

DETAINED

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT**

In the Matter of:)	Respondent's Brief on Changed and Extraordinary
)	Circumstances Exceptions to One-Year Filing
)	Deadline for Asylum
XXXXXXXXXXXXXXXXXXXXX)	
(AKA:XXXXXXX))	File No: XXXXXXXX
)	
)	Next Hearing: XXXXXXXX
In Removal Proceedings)	The Hon. XXXXXXXX
)	

INTRODUCTION

Counsel respectfully submits this brief in support of the Respondent's application for asylum on the issue of the applicability of the changed circumstances exception to the one-year filing deadline for asylum. The Respondent's changed circumstances stem from the heightened danger of transphobic and homophobic violence he faces after 1) he took steps to visibly transition his appearance and body making him immediately identifiable as a transgender man, and 2) numerous news outlets published photos and identifying information of the Respondent identifying him as a member of the lesbian, gay, bisexual, and transgender ("LGBT") community. In light of these changed circumstances, the Respondent will be at a substantially greater risk of persecution based on his gender identity or perceived sexual orientation if he is removed to Mexico.

Additionally, Counsel respectfully submits this brief in support of the Respondent's application for asylum on the issue of the applicability of the exception to the one-year filing deadline due to extraordinary circumstances related to the Respondent's severe depression that prevented him from filing for asylum prior to these removal proceedings. Additional extraordinary circumstances that contributed to the Respondent's depression include 1) being the victim of sexual assault at the hands of a Mexican community member days before entering the U.S., 2) the resulting pregnancy from the rape and the subsequent abortion terminating the pregnancy, and 3) experiencing rape again within the first year of entering the U.S. Taken together, the Respondent's depression, with these exacerbating factors, warrant an extraordinary circumstances exception to the one year filing deadline.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Respondent is a transgender man and a citizen of Mexico. Previously, he was perceived to be a lesbian woman. In Mexico, transphobic and homophobic community members beat and verbally abused the Respondent, threatened with death and corrective rape, and targeted and almost raped by a Mexican community member on account of his gender identity and perceived sexual orientation.¹ As a result of this persecution, the Respondent fled Mexico for the United States and entered without inspection on or around [REDACTED] 2002.² Since then, the Respondent has never returned to Mexico. Days before entering the United States, the Respondent was targeted and raped by a Mexican community member on account of his gender identity or perceived sexual orientation.³ Soon after arriving in the U.S., the Respondent

¹ See, The Respondent's Supplement to Declaration, generally.

² See, The Respondent's submitted I-589, Application for Asylum, Withholding of Removal, and both Withholding and Deferral of Removal under the Convention Against Torture.

³ See, The Respondent's Supplement to Declaration at 21.

discovered he was pregnant as a result of the rape and terminated the pregnancy.⁴ Following the trauma of rape, the resulting pregnancy, and subsequent abortion, the Respondent sunk into a deep depression.⁵ Less than a year after arriving in the U.S., the Respondent was again raped after incapacitating drugs were added to his beverage, without the Respondent's knowledge.⁶ Following this second incident of sexual assault within a year, the Respondent's already severe depression worsened.⁷ The Respondent did not seek mental health services because he believed it would not only place him at risk for deportation but was also a resource not available to him due to his immigration status.⁸

On [REDACTED] 2014, the Respondent was arrested and later indicted in [REDACTED] New Jersey for the offense of Cruelty and Neglect of Children, N.J.A.A. 9:6-3, a fourth degree offense.⁹ The Respondent is accused of failing to report excessive corporal punishment.¹⁰ Following the Respondent's arrest, multiple online news articles were published, in both Spanish and English, reporting the allegations against both the Respondent and his girlfriend. The news articles refer to the Respondent by his legal name, display his police line-up photo, use female pronouns, and clearly state that he and his girlfriend are romantically involved.¹¹ In addition to written news reports, the pending criminal case was similarly reported on Telemundo, a Spanish language network broadcast throughout Mexico.¹²

⁴ See, The Respondent's Supplement to Declaration at 22. See also, Copy of the Respondent's medical records from [REDACTED], at 51.

⁵ See, The Respondent's Supplement to Declaration at 22.

⁶ *Id.* at 23.

⁷ *Id.* at 24.

⁸ *Id.*

⁹ See, The Respondent's submitted I-589, Application for Asylum, Withholding of Removal, and both Withholding and Deferral of Removal under the Convention Against Torture.

¹⁰ See, The Respondent's Supplement to Declaration at 28.

¹¹ See, News articles Regarding the Respondent's sole arrest in the United States at 116, Evidentiary Submission dated [REDACTED] 2016.

¹² *Id.*

After being released without bond from criminal detention, the Respondent was placed in Immigration and Customs Enforcement (“ICE”) custody at [REDACTED] Correctional Facility. While in detention, the Respondent retained his current pro bono counsel, who filed an I-589 application for relief on the Respondent’s behalf at a Master Calendar Hearing on [REDACTED] 2015.

ARGUMENT

I. The Respondent Experienced Changed Circumstances that Excuse His Delay in Filing for Asylum.

While asylum applications must generally be filed within one year of an applicant’s arrival in the United States, the Immigration and Nationality Act (“INA”) includes an exception to this rule for “changed circumstances...which materially affect the applicant’s eligibility for asylum.”¹³ Further, evidence of “activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk” may qualify as an exception to the one year filing deadline.¹⁴

A. The Respondent’s Gender Transition Constitutes Changed Circumstances Excusing His Delay in Filing for Asylum Within One Year of His Arrival in the United States.

The Respondent’s gender transition constitutes “changed circumstances” that warrant an exception to the one year filing deadline. The United States Citizenship and Immigration Services (“USCIS”) Lesbian Gay Bisexual and Transgender (“LGBT”) Asylum Training Module provides persuasive guidance that recent steps taken to transition to a corrected gender can constitute changed circumstances. In pertinent part, the training module indicates that:

¹³ INA § 208(a)(2)(D).

¹⁴ 8 CFR §1208.4 (a)(4)(B).

[T]ransitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer “pass” as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to “pass” as male.¹⁵

The Respondent has taken numerous steps to transition to life as a man since coming to the United States, when he ultimately came to acknowledge and embrace his gender identity. Since arriving in the United States, the Respondent began wearing exclusively men’s clothing along with the short hair he considers masculinizing.¹⁶ He began using the name “XXXX” and male pronouns to refer to himself in his everyday life.¹⁷ Additionally, the Respondent has taken preliminary steps necessary to begin a course of hormone therapy treatment to further visibly change his body, including scheduling an appointment with a medical provider to assess his psychosocial and medical state and receive a recommendation to begin hormone therapy.¹⁸

Because the Respondent has taken steps that visibly transformed his appearance and his body, the Respondent is immediately identifiable as a transgender man, and is at an increased risk of persecution in Mexico. This court should find that the Respondent’s gender transition constitutes fundamentally changed personal circumstances, as an integral component of his transgender identity that he cannot or should not change.¹⁹

¹⁵ USCIS LGBT Asylum Training Module, Page 62. Available at: <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Asylum%20Native%20Document%20and%20Static%20Files/RAIO-Training-March-2012.pdf>.

¹⁶ See generally, Respondent’s Supplement to declaration

¹⁷ *Id.*

¹⁸ See, letter from Jessica Contreras, Project Manager at the Transgender Family Program at Community Healthcare Network, detailing consultation with the Respondent on January 5, 2016, including the Respondent’s expressed interest in beginning hormone therapy and scheduling an appointment to meet with a medical provider on February 22, 2016 to assess hormone therapy options.

¹⁹ See, *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (Holding that “[W]hatever the common characteristic... it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”).

i. The Respondent Applied for Asylum Within a Reasonable Period of Time After his Changed Circumstances.

The Board of Immigration Appeals has read 8 CFR § 1208.4(a)(4)(ii) to mean that the particular circumstances related to delays in filing an asylum application must be evaluated to determine whether the application was filed “within a reasonable period given those ‘changed circumstances.’”²⁰

As explained in the USCIS LGBT Asylum Training Module, transitioning is a process that can take many steps.²¹ The Respondent’s transition took place over the period of time in which he has been living in the U.S., as he has simultaneously come to terms with his gender identity and struggled with severe depression.²² He has since taken all opportunities to transition that he believed were available to him, such as clothing preferences and breast binding, to visibly align his external appearance to better reflect his gender identity. With increased access to literature about gender identity, the Respondent has recently been made aware of affordable access to medical treatments, such as hormone therapy, to further his transition. Almost immediately after he was made aware of these services, the Respondent scheduled an appointment with a qualified medical provider to begin the process of qualifying for hormone therapy.²³

As a result of his gradual transition to live his life openly as a man, the Respondent has begun to find that people, including fellow detainees, increasingly identify him as a transgender

²⁰ *Matter of T-M-H- & S-W-C*, 25 I.& N. Dec. 193 (BIA 2010).

²¹ USCIS LGBT Asylum Training Module, Page 62

²² See generally, Respondent’s Supplement to declaration.

²³ See, letter from [REDACTED], Project Manager at [REDACTED], detailing consultation with the Respondent on [REDACTED] 2016, including the Respondent’s expressed interest in beginning hormone therapy and scheduling an appointment to meet with a medical provider on [REDACTED] 2016 to assess hormone therapy options.

man, despite not having initially disclosed his identity as a transgender man.²⁴ Given the Respondent's limited access to affordable medical care, his limited English fluency, and his gradual transition due to these obstacles, the time from the changed circumstances and the filing of the asylum application are reasonable.

B. The Recent Publication of The Respondent's Pending Criminal Matter Qualifies as a Changed Circumstances Exception Because it Resulted in the Widespread Publication of Membership of the LGBT Community in Mexico.

The Code of Federal Regulations provides that "activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk" may qualify as an exception to the one year filing deadline.²⁵ The United States Citizenship and Immigration Services ("USCIS") Lesbian Gay Bisexual and Transgender ("LGBT") Asylum Training Module provides persuasive guidance as to Respondent's eligibility for a changed circumstances exception to the one-year filing deadline. The training module provides that public disclosure of an individual's sexual orientation, or "coming out of the closet," can constitute changed circumstances. In pertinent part, the module provides:

In many instances an individual does not "come out" as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently "come out" this may qualify as an exception to the one-year filing deadline based on changed circumstances.²⁶

The Respondent's situation is analogous to the "coming out" example given in the training module. The Respondent's pending criminal record resulted in numerous online news outlet publications, both in English and in Spanish, identifying the Respondent by his legal

²⁴ See, The Respondent's Supplement to Declaration at 27.

²⁵ 8 CFR § 1208.4 (a)(4)(i).

²⁶ USCIS LGBT Asylum Training Module, Page 48. Available at: <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>.

name, police line-up photo, and identifying him as a female cohabiting and involved in a romantic relationship with another woman.²⁷ In addition, the Respondent's pending criminal case was also featured in the Spanish language channel, "Telemundo" in the popular new show "Al Vivo Rojo", which is broadcast throughout all of Mexico.²⁸ Now that this publication has occurred, he has at greater risk of harm than had he been outed as an ordinary Mexican member of the LGBT community because of the infamous nature of the criminal proceedings concerning child abuse.

Previously, the Respondent had been at least partially able to evade anti-LGBT violence in Mexico by keeping his gender orientation a secret. However, the publication of definitive evidence of the Respondent's membership in the LGBT community on a widely watched new channel and numerous online articles has now made it impossible for the Respondent to conceal his gender identity or perceived sexual orientation from the Mexican community at large. Consequently, his removal would place him at a substantially increased risk of transphobic and homophobic violence and persecution in Mexico. Even assuming *arguendo* this court finds that the Respondent's would somehow be able to keep secret the fact that he is a transgender man, he remains eligible for asylum as his gender identity is an integral component of his identity that he cannot or should not change or be forced to hide.²⁹

Because the Respondent's appearance on numerous news outlets concerning his pending criminal matter amounted to a publication of his membership in the LGBT community among his community members in Mexico, his removal would entail an increased risk of persecution. Therefore, he merits a changed circumstances exception to the one-year filing deadline.

²⁷ See, News Items regarding the Respondent's sole arrest in the United States at 116

²⁸ *Id.*

²⁹ See, *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (Holding that "[W]hatever the common characteristic... it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.").

i. The Respondent Applied for Asylum Within a Reasonable Period of Time After his Changed Circumstances.

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Here, the Respondent filed his application for asylum at his Master Calendar Hearing on [REDACTED] 2015. The evidentiary record demonstrates that the publications outing the Respondent as a member of the LGBT community were published in [REDACTED] 2015.³¹ The Respondent’s [REDACTED] delay in filing for asylum after these life-changing publications is reasonable given the circumstances. Respondent was detained in criminal custody following his arrest on [REDACTED] 2014, and was still in criminal custody during the time in which the numerous publications took place. After discovering from family members in Mexico that his pending criminal case was featured in a new segment that was broadcast nationally in Mexico, the Respondent was incapable of appearing for an affirmative asylum interview.³² He was focused on his pending criminal matter, and so should not have been expected to be gathering evidence for an affirmative asylum application at that time. The Department of Homeland Security initiated these proceedings with a Notice to Appear dated [REDACTED] 2012.³³ The Respondent filed his asylum application four months after the issuance of the NTA. Given the Respondent’s

³⁰ *Matter of T-M-H- & S-W-C*, 25 I.& N. Dec. 193 (BIA 2010).

³¹ See, News Items regarding the Respondent’s sole arrest in the United States at 116

³² See, The Respondent’s Supplement to Declaration at 30.

³³ See, Notice to Appear, dated [REDACTED] 2012.

continuous status in custody, and his non-fluency in English, the time from the changed circumstances and the filing of the asylum application is reasonable.

II. The Respondent Experienced Exceptional Circumstances that Excuse His Delay in Filing for Asylum.

While asylum applications must generally be filed within one year of an applicant's arrival in the United States, the Immigration and Nationality Act ("INA") includes an exception to this rule for "extraordinary circumstances."³⁴ To qualify for this exception, the applicant must establish that his extraordinary circumstances were present during his first year in the United States, were not intentionally created by the applicant, directly relate to the applicant's delay in filing and that the delay was reasonable under the circumstances.³⁵ While not a binding authority on this court, the Asylum Officer's Basic Training Course ("AOBTC") provides guidance and instructs adjudicators to be "flexible and inclusive" when analyzing an extraordinary circumstances claim.³⁶

In the instant case, the Respondent has demonstrated "extraordinary circumstances" warranting an exception to the one-year filing deadline because he experienced severe depression on account of being sexually assaulted days before entering the U.S., the trauma caused by the resulting pregnancy and subsequent abortion, and the second incident of sexual abuse in the U.S. within the first year of entering.

A. The Respondent's Depression, Sexual Abuse, and Abortion Constitutes Extraordinary Circumstances.

³⁴ INA, 8 U.S.C. § 1158(a)(2)(D), 8 C.F.R. § 208.4(a)(5).

³⁵ 8 CFR § 208.4(a)(5).

³⁶ One Year AOBTTC, Immigration Officer Academy, November 30, 2001, at 15 (hereinafter, "One Year AOBTTC Materials").

The extraordinary circumstances exception to the one-year filing deadline includes “[s]erious illness or mental or physical disability, including any effect of persecution or violent harm suffered in the past, during the 1-year period after arrival.”³⁷ The Respondent experienced serious mental disability within the first year of arrival to the U.S. The Respondent reports suffering from severe depression, including efforts to avoid thoughts or feelings relating to his past persecution in Mexico and the trauma he experienced once in the U.S.³⁸ In addition, he states that his depression resulted in prolonged feelings of detachment or estrangement from others, and difficulty sleeping.³⁹

The Respondent’s struggle with severe depression, which was exasperated by sexual abuse and pregnancy, are extraordinary circumstances that reasonably prevented him from filing for asylum within the first year of his arrival. Even now, the Respondent still experiences great difficulty discussing his past persecution and fear of future persecution as a result of his traumatic experiences and resulting depression.⁴⁰

C. The Respondent’s Depression Existed During His First Year in the United States.

To qualify as an exception to the one-year filing deadline for asylum, 8 CFR § 208.4(a)(5)(i) includes a temporal requirement that the extraordinary circumstances be present during the 1-year period after arrival. Because he fled Mexico for the United States in 2002 immediately following a threat on his life by homophobic and transphobic community members

³⁷ 8 CFR § 208.4(a)(5)(i).

³⁸ See, The Respondent’s Supplement to Declaration at 24.

See also, Copy of The Respondent’s [REDACTED] Medical Records, Mental Health Progress Report at 57, noting that the Respondent “states that [he has been writing down [his] life story as part of [his] INS case and it has brought back a lot of difficult memories regarding [his] past.”

³⁹ See, The Respondent’s Supplement to Declaration at 24.

⁴⁰ See, Copy of The Respondent’s [REDACTED] Medical Records, Mental Health Progress Report at 57, noting that the Respondent “appears to be reliving [his] past as [he] writes it down causing [him] to feel depressed.”

and sexual assault at the hands of a coyote before arriving to the U.S., the Respondent's symptoms were certainly present during his first year in the United States. Additionally, the Respondent became pregnant as a result of the sexual assault, a particularly traumatic experience for the Respondent not only because of the sexual assault but because of the traumatic experience of a nonconsensual pregnancy as a transgender man. The Respondent terminated the pregnancy on [REDACTED] 2002⁴¹, resulting in another traumatic experience.⁴² Less than a year after arriving, the Respondent was again a victim of sexual assault.⁴³

D. The Respondent Did Not Intentionally Create His Extraordinary Circumstances.

The Code of Federal Regulations states that a respondent must establish that the extraordinary circumstances were not of his own creation.⁴⁴ In this case, the Respondent was the subject of violent abuse and persecution that resulted in severe depression. Respondent did not intentionally create a stigma against his personal traits and gender identity. He did not choose to be transgender, he did not choose an intolerant family and he did not deliberately provoke the physical and sexual attacks against himself.⁴⁵ The Respondent's mental disability is a function of the intolerable conditions in Mexico and sexual assault in the U.S. that injured his mental well-being.⁴⁶

⁴¹ See, Copy of the Respondent's Medical Records [REDACTED], providing details of the termination of the Respondent's pregnancy shortly after arriving to the U.S.

⁴² See, The Respondent's Supplement to the Declaration at 22

⁴³ *Id.* at 23

⁴⁴ 8 CFR § 208.4(a)(5).

⁴⁵ See generally, the Respondent's declaration.

⁴⁶ See, generally, Declaration of Dr. [REDACTED] D., submitted in support of the Respondent's application for asylum, withholding of removal and relief under the Convention Against Torture

E. The Respondent's Depression Directly Prevented him From Filing for Asylum Until Now.

The extraordinary circumstances exception to the one-year filing deadline requires the respondent to establish that his circumstances directly delayed his filing for asylum.⁴⁷ With the exception of very few people, the Respondent was unable to discuss with anyone the emotionally scarring events of his life in Mexico or those which he suffered once he arrived in the U.S. His depression directly prevented him from receiving emotional support, learning about asylum, or asking for help obtaining legal status.

Respectfully submitted,

Date

⁴⁷ 8 CFR § 208.4(a)(5).