



Overcoming the One-Year Bar: Changed Circumstances and Extraordinary Circumstances Plus: Focus on Ethical Interview Preparation

Kusia Hreshchyshyn, Staff Attorney
Oasis Legal Services



One Year Bar: Legislative History

- I. 1996 Illegal Immigration Reform and Immigrant Responsibility Act
- II. Bona fide Refugee



The One Year Bar

Statutory Language:

Applicant for asylum may not apply “unless the alien demonstrates by **clear and convincing evidence** that the application has been filed within 1 year after the date of alien's arrival in the United States”

INA § 208(a)(2)(B); *see also* 8 CFR 208.4(a)(2)(i)(A)

Two Exceptions:

Applicant demonstrates “to the satisfaction of the Attorney General” either

- 1. changed circumstances** “which materially affect the applicant's eligibility for asylum” OR
- 2. extraordinary circumstances** “relating to the delay in filing the application within [1 year]”

INA § 208(a)(2)(D);
see also 8 CFR §§ 208.4(a)(4),(5)

Establishing an Exception

Two Step Process:

Establishing the existence of a changed circumstance or extraordinary circumstance

Establishing filing was effected within a “reasonable time” given the circumstance

8 CFR §§ 208.4(a)(4)(ii),(5)

How Exceptions are Evaluated

Credibility:

Officer will evaluate credibility under the "totality of the circumstances" standard.

Shrestha v. Holder, 590 F.3d 1034, 1039-40 (9th Cir. 2010) (REAL ID standard).

Evidentiary Standard:

To the satisfaction of the adjudicator

8 CFR 208.4(a)(2)(i)(B)

NOT beyond a reasonable doubt or by clear and convincing evidence —

"credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially"

A0BTG 0YFD pp26

Changed Circumstances

- Changes in applicant's home country

8 CFR 208.4(a)(4)(i)(A)

- Changes in applicant's circumstances, including changes in US law and activities applicant becomes involved in outside applicant's home country

8 CFR 208.4(a)(4)(i)(B)

Examples:

- Coming out of the closet
- Gender affirmation / transition
- Becoming politically active
- Medical / HIV diagnosis
- Regime change / change in law in home country
- Religious conversion



Changed Circumstances

What makes it a “material” change?

- *Vahora v. Holder*, 641 F.3d 1038, 1042 (9th Cir. 2011) (worsening conditions, including religious riots that began after petitioner left India, and its subsequent impact on his family constituted changed circumstances to excuse late filing of asylum application).



Extraordinary Circumstances

1. Existence of extraordinary circumstances
2. Within the first year after last entry to the US
3. Directly related to delay in filing asylum application
4. Applicant did not create the circumstances (through action or inaction)

8 CFR 208.4(a)(5)

Extraordinary Circumstances

- “Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period of after arrival”

8 CFR 208.4(a)(5)(i)

- “Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival”

8 CFR 208.4(a)(5)(ii)

(USCIS applies this to ALL minors)

- “Ineffective assistance of counsel” (invokes specific procedural requirements)

8 CFR 208.4(a)(5)(iii)

- Maintained lawful status or parole

8 CFR 208.4(a)(5)(iv)

- Deficient filing

8 CFR 208.4(a)(5)(v)

- “The death or serious illness or incapacity of the applicant’s legal representative or a member of the applicant’s immediate family”

8 CFR 208.4(a)(5)(vi)

And more...

Extraordinary Circumstances

“Include, but are not limited to, **severe family or spousal opposition**, **extreme isolation within a refugee 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**”

2009 Asylum Officer Basic Training Guide: One-Year Filing Deadline (“AOBTG OYFD”) pp20

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>One-Year Filing Deadline</i>
Rev. Date	March 23, 2009
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.
Field 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 apply the rules and reach a decision.
Academy Training Performance Objective	Given written and roleplay asylum scenarios in which the one-year filing deadline or a previous denial is at issue, the trainee will be able to properly apply the law and reach a decision.
Interim (Training) Performance Objectives	<ol style="list-style-type: none">1. Identify whether the one-year filing rule applies.2. Correctly use the clear and convincing evidentiary standard.3. Explain the exceptions to the one-year filing rule.4. Identify all relevant factors and the totality of the circumstances in evaluating credibility with respect to the filing rule.5. Determine whether an applicant is barred from applying for asylum.
Instructional Methods	Lecture, discussion, practical exercises
Student References / Materials	INA §§ 208(a); 101(a)(42); 8 C.F.R. § 208.4(a) ; <i>Matter of Y-C-</i> , 23 I & N Dec. 286, 288 (BIA 2002)
Method of Evaluation	Observed Lab exercise with critique from evaluator, practical exercise exam, written test
Background Reading	Joseph E. Langlois. Asylum Division, Office of International Affairs. <i>Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR</i> , Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p. plus



Serious Illness + Mental/Physical Disability

Examples

- Post-Traumatic Stress Disorder
- Major Depression
- Anxiety Disorder

Requirements

- Present (not necessarily incurred) during first year after last arrival
- Directly relate to delay in filing
- Need not relate to claimed past or future persecution

Evidentiary requirements

- Testimony
- Expert Affidavit / Medical Report

Pitfalls

- Careful to distinguish applicant's ability to otherwise function in daily life from inability to file
 - Ability to work
 - Ability to go to church
 - Ability to relocate
 - Ability to file for other legal relief



Serious Illness + Mental/Physical Disability

PTSD:

The First Circuit has held that PTSD qualifies as an extraordinary circumstance, and that a failure to consistently seek medical treatment did not “undercut” the applicant’s claim that she was unable to meet the one year filing deadline.

Mukamusoni v. Ashcroft, 390 F.3d 110 (1st Cir. 2004) (holding a woman from Rwanda with post-traumatic stress disorder meets the extraordinary circumstances exception); see also *Munoz v. Holder*, 407 Fed. App’x 185, 186 (9th Cir. 2010) (“the IJ erred by failing to consider whether [petitioner’s] post-traumatic stress disorder (PTSD), brought on by abuses he claims to have suffered in Guatemala, excused him from filing his asylum application within one year.”);



Legal Disability: Mental Impairment

Definition:

No case law, reg's, or policy on point

BIA decision provides guidance:

"... whether he or she **has a rational and factual understanding of the object of proceedings**, **can consult with his or her representative**, and **has a reasonable opportunity to examine and present evidence and cross examine witnesses.**"

Matter of M-A-M-, 25 I&N Dec. 474, 479 (BIA 2011)

Franco-Gonzalez Settlement:

Provides representation for detained individuals with mental impairment.

Requirements—

- Either designation by qualified mental health provider or that the IJ seriously doubts the individual's capacity
- Includes general psychiatric symptoms and symptoms of several enumerated disorders.

See ACLU of Southern California, "Franco-Gonzalez Fact Sheet"

Legal Disability: Minors

Not just UACs:

"Minors are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults."

Applying as a minor establishes both extraordinary circumstances and reasonable time.

AOBTG OYFD pp15

Age 18-21:

The BIA has held that a person over 18 and under 21 may qualify for the extraordinary circumstances exception.

Case-by-case basis, consider:

- Age
- Language proficiency
- Time in the U.S.
- Interactions with legal services providers
- Physical and mental health
- Socio-economic & family status
- Housing or detention situation

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



Cause of Extraordinary Circumstances

Generally, applicants not found to have intentionally contributed to their extraordinary circumstances.

But potential issue where applicants testify to various reasons for their delay in filing.

See Gasparyan v. Holder, 707 F.3d 1130, 1135 (9th Cir. 2013)

Dismissing petition as to disputed facts regarding the severity of petitioner's mental health where petitioner said she was waiting for money to apply, and denying petition as to claim that BIA erred in not reaching factors to determine if the extraordinary circumstance excused the delay.

Additional dicta that petitioner intentionally contributed to the circumstances that delayed filing by voluntarily living with her abusive husband's brother when she had other living arrangement options.



Reasonable Time

Factors

- Awareness of changed circumstance
- Education & sophistication
- Time to obtain legal assistance
- Time to collect documents
- Ongoing effects of trauma / illness
- Situation that would otherwise qualify as an "extraordinary circumstance" but for occurrence outside of first year after arrival

Guidelines

- No black line rule
- Generally a delay of weeks or months is reasonable if explained
- 65 Fed. Reg. 76121, 76123- 24 (Dec. 6, 2000) ("Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.").

Reasonable Time

Cases:

- *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008) (holding that 364-day delay after lawful nonimmigrant visa status expired was not a “reasonable period”).
- *Wakkary v. Holder*, 558 F.3d 1049, 1058-59 (concluding that reasons for the delay were reasonable and remanding for agency to consider whether delay of just over six months constituted a “reasonable period” as required by the regulations).
- *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 193 (BIA 2010) (“Waiting six months or longer after expiration or termination of status would not be considered reasonable” and “[s]horter periods of time would be considered on a case-by-case basis, with the decision-maker taking into account the totality of the circumstances”).
- *Taslimi v. Holder*, 590 F.3d 981, 984-85 (9th Cir. 2010) (application filed within a “reasonable period” given the changed circumstances presented by her religious conversion which is a process that occurs over a period of time).



Practical Exercises

Danilo is an indigenous gay man from Guatemala. He grew up in a small mountain community. His cousin raped him repeatedly when Danilo was between the ages of 10-12. Danilo entered the US in 2002 and worked as a day laborer. In 2006, he began a romantic relationship with a man he was living with, Jorge. Jorge generally treated Danilo well, but took all of Danilo's earnings. Danilo learned about Oasis from another day laborer in November, 2018, and came in to the Oasis office in February, 2019. He never knew about asylum before coming to Oasis.

What questions would you ask Danilo?

How would you make an argument for an exception and reasonable time to filing?



Practical Exercises

Kayla is a trans woman from El Salvador who entered in 1999. Kayla began her transition in 2003 and was living her public life as a woman by 2005. She was always very open about her gender identity with friends and family. In 2016 Kayla became very involved with a trans latinx empowerment group and 2 months ago she became the lead media outreach spokesperson for the group. Now Kayla is at Oasis to see whether she has a good asylum case.

How would you make an argument for an exception and reasonable time to filing?



Practical Exercises

Nycolle Oleúde da Silva Gomes is a bisexual Brazilian woman whose last entry into the U.S. was in January 2017. She has a total of 16 entries to the U.S. over the last 5 years, mainly for travel and shopping purposes. Nycolle has a documented history of anxiety. In October 2018 a new president with a very anti-LGBTQ agenda is elected in Brazil. In May 2019, Nycolle comes to Oasis for an intake appointment to see about an asylum case.

How would you make an argument for an exception and reasonable time to filing?



Practical Exercises

Rogelio is a gay Mexican man who entered the U.S. in 2012 who was never harmed in Mexico and is not out to anyone other than his secret boyfriend of 2 years, Alejandro. In 2016 Rogelio broke up with Alejandro because he found out he was cheating on him. In June 2017, Rogelio was diagnosed with HIV, but he had not been with anyone else since breaking up with Alejandro. His healthcare provider referred him to a Bay Area nonprofit and he first spoke with someone there in August 2017. He was under the impression that they had taken on his case and had filed his asylum application, but after months of confusion and no answers, he went for a second opinion at Oasis in March 2018. In fact, no asylum application had been filed.

How would you make an argument for an exception and reasonable time to filing?



Practical Exercises

Janaina, a lesbian woman from Brazil, came to the United States in 2003, when she was 14 years old. In 2012, when she was 23, she applied for and received DACA. She has renewed her DACA ever since. In 2018, after she learned that DACA may be ending, Janaina decided to apply affirmatively for asylum.

How would you make an argument for an exception and reasonable time to filing?



Questions?

Rachel.Kafele@oasislegalservices.org

Kusia.Hreshchyshyn@oasislegalservices.org