

IMMIGRATION RELIEF FOR DACA RECIPIENTS BASED ON FEAR OF RETURN

CGRS Practice Advisory
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Kevin Lamarque/Reuters

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Please note that this advisory is provided for general purposes only. Information presented does not constitute legal advice. Although we strive to provide up-to-date information to the greatest extent possible, legal service providers should conduct their own independent research and analysis to ensure current and situation-specific assessments. Individuals without an attorney should consult with one.

Introduction

The Trump Administration's decision on September 5, 2017 to rescind the Deferred Action for Childhood Arrivals (DACA) program casts uncertainty on the future of the approximately 800,000 individuals DACA has protected and places them at potential risk of removal to countries where they may face danger. This practice advisory is designed to help legal service providers screen former and current DACA recipients for eligibility for asylum and related humanitarian relief based on potential fear of return to their countries of origin. Some DACA recipients may have initially applied for DACA without receiving a comprehensive screening for other immigration options. Other recipients may have more recently become fearful of return to their countries of origin due to changes in country conditions or their personal circumstances. With litigation on the rescission of DACA and legislation on a permanent solution for DACA recipients still pending as of the time of writing, asylum and related relief may be a primary pathway to secure lawful status for many DACA recipients.¹

Part I of this advisory provides an overview of: the current status and implications of the rescission of the DACA program; the U.S. immigration system as relevant to applicants for asylum and related relief; and common asylum claims and conditions in the top four countries of birth of DACA recipients (Mexico, El Salvador, Guatemala, and Honduras). Part II discusses eligibility requirements for asylum, withholding of removal, and protection under the Convention Against Torture (CAT) and special considerations for DACA recipients, including overcoming the one-year filing deadline for asylum applications and addressing any prior orders of removal from the United States.

The Appendix provides a list of relevant resources for service providers working with DACA recipients, including some recommended guides on general asylum law and directories of immigration attorneys. For attorneys representing applicants for asylum and related forms of relief, the Center for Gender & Refugee Studies (CGRS) also provides resource materials and consultations tailored to the facts of each case. Further information on our technical assistance program is included in the Appendix and at <http://cgrs.uchastings.edu/assistance>.

¹ For other potential forms of relief for DACA recipients, see Center for Human Rights & Constitutional Law, *DACA Legal Services Toolkit* (Dec. 2017), available at <https://www.houstonimmigration.org/policy/#DACA>, and American Immigration Council, *Screening Potential DACA Requestors for Other Forms of Relief* (Sept. 5, 2017), available at https://www.americanimmigrationcouncil.org/practice_advisory/screening-potential-daca-requestors-other-forms-relief.

Part I: Status of the September 5, 2017 Rescission of the DACA Program and Current Conditions in the Primary Countries of Origin of DACA Recipients

A. Status and Implications of the September 5, 2017 Rescission of DACA

The Obama Administration established the DACA program in 2012 as a form of temporary protection from removal for young undocumented immigrants who came to the United States before the age of 16 and met certain other requirements.² Eligible applicants received DACA initially for a period of two years, with the option of renewals in two-year increments.

On September 5, 2017, the Trump Administration rescinded the DACA program and announced a “wind down” of DACA for current recipients. Accordingly, after September 5, 2017, U.S. Citizenship and Immigration Services (USCIS) stopped accepting first-time applications from those who had never before received DACA. Under this decision, USCIS would continue to accept DACA renewal applications until October 5, 2017 from current recipients whose DACA expired between September 5, 2017 and March 5, 2018, but would not accept renewal applications from those whose DACA expired before September 5, 2017 or would expire after March 5, 2018. Those DACA recipients who were not eligible to renew, or who were eligible but missed the October 5, 2017 deadline, were to have DACA until the expiration date on their current DACA approval notice and employment authorization document (also known as “work permit”).

On January 9, 2018, in the case *Regents of the University of California v. Department of Homeland Security*, the U.S. District Court for the Northern District of California ordered a preliminary injunction which temporarily halted the Trump Administration’s rescission of the DACA program pending a final determination as to whether or not the rescission was unlawful. Under this order, the U.S. government must continue to accept DACA renewal applications, including from individuals whose DACA expired before September 5, 2017, those whose DACA will expire after March 5, 2018, and those with DACA expiring between September 5, 2017 and March 5, 2018 who missed the October 5, 2017 deadline for renewals or had their renewal applications rejected due to clerical errors. Subsequently, on January 13, 2018, USCIS issued guidelines on how it will process DACA renewal applications. In addition, on February 13, 2018, in *Batalla Vidal v. Nielsen*, the U.S. District Court for the Eastern District of New York issued another preliminary injunction similar in scope to that issued in *Regents of the University of California*. However, neither District Court required the U.S. government to accept new first-time applications, and

² These requirements were: being under the age of thirty-one as of June 15, 2012; continuous residence in the United States since June 15, 2007; physical presence in the United States on June 15, 2012 and at the time of DACA application; being in school, having graduated or obtained a General Educational Development (GED) certificate, or being an honorably discharged veteran of the U.S. Armed Forces; and not having a conviction for a felony, a significant misdemeanor, or three or more other misdemeanors and not otherwise posing a threat to national security or public safety. U.S. Citizenship & Immigration Services (USCIS), *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> (last reviewed/updated Feb. 14, 2018).

USCIS, the agency adjudicating DACA applications, has confirmed on its website that it is “not accepting requests from individuals who have never before been granted deferred action under DACA.”³

It is important to note that the District Courts’ preliminary injunctions do not permanently stop the U.S. government’s rescission of DACA and that a higher court may block the preliminary injunction on appeal.⁴ Therefore, the current DACA renewal process may only exist for a limited time, and DACA recipients may be at risk of immigration enforcement when their DACA expires. Although USCIS has noted that it will not, except in certain circumstances, proactively refer DACA recipients to Immigration and Customs Enforcement (ICE), the agency charged with immigration enforcement in the U.S. interior, or to Customs and Border Protection (CBP), the agency charged with immigration enforcement at the U.S. border and U.S. ports of entry,⁵ ICE may nonetheless target DACA recipients after their DACA expires under the enforcement priorities noted in President Trump’s January 25, 2017 Executive Order on Enhancing Public Safety in the Interior of the United States and its February 20, 2017 implementing memo. Under these enforcement priorities, individuals with orders of removal or criminal convictions (even if disclosed at the time of the initial DACA application) are at particularly high risk of ICE arrest. The enforcement priorities also include individuals who committed acts that constitute *any* chargeable criminal offense regardless of whether they were charged or even arrested. If implemented, this enforcement priority could broadly affect all individuals who entered the United States without inspection, which carries criminal penalties.⁶

B. Overview of the U.S. Immigration System for Fear-of-Return Claims

This section provides a brief overview of the U.S. immigration system as relevant to applications for immigration relief based on fear of return to one’s country of origin, i.e., asylum, withholding of removal,

³ USCIS, *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> (last reviewed/updated Feb. 14, 2018).

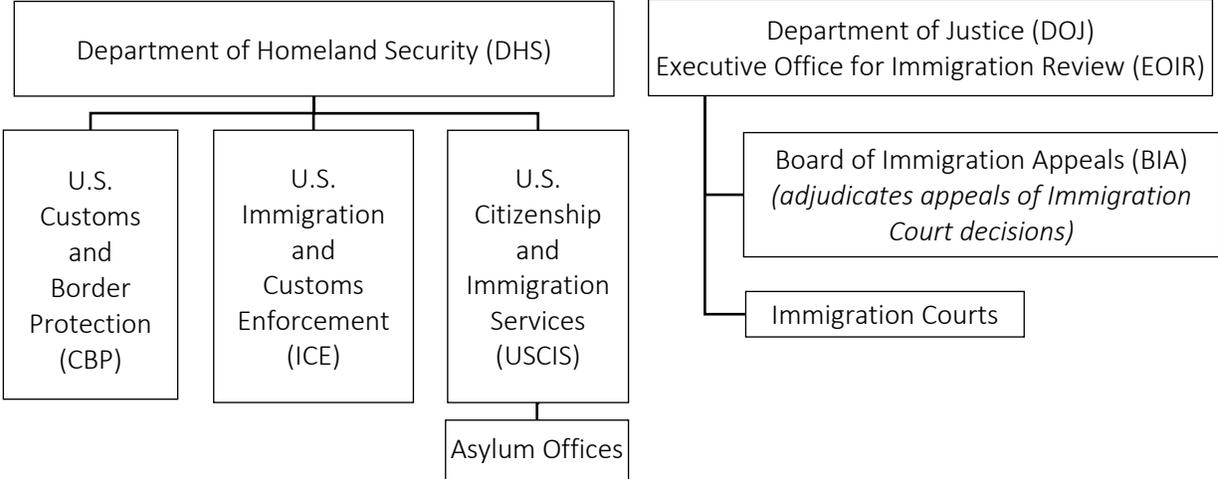
⁴ In *Regents of the University of California*, the Trump Administration bypassed traditional channels for appeals and requested the U.S. Supreme Court, instead of the U.S. Court of Appeals for the Ninth Circuit, to hear its challenge to the lower court’s preliminary injunction. On February 26, 2018, the Supreme Court denied the Administration’s request; as such, review of the case will proceed before the Court of Appeals for the Ninth Circuit. The Administration has also appealed the lower court’s preliminary injunction in *Batalla Vidal* to the Court of Appeals for the Second Circuit.

⁵ USCIS, *DHS DACA FAQs*, <https://www.uscis.gov/archive/frequently-asked-questions> (last reviewed/updated Feb. 14, 2018) (“Information provided in [a DACA] request is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice to Appear [document initiating removal proceedings when filed with an Immigration Court] or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance”); see USCIS, Policy Memorandum, PM-602-0050, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 17, 2011), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

⁶ Immigration & Nationality Act (INA) § 275, 8 U.S.C. § 1325.

and CAT protection. Applicants usually apply for such relief either affirmatively if they are not in removal proceedings or defensively if they are in removal proceedings.⁷

STRUCTURE OF THE U.S. IMMIGRATION SYSTEM



1. Affirmative Process

Individuals who are not in removal proceedings may apply for asylum affirmatively by filing an Application for Asylum and for Withholding of Removal (Form I-589) with USCIS. The asylum claim will be decided by an asylum officer at an Asylum Office. Some DACA recipients may choose to apply for asylum affirmatively because, while DACA only provides temporary relief from removal from the United States, asylum provides a more secure and longer-lasting status with the opportunity to obtain lawful permanent residency (LPR status, or commonly known as a “green card”) one year after the asylum grant and U.S. citizenship four years after obtaining LPR status.

⁷ An exception to this general rule applies to Unaccompanied Alien Children (UACs) who may apply directly with USCIS through the affirmative process described below even if they are in removal proceedings. INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C). A UAC is defined as a child under the age of eighteen without lawful immigration status who does not have a parent or legal guardian in the United States or for whom no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 279(g); 8 U.S.C. §1232(g). If a DACA recipient was previously designated a UAC or meets the definition of a UAC, please contact CGRS for additional resources and guidance (see instructions in Appendix). For example, our Children’s Asylum Manual has a section on jurisdictional issues specific to UACs.

PRACTICE POINTER / CONSULT WITH AN ATTORNEY

Keep in mind that applicants who are not granted asylum affirmatively by the Asylum Office are usually placed in removal proceedings, unless the applicant has lawful status or parole at the time of the Asylum Office's decision.⁸ Thus, **affirmatively applying for asylum may not be advisable for many individuals with uncertain status who are not already in removal proceedings. DACA recipients who are thinking of applying for asylum affirmatively should first speak with an immigration attorney well-versed in asylum law and removal defense**, in order to assess the benefits and risks of doing so based on their individual circumstances. Furthermore, legal service providers should be aware that "knowingly ma[king] a frivolous application for asylum" can trigger *permanent* ineligibility for *any* immigration benefit.⁹ DACA recipients should be cautioned about the consequences of filing frivolous asylum applications.

DACA recipients who decide to affirmatively file for asylum should indicate in their applications that they also want to apply for protection under CAT, where the facts support such a claim.¹⁰ Note, however, that the Asylum Office only has jurisdiction to adjudicate the asylum claim. If the Asylum Office does not grant asylum, or if the applicant is barred from asylum and filed an application with USCIS solely to apply for withholding of removal or CAT protection, the applicant will likely be placed in removal proceedings in Immigration Court (unless she has lawful status or presence as noted above). Then, in removal proceedings, an immigration judge will have jurisdiction to newly consider the asylum application and/or adjudicate the withholding of removal and CAT claims in the alternative. Withholding of removal and CAT claims are discussed further in Part II(B)–(C).

2. Defensive Process

If a person is apprehended by ICE or CBP, she may be placed in removal proceedings before an immigration judge in an Immigration Court. Individuals in removal proceedings may seek asylum, withholding of removal, and/or CAT protection as a defense against removal from the United States by filing their applications with the Immigration Court.¹¹

⁸ Federal regulations do not specify whether or not individuals who have DACA at the time of the Asylum Office's decision are exempt from referral to Immigration Court for removal proceedings if the Asylum Office does not grant asylum.

⁹ INA § 208(d)(6), 8 U.S.C. § 1158(d)(6). Under federal regulations, an asylum application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20. However, an individual who has previously filed a frivolous asylum application is not barred from seeking withholding of removal (discussed in Part II(B)). *Id.*

¹⁰ Applicants may indicate their intent to also apply for CAT by checking off and answering the relevant questions on Form I-589, available at <https://www.uscis.gov/i-589>.

¹¹ See *supra* note 7 regarding exception for UACs.

In some circumstances,¹² however, ICE or CBP may seek to summarily remove the individual from the United States without a hearing before an immigration judge, unless she expresses fear of return to her country of origin.¹³ In such situations, there is often very limited time to prevent the individual's removal from the United States.

PRACTICE POINTER

During intakes with DACA recipients, it is highly important to explain to recipients who fear returning to their countries of origin that they should express this fear to immigration officials if they are apprehended. It is also crucial to refer a DACA recipient with a potential fear-of-return claim to an immigration attorney experienced in asylum law and removal defense as soon as possible, so that in the event that DACA is terminated and the recipient is apprehended by ICE or CBP, an attorney is prepared to file an application for relief if appropriate. This is especially critical for those DACA recipients who have prior orders of removal or convictions for certain crimes in the United States, as they are at heightened risk of summary removal by ICE or CBP and may have a narrow window of time to seek protection.

¹² ICE or CBP may summarily remove: noncitizens who returned to the United States after having been removed under a prior order or removal (issued either by ICE/CBP or by an immigration judge); certain noncitizens who were convicted of certain felonies; and certain noncitizens who have made misrepresentations or false claims to U.S. citizenship or lack valid documents for entry into the United States. See INA § 235(b)(1), 8 U.S.C. § 1225(b)(1); INA § 238(b), 8 U.S.C. § 1228(b); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). Current policy as of the time of writing limits this last type of summary removal ("expedited removal") to those individuals who either arrive at a U.S. port of entry or are apprehended within fourteen days of their arrival and within 100 miles of the U.S. land border. See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). The Trump Administration indicated in the January 25, 2017 Executive Order on Border Security and Immigration Enforcement Improvements and its February 20, 2017 implementing memo that it seeks to expand application of expedited removal to the fullest extent of the law, which would broadly affect individuals who either arrive at a U.S. port of entry or are apprehended anywhere within the United States and cannot show that they have been continuously present in the United States for two or more years. For further information on this potential expansion of expedited removal, see American Immigration Council et al., *Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on January 25, 2017)* (Feb. 20, 2017), available at https://www.americanimmigrationcouncil.org/practice_advisory/expedited-removal-what-has-changed-executive-order.

¹³ If the individual expresses fear of returning to her country of origin, ICE or CBP should refer her to an asylum officer for an initial interview (either a "credible fear interview" or a "reasonable fear interview," depending on the circumstances). If the individual passes the interview, the asylum officer will refer her to Immigration Court for a full hearing before an immigration judge. For further information on summary removal procedures and credible/reasonable fear interviews, please contact CGRS (see instructions in Appendix). We also recommend reviewing the Practising Law Institute's free on-demand web program *Under Pressure: Representing Clients in Reasonable Fear and Credible Fear Interviews in the Trump Era* (Dec. 19, 2017), available at https://www.pli.edu/Content/OnDemand/Under_Pressure_Representing_Clients_in_Reasonable/_N-4nZ1z0zpus?Ns=sort_date%7c1&ID=336696.

AFFIRMATIVE APPLICATIONS	DEFENSIVE APPLICATIONS
Applicant not in removal proceedings (except UACs)	Applicant in removal proceedings
Application filed with USCIS	Application filed with Immigration Court
Non-adversarial interview with an asylum officer at an Asylum Office	Adversarial hearing before an immigration judge in Immigration Court with ICE as opposing counsel
Decision only on asylum	Decision on asylum or, in the alternative, withholding of removal or CAT protection

C. Common Fear-of-Return Claims and Current Conditions in Mexico and the Northern Triangle Countries

Immigration relief based on fear of return may address a diverse range of harms—including abuses against women, children, LGBTQI individuals, and other marginalized groups in the country of origin—perpetrated by either government officials or non-state actors such as family members or organized crime groups. The chart below provides a non-exhaustive list of some common fear-of-return claims from around the world.

EXAMPLES OF COMMON ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE CLAIMS	
<ul style="list-style-type: none"> • Domestic violence • Child abuse/other familial abuse • Female genital cutting/other mutilation • Forced marriage or relationship • Honor violence • Harms against LGBTQI people • Harms against people with HIV/AIDS • Harms against people with disabilities • Religiously motivated violence • Harms against indigenous people or other ethnic groups • Blood feuds/clan violence 	<ul style="list-style-type: none"> • Harms against street children • Trafficking/slavery (sex or labor) • Fear of gang or other organized crime/armed group • Political association claims • Targeting of whistleblowers or other crime witnesses/informants • Targeting of police officers • Targeting of conscientious objectors • Targeting of human rights activists • Coercive population control (forced abortion or sterilization)

While DACA recipients come from numerous countries, nearly 90% were born in Mexico and the “Northern Triangle” in Central America—comprised of El Salvador, Guatemala, and Honduras—a region of the world that is currently ravaged by a major humanitarian crisis.

APPROXIMATE ACTIVE DACA RECIPIENTS: TOP COUNTRIES OF BIRTH ¹⁴		
As of September 4, 2017		
Country of Birth	Number (rounded)	Percent
Mexico	548,000	79.4
El Salvador	25,900	3.7
Guatemala	17,700	2.6
Honduras	16,100	2.3
Other Countries	80,300	11.7
Not Available	1,800	0.3
Total	689,800	100.0



In fact, three of the five countries with the highest homicide rates in the world are Honduras, El Salvador, and Guatemala,¹⁵ and the three cities with the highest homicide rates are located in El Salvador, Mexico, and Honduras (San Salvador, Acapulco, and San Pedro Sula respectively).¹⁶

Over the last few years, tens of thousands of asylum seekers have fled the surge of violence in these countries, fueled in large part by “the increasing reach, power and violence of organized criminal groups,”¹⁷ namely Mexican drug cartels and the two largest gangs in the Northern Triangle: Mara

¹⁴ Adapted from USCIS, *Approximate Active DACA Recipients: Country of Birth*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf. According to USCIS, the total number of individuals who were granted DACA at any point was approximately 800,000 as of September 4, 2017. The chart reflects the total number of individuals who actively had DACA as of September 4, 2017, which excludes former DACA recipients who have since been granted LPR status as well as former DACA recipients who failed to renew or were denied renewal.

¹⁵ Charlotte Alfred, *These 10 Countries Have The World’s Highest Murder Rates*, The Huffington Post, Dec. 6, 2017, https://www.huffingtonpost.com/2014/04/10/worlds-highest-murder-rates_n_5125188.html; see also U.N. Office on Drugs and Crime (UNODC), *Global Study on Homicide: Trends, Context, Data (2013)*, available at https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

¹⁶ *The world’s most dangerous cities*, The Economist, Mar. 31, 2017, <https://www.economist.com/blogs/graphicdetail/2017/03/daily-chart-23>.

¹⁷ U.N. High Commissioner for Refugees (UNHCR), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador 4* (2016) [hereinafter UNHCR El Salvador Guidelines], available at

Salvatrucha (also known as MS or MS-13) and Mara 18 (also known as the 18th Street Gang).¹⁸ According to the Office of the U.N. High Commissioner for Refugees (UNHCR) “widespread domestic and societal abuse of women and children”¹⁹ has also contributed to the humanitarian crisis, with the increased rates of femicides and sexual violence “coinciding with the spread of gangs but also reflecting wider gender inequality.”²⁰ Other serious human rights problems reported in the region in recent years include harms against LGBTQI people, people with disabilities, and indigenous and Afro-descendant communities, which are compounded by widespread impunity for human rights violations.²¹

Although DACA recipients have been in the United States since at least June 2007, prior to the current Central American refugee crisis, the escalating rates of violence and deteriorating security in Mexico and the Northern Triangle place many of these young individuals at (renewed) risk of danger if they are removed to their countries of origin, regardless of whether or not their initial reason for moving to the United States was connected to persecution or torture.

<http://www.refworld.org/docid/56e706e94.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras* 6 (2016) [hereinafter UNHCR Honduras Guidelines], available at <http://www.refworld.org/docid/579767434.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala* 6 (2018) [hereinafter UNHCR Guatemala Guidelines], available at <http://www.refworld.org/country,,,GTM,,5a5e03e96,0.html>.

¹⁸ UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 16–18 (2015), available at <http://www.unhcr.org/56fc31864.html>.

¹⁹ UNHCR El Salvador Guidelines, *supra* note 17, at 4; UNHCR Honduras Guidelines, *supra* note 17, at 6; UNHCR Guatemala Guidelines, *supra* note 17, at 6; *see also* UNHCR, *Women on the Run*, *supra* note 18, at 25 (noting that many refugee women fled Mexico and the Northern Triangle because they were unable to receive state protection against domestic violence, which was often compounded by the fact that many of the women’s abusive partners had connections to criminal armed groups).

²⁰ UNHCR El Salvador Guidelines, *supra* note 17, at 8; *see also* UNHCR Honduras Guidelines, *supra* note 17, at 12; UNHCR Guatemala Guidelines, *supra* note 17, at 12–13.

²¹ *See* U.S. Department of State, Mexico 2016 Human Rights Report 1 (2017), available at <https://www.state.gov/documents/organization/265812.pdf>; U.S. Department of State, Honduras 2016 Human Rights Report 1 (2017), available at <https://www.state.gov/documents/organization/265808.pdf>; U.S. Department of State, Guatemala 2016 Human Rights Report 1 (2017), available at <https://www.state.gov/documents/organization/265802.pdf>; U.S. Department of State, El Salvador 2016 Human Rights Report 1 (2017), available at <https://www.state.gov/documents/organization/265798.pdf>.

Part II: Eligibility for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture

This practice advisory highlights considerations that are particularly relevant to DACA recipients when screening for potential eligibility for asylum, withholding of removal, and CAT protection. For more in-depth information on asylum law and procedure, please see the Appendix at the end of this advisory.

A. Asylum Eligibility

Asylum is available to persons physically present in the United States who meet the definition of a “refugee” in the Immigration and Nationality Act (INA):

[A]ny 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.²²

The basic legal elements of asylum stem from this definition and can be broken down as follows:

1. **Persecutory Harm** – the harm or threat of harm must rise to the level of persecution;
2. **Well-Founded Fear of Persecution** – there was persecution in the past creating a presumption of a likelihood and fear of persecution in the future, or there is an independent likelihood and fear of persecution in the future;
3. **Protected Ground** – the persecution must be on account of at least one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion;
4. **Nexus** – there must be a link between the persecution and at least one of the protected grounds; and
5. **Failure of State Protection** – the state participated in the persecution or the state is unwilling or unable to provide protection against persecution by a private individual.

Keep in mind that many DACA recipients do not have proof besides their own statements that they meet these requirements, and they may not be able to reasonably or safely obtain further evidence from their countries of origin. However, this alone should not undermine their eligibility for asylum; while the adjudicator may require additional evidence, such evidence must be *reasonably* available.²³ Thus, the applicant’s attorney can document why it would be unreasonable for the applicant to obtain additional evidence (e.g., attempts to secure the evidence were unsuccessful or it would be dangerous to attempt to do so in the first place). In addition, the applicant’s attorney can (and should) supplement the asylum

²² INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

²³ INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

application with documentation of objective country conditions evidence (discussed further in the following sections) as well as a psychological and/or medical evaluation where appropriate.

An asylum applicant must also show that she does not fall under any of the bars to asylum set forth in the INA (“statutory bars”).²⁴ However, even if the applicant meets all the requirements for asylum and does not face any statutory bars, the decision to grant asylum is left to the asylum officer’s or immigration judge’s discretion.²⁵ Nonetheless, the asylum officer or immigration judge must take into account and balance positive factors—such as family, community, or business/employment ties to the United States, length of residence in the United States, or evidence of good character, value, or service to the community—against any potential negative factors—such as a criminal record or misrepresentations to immigration officials.²⁶ Moreover, under U.S. case law, “the danger of persecution should generally outweigh all but the most egregious” negative factors.²⁷

1. Persecutory Harm

Asylum applicants must show that the harm or suffering they experienced in the past and/or fear in the future rises to the level of persecution. The term persecution is not clearly defined in the INA or federal regulations. U.S. case law has defined persecution as the infliction of suffering or harm,²⁸ but it usually must be more than mere harassment or discrimination.²⁹ However, persecution is not limited to extreme physical violence or harm that causes permanent or serious injuries.³⁰ According to guidance from the U.N. High Commissioner for Refugees (UNHCR), threats to life or freedom and serious violations of human rights will constitute persecution.³¹ The table below includes a non-exhaustive list of some acts that constitute persecution. It is important to note that persecution should also be assessed cumulatively; in other words, incidents of harm that do not constitute persecution on their own may rise to the level of persecution when considered together.

²⁴ INA §§ 208(a)(2), (b)(2); 8 U.S.C. §§ 1158(a)(2), (b)(2).

²⁵ 8 C.F.R. §§ 208.14(a), (b).

²⁶ See *Matter of Pula*, 19 I. & N. Dec. 467, 473–74 (BIA 1987); USCIS, *Asylum Officer Basic Training: Mandatory Bars to Asylum and Discretion* 34–37 (Mar. 25, 2009) (on file with CGRS).

²⁷ *Pula*, 19 I. & N. Dec. at 474.

²⁸ See, e.g., *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

²⁹ See, e.g., *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005); *Fisher v. INS*, 79 F.3d 955, 962–63 (9th Cir. 1996); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995).

³⁰ See, e.g., *Kovac*, 407 F.2d at 106–07; *Edimo-Doualla v. Gonzales*, 464 F.3d 276, 283 (2d Cir. 2006).

³¹ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, ¶51, U.N. Doc. HCR/1P/4/Eng/Rev. 3 (Dec. 2001) [hereinafter UNHCR Handbook], available at <http://www.unhcr.org/3d58e13b4.pdf>.

EXAMPLES OF ACTS THAT HAVE BEEN FOUND TO CONSTITUTE PERSECUTION

- Physical abuse (e.g., beatings)
- Rape and other sexual assault
- Threats of death or violence, even without actual physical harm
- Serious psychological harm
- Forced abortion or sterilization
- Female genital cutting
- Deprivations of certain fundamental rights (e.g., slavery)
- Severe economic deprivation, under certain circumstances

If a DACA recipient experienced harm as a child in her country of birth, or if she is still a child and fears harm if returned to that country, keep in mind that the threshold for harm may be lower if the applicant was a child at the time of the incident. In other words, harms that may not rise to the level of persecution for adults may nonetheless be considered persecution if committed against a child (e.g., recruiting children into security forces or armed groups).³² Furthermore, persecution that began against the DACA recipient's family even before she was born can be relevant to her claim.³³ For further guidance on claims involving persecution against children, please see our Children's Asylum Manual (instructions for accessing CGRS resources are included in the Appendix).

HYPOTHETICAL 1: PERSECUTION AGAINST CHILD

Sara fled El Salvador to the United States with her mother when she was five years old. In El Salvador, Sara's stepfather regularly beat her mother in front of her. He never beat Sara, but she was terrified of him and had frequent nightmares about him harming, or even killing, her mother. Even though Sara never suffered bodily harm herself, witnessing violence against family members can cause severe, lasting psychological harm to a young child and therefore may amount to persecution against Sara. Sara may also have a fear of future persecution based on these past harms (see Part II(A)(2)(a)).

³² See, e.g., UNHCR, *Guidelines on International Protection: 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*, ¶¶10, 15–16, 21, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), available at <http://www.unhcr.org/50ae46309.html>; *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007).

³³ See, e.g., *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1315 (9th Cir. 2012).

HYPOTHETICAL 2: PERSECUTION BEFORE APPLICANT’S BIRTH

Miguel is from Guatemala. He came to the United States with his mother when he was just two years old and does not remember anything about his life in Guatemala. When Miguel’s mother was pregnant with him, gang members assaulted her and killed Miguel’s father. Miguel’s mother fled their town and moved to another part of the country, where Miguel was born with a physical disability due to the injuries she sustained. As a single indigenous woman in Guatemala, Miguel’s mother had limited options and resources to make a living and care for an infant with special needs. As a result, Miguel was malnourished and his health deteriorated without treatment for his disability. After receiving further threats from gang members, Miguel’s mother fled with him to the United States. Even though Miguel was not born yet when his parents were attacked by gang members, the serious deprivations he suffered as a result of that attack may amount to persecution against Miguel, especially when considered cumulatively. Miguel may also have a fear of future persecution based on these past harms (see Part II(A)(2)(a)).

2. Well-Founded Fear of Persecution

Applicants must show not only that the harm feared arises to the level of persecution but also that their fear is “well-founded.” Applicants may demonstrate a well-founded fear of persecution through either persecution in the past or an independent likelihood and fear of persecution in the future.

a. Past Persecution and Presumption of Well-Founded Fear

PRACTICE POINTER

As part of their screenings for immigration options, legal service providers may already **ask potential DACA recipients what caused them to immigrate to the United States and whether they fear returning to their country of origin**. However, it is important to also **explore if anyone has harmed the DACA recipient in her country of origin at any point in time, going all the way back to early childhood**, regardless of why she eventually left the country or why she now fears going back.

As explained in Part II(A)(6) (Humanitarian Asylum), in some circumstances, applicants may be eligible for asylum based on particularly severe past persecution, regardless of any fear of future persecution. More generally, if the DACA recipient experienced past persecution in her country of birth, she is entitled to a presumption that she has a well-founded (i.e., genuine and objectively reasonable) fear of persecution in the future. The asylum officer (in affirmative cases) or ICE attorney (in defensive cases) can rebut this presumption by showing that circumstances have changed or that she can relocate to another part of the country safely and reasonably.

Country conditions documentation can be critical to making the case that the presumption cannot be rebutted. CGRS has on file research memoranda and expert declarations on country conditions in Mexico, the Northern Triangle, and dozens of other countries, tailored to different types of persecution (see instructions in Appendix). CGRS also has a forthcoming country conditions toolkit to guide research which will be released in spring 2018.

HYPOTHETICAL 3: PAST PERSECUTION (INTERNAL RELOCATION UNSAFE AND UNREASONABLE)

Miguel (from Hypothetical 2) does not believe he would be safe anywhere in Guatemala. Gang members managed to find and threaten his mother even after she fled to another part of the country. Although many years have since passed, the gang has greatly expanded its power and control over various parts of Guatemala. Moreover, even if Miguel managed to hide from the gang in a different area, it would be virtually impossible for him to survive on his own. He does not speak Spanish well, having lived in the United States nearly all his life and having indigenous heritage. Moreover, because Miguel has a disability, he would face severe discrimination throughout the country and have limited options to make ends meet without any family or community support.

HYPOTHETICAL 4: PAST PERSECUTION (NO CHANGE IN CIRCUMSTANCES)

Luis fled to the United States from Mexico when he was fifteen years old. As a child, Luis was beaten and verbally abused by his parents, neighbors, and classmates because he did not conform to traditional gender norms and was perceived as gay. While in college in the United States, Luis came out as gay and began dating another man. Subsequently, in 2009 Mexico City recognized same-sex marriage, and in 2015 the Supreme Court of Mexico held that it is unconstitutional for states to ban same-sex marriage. Nonetheless, Luis fears that if he returns to Mexico, he will face even worse violence than before, especially now that he is open about his sexual orientation. With the support of country conditions documentation, Luis's attorney can argue that the steps taken by the Mexican government towards marriage equality do not constitute a change in circumstances because there has been a corresponding increase in violence against LGBTQI individuals in recent years without meaningful protection from law enforcement.

b. Independent Fear of Future Persecution

A DACA recipient may fear persecution in the future even if she has never been persecuted in the past because of changes in personal circumstances or country conditions that took place after her arrival in the United States. If a DACA recipient has experienced persecution in the past, she may also fear a different form of persecution in the future for reasons independent of past harm suffered.

Nonetheless, a child DACA recipient may not be able to fully articulate her fear of return or comprehend the danger facing her in her country of origin. Similarly, an adult DACA recipient may be unaware of escalating or new forms of violence in her country of origin, and perhaps even longstanding social conditions, simply because she has lived in the United States for many years—possibly most of her life. In such cases, the DACA recipient may need to rely on country conditions documentation and testimony from experts, as well as information from others who have more direct knowledge of conditions on the ground (e.g., family members, former neighbors, former classmates or coworkers, former church members), in order to show a reasonable possibility of harm. However, the likelihood of future persecution is a relatively low threshold for asylum claims. The applicant need not show that it is more

likely than not that she would be persecuted; in fact, the U.S. Supreme Court has held that even a one-in-ten, or 10%, chance of persecution is sufficient for a fear to be “well-founded.”³⁴

At the screening stage, we recommend that legal service providers review information about the DACA recipient’s country of origin ahead of time so they can explore why someone in the DACA recipient’s circumstances may fear returning to her country. If appropriate, and if the DACA recipient gives permission, it may also be helpful to speak with her family members either here in the United States or back in her country as they may have a better recollection of incidents that occurred when the recipient was a child or a better understanding of the current situation on the ground.

HYPOTHETICAL 5: INDEPENDENT FEAR OF FUTURE PESECUTION

Eva, who was named Jose by her parents at birth, came to the United States from El Salvador when she was twelve years old. While in El Salvador, Eva lived as a boy and was afraid to disclose her gender identity to her family and friends because of widespread discrimination and abuses against LGBTQI people. Several years after living in the United States, Eva came out as a transgender woman and, in 2016, began hormone therapy. In recent years, there has been a surge of violence against transgender women in El Salvador, particularly by gangs, causing Eva to be fearful for her life if she is forced to return to her country. Even though she was never harmed in El Salvador in the past, Eva may now have a well-founded fear of persecution because of changes in both her personal circumstances and recent developments in El Salvador.

HYPOTHETICAL 6: INDEPENDENT FEAR OF FUTURE PERSECUTION

Ana, who was born in Mexico, came to the United States when she was seven years old. A few years ago, she had a baby with her boyfriend, who was also undocumented and from Mexico. Ana’s boyfriend became abusive soon after she gave birth. One day, when he was particularly violent and threatened her with a knife, Ana called the police. Her boyfriend, who had an existing criminal record, was arrested, convicted of aggravated assault, and eventually removed to Mexico. Having lived in the United States most of her life, Ana does not know anyone in Mexico other than some relatives, who were recently contacted by her boyfriend and are furious with her because they believe she should stay with the father of her baby no matter what. Even though Ana was never harmed in Mexico in the past, she may now have a well-founded fear of future persecution since her abusive boyfriend, who is in Mexico, can track her down with the help of her relatives and subject her to further violence because she reported him to the police.

3. Protected Ground(s)

Asylum applicants must show that there is a causal link between the persecution suffered or feared and at least one of five protected grounds: race, religion, nationality, membership in a particular social group, and political opinion. Each protected ground is discussed briefly below. Keep in mind that more than one

³⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

protected ground may be applicable in an asylum claim and that these grounds also often overlap in scope.

a. Race and Nationality

Race is understood “in its widest sense to include all kinds of ethnic groups that are referred to as ‘races’ in common usage,” including indigenous groups.³⁵ Nationality may overlap with race in some instances, as it refers to not only citizenship but also membership in an ethnic or linguistic group.³⁶

Note that the asylum applicant need not belong to a different race or nationality than her persecutor in order for either of these protected grounds to be a central reason for her persecution. For example, indigenous women often face additional obstacles to leaving abusive relationships because of racial discrimination by law enforcement, which may encourage an indigenous woman’s partner to harm her even if the abuser himself is also indigenous.

b. Religion

Religion includes but is not limited to traditional or organized religions. Such claims may involve religion as belief (including non-belief, e.g., atheism or agnosticism), as identity, or as a way of life.³⁷

As with race and nationality, applicants and their persecutors need not identify with different religious groups for religion-based asylum claims. For example, an Evangelical woman who disagrees with her persecutor that religious texts require women to be subordinate to men may be harmed for this difference in religious belief.

c. Political Opinion

Political opinion is understood broadly; it may include but is not limited to association with a political party or formal political ideology. For example, political opinion may be a feminist-defined opinion such as opposing violence against women or women’s subordinate role in families or society.³⁸

³⁵ UNHCR Handbook, *supra* note 31, at ¶68.

³⁶ *Id.* at ¶74.

³⁷ UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1(A)(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, ¶¶4–5, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004), available at <http://www.unhcr.org/en-us/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html>.

³⁸ See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); UNHCR, *Guidelines on International Protection: Gender-Related Persecution under Article 1(A)(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, ¶32, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), available at <http://www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html>.

In some cases, political opinion claims may overlap with religious beliefs. It is not necessary for the asylum applicant to express either her political opinion or religious belief publicly; she may have only expressed it to the persecutor or the persecutor may have learned it from others the applicant has spoken to. For instance, an applicant may be targeted by a gang because she told a gang member, or expressed to neighbors, that she is pro-rule of law and that gangs' actions are immoral and contrary to the nonviolence teachings of her faith.

d. Membership in a Particular Social Group

Members of a particular social group must share an “immutable or fundamental characteristic”: a characteristic that cannot be changed (such as family membership or a past experience) or that we should not reasonably expect someone to change because it is fundamental to one’s identity or conscience (such as gender identity or a deeply held belief).³⁹ According to the Board of Immigration Appeals (BIA), the body adjudicating appeals of Immigration Court decisions, a group must *also* be perceived as such by the applicant’s society (“social distinction”) and be defined by a clear benchmark for who belongs in the group (“particularity”) in order to constitute a particular social group.⁴⁰ Case law on membership in a particular social group, and particularly the BIA’s additional requirements of social distinction and particularity, is complex and evolving and differs by jurisdiction, so an in-depth discussion is outside the scope of this advisory.

Domestic violence (including partner abuse, child abuse, or other intrafamilial abuse), persecution against LGBTQI individuals, and many of the other common fear-of-return claims listed in Part I(C) can be framed as persecution on account of membership in a particular social group. Keep in mind that, in addition to articulating a valid particular social group formulation, applicants must also show that they belong to the group articulated. For example, an applicant who proposes a group defined in part by women in domestic relationships must demonstrate that her personal situation would be recognized as a domestic relationship in her country of origin.

For further guidance on framing particular social group claims, we would recommend reviewing the resources on general asylum law listed at the end of this advisory, as well as CGRS’s practice advisories on children’s, domestic violence, and fear-of-gang asylum claims (see instructions in Appendix).

e. Imputed Protected Ground

An asylum applicant need not actually have the protected characteristic that are the reasons for her persecution. It is sufficient that the persecutor assumed (perhaps falsely) that the applicant has that characteristic, i.e., that the persecutor “imputed” the characteristic to the applicant.⁴¹

³⁹ *Matter of Acosta*, 19 I. & N. Dec. 211, 214 (BIA 1985).

⁴⁰ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237–43 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210–18 (BIA 2014).

⁴¹ See, e.g., *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996); *Amanfi v. Ashcroft*, 328 F.3d 719, 729–30 (3d Cir. 2003).

An imputed protected ground argument could be particularly relevant to a DACA recipient because few people in her country of origin may be familiar with her actual characteristics and opinions. Thus, a characteristic or opinion may instead be imputed to her based on her family members' beliefs or actions, her own behavior, or other circumstantial evidence. For instance, a gang may impute an "anti-gang" political opinion to a DACA recipient, and harm her on that account, because her father testified against gang members in a criminal trial in her country of origin, regardless of the recipient's own opinion. Similarly, a gang may impute an "anti-gang" religious belief to a recipient because her family members are active church members who proselytize against gang activities as immoral. With respect to imputed race, a DACA recipient who is relatively dark-skinned may be persecuted because her persecutor assumes she is indigenous, regardless of her actual ethnicity. Or, the recipient may be harmed because her persecutor believes she is a lesbian, perhaps because she does not conform to traditional gender roles, even if she is not actually a lesbian. In this last example, the imputed protected ground could be imputed membership in a particular social group of "[nationality] lesbian women."

4. Nexus ("On Account Of")

Applicants must show not only that they fall under a protected ground but also that the harm suffered or feared is "on account of" the protected ground, i.e., there is a "nexus," or causal link, between the persecution and a protected ground. For example, let's say an applicant shows that "[nationality] orphans" are a particular social group in her country of origin and that she was an orphan when she was harmed in the past; the adjudicator may still deny the applicant's claim if she cannot show that her persecutor knew or would have any way of knowing that she was an orphan.

Keep in mind that there may be more than one reason for the harm suffered or feared, including unprotected reasons. The actual or imputed protected ground merely has to be one central reason, not the sole or even primary reason, for the persecution.⁴² The persecutor's reasons for harming the asylum applicant may also shift over time. For example, an applicant may have initially been targeted by traffickers in her country of origin because of their financial motives as well as because of her membership in the particular social group "[nationality] street children." Thus, the persecutors had mixed motives, including both an unprotected reason (pecuniary) and a protected ground (group membership). In addition, if the applicant is removed to her country and her traffickers find her again, they may be motivated to further harm her because she fled from them and left the country, thus manifesting her political opinion against human trafficking.

As with establishing likelihood of future harm, DACA recipients who have not been directly harmed in the past may need to rely on country conditions evidence, expert testimony, and testimony from family members or others familiar with the situation on the ground in order to show the link between the future harm and a protected ground.

⁴² See INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i); see also *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012).

HYPOTHETICAL 7: NEXUS

Miguel (from Hypotheticals 2 and 3), whose parents were attacked by gang members before his birth, believes that the gang would harm him in the future if he is removed to Guatemala because of his family membership. With Miguel's permission, his attorney spoke with his mother to gather more information about the attack. Miguel's mother explained that, although the gang members did not state their reasons for the attack, it occurred just a few weeks after her parents refused to comply with the gang's extortion demands and the gang also attacked her brother's family around the same time. In support of his claim, Miguel could submit a declaration from his mother explaining why, under these circumstances, she believes family membership was a central reason for the gang's attack on her and Miguel's father.

5. Failure of State Protection

Asylum applicants must also show that either a government actor is a perpetrator of the persecution or that the government is unwilling or unable to protect the applicant from harm by private individuals. Where the harm is perpetrated by a government actor, it is presumed that the government will not provide protection.

In many asylum cases, however, the persecutor is a private actor, such as a family member or organized crime group. In order to show that the government cannot protect the asylum applicant, the applicant need not have reported (or attempted to report) the harm or threat to the police; instead, the applicant may show that it would be futile or even dangerous to report the harm to the police or other authorities.⁴³ For example, the police may be prejudiced against and not take seriously people who share the applicant's characteristics (e.g., women, children, people with disabilities, indigenous people, LGBTQI people), or they may even collude with or be easily bribed by persecutors. It is also possible that government officials in the applicant's country of birth do not have real power because the country is a failed state or organized crime groups act as the de-facto government in the area. Where there is written law addressing the type of harm the applicant fears, it will be important to show that in practice such laws are not meaningfully enforced. For example, there may be few arrests or prosecutions made under the law or the law may provide inadequate sentencing. DACA recipients who have never suffered harm in their country of origin can show how the state will fail to protect them in the future, such as in the aforementioned ways, through country conditions evidence, possible expert testimony, and any accounts from other people in similar circumstances who tried to report harm.

6. Humanitarian Asylum

In some cases, where the applicant has established past persecution on account of a protected ground and state failure to protect, but is unable to establish a well-founded fear of future persecution, she may be granted what is termed "humanitarian asylum." However, humanitarian asylum cannot be granted

⁴³ See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073–74 (9th Cir. 2017) (en banc); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1333, 1335 (BIA 2000).

solely because a claim is compelling. In order to qualify for humanitarian asylum, the applicant must establish past persecution on account of a protected ground and state failure to protect, *and*:

- The past harm itself was severe or atrocious,⁴⁴ or
- There is a reasonable possibility of “other serious harm” in the future (the harm must rise to the level of persecution but need not be connected to a protected ground).⁴⁵

HYPOTHETICAL 8: HUMANITARIAN ASYLUM

When Juan was nine years old, his parents left him in the care of his uncle in Honduras and traveled to the United States to find work. Juan’s uncle sexually abused him throughout the time he lived with him. When his uncle unexpectedly passed away two years later, Juan came to the United States to join his parents. Juan’s immigration attorney referred him to a psychological evaluator who diagnosed him with post-traumatic stress disorder (PTSD), stemming from his past experience with child abuse. Juan and his parents also learned that the Mara Salvatrucha now controls their former neighborhood in Honduras and has harmed or killed many of their relatives and neighbors who could not afford to pay its extortion demands. Juan does not have family in any other part of Honduras, so he would be forced to return to his former neighborhood if he is removed from the United States. During his Immigration Court hearing, Juan established past persecution on account of his membership in a particular social group, but the ICE attorney rebutted the presumption of well-founded fear of persecution in the future because his uncle passed away. Nonetheless, Juan may be eligible for a grant of humanitarian asylum for two reasons: (1) The child abuse Juan suffered was so severe and traumatic that he should not be expected to return to Honduras; and (2) Juan faces harm from gang members in his former neighborhood, even if they would not single him out for any particular reason.

B. Withholding of Removal

If an applicant is denied asylum, for example, for failure to file her asylum application within one year of her last entry into the United States or due to the application of certain other statutory bars to asylum protection (discussed in Part II(D) below), she may still be eligible for withholding of removal under section 241(b)(3) of the INA.⁴⁶

Withholding under the INA requires a similar showing to asylum (e.g., persecution, nexus to a protected ground, inability or unwillingness of government to protect), and thus the guidance provided above continues to apply, though withholding claims differ in some key respects. As in an asylum claim, if a withholding applicant has been persecuted in the past, she is entitled to a presumption that her life or freedom would be threatened in the future. However, unlike asylum, withholding cannot be granted based on past persecution alone for humanitarian reasons. If the presumption is rebutted or if the

⁴⁴ See 8 C.F.R. § 208.13(b)(1)(iii)(A); *Brucaj v. Ashcroft*, 381 F.3d 602, 608 (7th Cir. 2004); *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989).

⁴⁵ See 8 C.F.R. § 208.13(b)(1)(iii)(B); *Matter of L-S-*, 25 I. & N. Dec. 705, 714 (BIA 2012).

⁴⁶ INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

applicant did not suffer past persecution, she must establish an independent likelihood of future persecution. Moreover, withholding requires that an applicant establish that it is more likely than not that her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This is a higher level of likelihood of harm than for asylum, where an applicant need only show a reasonable possibility (a 10% chance) of persecution. However, the U.S. Court of Appeals for the Ninth Circuit has held that a protected ground need only be “a reason” for persecution in withholding claims, which is lower than the “one central reason” requirement in asylum claims.⁴⁷ Finally, unlike asylum, which is a discretionary form of relief, withholding is mandatory relief that must be granted to those who qualify.

C. Protection Under the Convention Against Torture

If an applicant is denied both asylum and withholding of removal under the INA, for example because she is barred from both forms of relief (see Part II(D)) or because she failed to show a causal link between the persecution and a protected ground, she may nonetheless be eligible for protection under CAT. To establish eligibility for CAT protection, an applicant must demonstrate that it is more likely than not that she would be tortured if removed to her country of origin and that such torture would be either carried out or sanctioned by a public official.⁴⁸ Unlike asylum and withholding under the INA, CAT protection does not require the applicant to show a connection between the harm she fears and any protected ground; in other words, the applicant need not prove the motive of the torturer.⁴⁹

Nonetheless, for purposes of CAT protection, torture is generally understood to connote a greater degree of harm than persecution. Federal regulations define torture as “any act by which *severe* pain or suffering, whether physical or mental, is *intentionally* inflicted on a person” and as “an *extreme* form of cruel and inhuman treatment.”⁵⁰ For instance, let’s say an applicant is arrested for baseless, discriminatory reasons and harassed, slapped, and punched by the police, but she does not require medical attention. These acts, particularly if taken together, could amount to persecution, but they *may* not meet the higher threshold of severe harm necessary for torture.⁵¹ In another example, a fear of denial of critical medical care for a serious medical condition may merit humanitarian asylum based on “other serious harm” regardless of the underlying reason (as long as the applicant also faced persecution in the past for a protected reason), but it will generally not amount to torture on its own if the applicant cannot

⁴⁷ *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017).

⁴⁸ See 8 C.F.R. §§ 208.16(c), 208.18(a).

⁴⁹ Federal regulations require that the torture be inflicted for an impermissible purpose, which broadly includes obtaining information or a confession, punishment, intimidation or coercion, and “any reason based on discrimination of any kind.” 8 C.F.R. § 208.18(a).

⁵⁰ 8 C.F.R. §§ 208.18(a)(1), (2) (emphasis added).

⁵¹ However, as in asylum cases, the threshold of what constitutes torture of a child may be lower than that of an adult.

show it would be intentional. The table below includes examples of acts that could, on the other hand, constitute torture.

EXAMPLES OF ACTS THAT COULD CONSTITUTE TORTURE
<ul style="list-style-type: none">• Murder• Sustained and severe beatings• Rape• Threat of imminent death• Mental anguish from severe physical harm or threat of imminent death to another person• Female genital cutting

To demonstrate likelihood of future torture, immigration judges must consider *all* evidence relevant to the possibility of future torture, including evidence of any past torture.⁵² Even if the applicant has never faced torture in the past, as may be the case for many DACA recipients, she may still establish a likelihood of future torture through “[e]vidence of gross, flagrant or mass violations of human rights” and “[o]ther relevant information regarding conditions” in her country of origin.⁵³

One difficult aspect of establishing eligibility for CAT protection involves the requirement that the torture be inflicted by a public official acting in an official capacity or with the consent or acquiescence of a public official. In the most common fear-of-return claims coming from Mexico and the Northern Triangle, where the majority of DACA recipients were born, torture is carried out by private actors such as family members or organized crime groups (though such a group could arguably be the de-facto government in a particular area due to its power and control). While similar (and sometimes conflated by immigration judges), government acquiescence in CAT cases is separate from the inability or unwillingness of a government to protect in asylum and statutory withholding cases. For example, the fact that a government has been generally ineffective in investigating or preventing crimes may not be sufficient on its own to show that the government would acquiesce to torture in a CAT claim.

However, CAT protection does not require actual knowledge of the torture on the part of the government.⁵⁴ Therefore, as in asylum claims, the fact that an applicant did not report past torture to the police does not defeat a CAT claim. For example, collusion with the perpetrator or corruption in the police or other government entities is persuasive evidence that the government would acquiesce in the applicant’s torture. Furthermore, the actions of one or more public officials at the state or local level may be sufficient to show government acquiescence in the torture, even if the federal government would not acquiesce and may have even taken some partial steps to combat the type of harm feared.⁵⁵

⁵² 8 C.F.R. § 208.16(c).

⁵³ *Id.*

⁵⁴ *See, e.g., Zheng v. Ashcroft*, 332 F.3d 1186, 1188, 1196–97 (9th Cir. 2003).

⁵⁵ *See, e.g., Madrigal v. Holder*, 716 F.3d 499, 509–10 (9th Cir. 2013); *see also Cordoba v. Holder*, 726 F.3d 1106, 1117 (9th Cir. 2013).

HYPOTHETICAL 9: PROTECTION UNDER THE CONVENTION AGAINST TORTURE

Julia, who is currently in grad school, has lived in the United States since the age of six, when she left Honduras with her parents. Julia and her parents did not suffer any harm when they were living in Honduras. However, they remain in contact with their relatives in Honduras and are aware of recent gang violence in their town. Julia is particularly scared of returning to Honduras because, according to her relatives, there have been brutal, deathly attacks by gang members on young educated and “Americanized” individuals because they are perceived to be wealthy. Her relatives have also told her that the local police have not responded to such incidents and some police officers are even seen socializing with gang members. Julia’s lawyer told her that there are concerns about her asylum and withholding of removal claim because she is past the one-year filing deadline and because particular social groups defined by lengthy residence in the United States and perceived wealth have been largely unsuccessful. However, even if the immigration judge denies asylum or withholding of removal to Julia, she may receive CAT protection if she can show through country conditions documentation (and, if possible, declarations from her relatives) that individuals in her circumstances face serious physical harm and death at the hands of gang members and that police, at least at the local level, often acquiesce to such violence through bribery or collusion.

The chart on the following page summarizes similarities and differences between asylum, withholding of removal under the INA, and CAT protection. For further guidance on CAT protection, we would recommend reviewing CGRS’s forthcoming advisory on CAT claims, which will be released in spring 2018.

QUICK COMPARISON: ASYLUM, WITHHOLDING OF REMOVAL, AND PROTECTION UNDER THE CONVENTION AGAINST TORTURE			
	Asylum ⁵⁶	Withholding of Removal ⁵⁷	CAT ⁵⁸
Harm	Persecution	Threat to life or freedom	Torture
Occurrence or Likelihood of Harm	Well-founded fear of future persecution (one-in-ten chance could suffice) or Eligibility on past persecution alone if sufficiently severe	More likely than not	More likely than not
Nexus Between Harm and Protected Ground	Harm must be “on account of” race, religion, nationality, political opinion or membership in a particular social group	Same as asylum	No nexus required
Discretionary v. Mandatory	If no statutory bars apply, relief is discretionary	If no statutory bars apply, relief is mandatory	Relief is mandatory, but bars determine type of relief
Relief Provided	Right to bring spouse and children (derivatives); can lead to lawful permanent resident (LPR) and then citizenship status.	Prevents return only to a country of feared harm; protection does not extend to derivatives; no path to LPR status or citizenship.	No derivatives; no path to LPR status or citizenship.

⁵⁶ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); INA § 208(b)(1), 1158(b)(1).

⁵⁷ INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

⁵⁸ 8 C.F.R. §§ 208.16(c), 208.18(a).

D. Bars to Relief Based on Fear of Return

Applicants with a valid claim based on fear of return to their countries of origin may still be denied if they are subject to one of several bars to protection. This section highlights those bars that are more likely to be applicable to DACA recipients.

In addition to the bars discussed here, applicants may be disqualified from asylum and withholding of removal if they engaged in criminal activity in their country of origin; persecuted others in their country of origin; have supported terrorist activity; or have been convicted of certain crimes in the United States.⁵⁹ In light of the eligibility criteria for DACA, these bars are less likely to be at issue for DACA recipients; however, service providers concerned that an applicant may be subject to one of these bars should reach out to CGRS for additional resources (see instructions in Appendix) and refer the applicant to an immigration attorney experienced in the area of asylum law and removal defense.

1. One-Year Bar | *Bar to asylum only*

The one-year bar is likely to be an issue in most claims by DACA recipients as it requires that an application for asylum be filed within one year of a person's last arrival in the United States.⁶⁰ The BIA has held that "last arrival" includes situations where the person is merely returning to the United States after a short trip abroad, provided such a trip was not made for the purpose of evading the one-year bar.⁶¹ As such, DACA recipients who have reentered the United States after legitimate trips abroad may argue that the one-year period is to be calculated off this more recent, last entry.

For DACA recipients filing for asylum more than one year after their last entry, the one-year filing deadline may be excused if the applicant can show: (1) changed circumstances that materially affected the applicant's *eligibility* for asylum; or (2) extraordinary circumstances related to the *delay* in filing the application.⁶² The applicant must also show that she filed within a reasonable period of time given those circumstances.⁶³

a. Changed Circumstances

The changed circumstances exception excuses a late filing if intervening changes affect the applicant's eligibility for asylum. These changes can be in the conditions of an applicant's country of origin (e.g., an

⁵⁹ INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A); INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

⁶⁰ INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B).

⁶¹ *Matter of F-P-R-*, 24 I. & N. Dec. 681, 685 (BIA 2008) ("[A] literal construction of the term 'last arrival' may have the potential to permit certain aliens to defeat the purpose of the 1-year asylum filing deadline by making a brief trip abroad for the sole or principal purpose of evading the time bar However, it is not disputed that the respondent's trip, although brief, was for the legitimate purpose of attending a relative's funeral.").

⁶² INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. §§ 208.4(a)(4), (5).

⁶³ *Id.*

outbreak of violence or change of regime), in the applicant’s personal circumstances (e.g., undergoing a religious conversion, coming out as gay, or increasing political activism), or in relevant U.S. law. For those DACA recipients who had previously been included as a derivative on a family member’s immigration application, a change in their relationship with the principal applicant (e.g., the death of a parent or divorce of a spouse) can also be a qualifying changed circumstance.

This list of possible changed circumstances is non-exhaustive; any changed circumstance that affects asylum eligibility may mitigate the one-year bar.

HYPOTHETICAL 10: ONE-YEAR BAR AND CHANGED CIRCUMSTANCES

Rafael is from Mexico. He entered the United States in 2006, at age ten, and received DACA in 2012, when he was sixteen. At age twenty-one, he came out as gay. He now wants to file an asylum application in 2018, at age twenty-two. Rafael may establish an exception to the one-year bar by noting that his recent decision to come out makes him potentially eligible for asylum based on the harm he fears if he is returned to Mexico. As discussed below, he should also make any extraordinary circumstances arguments that further explain his delay in filing.

b. Extraordinary Circumstances

While the changed circumstances provision relates to the merits of the underlying asylum application, the extraordinary circumstances exception considers the reason for the delay.

Qualifying extraordinary circumstances must (1) not be intentionally created by the applicant; and (2) be directly related to the filing delay. Such circumstances might be a legal disability; a physical or mental illness/disability (e.g., post-traumatic stress disorder (PTSD)); ineffective assistance of prior counsel; or the loss of a lawful immigrant/nonimmigrant status, Temporary Protected Status, or parole. Of particular relevance is the legal disability exception, which should excuse filing delays during the time DACA recipients were under age eighteen, given the reduced capacity of children to navigate the legal system.⁶⁴

Although federal regulations include the above as potential extraordinary circumstances, the list is non-exhaustive. Applicants may argue that DACA, while not a lawful status, does represent presence authorized by the Attorney General.⁶⁵ Further, applicants may argue that the rationale underlying the

⁶⁴ See, e.g., USCIS, *Asylum Officer Basic Training Course: One-Year Filing Deadline* 14–15 (Mar. 23, 2009) [hereinafter AOBTC One-Year Filing Deadline Lesson] (on file with CGRS); *Matter of A-D-* (BIA May 22, 2017) (holding that “asylum applicants under 18 years old are understood to suffer from a per se legal disability excusing them from the filing deadline” and adding that “some consideration of an applicant’s age may be appropriate” for other young adults who, for example, “may have more difficulty recovering from trauma, locating housing, or obtaining legal assistance”). Please note that *Matter of A-D-* is an unpublished decision; therefore, it is of no precedential value but may be a useful reference to advocates and adjudicators. Note that UACs, see *supra* note 7, are automatically exempt from the one-year filing deadline under the INA. INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E).

⁶⁵ See USCIS, *DHS DACA FAQs*, *supra* note 5 (“[A]n individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period

“loss of a lawful status” exception—not forcing someone to apply for asylum if they wish to wait and see if country conditions improve prior to their return/expiration of their status—should apply equally to the loss of DACA.⁶⁶

As applicants using the extraordinary circumstances exception must account for all of the time they were in the United States without filing for asylum, they may need to make multiple arguments to explain their delayed filing. Arguments should be supported by all relevant evidence; for example, if the applicant is claiming a mental disability like PTSD prevented her from filing within a year, she should provide a psychological evaluation and other documents that identify and explain her disability.

HYPOTHETICAL 11: ONE-YEAR BAR AND EXTRAORDINARY CIRCUMSTANCES

Clara is originally from Honduras where she suffered serious child abuse at the hands of her father. She entered the United States with her mother in 2005, at age thirteen. She received DACA in 2012, when she was twenty, and now wants to file an asylum application in 2018. How might she explain the delay in filing?

- 2005 – 2010: Clara was a minor and thus had a legal disability.
- 2010 – 2018: If warranted by symptoms and/or diagnosis, Clara could argue that the mental health effects of her abuse (e.g., PTSD) in combination with her still relatively young age explain her failure to file earlier.
- 2012 – 2018: Clara had DACA which is considered a lawful presence in the United States.

c. Filing Within a Reasonable Period

Even if an applicant is able to show a changed or extraordinary circumstance excusing the late filing, she must also show that she filed her application within a “reasonable period” of time in light of the particular circumstance at issue. Factors relevant to whether an application was filed within a reasonable period may include the applicant’s education and level of sophistication, the amount of time it takes to obtain legal assistance, and any effects of persecution and/or illness.⁶⁷ If the applicant was not aware of a changed circumstance until after the fact, this delay may also be taken into account to determine whether the application was filed within a reasonable time.⁶⁸

deferred action is in effect.”); *see also* AOBTC One-Year Filing Deadline Lesson, *supra* note 64, at 19 (acknowledging this line of argument in another scenario and guiding asylum officers to consider the totality of circumstances when determining whether there is an exception to the one-year bar).

⁶⁶ Asylum Procedures, 65 Fed. Reg. 76,121, 76,123 (Dec. 6, 2000) (to be codified at 8 C.F.R. pt. 208).

⁶⁷ *See* AOBTC One-Year Filing Deadline Lesson, *supra* note 64, at 22–24.

⁶⁸ 8 C.F.R. § 208.4(a)(4)(ii).

In general, although “reasonable period” determinations should be made on a case-by-case basis, applicants seeking an exception based on lawful immigrant/nonimmigrant status, Temporary Protected Status, or parole should file for asylum within six months of losing status if at all possible.⁶⁹ Similarly, in the event that the DACA program is terminated, DACA recipients who have decided to apply for asylum should try to do so within six months after their DACA expires, if appropriate under their individual circumstances, in order to preserve the argument that they filed within a reasonable period of time. However, as noted earlier in this advisory, DACA recipients who are not in removal proceedings should consult with an immigration attorney experienced in asylum law and removal defense before applying for asylum affirmatively to discuss pros and cons, as applicants who are not granted asylum by the Asylum Office may be placed in removal proceedings. In particular, the Asylum Office is likely to refer for removal proceedings those DACA recipients who cannot provide a strong explanation as to why their asylum application qualifies for an exemption to the one-year bar.

2. Previous Denial of Asylum | *Bar to asylum, withholding of removal, and CAT protection*

This bar prevents the filing of successive asylum applications after a person has previously been denied by an immigration judge or the BIA.⁷⁰ However, if a person’s only previously denied asylum application was one in which she was a derivative applicant, the bar does not apply.⁷¹

HYPOTHETICAL 12: PREVIOUS DENIAL OF ASYLUM

Enrique and his parents fled El Salvador in 2002 when he was eight years old. His father submitted an asylum application shortly after arriving in the United States, with Enrique and his mother listed as derivative applicants. The asylum application was ultimately denied by the BIA in 2005. Enrique may still file his own asylum application in 2018 as he was not the principal applicant on the previous application.

While on its face this bar only applies to asylum, it has been interpreted by all courts to consider the issue as functioning to also prohibit successive filings of withholding and CAT claims.⁷² Individuals subject to the bar who were ordered removed may be able to file a motion to reopen their proceedings to reapply for asylum, withholding, and CAT protection under certain circumstances, as discussed further in Part II(E).

⁶⁹ See *Husyev v. Mukasey*, 528 F.3d 1172, 1181–82 (9th Cir. 2008); Asylum Procedures, 65 Fed. Reg. at 76,123; AOBTC One-Year Filing Deadline Lesson, *supra* note 64, at 24.

⁷⁰ INA § 208(a)(2)(C), 8 U.S.C. § 1158(a)(2)(C); 8 C.F.R. § 208.4(a)(3).

⁷¹ 8 C.F.R. § 208.14(f).

⁷² See, e.g., *Bamaca-Cifuentes v. Att’y Gen. of the U.S.*, 870 F.3d 108, 110 (3d Cir. 2017); *Go v. Holder*, 744 F.3d 604, 607 (9th Cir. 2014).

3. Firm Resettlement | *Bar to asylum only*

This bar applies to those who were firmly resettled in a third country prior to entering the United States. In order to be “firmly resettled,” the applicant must have (1) entered the third country and (2) received a permanent offer of residency from the third country’s government.⁷³ Importantly, the bar only requires that the applicant receive an *offer* of status—not necessarily that she accepted the status.

If the applicant was firmly resettled, she may be able to argue she falls into one of two exceptions to the bar:⁷⁴

1. The applicant entered the third country as a consequence of her flight from persecution, stayed only as long as necessary to arrange onward travel, and did not establish significant ties.
2. The conditions of residency in the third country were so restricted by the government that the applicant was not truly “resettled.” Examples of such restrictions include limited legal rights to own property, work, travel, and obtain education.

HYPOTHETICAL 13: FIRM RESETTLEMENT BAR

Maria is from Guatemala; prior to entering the United States she and her parents lived in Mexico for three years. The family had renewable temporary residency cards that allowed them limited rights to travel and work but did not allow them to transition to permanent residence. The firm resettlement bar should not apply in Maria’s case because it requires an offer of *permanent* status. Further, depending on the severity of the restrictions on her rights, Maria may also be able to argue for the restricted conditions exception to the bar.

4. Safe Third Country | *Bar to asylum and withholding of removal*

Despite the seemingly general name, this bar only applies to people who arrived in the United States through a land port-of-entry on the Canadian border and requested asylum.⁷⁵ Those subject to this bar will be returned to Canada in order to present their claim for asylum in the Canadian system. However, there are several exceptions available, including for Canadian citizens, those who entered the U.S. on a valid visa, and those who have relatives with status in the United States.⁷⁶

⁷³ INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 208.15.

⁷⁴ 8 C.F.R. § 208.15.

⁷⁵ See INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A); Agreement Covering Third-Country Asylum Claims at the Border, U.S.-Can., Dec. 5, 2002, 2002 Dig. of U.S. Prac. in Int’l. L. 31.

⁷⁶ See 8 C.F.R. § 208.30(e)(6)(iii) (listing exceptions to the bar).

E. Outstanding Orders of Removal

If a DACA recipient was previously placed in removal proceedings in Immigration Court and was denied any form of relief or did not attend a scheduled hearing, the immigration judge or the BIA may have ordered the DACA recipient removed from the United States.⁷⁷ If a DACA recipient is unsure whether an immigration judge or the BIA issued an order of removal in her case, she may call the EOIR automated case information system (1-240-314-1500 or 1-800-898-7180 (toll free)) with her alien registration number, which begins with the letter A and is followed by an eight- or nine-digit number, to check her case status.

1. Motions to Reopen Generally

A person with an outstanding order of removal may file a “motion to reopen” the prior removal proceedings with the Immigration Court or the BIA (depending on who issued the final removal order) in order to apply for relief based on evidence that was unavailable at the time of the previous hearing.⁷⁸ If the motion to reopen is granted, the prior removal order is vacated.

Generally, individuals must file a motion to reopen within ninety days of the order of removal.⁷⁹ If more than ninety days have passed, the filing deadline may be “tolled,” or paused, if an extraordinary circumstance stood in the way of filing (e.g., ineffective assistance of prior counsel) and the applicant was otherwise diligent in pursuing her case. In addition, there are no restrictions on timing for certain motions to reopen, including: motions filed jointly with ICE; motions filed by applicants with “in absentia” orders of removal (i.e., a removal order issued when the applicant failed to appear at a hearing) who did not receive proper notice of the hearing; and motions filed by applicants seeking asylum, withholding of removal, or CAT protection based on changed country conditions.⁸⁰ The following section describes circumstances under which DACA recipients may file this last category of motions to reopen.⁸¹

⁷⁷ In some cases, the immigration judge may have decided to “administratively close,” or temporarily stop, the removal proceedings instead of issuing an order of removal against the DACA recipient. In those situations, the DACA recipient will have to file a “motion to recalendar” the prior removal proceedings (in other words, put the case back on the Immigration Court’s calendar) in order to apply for relief. For guidance on administrative closure and motions to recalendar, see, e.g., American Immigration Council, *Administrative Closure and Motions to Recalendar* (Aug. 29, 2017), available at https://www.americanimmigrationcouncil.org/practice_advisory/administrative-closure-and-motions-recalendar.

⁷⁸ See INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.23(b)(3), 1003.2(c)(1).

⁷⁹ INA § 240(c)(7)(C), 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. §§ 1003.23(b)(1), 1003.2(c)(2).

⁸⁰ INA § 240(c)(7)(C), 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. §§ 1003.23(b)(4), 1003.2(c)(3).

⁸¹ For more in-depth guidance on filing motions to reopen removal proceedings, see, e.g., American Immigration Council, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018) [hereinafter *The Basics of Motions to Reopen*], available at https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders; American Immigration Council, *Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases* (Jan. 2016), available at <https://www.americanimmigrationcouncil.org/research/>

2. Motions to Reopen for Fear-of-Return Claims

Under INA § 240(C)(7)(ii), a person with an outstanding order of removal may apply or reapply for asylum, withholding of removal, or CAT protection by filing a motion to reopen based on evidence of changed circumstances in her country of origin if:

- The evidence is “material” to the applicant’s eligibility for relief; and
- The evidence “was unavailable and would not have discovered or presented at the previous proceeding.”⁸²

As noted earlier, motions to reopen based on INA § 240(C)(7)(ii) may be filed at any time. A person may also file more than one motion to reopen under this statute. However, filing a motion to reopen under INA § 240(C)(7)(ii) will not automatically “stay” removal—in other words, prevent ICE from removing the individual from the United States—so the applicant should also file a motion to stay removal with the motion to reopen.⁸³

In adjudicating these motions to reopen, the immigration judge or the BIA will compare country conditions evidence submitted with the motion with the country conditions that existed at the time of the removal order.⁸⁴ An applicant may point to new developments in her country of origin, such as political upheaval due to recent elections. Or, the applicant may show that conditions in her country that existed at the time the removal order was issued have significantly worsened since then. While the change should be more than a “slight . . . fluctuation” over time in the level of violence (which would be considered a continuing, not changed, circumstance), it need not be “dramatic.”⁸⁵

Unlike the changed circumstances exception to the one-year filing deadline for asylum, motions to reopen filed under INA § 240(C)(7)(ii) cannot be based *solely* on changed personal circumstances arising in the United States,⁸⁶ such as religious conversion, sex reassignment surgery, or the birth of one’s child.

[seeking-remedies-ineffective-assistance-counsel-immigration-cases](#); Asylum Seeker Advocacy Project & Catholic Legal Immigration Network, Inc., *A Guide to Assisting Asylum Seekers with In Absentia Removal Orders* (2016), available at <https://cliniclegal.org/sites/default/files/resources/asylum/A-Guide-to-Assisting-Asylum-Seekers.pdf>; Vikram K. Badrinath, Helen Parsonage & Jenna Petyon, *Time-Barred Motions to Reopen—Tips and Tricks for Success*, in American Immigration Lawyers Association, *Immigration Practice Pointers* 795 (2015–16 ed.), available at <http://www.aila.org/File/Related/14072246b.pdf>.

⁸² INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. §§ 1003.23(b)(4)(i), 1003.2(c)(3)(ii).

⁸³ 8 C.F.R. §§ 1003.23(b)(4)(i), 1003.2(f); see also American Immigration Council, *The Basics of Motions to Reopen*, *supra* note 81, at 7–9.

⁸⁴ *Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016); *Matter of S-Y-G-*, 24 I. & N. Dec. 247, 253 (BIA 2007).

⁸⁵ *Zhao-Cheng v. Holder*, 721 F.3d 25, 28–29 (1st Cir. 2013); *Joseph v. Holder*, 579 F.3d 827, 833–34 (7th Cir. 2009).

⁸⁶ *Matter of C-W-L-*, 24 I. & N. Dec. 346, 346 (BIA 2007). Although INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D), notes broadly that “changed circumstances which materially affect the applicant’s eligibility for asylum” could be an exception to the “previous asylum denial” bar, motions to reopen prior removal proceedings based solely on

Nonetheless, motions to reopen under this provision may be granted based on a combination of changed personal circumstances arising in the United States and changed conditions in the country of origin, such as where “changed country conditions are made relevant by a change in the[applicant]’s personal circumstances.”⁸⁷ Furthermore, the changed country conditions need not be “some kind of broad social or political change in the country . . . as opposed to a more personal or local change,”⁸⁸ such as new incidents of violence against the applicant’s family members in the country of origin. In such situations, the personal change is one that arises in the country of origin and not the United States.

HYPOTHETICAL 14: MOTION TO REOPEN BASED ON CHANGED COUNTRY CONDITIONS

Eva (from Hypothetical 5), who came out as a transgender woman and began hormone therapy in the United States in 2016, has an outstanding removal order that was issued by an immigration judge in 2010. Recently, Eva learned that the Mara 18 killed her cousin in El Salvador after she reported one of its gang members to the police for sexually assaulting her. Following her cousin’s murder, Mara 18 members have also threatened Eva’s parents and other family members. As a result, Eva is afraid of gang members based on both her gender identity and her family membership. She plans to file a motion to reopen under INA § 240(C)(7)(ii) with the Immigration Court based on her fear of return to El Salvador.

Assuming that Eva did not file her motion to reopen within ninety days of the 2010 removal order and could not qualify for any other exception to the deadline, she cannot prevail on her motion solely based on her coming out as a transgender woman and beginning hormone therapy because these are personal circumstances arising in the United States. However, the Immigration Court may grant her motion to reopen if, for example, she also presents evidence that violence against transgender women in El Salvador today occurs at levels significantly higher than in 2010. The Immigration Court may also grant Eva’s motion to reopen based on new incidents of gang violence against her family members because those circumstances, while personal, arose in El Salvador and not the United States.

changed personal circumstances arising in the United States will generally be subject to the ninety-day deadline, barring tolling or other exceptions to the deadline (see Part II(E)(1)).

⁸⁷ *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014); see also *Liu v. Holder*, 718 F.3d 706, 709 (7th Cir. 2013) (holding that the applicant’s religious conversion “was a change in her personal circumstances, true; but the change would not have exposed her to a risk of persecution in [her country] had it not been for the change in conditions in that country”).

⁸⁸ *Joseph*, 579 F.3d at 834–35; see also *Malty v. Ashcroft*, 381 F.3d 942, 945–46 (9th Cir. 2004).

Conclusion

As of the time of writing, litigation on the Trump Administration’s decision to rescind the DACA program and legislation on permanent lawful status for DACA recipients remain pending. Because the situation of DACA recipients is in flux, legal service providers should screen for potential fear-of-return claims during their intakes and meetings with recipients and refer them to an immigration attorney with experience in asylum law and removal defense as soon as possible. We encourage service providers to be in touch with CGRS regarding issues in their individual cases, as well as questions they might have about recent developments in asylum law and how such developments could affect DACA recipients. Information about CGRS’s technical assistance program, recommended guides on general asylum law, and directories for immigration attorneys are included in the Appendix below.

Appendix: Resources

CGRS Technical Assistance Program and Resources

Requesting CGRS Assistance

To request resources and/or assistance in your asylum case, fill out our assistance request form at <https://cgrs.uchastings.edu/assistance>. First-time registrants must create an account; save your credentials for future requests. We strive to respond within three business days. For urgent matters, note upcoming deadlines in the “Case Deadlines” field. If you have already received a CGRS case number in a particular case, do not submit a subsequent request form online. E-mail CGRS-TA@uchastings.edu with the case number and specify the type of follow-up requested.

Tracking of Case Outcomes

CGRS maintains a database of over 20,000 asylum cases and collects case information including the facts, arguments made, identity of the adjudicator, outcome, and the rationale for the decision. **Report your case outcome** at <https://cgrs.uchastings.edu//request-assistance/report-outcome-your-case>. This enables us to assist other attorneys with similar claims by providing information on how particular adjudicators have ruled and what evidence was persuasive. The information is also critical to informing our research, impact litigation, and policy advocacy efforts.

Subscribe to the CGRS Newsletter and Gender Asylum Listserv by emailing cgrs@uchastings.edu to stay informed on upcoming trainings, updates, and action alerts related to asylum/refugee law and policy.

General Asylum Law

For more in-depth information on general asylum law, please see the following selection of recommended sources:

American Immigration Lawyers Association, *Asylum Primer*
<http://agora.aila.org/Product/List/Publications>

Immigrant Legal Resources Center, *Asylum and Related Immigration Protections*
<http://www.ilrc.org/publications>

National Immigrant Justice Center, *Asylum Training Materials*
<http://www.immigrantjustice.org/resources>

Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook*
<http://agora.aila.org/product/detail/2885>

Ninth Circuit Case Law

For legal service providers working with DACA recipients in the Ninth Circuit, the U.S. Court of Appeals for the Ninth Circuit has prepared a comprehensive overview of immigration law in that jurisdiction, including relief from removal and motions to reopen removal proceedings:

U.S. Court of Appeals for the Ninth Circuit, *Immigration Outline*
http://www.ca9.uscourts.gov/guides/immigration_outline.php

Referrals for Immigration Attorneys

National Resources:

Executive Office for Immigration Review, List of Pro Bono Legal Service Providers
<https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>

Immigration Advocates Network, National Immigration Legal Services Directory
<https://www.immigrationadvocates.org/nonprofit/legaldirectory>

American Immigration Lawyers Association, Immigration Lawyer Search
<http://www.ailalawyer.org>

California Resources:

Ready California, California Service Map
<https://ready-california.org/service-providers>



The Center for Gender & Refugee Studies (CGRS) provides legal expertise, training, and resources to attorneys representing asylum seekers, advocates to protect refugees, advances refugee law and policy, and uses domestic, regional, and international human rights mechanisms to address the root causes of persecution. CGRS-California, the California-focused arm of CGRS, provides legal technical assistance, training, and litigation resources throughout the state.

To request technical assistance from CGRS, please visit <http://cgrs.uchastings.edu/assistance>.

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