



Overcoming the One-Year Bar: Changed Circumstances and Extraordinary Circumstances

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One Year Bar: Legislative History

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

See, e.g., statement of former Senator Alan Simpson, one of the sponsors of the deadline, explaining that it was meant to address migrants coming from “a country that is your leading source of illegal immigration|| who are —pick[ed] up|| and claim asylum defensively only to delay their deportation: —We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system.” 142 Cong. Rec. S4468 daily ed. (May 1, 1996); *see also* statement of Senator Orrin Hatch that “...[i]f the time limit is not implemented fairly or cannot be implemented fairly I will be prepared to revisit this issue in a later Congress.” *See* 142 Cong. Rec. S11840 (daily ed. September 30, 1996), cited in Leena Khandwala, Karen Musalo, Stephen Knight, and Maria Anna K. Hreshchyshyn, *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 Immigr. Briefings 1, 5 (2005).

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)

8 C.F.R. §§ 208.4(4), (5):

(4) Changed circumstances.

(i) The term "changed circumstances" in section 208(a)(2)(D) of the [Act](#) shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an [alien](#) who had previously been included as a dependent in another [alien](#)'s pending asylum [application](#), the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum [application](#) within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable

period.”

(5) The term “extraordinary circumstances” in section 208(a)(2)(D) of the [Act](#) shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the [alien](#) filed the [application](#) within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the [immigration judge](#), or the [Board](#) of Immigration Appeals that the circumstances were not intentionally created by the [alien](#) through his or her own action or inaction, that those circumstances were directly related to the [alien](#)'s failure to file the [application](#) within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

- (i)** Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;
- (ii)** Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;
- (iii)** Ineffective assistance of counsel, provided that:
 - (A)** The [alien](#) files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what [representations](#) counsel did or did not make to the [respondent](#) in this regard;
 - (B)** The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and
 - (C)** The [alien](#) indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;
 - (iv)** 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](#);
 - (v)** The applicant filed an asylum [application](#) prior to the expiration of the 1-year deadline, but that [application](#) was rejected by the [Service](#) as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and
 - (vi)** The death or serious illness or incapacity of the applicant's legal [representative](#) or a member of the applicant's immediate family.

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"

AOBTG OYFD pp26

An applicant who lies about his or her date of entry for the purpose of circumventing the OYFD may be found to have filed a frivolous asylum application, barring him or her from any other form of immigration relief. *Matter of M-S-B-*, 26 I&N Dec.872, 879 (BIA 2016).

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).

- Compare coming out vs marriage
- Infection date vs. diagnosis date goes back to the rule that if the applicant can establish that they did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a “reasonable period” (INA § 208.4(a)(4)(ii))
- Such as beginning to take hormones, having gender reassignment surgery – can spin in a lot of ways to determine exact date of the change (i.e. just starting transition to just finishing)
- Ex: if a new law goes into effect criminalizing homosexuality; or if a new regime takes power and begins homophobic campaign. Ex: Brazil in October 2018.
- This could make it more likely that other people would persecute the applicant. Note that the government would need to participate in the persecution (not just private actors).
- If this significantly affects how people will view applicant: i.e., if coming out of the closet (for a lesbian woman) entails a short haircut, wearing masculine clothing, etc. which will cause people to single applicant out.

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)

[*Viridiana v. Holder*, 646 F.3d 1230, 1234, 1238 \(9th Cir. 2011\)](#) (fraudulent deceit by non-attorney immigration consultant can amount to an extraordinary circumstance for the delay in filing);

[*Toj-Culpatan v. Holder*, 612 F.3d 1088, 1090 \(9th Cir. 2010\)](#) (per curiam).

[*Dhital v. Mukasey*, 532 F.3d 1044, 1049–50 \(9th Cir. 2008\)](#) (per curiam) (holding that BIA properly concluded alien lost nonimmigrant status when he failed to enroll in a semester of college classes, and that alien then failed to file application within a “reasonable period” when he waited 22 months without further explanation for delay).

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)
- "Ineffective assistance of counsel" (invokes specific procedural requirements)
8 CFR 208.4(a)(5)(iii)
- "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)
- 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...

Legal disability – minors and mental impairment

Lawful status or parole: (iv) 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; The BIA has an unpublished disposition holding DACA qualifies as an extraordinary circumstance, H-M-C-J- (BIA Mar. 1, 2018) (unpublished). The BIA acknowledged that DACA was not listed in the regulations but emphasized that the regulatory list of exceptions was non-exhaustive. The BIA agreed with the IJ's finding that "the receipt of DACA benefits reasonably disincentivized the respondent from filing for asylum within the filing deadline such that it qualifies as an extraordinary circumstance." However, DHS argued against DACA constituting an extraordinary circumstance in H-M-C-J-, and the BIA was deferring to a factual finding of the IJ under the circumstances of this particular case, so this issue may continue to be contested until there is binding authority.

Note - The USCIS DACA FAQs specify that DACA "does NOT confer any lawful status" and (like parole) the "period of stay is authorized by the Department of Homeland Security."

IAC:

(iii) Ineffective assistance of counsel, provided that:

(A) The [alien](#) files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and

what [representations](#) counsel did or did not make to the [respondent](#) in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The [alien](#) indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

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

Participant Workbook	
Lesson Plan Overview	
Course	Asylum Officer Basic Training
Lesson	One-Year Filing Deadline
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); 8 CFR § 208.4(a); <i>Matter of F-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

Present in first year: Was the condition caused by the harm that the client experienced before US entry?

Directly related: Did client's condition make it harder to tell their story? Did client experience heightened symptoms when seeking help? E.g. nightmares, panic attacks, tremors, etc. Did abuse prevent client from seeking help?

Other evidence of avoidance or learned helplessness (trauma caused applicant to be demoralized and degraded by the fact that they cannot predict or control the violence, such that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation)?

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.”);

Torture:

“Torture may result in serious illness or mental or physical disability” AOBTG OYFD pp14

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"

Incapacity:

"...best described as an incapacity for the full enjoyment of ordinary legal rights; it includes **minors** and **mental impairment**" AOBTG OYFD pp14

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.

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

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

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.

Consider removing or skipping this slide

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.").

***No regulatory list of factors. Determined on a case by case basis.**
Standard is: Establishing filing was effected within a "reasonable time" given the circumstance 8 CFR §§ 208.4(a)(4)(ii),(5). **Awareness of changed circumstances** is the only factor enumerated in regs.

Ongoing Effects:

"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 filing."

AOBTG OYFD pp14

Reasonable Time

Cases:

- *Husye 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).

Ongoing Effects:

“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 filing.”

Husye v. (Husye v.’s filing 364 days after his lawful status expired was unreasonable)

Note: filing was only six months after the one-year deadline had passed.

Taslimi (filed nearly seven months after circumstances conversion ceremony; Taslimi did not apply for asylum immediately after her conversion because she wanted to be sure that it was going to be a life-long decision)



Questions?

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