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Refuge from Time: How the One-Year Filing Deadline Unfairly Frustrates Valid Asylum Claims

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INTRODUCTION

In the United States, a person may apply for asylum if the person meets the statutory definition of a "refugee."[1] Asylum status grants "withholding of removal"[2] from the United States, as well as an eventual path to lawful permanent residence.[3] Although asylum is rooted in international humanitarian prerogatives, United States requirements are stringent due to national security concerns.[4] But while those concerns may debatably justify tougher laws for the sake of screening out meritless or fraudulent asylum claims, there are some aspects of asylum law that unduly prejudice many deserving applicants.

For instance, consider the case of "Alex," who fled a South American country because he feared that he would be killed due to his political beliefs.[5] After Alex unsuccessfully attempted to enter the United States, he was detained at the border and then interviewed by an immigration officer. Alex explained the circumstances that caused him to flee and seek asylum, and the interviewing officer noted that Alex had a credible fear of persecution if he were to return to his home country. The officer then gave Alex a Notice to Appear for a hearing, that stated that the date and time of the hearing were to be determined. In theory, Alex would later receive a "Notice of Hearing" indicating the date and time.[6] But, the United States

1. 8 U.S.C. § 1158(b)(1)(A) (2012).

2. Withholding of removal is effectively a stay on deportation proceedings.

3. People that are present in the United States unlawfully are subject to removal (deportation). A grant of asylum stalls or prevents that removal process from occurring. *See Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum [https://perma.cc/8LS7-E8YB] (last updated Aug. 6, 2015).

4. Swetha Sridharan, *Material Support to Terrorism—Consequences for Refugees and Asylum Seekers in the United States*, MIGRATION POL'Y INST. (Jan. 30, 2008), http://www.migrationpolicy.org/article/material-support-terrorism-%E2%80%94-consequences-refugees-and-asylum-seekers-united-states [https://perma.cc/8Q4S-KPJA].

5. "Alex" is an individual I represented while working for the Immigration Clinic at the University of North Carolina School of Law. The client's name has been changed for his protection. For more information about the clinic, see *Immigration Clinic*, UNC SCH. OF LAW, www.law.unc.edu/academics/clinic/immigration [https://perma.cc/PCN8-B8AY].

6. § 1229(a)(1)(G)(i); *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 69 (2016), https://www

Citizenship and Immigration Services ("USCIS") never docketed the case with the proper immigration court, and consequently, Alex never received a Notice of Hearing.[7]

In these specific circumstances, it was technically impossible for Alex to comply with a particular provision of the asylum statute that requires asylum applications to be "filed" within one year of arriving in the United States.[8] This one-year requirement (often referred to as the "one-year bar") frustrates valid asylum claims because applications are not considered filed until an immigration judge receives them in open court.[9] Alex and others like him have no way of complying with the requirement because they never have the opportunity to appear in immigration court since their hearings are never scheduled. And in cases where a hearing is scheduled, it may be set for a date that occurs after the one-year deadline. These two unfair practices are so pervasive that the American Immigration Council issued a practice advisory with strategies for circumnavigating the one-year filing deadline.[10] In short, because of the one-year deadline, many asylum applicants face a challenge.

Should an immigration judge determine that Alex's application was not filed within a year of his arrival, this administrative decision cannot easily be reviewed by federal courts.[11] While the one-year filing requirement can be waived by an immigration judge, such waivers are inequitably awarded.[12] Furthermore, an appeal is time consuming and expensive, a serious concern since applicants like Alex

.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf [https://perma.cc/74F2-BBSM].

7. For information regarding this interview, contact the author.

8. § 1158(a)(2)(B). This Recent Development will refer to this requirement as the "one-year bar" or "one-year deadline."

9. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *supra* note 6, at 35.

10. *See generally id.* (providing immigration attorneys with information about and strategies for complying with the one-year filing deadline). In addition, on June 30, 2016, the Northwest Immigration Rights Project filed a class action complaint in an attempt to remedy how the one-year deadline interacts with Department of Homeland Security ("DHS") and USCIS operating procedures to produce unfair outcomes for applicants. *See* Complaint—Class Action for Injunctive and Declaratory Relief and Mandamus at 1, Mendez Rojas v. Johnson, No. 2:16-cv-01024 (W.D. Wash. June 30, 2016), www.nipnlg.org/PDFs/practitioners/our_lit/2016_30Jun_rojas-v-johnson.pdf [https://perma.cc/AGB6-KGHS].

11. *See* Hana v. Gonzales, 503 F.3d 39, 40, 42 (1st Cir. 2007) (noting the Board of Immigration Appeals did not find a clear error with regard to the immigration judge's factual finding that the applicant, Hana, did not file his asylum application within a year and explaining that the First Circuit "do[es] not have jurisdiction to review the agency's findings regarding timeliness or its application of the 'extraordinary circumstances' exception . . . unless an alien identifies a legal or constitutional defect in the decision").

12. *See infra* Section III.A.

have no legal means of employment.[13] However, there is a potential solution: if the illegal entrant asylum applicant is found to have a credible fear during their removal hearing (as Alex did), the application could be constructively filed for the purposes of the one-year filing deadline. This type of constructive filing is known as "lodging," and there is precedent for the practice, as the Executive Office of Immigration Review ("EOIR") already allows lodging applications in at least one other context.[14]

This Recent Development argues that when an immigration officer determines that an illegal entrant asylum applicant has a credible fear of persecution during the initial removal hearing, that finding should "lodge" the application for purposes of the one-year filing deadline. Analysis proceeds in five parts. Part I further describes Alex's case and addresses how similarly situated applicants can fall through the cracks of the asylum process. Part II provides an overview of United States asylum law and the three types of asylum applications. Part III reviews the statutory bars to asylum, and Part IV details immigration office practices that make it difficult for illegal entrant asylum applicants to file their applications and receive notice about their hearing dates. Finally, Part V argues that a finding of credible fear in an initial removal hearing should lodge defensive asylum applications. It also recommends other changes in the law that could reduce the number of refugees who are deported.

I. THE ILLEGAL ENTRANT'S PLIGHT

Alex came from a country that recently experienced political upheaval. A new government assumed power and immediately instituted a number of troubling changes, including restrictions on the media and forms of public protest. Prior to the upheaval, Alex was intimately involved with the opposition party and frequently protested for issues he felt were important. He also directed and acted in plays that satirized government policies and were performed in public areas. After the country's leadership changed, Alex continued speaking out, but his form of protest was not well received by the ruling party, notorious for their association with violent criminal organizations. Alex later received a death threat. Fearing for his own safety and for the lives of his wife and children, he fled his

13. Non-citizens must have authorization to work in the United States legally. *Working in the US*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/working-us [https://perma.cc/893C-DSC5] (last updated Sept. 11, 2013). However, an asylee can work in the United States immediately. *See Asylum*, *supra* note 3.

14. *See infra* Section V.D.

home country by himself for a place that he thought would be a safe haven—the United States of America.

After Alex crossed the border into the United States "without inspection," he was detained, arraigned, and subjected to removal proceedings,[15] the formal procedures that precede deportation.[16] Specifically, because Alex attempted to circumvent inspection at the border, he was characterized as an illegal entrant making him subject to a fast-track deportation system known as "expedited removal."[17] These expedited proceedings offer fewer procedural safeguards to detainees.[18]

When Alex told the immigration officer why he had to leave his country, the officer in charge of his case noted that Alex had a plausible asylum claim. The officer then referred Alex for a preliminary interview known as a "credible fear interview" to make a further determination on the validity of his asylum case.[19] After the interview, the officer determined that Alex had a credible fear of persecution if he were to be returned to his home country. He was then given a "Notice to Appear" before an immigration judge for a full asylum determination. However, the time and place of that hearing were marked as "TBD" on the Notice to Appear, and he was instructed to check his mail for a Notice of Hearing, which would state the time and place of the hearing. He was also instructed to periodically call a toll-free number to check and see if he had been assigned a court date.[20]

In the months that followed, Alex dutifully checked his mail and called the toll-free number but never heard anything further regarding his hearing. While in asylum limbo, months elapsed and Alex began working under the table to survive while he waited for the government to initiate proceedings. By the time he saved enough

15. *See* text accompanying *infra* note 84. For information regarding this interview, contact the author.

16. *See* Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1533–34 (2010).

17. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2012); 8 C.F.R. § 1235.3(b) (2015).

18. Those subject to expedited removal will not get to appear before a judge, will have no right to review, and will not informed of their right to counsel. *See* AM. IMMIGRATION COUNCIL, REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 2 (MAY 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf [https://perma.cc/JR3B-7TFC]; *see also* Chapman, *supra* note 16, at 1566–68 (noting that United States Immigration and Customs Enforcement agency attorneys are not constrained by the Federal Rules of Evidence when cross-examining detainees).

19. *See* text accompanying *infra* note 51.

20. For information regarding this interview, contact the author.

money to retain an attorney, nearly a year had passed since his arrival in the country. For many immigrants like Alex, making the sociocultural adjustments that accompany living in a foreign place is a challenge by itself without also having to navigate a complex legal system with no legal assistance. Accordingly, Alex was devastated when his attorney informed him that the law requires him to apply for asylum within one year of his arrival into the United States and that the credible fear interview did not formally initiate the asylum application process. This one-year application filing requirement, along with other stiff procedural and substantive requirements, unfairly prejudice and exclude qualified refugees like Alex from receiving asylum.

II. OVERVIEW OF ASYLUM LAW

A. Substantive Requirements of Asylum Law

Under section 208 of the Immigration and Nationality Act ("INA"), the Secretary of Homeland Security and the Attorney General of the United States are authorized to grant asylum to any applicant who qualifies as a "refugee."[21] Under 8 USC § 1101(a)(42)(A), a refugee is:

> [A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[22]

An applicant can qualify as a refugee by showing that "she has suffered past persecution or because she has a well-founded fear of future persecution."[23] The burden of proof is on the applicant, and if the applicant is credible, her testimony can carry that burden even without corroboration.[24]

If an applicant shows that she was actually persecuted in the past on the basis of a statutorily enumerated ground—race, religion

21. 8 U.S.C. § 1158(b)(1)(A) (2012).

22. *Id.* § 1101(a)(42)(A).

23. 8 C.F.R. § 208.13(b) (2015).

24. *Id.* § 208.13(a). However, an asylum officer may rely on third-party sources of information in deciding whether an applicant qualifies as a refugee. *Id.* § 208.12(a).The sources can include government research through the Department of State or "other credible sources" such as "international organizations" or "academic institutions." *Id.*

nationality, membership in a particular social group, or political opinion—then there is a presumption of a well-founded fear of future persecution.[25] However, a reviewing asylum officer has considerable discretion to deny an application that is filed on the basis of past persecution.[26] First, an officer may deny the application if the officer finds that there has been a "fundamental change in circumstances" in the applicant's home country that renders the fear of persecution moot.[27] Second, an officer can also deny the application if the officer finds that the applicant could avoid persecution by relocating to another part of the applicant's country, also known as "relocation grounds."[28] In deciding whether relocation is reasonable, an officer considers a variety of factors, including "whether the applicant would face other serious harm in the place of suggested relocation" and "social and cultural constraints, such as age, gender, health . . . and familial ties."[29]

These grounds for denial threaten to swallow a large subset of asylum cases because while the inquiries are framed as objective, it seems inevitable that subjective perceptions will creep into the analysis. For example, even officially recognized and credible sources of information may contain considerable variance in their assessment of the "circumstances" of an applicant's home country.[30] Further, an officer may find that relocation to another place in the refugee's home country is reasonable on the basis of geographical distance or some other superficial factor when it is not, because of more nuanced "social and cultural constraints" affecting the refugee that the officer failed to consider.[31] For instance, one of the groups that was persecuting the applicant before they fled could have nationwide

25. *Id.* § 208.13(b)(1).
26. *Id.* § 208.13(b)(1)(i).
27. *Id.* § 208.13(b)(1)(i)(A).
28. *Id.* § 208.13(b)(1)(i)(B).
29. *Id.* § 208.13(b)(3).
30. *See* Christian A. Fundo, *Toward a More Individualized Assessment of Changed Country Conditions of Kosovar Asylum-Seekers*, 43 CORNELL INT'L L.J. 611, 634–36 (2010) (questioning accuracy of U.S. State Department materials with regard to safety conditions in Kosovo); Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 197, 209–12 (2000) (noting inconsistencies in U.S. State Department reports and criticizing their conclusory nature).
31. *See* Shu Han Liu v. Holder, 718 F.3d 706, 709–10 (7th Cir. 2013) (rejecting petitioner's claim of changed circumstances due to petitioner's conversion to Christianity on the premise that small house churches are not persecuted); Matter of L-S, 25 I. & N. Dec. 705, 708–09 (B.I.A. 2012) (denying asylum to petitioner based on general improvements to country conditions notwithstanding threats to petitioner's personal safety).

networks unknown to official sources. Therefore, while subjective judgment calls are appropriate in evaluating whether the applicant has a credible fear, determination of background facts, such as whether a country's conditions have fundamentally changed, should not be left to a single immigration officer.[32] Where an applicant has established past persecution, the asylum officer has the burden of proof when dismissing an application due to changed circumstances or on relocation grounds.[33] This burden-shifting standard is an important strategic advantage for those applicants with meritorious asylum claims.

An applicant seeking asylum on the basis of future persecution, rather than past persecution, must establish similar elements. The applicant must show a fear of persecution based on a statutorily enumerated ground.[34] However, the applicant does not have to show that he would specifically be singled out for persecution in order to qualify for asylum. Asylum can also be granted when there is "a pattern or practice in [the home] country . . . of persecution of a group" and that the applicant is a member of that group.[35] An asylum officer can also dismiss future persecution cases on "relocation grounds."[36] But unlike those applicants that have established past persecution, applicants whose asylum claims are based upon future persecution "bear the burden of establishing that it would not be reasonable . . . to relocate, unless the persecution is by a government or is government-sponsored."[37]

B. Types of Asylum Applications

While the substantive requirements of asylum law remain the same regardless of how an applicant submits her application, there are procedural differences among the three different application types. The application types are affirmative, defensive, and illegal entrant. Generally, affirmative applications are filed by applicants already in the United States under some form of temporary legal

32. In other words, discretion is suitable where the officer can personally observe the applicant; in contrast, asking officers to make calls about a country's conditions is inappropriately subjective given the inaccuracy of sources. Perhaps the harsh result of a denial of the application can be mitigated by making the officer's determination a rebuttable presumption.

33. § 208.13(b)(1)(ii).

34. *Id.* § 208.13(b)(2)(i)(A); *see* text accompanying *supra* note 25.

35. *Id.* § 208.13(b)(2)(iii)(A)–(B).

36. *Id.* § 208.13(b)(2)(ii).

37. *Id.* § 208.13(b)(3)(i).

status (i.e. tourist visas, student visas, or temporary work permits).[38] Conversely, defensive applications are usually a response to the initiation of removal proceedings.[39] "Illegal entrant" applications are a subset of defensive applications with additional procedures due to the accelerated pace of deportation proceedings.[40] Each of these application types is discussed below.

Affirmative applications are processed by the Department of Homeland Security ("DHS") through the USCIS.[41] Claimants, who are usually already physically present in the United States, fill out DHS Form I-589, and mail it with supporting documentation and an affidavit to a DHS service center.[42] If DHS declines to award the applicant asylum, the case is referred to immigration court.[43] If the applicant does not have lawful status when her application is denied, DHS will also refer the applicant to immigration court for removal proceedings.[44]

In a defensive application, the applicant claims asylum to prevent removal from the United States.[45] Accordingly, a defensive asylum application must be filed with the immigration court with jurisdiction over the applicant's case.[46] Defensive applications seek two forms of relief: (1) asylum and (2) withholding of removal, a separate remedy available any time the government initiates removal proceedings.[47] The substantive requirements of withholding removal are more stringent than the asylum requirements. For example, an asylum applicant need only demonstrate a "well-founded fear" of persecution whereas an applicant for withholding of removal must show that

38. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states [https://perma.cc/S25W-J3CN] (last updated Oct. 19, 2015).

39. *Id.*

40. Applicants are subject to cross-examination, and they have the veracity of their witnesses and other forms of proof questioned. *See* Chapman, *supra* note 16, at 1553–54.

41. *See Obtaining Asylum in the United States*, *supra* note 38.

42. DEP'T OF HOMELAND SEC. & DEP'T OF JUSTICE, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, OMB NO. 1615-0067 7, 10 (Dec. 29, 2014), https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf [https://perma.cc/7Q3Y-VBRN]; *Obtaining Asylum in the United States*, *supra* note 38.

43. Immigration courts are a branch of the Department of Justice's Executive Office of Immigration Review. *EOIR at a Glance*, U.S. DEP'T OF JUST. (Sept. 9, 2010), http://www.justice.gov/eoir/eoir-at-a-glance [https://perma.cc/DMA2-U6H9].

44. *See Asylum*, *supra* note 3.

45. *See id.*

46. 8 C.F.R. § 208.2(b) (2015).

47. *Id.* § 208.3(b). Withholding of removal essentially stays adverse immigration proceedings but does not offer applicants actual asylum status. *See Asylum*, *supra* note 3 (stating the form used to apply for asylum is called "Application for Asylum and for Withholding of Removal").

persecution is more probable than not.[48] However, an applicant whose asylum application is dismissed still retains the ability to ask for a withholding of removal.[49]

Finally, illegal entrant applications are filed by persons like Alex who entered the country without prior authorization. These applicants are immediately subject to removal, and by default, ineligible to receive visas or be lawfully admitted in the United States.[50] If an illegal entrant is detained and immediately expresses a desire to claim asylum, the detainee undergoes an initial screening known as the "credible fear interview."[51] The interview, although ostensibly non-adversarial, is still subject to procedural protections. For instance, regulations mandate that the interviewing officer "shall verify that the alien has received information about the credible fear information process" and understands it.[52] If the applicant does not speak English and is unable to proceed in the interview without an interpreter, the officer is required to provide one.[53] The applicant is also permitted to have a third party present at the hearing to corroborate her testimony, although such a consultation cannot "unreasonably delay" the interview.[54]

An officer can find a credible fear of persecution when "there is a significant possibility . . . the alien can establish eligibility for asylum" under the ordinary, affirmative application requirements.[55] If credible fear is found, the applicant is issued a Notice to Appear before an immigration judge.[56] Often, this Notice to Appear actually does *not* indicate the time and place the hearing will be held.[57] Instead, as was the case for Alex, the date and time will be marked as "to be determined."[58] At this point an asylum application is not

48. Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 668 (2010).

49. *See* Ahmed v. Ashcroft, 348 F.3d 611, 615 (7th Cir. 2003); LUTHERAN IMMIGRATION & REFUGEE SERV., ASYLUM SEEKERS: A SUPPLEMENT TO FIRST STEPS: AN LIRS GUIDE FOR REFUGEES, ASYLUM SEEKERS, AND MIGRANTS RELEASED FROM DETENTION 14 (2014), www.lirs.org/wp-content/uploads/first-steps/LIRS-FirstSteps-AsylumSeekers_WEB.pdf [https://perma.cc/KTV5-QUJ7].

50. 8 U.S.C. § 1182(a)(6) (2012).

51. 8 C.F.R. § 208.30(d)(2).

52. *Id.*

53. *Id.* § 208.30(d)(5).

54. *Id.* § 208.30(d)(4).

55. *Id.* § 208.30(e)(2) (referencing section 208 of the INA codified at 8 U.S.C. § 1158).

56. *Id.*

57. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *supra* note 6, at 69.

58. Another notice, called a Notice of Hearing, is required to be issued with the complete details of the hearing. *Id*.

considered filed for the purposes of the one-year deadline until the application is brought before a judge in open court.[59] This is a problem because the clock is ticking while the applicant waits for the hearing to be scheduled.

III. THE ONE-YEAR FILING DEADLINE

Like other avenues to lawful status in the United States, there are numerous substantive and procedural bars to asylum applications.[60] The substantive bars are concerned with whether the applicant is a danger to the United States or whether the applicant has committed acts of persecution. For instance, an applicant is not eligible for asylum if she "participated in the persecution of any person" based on one of the enumerated grounds for asylum, commited a serious crime, or poses a threat to national security among other disqualifying activities.[61] In addition to the substantive bars, three procedural bars are set out in the INA. First, applicants will not be granted asylum if there is a "safe third country" that the applicant can be removed to "pursuant to a bilateral or multilateral agreement."[62] Second, an applicant who has previously been denied asylum is barred from reapplying, unless circumstances in the applicant's home country have changed in a manner that will "materially affect the applicant's eligibility."[63] Finally, a person's application will be denied if she does not demonstrate "by clear and convincing evidence that the application has been filed in one year after the date of the alien's arrival in the United States."[64]

59. § 208.2(b); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *supra* note 6, at 38.

60. There are certain grounds for inadmissibility that apply to all visas regardless of the statute the petition is filed under. For instance, petitioners under the Violence Against Women Act may be inadmissible if they previously stayed in the country illegally for more than six months or if they committed a crime of moral turpitude. *See* 8 U.S.C. § 1158(a)(2)(B)–(b)(2)(A)(ii) (2012).

61. *Id.* § 1158(b)(2)(A)(i). The applicant is also ineligible if she is (1) convicted of a particularly serious crime; (2) if there is reason to believe that she committed a serious nonpolitical crime outside the United States; (3) if there is reason to believe that the applicant is a terrorist or otherwise a threat to the security of the United States; or (4) if the applicant was firmly resettled in another country before applying for asylum. *Id.* § 1158(b)(2)(A)(ii)–(vi). In addition to the enumerated grounds, aggravated felonies are considered serious crimes for the purposes of these bars. *Id.* § 1158(b)(2)(B)(i).

62. *Id.* § 1158(a)(2)(A).

63. *Id.* § 1158(a)(2)(C)–(D).

64. *Id.* § 1158(a)(2)(B).

A. The One-Year Bar

The one-year bar was added in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[65] At the time, there was strong anti-immigrant sentiment among the American public, stemming in part from events such as the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing.[66] There was also concern that immigrants were abusing the asylum process to secure employment authorization and to obtain welfare benefits.[67] Specific criticisms regarding the defensive asylum process were voiced in Congress as well, with one representative stating: "if you believe enough in America to claim asylum, you ought to come forward and not wait till someone says, Gotcha."[68] At the same time, other members of Congress believed that the one-year requirement would not deter much fraud, but would primarily frustrate legitimate claims.[69] The sponsor of the IIRIRA tried to alleviate these concerns by assuring critics that immigration authorities would provide notice of the new one-year deadline to new immigrants.[70] However, notice about the deadline has yet to be made available to applicants as a matter of policy.[71]

The one-year bar requires an applicant to prove that the application is being filed within one year of the applicant's arrival in the United States.[72] However, this requirement can be waived by an asylum officer[73] if the applicant shows "changed circumstances

65. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604(2)(B), 110 Stat. 3009-546, 3009-691 (1996) (codified as amended at 8 U.S.C. § 1158 (2012)).

66. *See* HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 16 (2007), http://hrw.org/reports/2007/us0707/us0707web.pdf [https://perma.cc/ZLN4-HGUN]; *Sentenced Home*, PBS, http://www.pbs.org/independentlens/sentencedhome/immigration.html [https://perma.cc/XJD7-BZPC].

67. Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 695 (2008). Public opinion may also have been influenced by a 1993 television segment which purported to show thousands of immigrants arriving without paperwork and filing false asylum claims. Celia W. Dugger, *Immigration Bills' Deadlines May Imperil Asylum Seekers*, N.Y. TIMES (Feb. 12, 1996), http://www.nytimes.com/1996/02/12/nyregion/immigration-bills-deadlines-may-imperil-asylum-seekers.html?pagewanted=all [https://perma.cc/6HRX-GF5Q].

68. Dugger, *supra* note 67.

69. Musalo & Rice, *supra* note 67, at 695–96.

70. *Id*.

71. *Id.* at 696 n.12.

72. 8 U.S.C § 1158(a)(2)(B) (2012).

73. *Id.* § 1158(a)(2)(D).

materially affecting the applicant's eligibility for asylum,"[74] or if the applicant provides evidence of extraordinary circumstances contributing to the delay in filing.[75] The one-year bar has been criticized for unfairly penalizing otherwise deserving applicants. Scholars Karen Musalo and Marcelle Rice observed a number of cases where applicants were granted "withholding of removal" but were denied asylum solely because of the one-year bar.[76] As mentioned, the substantive standard for granting a "withholding of removal" is "even more rigorous than . . . required for asylum."[77] The fact that an applicant can qualify for withholding of removal,[78] but still be denied asylum because of this procedural bar,[79] shows that the bar is frustrating valid claims.

Studies have also suggested that the asylum officer's power to waive the one-year bar through the "changed circumstances" and "extraordinary circumstances" exceptions is inequitably wielded.[80] Theoretically these exceptions provide some flexibility to an otherwise rigid requirement. But research shows there is a troubling level of variance among case outcomes. For instance, inspected Latin American applicants were rejected 66% more often on the basis of the one-year bar than inspected North African and Middle Eastern applicants.[81] Researchers also found variation among immigration offices, with some offices awarding exceptions in 45% of cases

74. 8 C.F.R. § 208.4(a)(4)–(5) (2015). For instance, if the applicant's circumstances or the conditions of the applicant's country have deteriorated significantly, the delay could be excused. *See* Musalo & Rice, *supra* note 67, at 697.

75. 8 U.S.C. § 1158(a)(2)(D) (2012). Examples of extraordinary circumstances include serious mental or physical illness and legal disability. *See* Musalo and Rice, *supra* note 67, at 697.

76. *See* Musalo & Rice, *supra* note 67, at 693. Karen Musalo is a professor of law and director of the Center for Gender & Refugee Studies at University of California Hastings College of Law and has written extensively about the asylum process. *UC Hastings Faculty: Karen Musalo*, UC HASTINGS COLL. OF THE LAW SAN FRANSCISCO, http://www.uchastings.edu/faculty/musalo/index.php [https://perma.cc/X625-5RVE]. Marcelle Rice is a practicing immigration attorney in Oakland, California. *Meet our Attorneys: Marcelle Rice*, LAW OFF. OF ROBERT L. LEWIS, http://www.immigrantdefense.com/attorneys/marcelle-rice [https://perma.cc/JL8D-QF3J].

77. *See* Musalo & Rice, *supra* note 67, at 700. These determinations are initially made by asylum officers, who are under the authority of DHS, and subsequently reviewed by immigration judges, who are under the authority of the EOIR. *Id.*

78. "Withholding removal" is effectively a deportation stay and is a more limited form of relief compared to a full grant of asylum. *Id.* "Withholding removal" is person-specific and family members cannot obtain derivative status. It does not allow the person to apply for a green card and does not authorize a person to work. *Id.*

79. *Id.*

80. *Id.* at 700–03; Schrag et al., *supra* note 48, at 726–54.

81. Schrag et al., *supra* note 48, at 727.

compared to rates as high as 70% in other locations.[82] Finally, exception granting rates can also vary significantly between officers in the same office. In one office, an officer rejected cases for missing the one-year deadline at a rate of 49% whereas another rejected cases at nearly 78%.[83]

Applicant ethnicity and immigration office location are not the only factors correlated with disparate outcomes. Generally, those applicants who enter without inspection ("EWI")—that is, cross the border illegally—miss the one-year filing deadline at a greater rate.[84] Between 1999 and 2000 the number of EWI cases with a finding of "late filing" doubled.[85] The author of the study suggested two reasons for this increase: (1) asylum offices post-2001 may have required a higher standard of proof for the date of entry or (2) officers, doubting the credibility of those entering illegally, may have more thoroughly scrutinized the applicants' claimed date of entry.[86]

There is little research specifically about whether the one-year requirement has affected affirmative and defensive applications differently. However, qualitative evidence suggests that the one-year bar disproportionately impacts illegal entrant asylum applicants for two reasons.[87] First, these kinds of applicants are not lawfully permitted to work and may lack the financial resources to retain legal counsel to help prove that their application is timely.[88] Second, lack of familiarity with American culture and social structures—including the courts—may also prevent illegal entrant applicants from following up on their initial expression of desire to apply for asylum.[89] From the point of view of an illegal entrant who knows nothing about

82. *Id.* at 738.
83. *Id.* at 740.
84. *Id.* at 699.
85. *Id.* at 708.
86. *Id.* at 709.
87. Musalo & Rice, *supra* note 67, at 718.
88. *Id.*
89. *Id.* Disparities in successful asylum applications between represented and unrepresented applicants may provide some support for this theory. An ABA-sponsored study found that only 14% of non-represented asylum-seekers were successful as compared to 39% of those with counsel. *See* AM. BAR ASS'N, THE QUEST TO FULFILL OUR NATION'S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES 7 (2006), http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107a.authcheckdam.pdf [https://perma.cc/M4YD-RV9X]. Another study found that immigrants were often pursuing temporary relief because they were unaware they qualified for permanent status. *See* Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. ON MIGRATION & HUM. SECURITY 287, 301 (2014), http://jmhs.cmsny.org/index.php/jmhs/article/download/37/30 [https://perma.cc/3GEC-82U2].

immigration law, the apparent formalities surrounding the credible fear interview might inadvertently lure the entrant into believing that this interview was the formal filing of the asylum application.

B. Judicial Review of Untimely Filing

If a deserving, yet untimely applicant is not fortunate enough to have the one-year bar waived by an immigration judge, the applicant could be deported. Further compounding that person's plight is the limited ability of federal courts to review an immigration court's determination of untimely filing. The same legislation that enacted the one-year bar also removed judicial review of certain determinations made by asylum officers and immigration judges.[90] Whether an asylum application was filed within one year of the applicant's date of entry into the United States is one such determination.[91] The Real ID Act[92] restored some level of judicial review for immigration determinations, but limited such review to questions of law.[93]

However, there is a circuit split as to what is considered a question of law. In *Ramadan v. Gonzales*,[94] the Ninth Circuit interpreted the Real ID Act as it applied to judicial review of untimely asylum application filings.[95] The Ninth Circuit held that the Real ID Act extended judicial review to an immigration judge's determination of untimely filing because it was a "mixed question of law and fact."[96] The court reviewed the legislative history of the Real

90. *See* 8 U.S.C. § 1252(a)(2)(A)–(D) (2012); Donald S. Dobkin, *Court Stripping and Limitations on Judicial Review of Immigration Cases*, 28 JUST. SYS. J. 104, 104 (2007), http://hoth.bizango.s3.amazonaws.com/assets/10116/COURT_STRIPPING.pdf [https://perma.cc/Z6BK-TELY]. The asylum statute states that "[n]o court shall have jurisdiction to review any determination of the Attorney General under paragraph (2)." § 1158(a)(3).

91. *Id.* § 1158(a)(2)(B).

92. REAL ID Act of 2005, Pub L. No. 109-13, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D) (2012)).

93. *Id.* ("Nothing . . . in any . . . provision of this Act . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law . . . .").

94. 479 F.3d 646 (9th Cir. 2007).

95. *Id.* at 650. The petitioner, Ramadan, was an outspoken proponent of women's rights in Egypt who was threatened and her son was kidnapped on account of her beliefs. *Id.* at 649. She came to the United States in September of 1999 and received further threats to her safety in February 2001. *Id.* She then applied for asylum in June 2001, arguing that she deserved a waiver of the filing deadline because the threats in February 2001 constituted changed circumstances relating to the merits of her claim. *Id.* The immigration judge denied her application because of the untimely filing and rejected her changed circumstances claim. *Id*.

96. *Id.* at 653–54.

ID Act and considered the impact of *Immigration and Naturalization Service v. St. Cyr*,[97] a case holding that federal courts have the authority to review questions of law presented in a habeas corpus petition notwithstanding the provisions seeking to limit that authority in both IIRIRA and the Antiterrorism and Effective Death Penalty Act ("AEDPA").[98] The Ninth Circuit noted that *St. Cyr* was partially decided on Suspension Clause grounds[99] and, in turn, based its reading of the Real ID Act on a desire to avoid a "constitutionally suspect" interpretation.[100] The *Ramadan* court opined that review of mixed questions of law and fact are confined to "situations in which the historical facts and applicable legal standard are undisputed but the agency's application of those facts to law are at issue."[101]

The Ninth Circuit's position on judicial review of mixed questions of law and fact, specifically applied to review of the timeliness of asylum claims, is unique among the circuits. Although the Second Circuit, in *Xiao Ji Chen v. U.S. Department of Justice*,[102] engaged in a similar analysis of *St. Cyr* and AEDPA to expand its interpretation of what constitutes a question of law, it ultimately decided that an immigration judge's determination of timeliness and exceptional circumstances was not fit for review.[103] Most of the circuits agree with that conclusion.[104]

Unfortunately, the slim possibility of judicial review is not the only barrier faced by illegal entrants who have their asylum applications denied on the basis of the one-year bar. If the government delays or fails to schedule the hearing, or if the hearing is scheduled but notice fails to reach the petitioner, the illegal entrant's application may be unfairly barred by the one-year requirement.

97. 533 U.S. 289 (2001).

98. *Id.* at 314; *Ramadan*, 479 F.3d at 648–49.

99. *Id.* at 651. The Suspension Clause of the U.S. Constitution provides that the writ of habeas corpus cannot ordinarily be suspended. U.S. CONST. art. I, § 9.

100. *Ramadan*, 479 F.3d at 654.

101. *Id.* at 653. Interestingly, once the court decided it had jurisdiction to entertain the petitioner's claim, it affirmed the immigration judge's decision. *Id.* at 657

102. 471 F.3d 315 (2d Cir. 2006).

103. *Id.* at 326–27, 332.

104. *See* Gomis v. Holder, 571 F.3d 353, 358–59 (4th Cir. 2009) ("Nearly every circuit that has analyzed § 1158(a)(3) in light of § 1252(a)(2)(D) has held that even after the REAL ID Act, the federal courts continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing.").

IV. IMMIGRATION SYSTEM FAILURES THAT PREVENT APPLICANTS FROM COMPLYING WITH THE ONE-YEAR DEADLINE

In order to comply with the one-year deadline, a defensive applicant must file an asylum application with the proper immigration court, usually by presenting the appropriate forms at the applicant's first scheduled appearance.[105] However, there are two situations where a defensive applicant is unable to do this. First, if USCIS officers fail to docket a case with the immigration court, the applicant's hearing can never be scheduled. In that case, there is no hearing where the applicant can present and file the application.[106] Second, even if the government does docket the case and the hearing is scheduled, the applicant may be unaware of the date and location of the hearing due to the erosion of service standards.[107] In both cases, the result may be that a deserving asylum applicant is deported for missing a deadline that was practically impossible for the applicant to meet.

A. Immigration Officers Often Fail to Schedule an Applicant's Hearing

The plain language of the INA statute states that proper notice should include a description of "[t]he time and place at which proceedings will be held."[108] Notwithstanding that provision, it is common practice for there to be no date for the master calendar hearing printed on the Notice to Appear that is issued after a credible fear interview.[109] In fact, in what seems to be in direct contrast to the INA statutes and regulations, the Executive Office of Immigration Review ("EOIR") practice manual instructs "DHS may serve a

105. *See* 8 C.F.R. § 1208.4 (2015); *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *supra* note 6, at 38.

106. *See* § 1003.13 (stating that a Notice to Appear includes information such as the nature of the proceedings and the charges against the applicant, but not the date and time of the hearing); *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *supra* note 6, at 59–60.

107. In 2011, service upon an applicant could be accomplished either in person or by first class mail. § 1003.32 (2011). However, the current standard for service states that if personal service was not practicable, a Notice to Appear could be served upon the applicant by regular mail. § 1003.13 (2015).

108. 8 U.S.C. § 1129(a)(1)(G)(i) (2012).

109. SANDRA A. GROSSMAN & LINDSAY M. HARRIS, AM. IMMIGRATION COUNCIL, PRESERVING THE ONE-YEAR FILING DEADLINE FOR ASYLUM CASES STUCK IN THE IMMIGRATION COURT BACKLOG 6 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/preserving_the_one-year_filing_deadline_for_asylum_cases_stuck_in_the_immigration_court_backlog_practice_advisory.pdf [https://perma.cc/WK3R-STLZ].

Notice to Appear . . . on an alien, but not file the Notice to Appear with the court until sometime later."[110] Cases examining the notice protections afforded to asylum seekers cite 8 C.F.R. § 1003.18(b) for the authority to withhold the time and place of a hearing until a subsequent Notice of Hearing is issued.[111] However, this regulation actually provides that "[i]n the case of any *change or postponement* in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding."[112] The plain language of the regulation seems to limit its application to instances where DHS is re-scheduling a hearing—and not to situations where DHS has not set the time and place of the hearing in the first place. This practice of not simultaneously scheduling an asylum applicant's hearing following the credible fear interview is not only a possibility, but a prevalent reality.[113] If the Notice to Appear does not indicate the time and place of the applicant's hearing, the government instructs the applicant to call a hotline to determine whether his case has been scheduled.[114]

In some instances, due to either clerical errors or the enormous backlog in the immigration courts, some cases simply never get docketed at the appropriate immigration court by immigration officials.[115] Even if the case is docketed, the date of the hearing may fall beyond the applicant's filing deadline, making it technically impossible for the applicant to meet the one-year deadline. To get around this particular situation, the applicant is expected to file a motion to advance the court date inside the one-year deadline.[116] In the situation where officials never docket the case after the credible fear interview, the applicant could file an affirmative application to avoid the one-year deadline. However, these are not obvious solutions for most asylum applicants. Furthermore, filing a motion or

110. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *supra* note 6, at 60.

111. Mater of M-R-A-, 24 I. & N. Dec. 665, 669 (B.I.A. 2008) (stating that 8 C.F.R. § 1003.18(b) places the responsibility on the Immigration Court to schedule cases and provide the required notice of hearing).

112. 8 C.F.R. § 1003.18(b) (emphases added).

113. *See* GROSSMAN & HARRIS, *supra* note 109, at 1; EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 6, at 56.

114. *Customer Service Initiatives: Immigration Case Status Information*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/customer-service-initiatives [http://perma.cc/N2YZ-3T34] (last updated Sept. 16, 2015) (providing a hotline number that applicants can call to find the date, time, and location of their next hearing using their alien registration numbers).

115. *See* GROSSMAN & HARRIS, *supra* note 109, at 1.

116. *Id.* at 7–8.

affirmative application will most likely require that the applicant retain and pay for legal assistance, even despite lacking legal authorization to work.[117] Asylum applications also require multiple fees and documentation that may be expensive to obtain.[118] In short, the submission of an asylum application is a complex and time consuming process that is a significant challenge for persons with limited English proficiency and little to no legal knowledge.[119]

B. Current Service Standards for Asylum Cases Fail to Provide Actual Notice

If the government dockets a case and schedules a hearing, a Notice of Hearing will be sent via regular mail to the applicant's last known address.[120] However, because illegal entrants are likely to change residences upon arriving in the United States,[121] an applicant may never receive this notice. Therefore, service via regular mail is not a reasonably calculated means of actually informing many applicant of the time and place of the asylum hearing.

Amendments to the asylum statutes have made it harder for some applicants to receive notice and have exacerbated the problem. The IIRIRA of 1996 made it acceptable to perfect service on defendants in immigration cases via regular mail.[122] Prior to this amendment, the asylum statute required personal service or service by certified mail,[123] and there was even authority stating that service

117. Free legal services are hard to find and most applicants have to hire a small law firm or solo practitioner. By one study, only about two percent of all immigrants facing removal obtained pro bono legal services. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 27 (2015).

118. Musalo & Rice, *supra* note 67, at 719.

119. *See supra* note 89 and accompanying text.

120. 8 U.S.C. § 1229(a)(1)(F)(i) (2012). This statute provides that defensive asylum applicants have a duty to provide a correct address as well as notify USCIS of any change in address. *See id.* It is important for all applicants for immigration status to fulfill this responsibility so that they can be served with further documentation.

121. *See* June Marie Nogle, *Immigrants on the Move: How Internal Migration Increases the Concentration of the Foreign-born*, CTR. FOR IMMIGR. STUD. (Feb. 1996), http://cis.org/InternalMigration-ImmigrantConcentration [https://perma.cc/HRX7-AV9M]. For example, Alex's official address changed several times within a year of arriving: it was first at his initial detention center in Texas, then at a friend's residence while he looked for work, and then another residence he rented on his own. Other immigrants may relocate from where they entered in order to live in immigrant-rich communities.

122. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009 (1996). This was also the Act that established the one-year bar to asylum.

123. *Compare* 8 U.S.C. § 1252(b)(a)(1) (1994) (requiring written notice, also known as an "order to show cause[,]" to be served by certified mail), *with* 8 U.S.C. § 1229(a)(1) (2012) (allowing a "notice to appear" to be served through regular mail).

would be ineffective unless the certified mail receipt was signed by the addressee.[124] The removal of these basic procedural safeguards has negatively impacted defensive asylum applicants.

Under 8 C.F.R. § 1003.26, "[w]ritten notice to the alien shall be considered sufficient for purposes of this section if it was provided at the most recent address provided by the alien." A decision by a panel of the Board of Immigration Appeals interpreted that regulation as meaning that a "letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee."[125] The strength of this delivery presumption has been questioned by another panel of the Board of Immigration Appeals.

In *Matter of M-R-A-*,[126] the respondent was an affirmative asylum applicant who filed his application directly with DHS.[127] After a preliminary hearing, the government issued him a Notice to Appear, instructing him to appear on a certain date.[128] Later, DHS issued the respondent a second Notice of Hearing advancing his hearing date forward one week.[129] He failed to respond to that notice and was ordered removed in absentia.[130] On a motion to reopen proceedings before an immigration judge, the respondent claimed he had never received the Notice of Hearing with the new hearing date.[131] He also submitted affidavits corroborating his story,[132] but the immigration judge denied the motion on the grounds that "the presumption that postal officers properly discharge their duties had not been rebutted."[133] On appeal before the Board of Immigration Appeals, the respondent argued that the immigration judge improperly applied a stronger presumption of delivery because the cases on which the judge relied dealt with instances of delivery by certified mail.[134] The Board of Immigration Appeals held that the judge improperly denied the motion to reopen and recognized that regular mail is afforded a

124. Matter of Huete, 20 I. & N. Dec. 250, 253 (B.I.A. 1991) (holding that in order to effect personal service of an Order to Show Cause and Notice of Hearing sent by certified mail, return receipt requested, the receipt must be signed by the addressee or a responsible person at his or her address and returned).

125. Matter of M-R-A-, 24 I. & N. Dec. 665, 671 (B.I.A. 2008) (quoting Matter of M-D, 23 I. & N. Dec. 540, 546 (B.I.A. 2002)).

126. Matter of M-R-A-, 24 I. & N. Dec. 665 (B.I.A. 2008).

127. *Id.* at 666.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 666–67.

"weaker presumption" of delivery than certified mail.[135] The focus of the inquiry, then, was whether the respondent actually received the notice and not merely whether it was delivered.[136]

The emphasis on actual delivery in *Matter of M-R-A-* suggests that when an affirmative asylum applicant faces a penalty for procedural error, the applicant should be given an opportunity to contest or remedy the error before immigration consequences manifest. Thus, in the "defensive" asylum application context, an applicant facing dismissal due to the one-year deadline after never receiving a Notice of Hearing should be afforded the same opportunity to contest the presumption of delivery. However, as noted above, compliance with the one-year filing determination is ordinarily a question of fact that is not reviewable, in contrast to the narrower, but related question presented in *Matter of M-R-A-* regarding the presumption of delivery. Given this tension, the procedural rights of immigrants cannot be reliably safeguarded via appellate review. Rather, for illegal entrant asylum applicants, procedural rights should be protected by allowing them to count their initial credible fear interview as applying for the purposes of the one-year deadline.

V. RECOMMENDATIONS

The harsh and unjust effects that the one-year bar imposes on some asylum applicants can be done away with, or at least mitigated, by enacting any of the following the following proposals. The asylum statutes could be amended to (1) eliminate the one-year bar all together, (2) expressly permit judicial review of denied asylum application in a certain class of cases, (3) require certified mail as the means of service for hearing notices, or (4) allow a successful credible fear interview to "lodge" an applicant's application for purposes of the one-year bar.

135. *See id.* at 671–73. The Board of Immigration Appeals noted that, in the Second Circuit, "the burden of proof to overcome the 'slight' presumption of receipt in the context of regular mail is significantly lower than the burden set forth for certified mail." *Id.* at 672. The First, Third, Fourth, and Fifth Circuits have all recognized a reduction in the strength of the presumption. Santana Gonzalez v. Att'y Gen. of U.S., 506 F.3d 274, 279 (3d Cir. 2007); Kozak v. Gonzales, 502 F.3d 34, 38 (1st Cir. 2007); Nibagwire v. Gonzales, 450 F.3d 153, 157 (4th Cir. 2006); Maknojiya v. Gonzales, 432 F.3d 588, 589 (5th Cir. 2005).

136. *Matter of M-R-A-*, 24 I. &. N. at 673–74 ("[W]hen an immigration judge adjudicates a respondent's motion to reopen . . . based on a claim that a Notice to Appear or Notice of Hearing sent by regular mail to the most recent address provided was not received, all relevant evidence submitted to overcome the weaker presumption of delivery must be considered.").

A. Congress Should Abolish the One-Year Deadline

The most immediate way to solve the problem of asylum applicants being unable to fulfill the one-year deadline due to procedural error is to abolish the one-year deadline entirely. Both the procedural and substantive bars found in section 18 U.S.C. § 1158(b)(2)(A),[137] in contrast to the one-year filing deadline, are reasonably drawn restrictions on asylum applicants. These substantive bars are clearly pertinent to the overarching goal of efficiently allocating asylum benefits to qualified and deserving applicants. Applicants with unclean hands—who themselves have subjected others to persecution—are rightfully denied the opportunity for asylum. A past history of serious criminal activity is also a factor fairly considered. There is undoubtedly variance in different jurisdictions as to prosecutorial discretion and sentencing, which in turn influences what would be considered a serious crime under the statute.[138] These variations could then lead to inequities such as similarly situated applicants receiving disparate immigration consequences for the same actions. However, the immigration system operates with severely constrained resources and processes far more applicants than it was designed to handle.[139] As such, barring applications from those with serious criminal histories is at least a fair policy choice.

Most of the "procedural" bars are also reasonable restrictions. For example, the safe third country provision[140] is not truly a bar to asylum—it recognizes that an applicant is potentially deserving of asylum and ensures that there is actually another place where the applicant can be relocated.[141] Similarly, the bar on reapplication

137. *See supra* Part III.

138. Immigration judges can review available evidence regarding the conviction. This review may invite a "retrial" of the underlying offense. *See* Nadeen Aljijakli, *Statutory Bars to Asylum: What Is So Serious About a 'Particularly Serious Crime?'*, *in* AM. IMMIGRATION LAWYERS ASS'N, IMMIGRATION PRACTICE POINTERS 491 (AILA ed., 2012–2013 ed.).

139. *See* HUMAN RIGHTS FIRST, IN THE BALANCE: BACKLOGS DELAY PROTECTION IN THE U.S. ASYLUM AND IMMIGRATION COURT SYSTEMS 7 (2016), http://www.humanrightsfirst.org/sites/default/files/HRF-In-The-Balance.pdf [https://perma.cc/4K9K-BSBN] (discussing the rapid growth of backlogged cases at the asylum division resulting from an increase in the number of credible fear and reasonable fear interviews, without a corresponding increase in funding).

140. 8 U.S.C. § 1158(a)(2)(A) (2012).

141. For instance, the United States and Canada sought review from the United Nations High Commissioner for Refugees regarding their respective safety before implementing a "safe third country" agreement between themselves. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, MONITORING REPORT, CANADA-UNITED STATES "SAFE THIRD COUNTRY" AGREEMENT 10 (2006), https://www.uscis.gov/sites/default/files/files/article/appendix-a.pdf [https://perma.cc/4FYM-TW5P].

supposes that the application has at least been previously considered on the merits.[142]

Unlike all of the above provisions, however, the one-year bar is strictly procedural and has nothing to do with the merits of the underlying application.[143] The requirement does not function to screen out dangerous individuals or those that have subjected others to persecution. Instead, it was passed with a goal of preventing fraudulent applications for employment authorization.[144] However, because of the Employment Authorization Deadline statutes, there is now a specific mechanism to prevent the type of fraud once feared—applicants must wait at least 180 days until after their asylum applications are officially filed to apply for work authorization.[145] Arguably, the one-year bar is duplicative and no longer necessary in light of its original justification.

Professors Karen Musalo and Marcelle Rice also argue that the bar should be abolished because, on balance, it does more harm than good.[146] As opposed to preventing fraud, the bar actively frustrates otherwise valid claims, evidenced by the high rate of instances where an immigration judge denies asylum yet grants withholding of removal.[147] In a similar manner, the bar punishes applicants who may try alternative forms of relief before applying for asylum.[148] Furthermore, the bar is an affront to the 1967 U.N. Protocol Relating to the Status of Refugees, an agreement ratified by the United States that helped establish the asylum system.[149] Under this protocol participating nations are prohibited from "expel[ing] or [returning] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion,

142. *See supra* Section III.A.

143. *See* AM. IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 8 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf [https://perma.cc/M8J2-AEED]; Susan S. Clark, Note, *The Illegal Immigration Reform & Immigrant Responsibility Act's One-Year Filing Deadline on Applications for Asylum: The Narrow Interpretation and Application of Exceptions to the Filing Deadline*, 22 GA. ST. L. REV. 463, 470–71 (2005).

144. *See supra* note 67 and accompanying text.

145. § 1158(d)(2).

146. Musalo & Rice, *supra* note 67, at 722.

147. *See id.* at 699–700. The judge is in effect admitting that the applicant has a meritorious case while denying the appropriate relief on account of the bar. *Id.*

148. *See id.* at 722. Musalo and Rice describe an applicant who applied for a religious worker visa, was denied, and then could not apply for asylum because he was beyond the deadline. *Id.*

149. *Id.* at 711.

[or] nationality . . . ."[150] The protocol provided the motivation behind the enactment of the Refugee Act of 1980.[151] The United Nations Handbook on Procedures and Criteria for Determining the Status of Refugees, which interprets the requirements of the protocol, provides that technical problems should not bar consideration of a legitimate asylum claim.[152] Against this background of collective international intent, it seems apparent that maintaining the one-year bar is contrary to the foundational purposes of the asylum system.

Nonetheless, there are practical reasons for resisting the urge to drop the bar altogether. First, there is a pressing risk of overcrowding the immigration court system.[153] A sudden influx of applications could backfire because asylum officers would inevitably have to dedicate less time and attention to each particular case they encounter. In the end, this could mean that deserving applicants may not get the consideration they deserve, or that deserving applicants could have to wait significantly longer. Second, it would be difficult to summon the political will to pass such an amendment to the INA given the current political climate and public aversion to admitting refugees.[154] That said, there are other ways to solve the problem that are more politically feasible. Legislation could be passed that would allow federal courts to review timeliness or that would once again require certified mail for certain notices, like asylum applicants' Notices of Hearing.

B. Congress Should Resolve the Circuit Split and Permit Federal Courts to Review Determinations of Timeliness

Federal courts should be allowed to review immigration courts' adjudications of timeliness, notwithstanding some compelling

150. UNITED NATIONS HIGH COMM'R FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 30 (2010), http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf [https://perma.cc/9FQ9-QYH8] (containing the text of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees).

151. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987) (noting that the Protocol provided the motivation behind the enactment of the Refugee Act of 1980).

152. UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 8 (2011), http://www.unhcr.org/3d58e13b4.pdf [https://perma.cc/A4W8-J8VZ]

153. *See supra* note 139 and accompanying text.

154. *See, e.g.*, Drew Desilver, *U.S. Public Seldom Has Welcomed Refugees into Country*, PEW RES. CTR. (Nov. 19, 2005), http://www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/ [https://perma.cc/7Q2L-6QRF]; Elizabeth McElvein, *What Do Americans Really Think About Syrian Refugees?*, BROOKINGS INST. (Mar. 4, 2016), https://www.brookings.edu/blog/markaz/2016/03/04/what-do-americans-really-think-about-syrian-refugees/ [https://perma.cc/H45L-KPDL];

interests for limiting judicial review in this arena. For example, lower courts have more direct exposure to evidence, witnesses, parties, and counsel, and permitting review of all findings of fact would confound the lower courts' authority while clogging appellate court dockets. There may also be some separation of powers concerns, and the courts may be reluctant to interfere with immigration matters that are ordinarily in the province of the executive branch.[155]

Nonetheless, the determination of whether an asylum application was timely filed is a mixed question of law and fact that arguably leans more toward a question of law. Strictly speaking, determining whether or not a date stamped on a paper application occurred more than a year ago is a straightforward question of fact. But this is not the only question an immigration judge must resolve. The judge must also decide whether the applicant qualifies for any of the statutory exceptions. Judicial review of this type of mixed legal and factual finding is a properly within the purview of an appellate court. More specifically, federal appellate courts should be permitted to review asylum cases to determine whether or not an administrative judge ignored substantial evidence that would have clearly justified granting an exception, or otherwise erred in the decision.

To mitigate the potential impacts on federal dockets, Congress should limit review to very specific instances, like determining whether or not any of the statutory exceptions applied. The power could be reserved for mixed questions of law and fact that have a disproportionate impact on an applicant's success on the merits. The magnitude of appeals could be further tempered by making review discretionary.

C. Congress Could Require Simultaneous Scheduling of Hearings and Use of Certified Mail for Notices of Hearing

Other legislation could address the fundamental problem of failing to make sure an applicant receives critical information about an asylum case. As noted above, there is no express legislative authority permitting USCIS to first issue in person "blank" Notices to Appear with no hearing date and then later mail the Notice of Hearing that identifies the date and time of the defensive asylum

155. *See* I.N.S. v. Chadha, 462 U.S. 919, 954 (1983) (holding that because Congress granted authority to the attorney general over immigration decisions, other branches of government, including Congress itself, must abide by that authority until such delegation is legislatively altered or revoked); Dobkin, *supra* note 90, at 104 ("The Supreme Court has suggested that 'protecting the Executive's discretion . . . can fairly be said to be the theme of the legislation.' ").

applicant's first appearance before an immigration judge.[156] Instead, this practice seems to stem from the rise in immigration cases handled by the system and is used to make it easier for courts to schedule cases.[157] Despite the administrative usefulness of this docket control technique, it has a real humanitarian cost–it can take away a deserving asylum applicant's day in court. Accordingly, Congress could end the practice by requiring immigration officers to issue Notices to Appear that contain the time and place of applicants' first hearing before they leave the immigration office.[158] This requirement would better ensure that applicants actually know when and where to appear, since mailing these notices to applicants who frequently change addresses is often futile.

Alternatively, if it is logistically impracticable to require courts to schedule hearings contemporaneously, Congress could amend the INA to restore the pre-IIRIRA certified mail service provisions.[159] Specifically, certified mail would be required and a signed receipt would be necessary in order for a court to presume delivery. Under the current regular mail service standard, if a Notice of Hearing fails to be delivered to the applicant and the applicant fails to appear on the scheduled date, the person can be summarily deported with no opportunity to present any reasons that would justify the failure to appear. Under the certified mail standard, the applicant would not be automatically barred from making a case. Instead, the person would have the burden of proving that the failure to appear was reasonable in light of the circumstances. Additionally, if the notice is successfully delivered via certified mail, the applicant would be barred from arguing that the applicant lacked sufficient notice because there would be a verified receipt.

D. Credible Fear Interview Should Lodge Illegal Entrant Asylum Applications

The most effective way to prevent qualified illegal entrant applicants from slipping through the cracks is to presume that an applicant has lodged the application after the applicant has successfully completed the credible fear interview. The process of lodging asylum applications has already been employed in the context

156. *See supra* Section IV.A.

157. *See* HUMAN RIGHTS FIRST, *supra* note 139, at 7–9.

158. This also removes the risk that a Notice of Hearing will be addressed incorrectly.

159. *See* 8 U.S.C. § 1252(b)(a)(1) (1994); *see also supra* notes 123–25 and accompanying text.

of the Employment Authorization Deadline ("EAD").[160] In that context, prior to an appearance before an immigration judge, an applicant is permitted to bring a paper copy of the application to the clerk of court and his application will be considered "lodged," starting the countdown until the applicant is eligible for employment.[161] In the illegal entrant asylum context, a successful credible fear interview should automatically lodge the application for the limited purpose of satisfying the one-year filing deadline.

Lodging was first utilized in the EAD context in response to a lawsuit which challenged an official EOIR policy. The EAD statute provided that asylum applicants are eligible for employment authorization documents 180 days after their applications are filed with the immigration court.[162] In theory, once a complete application is filed, the 180-day EAD period starts. However, prior to December 2013, the EOIR had a policy of not starting the 180-day period until the applicant first made a "substantive" appearance before an immigration judge.[163] A class action suit was filed on behalf of immigrants, and as part of the settlement, the EOIR agreed to allow applicants to lodge their applications before their first substantive appearances by submitting their paper applications to the clerk of court.[164] At that point, the date is noted by EOIR, sent to USCIS, and the EAD clock starts running.[165]

If lodging were to be applied to the one-year filing deadline, it would mean that as soon as an illegal entrant asylum applicant is found to have a credible fear of persecution, that applicant's application would be considered filed with USCIS. This main

160. *See* Settlement Agreement at 15, B.H. v. U.S. Citizenship & Immigration Servs., No. CV11-2108-RAJ (W.D. Wash. May 6, 2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/ABT%20v%20USCIS%20DRAFT%20SETTLEMENT%20AGREEMENT%20-%20FILED%20-%20050613.pdf [https://perma.cc/L9UR-53EK].

161. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, THE 180-DAY ASYLUM EAD CLOCK NOTICE (2013), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice.pdf [https://perma.cc/K36D-C95D].

162. *See* First Amended Complaint for Injunctive and Declaratory Relief at 2, B.H. v. U.S. Citizenship & Immigration Servs., No. CV11-2108-RAJ (W.D. Wash. June 5, 2012), http://www.clearinghouse.net/chDocs/public/IM-WA-0019-0003.pdf [https://perma.cc/U874-X8EY].

163. In the meantime, however, these applicants were unable to secure a legal means of employment because they could not get their employment authorization documents. *See id.* at 4. It is unclear where the EOIR found the authority to distinguish between "filing" in an open court and appearing before an immigration judge.

164. *See* Settlement Agreement, *supra* note 160, at 15.

165. *See id.* at 16.

difference between asylum application lodging and lodging in the EAD context is that no paper asylum application would have to be filed. The credible fear interview would act as a substitute for a physical application.

The argument that there is a strong incentive for deserving asylum applicants to dodge their immigration court date after their applications are lodged—an argument earnestly made when Congress instituted the one-year requirement—is based on a fundamental misunderstanding of the risks associated with living in the country without legal status.[166] While failing to appear in court may reduce the immediate likelihood of an adverse outcome for an individual, living without legal status increases the possibility of adverse immigration outcomes in the long run. Basic tasks conducted in public, like driving or grocery shopping, increase the chance of being identified. In turn, this creates a significantly higher risk of deportation. And if an applicant does decide to work, it will necessarily be under the table, and the lack of legal status will create a power imbalance between the applicant and the employer. Since the risk of deportation constantly looms, an unscrupulous boss can use this threat as a tool for manipulation and subjugation.[167] Perhaps the most unfortunate consequence of not having status pertains to the reunification of the immigrant's family. An alien without status has no way of lawfully bringing relatives into the country.[168] The potential consequences of living without status are serious.

These risks highlight the strong disincentives deserving applicants encounter when considering whether to abandon their

166. Such immigrants, especially children, live in fear of being taken away from their families and are often bullied or ostracized. *See, e.g.*, AM. PSYCHOLOGICAL ASS'N, CROSSROADS: THE PSYCHOLOGY OF IMMIGRATION IN THE NEW CENTURY, PRESIDENTIAL TASK FORCE ON IMMIGRATION 33–38, 53–58 (2012), http://www.apa.org/topics/immigration/report.aspx [https://perma.cc/6TR4-6PQ7]; Julia Preston, *Risks Seen for Children of Illegal Immigrants*, N.Y. TIMES (Sept. 20, 2011), http://www.nytimes.com/2011/09/21/us/illegal-immigrant-parents-pass-a-burden-study-says.html [http://perma.cc/DT8V-CLHR].

167. To combat concerns with allowing illegal entrants to start the EAD clock even earlier than other applicants, there could be a "tiered" system of lodging that distinguishes between lodging for EAD purposes and lodging for purposes of satisfying the one-year bar to asylum. Basically, the effect of lodging via a successful credible fear interview could be restricted to specifically satisfying the one-year deadline. In order to lodge for the EAD clock, the applicant would still have to bring a paper copy of her application to the clerk of court.

168. The "immediate family" green card is only available to U.S. citizens. *See Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen [https://perma.cc/84GV-ARNH] (last updated Feb. 18, 2016).

applications. If a person passes the credible fear interview, the asylum case presumably has some merit. Such a person, who has already suffered extensively to even reach to the U.S. border, is not likely to submit to the harsh consequences of living without status when the person has a chance at obtaining asylum. The law should not penalize these kinds of applicants. To allow them to be deported without a hearing on the merits, the consequence of the one-year filing deadline, runs counter to the humanitarian goals of asylum. Lodging is a solution that promotes those goals because it prevents people like Alex from having to choose between living in the shadows or being deported to a dangerous place due to a mere procedural error.

On the other hand, there is a valid concern that allowing credible fear interviews to lodge applications could cause a significant increase in applications, adding stress to an already stressed system. In fact, the problems described in this Recent Development are due in part to official responses to overburdened immigration courts. Implementing this proposal could cause the raw number of applications to increase, but it is unlikely that the immigration system will face monumental case load increases. This proposal assumes that asylum officers will continue to conduct credible fear interviews thoroughly and to make reasonable determinations of the applicants' credibility. Therefore, those applications motivated purely by a desire to lodge and abandon the asylum process are likely to be screened out by the relatively rigorous requirements of the credible fear interview.[169] That is, if an immigration officer finds that there is a significant possibility that an applicant can establish eligibility for asylum, then that finding should remedy the concerns of fraud that originally motivated enactment of the one-year bar.[170]

Immigration judges can also protect the legitimate government interest of preventing fraud in the asylum system. Specifically, lodging asylum applications would not remove an immigration judge's power to dismiss fraudulent cases. Furthermore, because lodging is a form of constructive filing, it would be reviewable by the immigration judge whenever the applicant submits an I-589.[171] Assuming there was a

169. *See generally* 8 C.F.R. § 208.30 (2015) (outlining the procedural and substantive aspects of a credible fear of persecution determination).

170. As noted above, those concerns were already mitigated to a large degree by the imposition of the EAD clock, *see* text accompanying *supra* note 145–46, which in turn garnered a class action settlement due to its oppressive effects on genuine applicants, *see* Settlement Agreement, *supra* note 160, at 15.

171. Under the recommended approach, a finding of credible fear serves only to satisfy the one-year filing deadline. The merits of the case would still be considered at the applicant's hearing as scheduled by his Notice to Appear or Notice of Hearing.

significant delay in filing after the application is lodged, the judge could still find that the delay was due to the applicant's actions. Then, the burden of proof would be back on the applicant to show that the applicant qualifies for an exception to the one-year requirement.

CONCLUSION

While enacted as a means to decrease fraud in the immigration system, the one-year bar is now an unforgiving barrier to meritorious asylum claims, especially those of illegal entrants. When the typical illegal entrant asylum applicant leaves the immigration office, he leaves with a piece of paper that essentially says: "Hearing Time and Place: To Be Determined." For some applicants, this promise is never fulfilled. Due to various challenges, they may never have his claim heard on the merits. Specifically, the number of instances where immigration officers have failed to schedule hearings is alarming, and the abandonment of certified mail as the standard for service makes it far less likely that asylum applicants actually know when and where to go plead their case. Moreover, even though the credible fear interview seemingly signals the start of the asylum process, asylum applications are not considered filed for the purposes of the one-year deadline until they are presented in open court at the proper immigration office.

In light of these obstacles, the vulnerability of those that must overcome them, and the humanitarian purpose of asylum, it is clear that our nation's asylum laws need improvement. Despite its harsh effect in many cases, outright removal of the one-year bar may not be the ideal solution because the bar does control the docket of an overburdened immigration system. Moreover, a full repeal would likely be politically infeasible. Permitting judicial review of timeliness is also an imperfect solution. While doing so would allow applicants another avenue for relief, it would also likely transfer some of the immigration court case load into the federal court system. Likewise, requiring certified mail for effective service could reduce the number of cases where an applicant is unaware of her hearing date and location, but it could also cause delays.[172]

No solution is perfect when there are so many competing interests. Nonetheless, allowing successful credible fear interviews to count as filing for the purposes of the one-year bar best addresses the problems detailed in this Recent Development. This solution shelters

172. For instance, if mail is returned as undeliverable, the court may be in limbo while it attempts to determine the applicant's whereabouts.

deserving applicants from procedural penalties but also recognizes that there are limits to what the immigration system can and should handle. Although recent world events may call into question the wisdom of admitting immigrants from violent or war-torn foreign areas, it is precisely in these times that the pursuit of humanitarian interests is most important. Our (perhaps not so) credible fear of outsiders should not prevent us from helping those that truly suffer from the threat of persecution. After all, many American settlers could have been considered refugees themselves.[173] By amending our immigration laws in measured and balanced ways to give deserving applicants a fair shake at a brighter future, we can help mitigate the devastating effects of oppression and persecution while also serving our national interests.

ROY XIAO[**]

173. *See* Reverend Irene Monroe, *The Pilgrims—Like Syrians—Were Refugees Too*, WGBH (Nov. 26, 2015), http://news.wgbh.org/post/pilgrims-syrians-were-refugees-too [http://perma.cc/ZNW9-7F4D]; *Religion and the Founding of the American Republic*, THE LIBR. OF CONGRESS, https://www.loc.gov/exhibits/religion/rel01.html [http://perma.cc/73SA-3TVD].

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