

10-21-2010

The One-Year Asylum Deadline and the BIA: No Protection, No Process

Penn State Law Immigrants' Rights Clinic

Human Rights First

National Immigrant Justice Center

Follow this and additional works at: http://elibrary.law.psu.edu/irc_pubs

 Part of the [Immigration Law Commons](#)

Recommended Citation

Penn State Law Immigrants' Rights Clinic, Human Rights First, and National Immigrant Justice Center, "The One-Year Asylum Deadline and the BIA: No Protection, No Process" (2010). *Center for Immigrants' Rights Clinic Publications*. Book 8.
http://elibrary.law.psu.edu/irc_pubs/8

This Book is brought to you for free and open access by the Center for Immigrants' Rights Clinic at Penn State Law eLibrary. It has been accepted for inclusion in Center for Immigrants' Rights Clinic Publications by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.



THE ONE-YEAR ASYLUM DEADLINE and the BIA: NO PROTECTION, NO PROCESS

An Analysis of Board of Immigration
Appeals Decisions 2005-2008

October 2010

Co-Authored by:



National Immigrant Justice Center



human rights *first*

PENN STATE LAW

THE ONE-YEAR ASYLUM DEADLINE and the BIA: NO PROTECTION, NO PROCESS

Table of Contents

Executive Summary	2
Background on the One-Year Deadline	3
Findings	5
Recommendations	10
Methodology	11
Endnotes	14
About the Authors.....	17
Appendices	18

EXECUTIVE SUMMARY

The right to seek asylum from persecution is a fundamental and long-recognized human right. The United States committed to protecting refugees in 1967 when it signed the Protocol relating to the Status of Refugees and later enacted legislation to incorporate the Protocol’s key provisions into domestic law.¹ Despite these commitments, in 1996 Congress enacted a filing deadline for asylum applications which has resulted in potentially denying protections to thousands of legitimate refugees.

The filing deadline requires an asylum seeker to establish by “clear and convincing” evidence that she filed her asylum application within one year of arrival in the United States. If she misses the deadline, she must prove eligibility for one of two exceptions in order to seek asylum.² An asylum seeker who does not establish she has applied within one year or meet an exception can be subject to deportation, even if she has a well-founded fear of persecution.

19% of the 3,472 cases included in the study involved the one-year filing deadline

The one-year deadline threatens the U.S. government’s fundamental moral and legal commitment to protect refugees. Legal experts conclude that the filing deadline results in the arbitrary denial of protection to refugees.³ No study has examined how the Board of Immigration Appeals (BIA) applies the deadline

until now. This report provides an understanding of the deadline’s impact on refugees whose asylum cases are decided by the BIA.

This study evaluated the BIA’s application and interpretation of the filing deadline by analyzing more than 3,472 BIA asylum cases decided during January of each year from 2005 to 2008. The Executive Office for Immigration Review (EOIR) provided these decisions in response to a Freedom of Information Act (FOIA) request submitted by the National Immigrant Justice Center (NIJC). The EOIR includes the BIA and the immigration courts.

Findings

- I. The BIA denies asylum to large numbers of refugees fleeing persecution on the basis of the asylum deadline alone. Many refugees prove they are “more likely than not” to face persecution, but are granted only “withholding of removal,” which accords only temporary protection and forecloses family reunification and a path to citizenship. For approximately half of the applicants in this study who were denied asylum due to the deadline, the delayed filing was the only specifically mentioned defect in the request for protection.

II. The BIA violates Congressional intent by failing to ensure that the deadline requirement is applied in a flexible and rational manner, increasing the number of arbitrary denials.

Recommendations

Congress must repeal the deadline. As long as the filing deadline remains, refugees will continue to be denied asylum on the basis of a technicality. Until Congress repeals the deadline, the U.S. Department of Justice (DOJ) and Department of Homeland Security (DHS) should take immediate action to ensure the greatest possible protection of refugees under current law. DOJ and DHS should revisit regulations governing exceptions to the deadline, create additional training materials and guidance on the deadline, issue precedential decisions interpreting the deadline (consistent with Congressional intent and international legal obligations) and monitor the adjudication of asylum cases involving the deadline.

BACKGROUND ON THE FILING DEADLINE

Congressional Intent

Congress enacted the filing deadline against a backdrop of two competing concerns. Some lawmakers worried that some non-refugees applied for asylum to delay their removal or to obtain immigration status fraudulently.⁴ However, lawmakers remained committed to protecting genuine refugees and insisted that the filing deadline was not intended to deny protection to those who truly need it.⁵ Accordingly, Congress included two exceptions to the filing deadline to protect refugees who do not file within their first year in the United States:

1. An applicant must demonstrate “changed circumstances which materially affect the applicant’s eligibility for asylum” or
2. The applicant must show “extraordinary circumstances relating to the delay in filing.”⁶

In 2000, the Immigration and Naturalization Service, predecessor to today’s immigration authorities within DHS, published the final rule implementing the filing deadline.⁷ The regulations list several examples of “changed” and “extraordinary” circumstances including: a change of conditions in the applicant’s home country, a serious illness which caused the applicant to miss the deadline,

incorrect legal advice, and maintaining other forms of lawful status. When an exception applies, the applicant must apply for asylum within a “reasonable period.”⁸

The regulations make clear that the list of example situations that might merit an exception is illustrative rather than exhaustive.⁹ In other words, adjudicators can, and should, find other situations not listed in the regulations to constitute exceptions if applicants show that (1) changed circumstances were “material to” asylum eligibility or (2) extraordinary circumstances were “directly related to” the delay in filing and were not created by the applicant.¹⁰

The Role of the BIA

The BIA is the administrative appellate body that hears appeals of immigration court rulings. The BIA’s 15 members decided between 30,000 and 42,000 cases per year during the study period.¹¹ The BIA plays a central role in interpreting immigration law and supervising adjudication in immigration courts. Although all but a few dozen of the BIA’s annual decisions are unpublished, its published decisions are binding on all immigration judges and asylum officers. The BIA becomes even more influential in the context of the filing deadline because Congress stripped federal court review of most administrative decisions in which the deadline is a factor.¹² The BIA’s review is the final recourse for most asylum seekers who lose their cases based on the filing deadline.

Withholding of Removal: A Poor Alternative

An applicant barred from asylum may be eligible for “withholding of removal,” a more limited form of protection which is not subject to the filing deadline.¹³ Withholding of removal has many shortcomings. Withholding of removal carries a much higher burden of proof than asylum. Even if the applicant meets that burden, the relief granted is very limited. Unlike refugees who are granted asylum, refugees who receive withholding protection are not allowed to bring children or spouses to the United States. Instead, families often are separated and young children may be stranded in dangerous situations. Further, refugees who are granted only withholding of removal cannot apply to become lawful permanent residents, and therefore do not have a path to citizenship or legal equality in the United States. Finally, the U.S. government can decide to return a person who has received withholding protection to her original country at any time if it determines the country is now safe, or can choose to deport the refugee to a third country. Withholding of removal status puts refugees in legal limbo where their rights are severely restricted and they are unable to permanently resettle.

FINDINGS

I The one-year deadline results in the arbitrary denial of protection to refugees. Due to the deadline, some refugees are denied asylum and ordered removed, while others are granted only limited protection under withholding of removal.

This study analyzed 3,472 BIA cases, of which 662 (19 percent) involved the filing deadline. In 22 of those cases, during four months alone, asylum seekers who were found to be refugees facing a clear probability of persecution in their home countries were denied asylum based on the filing deadline. While these individuals were granted withholding of removal, that limited protection from deportation did not allow them to become lawful permanent residents or to bring their families to safety in the United States.

In some cases, the BIA granted withholding of removal to a primary applicant but used the same decision to deport immediate family members, who had filed as derivatives. For example:

One applicant was a Chinese Christian Indonesian who testified that he suffered severe abuse, including being doused with gasoline in an attempt to burn him alive because of his faith and ethnicity. He and his wife (also a Chinese Christian Indonesian) applied for asylum and withholding of removal, but missed the one-year deadline. The wife was a derivative on the asylum application. An immigration judge denied the couple relief based on the missed filing deadline. On appeal, the BIA affirmed the ruling, but found that the applicant had suffered past persecution, which made him presumptively eligible for withholding of removal. His wife remained subject to deportation.¹⁴

A political dissident from Guinea fled to the United States, leaving at least two of his children behind after he was imprisoned, beaten, and threatened with death for more than a year because of his political beliefs and ethnicity. The BIA found that the man's testimony was credible and he was eligible for withholding of removal, but did not grant his wife any relief.¹⁵

-
- **In approximately 46 percent of cases where the filing deadline is an issue, it is the only reason cited by the BIA as justifying the denial of asylum.**

When the BIA identified no flaw in an asylum application besides the deadline, the study authors labeled the deadline issue as “potentially outcome determinative.” When the deadline issue is potentially outcome determinative, the applicant may have been recognized as a refugee deserving asylum protection, except for the deadline. If the BIA found that the applicant was not credible, that the applicant’s feared harm was not “on account of” one of the grounds protected under asylum law, or merely stated that the applicant would not have been eligible for asylum even if she had met the deadline, the deadline issue in that case was not considered to be potentially outcome determinative.

Even after immigration courts determine that the filing deadline bars applicants from asylum, the judges normally hear and rule upon the asylum seekers’ accounts of feared persecution to analyze their eligibility for withholding of removal. The BIA has access to this evidence when crafting its own decisions. The fact that the BIA points to no adverse credibility determination or other legal flaw in these cases is strong indication that an applicant possesses an otherwise legitimate claim to asylum.

The intent of Congress in enacting the filing deadline was to deter fraudulent or frivolous asylum applications by non-refugees, not to prevent the consideration of valid asylum claims. In only half of late-filed cases, however, did the BIA point to alternate grounds to deny the application, such as an adverse credibility finding. The other half of the cases, in which the BIA pointed to no legal flaw but the one year deadline, clearly included individuals who met the refugee definition. Furthermore, the BIA's ability to identify alternate grounds for denial in one half of the late-filed cases demonstrates that immigration authorities are capable of evaluating claims on their merits, without this deadline. The filing deadline has turned Congressional intent on its head. Unnecessary as a tool to prevent fraud, it causes the denial of asylum protection to asylum applicants regardless of whether they are refugees.

The filing deadline has turned Congressional intent on its head.

- **The filing deadline affects approximately one in five asylum applicants before the BIA.**

Approximately one in five asylum seekers who appeal to the BIA have missed the deadline or are alleged to have missed it. This figure significantly under-represents the true impact of the filing deadline on asylum applicants. First, many asylum applicants denied protection by an immigration judge due to the deadline choose not to pursue a BIA appeal, particularly if they are fighting their

cases from detention. Second, potential asylum applicants who have missed the filing deadline may decline to apply because they are advised by legal counsel that unsuccessful affirmative asylum applications result in referral to removal proceedings. Faced with the risk of deportation, refugees who have already missed the deadline may choose to remain in the United States without valid immigration status. They may decide that living without status, which implies facing a constant risk of being placed in removal proceedings, is safer than seeking an exception to the filing deadline or trying to meet the high standard for withholding of removal.

II. The BIA’s application of the one-year deadline is inflexible, contradicts Congressional and regulatory intent, and increases the threat of arbitrary denials of protection.

- **Despite the harsh consequences of denials due to the deadline, the BIA provides only summary analysis in a supermajority of cases.**

Often asylum cases are matters of life and death. Given the potentially disastrous consequences of incorrect decisions, they must be adjudicated with a high level of attention to due process. Despite this particular need for well-considered decisions, the authors concluded the BIA provided no substantive analysis of denials in 68 percent of the study’s filing deadline cases. Many of these cases were “affirmances without opinion,” in which the BIA simply stated that the immigration judge’s conclusion was correct and provided no additional commentary.¹⁶ In other cases with no substantive analysis, the BIA offered only conclusory statements endorsing the immigration judge’s findings. An example of a statement: “The Immigration Judge correctly concluded that the respondent’s asylum application was untimely as the respondent has failed to demonstrate either changed circumstances or extraordinary circumstances within the scope of 8 C.F.R. §§ 1208.4(a)(4) & (5).”¹⁷

Asylum applicants have no appeals process once the BIA has denied their claims based on the filing deadline.

The examples raise concerns that the BIA applies the deadline to bar applicants from asylum eligibility without evaluating thoroughly if the law requires it. These concerns are particularly significant because Congress has limited the federal courts’ jurisdiction over filing deadline issues to “questions of law and constitutional issues,” and most federal Courts of Appeals have interpreted the scope of their jurisdiction under this statute narrowly.¹⁸ This means asylum

applicants have no appeals process once the BIA has denied their claims based on the filing deadline. Summary and unreasoned decisions on whether to return people to countries where they may be persecuted are unacceptable, particularly when those decisions are unreviewable.

-
- **The BIA’s unpublished decisions apply the deadline in an inflexible and unnecessarily technical manner.**

While the law states that the list of examples of exceptions enumerated in the regulations is illustrative, this study identified 34 cases in which

Even though the list of exceptions included in the regulations is not intended to be exhaustive, the BIA did not grant a single unlisted exception.

the BIA refused to recognize a refugee’s circumstances as an exception on the sole justification that it was not listed in those regulations. The inflexibility is further demonstrated by the fact that the BIA did not recognize an unlisted circumstance as an exception in any of the 662 deadline-related cases studied. This practice contradicts explicit language in the statute stating that the examples listed in the regulations should not be considered complete. The following case examples highlight the BIA’s overly restrictive interpretation of the law:

A gay man from Mexico convinced an immigration judge that he was eligible for an extraordinary circumstances exception, as he had only recently accepted his sexual orientation. Even after accepting himself, he was afraid of and unwilling to tell government officials about his sexual orientation. The BIA reversed the immigration judge’s asylum grant, finding that “coming out” was “too nebulous” a concept to be considered an exception, and cited the list of exceptions in the regulations. The cite to the regulations implied that the applicant’s claimed exception was not valid because it was not listed.¹⁹

An ethnic Chinese Christian woman from Indonesia, a country with widespread violence against ethnic and religious minorities, waited two years to apply for asylum. She explained her family forbade her from applying and withheld evidence crucial to her claim. The woman cited guidance from the Asylum Office that specifically recognizes “severe family opposition” as a possible extraordinary circumstance. The BIA faulted the applicant for failing to provide this guidance, despite the fact that the guidance is available publicly and is widely understood.²⁰ The BIA refused to recognize family opposition as an extraordinary circumstance, stating that “nothing in the statutory or relevant regulatory history” supports it.²¹

-
- **The BIA’s decisions regarding the filing deadline are disproportionately adverse to asylum seekers.**

The BIA is significantly more likely to reverse an immigration judge’s grant of an exception to the deadline than it is to reverse the denial of a grant of an exception. When an immigration judge granted an exception to the one-year deadline, the BIA affirmed that decision in only 75 percent of cases. In contrast, when an immigration judge denied an exception, the BIA affirmed the immigration judge in 96 percent of those cases.

- **The BIA’s unnecessarily harsh interpretation of the “clear and convincing” standard for establishing an applicant’s date of arrival in the United States increases arbitrary denials of asylum due to the filing deadline.**

In many cases, the issue in an asylum case is not whether an exception should be granted, but whether the filing deadline even applies. Asylum applicants arrive in the United States after fleeing traumatic experiences. Their immediate attention is focused on safety and basic needs. Despite these competing urgent concerns and a likely lack of familiarity with U.S. asylum law, applicants must produce “clear and convincing evidence” that their arrival in the United States was within one year of when they filed their asylum applications. This issue arose in 22 percent of the filing deadline cases.

The “clear and convincing” standard for establishing date of arrival is problematic: refugees generally are eligible for protection if they establish a well-founded fear of persecution by a preponderance of the evidence. The Asylum Office interprets the law to allow

When asylum seekers enter the U.S., their immediate attention is focused on safety and basic needs—not gathering evidence.

an applicant to establish date of arrival by credible testimony alone.²² The BIA’s unnecessarily rigid approach for establishing an arrival date increases the number of arbitrary denials caused by the one-year deadline. This rigidity is illustrated in the following examples:

The BIA found a Mauritanian woman credible and granted withholding of removal, recognizing that she faced a clear probability of persecution. However, the BIA concluded that despite her testimony and a letter from a friend, the applicant had not provided clear and convincing evidence that she filed within one year of her arrival.²³

An Albanian applicant was unable to recount his date of entry into the United States. While the BIA was willing to accept that he likely entered the United States after the date his passport was issued—less than one year before he applied for asylum—the BIA found the applicant had failed to establish by clear and convincing evidence that he had applied within one year of his arrival.²⁴

In *Khunaverdians v. Mukasey*, a similar case decided by the U.S. Court of Appeals for the Ninth Circuit, the applicant's entry dates were disputed but there was no question that entry had occurred within a year of application filing. The Ninth Circuit found that the BIA's conclusion that the deadline barred asylum eligibility was wrong as a matter of law.²⁵ The review by the federal courts in this case illustrates the critical role of judicial review in ensuring that refugees are not deported arbitrarily. Because Mr. Khunaverdians' case arose within a circuit that provides some meaningful review of filing deadline denials, his denial of relief was reversed. In many other parts of the country, the federal courts do not review and correct these unnecessary filing deadline denials.

RECOMMENDATIONS

Congress must repeal the filing deadline to ensure that refugees are not denied protection based on a technicality. The deadline is unnecessary, arbitrary, and a violation of the U.S. government's commitments to refugees' basic human rights.

In the interim, DOJ and DHS should pursue the following administrative measures:

1. DOJ should provide increased training for immigration judges on issues such as persecution-induced psychological problems and sexual orientation and gender identity, as these issues often are central to determining whether an applicant can establish an exception to the deadline.
2. DOJ should immediately adopt Asylum Office guidance that lists additional circumstances that can constitute statutory exceptions to the deadline, beyond those listed in the regulations.
3. DOJ and DHS should clarify that adjudicators cannot merely state that a claimed deadline exception's absence from the regulatory list is adequate reason to deny asylum.

4. DOJ and DHS should consider expanding the regulatory list of sample circumstances that amount to exceptions to the deadline, in light of evolving experience since the implementation of the current regulations more than 10 years ago. DOJ and DHS should give particular consideration to whether individuals who were reasonably unaware of potential eligibility for asylum protection can demonstrate an exception to the deadline.

5. DOJ should clarify that asylum seekers who testify credibly about their dates of arrival should not be barred from asylum under the “clear and convincing evidence” requirement, as the Asylum Office recognizes.

Consistent with the U.S. government’s historic commitments, the Attorney General must ensure, to the maximum extent allowable under law, that people seeking protection are not deported to countries where they will face persecution.

Implementing these recommendations, based on a renewed commitment from United States agencies and lawmakers to fair and deliberative process, would help ensure that refugees are not denied protection because of a technicality.

METHODOLOGY

In April 2008, NIJC submitted a FOIA request to EOIR requesting “All copies of decisions of the BIA relating to applications for Asylum or Withholding of Removal in January 2008, January 2007, January 2006, and January 2005.”²⁶ In response to this request, EOIR produced 3,472 redacted cases.²⁷ The cases included decisions ranging from multiple-page analyses to short “affirmances without opinion”²⁸ in which the BIA simply affirmed the immigration judge’s underlying decision without further comment.

NIJC shared the case files with Human Rights First and Penn State Law’s Center for Immigrants’ Rights. The three groups reviewed the cases and extracted filing deadline information. Former Penn State Law students Charles Pace and Richard Lupinsky examined the 2005 cases and one third of the 2007 cases under the supervision of Penn State Law’s Center for Immigrants’ Rights Director Shoba Sivaprasad Wadhia. At various intervals, Professor Wadhia reviewed a sampling of the FOIA production to ensure the students’ coding accuracy and met weekly with the students

to discuss select cases and related findings. The students reread every case that considered a filing deadline issue. Human Rights First's Georgetown Fellow Tori Andrea examined the remaining two thirds of the 2007 cases. NIJC legal intern Matthew Lamberti and supervising attorney Eric Berndt examined the 2006 and 2008 case data. NIJC and Human Rights First also randomly reviewed a sample of their cases to help ensure data quality.

The researchers reviewed each decision produced by the FOIA request to determine if the case specifically dealt with the filing deadline issue. Cases were included in the statistical evaluation if they mentioned the filing deadline. If the BIA made no explicit reference, the researchers excluded the case from the report's statistical and qualitative analysis.

Each case was coded for the following information:

1. BIA decision date
2. Whether the immigration judge found that the filing deadline barred asylum eligibility in the underlying case
3. If the BIA affirmed or reversed the original immigration judge decision on the filing deadline
4. The federal circuit in which the immigration judge sat (to determine which federal circuit's law applied to the case)²⁹
5. Whether the filing deadline determination was potentially outcome determinative. This classification applied to any case in which the BIA's decision did not indicate that some alternative grounds would preclude asylum eligibility, regardless of the deadline (e.g. the applicant was not credible, was not a member of a protected group, or could not show government accountability for the feared persecution)
6. The BIA's rationale for its decision
7. Whether the case presented any other relevant issues or compelling case facts

In each case, the report extracted information about the specific circumstances underlying the fil-

ing deadline determination by the BIA and immigration judge. For example, in some cases the issue was whether the applicant established that she applied within one year of entry. In other cases, where the applicant conceded she applied more than one year after entry, the issue was whether an exception for changed or extraordinary circumstances applied. In yet other cases, the issue was whether the applicant applied within a “reasonable period” after the occurrence of extraordinary or changed circumstances that could excuse a late filing. In many cases, the BIA provided only its conclusion on the deadline determination, such that the underlying issues could not be determined. The researchers assigned a code for the primary types of issues in filing deadline determinations, then marked each case with the appropriate numerical code if the case presented that issue, and used this coding to tabulate statistical results and trends.

Finally, after reading and coding cases, Penn State Law’s Center for Immigrants’ Rights, Human Rights First, and NIJC compiled statistical abstracts of the data, summarized important case trends, and drafted this report. Penn State Law provided preliminary conclusions to NIJC and Human Rights First and the three entities collaborated on compilation of this report.

ENDNOTES

1. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; 8 U.S.C. § 1158.
2. INA § 208(a)(2)(B); 8 CFR § 1208.4(a)(2), (4)-(5) (2010).
3. See, e.g., Karen Musalo & Marcelle Rice, *Center for Gender and Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693 (2008); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 Geo. Immigr. L.J. 1 (2001); Philip G. Schrag et. al; *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L.Rev ___ (2010); Human Rights First, "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency," <http://www.humanrightsfirst.org/pdf/afd.pdf> (released September 30, 2010).
4. For example, Sen. Alan K. Simpson explained "What you are seeing is, when you have a country that is your leading source of illegal immigration, they are picking them up, and they have been here 2, 3 years, and they say, 'I am seeking asylum' because they know that these procedures are interminable. That is what we are trying to get at. We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system." 142 CONG. REC. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson).
5. Sen. Orrin Hatch assured that asylum protection would be "available for those with legitimate claims of asylum," and that he was "committed to ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies." 142 CONG. REC. S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch).
6. INA § 208(a)(2)(D).
7. 8 C.F.R. § 1208.4.
8. 8 C.F.R. § 1208.4(a)(4-5).
9. 8 C.F.R. § 1208.4(i) (exceptions "may include, but are not limited to" the listed regulatory examples); 8 C.F.R. § 1208.5.
10. *Id.*

-
11. EOIR Statistical Yearbook for 2009, accessible at <http://www.justice.gov/eoir/statspub/fy08syb.pdf>.
12. INA § 208(a)(3); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, Div. C, 110 Stat. 3009-546, at § 604(a).
13. 8 U.S.C. § 1231(b)(3).
14. Redacted January 2006 BIA Asylum Decisions at 3008, 3011 (January 17, 2006).
<http://law.psu.edu/pdf/2006All.pdf>
15. Redacted January 2006 BIA Asylum Decisions at 1244 (January 17, 2006). <http://law.psu.edu/pdf/2006All.pdf>
16. See 8 C.F.R. § 1003.1(e)(4) (detailing affirmance without opinion procedure).
17. Redacted January 2008 BIA Asylum decisions at 103 (January 3, 2008).
<http://law.psu.edu/pdf/Jan2008SearchableMerged.pdf>
18. 8 U.S.C. § 1158(a)(2)(D). See *Khan v. Filip*, 554 F.3d 681, 684 (7th Cir. 2009) (finding no jurisdiction over “factual” and “discretionary” issues related to the filing deadline, such as whether the applicant applied within one year); *Zhu v. Gonzales*, 493 F.3d 588, 596 n. 31 (5th Cir. 2007) (noting that federal appellate courts lack jurisdiction “to review timeliness determinations that are based on an assessment of the facts and circumstances of a particular case.”); *Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) (“This petitioner’s challenge is merely an objection to the IJ’s factual findings and the balancing of factors in which discretion was exercised.”); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (holding that a petitioner’s argument that a pending adjustment-of-status application excused his untimely asylum application “is a challenge to an exercise of discretion that remains outside our scope of review”); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (modifying the holding in *Castellano-Chacon v. INS*, 341 F.3d 533, (6th Cir. 2003), a case cited to clarify that courts lack jurisdiction to review “asylum applications denied for untimeliness only when the appeal seeks review of discretionary or factual questions,” and declining to exercise jurisdiction over a claim that the IJ incorrectly applied the “changed circumstances” provision.); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (finding that a claim in which the petitioners showed changed circumstances or extraordinary circumstances was discretionary); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (finding that the presence of changed circumstances “is a discretionary judgment of the Attorney General”); *Chacon-Botero v. U.S. AG*, 427 F.3d 954, 957 (11th Cir. 2005) (“The timeliness of an asylum application is not a constitutional claim or question of law covered by the Real ID Act’s changes.”).

-
19. Redacted 2005 BIA Asylum Decisions at 2261 (January 25, 2005). <http://law.psu.edu/pdf/Jan2005Searchable-Merged.pdf>
20. Immigration and Nationality Service, “Asylum Officer Basic Training Course: The One Year Filing Deadline” (“AOBTC”) http://www.asylumlaw.org/docs/united_states/one_year_lesson_March2001.pdf (last accessed Sept. 7, 2010).
21. Redacted January 2006 BIA Asylum Decisions at 1639 (January 19, 2006). <http://law.psu.edu/pdf/2006All.pdf>
22. AOBTTC at 6-7, 22, 28.
23. Redacted January 2008 BIA Asylum Decisions at 1196 (January 16, 2008). <http://law.psu.edu/pdf/Jan2008SearchableMerged.pdf>
24. Redacted January 2006 BIA Asylum Decisions at 1639, 2202 (January 31, 2006). <http://law.psu.edu/pdf/2006All.pdf>
25. *Khunaverdians v. Mukasey*, 548 F.3d 760, 765-766 (9th Cir. 2008). <http://law.psu.edu/pdf/Jan2008SearchableMerged.pdf>
26. FOIA request letter from Mary Meg McCarthy, executive director, National Immigrant Justice Center, and Karen Musalo, clinical professor of law and director, Center for Gender and Refugee Studies, University of California Hastings College of the Law, to Executive Office of Immigration Review (Mar. 21, 2008) (on file with National Immigrant Justice Center).
27. FOIA response letter from Crystal Souza, paralegal specialist, U.S. Department of Justice Executive Office for Immigration Review, National Immigrant Justice Center (Jan. 9, 2009) (on file with National Immigrant Justice Center).
28. 8 CFR § 1003.1(e)(4)(2009) (explaining that the BIA may affirm the Immigration Judge’s decision without providing further explanation).
29. 8 U.S.C. 1252(b). Federal Courts of Appeal for the 11 regional circuits interpret immigration law in diverse manners, including the extent to which they have jurisdiction over filing deadline determinations. *See supra*, FN 18.

ABOUT THE AUTHORS

Heartland Alliance’s National Immigrant Justice Center (NIJC) is a Chicago-based non-governmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers through a unique combination of direct services, policy reform, impact litigation and public education. NIJC’s National Asylum Partnership on Sexual Minorities (NAPSM) applies a comprehensive human rights and due process framework to issues that particularly affect lesbian, gay, bisexual, transgender and HIV-positive immigrants. NAPSM builds innovative partnerships and leverages the experiences and resources of NIJC’s broad network of *pro bono* attorneys to advance reform for all immigrants.

www.immigrantjustice.org

Human Rights First (HRF) provides *pro bono* legal representation to refugees who seek asylum and advocates for their protection consistent with international refugee and human rights conventions and law. Based in Washington, D.C., and New York, HRF builds respect for human rights and the rule of law to help ensure the dignity to which everyone is entitled and to stem intolerance, tyranny, and violence. HRF safeguards the rights of refugees through direct legal services and by advocating for changes in asylum laws and policies to ensure their consistency with human rights and refugee protection standards. *www.humanrightsfirst.org*

Penn State Law’s Center for Immigrants’ Rights Launched in 2008, the Center for Immigrants’ Rights is an immigration clinic where students work on innovative advocacy and policy projects relating to U.S. immigration, primarily through representation of immigration organizations. Over the past two years, students at the Center have produced policy-oriented white papers of national impact, prepared practitioner toolkits on substantive areas of immigration law, and assisted with individual casework for detained immigrants, among other projects. The mission of the Center is to represent immigrants’ interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. *www.law.psu.edu*

APPENDICES

1. Index of redacted BIA asylum decisions included in this study.

Available at www.immigrantjustice.org/oneyeardeadline

2. Redacted January 2005 BIA Asylum Decisions.

Available at <http://law.psu.edu/pdf/Jan2005SearchableMerged.pdf>

3. Redacted January 2006 BIA Asylum Decisions.

Available at <http://law.psu.edu/pdf/2006All.pdf>

4. Redacted January 2007 BIA Asylum Decisions.

Available at <http://law.psu.edu/pdf/2007All.pdf>

5. Redacted January 2008 BIA Asylum Decisions.

Available at <http://law.psu.edu/pdf/Jan2008SearchableMerged.pdf>

This report, along with links to the appendices, are available at:

www.immigrantjusticecenter.org/oneyeardeadline

http://law.psu.edu/academics/clinics_and_extrnships/center_for_immigrants_rights

http://www.humanrightsfirst.org/asylum/asylum_filing.aspx