



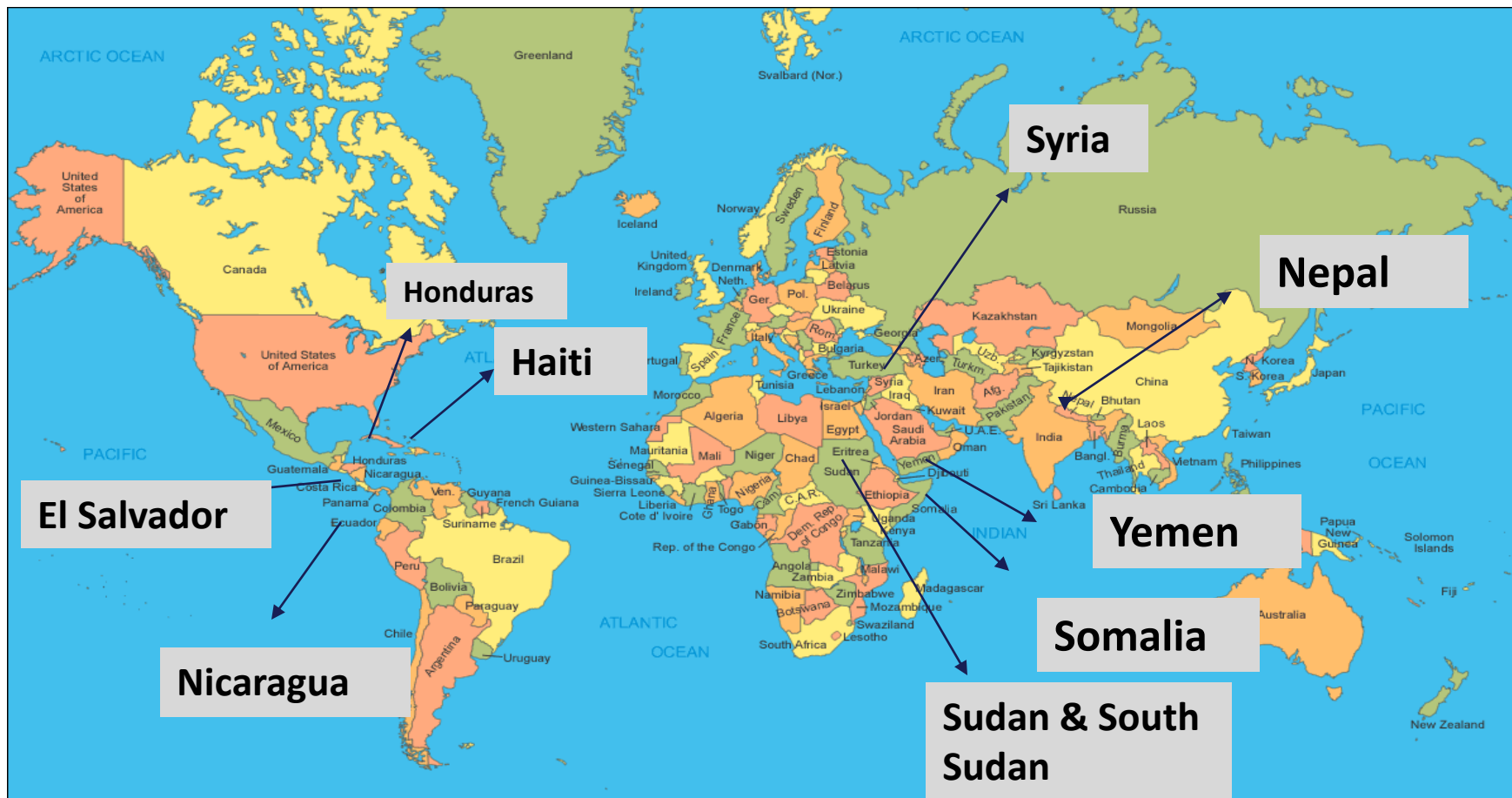
CATHOLIC LEGAL
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Asylum Considerations for TPS Holders
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TPS UPDATES

Current TPS Countries



Country	Population	Expiration	Designation	Re-Designation
Yemen	1,250	March 3, 2020	Sept. 3, 2015	Jan. 4, 2017
Somalia	500	March 17, 2020	Sept. 16, 1991	Sept. 4, 2001 and Sept.18, 2012
South Sudan	84	Nov. 2, 2020	Nov. 3, 2011	Sept. 2, 2014 and Jan. 25, 2016
Syria	7,000	March 31, 2021	Mar. 29, 2012	June 17, 2013; January 5, 2015; and Aug. 1, 2016
Sudan	1,040	Jan. 4, 2021	Nov. 4, 1997	Nov. 9, 1999; Nov. 2, 2004; and May 3, 2013
Nicaragua	2,550	Jan. 4, 2021	Jan. 5, 1999	N/A
Nepal	8,950	Jan. 4, 2021	June 24, 2015	N/A
Haiti	46,000	Jan. 4, 2021	Jan. 21, 2010	July 23, 2011
El Salvador	195,000	Jan. 4, 2021	Mar. 9, 2001	N/A
Honduras	57,000	Jan. 4, 2021	Jan. 5, 1999	N/A

Update on TPS Litigation

- In *Ramos v. Neilson*, the district court issued a “preliminary injunction” that prevents the government from implementing the TPS terminations for Sudan, Nicaragua, Haiti, and El Salvador.
- In *Bhattarai v. Neilson*, the district court entered a “stipulated order” in March 2019 pursuant to an agreement between the government and the plaintiffs. The order prevents the government from implementing the TPS terminations for Honduras and Nepal until the Ramos appeal is decided.
- *Saget vs. Trump*, the district court entered a preliminary injunction that prevents the government from implementing the TPS termination for Haiti.

Late TPS Re-Registration

- 8 CFR § 244.17(b): [USCIS](#) may, for good cause, accept and approve an untimely registration request.
- What is considered “good cause”?
- Keep in mind re-registration dates from USCIS website.

What is “Good Cause”

- No USCIS guidance defines “good cause.”
- Anecdotal approvals for:
 - Serious physical or mental illness
 - Death in family
 - Personal emergency
 - Sought assistance but was misinformed
 - Homelessness
 - Loss of employment
 - Inability to understand requirement due to lack of mental capacity, lack of access to legal resources, language barriers

“Good Cause” Under *Ramos v. Nielsen*

For late re-registrants from Sudan, Nicaragua, Haiti, El Salvador, Nepal and Honduras:

- Include a letter describing all reasons for failing to file timely
- If relevant, explain how announcement of TPS termination decisions impacted failure to re-register.
- Adjudicators will consider “all relevant factors”
- “Presumptive weight” will be given to an applicant’s credible statement that delay “was due in whole or in part to the termination notices.”

Screening for Other Relief

- LPR status through family, employment, humanitarian, diversity lottery paths
 - Consider TPS grant as “admission” in 6th and 9th Circuit states and advance parole travel
- Asylum and humanitarian protection
- Non-immigrant status
 - Many types require non-immigrant intent
- Relief from removal (non-LPR cancellation, etc.)



QUICK REVIEW OF ASYLUM LAW

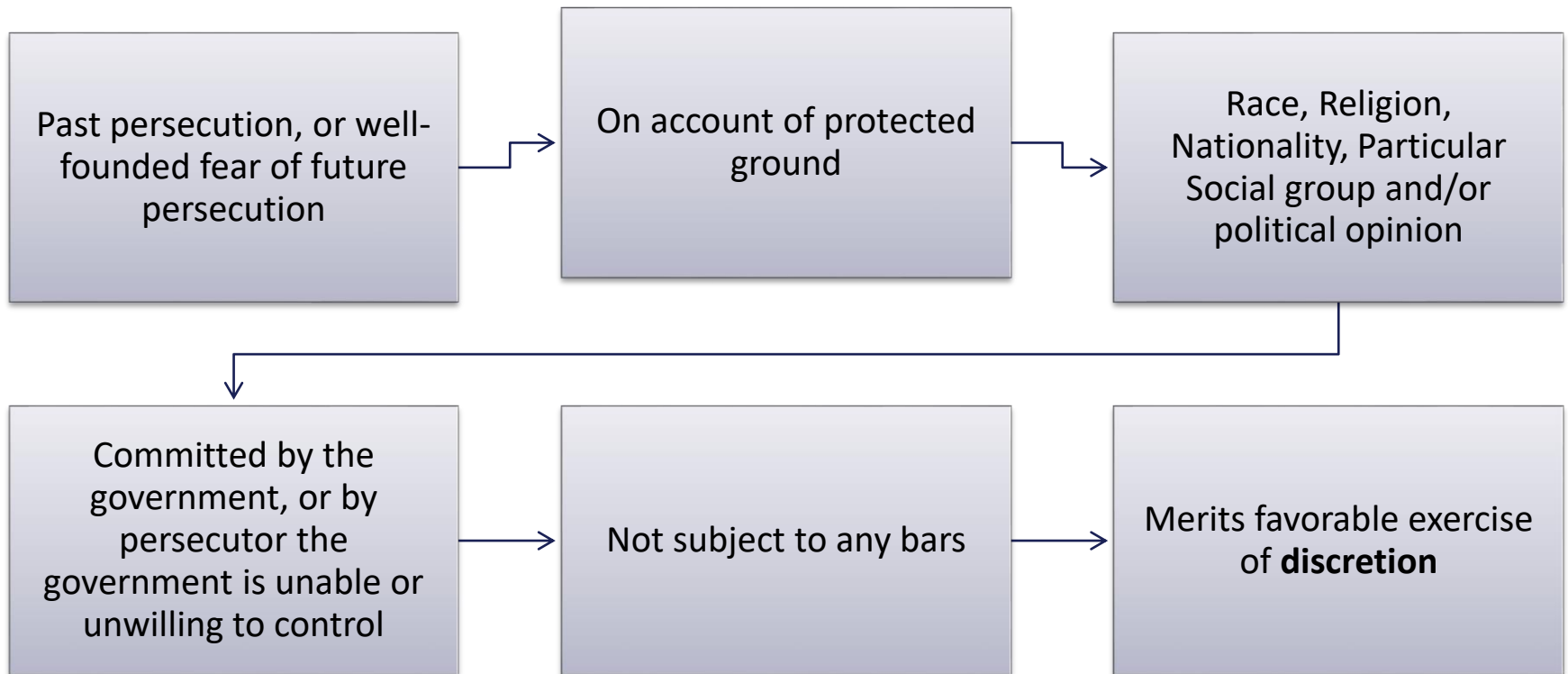
Asylum: Find the Refugee

- ... who is **outside his or her country of residence or nationality, or without nationality,** and is **unable or unwilling to return to, and is unable OR unwilling to avail himself or herself of the protection of, that country because of persecution OR a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.**

INA § 101(a)(42)



Putting it all together!



Asylum Claim Based on Past Persecution

Past persecution on account of one of the 5 grounds
Gov't or actor Gov't cannot control

Presumption of a well-founded fear

DHS can rebut the presumption:

1. Internal relocation
2. Changed circumstances

Humanitarian asylum: severe past persecution or other serious harm



Asylum Claim Based on Well-Founded Fear

Possession, Awareness,
Capability, Inclination

Objective and Subjective
Fear

Other Issues: internal
relocation, return trips,
delay in flight, threats
without harm. But
consider refugee sur place.

Withholding of Removal

- Refugee Definition applies, however - No “humanitarian” option
 - No subjective prong to fear
 - Heightened evidentiary standard – “more likely than not”
 - Available if applicant faces certain asylum bars (e.g., 1-year filing deadline bar, crimes with maximum five year sentence)
- Non-discretionary, but no pathway to residency and no derivative benefits for spouse, children.
- 9th Circuit - ‘a reason’ not ‘one central reason’

Convention Against Torture

- Intentional acts which cause severe physical or mental pain
- Specific intent, not general intent required
- Carried out for an impermissible purpose
- Custody and/or control of the persecutor
- State Action
 - At the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity
 - Acquiescence can be found where there is actual knowledge or willful blindness and breach of responsibility to prevent
- Torture must be “more likely than not”
- No Bars; No deadline



ONE YEAR FILING DEADLINE

One-Year Filing Deadline

- Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by **clear and convincing evidence** that his or her application for asylum was filed within one year after arrival in the United States. INA § 208(a)(2)(B) and 8 C.F.R. § 208.4
- **2 exceptions** –INA § 208(a)(2)(D), 8 C.F.R. §§ 208.4(a)(4), (5)
 - Changed circumstances that **materially affect eligibility for asylum**
 - Extraordinary circumstances **relating to the delay** in filing the application
- The application was filed within a **reasonable time** of those circumstances.
- Standard of proof is “to the satisfaction of the AG” or preponderance of the evidence.



Proving Filing Within One Year

- Applicant has burden of proving by “**clear and convincing evidence**” that application is filed within one year of last arrival. 8 CFR §208.4(a)(2)(i)(A).
- Types of proof?
 - I-94/passport stamp
 - Proof of travel
 - Proof individual outside country on date within one year
 - Affidavits etc., (not as probative)

Changed Circumstances

- Changed circumstances that *materially affect* eligibility for asylum
 - Changes in conditions in the country of nationality or last habitual residence
 - *See Vahora v. Holder*, 641 F.3d 1038 (9th Cir. 2011).
 - Changes in the applicant's circumstances that place the applicant at risk – *Refugee sur place*
 - Ages out, divorces, or becomes widowed suddenly necessitates own application
 - Changes in applicable U.S. Law

Extraordinary Circumstances

- Extraordinary circumstances (which is in existence in the first year of arrival) relating to the delay in filing the application
 - Serious illness or mental/physical disability (PTSD etc.)
 - Legal disability (unaccompanied **minors**, persons without ability to understand immigration law)
 - Ineffective assistance of counsel
 - Maintaining lawful immigrant or non-immigrant status (includes DACA and TPS)
 - Filing on time, but having application rejected by USCIS as incomplete
 - Death or serious illness or incapacity of legal representative or member of immediate family

Extraordinary Circumstance for Minors – “legal disability”

- Designated unaccompanied minor (“UAC”) (regardless of age)
- Under 18 regardless if “unaccompanied” (asylum office)
- Up to age 18, automatic one year filing deadline exception and 18-21, an applicant *may* be able to show extraordinary circumstances (unpublished BIA decision)

<https://www.scribd.com/document/351904250/A-D-AXXX-XXX-526-BIA-May-22-2017>

Delays in Immigration Court

- Gov't must provide notice to arriving asylum seekers: *Mendez Rojas v. Johnson*, 2018 WL 1532715 (W.D. Wash. March 29, 2018)
 - The government had until June 27, 2018, to adopt notice of the one-year deadline and thereafter provide notice to all current and future class members;
 - The government must accept as timely filed any asylum application from a class member filed one year from such notice
- What if Master Calendar is after One Year Filing Deadline? *Matter of S-V-C- Unpub. BIA Dec.*
<https://www.scribd.com/document/334139459/S-V-C-AXXX-XXX-431-BIA-Nov-1-2016>

Maintaining Lawful Status

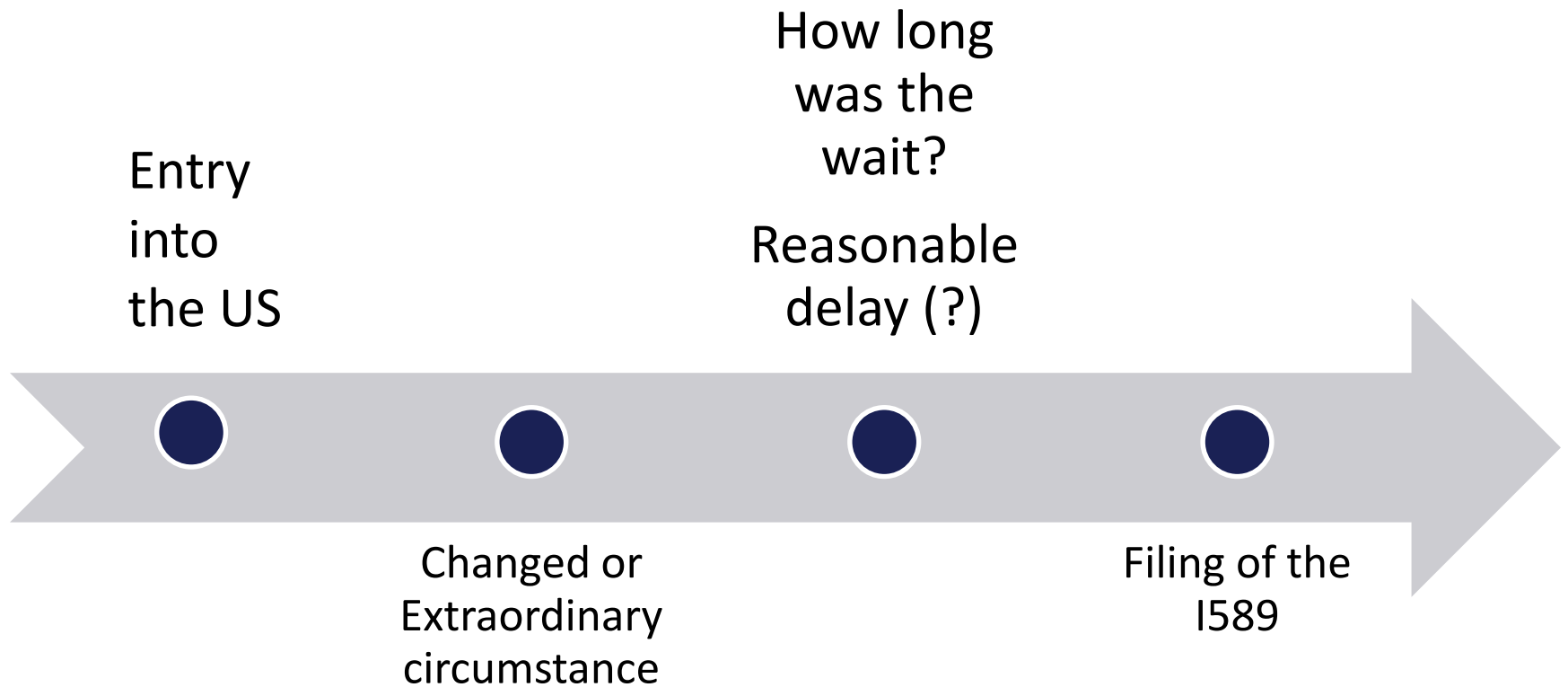
- 8 C.F.R. § 208.4(a)(5)(iv) states, as one example, the “applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application.”
- BUT the extraordinary circumstance exception only excuses time in the lawful status (not time in the U.S. before)

Reasonable Period of Time

- Delay in filing must be reasonable. 8 C.F.R. 208(a)(4)(ii).
- What is considered reasonable?
 - Adjudicated on a case by case basis
 - Six months can be considered presumptively a reasonable time. *Husyev v. Mukasey*, 528 F.3d 1172 (9th Cir. 2008) but not one year, *see Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010)



The Timeline!





LET'S APPLY THE LAW!

Hypothetical 1

- **Mohammed** is from Somalia and he arrived to the United States 2008. He applied for and received TPS in 2012, when TPS was re-designated. He fears TPS will end when a decision must be made next year. He was horribly tortured in Somalia by a rival clan and his family was killed. He arrived to the US through the southern border without inspection. Does he have OYFD problem?

Hypothetical 2

- **Miguel** is from Honduras and arrived in the U.S. in 1996 when he was 10 years old and applied for and received TPS in 2006. He complied with re-registration, except for this last requirement because he had heard TPS was about to be terminated and he did not want to waste his money. His TPS expired in 2018. He officially came out as a gay man about three years ago and fears going back to Honduras.

Hypothetical 3

- **Lupe** came to the U.S. from El Salvador at age 8 with her mother. Her mother applied for TPS in 2001, the same year they entered, and included Lupe in the application. Lupe is now 25 years old and is fearful of her TPS expiring one day. She remembers her father brutally beating her mother in El Salvador and occasionally hitting Lupe when she came between them. She is considering applying for asylum now.

Hypothetical 4

- **Hawa** was subjected to FGM in South Sudan before coming to the United States at age 16 in 2015. She obtained TPS in 2016, at age 17, and wants to know if she could qualify for asylum. TPS for South Sudan is set to expire in November 2020. What if she applied now? What if she waited until TPS for South Sudan expired?

Hypothetical 5

- **Fatima** is from Yemen and arrived to the US in 2013 on an F1 visa to study art. After two years her F1 visa ran out and she worked without authorization at an art gallery where she met a woman and started a relationship. In 2016 she applied for and received TPS from Yemen and she complied with all re-registration requirements. She is now married to her wife and can never go back to Yemen. Can she file for asylum? What more do you need to know?

Hypothetical 6

- **Javier** is from El Salvador. He first entered the US in 1999 and after workplace raid he was ordered removed from the US in 2000. In February 2001, applied for and received TPS. While he knows that his TPS will be valid until Jan. 2021, he was just told that many of his prominent family members in El Salvador have been targeted and/or killed by the gangs because of their activism against the gangs.



TIPS ON SCREENING AND APPLYING FOR ASYLUM FOR TPS HOLDERS

Considerations in Filing Affirmatively

- If a TPS holder has a very strong claim, she may want to file just before or soon after her TPS expires to preserve one year filing deadline
 - Note: current backlogs of 2-4 years
<https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin>
 - But possible change to scheduling “last in, first out”
- BUT if she is unsuccessful, she will be placed in removal proceedings
 - Consider other possible defenses in removal proceedings

Defensive Filings

- Asylum is also a defense to removal proceedings
 - If colorable but not strong asylum claim possible, advise client **if** he is placed in removal this could be a defense
 - OYFD still applies
- Withholding of removal
 - No OYFD; higher standard; less secure relief
- Relief under Convention against Torture
 - No OYFD; no nexus requirement; higher standard; less secure relief

Motions to Reopen – General Rules

- Must be filed within 90 days of decision – UNLESS:
 - VAWA
 - In absentia with no notice (very hard to prove)
 - Changed country conditions for asylum-based claim
- Equitable Tolling
- Judge's sua sponte authority

Motions to Reopen

- Remember, individuals with removal orders were eligible for TPS and for DACA
 - When in doubt – FOIA!
- Those who have removal orders already are most at risk when if their status expires/is revoked
- If there is a strong claim for relief, it may be strategic to move to reopen while the individual is still protected by TPS or DACA

TIPS for Screening

- ✓ Need to dig a little, as more specific questions than:
“Are you afraid to go back to your home country?”
“Have you ever been harmed?”
- ✓ Assess strength of asylum claim – is there past persecution? Strong claim for future persecution?
- ✓ Assess one year filing deadline exception – if no exception, probably don’t file affirmatively
- ✓ Check to see if there is a prior removal order – if so, are there strong grounds to move to reopen? FOIA!
- ✓ Assess whether there are other potential claims for relief – family immigration; VAWA; U/T visa; cancellation; SIJS?



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