CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Overcoming the Asylum One-Year Filing Deadline for DACA Recipients[1]

June 25, 2020

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I. Introduction

On June 18, 2020, the U.S. Supreme Court issued a decision in *Dep't of Homeland Sec. v. Regents of the Univ. of California* – U.S. -- , No. 18-587, 2020 WL 3271746, (U.S. June 18, 2020) holding that the Trump administration's effort to end Deferred Action for Childhood Arrivals (DACA) had not complied with the requirements of the Administrative Procedures Act. As a result, the Supreme Court upheld a lower court ruling issuing an injunction against the DACA rescission and remanding the case for further proceedings. While this reprieve from terminating DACA was very welcome news, it is not a permanent solution. Following the decision, President Trump announced that he would submit "enhanced papers" again seeking to end DACA.[2] As advocates continue to push Congress to pass the DREAM act, immigration practitioners should explore all possible options for permanent immigration relief for those who are currently protected by DACA.

With the uncertain future of DACA, it is important to fully screen all DACA recipients for other potential forms of relief, including asylum.[3] In analyzing asylum claims that may not be adjudicated for many months or even years, practitioners must be aware of recently proposed regulations, which would eviscerate asylum protections for most asylum seekers.[4] These rules could go into effect as early as fall 2020. While the final rules may change from the proposed rules, and there will likely be efforts to challenge these dramatic changes through litigation, practitioners should fully explain the risks of filing including the effects these rules, if implemented, will have on future asylum applications.

Many DACA recipients may be eligible for asylum, but they will have to overcome the one-year filing deadline (OYFD).[5] Addressing a OYFD in addition to an asylum claim can be very challenging and make it more difficult to succeed in the asylum application.[6] Whether or not to file affirmatively for asylum, and risk the possibility of the Department of Homeland Security (DHS) initiating removal proceedings, is a difficult decision and each potential claim must be assessed on a case-by-case basis, weighing the strength of the claim, the strength of the OYFD exception, and the goals of the client.

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[2] *Trump Says He Will Renew Effort to End DACA Protections,* Politico, June 19, 2020, https://www.politico.com/news/2020/06/19/trump-renewing-effort-to-end-daca-329646.

[3] There are excellent resources on asylum law generally as well as specific advisories on types of asylum claims that are most common in Mexico and the Northern Triangle of Central America. The Center for Gender and Refugee Studies wrote two helpful resources on these topics: "Asylum Based on Fear of Gangs and Other Organized Criminal Groups: Central America and Beyond" and "Immigration Relief for DACA Recipients Based on Fear of Return," both of which are available upon request from CGRS, cgrs.uchastings.edu.

[4] Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264-01, (June 15, 2020), regulations.gov/document?D=EOIR-2020-0003-0001.

[5] As discussed below, only DACA recipients who have traveled on advance parole and recently re-entered the United States would not require a OYFD exception.

[6] Human Rights First, *The One-Year Asylum Deadline and the BIA: No Protection, No Process* (Oct. 2010) at 6, humanrightsfirst.org/wp-content/uploads/pdf/1YD-report-FULL.pdf. A 2010 report analyzing Board of Immigration Appeals decisions on the OYFD found that the OYFD affects approximately one in five asylum applicants before the BIA, and that "in approximately 46 percent of cases where the filing deadline is an issue, it is the only reason cited by the BIA as justifying the denial of asylum."

This practice advisory focuses on the OYFD under asylum law as it may relate to DACA recipients who are considering applying for asylum. Section II discusses the DACA recipients as potential asylum applicants based on their country of origin. Section III explains the OYFD. Section IV delves into the exceptions to the OYFD. Section V reviews the requirement of applying for asylum within a reasonable period of time of the exception. Section VI notes the possibility of combining OYFD exceptions. This practice advisory does not discuss asylum generally.[7]

II. DACA Recipients as Asylum Applicants

To be eligible to receive DACA, the requestor had to demonstrate that he or she:

- Entered the United States before age 16
- Continuously resided in the United States from June 15, 2007 to the present
- Was physically present in the United States, 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 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.[8]

The top five countries for DACA recipients are Mexico, El Salvador, Guatemala, Honduras, and Peru.[9] Mexican citizens comprise over 80 percent of all DACA recipients and citizens of the Northern Triangle countries of Central America (El Salvador, Guatemala, Honduras) comprise nearly 10 percent.[10]

With the humanitarian crisis that has enveloped the Northern Triangle of Central America and Mexico in recent years, these are also top asylum-producing countries. Under the Immigration and Nationality Act (INA) § 101(a)(42) the term "refugee" is defined as:

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[7] For general asylum procedures, see CGRS Advisories cited *supra* note 3; National Immigrant Justice Center, *Basic Procedural Manual For Asylum Representation Affirmatively and in Removal Proceedings* (June 2019), immigrantjustice.org/for-attorneys/legal-resources/file/nijc-procedural-manual-asylum-representation-pdf.

[8] USCIS, Frequently Asked Questions, (last reviewed/updated Mar.8, 2018), uscis.gov/archive/frequently-asked-questions.

[9] USCIS, *Approximate Active DACA Recipients: Country of Birth*, at 5, (Apr. 20, 2020), uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Receipts_since_Injunction_Dec_31_2019.pdf . [hereinafter, USCIS DACA Recipients]..

[10] *Id.*

> 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.

In 2018, the last year for which statistics are available on the Department of Justice website, the four countries with the highest asylum grant rates were China, El Salvador, Honduras and Guatemala.[11] "[T]he top four nationalities accounted for 53 percent of asylum grants. China alone accounted for 23 percent of all asylum grants," meaning that the Northern Triangle countries accounted for 30% of defensive asylum grants.[12] In 2018, Mexico had the sixth highest asylum grant rate for defensive applications.[13]

Further, Mexico, El Salvador, Guatemala, and Honduras are among the top six leading nationalities of affirmative asylum filings as of September 2019, the last date for which statistics are publicly available.[14] Together, applicants from these four countries account for 35% of all affirmative asylum filings.[15]

The Trump Administration has launched an assault against asylum protections,[16] particularly as they relate to cases commonly filed by citizens of the Northern Triangle of Central America and Mexico. Thus, cases that would have seemed strong in the recent past, may now carry added risk of being denied. This practice advisory focuses solely on the asylum OYFD, but it is imperative that practitioners adequately research the law surrounding the claim a DACA recipient may be able to put forward in light of very harsh decisions issued by the attorney general and the Board of

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[11] U.S. Department of Justice Executive Office for Immigration Review Office of Planning, Analysis, and Technology Immigration Courts, *Asylum Statistics FY 2014 – 2018*, at 29, (undated), justice.gov/eoir/file/asylum-statistics/download.

[12] *Id.* Note in 2019 EOIR created an Office of Policy which now releases curated statistics. CLINIC raised concerns about the politicization of EOIR through the creation of this Office of Policy in response to the Interim Final Rule which established this office. *See* CLINIC, *CLINIC Submits Comment Opposing EOIR's Reorganization Interim Rule, Calls for Withdrawal* (Oct. 19, 2019), cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-eoirs-reorganization. The most recent statistics, released through the Office of Policy, list El Salvador (2,311), Guatemala (1540), Honduras (1286), and Mexico (802) as the countries with the third through sixth most immigration court asylum grants, with China and India having the highest number of grants. AILA, *EOIR Releases Asylum Decision Rates by Nationality for FY2019*, Sep. 30, 2019, AILA Doc. No. 19111401, aila.org.

[13] *Id.*

[14] USCIS, Leading Nationalities for Asylum Applications Filed with USCIS at 3 (Sep. 2019), uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffirmativeAsylumStatisticsFY2019.pdf. The top six countries, in descending order, are: Venezuela, China, Guatemala, El Salvador, Honduras, and Mexico.

[15] *Id.*

[16] *See* National Immigrant Justice Center, *A Timeline of the Trump Administration's Efforts to End Asylum*, Mar. 2020, immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-04/04-01-2020-asylumtimeline.pdf.

Immigration Appeals (BIA) over the past two years.[17] Practitioners should also consider the decreased chances of success on asylum based on changes to immigration court procedures and judges,[18] as well as anti-immigrant ideological hiring at the BIA.[19]

The following are common asylum particular social group and political opinion claims as well as possible Convention Against Torture (CAT)[20] claims that DACA recipients from the top five countries of Mexico, El Salvador, Guatemala, Honduras, and Peru may be able to articulate.[21] Note, however, that as discussed in the footnotes, the attorneys general and BIA have targeted many of these particular social groups in efforts to make it more difficult to obtain asylum. Common claims have included:

- Family membership[22]
- Sexual minorities[23]

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[17] *See Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018)(finding that a particular social group (PSG) of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common" was not cognizable) ; *Matter of L-E-A-,* 27 I&N Dec. 581 (A.G. 2019)(finding that family-based PSG was not cognizable); *Matter of E-R-A-L-*, 27 I&N Dec. 767 (BIA 2020)(finding that landowner PSG was not cognizable).

[18] See Innovation Law Lab and Southern Poverty Law Center, The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool, June 2019, splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

[19] Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration*, Roll Call, May 4, 2020, rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/.

[20] Claims under CAT do not require a nexus to a protected characteristic, nor must they be filed within one year of arrival, but practitioners should remember to perform a CAT analysis in all fear-based claims.

[21] Center for Gender and Refugee Studies, *Immigration Relief For DACA Recipients Based On Fear Of Return* (Feb. 2018), pennstatelaw.psu.edu/sites/default/files/CGRS%20DACA%20Fear%20of%20Return%20Claims%20Practice%20Advisory_02-28-2018.pdf.

[22] Although every federal court of appeals to consider the issue has found that family can be the basis of a viable PSG, in 2019 the attorney general issued a decision *Matter of L-E-A-* 27 I&N Dec. 581 (A.G. 2019), overturning that portion of *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) that had found the respondent's family membership to constitute a valid PSG. In dicta, the attorney general went on to state, "in the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct." *Matter of L-E-A-* 27 I&N Dec. at 589. Following this decision, the BIA rejected a family-based PSG in *Matter of E-R-A-L-*, 27 I&N Dec. 767, 774 (BIA 2020), finding that "The respondent has not shown that his family is socially distinct or was viewed as anything besides a typical nuclear family in Guatemala." For information on how to approach family-based claims after *L-E-A-*, see, CLINIC, *Practice Pointer: Matter of L-E-A-*, (Aug. 2, 2019), cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e.

[23] *See, e.g., Doe v. Attorney Gen. of the United States,* 956 F.3d 135, 142 (3d Cir. 2020) ("Petitioner's sexual orientation and identity as a gay man is enough to establish his membership in the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in Ghana, a "particular social group" within the meaning of the INA"); *Amanfi v. Ashcroft,* 328 F.3d 719, 728-29 (3rd Cir. 2003) (perceived homosexuality, even where the applicant is not gay, could be enough for an imputed particular social group); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 (9th Cir. 2000); *Matter of Toboso-Alfonso,* 20 I&N Dec. 819, 822 (BIA 1994).

- Witnesses/informants[24]
- Former gang membership[25]
- Gender based social group and political opinion claims[26]
- Resistance to gang recruitment as an expression of political dissent[27]
- Children in domestic relationships they are unable to leave[28]
- Journalists[29]
- Women in domestic relationships they are unable to leave[30]
- Political opposition/opinion manifested in the United States, and
- Possible CAT Claims based on victims of cartel violence where the state acquiesces.[31]

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[24] *See, e.g., Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092-93 (9th Cir. 2013); *Gashi v. Holder,* 702 F.3d 130, 137 (2d Cir. 2012); *Garcia v. Att'y Gen.*, 665 F.3d 496, 503-04 (3d Cir. 2011).

[25] *See, e.g., Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015); *Urbina-Mejia v Holder*, 597 F.3d 360, 366 (6th Cir. 2010); *Gatimi v. Holder*, 578 F.3d 611, 617 (7th Cir. 2010).

[26] *See Hernandez-Chacon v. Barr,* 948 F.3d 94, 102 (2d Cir. 2020) (remanding the case for the BIA to consider the actual or imputed political opinion of "her opposition to the male-dominated social norms in El Salvador and her taking a stance against a culture that perpetuates female subordination and the brutal treatment of women");
Cece v. Holder, 733 F.3d 662, 677 (7th Cir. 2013) (en banc) (concluding that "young Albanian women living alone" was a valid particular social group); *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010) (remanding to the BIA to consider if "Guatemalan women" is a viable particular social group); *Fatin v. INS,* 12 F.3d 1233, 1240 (3d Cir. 1993) (stating that Iran's "gender-specific laws and repressive social norms" must be disobeyed on grounds of conscience and could be a valid political opinion).

[27] *But see INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

[28] *See, e.g., Ming Li Hui v. Holder*, 769 F.3d 984, 986 (8th Cir. 2014) (affirming that "children viewed as property" could be a viable particular social group), *but see, Enamorado-Rodriguez v. Barr,* 941 F.3d 589, 599 (1st Cir. 2019) (upholding finding that neither "Honduran children viewed as property by immediate family and unable to leave" nor "Honduran children lacking parental protection" were cognizable PSGs)..

[29] *See Mucaj v. Holder*, 469 F. App'x 31, 33 (2d Cir. 2012) (unpublished) (Seemingly accepting that being a journalist could constitute membership in a PSG, but finding no nexus to the harm he suffered from "private criminals.")

[30] The attorney general's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) overturned *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014) which had found cognizable the PSG of "married women in Guatemala who are unable to leave their relationship." Since that decision, several federal courts of appeals have addressed *Matter of A-B-*. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125 (D.D.C. 2018) found *Matter of A-B-* arbitrary and capricious, in the context of credible fear interviews; the Sixth Circuit Court of Appeals has interpreted *Grace* as abrogating *A-B-*, thereby making *A-R-C-G-* good law. *Juan Antonio v. Barr,* No. 18-3500, 2020 WL 2537427, footnote 3 at *6 (6th Cir. May 19, 2020). The First Circuit Court of Appeals found in *De Pena-Paniagua v. Barr*, 957 F.3d 88, 93 (1st Cir. 2020) that there is no categorical bar on PSG formulations like the one recognized in *A-R-C-G-*. However the Fifth Circuit has given deference to *Matter of A-B-*, *see, Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019)(finding the "unable to leave the relationship" formulation of a PSG impermissibly circular); *see also Scarlett v. Barr*, 957 F.3d 316 (2d Cir. 2020) (rejecting an arbitrariness challenge to *A-B-*, in the context of its interpretation of the government protection standard.). Practitioners should understand that this area of the law is in flux and should continue to put forward claims based on domestic violence, but with the understanding that many of these claims may have to be litigated to the federal courts.

[31] *See, e.g., Diaz v. Sessions*, 880 F.3d 244, (6th Cir. 2018) (granting petition for review after BIA denied Mexican woman's motion to reopen seeking withholding and CAT after her father had been kidnapped by a drug cartel.) *See also Madrigal v. Holder*, 716 F.3d 499, 508-10 (9th Cir. 2013) (remanding for BIA to consider whether any torture the petitioner was likely to endure upon return to Mexico would be with the consent or acquiescence of a public official). *But*

Even with the extreme violence that exists in these countries against certain groups of people, asylum law is complicated, and one should not file for asylum without undergoing thorough screening and, ideally, representation by a competent immigration attorney or accredited representative. Once a practitioner has identified the basis for an asylum claim, the next step will be to assess the OYFD and its exceptions.

III. One-Year Filing Deadline

One of the most challenging aspects of asylum law is the OYFD and arguing the exceptions to this deadline. The OYFD will be relevant to almost all DACA recipients because to be eligible for DACA one had to have continuously resided in the United States on or before June 15, 2007. As a result, almost any DACA recipient who wishes to file for asylum will have to address the OYFD.

For those seeking asylum within the United States, in addition to meeting the "refugee" definition, the applicant must demonstrate, "by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States."[32] Congress added this filing deadline to the asylum statute in 1996 to deter individuals who did not have *bona fide* claims from filing simply to seek employment authorization or to delay removal.[33] Of course, there are many reasons that asylum applicants are unable to file for asylum immediately upon arrival in the United States. In fact, much has been written about the OYFD[34] and how it undermines the ability of *bona fide* asylum applicants to obtain protection in the United States.

The INA does contain some limited exceptions to the OYFD. Section 208(a)(2)(D) of the INA specifies that, notwithstanding the filing deadline, an applicant may be eligible for asylum if he or she can show "either the existence of changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the [one-year filing] period." The regulations also contain a longer list of examples that could satisfy these exceptions.[35]

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see, Matter of O-F-A-S-, 27 I&N Dec. 709 (BIA 2019) (finding Guatemalan applicant for protection under CAT had to demonstrate that officer who committed torture was acting under color of law.)

[32] INA § 208(a)(2)(B).

[33] *See* Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1193 (2016) ("Despite the fact that most genuine refugees were not able to apply within one year of their arrival, members of the 104th Congress were intent on imposing a deadline, apparently under the belief that such a bar was necessary to prevent time-consuming adjudication of fraudulent applications."); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 9 (2001).

[34] *See, e.g.*, Harris, *supra* note 32, at 1193; Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651 (2010); Human Rights First, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency* (2010), humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf.

[35] 8 CFR § 208.4(a)(2).

A. Agency Interpretation of the One-Year Filing Deadline

The Asylum Office Lesson Plan, entitled "Asylum Officer Basic Training: One-Year Filing Deadline" (hereinafter, AO OYFD Lesson Plan) is an excellent resource in understanding how the Asylum Office analyzes OYFD exceptions.[36] Even though the Lesson Plan was issued in 2009, and while it is not binding authority on the immigration court, there is little case law available on the OYFD issue, which makes this Lesson Plan a particularly valuable resource. The Asylum Office Lesson Plan entitled "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module" (hereinafter AO LGBTI Lesson Plan) also includes valuable examples of OYFD exceptions that will be discussed below.[37] Practitioners should note, however, that as the Trump administration has implemented changes restricting asylum, and has removed many asylum officer training materials from its website, it is not clear which Asylum Office training materials are still in use.[38]

The few BIA and U.S. court of appeals cases[39] that address the OYFD are discussed below.

B. Federal Court Interpretation of the One-Year Filing Deadline

There are not many U.S. courts of appeals cases addressing the OYFD in part because Congress included a jurisdiction-stripping provision when it added the OYFD to the INA. Pursuant to INA §

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[36] USCIS, *Asylum Officer Basic Training Course: One-Year Filing Deadline* (Mar. 23, 2009), AILA Doc. No. 16102840, aila.org/infonet. [hereinafter AO OYFD Lesson Plan]. The Lesson Plan can also be accessed publicly on the Ninth Circuit website at cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Vahora_LessonPlan.pdf. In 2017, USCIS removed the training materials altogether. USCIS has since restored many internal Asylum Office documents, but as a single pdf that is difficult to navigate and is redacted in places: uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf. (The One-Year Filing Deadline Lesson Plan is not included.)

[37] USCIS, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* Training Dec. 20, 2019), https://www.uscis.gov/sites/default/files/files/nativedocuments/LGBTI_Claims_LP_RAIO.pdf [hereinafter AO LGBTI Lesson Plan].

[38] Jon Campbell, Sunlight Foundation, *USCIS Removed Asylum Training Documents from Website at Direction of Top Brass,* (June 4, 2019) sunlightfoundation.com/2019/06/04/uscis-removed-asylum-training-documents-from-website-at-direction-of-top-brass/.

[39] There are not many U.S. courts of appeals cases addressing the OYFD in part because Congress included a jurisdiction-stripping provision when it added the OYFD to the INA. Pursuant to 8 USC § 1158(a)(3), the federal courts lack jurisdiction to review the agency's determination that an asylum application is not timely. However, section 106 of the REAL ID Act restored jurisdiction over cases where the OYFD is at issue, but only in circumstances where there is an issue of law, and not of fact. INA§ 242(a)(2); Real ID Act, Pub L. No. 109-13 § 106(a) (2005), codified at 8 USC § 1252(a)(2)(C). Federal courts have in some circumstances found jurisdiction to review questions of law relating to the OYFD, but not questions of fact. *See, e.g., Zambrano v. Sessions,* 878 F.3d 84, 87 (4th Cir. 2017) (concluding that the "definition of a changed circumstance presents a distinctly legal question over which this Court may properly exercise jurisdiction"); *see also Ramadan v. Gonzales,* 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (exercising jurisdiction over "changed circumstances" question because it was a question of the application of a statutory standard to undisputed facts). *But see Bitsin v. Holder,* 719 F.3d 619, 626 (7th Cir. 2013) (finding that the court lacked jurisdiction to determine "whether particular facts constitute 'extraordinary circumstances'").

208(a)(3), the federal courts lack jurisdiction to review the attorney general's determination that an asylum application is not timely. However, section 106 of the REAL ID Act restored jurisdiction over cases where the OYFD is at issue, but only in circumstances where there is an issue of law, and not of fact.[40] Federal courts have found jurisdiction to review questions of law relating to the OYFD in some circumstances, but not questions of fact.[41]

The U.S. Supreme Court recently issued a decision, *Guerrero-Lasprilla v. Barr,*[42] which unequivocally holds that courts of appeals have jurisdiction to apply a legal standard to undisputed or established facts. *Guerrero-Lasprilla* considered the issue of whether or not a court of appeals could rule on an applicant's due diligence in the context of an equitable tolling argument in a motion to reopen. In the case, the underlying facts were not in dispute, but the government argued that a jurisdiction-stripping provision limiting court review to "questions of law" deprived the court or jurisdiction to consider this argument. The Supreme Court rejected the government's argument, finding that "'questions of law' includes the application of a legal standard to undisputed or established facts."[43] The Court concluded:

> the Government's interpretation is itself difficult to reconcile with the Provision's basic purpose of providing an adequate substitute for habeas review. That interpretation would forbid review of any Board decision applying a properly stated legal standard, irrespective of how mistaken that application might be. By reciting the standard correctly, the Board would be free to apply it in a manner directly contrary to well-established law.[44]

While the jurisdiction-stripping provision in the asylum statute is not identical to the one reviewed in *Guerrero-Lasprilla*, practitioners can make similar arguments. And there is already precedent finding that courts can analyze the application of the law to undisputed facts.[45] *Guerrero-Lasprilla* puts these arguments on a firmer ground particularly in courts of appeals that have not addressed the issue or that have reached a contrary conclusion.[46]

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[40] *See* INA§ 242(a)(2); Real ID Act, Pub L. No. 109-13 § 106(a) (2005), codified at 8 USC § 1252(a)(2)(C).

[41] *See, e.g., Zambrano v. Sessions,* 878 F.3d 84, 87 (4th Cir. 2017) (concluding that the "definition of a changed circumstance presents a distinctly legal question over which this Court may properly exercise jurisdiction"); *see also Ramadan v. Gonzales,* 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (exercising jurisdiction over "changed circumstances" question because it was a question of the application of a statutory standard to undisputed facts). *But see Lesum v. Barr,* 915 F.3d 1189, 1193 (8th Cir. 2019) (finding that it did not have jurisdiction "to second-guess the IJ's determination" of what constitutes a reasonable period of time after a potential OYFD exception); *Bitsin v. Holder,* 719 F.3d 619, 626 (7th Cir. 2013) (finding that the court lacked jurisdiction to determine "whether particular facts constitute 'extraordinary circumstances'").

[42] *Guerrero-Lasprilla v. Barr,* 140 S. Ct. 1062 (2020).

[43] *Id.* at 1068.

[44] *Id.* at 1073.

[45] *See* note 40, *supra.*

[46] *See Burka v. Sessions,* 900 F.3d 575, 577 (8th Cir. 2018) (holding that the court of appeals lacked jurisdiction to review a OYFD exception denial even where the facts were not in dispute where "neither the immigration judge nor the

DACA Example: Fernanda is a transgender woman from El Salvador who was granted DACA in 2013 at the age of 19. Twelve months prior to filing for asylum she began taking hormones as part of her transition to living as a woman. The immigration judge found that filing twelve months after beginning her transition was not filing within "a reasonable period of time." A federal court of appeals should have jurisdiction to apply the reasonable period of time legal standard to the undisputed facts of the case.

C. Date of Entry – When Does the One-Year Filing Deadline Clock Start?

The first issue to address in analyzing a DACA recipient's potential OYFD issue is to determine the date of entry that starts the clock on the OYFD. The burden is on an asylum applicant to prove, "[b]y clear and convincing evidence that the application has been filed within one year of the date of the alien's arrival in the United States" or to prove an exception to the OYFD.[47] An applicant who lies about his or her date of entry for the purpose of circumventing the OYFD may be found to have filed a frivolous asylum application, barring him or her from any other form of immigration relief.[48]

The regulations further state, "The 1-year period shall be calculated from the date of the alien's last arrival in the United States. . . ."[49] The AO OYFD Lesson Plan states that, "The one-year period is calculated from the date of the applicant's last arrival in the United States. The date of arrival is counted as day zero, so the first day in the calculation is the day after the last arrival."[50]

The BIA has similarly upheld this plain language interpretation in *Matter of F-P-R-*.[51] In that case, the asylum applicant, a citizen of Mexico, had been living in the United States since 1989 without lawful status after entering without inspection. In 2005, he returned to Mexico for approximately one month to attend his father's funeral. He was apprehended when he returned to the United States and placed in removal proceedings. The immigration judge (IJ) found that Mr. F-P-R's brief trip abroad did not restart the one-year clock for asylum purposes and denied the application for failing to meet the OYFD. The BIA reversed, finding that the language in the regulations is unambiguous and mandatory and the one-year period "*shall* be calculated from the date of the alien's last arrival."[52] It is worth noting that in *Matter of F-P-R* the BIA stated, "we need not here examine whether the regulation should be read to embody an implicit exception in a case where it is found that an alien's trip abroad

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BIA engaged in an analysis of the statute or otherwise elaborated on the meaning of 'changed circumstances,' which forecloses the possibility that this case presents a question of statutory interpretation for us to review.")

[47] 8 CFR § 208.4(a)(2)(i)(A).

[48] *Matter of M-S-B-*, 26 I&N Dec.872, 879 (BIA 2016).

[49] 8 CFR § 208.4(a)(2)(ii).

[50] *See* AO OYFD Lesson Plan, *supra* note 35 at 5 (emphasis in original); *see also Minasyan v. Mukasey*, 553 F.3d 1224, 1227 (9th Cir. 2009) (holding that the plain meaning of the statute requires filing *within one year after the date* of the alien's arrival in the United States) (emphasis in the original).

[51] *Matter of F-P-R-*, 24 I&N Dec.681, 685 (BIA 2008).

[52] *Id.* at 684 (emphasis added).

was solely or principally intended to overcome the 1-year time bar"[53] because the BIA found that Mr. F-P-R- had traveled for the legitimate purpose of attending his father's funeral.

Although, by definition, DACA recipients must have been living in the United States since 2007, there are many DACA recipients whose "last arrival" has been more recent, because they traveled outside the United States and re-entered on advance parole.[54] The USCIS DACA guidelines permitted DACA recipients to apply for advance parole to travel abroad for brief periods of time and return to the United States without losing their DACA and from 2012 to 2015, nearly 20,000 DACA recipients received advance parole.[55] Although USCIS stopped approving new applications for advance parole, on September 5, 2017,[56] in the past, USCIS stated that advance parole would be granted for traveling abroad for:

- humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative
- educational purposes, such as semester-abroad programs and academic research, or
- employment purposes such as overseas assignments, interviews, conferences, or training, or meetings with clients overseas.[57]

Travel for vacation was not considered a valid basis for advance parole.[58] Few, if any, DACA recipients will have re-entered the United States within the last year, such that the OYFD does not apply to them, but for those who did travel under advance parole, the clock on OYFD exceptions will start ticking on the date of their last arrival in the United States.

Practitioners representing DACA recipients who have used advance parole to return to the country from which they are seeking asylum will need to address why they voluntarily returned to the country in which persecution is feared. An asylum officer or IJ may question whether the asylum applicant truly has a well-founded fear of return if he or she voluntarily traveled to the country where he or she claims fear.[59] Likewise, if the DACA recipient traveled to a country other than the country of feared

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[53] *Id.* at 685.

[54] USCIS stopped accepting applications for advance parole from DACA recipients after announcing the end of DACA on September 5, 2017. Thus it is unlikely that any DACA recipients have entered the United States within the last year.

[55] USCIS, Advance Parole Documents (Jan. 6, 2017), dhs.gov/sites/default/files/publications/USCIS%20-%20USCIS%20Advance%20Parole%20Documents.pdf. (During this period, 19,943 DACA recipients received advance parole)

[56] *See* The California-Mexico Studies Center, Inc., *National Campaign to Restore DACA's Advance Parole*, http://www.california-mexicocenter.org/national-campaign-to-restore-dacas-advance-parole/

[57] USCIS, Frequently Asked Questions, Q. 57, Archived Content, (last reviewed/updated April 10, 2018), uscis.gov/archive/frequently-asked-questions.

[58] *Id.*

[59] USCIS Asylum Office Lesson Plan, *Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*, at 14 (Mar. 6, 2009). AILA Doc. No. 18030800,http://www.aila.org/infonet; hanoverlawpc.com/wp-content/uploads/2018/01/Asylum-officers-Guide-to-Approving-Asylum-applications.pdf ("The fact that an asylum applicant returned to a country of persecution or feared persecution may indicate that the applicant is willing and able to return, but does not in and of itself preclude establishment of eligibility."); *see also Boer-*

persecution, he or she may need to explain why he or she did not seek asylum in that country. If he or she received an offer of permanent residence in a third country, he or she may be barred from seeking asylum in the United States based on the firm resettlement bar.[60]

DACA Example. Cristina is a citizen of Mexico and obtained DACA in 2013. In 2017, she applied for and received advance parole for a summer semester abroad in France with her college. She left the United States on June 1, 2017 and returned on August 20, 2017. For asylum clock purposes, the August 20, 2017 date should be considered her "last arrival" since that is the last time she entered the United States and she was abroad for a legitimate purpose and not simply to restart her asylum clock. She may, however, have to explain to an adjudicator why she did not seek asylum in France and that her temporary stay in France, with no offer of permanent residence, would not subject her to the firm resettlement bar.

IV. Exceptions to the One-Year Filing Deadline

Nearly all DACA recipients considering applying for asylum will have to put forward an exception to the OYFD. There are two different categories of OYFD exceptions under the INA. An asylum applicant can prevail, even after missing the OYFD, if he or she "demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application."[61] This section discusses common changed circumstances exceptions, common extraordinary circumstances exceptions, the requirement to file within a "reasonable period of time," and the possibility of combining more than one exception.

A. Changed Circumstances

8 CFR § 208.4(a)(4)(i) states, "The term 'changed circumstances' in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum." In cases involving changed circumstances, the applicant argues that he or she now has a claim where one did not previously exist. As a result, claims that fall into this category will most likely be based on a well-founded fear of future persecution rather than on past persecution.[62]

The regulations discuss several categories of changed circumstances: changed country conditions, changed personal circumstances, changes in applicable U.S. law, and loss of derivative status. The

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Sedano v. Gonzales, 418 F.3d 1082, 1091 (9th Cir. 2005*)* (repeated trips home did not rebut the presumption of countrywide persecution where the trip was short and only to gather enough income to flee Mexico*). But see Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (noting that "an alien's history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution").

[60] INA § 208(b)(2)(A)(vi); *see also, Matter of K-S-E-,* 27 I&N Dec. 818 (BIA 2020) (finding offer of permanent residence was sufficient to negate asylum eligibility).

[61] INA § 208(a)(2)(D).

[62] The concept of "well-founded fear" is explained in the regulations at 8 CFR § 208.13(b)(2).

following addresses each of these categories, as well as changed personal circumstances that arise in the LGBTI context. Note that even if the applicant does successfully put forward a changed circumstances exception, he or she will need to file for asylum within a "reasonable period of time" of the change in circumstances. See Section V below.

1. Changed Country Conditions

The first category of changed circumstances is "Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence."[63] Some asylum cases will present a OYFD argument based purely on changed country conditions, such as when a dictator assumes power or practice of a particular religion is outlawed. However, some asylum applicants will be limited to the argument that country conditions have worsened and that the conditions are likely to affect them based on their personal circumstances. Even if country conditions have changed by worsening significantly, the asylum applicant must still establish that their fear of future persecution is based on a protected ground.[64]

Many asylum applicants with DACA come from countries that are in humanitarian crisis, including Mexico and the Northern Triangle. These individuals may be able to demonstrate that country conditions have substantially worsened since they came to the United States. For example, the United States currently cautions U.S. citizens to reconsider traveling to El Salvador, Honduras, or Guatemala because of violent crime in those countries and the governments' inability to provide protection.[65] Likewise, the United States has given its highest warning against travel—Level 4, Do Not Travel—to five Mexican states, with another 11 states carrying a "reconsider travel" warning and the remaining 16 states carrying an "exercise increased caution" warning.[66] These travel warnings mean that conditions in several Mexican states are comparably dangerous to those in Syria[67] and Iraq.[68]

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[63] 8 CFR § 208.4(a)(4)(i)(A).

[64] 8 CFR § 208.13(b)(2)(iii).

[65] The U.S. Department of State has the same warning regarding all three Northern Triangle countries "Violent crime, such as homicide and armed robbery, is common. Violent gang activity, such as extortion, violent street crime, rape, and narcotics and human trafficking, is widespread. Local police and emergency services lack the resources to respond effectively to serious crime." Honduras and El Salvador have "reconsider travel" warnings while Guatemala has an "exercise increased caution" warning generally, and a "reconsider travel" warning for six departments, including the most populous one. See U.S. Department of State, Honduras Travel Advisory (June 24, 2019), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html; U.S. Department of State, El Salvador Travel Advisory (Jan. 29, 2019), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html; U.S. Department of State, Guatemala Travel Advisory (Feb. 28, 2019), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html.

[66] U.S. Department of State, Mexico Travel Advisory, (Dec. 17, 2019) travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

[67] U.S. Department of State, Syria Travel Advisory, (Nov. 4, 2019), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/syria-travel-advisory.html.

[68] U.S. Department of State, Iraq Travel Advisory, (Mar. 26, 2020), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iraq-travel-advisory.html.

Some DACA recipients may have left their countries many years ago, before gang activity or activity by drug cartels, became prevalent; others may have fled to avoid harm from the gangs or other mistreatment in their countries. It is important to be aware of U.S. courts of appeals cases holding that worsening country conditions can constitute a "changed circumstance;" it is not necessary that the change be something entirely new. For example, in *Zambrano v. Sessions*, the applicant had left Honduras after facing threats by gangs. When Mr. Zambrano was arrested by ICE in the United States, three years after his arrival here, word of his potential deportation reached Honduras. The gangs increased their threats to his family members, including tying up one brother and breaking into the home of another, demanding to know where Mr. Zambrano was.[69] The U.S. Court of Appeals for the Fourth Circuit held that "[n]ew facts that provide additional support for a pre-existing asylum claim can constitute a changed circumstance. These facts may include circumstances that show an intensification of a preexisting threat of persecution or new instances of persecution of the same kind suffered in the past."[70] The Ninth Circuit,[71] Second Circuit,[72] and Sixth Circuit[73] have likewise found that worsening conditions, rather than an entirely new claim, may support a changed circumstances exception to the OYFD. On the other hand, if the bad country conditions are merely a "continuation" of the situation that led the applicant to flee his or her country, there may not be a viable changed circumstances exception.[74]

Asylum applicants can have multiple reasons for advancing an asylum claim past the one-year filing deadline. In an unpublished decision, the Ninth Circuit also explained that whether the changed condition "was the real reason petitioners decided to file their asylum applications or just an 'after thought,' as the IJ concluded, has 'no role in the changed circumstances analysis."[75] Instead, the correct legal standard is whether changed country conditions "materially affect the applicant's eligibility for asylum."[76] Thus, even if a potential asylum applicant's "real reason" for seeking asylum may be that he or she is about to lose DACA, if there are severely worsening country conditions, the applicant could still put forward a changed circumstances exception.

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[69] *Zambrano v. Sessions*, 878 F.3d 84, 85 (4th Cir. 2017).

[70] *Id.* at 88.

[71] *Vahora v. Holder*, 641 F.3d 1038, 1044 (9th Cir. 2011) ("Our law does not require that "changed circumstances" constitute an entirely new conflict in an asylum applicant's country of origin, nor does it preclude an individual who has always feared persecution from seeking asylum because the risk of that persecution increases. . . . An applicant is not required to file for asylum when his claim appears to him to be weak; rather he may wait until circumstances change and the new facts make it substantially more likely that his claim will entitle him to relief.").

[72] *Weinong Lin v. Holder*, 763 F.3d 244,247 (2d Cir. 2014) (finding the respondent's recent political activism in the United States to be a potential changed circumstance).

[73] *Mandebvu v. Holder*, 755 F.3d 417, 426 (6th Cir. 2014) (rejecting the IJ's conclusion that an "incremental change" from poor country conditions to worse country conditions was insufficient to constitute "changed circumstances which materially affect the applicant's eligibility for asylum).

[74] *See Moreno-Lopez v. Barr*, 764 F. App'x 614, 615 (9th Cir. 2019) (unpublished).

[75] *Tomsuren v. Lynch*, 609 F. App'x 392, 394 (9th Cir. 2015).

[76] *Id.* (citations omitted).

DACA Example. Marco left Mexico when he was 15 years old, in 2001. His father, a very prominent journalist, stayed back to continue his important work of uncovering police corruption. Marco received DACA in 2012. Four months ago, Marco's father was arrested and his family threatened if he does not stop publishing articles. Marco has been considering applying for asylum based on the worsening conditions for journalists and their families. These changed circumstances may qualify for an exception to the OYFD.

2. Changed Personal Circumstances

The second category of changed circumstances is based on "activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk."[77] The AO OYFD Lesson Plan goes into some detail about how changes in personal circumstances may affect an applicant's asylum eligibility. Persons whose claims fall into this category are considered "refugees sur place." The AO OYFD Lesson Plan explains, "The changed circumstance exception to the one-year filing deadline reflects the principle that some individuals become refugees after they have left their countries and even after they may have been residing in another country for several years. Changes occurring in an applicant's country or place of last habitual residence, and/or activities by an applicant outside his or her country may make the applicant a refugee sur place."[78] Some examples are increased political involvement in the United States, religious conversion, and threats or harm to the asylum applicant's family members in the home country.[79]

Significantly, in *Yan Yang v. Barr*[80] the Second Circuit Court of Appeals found that a Chinese asylum seeker who had a changed circumstances exception based on her recent conversion to Christianity, could nonetheless put forward other, previously existing claims that had not changed, including a claim based on a forced abortion, and be eligible for asylum. The Second Circuit found that "the plain language of the statute unambiguously permits an applicant to raise multiple claims in [their] asylum application, even if the changed circumstance relates only to one proffered basis for asylum."[81] Thus asylum seekers should argue that if they meet a changed circumstance exception on one claim, they can be found asylum-eligible on any claim, even if the claim pre-dated their departure from their country.

Several of these categories may be relevant to DACA recipients in the United States who are now considering filing for asylum. A DACA recipient may be politically active in the United States, or may take stances against gang activity either in the United States or in his or her country of origin. It is also, unfortunately, common for individuals from the Northern Triangle and Mexico to learn of increased violence and threats towards family members living in their home countries. In one unpublished decision, the BIA remanded a Mexican asylum seeker's case for further fact-finding

[77] 8 CFR § 208.4(a)(4)(i)(B).
[78] See AO OYFD Lesson Plan, *supra* note 35 at 11-12.
[79] *Id.*
[80] *Yan Yang v. Barr*, 939 F.3d 57 (2d Cir. 2019).
[81] *Id.* at 57, 59–60.

where the applicant's proposed PSG was based on his mental illness and the BIA found in that circumstance that the onset of the mental illness or its increased severity might constitute a changed circumstance.[82]

DACA Example. Manuel from El Salvador received DACA in 2014, when he was 25 years old. He first came to the United States in 2003, when he was 14 years old. Last year, Manuel heard that the MS-13 gang was actively recruiting his younger brothers. Both brothers refused to join and the gang members said their entire family would be marked and targeted, including "that brother living in the United States." These recent threats that have significantly increased Manuel's fear of return may make Manuel eligible for a changed circumstances exception. Be aware, however, of *Matter of L-E-A-*, discussed above, which will likely make it more difficult to prevail on a family-based PSG claim, than in the past. The practitioner should be aware of circuit court precedent and frankly discuss with the applicant the likelihood that the case would have to be litigated to federal court to obtain meaningful review.

LGBTI-Specific Changed Circumstances. There are several exceptions to the OYFD that have generally been accepted for LGBTI applicants in the past. The Asylum Office Lesson Plan on LGBTI issues, in addition to providing general guidance on adjudicating LGBTI claims, also includes several common OYFD exceptions in this context. The LGBTI Lesson Plan explains that "coming out" as LGTBI can constitute a changed circumstance by which to overcome the OYFD. The Lesson Plan states:

> In many instances an individual does not feel comfortable accepting himself or herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has recently "come out" as lesbian, gay, bisexual, or transgender, this may qualify as an exception based on changed circumstances.[83]

Many DACA recipients arrived in the United States as children, possibly before they came to terms with their sexual orientation or gender identity. Even those who identified as LGBTI at the time they arrived in the United States may have a changed circumstance claim based on living openly in the United States and being unable to hide their identity if they return to their home country.[84]

Another exception specifically referenced in the AO LGBTI Lesson Plan is gender transition steps. Asylum applicants who identify as transgender or intersex may take medical steps to align their physical appearance with their identity. Once they take medical steps such as beginning hormone replacement therapy or having surgery such as breast augmentation or breast reduction, they may

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[82] *J-J-I-I-*, AXXX XXX 297 (BIA May 30, 2019)(unpublished) scribd.com/document/414383507/J-J-I-I-AXXX-XXX-297-BIA-May-30-2019?secret_password=dojByDvtlN5UoMMkyEEP.

[83] *See* AO LGBTI Lesson Plan, *supra* note 36 at 64-65.

[84] *See Karouni v. Gonzales,* 399 F.3d 1163, 1173 (9th Cir. 2005) (An asylum seeker should not be "saddl[ed] with the Hobson's choice of returning to [his home country] and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy. In our view, neither option is acceptable.").

be at greater risk of persecution if forced to return to their country as their LGBTI identity will be apparent from their physical appearance. These transition steps can qualify as a OYFD exception.[85]

The AO LGBTI Lesson Plan also discusses a recent HIV diagnosis as a potential changed circumstance that may excuse the OYFD. USCIS recognizes that being HIV-positive may constitute a particular social group.[86] In many cases an applicant will fear harm because he or she is HIV-positive, or will fear that his or her HIV status will exacerbate harm that he or she fears because HIV status is associated with being LGBTI in his or her country of origin. Even for individuals who had some fear of return to their home country based on being LGBTI, a recent diagnosis of HIV may lead to an increased fear of return and thus may constitute a changed circumstance.[87]

DACA Example. Martha is from Guatemala and came to the United States in 2004 when she was 10 years old. She received DACA in 2016 when she was 22 years old. Last year, she began her first relationship with a woman and realized that she is a lesbian. She is considering marrying her partner and is very scared that they could not have an open relationship if they had to return to Guatemala. If Martha does get married to her girlfriend, her legal representative could argue that that is a changed circumstance that should allow her to file for asylum within a reasonable period of time thereafter. Even if Martha does not marry, she may have a changed circumstance exception based on living openly as a lesbian, but it is generally easier to demonstrate a changed circumstance where there is a fixed event that restarts the clock.

3. *Changes in Applicable U.S. Law*

An asylum applicant may be able to qualify for a changed circumstances exception based on "changes in applicable U.S. law."[88] In the past, this exception has been used when Congress has changed the law to allow for asylum eligibility where it may not have previously existed[89] or where a

[85] The AO LGBTI Lesson Plan states, "As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer 'pass' as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to 'pass' as male." *See* AO LGBTI Lesson Plan, *supra* note 36 at 65.
[86] 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).
[87] Some individuals will apply for asylum only after they have been diagnosed with HIV. For some applicants, the claim will be based wholly on his or her HIV status and the fear of persecution upon return to the country of origin. For other individuals who may also be LGBTI, the HIV diagnosis may be "the last straw," causing the applicant to realize that returning to the country of origin would be a "death sentence." Many countries do not have confidentiality laws protecting HIV status, so some LGBTI people fear that their HIV status could become widely known. In many countries, being HIV-positive is equated with being LGBTI, and so their LGBTI identity would become known. *See* AO LGBTI Lesson Plan, *supra* note 36 at 65.
[88] 8 CFR § 208.4(a)(4)(i)(B).
[89] An example of this might be when Congress specifically added resistance to coerced population control to the definition of refugee at INA § 101(a)(42)(B).

U.S. court of appeals or the BIA has expanded asylum eligibility.[90] Unfortunately, there is no precedent for considering the loss of a category of immigration status or protection, such as DACA, under U.S. law as a qualification for a change in applicable circumstances that would result in a changed circumstances exception. However, as discussed in Section B.1. below, maintaining lawful status, or being authorized to remain in the United States, may constitute an extraordinary circumstances exception.

4. *Loss of Derivative Status*

There is another clear regulatory changed circumstances exception "[i]n the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, [or] death. . . ."[91] This exception, in and of itself, may not have broad applicability to those with DACA, but it is important to ask any DACA recipient who is being screened whether he or she was a dependent on a family member's asylum application. For example, some DACA recipients may have been included on their parent's asylum application and have married and thus lost their derivative status. The clock on changed circumstances would start when the DACA recipient ceased to be a dependent.[92]

B. Extraordinary Circumstances

The second category of OYFD exceptions is "extraordinary circumstances." These are defined generally in the regulations as follows:

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

[90] For example, *Matter of S-A-K-*, 24 I&N 464 (BIA 2008) expanded access to asylum based on humanitarian asylum for women who had been subjected to female genital cutting, even if they did not have a future fear of persecution.
[91] 8 CFR § 208.4(a)(4)(i)(C). Note that while the regulations reference "aging out" of asylum derivative status, the Child Status Protection Act cured this problem and under INA §208(b)(3)(B) "an unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending."
[92] USCIS, Frequently Asked Questions (last reviewed/updated Mar. 8, 2018), uscis.gov/archive/frequently-asked-questions.

failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances.[93]

Whereas the concept behind "changed circumstances" is that an applicant now has a claim for asylum that he or she may not have had when he or she arrived in the United States, the concept behind "extraordinary circumstances" is that some circumstance that manifested itself while in the United States prevented the applicant from filing. There are several extraordinary circumstances exceptions discussed in the regulations that may be relevant to DACA recipients. As discussed in Section V below, even applicants who successfully argue an extraordinary circumstances exception will have to file for asylum within a reasonable period of time of the exception.

1. Maintaining Lawful Status

For most DACA recipients, one of the most important issues in analyzing the viability of an extraordinary circumstances exception to the OYFD is whether or not USCIS or the IJ will consider maintaining DACA as maintaining lawful status.[94] The regulations state that extraordinary "circumstances may include but are not limited to" circumstances where the "applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application."[95] It is important to note that the lawful status examples in the regulations are not intended to be exhaustive and DACA did not exist when the regulations were promulgated.[96] Moreover, the AO OYFD Lesson Plan explains that the purpose behind this exception is to allow potential asylum applicants to monitor conditions in their home country and wait to file for asylum, until they have no other options.[97] If, in the future, the administration is able to legally rescind DACA, DACA recipients could argue having no other temporary protection option has forced them to consider the current conditions in their home country.

The archived USCIS DACA FAQs make it clear that DACA recipients' stay is authorized in the United States even though DACA is not a lawful status. The FAQs state:

> **Q5: If my case is deferred, am I in lawful status for the period of deferral?**
> A5: No. Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful status.

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[93] 8 CFR § 208.4(a)(5).

[94] As discussed in Section VI *infra*, it is important for the practitioner to understand that an asylum applicant must account for all of his or her time in the United States. Even if the adjudicator accepts receiving DACA as an extraordinary circumstance, the applicant must also account for his or her time in the United States before receiving DACA.

[95] 8 CFR § 208.4(a)(5); 8 CFR § 208.4(a)(5)(iv).

[96] 8 CFR § 208.4(a)(5) specifically states before a list of potentially extraordinary circumstances, "those circumstances may include but are not limited to . . . ."

[97] *See* AO OYFD Lesson Plan, *supra* note 35 at 17.

> The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. However, although deferred action does not confer a lawful immigration status, **your period of stay is authorized by the Department of Homeland Security** while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time.[98]

The status of DACA recipients is most analogous to that of non-citizens who have applications for adjustment of status pending. That scenario is addressed directly in the AO OYFD Lesson Plan that allows asylum officers to consider any "stay authorized by the Attorney General" as analogous to being in "lawful status."[99] The Lesson Plan states:

> An alien with a pending application, who is not in any lawful status, may be considered to be an alien whose period of stay is authorized by the Attorney General. The types of "stay authorized by the Attorney General" that the asylum officer might encounter could include pending applications for adjustment of status. Such applicants would not be analyzed specifically under the "lawful status" exception to the one-year filing deadline. However, insofar as the "extraordinary circumstances" exception is not limited to the precise scenarios outlined, the Asylum Officer should consider the totality of the circumstances when determining whether an applicant with a pending application can establish an exception to the requirement that the application be filed within one year of last arrival.[100]

Here, the Lesson Plan suggests that those with pending adjustment of status applications—who like those with DACA have an "authorized stay" and are not accruing unlawful presence but are not actually in lawful status[101]—should be considered for an extraordinary circumstances exception.

The BIA has previously agreed that DACA qualifies as an extraordinary circumstance pursuant to an unpublished decision, *H-M-C-J-*.[102] The BIA acknowledged that DACA was not listed in the regulations but emphasized that the regulatory list of exceptions was non-exhaustive. The BIA agreed

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[98] USCIS, Frequently Asked Questions (last reviewed/updated Mar. 8, 2018), uscis.gov/archive/frequently-asked-questions (emphasis added).

[99] Approximately 850 DACA recipients enlisted in the U.S. military through the Military Accessions to the Vital National Interest, or MAVNI program. Defense Secretary James Mattis has given assurances that they will not be deported, giving further strength to the argument that DACA recipients' stay is authorized. Richard Gonzalez, *Mattis: 'DREAMers' In The Military Won't Be Deported*, NPR, Feb. 8, 2018, npr.org/sections/thetwo-way/2018/02/08/584424541/mattis-dreamers-in-the-miliary-won-t-be-deported.

[100] See AO OYFD Lesson Plan, *supra* note 35 at 19.

[101] *Id.* at 19. citing, Memorandum from Michael A. Pearson, Executive Association Commissioner Office of Field Operations, INS, Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act) (Mar. 3, 2000), nafsa.org/uploadedFiles/ins_march_2000_memo_on_2.pdf?n=7212.

[102] *H-M-C-J-*, AXXX-XXX-586 (BIA Mar. 1, 2018) (unpublished), scribd.com/document/374339687/H-M-C-J-AXXX-XXX-586-BIA-March-1-2018?secret_password=GG1eV8bffNQDy5GXq1GM.

with the IJ's finding that "the receipt of DACA benefits reasonably disincentivized the respondent from filing for asylum within the filing deadline such that it qualifies as an extraordinary circumstance."[103] However, DHS argued against DACA constituting an extraordinary circumstance in *H-M-C-J-*, so this issue may continue to be contested until there is binding authority.[104]

Thus, DACA recipients have a strong argument for a OYFD exception based on DACA and should be prepared to present these arguments before an asylum officer or an IJ.

DACA Example. Eduardo is from El Salvador and came to the United States in 2006 when he was 10 years old and received DACA in 2013 when he was 17. He is now 22 years old. His maternal aunt who raised him in El Salvador until the age of ten, severely abused him, but he did not consider applying for asylum until he heard that DACA was going to end. Here Eduardo can argue both an extraordinary circumstance based on receiving DACA before he turned 18 (see section 2 below) and that he has continued to be a DACA recipient, meaning his stay was authorized by DHS from 2013 until now. He will have good arguments for overcoming the OYFD.

2. Legal Disability

There are special considerations under asylum law for those who have a "legal disability." This term of art is defined in the regulations as, "Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival."[105] Looking at the term of art, "unaccompanied minor," the practitioner should be aware that the Asylum Office does not differentiate between "unaccompanied" and "accompanied" minors in applying the OYFD exception: if the Asylum Office determines that the individual was a minor at the time of application, the extraordinary circumstances exception applies.[106]

The AO OYFD Lesson Plan defines "minor" as under 18 for the per se extraordinary circumstances exception.[107] However, practitioners can argue that those between the ages of 18 and 21 should also qualify for this exception. In the unpublished decision of *A-D-*,[108] the BIA analyzed the extraordinary circumstances exception for a young person who was in the United States for more than a year before filing for asylum at the age of 21 and two months. In the decision, the BIA affirms the "bright line" rule that children under 18 should not be held to the OYFD and opens the door for an exception for those between 18 and 21 but finds that each case must be analyzed on a case-by-

[103] *Id.* at 3.
[104] Throughout the *United States v. Texas* DACA litigation, the U.S. government maintained that individuals protected by DACA, while not accruing unlawful presence, do not have lawful status. Brief of Petitioners, at 39 *U.S. v. Texas, 579 U. S.* __ (2016), (U.S. Supreme Court brief filed March 2016), scotusblog.com/wp-content/uploads/2016/03/15-674tsUnitedStates.pdf.
[105] 8 CFR § 208.4(a)(5)(i).
[106] See AO OYFD Lesson Plan, *supra* note 35 at p.15.
[107] *Id.*
[108] *A-D-*, AXXX XXX 526 (BIA May 22, 2017) (unpublished), scribd.com/document/351904250/A-D-AXXX-XXX-526-BIA-May-22-2017.

case basis. The decision set forth factors for the adjudicator to conduct the case-by-case analysis for those applicants who are over 18 but under 21:

> These factors include, but are not limited to, an applicant's age, language proficiency, time in the United States, interactions with legal service providers, physical and mental health and well-being, socio-economic and family status, and housing or detention situation. All factors should be considered on a case-by-case basis, in the totality of the circumstances. Thus an applicant's age alone will not suffice, but in combination with other factors, if shown that they were directly responsible for the failure to timely file, may constitute an extraordinary circumstance.[109]

The BIA remanded the case to the IJ to determine whether the applicant's age, considered with the factors above, was directly related to her delay in filing.[110]

"Legal disability" is relevant to DACA requestors because more than 29 percent of DACA recipients sought DACA protection before they turned 20.[111] For purposes of OYFD, these DACA recipients can fall into one of three categories regarding age:

a. **Received DACA while under the age of 18.** If USCIS and EOIR accept the existence of DACA as an extraordinary circumstances exception, then those who filed for DACA before reaching the age of 18 should have a clear extraordinary circumstances exception. First, their status as a minor was an extraordinary circumstance excusing filing and then their period of authorized stay excused filing while they maintained DACA.

b. **Received DACA between the ages of 18 and 21**. To succeed with an extraordinary circumstances exception based on age, those DACA recipients would need to analyze the lack of asylum filing in light of the *A-D-* factors. Given that one factor to consider is

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[109] *Id.* at 7.

[110] In an unpublished decision, the Ninth Circuit Court of Appeals did not find an automatic OYFD for an applicant who was between the ages of 18 and 21, and denied the application finding, "Quebrado-Cantor makes no substantive argument to explain what 'extraordinary circumstances' justified the almost-three year delay between his eighteenth birthday and the filing of his application, and therefore has waived this issue." *Quebrado-Cantor v. Sessions*, 731 F. App'x 690, 691 (9th Cir. 2018) (unpublished.). *See also Umirov v. Whitaker*, 760 F. App'x 17, 20 (2d Cir. 2019) (unpublished) (finding that the BIA's conclusion that a 19-year-old had not filed within a reasonable period of time of turning 18 was a factual issue not subject to federal court review).

[111] *See*, USCIS, Approximate Active DACA Recipients: Country of Birth, as of September 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. According to these statistics, which were current through the day before the Trump administration announced the end of DACA, an additional 36.7 percent of DACA recipients were between the ages of 21-25. It is not possible to tell from these statistics how old these DACA recipients were when they sought DACA, but it is possible that more than 50 percent of DACA recipients first applied for DACA when they were below the age of 21.(For example, a DACA recipient who was 24 years old in 2017, but who applied for DACA in 2012, would have been 19 years old when he or she first applied.).

"interaction with legal services providers," the DACA recipient may need to explain whether he or she previously discussed asylum when filing for DACA or whether he or she filed pro se or in a clinic setting. He or she will also need to explain his or her general circumstances up until the point of filing for DACA in an effort to show USCIS or the IJ why his or her young age in conjunction with other factors prevented him or her from filing.

c. **Received DACA when over the age of 21**. For most individuals[112] who were over 21 when they filed for DACA, the legal disability exception based on age will not help and they will need to find a different one-year exception. However, as discussed below, the individual may be eligible for other OYFD exceptions.

3. Serious Illness, Disability, or Post Traumatic Stress Disorder

Under the regulations, the OYFD can be excused where the applicant can show "Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival."[113]

One of the most common extraordinary circumstances exceptions is post-traumatic stress disorder (PTSD). In the asylum context, PTSD often relates to the past harm suffered by the asylum applicant in his or her country of origin, but it does not have to. For example, an individual may suffer severe mental health effects from the difficult journey to the United States or conditions after arrival in the United States. For this reason, it is always helpful to inquire about the individual's mental health. While many DACA recipients will have left the country where they fear harm without having suffered past persecution, some DACA recipients may have experienced harm in their home country when they were very young. In particular, practitioners should question DACA recipients about whether there was domestic violence in the home while in the country of origin or whether the child suffered abuse from family members. Such harm may lead to PTSD or other mental health issues that may make the DACA recipient eligible for an extraordinary circumstances exception.[114] Remember that an adjudicator will analyze the past harm a child has suffered, and which could amount to past persecution and result in PTSD, differently than the harm an adult suffered.[115]

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[112] It may be possible to argue that an applicant who filed for DACA or for asylum shortly after their 21st birthday has filed within a reasonable period of time after the end of the legal disability.

[113] 8 CFR § 208.4(a)(5)(ii).

[114] The AO OYFD Lesson Plan states, "If the applicant has suffered torture or other severe trauma in the past, the asylum officer should elicit information about any continuing effects from that torture or trauma, which may be related to a delay in filing." *See* AO OYFD Lesson Plan, *supra* note 35 at 13.

[115] *See* USCIS, *Asylum Office Lesson Plan, Guidelines for Children's Asylum Claims* (Nov. 30, 2015) at 44 uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf beginning at p 1181; *see also* CLINIC, *EOIR Revises Guidance On Immigration Court Cases Involving Juveniles* (Feb. 1, 2018), cliniclegal.org/resources/eoir-revises-guidance-immigration-court-cases-involving-juveniles.

Likewise, serious physical illness or disability that prevents the individual from filing can constitute an extraordinary circumstances exception.[116] Thus, for example, if the DACA recipient was seriously ill, in a car accident or suffered any kind of cognitive impairment,[117] practitioners could argue that this extraordinary circumstances exception applies.

4. Ineffective Assistance of Counsel

The regulations also provide for a possible extraordinary circumstances exception where there was ineffective assistance of counsel. The regulations provide a specific procedure that applicants must follow if they are advancing an extraordinary circumstances claim based on ineffective assistance:

> (A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
> (B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and
> (C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.[118]

In some instances, a DACA recipient may have paid an attorney to file an asylum application that the attorney never filed. This ineffective assistance could provide a OYFD exception, but the applicant must follow the complaint steps outlined above.

While the regulations spell out a specific exception based on ineffective assistance by an attorney, it might also be possible to advance an extraordinary circumstances exception based on fraud by a

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[116] *But see Gasparyan v. Holder,* 707 F.3d 1130, 1135 (9th Cir. 2013) (upholding BIA determination that the applicant did have an extraordinary circumstances exception in part because the factor that exacerbated her mental health problems, living with her abusive husband's brother, was undertaken voluntarily when she had other living arrangement options).

[117] *See J-S-S-*, AXXX XXX 471 at *3 (BIA March 30, 2020) (unpublished) scribd.com/document/457376943/J-S-S-AXXX-XXX-471-BIA-March-30-2020?secret_password=Xaad4T3TnD5zABc38BRQ (finding an extraordinary circumstances exception for Mexican asylum seeker who "is suffering from major mental health problems, he has serious cognitive impairment, and he is
of [b]orderline intelligence" even though he was sufficiently competent to understand removal proceedings.) *See also R-U-J-*, AXXX XXX 713 (BIA Oct. 15, 2019) (unpublished) scribd.com/document/437040658/R-U-J-AXXX-XXX-713-BIA-Oct-15-2019?secret_password=wunNKi2XjXbaw7MQRHgz (finding IJ erred in considering traumatic brain injury only under changed circumstances analysis, and holding respondent's inability to file an asylum application as a result of the injury constituted an extraordinary circumstance) E-A-D-, AXXX XXX 097 (BIA May 20, 2019) (unpublished) scribd.com/document/414382053/E-A-D-AXXX-XXX-097-BIA-May-20-2019?secret_password=JvAWXsmMT93ZCqjfWxHG (finding extraordinary circumstance exception where asylum applicant suffered PTSD from the time of entry until filing, and also experiencd a high risk pregnancy while in the United States.)

[118] 8 CFR § 208.4(a)(5)(iii); *see also Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988).

non-attorney.[119] In *Viridiana v. Holder*, the U.S. Court of Appeals for the Ninth Circuit remanded a case with a OYFD issue, finding that the BIA had misconstrued the applicant's claim as an ineffective assistance of counsel claim when, in fact, she had been defrauded by a non-attorney. Although the Ninth Circuit agreed with the BIA that Ms. Viridiana could not make out a claim for ineffective assistance of counsel where she had not been represented by an attorney, it found that the list of potential extraordinary circumstances in the regulations was non-exhaustive and she might qualify for an extraordinary circumstances exception based on the fraud committed by a non-attorney.[120]

5. LGBTI-Specific Extraordinary Circumstances

The AO LGBTI Lesson Plan sets forth several examples of potentially qualifying extraordinary circumstances exceptions for applicants who identify as LGBTI and/or are HIV-positive. The AO LGBTI Lesson Plan discusses PTSD and other mental health issues in the context of LGBTI claims.[121] The Lesson Plan specifies that medical problems related to being HIV-positive, including depression, may rise to the level of extraordinary circumstances if they prevent the applicant from complying with the OYFD.[122] And, finally the AO LGBTI Lesson Plan also highlights a possible extraordinary circumstances exception based on "severe family or community opposition or isolation," explaining that it is common for immigrants to live with members of their own community who may continue to make it difficult for the individual to "come out" or file a claim based on being LGBTI.[123]

V. Applying for Asylum within a "Reasonable Period of Time" of the Exception

The regulations governing both changed and extraordinary circumstances require the applicant to file within a reasonable period of time following the exception.[124] Although the regulations do not specify what constitutes a reasonable period of time, it is generally advisable to file within six months of a OYFD exception.[125] A finding of a changed circumstance does not result in a new, year-long

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[119] *Cf.* CLINIC, *Stopping Immigration Services Scams A Tool for Advocates and Lawmakers* (Mar. 8, 2018), cliniclegal.org/resources/protecting-your-community/unauthorized-practice-immigration-law/stopping-immigration; American Immigration Lawyers Association, *Guidelines for Consumers: How and Where to File Complaints Against Notarios and Immigration Consultants,* americanbar.org/content/dam/aba/administrative/immigration/fightnotariofraud/aila_howandwheretofile_notariofraud.authcheckdam.pdf.

[120] *Viridiana v. Holder*, 646 F.3d 1230, 1239 (9th Cir. 2011).

[121] See AO LGBTI Lesson Plan, *supra* note 36 at 67.

[122] *Id.*at 66.

[123] *Id.* at 67-68.

[124] 8 CFR §§ 208.4(a)(4)(ii), 208.5.

[125] Proposed regulations that were never finalized by DHS would have set six months as a presumptively reasonable period of time with applicants having to explain on a case-by-case basis any time beyond that. 65 Fed. Reg. 76121, 76123-24 (Dec. 6, 2000); *see Wakkery v. Holder*, 558 F.3d 1049, 1057-1058 (9th Cir. 2008) (holding that six months and a few days is reasonable within the meaning of 8 CFR § 208.4(a)(5) because Mr. Wakkery had to collect pertinent documents before filing his asylum application).

period in which to file.[126] Rather, as with most aspects of asylum law, the period of time after the changed circumstance or extraordinary circumstance will be evaluated on a case-by-case basis.

Matter of T-M-H- & S-W-C-, is one of the few BIA decisions to address the OYFD.[127] In this case, the applicants were a Chinese couple who had just had a second child. The mother filed for asylum nine months after the child's birth and the father filed 12 months after the birth. Here the BIA stated, "[c]learly, waiting six months or longer after expiration or termination of status would not be considered reasonable. Shorter periods of time would be considered on a case-by-case basis, with the decision-maker taking into account the totality of the circumstances."[128] The BIA remanded to the IJ to determine whether there were other factors in the case that would make delays of nine or 12 months reasonable.[129]

As with changed circumstances exceptions, the regulations state that extraordinary circumstances "may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances."[130] For some exceptions, such as maintaining lawful status, it will be clear when the extraordinary circumstance ends and when the clock starts running on a reasonable period of time. For other extraordinary circumstances, such as suffering from PTSD, it is less clear how to calculate the reasonable period of time. In the case of PTSD that resulted from harm in the home country, practitioners may argue that the extraordinary circumstance began when the asylum applicant entered the United States, and the reasonable time extended until the applicant was able to talk about the harm and file for asylum. Practitioners should be prepared to advance an argument as to why the filing is possible now and account for why filing now is reasonable under all of the circumstances of the individual's case.
The AO OYFD Lesson Plan states that asylum officers "are encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file."[131] It also lays out factors to consider in this evaluation:

> An applicant's education and level of sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors should be considered.[132]

Practitioners should be aware that since DACA recipients have been in the United States for a long time, been educated here, and typically speak English, they may be considered relatively

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[126] *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010).
[127] *Id.*
[128] *Id.*at 194.
[129] *Id.* at 195-196. *See also Z-X-*, AXXX XXX 571 (BIA March 13, 2019)(unpublished) https://www.scribd.com/document/406493666/Z-X-AXXX-XXX-571-BIA-March-13-2019?secret_password=hRbgkImkeSOkPkBYROtq (finding that asylum application filed in December following April baptism as changed circumstances exception was filed within a reasonable period of time).
[130] 8 CFR § 208.4(a)(5).
[131] *See* AO OYFD Lesson Plan, *supra* note 35 at 22.
[132] *Id.*

"sophisticated" and thus receive less "benefit of the doubt" for what constitutes a reasonable period of time. Thus, if a practitioner sees a strong changed circumstances exception, it may be prudent to file as soon as possible, unless there are also arguments that an extraordinary circumstances exception applies. Practitioners should also be mindful that if a DACA recipient was in removal proceedings which were administratively closed, they should be prepared to file for asylum, if warranted, quickly after DHS recalendars the case.[133]

For some DACA recipients, living with years of uncertainty regarding their future in the United States and their ability to remain in the same country as family members, may have resulted in anxiety, depression, or other mental health issues. Practitioners should explore these issues with asylum seekers as the basis for a possible extraordinary circumstances exception.

VI. Combining One-Year Filing Deadline Exceptions

Generally, an asylum applicant must demonstrate by clear and convincing evidence that he or she is filing for asylum within one year of entry.[134] For applicants who are filing beyond the OYFD, they must account for all of their time in the United States. This can be broken down into several steps. First, ascertain the date of entry, as discussed previously. If the date of entry is more than one year prior to the application, the applicant must have a viable changed circumstances exception, extraordinary circumstances exception, or combination of changed and extraordinary circumstances exceptions to prevail. Additionally, he or she must file within a reasonable period of time of the changed or extraordinary circumstance.

For many DACA recipients considering filing for asylum, it will be necessary to combine more than one OYFD exception. Each asylum applicant must account for all of his time in the United States. While a changed circumstances exception essentially restarts the clock for filing for asylum, an applicant should file within six months of the changed circumstance. If he or she does not do so, he or she will need another OYFD exception. DACA recipients may be able to argue several combinations of OYFD exceptions.

DACA Example. Julia arrived in the United States at age 13, applied for DACA when she was 23 years old and has maintained DACA ever since. It will not suffice for Julia to argue that DACA is an extraordinary circumstance that is the equivalent of maintaining lawful status because she will need to account for her time in the United States between when she became an adult and when she received DACA. She has a clear exception up until age 18 and a possible exception until she reached 21 but she would still need to have an exception for the two years between reaching the age of 21 and receiving DACA at age 23. She will either have to show an extraordinary circumstance that excused her filing for her first ten years in the United States or show that a changed

[133] *See M-S-*, AXXX XXX 870 (BIA Sept. 27, 2019) (unpublished) scribd.com/document/431715362/M-S-AXXX-XXX-870-BIA-Sept-27-2019?secret_password=hNMO7Nok360IRyEefcMl (finding that Salvadoran asylum seeker filed within a reasonable period of time, where his case was administratively closed in 2008, he was threatened by gang members in 2014, and he filed for asylum within three months of the case being re-calendared in 2018).

[134] INA § 208(a)(B).

circumstance has occurred within the last six months before applying for asylum. Finally, if she can show a changed circumstance that occurred while she was in receipt of DACA, she could combine that changed circumstance with the extraordinary circumstance of having her stay authorized under DACA.

A. Combining Extraordinary Circumstances with Extraordinary Circumstances

For applicants who filed for DACA before turning 18 (or under certain circumstances discussed above before turning 21), the time the individual was under the legal disability of being a minor will likely qualify for an extraordinary circumstances exception. If the individual is now an adult, he or she will also have to argue that maintaining DACA, a lawful status, is an extraordinary circumstance and therefore qualifies as a one-year exception.

DACA Example. Xiomara came to the United States at age 10 and applied for DACA in 2012 when she was 17 years old. She has consistently renewed her DACA and currently has DACA. She could argue that her first seven years in the United States are excused by the extraordinary circumstance of being a minor, and her delay in filing for asylum from 2012 forward is excused by maintaining DACA status.

B. Combining Changed Circumstances with Extraordinary Circumstances

Many DACA recipients may be able to argue a change in circumstances such that the applicant now has an asylum claim. For Northern Triangle countries and Mexico, there is significant country conditions evidence of worsening human rights violations that could potentially qualify as a changed circumstance. However, applicants must generally file within six months after a changed circumstance exception, and it is likely that practitioners may meet with DACA recipients who can articulate a changed circumstance that happened more than six months ago, but while they were DACA recipients. For such potential asylum applicants, it may be possible to combine a changed circumstances exception with an extraordinary circumstances exception. The logic here would be that the changed circumstance reset the OYFD and the extraordinary circumstance of having DACA would excuse the asylum deadline until the DACA protection ended.

DACA Example. Jose arrived in the United States from Honduras in 2004. In 2012, at age 23, he obtained DACA. Jose's extended family still lives in the village in Honduras where Jose grew up. Jose's older brother, Raul, remained in Honduras and is an evangelical minister. He regularly gives sermons calling on his parishioners to reject the violent life of the gangs and instead place their faith in God. Two years ago, Raul's wife was murdered. The police barely investigated and did not find the killer or a motive, but Jose's family believes the gangs killed her based on her religion and her imputed anti-gang opinion, as well as her family relationship to Raul. Jose is afraid he will be targeted for the same reasons if he has to return to Honduras.

In this example, Jose probably could not succeed with only a changed circumstances exception since his sister-in-law was murdered two years ago and waiting two years to file for asylum would not be considered filing within a reasonable period of time, even though he could argue the clock was reset when she was killed and the changed circumstance occurred. Likewise, Jose probably could not succeed with only an extraordinary circumstances exception based on being a DACA recipient because Jose was in the United States for many years, two of which were when he was over the age of 21, before he received DACA, so the extraordinary circumstances exception would not cover all of his time in the United States. Jose could argue, however, that he had a changed circumstance two years ago when his cousin was killed and that by being a DACA recipient from that date forward, he has had an extraordinary circumstance. Jose would need to file as quickly as possible after his DACA protection ends since an adjudicator may decide that the murder of his brother's wife put Jose on notice that he cannot safely return to Honduras and that Jose should thus not benefit from the presumptive six months of reasonable time.

VII. Conclusion

As practitioners meet with DACA recipients whose future protection remains uncertain, to screen for other potential forms of relief, it is important to screen for asylum. Screening for asylum will require thorough consideration of the asylum OYFD. Since all DACA recipients have been in the United States for many years, they have missed the OYFD. However, there are exceptions to the OYFD and DACA recipients may be able to successfully argue those OYFD exceptions. Remember that those who apply for asylum affirmatively if DACA ends will be placed into removal proceedings if they do not succeed before the Asylum Office. Even now, it is unclear whether asylum offices will refer those who are maintaining DACA to the IJ if they are unsuccessful at the Asylum Office. Thus, advocates should be sure to fully explore the strength of these asylum claims, the exceptions to the one-year filing deadline, and alternate possible relief from removal before filing an asylum claim.

The Catholic Legal Immigration Network, Inc., or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 375 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC's BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP'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, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist practitioners; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, 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 the Supreme Court's decision in *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020), a practice pointer on refreshing recollection in immigration court, a practice advisory on strategies and considerations in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client's release from immigration detention, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court." These resources and others are available on the DVP webpage.