PRACTICE ADVISORY[1]

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PRESERVING THE ONE-YEAR FILING DEADLINE FOR ASYLUM CASES STUCK IN THE IMMIGRATION COURT BACKLOG

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The immigration courts' unprecedented backlogs are creating procedural and substantive challenges for attorneys trying to comply with the One-Year Filing Deadline (OYFD) in asylum cases.[3] These difficulties are most prevalent in scenarios where an asylum applicant is running up against the OYFD and Immigration and Customs Enforcement (ICE) has issued a charging document, but not yet filed it with the immigration court. Similar complications arise where a master calendar hearing is scheduled beyond the one-year filing deadline. As practitioners know, failure to meet the OYFD can have severe and lasting repercussions for applicants and their families.

What steps should a practitioner take to comply with the OYFD under these circumstances? How can a practitioner best create a record for appeal if an immigration judge denies asylum for failure to meet the OYFD due to circumstances beyond the respondent's control? This Practice Advisory answers these questions and discusses strategies and procedures for complying with the OYFD.

What is the one-year filing deadline?

In order to establish eligibility for asylum under the Immigration and Nationality Act (INA), the applicant must prove by "clear and convincing evidence" that the asylum application was filed within one year of the date of his or her last arrival in the United States unless one of two statutory exceptions, discussed below, applies.[4]

Asylum applications may be filed either affirmatively with U.S. Citizenship and Immigration Services (USCIS) or, if the applicant is in removal proceedings, defensively

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[3] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 created the requirement that an asylum applicant must file their asylum application within one year of their last entry into the United States. 8 C.F.R. § 1208.4(a)(2)(A).

[4] *See* 8 C.F.R. § 1208.4(a)(2)(i)(A).

with Executive Office of Immigration Review (EOIR). Affirmative filings are mailed to a USCIS Service Center. Applicants should then receive a USCIS receipt notice as well as a notice from an Application Support Center (ASC) instructing them to appear for an appointment for the collection of biometric information. Applicants should retain their ASC biometrics confirmation as proof that biometrics were taken.[5] Due to unprecedented backlogs in the processing of affirmative asylum claims, according to current processing times, USCIS may take up to four years to schedule an interview in an affirmative asylum case.[6]

In defensive filings, asylum applications must be filed in "open court" at a master calendar hearing.[7] Attorneys also must comply with pre-filing instructions by sending the first three pages of the Form I-589, their Form G-28 Notice of Entry of Appearance, and a copy of DHS's "pre-filing instructions" to the USCIS Nebraska Service Center (NSC). Applicants will then receive a USCIS receipt notice as well as an ASC notice instructing them to appear for an appointment for collection of biometric information. Applicants should retain their ASC biometrics confirmation as proof that biometrics were taken, and should be ready to provide the proof at their removal hearings. Immigration judges may not grant asylum without valid, unexpired biometrics and a complete background check performed by the Department of Homeland Security (DHS).

The clear and convincing evidence standard for showing compliance with the OYFD applies to both affirmative and defensive asylum filings.[8] Clear and convincing evidence falls somewhere between the "preponderance of the evidence" standard (51% or more) and the "beyond a reasonable doubt" standard.[9] Some ways to establish clear and convincing evidence that an application has been filed within the OYFD include: a certified mail receipt where the mailing date will be considered the filing date,[10] credible testimony, or documentary evidence that establishes when the applicant entered the

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[5] Due to extensive backlogs in processing asylum claims, biometrics are only valid for fifteen months. *See* DHS Procedures for Implementation of EOIR Background Check Regulations for Aliens Seeking Relief or Protection from Removal (August 22, 2011), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Laws%20Static%20Files/EOIR_Q_A%202011_FINAL.pdf (last visited Nov. 10, 2015). Following the expiration of biometrics, the applicant must request a second ASC appointment notice. In some jurisdictions, attorneys must proactively call ICE to request new ASC notices on their clients' behalf. In other jurisdictions, respondents may simply appear at the local ASC with an immigration court hearing notice and will be allowed to have biometrics retaken. Practices to maintain current biometrics vary by jurisdiction.

[6] *See* USCIS Affirmative Asylum Scheduling Bulletin, *available at* http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (last visited Nov. 10, 2015).

[7] EOIR Practice Manual, Chapt. 3.1.

[8] *See* 8 C.F.R. § 1208.4(a)(2)(i)(A). To satisfy the standard, an applicant must provide enough proof to "produce in the mind of the court a firm belief or conviction" that the claim was timely filed. *See Matter of Carrubbam*, 11 I&N Dec. 914, 917 (BIA 1966).

[9] Asylum Officer Basic Training: One Year Filing Deadline, 6 (March 23, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf (last visited Nov. 10, 2015).

[10] *See* 8 C.F.R. § 208.4(a)(2)(ii).

United States.[11] Attorneys should gather all available documentary and testimonial evidence to demonstrate compliance with the OYFD.

What are the exceptions to the OYFD?

The one-year filing deadline is subject to two statutory exceptions. An applicant may apply for asylum more than one year after entry by demonstrating "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application."[12]

An applicant demonstrating changed circumstances must also demonstrate that the application was filed "within a reasonable period given those changed circumstances."[13] Similarly, an applicant demonstrating "extraordinary circumstances" must show that the application was filed "within a reasonable period given those circumstances."[14]

Depending on the procedural posture of the claim and whether it is a defensive or affirmative filing, the asylum officer, the immigration judge (IJ), or the Board of Immigration Appeals (Board or BIA) will determine whether the applicant qualifies for an exception to the OYFD.[15]

Changed circumstances must have a material effect on an applicant's eligibility for asylum. They include but are not limited to: changes in the applicant's country of nationality or country of last habitual residence (for stateless individuals), changes in U.S. law, changes in activities in which an applicant has become involved outside his country of nationality, and the loss of a child-parent or spousal relationship to a principal asylum applicant via marriage, divorce, death, or attaining the age of 21.[16]

Extraordinary circumstances are defined as "events or factors directly related to the failure to meet the one-year deadline" and are especially relevant in the context of the immigration court backlogs.[17] Extraordinary circumstances may include but are not limited to: serious illness or mental or physical disability; legal disability (such as being an unaccompanied minor); ineffective assistance of counsel; maintaining Temporary Protected Status or other lawful immigrant or nonimmigrant status until a reasonable period of time before filing the asylum application; having timely filed an application that has been rejected for the applicant to make corrections; or the death or serious illness of an applicant's legal representative or immediate family member.[18] Because problems

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[11] *See* Asylum Officer Basic Training Participant Workbook, pt. IV (March 23, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf (last visited Nov. 10, 2015).
[12] 8 U.S.C. § 1158(a)(2)(D).
[13] 8 C.F.R. § 208.4(a)(4)(ii).
[14] 8 C.F.R. § 208.4(a)(5).
[15] *See* 8 C.F.R. § 1208.4(a)(2)(ii).
[16] *See* 8 C.F.R. § 208.4(a)(4)(i).
[17] 8 C.F.R. § 208.4(a)(5).
[18] *Id.*

stemming from backlogs before the immigration courts are beyond the applicant's control, they should similarly constitute an extraordinary circumstance that excuses the OYFD.

The USCIS Asylum Office's Lesson Plan on the OYFD explains that other types of circumstances might also justify an extension if the applicant can show that they were "extraordinary and directly related to the failure to timely file."[19] These circumstances include: "severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization."[20] Any such factor or combination of factors must have compromised the applicant's functioning severely enough to have generated a "significant barrier" to timely filing.[21] Attorneys should carefully review their client's cases to determine if any such factors, other than the EOIR backlog, played an outcome-determinative role in the failure to timely file.

Applicants bear the burden of convincing the IJ or asylum officer that the failure to timely file was not their fault.[22] The BIA has set forth a three-part test to determine whether an applicant's failure to file within the OYFD was due to an extraordinary circumstance.[23] First, the applicant must establish that an extraordinary circumstance actually exists. Second, the applicant must demonstrate how those circumstances directly relate to his or her failure to timely file the application. Third and finally, the applicant must prove that the delayed filing was reasonable under the circumstances.[24] These criteria should be easily satisfied where failure to comply with the OYFD is due to immigration court backlogs, as long as the asylum application has been submitted in a timely manner and the applicant (or the applicant's attorney) presents evidence of other good faith efforts to file.

Timing plays an important role in arguing exceptions to the OYFD. Both extraordinary and changed circumstances may excuse an applicant from meeting the OYFD only if the asylum application is filed within a reasonable period of time.[25] However, unlike changed circumstances, extraordinary circumstances must occur during the OYFD period, as they must directly relate to the applicant's failure to timely file.[26] The BIA examines "reasonable time" disputes on a case-by-case basis but has found that "waiting six months or longer after expiration or termination of status would not be considered

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[19] Asylum Officer Basic Training: One Year Filing Deadline 13, (March 23, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf (last visited Nov. 10, 2015).
[20] *Id.* at 20.
[21] *Id.* at 20.
[22] *Id.*
[23] *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002).
[24] *Id.* at 288.
[25] 8 C.F.R. § 208.4(a)(5)
[26] *See e.g.*, Dree K. Collopy, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (7th ed. 2015), pp. 193-194.

reasonable."[27] Attorneys should review the specific facts of their clients' cases to determine whether, taking into account the totality of the circumstances, a bona fide argument exists for timely filing.[28]

What is the difference between lodging an asylum application and filing it in court?

Asylum applicants are eligible to receive employment authorization documents (EAD) from USCIS 180 days after their asylum applications are filed in both affirmative and defensive cases. The 180-day waiting period is calculated according to the "asylum EAD clock," which tracks the number of days since an asylum application has been filed. To facilitate USCIS's adjudication of EAD applications, EOIR provides USCIS with access to the clock for cases pending before the immigration courts.[29] USCIS will consider an application "filed" only when it has been submitted in open court. However, the asylum EAD clock starts after an application has been "lodged" with the immigration court.

An application is "lodged" for purposes of determining eligibility for employment authorization, when an applicant or attorney submits an asylum application to the court clerk either in person or by mail.[30] Pursuant to the "ABT Settlement Agreement,"[31] EOIR accepts defensive filings at the immigration court window and stamps these applications "lodged not filed."[32] EOIR then transmits the "lodged not filed" date to USCIS.[33] For detailed guidance on lodging an asylum application for employment authorization purposes, see Employment Authorization and Asylum: Strategies to Avoid Stopping the Asylum EAD Clock, American Immigration Council Practice Advisory (last updated February 5, 2014).

[27] *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 193 (BIA 2010) (noting "[s]horter periods of time would be considered on a case-by-case basis, with the decision-maker taking into account the totality of the circumstances"); *but see Taslimi v. Holder*, 590 F.3d 981 (9th Cir. 2010) (finding that asylum application filed nearly seven months after circumstances changed to be within a reasonable time).

[28] Alternatively, some practitioners have also argued that the regulations providing applicants with a "reasonable time" to file after the changed circumstances occur are *ultra vires*. The statute only requires that "that the application has been filed within 1 year after the date of the alien's arrival in the United States." *See* INA § 208(a)(2)(B) The Act then allows for the changed and extraordinary circumstances exception. *See* INA § 208(a)(2)(D). Nowhere does the statute provide temporal limits on filing once an exception is met.

[29] *See* EOIR Practice Manual, Chapt. 4(l), *citing* INA § 208(d)(2), § 208(d)(5)(A)(iii); 8 CFR § 1208.7.

[30] *See* EOIR Practice Manual, Chapt. 4(i).

[31] As part of a settlement of a nationwide class action lawsuit, *B.H., et al. v. USCIS, et al.*, No. CV11-2108-RAJ (W.D. Wash.), EOIR and USCIS established certain procedures that affect the eligibility of some asylum applicants for employment authorization. The settlement agreement and other documents pertaining to and interpreting the agreement can be found here: http://www.legalactioncenter.org/litigation/asylum-clock.

[32] *See* EOIR Practice Manual, Chapt. 4(i).

[33] *Id.*

For purposes of the OYFD, a lodged asylum application is not considered "filed."[34] The asylum application must still be filed with an immigration judge at a master calendar hearing.[35] Nevertheless, as explained below, "lodging" is one of several actions attorneys may utilize in seeking to comply with the OYFD.

How can I preserve the OYFD where the immigration court does not schedule my client's master calendar hearing or schedules it beyond the OYFD?

Many practitioners face the scenario where a client has been served with a Notice to Appear (NTA) but the NTA has not been filed with the immigration court. Alternatively, even if is the NTA has been filed, an initial master calendar hearing may not be scheduled until after the OYFD has passed. In these situations, clients are best served by a multi-pronged strategy demonstrating that their failure to meet the OYFD is due to circumstances beyond their control. This strategy may include some or all of the steps discussed below.

Filing the I-589 Application for Asylum with USCIS

In cases where an NTA has been served on a client but not filed with the immigration court, attorneys should file the asylum application with the relevant USCIS Service Center. At a recent USCIS Asylum Division Quarterly Stakeholder Meeting, John Lafferty, Chief of the Asylum Division, indicated that asylum applications (Form I-589) sent to USCIS Service Centers will be rejected only if internal databases show that the NTA has been filed with the immigration court, thereby establishing jurisdiction with EOIR.[36] Thus, the Service Center will accept the application if an NTA has not yet been filed with the court. If accepted, the application will be forwarded, along with the applicant's A-file, to the relevant USCIS Asylum Office, which will then determine whether to adjudicate the case. Filing before USCIS may also constitute evidence of good faith efforts to meet the OYFD.

In some jurisdictions, submission of an application to USCIS may not excuse a late filing. In the Houston immigration court, for example, an IJ found that the extraordinary circumstances exception did not apply where the respondent had timely filed his application and biometrics request with USCIS, but the first available master calendar hearing date fell beyond the OYFD. The IJ found that counsel's failure to file a Motion to Advance the Hearing date precluded a finding of extraordinary circumstances. As of November 2015, the case was pending before the Fifth Circuit Court of Appeals.

[34] *Id.* Please note that some judges and immigration court jurisdictions do accept lodged applications as "filed" for the purposes of the OYFD. Please see footnote 38 below describing local practices across the nation.

[35] U.S. Department of Justice, EOIR, Memorandum from Chief Immigration Judge O'Leary, "Operating Policies and Procedures Memorandum 13-03: Guidelines for the Implementation of the ABT Settlement Agreement," Dec. 2, 2013; *see also,* EOIR Practice Manual, Chapter 3.1(b)(III)(A).

[36] USCIS Asylum Division, Quarterly Stakeholder Meeting Agenda and Unofficial Notes, August 7, 2015, AILA Doc. No. 15111204, *available at* http://www.aila.org/infonet/uscis-asylum-division-liaison-minutes-08-07-15 (last visited Nov. 23, 2015).

Decisions such as these are prime example of the need for attorneys to follow a multi-pronged approach, combining many efforts, to preserve the OYFD.

"Lodging" an asylum application with EOIR

In cases where the NTA has been filed with the immigration court but the master calendar hearing is scheduled beyond the OYFD, the "lodging" procedure described above may constitute additional evidence of good faith efforts to meet the filing requirements. Indeed, the EOIR guidelines under the ABT Settlement Agreement specifically permit judges to "consider the legal effect of lodging an asylum application when considering whether an exception to the one-year bar applies."[37] Policies and practices regarding whether lodging is in fact accepted as filing vary widely nationwide.[38]

If pursuing a "lodging" strategy, practitioners should comply with the requirements for lodging set forth in the EOIR Practice Manual.[39] Additionally, given the firm deadlines involved, there is little room for error. EOIR rejects "defective filings" where for example, the I-589 is not signed by the applicant, the I-589 is not filed at the correct court location, or where the case is not pending before EOIR, among numerous other reasons.[40] Similarly, an application that is submitted by mail or courier for lodging purposes may be rejected if it is not accompanied by a self-addressed, stamped, envelope; does not include a cover page; or does not include a prominent annotation on the top of the front page stating that is being submitted for the purpose of lodging.[41]

Filing a Motion to Advance the Hearing Date

In cases where an NTA has been filed with the immigration court but the master calendar hearing is scheduled beyond the OYFD, attorneys should also consider filing a Motion to

[37] U.S. Department of Justice, EOIR, Memorandum from Chief Immigration Judge O'Leary, "Operating Policies and Procedures Memorandum 13-03: Guidelines for the Implementation of the ABT Settlement Agreement," Dec. 2, 2013 at 6.

[38] AILA asylum liaison contacts across the country shared the lodging and filing practices at their local courts with the authors of this Practice Advisory. This informal polling yielded the following information which is provided for informational purposes only, is subject to change, and should not be relied upon as established practice in any matter or proceeding before EOIR: Judges at the immigration court in Arlington, VA have agreed (and communicated their agreement to local attorneys through pro bono liaison meetings with the court) that lodging constitutes filing for the purpose of meeting the OYFD and routinely permit an exception to the deadline where an applicant has lodged the I-589 within one year of his or her last entry into the United States. Judges in some courts, including Omaha, NE, Los Angeles, CA, New Orleans, LA, and Seattle, WA, accept lodging as filing but have not made any formal policy announcement to that effect. In other courts, including Denver, CO, Judges do not consider lodging as filing for the purposes of the OYFD. In Houston, TX court personnel informed practitioners that each immigration judge has discretion to determine whether lodging constitutes filing and that there is no official guidance. In Portland, OR, practitioners similarly report that there is no official rule regarding lodging as filing, but that Judges seem to often accept the lodged date as filed for the purposes of the OYFD.

[39] *See* EOIR Practice Manual Chapter 4(i)(A).

[40] *Id.*

[41] *Id.*

Advance the Master Calendar Hearing Date. Such a motion may constitute further evidence of good faith efforts to meet the OYFD and will preserve a record for appeal should an IJ find there are no extraordinary circumstances.

A Motion to Advance should "completely articulate" the reasons for advancing the hearing date, the negative consequences of not doing so, and the relief or remedy sought.[42] Attorneys should explicitly state that the purpose of the motion is to enable the respondent to meet the OYFD. Motions should be accompanied by the respondent's written pleadings, a copy of the asylum application (as well as any additional copies for family members included in the application), and supporting documentation. The motion must be filed with a cover page labeled "MOTION TO ADVANCE" and include a proposed order for the IJ to sign.[43] While not required by the regulations or the EOIR Practice Manual, a Motion to Advance may help preserve arguments for appeal should an IJ refuse to accept an asylum application due to issues relating to the OYFD.

After filing a Motion to Advance the Hearing Date, an attorney should be ready to proceed if the motion is granted. Attorneys should prepare the asylum application and supporting documents for submission to the immigration court, along with evidence of their attempts to timely file. Such evidence may include a copy of the cover page with the "lodged not filed" stamp, the USCIS receipt and ASC notices, and a copy of the Motion to Advance.

Arguing that a Request for a Credible Fear Interview is an Application for Asylum

In a situation where a client has undergone or requested a credible fear interview, and then failed to file within one year of entry into the United States, the following argument may be made. Paragraph (1) of INA §208 provides that an application for asylum can be made "in accordance with this section or, *where applicable, section 235(b) of this title*."[44] The OYFD rule provides, of course, that subject to certain exceptions described in the statute, paragraph 208(1) shall not apply unless the application for asylum is made within one year of the applicant's entry into the United States.[45]

INA §235(b), in turn, provides that when an inadmissible alien seeking admission "indicates either an intention to apply for asylum under INA§208 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B)."[46] INA §235(b) provides the process for consideration and review of the credible fear interview for applicants for admission. No particular form is required.

Once an applicant states that he or she is afraid to return, the applicant is deemed an applicant for asylum. The argument should be made that under the plain language of the

[42] *See* EOIR Practice Manual Chapter 5.10(b).
[43] *See Id.* at Chapter 5.2(b).
[44] INA § 208(a)(1) (emphasis added).
[45] INA § 208(a)(2)(B).
[46] INA § 235(b)(1)(A)(ii).

statute, a request for a credible fear interview under INA Section 235(b), made within one year of entry, constitutes an application for asylum. As such, practitioners should argue that any individual who has undergone or even simply requested a credible fear interview, is not subject to a bar to asylum raised by the OYFD. Again, practitioners and their clients are best served by a multi-faceted approach that, when applicable, incorporates this argument, as well as the other strategies cited herein.

Under what circumstances should I appeal a denial of an asylum application based on failure to meet the OYFD?

If an IJ denies asylum based on a failure to meet the OYFD, attorneys should consider appealing the decision to the Board and, if necessary, to the relevant court of appeals. The REAL ID Act limits judicial review of legal claims, with the exception of constitutional claims or questions of law.[47] Courts have generally considered questions of timeliness and changed or extraordinary circumstances to be questions of fact, and therefore unreviewable.[48] Nevertheless, attorneys may argue that an IJ's refusal to accept an asylum application is not a pure question of fact, but also an error of law that deprives an asylum applicant of his statutory and due process right to seek asylum.[49]

The Ninth Circuit has found jurisdiction to review the Board's extraordinary and changed circumstances determinations. In *Husyev v. Mukasey*, for example, the Ninth Circuit concluded that EOIR had established a "meaningful standard" by which it could review the BIA's extraordinary circumstances determinations, "including review of the

[47] *See* 8 U.S.C. § 1252(a) ("[n]othing ... in any ... provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims* or *questions of law* raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.").

[48] *See e.g., Diallo v. Gonzales*, 447 F.3d 1274, 1281-82 (10th Cir. 2006); *Sukwanputra v. Gonzales*, 434 F.3d 627, 633-35 (3d Cir. 2006); *Chen v. Gonzales*, 434 F.3d 144, 154 (2nd Cir. 2006); *Mehilli v. Gonzales*, 433 F.3d 86, 93-94 (1st Cir. 2005); *Vasile v. Gonzales*, 417 F.3d 766, 768-69 (7th Cir. 2005); *see also Chacon-Botero v. U.S. Attorney Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (holding that the REAL ID Act did not confer jurisdiction to review an IJ's untimeliness ruling); *Bosung v. Gonzales*, No. 05-1555, 2006 WL 851092, at *1 (4th Cir. 2006) (unpublished opinion) (per curiam) (same).

[49] *See e.g., Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (modifying a previous holding to bar review of asylum applications denied for untimeliness "only when the appeal seeks review of discretionary or factual questions, but not when the appeal seeks review of constitutional claims or matters of statutory construction."); *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (holding that "jurisdiction over 'questions of law' as defined in the Real ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact."); *Nakimbugwe v. Gonzales*, 475 F.3d 281, 284 (5th Cir. 2007) ("finding that "the IJ's determination was based entirely on his construction of a federal regulation, which is a question of law over which we now have jurisdiction."); *Lumataw v. Holder*, 582 F.3d 78 (1st Cir. 2009) (holding that "the question of whether the IJ and BIA applied the correct filing deadline in assessing the timeliness of his asylum application, constitutes a 'question of law' underlying the agency's timeliness determinations."); *Mabasa v. Gonzales*, 455 F.3d 740, 744 (7th Cir. 2006) (finding jurisdiction over Petitioners' claims under the REAL ID Act on the basis that "they were not afforded a meaningful opportunity to be heard since the BIA wrongly analyzed their claim as one of extraordinary circumstances"); *see also* Dree K. Collopy, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* Ch. 12 (7th ed. 2015).

'reasonable period' prong in particular."[50] In *Taslimi v. Holder*, the court applied similar reasoning to find it had jurisdiction to review whether the respondent had filed her asylum application within a reasonable period of time given the changed circumstances presented by her religious conversion.[51] These cases suggest an argument that, given existing backlogs in the immigration courts, an IJ's refusal to accept an asylum application under one of the exceptions to the OYFD constitutes an error of law that is subject to judicial review.

What other arguments can I make to appeal a denial of an asylum application based on failure to meet the OYFD?

Attorneys may also argue that denials of asylum applications for failure to meet the OYFD for purely technical reasons are too stringent and beyond the scope of Congressional intent. The exceptions to the OYFD were intended to be flexible and broad.[52] At the time of enactment, Congress' "paramount objective" was to prevent fraudulent claims.[53] "Wide concern existed that undocumented immigrants were abusing the asylum process in order to obtain permission to work and access other societal benefits."[54] Nevertheless, even with these concerns, Congress sought to ensure that the U.S. "remain a safe haven" for legitimate asylum seekers fleeing persecution in their home countries.[55] Recognizing this overriding goal, Senator Orrin Hatch, a proponent for the one-year bar, stated that he too was "committed to ensuring that those with legitimate claims for asylum are not returned to persecution, particularly for technical deficiencies."[56]

Where asylum applicants have made good faith efforts to file asylum applications within a reasonable period of time, for example, by lodging, by filing a motion to advance the hearing date, filing an application with USCIS where possible, and other such strategies, it would be contrary to Congressional intent to reject such claims for failure to file within the OYFD. Strict application of the OYFD in this manner is rigid, does not prevent fraud, and denies protection to legitimate asylum seekers.

The American Immigration Council and AILA are interested in tracking and potentially intervening as amicus in cases where immigration judges or the Board of Immigration Appeals have declined to find an exception to the OYFD even though a respondent's

[50] 528 F.3d 1172, 1181 (9th Cir. 2008).
[51] 590 F.3d 981, 985 (9th Cir. 2010).
[52] *See Vahora v. Holder*, 641 F.3d 1038, 1045 (9th Cir. 2011); *see also,* Karen Musalo and Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 696 (2008) [Hereinafter "Musalo, *Implementation of the One-Year Bar to Asylum*."]
[53] *Vahora*, 641 F.3d at 1045.
[54] Musalo, *Implementation of the One-Year Bar to Asylum* at 695.
[55] *Vahora*, 641 F.3d at 1045.
[56] *See* 142 Cong. Rec. S11838 - 40 (daily ed. Sept. 30, 1996) (statement of Sen. Orrin Hatch) *cited in Vahora*, 641 F.3d at 1045.

master calendar hearing was scheduled beyond the deadline. Please submit your case via our online form.[57]

Conclusion

The immigration court backlogs present serious challenges for asylum seekers. By pursuing the type of multi-pronged, proactive strategy described above, attorneys can assist their clients in complying with the OYFD and thereby safeguard their ability to apply for asylum. [58]

[57] Call for Examples: Denial of Asylum Based on Master Calendar Hearing Scheduled After One-Year Filing Deadline, August 4, 2015, AILA Doc. No. 15071403, *available at* https://liaison.formstack.com/forms/asylumfilingdeadline.

[58] For additional practice pointers regarding the OYFD, *see e.g.*, Dree K. Collopy, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (7th ed. 2015), pp. 184-197.