Practice Advisory
LGBTI DACA Recipients and Options for Relief under Asylum Law

Victoria Neilson and Reena Arya

1 Copyright 2018, The Catholic Legal Immigration Network, Inc. (CLINIC). This practice advisory is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction. The authors of this practice advisory are Victoria Neilson, Training and Legal Support Senior Attorney, and Reena Arya, Training and Legal Support Senior Attorney. The authors would like to thank the following individuals for their invaluable contributions to this advisory: Michelle Mendez, Training and Legal Support Managing Attorney; Rebeca Scholtz, Training and Legal Support Staff Attorney; and Katherine M. Lewis, Senior Associate Attorney at Van Der Hout, Brigagliano & Nightingale, LLP. We would also like to express our gratitude to Immigration Equality for sharing country conditions indices with us, which were invaluable in writing the country conditions section of this advisory.
CONTENTS

I. INTRODUCTION................................................................................................................................................. 3

II. LGBTI DACA RECIPIENTS AND ASYLUM....................................................................................................... 3

III. OVERVIEW OF ASYLUM LAW .......................................................................................................................... 5
   A. The Persecution Analysis .................................................................................................................................... 6
      1. Past Persecution ........................................................................................................................................... 6
      2. Well-Founded Fear of Future Persecution .................................................................................................. 12
   B. Protected Characteristic .............................................................................................................................. 13
   C. Nexus ............................................................................................................................................................ 15
   D. One Year Filing Deadline ............................................................................................................................ 17
   E. Matter of Discretion ...................................................................................................................................... 19

IV. OVERVIEW OF WITHHOLDING OF REMOVAL UNDER INA § 241(b)(3) AND PROTECTION UNDER THE
    CONVENTION AGAINST TORTURE ................................................................................................................... 19
   A. Withholding of Removal Under INA § 241(b)(3) ....................................................................................... 20
   B. Protection Under the Convention Against Torture ....................................................................................... 20

V. UNIQUE ISSUES IN PREPARING ASYLUM, WITHHOLDING OF REMOVAL, OR CONVENTION AGAINST
   TORTURE CLAIMS FOR LGBTI APPLICANTS ................................................................................................... 23
   A. Discussing LGBTI Identity with Clients ....................................................................................................... 23
   B. Special Considerations for Discussing Transgender Identity with Clients .................................................. 23
   C. Corroboration of LGBTI Identity ................................................................................................................ 24

VI. COUNTRY CONDITIONS FOR LGBTI DACA RECIPIENTS FROM THE TOP FIVE DACA COUNTRIES .............. 26
   A. Researching Country Conditions for LGBTI Applicants .............................................................................. 27
   B. Mexico .......................................................................................................................................................... 28
   C. El Salvador .................................................................................................................................................. 29
   D. Guatemala .................................................................................................................................................... 30
   E. Honduras ...................................................................................................................................................... 30
   F. Peru ............................................................................................................................................................. 31

VII. CONCLUSION ..................................................................................................................................................... 32
I. INTRODUCTION

On September 5, 2017, the Trump Administration announced that Deferred Action for Childhood Arrivals (DACA) would end on March 5, 2018. Since then, there has been litigation seeking to protect DACA recipients from this abrupt termination of their DACA protection. As of the writing of this practice advisory, two federal courts have issued preliminary injunctions staying the Trump Administration’s plan to end DACA and, as a result of the litigation, U.S. Citizenship and Immigration Services (USCIS) continues to accept DACA renewals. Seven states opposed to DACA have also recently filed litigation seeking to end the program. Nonetheless, USCIS is not currently accepting new applications for DACA, and the future of the program is uncertain. Congress will likely have to take action to provide a long-term fix for DACA recipients, otherwise known as the “Dreamers.”

This advisory explores the possibility of filing Lesbian, Gay, Bisexual, Transgender or Intersex-based (LGBTI) applications for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA), and protection under the Convention Against Torture (CAT). The advisory is not intended to be a comprehensive guide to asylum and other protection claims generally. Section II discusses the requirements for DACA and the overlap between DACA recipients and LGBTI non-citizens. Section III provides an overview of asylum law in the LGBTI context. Section IV gives an overview of the law pertaining to withholding of removal and CAT for LGBTI applicants. Section V discusses the particular issues that may arise in proving and corroborating LGBTI protection-based claims. Finally, section VI provides guidance on conducting country condition research for LGBTI claims, including summaries of country conditions for the top five DACA countries.

II. LGBTI DACA RECIPIENTS AND ASYLUM

Under the DACA program announced by the Obama administration on June 15, 2012, an individual had to meet the following criteria to seek DACA:

- Entered the United States before age 16
- Continuously resided in the United States from June 15, 2007 to the present
- Was physically present, without lawful status, and under the age of 31 on June 15, 2012
- Was currently in school or had graduated or obtained a certificate of completion from high school, or obtained a general education development (GED) certificate, or had been honorably discharged from the

---

5 On April 24, 2018, a federal district court judge issued a decision requiring USCIS to resume processing new asylum application for those eligible for DACA. However, the judge stayed the decision for 90 days, so it is unclear when, if ever, the decision will go into effect. Nat’l As’n for the Advancement of Colored People v. Trump, No. CV 17-1907 (JDB), 2018 WL 1920079 (D.D.C. Apr. 24, 2018).
6 This practice advisory uses the term “LGBTI” throughout, unless it is using an exact quotation or referring to an organization or publication that uses the acronym LGBT and does not purport to address intersex issues. Both the USCIS asylum office training materials and United Nations High Commissioner on Human Rights materials use “LGBTI” in their guidance and training materials.
U.S. Coast Guard or Armed Forces, and

- Had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, nor posed a threat to national security or public safety.\(^7\)

The five countries with the largest numbers of DACA recipients are, in descending order, Mexico, El Salvador, Guatemala, Honduras, and Peru.\(^8\) A high percentage of LGBTI asylum applicants likewise come from Mexico, El Salvador, Guatemala, and Honduras.\(^9\)

Many of those active in the “Dreamer” movement—both before and after President Obama initiated the DACA program—identify as LGBTI, and these activists played an instrumental role in pushing for DACA protections.\(^10\) Indeed, one of the most significant moments in the fight for protections for “Dreamers” was the publication of Pulitzer Prize winner Jose Antonio Vargas’s piece in the New York Times Magazine in which he “came out” both as gay and as undocumented.\(^11\) The Williams Institute, an LGBT\(^12\) research center at the University of California Los Angeles, estimates that 36,000 DACA recipients are LGBT and that 28 percent of LGBT DACA recipients live in California.\(^13\) For these DACA recipients, the potential end of immigration protections could be especially harmful. Like all “Dreamers,” their futures in the United States remain uncertain, but for many LGBTI DACA recipients, the possibility of returning to a country where they could face persecution, or could not live openly LGBTI lives, is particularly devastating.\(^14\) Some LGBTI DACA recipients may be able to win asylum in the United States, allowing them to remain here permanently. With the announcement of DACA’s end, it is very important for practitioners to screen DACA recipients for asylum and to investigate possible claims based on LGBTI identity.

If an LGBTI individual is already in removal proceedings, the practitioner should advance every meritorious asylum and related relief argument on his or her behalf. For LGBTI individuals who are not in removal

---


\(^8\) USCIS, Approximate Active DACA Recipients: Country of Birth (Sept. 4, 2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf). [hereinafter, USCIS DACA Recipients].

\(^9\) Neither USCIS nor the immigration courts make statistics publicly available on the ground upon which applicants seek asylum. However, some data is available from non-governmental sources. “Asylum applicants from Mexico accounted for the second-highest number of asylum applications for people not in removal proceedings filed by Immigration Equality—the largest immigration service provider for LGBTQ immigrants. The next three most frequent countries of origin for DACA recipients—El Salvador, Guatemala, and Honduras—were also the most frequently occurring countries of origin among Immigration Equality’s clients who applied for asylum during removal proceedings.” Sharita Gruberg, Center for American Progress, *What Ending DACA Means for LGBTQ Dreamers* (Oct. 11, 2017), [https://www.americanprogress.org/issues/lgbt/news/2017/10/11/440450/ending-daca-means-lgbtq-dreamers/](https://www.americanprogress.org/issues/lgbt/news/2017/10/11/440450/ending-daca-means-lgbtq-dreamers/). [hereinafter CAP LGBTQ Dreamers].


\(^12\) Although this practice advisory generally uses the acronym LGBTI, because the Williams Institute identifies itself as collecting data on LGBT people, and not on those with intersex condition, the advisory is using LGBT here.


proceedings, practitioners and clients must fully evaluate the pros and cons of filing affirmatively for asylum based on the strength of the case, including potential one-year filing deadline (OYFD) exceptions and overall likelihood of success in the jurisdiction where the DACA recipient resides. To assess the overall likelihood of success in a particular jurisdiction, practitioners should reach out to local asylum practitioners to inquire how the local adjudicators may respond to particular arguments.

III. OVERVIEW OF ASYLUM LAW

Under the INA, the term “refugee” is defined as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who 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.\(^{15}\)

Breaking this definition down further, there are several elements that an asylum applicant must establish to succeed in his or her claim. He or she must:

- Possess one of the following protected characteristics, a combination of protected characteristics, or imputed protected characteristics which are: race, religion, nationality, membership in a particular social group (PSG), or political opinion
- Have suffered past persecution or have a well-founded fear of future persecution
- The persecution must be by the government, or by private actors the government is unable or unwilling to control
- The persecution must be “on account of” the protected characteristic, or, have a “nexus” to the protected characteristic\(^{16}\)
- The application must be filed within one year of the applicant’s last arrival in the United States\(^{17}\) or the applicant must qualify for an exception to the OYFD,\(^{18}\) and
- The applicant must not be otherwise ineligible due to criminal, security, or persecutor bars.\(^{19}\)

One of the most valuable resources in approaching a potential LGBTI asylum claim is the Asylum Office

\(^{15}\) INA § 101(a)(42)(A).
\(^{16}\) Id.
\(^{17}\) INA § 208(a)(2)(B).
\(^{18}\) See CLINIC, Overcoming the One Year Filing Deadline for Asylum for DACA Recipients (Apr. 13, 2018), https://cliniclegal.org/sites/default/files/DACA-and-the-One-Year-Filing-Deadline-.pdf. [hereinafter, CLINIC, Overcoming the OYFD].
\(^{19}\) Applicants are barred from asylum under 8 CFR § 1208(b)(1)(2) if: “(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is . . . [engaging in terrorist activities]; or (vi) the alien was firmly resettled in another country prior to arriving in the United States.” While these issues are not likely to be common among DACA recipients, practitioners should screen for all bars before filing any asylum application.
Training Module on Lesbian, Gay, Bisexual, Transgender, and Intersex Refugee and Asylum Claims (hereinafter “LGBTI Training Module”). This Module, which is used to train asylum officers, can be helpful both to understand how asylum officers have been trained on LGBTI issues and as legal authority for affirmative cases. However, the LGBTI Training Module is not binding on immigration judges (IJs).

A. The Persecution Analysis

Although the term “persecution” is not defined in the INA, an asylum applicant must prove a well-founded fear of persecution. As discussed infra, if the applicant has suffered past persecution, he or she receives a presumption that he or she will suffer future persecution. If there was no past persecution, the claim can be based solely on fear of future persecution.

1. Past Persecution

If an asylum applicant can establish past persecution on account of one of the protected grounds, it is presumed the person has a well-founded fear of future persecution, and the burden of proof shifts to the government to prove that conditions have changed and the applicant can now safely return to the country of persecution. It is therefore much easier to prevail on asylum cases where an individual has suffered persecution in the past than in cases based solely on fear of future persecution.

The LGBTI Training Module lays out typical types of harm that may be present in LGBTI asylum cases. These include:

- Criminal penalties
- Rape and sexual violence
- Beatings, torture, and inhumane treatment
- Forced medical treatment
- Forced psychiatric treatment or other efforts to “cure” homosexuality
- Discrimination, harassment, and economic harm
- Forced marriage
- Threats of harm, and
- Gender-based mistreatment.

Since DACA recipients came to the United States as children or teenagers rather than adults, it is important to

20 There are no published decisions on asylum claims based on having an intersex condition. Since intersex asylum claims are relatively rare, this practice advisory will focus on LGBT claims. For more information, generally, on intersex issues, see Advocates for Informed Choice, https://aiclegal.wordpress.com/.
22 8 CFR § 1208.13(b)(a).
23 The LGBTI Training Module acknowledges that LGBTI applicants are uniquely vulnerable to rape and sexual violence. AO LGBTI Training Module supra note 21, at 21-22.
24 Id. at 21-23.
be aware that USCIS employs special guidelines in considering harm suffered by children. Additionally, the United Nations High Commissioner for Refugees has issued guidance on children’s claims that states:

*Actions or threats that might not reach the threshold of persecution in the case of an adult may mount to persecution in the case of a child...Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.*

The Ninth Circuit also found in *Hernandez-Ortiz v. Gonzalez* that “[a]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of persecution.” In cases with past persecution, DACA recipients may have suffered past physical or sexual abuse, particularly by family or community members, and maybe even law enforcement. These types of claims are discussed in Section III.B.2.b, Non-Governmental Actors, infra.

**a. Government Actor**

If an asylum applicant has suffered past persecution there is a presumption that he or she will suffer future persecution and the burden shifts to the government to rebut the presumption. Part of the past persecution analysis is to determine who is the persecutor. If the persecution occurred directly at the hands of a government actor, there is a presumption that he or she would face harm country-wide.

Persecution against LGBTI people by government actors is unfortunately a common occurrence around the world, with 72 countries criminalizing same-sex, sexual conduct, eight of which have the death penalty for such “crimes.” There have been many claims by LGBTI individuals who have been sexually assaulted by the police or the military in their home country based on their identity. It may be unlikely that many DACA recipients, who all came to the United States prior to turning 16, experienced harm directly by government actors, but for those who did, establishing that the harm is persecution should be relatively straightforward.

---


27 *Hernandez-Ortiz v. Gonzalez*, 496 F.3d 1042, 1045 (9th Cir. 2007) (citation and internal quote omitted).

28 8 CFR § 1208.13(b)(a).


31 See, e.g., *Todorovic v. U.S. Atty. Gen.*, 621 F.3d 1318, (11th Cir. 2010) (gay Serbian man, was forced to perform oral sex on police officer at gun point, in addition to other harms); *Boer–Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005) (finding persecution where gay, HIV-positive Mexican man was sexually and physically abused by a police officer.) *But see Sama v. U.S. Atty’ Gen.*, 2018 WL 1870152, at *5 (11th Cir. Apr. 19, 2018)(finding that even though applicant with imputed LGBTI identity based on pro-LGBT political opinion was subject of arrest warrant in Cameroon, because the police did not arrest him on one occasion when they had the opportunity he did not have well-founded fear); *Kimunwev. Gonzales*, 431 F.3d 319 (8th Cir. 2005) (finding that gay man from Zimbabwe had not been jailed because of his sexual orientation but rather because of sexual misconduct with another man at college).
**DACA Example.** Julia is a transgender woman from Mexico. While living in Mexico, she identified as a gay man, but she wore female clothing when going to bars. Even at age 15, she frequented bars where gay men would congregate because they were the only places where she felt she could express herself. On one occasion when leaving the bar, two police officers put her in their car and threatened her with arrest unless she performed oral sex. Fearing what might happen to her if she were brought to jail, Julia complied. One week later, she left Mexico. In 2013, she received DACA. Assuming Julia can overcome the OYFD, she likely has a strong asylum case based on past persecution by government actors.

**b. Non-Governmental Actor**

In many LGBTI asylum cases, the harm the asylum applicant suffered or fears is not directly from the government but from private, non-governmental actors.\(^{32}\) If the harm suffered by the applicant is at the hands of a private actor, he or she must additionally demonstrate that the government is unwilling or unable to protect him or her.\(^{33}\) In private actor cases, the applicant should explain whether he or she reported the harm to the police and how the police responded, that is, whether the government offered protection. If the applicant never reported the harm to the police, he or she must explain why doing so would have been futile.\(^{34}\)

Furthermore, in private actor harm cases, the applicant must show that he or she cannot reasonably relocate within his or her country to avoid harm.\(^{35}\) DACA recipients who hail from the top five DACA countries will be able to show widespread violence by private actors that may be indicative of their inability to reasonably relocate within the country of origin to avoid harm.\(^{36}\) Additionally, harm inflicted by family members or other community members can rise to the level of persecution if the government will not protect the individual from the harm.\(^{37}\) DACA recipients who have suffered past harm will, by definition, have been harmed as children or teenagers since potential DACA recipients had to have been in the United States and below the age of 16 on June 15, 2012.

It is therefore helpful to understand case law as it pertains to abuses suffered by LGBTI individuals as children. In *Bringas-Rodriguez v. Sessions*,\(^{38}\) the U.S. Court of Appeals for the Ninth Circuit ruled *en banc* in favor of a gay man from Mexico. Bringas had suffered horrific sexual and physical abuse as a child, at the hands of his uncle, father, cousins, and neighbor.\(^{39}\) After a brief period of time spent in the United States, he returned to Mexico and his neighbor attempted to force him to perform oral sex. When Bringas refused, his neighbor beat and raped him, threatening to harm his grandmother if Bringas told anybody.\(^{40}\) The Ninth Circuit initially upheld

\(^{32}\) Practitioners should be aware that Attorney General Sessions recently referred a case to himself with the intention of issuing a precedential decision that may affect the legal standard for private actor asylum cases. See *Matter of A–B–*, 27 I&N Dec. 227 (A.G. 2018).

\(^{33}\) In some cases, it may be possible to demonstrate that the gang has established so much control that it is functioning as a quasi-government.

\(^{34}\) See, e.g., *Matter of S–A–*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding that testimony and country conditions indicated that it would be unproductive and possibly dangerous for a young female applicant to report father’s abuse to government); *Ornelas Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (holding that reporting not required if applicant can convincingly establish that doing so would have been futile or have subjected the applicant to further abuse).

\(^{35}\) 8 CFR § 1208.13(b)(1)(B) and § 1208.13(b)(2)(i). See discussion of internal relocation section III.A.1.c.i infra.

\(^{36}\) See section VI infra for a discussion of country conditions in each of the top five top DACA countries.

\(^{37}\) See, e.g., *Matter of A–R–C–G–*, 26 I&N Dec. 388, 390 (BIA 2014) (finding that “married women in Guatemala who are unable to leave their relationship” could constitute a particular social group and remanding for immigration court to determine whether the Guatemalan government was unable or unwilling to protect her); *Nabukuwa v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007) (remanding to determine whether Ugandan government was unable or unwilling to protect applicant where family had neighbors rape her to “cure” applicant of her homosexuality).

\(^{38}\) *Bringas–Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017).

\(^{39}\) Id. at 1056.

\(^{40}\) Id.
the denial of Bringas’s case, finding that there had been no government involvement and insufficient proof that the Mexican government would be unable or unwilling to protect Bringas since he had not reported the crimes against him.\footnote{Bringas-Rodriguez v. Lynch, 805 F.3d 1171, 1175 (9th Cir. 2015), on reh’g en banc sub nom, Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017).}

The Ninth Circuit reheard the case \textit{en banc} and granted Bringas’s case finding that, “credible written and oral testimony that reporting was futile and potentially dangerous, that other young gay men had reported their abuse to the Mexican police to no avail, and country reports and news articles documenting official and private persecution of individuals on account of their sexual orientation—satisfies our longstanding evidentiary standards for establishing past persecution.”\footnote{Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1056 (9th Cir. 2017).} The Ninth Circuit furthermore explained, “we recognize that children who suffer sexual abuse are generally unlikely to report that abuse to authorities. Because they are unlikely to report, it is similarly unlikely that country reports or other evidence will be able to document the police response, or lack thereof, to the sexual abuse of children.”\footnote{Id. at 1071.} At least within the Ninth Circuit,\footnote{An unpublished Fifth Circuit case reached a different conclusion. Rodriguez v. Lynch, 643 F. App’x 365 (5th Cir. 2016) (per curiam) (unpublished) (finding childhood sexual abuse by family members did not rise to the level of persecution and that he could not show inability to safely relocate within Honduras because he had lived “peacefully” in San Pedro Sula before coming to the United States); see also Osejo-Romero v. Sessions, 689 F. App’x 815, 816 (5th Cir. 2017) (per curiam) (unpublished) (finding that neither surveillance by a criminal gang nor “the discrimination and isolated incidents of abuse Osejo-Romero encountered as a gay male in Honduras,” rose to the level of persecution).} it is therefore possible for an LGBTI individual who was sexually or physically abused as a child on account of his or her LGBTI identity to prevail on asylum cases, provided he or she can demonstrate through testimony and country conditions materials that reporting the abuse would be futile, or that he or she did report the abuse and the government was unwilling or unable to protect him or her.

It is therefore very important for practitioners to ask DACA recipients about all types of harm they suffered in their home countries prior to coming to the United States. Young adults who have lived most of their lives in the United States may not understand that abuse they suffered as children in their home countries may qualify them for asylum. Of course, it is also necessary to tie the physical harm to a protected characteristic, whether that is LGBTI identity or some other protected characteristic.\footnote{See Center for Gender and Refugee Studies, \textit{Practice Advisory, Children’s Asylum Claims}, (Updated Mar. 2015) https://cgrs.uchastings.edu/sites/default/files/CGRS_Child_Asylum_Advisory_3-31-2015_FINAL.pdf.} In \textit{Bringas-Rodriguez}, the Ninth Circuit agreed that he had been targeted because of his membership in the PSG of gay men, which, as a young child, manifested itself in his seeming effeminate.\footnote{Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1073 (9th Cir. 2017).}

\textbf{c. Presumption of a Well-Founded Fear}

Once an asylum applicant has successfully established past persecution, he or she is entitled to a presumption of a well-founded fear of future persecution.\footnote{8 CFR § 1208.13(b)(1).} The burden then shifts to the government to rebut this presumption, which it can establish in one of two ways:

\begin{itemize}
\item Reasonable internal relocation, or
\item Fundamental change in circumstances\footnote{8 CFR § 1208.13(b)(1)(i)(A) & (B).}
\end{itemize}
i. Internal Relocation

The internal relocation is a two-part analysis. The first part of the analysis is determining whether an asylum applicant can safely relocate within the country of persecution. For example, if the persecutor harmed the applicant in one region of the country, could the applicant safely live somewhere else? Does the persecutor have the means or networks (for example a member of a transnational gang or cartel) to find the applicant anywhere in the country? Once it is determined that an applicant can internally relocate safely, the next part of the analysis is to determine if the applicant can reasonbably relocate. For determining the ability to reasonably relocate, the regulations suggest a non-exhaustive list of factors to consider such as gender, age, health, language, geography, and ability to support oneself. The Board of Immigration Appeals (BIA) has held that the IJ must balance these factors against any evidence that the applicant previously resided safely in another part of the country, or the government’s argument that another part of the country is safe.

ii. Fundamental Change of Circumstances

Another way the government can rebut well-founded fear is to show there is a fundamental change of circumstances that would materially affect the person’s well-founded fear. One example would be where the persecutor, who was a family member or other private actor, has died, moved away, or not been in contact with the asylum applicant for many years. Furthermore, if the persecution happened while the applicant was a child, and the applicant is now an adult, the fact that he or she is no longer a child could serve as a fundamental change in circumstances. Another example could be if conditions in the country of origin have changed significantly such that the applicant could live safely anywhere. If there is a possibility the government may argue changed country conditions, the practitioner should submit current country of origin information and potentially engage a country expert to establish that LGBTI persons are still at risk of persecution in the country of origin.

d. Humanitarian Asylum

In some cases, it may be possible for an asylum applicant to prevail even if he or she no longer has a well-founded fear of persecution through a grant of “humanitarian asylum.” Under U.S. asylum law, an individual who has suffered past persecution may be granted asylum in the exercise of discretion even if he or she no longer has a well-founded fear of future persecution if:

- The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or
- The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

i. Severe Past Persecution and Unable or Unwilling to Return

50 8 CFR § 1208.13(b)(3).
51 See Matter of M–Z–M–R–, 26 I. & N. Dec. 28 (BIA 2012) (directing IJ to apply the factors in the regulations to the facts of the case); see also, Garcia-Cruz v. Sessions, 858 F.3d 1, 9 (1st Cir. 2017) (remanding for BIA to consider reasonableness of internal relocation where applicant might face violence, severe economic difficulties, and only speaks Quiché).
53 See Extiño-Morales v. Keiser, 507 F.3d 651, 652 (8th Cir. 2007) (concluding that the presumption of future persecution was rebutted by a changed circumstance, namely the fact that the petitioner was no longer a child, and failed to show that he would be persecuted as an “HIV-positive adult homosexual” in Mexico).
54 8 CFR § 1208.13(b)(1)(ii)(A) or (B).
If an applicant has suffered severe past persecution, he or she may argue that he or she should not be required to ever return to the home country.\footnote{8 CFR § 1208.13(b)(1)(iii)(A).} For example, in \textit{Matter of Chen}, the BIA granted asylum to a Chinese asylum applicant who had suffered severe harm during the Chinese Cultural Revolution, even though there had been a change in regime and the applicant no longer had a “well-founded fear” of future persecution in China. Chen was the son of a Christian minister who had been tortured for his beliefs. Chen himself suffered harm that included being locked in a room for six months as a child, sustaining a head injury that required a month-long hospitalization, and being sent to a rural village for re-education.\footnote{\textit{Matter of Chen}, 20 I&N Dec. 16 (BIA 1989).} While the harm in \textit{Chen} was particularly egregious, practitioners should always consider the possibility of humanitarian asylum in cases with past persecution.

DACA recipients who suffered persecution in the home country before coming to the United States suffered this persecution as children or teenagers. There is special guidance in place for adjudicators to consider the particular vulnerabilities of children that may make “ordinary” persecution more severe. This guidance is discussed in sections III.B.1 and III.B.2.b, \textit{supra}. Therefore, by virtue of their age at the time of the past persecution, DACA recipients may be able to present a strong argument for severe past persecution.

\textbf{ii. Other Serious Harm}

If the applicant can demonstrate past persecution and “other serious harm” if returned, he or she may win humanitarian asylum even where there is evidence presented by the government that the person can reasonably relocate or there has been a change in circumstances such that the applicant no longer has a well-founded fear. Humanitarian asylum for other serious harm provides “a second avenue of relief, a clearly liberalized alternative route to humanitarian asylum.”\footnote{\textit{Sheriff v. Atty. Gen. of U.S.}, 587 F.3d 584, 595 (3d Cir. 2009).} In \textit{Matter of L–S–}, the BIA addressed the “other serious harm” standard and emphasized that while the feared harm does have to rise to the level of persecution it does not have to be on account of a protected ground.\footnote{See \textit{Matter of L–S–}, 25 I&N Dec. 705 (BIA 2012); \textit{Chen}, 20 I. & N. Dec. 16.} The BIA stated:

\begin{quote}
[A]djudicators considering “other serious harm” should be cognizant of conditions in the applicant’s country of return and should pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant. Such conditions may include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.
\end{quote}

Practitioners may also encounter cases where the asylum applicant suffered past persecution unrelated to his or her LGBTI identity, for example, if there was severe domestic violence in the home. If the asylum applicant has recently become open about his or her LGBTI identity, he or she may fear “other serious harm” if returned to the home country based on being LGBTI and feared mistreatment or lack of rights on that basis.

\textbf{DACA Example}. Raul came to the United States from Peru when he was 14 and received DACA when it became available in 2012. Raul's father died when he was young and his mother remarried an abusive and alcoholic man. Raul’s stepfather often called Raul “sissy” and told him he was glad Raul was not his son because he would never be “man enough.” Raul’s stepfather beat him regularly, on one occasion rupturing Raul’s spleen. Raul almost died and was hospitalized for several weeks after that attack. Raul’s stepfather died last year. If Raul succeeds in demonstrating that the abuse by his stepfather constitutes past persecution,
the government may rebut the presumption of future persecution by arguing that there is a fundamental change in circumstances, based on the death of Raul’s stepfather. Here, Raul could argue he is entitled to humanitarian asylum based on the severity of the persecution and its lasting effects on him, and/or that he would face other “serious harm” if returned to Peru where violence and discrimination against LGBTI people often go unpunished. If Raul needed specialized medical care that he could only obtain in the United States, that could also be a serious harm factor in the humanitarian asylum analysis because the other serious harm does not have to be related to his protected characteristic.

2. Well-Founded Fear of Future Persecution

Even if an asylum applicant has not suffered past persecution, he or she may be able to prevail by demonstrating a well-founded fear of future persecution.60 The Center for American Progress estimates that “[j]ust more than half of LGBT DACA recipients were five years old or younger when their parents brought them to the United States.”61 Thus, many DACA recipients may have been too young to have “come out”62 as LGBTI at the time they left the country of origin or to have suffered past persecution on this basis.

In INS. v. Cardoza–Fonseca, the U.S. Supreme Court held that an asylum applicant need not prove a “clear probability” of persecution, but instead could establish a well-founded fear if he or she had a one in ten chance of facing persecution.63 Although this sounds like a low threshold, it is generally more difficult to win future fear cases than past persecution cases both because the applicant does not receive a presumption of future persecution and because, as a practical matter, it is often more difficult for an applicant to provide compelling testimony about what he or she thinks will happen in the future than what he or she has lived through in the past.

The regulations allow for asylum based on well-founded fear under two categories: the applicant must prove either that he or she will be singled out or that there is a pattern and practice of persecuting similarly situated people.64 U.S. courts of appeal are often reluctant to grant pattern and practice claims because doing so would mean every person from a particular country who has the protected characteristic could be eligible for asylum.65 In some decisions, it is difficult to discern whether the court’s decision is based on being singled out, on pattern and practice, or on some combination of the two. For example, without explicitly finding that he would be “singled out” for persecution, the Ninth Circuit found a well-founded fear in the case of a gay, HIV-positive Lebanese man who had been “outed” in Lebanon and whose prominent family name would make him easy to identify.66 Here, the Ninth Circuit found the applicant’s subjective fear of return to be objectively reasonable based on both country conditions in Lebanon and the fact that his family name would make him readily identifiable.67 Additionally, in an unpublished decision with few facts, the Ninth Circuit remanded the case of a gay Salvadoran man whom the IJ had found to have a subjective fear but applied the wrong standard in determining whether that fear was objectively reasonable.68

60 8 CFR § 1208.13(b)(2).
61 See CAP LGBTQ Dreamers, supra note 9.
62 Note that under the LGBTI Training Module, supra note 21, at 52, the term “come out” has two distinct but overlapping meanings. “Coming out” to oneself as LGBTI means accepting one’s LGBTI identity, and “coming out” to others means telling others of one’s LGBTI identity.
64 8 CFR § 1208.13(b)(2)(i).
65 But note there is one Ninth Circuit case finding “a pattern or practice of persecution of gay men in Jamaica,” Bromfield v. Mukasey, 543 F.3d 1071, 1079 (9th Cir. 2008).
66 Karouni v. Gonzales, 399 F.3d 1163, 1178 (9th Cir. 2005).
67 Id.
Several unpublished U.S. courts of appeal cases uphold the BIA’s decision that the applicant had not proven a well-founded fear in cases based on LGBTI identity. It is generally advisable, if possible under the facts, to demonstrate why an applicant would be singled out for persecution if returned and to provide strong background country conditions and, whenever possible, expert testimony.

Internal Relocation. An asylum applicant who applies for asylum based on a well-founded fear of future persecution must also demonstrate that he or she is unable to safely relocate internally within the country of feared harm, or if he or she can internally relocate safely, that it would not be reasonable to be required to do so. In cases where the applicant has experienced past harm, there is no need for the applicant to demonstrate that the harm he or she suffered was “country-wide,” although the government can seek to rebut the presumption of future harm by proving that the harm does not exist throughout the country. In cases where the feared harm is at the hands of the government, there is a presumption that the harm will be country-wide. However, in cases where the applicant fears future harm by a private actor, he or she will have to demonstrate why it would not be reasonable for him or her to relocate elsewhere in the country.

The internal relocation analysis is important both in the past persecution analysis, where the government can rebut the presumption of a well-founded fear, and in cases based solely on a well-founded fear. Thus, in both past persecution cases and well-founded fear cases, adjudicators may ask whether the applicant has ever lived anywhere else in the country and make inferences based on whether the individual suffered harm in more than one location. Where the persecutor is a private actor, it is important that asylum applicants supplement the record with background country condition information to establish that the asylum applicant will face persecution throughout the country and cannot internally relocate safely and reasonably.

**DACA Example.** Juana has been gender-nonconforming since she was a child, preferring to wear masculine clothes and engage in “rugged” activities like soccer and farming in the small village where she grew up in her native Guatemala. Her uncle who resided with her family ridiculed Juana as a child, telling her that she “shamed her family by pretending to be a boy.” Juana and her mother came to the United States when Juana was ten years old. She now has DACA in the United States and is afraid to return to Guatemala as she lives openly as a gender-nonconforming lesbian. She may be able to win asylum based on a well-founded fear of future persecution. She should include a description of harm she suffered in the past, even if it did not rise to the level of past persecution, as a way to demonstrate that she will be singled out for future harm. Juana should also present persuasive country conditions materials, including, if possible, an expert witness.

**B. Protected Characteristic**

A key element of asylum law is proving that the applicant possesses a protected characteristic that motivates

---

69 See, e.g., *Osejo-Romero v. Sessions*, 689 F. App’x 815, 816 (5th Cir. 2017) (per curiam) (unpublished) (finding that past harm did not rise to the level of persecution and that the applicant “points to nothing showing that anything worse would happen in the future”); *Silva v. Lynch*, 654 F. App’x 508, 510 (2d Cir. 2016) (unpublished) (denying asylum claim for gay man from Angola based solely on future fear where the record contained conflicting evidence about violence against gay people).

70 8 CFR § 1208.13(b)(2)(ii).


74 *Id.* at 26-27.

75 See *Rodriguez v. Lynch*, 643 F. App’x 365, 367 (5th Cir. 2016) (per curiam) (unpublished) (finding that gay male applicant could safely relocate within Honduras because he had moved to San Pedro Sula in the past and only suffered name calling and discrimination).

76 See section III.A.1.c.1 *supra* for a discussion of internal relocation.
the persecutor to harm the applicant. As discussed in section III, supra, these protected characteristics are the following: race, religion, nationality, membership in a particular social group, or political opinion. LGBTI identity may form the basis for multiple protected grounds, individually or simultaneously. The BIA has recognized sexual orientation as a potential PSG for nearly 30 years. Likewise, U.S. courts of appeal have consistently found lesbians, gay men, bisexual, and transgender individuals to be members of PSGs. There is also precedent recognizing HIV-positive status as a possible PSG. Asylum applicants may also seek asylum based on imputed membership in an LGBTI PSG, meaning that the individual does not have to actually identify as LGBTI if the persecutor seeks to harm the applicant based on the persecutor’s belief that the individual is LGBTI.

Unlike many other asylum claims based on membership in a PSG, establishing that the PSG itself is viable is generally not an issue in LGBTI claims. The LGBTI Training Module takes a broad view of how to define PSGs and even allows for the possibility of framing any LGBTI PSG as “sexual minority from country X,” rather than forcing the applicant to articulate a more precise identity or PSG. However, asylum law is always in flux, and different adjudicators may have a preference for a more specific or more general articulation of the PSG, so it may be strategic to articulate the PSG in more than one way. Also, as noted above, the attorney general recently referred a case to himself, Matter of A–B–, which may substantially alter the legal definition of PSGs. Practitioners should be aware of this case and ensure that at the time of filing the outcome of Matter of A–B– will not change the PSG formulation in LGBTI cases. Because of the uncertainty surrounding PSG jurisprudence, if an LGBTI asylum applicant can also articulate a claim based on one of the other four protected grounds, he or she should do so.

An LGBTI asylum applicant may also have claims based on political opinion, if he or she has advocated for LGBTI rights. Likewise, he or she may have a claim based on religion if his or her LGBTI identity goes against religious norms in a non-secular country. For example, if an asylum applicant comes from a non-secular

---

80 See Pitcherskaia v. I.N.S., 118 F.3d 641 (9th Cir. 1997).
81 See Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (“all alien homosexuals are members of a particular social group”).
82 See Fuller v. Lynch, 833 F.3d 866, 869 (7th Cir. 2016) (seemingly accepting bisexual identity as a PSG, but denying applicant’s claim on credibility ground for not establishing that he is bisexual).
83 See Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (denying asylum and withholding because of applicant’s conviction of a particularly serious crime but granting deferral of removal under the Convention Against Torture).
84 See Velasquez-Banegas v. Lynch, 846 F.3d 258 (7th Cir. 2017); Memorandum from David A. Martin, INS General Counsel, Seropositivity for HIV and Relief From Deportation (Feb. 16, 1996), 73 Interpreter Releases 901 (July 8, 1996).
85 See Amanfi v. Ashcroft, 328 F.3d 719, 721 (3d Cir. 2003).
86 While there are numerous U.S. court of appeals decisions denying those who claim asylum based on being LGBTI, none of these cases deny asylum because the PSG itself is not viable. Rather, cases are generally denied because the court does not find the applicant credible. See, e.g., Fuller v. Lynch, 833 F.3d 866, 869 (7th Cir. 2016), or because there is no nexus to the protected ground, see e.g., Gonzalez-Posasas v. Attorney Gen. U.S., 781 F.3d 677, 686 (3d Cir. 2015).
87 LGBTI Training Module, supra note 21, at 17 and 47.
88 Practitioners should note that in Matter of W–Y–C & H–O–B, 27 I&N 189 (BIA 2018), the BIA held that respondents in immigration court proceedings must articulate the PSG at the trial level and cannot add new or different PSGs on appeal. The authors are aware of IJs who are interpreting this decision to require the respondent to articulate all PSGs at a master calendar hearing, before setting the case for an individual hearing. Thus practitioners should consider all possible PSG formulations early in the case.
90 As discussed supra at note 10, many DACA recipients have been activists both for LGBTI rights and for immigrant rights and thus may be easily identifiable as LGBTI and politically active in their home countries.
country or a country with one dominant faith that sees being LGBTI as an abomination, the applicant may be imputed to not hold the expected religious beliefs of the state or dominant religion, or to have “liberal” religious views. The applicant may therefore fear harm based on his or her imputed religious beliefs in addition to his or her LGBTI identity.91

**DACA Example.** Enrique was an effeminate boy and suffered bullying and physical abuse growing up in Mexico. When he was injured and threatened, he was called “maricon” or “faggot.” At that time, he was too young to have come to terms with his sexual orientation or gender identity. Enrique entered the United States when he was 14 years old, and is now 23 years old. He “came out” as gay four years ago and is now questioning whether he may actually identify as a transgender woman, though he still uses the male pronoun. If Enrique files for asylum, it may be helpful to frame the claim as being a “sexual minority from Mexico,” since it is not clear how Enrique currently identifies or how Enrique identified when living in Mexico. Be aware that in many countries, country conditions are much worse for transgender people than for gay people, so there may be strategic advantages in structuring the claim as a transgender claim if doing so is possible under the facts of the case. Even if Enrique does not identify as transgender, if he fears being persecuted based on being perceived as transgender, he could articulate a PSG based on imputed identity. Thus, Enrique could put forward several PSGs in the alternative: “gay mean from Mexico,” “people imputed to be transgender from Mexico,” and “sexual minorities from Mexico.”

**C. Nexus**

In addition to proving that an individual actually has the protected characteristic of being LGBTI or perceived as LGBTI, he or she must also prove that the persecution he or she suffered in the past or fears in the future is “on account of” his or her LGBTI identity. That is, it is not sufficient to prove that an applicant is LGBTI and was harmed in the past; he or she must also prove a nexus between his or her protected characteristic and the harm. Asylum applicants are further required to prove that the protected characteristic was at least “one central reason” for the harm.92

The LGBTI Training Module lays out possible ways for the asylum officer to determine nexus. This evidence may include the applicant’s testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or while holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony [about the nexus to the harm].93

Another common scenario involves harm that was not initially based on a protected ground but worsens once the persecutor determines that the applicant is LGBTI. For example, an LGBTI person may have been the victim of a random criminal act, such as a robbery, but when the perpetrator realized the victim was LGBTI,

91 See Matter of S–A–, 22 I&N Dec. 1328 (BIA 2000) (holding that a woman with liberal Muslim beliefs was persecuted based on her religion by her conservatively religious father). In such cases the applicant may also be able to advance an imputed political opinion case, if he or she can show that his or her failure to adhere to cultural norms is the equivalent of expressing an opinion against the non-secular government.
92 INA § 208(b)(1)(B)(i).
93 LGBTI Training Module, supra note 21, at 18.
the perpetrator escalated the incident, beating the asylum applicant and threatening to kill him or her. While the government may argue that the harm was not motivated by the protected characteristic, if the applicant can demonstrate that the violence escalated to the level of persecution because the persecutor became aware of the protected characteristic, this incident may be considered persecution.  

Many asylum cases from the Northern Triangle and Mexico involve fear of gangs and criminal drug cartels. In LGBTI cases involving harm by gangs, as in all gang-based asylum cases, it can be challenging for the applicant to prove that the applicant's protected characteristic, here LGBTI identity, was “one central reason” for the harm. In a precedential decision with a fact pattern that is typical of Northern Triangle cases, Gonzalez-Posadas v. Att'y Gen. U.S., the U.S. Court of Appeals for the Third Circuit denied withholding of removal to a gay Honduran man who had been threatened by gangs, including by using homophobic slurs. The court found, “[w]hile it may certainly be true that the Maras used homophobic slurs and sexual threats when addressing Gonzalez-Posadas, the record can support the conclusion that the abusive language was a means to an end—namely cowing Gonzalez-Posadas into paying them off or joining their gang.” Even accepting that Gonzalez-Posadas was gay, the court upheld the finding that the real motivation of the gang was to recruit and extort him, and that the gang’s actions were not motivated by his sexual orientation. This decision is deeply problematic since no asylum applicant can ever know with certainty what the persecutor’s true motivation was, and since the REAL ID act requires only that the protected characteristic be “one central reason,” and not “the only reason.” Nonetheless, practitioners should be familiar with this case in considering how to frame gang violence cases where the applicant’s sexual orientation may not be the sole motivation for the harm.

Keeping the reasoning in this case in mind, the practitioner should make use of the LGBTI Training Module and spend time interviewing the applicant to better understand whether the persecutor actually knew or believed the applicant was LGBTI, or whether the persecutor was merely using homophobic or transphobic epithets as slurs. Furthermore, in similar cases, it would be helpful to include testimony or evidence that the persecution worsened when the persecutor found out or perceived the person’s identity to be LGBTI to establish that was at least one central reason for the persecution. Furthermore, it will be essential for the practitioner to include country conditions materials that corroborate the persecutor’s animus towards LGBTI people in the country of origin.

**DACA Example.** Fredy left Guatemala when he was 15 years old. The town where Fredy grew up was under the control of the MS-13 gang. When Fredy turned 14, his best friend, Alex, was recruited by the gang. Fredy became worried that he too would be recruited. Instead, when Fredy passed a group of MS-13 members they told him that they did not want “his kind” in Guatemala and one of the gang members used a hand gesture to signal putting a gun to his head. Sometimes the gang would throw rocks at Fredy as he passed by. Fredy changed his route to avoid the gang, but one day his house was spray painted with the words “Garbage out of Guatemala.” Alex warned Fredy that the gang wanted to kill Fredy because “it would

---

94 The Asylum Office Lesson Plan on Nexus notes that “[t]here is no requirement that the persecutor’s harmful contact with the applicant be initially motivated by the applicant’s possession of a protected belief or characteristic.” If the motivation changes to having a nexus to a protected ground, the applicant may be able to show persecution. USCIS, Nexus, supra note 78, at 13. See also, Tarubac v. INS, 182 F.3d 1114 (9th Cir. 1999) (holding that what began as extortion by the Philippine New People’s Army became persecution after applicant expressed an anti-communist political opinion and the harm escalated.)
95 The term “Northern Triangle” refers to Guatemala, El Salvador and Honduras because these countries comprise the northern geographic triangle of Central America.
96 See Center for Gender and Refugee Studies, Practice Advisory, Asylum Based on Fear of Gangs and Other Organized Criminal Groups: Central America and Beyond, (May 2017) available by request at https://cgrs.uchastings.edu/article/cgrs-develops-new-resources-fear-gang-cases.
98 The Third Circuit also found that sexual abuse that Gonzalez-Posadas suffered from cousin as a child constituted “isolated criminal acts’ that were not motivated by Gonzalez–Posadas’s homosexuality.” Id. at 687.
be funny to kill a faggot.” Fredy immediately fled Guatemala.

In this example, it is clear that the gang is targeting Fredy on account of his actual or perceived sexual orientation. This example is more straightforward than most real life situations because there are no mixed motives (such as extorting money or recruiting to fill gang ranks) to explain. However, even if Fredy was initially accosted by the gang members for recruitment or extortion, and then the gang members determined that Fredy was gay, and as a result the harm worsened, Fredy could have a viable asylum claim based on his LGBTI identity.

D. One Year Filing Deadline

By definition, DACA recipients will have been in the United States since at least June 15, 2007. The INA requires an asylum applicant to file for asylum within one year of his or her last arrival in the United States, or meet an exception to the OYFD. Even if filing more than a year after arriving in the United States, a DACA recipient can prevail if he or she “demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing the application.” For both changed and extraordinary circumstances exceptions, an applicant must also file within a reasonable period of time of the exception.

One of the best resources in analyzing OYFD issues is the Asylum Office Lesson Plan on the OYFD, entitled “Asylum Officer Basic Training: One Year Filing Deadline.” Additionally, CLINIC recently issued a practice advisory titled, “Overcoming the One Year Filing Deadline for Asylum for DACA Recipients” that explores the OYFD in the DACA context in depth.

The “changed circumstances” exception is invoked if an applicant did not have a claim for asylum within the first year of arrival in the United States, but something has changed to make him or her eligible now. By way of contrast, the “extraordinary circumstances” exception applies if the applicant did have an asylum claim upon arrival in the United States, but something prevented him or her from timely filing.

The LGBTI Training Module gives specific examples of common fact patterns that may give rise to OYFD exceptions in these cases. These examples include (but are not limited to):

99 INA § 208(a)(2)(B).
100 INA § 208(a)(2)(D).
101 8 CFR § 1208.4(a)(4)(ii); 8 CFR § 1208.4(a)(5).
102 USCIS, Asylum Officer Basic Training: One Year Filing Deadline, (March 23, 2009). This and other Asylum Officer Lesson Plans used to be easily accessible on the USCIS website. In 2017, USCIS removed the training materials altogether. It has now restored many internal Asylum Office documents, but as a single pdf that is difficult to navigate and is heavily redacted. The One Year Filing Deadline Lesson Plan is not included. https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf. The Lesson Plan can be accessed publicly on the U.S. Court of Appeals for the Ninth Circuit website at http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Vahora_LessonPlan.pdf. This document is also accessible to members of the American Immigration Lawyers Association at AILA InfoNet Doc. No. 16102840 www.aila.org/infonet.
103 CLINIC, Overcoming the OYFD, supra note 18.
104 8 CFR § 1208.4(a)(4)(i) includes a non-exhaustive list of changed circumstances which can excuse the OYFD. These include: changed country conditions; changed personal circumstances; and losing derivative status on a family member’s asylum application.
105 8 CFR § 1208.4(a)(5) includes a non-exhaustive list of extraordinary circumstances which can excuse the OYFD. These include: serious mental or physical illness; legal disability (including both being under age 18 and/or having a mental disability); ineffective assistance of counsel (provided certain procedural requirements are met); maintaining lawful status; filing within one year but having the application rejected for a mistake; or death or serious illness of a legal representative or close family member.
**Changed Circumstances:**

- Changed country conditions
- “Coming out” as LGBTI
- Recent steps in gender transitioning
- Recent HIV diagnosis

**Extraordinary Circumstances:**

- HIV-positive status, if the illness was sufficiently severe to prevent filing
- PTSD or other mental health issues, or
- Severe family or community opposition or isolation experienced by the applicant in the United States.\(^\text{106}\)

Practitioners should also be aware that the regulations list being an “unaccompanied minor” as an extraordinary circumstance as well.\(^\text{107}\) USCIS has interpreted this exception to include all minors below the age of 18.\(^\text{108}\)

Likewise, an unpublished BIA decision agreed that “asylum applicants under 18 years old are understood to suffer from a per se legal disability excusing them from the filing deadline.”\(^\text{109}\) The BIA further held that for those who fall between the ages of 18 and 21, the adjudicator should engage in a case-by-case analysis of whether the applicant’s age prevented him or her from filing sooner.\(^\text{110}\)

Since DACA recipients arrived in the United States as minors, it is essential for practitioners to consider this and other OYFD exceptions, in addition to those that are specific to LGBTI claims.\(^\text{111}\)

For DACA recipients, the most common OYFD deadline exceptions will probably be changed circumstances, particularly if the applicant recently “came out” as LGBTI, recently took medical steps in gender transitioning, or was recently diagnosed with HIV. Although not included in the OYFD section of the LGBTI Lesson Plan, the Lesson Plan includes the example of the applicant’s family in the home country becoming aware of the applicant’s sexual orientation as a potential ground for asylum,\(^\text{112}\) and practitioners can also argue that this new notoriety would put the applicant at greater risk and therefore qualify as a changed circumstances exception. Additionally, DACA recipients should argue that receiving and maintaining DACA constitutes an extraordinary circumstance.\(^\text{113}\)

**DACA Example.** Marta came to the United States from El Salvador when she was four years old. In 2013, at age 22, she received DACA. Marta has been an activist for “Dreamers” and has highlighted her personal story of “coming out” as a lesbian and as an undocumented immigrant. In December of last year Marta was featured on the cover of Time magazine. Marta has heard that the magazine has circulated in her town in El

---

\(^{106}\) LGBTI Training Module, supra note 21, at 61–62.

\(^{107}\) 8 CFR § 1208.4(a)(5)(ii).

\(^{108}\) See AO Children’s Claims, supra note 25, at 77.


\(^{110}\) Id. at 5-7.

\(^{111}\) See CLINIC, Overcoming the OYFD, supra note18.

\(^{112}\) LGBTI Training Module, supra note 21, at 26.

\(^{113}\) In an unpublished decision, the BIA recently found maintaining DACA to constitute an extraordinary circumstance for OYFD purposes. It is important to note, however, that the government appealed this ruling to the BIA so may not be accepting DACA generally as a OYFD exception. H–M–C–J–, AXXX–XXX–586 (BIA Mar. 1, 2018) (unpublished), https://www.scribd.com/document/374339687/H-M-C-J-AXXX-XXX-586-BIA-March-1-2018?secret_password=GG1eV8bffNQDy5GXq1GM.
Salvador and that she is now “famous” for being a lesbian celebrity. Marta may have a changed circumstances exception based on her notoriety as an “out” lesbian. She could also argue an extraordinary circumstance of being a DACA recipient and wait to file for asylum until a reasonable period of time after she loses DACA.

E. Matter of Discretion

Finally, granting asylum requires a favorable exercise of discretion. Generally, unless a mandatory asylum bar applies, the adjudicator exercises favorable discretion. However, adjudicators can consider adverse factors and weigh them against positive factors presented in the case. The manner of entry for an asylum applicant is one issue for the adjudicator to consider, but an irregular entry generally should not bar asylum as a matter of discretion.

While most DACA recipients received DACA because they had positive equities, practitioners should be prepared to explain any negative factors, such as criminal convictions that do not rise to the level of statutory disqualification but that may lead an adjudicator to not exercise favorable discretion. Since discretion is an issue in asylum cases, it can also be strategic to include evidence that supports a positive exercise of discretion to further humanize the applicant for the adjudicator.

IV. OVERVIEW OF WITHHOLDING OF REMOVAL UNDER INA § 241(B)(3) AND PROTECTION UNDER THE CONVENTION AGAINST TORTURE

Several U.S. courts of appeal have issued precedential decisions addressing withholding and CAT protection in the LGBTI context from the top five DACA countries. As such, practitioners should consider, in the alternative to asylum, withholding of removal under INA § 241(b)(3) and CAT protection for DACA recipients.

Individuals who are in removal proceedings can seek withholding of removal under section 241(b)(3) of the INA and protection under CAT simultaneously with filing for asylum. Practitioners should be aware that individuals who cannot succeed with an exception to the OYFD may still be eligible for withholding of removal or CAT protection. However, both withholding under the INA and CAT protection require the applicant to meet a higher standard than asylum, proving that it is “more likely than not” the applicant will be persecuted.

114 Matter of Salim, 18 I. & N. Dec. 311, 315-16 (1982) (finding that “all relevant factors must be considered,” and that “[a] 'strong negative discretionary factor' may be overborne by ‘countervailing equities’”); see also. USCIS, Discretion Training Module, internal page numbering at 20 (Nov. 23, 2015) https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf, beginning at page 1406 (“Generally, a positive exercise of discretion does not require a detailed analysis or explanation in the written decision). 115 Positive factors can include: family ties; business ties; employment; school and humanitarian considerations including health. Negative factors can include: criminal history and significant violations of U.S. immigration law. Id. at 18-19.
117 See Velasquez-Banegas v. Lynch, 846 F.3d 258, (7th Cir. 2017) (granting petition for review and remanding withholding case for HIV-positive Honduran man with imputed gay sexual orientation); Neri-Garcia v. Holder, 696 F.3d 1003, 1006 (10th Cir. 2012) (denying withholding and CAT to gay man from Mexico where IJ found that country conditions had improved sufficiently in the 15 years since the applicant had lived in Mexico to rebut the presumption of future harm); Morales v. Gonzales, 478 F.3d 972, 980 (9th Cir. 2007) (remanding transgender Mexican's claim for CAT protection where IJ applied the wrong legal standard regarding government conduct); Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (remanding withholding of removal and CAT claims for “gay man with female sexual identity” from El Salvador where IJ and BIA had improperly applied a per se rule requiring applicant to report private actor harm and had misapplied the standard of government acquiescence).
118 The USCIS Asylum Office does not have jurisdiction to review applications for withholding of removal or CAT protection.
or tortured, respectively.\textsuperscript{119} Neither withholding nor CAT protection leads to permanent residence or U.S. citizenship; these forms of protection from removal merely prevent the U.S. government from removing the individual to a country where he or she is likely to face persecution or torture and allow the recipient to live and work in the United States.

### A. Withholding of Removal Under INA § 241(b)(3)

Withholding of removal under INA § 241(b)(3) is not considered a form of relief from removal because the applicant is still ordered removed, but the U.S. government is prevented from removing the individual to country where he or she would face persecution.\textsuperscript{120} To qualify for withholding of removal, an applicant must establish that it is more likely than not that he or she would be subject to persecution based on one of the protected grounds.\textsuperscript{121} The “more likely than not” burden is higher than is the “well-founded fear” standard for asylum. Furthermore, withholding of removal is a mandatory form of relief—it is not discretionary—thus there is no equivalent of “humanitarian asylum” for applicants who no longer possess a well-founded fear of return.\textsuperscript{122} Applicants for withholding of removal are not subject to the OYFD, nor are they subject to a bar based on firm resettlement, but the other mandatory bars that apply to asylum also apply in the withholding context.\textsuperscript{123} Moreover, an applicant who has a criminal record may be barred from asylum based on discretion but will not be barred from withholding of removal unless he or she has been convicted of a particularly serious crime. Most DACA recipients will not be subject to the criminal or security bars to withholding or they would not have been eligible for DACA. However, if they cannot meet an exception to the OYFD, withholding of removal may be the best option as a defense in removal proceedings.

In Velasquez—Banegas v. Lynch, the U.S. Court of Appeals for the Seventh Circuit vacated the denial of withholding of removal for an HIV-positive man with an imputed gay sexual orientation from Honduras, noting that “the [IJ] made a hash of the record” and overlooked key testimony.\textsuperscript{124} Velasquez—Banegas argued that Hondurans would assume he is LGBTI because he is HIV-positive, middle-aged, and unmarried. Relying heavily on the testimony of an expert witness, the Seventh Circuit remanded the case, instructing the BIA to take the uncontested testimony that the applicant would face future harm into account.\textsuperscript{125} This case highlights why it is critical to build a strong record before the IJ. For individuals with DACA who came to the United States without having experienced past harm, it will likewise be crucial to build a strong record before the IJ, including providing expert testimony, to demonstrate that it is more likely that persecution will occur.

### B. Protection Under the Convention Against Torture

Applicants who cannot establish a nexus to a protected ground may be granted protection under CAT. There are two available forms of protection under CAT: withholding of removal under CAT and deferral of removal under

\textsuperscript{119} See 8 CFR § 1208.16(b)(2); 8 CFR § 1208.16(c)(2).

\textsuperscript{120} INS v. Aguirre-Aguirre, 526 U.S. 415, 419-20 (1999).


\textsuperscript{122} INA § 241(b)(3)(A).

\textsuperscript{123} INA § 241(b)(3)(B) ((i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.)

\textsuperscript{124} Velasquez—Banegas, 846 F.3d 258.

\textsuperscript{125} Id. at 264.
CAT.\textsuperscript{126} For both forms of protection, the applicant must demonstrate that it is more likely than not that he or she will be subjected to torture. For purposes of CAT protection, torture is defined as:

\begin{quote}
\textit{as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.}\textsuperscript{127}
\end{quote}

The regulations further define mental torture as potentially including: physical pain or suffering; the use of mind-altering substances or procedures; the threat of imminent death to the individual or the threat that another person will suffer of any of the above forms of torture.\textsuperscript{128} Availability of CAT protection is limited further in the regulations, which specify that the torture must be extreme,\textsuperscript{129} cannot be part of a lawful sanction,\textsuperscript{130} must be intentionally intended to inflict severe pain or suffering,\textsuperscript{131} and that the individual must be in the physical custody of the government actor or the government actor must acquiesce in the torture.\textsuperscript{132}

In many CAT protection cases, the most difficult element is proving that the applicant was tortured or will be tortured by a state actor or with the acquiescence of a state actor. This element will likely also present difficulties for LGBTI asylum seekers because they often suffer extreme harm at the hands of private actors and not the government. Most U.S. courts of appeal take the position that showing that the government is “willfully blind” to the torture, suffices to meet the state action element in the torture analysis.\textsuperscript{133}

The legal standard for proving torture is the same whether an applicant is seeking withholding of removal under CAT or deferral of removal under CAT.\textsuperscript{134} The primary reason an applicant may be granted withholding of removal under CAT rather than asylum or withholding of removal under INA § 241(b)(3) is that he or she cannot establish a nexus to the severe harm suffered in the past or feared in the future. Likewise, there is no nexus requirement for deferral of removal under CAT. However, unlike asylum or either form of withholding, there are no criminal or security-related bars to granting CAT deferral.\textsuperscript{135} Because CAT deferral remains available to applicants who the U.S. government may see as posing a safety threat,\textsuperscript{136} the regulations provide for

\textsuperscript{126}Withholding of removal under CAT requires the applicant to show a likelihood of torture, even if this harm does not have a nexus to a protected ground. For an individual who is barred from asylum, INA § 241(b)(3) withholding of removal, or CAT withholding because he or she has committed a particularly serious crime or for security related grounds, may still be eligible for deferral of removal under CAT. Although, with deferral of removal, an individual granted protection could be removed to a third country or may remain detained even after winning his or her claim if he or she is found to pose a danger to the community. 8 CFR §§ 1208.16–1208.18.

\textsuperscript{127} 8 CFR § 1208.8(a)(1).

\textsuperscript{128} 8 CFR § 1208.18(a)(4).

\textsuperscript{129} 8 CFR § 1208.18(a)(2).

\textsuperscript{130} 8 CFR § 1208.18(a)(3).

\textsuperscript{131} 8 CFR § 1208.18(a)(5).

\textsuperscript{132} 8 CFR § 1208.18(a)(6)–(a)(7); see, e.g., Madrigal v. Holder, 716 F.3d 499 (9th Cir. 2013) (“Acquiescence . . . does not require that the public official approve of the torture, even implicitly. It is sufficient that the public official be aware that torture of the sort feared by the applicant occurs and remain willfully blind to it.”)

\textsuperscript{133} See, e.g., Suarez-Valenzuela v. Holder, 714 F.3d 241, 245–46 (4th Cir. 2013); Diaz v. Holder, 501 F. App’x 734, 736 (10th Cir. 2012); Pieschacon-Villegas v. Att’y Gen. of U.S., 671 F.3d 303(3d Cir. 2011); Hakim v. Holder, 628 F. 3d 151 (5th Cir. 2010); Aguilar-Ramos v. Holder, 594 F.3d 701, 706 (9th Cir. 2010); Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001).

\textsuperscript{134} 8 CFR § 1208.16(c); 8 CFR § 1208.18(a).

\textsuperscript{135} 8 CFR § 1208.17(a).

\textsuperscript{136} Since there are no bars to CAT deferral, practitioners should mark the boxes on pages 1 and 5 the I-589 to seek this relief in the event the IJ finds that the applicant is barred from asylum or withholding of removal under INA §241(b)(3) and the practitioner
potential detention even after a grant of CAT deferral and allow the government to move the immigration court “at any time” after a grant to reopen and seek termination of deferral if country conditions have changed.137

CAT applicants from the top five DACA countries have often been unsuccessful before the U.S. courts of appeal in proving eligibility for CAT protection. For example, in Lopez v. Lynch,138 the U.S. Court of Appeals for the Seventh Circuit upheld the denial of a deferral of removal under CAT claim by a gay, HIV-positive man from Mexico. Although there was substantial evidence in the record of violence towards gay men, the court of appeals found that the record did not compel a finding that it was more likely than not he would be tortured.139 Similarly, in another unpublished case, the U.S. Court of Appeals for the Ninth Circuit denied CAT protection to a gay man from El Salvador, finding that the IJ had adequately considered an expert witness report in denying the application.140 Likewise, in an unpublished case, the Ninth Circuit upheld the denial of deferral of removal under CAT to a gay Honduran man, finding that he could not establish a likelihood of torture there because “the LGBTI community in Honduras was active and … crimes against members of that community were being prosecuted.”141 In another unpublished CAT denial for a gay man from Honduras from the Ninth Circuit, the court did leave open the possibility of CAT if there were aggravating factors such as being “a gay rights activist, transsexual, or member of another category of homosexual persons more frequently targeted for violence.”142 It is important to remember that every case is very fact-specific and outcomes vary greatly depending on how the record is developed, so practitioners should be aware of trends in adjudications but not be deterred from representing an individual based on an unfavorable outcome in a case with similar facts.

DACA Example. Mayra is transgender woman from Mexico. She came to the United States when she was 11 years old and received DACA when she was 29 years old. Mayra is now 35. Mayra did not “come out” as transgender until she was living in the United States. She experienced some teasing and bullying as a teenager in Mexico for appearing to be an effeminate boy, but did not experience any serious harm. She began to come to terms with her transgender identity as a teenager in the United States, and had several gender-affirming medical procedures between the ages of 18 and 25. Although taking medical steps to align Mayra’s physical appearance with her gender identity could constitute a “changed circumstance” exception, Mayra did not file for asylum within a reasonable period of time after the changed circumstance. Moreover, while being a DACA recipient may qualify as an extraordinary circumstance from the time she was 29 until the present, it would not excuse the time she spent in the United States as an adult before she applied for DACA. Of course, the practitioner should explore whether there are any other possible exceptions, such as mental health issues or homelessness, but if Mayra cannot demonstrate an exception to the OYFD, she may only be eligible for withholding of removal or CAT protection. Her case would be based primarily on country conditions as she would have to demonstrate that it is more likely than not that she would be persecuted as a transgender woman in Mexico or that she would face torture by the government or entities acting with the acquiesce, or “blind eye” of the government, if returned.

determines that the client is eligible for CAT. See USCIS, Form I-589, Application for Asylum and for Withholding of Removal (Revised 05/16/17), https://www.uscis.gov/i-589.

137 8 CFR § 1208.17(b)–(17)(d).
138 Lopez v. Lynch, 810 F.3d 484 (7th Cir. 2016).
139 Id. at 493.
140 Soriano v. Holder, 553 F. App’x 705, 707 (9th Cir. 2014) (unpublished); see also Martinez v. Holder, 557 F.3d 1059, 1065 (9th Cir. 2009) (denying a withholding claim by gay Guatemalan man, based on a credibility finding because of a prior untruthful asylum application filed on a different ground).
141 Meza-Barhona v. Lynch, 614 F. App’x 908, 910 (9th Cir. 2015) (unpublished).
V. UNIQUE ISSUES IN PREPARING ASYLUM, WITHHOLDING OF REMOVAL, OR CONVENTION AGAINST TORTURE CLAIMS FOR LGBTI APPLICANTS

There are some unique issues that arise in preparing LGBTI asylum applications. It can be challenging to prove an individual’s sexual orientation or gender identity. This section will provide information about these challenges and tips on how to prepare strong applications.

A. Discussing LGBTI Identity with Clients

Talking about sexual orientation or gender identity can be very difficult for many people. It often takes several meetings with a potential client before a relationship of trust is developed and he or she feels comfortable talking about deeply personal issues, such as his or her sexual orientation or gender identity, with the legal representative. It is important not to rush the applicant and develop the relationship of trust.

Practice Tip: It generally feels awkward to ask someone directly: “Are you gay?” Often a better approach is to explain potential eligibility grounds for asylum. For example, you could say, “People can apply for asylum in the United States if they fear returning to their countries for certain specific reasons. Under U.S. law, you may be able to qualify for asylum if you fear someone will harm you in your country because of your race, religion, nationality, membership in a particular social group, or political opinion. It is difficult to explain what ‘membership in a particular social group’ means, but people have won asylum in the United States based on personal circumstances such as being gay [or lesbian, bisexual, or transgender], or because they have been victims of familial violence. Do any of those things apply to you?” A client is more likely to divulge personal information if he or she understands that it is relevant and potentially helpful for his or her case.

Asylum clients often become more comfortable discussing sensitive issues over time. Thus, even if the applicant does not immediately identify as LGBTI, it can be helpful to continually revisit the grounds for asylum. Practitioners should also emphasize that whether or not the applicant actually identifies as LGBTI, if the persecutor believed he or she was LGBTI and sought to harm him or her on the imputed identity that harm can be a basis of granting asylum.

Practice Tip: If an applicant has been harmed or threatened with harm, it is always a good idea to ask whether the persecutor said anything. If the persecutor used a homophobic slur, this may be a reason to conclude that the persecutor believed the applicant to be LGBTI. Sometimes, facts initially indicate that the harm suffered is not based on a protected ground (such as a robbery) but the harm gets worse after the persecutor finds out the person is LGBTI. Therefore, it is critical to ask the client follow up questions such as, “Were you called any names?” and “Why do you think he called you that?” Practitioners will also want to explore how persons who are perceived as LGBTI are treated in the community from which the individual fled.

B. Special Considerations for Discussing Transgender Identity with Clients

Transgender people are often at greater risk for harm that rises to the level of persecution than other applicants. While it may be obvious that some prospective applicants identify as transgender, it may not be obvious with all clients, so it is important to include transgender issues in the discussion of asylum possibilities.


144 See Victoria Neilson, editor, IMMIGRATION LAW AND THE TRANSGENDER CLIENT, AILA Publications (2008) (for tips on
Practice Tip: As with bringing up LGBTI issues generally with clients, it may be helpful to explain to a client how identifying as transgender may improve his or her chances of succeeding with an asylum case. That is, if a client is gender non-conforming and has self-identified as lesbian, gay or bisexual, but has not identified as transgender, practitioners should explore whether the individual may have a claim based on transgender identity or imputed transgender identity. The LGTI Training Module has helpful tips on appropriate and inappropriate lines of questioning that the adjudicator may use.\(^\text{145}\) It can also be helpful to review preferred terminology in discussing medical and other transition issues with transgender clients before your first meeting.\(^\text{146}\)

In many countries transgender people are particularly vulnerable to persecution.\(^\text{147}\) Courts have found that it is error to rely on improving country conditions for lesbian and gay people in denying an asylum claim by a transgender applicant.\(^\text{148}\) As discussed above, a transgender applicant may be able to demonstrate a changed circumstance exception to the OYFD if he or she has recently taken steps to align his or her physical appearance with his or her gender identity.\(^\text{149}\)

C. Corroboration of LGBTI Identity

An asylum applicant, including an LGBTI applicant, may be able to prevail on an asylum claim based solely on his or her own detailed, credible testimony.\(^\text{150}\) However, with the passage of the REAL ID Act in 2005, there are heightened requirements for corroboration in asylum cases. Thus, if there are corroborating documents that are readily available, the applicant must submit these or account for their absence.\(^\text{151}\)

It is especially important to include corroboration if there are any indicia of fraud or reasons for the adjudicator to doubt the applicant’s credibility. In Eke v. Mukasey,\(^\text{152}\) a case where a gay Nigerian man presented inconsistent testimony and had criminal convictions involving fraud, the IJ found that he lacked credibility. The U.S. Court of Appeals for the Seventh Circuit upheld the determination that Eke had not proven that he was actually a member of the PSG of gay men in Nigeria because:

He also failed to either submit some kind of documentation indicating his sexual preferences, such as letters, affidavits, photographs, or other forms of corroborative evidence; or establish that such evidence was not reasonably available to him. In fact, the applicant could not even provide the name of the gentleman with whom he was interviewing techniques when working with transgender clients.).

145 LGBTI Training Module, supra note 21, at 36–37.
147 LGBTI Training Module, supra note 21, at 24. (“Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution.”)
148 Ramos v. Lynch, 636 F. App’x 710, 711 (9th Cir. 2016), as amended (Feb. 18, 2016) (unpublished) (remanding the case of a Salvadoran transgender woman where the IJ “improperly conflated Ramos’s gender identity and sexual orientation”); Mondragon-Allday v. Lynch, 625 F. App’x 794, 795 (9th Cir. 2015) (unpublished) (remanding case of transgender Mexican woman to consider fear of future persecution based on country conditions specific to transgender Mexicans rather than gay or lesbian Mexicans). But see Jeune v. U.S. Att’y Gen., 810 F.3d 792, 803 (11th Cir. 2016) (dismissing appeal where court found applicant had failed to advance separate argument for potential harm based on transgender identity as distinct from sexual orientation, before the immigration judge).
149 See section III.D supra.
150 8 CFR § 1208.13(A).
151 INA § 208(b)(1)(B)(ii) (“Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”).
152 Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008).
allegedly involved in a homosexual relationship.\textsuperscript{153}

While it should not always be necessary to provide extrinsic proof of LGBTI identity, in cases where an applicant’s credibility is questioned, he or she should be prepared to do so. However, an adjudicator may not rely on stereotypes to determine whether an applicant is gay.\textsuperscript{154} An adjudicator can ask general questions about where an applicant met his or her partner or activities he or she engages in as part of the LGBTI community, but should not rely on stereotypes, or find an applicant not credible if, for example, he or she does not frequent LGBTI bars or nightclubs.

In general, if corroborating proof is available, the applicant should provide it. Possible corroboration can include:

- Proof of a long-term relationship or former relationship with a same-sex partner, similar to marriage \textit{bona fides} proof, such as proof of cohabitation, proof of shared expenses, photos with each other’s families.
- Affidavits or letters from friends or family who know that the applicant is LGBTI, including how the affiant or letter writer knows this. For example, the affiant could be an LGBTI friend who frequents LGBTI clubs with the applicant. Another example could be a letter from a family member in the home country confirming that the applicant is LGBTI and/or that he or she would face harm if he or she returned.
- Proof of involvement in the LGBTI community. While many new immigrants may not be involved with any LGBTI organizations, some are and it can be helpful to provide proof of these activities. Examples include involvement in a local LGBTI community center, LGBTI faith groups, LGBTI sports groups, LGBTI social media groups, LGBTI support or identity groups, etc.
- Affidavit from a mental health expert. Although it is not always necessary to include evidence from a mental health expert, it can be very helpful to do so, especially in cases where the applicant is reticent to testify about being LGBTI and has little corroboration of his or her LGBTI identity. A mental health expert can both corroborate the applicant’s narrative and help explain why it is difficult for the applicant to speak about his or her LGBTI identity.
- Proof of LGBTI dating. Some practitioners have found it helpful to submit proof that an applicant is active on same-sex dating websites by printing out profiles from websites. It is important that any evidence submitted is not graphically sexual or otherwise inappropriate to give to a government official and that there is not other problematic or unlawful material on the website.
- Medical evidence of gender transition. If the applicant is transgender and has taken medical steps to transition such as taking hormones or having surgeries, the applicant should submit such medical documentation.
- Medical evidence of HIV status. If an applicant’s asylum claim or one-year filing deadline exception is based on being HIV-positive, he or she should include proof of his or her HIV diagnosis.\textsuperscript{155}

\textbf{DACA Example.} Sergio, from Honduras, recently married his partner, Mateo, in New York City. Sergio fears that it would be impossible to live openly in Honduras as a gay, married man. He also fears that he and his spouse will be subject to violence from which the Honduran government will not protect them. Sergio

\textsuperscript{153} Id. at 381.

\textsuperscript{154} \textit{Todorovic v. U.S. Att’y Gen.}, 621 F.3d 1318, 1326 (11th Cir. 2010) (remanding case where the IJ committed error by finding Serbian gay man would not experience future harm because his demeanor is not “overtly homosexual”); \textit{see also, Shabinaj v. Gonzales}, 481 F.3d 1027, 1027 (8th Cir. 2007).

\textsuperscript{155} \textit{See LGBTI Training Module, supra} note 21, at 44-46.
should include his marriage certificate as part of his asylum application because it is material to his case and readily available. In addition to the marriage certificate, Sergio can also include pictures of the dating period, courtship, and wedding.

VI. COUNTRY CONDITIONS FOR LGBTI DACA RECIPIENTS FROM THE TOP FIVE DACA COUNTRIES

As stated above, the five countries with the highest number of DACA recipients in the United States are Mexico, El Salvador, Guatemala, Honduras, and Peru. It is generally helpful for the practitioner to begin assessing a case by reviewing federal court and BIA decisions from the applicant’s country of origin to understand issues that courts have addressed in LGBTI cases. There have been LGBTI-related federal court decisions from each of the top five DACA countries. There are a significant number of federal court cases from Mexico, El Salvador, Guatemala, Honduras, and Peru. It is generally helpful for the practitioner to begin assessing a case by reviewing federal court and BIA decisions from the applicant’s country of origin to

156 Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) (finding that a gay man who had been subjected to private abuse had suffered past persecution even though he had not reported harm to police); Barragan-Ofeda v. Sessions, 853 F.3d 374 (7th Cir. 2017) (denying case for gay man from Mexico who had initially put forward an imputed sexual orientation claim and did not raise actual gay sexual orientation claim until federal court appeal); Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015) (finding court erroneously considered improving country conditions for gay people in adjudicating claim of transgender woman); Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015) (finding court erroneously considered improving country conditions for gay people in adjudicating claim of transgender woman); Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015) (finding court erroneously considered improving country conditions for gay people in adjudicating claim of transgender woman);

157 Ramos v. Lynch, 636 F. App’x 710, 711 (9th Cir. 2016), as amended (Feb. 18, 2016) (unpublished) (finding BIA erred in requiring showing of lack of government protection when persecution was by Salvadoran police and finding transgender identity is a different PSG and needs different analysis from sexual orientation); N-A-A-M v. Holder, 587 F.3d 1052 (10th Cir. 2009) (denying withholding of removal to transgender Salvadoran woman because of her conviction for a particularly serious crime, no discussion in case of potential CAT claim); Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (finding the Salvadoran government acquiesced in torture of “gay male with female sexual identity” who had been kidnapped and tortured).

158 See Aguilar-Mejia v. Holder, 616 F.3d 699 (7th Cir. 2010)(denying asylum to an HIV-positive, imputed gay man who held citizenship in Mexico, Guatemala, and Colombia where applicant only put forward a “pattern and practice” claim and did not raise an individualized harm claim at trial); Martinez v. Holder, 557 F.3d 1059 (9th Cir. 2009) (denying asylum to gay Guatemalan on credibility grounds where he had previously filed a fraudulent asylum claim based on political opinion); Galicia v. Ashcroft, 396 F.3d 446 (1st Cir. 2005) (upholding denial of gay Guatemalan man’s asylum claim where he did not show government involvement or lack of protection for past harm suffered).

159 Velazquez-Banegas v. Lynch, 846 F.3d 258 (7th Cir. 2017) (remanding claim by HIV-positive, imputed gay man from Honduras); Osorio-Ramero v. Sessions, 689 F. App’x 815, 816 (5th Cir. 2017) (unpublished) (per curiam) (denying asylum to transgender woman, who lived as a gay man in Honduras, based on no past persecution); Rodriguez v. Lynch, 643 F. App’x 365, 367 (5th Cir. 2016) (per curiam) (unpublished) (finding that gay male applicant could safely relocate within Honduras when he had moved to San Pedro Sula in the past and only suffered name calling and discrimination); Gonzalez-Pousadas v. Att’y Gen. U.S., 781 F.3d 677 (3d Cir. 2015) (per curiam) (upholding denial of gay Guatemalan man’s asylum claim where he did not show government involvement or lack of protection for past harm suffered).
crucial in asylum cases to build a strong record of conditions in the applicant’s country for LGBTI individuals.

The following sections provide general tips on how to approach country conditions research and then briefly discusses country conditions for LGBTI individuals in each of those countries.160 The Center for Gender and Refugee Studies recently released a helpful advisory on how to conduct country conditions research generally, which also provides useful tips.161

A. Researching Country Conditions for LGBTI Applicants

In preparing any asylum application, practitioners should begin by reading the U.S. Department of State Human Rights Report for the country in question.162 These reports have increasingly included information on LGBTI rights violations; however, the quality of the reports on LGBTI issues vary greatly from country to country. Since the government routinely relies on these reports, practitioners must know what they contain, but it is important for the practitioner’s research to go further than this.

There are several human rights organizations that focus on LGBTI issues and include reports on these issues on their websites.163 General government and human right websites also frequently contain valuable materials about LGBTI-related country conditions.164 Other sources of useful information include general interest LGBTI media websites for articles about international human rights165 and newspaper or other media sites in the country of feared harm on which the practitioner can conduct searches within the site for relevant terms.166 If any of the sites do not have a robust internal search feature, it is possible to use Google to search within websites.167 Finally, there are also nonprofit organizations that focus on LGBTI168 and gender-related169 immigration issues that share country conditions resources with asylum practitioners. These resources can be a

---

160 The authors would like to thank colleagues at Immigration Equality for sharing country conditions materials.


162 U.S. Department of State, Country Reports on Human Rights Practices – https://www.state.gov/j/drl/rls/hrrpt/. Note that the 2017 Human Rights Reports are generally shorter and go into less depth regarding gender-related issues and, in some instances, LGBTI issues. It is therefore advisable to consult and potentially include earlier reports as well, particularly if the asylum applicant experienced harm in his or her country prior to 2017.


166 Obviously, the terms should be in the language of the website. Thus, on Spanish language sites in addition to searching “gay,” it is advisable to search “homosexual,” “lesbiana,” “transgenero,” “travesti,” “VIH,” or “SIDA.”

167 Google’s search engine can be used to search for specific terms within sites. To do this, go to Google, Enter “site:www.website.com search term” into the search box. For example, the Google search “site:https://www.advocate.com/ Russia” yields multiple articles about mistreatment of LGBT people in Russia.

168 Immigration Equality is the country’s leading LGBT immigration non-profit and can assist with country conditions materials. https://www.immigrationequality.org/.

169 The Center for Gender & Refugee Studies provides technical assistance and country conditions information on gender-related claims as well as LGBT claims. Practitioners can submit a technical assistance request here: https://cgrs.uchastings.edu/.
helpful starting point for the practitioner, but it is important to thoroughly read all materials before filing them with the IJ and to supplement them with recent information.

B. Mexico

Nearly 80 percent of all DACA recipients—approximately 548,000 individuals—are from Mexico. Practitioners should be prepared to counter arguments the U.S. government may make that there have been some advances in rights for lesbians and gay men over the past few years, including anti-discrimination laws and marriage equality in some parts of the country. However, the U.S. Department of State Human Rights Report for 2017 acknowledges “[c]ivil society groups claimed police routinely subjected LGBTI persons to mistreatment while in custody. . . . There were reports that the government did not always investigate and punish those complicit in abuses, especially outside Mexico City,” but also reports some gains in anti-discrimination laws. Likewise, a report by the Organization for Refuge, Asylum & Migration, finds that despite changes in the Mexican law purporting to protect lesbian, gay, and bisexual individuals there is still widespread societal intolerance. A human rights shadow report released by Letra S, Center for International Human Rights, of Northwestern University School of Law, and Heartland Alliance for Human Needs & Human Rights, Global Initiative for Sexuality and Human Rights in 2014 likewise contains important information about the Mexican government’s failure to protect LGBTI individuals from harm. A Report of the Special Rapporteur to the United Nations found a “pattern of grotesque homicides.” Additionally, there are valuable resources from the Canadian Immigration and Refugee Board on conditions in Mexico for LGBTI individuals. The Center for Gender and Refugee Studies also recently issued a report on country conditions in Mexico for sexual orientation and gender-based asylum applicants.

For Mexican citizens who are considering applying affirmatively based solely on future fear of harm because of sexual orientation, the case may be challenging unless there is some other aggravating factor. On the other


172 Id. at 31.


178 If there are additional factors that make the applicant’s fear particularized, the case will be much stronger. These factors could include particularized threats to the individual or his or her family; political activism on behalf of the LGBT community; gender
hand, there is more documentation of extreme violence towards transgender individuals in Mexico.\(^\text{179}\) The Transgender Law Center, in conjunction with Cornell Law School recently released a report on human rights abuses against Mexican transgender women, finding, among other things, that Mexico has the second highest rate of transphobic violence in Latin America.\(^\text{180}\) In many cases, it is easier to demonstrate that a transgender person will be singled out for persecution, making his or her claim based solely on well-founded fear somewhat stronger than those based on only sexual orientation.

C. El Salvador

With approximately 25,900 DACA recipients from El Salvador, it is a distant second to Mexico in sheer numbers.\(^\text{181}\) The Northern Triangle, which includes El Salvador, is one of the most dangerous regions in the Western Hemisphere, both generally\(^\text{182}\) and for LGBTI people specifically,\(^\text{183}\) so there may be many strong asylum claims available to Salvadoran LBGTI DACA recipients.

The U.S. Department of State Human Rights Report for 2017 states, “NGOs reported that public officials, including police, engaged in violence and discrimination against LGBTI persons.”\(^\text{184}\) Likewise a Canadian Immigration and Refugee Board Report found that Salvadoran police had failed to solve crimes against LGBTI people.\(^\text{185}\) A report by Human Rights First found that Salvadoran police are often homophobic and that crimes against LGBTI people often go unreported.\(^\text{186}\) Additionally, a report by the University of California Berkeley found that gangs often required new recruits to attack LGBTI individuals as part of their gang initiation process.\(^\text{187}\) As with other Latin American countries, violence against transgender people is often particularly severe.\(^\text{188}\)

---

\(^{179}\) U.S. Department of State, 2016 Country Reports on Human Rights Practices – Mexico, at 31 (Apr. 7, 2017), https://www.state.gov/documents/organization/265812.pdf, “In October [2016] the press reported three killings of transgender individuals in the space of 13 days. NGOs stated transgender individuals faced discrimination and were marginalized even within the lesbian and gay community.”


\(^{181}\) USCIS DACA Recipients supra note 8.


\(^{186}\) Human Rights First, Bias-Motivated Violence Against LGBT People In El Salvador (May 2016), http://www.humanrightsfirst.org/sites/default/files/El-Salvador-Brief-ENG_0.pdf.


D. Guatemala

There are roughly 17,700 DACA recipients from Guatemala. Guatemala, like other Northern Triangle countries, is increasingly subject to violence and de facto control by gangs.

The U.S. Department of State Human Rights Report for 2017 states that “[a]ccording to LGBTI rights groups, gay and transgender individuals often experienced police abuse.” In Guatemala, as in El Salvador and Honduras, gender-based violence is common, and LGBTI individuals are particularly vulnerable to this violence. A report by the Inter-American Commission on Human Rights found that LGBTI people were subjected to assaults, and that Guatemala had an especially high rate of murders against transgender individuals. Guatemalans living with HIV are unlikely to receive life-saving medical care and often face discrimination and stigma. Likewise, transgender individuals are at particular risk of violent harm.

E. Honduras

There are approximately 16,100 DACA recipients from Honduras. Until recently, Honduras was the “murder capital of the world.” Even after a slight drop in the murder rate, it remains an extremely dangerous country.

The U.S. Department of State Human Rights Report for 2017 describes severe harassment of LGBTI people, including fear of reprisals and corruption by the police. The Honduran LGBTI community, like that of neighboring El Salvador and Guatemala, is uniquely vulnerable to gender-based violence and cannot count

---

189 USCIS DACA Recipients supra note 8.
196 USCIS DACA Recipients supra note 8.
on the state for protection.\textsuperscript{199} The U.S. Embassy in Honduras has reported on dangers faced by the LGBTI community, including dangers perpetrated by the police.\textsuperscript{200} Likewise, the United Nations in Honduras has spoken out against the persecution and murder of LGBTI community members.\textsuperscript{201} The Inter-American Commission on Human Rights has also raised concerns about the violence against the LGBTI community.\textsuperscript{202} Both Human Rights Watch\textsuperscript{203} and Amnesty International\textsuperscript{204} have issued recent reports on the extreme danger faced by LGBTI individuals in Honduras.

F. Peru

There are approximately 7,420 DACA recipients from Peru.\textsuperscript{205} While there are fewer DACA recipients and asylum applicants from Peru than from Mexico and Central America, there are viable LGBTI asylum claims for Peruvian nationals.

The U.S. Department of State Human Rights Report for 2017 noted that, “NGO studies revealed that law enforcement authorities repeatedly failed to protect, and on occasion violated, the rights of LGBTI citizens.”\textsuperscript{206} Amnesty International also found ongoing violence against people in Peru based on sexual orientation and gender identity.\textsuperscript{207} Additionally, there are other reports of ongoing violence against LGBTI people in Peru.\textsuperscript{208}

\section*{F. Peru}

\begin{itemize}
\item There are approximately 7,420 DACA recipients from Peru.\textsuperscript{205} While there are fewer DACA recipients and asylum applicants from Peru than from Mexico and Central America, there are viable LGBTI asylum claims for Peruvian nationals.
\item The U.S. Department of State Human Rights Report for 2017 noted that, “NGO studies revealed that law enforcement authorities repeatedly failed to protect, and on occasion violated, the rights of LGBTI citizens.”\textsuperscript{206} Amnesty International also found ongoing violence against people in Peru based on sexual orientation and gender identity.\textsuperscript{207} Additionally, there are other reports of ongoing violence against LGBTI people in Peru.\textsuperscript{208}
\end{itemize}


\textsuperscript{201} United Nations in Honduras, \textit{Comunicado Sobre Asesinatos de Personas LGBTI} (June 8, 2016), http://hn.one.un.org/content/unct/honduras/es/home/presscenter/comunicado-asesinatos-lgbti.html.


\textsuperscript{205} USCIS DACA Recipients supra note 8.


As in many countries throughout the world, transgender people are at particular risk for abuse and violence.\footnote{209} Despite some gains in HIV treatment,\footnote{210} medications remain expensive and potentially unattainable for those who need them.\footnote{211} HIV-positive women face particular stigma, largely because the virus is associated with “immoral” behavior.\footnote{212}

**VII. CONCLUSION**

As the future of DACA recipients remains uncertain, practitioners who work with DACA recipients should explore permanent relief options for this vulnerable population. Practitioners should consider that some DACA recipients may be LGBTI and should determine based on the specific facts and country of origin whether the individual’s LGBTI identity can form the basis for an asylum, withholding of removal, or CAT claim. LGBTI DACA recipients from the top five DACA countries may have strong asylum, withholding of removal, or CAT claims in light of the country conditions.


\footnote{211} People Living with HIV in Peru Protest Against High Treatment Prices, Avert, Jan. 23, 2015 \url{https://www.avert.org/news/people-living-hiv-peru-protest-against-high-treatment-prices}.

The Catholic Legal Immigration Network’s commitment to defending the vulnerable

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—more than 330 organizations in 47 states and the District of Columbia—is the largest in the nation.

In response to growing anti-immigrant sentiment and to prepare for policy measures that will hurt immigrant families, CLINIC launched the Defending Vulnerable Populations Project. The project’s primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, the Defending Vulnerable Populations Project conducts court skills training for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants.

By increasing access to competent, affordable representation, the project’s initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

The DVP Project offers a variety of written resources including timely practice advisories and guides on removal defense tactics, amicus briefs before the BIA and U.S. courts of appeal, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), a guide on how to obtain a client’s release from immigration detention, amicus briefs on the “serious nonpolitical crime” bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one’s immigration bond money, and a report entitled “Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution.”

Get free resources to help you defend immigrants at cliniclegal.org/defending-vulnerable-populations!