawful status, some still may establish extraordinary circumstances exceptions. In evaluating whether an exception applies, the asylum officer should determine whether the applicant believed that he or she was maintaining lawful status.

In some circumstances, where the visa allows an applicant to be admitted to the United States for a specific function or purpose, and the applicant never performs that function or purpose, the applicant will be unable to establish that he or she qualifies for an extraordinary circumstances exception.

For example, an applicant who was admitted as an F-1 student, but never attended school (where the purpose of the visa is to permit the applicant to attend school in the United States) would be unable to establish that he or she qualifies for an extraordinary circumstances exception to filing within the one-year deadline.

On the other hand, an F-1 student may work, mistakenly, or transfer schools without permission, believing that this does not violate the terms of the admission. The applicant's belief that he or she is maintaining F-1 status may provide for an extraordinary circumstances exception, provided that the applicant filed within a reasonable period of time

See section VI., *Filing Within a Reasonable Period of Time*, below.

given the circumstances that relate to the failure to timely file.

In evaluating whether an extraordinary circumstances exception applies, asylum officers should keep in mind the rationale for including "maintaining lawful status" among the exceptions to the filing deadline (see note above). Although not actually maintaining status, the applicant who believes he or she is maintaining lawful status also may delay filing for asylum until there is no alternative.

Parole of one year or less for the purpose of submitting an asylum application may not be considered an exception to the one-year filing deadline. Applicants paroled for the purpose of filing asylum are expected to file their asylum applications within one year of the parole and are given notice to that effect. Therefore, unless such applicants are granted an extension of this parole or granted some other form of legal status, they are not eligible for the lawful status exception to a timely filing.

Applicants who are not paroled for the purpose of submitting an asylum application during the required filing period may qualify for an extraordinary circumstances exception. In such cases, applicants still must file within a reasonable time after the period of parole ends.

The same logic that applies for asylum applicants who are maintaining a status or parole may apply to asylum applicants who are derivatives on a principal's asylum application. For instance, where a child is a derivative on her parent's asylum application and the child decides to file her own asylum application as the principal applicant, the child's having been a derivative on a pending asylum application at a point during the one-year following the child's last entry could constitute an extraordinary circumstance.

An alien with a pending application, who is not in any lawful status, may be considered to be an alien whose period of stay is authorized by the Attorney General. The types of "stay authorized by the Attorney General" that the asylum officer might encounter could include pending applications for adjustment of status, Such applicants would not be analyzed specifically under the "lawful status" exception to the one-year

For examples of periods of stay authorized by the Attorney General, *see Michael Pearson, Executive Associate Commissioner, Field Office Operations, Period of stay authorized by the Attorney General after 120-day tolling period for*

filing deadline. However, insofar as the "extraordinary circumstances" exception is not limited to the precise scenarios outlined, the Asylum Officer should consider the totality of the circumstances when determining whether an applicant with a pending application can establish an exception to the requirement that the application be filed within one year of last arrival.

purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act). (AD 00-07), Memorandum to INS field offices, March 3, 2000.

f. initial attempted submission of application was timely

(i) defect in first submission

8 C.F.R. § 208.4(a)(5)(v).

The I-589 was mailed within one year of the last arrival, but the USCIS Service Center returned it as improperly filed. It was subsequently refiled more than one year after the arrival. In cases such as this, the applicant is presumed to have attempted a timely request for protection with USCIS. The application will not be referred on the basis of the one-year filing deadline, provided the applicant refiles within a reasonable period of time from the date the application was returned by the Service Center. **Note:** The file must always be thoroughly checked to ensure that correspondence to an applicant from the Service Center is not overlooked.

(ii) administrative closure

Where a case was initially filed before April 16, 1998 or prior to the expiration of the one-year period, then closed and subsequently reopened by USCIS, there is no filing deadline issue because the application was timely filed.

(iii) previous asylum case was terminated by an immigration judge

Provided the first filing was before April 16, 1998, or before the expiration of the one-year period, an asylum officer should examine the period of time from the termination date to the second filing date in order to determine whether the delay was reasonable.

g. other circumstances

See also RAIO training module *Guidance for Adjudicating Lesbian, Gay,*

Other circumstances that are not specifically listed in

the non-exclusive list in the regulations, but which may constitute extraordinary circumstances, depending on the facts of the case, include, but are not limited to, severe family or spousal opposition, extreme isolation within a community, profound language barriers, or profound difficulties in cultural acclimatization. Any such factor or group of factors must have had a severe enough impact on the applicant's functioning to have produced a significant barrier to timely filing.

Bisexual and Intersex Claims.

C. Burden and Standard of Proof

1. Applicant's burden

The burden of proof is on the applicant to establish the existence of a changed circumstance materially affecting eligibility for asylum or of an extraordinary circumstance related to the applicant's failure to apply for asylum within one year from the last arrival.

2. Standard of proof

The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General.* This is a lower standard of proof than the "clear and convincing" standard that is required to establish that the applicant timely filed.

INA § 208(a)(2)(D); *see* RAIO Training Module, *Evidence*.

The standard "to the satisfaction of the Attorney General" places the burden on the applicant to demonstrate that an exception applies. The applicant is not required to establish "beyond a reasonable doubt" or by "clear and convincing evidence" that the exception applies. Rather, this standard has been described in another immigration context as requiring the applicant to demonstrate that the exception applies through "credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially."

See Matter of Barreiro, 12 I&N Dec. 277, 282 (BIA 1967) (interpreting the "satisfaction of the Attorney General" standard as applied when adjudicating an exception to deportability for failure to notify the Service of a change of address).

This standard has also been interpreted in other immigration contexts to require a similar showing as the "preponderance of evidence" standard, requiring an individual to prove an issue:

- "by a preponderance of evidence which is reasonable, substantial and probative," or

See e.g. Matter of Barreiros, 10 I&N Dec. 536, 538 (BIA 1964) (interpreting same standard for rescinding LPR status by establishing that applicant was not eligible for adjustment); *Matter of V-*, 7 I&N Dec. 460, 463 (BIA

- “in his favor, just more than an even balance of the evidence.”

1957) (interpreting standard for an alien to establish that a marriage was not contracted for the purpose of evading immigration laws).

3. Evidence

Generally, asylum officers must consult country conditions information relevant to the applicant’s claim to determine whether there are changed country conditions material to the applicant’s eligibility for asylum.

Note: This, of course, would not apply where the changed circumstance is a change in the applicant’s spousal or parent-child relationship to the principal in a previous application.

While the burden of proof is on the applicant to show that there are changed circumstances that now materially affect his or her eligibility for asylum, many applicants affected by changed circumstances may not be able to articulate those circumstances. The unique nature of assessing an applicant’s need of protection places the officer in a “cooperative” role with the applicant. It is an asylum officer’s affirmative duty “to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.”

See RAIO Training Module, Researching and Using Country of Origin Information in RAIO Adjudications.

UNHCR Handbook, para. 196; 8 C.F.R. § 208.9(b). .

Asylum officers must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists. Documentary evidence includes country conditions and legal information that the asylum officer researches and uses.

INS, Interim Rule with Request for Comments, 62 Fed. Reg. 10312, 10316 (Mar. 6, 1997) (acknowledging the weight of “a decision to deny an alien the right to apply for asylum”); 142 Cong. Rec. S11840 (Sept. 30, 1996) (comments by Senators Hatch and Abraham shortly before passage of IIRIRA that indicate legislative intent for exceptions to cover a broad range of circumstances).

VI. FILING WITHIN A REASONABLE PERIOD OF TIME

A. Overview

If there are changed or extraordinary circumstances either material to the applicant’s claim or related to the applicant’s failure to file timely, respectively, the applicant must have filed the asylum application within a reasonable period of time from the occurrence of the changed or extraordinary circumstance in order to establish an exception to the one-year filing deadline.

8 C.F.R. § 208.4(a)(4)(ii).

B. Delayed awareness

If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness must be taken into account in determining what constitutes a "reasonable period of time."

8 C.F.R. § 208.4(a)(4)(ii).

C. Evaluation of the "reasonable period of time"

What constitutes a reasonable period of time to file following a changed or extraordinary circumstance depends upon the facts of the case. There is no amount of time that is automatically considered reasonable or unreasonable. Asylum officers must ask themselves if a reasonable person under the same or similar circumstances as the applicant would have filed sooner. Asylum officers are encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file. An applicant's education and level of sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors should be considered.

Asylum Procedures, 65 Fed. Reg. 76121, 16123-24 (Dec. 6. 2000) (Supplementary Information) (noting that the finding of changed or extraordinary circumstances would justify late filing "to the extent necessary to allow the alien a reasonable amount of time to submit the application," but not providing an automatic extension of a certain period of time); *see Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (finding that there is no automatic one year extension in which to file an asylum application following material "changed circumstances")

In addition, the applicant may assert that a particular situation that would otherwise be considered "an extraordinary circumstance," such as a serious injury to the applicant and/or his or her representative, that took place outside of the one year filing period contributed to his or her delay in filing. Though such situations cannot be considered "extraordinary circumstances" for the purposes of an exception, they should be considered when determining whether the application was filed in a reasonable period of time where there has been a changed or extraordinary circumstance identified that could give rise to an exception.

Examples

1) An educated human rights lawyer arrived in the U.S. in 1985. She demonstrates that country conditions changed in 1997, placing her at risk. She files for asylum in January 2001. Due to this particular applicant's knowledge of the law and human rights conditions, an explanation for waiting so long to file would have to be very convincing to be considered reasonable.

2) In 1987 a Polish citizen was jailed by the Polish Government for one year for expressing a pro-democracy

political opinion. He arrived in the U.S. in 1988. He filed for asylum in September 2000. His attorney states that an I-589 was not filed for many years because she did not believe he was eligible. She believes that a BIA case decided in May 2000 affects his eligibility. Presuming his attorney is correct, a changed circumstance exception to the filing deadline rule – change in applicable U.S. law – applies, provided that the four-month period from May to September is considered a reasonable delay.

3) Applicant was seriously ill during a one-year period after her last arrival, but was in very good health for 18 months prior to filing her asylum application. When asked why she waited so long, she replied that she was too busy repairing her home. While this applicant's illness constituted an extraordinary circumstance for not timely filing the I-589, delaying the filing as long as she did was not reasonable. Such a delay might, depending on the circumstances, be considered reasonable for an applicant who continued to require intensive therapy and other treatment as a result of the illness.

Examples related to permission to remain in the U.S. ("status cases")

When it is determined that an application was untimely filed and that during the one-year period the applicant had TPS, parole, or a lawful status, the inquiry is whether the applicant filed for asylum within a reasonable period of time after the TPS, parole, or lawful status ended. The existence of an extraordinary circumstance in the form of a legal status does not toll the one-year limitation. The determinations of reasonableness are made on a case-by-case basis. Although the totality of circumstances in the case determines what is considered a reasonable period of time, guidance offered by the Department of Justice states that more than a six-month delay would usually be considered unreasonable.

Husyev v. Mukasey, 528 F.3d 1172 (9th Cir. 2008) (Court found that Husyev's filing 364 days after his lawful status expired was unreasonable even though the filing was six months after the one-year deadline had passed.); *see* Asylum Procedures, 65 Fed. Reg. 76121, 76123-24 (Dec. 6, 2000) (Supplementary Information) ("Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.").

1) In February 1999, Applicant was admitted on a B-2 visa until August 1999. She applied for asylum untimely in June 2000. An extraordinary circumstance exception applies because Applicant was in lawful status during the one-year filing period. The issue before the asylum officer

See Asylum Procedures, 65 Fed. Reg. 76121, 76123 (Dec. 6, 2000) (Supplementary Information) ("The Department would expect a

is whether ten months between the expiration of lawful status (August 1999) and the time of filing (June 2000) is a reasonable period of time to file. The asylum officer does NOT look to the period of time between when the application should have been filed (February 2000) and when it was actually filed (June 2000).

person in that situation to apply for asylum, should conditions not improve, within a very short period of time after the expiration of her status. Failure to apply within a reasonable time after expiration of the status would foreclose the person from meeting the statutory filing requirements.”).

2) In September 1998, Applicant entered the U.S. on a student visa. Her status lapsed in June 2000. She filed for asylum in August 2000. Because the I-589 was filed more than one year after the last arrival, the issue for the asylum officer is whether it was reasonable to delay filing for two months after the applicant’s lawful status lapsed. **Note:** Barring facts to the contrary, in this situation a two-month delay would ordinarily be considered a reasonable period of time. A longer period of time may also be reasonable, depending on the circumstances.

3) In March 1999, Applicant was admitted to the U.S. on a B-1 visa and authorized to stay until June 1999. She applied for asylum in February 2000. This applicant timely filed the application within one year of her last arrival, so there is no filing deadline issue to adjudicate; whether it was reasonable to delay filing for eight months from the visa expiration is irrelevant. Applicant has met the one-year filing requirement.

VII. CREDIBILITY

A. Overview

As explained in this lesson, an applicant must demonstrate by clear and convincing evidence that he or she applied for asylum within one year after the date of last arrival. This may be demonstrated either by establishing the date of last arrival or by establishing that the applicant was outside the United States less than one year prior to the date the application was filed. If the applicant fails to file within one year from the date of last arrival, the applicant may still be eligible to apply for asylum if the applicant establishes to the satisfaction of the asylum officer that an exception applies. To determine whether the applicant met the filing deadline or whether an exception applies, the asylum officer will have to evaluate the credibility of the applicant’s testimony regarding each of these issues.

B. Totality of the Circumstances

In making the determination as to an asylum applicant's credibility, including the credibility of testimony related to the elements of the one-year filing deadline, asylum officers should consider "the totality of the circumstances, and all relevant factors." As noted in the Congressional conference report issued in conjunction with the enactment of the REAL ID Act of 2005, the credibility "determination must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant."

INA § 208 (b)(1)(B)(iii); *see* RAIO Training Module, *Credibility*.

H.R. Rep No.. 109-72, at 167 (2005).

Note: The standard for evaluating the applicant's credibility should be distinguished from the standards of proof by which the applicant must establish the requirements of the one-year filing deadline. For example, to determine whether an applicant has established that he or she timely filed the application, the asylum officer will evaluate whether, in the totality of the circumstances, the applicant can be considered credible as to the facts related to his or her date of entry and filing of the application and, if credible, whether the testimony establishes by "clear and convincing evidence" that the application was filed timely. To determine whether an applicant has established that he or she has satisfied the requirements of an exception, first, the asylum officer will evaluate whether, in the totality of the circumstances, the applicant's testimony related to the existence of an changed or extraordinary circumstance is credible and, if so, whether the testimony establishes to the "satisfaction of the adjudicator" that a changed or extraordinary circumstance exists. Then the asylum officer will evaluate whether, in the totality of the circumstances, the applicant's testimony regarding the circumstances surrounding the delay in filing is credible and, if so, whether the testimony supports a finding that the applicant was filed in a reasonable amount of time given the circumstances.

There may be instances where an applicant presents persuasive testimony as to one aspect of his or her claim, but does not present persuasive testimony as to another aspect. In evaluating whether an applicant was credible, asylum officers should evaluate the credibility of each factual issue, and then make a decision reviewing all relevant factors and the totality of the circumstances. Facts bearing on the filing deadline determination that should be evaluated for credibility include, but are not limited to, the details of the arrival, the applicant's whereabouts during the one year prior to the date of filing, the existence of changed or extraordinary circumstances, and the reason presented for any delay in filing if a changed or extraordinary circumstance is established. The testimony and

See Kadia v. Gonzales, 501 F.3d 817, 821-22 (7th Cir. 2007) (rejecting the doctrine of *falsus in uno, falsus in omnibus* - false in one thing, false in all things – for asylum credibility determinations).

other relevant factors should be evaluated based on the totality of the circumstances to determine whether the applicant has credibly established the facts related to the elements of the one-year filing deadline rule.

Example

Applicant credibly testifies that she is a member of a minority religious group. She cannot credibly establish her last arrival date or when she was last outside the United States. She claimed that she was jailed because of her religion, but presents inconsistent testimony concerning important details about her arrest and prolonged jail sentence. Country conditions information establishes that there recently has been a significant escalation of violence against the applicant's religious group in her country. Although this applicant's claims regarding her last arrival and prior religious persecution are found not credible, she does credibly establish she is a member of a religious minority that recently has been targeted.

Considering the totality of the circumstances, the facts related to the applicant's date of entry are found not credible, and thus she has not established by clear and convincing evidence that she timely filed her application. Considering the totality of the circumstances, the facts related to an exception to the one-year filing deadline – the applicant's membership in the targeted religious minority and the recent change in conditions in the applicant's country – are found credible. Therefore, the applicant may establish that an exception to the one-year filing deadline applies and she is eligible to apply for asylum, assuming she filed within a reasonable period of time from the changed circumstance. The asylum officer would then analyze and make a decision on the merits of the asylum claim.

a. last arrival

There should always be an inquiry concerning an applicant's manner, place and time of last arrival. If satisfactory arrival documents are not available, follow-up questions should be asked and the credibility of the applicant's responses evaluated.

If the applicant cannot credibly establish the date of last arrival or cannot remember the date of last arrival, the asylum officer should inquire into whether the

applicant was outside the United States at any time during the 12 months before the filing date. In such cases, the applicant's whereabouts during the 12 months before the filing date becomes relevant.

Examples

1) Applicant does not provide credible testimony on her manner, place, or time of last arrival. Applicant does, however, provide credible documentary and/or credible testimonial evidence of being in Taiwan seven months before the filing date. Because applicant credibly testified that she was in Taiwan seven months before filing for asylum and therefore must have last entered the United States less than 12 months before the filing date, she has satisfied her evidentiary burden of proving with clear and convincing evidence that the application was filed within one year of her last arrival.

   Note #1: Asylum officers should not assume that the absence of detailed and consistent testimony regarding the specifics of an applicant's arrival indicate an attempt to circumvent the filing deadline requirements. There may be other reasons an applicant fails to provide details about his or her arrival, such as the desire to protect the identity of the person whose passport an applicant used, language confusion, fear of smugglers, or the natural fading of memory over time. The asylum officer should inquire into the reasons an applicant fails to provide detailed information about his or her arrival and carefully consider the response based on the totality of the circumstances. If an applicant presents vague or inconsistent testimony about the date, manner, and place of last entry, the applicant may nonetheless be able to establish by clear and convincing evidence that he or she was outside the United States less than one year prior to the filing date and thus met the one-year filing requirement.

   Note #2: Information pertaining to an applicant's whereabouts prior to 12 months before the filing date may be relevant to the last arrival date, but only if it indicates the applicant was present in

the United States. To illustrate, if the I-589 is filed in December 2000, information indicating that the applicant was in the United States before December 1999 without having left the United States and returned could be relevant, because it may be probative of whether the applicant was in the United States for more than a year before applying for asylum. On the other hand, information relating to an applicant's presence outside the United States before December 1999 generally would not be relevant.

2) Applicant files an I-589 in December 2000. He testifies that in February 2000 he moved from New York to Detroit. Three months later he moved to Miami, and four months after that he moved to Los Angeles. He testifies that during these months he installed billboards for a living. Upon further questioning, the asylum officer concludes that the applicant's testimony about the different places he claims to have resided during those months is not credible. The applicant also does not know anything about the billboard business. This testimony should be evaluated under the totality of the circumstances to determine whether the applicant's claim as to his employment is credible. Though the applicant may be found not credible as to his claimed work as a billboard installer in those specific cities, this information alone is insufficient to find that he has not established by clear and convincing evidence that he filed within one year of his last arrival, as the information is not related to whether the applicant was in the United States for more than 12 months before the filing date.

3) Applicant files an I-589 in September 2000. His testimonial and documentary evidence on being in a refugee camp from 1993 to 1998 is not credible. The evidence concerning 1993 to 1998 is not related to whether the applicant was in the United States for more than 12 months before the filing date, and does not cast doubt on a last arrival date. Therefore, it is not relevant and cannot be the basis upon which the application is referred. For this 1995 to1998 period, facts relating to a United States residence would be

relevant to the timeliness determination.

b. changed circumstances

Whenever a filing is untimely, asylum officers must explore reasons that may have caused a late filing, such as changes in the law, country conditions, the applicant's personal circumstances, or other areas that materially affect the applicant's asylum eligibility, and evaluate the credibility of the applicant's testimony regarding these reasons under the totality of the circumstances. Information directly related to the existence of a changed circumstance is relevant to the determination of whether the applicant is eligible for an exception to the filing requirement.

Example: Applicant claims that her sister recently published in a newspaper in Applicant's country an article that was highly critical of the government. Family members remaining in her country have been threatened by the government as a result. Facts related to whether the article was published by the applicant's sister and whether publication of such an article could affect the applicant's eligibility for asylum are relevant to whether the applicant established the existence of a changed circumstance for the purposes of the one-year filing deadline. Reminder: In evaluating the credibility of the presented changed circumstance, the asylum officer should not be making a determination on whether the applicant is eligible for asylum, only whether the applicant is eligible to apply for asylum.

c. extraordinary circumstances

Whenever a filing is untimely, asylum officers must explore events or factors in the applicant's life that may have caused a late filing. Information directly related to the existence of an extraordinary circumstance is relevant to the determination of whether the applicant has established the existence of an extraordinary circumstance for the purposes of the one-year filing deadline.

Example: Applicant claimed that she was in a serious car accident, which caused her to miss the one-year filing deadline. Facts relating to whether the accident occurred and the extent of Applicant's

injuries are relevant to the determination of whether Applicant established the existence of an extraordinary circumstance.

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years, as well as familial and societal discrimination and ostracism on account of his sexual orientation. He last entered the U.S. in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be seen as an extraordinary circumstance related to the delay in filing during the year after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.

See RAIO training module, *Guidance for Adjudicating Lesbian, Gay, Bisexual and Intersex Claims.*

d. delay in filing

An applicant's explanation of the circumstances surrounding the delay in filing is relevant to the issue of whether the applicant established that the application was filed in a reasonable period of time after the changed or extraordinary circumstance and thus established an exception to the filing requirement. Asylum officers should inquire into the reason for the delay when the delay appears unreasonable on its face.

For example, if an applicant filed for asylum within a few months after recovering from a serious illness that directly related to the failure to timely file, the delay would appear reasonable on its face. The asylum officer would not need to inquire into why it took the applicant two months to apply. However, if the applicant waited eight months after recovering from the illness, the asylum officer should inquire into the reason for the delay and evaluate the credibility of the explanation provided.

Example: A citizen of Bulgaria arrives in the U.S. in 1989 and files for asylum in January 2001. She is very well educated, fluent in English and not

represented by an attorney. The asylum officer knows that a widely-publicized change in U.S. law in 1998 may help Applicant's asylum case. When asked why the application was not filed sooner, the applicant testified that until late in 2000, she did not know about the change in the law or even that asylum existed. This change in law, which affects the applicant's eligibility, is a changed circumstance. The officer would need to evaluate the credibility of the applicant's explanation of delayed awareness of the change in the law to determine whether the delay in filing was reasonable.

VIII. SUMMARY

A. Filing Deadline Requirement

Any asylum applicant who applied for asylum on or after April 1, 1998 (or April 16, 1998, for those applying affirmatively), must establish that he or she filed for asylum within one year from the date of last arrival or that he or she is eligible for an exception to the one-year filing requirement.

B. Calculating the One-Year Period

The one-year period is calculated from the last arrival date ("day zero") up to the same calendar day the following year. If the last day for timely filing falls on a Saturday, Sunday, or legal holiday, filing on the next business day will be considered timely.

C. Burden and Standard of Proof for One-Year Period

The burden of proof is on the applicant to establish by clear and convincing evidence that the application was filed within one year from the date of the applicant's last arrival in the United States. The burden may be met by presentation of credible testimony, documentation, or a combination of both.

D. Exceptions—Changed or Extraordinary Circumstances

If an applicant did not apply for asylum within one year from last arrival in the United States, he or she may still be eligible to apply for asylum if the applicant establishes either the existence of changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances related to the delay in filing and that the application was filed in a reasonable period of time given the circumstances.

E. Standard and Burden of Proof for Establishing a Changed or Extraordinary Circumstance

The burden of proof is on the applicant to establish to the satisfaction of the asylum officer that a changed or extraordinary circumstance exists.

F. Reasonable Period of Delay

Once an applicant establishes the existence of a changed or extraordinary circumstance, the applicant bears the burden to demonstrate that the application was filed within a reasonable amount of time given those circumstances. If the applicant can establish that he or she did not become aware of a changed circumstance until after it occurred, such delayed awareness must be taken into account in determining what constitutes a "reasonable period."

G. Credibility

Asylum officers must consider whether the applicant's testimony related to the one-year filing deadline is credible in the totality of circumstances. Facts bearing on the filing deadline adjudication that should be evaluated for credibility include the details of the arrival, the applicant's whereabouts before the filing date, the existence of changed or extraordinary circumstances, and the reason presented for any delay in filing if a changed or extraordinary circumstance is established. Credible testimony related to these facts should be evaluated to determine whether the applicant has established, according to the appropriate standard of proof, each element of the one-year filing deadline.