



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

LGBTI DACA Recipients and Options for Relief under Asylum Law¹

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I. Introduction

On June 18, 2020, the U.S. Supreme Court issued a decision in [Dep't of Homeland Sec. v. Regents of the Univ. of California](#) – U.S. -- , No. 18-587, 2020 WL 3271746, (U.S. June 18, 2020) holding that the Trump administration's effort to end Deferred Action for Childhood Arrivals (DACA) had not complied with the requirements of the Administrative Procedures Act. As a result, the Supreme Court upheld a lower court ruling issuing an injunction against the DACA rescission and remanding the case for further proceedings. While this reprieve from terminating DACA was very welcome news, it is not a permanent solution. Following the decision, President Trump announced that he would submit "enhanced papers" again seeking to end DACA..² As advocates continue to push Congress to pass the DREAM act, immigration practitioners should explore all possible options for permanent immigration relief for those who are currently protected by DACA.

This advisory explores the possibility of filing Lesbian, Gay, Bisexual, Transgender or Intersex-based³ (LGBTI) applications for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA), and protection under the Convention Against Torture (CAT). The advisory is not intended to be a comprehensive guide to asylum and other protection claims generally. Section II discusses the requirements for DACA and the overlap between DACA recipients and LGBTI noncitizens. Section III provides an overview of asylum law in the LGBTI context. Section IV gives an overview of the law pertaining to withholding of removal and CAT for LGBTI applicants. Section V discusses the particular issues that may arise in proving and corroborating LGBTI protection-based claims. Finally, section VI provides guidance on conducting country condition research for LGBTI claims, including summaries of country conditions for the top five DACA countries.

II. LGBTI DACA Recipients and Asylum

Under the DACA program announced by the Obama administration on June 15, 2012, an applicant had to meet the following criteria to seek DACA:

- Entered the United States before age 16
- Continuously resided in the United States from June 15, 2007 to the present
- Was physically present, without lawful status, and under the age of 31 on June 15, 2012
- Was currently in school or had graduated or obtained a certificate of completion from high school, or obtained a general education development (GED) certificate, or had been honorably discharged from the U.S. Coast Guard or Armed Forces, and

² *Trump Says He Will Renew Effort to End DACA Protections*, Politico, June 19, 2020, [politico.com/news/2020/06/19/trump-renewing-effort-to-end-daca-329646](https://www.politico.com/news/2020/06/19/trump-renewing-effort-to-end-daca-329646).

³ This practice advisory uses the term "LGBTI" throughout, unless it is using an exact quotation or referring to an organization or publication that uses the acronym LGBT and does not purport to address intersex issues. Both the USCIS asylum office training materials and United Nations High Commissioner on Human Rights materials use "LGBTI" in their guidance and training materials.

- Had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, nor posed a threat to national security or public safety.⁴

The five countries with the largest numbers of DACA recipients are, in descending order, Mexico, El Salvador, Guatemala, Honduras, and Peru.⁵ A high percentage of LGBTI asylum applicants likewise come from Mexico, El Salvador, Guatemala, and Honduras.⁶

Many of those active in the “Dreamer” movement—both before and after President Obama initiated the DACA program—identify as LGBTI, and these activists played an instrumental role in pushing for DACA protections.⁷ Indeed, one of the most significant moments in the fight for protections for “Dreamers” was the publication of Pulitzer Prize winner Jose Antonio Vargas’s piece in the New York Times Magazine in which he “came out” both as gay and as undocumented.⁸ The Williams Institute, an LGBT⁹ research center at the University of California Los Angeles, estimates that 36,000 DACA recipients are LGBT and that 28 percent of LGBT DACA recipients live in California.¹⁰ The Center for

⁴ USCIS, Frequently Asked Questions uscis.gov/archive/frequently-asked-questions (last reviewed/updated Mar. 8, 2018).

⁵ USCIS, Approximate Active DACA Recipients: Country of Birth (Apr. 20, 2020), uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Receipts_since_Injunction_Dec_31_2019.pdf. [hereinafter, USCIS DACA Recipients].

⁶ Neither USCIS nor the immigration courts make statistics publicly available on the ground upon which applicants seek asylum. However, some data is available from non-governmental sources. “Asylum applicants from Mexico accounted for the second-highest number of asylum applications for people not in removal proceedings filed by Immigration Equality—the largest immigration service provider for LGBTQ immigrants. The next three most frequent countries of origin for DACA recipients—El Salvador, Guatemala, and Honduras—were also the most frequently occurring countries of origin among Immigration Equality’s clients who applied for asylum during removal proceedings.” Sharita Gruberg, Center for American Progress, *What Ending DACA Means for LGBTQ Dreamers* (Oct. 11, 2017), americanprogress.org/issues/lgbt/news/2017/10/11/440450/ending-daca-means-lgbtq-dreamers/. [hereinafter CAP LGBTQ Dreamers]. See also, Zach Stafford, *Meet Some of the 60,000 LGBTQ Immigrants Impacted by DACA Hearing*, THE ADVOCATE, Nov. 12, 2019, advocate.com/politics/2019/11/12/meet-60000-lgbtq-immigrants-impacted-daca-hearings#media-gallery-media-1; Sharita Gruberg et al, Center for American Progress, *LGBTQ Dreamers Fear Detention and Deportation and Need DACA’s Protections*, (Oct. 17, 2019), americanprogress.org/issues/lgbtq-rights/news/2019/10/17/476003/lgbtq-dreamers-fear-detention-deportation-need-dacas-protections/ [hereinafter “CAP LGBT Dreamers Fear Detention”].

⁷ See, e.g., Prerna Lal, *How Queer Undocumented Youth Built the Immigrant Rights Movement*, HUFFINGTON POST, Feb. 2, 2016, huffingtonpost.com/prerna-lal/how-queer-undocumented_b_2973670.html; Rosa Ramirez, *Undocumented Activists Follow LGBT Tactics*, THE ATLANTIC, July 24, 2012, theatlantic.com/politics/archive/2012/07/undocumented-activists-follow-lgbt-tactics/428277/; Undocuqueer, Movement, Equality Archive equalityarchive.com/issues/undocuqueer-movement/.

⁸ Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES, June 22, 2011, nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html.

⁹ Although this practice advisory generally uses the acronym LGBTI, because the Williams Institute identifies itself as collecting data on LGBT people, and not on those with intersex condition, the advisory is using LGBT here.

¹⁰ Kerith Conron & Taylor N.T. Brown, Williams Institute, *LGBT DREAMers and Deferred Action for Childhood Arrivals (DACA)*, (Feb. 2017), williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-DREAMers-and-DACA-February-2017.pdf.

American Progress places the estimate even higher, finding that there may be 66,825 LGBTI DACA recipients.¹¹ For these DACA recipients, the potential end of immigration protections could be especially harmful.¹² Like all “Dreamers,” their futures in the United States remain uncertain, but for many LGBTI DACA recipients, the possibility of returning to a country where they could face persecution, or could not live openly LGBTI lives, is particularly devastating.¹³ Some LGBTI DACA recipients may be able to win asylum in the United States, allowing them to remain here permanently. With the uncertainty that still surrounds DACA’s future, it is very important for practitioners to screen DACA recipients for asylum and to investigate possible claims based on LGBTI identity.

If an LGBTI individual is already in removal proceedings, the practitioner should advance every meritorious asylum and related relief argument on his or her behalf. For LGBTI individuals who are not in removal proceedings, practitioners and clients must fully evaluate the pros and cons of filing affirmatively for asylum based on the strength of the case, including potential one-year filing deadline (OYFD) exceptions and overall likelihood of success in the jurisdiction where the DACA recipient resides. To assess the overall likelihood of success in a particular jurisdiction, practitioners should reach out to local asylum practitioners to inquire how the local adjudicators may respond to particular arguments.

III. Overview of Asylum Law

Under the INA, the term “refugee,” which is the same as the standard used to evaluate applications for asylum, is defined as:

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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.¹⁴

Breaking this definition down further, there are several elements that an asylum applicant must establish to succeed in his or her claim. He or she must:

¹¹ See CAP LGBT Dreamers Fear Detention, *supra* note 6.

¹² See Jenny Manrique, *For this Young LGBT Man, the DACA Fight Means Coming out of Two Closets*, DALLAS NEWS, Mar. 5, 2018, dallasnews.com/news/immigration/2018/03/05/for-this-young-lgbt-man-the-daca-fight-means-coming-out-of-two-closets/.

¹³ John Paul Brammer, *DACA Reversal Could Be 'Death Sentence' for LGBTQ Immigrants*, NBC NEWS Sept. 7, 2017, [nbcnews.com/feature/nbc-out/daca-reversal-could-be-death-sentence-lgbtq-immigrants-n799281](https://www.nbcnews.com/feature/nbc-out/daca-reversal-could-be-death-sentence-lgbtq-immigrants-n799281); Corinne Segal, *LGBTQ 'Dreamers' Are Particularly Vulnerable as DACA Winds Down. Here's Why*, PBS NEWSHOUR, Sept. 8, 2017, [pbs.org/newshour/nation/lgbtq-dreamers-particularly-vulnerable-daca-winds-heres](https://www.pbs.org/newshour/nation/lgbtq-dreamers-particularly-vulnerable-daca-winds-heres).

¹⁴ INA § 101(a)(42)(A).

- Possess one of the following protected characteristics, a combination of protected characteristics, or imputed protected characteristics which are: race, religion, nationality, membership in a particular social group (PSG), or political opinion
- Have suffered past persecution or have a well-founded fear of future persecution
- The persecution must be by the government, or by private actors the government is unable or unwilling to control
- The persecution must be “on account of” the protected characteristic, or, have a “nexus” to the protected characteristic¹⁵
- The application must be filed within one year of the applicant’s last arrival in the United States¹⁶ or the applicant must qualify for an exception to the OYFD,¹⁷ and
- The applicant must not be otherwise ineligible due to criminal, security, or persecutor bars.¹⁸

One of the most valuable resources in approaching a potential LGBTI asylum claim is the Asylum Office Training Module on Lesbian, Gay, Bisexual, Transgender, and Intersex¹⁹ Refugee and Asylum Claims (hereinafter “LGBTI Training Module”).²⁰ This Module, which is used to train asylum officers, can be helpful both to understand how asylum officers have been trained on LGBTI issues and as legal authority for affirmative cases. However, the LGBTI Training Module is not binding on immigration judges (IJs). Moreover, as the Trump administration has implemented changes restricting asylum, and has removed many asylum officer training materials from its website, it is not clear which Asylum Office training materials are still in use.²¹

¹⁵ *Id.*

¹⁶ INA § 208(a)(2)(B).

¹⁷ See CLINIC, *Overcoming the One Year Filing Deadline for Asylum for DACA Recipients* (June 25, 2020), cliniclegal.org/resources/asylum-and-refugee-law/practice-advisory-overcoming-asylum-one-year-filing-deadline-daca [hereinafter, CLINIC, *Overcoming the OYFD*].

¹⁸ Applicants are barred from asylum under 8 CFR § 1208(b)(1)(2) if: “(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is . . . [engaging in terrorist activities]; or (vi) the alien was firmly resettled in another country prior to arriving in the United States.” While these issues are not likely to be common among DACA recipients, practitioners should screen for all bars before filing any asylum application.

¹⁹ There are no published decisions on asylum claims based on having an intersex condition. Since intersex asylum claims are relatively rare, this practice advisory will focus on LGBT claims. For more information, generally, on intersex issues, see Advocates for Informed Choice, aiclegal.wordpress.com/.

²⁰ USCIS, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims Training Module* (Dec. 20, 2019), uscis.gov/sites/default/files/files/natedocuments/LGBTI_Claims_LP_RAIO.pdf. [hereinafter AO LGBTI Training Module].

²¹ Jon Campbell, Sunlight Foundation, *USCIS Removed Asylum Training Documents from Website at Direction of Top Brass*, (June 4, 2019) sunlightfoundation.com/2019/06/04/uscis-removed-asylum-training-documents-from-website-at-direction-of-top-brass/.

In analyzing asylum claims that may not be adjudicated for many months or even years, practitioners must be aware of recently proposed regulations which would eviscerate asylum protections for most asylum seekers.²² These rules could go into effect as early as fall 2020. While the final rules may change from the proposed rules, and there will likely be efforts to challenge these dramatic changes through litigation, practitioners should fully explain the risks of filing including the effects these rules, if implemented, will have on future asylum applications.

A. The Persecution Analysis

An asylum applicant must prove a well-founded fear of persecution. The term “persecution” is not defined in the INA but has been clarified through case law. The LGBTI Training Module lays out typical types of harm that may be present in LGBTI asylum cases. These include:

- Criminal penalties
- Rape and sexual violence²³
- Beatings, torture, and inhumane treatment
- Forced medical treatment
- Forced psychiatric treatment or other efforts to “cure” homosexuality
- Discrimination, harassment, and economic harm
- Forced marriage
- Threats of harm, and
- Gender-based mistreatment.²⁴

An applicant may put forward an asylum claim based on past persecution, fear of future persecution, or both. Past persecution claims may be stronger since it can be more difficult to prove that something is likely to happen in the future than that it did happen in the past.

1. Past Persecution

If an asylum applicant can establish past persecution on account of one of the protected grounds, it is presumed the person has a well-founded fear of future persecution, and the burden of proof shifts to the government to prove that conditions have changed and the applicant can now safely return to the country of persecution.²⁵ It is therefore much easier to prevail on asylum cases where an individual has suffered persecution in the past than in cases based solely on fear of future persecution.

²² Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264-01, (June 15, 2020), [regulations.gov/document?D=EOIR-2020-0003-0001](https://www.regulations.gov/document?D=EOIR-2020-0003-0001).

²³ The LGBTI Training Module acknowledges that LGBTI applicants are uniquely vulnerable to rape and sexual violence. AO LGBTI Training Module *supra* note 20, at 21.

²⁴ *Id.* at 19-24.

²⁵ See 8 CFR § 1208.13(b)(1).

Since DACA recipients came to the United States as children or teenagers rather than adults, it is important to be aware that USCIS employs special guidelines in considering harm suffered by children.²⁶ Additionally, the United Nations High Commissioner for Refugees has issued guidance on children's claims that states:

Actions or threats that might not reach the threshold of persecution in the case of an adult may mount [sic] to persecution in the case of a child ... Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.²⁷

The Seventh Circuit also found in *Liu v. Ashcroft* that “[a]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of persecution.”²⁸ The “‘harm a child fears or has suffered ... may be relatively less than that of an adult and still qualify as persecution.’”²⁹ In cases with past persecution, DACA recipients may have suffered past physical or sexual abuse, particularly by family or community members, and maybe even law enforcement. These types of claims are discussed in Section III.B.2. Non-Governmental Actors, *infra*.

a. Presumption of a Well-Founded Fear

Once an asylum applicant has successfully established past persecution, he or she is entitled to a presumption of a well-founded fear of future persecution.³⁰ The burden then shifts to the government to rebut this presumption, by establishing one of two things:

- Reasonable internal relocation, or
- Fundamental change in circumstances³¹

i. Internal Relocation

²⁶ See USCIS, *Asylum Office Lesson Plan, Guidelines for Children's Asylum Claims* (Nov. 30, 2015) at 44 uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf beginning at p 1181.

²⁷ The United Nations High Commissioner for Refugees, *Child Asylum Claims under Articles 1(A)(2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees Child Asylum Guidelines* (Dec. 22, 2009), at ¶ 15, unhcr.org/en-us/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html.

²⁸ *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir.2004). The Ninth and Second Circuit later issued decisions including the same language. See *Hernandez-Ortiz v. Gonzalez*, 496 F.3d 1042, 1045 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir.2006) (per curiam).

²⁹ *Liu*, 380 F.3d at 314 (quoting Jeff Weiss, U.S. Dep't of Justice, *Guidelines for Children's Asylum Claims*, 1998 WL 34032561, at * 14 (Dec. 10, 1998)).

³⁰ 8 CFR § 1208.13(b)(1).

³¹ 8 CFR § 1208.13(b)(1)(i)(A) & (B).

The internal relocation analysis has two components. The first part of the analysis is determining whether an asylum applicant can safely relocate within the country of persecution.³² For example, if the persecutor harmed the applicant in one region of the country, could the applicant safely live somewhere else? Does the persecutor have the means or networks (for example a member of a transnational gang or cartel) to find the applicant anywhere in the country? Once it is determined that an applicant can internally relocate safely, the next part of the analysis is to determine if the applicant can *reasonably* relocate. For applicants who come from large countries with some cities that are more accepting of LGBTI people, it may be more difficult to show that it is not reasonable to relocate in a relatively more accepting city or region.³³

For determining the ability to reasonably relocate, the regulations suggest a non-exhaustive list of factors to consider such as gender, age, health, language, geography, and ability to support oneself.³⁴ The Board of Immigration Appeals (BIA) has held that the IJ must balance these factors against any evidence that the applicant previously resided safely in another part of the country, or the government's argument that another part of the country is safe.³⁵ In July 2019, the acting director of USCIS issued a statement reminding asylum officers to analyze whether victims of private actor violence could safely relocate internally in their countries of origin, claiming, without evidence, "there are areas that are generally very safe within each of the countries that currently make up the bulk of our credible fear cases."³⁶ Significantly, this guidance misstates the law, with the acting director instructing asylum officers to consider whether internal relocation would be "possible" when the regulatory standard is whether such relocation would be "reasonable."³⁷ It is not clear whether asylum officers are currently applying the "reasonable" standard required by the regulations, or the incorrect "possible" standard in the USCIS statement.

ii. Fundamental Change of Circumstances

Another way the government can rebut well-founded fear is to show there is a fundamental change of circumstances that would materially affect the person's well-founded fear.³⁸ One example would be where the persecutor, who was a family member or other private actor, has died, moved away, or

³² 8 CFR § 1208.13(b)(1)(i)(B) & (b)(2)(ii).

³³ See AO LGBTI Training Module, *supra* note 20, at 25-26 for a discussion of cases involving internal relocation in Mexico.

³⁴ 8 CFR § 1208.13(b)(3).

³⁵ See *Matter of M-Z-M-R-*, 26 I. & N. Dec. 28 (BIA 2012) (directing IJ to apply the factors in the regulations to the facts of the case); see also, *Garcia-Cruz v. Sessions*, 858 F.3d 1, 9 (1st Cir. 2017) (remanding for BIA to consider reasonableness of internal relocation where applicant might face violence, severe economic difficulties, and only speaks Quiché).

³⁶ USCIS, Asylum and Internal Relocation Guidance, July 26, 2019, uscis.gov/news/news-releases/asylum-and-internal-relocation-guidance.

³⁷ 8 CFR 208.13(b).

³⁸ 8 CFR § 1208.13(b)(1)(i)(A).

not been in contact with the asylum applicant for many years.³⁹ Furthermore, if the persecution happened while the applicant was a child, and the applicant is now an adult, the fact that he or she is no longer a child could be considered a fundamental change in circumstances.⁴⁰ Another example could be if conditions in the country of origin have changed significantly such that the applicant could live safely anywhere, for example, if a country has recently decriminalized same-sex, sexual activity. Courts have found that it is error to rely on improving country conditions for lesbian and gay people in denying an asylum claim by a transgender applicant.⁴¹ If there is a possibility the government may argue changed country conditions, the practitioner should submit current country of origin information and potentially engage a country expert to establish that LGBTI persons are still at risk of persecution in the country of origin.

b. Humanitarian Asylum

In some cases, it may be possible for an asylum applicant who has suffered past persecution to prevail even if he or she no longer has a well-founded fear of persecution through a grant of “humanitarian asylum.” Under U.S. asylum law, an individual who has suffered past persecution may qualify for humanitarian asylum if:

- The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or
- The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.⁴²

³⁹ While the government may try to rebut the presumption of future persecution in such cases, it is not always successful. See *Ortez-Cruz v. Barr*, 951 F.3d 190, 199 (4th Cir. 2020)(finding, in the context of heterosexual domestic violence, that DHS had not met its burden of rebutting the presumption of future harm based solely on the passage of time, 15 years, since the applicant had left Honduras, when the respondent testified that she believed her persecutor was still looking to harm her.)

⁴⁰ See *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 652 (8th Cir. 2007) (concluding that the presumption of future persecution was rebutted by a changed circumstance, namely the fact that the petitioner was no longer a child, and failed to show that he would be persecuted as an “HIV-positive adult homosexual” in Mexico).

⁴¹ See *Barrera v. Barr*, 798 F. App'x 312, 316 (10th Cir. 2020)(unpublished)(remanding Salvadoran transgender woman’s asylum application on motion by the government); *Lorenzo-Lopez v. Whitaker*, 747 F. App'x 587, 588 (9th Cir. 2019)(unpublished)(remanding transgender Mexican woman’s claim for withholding and CAT while denying asylum claim based on OYFD); *Medina v. Sessions*, 734 F. App'x 479, 482 (9th Cir. 2018)(unpublished)(remanding case of Mexican transgender woman where BIA failed to consider transgender claim separately from her sexual orientation claim); *Ramos v. Lynch*, 636 F. App'x 710, 711 (9th Cir. 2016), as amended (Feb. 18, 2016) (unpublished) (remanding the case of a Salvadoran transgender woman where the IJ “improperly conflated Ramos's gender identity and sexual orientation”); *Mondragon-Alday v. Lynch*, 625 F. App'x 794, 795 (9th Cir. 2015) (unpublished)(remanding case of transgender Mexican woman to consider fear of future persecution based on country conditions specific to transgender Mexicans rather than gay or lesbian Mexicans). *But see Jeune v. U.S. Att’y Gen.*, 810 F.3d 792, 803 (11th Cir. 2016) (dismissing appeal where court found applicant had failed to advance separate argument for potential harm based on transgender identity as distinct from sexual orientation, before the immigration judge).

⁴² 8 CFR § 1208.13(b)(1)(ii)(A) or (B).

Humanitarian asylum is not a separate form of relief under the INA; rather, it is a discretionary form of relief that IJs may grant to certain asylum seekers who have suffered past persecution.⁴³

i. Severe Past Persecution and Unable or Unwilling to Return

If an applicant has suffered severe past persecution, he or she may argue that he or she should not be required to ever return to the home country.⁴⁴ For example, in *Matter of Chen*, the BIA granted asylum to a Chinese asylum applicant who had suffered severe harm during the Chinese Cultural Revolution, even though there had been a change in regime and the applicant no longer had a “well-founded fear” of future persecution in China. Chen was the son of a Christian minister who had been tortured for his beliefs. Chen himself suffered harm that included being locked in a room for six months as a child, sustaining a head injury that required a month-long hospitalization, and being sent to a rural village for re-education.⁴⁵ The BIA relied in part on the applicant’s continuing physical disability—he had to wear a hearing aid due to injuries sustained when rocks were thrown at his head at a young age, was “always anxious and fearful, and [was] often suicidal”—in deciding to exercise discretion and grant him humanitarian asylum.⁴⁶ While the harm in *Chen* was particularly egregious, practitioners should always consider the possibility of humanitarian asylum in cases with past persecution.

DACA recipients who suffered persecution in the home country before coming to the United States suffered this persecution as children or teenagers. There is special guidance in place for adjudicators to consider the particular vulnerabilities of children that may make “ordinary” persecution more severe. This guidance is discussed in sections III.A.1, *supra*. Therefore, by virtue of their age at the time of the past persecution, DACA recipients may be able to present a strong argument for severe past persecution.

ii. Other Serious Harm

If the applicant can demonstrate past persecution and “other serious harm” if returned, he or she may win humanitarian asylum even where there is evidence presented by the government that the person can reasonably relocate or there has been a change in circumstances such that the applicant no longer has a well-founded fear. Humanitarian asylum for other serious harm provides “a second avenue of relief, a clearly liberalized alternative route to humanitarian asylum.”⁴⁷ In *Matter of L–S–*, the BIA addressed the “other serious harm” standard and emphasized that while the feared harm

⁴³ *Id.* See also *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

⁴⁴ 8 CFR § 1208.13(b)(1)(iii)(A).

⁴⁵ *Matter of Chen*, 20 I&N Dec. 16.

⁴⁶ *Id.* at 20-21. While the severe past harm in *Matter of Chen* was physical, it may be possible to demonstrate that very severe psychological harm suffices for a grant of humanitarian asylum.

⁴⁷ *Sheriff v. Atty. Gen. of U.S.*, 587 F.3d 584, 595 (3d Cir. 2009).

does have to rise to the level of persecution it does not have to be on account of a protected ground.⁴⁸ The BIA stated:

[A]djudicators considering “other serious harm” should be cognizant of conditions in the applicant’s country of return and should pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant. Such conditions may include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.⁴⁹

Practitioners may also encounter cases where the asylum applicant suffered past persecution unrelated to his or her LGBTI identity, for example, if there was severe domestic violence in the home. If the asylum applicant has recently become open about his or her LGBTI identity, he or she may fear “other serious harm” if returned to the home country based on being LGBTI and feared mistreatment or lack of rights on that basis.

DACA Example. Raul came to the United States from Peru when he was 14 and received DACA when it became available in 2012. Raul’s father died when he was young, and his mother remarried an abusive and alcoholic man. Raul’s stepfather often called Raul “sissy” and told him he was glad Raul was not his son because he would never be “man enough.” Raul’s stepfather beat him regularly, on one occasion rupturing Raul’s spleen. Raul almost died and was hospitalized for several weeks after that attack. Raul’s stepfather died last year. If Raul succeeds in demonstrating that the abuse by his stepfather constitutes past persecution, the government may rebut the presumption of future persecution by arguing that there is a fundamental change in circumstances, based on the death of Raul’s stepfather. Here, Raul could argue he is entitled to humanitarian asylum based on the severity of the persecution and its lasting effects on him, and/or that he would face other “serious harm” if returned to Peru where violence and discrimination against LGBTI people often go unpunished. If Raul needed specialized medical care that he could only obtain in the United States, that could also be a serious harm factor in the humanitarian asylum analysis because the other serious harm does not have to be related to his protected characteristic.

2. Well-Founded Fear of Future Persecution

Even if an asylum applicant has not suffered past persecution, he or she may be able to prevail by demonstrating a well-founded fear of future persecution.⁵⁰ The Center for American Progress estimates that “[j]ust more than half of LGBT DACA recipients were five years old or younger when

⁴⁸ See *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012); *Chen*, 20 I. & N. Dec. 16.

⁴⁹ *Matter of L-S-*, 25 I&N Dec. at 714.

⁵⁰ 8 CFR § 1208.13(b)(2).

their parents brought them to the United States.”⁵¹ Thus, many DACA recipients may have been too young to have “come out”⁵² as LGBTI at the time they left the country of origin or to have suffered past persecution on this basis.

In *INS. v. Cardoza–Fonseca*, the U.S. Supreme Court held that an asylum applicant need not prove a “clear probability” of persecution, but instead could establish a well-founded fear if he or she had a one in ten chance of facing persecution.⁵³ A one in ten chance of facing persecution sounds like a low threshold. However, it is generally more difficult to win future fear cases than past persecution cases both because the applicant does not receive a presumption of future persecution and because, as a practical matter, it is often more difficult for an applicant to provide compelling testimony about what he or she thinks will happen in the future than what he or she has lived through in the past.

The regulations allow for asylum based on well-founded fear under two categories: the applicant must prove either that he or she will be singled out or that there is a pattern and practice of persecuting similarly situated people.⁵⁴ U.S. courts of appeal are often reluctant to grant pattern and practice claims because doing so would mean every person from a particular country who has the protected characteristic could be eligible for asylum.⁵⁵ In some decisions, it is difficult to discern whether the court’s decision is based on being singled out, on pattern and practice, or on some combination of the two. For example, without explicitly finding that he would be “singled out” for persecution, the Ninth Circuit found a well-founded fear in the case of a gay, HIV-positive Lebanese man who had been “outed” in Lebanon and whose prominent family name would make him easy to identify.⁵⁶ Here, the Ninth Circuit found the applicant’s subjective fear of return to be objectively reasonable based on both country conditions in Lebanon and the fact that his family name would make him readily identifiable.⁵⁷ Additionally, in an unpublished decision with few facts, the Ninth Circuit remanded the case of a gay Salvadoran man whom the IJ had found to have a subjective fear but applied the wrong standard in determining whether that fear was objectively reasonable.⁵⁸

Several unpublished U.S. courts of appeal cases uphold the BIA’s decision that the applicant had not proven a well-founded fear in cases based on LGBTI identity.⁵⁹ It is generally advisable, if possible

⁵¹ See CAP LGBTQ Dreamers, *supra* note 6.

⁵² Note that under the LGBTI Training Module, *supra* note 20, at 52, the term “come out” has two distinct but overlapping meanings. “Coming out” to oneself as LGBTI means accepting one’s LGBTI identity, and “coming out” to others means telling others of one’s LGBTI identity.

⁵³ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

⁵⁴ 8 CFR § 1208.13(b)(2)(i).

⁵⁵ But note there is one Ninth Circuit case finding “a pattern or practice of persecution of gay men in Jamaica,” *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008).

⁵⁶ *Karouni v. Gonzales*, 399 F.3d 1163, 1178 (9th Cir. 2005).

⁵⁷ *Id.*

⁵⁸ *Ponce v. Holder*, 329 F. App’x 77, 78 (9th Cir. 2009) (unpublished).

⁵⁹ See, e.g., *Osejo-Romero v. Sessions*, 689 F. App’x 815, 816 (5th Cir. 2017) (per curiam) (unpublished) (finding that past harm did not rise to the level of persecution and that the applicant “points to nothing showing that anything worse would happen in the future”); *Silva v. Lynch*, 654 F. App’x 508, 510 (2d Cir. 2016) (unpublished) (denying asylum

under the facts, to demonstrate why an applicant would be singled out for persecution if returned and to provide strong background country conditions and, whenever possible, expert testimony.

Internal Relocation. An asylum applicant who applies for asylum based on a well-founded fear of future persecution must also demonstrate that he or she is unable to safely relocate internally within the country of feared harm, or if he or she can internally relocate safely, that it would not be reasonable to be required to do so.⁶⁰ In cases where the applicant has experienced past harm, there is no need for the applicant to demonstrate that the harm he or she suffered was “country-wide,”⁶¹ although the government can seek to rebut the presumption of future harm by proving that the harm does not exist throughout the country.⁶² In cases where the feared harm is at the hands of the government, there is a presumption that the harm will be country-wide.⁶³ However, in cases where the applicant fears future harm by a private actor, he or she will have to demonstrate why it would not be reasonable for him or her to relocate elsewhere in the country.⁶⁴

The internal relocation analysis is important both in the past persecution analysis, where the government can rebut the presumption of a well-founded fear, and in cases based solely on a well-founded fear. Thus, in both past persecution cases and well-founded fear cases, adjudicators may ask whether the applicant has ever lived anywhere else in the country and make inferences based on whether the individual suffered harm in more than one location.⁶⁵ Where the persecutor is a private actor, it is important that asylum applicants supplement the record with background country condition information to establish that the asylum applicant will face persecution throughout the country and cannot internally relocate safely and reasonably.⁶⁶ Note, the Trump administration has given guidance to asylum officers, directing them to employ a legal standard in determining relocation issues that is more restrictive than the standard in the regulations.⁶⁷

DACA Example. Juana has been gender-nonconforming since she was a child, preferring to wear masculine clothes and engage in “rugged” activities like soccer and farming in the small village where she grew up in her native Guatemala. Her uncle who resided with her family ridiculed Juana

claim for gay man from Angola based solely on future fear where the record contained conflicting evidence about violence against gay people).

⁶⁰ 8 CFR § 1208.13(b)(2)(ii).

⁶¹ USCIS, Asylum Office Well-Founded Fear Training Module, (July 8, 2012) uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf at internal page numbers 25-26 [hereinafter AO Well-Founded Fear Training Module].

⁶² 8 CFR § 1208.13(b)(1)(i)(B).

⁶³ AO Well-Founded Fear Training Module, *supra* note 61, at internal page number 26.

⁶⁴ *Id.* at 26-27.

⁶⁵ See *Rodriguez v. Lynch*, 643 F. App'x 365, 367 (5th Cir. 2016) (per curiam) (unpublished) (finding that gay male applicant could safely relocate within Honduras because he had moved to San Pedro Sula in the past and only suffered name calling and discrimination).

⁶⁶ See section III.A.1.c.i *supra* for a discussion of internal relocation.

⁶⁷ See footnote 35 and accompanying text.

as a child, telling her that she “shamed her family by pretending to be a boy.” Juana and her mother came to the United States when Juana was ten years old. She now has DACA in the United States and is afraid to return to Guatemala as she lives openly as a gender-nonconforming lesbian. She may be able to win asylum based on a well-founded fear of future persecution. She should include a description of harm she suffered in the past, even if it did not rise to the level of past persecution, as a way to demonstrate that she will be singled out for future harm. Juana should also present persuasive country conditions materials, including, if possible, an expert witness.

B. Agent of Persecution

1. Government Actor

Part of the persecution analysis is to determine who is the persecutor. Persecution “‘is something a government does,’ either directly or indirectly by being unwilling or unable to prevent private misconduct.”⁶⁸ If the persecution occurred directly at the hands of a government actor, there is a presumption that he or she would face harm country-wide.⁶⁹

Persecution against LGBTI people by government actors is unfortunately a common occurrence around the world, with 70 countries criminalizing same-sex, sexual conduct, eight of which have the death penalty for such “crimes.”⁷⁰ There have been many claims by LGBTI individuals who have been sexually assaulted by the police or the military in their home country based on their identity.⁷¹ It may be unlikely that many DACA recipients, who all came to the United States prior to turning 16, experienced harm directly by government actors, but for those who did, establishing that the harm is persecution should be relatively straightforward.

DACA Example. Julia is a transgender woman from Mexico. While living in Mexico, she identified as a gay man, but she wore female clothing when going to bars. Even at age 15, she frequented bars where gay men would congregate because they were the only places where she felt she could express herself. On one occasion when leaving the bar, two police officers put her in their car and threatened her with arrest unless she performed oral sex. Fearing what might happen to her if she

⁶⁸ *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018).

⁶⁹ AO Well-Founded Fear Training Module, *supra* note 61 at p. 28.

⁷⁰ Lucas Ramon Mendos, International Lesbian Gay Association: *State-Sponsored Homophobia 2019*, at 15 (2019), [ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf](https://www.ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf).

⁷¹ See, e.g., *Todorovic v. U.S. Atty. Gen.*, 621 F.3d 1318, (11th Cir. 2010) (gay Serbian man, was forced to perform oral sex on police officer at gun point, in addition to other harms); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005) (finding persecution where gay, HIV-positive Mexican man was sexually and physically abused by a police officer.) *But see Sama v. U.S. Atty Gen*, 887 F.3d 1225, 1232 (11th Cir. 2018) (finding that even though applicant with imputed LGBTI identity based on pro-LGBT political opinion was subject of arrest warrant in Cameroon, because the police did not arrest him on one occasion when they had the opportunity he did not have well-founded fear); *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005) (finding that gay man from Zimbabwe had not been jailed because of his sexual orientation but rather because of sexual misconduct with another man at college).

were brought to jail, Julia complied. One week later, she left Mexico. In 2013, she received DACA. Assuming Julia can overcome the OYFD, she likely has a strong asylum case based on past persecution by government actors.

2. Non-Governmental Actor

In many LGBTI asylum cases, the harm the asylum applicant suffered or fears is not directly from the government but from private, non-governmental actors. If the harm suffered by the applicant is at the hands of a private actor, he or she must additionally demonstrate that the government is unwilling or unable to protect him or her.⁷² In private actor cases, the applicant should explain whether he or she reported the harm to the police and how the police responded, that is, whether the government offered protection. If the applicant never reported the harm to the police, he or she must explain why doing so would have been futile.⁷³

Under the Trump Administration, the attorneys general and Board of Immigration Appeals have taken extraordinary steps, both substantive and procedural, to make it more difficult for asylum seekers to prevail.⁷⁴ In *Matter of A-B-*, the attorney general conflated the widely accepted legal standard that a government must be “unwilling or unable to protect” an asylum seeker from private actor harm, with a more restrictive standard that the government must be “completely helpless” to provide protection or must “condone” the harm.⁷⁵ While this aspect of *Matter of A-B-* was recently rejected by the Eighth Circuit in favor of maintaining the “unable or unwilling to control” standard,⁷⁶ both the Fifth Circuit and Second Circuit have deferred to the attorney general’s decision and upheld the more restrictive formulation.⁷⁷ It may be helpful to include evidence of criminalization of same-sex activity,

⁷² In some Northern Triangle cases, it may be possible to demonstrate that the gang has established so much control that it is functioning as a quasi-government. See *Alvarez Lagos v. Barr*, 927 F.3d 236, 244 (4th Cir. 2019) (“The gang monitors who enters and exits the neighborhood, controls when residents can worship, collects taxes from residents, and kills individuals who disobey its commands.”)

⁷³ See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding that testimony and country conditions indicated that it would be unproductive and possibly dangerous for a young female applicant to report father’s abuse to government); *Ornelas Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (holding that reporting not required if applicant can convincingly establish that doing so would have been futile or have subjected the applicant to further abuse).

⁷⁴ National Immigrant Justice Center, *A Timeline of the Trump Administration’s Efforts to End Asylum*, Mar. 2020, immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-04/04-01-2020-asylumtimeline.pdf.

⁷⁵ In an oral argument before the DC Circuit Court of Appeals in *Grace v. Whitaker*, the Department of Justice made the claim that these two standards are identical although it is clear from the wording alone that the “completely helpless” or “condone” standard is much more difficult to meet. [cadc.uscourts.gov/recordings/recordings2019.nsf/EE79628E3B85A18D852584CB0062172F/\\$file/19-5013.mp3](https://cadc.uscourts.gov/recordings/recordings2019.nsf/EE79628E3B85A18D852584CB0062172F/$file/19-5013.mp3).

⁷⁶ See *Galloso v. Barr*, 954 F.3d 1189 (8th Cir. 2020), as amended (Apr. 15, 2020) (“To the extent that the condone-or-completely-helpless standard conflicts with the unable-or-unwilling standard, the latter standard controls.”)

⁷⁷ See *Scarlett v. Barr*, --F.3d --, No. 16-940, 2020 WL 2046544, at *12 (2d Cir. Apr. 28, 2020); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019).

where available, to demonstrate that the government of a particular country condones anti-LGBTI behavior.

Furthermore, in private actor harm cases, the applicant must show that he or she cannot reasonably relocate within his or her country to avoid harm.⁷⁸ DACA recipients who hail from the top five DACA countries will often be able to show widespread violence by private actors that may be indicative of their inability to reasonably relocate within the country of origin to avoid harm.⁷⁹

Additionally, harm inflicted by family members or other community members can rise to the level of persecution if the government will not protect the individual from the harm.⁸⁰ DACA recipients who have suffered past harm will, by definition, have been harmed as children or teenagers since potential DACA recipients had to have been in the United States and below the age of 16 on June 15, 2012.

It is therefore helpful to understand case law as it pertains to abuses suffered by LGBTI individuals as children. In *Bringas-Rodriguez v. Sessions*,⁸¹ the U.S. Court of Appeals for the Ninth Circuit ruled *en banc* in favor of a gay man from Mexico. Mr. Bringas had suffered horrific sexual and physical abuse as a child, at the hands of his uncle, father, cousins, and neighbor.⁸² After a brief period of time spent in the United States, he returned to Mexico and his neighbor attempted to force him to perform oral sex. When Mr. Bringas refused, his neighbor beat and raped him, threatening to harm his grandmother if Mr. Bringas told anybody.⁸³ The Ninth Circuit initially upheld the denial of Mr. Bringas's case, finding that there had been no government involvement and insufficient proof that the Mexican government would be unable or unwilling to protect Mr. Bringas since he had not reported the crimes against him.⁸⁴

The Ninth Circuit reheard the case *en banc* and granted Mr. Bringas's case finding that, "credible written and oral testimony that reporting was futile and potentially dangerous, that other young gay men had reported their abuse to the Mexican police to no avail, and country reports and news articles documenting official and private persecution of individuals on account of their sexual

⁷⁸ 8 CFR § 1208.13(b)(1)(B) and § 1208.13(b)(2)(ii). See discussion of internal relocation section III.A.1.a.i *infra*.

⁷⁹ See section VI *infra* for a discussion of country conditions in each of the top five top DACA countries.

⁸⁰ See, *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007) (remanding to determine whether Ugandan government was unable or unwilling to protect applicant where family had neighbors rape her to "cure" applicant of her homosexuality). Courts have found that that harm must be evaluated differently where it is experienced by a small child. See *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) ("Because the IJ failed to take into account significant evidence and to address the harms Jorge-Tzoc and his family incurred cumulatively and from the perspective of a small child, vacatur of the determination that Jorge-Tzoc failed to establish past persecution is required.")

⁸¹ *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017).

⁸² *Id.* at 1056.

⁸³ *Id.*

⁸⁴ *Bringas-Rodriguez v. Lynch*, 805 F.3d 1171, 1175 (9th Cir. 2015), on reh'g *en banc sub nom, Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017).

orientation—satisfies our longstanding evidentiary standards for establishing past persecution.”⁸⁵ The Ninth Circuit further explained, “we recognize that children who suffer sexual abuse are generally unlikely to report that abuse to authorities. Because they are unlikely to report, it is similarly unlikely that country reports or other evidence will be able to document the police response, or lack thereof, to the sexual abuse of children.”⁸⁶ At least within the Ninth Circuit,⁸⁷ it is possible for an LGBTI individual who was sexually or physically abused as a child on account of his or her LGBTI identity to prevail on asylum cases, provided he or she can demonstrate through testimony and country conditions materials that reporting the abuse would be futile, or that he or she did report the abuse and the government was unwilling or unable to protect him or her.

Practitioners should be sure to ask DACA recipients about all types of harm they suffered in their home countries prior to coming to the United States. Young adults who have lived most of their lives in the United States may not understand that abuse they suffered as children in their home countries may qualify them for asylum. Of course, it is also necessary to tie the physical harm to a protected characteristic, whether that is LGBTI identity or some other protected characteristic.⁸⁸ In *Bringas-Rodriguez*, the Ninth Circuit agreed that he had been targeted because of his membership in the PSG of gay men, which, as a young child, manifested itself in his effeminacy.⁸⁹

C. Protected Characteristic

A key element of asylum law is proving that the applicant possesses a protected characteristic that motivates the persecutor to harm the applicant.⁹⁰ These protected characteristics are the following: race, religion, nationality, membership in a particular social group, or political opinion. LGBTI identity may form the basis for multiple protected grounds, individually or simultaneously.⁹¹ While LGBTI claims are most commonly brought as PSG cases, with the legal standards surrounding PSG in flux

⁸⁵ *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1056 (9th Cir. 2017).

⁸⁶ *Id.* at 1071.

⁸⁷ An unpublished Fifth Circuit case reached a different conclusion, *Rodriguez v. Lynch*, 643 F. App'x 365 (5th Cir. 2016) (per curiam) (unpublished) (finding childhood sexual abuse by family members did not rise to the level of persecution and that he could not show inability to safely relocate within Honduras because he had lived “peacefully” in San Pedro Sula before coming to the United States); see also *Osejo-Romero v. Sessions*, 689 F. App'x 815, 816 (5th Cir. 2017) (per curiam) (unpublished) (finding that neither surveillance by a criminal gang nor “the discrimination and isolated incidents of abuse Osejo-Romero encountered as a gay male in Honduras,” rose to the level of persecution). See also *Mendez v. Barr*, 792 F. App'x 466, 468 (9th Cir. 2019) (unpublished) (finding that although childhood sexual abuse was severe enough harm to qualify as persecution the transgender Honduran asylum seeker could not show that there was a nexus to her LGBTI identity since the abuse took place before she identified as transgender).

⁸⁸ See Center for Gender and Refugee Studies, *Practice Advisory, Children’s Asylum Claims*, (Updated Mar. 2015) cgrs.uchastings.edu/sites/default/files/CGRS_Child_Asylum_Advisory_3-31-2015_FINAL.pdf.

⁸⁹ *Bringas-Rodriguez v. Sessions*, 850 F.3d at 1073.

⁹⁰ *Matter of Acosta*, 19 I&N Dec. 211, 226 (BIA 1985).

⁹¹ USCIS, *Refugee Asylum and International Operations Combined Training Course, Nexus and the Protected Grounds* Training Module* (Feb. 21, 2012). AILA Doc. No. 18012237, [aila.org/infonet](https://www.aila.org/infonet). [hereinafter USCIS, Nexus].

and subject to being further restricted, it is best practice to advance alternate protected characteristics where warranted by the facts.

1. Particular Social Group

Under current law, to be cognizable, a particular social group must be:

- (1) composed of members who share a common immutable characteristic,
- (2) defined with particularity, and
- (3) socially distinct within the society in question.⁹²

The BIA has recognized sexual orientation as a potential PSG for nearly 30 years.⁹³ Likewise, U.S. courts of appeal have consistently found lesbians,⁹⁴ gay men,⁹⁵ bisexual,⁹⁶ and transgender individuals⁹⁷ to be members of PSGs. There is also precedent recognizing HIV-positive status as a possible PSG.⁹⁸ Asylum applicants may also seek asylum based on imputed membership in an LGBTI PSG, meaning that the individual does not have to actually identify as LGBTI if the persecutor seeks to harm the applicant based on the persecutor's belief that the individual is LGBTI.⁹⁹

Unlike many other asylum claims based on membership in a PSG, establishing that the PSG itself is viable has generally not been an issue in LGBTI claims.¹⁰⁰ The LGBTI Training Module takes a broad view of how to define PSGs and even allows for the possibility of framing any LGBTI PSG as "sexual minority from country X," rather than forcing the applicant to articulate a more precise identity or PSG.¹⁰¹ However, asylum law is always changing, and different adjudicators may have a preference

⁹² *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

⁹³ See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990).

⁹⁴ See *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997).

⁹⁵ See *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("all alien homosexuals are members of a 'particular social group'").

⁹⁶ See *Fuller v. Lynch*, 833 F.3d 866, 869 (7th Cir. 2016) (seemingly accepting bisexual identity as a PSG, but denying applicant's claim on credibility ground for not establishing that he is bisexual).

⁹⁷ See *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (denying asylum and withholding because of applicant's conviction of a particularly serious crime but granting deferral of removal under the Convention Against Torture).

⁹⁸ See *Velasquez-Banegas v. Lynch*, 846 F.3d 258, (7th Cir. 2017); Memorandum from David A. Martin, INS General Counsel, Seropositivity for HIV and Relief From Deportation (Feb. 16, 1996), 73 Interpreter Releases 901 (July 8, 1996).

⁹⁹ See *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003).

¹⁰⁰ While there are numerous U.S. court of appeals decisions denying those who claim asylum based on being LGBTI, none of these cases deny asylum because the PSG itself is not viable. Rather, cases are generally denied because the court does not find the applicant credible. See, e.g., *Fuller v. Lynch*, 833 F.3d at 869, or because there is no nexus to the protected ground, see e.g., *Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677, 686 (3d Cir. 2015).

¹⁰¹ LGBTI Training Module, *supra* note 20, at 17 and 47.

for a more specific or more general articulation of the PSG, so it may be strategic to articulate the PSG in more than one way, both generally and more specifically.¹⁰²

Also, the administration has sought to make the standard to articulate a viable PSG more difficult. In both *Matter of A-B-*, and *Matter of L-E-A-*, the primary holdings were that the adjudicator must determine whether a proposed PSG is viable in every case, on a case-by-case basis.¹⁰³ In both of these decisions, the attorney general faulted the BIA for relying on “concessions” from DHS through which it agreed with the viability of the PSG in those cases. Based on this reasoning, practitioners should not take for granted that “sexual minorities” or any formulation of an LGBTI PSG is cognizable based solely on the fact that it has been found cognizable before.¹⁰⁴

Thus, it is best practice to lay out how the proposed PSG meets the three-prong test in every case. A good example of how to do this can be found in the following excerpt from a post-*Matter of A-B-* Asylum Office referral to immigration court, which found the PSG viable, but found the applicant had not established past persecution or a well-founded fear of future persecution:

The particular social group put forward by you meets the prongs of this test. Your sexual orientation is a common, immutable characteristic that you possess which is so fundamental to your identity that you cannot change, and should not be required to change it. The group can be defined with particularity since only males who desire to be in intimate relationships only with people of the same gender belong to the group. Country conditions information establishes that the group is socially distinct.

Credible NGOs reported incidents of bias-motivated violence against LGBTI persons [in your country]. . . Additionally, the BIA and 2nd Circuit have recognized sexual orientation as a particular social group. [citing cases.] Therefore, the applicant’s proposed particular social group of Country X sexual minorities meets the requirements as articulated in *Matter of M-E-V-G-*.¹⁰⁵

¹⁰² Practitioners should note that in *Matter of W-Y-C & H-O-B*, 27 I&N 189 (BIA 2018), the BIA held that respondents in immigration court proceedings must articulate the PSG at the trial level and cannot add new or different PSGs on appeal. The authors are aware of IJs who are interpreting this decision to require the respondent to articulate all PSGs at a master calendar hearing, before setting the case for an individual hearing. Thus practitioners should consider all possible PSG formulations early in the case.

¹⁰³ The Court of Appeals for the First Circuit recently rejected the BIA’s interpretation of *Matter of A-B-* as a categorical bar to particular social groups structured similarly to the one in *A-B-*, holding instead that the PSG in each case must be analyzed according to “the particulars of a given case.” *De Pena-Paniagua v. Barr*, -- F.3d -- No. 18-2100, 2020 WL 1969458, at *4 (1st Cir. Apr. 24, 2020).

¹⁰⁴ In *Matter of A-B-* 27 I&N Dec. 316, 337 (A.G. 2018) and *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) the attorneys general’s decisions fault federal courts of appeals for issuing decisions they claim were wrongly decided.

¹⁰⁵ USCIS, Notice of Intent to Deny, Sep. 2019, on file with the authors.

Practitioners should also be familiar with *Matter of W-Y-C- & H-O-B*,¹⁰⁶ a BIA decision which held that all proposed PSGs must be raised before the immigration judge rather than on appeal. Thus, if there are strategic reasons to advance more than one PSG, it is important to fully engage in the three-part analysis for each proposed PSG before the immigration judge.¹⁰⁷

DACA Example. Enrique was an effeminate boy and suffered bullying and physical abuse growing up in Mexico. When he was injured and threatened, he was called “maricon” or “faggot.” At that time, he was too young to have come to terms with his sexual orientation or gender identity. Enrique entered the United States when he was 14 years old, and is now 23 years old. He “came out” as gay four years ago and is now questioning whether he may actually identify as a transgender woman, though he still uses the male pronoun. If Enrique files for asylum, it may be helpful to frame the claim as being a “sexual minority from Mexico,” since it is not clear how Enrique currently identifies or how Enrique identified when living in Mexico. Be aware that in many countries, country conditions are much worse for transgender people than for gay people, so there may be strategic advantages in structuring the claim as a transgender claim if doing so is possible under the facts of the case. Even if Enrique does not identify as transgender, if he fears being persecuted based on being perceived as transgender, he could articulate a PSG based on imputed identity. Thus, Enrique could put forward several PSGs in the alternative: “gay man from Mexico,” “people imputed to be transgender from Mexico,” and “sexual minorities from Mexico.”

2. Political Opinion

An LGBTI asylum applicant may also have claims based on political opinion, if he or she has advocated for LGBTI rights¹⁰⁸ or imputed political opinion if a persecutor believes the applicant holds a political opinion that LGBTI people should be given equal rights. For example, in *Pitcherskaia v. I.N.S.*,¹⁰⁹ Ms. Pitcherskaia sought asylum based both on political opinion and her PSG as a Russian lesbian. She was arrested for protesting the beating of a gay friend and arrested again and beaten for participating in an illegal demonstration demanding the release of an arrested leader of a lesbian youth organization to which Ms. Pitcherskaia belonged.¹¹⁰ Likewise, in *Nabulwala v. Gonzales*, Ms. Nabulwala claimed past persecution, in part, based on having been hospitalized following an attack by an angry mob while she was participating in a meeting of a gay rights organization.¹¹¹ Since LGBTI PSGs have been so widely accepted, there is little case law on political opinion in this context,

¹⁰⁶ *Matter of W-Y-C- & H-O-B*, 27 I&N Dec. 189 (BIA 2018).

¹⁰⁷ For example, a transgender applicant may also have an imputed gay sexual orientation claim. If articulating these claims as two distinct PSGs makes the case stronger, the practitioner must raise them both before the immigration judge.

¹⁰⁸ As discussed *supra* Section II, many DACA recipients have been activists both for LGBTI rights and for immigrant rights and thus may be easily identifiable as LGBTI and politically active in their home countries.

¹⁰⁹ *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 644 (9th Cir. 1997).

¹¹⁰ *Id.*

¹¹¹ *Nabulwala v. Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007). In this case, the immigration judge had accepted that her homosexuality placed her in a PSG, so there was no analysis of a political opinion-based claim.

but practitioners should be sure to explore political opinion as another possible protected characteristic in these claims, especially if the applicant has publicly supported LGBTI rights.

DACA Example: Angelica has lived in the United States since she was five years old and received DACA in 2015. She came out as a lesbian during college and since graduation has worked for an LGBT rights organization in the United States. She is a frequent blogger and has written two op-eds that have reached a wide audience through social media. She has been severely critical of her own country's government's failure to protect LGBTI people and fears returning to her country because government officials and homophobic private actors could easily learn about her pro-LGBTI rights opinion.

3. Religion

Asylum applicants who are LGBTI may also have a claim based on religion if their LGBTI identity goes against religious norms in a non-secular country. For example, if an asylum applicant comes from a non-secular country or a country with one dominant faith that sees being LGBTI as an abomination, the applicant may be imputed to not hold the expected religious beliefs of the state or dominant religion, or to have "liberal" religious views. In *Matter of S-A-*, the BIA held that a woman with liberal Muslim beliefs was persecuted based on her religion by her father who was conservatively religious.¹¹² Although the case does not involve an LGBTI applicant, the facts may be analogous to some LGBTI cases. For example, Ms. S-A-'s father physically abused her for wearing clothing that he deemed contrary to his religious beliefs, a short skirt, as well as for what he deemed to be inappropriate sexual behavior, speaking with a man on the street.¹¹³ Her father's violence against her escalated when she began a long-distance relationship that her father had not approved with a man who became her fiancé.¹¹⁴ LGBTI asylum applicants may be able to analogize to this case if they have feared or fear harm based on defying religious norms in their country.

D. Nexus

In addition to proving that an individual actually has the protected characteristic of being LGBTI or perceived as LGBTI, he or she must also prove that the persecution he or she suffered in the past or fears in the future is "on account of" his or her LGBTI identity. That is, it is not sufficient to prove that an applicant is LGBTI and was harmed in the past; he or she must also prove a connection between his or her protected characteristic and the harm. Asylum applicants are further required to prove that the protected characteristic was at least "one central reason" for the harm.¹¹⁵

¹¹² See *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) In such cases the applicant may also be able to advance an imputed political opinion case, if he or she can show that his or her failure to adhere to cultural norms is the equivalent of expressing an opinion against the non-secular government.

¹¹³ *Id.* at 1329.

¹¹⁴ *Id.* at 1330.

¹¹⁵ INA § 208(b)(1)(B)(i).

The LGBTI Training Module lays out possible ways for the asylum officer to determine nexus. This evidence may include the applicant's testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or while holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony [about the nexus to the harm].¹¹⁶

Another common scenario involves harm that was not initially based on a protected ground but worsens once the persecutor determines that the applicant is LGBTI. For example, an LGBTI person may have been the victim of a random criminal act, such as a robbery, but when the perpetrator realized the victim was LGBTI, the perpetrator escalated the incident, beating the asylum applicant and threatening to kill him or her. While the government may argue that the harm was not motivated by the protected characteristic, if the applicant can demonstrate that the violence escalated to the level of persecution because the persecutor became aware of the protected characteristic, this incident may be considered persecution.¹¹⁷

Many asylum cases from the Northern Triangle¹¹⁸ and Mexico involve fear of gangs and criminal drug cartels.¹¹⁹ In LGBTI cases involving harm by gangs, as in all gang-based asylum cases, it can be challenging for the applicant to prove that his or her protected characteristic, here LGBTI identity, was "one central reason" for the harm. In a precedential decision with a fact pattern that is typical of Northern Triangle cases, *Gonzalez-Posadas v. Att'y Gen. U.S.*, the U.S. Court of Appeals for the Third Circuit denied withholding of removal to a gay Honduran man who had been threatened by gangs, including by using homophobic slurs. The court found, "[w]hile it may certainly be true that the Maras used homophobic slurs and sexual threats when addressing Gonzalez-Posadas, the record can support the conclusion that the abusive language was a means to an end—namely cowing Gonzalez-Posadas into paying them off or joining their gang."¹²⁰ Even accepting that Gonzalez-Posadas was gay, the court upheld the finding that the real motivation of the gang was to recruit and

¹¹⁶ LGBTI Training Module, *supra* note 20, at 18.

¹¹⁷ The Asylum Office Lesson Plan on Nexus notes that "[t]here is no requirement that the persecutor's harmful contact with the applicant be initially motivated by the applicant's possession of a protected belief or characteristic." If the motivation changes to having a nexus to a protected ground, the applicant may be able to show persecution. USCIS, Nexus, *supra* note 91, at 13. See also, *Tarubac v. INS*, 182 F.3d 1114 (9th Cir. 1999) (holding that what began as extortion by the Philippine New People's Army became persecution after applicant expressed an anti-communist political opinion and the harm escalated.)

¹¹⁸ The term "Northern Triangle" refers to Guatemala, El Salvador and Honduras because these countries comprise the northern geographic triangle of Central America.

¹¹⁹ See Center for Gender and Refugee Studies, *Practice Advisory, Asylum Based on Fear of Gangs and Other Organized Criminal Groups: Central America and Beyond*, (May 2017) available by request at cgrs.uchastings.edu/article/cgrs-develops-new-resources-fear-gang-cases.

¹²⁰ *Gonzalez-Posadas v. Att'y Gen. U.S.*, 781 F.3d 677, 686 (3d Cir. 2015).

extort him, and that the gang's actions were not motivated by his sexual orientation. This decision is deeply problematic¹²¹ since no asylum applicant can ever know with certainty what the persecutor's true motivation was, and since the REAL ID act requires only that the protected characteristic be "one central reason," and not "the only reason." Nonetheless, practitioners should be familiar with this case in considering how to frame gang violence cases where the applicant's sexual orientation may not be the sole motivation for the harm.¹²²

Additionally, practitioners should be the aware of proving nexus to harm for applicants who entered the United States as children and may not have identified as LGBTI when they were abused or otherwise harmed as children. If the harm took place before the applicant identified as LGBTI, it may be very difficult to prove a nexus between the past harm and the applicant's LGBTI identity.¹²³

The practitioner should make use of the LGBTI Training Module and spend time interviewing the applicant to better understand whether the persecutor actually knew or believed the applicant was LGBTI, or whether the persecutor was merely using homophobic or transphobic epithets as slurs that are not specifically about the applicant. Furthermore, in similar cases, it would be helpful to include testimony or evidence that the persecution worsened when the persecutor found out or perceived the person's identity to be LGBTI to establish that the applicant's sexual orientation or gender identity was at least one central reason for the persecution. It will always be important for the practitioner to include country conditions materials that corroborate the persecutor's animus towards LGBTI people in the country of origin. In some cases, it may be possible to demonstrate that a persecutory group, like MS-13 is *machista* and anti-gay even if it may not be possible to demonstrate the specific motivations of a particular gang member. It is often crucial to the case to have an expert witness who can address these issues.

DACA Example. Fredy left Guatemala when he was 15 years old. The town where Fredy grew up was under the control of the MS-13 gang. When Fredy turned 14, the gang recruited his best friend, Alex, to join it. Fredy became worried that he too would be recruited. Instead, when Fredy passed a group of MS-13 members they told him that they did not want "his kind" in Guatemala and one of the gang members used a hand gesture to signal putting a gun to his head. Sometimes the gang would throw rocks at Fredy as he passed by. Fredy changed his route to avoid the gang, but one day his house was spray painted with the words "Garbage out of Guatemala." Alex warned Fredy

¹²¹ The Third Circuit also found that the sexual abuse that Mr. Gonzalez-Posadas suffered from a cousin as a child constituted "'isolated criminal acts' that were not motivated by Gonzalez-Posadas's homosexuality." *Id.* at 687.

¹²² Note that a subsequent, unpublished Third Circuit decision remanded the case to the BIA where a gay man had been threatened by gangs and forced to pay "renta." While the IJ and BIA found that this was the same criminal violence that all Salvadorans face, the Court of Appeals remanded the case because the BIA did not consider the added harm to gay men, including sexual violence. *Orellana v. Attorney Gen. of United States*, No. 19-2404, 2020 WL 1651273, at *4 (3d Cir. Apr. 3, 2020) (unpublished).

¹²³ See *Mendez v. Barr*, 792 F. App'x 466, 468 (9th Cir. 2019) (unpublished.) (finding that although childhood sexual abuse was severe enough harm to qualify as persecution the transgender Honduran asylum seeker could not show that there was a nexus to her LGBTI identity since the abuse took place before she identified as transgender).

that the gang wanted to kill Fredy because “it would be funny to kill a faggot.” Fredy immediately fled Guatemala.

In this example, it is clear that the gang is targeting Fredy on account of his actual or perceived sexual orientation. This example is more straightforward than most real-life situations because there are no mixed motives (such as extorting money or recruiting to fill gang ranks) to explain. However, even if Fredy had been initially accosted by the gang members for recruitment or extortion, and then the gang members determined that Fredy was gay, and as a result the harm worsened, Fredy could have a viable asylum claim based on his LGBTI identity.

E. One Year Filing Deadline

By definition, DACA recipients will have been in the United States since at least June 15, 2007. The INA requires an asylum applicant to file for asylum within one year of his or her last arrival in the United States,¹²⁴ or meet an exception to the OYFD. Even if filing more than a year after arriving in the United States, a DACA recipient can prevail if he or she “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 the application.”¹²⁵ For both changed and extraordinary circumstances exceptions, an applicant must also file within a reasonable period of time of the exception.¹²⁶

One of the best resources in analyzing OYFD issues is the Asylum Office Lesson Plan on the OYFD, entitled “Asylum Officer Basic Training: One Year Filing Deadline.”¹²⁷ Since this is a USCIS lesson plan, it is not binding on immigration courts. Moreover, with an increasing lack of transparency and communication between the asylum offices and stakeholders, it is not clear which lesson plans are currently being used to train asylum officers. Additionally, CLINIC recently issued a practice advisory titled, “Overcoming the One Year Filing Deadline for Asylum for DACA Recipients” that explores the OYFD in the DACA context in depth.¹²⁸

¹²⁴ INA § 208(a)(2)(B).

¹²⁵ INA § 208(a)(2)(D).

¹²⁶ 8 CFR § 1208.4(a)(4)(ii); 8 CFR § 1208.4(a)(5).

¹²⁷ USCIS, *Asylum Officer Basic Training: One Year Filing Deadline*, (March 23, 2009). This and other Asylum Officer Lesson Plans used to be easily accessible on the USCIS website. In 2017, USCIS removed the training materials altogether. It has now restored many internal Asylum Office documents, but as a single pdf that is difficult to navigate and is heavily redacted. The One Year Filing Deadline Lesson Plan is not included. uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf. The Lesson Plan can be accessed publicly on the U.S. Court of Appeals for the Ninth Circuit website at cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Vahora_LessonPlan.pdf. This document is also accessible to members of the American Immigration Lawyers Association at AILA InfoNet Doc. No. 16102840 aila.org/infonet. [hereinafter “AO OYFD Lesson Plan”].

¹²⁸ CLINIC, *Overcoming the OYFD*, *supra* note 17.

The “changed circumstances” exception is invoked if an applicant did not have a claim for asylum within the first year of arrival in the United States, but something has changed to make him or her eligible now.¹²⁹ By way of contrast, the “extraordinary circumstances” exception applies if the applicant did have an asylum claim upon arrival in the United States, but something prevented him or her from timely filing.¹³⁰

The LGBTI Training Module gives specific examples of common fact patterns that may give rise to OYFD exceptions in these cases. These examples include (but are not limited to):

Changed Circumstances:

- Changed country conditions
- “Coming out” as LGBTI
- Recent steps in gender transitioning
- Recent HIV diagnosis

Extraordinary Circumstances:

- HIV-positive status, if the illness was sufficiently severe to prevent filing
- PTSD or other mental health issues, or
- Severe family or community opposition or isolation experienced by the applicant in the United States.¹³¹

Additionally, the regulations specify that maintaining Temporary Protected Status, lawful immigrant, or lawful nonimmigrant status, or receiving parole, can constitute an extraordinary circumstance.¹³² DACA did not exist when these regulations were published so, it is obviously not on the list, but the regulations state that the list is not exhaustive.¹³³ Moreover, the Asylum Office OYFD Lesson Plan explains that the purpose behind this exception is to allow potential asylum applicants to monitor conditions in their home country and wait to file for asylum, until they have no other options.¹³⁴ This same reasoning, that DACA recipients should not feel compelled to seek asylum until it became

¹²⁹ 8 CFR § 1208.4(a)(4)(i) includes a non-exhaustive list of changed circumstances which can excuse the OYFD. These include: changed country conditions; changed personal circumstances; and losing derivative status on a family member’s asylum application.

¹³⁰ 8 CFR § 1208.4(a)(5) includes a non-exhaustive list of extraordinary circumstances which can excuse the OYFD. These include: serious mental or physical illness; legal disability (including both being under age 18 and/or having a mental disability); ineffective assistance of counsel (provided certain procedural requirements are met); maintaining lawful status; filing within one year but having the application rejected for a mistake; or death or serious illness of a legal representative or close family member.

¹³¹ LGBTI Training Module, *supra* note 20, at 61-62.

¹³² 8 CFR § 1208.4(a)(5)(iv).

¹³³ 8 CFR § 208.4(a)(5) specifically states before a list of potentially extraordinary circumstances, “those circumstances may include but are not limited to”

¹³⁴ See AO OYFD Lesson Plan, *supra* note 127 at 17.

necessary, would apply to those with DACA and can therefore argue that receiving and maintaining DACA constitutes an extraordinary circumstance.¹³⁵

Practitioners should also be aware that the regulations list being an “unaccompanied minor” as an extraordinary circumstance as well.¹³⁶ USCIS has interpreted this exception to include all minors below the age of 18.¹³⁷ Likewise, an unpublished BIA decision agreed that “asylum applicants under 18 years old are understood to suffer from a *per se* legal disability excusing them from the filing deadline.”¹³⁸ The BIA further held that for those who fall between the ages of 18 and 21, the adjudicator should engage in a case-by-case analysis of whether the applicant’s age prevented him or her from filing sooner.¹³⁹ Since DACA recipients arrived in the United States as minors, it is essential for practitioners to consider this and other OYFD exceptions, in addition to those that are specific to LGBTI claims.¹⁴⁰

For DACA recipients, the most common OYFD deadline exceptions will probably be changed circumstances, particularly if the applicant recently “came out” as LGBTI, recently took medical steps in gender transitioning, or was recently diagnosed with HIV. In many countries, transgender people are particularly vulnerable to persecution.¹⁴¹

Although not included in the OYFD section of the LGBTI Lesson Plan, the Lesson Plan includes the example of the applicant’s family in the home country becoming aware of the applicant’s sexual orientation as a potential ground for asylum,¹⁴² and practitioners can also argue that this new notoriety would put the applicant at greater risk and therefore qualify as a changed circumstances exception.

DACA Example. Marta came to the United States from El Salvador when she was four years old. In 2013, at age 22, she received DACA. Marta has been an activist for “Dreamers” and has highlighted her personal story of “coming out” as a lesbian and as an undocumented immigrant. In

¹³⁵ In an unpublished decision, the BIA found maintaining DACA to constitute an extraordinary circumstance for OYFD purposes. It is important to note, however, that the government appealed this ruling to the BIA so may not be accepting DACA generally as a OYFD exception. *H-M-C-J-*, AXXX-XXX-586 (BIA Mar. 1, 2018) (unpublished), [scribd.com/document/374339687/H-M-C-J-AXXX-XXX-586-BIA-March-1-2018?secret_password=GG1eV8bffNQDy5GXq1GM](https://www.scribd.com/document/374339687/H-M-C-J-AXXX-XXX-586-BIA-March-1-2018?secret_password=GG1eV8bffNQDy5GXq1GM).

¹³⁶ 8 CFR § 1208.4(a)(5)(ii).

¹³⁷ See *AO Children’s Claims*, *supra* note 26, at 77.

¹³⁸ *A-D-*, AXXX XXX 526, at 5 (BIA May 22, 2017) (unpublished), [scribd.com/document/351904250/A-D-AXXX-XXX-526-BIA-May-22-2017](https://www.scribd.com/document/351904250/A-D-AXXX-XXX-526-BIA-May-22-2017). CLINIC and Public Counsel submitted an amicus brief in this case. See, CLINIC and Public Counsel BIA Amicus Brief on Definition of a Minor, (Apr. 19, 2017) [cliniclegal.org/resources/litigation/clinic-and-public-counsel-bia-amicus-brief-definition-minor](https://www.cliniclegal.org/resources/litigation/clinic-and-public-counsel-bia-amicus-brief-definition-minor).

¹³⁹ *A-D-*, at 5-7.

¹⁴⁰ See CLINIC, *Overcoming the OYFD*, *supra* note 17.

¹⁴¹ LGBTI Training Module, *supra* note 20, at 24. (“Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution.”)

¹⁴² *Id.*, at 26.

December of last year, Marta was featured on the cover of Time magazine. Marta has heard that the magazine has circulated in her town in El Salvador and that she is now “famous” for being a lesbian celebrity. Marta may have a changed circumstances exception based on her notoriety as an “out” lesbian. She could also argue an extraordinary circumstance of being a DACA recipient and wait to file for asylum until a reasonable period of time if, in the future, the administration rescinds DACA.

E. Matter of Discretion

Finally, granting asylum requires a favorable exercise of discretion. Generally, unless a mandatory asylum bar applies, the adjudicator exercises favorable discretion.¹⁴³ However, adjudicators can consider adverse factors and weigh them against positive factors presented in the case.¹⁴⁴ The manner of entry for an asylum applicant is one issue for the adjudicator to consider, but an irregular entry generally should not bar asylum as a matter of discretion.¹⁴⁵

While most DACA recipients received DACA because they had positive equities, practitioners should be prepared to explain any negative factors, such as criminal convictions that do not rise to the level of statutory disqualification but that may lead an adjudicator to not exercise favorable discretion. Since discretion is an issue in asylum cases, it can also be strategic to include evidence that supports a positive exercise of discretion to further humanize the applicant for the adjudicator.

IV. Overview of Withholding of Removal Under INA § 241(b)(3) and Protection Under the Convention Against Torture

Several U.S. courts of appeal have issued precedential decisions addressing withholding and CAT protection in the LGBTI context from the top five DACA countries.¹⁴⁶ As such, practitioners should

¹⁴³ *Matter of Salim*, 18 I. & N. Dec. 311, 315-16 (1982) (finding that “all relevant factors must be considered,” and that “[a] ‘strong negative discretionary factor’ may be overborne by ‘countervailing equities’”); see also. USCIS, Discretion Training Module, internal page numbering at 20 (Nov. 23, 2015) uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asymylum_claims_and_issues_related_to_the_adjudication_of_children.pdf, beginning at page 1406 (“Generally, a positive exercise of discretion does not require a detailed analysis or explanation in the written decision”).

¹⁴⁴ Positive factors can include: family ties; business ties; employment; school and humanitarian considerations including health. Negative factors can include: criminal history and significant violations of U.S. immigration law. *Id.* at 18-19.

¹⁴⁵ *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987).

¹⁴⁶ See *Velasquez-Banegas v. Lynch*, 846 F.3d 258, (7th Cir. 2017) (granting petition for review and remanding withholding case for HIV-positive Honduran man with imputed gay sexual orientation); *Neri-Garcia v. Holder*, 696 F.3d 1003, 1006 (10th Cir. 2012) (denying withholding and CAT to gay man from Mexico where IJ found that country conditions had improved sufficiently in the 15 years since the applicant had lived in Mexico to rebut the presumption of future harm); *Morales v. Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007) (remanding transgender Mexican’s claim for CAT protection where IJ applied the wrong legal standard regarding government conduct); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) (remanding withholding of removal and CAT claims for “gay man with female sexual identity” from El Salvador where IJ and BIA had improperly applied a per se rule requiring applicant to report private actor harm and had misapplied the standard of government acquiescence).

consider, in addition to and in the alternative to asylum, withholding of removal under INA § 241(b)(3), and CAT protection for DACA recipients.

Individuals who are in removal proceedings can seek withholding of removal under section 241(b)(3) of the INA and protection under CAT simultaneously with filing for asylum.¹⁴⁷ Practitioners should be aware that individuals who cannot succeed with an exception to the OYFD may still be eligible for withholding of removal or CAT protection. However, both withholding under the INA and CAT protection require the applicant to meet a higher standard than asylum, proving that it is “more likely than not” the applicant will be persecuted or tortured, respectively.¹⁴⁸ Neither withholding nor CAT protection leads to permanent residence or U.S. citizenship; these forms of protection from removal merely prevent the U.S. government from removing the individual to a country where he or she is likely to face persecution or torture and allow the recipient to live and work in the United States.

A. Withholding of Removal Under INA § 241(b)(3)

Withholding of removal under INA § 241(b)(3) is not considered a form of relief from removal because the applicant is still ordered removed, but the U.S. government is prevented from removing the individual to country where he or she would face persecution.¹⁴⁹ To qualify for withholding of removal, an applicant must establish that it is more likely than not that he or she would be subject to persecution based on one of the protected grounds.¹⁵⁰ The “more likely than not” burden is higher than the “well-founded fear” standard for asylum. Furthermore, withholding of removal is a mandatory form of relief—it is not discretionary—thus there is no equivalent of “humanitarian asylum” for applicants who no longer possess a well-founded fear of return.¹⁵¹ Applicants for withholding of removal are not subject to the OYFD, nor are they subject to a bar based on firm resettlement, but the other mandatory bars that apply to asylum also apply in the withholding context.¹⁵² Moreover, an applicant who has a criminal record may be barred from asylum based on discretion but will not be barred from withholding of removal unless he or she has been convicted of a particularly serious crime. Most DACA recipients will not be subject to the criminal or security bars to withholding or they would not have been eligible for DACA. However, if they cannot meet an exception to the OYFD, withholding of removal may be the best option as a defense in removal proceedings.

¹⁴⁷ The USCIS Asylum Office does not have jurisdiction to review applications for withholding of removal or CAT protection.

¹⁴⁸ See 8 CFR § 1208.16(b)(2); 8 CFR § 1208.16(c)(2).

¹⁴⁹ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999).

¹⁵⁰ *INS v. Stevic*, 467 U.S. 407, 430 (1984).

¹⁵¹ INA § 241(b)(3)(A).

¹⁵² INA § 241(b)(3)(B) ((i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.)

In *Velasquez-Banegas v. Lynch*, the U.S. Court of Appeals for the Seventh Circuit vacated the denial of withholding of removal for an HIV-positive man with an imputed gay sexual orientation from Honduras, noting that “the [IJ] made a hash of the record” and overlooked key testimony.¹⁵³ Mr. Velasquez-Banegas argued that Hondurans would assume he is LGBTI because he is HIV-positive, middle-aged, and unmarried. Relying heavily on the testimony of an expert witness, the Seventh Circuit remanded the case, instructing the BIA to take the uncontested testimony that the applicant would face future harm into account.¹⁵⁴ This case highlights why it is critical to build a strong record before the IJ. For individuals with DACA who came to the United States without having experienced past harm, it will likewise be crucial to build a strong record before the IJ, including providing expert testimony, to demonstrate that it is more likely that persecution will occur.

B. Protection Under the Convention Against Torture

Applicants who cannot establish a nexus to a protected ground may be granted protection under CAT. There are two available forms of protection under CAT: withholding of removal under CAT and deferral of removal under CAT.¹⁵⁵ For both forms of protection, the applicant must demonstrate that it is more likely than not that he or she will be subjected to torture. For purposes of CAT protection, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁵⁶

The regulations further define mental torture as potentially including: physical pain or suffering; the use of mind-altering substances or procedures; the threat of imminent death to the individual or the threat that another person will suffer of any of the above forms of torture.¹⁵⁷ Availability of CAT protection is limited further in the regulations, which specify that the torture must be extreme,¹⁵⁸

¹⁵³ *Velasquez-Banegas*, 846 F.3d 258.

¹⁵⁴ *Id.* at 264.

¹⁵⁵ Withholding of removal under CAT requires the applicant to show a likelihood of torture, even if this harm does not have a nexus to a protected ground. For an individual who is barred from asylum, INA § 241(b)(3) withholding of removal, or CAT withholding because he or she has committed a particularly serious crime or for security related grounds, may still be eligible for deferral of removal under CAT. Although, with deferral of removal, an individual granted protection could be removed to a third country or may remain detained even after winning his or her claim if he or she is found to pose a danger to the community. 8 CFR §§ 1208.16-1208.18.

¹⁵⁶ 8 CFR § 1208.8(a)(1).

¹⁵⁷ 8 CFR § 1208.18(a)(4).

¹⁵⁸ 8 CFR § 1208.18(a)(2).

cannot be part of a lawful sanction,¹⁵⁹ must be intentionally intended to inflict severe pain or suffering,¹⁶⁰ and that the individual must be in the physical custody of the government actor or the government actor must acquiescence in the torture.¹⁶¹ In many CAT protection cases, the most difficult element is proving that the applicant was tortured or will be tortured by a state actor or with the acquiescence of a state actor. This element will likely also present difficulties for LGBTI asylum seekers because they often suffer extreme harm at the hands of private actors and not the government. Most U.S. courts of appeal take the position that showing that the government is “willfully blind” to the torture, suffices to meet the state action element in the torture analysis.¹⁶²

In 2019, the BIA issued a precedential decision which greatly elevates the level of proof for winning CAT claims. In *Matter of O-F-A-S-*,¹⁶³ the BIA held that even when a uniformed police officer inflicts harm that rises to the level of torture, the burden is on the applicant to prove that the torturer was acting under color of law, and was not a “rogue official.”¹⁶⁴ It will often be impossible for a CAT applicant to know whether an official who is in uniform is acting in an official capacity or not.¹⁶⁵

The legal standard for proving torture is the same whether an applicant is seeking withholding of removal under CAT or deferral of removal under CAT.¹⁶⁶ The primary reason an applicant may be granted withholding of removal under CAT rather than asylum or withholding of removal under INA § 241(b)(3) is that he or she cannot establish a nexus to the severe harm suffered in the past or feared in the future. Likewise, there is no nexus requirement for deferral of removal under CAT. However, unlike asylum or either form of withholding, there are no criminal or security-related bars to

¹⁵⁹ 8 CFR § 1208.18(a)(3).

¹⁶⁰ 8 CFR § 1208.18(a)(5).

¹⁶¹ 8 CFR § 1208.18(a)(6)–(a)(7); see, e.g., *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013) (“Acquiescence . . . does not require that the public official approve of the torture, even implicitly. It is sufficient that the public official be aware that torture of the sort feared by the applicant occurs and remain willfully blind to it.”)

¹⁶² See, e.g., *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245–46 (4th Cir. 2013); *Diaz v. Holder*, 501 F. App’x 734, 736 (10th Cir. 2012); *Pieschacon-Villegas v. Att’y Gen. of U.S.*, 671 F.3d 303(3d Cir. 2011); *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001). The “willful blindness” standard is less stringent than a “willful acceptance” standard which the government sometimes advances. “Under the willful acceptance standard, an applicant must demonstrate that government officials had actual knowledge of his or her torture to satisfy the CAT’s acquiescence requirement. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir.2003) (distinguishing willful acceptance from willful blindness). By contrast, pursuant to the willful blindness standard, government officials acquiesce to torture when they have actual knowledge of or ‘turn a blind eye to torture.’” *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245 (4th Cir. 2013).

¹⁶³ *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019).

¹⁶⁴ *Id.* at 714.

¹⁶⁵ Note that the Ninth Circuit Court of Appeals held that the “regulation uses the word ‘or’ between the phrases ‘inflicted by ... a public official’ and ‘acting in an official capacity.’ The word ‘or’ can only mean that either one suffices, so the torture need not be both by a public official and also that the official is acting in his official capacity. An ‘and’ construction would require that the conjunction be ‘and.’” *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017). Thus practitioners should push back against *Matter of O-F-A-S*, arguing that the BIA’s reading is not supported by the plain language of the regulations.

¹⁶⁶ 8 CFR § 1208.16(c); 8 CFR § 1208.18(a).

granting CAT deferral.¹⁶⁷ Because CAT deferral remains available to applicants who the U.S. government may see as posing a safety threat,¹⁶⁸ the regulations provide for potential detention even after a grant of CAT deferral and allow the government to move the immigration court “at any time” after a grant to reopen and seek termination of deferral if country conditions have changed.¹⁶⁹

CAT applicants from the top five DACA countries have often been unsuccessful before the U.S. courts of appeal in proving eligibility for CAT protection. For example, in *Lopez v. Lynch*,¹⁷⁰ the U.S. Court of Appeals for the Seventh Circuit upheld the denial of a deferral of removal under CAT claim by a gay, HIV-positive man from Mexico. Although there was substantial evidence in the record of violence towards gay men, the Seventh Circuit found that the record did not compel a finding that it was more likely than not he would be tortured.¹⁷¹ Similarly, in another unpublished case, the U.S. Court of Appeals for the Ninth Circuit denied CAT protection to a gay man from El Salvador, finding that the IJ had adequately considered an expert witness report in denying the application.¹⁷² Likewise, in an unpublished case, the Ninth Circuit upheld the denial of deferral of removal under CAT to a gay Honduran man, finding that he could not establish a likelihood of torture there because “the LGBTI community in Honduras was active and ... crimes against members of that community were being prosecuted.”¹⁷³ In another unpublished CAT denial for a gay man from Honduras from the Ninth Circuit, the court did leave open the possibility of CAT if there were aggravating factors such as being “a gay rights activist, transsexual, or member of another category of homosexual persons more frequently targeted for violence.”¹⁷⁴ It is important to remember that every case is very fact-specific and outcomes vary greatly depending on how the record is developed, so practitioners should be aware of trends in adjudications but not be deterred from representing an individual based on an unfavorable outcome in a case with similar facts.

DACA Example. Mayra is transgender woman from Mexico. She came to the United States when she was 11 years old and received DACA when she was 29 years old. Mayra is now 35. Mayra did not “come out” as transgender until she was living in the United States. She experienced some teasing and bullying as a teenager in Mexico for appearing to be an effeminate boy but did not experience any serious harm. She began to come to terms with her transgender identity as a teenager in the United States, and had several gender-affirming medical procedures between the

¹⁶⁷ 8 CFR § 1208.17(a).

¹⁶⁸ Since there are no bars to CAT deferral, practitioners should mark the boxes on pages 1 and 5 the I-589 to seek this relief in the event the IJ finds that the applicant is barred from asylum or withholding of removal under INA §241(b)(3) and the practitioner determines that the client is eligible for CAT. See USCIS, Form I-589, Application for Asylum and for Withholding of Removal (Revised 09/10/19), uscis.gov/i-589.

¹⁶⁹ 8 CFR § 1208.17(b)–(17)(d).

¹⁷⁰ *Lopez v. Lynch*, 810 F.3d 484 (7th Cir. 2016).

¹⁷¹ *Id.* at 493.

¹⁷² *Soriano v. Holder*, 553 F. App’x 705, 707 (9th Cir. 2014) (unpublished); see also *Martinez v. Holder*, 557 F.3d 1059, 1065 (9th Cir. 2009) (denying a withholding claim by gay Guatemalan man, based on a credibility finding because of a prior untruthful asylum application filed on a different ground).

¹⁷³ *Meza-Barhona v. Lynch*, 614 F. App’x 908, 910 (9th Cir. 2015) (unpublished).

¹⁷⁴ *Solando v. Holder*, 359 F. App’x 872, 874 (9th Cir. 2009) (unpublished).

ages of 18 and 25. Although taking medical steps to align Mayra’s physical appearance with her gender identity could constitute a “changed circumstance” exception, Mayra did not file for asylum within a reasonable period of time after the changed circumstance. Moreover, while being a DACA recipient may qualify as an extraordinary circumstance from the time she was 29 until the present, it would not excuse the time she spent in the United States as an adult before she applied for DACA. Of course, the practitioner should explore whether there are any other possible exceptions, such as mental health issues or homelessness, but if Mayra cannot demonstrate an exception to the OYFD, she may only be eligible for withholding of removal or CAT protection. Her case would be based primarily on country conditions as she would have to demonstrate that it is more likely than not that she would be persecuted as a transgender woman in Mexico or that she would face torture by the government or entities acting with the acquiesce, or “blind eye” of the government, if returned.

V. Unique Issues in Preparing Asylum, Withholding of Removal, or Convention Against Torture Claims for LGBTI Applicants

There are some unique issues that arise in preparing LGBTI asylum applications. It can be challenging to prove an individual’s sexual orientation or gender identity. This section will provide information about these challenges and tips on how to prepare strong applications.

A. Discussing LGBTI Identity with Clients

Talking about sexual orientation or gender identity can be very difficult for many people. It often takes several meetings with a potential client before a relationship of trust is developed and he or she feels comfortable talking about deeply personal issues, such as his or her sexual orientation or gender identity, with the legal representative. It is important not to rush the applicant and develop the relationship of trust.¹⁷⁵

Practice Tip: It generally feels awkward to ask someone directly: “Are you gay?” Often a better approach is to explain potential eligibility grounds for asylum. For example, the practitioner could say, “People can apply for asylum in the United States if they fear returning to their countries for certain specific reasons. Under U.S. law, you may be able to qualify for asylum if you fear someone will harm you in your country because of your race, religion, nationality, membership in a particular social group, or political opinion. It is difficult to explain what ‘membership in a particular social group’ means, but people have won asylum in the United States based on personal circumstances such as being gay [or lesbian, bisexual, or transgender], or because they have been victims of familial violence. Do any of those things apply to you?” A client is more likely to divulge personal information if he or she understands that it is relevant and potentially helpful for his or her case.

¹⁷⁵ Immigration Equality Asylum Manual, (last updated 2006), immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/#.WrTSpajwbIV (a comprehensive, though somewhat dated, resource on the basics of preparing an LGBTI asylum application).

Asylum clients often become more comfortable discussing sensitive issues over time. Thus, even if the applicant does not immediately identify as LGBTI, it can be helpful to continually revisit the grounds for asylum. Practitioners should also emphasize that whether or not the applicant actually identifies as LGBTI, if the persecutor believed he or she was LGBTI and sought to harm him or her on the imputed identity that harm can be a basis of granting asylum.

Practice Tip: If an applicant has been harmed or threatened with harm, it is always a good idea to ask whether the persecutor said anything. If the persecutor used a homophobic slur, this may be a reason to conclude that the persecutor believed the applicant to be LGBTI. Sometimes, facts initially indicate that the harm suffered is not based on a protected ground (such as a robbery) but the harm gets worse after the persecutor finds out the person is LGBTI. Therefore, it is critical to ask the client follow up questions such as, “Were you called any names?” and “Why do you think he called you that?” Practitioners will also want to explore how people who are perceived as LGBTI are treated in the community from which the individual fled.

B. Special Considerations for Discussing Transgender Identity with Clients

Transgender people are often at greater risk for harm that rises to the level of persecution than other applicants. While it may be obvious that some prospective applicants identify as transgender, it may not be obvious with all clients, so it is important to include transgender issues in the discussion of asylum possibilities.¹⁷⁶

Practice Tip: As with bringing up LGBTI issues generally with clients, it may be helpful to explain to a client how identifying as transgender may improve his or her chances of succeeding with an asylum case. That is, if a client is gender non-conforming and has self-identified as lesbian, gay, or bisexual, but has not identified as transgender, practitioners should explore whether the individual may have a claim based on transgender identity or imputed transgender identity. The LGTI Training Module has helpful tips on appropriate and inappropriate lines of questioning that the adjudicator may use.¹⁷⁷ It can also be helpful to review preferred terminology in discussing medical and other transition issues with transgender clients before the first client meeting.¹⁷⁸

C. Corroboration of LGBTI Identity

An asylum applicant, including an LGBTI applicant, may be able to prevail on an asylum claim based solely on his or her own detailed, credible testimony.¹⁷⁹ However, with the passage of the REAL ID Act in 2005, there are heightened requirements for corroboration in asylum cases. Thus, if

¹⁷⁶ See Victoria Neilson, editor, *IMMIGRATION LAW AND THE TRANSGENDER CLIENT*, AILA Publications (2008) (for tips on interviewing techniques when working with transgender clients.).

¹⁷⁷ LGBTI Training Module, *supra* note 20, at 36-37.

¹⁷⁸ See National Center for Transgender Equality, *Understanding Transgender People: The Basics* (July 9, 2016), transequality.org/issues/resources/understanding-transgender-people-the-basics.

¹⁷⁹ 8 CFR § 1208.13(A).

there are corroborating documents that are readily available, the applicant must submit these or account for their absence.¹⁸⁰

It is especially important to include corroboration if there are any indicia of fraud or reasons for the adjudicator to doubt the applicant's credibility. In *Eke v. Mukasey*,¹⁸¹ a case where a gay Nigerian man presented inconsistent testimony and had criminal convictions involving fraud, the IJ found that he lacked credibility. The U.S. Court of Appeals for the Seventh Circuit upheld the determination that Mr. Eke had not proven that he was actually a member of the PSG of gay men in Nigeria because:

He also failed to either submit some kind of documentation indicating his sexual preferences, such as letters, affidavits, photographs, or other forms of corroborative evidence; or establish that such evidence was not reasonably available to him. In fact, the applicant could not even provide the name of the gentleman with whom he was allegedly involved in a homosexual relationship.¹⁸²

While it should not always be necessary to provide extrinsic proof of LGBTI identity, in cases where an applicant's credibility is questioned, he or she should be prepared to do so. However, an adjudicator may not rely on stereotypes to determine whether an applicant is gay.¹⁸³ An adjudicator can ask general questions about where an applicant met his or her partner or activities he or she engages in as part of the LGBTI community, but should not rely on stereotypes, or find an applicant not credible if, for example, he or she does not frequent LGBTI bars or nightclubs.

In general, if corroborating proof is available, the applicant should provide it. Possible corroboration can include:

- Proof of a long-term relationship or former relationship with a same-sex partner, similar to marriage *bona fides* proof, such as proof of cohabitation, proof of shared expenses, photos with each other's families.¹⁸⁴
- Affidavits or letters from friends or family who know that the applicant is LGBTI, including how the affiant or letter writer knows this. For example, the affiant could be an LGBTI friend who

¹⁸⁰ INA § 208(b)(1)(B)(ii) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

¹⁸¹ *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008).

¹⁸² *Id.* at 381.

¹⁸³ *Todorovic v. U.S. Att'y Gen.*, 621 F.3d 1318, 1326 (11th Cir. 2010) (remanding case where the IJ committed error by finding Serbian gay man would not experience future harm because his demeanor is not "overtly homosexual"); see also, *Shahinaj v. Gonzales*, 481 F.3d 1027, 1027 (8th Cir. 2007).

¹⁸⁴ While the burden of proof for demonstrating the existence of a relationship should not be as high in the context of asylum applications as it is in the context of marriage-based petitions, practitioners may, nevertheless, find this practice advisory helpful in considering the types of evidence of a relationship that may be submitted. Em Puhl, Immigrant Legal Resource Center, *Family-Based Petitions for LGBTQ Couples* (Jan. 2020), ilrc.org/sites/default/files/resources/bona_fide_marriage_lgbtq_couples_final.pdf.

frequents LGBTI clubs with the applicant. Another example could be a letter from a family member in the home country confirming that the applicant is LGBTI and/or that he or she would face harm if he or she returned.

- Proof of involvement in the LGBTI community. Examples include involvement in a local LGBTI community center, LGBTI faith groups, LGBTI sports groups, LGBTI social media groups, LGBTI support or identity groups, etc.
- Affidavit from a mental health expert. Although it is not always necessary to include evidence from a mental health expert, it can be very helpful to do so, especially in cases where the applicant is reticent to testify about being LGBTI and has little corroboration of his or her LGBTI identity. A mental health expert can both corroborate the applicant's narrative and help explain why it is difficult for the applicant to speak about his or her LGBTI identity.
- Proof of LGBTI dating. Some practitioners have found it helpful to submit proof that an applicant is active on same-sex dating websites by printing out profiles from websites. It is important that any evidence submitted is not graphically sexual or otherwise inappropriate to give to a government official and that there is not other problematic or unlawful material on the website.
- Medical evidence of gender transition. If the applicant is transgender and has taken medical steps to transition such as taking hormones or having surgeries, the applicant should submit such medical documentation.
- Medical evidence of HIV status. If an applicant's asylum claim or OYFD exception is based on being HIV-positive, he or she should include proof of his or her HIV diagnosis.¹⁸⁵

DACA Example. Sergio, from Honduras, recently married his partner, Mateo, in New York City. Sergio fears that it would be impossible to live openly in Honduras as a gay, married man. He also fears that he and his spouse will be subject to violence from which the Honduran government will not protect them. Sergio should include his marriage certificate as part of his asylum application because it is material to his case and readily available. In addition to the marriage certificate, Sergio can also include pictures of the dating period, courtship, and wedding. He can argue that his recent marriage is a changed circumstance. Furthermore, if Sergio is facing anxiety about the possibility of being removed to Honduras, it may be helpful to include proof that he has been seeing a mental health professional to help him cope with this anxiety.

VI. Country Conditions for LGBTI DACA Recipients from the Top Five DACA Countries

As stated above, the five countries with the highest number of DACA recipients in the United States are Mexico, El Salvador, Guatemala, Honduras, and Peru. It is generally helpful for the practitioner to begin assessing a case by reviewing federal court and BIA decisions from the applicant's country of origin to understand issues that courts have addressed in LGBTI cases. There have been LGBTI-

¹⁸⁵ See LGBTI Training Module, *supra* note 20, at 44-46.

related federal court decisions from each of the top five DACA countries: Mexico,¹⁸⁶ El Salvador,¹⁸⁷ Guatemala,¹⁸⁸ Honduras,¹⁸⁹ and Peru. Some of these cases hinge on country conditions in the

¹⁸⁶ See *Carranza-Albarran v. Barr*, 783 F. App'x 656, 658 (9th Cir. 2019)(unpublished)(remanding gay Mexican man's asylum claim where BIA had improperly made adverse credibility finding based on an alleged omission of rape by the police in his asylum application); *Lorenzo-Lopez v. Whitaker*, 747 F. App'x 587, 588 (9th Cir. 2019)(unpublished)(remanding transgender woman's claim for withholding and CAT while denying asylum claim based on OYFD); *Hernandez-Garcia v. Barr*, 771 F. App'x 837, 838 (9th Cir. 2019)(unpublished)(upholding denial where applicant only alleged discriminatory comments based on her sexual orientation); *Medina v. Sessions*, 734 F. App'x 479, 482 (9th Cir. 2018)(unpublished)(remanding case of Mexican transgender woman where BIA failed to consider transgender claim separately from her sexual orientation claim); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (finding that a gay man who had been subjected to private abuse had suffered past persecution even though he had not reported harm to police); *Barragan-Ojeda v. Sessions*, 853 F.3d 374 (7th Cir. 2017) (denying case for gay man from Mexico who had initially put forward an imputed sexual orientation claim and did not raise actual gay sexual orientation claim until federal court appeal); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) (finding court erroneously considered improving country conditions for gay people in adjudicating claim of transgender woman); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) (finding court erroneously considered improving country conditions for gay people in adjudicating claim of transgender woman); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) (finding court erroneously considered improving country conditions for gay people in adjudicating claim of transgender woman); *Rosiles-Camarena v. Holder*, 735 F.3d 534 (7th Cir. 2013) (remanding case of gay, HIV-positive Mexican man where court applied wrong standard in analyzing withholding and CAT claims); *Neri-Garcia v. Holder*, 696 F.3d 1003, 1006 (10th Cir. 2012) (denying withholding and CAT to gay man from Mexico after the government submitted evidence of improving conditions); *Aguilar-Mejia v. Holder*, 616 F.3d 699 (7th Cir. 2010) (denying asylum to an HIV-positive, imputed gay man who held citizenship in Mexico, Guatemala, and Colombia where applicant only put forward a "pattern and practice" claim and did not raise an individualized harm claim at trial); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) (denying asylum to gay HIV-positive man where past attacks did not rise to level of past persecution and current conditions not widespread enough for well-founded fear); *Morales v. Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007) (remanding case for Mexican "transsexual" for, inter alia, incorrect application of CAT standard); *Ornelas Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006) (finding past persecution for gay Mexican even though he did not report private actor harm to police); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005) (Mexican gay man with AIDS who was sexually and physically abused by Mexican police was eligible for asylum); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1098 (9th Cir. 2000), overruled on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)(finding past persecution for a Mexican "gay male with female sexual identity" who was raped by the police).

¹⁸⁷ See *Orellana v. Attorney Gen. of United States*, 2020 WL 1651273, at *6 (3d Cir. Apr. 3, 2020)(unpublished) (remanding Salvadoran gay man's case where the IJ and BIA considered him an ordinary "victim of gang violence" and failed to consider evidence in the record of gangs' specifically targeting gay people, especially for sexual violence); *Barrera v. Barr*, 798 F. App'x 312, 316 (10th Cir. 2020)(unpublished)(remanding transgender woman's asylum application on motion by the government); *Munoz v. Sessions*, 733 F. App'x 904, 905 (9th Cir. 2018)(unpublished)(denying asylum based on OYFD where applicant filed 15 years after HIV diagnosis, but remanding to consider childhood abuse in withholding claim); *Ramos v. Lynch*, 636 F. App'x 710, 711 (9th Cir. 2016), as amended (Feb. 18, 2016) (unpublished) (finding BIA erred in requiring showing of lack of government protection when persecution was by Salvadoran police and finding transgender identity is a different PSG and needs different analysis from sexual orientation); *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009) (denying withholding of removal to transgender Salvadoran woman because of her conviction for a particularly serious crime, no discussion in case of potential CAT claim); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) (finding the Salvadoran government acquiesced in torture of "gay male with female sexual identity" who had been kidnapped and tortured).

¹⁸⁸ See *Gomez-Ortega v. Barr*, No. 17-72433, 2020 WL 2316108, at *1 (9th Cir. May 11, 2020) (unpublished) (affirming denial of transgender woman's claim on credibility grounds); *Gonzalez-Gomez v. Barr*, 783 F. App'x 771, 772 (9th Cir. 2019)(unpublished)(denying claim by lesbian Guatemalan who failed to show a nexus between childhood

record, and it is always crucial in asylum cases to build a strong record of conditions in the applicant's country for LGBTI individuals.

The following sections provide general tips on how to approach country conditions research and then briefly discusses country conditions for LGBTI individuals in each of those countries.¹⁹⁰ The Center for Gender and Refugee Studies recently released a helpful advisory on how to conduct country conditions research generally, which also provides useful tips.¹⁹¹

sexual abuse and protected characteristic, and who no longer feared harm from relatives who were not living in Guatemala); *Recinos-Coronado v. U.S. Attorney Gen.*, 778 F. App'x 666, 671 (11th Cir. 2019) (unpublished)(upholding denial of gay Guatemalan man's asylum claim where BIA found sexual abuse from uncle as a child was not motivated by the applicant's gay identity and other harm suffered did not rise to the level of persecution); *Aguilar-Mejia v. Holder*, 616 F.3d 699 (7th Cir. 2010) (denying asylum to an HIV-positive, imputed gay man who held citizenship in Mexico, Guatemala, and Colombia where applicant only put forward a "pattern and practice" claim and did not raise an individualized harm claim at trial); *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009)(denying asylum to gay Guatemalan on credibility grounds where he had previously filed a fraudulent asylum claim based on political opinion); *Galicia v. Ashcroft*, 396 F.3d 446 (1st Cir. 2005) (upholding denial of gay Guatemalan man's asylum claim where he did not show government involvement or lack of protection for past harm suffered).

¹⁸⁹ See *Mendez v. Barr*, 792 F. App'x 466, 468 (9th Cir. 2019)(unpublished)(upholding denial of transgender woman's claim because there was no nexus between childhood sexual abuse and her protected characteristic and because later conviction of the abuser showed that government was not unable or unwilling to protect her); *Cazares-Zandre v. U.S. Attorney Gen.*, 791 F. App'x 96, 104 (11th Cir. 2019)(unpublished)(denying CAT claim by transgender woman because the record does not compel a finding that she would be tortured even though there is evidence in the record of violence against transgender people in Honduras); *Antunez-Blanco v. Whitaker*, 744 F. App'x 886, 887 (5th Cir. 2018)(unpublished)(upholding denial, finding that "verbal threats, gay slurs, harassment, and a single, minor physical altercation while living in Honduras in 2014 do not constitute persecution"); *Martinez-Almendares v. Attorney Gen. United States*, 724 F. App'x 168, (3d Cir. 2018)(unpublished)(upholding denial of gay Honduran man's asylum application, agreeing with BIA's assessment that there was not sufficient evidence of a pattern and practice of persecution of gay men in Honduras and finding that the applicant had not proven he could not internally relocate); *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017) (remanding claim by HIV-positive, imputed gay man from Honduras); *Osejo-Romero v. Sessions*, 689 F. App'x 815, 816 (5th Cir. 2017) (unpublished) (per curiam) (denying asylum to transgender woman, who lived as a gay man in Honduras, based on no past persecution); *Rodriguez v. Lynch*, 643 F. App'x 365, 367 (5th Cir. 2016) (per curiam) (unpublished) (finding that gay male applicant could safely relocate within Honduras when he had moved to San Pedro Sula in the past and only suffered name calling and discrimination); *Gonzalez-Posadas v. Att'y Gen. U.S.*, 781 F.3d 677 (3d Cir. 2015) (upholding denial of asylum to gay Honduran who was not able to show his sexual orientation was "one central reason" for harm from gangs); *Meza-Barhona v. Lynch*, 614 F. App'x 908, 910 (9th Cir. 2015) (unpublished) (upholding denial of CAT to gay man based on country conditions); *Solando v. Holder*, 359 F. App'x 872, 874 (9th Cir. 2009) (unpublished) (denying CAT to gay man from Honduras because there was not sufficient proof that the Honduran government acquiesces in the torture of gay men).

¹⁹⁰ The authors would like to thank colleagues at Immigration Equality for sharing country conditions materials.

¹⁹¹ Center for Gender and Refugee Studies, *Conducting Country Conditions Research for Asylum, Withholding of Removal, And Convention Against Torture Claims*, CGRS Practice Advisory (Mar. 2018), available by request at cgrs.uchastings.edu/article/cgrs-releases-new-litigation-resources.

A. Researching Country Conditions for LGBTI Applicants

In preparing any asylum application, practitioners should begin by reading the U.S. Department of State Human Rights Report for the country in question.¹⁹² These reports generally include information on LGBTI rights violations; however, the quality of the reports on LGBTI issues vary greatly from country to country. Since the government routinely relies on these reports, practitioners must know what they contain, but it is important for the practitioner's research to go further than this.

There are several human rights organizations that focus on LGBTI issues and include reports on these issues on their websites.¹⁹³ General government and human right websites also frequently contain valuable materials about LGBTI-related country conditions.¹⁹⁴ Other sources of useful information include general interest LGBTI media websites for articles about international human rights¹⁹⁵ and newspaper or other media sites in the country of feared harm on which the practitioner can conduct searches within the site for relevant terms.¹⁹⁶ If any of the sites do not have a robust internal search feature, it is possible to use Google to search within websites.¹⁹⁷ Finally, there are also nonprofit organizations that focus on LGBTI¹⁹⁸ and gender-related¹⁹⁹ immigration issues that share country conditions resources with asylum practitioners. These resources can be a helpful starting point for the practitioner, but it is important to thoroughly read all materials before filing them with the IJ and to supplement them with recent information.

¹⁹² U.S. Department of State, Country Reports on Human Rights Practices, [state.gov/j/drl/rls/hrrpt/](https://www.state.gov/j/drl/rls/hrrpt/). Note that the Human Rights Reports under the Trump administration have generally been shorter and less detailed regarding gender-related issues and, in some instances, LGBTI issues than in previous years. It is therefore advisable to consult and potentially include earlier reports as well, particularly if the asylum applicant experienced harm in his or her country prior to 2017.

¹⁹³ See OutRight International outrightinternational.org/; International Lesbian, Gay, Bisexual, Trans and Intersex Association ilga.org/; Human Rights First LGBT Project humanrightsfirst.org/topics/lgbt.

¹⁹⁴ See US Department of State International Religious Freedom [state.gov/j/drl/rls/irf/](https://www.state.gov/j/drl/rls/irf/); Human Rights Watch [hrw.org/](https://www.hrw.org/); Amnesty International [amnesty.org/en/](https://www.amnesty.org/en/); RefWorld [refworld.org/cgi-bin/texis/vtx/rwmain](https://www.refworld.org/cgi-bin/texis/vtx/rwmain).

¹⁹⁵ LGBT media websites which may have helpful information include: THE ADVOCATE, [advocate.com/](https://www.advocate.com/); THE WASHINGTON BLADE, [washingtonblade.com/](https://www.washingtonblade.com/); TOWLEROAD [towleroad.com/](https://www.towleroad.com/); QUEERTY [queerty.com/](https://www.queerty.com/); GAY CITY NEWS, [gaycitynews.com/](https://www.gaycitynews.com/); GAY TODAY, [gaytoday.com/](https://www.gaytoday.com/); and PINK NEWS, [pinknews.co.uk/edition/us/](https://www.pinknews.co.uk/edition/us/).

¹⁹⁶ Obviously, the terms should be in the language of the website. Thus, on Spanish language sites in addition to searching "gay," it is advisable to search "homosexual," "lesbiana," "transgenero," "travesti," "VIH," or "SIDA."

¹⁹⁷ Google's search engine can be used to search for specific terms within sites. To do this, go to Google, Enter "site:www.website.com search term" into the search box. For example, the Google search "site:https://www.advocate.com/ Russia" yields multiple articles about mistreatment of LGBT people in Russia.

¹⁹⁸ Immigration Equality is the country's leading LGBT immigration non-profit and can assist with country conditions materials. [immigrationequality.org/](https://www.immigrationequality.org/).

¹⁹⁹ The Center for Gender & Refugee Studies provides technical assistance and country conditions information on gender-related claims as well as LGBT claims. Practitioners can submit a technical assistance request here: cgrs.uchastings.edu/.

B. Mexico

Over 80 percent of all DACA recipients—approximately 521,440 individuals—are from Mexico.²⁰⁰ The U.S. Department of State Human Rights Report for 2019 acknowledges “[c]ivil society groups claimed police routinely subjected LGBTI persons to mistreatment while in custody. . . . There were reports that the government did not always investigate and punish those complicit in abuses, especially outside Mexico City,”²⁰¹ but also reports some gains in anti-discrimination laws. Likewise, a report by the Organization for Refugee, Asylum & Migration, finds that despite changes in the Mexican law purporting to protect lesbian, gay, and bisexual individuals there is still widespread societal intolerance.²⁰² A human rights shadow report released by Letra S, Center for International Human Rights, of Northwestern University School of Law, and Heartland Alliance for Human Needs & Human Rights, Global Initiative for Sexuality and Human Rights in 2014 likewise contains important information about the Mexican government’s failure to protect LGBTI individuals from harm.²⁰³ A Report of the Special Rapporteur to the United Nations found a “pattern of grotesque homicides.”²⁰⁴ Additionally, there are valuable resources from the Canadian Immigration and Refugee Board on conditions in Mexico for LGBTI individuals.²⁰⁵ The Center for Gender and Refugee

²⁰⁰ See USCIS DACA Recipients, *supra* note 5. See also, Gustavo Lopez and Jens Manuel Krogstad, Key Facts About Unauthorized Immigrants Enrolled in DACA, Pew Research Center (Sept. 25, 2017), [pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/](https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/).

²⁰¹ U.S. State Department, 2019 Country Reports on Human Rights Practices – Mexico, at 31 (Mar. 11, 2020), [state.gov/reports/2019-country-reports-on-human-rights-practices/mexico/](https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/mexico/) [hereinafter “DOS Human Rights Mexico.”]

²⁰² Organization for Refugee, Asylum and Migration, *Blind Alleys The Unseen Struggles of Lesbian, Gay, Bisexual, Transgender and Intersex Urban Refugees in Mexico, Uganda and South Africa PART II Country Findings: Mexico*, Organization for Refugee, Asylum & Migration (Feb. 2013), oramrefugee.org/wp-content/uploads/2016/06/ORAM_BA_MexicoENG_HR.pdf.

²⁰³ Letra S, Center for International Human Rights, of Northwestern University School of Law, and Heartland Alliance for Human Needs & Human Rights, *Global Initiative for Sexuality and Human Rights in 2014, Center for International Human Rights, Human Rights Violations Against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People in Mexico: A Shadow Report* (July 2014), tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MEX/INT_CCPR_ICM_MEX_17477_E.pdf (“[A]n alarmingly high number of LGBTI individuals have been murdered in Mexico in recent years.”) at 5. Recent news indicates that LGBTI people continue to be murdered at high rates in Mexico. *Violencia Hacia Personas LGBT No Disminuye con 28 Muertes con López Obrador*, EFE, May 17, 2019, [efe.com/efe/america/mexico/violencia-hacia-personas-lgbt-no-disminuye-con-28-muertes-lopez-obrador/50000545-3979021#](https://www.efe.com/efe/america/mexico/violencia-hacia-personas-lgbt-no-disminuye-con-28-muertes-lopez-obrador/50000545-3979021#).

²⁰⁴ UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Follow Up to his Mission to Mexico* at 19 (May 6, 2016), refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=57616b6e4&skip=0&query=transgender&coi=MEX&querysi=2016&searchin=year&sort=relevance.

²⁰⁵ Immigration and Refugee Board of Canada, *Mexico: Situation and Treatment of Sexual Minorities, Particularly in Mexico City, Cancún, Guadalajara, And Acapulco; State Protection And Support Services Available* (2012-July 2015), refworld.org/publisher.IRBC.,MEX,55ded1b84,0.html; Immigration and Refugee Board of Canada, *Mexico: Reports of Sexual Abuse Committed by Police Officers Against Sexual Minorities*, (Sept. 13, 2012) available at refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=50753cfe2.

Studies also recently issued a report on country conditions in Mexico for sexual orientation and gender-based asylum applicants.²⁰⁶

For Mexican citizens who are considering applying affirmatively based solely on future fear of harm because of sexual orientation, the case may be challenging unless there is some other aggravating factor.²⁰⁷ Practitioners should be prepared to counter arguments the U.S. government may make that there have been some advances in rights for lesbians and gay men over the past few years, including anti-discrimination laws and marriage equality in some parts of the country.²⁰⁸ There is more documentation of extreme violence towards transgender individuals in Mexico.²⁰⁹ The Transgender Law Center, in conjunction with Cornell Law School released a report on human rights abuses against Mexican transgender women, finding, among other things, that Mexico has the second highest rate of transphobic violence in Latin America.²¹⁰ Likewise, transgender asylum seekers have experienced extraordinary violence as a result of the United States' so-called Migrant Protection Protocols as they are forced to wait for U.S. hearings in Mexico.²¹¹ In many cases, it is easier to demonstrate that a transgender person will be singled out for persecution, making his or her claim based solely on well-founded fear somewhat stronger than those based on only sexual orientation.

C. El Salvador

With approximately 25,050 DACA recipients from El Salvador, it is a distant second to Mexico in sheer numbers.²¹² The Northern Triangle, which includes El Salvador, is one of the most dangerous

²⁰⁶ Center for Gender and Refugee Studies, *Mexico: Country Conditions Documentation Toolkit for Fear-of-Return Claims Based on Sexual Orientation and Gender Identity*, (Mar. 2018) available by request at cgrs.uchastings.edu/article/cgrs-releases-new-litigation-resources.

²⁰⁷ If there are additional factors that make the applicant's fear particularized, the case will be much stronger. These factors could include particularized threats to the individual or his or her family; political activism on behalf of the LGBT community; gender non-conformity; HIV-positive status; or other factors that might lead to the applicant being singled out. For useful information about HIV issues in Mexico see University of Toronto International Human Rights Program, *Unsafe and on the Margins: Canada's Response to Mexico's Mistreatment of Sexual Minorities and People Living with HIV* (2016), ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-UnsafeAndOnMargins2016.pdf.

²⁰⁸ DOS Human Rights Mexico, *supra* note 201, at 27.

²⁰⁹ *Id.* ("According to the OHCHR, in the first eight months of the year, there were 16 hate crime homicides in Veracruz, committed against nine transgender women and seven gay men.") See also, U.S. Department of State, 2016 Country Reports on Human Rights Practices – Mexico, at 31 (Apr. 7, 2017), state.gov/documents/organization/265812.pdf, "In October [2016] the press reported three killings of transgender individuals in the space of 13 days. NGOs stated transgender individuals faced discrimination and were marginalized even within the lesbian and gay community."

²¹⁰ Transgender Law Center, *Report on Human Rights Conditions of Transgender Women in Mexico* (May 27, 2016), transgenderlawcenter.org/wp-content/uploads/2016/05/CountryConditionsReport-FINAL.pdf.

²¹¹ Jaime Llera, *Con Tiro de Gracias Asesinan a Mujer Transexual en Cuauhtémoc*, LA PRENSA, Mar. 24, 2020, laprensa.com.mx/policiaca/con-tiro-de-gracias-asesinan-a-mujer-transexual-en-cuauhtemoc-5010126.html; *Matan a Mujer Trans de 8 Puñaladas en CDMX*, EL IMPARCIAL, Aug. 15, 2019, elimparcial.com/mexico/Matan-a-mujer-trans-de-8-punaladas-en-CDMX--20190815-0038.html; Carolina Romero, *El Riesgo de Ser Transexual en Mexico*, Oct. 15, 2018, EL UNIVERSAL, eluniversal.com.mx/nacion/el-riesgo-de-ser-transexual-en-mexico.

²¹² USCIS DACA Recipients *supra* note 5.

regions in the Western Hemisphere, both generally²¹³ and for LGBTI people specifically,²¹⁴ so there may be strong asylum claims available to Salvadoran LGBTI DACA recipients.

The U.S. Department of State Human Rights Report for 2019 states, “NGOs reported that public officials, including police, engaged in violence and discrimination against sexual minorities.”²¹⁵ Likewise a Canadian Immigration and Refugee Board Report found that Salvadoran police had failed to solve crimes against LGBTI people.²¹⁶ A report by Human Rights First found that Salvadoran police are often homophobic and that crimes against LGBTI people often go unreported.²¹⁷ Additionally, a report by the University of California Berkeley found that gangs often required new recruits to attack LGBTI individuals as part of their gang initiation process.²¹⁸ Despite LGBTI people being covered under hate crimes laws, there has not been a single conviction under this law for any murdered sexual minority²¹⁹ and according to one study, 67% of Salvadoran national police believe that LGBTI people do not have the same legal rights as other people.²²⁰ As with other Latin American countries, violence against transgender people is often particularly severe.²²¹

²¹³ Alan Gomez, *El Salvador: World’s New Murder Capital*, USA TODAY, Jan. 7, 2016, [usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/](https://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/).

²¹⁴ Kids in Need of Defense, *Neither Security nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala* (May 2017), supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf.

²¹⁵ U.S. Department of State, 2019 Country Reports on Human Rights Practices – El Salvador, at 22, (Mar. 11, 2020), [state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf).

²¹⁶ Canada: Immigration & Refugee Bd. of Canada, *El Salvador: Situation of Sexual Minorities, Including Treatment by Society and Authorities; Support Services and State Protection, Including Implementation of Anti-Discrimination Legislation* at 4, (2012-June 2014) (July 16, 2014), refworld.org/cgi-bin/txis/vtx/rwmain?page=printdoc&docid=53e492bb4.

²¹⁷ Human Rights First, *Bias-Motivated Violence Against LGBT People In El Salvador* (May 2016), [humanrightsfirst.org/sites/default/files/El-Salvador-Brief-ENG_0.pdf](https://www.humanrightsfirst.org/sites/default/files/El-Salvador-Brief-ENG_0.pdf).

²¹⁸ Univ. of Cal., Berkeley, Sch. of Law, Int’l Human Rights Law Clinic, *Sexual Diversity in El Salvador: A Report on the Human Rights Situation of the LGBT Community* (July 2012), [law.berkeley.edu/files/IHRLC/LGBT_Report_English_Final_120705.pdf](https://www.law.berkeley.edu/files/IHRLC/LGBT_Report_English_Final_120705.pdf).

²¹⁹ Cristian González Cabrera, Human Rights Watch, *Justice for LGBT Salvadorans Requires Reckoning with Hate No Hate Crime Conviction Despite Five Years of LGBT Murders Since Legislative Reform*, (Apr. 11, 2020) [hrw.org/news/2020/04/11/justice-lgbt-salvadorans-requires-reckoning-hate](https://www.hrw.org/news/2020/04/11/justice-lgbt-salvadorans-requires-reckoning-hate).

²²⁰ Red LAC, *The Impact of Violence on LGBTI People in the North of Central America*, at 8, (Sep. 2019), reliefweb.int/sites/reliefweb.int/files/resources/Protection%20Snapshot%206%20-%20English%20-%20September%202019.pdf [hereinafter “Red LAC report.”].

²²¹ See Jorge Beltran Luna, *Identifican a Mujer Trans Asesinada en Ciudad Delgado*, ELSALVADOR.COM, Jan. 19, 2020, [elsalvador.com/eldiariodehoy/identifican-a-mujer-trans-asesinada-en-ciudad-delgado/678374/2020/](https://www.elsalvador.com/eldiariodehoy/identifican-a-mujer-trans-asesinada-en-ciudad-delgado/678374/2020/); *El Salvador: Matan a Briyit Alas, Primer Asesinato a una Mujer Trans en 2020*, DW, Jan. 18, 2020, [dw.com/es/el-salvador-matan-a-briyit-alas-primer-asesinato-a-una-mujer-trans-en-2020/a-52056077](https://www.dw.com/es/el-salvador-matan-a-briyit-alas-primer-asesinato-a-una-mujer-trans-en-2020/a-52056077); *Preocupación por Asesinatos de Mujeres Trans en El Salvador*, 20 MINUTOS, Nov. 14, 2019, [20minutos.com/noticia/258662/0/preocupacion-n-por-asesinatos-mujeres-trans-salvador/](https://www.20minutos.com/noticia/258662/0/preocupacion-n-por-asesinatos-mujeres-trans-salvador/);

Jaime Lopez, *Mujer Trans Fue Asesinada y Luego Lanzada de Vehículo en el Bulevar Los Héroes*, ELSALVADOR.COM, Oct. 28, 2019, [elsalvador.com/eldiariodehoy/mujer-trans-fue-asesinada-y-luego-lanzada-de-vehiculo/653826/2019/](https://www.elsalvador.com/eldiariodehoy/mujer-trans-fue-asesinada-y-luego-lanzada-de-vehiculo/653826/2019/); Ernesto Valle, *Dos Mujeres Trans Asesinadas en El Salvador*, Washington Blade, Feb. 16, 2019,

D. Guatemala

There are roughly 16,970 DACA recipients from Guatemala.²²² Guatemala, like other Northern Triangle countries, is increasingly subject to violence and *de facto* control by gangs.

The U.S. Department of State Human Rights Report for 2019 states that “[a]ccording to LGBTI rights groups, gay and transgender individuals often experienced police abuse.”²²³ In Guatemala, as in El Salvador and Honduras, gender-based violence is common, and LGBTI individuals are particularly vulnerable to this violence.²²⁴ A report by the Inter-American Commission on Human Rights found that LGBTI people were subjected to assaults, and that Guatemala had an especially high rate of murders against transgender individuals.²²⁵ Guatemalans living with HIV are unlikely to receive life-saving medical care²²⁶ and often face discrimination and stigma.²²⁷ Likewise, transgender individuals are at particular risk of violent harm.²²⁸

[washingtonblade.com/2019/02/16/dos-mujeres-trans-asesinadas-en-el-salvador/](https://www.washingtonblade.com/2019/02/16/dos-mujeres-trans-asesinadas-en-el-salvador/); NGO Demands Justice for Three Transgender Women Killed in El Salvador This Week, TELESUR (Feb. 24, 2017), telesurtv.net/english/news/NGO-Demands-Justice-for-Transgender-Women-Killed-in-El-Salvador-20170224-0007.html; Amnesty International, *Life as a Transgender Woman in El Salvador: 'I Am Always Afraid'* (July 30, 2015),

[amnesty.org/en/latest/news/2015/07/ser-mujer-trans-en-el-salvador-tengo-miedo-constantemente/](https://www.amnesty.org/en/latest/news/2015/07/ser-mujer-trans-en-el-salvador-tengo-miedo-constantemente/); American University / CONCAVIS et al, *Human Rights Violations Against Transgender Persons in El Salvador*, (2015), [comcavis.org/sv/archivos/categorizados/85.pdf?1493090573](https://www.comcavis.org/sv/archivos/categorizados/85.pdf?1493090573); United Nations High Commissioner for Refugees, *Stabbed 58 times, Transgender Woman Flees El Salvador* (2015), [ecoi.net/local_link/316435/441352_en.html](https://www.ecoi.net/local_link/316435/441352_en.html).

²²² USCIS DACA Recipients *supra* note 5.

²²³ U.S. Department of State, 2019 Country Reports on Human Rights Practices – Guatemala, at 22, (Mar. 11, 2020), [state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf).

²²⁴ See Kids in Need of Defense, *Neither Security nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala* (May 2017), supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice-SGBV-Gang-Report-FINAL.pdf [hereinafter “KIND Neither Security nor Justice”]; University of Toronto Faculty of Law, International Human Rights Program, *Guatemala: Country Report for use in refugee claims based on persecution relating to sexual orientation and gender identity* (Nov. 29, 2010), ihrp.law.utoronto.ca/utfl_file/count/documents/Guatemala_SOGL_2010.pdf.

²²⁵ Inter-American Commission on Human Rights, Organization of American States, *Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion* (Dec. 31, 2015), [oas.org/en/iachr/reports/pdfs/Guatemala2016-en.pdf](https://www.oas.org/en/iachr/reports/pdfs/Guatemala2016-en.pdf).

²²⁶ Centers for Disease Control and Prevention, Guatemala (July 20, 2016), [cdc.gov/globalhivtb/where-we-work/guatemala/guatemala.html](https://www.cdc.gov/globalhivtb/where-we-work/guatemala/guatemala.html) (“37% Estimated percentage of adults living with HIV receiving antiretroviral treatment (ART) (2014)”).

²²⁷ Danilo Valladares, *Guatemala: Discrimination Undermines AIDS Prevention*, INTER PRESS SERVICE, Dec. 13, 2011, [ipsnews.net/2011/12/guatemala-discrimination-undermines-aids-prevention/](https://www.ipsnews.net/2011/12/guatemala-discrimination-undermines-aids-prevention/); UNAIDS, *HIV Prevention Hampered by Homophobia* (Jan. 13, 2009), [unaids.org/en/resources/presscentre/featurestories/2009/january/20090113msmlatam](https://www.unaids.org/en/resources/presscentre/featurestories/2009/january/20090113msmlatam).

²²⁸ Pilar Salazar, *Lapidaron a una Mujer Trans en Guatemala: Tenía 35 Años*, PRESENTES, Jan. 2, 2020, [agenciapresentes.org/2020/01/02/lapidaron-a-una-mujer-trans-en-guatemala-tenia-35-anos/](https://www.agenciapresentes.org/2020/01/02/lapidaron-a-una-mujer-trans-en-guatemala-tenia-35-anos/); Gladys Olmstead, *Madre de Joven Gay Asesinado: “Él Es una Reina y Como Reina Que Es, Quiero Justicia”*, NOMADA, Mar. 27, 2019, [nomada.gt/identidades/queer/madre-de-joven-gay-asesinado-el-es-una-reina-y-como-reina-que-es-quiero-justicia/](https://www.nomada.gt/identidades/queer/madre-de-joven-gay-asesinado-el-es-una-reina-y-como-reina-que-es-quiero-justicia/); Inter-American Commission on Human Rights, *IAHCR Condemns Murder of Trans Woman in*

E. Honduras

There are approximately 15,570 DACA recipients from Honduras.²²⁹ Until recently, Honduras was the “murder capital of the world.”²³⁰ Even after a slight drop in the murder rate, it remains an extremely dangerous country.

The U.S. Department of State Human Rights Report for 2019 describes “an increase in the number of killings of LGBTI persons during the year” with 92% of hate crimes against LGBTI people going unpunished.²³¹ Since 2014, there have been 164 documented murders of LGBTI people in Honduras.²³² The Honduran LGBTI community, like that of neighboring El Salvador and Guatemala, is uniquely vulnerable to gender-based violence and cannot count on the state for protection.²³³ The United Nations in Honduras has spoken out against the persecution and murder of LGBTI community members.²³⁴ The Inter-American Commission on Human Rights has also raised concerns about the violence against the LGBTI community.²³⁵ Both Human Rights Watch²³⁶ and Amnesty International²³⁷

Guatemala (Dec. 2, 2016), oas.org/en/iachr/media_center/PReleases/2016/181.asp; Organización Trans Reinas de la Noche, et al., *Human Rights Situation of Transvestite, Transgender and Transsexual Persons in Guatemala* (Aug. 2015), tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GTM/INT_CCPR_ICSGTM_21419_E.pdf; RED LACTRANS, et al., *The Night is Another Country: Impunity and Violence Against Transgender Women Human Rights Defenders in Latin America* (Oct. 12, 2012), redlactrans.org.ar/site/wp-content/uploads/2013/05/Violencia-e-impunidad-English1.pdf (out of 35 transgender people murdered, only one perpetrator was brought to justice); Human Rights Watch, *Guatemala: Mujeres transgénero se enfrentan a atentados mortales*, (Feb. 20, 2006), hrw.org/es/news/2006/02/20/guatemala-mujeres-transgenero-se-enfrentan-atentados-mortales.

²²⁹ USCIS DACA Recipients *supra* note 5.

²³⁰ Carrie Kahn, *Honduras Claims Unwanted Title Of World’s Murder Capital*, NPR, (June 12, 2013), [npr.org/sections/parallels/2013/06/13/190683502/honduras-claims-unwanted-title-of-worlds-murder-capital](https://www.npr.org/sections/parallels/2013/06/13/190683502/honduras-claims-unwanted-title-of-worlds-murder-capital).

²³¹ U.S. Department of State, 2019 Country Reports on Human Rights Practices – Honduras, at 19, (Mar. 11, 2020), [state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf).

²³² Red LAC report, *supra* note 220, at 6. Since 2009, there have been at least 325 LGBTI people murdered in Honduras. *Al Menos 325 Personas LGBTI Asesinadas en Honduras Desde 2009*, DW, Jul. 15, 2019, <https://www.dw.com/es/al-menos-325-personas-lgbti-asesinadas-en-honduras-desde-2009/a-49590145>.

²³³ KIND Neither Security nor Justice, *supra* note 224; Research Directorate, Immigration and Refugee Bd. of Canada, *Honduras: Treatment of Sexual Minorities, Including Legislation; State Protection and Support Services Available* (Nov. 28, 2013), [justice.gc.ca/sites/default/files/eoir/legacy/2014/02/04/HND104661.E.pdf](https://www.justice.gc.ca/sites/default/files/eoir/legacy/2014/02/04/HND104661.E.pdf).

²³⁴ United Nations in Honduras, *Comunicado Sobre Asesinatos de Personas LGBTI* (June 8, 2016), [hn.one.un.org/content/unct/honduras/es/home/presscenter/comunicado-asesinatos-lgbti.html](https://www.hn.one.un.org/content/unct/honduras/es/home/presscenter/comunicado-asesinatos-lgbti.html).

²³⁵ Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras* (2015), [oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf](https://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf).

²³⁶ Human Rights Watch, *World Report, 2018 (Honduras)* (Jan. 18, 2018), [hrw.org/world-report/2018/country-chapters/honduras](https://www.hrw.org/world-report/2018/country-chapters/honduras).

²³⁷ Amnesty International, *Honduras 2017/2018* (Feb. 22, 2018), [amnesty.org/en/countries/americas/honduras/report-honduras/](https://www.amnesty.org/en/countries/americas/honduras/report-honduras/); Amnesty International, *Honduras 2016/2017* (Feb. 22, 2017), [refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=58b033f318](https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=58b033f318).

have issued recent reports on the extreme danger faced by LGBTI individuals in Honduras. Transgender women are especially vulnerable to physical violence.²³⁸

F. Peru

There are approximately 6,360 DACA recipients from Peru.²³⁹ While there are fewer DACA recipients and asylum applicants from Peru than from Mexico and Central America, there are viable LGBTI asylum claims for Peruvian nationals.

The U.S. Department of State Human Rights Report for 2019 noted that, “NGO studies revealed that law enforcement authorities repeatedly failed to protect, and on occasion violated, the rights of LGBTI citizens.”²⁴⁰ Amnesty International also found ongoing violence against people in Peru based on sexual orientation and gender identity.²⁴¹ Additionally, there are other reports of ongoing violence against LGBTI people in Peru.²⁴² As in many countries throughout the world, transgender

²³⁸ See Red LAC Report, *supra* note 220 at 6. 60% of transgender Hondurans responded to a poll that they had suffered physical violence in Honduras. See also *En Menos de 48 Horas Matan a Dos Mujeres Trans*, EL PULSO, Jul. 9, 2019, elpulso.hn/en-menos-de-48-horas-matan-a-dos-mujeres-trans/; Emily Padilla, *Asesinaron a la Activista Trans Bessy Ferrera: Quinto Crimen de Odio en la Semana*, AGENCIA PRESENTES, Jul. 9, 2019, agenciapresentes.org/2019/07/09/asesinaron-a-la-activista-trans-hondurena-bessy-ferrera-cuarto-crimen-de-odio-en-la-semana/; *Matan a Estudiante Transexual de la Pedagogica*, EL HERALDO, June 26, 2015, elheraldo.hn/sucesos/853139-219/matan-a-estudiante-transexual-de-la-pedag%C3%B3gica.

²³⁹ USCIS DACA Recipients *supra* note 5.

²⁴⁰ U.S. Department of State, 2019 Country Reports on Human Rights Practices – Peru, at 19 (Mar. 11, 2020), [state.gov/wp-content/uploads/2020/02/PERU-2019-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2020/02/PERU-2019-HUMAN-RIGHTS-REPORT.pdf).

²⁴¹ Amnesty International, *Peru 2017/2018* (2018), <https://www.amnesty.org/en/countries/americas/peru/report-peru/>.

²⁴² Vero Ferrari, *El Estado es el Principal Agente de Violencia a LGBT+ en Perú*, Agencia Presentes, Sep. 17, 2019, agenciapresentes.org/2019/09/17/el-estado-es-el-principal-agente-de-violencia-a-lgbt-en-peru/; Graciela Tiburcio Loayza, *Historias de Tortura: Crímenes de Odio Contra Personas LGTBIQ en Perú*, Wakya.pe, Aug. 29, 2019, wayka.pe/historias-de-tortura-crimenes-de-odio-contra-personas-lgtbiq-en-peru/; *Comunidad LGBTI: 5.411 Afirman Haber Sufrido Discriminación y Violencia*, EL COMERCIO, Mar. 28, 2018, elcomercio.pe/peru/comunidad-lgbti-5-411-afirman-haber-sufrido-discriminacion-violencia-noticia-508041; *Perú Registra 16 Crímenes de Odio Contra LGBT en 2016*, TELESUR, Sept. 21, 2017, telesurtv.net/news/Peru-registra-16-crimenes-de-odio-contra-LGBT-en-2016-20170921-0077.html; Steven Davy, *These Photos Show the Courage and Tragedy of LGBTQ Life in Peru*, WGBH News, Feb. 21, 2017, news.wgbh.org/2017/02/21/these-photos-show-courage-and-tragedy-lgbtq-life-peru (“if you are gay or trans, or, if you are a part of the LGBTQ community in my country and something bad happens to you, [and] you go to the police they do not even pay attention to you.”); *Más del 70% de Estudiantes LGBT en el Perú Son Acosados en sus Colegios*, LA REPUBLICA, Aug. 16, 2016, larepublica.pe/sociedad/794667-mas-del-70-de-estudiantes-lgbt-en-el-peru-son-acosados-en-sus-colegios; *Ser Homosexual y Transexual en el Perú*, LOS ANDES, Sept. 20, 2015, losandes.com.pe/Sociedad/20150920/91532.html; *Sin Etiquetas, Violencia LGBT en Perú: Conoce a los Perpetradores de Violencia* (May, 18, 2015), sinetiquetas.org/2015/05/18/violencia-lgbt-en-peru-conoce-a-los-perpetradores-de-violencia/; Janet Arelis Quezada, *Deadly Homophobia and Transphobia Take Victims in Perú and Brazil*, GLAAD, Feb. 13, 2015, glaad.org/blog/deadly-homophobia-and-transphobia-take-victims-peru-and-brazil; *El 90% de la Población LGTB de Lima Metropolitana Ha Sido Víctima de Violencia*, GESTIÓN, Feb. 10, 2015, gestion.pe/peru/politica/90-poblacion-lgtb-lima-metropolitana-sido-victima-violencia-76488;

people are at particular risk for abuse and violence.²⁴³ Despite some gains in HIV treatment,²⁴⁴ medications remain expensive and potentially unattainable for those who need them.²⁴⁵ HIV-positive women face particular stigma, largely because the virus is associated with “immoral” behavior.²⁴⁶

VII. Conclusion

As the future of DACA recipients remains uncertain, practitioners who work with DACA recipients should explore permanent relief options for this vulnerable population. Practitioners should consider that some DACA recipients may be LGBTI and should determine based on the specific facts and country of origin whether the individual’s LGBTI identity can form the basis for an asylum, withholding of removal, or CAT claim. LGBTI DACA recipients from the top five DACA countries may have strong asylum, withholding of removal, or CAT claims in light of the country conditions.

Dan Littauer,,*Peru Gay Man Tortured, Dismembered and Burned to Death*, THE HUFFINGTON POST UNITED KINGDOM, June 12, 2013, huffingtonpost.co.uk/dan-littauer/peru-gay-man-tortured-dis_b_4399107.html.

²⁴³ *Asesinan a Mujer Trans en Lima y Denuncian Inacción de Serenazgo*, PRESENTES, Feb. 25, 2020, agenciapresentes.org/2020/02/25/asesinan-a-mujer-trans-en-lima-y-denuncian-inaccion-de-serenazgo/; *Asesinan a Activista Transexual que Promovía la Prevención del VIH en Perú*, NEWSWEEK ESPAÑOL, Apr. 2, 2019, newsweekespanol.com/2019/04/asesinan-activista-transexual-vih-peru/; ONUSIDA, *Reportaje: Las Injusticias a las que se Enfrentan las Mujeres Transgénero en Perú* (Apr. 26, 2018), unaids.org/es/resources/presscentre/featurestories/2018/april/injustices-faced-by-transgender-women-in-peru; *La Violencia en la Piel de las Trabajadoras Sexuales Trans*, EL COMERCIO, Oct. 9, 2017, elcomercio.pe/lima/sucesos/violencia-piel-trabajadoras-sexuales-trans-noticia-464206.

²⁴⁴ UNAIDS, *Peru* (2016), unaids.org/en/regionscountries/countries/peru.

²⁴⁵ *People Living with HIV in Peru Protest Against High Treatment Prices*, AVERT, Jan. 23, 2015 avert.org/news/people-living-hiv-peru-protest-against-high-treatment-prices.

²⁴⁶ National Library of Medicine, National Institutes of Health, *Women’s Experiences with HIV-Related Stigma from Healthcare Providers in Lima, Peru: “I Would Rather Die Than Go Back For Care”* (Aug. 2, 2016), ncbi.nlm.nih.gov/pmc/articles/PMC5586036/.



The Catholic Legal Immigration Network, Inc., or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 375 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC’s BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP’s primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist practitioners; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program’s initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on the Supreme Court’s decision in *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020), a practice pointer on refreshing recollection in immigration court, a practice advisory on strategies and considerations in light of the Supreme Court’s decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client’s release from immigration detention, an article in Spanish and English on how to get back one’s immigration bond money, and a report entitled “Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court.” These resources and others are available on the [DVP webpage](#).