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The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal

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THE GAY BAR: THE EFFECT OF THE ONE-YEAR FILING DEADLINE ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND HIV-POSITIVE FOREIGN NATIONALS SEEKING ASYLUM OR WITHHOLDING OF REMOVAL

*Victoria Neilson & Aaron Morris**

I. INTRODUCTION

We find the respondent's testimony and the documentary evidence of widespread violence directed against bisexual and homosexual individuals living in Jamaica troubling. Based upon the evidence before us, were the respondent eligible for asylum, we might well be inclined to find that the burden of proof for that form of relief had been met. However, a higher standard of proof is imposed for withholding and deferral of removal, and we must agree that the respondent has failed to establish a clear probability of persecution or torture upon his return to Jamaica.¹

When the Board of Immigration Appeals (BIA) wrote these words, it was pointing out the harsh human reality of changes made by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a 1996 Congressional law which substantially altered the Immigration and Nationality Act (INA). One of the provisions of IIRIRA changed the INA by requiring asylum seekers to file their applications within one year of their last entry into the United States unless they could prove that their case fell within certain narrow exceptions to the rule. While a primary rationale behind the change in the law was to reduce the number of fraudu-

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¹ Matter of L-R- (B.I.A. 2003) (unpublished decision, on file with Immigration Equality). As the quotation suggests, if an applicant misses the one-year filing deadline he may still be able to qualify for "withholding of removal." However, the standard of proof for this form of relief is much higher than for asylum, and the benefits of the status are much fewer. See *infra* Part II.D. for an in-depth discussion of withholding of removal. Note that the term "withholding" is used throughout to refer to "withholding of removal" or "withholding of deportation."

lent asylum applications,² a major consequence of the change has been to foreclose relief for untold numbers of otherwise eligible and deserving asylum seekers.

This Article explores the detrimental effect of the arbitrary and unjust one-year rule, namely, the deportation³ of many vulnerable foreign nationals⁴ to the very countries from which they fled due to a justifiable fear of persecution. Part II explains the basics of asylum and withholding and discusses the elevated standard of proof required to win withholding. Part III discusses the changes in the law enacted by IIRIRA, specifically focusing on the implementation of the one-year filing deadline as well as the provisions which stripped federal courts of jurisdiction to review one year issues. Part III also explains the severe limitations of the rights granted to winners of withholding status, as opposed to asylum status, in order to understand the human impact of the changes in the law. Part IV argues that the changes in the law have had particularly harsh consequences for individuals seeking asylum based on their sexual orientation, transgender identity, or HIV-positive status. It also describes particular examples of exceptions to the law which are likely to apply to these groups. The Article concludes with an appeal for the elimination of the one-year filing deadline, or, short of that, for a liberal application of the exceptions to ensure that deserving applicants are not removed to countries from which they are legitimately seeking protection.

II. IMMIGRATION LAW BASICS

A. *The Basics of Asylum Eligibility*

Asylum is a discretionary form of relief granted by the U.S. government to foreign nationals who fit within the definition of a refugee.⁵ The adjudication of asylum claims falls within the juris-

² See *infra* Part III.A. for a fuller discussion of the background to the 1996 changes in the law.

³ Immigration and Nationality Act (INA) § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2000). The 1996 changes to the INA replaced the term “deportation” with “removal.” INA § 239, 8 U.S.C. § 1229 (2004). Since older cases and articles use the term “deportation,” this Article will use the two terms interchangeably.

⁴ While the Immigration and Nationality Act uses the term “alien” to describe individuals who are not U.S. citizens, this Article uses the term “foreign national” unless it is quoting directly from another source. Many commentators, including the Authors, find the term “alien” offensive. See also Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 12 n.64 (2001) [hereinafter *Improved but Still Unfair*] (discussing the choice to use the term “alien” in their article).

⁵ A person is granted “refugee” status if she makes her application and is granted

diction of asylum officers who function within the Citizenship and Immigration Services (CIS) branch of the Department of Homeland Security (DHS)⁶ and the immigration courts of the Department of Justice.⁷ Applicants may initially file for relief with CIS which has independent authority to grant asylum.⁸ If a CIS asylum officer denies the application and the foreign national does not have legal status at the time of the asylum officer's decision,⁹ she will be immediately placed in removal proceedings.¹⁰ At that time, she may renew the application before an immigration judge.¹¹ Asylum applications can also be filed defensively when a foreign national is placed in removal proceedings for an unrelated reason.¹² Defensive asylum applications are adjudicated by the immigration

protection while still outside the United States. Although the legal grounds for applying are the same, if the application is made from inside the United States, it is called an "asylum" application. See *infra* text accompanying note 14 for the definition of a "refugee."

⁶ See U.S. Citizenship and Immigration Services, Asylum Program Overview, available at <http://uscis.gov/graphics/services/asylum/overview.htm> (last visited Aug. 31, 2005). See also 8 C.F.R. §§ 208.1, 208.2 (2004). In 2004, the Department of Homeland Security (DHS) was created and the functions of the former agency, the Immigration and Naturalization Service (INS), were divided among agencies within DHS. Immigration and Customs Enforcement (ICE) is the enforcement branch of DHS and oversees the trial attorneys in removal proceedings. The U.S. Citizenship and Immigration Services (CIS) is the service branch of DHS which oversees the asylum offices. See Immigration Law Review, *The INS No Longer: Immigration and Asylum under the Department of Homeland Security*, THE LESBIAN AND GAY IMMIGRATION RIGHTS TASK FORCE STATUS REPORT 1, 4 (2003), available at <http://www.immigrationequality.org/uploadedfiles/1newsletter2003.pdf>.

⁷ See U.S. Department of Justice, Executive Office for Immigration Review, Organization and Information Breakdown, available at <http://www.usdoj.gov/eoir/orginfo.htm> (last visited Sept. 1, 2005). See also 8 C.F.R. §§ 208.1 and 208.2 (2004).

⁸ 8 C.F.R. § 208.14(b) (2004).

⁹ If an applicant has lawful status at the time that the application is denied, she will be issued a Notice of Intent to Deny by the asylum office. The applicant then has 16 days to present rebuttal evidence before the asylum office will make a final decision on the application. If the applicant is still unsuccessful, the asylum application will be denied and the applicant will be able to continue to remain in the United States for the duration of her lawful status. There is no appeal at this point, although the applicant may again apply for asylum after falling out of status, at which point if she is again unsuccessful at the asylum office, she will be placed in removal proceedings. 8 C.F.R. § 208.14(c). See also U.S. Citizenship and Immigration Services, Types of Asylum Decisions, at <http://uscis.gov/graphics/services/asylum/types.htm#notice> (last visited Mar. 1, 2005).

¹⁰ *Id.*

¹¹ 8 C.F.R. § 208.4(b)(3)(i) (2004).

¹² Examples of ways in which foreign nationals may also be placed in removal proceedings include (1) arriving in the United States without a proper visa, (2) being discovered working illegally in an ICE raid, (3) being unable to produce proper documentation of legal status if stopped by an immigration official near the border or at an airport, or (4) after coming into contact with local police by committing a crime or driving infraction.

judge in the same way as affirmative applications. In deciding whether to grant asylum, these officers and judges must first determine whether an applicant meets the definition of a refugee,¹³ which was adopted into U.S. law pursuant to international obligations under the United Nations Protocol Relating to the Status of Refugees of 1967.¹⁴

To satisfy the definition of refugee, an individual must prove that she has suffered past persecution or has a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion.¹⁵ While the INA does not define "persecution," courts have recognized its presence in cases where the applicant has suffered physical harm, such as repeated physical assaults,¹⁶ female genital mutilation¹⁷ or confinement and torture.¹⁸ Additionally, courts have found the existence of persecution in cases where the applicant was subjected to a severe non-physical injury, such as intense discrimination or severe economic deprivation.¹⁹

When an applicant can demonstrate that past mistreatment on account of one of the five protected grounds rises to the level of persecution, he meets the definition of refugee.²⁰ Moreover, once an applicant has established that past persecution has occurred, he is entitled to a rebuttable presumption of future persecution.²¹ If no past persecution has occurred, or past mistreatment is not se-

¹³ INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2000).

¹⁴ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (discussing the definition of a refugee found in the Refugee Act of 1980 and holding that "[i]f one thing is clear from the legislative history of the new definition of 'refugee' . . . it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968."). For an excellent discussion of the statutory history and development of asylum law, see Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L & COMP. L.J. 255 (1996).

¹⁵ INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2000); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000).

¹⁶ See *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (holding that a Moroccan woman suffered persecution because her father found her to be too liberal and often beat and isolated her).

¹⁷ See *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (holding that a 19-year-old woman's fear of ritual female genital mutilation in Togo constituted persecution).

¹⁸ *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997) (holding that a man's fear of facing prosecution, detention, and economic problems in China constituted persecution).

¹⁹ Karen Musalo, *Ruminations on In re Kasinga: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 362-63 (1998).

²⁰ 8 C.F.R. § 208.13(b)(1) (2004).

²¹ 8 C.F.R. § 209.13(b)(1) (2004).

vere enough to constitute persecution, an applicant must affirmatively prove that he has a well-founded fear of future persecution in order to qualify for asylum.²²

Initially, some circuits interpreted the statute to require that persecution be more likely than not in order for an applicant to be eligible for asylum.²³ Over time, however, the standard has eased. In *INS v. Cardoza-Fonseca*,²⁴ a Nicaraguan woman sought to prove a well-founded fear of persecution based on the imprisonment and torture of her brother as a result of his anti-governmental political actions. The woman argued that although she had not personally participated in any of the political activities, her relationship to and association with her brother put her at risk of persecution in the form of interrogation and torture.²⁵ After applying withholding of removal's "clear probability of persecution" standard to her asylum claim, the immigration judge hearing the case found that the woman had failed to prove that she was eligible for discretionary relief.²⁶ On appeal, the BIA²⁷ affirmed the immigration judge's opinion, acquiescing to the use of the clear probability standard.²⁸ However, the Ninth Circuit overturned the BIA decision, specifically rejecting "clear probability" in favor of a more generous standard.²⁹ The case was granted certiorari to resolve what had become a circuit conflict.³⁰ Instead of requiring that persecution be more likely than not, the Supreme Court relied on authority stating that even a one in ten chance (and possibly less) of facing future persecution should be sufficient to warrant a well-founded

²² 8 C.F.R. § 209.13(b)(2) (2004).

²³ See, e.g., *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982) (finding that the government's application of a clear probability standard had generally been accepted for relief against deportation before the Refugee Act of 1980, and that the standard still applied in asylum cases subsequent to the Act); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977) (converging the clear probability standard and the well-founded fear standard); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967) (limiting the attorney general's discretionary suspension of deportation to cases where there was a clear probability of persecution).

²⁴ 480 U.S. 421 (1987).

²⁵ *Id.* at 424-25.

²⁶ *Id.* at 425.

²⁷ In immigration cases, foreign nationals appeal from decisions by immigration judges to an administrative appellate body, the BIA. 8 C.F.R. § 1003.1 (2004). Appeals from the BIA are taken directly to the federal court of appeals. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2004).

²⁸ See *Cardoza-Fonseca*, 480 U.S. at 425.

²⁹ *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453-54 (9th Cir. 1985).

³⁰ See *Cardoza-Fonseca*, 480 U.S. at 426. See, e.g., *Rejaie*, 691 F.2d at 146; *Kashani*, 547 F.2d at 379; *Cheng Kai Fu*, 386 F.2d at 753.

fear.³¹ This change in the standard of proof dramatically increased the ability of applicants to succeed with their claims for asylum in the United States.³²

B. The Particular Social Group Ground for Asylum Eligibility

In addition to liberalizing the persecution standard, over the last twenty years, the U.S. government has also expanded the basis through which applicants can qualify for asylum under the “particular social group” category. As described in the previous Part, to qualify for asylum, an applicant must demonstrate that the persecution she experienced was on account of one of five protected grounds.³³ Of the five grounds, the particular social group category has been described as the “most elastic and nebulous”³⁴ as it encompasses “persons of similar background, habits or social status.”³⁵ The BIA defines particular social groups to include persons who “share a common, immutable characteristic . . . [which] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”³⁶ Over time, this ground for relief has expanded to include groups based on gender, including women who have been subjected to female genital mutilation and domestic violence,³⁷ groups based on sexual orientation,³⁸ and even some groups based on transgender and HIV status.³⁹

³¹ *Cardoza-Fonseca*, 480 U.S. at 431.

³² In 1987, the year in which the Supreme Court distinguished “clear probability” from “well-founded fear,” the approval rate for asylum applications rose to 54% from 30% the previous year. U.S. DEP’T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 56 (Sept. 2004), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>.

³³ 8 C.F.R. § 208.13(b)(1) (2004).

³⁴ Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L.J. 281, 282 (2002).

³⁵ *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (establishing the nature of the particular social group and quoting the UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶¶ 77-78 (1979) U.N. Doc. HCR/IP/4/Eng./Rev.1, available at www.unhcr.org).

³⁶ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (rejecting the claim that taxi cab drivers from El Salvador constituted a particular social group because they could have changed jobs without interfering with their fundamental identity).

³⁷ See generally Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003).

³⁸ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

³⁹ See *infra* Part II.C.

C. *Sexual Orientation, Transgender Identity, and HIV Status as Particular Social Groups*

In 1990, the same year that the ban on homosexual immigration was lifted,⁴⁰ the BIA upheld a grant of withholding of deportation to a gay man from Cuba in a then unpublished decision entitled *Matter of Toboso-Alfonso*.⁴¹ Although Toboso-Alfonso was denied asylum by the immigration judge because of certain criminal convictions, he was granted withholding of deportation. The immigration judge found that his forced registration with the government, frequent police detention, and sentencing to hard labor, constituted persecution on account of his membership in a particular social group, namely homosexual men.⁴²

The case was designated as precedent by Attorney General Janet Reno in 1994, thereby requiring asylum officers, immigration courts, and the BIA to follow the holding in all similar cases.⁴³ Although it is impossible to know the exact number of asylum applicants who have filed claims based on sexual orientation, transgender identity, or HIV status,⁴⁴ it is probable that thousands of foreign nationals have been granted asylum in the United States on these grounds since 1994.⁴⁵

In addition to the grants of asylum based on sexual orientation, some cases by transgender individuals have been successful. For example, the Ninth Circuit granted asylum and withholding to a Mexican transgender individual who had been raped by local police and stabbed with a knife by an angry mob in *Hernandez-Montiel v. INS*.⁴⁶ Although the court did not address whether transgender identity constituted a particular social group, or decide whether Hernandez-Montiel was in fact transsexual, it did find that he qualified for asylum on account of his membership in the particular

⁴⁰ Robert C. Leitner, Note, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 686 (2004).

⁴¹ See *Toboso-Alfonso*, 20 I. & N. Dec. 819.

⁴² *Id.* at 819-21.

⁴³ *Reno Designates Gay Case as Precedent*, 71 INTERPRETER RELEASES 859 (1994) (discussing Att'y Gen. Order No. 1895-94 (June 19, 1994)).

⁴⁴ CIS does not keep statistics which break down asylum claims by the ground under which the applicant has applied. See Victoria Neilson, *Homosexual or Female: Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417, 418 (2005).

⁴⁵ Lavi Soloway, one of the founders of Immigration Equality, estimated that approximately 2000 asylum applications had been filed based on sexual orientation. Symposium, *Recent Developments in International Law*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 187-88 (2000-2001).

⁴⁶ *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000).

social group of gay men with female sexual identities.⁴⁷

Four years later, in *Reyes-Reyes v. Ashcroft*,⁴⁸ the Ninth Circuit granted a petition for review and remanded a transgender applicant's claims for relief under the Convention against Torture⁴⁹ and for withholding of removal.⁵⁰ The case involved a male to female transgender person from El Salvador who had been kidnapped, raped, and beaten by a group of men who threatened him⁵¹ with future assaults.⁵² The court held that Reyes belonged to the same particular social group as Hernandez-Montiel and characterized him as a gay man with "deep female identity."⁵³ Thus, while there have been successful asylum cases by transgender individuals, there are currently no precedential decisions which have established transgender identity as a recognized particular social group.⁵⁴

Similarly, although there has not been a precedential decision finding that HIV-positive status constitutes membership in a particular social group, there have been a few asylum grants based on HIV status.⁵⁵ In one such non-precedential case, a woman from

⁴⁷ *Id.* at 1087. This Article uses the male pronoun to describe Hernandez-Montiel because that is the pronoun used by the court in its decision.

⁴⁸ 384 F.3d 782 (9th Cir. 2004).

⁴⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

⁵⁰ The court found that it lacked jurisdiction to hear Reyes's claim for asylum because he filed well beyond the one-year filing deadline. 384 F.3d at 786-787.

⁵¹ This Article uses the male pronoun to describe Reyes because that is the pronoun used by the court in its decision.

⁵² 384 F.3d at 785.

⁵³ *Id.* at 785, n.1 (commenting that Reyes's sexual orientation, for which he was targeted, and his "transsexual behavior, are intimately connected").

⁵⁴ For one example of a successful claim by a transgender woman from Argentina, see Melissa Castillo-Garsow, *An Odyssey to Asylum*, GAY CITY NEWS, Dec. 30, 2004–Jan. 5, 2005, available at http://www.gaycitynews.com/gcn_353/anodysseytoasylum.html (last visited Sept. 1, 2005). Additionally, the Author is personally aware of other cases based on transgender identity which have been granted both by asylum officers and immigration judges, but none of these cases have precedential value.

⁵⁵ See generally Victoria Neilson, *On the Positive Side: Using a Foreign National's HIV-Positive Status in Support of an Application to Remain in the United States*, 19 AIDS & PUB. POL'Y J. 45, 48 (2004) [hereinafter *On the Positive Side*]. See also Victoria Neilson, *HIV-Based Persecution in Asylum and Immigration Decisions*, 31 HUM. RTS. 8 (2004) (a condensed version of *On the Positive Side: Using a Foreign National's HIV-Positive Status in Support of an Application to Remain in the United States*, 19 AIDS & PUB. POL'Y J. 1 (2004)). In a recent case, *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005), the Ninth Circuit reversed and remanded the BIA's decision that a gay, HIV-positive man from Lebanon did not have a well-founded fear of persecution if he had to return to his country. While the Court did not explicitly hold that Karouni's HIV-positive status made him a member of a particular social group, the Court did note that the INS had adopted a position "that homosexuals *do* constitute a particular social group." *Id.* at 1171. Even more recently, in *Boer-Sedano v. Gonzalez*, 418 F.3d 1082 (9th Cir. 2005), the

India won a grant of asylum from an immigration judge in 2000. The judge found that “married women in India who have contracted HIV, who fear that their families will disown them or force them to get a divorce, and who wish to or need to be employed” constitute a particular social group.⁵⁶ It should be noted that this case was unusual because the Indian Supreme Court had recently ruled that HIV-positive individuals could not marry in India. As a result, since she was married, the applicant could have faced criminal prosecution because of her HIV-positive status.⁵⁷ In many HIV-based claims, it is difficult to show this level of governmental animus. Although many HIV-positive individuals fear returning to their countries because there is little or no advanced HIV treatment available, in general, the United States does not recognize that such hardship-based claims amount to government sponsored or sanctioned persecution.⁵⁸

Despite these significant advances in protecting the rights of lesbian, gay, bisexual, transgender (LGBT) and HIV-positive people, innumerable deserving claimants have undoubtedly been denied asylum in the United States because of an unjust and unnecessary time limitation imposed by the INA.⁵⁹ Although applicants may fit the definition of refugee and may be at great danger of persecution or even death if returned to their countries of origin, once they miss the one-year filing requirement they are statutorily ineligible for asylum with few exceptions.

D. *The Basics of Withholding Eligibility*

When asylum seekers miss the one-year filing deadline their primary hope of remaining in the United States is through a grant of withholding of removal.⁶⁰ Withholding is a form of relief that is related to asylum, but which carries a higher standard of proof and offers greatly reduced rights and privileges. Like asylum, it is a do-

Court analyzed the applicant’s HIV-positive status and determined that based on his health it would be unreasonable to require him to relocate within Mexico.

⁵⁶ *Ostracism, Lack of Medical Care Support HIV-Positive Alien’s Asylum Quest, IJ Rules*, 78 INTERPRETER RELEASES 233 (2001).

⁵⁷ *Id.* at 234.

⁵⁸ *See On the Positive Side*, *supra* note 55, at 47-48.

⁵⁹ *See infra* Part IV for a complete discussion of the impact of the one-year filing deadline on LGBT and HIV-positive individuals fleeing persecution.

⁶⁰ There are several other humanitarian forms of relief for which an applicant who is denied asylum may be eligible, including relief under the Convention against Torture, deferred action, and private bills. *See* Convention against Torture *supra* note 49. These forms of relief are generally more difficult to obtain than withholding of removal, and are beyond the scope of this Article.

mestic remedy derived from the United States' international obligations pursuant to the 1951 Refugee Convention, which contains a non-refoulement provision.⁶¹ Although the same application form is used for asylum, withholding of removal, and relief under the Convention against Torture,⁶² withholding cannot be granted by an officer of CIS; it can only be granted by an immigration judge.⁶³ Another feature distinguishing withholding from asylum is that withholding is mandatory if an applicant proves eligibility, whereas asylum is a discretionary grant of relief.⁶⁴ Even if an applicant wins withholding, the limited rights which attach to the status make it nearly impossible for an individual who wins withholding to ever lead a normal, fully integrated life in the United States.

As with asylum, a withholding applicant who can demonstrate past persecution on account of one of the five protected characteristics⁶⁵ is entitled to a rebuttable presumption that she will suffer future persecution.⁶⁶ However, if a withholding applicant is unable to demonstrate past persecution, she must meet a much higher legal standard regarding the likelihood of future persecution: she must prove that it is "more likely than not" that she would be persecuted in the future.⁶⁷

The Supreme Court set forth the standard for withholding in *INS v. Stevic*.⁶⁸ In *Stevic*, a Yugoslavian man applied for withholding of deportation following his involvement in an anti-Communist organization.⁶⁹ Initially, the Second Circuit remanded the case for

⁶¹ "Non-refoulement" is a prohibition on the expulsion or return of a refugee to the place where her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 150; see also *INS v. Stevic*, 467 U.S. 407, 416 (1984) (holding that the 1967 Refugee Protocol, to which the United States was a signatory, bound the U.S. to Articles 2-34 of the United Nations Convention Relating to the Status of Refugees); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2001).

⁶² See U.S. CIS, I-589 Application for Asylum and Withholding of Removal, available at <http://uscis.gov/graphics/formsfee/forms/files/i-589.pdf> (last visited Sept. 1, 2005).

⁶³ 8 C.F.R. § 208.16(a) (2004).

⁶⁴ 8 C.F.R. § 208.16(d)(1) (2004). For a discussion of discretionary factors which are relevant to granting asylum as opposed to withholding, see *Kalubi v. Ashcroft*, 364 F.3d 1134 (9th Cir. 2004).

⁶⁵ See *supra* note 15 and accompanying text.

⁶⁶ 8 C.F.R. § 208.16(b)(1)(i) (2004). Although the regulations contain a presumption of future persecution for withholding applicants just as they do for asylum applicants, in practice the Author has found that judges tend to invoke a higher standard for finding past persecution in withholding cases.

⁶⁷ 8 C.F.R. § 208.16(b)(2) (2004).

⁶⁸ 467 U.S. 407 (1984).

⁶⁹ *Id.* at 410.

reconsideration after finding that the reasonable fear of persecution standard⁷⁰ employed in asylum cases was also appropriate for withholding cases.⁷¹ The Supreme Court overturned the ruling, explaining that “the ‘clear probability of persecution’ standard remain[ed] applicable to . . . withholding of deportation claims.”⁷² The Court further held that an application for withholding may only be successful if it is “supported by evidence establishing that it is more likely than not that the alien would be subject to persecution”⁷³

In 1997, the BIA offered some clarification on the type of evidence required to establish a claim based on persecution. In *In re S-M-J*, the BIA held that although an applicant’s credible testimony could suffice to prove an asylum or withholding claim, an applicant should nevertheless “provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available,” and where “such evidence is unavailable, the applicant must explain its unavailability”⁷⁴

Given the higher standard of proof for withholding, it is often impossible for a withholding applicant to document her claim adequately.⁷⁵ Since the same evidence is used in both an applicant’s

⁷⁰ See *supra* Part II.A.

⁷¹ *Id.* at 412 (The Supreme Court rejected the Court of Appeals’ conclusion that, in the Refugee Act of 1980, Congress had abandoned the “clear probability of persecution” standard and substituted the “well-founded fear of persecution” language in order to comply with the definition of a refugee posited United Nations Protocol Relating to the Status of Refugees.). See also *supra* note 14. The Court held instead that “to the extent such a standard can be inferred from the bare language [of the provision], it appears that a likelihood of persecution is required.” *Stevic*, 467 U.S. at 408.

⁷² *Id.* at 430.

⁷³ *Id.*

⁷⁴ *In re S-M-J*, 21 I. & N. Dec. 722, 724 (B.I.A. 1997). See also Brian P. Downey & Angelo A. Stio III, “Of Course We Believe You, But . . .” *The Third Circuit’s Position on Corroboration of Credible Testimony*, 48 VIL. L. REV. 1281, 1293-00 (2003) (discussing the Second, Third, and Ninth Circuits’ disagreement with the evidentiary requirements of *Matter of S-M-J*). The recently enacted REAL ID Act has codified this requirement for collaboration or detailed explanation as to its unavailability. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

⁷⁵ See Virgil Wiebe, et al., *Asking for a Note From Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, 1 IMMIGR. & NAT’LITY L. HANDBOOK 414 (Randy P. Auerbach ed., 2001-02) (commenting that evidence of arrests, detention, identity, nationality, presence in a refugee camp, place of birth, media accounts of large demonstrations, publicly held office, and medical treatment, all of which have been suggested as necessary corroborating evidence by the BIA, may be extremely difficult for an applicant to find while they are outside of their home country, and may be dangerous for the applicant’s family to obtain within the home country).

claims for asylum and for withholding, when an immigration judge finds that an applicant has not met the standard of proof for asylum, the withholding claim must also necessarily fail. That is, because the standard for withholding is higher than that for asylum, if an applicant fails to demonstrate a well-founded fear of persecution, she also fails to prove that it is more likely than not that she will be persecuted if she is returned to her country of origin. However, even when withholding is granted, recipients face great obstacles to life in the United States because the opportunities provided by the relief are substantially fewer than those provided to asylees.

E. The Effects of Winning Asylum Versus Withholding of Removal

Asylum is a very good status to hold under U.S. immigration law. As an asylee, a foreign national is entitled to work in the United States without having to file for an employment authorization document.⁷⁶ An individual with asylum status can also obtain an unrestricted social security card.⁷⁷ Additionally, an asylee can apply for derivative asylum status⁷⁸ for her immediate relatives, including her opposite sex spouse or minor children, and may apply for a refugee travel document which will allow for travel abroad.⁷⁹

⁷⁶ INS Memorandum from William Yates, Acting Associate Director, Operations, Bureau of Citizenship and Immigration Services, to Regional Directors, *The Meaning of 8 C.F.R. 274a.12(a) as it Relates to Refugee and Asylee Authorization for Employment*, HQADJ 70/21.1.13 (on file with Immigration Equality), available at <http://uscis.gov/graphics/lawsregs/handbook/Asylees031003.pdf> (last visited Sept. 1, 2005).

⁷⁷ Most foreign nationals who have employment authorization in the United States are issued "restricted" social security cards which contain the notation "valid only with INS employment authorization." See SOCIAL SECURITY ONLINE, DOCUMENTS YOU NEED TO WORK IN THE U.S., available at <http://www.ssa.gov/immigration/documents.htm> (last visited Sept. 1, 2005).

⁷⁸ 8 C.F.R. § 208.21 (2004). Derivative asylum status allows an asylee's relatives to come to the United States as asylees.

⁷⁹ 8 C.F.R. § 223.2 (2004). A refugee travel document functions and looks like a passport. An asylee may not travel to the country from which she claimed persecution or her asylee status may be revoked. Additionally, there are potential risks for asylees traveling abroad if they accrued more than six months of unlawful presence in the United States before filing their applications for asylum. The IIRIRA implemented a three year/ten year bar under which foreign nationals who have accrued six months or more of unlawful presence in the United States cannot return to the United States for three years if they leave the country. Foreign nationals who travel outside the United States after accruing a year or more of unlawful presence cannot return for ten years. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2000). There is no provision in the INA exempting asylees from these bars. Thus, there is a risk for asylees who have accrued unlawful presence to travel internationally until they obtain legal permanent residence. In practice, it does not appear that the three year/ten year bar is routinely enforced against asylees traveling with a refugee travel document, but there is no official communication from CIS unequivocally permitting re-entry for such individuals.

Most importantly, an asylee can apply to adjust her status to that of legal permanent resident one year after receiving asylum.⁸⁰

The law allowing asylees to apply for legal permanent residence includes liberal waiver policies for violations of the immigration law. Violations which would otherwise render an applicant inadmissible, including entering without inspection, entering with fraudulent documents, and suffering from health problems, including HIV, may be waived on humanitarian grounds for asylees.⁸¹ Finally, four years after gaining legal permanent resident status, asylees, like other legal permanent residents, can apply to naturalize as U.S. citizens.⁸² Under the INA, the difference in rights given to asylees and those granted withholding are profound.

One reason that withholding creates obstacles for foreign nationals is that it is a less defined legal status than asylum. The standard for withholding appears in the INA within the section entitled "Detention and Removal of Aliens Ordered Removed."⁸³ Because of this, many attorneys believe that when a foreign national is granted withholding, a final order of removal is simultaneously entered against her.⁸⁴ In fact, neither the statute nor the regulations explicitly state that an order of withholding must be accompanied by a final order of removal.⁸⁵ Still, it is the practice of some immi-

⁸⁰ 8 C.F.R. § 209.2 (2004). Currently, there is a backlog of approximately twelve years for asylees seeking to obtain legal permanent residence. See U.S. CIS, *Citizenship and Immigration Services, Adjustment of Status for Asylees*, at <http://uscis.gov/graphics/fieldoffices/nebraska/asyleeadj.htm> (last visited Jan. 19, 2005). The recently enacted REAL ID Act has removed the cap of 10,000 asylee adjustments per year. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302. It remains to be seen whether CIS assigns enough officers to these cases to significantly reduce the backlog.

⁸¹ INA § 209(c), 8 U.S.C. § 1159(c) (2000).

⁸² 8 C.F.R. § 316.2(a) (2004). Asylees who adjust status are considered legal permanent residents as of the date one year before their residence application was approved. 8 C.F.R. § 209.2(f).

⁸³ INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2000) (stating that "[n]otwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion").

⁸⁴ Information about the consequences of a withholding grant is so hard to come by that every few weeks there are questions posted on the message boards of the American Immigration Lawyers Association (AILA) about what benefits, if any, attach to a grant of withholding. These message boards allow immigration practitioners to pose vexing questions and obtain feedback from other practitioners. AILA message boards are available to AILA members at <http://www.aila.org>.

⁸⁵ In a case decided shortly after the 1980 passage of the Refugee Act, the BIA addressed the standard and consequences of asylum versus withholding. The Immigration Judge had entered an order of deportation and simultaneously ordered that

gration judges to order removal simultaneously with a grant of withholding, and for others to simply grant withholding without entering a removal order.⁸⁶ The *Immigration Judge Benchbook* is silent on this issue, and only instructs judges that they “should note that withholding of deportation confers no immigration benefit other than a prohibition against deportation to a particular country[,]” and that “[t]his benefit may be withdrawn where conditions change in the country from which the applicant fled.”⁸⁷

Thus, unlike asylees who enjoy a statutory right to apply for legal permanent residence after one year, individuals with withholding have no such right.⁸⁸ The INA also contains no provision allowing foreign nationals granted withholding to petition for derivative status for family members.⁸⁹ Moreover, unlike asylees, individuals granted withholding do not have the ability to apply for a refugee travel document.⁹⁰ The effect of this combined lack of

the applicant’s deportation to the People’s Republic of China be withheld. The BIA wrote, “A grant of section 243(h) [the former INA section governing withholding] relief is merely a stay of deportation. Should substantial changes occur in the country from which such relief is granted, or if, for other reasons, the grant should need to be reevaluated, the Service can move for reopening.” *Matter of Lam*, 18 I. & N. Dec. 15, 16 n.2 (B.I.A. 1981).

⁸⁶ Again, there does not appear to be any legal requirement for judges to enter a removal order. In general, when an immigration judge grants relief, she fills out a pre-printed relief check-off form with different options. Some judges simultaneously check-off removal and withholding of removal, whereas others do not enter an order of removal and merely enter the withholding grant. It is unclear whether there is a substantive reason for this difference or merely lack of guidance and consistency. This anecdotal information comes from the Author’s conversations with other practitioners and from immigration listserv discussions on the topic.

⁸⁷ 2 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK 561-62 (4th ed. 2001) (*reprinted by* American Immigration Law Lawyers Association).

⁸⁸ See Anwen Hughes, *Withholding of Removal*, BASIC IMMIGRATION LAW 2004, 139 PLI/NY 327, 332 (2004). Another example of the confusion surrounding the meaning of a grant of withholding status occurred in a recent Ninth Circuit decision concerning a claim for Convention against Torture (CAT) relief. In dicta distinguishing CAT-based withholding from CAT-based deferral of removal, the Ninth Circuit mistakenly wrote: “[w]ithholding entitles the alien to remain indefinitely in the United States and eventually to apply for permanent residence; deferral also prevents removal, but confers no lawful or permanent status.” *Huang v. Ashcroft*, 390 F.3d 1118, 1121 (9th Cir. 2004). In fact, as with INA § 241(b)(3) based withholding, there is no provision for those granted CAT-based withholding to adjust status.

⁸⁹ See Hughes, *supra* note 88, at 332. See also Lori Nessel, “Willful Blindness” to Gender-based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 94, n.90 (2004) (summarizing arguments that prohibitions against family unity are emerging as a potential breach of international law).

⁹⁰ There is no provision in the INA or regulations permitting individuals with withholding to apply for a refugee travel document, nor does the application form (form I-131) indicate that it is intended for use by individuals with withholding status. The

rights is severe. Since an individual granted withholding cannot travel abroad or petition for family members to obtain status in the United States they will often, as a practical matter, never see their family members again.⁹¹

There is one provision in the regulations which is intended to soften the harsh consequences of a withholding grant. The regulations allow an individual who was denied asylum, and who is thereby precluded from petitioning for her spouse or minor children to join her in the United States to ask the judge to reconsider the denial of the asylum application “solely in the exercise of discretion.”⁹² Since asylum applications denied for missing the one-year deadline are denied on a statutory ground rather than as a matter of discretion, the provision does not appear to be available to those who are granted withholding because of the one-year bar on asylum.⁹³ This leads to the anomalous result that individuals who have been denied asylum on discretionary grounds that do not rise to the level of a statutory bar, such as criminal activity, forum shopping, or entering with fraudulent documents,⁹⁴ are treated better under the law than those who merely were unaware of an artificial and recently enacted filing deadline.

Since an individual granted withholding does not have the right to apply for adjustment of status to legal permanent residence, her status in the United States remains forever insecure. This is particularly true because if the United States determines

Refugee Travel Document application form instructions state that “a refugee travel document is issued to a person classified as a refugee or an asylee” U.S. CIS, Form I-131 Instructions, Application for Travel Document 2 (Rev. Apr. 16, 2004), available at <http://uscis.gov/graphics/formsfee/forms/files/I-131.pdf> (last visited Sept. 1, 2005). Although there does not appear to be any authority to issue a refugee travel document to a person who has been granted withholding status, one practitioner on an AILA message board (*see supra* note 84) reported having successfully obtained a refugee travel document for a client with withholding status. This example highlights the fact that CIS employees are probably as confused about the benefits that attach to withholding status as practitioners.

⁹¹ It should be noted that an individual who comes from a country where he fears persecution, almost by definition, also comes from a country from which it is difficult for its citizens to obtain visas to the United States. All foreign nationals applying for tourist visas to the United States must overcome a presumption that they intend to remain in the United States permanently. INA § 214 (B), 8 U.S.C. § 1184(b) (2004). If the individual’s family member is unable to obtain a visa to the United States, the individual who has been granted withholding cannot ever see the family member again. While asylees’ family members may face the same difficulties in obtaining visas to the United States, it is at least possible for the asylee to travel to a neutral third country to which it may be easier for his relatives to travel.

⁹² 8 C.F.R. § 208.16(e) (2004).

⁹³ *See Lam*, 18 I. & N. at 18.

⁹⁴ *See Matter of Salim*, 18 I. & N. Dec. 311 (B.I.A. 1982).

that conditions in her home country have changed such that her fear of persecution no longer exists, she can be removed to that country.⁹⁵ Likewise, if the United States can locate a safe third country that is willing to accept the foreign national, she can be removed to that country.⁹⁶ Therefore an individual who has won withholding may never feel fully secure that she can remain in the United States permanently.

It is also unclear whether an individual with withholding status has the ability to adjust that status to that of legal permanent residence should she secure another means of obtaining residence, such as marrying a United States citizen, applying through the family preference system, winning the diversity visa lottery, or finding an employer sponsor.⁹⁷ The answer to this question may depend on whether the immigration judge issued a final order of removal in the case. In general, in order to be permitted to adjust status to legal permanent residence from within the United States, a foreign national must not be "inadmissible"⁹⁸ and must have maintained lawful status in the United States.⁹⁹ Individuals who have been ordered removed from the United States are inadmissible for ten years after their removal or departure.¹⁰⁰ Asylum applicants who are granted withholding for missing the one-year deadline have, by

⁹⁵ 8 C.F.R. § 208.24(a)(1)(b)(1) (2004); 8 C.F.R. § 208.24(a)(1)(f) (2004).

⁹⁶ 8 C.F.R. § 208.16(f) (2004). Theoretically, for example, this could mean that any foreign national who is Jewish and wins withholding could be removed to Israel because Israel will accept virtually any Jew who wishes to immigrate. Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 279 (1997) [hereinafter *Not Yet a Model*].

⁹⁷ In *Matter of K*, the BIA considered whether a conviction for an aggravated felony should constitute a statutory bar for grants of withholding, as it already did for grants of asylum. The applicant argued that such convictions should not constitute a bar because, unlike asylum, grants of withholding do not lead to permanent residence. The BIA wrote, "[w]e note the policy argument raised by the respondent that it would not necessarily be inconsistent for Congress to make 'danger to the community' a separate and distinct test in section 243(h)(2)(B), and thereby allow for the possibility of an alien convicted of an aggravated felony to qualify for withholding of deportation, even if asylum is categorically denied to aggravated felons, because a grant of asylum contemplates the adjustment of the alien to lawful permanent resident status in this country and withholding only requires that the alien not be deported to the country of persecution." *Matter of K*, 20 I. & N. Dec. 418, 425 (B.I.A. 1991) (interim decision). Here, while the BIA notes that individuals with withholding are not statutorily entitled to adjust status, the BIA does not explicitly rule that they are barred from adjusting status.

⁹⁸ INA § 245(a), 8 U.S.C. § 1255(a) (2000); INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I) (2000).

⁹⁹ 8 C.F.R. § 245.1(b)(6) (2004).

¹⁰⁰ INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I) (2000).

definition, failed to maintain lawful status in the United States.¹⁰¹ Therefore, it seems clear that for most paths to legal permanent residence¹⁰² an individual who was granted withholding would be unable to adjust status.¹⁰³

What remains unclear is whether an individual who has been granted withholding would be able to adjust if she married a U.S. citizen or was sponsored for adjustment by an adult U.S. citizen son or daughter. In general, an adjustment applicant who is being sponsored by a U.S. citizen immediate relative can proceed with her application even if she has not maintained lawful status in the United States, so long as she entered with inspection.¹⁰⁴ Individuals who have been ordered removed from the United States are inadmissible for ten years after their removal or departure.¹⁰⁵ Thus, the ability of an individual who has been granted withholding to adjust status through an immediate relative would seem to be dependent on whether the immigration judge entered an order of removal against the individual with withholding,¹⁰⁶ or on whether the CIS officer adjudicating the adjustment application believes that anyone who has been granted withholding has also been ordered removed.¹⁰⁷ If there is a removal order, or if the local CIS office rejects the adjustment of status application, the individual who had been granted withholding would have to make a motion to reopen the removal proceedings, have the removal order and withholding grant vacated, and ask the judge to adjudicate the adjustment of status application. Since there are strict time limits on reopening removal proceedings, this procedure would

¹⁰¹ Since there is an exception to the one-year filing deadline for individuals who maintain lawful status until a reasonable period of time prior to filing for asylum, any applicant who is denied asylum based on the one-year deadline would have to have been out of status for some period of time prior to filing her application for asylum and withholding. See *infra* Part IV.B.3.

¹⁰² As discussed in the next paragraph, adjustment applications based on sponsorship by an immediate relative who is a U.S. citizen are treated differently than other categories of legal permanent resident applicants.

¹⁰³ Some individuals win withholding rather than asylum because they have criminal convictions which result in the asylum application being denied. Whether individuals with withholding in that category who never accrued unlawful presence in the United States would be eligible to adjust is beyond the scope of this Article.

¹⁰⁴ 8 C.F.R. § 245.1(b)(6) (2004); 8 C.F.R. § 245.1(b)(3) (2004).

¹⁰⁵ INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I) (2000).

¹⁰⁶ See *supra* note 88.

¹⁰⁷ See *supra* notes 85-87. Again, on AILA message boards discussing the possibility of adjustment for individuals with withholding status, some practitioners report having legal permanent residence applications granted without any difficulties. Others have been told by district offices that only the immigration judge had jurisdiction to adjudicate the adjustment application.

probably only be possible if the attorney for Immigration and Customs Enforcement (ICE)¹⁰⁸ agreed to file a joint motion asking the court to reopen the proceedings.¹⁰⁹ If the ICE attorney did not agree to do so, the foreign national would have no way to adjust status or to appeal the ICE attorney's decision not to join the motion.¹¹⁰

Since individuals with withholding cannot obtain legal permanent residence, it goes without saying that they can never naturalize. Thus they can never vote, serve on juries, or otherwise become fully equal members of American society. The limitations of withholding as a status force recipients of the relief into a never-ending legal limbo.¹¹¹

In stark contrast, in legal contexts other than immigration law, individuals who have withholding status are often treated identically to those with asylum status. For example, both asylees and those with withholding status may be eligible to receive welfare, Medicaid, Supplemental Security Income, and Food Stamps for up to seven years upon receiving their status.¹¹² In fact, in this limited area of federal financial assistance, and for certain housing subsidies,¹¹³ foreign nationals who have been granted withholding have

¹⁰⁸ See *supra* note 6 (discussing the various divisions within DHS that are responsible for regulation and enforcing immigration laws).

¹⁰⁹ 8 C.F.R. § 1003.2 (2004). It is also possible for a court or the BIA to reopen a decision *sua sponte* but this power is rarely exercised. 8 C.F.R. § 1003.2.

¹¹⁰ While much of the above discussion is irrelevant to lesbians and gay men who cannot currently enter into relationships which are recognized by the U.S. federal government, the consequences of marriage to a U.S. citizen may be relevant to bisexual, transgender, and HIV-positive foreign nationals.

¹¹¹ Jaya Ramji contends that this limbo status "is arguably contrary to the spirit of the non-refoulement principle and violative of other articles of the Refugee Convention" because the Refugee Convention states that "the Contracting State shall as far as possible facilitate the assimilation and naturalization of refugees." Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 123-24 n.36 (2001).

¹¹² The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105, revoked the eligibility of most foreign nationals, who were not lawful permanent residents, for federal benefits. However, the INA provides that those foreign nationals who do qualify for assistance include asylees and those granted withholding of removal. See 8 U.S.C. §§ 1641(b)(2), (b)(5) (2000) (defining "qualified alien" for the purposes of granting federal public benefits); 8 U.S.C. §§ 1612(a)(2), (b)(2) (2000) (describing the exception to the rule that qualified aliens have limited eligibility for federal public benefits).

¹¹³ Individuals who have been granted asylum or withholding are generally eligible for federal Section 8 housing subsidies as well as for admission into public housing as made available pursuant to 42 U.S.C. §§ 1436a(a)(3), (a)(5) (2004), the United States Housing Act of 1937, 42 U.S.C. § 1437 (2000), 12 U.S.C. §§ 1715z, 1715z-1 (2001), the direct loan program, 42 U.S.C. §§ 1472, 1472(c)(5)(D), 1474,

greater rights than legal permanent residents.¹¹⁴ Individuals with withholding can also receive legal representation from organizations funded by the Legal Services Corporation, even though such funding severely curtails representation of other non-citizens.¹¹⁵

Thus, in federal statutes concerning public benefits, Congress has recognized that withholding is a status comparable to that of asylum. While these benefits have undoubtedly provided an important safety net for the many individuals who have been granted withholding, it is unfortunate that Congress has done nothing to assist those same individuals to obtain the most important benefit of all, the ability to fully integrate into U.S. society by obtaining permanent residence, and, eventually U.S. citizenship.

III. THE IMPACT OF IIRIRA ON INDIVIDUALS FLEEING PERSECUTION

A. *Background on the 1996 Changes in the Law*

In 1996, Congress undertook the most sweeping change of the Immigration and Nationality Act in years.¹¹⁶ IIRIRA substantially changed asylum law by imposing, for the first time, a requirement that foreign nationals seeking asylum submit their applications within one year of entering the United States.¹¹⁷ Prior to the enactment of IIRIRA, the government perceived that many foreign nationals were abusing the asylum process and filing fraudulent claims as a means to obtain interim employment authorization.¹¹⁸ At that time, the backlog in processing asylum claims ran several years. So, hypothetically, a foreign national could have submitted a frivolous application, obtained employment authorization and a Social Security number, and worked for years before the applica-

1490a(a)(2)(A), 1490r (2000), subtitle A of title III of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12851 (2000), and section 101 of the Housing and Urban Development Act of 1965, 12 U.S.C. § 1701s (West 2001).

¹¹⁴ Legal permanent residents who gained their status after the August 22, 1996 effective date of the PRWORA are generally prohibited from receiving SSI or Temporary Aid to Needy Families for the first five years of their status and until they have 40 qualifying quarters of work (generally ten years) in the United States. See 8 U.S.C. §§ 1612(a)(2)(B), (b)(2)(B) (2000).

¹¹⁵ 45 C.F.R. § 1626.5(e) (2004).

¹¹⁶ Commentators have called IIRIRA “the harshest, most procrustean immigration control measure in [the twentieth] century.” See *Improved but Still Unfair*, *supra* note 4, at 1, quoting Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 371 (1999).

¹¹⁷ INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2000).

¹¹⁸ See Stephen H. Legomsky, *An Asylum Seeker’s Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 625-26 (2000); *Improved but Still Unfair*, *supra* note 4, at 9 n.51.

tion would have been adjudicated and eventually denied.¹¹⁹

To address this problem, Congress instituted new rules including: (1) a prohibition on issuing employment authorization until the application had been pending for 180 days, (2) a requirement that applications be adjudicated within a 180-day time period, and (3) a one-year filing deadline.¹²⁰ These new fast track rules for asylum applications meant that applications would either be granted within the 180 days, or the applicant would be placed in removal proceedings. Shortly after the new rules went into effect, former INS Commissioner Doris Meissner stated, “[the] INS has removed the primary incentive for baseless asylum claims.”¹²¹

Advocates were concerned that this new rule would result in the denial of relief to many legitimate asylum seekers.¹²² Congress did recognize that there could be exceptions to the filing deadline and created two categories of exceptions: changed circumstances and extraordinary circumstances.¹²³ Senator Orrin Hatch, Chair of the Senate Judiciary Committee, explained that “the changed circumstances provision will deal with situations like those in which . . . the applicant obtains more information about likely retribution he or she might face if the applicant returned home . . .”¹²⁴ Just before the implementation of the new rule, which required anyone in the United States to file by April 1, 1998 or within one year of his last entry into the United States, the INS saw a surge in asylum applications. It received 5,000 more applications during the final month of pre-deadline eligibility than during the previous

¹¹⁹ As Michele Pistone and Philip Schrag point out, the result of discouraging frivolous asylum applications filed only to receive employment authorization could have been achieved without imposing the one-year filing deadline. Even before the filing deadline was imposed, the INS had amended the regulations and prohibited asylum applicants from receiving employment authorization until after they had won their case. The result was a 62% reduction in asylum applications. *Id.* at 9 n.51.

¹²⁰ INA § 208(d)(5), 8 U.S.C. § 1158(d)(5)(A)(1)(iii) (2000).

¹²¹ See Legomsky, *supra* note 118, at 632 (citing 73 INTERPRETER RELEASES 46 (1996)).

¹²² In a report issued by Human Rights First (then known as the Lawyers Committee on Human Rights), a review of 200 case files found that only 38% of applicants had filed for asylum within one year of entry into the U.S. See *Not Yet a Model*, *supra* note 96, at 271. “Even President Clinton, when signing the IIRIRA into law, promised to ‘correct provisions in this bill that are inconsistent with international principles of refugee protection, including the imposition of rigid deadlines for asylum applications.’” Ramji, *supra* note 111, at 141 (quoting Statement on Signing the Omnibus Consolidated Appropriations Act, 32 WEEKLY COMP. PRES. DOC. 1938 (Sept. 30, 1996)).

¹²³ INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).

¹²⁴ See *Not Yet a Model*, *supra* note 96, at 277.

month.¹²⁵ Subsequently, asylum application rates have steadily declined. In the past year, the number of affirmative asylum applications filed has fallen to 46,200 from a high of nearly 150,000 in 1995.¹²⁶

B. Effects of the Changes in the Law

As discussed in Part I.A., the United States Supreme Court has held that if an asylum applicant faces a 10% risk of persecution if returned to her country, that risk is sufficient to warrant a grant of asylum.¹²⁷ On the other hand, to win withholding of removal, an applicant must demonstrate that she faces a “clear probability” of persecution if removed, or that her risk of persecution is 51% if she is removed to her home country.¹²⁸ This means that an individual fleeing persecution, who fails to file for asylum within one year of entering the United States or to meet an exception to the deadline, will be denied relief even if an adjudicator finds that her likelihood of future persecution is 40%, or even 50%. Compounding the problem is the fact that when Congress enacted IIRIRA, it stripped federal courts of jurisdiction to review the BIA’s determinations about exceptions to the one-year filing deadline.¹²⁹ Worse yet, in 1999, Attorney General John Ashcroft implemented a “streamlining” procedure at the BIA, reducing the traditional three-member panel to a single adjudicator for the majority of BIA appeals. After these changes were made, most of the decisions issued by the BIA simply affirmed immigration judges’ decisions without any written opinion.¹³⁰

¹²⁵ *INS Outlines Changes to Asylum Program Affecting Case Completions, Releases Stats*, 78 INTERPRETER RELEASES 1310, 1312 (Aug. 13, 2001).

¹²⁶ See U.S. DEP’T OF HOMELAND SEC., *supra* note 32, at 46.

¹²⁷ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). See *supra* text accompanying note 31.

¹²⁸ See *INS v. Stevic*, 467 U.S. 407, 416 (1984).

¹²⁹ INA § 208(a)(3), 8 U.S.C. § 1158(a)(3). As this Article was going to press, Congress enacted the REAL ID Act which gives the Courts of Appeal “sole and exclusive means for judicial review of an order of removal entered or issued under any provision of [the] Act.” INA § 242(a)5; 8 U.S.C. § 1252(a)5. This Section should allow for judicial review by the Courts of Appeal of one-year deadline issues.

¹³⁰ See 8 C.F.R. § 1003.1(a)(7). While there have been several cases challenging the BIA streamlining as a violation of due process, thus far courts have upheld the law. Beth Werlin, *American Immigration Law Foundation Legal Action Center Practice Advisory, Update on BIA Affirmance Without Opinion Litigation*, (Dec. 9, 2003), available at http://www.aifl.org/lac/lac_pa_120903.asp. Even without having jurisdiction to review one year issues in asylum cases, federal courts of appeals have been completely overwhelmed with immigration cases following the streamlining procedure. The Second Circuit in 2004 estimated that 44% of its docket is comprised of immigration appeals. In 2002, the year the BIA implemented its streamlining procedures, only 9% of the

In 2003, the most recent year for which statistics are available, the CIS reported that 11,221 applicants who filed affirmatively¹³¹ for asylum were placed in removal proceedings because they did not file within one year of their arrival in the United States.¹³² This is a staggeringly high figure considering that during the same year the total number of new, affirmative applications filed was only 42,114.¹³³ The number is especially high when considering that these statistics do not include asylum applications filed defensively by foreign nationals who are already in removal proceedings. It seems logical to conclude that a higher percentage of asylum seekers would file as a defense to removal proceedings outside the one-year deadline because defensive filings only occur when foreign nationals come into contact with ICE officials who then initiate removal proceedings against them. Such applicants may have been living in the United States for years without ever filing any application for legal status with the U.S. government. In these situations, the foreign national may seek asylum despite having missed the one-year deadline because he has no other option to avoid removal to his country.¹³⁴

Unfortunately, the asylum statistics maintained by the Executive Office of Immigration Review, the office which oversees the immigration courts, do not track one-year filing deadline issues. In 2003, 65,153 asylum applications were filed in immigration court. Of these, 10,918 were granted.¹³⁵ An additional 13,527 cases have

Second Circuit docket consisted of immigration appeals. Tom Perrotta, *Immigration Appeals Surge in Second Circuit*, N.Y. L.J., Nov. 4, 2004, available at <http://www.ny-lawyer.com/news/04/11/110404b.html>. See also Comm. on Fed. Courts, Ass'n of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 THE RECORD 243 (2005), available at http://www.abcny.org/record/2005_1/THE_SURGE_OF_IMMIGRATION_APPEALS.pdf.

¹³¹ See *supra* Part II.A. (explaining that asylum applications may either be filed affirmatively or defensively after a foreign national has been placed in removal proceedings).

¹³² See U.S. DEP'T OF HOMELAND SEC., *supra* note 32, at 67.

¹³³ *Id.* at 58.

¹³⁴ On the contrary, Phillip Schrag and Michele Pistone postulate that the one-year deadline would have a greater effect on affirmative applicants, reasoning that the majority of defensive asylum seekers would be apprehended upon entering the United States without proper documentation and therefore clearly be able to submit their applications within one year of entering. See *Not Yet a Model*, *supra* note 96, at 268. However, in the post-September 11th climate, in which the DHS has emphasized enforcement, foreign nationals are being placed in removal proceedings for even minor immigration violations. Thus, it is more likely today than at the time the law was passed that it affects asylum seekers who file as their only defense to removal proceedings.

¹³⁵ EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEPT. OF JUSTICE, IMMIGRATION

their disposition characterized as “other.”¹³⁶ Regrettably, there is no description in the statistics of what the “other” category includes. It is probable that the category includes grants of withholding of removal, relief under the Convention against Torture, and voluntary departure granted when asylum is denied after trial.¹³⁷ Without breaking the numbers down further, it is difficult to know exactly how the one-year deadline has affected the outcomes in immigration court. However, only one in five applicants who is unsuccessful on an affirmative asylum application prevails before an immigration judge.¹³⁸

It appears that when the filing deadline was first implemented, asylum officers were more inclined to grant exceptions to the rule. From, April 15, 1998 (the date that enforcement of the law went into effect) through December 27, 1998, asylum officers found exceptions in two-thirds of cases affected by the one-year deadline, with only 33.79% of such claims (1,135 out of 3,359) being denied.¹³⁹ Between October 1998 and March 1999, the asylum offices denied 5% of asylum claims (1,390 out of 26,865) for missing the one-year deadline.¹⁴⁰ By 2000, the number of asylum applicants succeeding on their claims for exceptions to the one-year filing deadline had dropped dramatically. More than half of the applicants who had filed beyond the deadline were referred to immigration court without consideration of the merits of their cases.¹⁴¹ Ironically, at the same time that the *Asylum Officer's Train-*

COURTS FY 2003 ASYLUM STATISTICS 9 (Apr. 2004), available at <http://www.usdoj.gov/eoir/efoia/FY03AsyStats.pdf>.

¹³⁶ *Id.*

¹³⁷ Foreign nationals in removal proceedings can request “voluntary departure” meaning that they will leave the United States at their own expense by a certain date in lieu of being deported by the U.S. government. Procedurally this can happen in two ways: (1) a foreign national in removal proceedings can withdraw her application for asylum (14,482 applications were “withdrawn” in 2003, *id.*), and accept voluntary departure, or (2) if the foreign national loses on the merits of his asylum application, provided certain conditions are met, the immigration judge can grant voluntary departure rather than issue a removal order. See INA § 240B, 8 U.S.C. § 1229c (2001). If, however, the foreign national fails to depart, he shall be subjected to fines and be ineligible for most forms of immigration relief for ten years. *Id.*

¹³⁸ Laura Isabel Bauer, *They Beg for Our Protection and We Refuse: U.S. Asylum Law's Failure To Protect Many of Today's Refugees*, 79 NOTRE DAME L. REV. 1081, 1093 (2004).

¹³⁹ See Ramji, *supra* note 111, at 142 n.139.

¹⁴⁰ *Id.* at 142. Unfortunately it is not possible to tell from these statistics how many cases were granted a one-year exception.

¹⁴¹ Pistone and Schrag obtained statistics from the INS Asylum Division of cases filed between October 2000 and June 2001. During that nine month period, asylum officers interviewed 6,198 affirmative applicants who filed their applications beyond the one year deadline. More than half of these applicants, 3,141, were referred to immigration court for missing the one year deadline, without substantive considera-

ing Manual¹⁴² and the regulations were pointing to increased possibilities of meeting a filing deadline exception, asylum officers appeared to have grown increasingly unwilling to grant such an exception.¹⁴³

C. *Exceptions to the One Year Filing Deadline*

Fortunately, the amended INA includes two categories of exceptions to the one-year filing rule. In spite of missing the deadline, an individual may still be eligible for asylum if she can demonstrate “changed conditions” or “extraordinary circumstances” related to the case.¹⁴⁴

In January 1997, following passage of the IIRIRA, the INS published proposed regulations for the legislation. These regulations were implemented as an interim rule in March 1997.¹⁴⁵ Although the period for public comments ended in July 1997, and the INS stated its intention to issue regulations quickly, the final regulations were not promulgated until December 2000.¹⁴⁶

Before the final regulations came into effect, the INS put out an *Asylum Officer Training Manual (Officer Training Manual)* with a lesson plan on the one-year filing deadline.¹⁴⁷ The manual was first released in 1999, and two revised versions were issued in 2001.¹⁴⁸ The *Officer Training Manual* provides useful guidance to asylum officers, explaining how to calculate the entry date for the one-year deadline and offering examples of fact patterns that

tion of the case. See *Improved but Still Unfair*, *supra* note 4, at 30-31. Of the 3,057 applicants whom the asylum officers determined had met an exception to the deadline, 1,876 were granted asylum by the asylum officers. The remaining applications were denied or referred to immigration court on other grounds. *Id.* at 31 n.177.

¹⁴² See discussion *infra* note 149.

¹⁴³ Pistone and Schrag note that “the percentage of late filers who are not excused on the basis of an exceptional pigeonhole has increased steadily - from 37% in FY 1998, to 39% in FY 1999, to 42% in FY 2000, and, as noted above, to 51% most recently.” They also point out that the granting of exceptions to the one year deadline has declined in practice even as the regulations have permitted for greater exceptions than were initially contemplated under the statute. They surmise, “[p]ossibly asylum officers were reluctant, while the ink was still wet on the 1996 immigration law, to reject asylum seekers on what was then a new and, to many, intuitively unfair basis. But as rejections of late filers became a bureaucratic routine rather than a new and therefore closely observed procedure, asylum officers may have become more deadened to the injustice of their rejection decisions.” See *Improved but Still Unfair*, *supra* note 4, at 31.

¹⁴⁴ INA §208(a)(2)(D), 8 U.S.C. §1158(a)(2)(D).

¹⁴⁵ See *Improved but Still Unfair*, *supra* note 4, at 3.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 10-11.

¹⁴⁸ *Id.* at 10 n.56.

should and should not qualify for filing deadline exceptions.¹⁴⁹ As discussed in Part III.D., while the *Officer Training Manual* is a valuable tool in determining potential exceptions to the filing deadline, it is not binding law.

D. *One-Year Filing Deadline Precedent*

1. Board of Immigration Appeals Review

To date, there has been only one precedential BIA case to address the one-year issue directly, *Matter of Y-C*.¹⁵⁰ In that case, Y-C-, a Chinese national, arrived in the United States as an unaccompanied minor and was immediately detained.¹⁵¹ He filed for asylum within a year of his release from detention, while he was still a minor.¹⁵² Although the asylum regulations specifically mention arriving as an unaccompanied minor as an example of the “extraordinary circumstances” exception to the one-year deadline, the BIA still found that an individualized inquiry as to whether Y-C- met the exception was required.¹⁵³ The Board held that since the applicant had arrived at age 15, been detained for a year, and filed within a year after his release, he had demonstrated extraordinary circumstances. The BIA also found it significant that Y-C- had been in removal proceedings since his arrival in the United States, and that the immigration judge could have held a hearing sooner or set a deadline for the Y-C- to file an application. However, the Judge did neither of these things.¹⁵⁴

It is unfortunate that the only case which the BIA chose to publish as precedent¹⁵⁵ on the one-year issue has such clear cut

¹⁴⁹ INS, ASYLUM OFFICER TRAINING MANUAL: ONE YEAR FILING DEADLINE (Nov. 30, 2001), available at http://www.asylumlaw.org/docs/united_states/asylum_officer_training_oneyear_112001.pdf [hereinafter OFFICER TRAINING MANUAL]. One of the problems with the *Officer Training Manual* is that it is not readily available for asylum seekers and their representatives. It can be found on the website of the non-profit, www.asylumlaw.org but not on the DHS website. An additional problem with the *Officer Training Manual* is that although it provides guidance for asylum officers, it is not binding authority. Moreover, if an asylum officer ignores the *Officer Training Manual's* instructions, and does not find a one-year exception in a case in which she should have, that case would merely be referred to immigration court. There, the Manual is not binding authority for immigration judges who are not under the jurisdiction of the CIS or even the DHS.

¹⁵⁰ *Matter of Y-C*, 23 I. & N. Dec. 286 (B.I.A. 2002).

¹⁵¹ *Id.* at 288.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Although the BIA hears approximately 4,000 appeals per year, it generally publishes only around 50 decisions as precedent. The BIA also favors publishing asylum denial over asylum grants cases; it was not until 1987 that the BIA published an asylum

facts. The facts parallel the regulations¹⁵⁶ and the *Officer Training Manual*¹⁵⁷ almost exactly. It would have been more instructive if the BIA had published a decision concerning facts that fall outside of the examples already contemplated in these authorities.

2. Federal Court Review

One of the most troubling aspects of the 1996 changes to the INA is that they stripped the federal courts of the power to review numerous issues,¹⁵⁸ including the failure to meet the one-year filing deadline.¹⁵⁹ Under the INA, foreign nationals who seek to challenge removal orders must first appeal to the BIA, and then jurisdiction vests directly with the federal court of appeals.¹⁶⁰ There have been several cases in which the denial of asylum claims based on the one-year deadline were appealed to federal court. However, in each instance, the court has found that pursuant to the clear language of the INA,¹⁶¹ it lacks jurisdiction to consider

decision in which the applicant was successful in his claim. See Leitner, *supra* note 40, at 696. Some commentators have speculated that the BIA intentionally chooses not to publish successful asylum claims to insure that each decision is reached on a case by case basis and to avoid drawing a “blueprint” for successful claims. Erik D. Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 GEO. IMMIGR. L.J. 1, n.2 (1996). There have been a number of other BIA cases which address the one year issue indirectly. See *In re G-C-L*, 23 I. & N. Dec. 359 (BIA 2002); *In re R-S-H*, 23 I. & N. 629 (BIA 2003). Additionally, as this Article was going to press, the BIA issued a decision *In re A-M*, 231 I. & N. 737 (BIA 2005), in which the Board determined that a recent nightclub bombing in Bali did not warrant a “changed circumstances” exception for an Indonesian Chinese applicant who lived on a different island with a different religious composition from Bali.

¹⁵⁶ See 8 C.F.R. § 208.4(a)(5)(ii) (2000).

¹⁵⁷ OFFICER TRAINING MANUAL, *supra* note 149, at 12.

¹⁵⁸ Other issues include: discretionary decisions by the attorney general; review of bond determinations; and review of many removal decisions where foreign nationals have been ordered removed because of criminal convictions. IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK, 748-750 (8th ed. American Immigration Law Foundation 2002) (discussing INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2004) among others).

¹⁵⁹ INA § 208(a)(3), 8 U.S.C. § 1158(a)(3) (2000). As this Article was going to press, the REAL ID Act was passed, substantially changing the landscape for federal court review of removal proceedings.

¹⁶⁰ See *supra* note 27. An asylum seeker who files affirmatively while in lawful status does not have any opportunity for appeal. If unsuccessful after the asylum interview, the case is over and her only chance for further review is to re-file after she falls out of legal status. Re-filing would then trigger removal proceedings and full appellate review if she loses. See *supra* Part II.A. An individual who files while in lawful status meets a regulatory exception to the one-year filing deadline. See *infra* Part IV.B.2.d.

¹⁶¹ The INA states, “No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2) [where paragraph 2 refers, *inter alia*, to the one year filing deadline and its exceptions].” INA § 208(a)(3), 8 U.S.C. § 1158(a)(3) (2000).

the one-year deadline issue.¹⁶² However, in such cases, it should be noted that the federal courts retain jurisdiction over claims for withholding and relief under the Convention against Torture¹⁶³ because such claims are not subject to the one-year filing deadline.

(a) *Review in Federal Courts of Appeal*

In a recent case, the Ninth Circuit Court of Appeals did open the possibility of reviewing an asylum claim that might be time-barred. In *Lanza v. Ashcroft*¹⁶⁴ the immigration judge denied an Argentinian's claim for asylum, withholding of removal, and relief under the Convention against Torture. The immigration judge found that Lanza's application for asylum was untimely, and that she did not meet one of the exceptions to the one-year filing deadline.¹⁶⁵ The BIA affirmed the immigration judge's decision without opinion.¹⁶⁶ Although the Ninth Circuit would not address the one-year issue directly, it did find that there were two potential reasons that the BIA could have upheld the denial: one was a reviewable claim as to the merits of her case and the other was an unreviewable claim as to whether she met an exception to the filing deadline.¹⁶⁷ Since the BIA affirmed without opinion, the court remanded the case to the BIA for clarification rather than simply refusing to hear the asylum appeal because the immigration judge had found that the applicant missed the one-year deadline.¹⁶⁸

In a similar case, *Haoud v. Ashcroft*,¹⁶⁹ the First Circuit found that when the BIA affirmed the immigration judge's decision without opinion, the case had to be remanded for further consideration. In *Haoud*, as in *Lanza*, the applicant missed the one-year deadline, and this was one of several reasons for the immigration judge's denial of the asylum application. In both cases, the govern-

¹⁶² See *Zaidi v. Ashcroft*, 377 F.3d 678 (7th Cir. 2004); *Tarrawally v. Ashcroft*, 338 F.3d 180, 185 (3d Cir. 2003); *Castellano-Chacon v. INS*, 341 F.3d 533, 544 (6th Cir. 2003); *Tsevegmid v. Ashcroft*, 318 F.3d 1226, 1229-30 (10th Cir. 2003); *Fahim v. INS*, 278 F.3d 1216, 1217-18 (11th Cir. 2002); *Ismailov v. Reno*, 263 F.3d 851, 854 (8th Cir. 2001); *Hakeem v. INS*, 273 F.3d 812, 815-16 (9th Cir. 2001). In a recent decision involving a claim for asylum and withholding by a gay man from Botswana, the Eighth Circuit held that it lacked jurisdiction to review the applicant's claimed "extraordinary circumstance" of recently "coming out." *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004).

¹⁶³ Convention against Torture, *supra* note 49.

¹⁶⁴ *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004).

¹⁶⁵ *Id.* at 919.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 928-29.

¹⁶⁸ *Id.* at 932.

¹⁶⁹ *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003).

ment argued that the decision was unreviewable. Finally, the First Circuit determined that the case had to be remanded for further consideration as the Ninth Circuit had done in the *Lanza* case.¹⁷⁰

The willingness of federal appellate courts to remand cases in which it is unclear whether the one-year rule was the ground for denial provides some hope to litigants. At a minimum, the courts of appeals have recognized that a litigant must be provided with an explanation for the denial of an asylum claim. Unfortunately, however, these cases may just be delaying the inevitable. If the BIA clarifies that its reason for affirming the immigration judge's decision was based upon the failure to file within one year, the applicant will lose the claim and the court will likely not offer further review.

(b) *Federal Habeas Review*

Although the INA bars federal courts from direct review of one-year filing deadline decisions, it may be possible to review such decisions through *habeas corpus* petitions.¹⁷¹ In *INS v. St. Cyr*,¹⁷² a Haitian man in removal proceedings was denied access to discretionary relief from deportation after he had pled guilty to an aggravated felony. However, the man had entered the plea agreement before the IIRIRA was enacted and before there was a restriction on relief for aggravated felons.¹⁷³ The INS retroactively applied the 1996 law to his old conviction, and St. Cyr appealed to the Supreme Court in a *habeas corpus* petition.¹⁷⁴ The INS both defended its interpretation of IIRIRA and opposed St. Cyr's right to use a *habeas* petition to appeal its decision.¹⁷⁵ After it granted *certiorari*, the Supreme Court held that although statutory provisions might restrict certain kinds of judicial review, matters of law through the *habeas* process could not be so restricted.¹⁷⁶ The holding of *St. Cyr*

¹⁷⁰ *Id.* at 207-08.

¹⁷¹ Historically, the writ of *habeas corpus* has been a primary vehicle for obtaining judicial review of immigration decisions. 28 U.S.C. § 2241 confers *habeas* jurisdiction in cases where individuals are in custody of the U.S. government or under color of government authority and in violation of their constitutional rights. Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction - Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245, 256 (1997).

¹⁷² *INS v. St. Cyr*, 533 U.S. 289 (2001).

¹⁷³ *Id.* at 293. In addition to the imposition of the one-year filing deadline, the 1996 IIRIRA also repealed § 212(c) of the INA which had given the Attorney General the discretion to waive the inadmissibility of certain aggravated felons like St. Cyr.

¹⁷⁴ *Id.* at 293.

¹⁷⁵ *Id.* at 297.

¹⁷⁶ *Id.* at 314 (holding that the absence of a forum in which questions of law could be answered "coupled with the lack of a clear, unambiguous, and express statement of

is equally important for asylum seekers because federal courts may exercise jurisdiction over one-year filing deadline issues through *habeas* petitions.

Recently, in *Kanivets v. Riley*, the Eastern District Court of Pennsylvania found that it had *habeas corpus* jurisdiction over the case of a Jewish man from Kyrgyzstan who had lost his appeal in front of the BIA and had received a letter with a date to appear for removal from the United States.¹⁷⁷ One of the legal issues raised in the *habeas* review was whether the immigration judge had erred¹⁷⁸ in finding that Kanivets's asylum application was time barred. The District Court found that, "[a]lthough the time limitation is not reviewable under I.N.A. § 208(a)(3), application of the 'changed circumstances' exception is a legal issue reviewable on writ of *habeas corpus*, as preserved by the Supreme Court in *St. Cyr*."¹⁷⁹ The Court therefore concluded that the immigration judge had committed legal error by failing to consider Kanivets's changed circumstances arguments that conditions had deteriorated in Kyrgyzstan after he had left and that it was not until his mother apprised him of how dangerous conditions had become that he decided to file for asylum.¹⁸⁰ Based on this finding, the court remanded the case to the BIA for further proceedings.¹⁸¹

The importance of finding *habeas* jurisdiction over the legal issue of whether an asylum applicant meets one of the statutory exceptions to the one-year filing deadline cannot be overstated. With the BIA increasingly deciding cases without opinion, and with federal courts of appeals unanimously finding that they lack jurisdiction to review one-year issues, *habeas* proceedings may be the only means by which an asylum applicant can seek review of an immigration judge's erroneous legal finding about a deadline exception. Moreover, because of the great difference between the burdens of proof in asylum and withholding cases, recognizing that an asylum claim fits within an exception to the one-year filing

congressional intent to preclude judicial consideration on *habeas*" necessitate the preservation of judicial review).

¹⁷⁷ *Kanivets v. Riley*, 320 F. Supp. 2d 297, 298-99 (E.D. Pa. 2004) [hereinafter *Kanivets III*]. See also *Kanivets v. Riley*, 286 F. Supp. 2d 460 (E.D. Pa. 2003) (granting a stay of removal pending the determination of the *habeas* petition).

¹⁷⁸ The BIA dismissed Kanivets's appeal without opinion, so the federal court only had the immigration judge's decision to review. *Kanivets*, 286 F. Supp. 2d at 463.

¹⁷⁹ *Kanivets II*, 320 F. Supp. 2d at 300.

¹⁸⁰ *Id.* at 300-01.

¹⁸¹ *Id.* at 301. Unfortunately, the Court stops short of finding that the facts presented meet the legal standard for changed circumstances and instead remands the case to the BIA for further proceedings to consider the possibility. *Id.*

deadline often makes the difference between obtaining lawful status in the United States and being returned to the country from which the individual fled.

IV. THE EFFECT OF THE ONE-YEAR FILING DEADLINE AND ITS EXCEPTIONS ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND HIV-POSITIVE FOREIGN NATIONALS

A. *Meeting the One-Year Filing Deadline*

Applying for asylum is a complex and difficult process for anyone. The applicant must discuss and write out in detail the worst experiences of her life.¹⁸² Generally the applicant will have to review these experiences multiple times with an attorney, then perhaps with an expert witness, and finally in front of an asylum officer and/or an immigration judge. Many asylum seekers come to the United States with very limited financial resources, limited English speaking abilities, and little or no knowledge of the legal system.¹⁸³ For an individual struggling to keep a roof over her head and food on the table in a foreign land, getting to work immediately on a complex, potentially expensive, and emotionally difficult immigration application is often impossible.¹⁸⁴

For applicants seeking asylum based on sexual orientation, transgender identity, or HIV status, the impediments to filing within one year are even greater.¹⁸⁵ Many LGBT and HIV-positive foreign nationals have no idea that they can seek asylum based on their fear of persecution because of sexual orientation, gender

¹⁸² Many refugees suffer from post-traumatic stress disorder which makes it even more difficult for them to relate the details of the persecution they have suffered. See *Improved but Still Unfair*, *supra* note 4, at 49.

¹⁸³ See *Improved but Still Unfair*, *supra* note 4, at 8; Ramji, *supra* note 111, at 143.

¹⁸⁴ "Refugees had many different reasons for having waited for more than a year before filing. The reasons included: ignorance of the asylum process; more urgent needs to find family, friends, food and shelter in the United States; the inability, following torture and the onset of post-traumatic stress syndrome, to tell their stories to advocates, much less official governmental authorities; the inability to pay lawyers or locate free sources of professional assistance; the inability to obtain promptly the documents needed to file for asylum or prove a claim; and deliberate decisions to wait before filing for asylum, hoping that conditions would change for the better and permit the refugee to return home." *Not Yet a Model*, *supra* note 96, at 271.

¹⁸⁵ In a 1998 symposium, immigration attorney Noemi Masliah explained, "proving that he is gay or that she is a lesbian is not enough." The applicant must articulate a real fear of return to his or her country and, "for many reasons, cultural, emotional, etc., this hurdle may be insurmountable and could require hours of guidance and preparation, both of the application and the applicant's eventual testimony." Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 500 (1998).

identity, or HIV status.¹⁸⁶ While many individuals around the world are probably aware of the concept of a “refugee” and the notion that a person who faces persecution because she holds political opinions which contradict those of her government may be able to seek refuge in another country,¹⁸⁷ LGBT and HIV-positive individuals, especially those who come from particularly repressive countries, have no way of knowing that the United States might offer them immigration relief because of their sexual-minority or HIV-positive status.¹⁸⁸

Indeed, the right of LGBT and HIV-positive individuals to seek asylum in the United States is somewhat anomalous under U.S. law. Until 1990, homosexuality was, in and of itself, a ground of inadmissibility to the United States.¹⁸⁹ Furthermore, it was not until 2003 that the Supreme Court ruled that a Texas law criminalizing private, consensual sex between members of the same sex violated the couple’s constitutional right to privacy.¹⁹⁰ Additionally, transgender individuals, including U.S. citizens, currently have only limited rights to marry. Likewise, they are prohibited by some states from obtaining identity documents, such as amended birth certifi-

¹⁸⁶ Michele Pistone and Philip Schrag state that they have personally encountered many asylum seekers who were unaware of the possibility of applying for asylum. See *Improved but Still Unfair*, *supra* note 4, at 26.

¹⁸⁷ Representative Bill McCollum, one of the principal House sponsors of the bill which amended the INA to include the filing deadline, was apparently under the misimpression that all foreign nationals entering the United States would be informed of the asylum filing deadline and how long an asylum application would take. See *Not Yet a Model*, *supra* note 96, at 276 n.44. Of course, immigration officials at the airport do not give new arrivals any information about asylum generally nor do they inform arrivals of the one-year deadline.

¹⁸⁸ “For example, a Honduran man claiming asylum in the USA feared speaking openly to immigration officials. He omitted key details of the homophobic ill-treatment he was fleeing because he feared that fellow inmates in the immigration detention centre would turn violent if he disclosed his sexual orientation. The fear of disclosure and potential breaches of confidentiality were so great that the asylum-seeker chose to censor some of the most important supporting information for his claim. The claim was rejected.” AMNESTY INT’L, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY 50 (2001), available at [http://web.amnesty.org/aidoc/ai.nsf/afec99eadc40eff880256e8f0060197c/dc31f264b72fabf280256a48003c810c/\\$FILE/lgbt.pdf](http://web.amnesty.org/aidoc/ai.nsf/afec99eadc40eff880256e8f0060197c/dc31f264b72fabf280256a48003c810c/$FILE/lgbt.pdf).

¹⁸⁹ See RUTHANN ROBSON, *Lesbians and Immigration*, in LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 101, 101-05 (1992). In other words, if a foreign national had an independent means of obtaining legal permanent residence, such as through a petition by a United States citizen parent, the application would be denied if the INS became aware of the applicant’s sexual orientation. This was because the individual was deemed to have a “psychopathic personality” or suffer from the affliction of “sexual deviation.” See also KURZBAN, *supra* note 158, at 40; Leitner, *supra* note 40, at 686.

¹⁹⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

cates, which match their corrected sex.¹⁹¹ At the same time, the United States continues to have one of the world's most restrictive immigration policies towards HIV-positive foreign nationals. Today, the United States bars their entrance as non-immigrants except under the most limited circumstances, and denies their applications for legal permanent residence unless they meet narrow waiver eligibility criteria.¹⁹² Against this backdrop of curtailed rights for LGBT and HIV-positive citizens and foreign nationals, it is not surprising that many new entrants into the United States may be unaware of the possibility of seeking refuge on account of their sexual minority or HIV status.¹⁹³

LGBT and HIV-positive foreign nationals may face the additional barrier of being "closeted" within their own communities even once they reach the United States. Many foreign nationals who arrive in the United States seek out assistance from the extended ethnic and social communities to which they belonged in their home country. Individuals who have no other option for low-cost housing may stay with family or friends of relatives. Many LGBT and HIV-positive asylum seekers are not "out" to their families in their own countries due to shame, deeply rooted social taboos, or fear for their physical safety. Therefore, they often continue to live a life of secrecy once they reach the United States. The fear and danger they experienced at home is transferred to their new lives in the United States within their insular communities, especially during their first year here.¹⁹⁴

¹⁹¹ Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues*, National Center for Lesbian Rights (2004), available at <http://www.nclrights.org/publications/tgclients.htm>.

¹⁹² See INA § 212(a)(1)A, 8 U.S.C. § 1182(a)(1)(A) (2000) and INA § 212(g)(1), 8 U.S.C. § 1182(g)(1) (2000). To qualify for a waiver of the HIV ground of inadmissibility, a foreign national must have an immediate relative (generally, an opposite sex spouse, parent or child) who is a U.S. citizen or legal permanent resident, and must demonstrate that: the danger she poses to the public health is minimal; the possibility of the spread of the disease by her admission is minimal; and no cost will be incurred by any government agency in the United States without the agency's prior consent. INS Memorandum from Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, to Regional Directors et al., *Medical Examinations, Vaccination Requirements, Waivers of Medical Grounds of Inadmissibility, and Designation of Civil Surgeons and Revocation of Such Designation*, HQ 70/21/1.1-P AD 0103 (Oct. 17, 2002) (on file with the Immigration Equality), available at <http://www.immigrationequality.org/uploadedfiles/2002%20HIV%20Immigration%20policy%20memo.pdf>. An HIV waiver based on humanitarian grounds is available to asylees and refugees.

¹⁹³ "Many refugees and their legal representatives are not aware that the option of filing an asylum claim on the grounds of persecution because of their sexual orientation is available to them." AMNESTY INT'L, *supra* note 188, at 50.

¹⁹⁴ Even for sexual minorities who are not newcomers to the United States, there is often a struggle between a desire to "assimilate" into the dominant culture and a

Additionally, it is not uncommon for an LGBT or HIV-positive foreign national's only contact with an immigration attorney to be with an attorney who is originally from the same country as the applicant. The members of the applicant's community in the United States are often his only source of immigration information and they are likely to recommend legal counsel with someone with whom they are familiar. In such situations, the foreign national may be afraid to disclose his sexual orientation or HIV status, and it may never occur to the attorney to ask about those subjects.¹⁹⁵ Indeed, even assuming that an attorney is aware of the possibility of filing an asylum application based on sexual minority or HIV status, the attorney might worry about offending the client by even broaching the subject. This is particularly likely in situations where the client comes from a culture where homosexuality, transgender identity, and HIV-positive status are severely stigmatized.

B. Application of the Filing Deadline Exceptions to Asylum Claims Based on LGBT and HIV-Positive Status

As discussed above, the primary reason that LGBT and HIV-positive foreign nationals miss the one-year filing deadline is because they are unaware of the possibility of applying for asylum at all. Unfortunately, lack of awareness does not qualify as one of the exceptions to the one-year deadline.¹⁹⁶ How then do the two existing categories of filing deadline exceptions, "changed circumstances" and "extraordinary circumstances," apply to LGBT and HIV-positive asylum seekers? The regulations expound on the two exceptions by providing examples that would satisfy them. However, the examples provided are not intended to be exhaustive. Although neither the regulations nor the *Officers Training Manual* list any examples of exceptions which are specific to LGBT or HIV-based cases, some of the examples are particularly relevant to LGBT and HIV-based claims.

desire to resist assimilation. See generally Ruthann Robson, *Introduction: Assimilation and/or Resistance?*, 1 SEATTLE J. FOR SOC. JUST. 631 (2003). For LGBT foreign nationals who have just arrived in the United States, it is easy to see why they would, at least initially, favor blending into the dominant community.

¹⁹⁵ The Author has met with many LGBT and HIV-positive asylum seekers who have related the above factual scenarios to her.

¹⁹⁶ See *infra* Part IV.B.2.f. and Conclusion for an argument which could encompass lack of awareness as an exception.

1. Application of the Changed Circumstances Exception

(a) *Changed Country Conditions*

The first example of “changed circumstances” listed in the regulations is for “changes in conditions in the applicant’s country of nationality.”¹⁹⁷ This example could encompass situations where the government has recently criminalized sexual activity between members of the same sex or where a government has recently increased enforcement of existing laws. For example, the Egyptian government recently began a systematic crackdown against gay establishments which has resulted in the arrest, trial, and imprisonment of scores of Egyptian gay men.¹⁹⁸ Another example involves the rise in prominence of Sharia law in Nigeria. Under this law, an arrest warrant was recently issued for a gay man who potentially faces the sentence of death by stoning.¹⁹⁹ These dramatic changes in the law or in the enforcement of the law would seem to satisfy the changed conditions exception to the deadline.

Of course, as the BIA demonstrated in *Matter of Y-C*,²⁰⁰ there are no automatic exceptions to the deadline and each case must be analyzed individually. Thus, even in the case of an Egyptian who has missed the one-year deadline and claims changed country conditions, there are potential problems. If the applicant was persecuted in the past, an adjudicator might wonder why the worsened conditions warrant a finding of changed conditions if the abuse he underwent in the past sufficed to make out a claim for asylum.²⁰¹ If, on the other hand, the applicant did not suffer past persecution, and is therefore basing his claim entirely on the fear of future persecution because of the recent reports of attacks on gay men, it will be more difficult for him to prove his case. Although asylum law

¹⁹⁷ 8 C.F.R. § 208.4(a)(4)(i)(A) (2004).

¹⁹⁸ HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT (2004), available at <http://www.hr.org/reports/2004/egypt0304/>.

¹⁹⁹ *Man Faces Death by Stoning for Gay Sex*, at <http://www.365gay.com/newscon04/11/11290nigeria.htm> (Nov. 29, 2004).

²⁰⁰ See *Matter of Y-C*, 23 I. & N. Dec. 286 (B.I.A. 2002).

²⁰¹ In fact, the *Asylum Officer Training Manual* cites the following example: 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 referred 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.

OFFICER TRAINING MANUAL, *supra* note 149, at 8-9.

allows for the possibility of winning asylum based solely on fear of future persecution,²⁰² it is much more difficult to prove that something may happen in the future than to prove that it has already happened in the past. Moreover, as a practical matter, it is easier to present a compelling narrative of past mistreatment than to rely entirely on country condition reports for a claim based on a fear of future mistreatment.

(b) *Changes in the Applicant's Circumstances*

The regulations also allow for an exception based on “changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum including . . . activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk.”²⁰³ This exception may be the most relevant for LGBT and HIV-positive asylum seekers because it could encompass “coming out” as a lesbian or gay man, “transitioning” as a transgender man or woman, or learning of one’s HIV-positive status. One of the examples listed in the *Officers Training Manual* is an “applicant’s conversion from one religion to another, or abandonment of religion altogether.”²⁰⁴ This situation could be analogized to an applicant who has recently “converted” from being HIV-negative to being HIV-positive. Although it is difficult to win asylum based on HIV-positive status alone,²⁰⁵ a gay or transgender individual who had some fear of returning to her country in the past may find that her fear has been greatly exacerbated by an HIV diagnosis.²⁰⁶

Although most homosexual and transgender individuals would not characterize their “coming out” experience as changing from heterosexual to homosexual or as changing from one gender to another, the lengthy process of coming to terms with one’s identity is not unlike that of religious conversion. Moreover, for some applicants who come from countries where one conservative religion predominates, discovery of a minority sexual orientation or transgender identity may require the individual to leave his or her religious faith which could lead to further negative conse-

²⁰² 8 C.F.R. § 208.13(b)(2)(iii) (2004).

²⁰³ 8 C.F.R. § 208.4(a)(4)(i)(B) (2004).

²⁰⁴ OFFICER TRAINING MANUAL, *supra* note 149, at 10.

²⁰⁵ See *On the Positive Side*, *supra* note 55.

²⁰⁶ It is possible to put forward an asylum application based on more than one ground. Thus, while grants based on HIV-positive status alone are uncommon, grants based on sexual orientation combined with HIV-positive status occur frequently.

quences.²⁰⁷ For applicants from countries where homosexuality is taboo, it may take a long time for an individual to even accept the label of homosexual for herself and even longer to be able to discuss her sexual orientation with strangers, particularly those who are employed by the government.²⁰⁸

Of course “coming out” has many meanings. It may simply entail accepting personal sexual identity, but it may also include being open with others about a sexual orientation. Thus, one scenario in which an individual might warrant an exception to the deadline would be when the individual “comes out” to her family and faces threats as a result.²⁰⁹

For a transgender individual, it may take a substantial period of time before she feels comfortable enough to take steps to ana-

²⁰⁷ For example, the Author represents a gay man from a Muslim country who, after numerous incidents of abuse by community members and religious leaders, has abandoned the Muslim faith and is now a practicing Christian. This religious conversion may have even more serious consequences than his sexual orientation if he is returned to his country.

²⁰⁸ In one case, the *pro se* asylum applicant did not have the language to appropriately identify his sexual orientation. The following is a direct quotation from the transcript where the attorney for DHS questioned an asylum seeker from Jamaica:

Q: Do you know the difference between homosexual and bisexual?

A: Huh?

Q: Do you know the difference –

A: Yeah.

Q: – between being a homosexual and being bisexual?

A: Yes.

Q: What’s the difference?

A: Homosexual is like a man and another man.

Q: And bisexual is?

A: It’s like almost like the same I guess.

Judge: Bisexual is also a man and another man?

A: Yeah, like two gay people.

Transcript from June 20, 2003 Immigration Court proceedings at 23, Matter of L-R (B.I.A. 2003) (unpublished decision, on file with Immigration Equality). See also AMNESTY INT’L, *supra* note 188, at 49-52. Unfortunately, in a recent case in which a gay man from Botswana claimed that he did not file within one year of his arrival in the United States because he did not want to accept his sexual orientation and he was unaware that his sexual orientation could be the basis of an asylum claim, the immigration judge held that he did not meet an exception to the one-year filing deadline. The Eighth Circuit held that it lacked jurisdiction to review this finding but upheld the judge’s finding that Molathwa did not prove that it was “more likely than not” that he would suffer future persecution so as to warrant a grant of withholding. *Molathwa v. Ashcroft*, 390 F.3d 551, 554 (8th Cir. 2004).

²⁰⁹ One of the sponsors of the law enacting the one-year filing deadline, Senator Hatch, stated: “the changed circumstances provision will deal with situations like those in which . . . the applicant obtains *more* information about likely retribution he or she might face if the applicant returned home” Beth Lyon, *Fighting a Deadline on Fear: Asylum Practice Update as the One-Year Deadline Approaches*, 75 INTERPRETER RELEASES 285, 288-89 (1998) (citing 142 Cong. Rec. S11840 (daily ed. Sept. 30, 1996)).

tomically “transition” into her true gender identity. Additionally, if a transgender applicant undergoes medical interventions such as hormone therapy, electrolysis, or surgery, she may feel a much greater fear of being forced to return to her country than she did before. The medical interventions may make it impossible for her to pass as the gender by which she was known before she left her country, and she may be at much greater risk of persecution after taking irrevocable steps to bring her anatomical sex in line with her gender identity.²¹⁰ It is important to note that under the “extraordinary circumstances” exception to the one-year filing deadline an applicant must demonstrate that the “circumstances were not intentionally created by the alien through his or her own action or inaction,”²¹¹ but there is no such requirement under the “changed circumstances” exception.²¹² Hence, an applicant should not be at risk of falling outside the “changed circumstance” exception simply because her own action (such as undergoing a medical sex transition) caused the changed circumstances.

The changed conditions exception also encompasses individuals whose “activities” in the United States might put them at risk.²¹³ This may include applicants who have become active in LGBT rights or HIV education in the United States or those who have participated in gay pride events. Such foreign nationals sometimes fear that news of their identity has reached their country, perhaps from members of their tightly-knit community in the United States or from the media attention which they have received.²¹⁴

²¹⁰ If an applicant has completed sex reassignment and her outward appearance matches her gender identity, a practitioner should be prepared to address an adjudicator’s questions about how potential persecutors in her country would know that she is transgender. Answers to these questions could include that her family would know and would seek to harm her; that the gender notation on her identity documents would not match her current appearance; or that in her culture she would be expected to marry and have children and she would be at risk of severe physical harm when her transgender identity became known to potential romantic partners or spouses.

²¹¹ 8 C.F.R. § 208.4(a)(5) (2004).

²¹² Fortunately, the *Asylum Officer Training Manual* further clarifies the requirement, stating that the applicant must “not have intentionally created the extraordinary circumstance, through his or her action or inaction, for the purpose of establishing a filing-deadline exception.” OFFICER TRAINING MANUAL, *supra* note 149, at 11 (emphasis added). The interpretation leaves open the possibility that the exception came about because of the applicant’s actions, but only holds the actions against the applicant if their purpose was to create an exception to the filing deadline. *Id.*

²¹³ See 8 C.F.R. § 208.4(a)(4)(i)(B) (2004).

²¹⁴ The Author is currently working with a man who missed the one-year filing deadline but who was recently seen by his cousin walking hand-in-hand with his same-sex partner in Greenwich Village. The applicant now fears returning to his country

2. Application of the Extraordinary Circumstances Exception

(a) *Illness or Disability*

The other category of exceptions to the deadline in the INA is for “extraordinary circumstances.” The regulations define extraordinary circumstances as “events or factors directly related to the failure to meet the one-year deadline.”²¹⁵ This definition encompasses a range of occurrences which may have prevented the applicant from filing within a year of her entry into the United States.

The first such circumstance contemplated by the regulations is for “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.”²¹⁶ It is easy to see how this exception might apply to an individual who is HIV-positive. An HIV-positive foreign national, particularly one who comes from a country without advanced HIV treatment options, may be very ill when he arrives in the United States and may spend his first year or longer trying to stabilize his health. Likewise, it is easy to envision circumstances where an individual is diagnosed with HIV within a year of his arrival in the United States, and then suffers from debilitating depression as a result of being diagnosed with an incurable and potentially fatal disease.

The “mental disability” exception may be the one most commonly used in asylum applications because so many asylum applicants suffer from post traumatic stress disorder (PTSD), depression, or other mental health issues as a result of the persecution they have endured.²¹⁷ Since mental health diagnoses are more subjective than any of the other one-year exceptions, this exception may be subject to overuse.²¹⁸

because his entire family has become aware of his sexual orientation through his cousin’s disclosure.

²¹⁵ 8 C.F.R. § 208.4(a)(5) (2004).

²¹⁶ 8 C.F.R. § 208.4(a)(5)(i) (2004).

²¹⁷ See *Improved but Still Unfair*, *supra* note 4, at 14.

²¹⁸ On one occasion the Author was giving a presentation to asylum officers on LGBT and HIV-based asylum claims, and one officer stated that he was tired of post traumatic stress disorder (PTSD) claims. The officer cited an example of an applicant who had been in the United States for close to ten years, completed his Ph.D., and then suddenly claimed a PTSD diagnosis. Because adjudicators view PTSD claims with jaded eyes, it is very important to carefully document legitimate claims of PTSD or depression. An adjudicator is much more likely to credit testimony from a psychiatrist or therapist who has an ongoing relationship with the applicant than from a mental health professional who has only met the applicant once and who has written

For LGBT applicants, in addition to the potential mental health effects of the trauma they suffered in their own countries, they may find it difficult or impossible to come to terms with their sexual orientation or gender identity until after they have lived in the United States and undergone counseling for a substantial period of time. Moreover, applicants from countries where homosexuality is deeply stigmatized may experience severe depression as they “come out” to themselves.²¹⁹ In such cases, the “extraordinary circumstances” exception may be closely linked to the “changes in the applicant’s circumstances” exception. That is, an applicant who accepts the “changed circumstance” of her sexual orientation may lead her to suffer the “extraordinary circumstance” of a mental health problem.

(b) *Unaccompanied Minors*

Another exception which is clearly delineated in the regulations is for unaccompanied minors.²²⁰ Some commentators have argued that because the regulations also create an exception for those with “legal disabilities,” all minors should be granted a filing deadline exception, even those who are “accompanied.”²²¹ This distinction may be significant for LGBT youth because they may not be open with their families about their sexual orientation, and therefore may be unable to pursue an asylum claim based on their sexual orientation or gender identity until they are older and no longer living with potentially hostile family members.²²²

an evaluation solely for the purpose of bolstering the asylum application based on the single consultation.

²¹⁹ The Author worked with one client from Indonesia who continued having feelings of shame about his sexual orientation long after he came out to himself. He found the word “gay” to be deeply offensive and instead preferred to refer to himself as “homosexual.”

²²⁰ The BIA has held that each case, even those clearly fitting within the regulations excepting unaccompanied minors, must be adjudicated on a case by case basis. *See Matter of Y-C-*, 23 I. & N. Dec. 286 (B.I.A. 2002).

²²¹ Lee Berger & Davina Figeroux, *Protecting Accompanied Child Refugees from the One-year Deadline: Minority as a Legal Disability*, 16 GEO. IMMIGR. L.J. 855, 859 (2002).

²²² A practitioner told the Author about a case in which an entire family was placed in removal proceedings after complying with special registration. After meeting with the teenage son apart from the family, the practitioner was able to determine that he was gay and had a viable claim for asylum based on his sexual orientation. In this example, even though the applicant was “accompanied” by his family, they were unaware of his sexual orientation, and he had thus been unable to pursue his options under the immigration law.

(c) *Ineffective Assistance of Counsel*

Another exception which could affect LGBT and HIV-positive asylum seekers is based on the ineffective assistance of counsel.²²³ The regulations specify stringent conditions, which are derived from a BIA case on this issue, to meet the ineffective assistance exception.²²⁴ The regulations require that: the applicant must write a detailed affidavit explaining the deficiencies of the representation; must notify the attorney against whom the allegations are being made; and must explain whether a complaint has been filed with the relevant disciplinary committee, and if not, why not.²²⁵ Essentially, an asylum applicant must allege a colorable claim of malpractice in order to succeed under this exception.

As discussed above, many attorneys are not aware that sexual orientation, transgender identity, or HIV status can form the basis of an asylum claim.²²⁶ Even if an attorney is aware that these grounds exist, if she does not regularly work with the affected communities, it would probably not occur to her to discuss these issues with a client. This problem is complicated further by the fact that some clients may be afraid to reveal their sexual orientation, gender identity, or HIV status to an attorney. This is especially the case if the attorney comes from the foreign national's ethnic community because the applicant may fear that her status will become known within that community.²²⁷ While an attorney's failure to ask about particular grounds for asylum would certainly be unfortunate and might be the result of less than thorough lawyering, it would be difficult to advise a client to file an ethical complaint against an attorney for failing to spot an issue that the client did not seem to raise. On the other hand, many unscrupulous lawyers will represent asylum seekers on claims which are barely colorable and without fully explaining the consequences of having an application denied.²²⁸ Thus, depending on the facts of the particular

²²³ 8 C.F.R. § 208.4(a)(5)(iii) (2004).

²²⁴ *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988) *aff'd*, 857 F.2d 10 (1st Cir. 1988).

²²⁵ 8 C.F.R. § 208.4(a)(5)(iii)(A)-(C) (2004).

²²⁶ *See supra* Part IV.A.

²²⁷ The Author has met with numerous clients who were afraid to tell their original immigration attorney that they had tested positive for HIV. The Author has also met with numerous clients whose prior attorneys filed a colorable but weak asylum case based on political opinion when the client had a much stronger claim based on sexual orientation. These clients had never even discussed their sexual orientation with their former attorneys.

²²⁸ Of course, ineffective assistance of counsel alone would not result in the finding

case, this exception may be the only hope for some applicants to gain status.

(d) *Maintaining Lawful Non-Immigrant Status*

The regulations also provide that maintaining lawful immigrant or non-immigrant status and filing within a reasonable time after that status ends constitutes an exception to the filing deadline.²²⁹ This is another important category of exceptions for LGBT asylum applicants. Many young men and women discover their sexual orientation or gender identity during their student years. An asylum seeker's ability to wait until his student status expires before filing for asylum may be critical because it could allow him to reach a point where he is comfortable enough with his sexual identity to file for asylum.

This exception is also extremely important to applicants with a student or work visa who have HIV. Foreign nationals who are HIV-positive are generally barred from obtaining legal permanent residence because of their HIV status.²³⁰ Since lesbians and gay men are unable to enter into marriages which are recognized by the U.S. federal government,²³¹ many foreign nationals who wish to remain in the United States to be with American partners, attempt to do so through employment-based sponsorship or through the diversity visa lottery. However, even if an HIV-positive foreign national obtains the ability to apply for legal permanent residence status through either of these routes, the application will be denied once CIS discovers that he is HIV positive. In these circumstances, if the individual comes from a country where he faces persecution because of his sexual orientation and/or HIV-positive status, the one-year filing exception could prove crucial.²³² Rather than pursuing legal permanent residence through employment or the di-

of an exception to the deadline if the poorly prepared application was filed more than a year after the applicant arrived in the United States.

²²⁹ 8 C.F.R. § 208.4(a)(5)(iv) (2004).

²³⁰ INA § 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i) (2000).

²³¹ The federal Defense of Marriage Act (DOMA) defines marriages for federal purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7 (1996). Thus even same-sex couples who are lawfully married in Massachusetts or Canada will not have their marriages recognized for immigration purposes because immigration is entirely governed by federal law.

²³² The Author has met with many individuals who have held H1B, skilled worker visas for several years and did not discover until their labor certifications for legal permanent residence were approved that their HIV-positive status would prevent them from obtaining legal permanent residence. In fact, their HIV status makes such individuals ineligible for H1B status too. However, unlike legal permanent residence applications, no medical exam is required for a temporary, non-immigrant visa.

versity visa lottery, a foreign national could submit his asylum application within a reasonable period of time after the expiration of his student or work visa.

(e) *Death or Serious Illness of Legal Representative or Family Member*

The final provision in the “extraordinary circumstances” regulations²³³ allows an exception to the filing deadline for individuals who have had their legal representative or a close family member die or suffer serious illness.²³⁴ Under this exception, CIS has taken an expansive view of family. Under federal law, however, marriages between same-sex partners are not cognizable.²³⁵ Additionally, the Department of Homeland Security has recently taken the position that it will not grant immigration petitions based on marriages where one of the spouses is transgender.²³⁶ In light of these developments, it would be interesting to see whether same-sex marriages²³⁷ or other long-term, same-sex relationships might be recognized under this exception.

The *Officers Training Manual* explains that 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.”²³⁸ Because there are no provisions of the INA which specifically recognize the relationship of uncle and no provisions under which a niece or nephew could derive benefits

²³³ There is one other enumerated exception in the regulations for timely filing with the application rejected for a technical defect such as leaving a box on the form blank. 8 C.F.R. § 208.4(a)(5)(v) (2004). Since this exception does not raise any issues specific to LGBT or HIV claims it is not discussed in this Article.

²³⁴ 8 C.F.R. § 208.4(a)(5)(vi) (2004).

²³⁵ See *DOMA*, 1 U.S.C. § 7, *supra* at note 231.

²³⁶ U.S. CIS Interoffice Memorandum from William R. Yates, Associate Director for Operations, U.S. Citizenship and Immigration Services, *Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals HQOPRD 70/6* (April 16, 2004) (on file with Immigration Equality), available at <http://www.immigrationequality.org/uploadedfiles/Yates%20april%2004%20trans%20marriage.pdf>. But see *In re Lovo-Lara*, 23 I. & N. 746 (BIA 2005), upholding the validity of a marriage where one spouse was transgender and the marriage was validly entered into in the state in which they resided, North Carolina.

²³⁷ It is now legally possible for same-sex couples to marry in Massachusetts, most of Canada, Belgium and the Netherlands. See *Canada Court Okays Same Sex Unions*, CBS NEWS, Dec. 9, 2004, available at <http://www.cbsnews.com/stories/2004/12/09/world/main660070.shtml>.

²³⁸ OFFICER TRAINING MANUAL, *supra* note 149, at 12.

from an uncle,²³⁹ the *Officers Training Manual* is articulating that for the purposes of this exception, it is the individualized assessment of the relationship which is significant, not the existence of a legal familial relationship with an individual who dies or suffers from a serious illness.²⁴⁰

(f) *Other Circumstances*

The *Officers Training Manual* also leaves room for the possibility of “other circumstances” which are not enumerated in the regulations. The *Officers Training Manual* states:

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

²³⁹ In one context where expanded family members are recognized under immigration law, the United States rejected recognition of same-sex partners. Under the Safe Third Country Agreement which the United States and Canada implemented on December 29, 2004, a potential asylum applicant must file her application in whichever of the two countries she arrived first. Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Dec. 5, 2002, U.S.-Can., available at http://uscis.gov/graphics/lawsregs/Safe3rd_finaltext12-5-021.pdf. However, there are various exceptions to this rule including the ability to file in the second country if the applicant has family members there who are citizens or residents of the country. For this purpose, family is broadly defined to include: spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew. Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 208, 212, 235); Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry, 69 Fed. Reg. 69,490 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 1003, 1208, 1213, 1235, 1240). While Canada also recognizes same-sex spouses and conjugal partners (romantic partners who reside together) of either sex for the exception, the United States explicitly rejected recognition of same-sex partners in implementing the treaty because of DOMA. The U.S. commentary to the regulation states that although “valid foreign marriages, including common law marriages, are generally given effect under U.S. immigration law . . . [the DOMA] precludes use of the terms ‘marriage’ or ‘spouse’ to refer to same sex partnerships.” Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,482.

²⁴⁰ While there is no provision of the INA specifically granting benefits based on an uncle-nephew/niece relationship, there is also no law, comparable to the DOMA, which explicitly forbids federal recognition of the relationship.

to timely filing.²⁴¹

This exception could have particular relevance for LGBT or HIV-positive applicants who are severely isolated because of their sexual-minority status or HIV status and are unable to avail themselves of resources which may be available within their ethnic community.

It may be possible to further expand this catchall portion of the “extraordinary circumstances” exception. As noted above, it is probably more common for LGBT and HIV-positive asylum seekers to lack awareness that their sexual orientation, gender identity, or HIV status could be a ground for asylum than it is for applicants applying based on more traditional grounds such as political opinion or race.²⁴² Although the regulations do not provide an exception to the deadline based on lack of awareness of asylum law,²⁴³ this catchall provision in the *Officers Training Manual* could potentially include lack of awareness of the deadline.²⁴⁴

3. Filing within a Reasonable Time of the Changed or Extraordinary Circumstances

An applicant who presents an acceptable exception to the one-year filing deadline faces the added burden of demonstrating that he has filed within “a reasonable period given those circumstances.”²⁴⁵ However, neither the statute nor the regulations define “reasonable period.” The *Officers Training Manual* only explains that the officer should take into account the particular facts of the case, including the “applicant’s education and level of sophistication, the amount of time it takes to obtain legal assis-

²⁴¹ OFFICER TRAINING MANUAL, *supra* note 149, at 14-15.

²⁴² See *supra* notes 186-89 and accompanying text.

²⁴³ Pistone and Schrag point out that the earlier version of the *Asylum Officer Training Manual* gave an example of missing the deadline which appeared to allow for the possibility of lack of awareness qualifying as an exception. The old manual stated, “[t]he credibility of an applicant’s unawareness of asylum should be assessed on a case-by-case basis” *Improved but Still Unfair*, *supra* note 4, at 26-27 n.155. Pistone and Schrag state that this implies “that if the adjudicator is convinced that the applicant is telling the truth, the belated discovery will justify an exception to the deadline.” *Id.* However, the 2001 version of the *Officer Training Manual* eliminated this example.

²⁴⁴ Philip Schrag and Michele Pistone argue in their 1997 article that lack of awareness of the ability to file for asylum should constitute an exception to the filing deadline. They suggest that an applicant claiming such an exception should have to bear the burden of proof. An applicant could do this by demonstrating the date upon which he learned about the law through submission of affidavits by attorneys or human rights groups who first informed him about asylum. See *Not Yet a Model*, *supra* note 96, at 276. Unfortunately, CIS does not generally accept lack of awareness of asylum as an exception to the filing deadline.

²⁴⁵ 8 C.F.R. § 208.4(a)(5) (2004); 8 C.F.R. § 208.4(a)(4)(ii) (2004).

tance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors”²⁴⁶ Since the filing deadline itself is one year, a practitioner should generally assume that filing more than a year after the triggering circumstance would be considered unreasonable²⁴⁷ unless there were some subsequent circumstance that constituted an exception. For example, an applicant might succeed in demonstrating a “changed circumstance” by proving that she learned that she was HIV positive 18 months ago. It might then be possible for her to show an “extraordinary circumstance” exception if she were either very ill or suffered from severe depression following her diagnosis.

Essentially an applicant must account for the time period from when she entered the United States until the time that she filed, and explain the delay in filing. In effect, the need to file within a “reasonable period” often militates against filing even if the applicant had a cognizable exception during the first year, if the applicant cannot adequately explain the subsequent delay in filing.

4. For Attorneys the Deadline Adds Challenges in Evaluating Asylum Cases

For attorneys, the one-year rule has added new dimensions of complexity to evaluating asylum cases. The exceptions to the rule are so narrow that it is difficult to imagine a factual scenario in which an individual has missed the one-year deadline and an attorney could confidently advise that client that she would be likely to succeed.²⁴⁸ Assisting an applicant to file a claim which is likely to land him in removal proceedings is a frightening position for an attorney. Moreover, as discussed previously, if an applicant cannot demonstrate an exception to the one-year asylum rule, her attorney must be sure that she understands the possibility of winning withholding, and the limitations of that status.²⁴⁹

One of the unexpected consequences of the harsh one-year rule is that the stakes have become even higher for practitioners who are helping clients who have been in the United States for less

²⁴⁶ OFFICER TRAINING MANUAL, *supra* note 149, at 16.

²⁴⁷ The Author has appeared in front of immigration judges who have interpreted the “reasonable period” to mean a one-year filing deadline after a foreign national who was previously in lawful status was placed in removal proceedings.

²⁴⁸ Of course, there are many cases where applicants who miss the deadline do succeed, but the exceptions are so narrow and so unevenly applied that the accurate prediction of an outcome in a specific case is exceedingly difficult.

²⁴⁹ *See supra* Part II.C-D.

than one year to determine whether to file for asylum. An attorney must assist a client in thoroughly evaluating the merits of her potential asylum claim. Even a weak asylum claim is much stronger within the first year than it is when the applicant must also demonstrate an exception to the filing deadline.

Attorneys must also be aware of the serious malpractice issues raised by representing individuals in asylum cases. An attorney who advises a client with a weak claim not to file may find himself the subject of a complaint lodged by the former client as she tries to meet the “ineffective assistance” exception to the deadline.²⁵⁰ On the other hand, an attorney who assists an applicant to file a weak application could also face claims of malpractice as the applicant goes from the bad position of being undocumented to the worse position of facing removal from the United States. Clearly, the 1996 changes to the INA have raised the stakes in asylum law for attorneys as well as for asylum seekers.

CONCLUSION

Though there is a general belief that the attacks of September 11, 2001 were responsible for the current focus on immigration enforcement, it was the radical 1996 changes to the INA which began the current onslaught against foreign nationals. Before the enactment of the one-year filing deadline, it was only applicants who did not merit a favorable exercise of discretion under asylum law, such as those with criminal records, who would be granted withholding status in place of asylum. However, the implementation of the one-year deadline has created a new, and perhaps unexpected, class of individuals who are forever trapped in the United States in the limbo status of withholding of removal. Worse yet, those saddled with withholding are the “lucky” ones. There may be many thousands of deserving foreign nationals who were returned to the countries from which they fled even though they could have established a “well-founded fear” of future persecution, but who were unable to meet the heightened “more likely than not” probability of future persecution which is required for a grant of withholding.

Prior to the enactment of IIRIRA, the primary reason that an individual would be granted withholding rather than asylum was if the applicant was a member of “one of the undesirable groups described [in the INA.]”²⁵¹ That is, foreign nationals could be prohibited from meriting a favorable exercise of discretion if, for

²⁵⁰ See *supra* Part IV.B.2(c).

²⁵¹ *Matter of Lam*, 18 I. & N. Dec. 15, 18 (B.I.A. 1981).

example, they engaged in criminal or terrorist activities. It does not seem unreasonable to grant such individuals a lesser status than asylees. But for individuals who have been found to legitimately fear returning to their countries, and whose only “undesirable” attribute was lack of awareness of or inability to comply with the one-year filing deadline, the consequences of a life in withholding status are manifestly unfair.

For too long, Congress and anti-immigration groups have viewed those fleeing persecution as undeserving and undesirable.²⁵² They have perceived asylum seekers as trying to circumvent U.S. immigration laws to gain better economic opportunities here, or, more recently, as trying to gain entry into the United States in order to harm American citizens.²⁵³ This hostility towards our most vulnerable immigrants not only contradicts our obligations under international law, it also contradicts the principles upon which the United States was founded. Those fleeing persecution should be welcomed into American society and given the legal means to become full participants in it as quickly as possible.

Although the United States has a legitimate interest in weeding out fraudulent asylum applications, the one-year deadline is unnecessary to further that interest. The most effective deterrents to asylum fraud were the implementation of the 180-day waiting

²⁵² The anti-immigration organization Federation for American Immigration Reform (FAIR) is calling upon the 109th Congress to reform asylum procedures. Claiming that “our policies in recent years have reflected political considerations in this country, rather than political oppression in the countries from which the refugees and asylees have come,” FAIR states that the grounds for asylum should be limited to “race, ethnicity, religion or political belief.” Thus, FAIR would eliminate the particular social group category which would eliminate, among other things, sexual orientation, transgender identity, and HIV status-based asylum claims. FAIR, *An Immigration Reform Agenda for the 109th Congress*, at <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=2613&c=12> (Jan. 2005).

²⁵³ Representative James Sensenbrenner of Wisconsin, the current Chair of the influential House Judiciary Committee, has stated in Congressional debate that asylum laws need to be tightened and further corroborative evidence must be gathered from applicants because “[m]any terrorist aliens have applied for asylum and then been released from detention to plot or commit their crimes.” *Sensenbrenner Statement During House Floor Debate on 9/11 Legislation Conference Report*, at <http://judiciary.house.gov/newscenter.aspx?A=425> (Dec. 7, 2004). Of course, Representative Sensenbrenner cites no actual examples of terrorists going through the lengthy and invasive asylum application process. Several of the September 11th bombers were in the United States on student visas which allow foreign nationals to remain in the United States for the duration of their course of study. *See Six months after Sept. 11, hijackers' visa approval letters received*, at <http://archives.cnn.com/2002/US/03/12/inv.flight.school.visas/> (Mar. 13, 2002). On May 11, 2005 President Bush signed the Real ID Act into law which will make it more difficult for asylum seekers to win their cases. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

period for obtaining employment authorization coupled with the streamlined process through which asylum applicants win recommended approval or are placed in removal proceedings within 60 days of filing their applications. These reforms alone were sufficient to address fraud within the asylum application system.

In light of the success of these other reforms, there is simply no justification for the one-year filing deadline. To protect the world's most vulnerable individuals, Congress should remove the deadline from the INA. If removal of the deadline is unlikely during the current Congress,²⁵⁴ reforms should be made to allow individuals who have been granted withholding of removal to normalize their immigration status. The failure to comply with a procedural deadline is no justification for holding human lives in a permanent state of limbo—a state of limbo which is produced by prohibiting those with withholding status from ever traveling outside the United States or petitioning for relatives to join them here. These prohibitions leave those granted withholding unable to ever fully become a part of American society.

Even in the absence of amendments to the INA, CIS could take steps to reduce the harshness of the one-year filing requirement by relaxing the exceptions to the deadline. Although the regulations and the *Asylum Officers Training Manual* have signaled a liberalization of the exceptions to the deadline since the IIRIRA was enacted, in reality the granting of exceptions seems to have decreased over time, not increased.²⁵⁵ Asylum officers are often unwilling to give serious consideration to one-year exceptions, opting instead to refer cases filed outside the deadline to the immigration court.²⁵⁶

²⁵⁴ Unfortunately, in the current Congress, not only is this possibility unlikely, there have actually been recent bills proposed which would require asylum seekers to file their applications within 30 days of arrival in the United States.

²⁵⁵ See *supra* Part III.B. Recent figures show that asylum grant rates for the month of November 2004 were 17% in the New York asylum office, and 16% in the New Jersey office. In 2003, the grant rates were 20-25% in New York and 22% in New Jersey with a national average of 32%. AILA EOIR/District Counsel/Asylum Committee in conjunction with the New York Immigration Coalition, *New Jersey-New York Asylum Liaison Meeting*, Dec. 13, 2004, (on file with Immigration Equality), available at <http://aila.org/infonet/fileViewer.aspx?docID=17152>. (Available to AILA members only).

²⁵⁶ The Author's experience and the anecdotal accounts of other attorneys indicate that in the New York and New Jersey Asylum Offices, more often than not, asylum officers refer applications that have been filed beyond the one-year filing deadline to immigration court. Such referrals are based solely on the one-year issue without analyzing the merits of the case. In the Author's experience, the only exceptions which are routinely recognized by asylum officers are where the applicant maintained valid non-immigrant status, and where the application was timely filed but returned to the

In theory, an asylum applicant is entitled to multiple levels of review to ensure a fair adjudication of her application. First, her case is heard by a specially trained asylum officer in a non-adversarial interview. If unsuccessful, the applicant's claim goes before an impartial immigration judge in an adversarial setting. If the applicant again loses and is ordered removed, she can appeal to the Board of Immigration Appeals, and, if she again loses, her case can be heard by a federal court of appeals.

However, the recent changes to immigration law essentially limit an asylum seeker who misses the one-year filing deadline to only one opportunity to have her case reviewed. Increasingly, asylum officers refer late applications to immigration courts with no meaningful analysis of the one-year exception. The applicant's fate will then hinge almost entirely on the outcome of the hearing before the immigration judge. With so little binding precedent in the area of asylum law and virtually no precedent on one-year issues, results in asylum cases vary wildly from one adjudicator to another.²⁵⁷ Because federal courts have been almost completely stripped of jurisdiction to hear one year issues, if an immigration judge finds that the applicant has failed to meet the one-year deadline, the applicant's only chance for review is before the BIA.²⁵⁸ With a majority of BIA decisions now made by a single Board member, and with a majority of these decisions being affirmances without opinion,²⁵⁹ an unsuccessful applicant is unlikely to receive

applicant by the Service Center for a technical deficiency, such as not filling in a box on the application.

²⁵⁷ One commentator cites a documentary likening the asylum application process to playing "asylum officer roulette," stating, "[n]ot only does today's refugee have to prove particularized persecution that is consistent with U.S. political objectives, she must also pray that a sympathetic asylum officer hears and believes her story." Bauer, *supra* note 140, at 1094. A report commissioned by the *San Jose Mercury News* published on October 17, 2000 compiled statistics of asylum grant rates for individual immigration judges in the period between 1995-1999. The study revealed that eight judges granted over 50% of the asylum applications they heard whereas 42 judges granted fewer than 5% of the asylum applications which came before them. Asylumlaw.org, *Legal Tools: Judges*, available at http://www.asylumlaw.org/legal_tools/index.cfm?fuseaction=showJudges&countryID=194 (last visited Jan. 2, 2005) (available to asylumlaw.org registered users only) (on file with Immigration Equality).

²⁵⁸ The REAL ID Act has restored federal review of issues of law in removal proceedings to the Courts of Appeal. It is too early to tell whether courts will view one year filing deadline issues as issues of law or fact.

²⁵⁹ According to an article appearing in the L.A. Times in 2003, shortly after Attorney General Ashcroft announced changes in the decision making rules, permitting single Board members to affirm decisions without opinion, the Board began doing so. In February 2002, only 9% of the BIA's decisions were by a single member. By March 2002, the number had climbed to 38% and by August it had risen to over 50%. At the same time that the cases reviewed by a single Board member increased, the denial

meaningful review at this level. For issues as significant as those raised in asylum cases, this situation is simply unacceptable.

Given the limited opportunity for review at higher levels, it is essential that asylum officers fully evaluate each applicant's claims for exceptions to the one-year deadline. The obstacles which asylum seekers face in meeting the one-year deadline are enormous.²⁶⁰ Officers and judges should apply the regulations liberally, and understand the hurdles which must be overcome to file an asylum application. As an adjudicator hears a particular claim, she should take into account the particular difficulties which the claimant may have experienced based on the merits of his claim. As discussed above, LGBT and HIV-positive asylum seekers are often unaware of the possibility of seeking asylum based on their membership in a particular social group. If an applicant can give detailed testimony about when he became aware of the possibility of seeking asylum and can convince an asylum officer or judge of the delayed awareness, he should be granted an exception to the one-year deadline. Even if an adjudicator is unwilling to expand the exceptions to include lack of awareness, she should take into account the unique difficulties which LGBT and HIV-positive asylum seekers face in meeting the deadline, including coming out, fear of discussing their sexuality with government officials, and dealing with the effects of serious illness. For asylum to continue to offer hope and the prospect of a life free of fear and persecution, the United States must take steps to open the doors to those legitimately fleeing persecution, not shut them through the formulaic application of an unjustified filing deadline.

rate rose as well, with an 86% denial rate by October 2002, compared to a 59% denial rate in October 2001. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportations Assailed*, L.A. TIMES, Jan. 5, 2003, available at <http://www.usdoj.gov/eoir/press/03/speedierrate.pdf>. In one case in which the applicant's federal appeal was denied, the First Circuit found that the Board member who had reviewed the case, had decided fifty appeals on the day that he decided the appellant's case, translating into a rate of one case reviewed every ten minutes. *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003).

²⁶⁰ See *supra* Part IV.A.