Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	***One-Year Filing Deadline***
Field Performance Objective	Given an asylum application to adjudicate in which the one-year filing deadline or a previous denial is at issue, the asylum officer will be able to properly apply the rules and reach a decision.
Interim (Training) Performance Objectives	1. Identify whether the one-year filing rule applies. 2. Correctly use the clear and convincing evidentiary standard. 3. Explain the exceptions to the one-year filing rule. 4. Identify facts material to the filing rule in evaluating credibility.
Student References / Materials	INA §§ 208(a); 101(a)(42); 8 C.F.R. § 208.4(a).

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I. INTRODUCTION

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), eligibility for asylum was not linked to how long an applicant had been in the United States. IIRIRA introduced a new eligibility requirement: an asylum applicant filing after April 1, 1998, must apply within one year of his or her last arrival, unless there are changed circumstances which materially affect his or her eligibility for asylum, or extraordinary circumstances relating to the delay in filing. This lesson provides guidance on determining whether an applicant has applied for asylum within one year from date of arrival in the United States and, if not, whether an exception exempting the applicant from this requirement applies.

Pub. L. No. 104-208, 110 Stat. 3546 (September 30, 1996).

Authority for this requirements is contained in INA § 208(a)(2)(B) and 8 C.F.R. § 208.4 (a). Exceptions to the rule are provided in INA § 208(a)(2)(D)and 8 C.F.R. § 208.4(a).

II. OVERVIEW

Any asylum applicant who applied for asylum on or after April 1, 1998 (or April 16, 1998, for those applying with the INS), must establish that he or she filed for asylum within one year from the date of last arrival or establish that he or she is eligible for an exception to the one-year filing requirement. If an applicant fails to establish timely filing of the application or that an exception applies, the application must be rejected. Only an asylum officer, immigration judge or the Board of Immigration Appeals (BIA) is authorized to make this determination. The determination may be made only after an interview with an asylum officer or hearing before an Immigration Judge.

8 CFR 208.4(a)

See discussion of 14-day grace period in Section III below for April 16, 1998 date.

Note: An applicant who is not eligible to apply for asylum for failure to meet the one-year filing requirement is still eligible to apply for withholding of removal before an immigration judge.

An asylum interview is the method asylum officers use to determine an applicant's last arrival date, basis for asylum claim, and whether any exceptions to the filing deadline apply. No applicant is to be denied a full asylum interview based solely on one-year filing deadline issues. A full and thorough asylum interview includes a pre-interview check of country conditions and post-interview research where necessary.

Decisions by an asylum officer must be supported by the officer's written assessment of the case. Because changed conditions may provide an exception to the one-year filing requirement (as discussed below), all rejection decisions must address pertinent country conditions, and must analyze whether there has been any change in country conditions.

III. APPLICABILITY

Only applications with a filing date on or after April 16, 1998, are subject to the one-year rule. Applications with a filing date on or before April 15, 1998, are not subject to the one-year filing deadline as implemented by the Asylum Division. Although April 1, 1998, is the effective date provided by regulation for those who arrived before April 1, 1997, the INS extended an administrative 14-day grace period for applications filed with the INS. This 14-day period only applies to those applications filed in the first 15 days of April, 1998.

IV. DETERMINING WHETHER THE APPLICATION WAS FILED WITHIN THE ONE-YEAR PERIOD

A. Calculating the One-Year Period

1. Date one-year period begins

The one-year period begins running from the date of the applicant's last arrival in the United States. For example, if an applicant enters the United States on February 2, 2000, leaves the United States on February 25, 2000, and returns to the United States on March 1, 2000, the one-year period begins on March 1, 2000.

2. Date one-year period ends

The one-year period is calculated from the last arrival date up to the previous calendar day the following year. For example, an applicant who arrives on February 23, 2000, and files on February 22, 2001, will have timely filed; an applicant who arrives on February 23, 2001, and files on (or after) February 23, 2000, will not have timely filed.

If the last day for timely filing falls on a Saturday, Sunday, or legal holiday, filing on the next business day will be considered timely. For example, an applicant who last arrives on June 24, 2000, can timely file on June 25, 2001, because June 23, 2001, is a Saturday.

8 C.F.R. § 208.4(a)(2)(ii)

3. Filing date

The filing date is found on the Service's date/time stamp on the I-589 and on the RAPS 'I589' and 'CSTA' screens. If any of these dates are different, the earliest date is to be used.

An affirmative asylum application is considered filed when *received* by the INS Service Center. However, the application can be considered timely if "clear and convincing" documentary evidence demonstrates that the application was *mailed* within the statutory one-year period. The "clear and convincing" standard is explained in Section IV.B.

8 C.F.R. § 208.4(a)(2)(ii)

B. Burden and Standard of Proof

There are two different standards of proof that are operative in making determinations related to the one-year filing requirement: a) the standard of proof to establish that an applicant applied within one year and b) the standard of proof to establish that an exception to the requirement applies, if the applicant failed to meet the one-year requirement. This section focuses on the standard of proof required to establishing filing within one year.

1. Applicant's burden

The burden of proof is on the applicant to establish that he or she applied for asylum within one year from the date of last arrival in the United States.

2. Standard of proof

Pursuant to INA section 208(a)(2), the standard of proof required to establish that an applicant filed

Black's Law Dictionary, 5th and 6th Editions; *Woodby v.*

within one year from last arrival is the ***clear and convincing*** standard.

INS, 385 U.S. 276 (1966); *Matter of Carrubba*, 11 I&N Dec. 914 (BIA 1966); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988)

"Clear and convincing" is that degree of proof that will produce a "firm belief or conviction," and "where the truth of the facts asserted is highly probable."

The proof need not be "conclusive" or "unequivocal"; if put on a scale, the clear and convincing standard would be somewhere between the "preponderance of evidence" standard (greater than 50% standard, or "more likely than not") and that of the "beyond a reasonable doubt" standard used in criminal trials.

Asylum officers should avoid trying to place the clear and convincing standard on a particular point on a percentage scale. Clear and convincing evidence does not fall precisely on any point between the "preponderance of evidence" standard and the "beyond a reasonable doubt standard." Instead, it is the degree of evidence necessary to create a firm belief that the asserted fact is true.

3. Evidence

An applicant may establish that an application was filed within one year from the date of last arrival by providing either a) clear and convincing evidence of a date of last arrival within the applicable one-year period, <u>or</u> b) clear and convincing evidence that the applicant was outside of the United States during the previous year immediately before the date of filing. The evidence provided may be testimony, documentation, or a combination of both.

a. testimony

8 C.F.R. § 208.13(a); *Matter of S-M-J-*, Int. Dec. #3303 (BIA 1997) *See* Asylum Officer Basic Training Course ("AOBTC") lesson,

Testimony is evidence. Standing alone without witness corroboration or documentary evidence, when credible,

testimony can be sufficiently clear and convincing to lead an asylum officer to a "firm belief" that the applicant arrived within one year before the filing date.

Eligibility Part IV: Burden of Proof and Evidence.

b. Documents

Documentary evidence such as passport entries, boarding passes, leases, etc., are probative as to when an applicant entered the United States, when presence outside the United States ended, and when presence in the United States began.

Caselaw that addresses an asylum applicant's responsibility to provide reasonably available corroborating evidence to establish eligibility for asylum does not specifically address requirements for establishing that the one-year filing requirement has been met. However, consistent with the reasoning of that case law is the premise that corroboration should not be required when there are reasonable explanations for the inability to provide corroborating evidence. Due to circumstances that give rise to a refugee's flight, it generally would be unreasonable to expect a refugee to have documentary proof of presence outside the United States within a year from last arrival.

See Asylum Officer Basic Training Course ("AOBTC") lesson, *Eligibility Part IV: Burden of Proof and Evidence*.

Note: there may be instances in which the asserted arrival date is uncertain or not believable. These credibility issues are explored in Section VII.

V. EXCEPTIONS TO THE ONE-YEAR RULE

If an applicant did not apply for asylum within one year from last arrival in the United States, he or she may still be eligible to apply for asylum if the applicant establishes that there are changed circumstances materially affecting the applicant's eligibility for asylum or extraordinary circumstances related to the delay in

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)

filing. Once an applicant establishes the existence of such a changed or extraordinary circumstance, the applicant must demonstrate that the application was filed within a reasonable amount of time given those circumstances.

Keep in Mind:

The ultimate decision on whether an applicant qualifies for asylum is irrelevant to analyzing one-year filing deadline issues; rather, the task at this initial stage is to determine whether an exception to the one-year filing deadline applies. If an exception to the one-year filing deadline applies, then the applicant is entitled to a full adjudication of the asylum application.

A. Changed Circumstances

1. General considerations

INA § 208(a)(2)(D)

The statute allows for exceptions due to changed circumstances that materially affect an applicant's eligibility for asylum. To show that the exception applies, the applicant must establish the following:

a. the existence of a changed circumstance that occurred on or after April 1, 1997, the effective date of the statute;

b. that the changed circumstance is material to the applicant's eligibility for asylum; and

c. that the application was filed within a reasonable period of time after the changed circumstance.

8 C.F.R. § 208.4(a)(ii). This is discussed further in Section VI.

In evaluating whether the delay was reasonable, the asylum officer must take into account any delayed awareness the applicant may have had of the changed circumstance.

2. Types of changed circumstances

Regulations provide a non-exhaustive list of the

types of changed circumstances that may provide an exception to the one-year filing rule, as long as they materially affect the applicant's eligibility for asylum. These include:

a. changed conditions in applicant's country of nationality or, if stateless, applicant's country of last habitual residence

8 C.F.R. § 208.4(a)(4)(i)(A)

b. changes in applicable U.S. law

8 C.F.R. § 208.4(a)(4)(i)(B)

c. changes in applicant's personal circumstances, such as recent political activism, conversion from one religion to another, etc.

8 C.F.R.§ 208.4(a)(2)(i)(B)

d. the ending of applicant's dependent relationship to the principal applicant in a previous application.

8 C.F.R.§ 208.4(a)(2)(i)(C)

Examples

1) Applicant was forced by her government to undergo an abortion. She arrives in the U.S. in 1992. The 1996 change to the refugee definition related to harm pursuant to a coercive population control program materially affects her asylum eligibility. She files for asylum on April 18, 1998. This applicant is not entitled to the changed circumstance exception because the change did not occur on or after April 1, 1997. If no other exceptions apply, her application will be rejected.

2) Applicant is a member of the XYZ party in his country. He is briefly jailed in September 1999. He arrives in the U.S. in November 1999 and files for asylum in December 2000. On the day of the interview, XYZ members are still routinely being jailed. Because there has been no change of country conditions, the application will be rejected provided no other exceptions

apply. **Note:** If conditions for XYZ members worsened after applicant departed his country, he may be eligible for the changed circumstance exception.

3) Applicant arrived in the U.S. in 1989 and has never left. She was included as a dependent on her mother's I-589, which was filed in September 1998. Applicant's mother died in May 1999 before receiving her asylum interview. In June 2000 applicant files her own I-589. Due to the change in applicant's dependent relationship an exception to the filing deadline would apply provided the asylum officer considered the delay in filing from May 1999 to June 2000 to be a reasonable period of time. .

4) Applicant was a dependent on his father's I-589, which was filed in January 1999. In July 2000 applicant turned 21 years of age. His father still had not received an asylum interview. An exception to the filing deadline would apply in the son's case, provided the asylum officer considered the delay in filing from the attainment of 21 years of age to the I-589 filing date to be a reasonable period of time.

Note: The fact that minors customarily leave immigration and other legal paperwork to older family members should be taken into account when evaluating the reasonableness of the delay in filing.

3. Refugees *sur place*

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.

8 C.F.R. § 208.4 (a)(4)(i)(A); UNHCR *Handbook*, Paragraphs 94-95; *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *See* AOBTC lesson,

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*. Examples include but are not limited to:

Asylum Eligibility Part II: Well-Founded Fear, Sec. X, Refugee *Sur Place*

a. a change of government which is now hostile to applicant's profession, such as journalists

b. applicant's involvement in political organizing or other activities in the U.S. that are critical of applicant's government

c. applicant's conversion from one religion to another, or abandonment of religion altogether

d. recent antagonism in applicant's country toward applicant's race or nationality

e. threats against an applicant's family member living abroad

Example

A Russian citizen of West African ancestry has lived in the United States since 1989. She filed a Request for Asylum in June 2000. Country conditions information shows that since the 1991 breakup of the former Soviet Union, individuals with West African ancestry have been targeted by ordinary citizens in Russia. The police have tolerated this abuse. Depending on the particular circumstances of the case, this applicant could be considered a refugee *sur place*. Provided there are no additional exceptions, because the change in country conditions occurred before April 1997, the applicant's failure to file for asylum within one year of arrival would result in his application being rejected. **Note:** If there had been an escalation of violence between ethnic Russians and West Africans after April 1, 1997, the applicant would be

eligible for an exception, provided the delay in filing is a reasonable period of time.

B. Extraordinary Circumstances

1. General considerations

8 C.F.R. § 208.4(a)(5)

Events or factors in an applicant's life that caused the applicant to miss the filing deadline may except the applicant from the requirement to file within one year of the last arrival. To be eligible for this exception, the applicant must:

a. establish the existence of an extraordinary circumstance;

b. establish that the extraordinary circumstance was directly related to the failure to timely file;

c. not have intentionally created the extraordinary circumstance, through his or her action or inaction, for the purpose of establishing a filing-deadline exception; and

d. file the application within a reasonable period given the circumstances that related to the failure to timely file.

Although an extraordinary circumstance can occur before or after an applicant's arrival in the U.S., and before or after the April 1, 1997, effective date of the statutory provision, the circumstance must directly relate to an applicant's failure to file within one year of his or her last arrival.

2. Types of circumstances that may be "extraordinary"

Regulations describe several situations that could fall under the extraordinary circumstances exception. This list is not all-inclusive. There are other circumstances that might apply if the applicant is able to show that those circumstances

were extraordinary and directly related to the failure to timely file. Extraordinary circumstances include but are not limited to:

a. serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past

8 C.F.R. § 208.4(a)(5)(i)

The illness or disability must have been present, although not necessarily incurred, during at least part of the one-year period after arrival.

If the alien 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. Torture may result in serious illness or mental or physical disability.

Effects of persecution can include inability to recall details, severe lack of focus, problems with eating and sleeping, and other post-traumatic stress disorder (PTSD) symptoms. See AOBTC lesson, *Interviewing Part V: Interviewing Survivors*

b. the death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

8 C.F.R. § 208.4(a)(5)(vi)

Applicant's legal guardian, or holder of power of attorney, is also considered a family member.

The degree of interaction between the family members, as well as the blood relationship between applicant and the family member must be considered. For example, an estranged brother with whom the applicant has never had much contact would not qualify, but a grandparent or uncle for whom the applicant has sole physical responsibility would qualify.

c. legal disability

This is best described as an incapacity for the full enjoyment of ordinary legal rights; it includes unaccompanied minors and mental impairment.

The legal disability must have been during the one-year period after arrival.

8 C.F.R. § 208.4(a)(5)(ii)
Black's Law Dictionary, 5th Ed.

d. Ineffective assistance of counsel (limited to attorneys or accredited representatives)

The following are required for this exception:

- the applicant must file a written affidavit explaining the agreement in detail and listing what promises the attorney made or did not make, and
- testimony or documentary evidence that the accused counsel was informed of the allegation and was given an opportunity to respond, and
- testimony or documentary evidence that indicates whether there has been a complaint filed with the appropriate disciplinary authorities, and if not, an explanation why there has been no complaint.

8 C.F.R. § 208.4(a)(5)(iii)

Note: regulations and caselaw that address whether counsel's assistance was ineffective are not relevant here. The asylum officer is not evaluating whether applicant was given poor counsel; rather, the responsibility of the asylum officer is to decide whether the above elements have been fulfilled and that the counsel's actions were related to the delay in filing.

8 C.F.R. § 292.3(a); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *Matter of B-B-*, Int. Dec. #3367 (BIA 1998)

e. Maintaining of TPS, lawful status, or parole

8 C.F.R. § 208.4(a)(5)(iv)

Applicant had Temporary Protected Status (TPS), lawful immigrant/non-immigrant status, or was given parole during the one-year period after the last arrival, and filed the asylum application within a reasonable period of time after expiration of that status. Guidance on how to determine whether it was reasonable for the applicant to delay the filing is provide in Section VI.

The Department of Justice included this on the list of possible extraordinary circumstances to avoid forcing a premature application for asylum in cases in which an individual believes circumstances in his country may improve. For example, an individual admitted as a student who expects that the political situation in her country may soon change for the better as a result of recent elections may wish to refrain from applying for asylum until absolutely necessary. *See* 65 Fed. Reg. 76121, 76123 (December 6, 2000).

An application is considered timely if the applicant maintains a lawful status through the one-year required filing period and continues to maintain lawful status up to the I-589 filing date.

Applicants who receive a one-year humanitarian parole for the purpose of submitting an asylum application are on notice that the one-year period runs from the time the parole is given. They therefore are not eligible for the lawful status exception to a timely filing. Applicants who receive other types of parole during the required filing period are eligible for this exception.

An applicant who upon the last arrival is inspected and admitted with fraudulent documents does not satisfy a "maintaining of lawful status" extraordinary exception to the one-year filing deadline because that status was not lawful.

f. initial submission of application was timely

(*i*) defect in first submission

8 C.F.R. § 208.4(a)(5)(v)

The I-589 was mailed within one year of the last arrival, but the INS Service Center

returned it as improperly filed. It was subsequently re-filed more than one year after the arrival. In cases such as this, the applicant is presumed to have made the request for protection known to the INS in a timely way. The application will not be rejected, provided the applicant refiles within a reasonable period of time from the date the application was returned by the Service Center. **Note:** The file must always be thoroughly checked to ensure that correspondence to an applicant from the Service Center is not overlooked.

(ii) administrative closure

Case was initially filed before April 16, 1998, then closed and subsequently reopened by the Service. In this situation, there is no filing deadline issue because the application was timely filed. **Note:** This situation can occur when an interview no-show results in the administrative closure, and a subsequent employment authorization renewal causes the case to reopened and rescheduled for interview.

(iii) previous asylum case was terminated by an immigration judge

Provided the first filing was before April 16, 1998, the period of time for re-filing that must be reasonable runs from the termination date to the second filing date.

g. other circumstances

Other circumstances that are not specifically listed in the non-exclusive list in the regulations, but which may constitute extraordinary circumstances, depending on the facts of the case, include severe family or spousal opposition, extreme isolation

within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization. Any such factor or group of factors must have had a severe enough impact on the alien's functioning to have produced a significant barrier to timely filing.

C. Burden and Standard of Proof

1. Applicant's burden

The burden of proof is on the applicant to establish the existence of a changed circumstance materially affecting eligibility for asylum or of an extraordinary circumstance related to the applicant's failure to apply for asylum within one year from the last arrival.

2. Standard of proof

The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General.* This is a reasonableness test, i.e., it must be reasonable for the asylum officer, immigration judge, or BIA to conclude that a changed or extraordinary circumstance exists. This is a lower standard of proof than the "clear and convincing" standard that is required to establish that the applicant timely filed.

INA § 208(a)(2)(D); *See* Asylum Officer Basic Training Course ("AOBTC") lesson, *Eligibility Part IV: Burden of Proof and Evidence*.

3. Evidence

Generally, asylum officers must consult country conditions information relevant to the applicant's claim to determine whether there are changed country conditions material to the applicant's eligibility for asylum.

This, of course, would not apply to the changed condition based on a dependent reaching 21 years of age.

While the burden of proof is on the applicant to show that there are changed circumstances that now materially affect his or her eligibility for asylum, many applicants affected by changed circumstances

See AOBTC lesson, *Country Conditions Research and the Resource Information*

many applicants affected by changed circumstances may not be able to articulate this. The unique nature of assessing an applicant's need of protection places the officer in a "cooperative" role with the applicant. It is an asylum officer's affirmative duty "to elicit all relevant and useful information bearing on the applicant's eligibility for asylum."

Center ("RIC")

UNHCR *Handbook,* para. 196; *Matter of S-M-J-*, Int. Dec. #3303 (BIA 1997)**;** 8 C.F.R. § 208.9(b)

Asylum officers must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists. Documentary evidence includes country conditions and legal information that the asylum officer researches and uses.

Fed. Reg. comments on proposed rule, 3/6/97; comments by Senators Hatch and Abraham shortly before passage of IIRIRA that indicate legislative intent for exceptions to cover a broad range of circumstances. 142 Cong. Rec. S11840, 9/30/96.

VI . FILING WITHIN A REASONABLE PERIOD OF TIME

A. Overview

If there are changed or extraordinary circumstances that except an applicant from the one-year filing rule, the I-589 must be filed within a reasonable period of time from the occurrence of the changed or extraordinary circumstance.

8 C.F.R. § 208.4(a)(4)(ii)

B. Delayed awareness

If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness must be taken into account in determining what constitutes a "reasonable period of time."

8 C.F.R.§ 208.4(a)(4)(C)(ii)

C. Evaluation of the "reasonable period of time"

What constitutes a reasonable period of time to file following a changed or extraordinary circumstance

depends upon the facts of the case. Asylum officers must ask themselves if a reasonable person under the same or similar circumstances as the applicant would have filed sooner. Asylum Officers are encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file. 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.

Examples

1) An educated human rights lawyer arrived in the U.S. in 1985. She demonstrates that country conditions changed in 1997, placing her at risk., She files for asylum in January 2001. Due to this particular applicant's knowledge of the law and human rights conditions, an explanation for waiting so long to file would have to be very convincing to be considered reasonable.

2) In 1987 a Polish citizen was jailed by the Polish Government for one year for expressing a pro-democracy political opinion. He arrived in the U.S. in 1988. He filed for asylum in September 2000. His attorney states that an I-589 was not filed for many years because she did not believe he was eligible. She believes that a BIA case decided in May 2000 affects his eligibility.. A changed circumstance exception to the filing deadline rule – change in applicable U.S. law – applies, provided that the four-month period from May to September is considered a reasonable delay.

3) Applicant was seriously ill during a one-year period after her last arrival, but was in very good health for 18 months prior to filing her asylum application. When asked why she waited so long, she replied that she was too busy repairing her home. While this applicant's illness constituted an extraordinary circumstance for not timely filing the I-589, delaying the filing as long as she did was not reasonable. Such

a delay might be considered reasonable for an applicant who continued to require intensive therapy and other treatment as a result of the illness, depending on the circumstances.

Examples related to permission to remain in the U.S. ("status cases")

Once it is determined that the application was untimely filed and that during the one-year period the applicant had TPS, parole, or a lawful status, the inquiry is whether the applicant filed for asylum within a reasonable period of time after the TPS, parole, or lawful status ended. These determinations are made on a case-by-case basis. Although the totality of circumstances in the case determines what is considered a reasonable period of time, guidance offered by the Department of Justice suggests that more than a six-month delay would usually be considered unreasonable.

65 Fed. Reg. 76121, 76124 (2000)

6) In February 1999, the applicant entered the U.S. on a B-2 visa which expired in August 1999. She applied for asylum in June 2000. Because the I-589 was filed more than one year after the last arrival, the asylum officer's inquiry before the asylum officer is whether it was reasonable to delay filing for 10 months after the expiration of lawful status.

7) In September 1998, the applicant entered the U.S. on a student visa. Her status lapsed in June 2000. She filed for asylum in August 2000. Because the I-589 was filed more than one year after the last arrival, the issue for the asylum officer is whether it was reasonable to delay filing for two months after the applicant's lawful status lapsed. **Note:** Barring facts to the contrary, in this situation a two-month delay would ordinarily be considered a reasonable period of time. A longer period of time may also be reasonable, depending on the circumstances.

8) In March 1999, applicant was admitted to the U.S. on a B-1 visa that expired in June 1999. She applied for asylum in February 2000. This applicant timely filed

the application within one year of her last arrival, so there is no filing deadline issue to adjudicate; whether it was reasonable to delay filing for eight months from the visa expiration is irrelevant. The applicant has met the one-year filing requirement.

VII. CREDIBILITY

A. Overview

As explained in this lesson, an applicant must demonstrate by clear and convincing evidence that he or she applied for asylum within one year after the date of last arrival. This may be demonstrated either by establishing the date of last arrival or by establishing that the applicant was outside the United States less than one year prior to the date the application was filed. If the applicant fails to file within one year from the date of last arrival, the applicant may still be eligible to apply for asylum if the applicant establishes to the satisfaction of the asylum officer that an exception applies. To determine whether the applicant met the filing deadline or an exception applies, the asylum officer will have to evaluate the credibility of the applicant's testimony regarding these issues.

B. Materiality

A material fact is one that is necessary for a claim to succeed. It has a direct bearing on eligibility for the benefit sought. Facts that prove or disprove either asylum eligibility or a timely filing are therefore material. Material facts used in making a decision on whether the application was timely filed are usually different than material facts used in making a decision on the merits of the asylum claim.

See Asylum Officer Basic Training Course ("AOBTC") lesson, *Credibility*

1. Facts material to asylum eligibility

In asylum, a fact that is necessary for the claim to succeed generally is a fact that is connected either to an element in the refugee definition or to a mandatory bar to asylum. For instance, if an applicant's claim regarding the extent of her injuries as a result of a beating from government

solders is not credible, that falsehood is material to whether she suffered persecution and could form the basis for the case being denied or referred to an immigration judge.

2. Facts material to the filing deadline

Facts that have a direct bearing on the filing deadline adjudication may include the specifics of the arrival, the applicant's whereabouts before the filing date, the existence of changed or extraordinary circumstances, and the reason presented for any delay in filing if a changed or extraordinary circumstance is established. Asserted material facts relating to asylum eligibility are often not material to the filing deadline adjudication.

Example

Applicant credibly testifies that she is a member of a minority religious group. She cannot credibly establish her last arrival date or when she was last outside the United States. She claimed that she was jailed because of her religion, but presents inconsistent testimony concerning important details about her arrest and prolonged jail sentence. Country conditions information establishes that there recently has been a significant escalation of violence against the applicant's religious group in her country. Although this applicant's claims regarding her last arrival and prior religious persecution are found not credible, she does credibly establish she is a member of a religious minority that recently has been targeted.

The material facts related to an exception to the one-year filing deadline – the applicant's membership in the targeted religious minority and the recent change in conditions in the applicant's country – are found credible. Therefore, the applicant may establish that an exception to the one-year filing deadline applies and she is eligible to apply for asylum, assuming she filed within a

reasonable period of time from the changed circumstance. The asylum officer would then analyze and make a decision on the merits of the asylum claim.

a. last arrival

There should always be an inquiry concerning an applicant's manner, place and time of last arrival. If satisfactory arrival documents are not available, follow-up questions should be asked and the credibility of the applicant's responses evaluated.

If the applicant cannot credibly establish the date of last arrival or cannot remember the date of last arrival, the asylum officer should inquire into whether the applicant was outside the United States at any time during the 12 months before the filing date. In such cases, the applicant's whereabouts during the 12 months before the filing date becomes material.

Examples

1) Applicant does not provide credible testimony on her manner, place, or time of last arrival. Applicant does, however, provide credible documentary and/or credible testimonial evidence of being in Taiwan seven months before the filing date. Because applicant credibly testified that she was in Taiwan seven months before filing for asylum and therefore must have last entered the United States less than 12 months before the filing date, she has satisfied her evidentiary burden of proving with clear and convincing evidence that the application was filed within one year of her last arrival.

Note #1: Asylum officers should not assume that

the absence of detailed and consistent testimony regarding the specifics of an applicant's arrival indicate an attempt to circumvent the filing deadline requirements. There may be other reasons an applicant fails to provide details about his or her arrival, such as the desire to protect the identity of the person whose passport an applicant used, language confusion, fear of smugglers, or the natural fading of memory over time. The asylum officer should inquire into the reasons an applicant fails to provide detailed information about his or her arrival and carefully consider the response in light of the applicant's experiences and circumstances. If an applicant presents vague or inconsistent testimony about the date, manner, and place of last entry, the applicant may nonetheless be able to establish by clear and convincing evidence that he or she was outside the United States less than one year prior to the filing date and thus meet the one-year filing requirement.

Note #2: Facts pertaining to an applicant's whereabouts prior to 12 months before the filing date may be material to the last arrival date, but only if they indicate the applicant was present in the United States. To illustrate, if the I-589 is filed in December 2000, facts indicating that the applicant was in the United States before December 1999 could be material, because they may be probative of whether the applicant was in the United States for more than a year before applying for asylum. If there is no evidence that the applicant left the United States and returned, the applicant could not establish by clear and convincing evidence that he or she applied within one year from last arrival. Facts relating to an applicant's presence outside the United States before December 1999 generally would not be material.

2) Applicant files an I-589 in December 2000. He testifies that in February 2000 he moved from New York to Detroit. Three months later he moved to Miami, and four months after that he moved to Los

Angeles. He testifies that during these months he installed billboards for a living. Upon further questioning, the asylum officer concludes that the applicant's testimony about the different places he claims to have resided during those months is not credible. The applicant also does not know anything about the billboard business. This testimony is not material to the filing deadline issue because it does not identify or cast doubt on a last arrival date, and is not related to whether applicant was in the United States for more than 12 months before the filing date.

3) Applicant files an I-589 in September 2000. His testimonial and documentary evidence on being in a refugee camp from 1993 to 1998 is not credible. The evidence concerning 1993 to 1998 is not related to whether the applicant was in the United States for more than 12 months before the filing date, and does not cast doubt on a last arrival date. Therefore, it is not material and cannot be the basis upon which the application is rejected. For this 1995-1998 period, facts relating to a United States residence <u>would</u> be material.

b. changed circumstances

Whenever a filing is untimely, the asylum officer must explore reasons that may have caused a late filing, such as changes in the law, country conditions, applicant's personal circumstances, or other areas that materially affect the applicant's asylum eligibility. Information directly related to the existence of a changed circumstance is material to the determination of whether the applicant is eligible for an exception to the filing requirement.

Example: Applicant claims that her sister recently published an article in a newspaper in the applicant's country that was highly critical of the government. Family

members remaining in her country have been threatened by the government as a result. Facts related to whether the article was published by the applicant's sister and whether publication of such an article could affect the applicant's eligibility for asylum are material to whether the applicant is eligible for an exception to the filing requirement. Reminder: In evaluating the credibility of the presented exception, the asylum officer should not be making a determination on whether the applicant is eligible for asylum, only whether the applicant is eligible to apply for asylum.

c. extraordinary circumstances

Whenever a filing is untimely, the asylum officer must explore events or factors in the applicant's life that may have caused a late filing. Information directly related to the existence of an extraordinary circumstance is material to the determination of whether the applicant is eligible for an exception to the filing requirement.

Example: Applicant claimed that she was in a serious car accident, which caused her to miss the one-year filing deadline. Facts relating to whether the accident occurred and the extent of the applicant's injuries are material to whether the applicant is eligible for an exception to the filing requirement.

d. delay in filing

An applicant's explanation for a delay in filing is material to the issue of whether the applicant is eligible for an exception to the filing requirement. Asylum officers should inquire into the reason for the delay when the delay appears unreasonable on its face.

For example, if an applicant filed for asylum within a few months after recovering from a serious illness that directly related to the failure to timely file, the delay would appear reasonable on its face. The asylum officer would not need to inquire into why it took the applicant two months to apply. However, if the applicant waited 8 months after recovering from the illness, the asylum officer should inquire into the reason for the delay and evaluate the credibility of the explanation provided.

Example: A citizen of Bulgaria arrives in the U.S. in 1989 and files for asylum in January 2001. She is very well-educated, fluent in English and not represented by an attorney. The asylum officer knows that a widely-publicized change in U.S. law in 1998 may help applicant's asylum case. When asked why the application was not filed sooner, the applicant testified that until late in 2000, she did not know about the change in the law or even that asylum existed. This change in law, which affects the applicant's eligibility, is a changed circumstance. The officer would need to evaluate the credibility of the applicant's explanation of delayed awareness of the change in the law to determine whether the delay in filing was reasonable.

VIII. SUMMARY

A. Filing Deadline Requirement

Any asylum applicant who applied for asylum on or after April 1, 1998 (or April 16, 1998, for those applying with the INS), must establish that he or she filed for asylum within one year from the date of last arrival or that he or she is eligible for an exception to the one-year filing requirement.

B. Calculating the One-Year Period

The one-year period is calculated from the last arrival date up to the previous calendar day the following year. If the last day for timely filing falls on a Saturday, Sunday, or legal holiday, filing on the next business day will be considered timely.

C. Burden and Standard of Proof for One-Year Period

The burden of proof is on the applicant to establish by clear and convincing evidence that the application was filed within one year from the date of the applicant's last arrival in the United States. The burden may be met by presentation of credible testimony, documentation, or a combination of both.

D. Exceptions

If an applicant did not apply for asylum within one year from last arrival in the United States, he or she may still be eligible to apply for asylum if the applicant establishes either the existence of changed circumstances that materially affect the applicant's eligibility for asylum or that extraordinary circumstances related to the delay in filing.

E. Standard and Burden of Proof for Exceptions

The burden of proof is on the applicant to establish to the satisfaction of the asylum officer that an exception applies.

F. Reasonable Period of Delay

Once an applicant establishes the existence of a changed or extraordinary circumstance, the applicant must demonstrate that the application was filed within a reasonable amount of time given those circumstances. If the applicant can establish that he or she did not become aware of a changed circumstance until after it occurred, such delayed awareness must be taken into account in determining what constitutes a “reasonable period.”

G. Credibility

To determine whether the applicant met the filing deadline or an exception applies, the asylum officer will have to evaluate the credibility of the applicant’s testimony regarding these issues. Facts that are material to the filing deadline adjudication may include specifics of the arrival, the applicant’s whereabouts before the filing date, the existence of changed or extraordinary circumstances, and the reason presented for any delay in filing if a changed or extraordinary circumstance is established. Material facts relating to the filing requirement (eligibility to apply for asylum) are often distinct from those material to the asylum claim.