Practice Advisory:

Distinguishing *Matter of M-A-F-* in the Pretermission Context[1]

May 22, 2026

Introduction

Since the start of the second Trump administration, the Executive Office for Immigration Review (EOIR) has implemented changes that strip noncitizens of their right to a fair hearing in immigration court. Pretermission of asylum claims, a tactic grounded in new Board of Immigration Appeals (BIA) decisions, cuts off asylum seekers' ability to present their case at a hearing and seek asylum.[2] While practitioners may insulate against pretermission by amending the client's previously filed asylum application, this strategy is not risk-free in light of *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015) and the asylum one-year filing deadline (OYFD). This practice pointer briefly discusses how pretermission functions, explains the *Matter of M-A-F-* decision, and guides practitioners on how to defend against *Matter of M-A-F-* when the Department of Homeland Security (DHS) or the Immigration Judge (IJ) relies on the decision to assert that an updated asylum application is barred by the OYFD.

How Pretermission Functions

BIA precedent from 2025 lays the groundwork for pretermission. In some cases, the DHS attorney argues that pursuant to *Matter of C-A-R-R-*, 29 I&N Dec. 13 (BIA 2025), the respondent's I-589 application does not have a complete answer to every substantive question and urges the immigration judge (IJ) to pretermit the protection claims. In other cases, DHS cites to *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025) to argue, often at an early stage of proceedings, that the IJ can pretermit without a hearing because there are no "facts in dispute" or because the respondent has not set forth a prima facie case for asylum or related protection.[3]

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[2] National Immigration Project, *"Pretermission" of Asylum Cases in Immigration Court* (Apr. 30, 2026) https://nipnlg.org/work/resources/pretermission-asylum-cases-immigration-court-terminacion-prematura-de-los-casos-de.

[3] For a comprehensive practice advisory on fighting pretermission based on an allegedly incomplete asylum application or alleged failure to state a prima facie claim for asylum, see National Immigration Project and CGRS, *Fighting for a Day in Court: Understanding and Responding to Pretermission of Asylum Applications* (Updated Aug. 27, 2025) https://nipnlg.org/work/resources/fighting-day-court-understanding-and-responding-pretermission-asylum-applications.

In cases where practitioners seek to update the I-589 to stave off a *C-A-R-R-* or *H-A-A-V-* pretermission by submitting a new I-589, supplementing the existing I-589, and/or presenting further evidence to develop or expand upon the prior filing, DHS will often argue that, pursuant to *Matter of M-A-F-*, the respondent has filed a new application that is barred by the OYFD, even though the initial filing was timely.

The One Year Filing Deadline in Asylum Cases

Pursuant to Immigration and Nationality Act (INA) § 208(a)(2)(B), asylum applications must be filed within one year of the noncitizen's arrival in the United States unless the asylum seeker can demonstrate that they meet a changed or extraordinary circumstance under INA § 208(a)(2)(D), and 8 CFR §§ 208.4; 1208.4. The OYFD was added to the INA in the 1996 Illegal Immigration Reform and Immigration Responsibility Act, purportedly to deter noncitizens from filing non-meritorious applications.[4]

In adding this new limitation on asylum eligibility, Congress was mindful of ensuring that bona fide asylum seekers could still win their claims, and therefore included section 208(a)(2)(D) which permits an asylum application to be granted notwithstanding the OYFD if the noncitizen "demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [first year]."

There is no language in the statute prohibiting asylum seekers who timely filed their asylum applications within one year of their last arrival in the United States from later amending that application. Moreover, during debate about adding the OYFD to the INA, and the proposed changed circumstances exceptions, Senator Orin Hatch stated:

> 'the changed circumstances provision will deal with situations like those in which the situation in the [noncitizen's] home country may have changed, *the applicant obtains more information* about likely retribution he or she might face if the applicant returned home, and other situations that we in Congress may not be able to anticipate at this time.'[5]

Thus, practitioners can argue that Congress did not intend the one-year bar to apply to timely filed applications to which asylum seekers later add more information.

Nonetheless, as discussed below, DHS most frequently argues that the OYFD applies if an asylum seeker adds more information to their initial asylum claim. Thus, in navigating OYFD issues where DHS raises *M-A-F-*, practitioners will often need to determine whether to argue that additions to the initial application are sufficiently limited to not be considered a new application

[4] Lindsay M. Harris, The One-Year Bar to Asylum in the Age of the Immigration Court Backlog, 2016 WIS. L. REV. 1185, 1193 (2016) ("Despite the fact that most genuine refugees were not able to apply within one year of their arrival, members of the 104th Congress were intent on imposing a deadline, apparently under the belief that such a bar was necessary to prevent time-consuming adjudication of fraudulent applications.")

[5] Philip G. Schrag & Michele R. Pistone, The New Asylum Rule: Not Yet A Model of Fair Procedure, 11 GEO. IMMIGR. L.J. 267, 275 (1997) (citing 142 Cong. Rec. S11840 (Sept. 30, 1996) (daily ed.)) (emphasis added).

or whether the changes are so great that the applicant might warrant a changed circumstances exception. This practice advisory assumes that practitioners have familiarity with the OYFD and its exceptions.[6]

Matter of M-A-F-

Unlike *C-A-R-R-* or *H-A-A-V-* or any of the dozens of Trump 2.0 BIA decisions narrowing noncitizens' avenues for relief, [7] the BIA issued *Matter of M-A-F-* in 2015. However, in the context of expanded pretermission, *Matter of M-A-F-* has taken on a new significance as IJs have relied on an overly expansive reading of the decision to deny relief.

Matter of M-A-F- concerned an asylum seeker from Pakistan. He was admitted to the United States as a visitor with an authorized stay through November 2000. In 2003, he had filed an affirmative application based on false information, including: a slightly different name, incorrect date of birth, and most importantly statements that he had been detained and tortured. In 2006, after being placed in removal proceedings, he filed a second asylum application in which he stated that he had attended political protests in Pakistan but had never been arrested.

The IJ denied asylum finding that Mr. M-A-F- had not timely filed his application and making an adverse credibility determination. Mr. M-A-F- appealed that decision first to the BIA and then to the Ninth Circuit Court of Appeals. The Ninth Circuit remanded to the BIA to consider whether the 2006 Real ID Act, applied to the credibility determination and whether the application was timely filed. To address both issues, the BIA had to decide whether the relevant application date was 2003, when the first application was filed, or 2006, when the second application was filed.[8]

The BIA first addressed the applicability of the Real ID Act, which was enacted in 2006, after the filing of the first asylum application but prior to the filing of the second application. It looked at the parallel regulations at 8 CFR §§ 208.4(c) and 1208.4(c) which discuss the OYFD and its exceptions. The BIA noted that these regulations permit the asylum seeker to "amend or supplement the application" but does not say anything about whether the Real ID Act should apply to applications amended after its effective date.

In the absence of guidance from the regulations, the BIA devised the following rule for determining which was the legally relevant asylum application for purposes of applying the Real ID Act to credibility determinations:

> A later filed application that presents a previously unraised basis for relief—such as a fear of persecution on account of a different protected ground—will generally be

[6] For a longer (albeit slightly dated) practice advisory on the OYFD, *see* CLINIC, *Practice Advisory: Overcoming the Asylum One-Year Filing Deadline for DACA Recipients* (June 25, 2020) https://www.cliniclegal.org/resources/asylum-and-refugee-law/practice-advisory-overcoming-asylum-one-year-filing-deadline-daca.

[7] *See* National Immigration Project, *The BIA and AG's Systemic Destruction of Noncitizens' Rights in Removal Proceedings* (Feb. 19, 2026) https://nipnlg.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings.

[8] It is worth noting that even the first asylum application in this case was untimely by more than two years.

> considered a new application. Even an application that is based on the same protected ground may also be considered a new application if the [noncitizen's] later claim is predicated on a new or substantially different factual basis. By contrast, a subsequent application that merely clarifies or slightly alters the initial claim will generally not be considered a new application.

26 I&N Dec. at 655. Applying this rule to Mr. M-A-F-'s case, the BIA determined that the second, post-Real ID Act application was a new asylum application. The BIA found it significant that the first application was "was based on a false narrative" and determined that Mr. M-A-F- "should not be able to bypass the credibility provisions" of the Real ID Act based on that false claim. *Id.*

While the bulk of the analysis in this decision concerns the applicability of the Real ID Act, the BIA also spent four paragraphs discussing the OYFD. Mr. M-A-F- entered the United States on October 11, 2000, on a visitor visa and was authorized to remain in the United States until November 10, 2000. *Id.* at 652. He filed his first application on February 26, 2003—more than 28 months after he last arrived in the United States. The IJ accepted the first application's filing date as the operative date for "determining whether the statutory time bar applies" and found that no extraordinary exception applied. *Id.* at 656-57.[9] Even though the first application was untimely, deciding which application started the OYFD clock still mattered for the potential extraordinary circumstances exception and the BIA determined that the 2006-filed application was the one that mattered for that purpose.

Significantly, the only case the BIA cites in support of its holding is *Dhital v. Mukasey*, 532 F.3d 1044, 1049 (9th Cir. 2008), a case where the asylum seeker had similarly "initially filed a fraudulent asylum application." 26 I&N Dec. at 656. As the BIA states:

> the respondent in this case applied for asylum under a false factual predicate and then submitted a new asylum application before the Immigration Judge after being placed in proceedings. Consistent with the Ninth Circuit's analysis in *Dhital v. Mukasey*, we conclude that the date of the respondent's second asylum application is the relevant date for purposes of determining whether the 1-year statutory bar applies.

Id. The only reasoning in this section of the BIA decision for using the second asylum application to restart the OYFD is that the first application was based on "a false factual predicate" and the only case on which the BIA relies is a case where the applicant also had initially filed a fraudulent application. Whereas the earlier part of the decision takes a more expansive reading of which asylum application is operative for application of the Real ID Act, the OYFD section of *Matter of M-A-F-* is much narrower.

This difference makes sense because the Real ID Act changed the evidentiary standard that immigration judges use to adjudicate cases before them. But the purpose of the OYFD was to

[9] Oddly, on appeal DHS argued that the IJ made "erroneous findings of fact" concerning the respondent's alleged ineffective assistance of counsel claim, which the IJ had denied, and the BIA instructed the IJ to "make further factual findings and legal determinations, as appropriate" on remand. *Id*. at 657, n. 4.

deter non-meritorious applications,[10] and there is no reason that supplementing an existing, bona fide asylum application should have any effect on the OYFD. The concern by Congress that some noncitizens who had been in the United States for several years, later filed an asylum application to delay removal, simply does not apply to applications that were timely filed and later supplemented. Given this context, it makes sense that Mr. M-A-F- could not rely on the filing date of his second asylum application when the first one included false information.

In fact, Department of Justice training materials from 2018, not long after the BIA issued *M-A-F-*, describe the holding as, "Where an initial I-589 filed under "a false predicate" and later I-589 filed after alien placed in removal proceedings: • filing date of the second I-589 applies." [11] The training further summarizes the *M-A-F-* holding as "A 'new' application is not the same as: • a renewed, • amended, or • updated application."[12] Unless the asylum seeker initially filed a false claim, in which case they may face the frivolous asylum bar,[13] they will generally be updating or amending their prior application, which is how DOJ itself interpreted *M-A-F-* as applying to subsequent filings in asylum cases.

Addressing DHS Arguments That Supplementing an Asylum Application Renders the Application Untimely Pursuant to *Matter of M-A-F-*

In many cases since the start of the second Trump administration, DHS attorneys seem to mechanically follow orders, moving to pretermit "under *C-A-R-R-*" or "under *H-A-A-V-*" and/or arguing that a supplement to an asylum application is untimely "under *M-A-F-*," without elaborating on why those BIA decisions actually apply to the facts of the case before the IJ. Several arguments are available to practitioners, depending on the facts of their case, to fight back against DHS's OYFD arguments based on amending the I-589.

Argument One: The Second Asylum Application Merely Clarifies or Slightly Alters the Initial Claim

Practitioners should first argue that the amended or updated asylum application "merely clarifies or slightly alters the initial claim." *M-A-F-*, 26 I&N Dec. at 655. While *M-A-F-* does say that adding an "unraised basis for relief" generally means the second application would be considered a new application, at least for Real ID Act purposes, practitioners should point out that the BIA made this determination in the context of an asylum claim where the first application included false information. Assuming the initial asylum application before the court was not based on "a false factual predicate" the date of the first filing should control.

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[10] *See* Harris, The One-Year Bar to Asylum in the Age of the Immigration Court Backlog, at 1194, *supra* n.4. (citing 142 CONG. REC. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson)).

[11] Department of Justice, *Advanced Adjudication Issues in Asylum Law: An Examination of the One-Year Bar and One Central Reason Standard* at 13 (May 29, 2018) https://www.hoppocklawfirm.com/wp-content/uploads/2018/08/Slides-Advanced-Adjudication-Issues-in-Asylum-Law-An-Examination-of-the-One-Year-Bar.pdf.

[12] *Id.*

[13] *See Matter of S-M-H-*, 29 I&N Dec. 412 (BIA 2026) (holding that written warnings on asylum application form are sufficient notice of consequences of filing a frivolous application).

In many cases, asylum seekers have filed "barebones" asylum applications to meet the OYFD. Demand for counsel to provide full representation on asylum has always been greater than available attorneys for full representation. As a result, it has been common for attorneys to assist with I-589 preparation at asylum application clinics.[14] But in these often-public settings where practitioners may meet only once with an asylum seeker, it may not be possible to fully develop every potential ground for asylum. If the initial I-589 was not fully developed, especially if it was filed pro se or in a "pro se plus" setting, practitioners should argue that the supplement to the application "clarifies or slightly alters the initial claim." *M-A-F-*, 26 I&N Dec. at 655.

If the asylum seeker filed a "barebones" application because they were not fully represented by counsel, newly retained counsel should assist the applicant to develop the application with all available claims and include any significant facts that were missing. In developing the substance of the claim, the asylum seeker should also explain the setting in which they filed their initial application, their efforts to find full representation before filing pro se or at a clinic, and the amount of time they spent with a volunteer completing the application. While an IJ and the BIA may not be persuaded that the circumstances of completing the initial I-589 matter, it is important to make the record complete for potential federal review, if the case is denied as untimely under *M-A-F-* after new counsel supplements the I-589. Likewise, if the asylum seeker initially filed the I-589 without any assistance, newly retained counsel should note this point when filing a more complete asylum supplement or application.

Practitioners should consider filing an additional document with a title like "Supplemental Asylum Information" ore "Updated Asylum Information" rather than filing an entirely new I-589 application form, to minimize the likelihood that DHS will argue that the second application is new and restarts the asylum clock. Of course, filing critical substantive information outside the four corners of the I-589 form itself could risk pretermission under *C-A-R-R-*. Thus, practitioners will need to evaluate the pros and cons of filing a new I-589 versus a supplement, taking into account how much information needs to be updated or supplemented.

In most cases where an asylum seeker is adding facts to an existing application, they will be "amending" or "updating" the existing application.[15] *M-A-F-* itself says that "a subsequent application that merely clarifies or slightly alters the initial claim will generally not be considered a new application." 26 I&N Dec. at 655. Thus, even if the asylum seeker "amends" or "slightly alters" their claim, those changes should not restart the asylum clock.

> *Example: Karla timely filed her asylum application at an asylum application clinic. Karla was in a physically abusive relationship with the mayor of her town who had connections to the MS-13. The attorney who assisted her, only checked the "Particular Social Group" and "Torture" boxes. Karla's new counsel should amend the application to include a "political opinion" ground. Counsel will need to make a strategic choice, based on the IJ's preferences, if known, about whether they should file a completely new*

[14] In New York City alone, counsel at asylum application help centers assisted more than 100,000 asylum seekers to file their I-589s. Luis Ferré-Sadurní, *New York Helped Thousands of Migrants With Legal Issues. That's Ending*., THE NEW YORK TIMES, May 16, 2025, https://www.nytimes.com/2025/05/16/nyregion/nyc-migrants-legal-help-ending.html.

[15] *See* DOJ training materials, *supra* note 9.

I-589 with the "political opinion" box checked, or whether they can just file a supplement to the existing I-589. Counsel can argue, either in a pre-hearing brief, or before the IJ if DHS raises the OYFD orally, that the addition of the political opinion only "slightly alters" her existing claim but is based on the same underlying facts. Karla's counsel should be sure that the new or supplemental I-589 includes facts about her abuser's political position as the town's mayor and how Karla's own political opinion was at least one central reason for her abuser harming her.

Argument Two: The Asylum Seeker Is Not Advancing a New Claim, as BIA Decisions Finding No Changed Circumstances Exception to the OYFD Illustrate

In two precedential BIA decisions where the asylum seeker attempted to argue a changed circumstances exception, the BIA relied on *Matter of M-A-F-* to hold that the circumstances were not sufficiently changed to warrant a OYFD exception. Practitioners can analogize to these two cases to argue the converse—that including additional information that is similar to the information in the initial asylum application does not restart the OYFD clock.

Matter of D-G-C-, 28 I&N Dec. 297 (BIA 2021) illustrates the BIA's interpretation of the changed circumstances exception. In *D-G-C-*, the asylum seeker admittedly filed beyond the one-year date of entry and sought to prove that he met a changed circumstances exception under 8 CFR § 1208.4(a)(4). Thus, unlike the applicant in *M-A-F-*, Mr. D-G-C- only submitted one asylum application, and he admittedly missed the OYFD. Nonetheless, the BIA relied on its analysis in *M-A-F-* to deny Mr. D-G-C-'s asylum claim as untimely. The BIA explained:

> In *Matter of M-A-F-*, 26 I&N Dec. at 655-56, we concluded that the date when a new asylum application is filed controls for the purposes of assessing the application's timeliness under section 208(b)(2)(B) of the Act, where the application presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis.[16] By contrast, to qualify for the 'changed circumstances' exception under section 208(a)(2)(D), we clarify that the alleged change must be significant such that it materially affects an applicant's asylum eligibility.

28 I&N Dec. 301. Whereas under *M-A-F-,* asylum seekers are often looking to prove that the facts alleged in a second asylum application are similar to those set forth in the first I-589, Mr. D-G-C-, had to prove that activities he undertook in the United States were different enough from his activities in China that he should be excused from filing within one year. The BIA denied the application after it determined that, the "activity the respondent engaged in while in the United States—emailing Christian proselytizing messages to people in China—is substantially similar to the actions he undertook in China and represents a continuation of those religious activities without a significant change." *Id.*

[16] As discussed above, the bulk of the BIA's analysis in *M-A-F-* concerns the application of the Real ID Act, not the one-year filing deadline. While *D-G-C-* pulls this quotation from *M-A-F-* and says that the rule is about "timeliness," that quote is actually from the section of *M-A-F-* that addresses the Real ID Act.

In reading *M-A-F-* and *D-G-C-* together, an asylum seeker who adds detail that is "substantially similar" to that in the first (and unfabricated) application would not restart the clock. If, however, unlike *D-G-C,* the second application discusses "significant" changes, the asylum seeker may qualify for a changed circumstances exception. Practitioners may be able to contrast their case to the facts in *D-G-C-* and analogize to its reasoning to show that the additional facts the asylum seeker is adding in their asylum supplement are "substantially similar" to those in the initial application. *Id.*

The BIA also relied on *Matter of M-A-F-* in analyzing a motion to reopen based on changed circumstances. In *Matter of F-S-N-*, 28 I&N Dec. 1 (BIA 2020), the asylum seeker's initial claim was found to be not credible. When Ms. F-S-N- later moved to reopen proceedings based on changed circumstances, the BIA denied the motion because "the respondent's newly raised claim is not independent of her prior one but merely supplements it, 'intertwin[ing] the new with the old'" 28 I&N at 5. Practitioners can use this case to argue the converse, that is that a second asylum application is not a *new* asylum application that restarts the asylum clock if the claims "'intertwine[] the new with the old'" rather than raising completely new claims which could not have been raised previously.

> *Example: Jorge fled his country after a gang killed his brother and threatened to kill everyone in Jorge's family for defying them because Jorge's father filed a police complaint. Jorge timely filed for asylum based on a "family of Jorge's father" PSG. Jorge's sister was recently kidnapped by the gang and another family member placed ads in local newspapers and on social media offering a reward for her return. This fact may make his family-based PSG stronger since the media advertising may make their family meet the added "social distinction" requirement to family-based PSGs* under Matter of L-E-A- *II, 27 I&N Dec. 581 (A.G. 2019)* reinstated by Matter of R-E-R-M- & J-D-R-M-, *29 I&N Dec. 202 (A.G. 2025). Although the sister's kidnapping and her family's subsequent posts to try to locate her are new facts, they are "substantially similar" to the facts in Jorge's initial application. And, as discussed below, if there were other new facts that were not "substantially similar" Jorge may be able to succeed on a changed circumstances exception to the OYFD.*

Argument Three: The Asylum Seeker Qualifies for a Changed Circumstances Exception

Even under DHS's often overly expansive reading of *M-A-F-*, if the new facts alleged, or the newly available ground for seeking asylum, arose after the asylum seeker filed the initial asylum application, the reasoning of *M-A-F-* does not apply. Instead, the practitioner should explore whether the asylum seeker qualifies for a changed circumstances exception to the OYFD based on the new facts. It is important to understand, however, that the changed circumstances generally must have arisen *after* the noncitizen filed for asylum initially and that the new filing must be within a reasonable period of time after the changed circumstances. 8 CFR § 1208.4(a)(4). As set forth at the regulations, a changed circumstance "materially affect[s] the applicant's eligibility for asylum" and can include, but is not limited to: changes in country conditions, changes in personal circumstances, losing dependent status on a principal's asylum application, and "changes in applicable U.S. law."

When updating an asylum application, especially if the initial asylum application was filed years ago, practitioners should always explore whether there are any changed circumstances. Practitioners can then argue in the alternative, that the applicant has merely supplemented the initial I-589, but if the IJ finds otherwise, the applicant also qualifies for a changed circumstances exception.

At times DHS will argue that the changed circumstances exception can only be granted if the new facts arose prior to the noncitizen filing the I-589. In *Ordonez Azmen v. Barr*, 965 F.3d 128, 137 (2d Cir. 2020), the Second Circuit rejected this argument and held that a new fact—a murder of someone similarly situated in the applicant's home country—could qualify as a changed circumstances exception to the OYFD, even though the murder happened after Mr. Ordonez Azmen had filed for asylum. The Court determined:

> Congress did not intend to bar the agency from considering the asylum application of an applicant who shows changed circumstances that first arise after the application is filed, and did not require that the changed circumstances even relate to the delay in filing. To the contrary, Congress clearly contemplated that the agency could consider a change in circumstances such as the one alleged here at several stages in an applicant's proceedings—even when the change bears no relation to the reason for the delay, and even as late as a motion to reopen a final order of removal. *Id.*

In this case, the government argued under *M-A-F-* that "to conclude that there may be an exception to its rule that changed circumstances must predate the filing of the application [] the changed circumstances [must] present 'a new claim ... completely untethered to an existing application.'" *Id.* at 140, n. 4. The Court did not address this argument directly and instead looked to congressional intent to find that the date of the changed circumstance should not be determinative to the OYFD exception. This is a sensible conclusion because the purpose of the OYFD was to deter non-meritorious applications from being filed years after noncitizens had been living in the United States, not to prevent legitimate asylum seekers from updating their claims when their fear of return has increased.[17]

Finally, practitioners should also note that 8 CFR § 1208.4(a)(4)(i)(B) includes an exception for "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law." There may be situations where an asylum seeker initially filed their application based on one protected characteristic (such as particular social group) where applicable U.S. law has changed to narrow eligibility under that category and the asylum seeker must now rely on a different protected characteristic, such as political opinion. While DHS is likely to argue that raising a new protected characteristic restarts the OYFD, the practitioner can counter that the regulation does not specify whether the change in U.S. law must be favorable or unfavorable to the noncitizen.[18]

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[17] The preamble to 8 CFR § 1208.4(a)(4) states, "Regarding the changed circumstances exception in section 208(a)(2)(D), the Department has followed the recommendation of numerous commentators to drop the language limiting this exception, for purposes of section 208(a)(2)(B), to circumstances that arise after the one-year period." 62. Federal Register 10312, 10316 (March 6, 1997)

[18] Since the start of the second Trump administration, the BIA has issued dozens of decisions narrowing the grounds for asylum and other protections. *See supra* note 3. Many asylum seekers whose applications were filed before the

Example: Martin fled Guatemala after several being abused and threatened for years because he was effeminate and presumed to be gay. He completed his initial I-589 application with a volunteer at a legal clinic, and stated that he is gay, but did not disclose an incident where a police officer raped him because he was not comfortable discussing this with a stranger. Martin has recently married Carlos, a U.S. citizen and is more afraid to return to Guatemala now because he has been public about his same-sex relationship on social media. Martin's counsel should add the important information about the sexual assault in a supplement to the asylum application, and include Martin's explanation about why he was unable to disclose this very personal information to a volunteer who he met only once. Martin's counsel should argue, in the alternative, that even if the court finds that the new information would restart the OYFD, Martin has a changed circumstances exception based on his recent marriage and the greater risk this puts Martin in if he is returned to Guatemala.

Argument Four: The Asylum Seeker Qualifies for an Extraordinary Circumstances Exception

The adjudicator is most likely to find that *M-A-F-* applies in cases where the noncitizen did not include all potential protected characteristics in the initial application, or where the noncitizen raises significant new facts about what occurred in the country of persecution. In this situation—where DHS claims that the supplemental asylum application is really a new claim based on facts that took place before the asylum seeker left their country—practitioners should explore potential extraordinary circumstances exceptions under 8 CFR § 1208.4(b)(5). In particular, if the noncitizen was represented by counsel on the initial application and counsel did not include all grounds for asylum, the asylum seeker may have an exception based on ineffective assistance of counsel (IAC). It is important to note, however, that under 8 CFR § 1208.4(b)(5)(iii) the asylum seeker must fully comply with the *Lozada* requirements to succeed on an extraordinary circumstances exception based on IAC.[19] It is not clear whether asylum seekers who were

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start of this administration had a strong claim based on precedent that has since been overturned. If they now pursue their claim based on the same facts they already alleged but add a different protected characteristic they could try to frame the change in law as a changed circumstance. There is an example in the USCIS One Year Filing Deadline Training Module at 24 gives one example of a potential changed circumstances exception where, "an I-589 was not filed for many years because [the asylum seeker's attorney] did not believe [the asylum seeker] was eligible. [The attorney] believes that a BIA case decided in May 2000 affects [the asylum seeker's] eligibility. Presuming his attorney is correct, a changed circumstance exception to the filing deadline rule – change in applicable U.S. law – applies. . ." USCIS One Year Filing Deadline Training Module (May 6, 2013) https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf. Presumably the change in U.S. law cited in the Asylum Office training materials is a broadening of eligibility, not a narrowing, but the plain language of the regulation does not say that the change has to be favorable to the noncitizen.

[19] Those requirements are: "The [noncitizen] files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and
(C) The [noncitizen] indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not." 8 CFR 1208.4(b)(5). Whether or not an asylum seeker could make a *Lozada*-IAC claim in the context of an attorney who listed

assisted at "pro se plus" clinics would be able to make an IAC claim against the attorney who assisted them, since they did not enter into an attorney-client relationship. However, strictly following the *Lozada* requirements may be the most protective way for an asylum seeker to add a claim that the "pro se plus" attorney did not discuss with the asylum seeker. It may seem harsh to file an IAC claim against a practitioner who was engaging in a widely-used practice but new counsel will have to weigh the pros and cons of doing so.

Furthermore, asylum seekers are frequently diagnosed with post-traumatic stress disorder (PTSD) or other mental health issues as a result of the harm they suffered in their country of persecution. If new counsel learns of new bases for asylum which were not included in the initial I-589, counsel should discuss with the asylum seeker why they did not include that information in the initial filing. 8 CFR § 1208.4(a)(5)(i) specifies that asylum seekers may be able to demonstrate an extraordinary circumstances exception based on "[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past." Practitioners should consider and explain, the difficulty for the asylum seeker of discussing particularly traumatic past experiences, especially if they only met with the asylum preparer once and if that meeting was not in a fully confidential setting. This type of extraordinary circumstances argument will be much stronger if the asylum seeker presents medical documentation of their PTSD or other mental health issues.

Furthermore, while 8 CFR § 1208.4(a)(5) lists several examples of extraordinary circumstances, it also states that the listed extraordinary "circumstances may include but are not limited to" those set forth in the regulation. Thus, practitioners can consider any other barriers the noncitizen faced that prevented them from expressing their full claim, such as limited education or language barriers.

Practice Pointers

- Distinguish *Matter of M-A-F-*. As discussed above, the facts of that case are unusual—the first application included false information; the case should therefore be easily distinguished from most cases where the initial I-589 does not include untruthful information.
- Unless the initial I-589 includes significant incorrect information or contains almost no content, file a document labeled "Asylum Supplement" rather than filing a new I-589 form. Filing an entirely new form may be more likely to lead DHS to argue that the IJ should consider the date the second I-589 form is filed for OYFD purposes.
- Argue the supplement or amendment to the asylum application is "intertwined" with the existing claims, and therefore it should not be considered a new application. *Matter of F-S-N-*, 28 I&N at 5.

themselves as a preparer at a clinic, but did not enter a Notice of Appearance, is beyond the scope of this practice advisory.

- Argue a changed circumstances exception to the OYFD if new facts have arisen after filing the initial asylum application, under 8 CFR § 1208.4(a)(4) or if the asylum seeker has become aware of new facts that make return to the home country more dangerous.
- Argue an extraordinary circumstances exception to the OYFD if prior counsel committed IAC by not adequately exploring all facts and potential grounds for the asylum claim. *See* 8 CFR § 1208.4(a)(5)(iii). If making this argument, it is important to strictly adhere to the *Lozada* requirements set forth in the regulations.
- Argue an extraordinary circumstances exception to the OYFD if PTSD or other mental health issues prevented the asylum seeker from fully articulating all potential asylum grounds at the time they filed their initial application. *See* 8 CFR § 1208.4(a)(5)(i).
- Argue that *M-A-F-* was wrongly decided and that there is no prohibition under the INA against adding new facts or claims to previously filed asylum application. Furthermore, after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the BIA's reading of the OYFD should not be given deference, and the INA says nothing about amending or supplementing a timely filed asylum application.
- Be mindful of credibility issues. DHS is likely to cross examine the asylum seeker about why they left out details in the initial asylum application that they are now adding in a supplement. Prepare the respondent to explain the circumstances of the initial filing and why they are able to include these details now. For example, the applicant may have developed a relationship of trust with new counsel that they did not have with the person who assisted them in completing the initial application, or the applicant may have received therapy to help them address traumatic past events.