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*Roundtable Discussion on the One Year Asylum Deadline*  
Hosted by Paul, Hastings, Janofsky & Walker LLP  
December 2, 2010

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## INA § 208(a)(2)(B)

Sec. 208. (a) Authority to Apply for Asylum.-

(1) In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. -

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(E) 7 APPLICABILITY- Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))).

(3) Limitation on judicial review.<sup>3/4</sup>No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

## 8 CFR § 1208.4(a)(2), (4)-(5) (2010)

### § 1208.4 Filing the application.

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

(a) *Prohibitions on filing.* Section [208\(a\)\(2\)](#) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate to the satisfaction of the Attorney General that one of the exceptions in section [208\(a\)\(2\)\(D\)](#) of the Act applies. Such prohibition applies only to asylum applications under section [208](#) of the Act and not to applications for withholding of removal under [§1208.16](#). If an applicant files an asylum application and it appears that one or more of the prohibitions contained in section [208\(a\)\(2\)](#) of the Act apply, an asylum officer, in an interview, or an immigration judge, in a hearing, shall review the application and give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing to determine if the application should be rejected. For the purpose of making determinations under section [208\(a\)\(2\)](#) of the Act, the following rules shall apply:

(1) *Authority.* Only an asylum officer, an immigration judge, or the Board of Immigration Appeals is authorized to make determinations regarding the prohibitions contained in section [208\(a\)\(2\)\(B\)](#) or [\(C\)](#) of the Act.

(2) *One-year filing deadline.* (i) For purposes of section [208\(a\)\(2\)\(B\)](#) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. For the purpose of making determinations under section [208\(a\)\(2\)\(B\)](#) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to [§103.2\(a\)\(7\)](#) of 8 CFR chapter I. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with [§1003.13](#) of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline. The failure to have provided required biometrics and other biographical information does not prevent the

"filing" of an asylum application for purposes of the one-year filing rule of section [208\(a\)\(2\)\(B\)](#) of the Act. See [8 CFR 1003.47](#). For aliens present in or arriving in the Commonwealth of the Northern Mariana Islands, the 1-year period shall be calculated from January 1, 2015, or from the date of the alien's last arrival in the United States (including the Commonwealth of the Northern Mariana Islands), whichever is later. No period of physical presence in the Commonwealth of the Northern Mariana Islands prior to January 1, 2015, shall count toward the 1-year period. After November 28, 2009, any travel to the Commonwealth of the Northern Mariana Islands from any other State shall not re-start the calculation of the 1-year period. (Amended effective 11/28/09; [74 FR 55725](#).)

(3) *Prior denial of application.* For purposes of section [208\(a\)\(2\)\(C\)](#) of the Act, an asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals.

(4) *Changed circumstances.* (i) The term "changed circumstances" in section [208\(a\)\(2\)\(D\)](#) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

(5) The term "extraordinary circumstances" in section [208\(a\)\(2\)\(D\)](#) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability ( e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

Language contained in proposed Foreign Operations “Omnibus” Appropriations Bill,  
S.2676 RS, Sec. 7080

## **Elimination of arbitrary time limits**

Sec. 7080.

Section 208(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1158(a)(2)) is amended--

- (1) by striking subparagraph (B);
- (2) by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively;
- (3) in subparagraph (B), as redesignated, by striking `subparagraph (D)' and inserting `subparagraphs (C) and (D)'; and
- (4) by striking subparagraph (C), as redesignated, and inserting the following:

`(C) CHANGED CIRCUMSTANCES- Notwithstanding subparagraph (B), an application for asylum of an alien may be considered if the alien demonstrates, to the satisfaction of the Attorney General, the existence of changed circumstances that materially affect the applicant's eligibility for asylum.'

`(D) MOTION TO REOPEN DENIED ASYLUM CLAIM- Notwithstanding subparagraph (B) or section 240(c)(7), an alien may file a motion to reopen an asylum claim during the 2-year period beginning on the date of enactment of this subparagraph if the alien--

`(I) was denied asylum based solely upon a failure to meet the 1-year application filing deadline in effect on the date on which the application was filed;

`(II) was granted withholding of removal to the alien's country of nationality (or, if stateless, to the country of last habitual residence under section 241(b)(3));

`(III) has not obtained lawful permanent residence in the United States pursuant to any other provision of law;

`(IV) is not subject to a bar to asylum under section 208(b)(2) and should not be denied asylum as a matter of discretion; and

`(V) is physically present in the United States.'; and

- (5) in subparagraph (E), by striking `subparagraphs (A) and (B)' and inserting `subparagraph (A)'.

# Post Traumatic Stress Disorder

Constance Sheehan, LCSW

## Three categories of PTSD Symptoms

- Intrusive memories
  - Avoidance and Numbing
  - Hyperarousal
- avoidance and numbing appear to be the most specific for identification of PTSD.

## Sufficient exposure

"The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event" of a similar nature or learning that a loved one experienced such an event.

## Differential Dx

- Most individuals directly involved in catastrophic events do not develop diagnosable psychiatric illness rather 'reactions' or responses
  - majority report experiences such as sleep disturbance, loss of concentration, or feeling emotionally upset afterward. "probable PTSD" or "symptoms of PTSD" rather than representing them as actual PTSD.



## Symptoms

|                      |                            |
|----------------------|----------------------------|
| Intrusive thoughts   | Physiological reactivity   |
| Nightmares           | Excessive startle response |
| Flashbacks           | Hypervigilance             |
| Emotional reactivity | Difficult concentrating    |
| Detachment           | Sleep disturbances         |
| Restricted affect    | Loss of interest           |

Avoiding thoughts of trauma  
Increased irritability  
Avoiding situational reminders of trauma  
Sense of foreshortened future

## Trauma Types

- PTSD and range of trauma types
  - natural disasters
  - Terrorism
  - rape and other assaultive violence
  - military combat
  - accidental injuries
- Trauma types demonstrated most commonly associated with PTSD are rape, kidnapping, and torture

## Numbing

- Victims often mobilize strategies (e.g. distraction) aimed at reducing distress associated with memories of trauma.
- When such strategies fail, a “shutting down” of the affective system ensues: this process is expressed as numbing symptoms.
- It is thought that severe arousal and severe avoidance will increase the likelihood of numbing symptoms

## Emotional Numbing

- Loss of interest in
- Activities
- detachment from others
- restricted affect
- symptoms of effortful avoidance of trauma-related situations and thoughts are in the cluster called “persistent avoidance”

## PTSD Dx

- PTSD debuted in DSM-III in 1980.
- PTSD differs from other psychiatric diagnoses by its inherent dependence on two distinct processes:
  - exposure to trauma
  - development of a specific pattern of symptoms in temporal and/or contextual relation to the traumatic event.

## PTSD Dx

- The diagnosis of PTSD requires assessment of 17 trauma-associated symptoms divided into three groups:
  - B = 1 intrusive memories of the event
  - C = 3 avoidance and numbing responses
  - D = 2 hyperarousal symptoms

## C Symptoms

- C symptoms predict psychiatric illness and comorbidity.
- B and D symptoms appear to represent normative responses which, by themselves, do not necessarily indicate psychopathology
- Thus, while the relatively common group B and D symptoms signify distress, the less prevalent group C cluster serves as a marker of psychopathology.

## Symptoms

- Symptoms contextually tied to the event
  - Nightmares of the *event* rather than just *any* nightmares)
  - temporally tied to it (e.g., requiring *new onset* of insomnia, problems concentrating, or loss of interest after the event, rather than just the *presence* of these symptoms after the event)

## PTSD Dx

- The diagnosis of PTSD depends on two separate but confounded processes
  - Exposure to trauma
  - Development of a specific pattern of the symptoms that appear following the trauma.

## Cross Study

- Cross-national similarities in PTSD between civilian groups in the United States (Oklahoma City) and Kenya (Nairobi) directly exposed to terrorist bombings
- The incidence of PTSD by gender was similar among survivors in the two countries (20%-30% in men and 40%-50% in women).
- In both sites, group C was strongly predictive of a diagnosis of PTSD.

## Cross Study

- Both groups overwhelmingly depended on support from loved ones to help them cope.
- Secondly, Nairobi, Kenya, survivors were inclined to seek comfort from their religious community, whereas Oklahoma City survivors favored medical treatment, medications, and alcohol for coping.
- Thus, the expression of PTSD itself was more similar than different in the two sites, but coping responses differed.

## References

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- North CS, Pfefferbaum B: Research on the mental health effects of terrorism. JAMA 2002; 288:633-636
- Norris FH: Epidemiology of trauma: frequency and impact of different potentially traumatic events on different demographic groups. J Consult Clin Psychol 1992; 60:409-418
- Breslau N, Reboussin BA, Anthony JC, Storr CL: The structure of posttraumatic stress disorder: latent class analysis in two community samples. Arch Gen Psychiatry 2005; 62:1343-1351
- Foa EB, Riggs DS, Gershuny BS: Arousal, numbing, and intrusion: symptom structure of PTSD following assault. Am J Psychiatry 1995; 152:116-120
- The Importance of Four-Factor Emotional Numbing and Dysphoria Models in PTSD ROBERT H. PIETRZAK and STEVEN M. SOUTHWICK Am J Psychiatry 2009; 166: 726-a-727-a.
- Diagnostic Criteria: Understanding Etiology and Treatment GORDON J.G. ASMUNDSON and STEVEN TAYLOR Am J Psychiatry 2009; 166: 726
- The Psychosocial Context of Trauma in Treating PTSD Patients Herbert Hendin, John T. Maltzberger, and Katalin Szanto Am J Psychiatry 2008; 165: 28-



**Reference Materials**

*Roundtable Discussion on the One Year Asylum Deadline*

Hosted by Paul, Hastings, Janofsky & Walker LLP

December 2, 2010

1. Research Reports on the One Year Deadline:

- A. "The BIA and the One Asylum Deadline and the BIA: No Protection, Process," National Immigrant Justice Center, Human Rights First, Penn State Law School's Center for Immigrants' Rights, released October 21, 2010, available at <http://www.immigrantjustice.org/press/asylum/oneyeardeadline.html> [copy included in materials]
- B. Schrag et. al., "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum," 52 Wm. & Mary L.Rev \_\_\_\_ (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684231](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684231).
- C. "Winning Asylum, Withholding of Removal, and Convention Against Torture Relief for LGBT and HIV-positive Immigrants," National Immigrant Justice Center and Immigration Equality, available at <http://www.immigrantjustice.org/resourcespolicy/napso/napsmtest.html>.

2. Useful law review articles on the One Year Deadline:

- A. Musalo, Karen, "Center for Gender and Refugee Studies: The Implementation of the One Year Bar," 31 Hastings Int'l & Comp. L. Rev. 693 (2008)
- B. Neilson, Vickie, "The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal," 8 NYCLR 233 (2005).

3. Legal Authorities

- A. Statute: 8 U.S.C. § 1158(a)(2); INA § 208(a)(2)
- B. Implementing Regulations: 8 C.F.R. §§ 208.4, 1208.4
- C. Explanatory "Preamble" current implement regulations: 65 FR 76,121
- D. Asylum Officer's Basic Training Course – 1YD section, available at: [http://www.asylumlaw.org/docs/united\\_states/one\\_year\\_lesson\\_March2001.pdf](http://www.asylumlaw.org/docs/united_states/one_year_lesson_March2001.pdf)

\*\* This document contains only the relevant personal history and one year deadline argument sections of a cover letter submitted in support of an affirmative asylum application. The applicant was granted asylum by the Chicago Asylum Office, despite having arrived approximately nine years before his application date.

### Mr. Redacted's personal history

[personal history outside U.S. omitted]

...Soon after that call, on November 1, 1999, Mr. Redacted arrived in New York for a business trip on which he intended to promote his fashion business to prospective clients and investors in the United States. While touring the United States, he began to notice its open and free LGBT communities, which included several of Mr. Redacted's personal friends from the fashion world. Mr. Redacted felt relieved to be in an environment in which conducting his profession did not cause him to fear bodily harm and social ruination. Sometime in early 2000, he decided to remain in the United States instead of returning to Burkina Faso. He called his wife Ivonne and told her that he was not coming back. He reconnected and began a relationship with John Doe, a bisexual friend he had dated while studying in Ghana. Mr. Redacted moved in with Albert in Los Angeles.

Although he was relieved to be away from danger on account of his perceived sexual orientation, Mr. Redacted was not ready to publicly identify as a bisexual man at this time, and was uncomfortable with his own sexuality as well. Mr. Redacted's family continued to pressure him to marry and start a family, and he deeply desire to have children as well. Mr. Redacted met a young woman named Dominique in the middle of 2000, and soon married her. She was immature and had substance abuse problems, however, and left Mr. Redacted immediately after the marriage. Mr. Redacted continued to live with and date John Doe, though they only let a few friends know the intimate nature of their relationship.

In the meantime, Mr. Redacted established himself as a fashion designer in Los Angeles, and even put on an African-theme fashion show that received coverage on the local news. Mr. Redacted was able to earn enough money to send funds to his church in Ouagadougou, to his mother and sister in Nigeria, to his father in Cote D'Ivoire, and to other family in Burkina Faso.

Mr. Redacted still yearned to start a family and to relieve some of his own family's pressure to marry – and his own internal desire to have a normal family. He met Frances Roe (Ms. Roe) in 2002 through a mutual friend and believed he had found the perfect partner for a family. Ms. Roe was also bisexual, but she seemed to share Mr. Redacted's commitment to family life. They planned to adopt African children together, and Mr. Redacted felt relieved and happy that he was able to tell his family in Africa (via phone) that he had a wife. The couple married in June, 2002. Soon after they got married, however, Ms. Roe's behavior became odd. She decided that she wanted to move to Atlanta to "rest," and did so despite Mr. Redacted's protestations that he could not move his successful fashion business in Los Angeles. Eventually, Mr. Redacted decided to move to Atlanta with her, giving up his fashion career. In Atlanta, however, things



were no better between them, and Ms. Roe' behavior became increasingly erratic. They applied for immigration benefits together on two separate occasions, but on each occasion Ms. Roe' non-cooperation prevented them from demonstrating a sufficient commingling of life to establish a qualifying marriage: Ms. Roe refused to put Mr. Redacted's name on their lease together. Ms. Roe continued to spend Mr. Redacted's money and promise him that they would start a family together, but Mr. Redacted began to believe that she was just using and abusing him. Finally, in October, 2005, Ms. Roe and Mr. Redacted had a fight in which Ms. Roe shoved Mr. Redacted and put all of his possessions out of the house. Mr. Redacted left and moved in permanently with a friend who had put him up during temporary fights with Ms. Roe. Mr. Redacted withdrew his application for immigration benefits on the basis of the marriage. Later, Mr. Redacted filed a self-petition under the Violence Against Women Act, which USCIS received on December 29, 2006. Catholic Charities of Atlanta represented him in the petitioner, which USCIS denied on the grounds that his wife's actions, though "unpleasant," were only the product of a "deteriorating marriage," and not "extreme cruelty." Ex. H.

Mr. Redacted moved to Chicago in August, 2006, to start a new life away from his ex-wife. He moved to the North Side of Chicago and soon found a new church, the New Life Christian Center. Mr. Redacted was not in Chicago long, however, until his HIV/AIDS condition caused a near disaster. Mr. Redacted had noticed himself getting sick, having a "shingles" outbreak, and had gone to hospitals. On April 17, 2007, Mr. Redacted traveled to Milwaukee via bus to retrieve some possessions from a friend. He remembers feeling mentally "foggy" that day, but remembers little else. Police arrested Mr. Redacted and cited him for disorderly conduct. The citation states that he was shouting Bible verses, which scared the other passengers. Later that night, Mr. Redacted remembers watching television coverage of the Virginia Tech massacre and feeling scared and disturbed. Next he vaguely remembers jumping up and down in his apartment and leaving it in a shirt and underwear only. Mr. Redacted's next memory is of waking up tied to a hospital bed with a broken ankle.

Unbeknownst to him, Mr. Redacted had contracted HIV and the disease had progressed to full-blown AIDS. Mr. Redacted almost certainly suffered from HIV/AIDS related dementia, though he did not have a CAT-scan at that time. He spent one month in a hospital, and then another month in a mental hospital, where he recovered and received treatment for this depression.

When Mr. Redacted came out of the hospital in June, 2007, he was on the verge of losing his apartment and had lost his employment at a fashion boutique in Chicago. In July, 2007, his church arranged for him to live with a deacon from the congregation. Mr. Redacted was suffering the combined effects of unknown brain damage due to HIV/AIDS and depression caused by his understanding of the HIV/AIDS diagnosis, which in Burkinabe culture is tantamount to a death sentence. His living situation was unhealthy, as the deacon was verbally abusive towards him. Mr. Redacted spent over a year getting back to a decent level of functioning, and describes himself during this period as unable to plan or reason. Ex. A. at 13. By approximately August, 2007, he felt good enough to begin looking for options to redress his immigration status: as an HIV-positive person, he was now more fearful than ever of returning to Burkina Faso. He remembered that Heartland Alliance, where he previously volunteered, represented all people, and began looking for options again. After finding out about asylum for sexual

minorities, he went to the National Immigrant Justice Center (NIJC) during early September, 2008. NIJC accepted his case and filed the instant asylum application on his behalf.

### **Mr. Redacted's Eligibility for an Exception to the One-Year Deadline**

A combination of both changed and extraordinary circumstances delayed Mr. Redacted's asylum application. Specifically, Mr. Redacted's personal circumstances changed when he became aware of his HIV status in April, 2007. After April 2007, extraordinary circumstances, namely the mentally and physically disabling effects of his HIV/AIDS outbreak and related health complications, delayed his application until within a reasonable period before November 10, 2008, when he applied for asylum.

In addition and in the alternative, Mr. Redacted's recent acceptance of, and willingness to assert, an openly bisexual identity, also constitute changed circumstances for the purposes of this asylum application.

#### **Mr. Redacted's HIV diagnosis constitutes changed circumstances**

"Changed circumstances... shall refer to circumstances materially affecting the applicant's eligibility for asylum." 8 C.F.R. § 208.4(a)(4)(i). Changed circumstances includes "changes in the applicant's personal circumstances." 8 C.F.R. § 208.4(a)(4)(i)(B).

Mr. Redacted's HIV diagnosis constitutes a changed circumstance because it is material to his asylum eligibility. HIV status is an independent ground for asylum, as HIV-positive individuals constitute a particular social group. *See, e.g., Manani v. Filip*, 552 F.3d 894 (8th Cir. 2009)(denying asylum based on HIV status, but assuming that HIV status underlies a valid particular social group), *Memorandum from INS Counsel David Martin to All Regional Counsel*, 73 Interp. Rel. 901 (1996). Furthermore, AIDS symptoms, such as those displayed by Mr. Redacted, increase the identifiability of a gay or bisexual applicant, as these symptoms are visible to society and associated with men who have sex with men. Identifiability is material to asylum eligibility. *See Matter of Mogharrabi*, 19 I.&N. Dec. 439 (BIA 1987). Mr. Redacted's HIV status and AIDS symptoms decrease his ability to find employment and earn a living in Burkina Faso, thereby increasing his likelihood of suffering economic persecution. Finally, Mr. Redacted's HIV status decreases his access to family and community networks on which he might otherwise rely for protection and safety, rendering him more vulnerable to persecution.

Mr. Redacted's HIV status constitutes an independent particular social group, will aggravate his offensiveness to anti-gay persecutors, will prevent him from sustaining himself economically, and increases his vulnerability to persecution. These additional threats against him are sufficiently serious to be material to his asylum eligibility, and therefore constitute changed circumstances.

#### **Mr. Redacted's HIV disease and related complications constituted extraordinary circumstances subsequent to April, 2007**

“Serious illness or mental or physical disability” can constitute extraordinary circumstances. 8 C.F.R. § 208.4(a)(5)(i).

Mr. Redacted experienced a nearly fatal outbreak of AIDS and related infections that culminated in his mental and physical collapse and ensuing hospitalization from April 2007 until June 2007. Mr. Redacted’s treating psychiatrist states that Mr. Redacted suffered “Major Depression with Psychotic Features,” and states that this psychological manifestation is common for people who, like Mr. Redacted, have extremely depressed CD4 counts and suffer neurological toxicity because of HIV infection. According to Dr. Watts, Mr. Redacted’s mental and physical illness caused him to be “extremely depressed, disorganized, and hopeless.” According to Lori Quilty, Mr. Redacted’s treating clinical social worker, his depression was “severe” and he “struggled with daily functioning.” Ex. D at 2. Mr. Redacted relates that without help he was unable to direct himself around Chicago, where he had been living since August 2006. He attended church as instructed but could not give his attention. His behavior was so odd and withdrawn that strangers remarked that he must be “crazy.” Ex. A at 13.

In addition, Mr. Redacted struggled to reconcile himself to his HIV/AIDS diagnosis. In his cultural and family background, this was a death sentence. Mr. Redacted had followed via written correspondence and phone his sister Kadiatou’s death from AIDS in Cote D’Ivoire. He therefore knew that his family viewed AIDS’s victims with contempt and little or no pity, and had internalized this stigmatization to some extent himself.

Due to the profound physical, psychiatric, and psychological disruption caused by Mr. Redacted’s AIDS condition, he was substantially unable to function for over one year after being released from the hospital. Only in around the summer of 2008 did Mr. Redacted begin to return to a normal level of functioning, as evidenced by the resumption of his volunteer activities at church. Mr. Redacted was still not able to work or volunteer on a full-time basis, however.

The massive disruption that AIDS caused to Mr. Redacted’s life physiologically, mentally, and emotionally constitutes a “serious illness” as envisioned by the regulations listing examples of extraordinary circumstances. This extraordinary circumstance, in combination with the changed circumstance of Mr. Redacted’s recent HIV-positive status, makes him eligible for an exception to the one year deadline.

Mr. Redacted’s delayed acceptance of his sexuality is also a changed circumstance

Mr. Redacted states that he is only beginning to accept his same-sex attractions. This statement is consistent with his life history of maintaining secretive same-sex relationships, while being open about his heterosexual relationships. Mr. Redacted’s treating psychiatrist and clinical social worker corroborate his ongoing struggle with, and progress in, accepting his sexual orientation. Mr. Redacted hopes that soon his same-sex relationships will no longer be silent. Ex. A at 14-15. Mr. Redacted cannot be asked to forego his desire to be open about his sexual orientation, as an alternative to granting asylum. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9<sup>th</sup> Cir. 2005). The change in Mr. Redacted’s desire to be open is material to his asylum application because it increases his

likelihood of being identified as bisexual. As stated above, identifiability is material to asylum eligibility.

## **Statement of [Redacted]**

### **The Onset of AIDS**

1. In October 2006, I visited my doctor because I was having rashes and was having such great pain in my legs that I could not stand. My doctor told me that I should get an HIV test. I did not get an HIV test because I was afraid of finding out about the results. I was afraid of the disease and its effects on my health, but more than that I knew that having HIV was like a death sentence in Africa and in Burkina Faso specifically. People with the disease are looked down upon greatly, and I knew that having the disease would mean that I would be renounced by my family and possibly harmed in Burkina Faso.
2. In January, 2007, I went to Saint Bernard hospital because I was feeling very sick. They told me that I had pneumonia and gave me some medications. A few days later, I felt much better. They did not tell me to get an HIV test at that time, nor did they conduct one on me, to my knowledge.
3. Approximately two weeks after I visited Saint Vernon, I began to feel chest pains and one side of my ribs were hurting. I checked myself into Cook County hospital, where they told me that my ribs were hurting because of an old accident.
4. In April, 2007, I started getting shingles on my face and visited Weiss hospital on Lake Shore Drive on the north side of Chicago. They gave me a prescription medication for the shingles. At Weiss, they said they were going to do an HIV test, but they were charging me for everything, so I never went back to get a result.
5. Approximately a week after I went to Weiss, I went to Cook County hospital again because I felt very sick and weak. There, they said they were going to do a blood test for HIV and other diseases and send the results to the CORE Center.
6. Less than a week after I went to Cook County hospital for the second time, I went to Milwaukee to pick up some property that I had left at my friend Ablasse's store. I remember that I was feeling dizzy sitting on the bus on the way up to Milwaukee and couldn't tell exactly what was going on. I couldn't remember everything I was doing or what my plans were. I do not remember much of this trip to Milwaukee, but I know that the Milwaukee police cited me for disorderly conduct. All I remember is that the bus was standing on the side of the road waiting for the police to come, and that the police took me in a car and then moved me to the police station. I remember being interrogated at the police

station about my immigration status and then staying in a cell for maybe 15 minutes. From the citation, I know that people said that I was yelling Bible verses and that this was scaring people. Somehow, I got back to my apartment. I remember watching news coverage of the mass shooting at Virginia Tech. I remember feeling very scared and troubled. I did not sleep that night. I remember that I was jumping around in my apartment and that I hit a light on the ceiling fan with something, maybe my head. I remember that I walked out of my apartment in my underwear and a shirt only. The next thing I remember is waking up in St. Francis tied to a bed. My ankle was broken and I had a large cut with stitches on my foot. The staff at St. Francis told me that I had jumped out of my apartment window in a suicide attempt, but I know that this cannot be true, as I live on the 7<sup>th</sup> floor and would have died had I jumped. My only other memories of St. Francis are when they untied me and put me through an MRI scanner, and a nurse telling me that they had restrained me when I arrived because I was so agitated.

7. In the first week of May, St. Francis transferred me to St. Mary's at Divison and Western in Chicago, where they put me in the behavioral unit. I stayed at St. Mary's until the first week of June. I found out that I was HIV-positive maybe a week after I came to St. Mary's. I remember that, although I was very foggy mentally still, I believed that my diagnosis was like a death sentence. I could not sleep at night for long stretches of time while I was at Saint Mary's. They gave me sleeping pills and injections to try to help me sleep, and sometimes this worked. When I was able to sleep I had constant nightmares. They did not give me any medications upon release from St. Mary's, but told me to go to the CORE Center.
8. I went to the CORE Center in June, when I got out of custody. According to my doctor, when I arrived at the CORE Center, my T-cell count was at 29. My doctor Bala Hota started me on a customized medication regime for HIV/AIDS and for my psychiatric treatment. My health started to improve, though I continued to feel extremely mentally foggy, depressed, and lacking in motivation. I knew that I had to go to the CORE Center to save my life, but I was not able to do anything else.
9. I was sick and depressed and didn't feel the drive to do anything. I felt like everything I was doing was failing. I felt like every ability I used to have was gone. I would go to church as the pastors told me to do, but I lacked any zeal for these activities and didn't take any initiative on my own. I used to sit in church without saying anything or doing anything – I would just sit there. The pastor used to waive at me to get my attention. My lethargy and somberness was so pronounced and obvious that the other members of the church noticed and tried to

intervene on my behalf about it: Sometime during the summer of 2008, I remember that I was in a church meeting called “Adam’s Men’s Meeting.” During this meeting, everybody expressed concern for me, saying that I was not myself. I explained that I felt scared of talking to people.

10. I lost my apartment in July, 2007, and moved in with a man from the church named Deacon Kerry. Deacon Kerry was very verbally abusive towards me. He would talk to me like I was a kid, like someone who couldn’t hold a spoon. Sometimes this would remind me of what had happened with my ex-wife. All of this, combined with my HIV diagnosis and my health problems, were like an enormous weight on me, and I now understand that I was not fully functioning biologically at that time. Even though I had volunteered at the Marjorie Kovler Center, I just couldn’t make myself make the connection and find an immigration solution. I remember when I got out of the hospital I had memory problems and difficulties with simple directions. I was shocked that I recognized that I had lost all sense of direction and motivation. I thought, “this isn’t me,” but I still couldn’t do anything.
11. I remember sitting in a restaurant after I got out of the hospital and trying to order food. The only word I could think to say was “taco.” I heard a man next to me say something to his wife about me being crazy.
12. In August, 2008, Deacon Kerry lost his house because he had not been paying his mortgage. I went to a shelter, filled out an application, and was accepted for placement in the shelter. When Pastor Xavier heard of this, he said that I could stay with him. This was really a blessing for me, as living with Deacon Kerry was just too stressful.
13. On September 1, 2008, my brother informed me that my father had passed away. It comforted me that my brother told me that as he was dying he said my name, and my sister Mariam’s name, and said that he loved us and appreciated all the help that I had given name. I was getting better and coming out of my deepest depression at this time, but the news of my father’s death caused me to go into depression again for a little while.
14. By October, 2008, I was feeling significantly better and was able to plan. My physical health, including my brain, was getting better, I was in a more positive living environment, and I had seen that my HIV/AIDS disease can be managed. I did not feel nearly as energetic as I had before I got sick, but I was able to plan and motivate myself to some degree by then. I researched the Marjorie Kovler Center and other Heartland Alliance programs, and found out that the National

Immigrant Justice Center represented sexual minorities in asylum programs. I scheduled an appointment to talk to them.

15. My AIDS outbreak and HIV diagnosis made me extremely fearful of returning to Burkina Faso. I know that my condition makes me more vulnerable to abuse and mistreatment than I had been previously for many reasons, and decided that I needed to figure out a way to avoid returning there permanently.

### **My Fear of Return to Burkina Faso**



**SAMPLE ONE-YEAR ARGUMENT**

*Extraordinary Circumstance: Applicant in Status  
 Changed Circumstance: Deterioration of Conditions in Home Country*

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**I. ARGUMENT**

**A. MR. CLIENT MERITS A WAIVER OF THE ONE YEAR FILING DEADLINE**

Under §208(a)(2)(B) of the INA, an asylum applicant must show by clear and convincing evidence that he or she has filed his or her application within one year of his arrival in the United States. Section 208(a)(2)(D) of the INA provides an exception permitting an asylum application to be considered, notwithstanding the one year deadline, “if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application.” *Id.* To qualify for an exception, the applicant must show that (a) the conditions of his or her country of nationality have changed to the applicant’s detriment, or (b) that circumstances, not intentionally created by the applicant through his or her own actions or inactions were directly related to the delay in filing the application. 8 CFR §208.4(a)(4)(i).

Mr. CLIENT demonstrates both changed and extraordinary circumstances which delayed him in filing his asylum application.

**1. Mr. CLIENT Filed his I-589 More Than One Year After He Arrived in the United States Due to Extraordinary Circumstances**

Under 8 CFR §208.4(a)(5), the Code defines the term “extraordinary circumstance” as events or factors directly related to the failure to meet the one year deadline. The burden of proof is on the applicant to show, but for those circumstances, he or she would have filed his or her application within the one year deadline. 8 CFR §208.4(a)(5). An applicant must also show

the circumstances were not intentionally created through his or her own action or inaction. *Id.*

The Code lists lawful nonimmigrant status until a reasonable period before the filing of the asylum application as an extraordinary circumstance. 8 CFR §208.4(a)(5)(iv).

Mr. CLIENT arrived in the United States in November of 1999, on an F visa. He attended Lake Michigan College in Michigan until May 2003. Following his graduation, he applied for an Optional Practical Training and received an Employment Authorization Document (EAD) from the USCIS that was valid until December 31, 2003. *See* Exhibit D, G and H, Passport, EAD, and I-20 of Client CLIENT. Mr. CLIENT filed his asylum application on November 17, 2003 while he was in lawful nonimmigrant status. Mr. CLIENT's status expired on December 31, 2003. Thus, though more than a year passed between the time Mr. CLIENT entered the United States and the date he filed his asylum application, Mr. CLIENT was in status when he filed his I-589. This lawful nonimmigrant status constitutes extraordinary circumstances relating to the delay in filing an application.

**2. Mr. CLIENT Filed his I-589 More Than One Year After He Arrived in the United States Due to Changed Circumstances**

The Code of Federal Regulations, Section 208.4(a)(4) defines “changed circumstances” as changes that materially affect the applicant’s eligibility for asylum. Changed circumstances reflect the principle that after individuals leave their countries of origin, some can become *refugee sur place*. *See UNHCR Handbook*, ¶¶ 94-95. Changed circumstances include activities the applicant becomes involved in outside the applicant’s country of nationality that put the applicant at risk in the applicant’s home country. *See* 8 CFR §§208.4(a)(4)(i)(A)-(B). Political organizing and other activities in the United States that are considered critical of the applicant’s government also constitute changed circumstances. *Id.*

Mr. CLIENT's case demonstrates both scenarios: The Zimbabwean government has increased its persecution of dissidents and perpetuated the deterioration of human rights and Mr. CLIENT's involvement with the opposition party while in the United States has heightened the government's interest in persecuting Mr. CLIENT in particular.

Mr. CLIENT left Zimbabwe in 1999. In the five years since his departure, Zimbabwe has undergone drastic changes. Under President Mugabe, the ZANU-PF controlled government passed laws in early 2002 that allow the government greater control over opposition groups. *See Exhibit Z, Human Rights Crisis in Zimbabwe*, Human Rights First, October 2004. Mugabe's government formalized its assault on the free press in 2002 by passing the Public Order and Security Act (POSA) which makes it an offense to criticize the President and give the police broader powers to enforce the law. *See id.* The focus of the majority of the government abuse has been directed at the MDC. *See Exhibit X, Zimbabwe: Country Reports on Human Rights Practices – 2003*, U.S. Department of State.

The Zimbabwean government knows that Mr. CLIENT and his family members are active supporters of MDC. Mr. CLIENT has attended MDC meetings in Detroit and sends a portion of his earnings to support the MDC every month. *See Exhibit M, N, and S, MDC Membership Card of Client CLIENT and WIFE CLIENT, and Declaration of Allan A. Banda* (hereafter "Allan Decl.") at ¶¶ 1, 2. Mr. CLIENT believes that his financial support for the MDC in the United States has been brought to the attention of the Zimbabwean government.

The ZANU-PF believes that the MDC funded Mr. CLIENT's education in the United States so that he may return to Zimbabwe and become a leader in the MDC. Furthermore, the government has indicated that it will not stop harassing his family members until Mr. CLIENT's family members withdraw their support for the MDC. *See Exhibit C, Client Decl.* at ¶14.

Additionally, since his arrival in the United States, Mr. CLIENT's father has been murdered by the ruling party because of his MDC affiliation. *See* Exhibit W, Death Certificate of Innocent CLIENT. The same people who killed Mt CLIENT's father target Mr. CLIENT and threaten his family members. They have stated that Mr. CLIENT is next on their list. *See* Exhibit R, Declaration of Wendy Sidumisile Sandato (hereafter "Wendy Decl.") at ¶ 3. Since the ZANU-PF targets Mr. CLIENT and knows of his continuous support for MDC in the United States, Mr. CLIENT qualifies for a waiver of the one year deadline under the definition of changed circumstances.

**3. Mr. CLIENT Filed his I-589 Within a Reasonable Period of Time**

The applicant must file his or her application in a reasonable period of time given the changed or extraordinary circumstances, to the satisfaction of an asylum officer, immigration judge, or Board of Immigration Appeals. *See* §§208.4(a)(4)(ii), 208.4(a)(5). With respect to maintaining lawful immigrant or nonimmigrant status prior to filing the asylum application, USCIS takes the position that an individual should file an asylum application as soon as possible after the expiration of his or her valid status. *See* "Supplementary Information" to Final Rule, 65 Fed. Reg. 76121, 76123-24 (Dec. 6, 2000). The USCIS further maintains that waiting six months is "clearly" not reasonable and that shorter periods of time should be considered on a case-by-case basis. *Id.*

When Mr. CLIENT filed his asylum application on November 17, 2003, he had lawful nonimmigrant status in the United States. He was authorized to participate in Optional Practical Training until December 31, 2003, several weeks after he filed his application. Mr. CLIENT filed his application within a reasonable period of time since he filed while he had lawful

nonimmigrant status in the United States. Mr. CLIENT therefore should not be barred by the one-year filing requirement and should be allowed to proceed with his application.

**SAMPLE ONE-YEAR ARGUMENT**

***Extraordinary Circumstances: Illness, Mental Incapacity, No Access to Counsel***

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**A. MS. CLIENT MERITS A WAIVER OF THE ONE YEAR FILING DEADLINE**

An asylum applicant must show by clear and convincing evidence that he or she has filed his or her application within one year of his arrival in the United States. INA §208(a)(2)(B). Notwithstanding the one year deadline, an application may be considered “if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application.” INA §208(a)(2)(D). To qualify for an exception under this standard, the applicant must show that (a) the conditions of his or her country of nationality have changed to the applicant’s detriment, or (b) that circumstances, not intentionally created by the applicant through his or her own actions or inactions were directly related to the delay in filing the application. 8 C.F.R. §208.4(a)(4)(i).

**1. Ms. CLIENT Filed her I-589 More Than One Year After She Arrived in the United States Due to Extraordinary Circumstances**

Regulations accompanying the INA (the “Regulations”) define “extraordinary circumstances” as events or factors directly related to the failure to meet the one-year deadline. 8 C.F.R. §208.4(a)(5). The burden of proof is on the applicant to show that but for those circumstances, he or she would have filed his or her application within the one year deadline. 8 CFR §208.4(a)(5). An applicant must also show the circumstances were not intentionally created through his or her own action or inaction. *Id.*

**i. Ms. CLIENT Suffered from Serious Illness and Mental and Physical Disabilities Which Qualify as “Extraordinary Circumstances”**

The Regulations contain an illustrative—not exhaustive—list of circumstances which may be considered “extraordinary” in relation to a delay in filing. The Regulations list “[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival” as an extraordinary circumstance. 8 C.F.R. §208.4(a)(5)(i).

Ms. CLIENT was brutally attacked by members of the Mungiki sect in her home country of Kenya in late June 2001. A mob of Mungiki beat her with clubs, whips, and sheathed swords. The Mungiki stripped her naked, raped her in front of her teenage son, melted hot plastic over her thighs and genitals, and partially circumcised her. See Tab A, *Aff. of Client CLIENT* at ¶ 26–27. In the aftermath of this attack, she was refused treatment at the local hospital because the police would not provide her with the necessary paperwork. Her wounds caused her such severe physical pain that she was oftentimes unable to move.

When she arrived in the United States on September 28, 2001, Ms. CLIENT still suffered from significant physical and mental disabilities including intermittent bleeding, arthritis, pelvic infections, depression, and post-traumatic stress disorder. She was treated for a pelvic infection in May 2002, for severe bleeding in mid-2002, and she was diagnosed with arthritis in June 2003. See Supp. Docs., Item 2, *Medical Records*. She reports that she continues to suffer psychologically from the trauma. These symptoms are consistent with the finding of the Seventh Circuit that “[female genital mutilation] is extremely painful and at least temporarily incapacitating.” Nwaokole v. I.N.S., 314 F.3d 303, 309 (7th Cir. 2002). Ms. CLIENT’s severe physical and mental ailments consumed her attention and left her virtually incapacitated during

the months following her arrival in the United States and are therefore directly related to the delay in her filing.

**ii. Ms. CLIENT’s Inability to Secure Legal Representation Despite Good Faith Efforts Qualifies as an “Extraordinary Circumstance”**

Legislative history related to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) suggests Ms. CLIENT’s inability to secure legal representation should be considered an “extraordinary circumstance” related to her delay in filing. The original Senate bill included an explicit provision based on “efforts to seek asylum that were delayed by the temporary unavailability of professional assistance.” See Supp Docs., Item 22, *H.R. 2202, 104th Cong. § 193, 142 CONG. REC. S.4730 (daily ed. May 6, 1996)*. When the words “extraordinary circumstances” were eventually adopted, there was an assurance that good cause exceptions such as the inability to obtain counsel would be encompassed within the meaning of the exception. See Supp. Docs., Item 23, *16 GEO. IMMIGR. L.J. 1, 29 (2002)*. Although the unavailability of legal assistance is not explicitly cited as an “extraordinary circumstance” in the regulations, that list of examples is explicitly illustrative and not exhaustive. The regulation states, “[t]hose circumstances may include *but are not limited to...*” 8 CFR § 208.4(a)(5) (italics added).

Despite numerous good faith attempts, Ms. CLIENT was unable to obtain counsel to aid her in the application process. She contacted Indiana Legal Services in December of 2001—well within the one-year deadline—but the organization could take her case. See Tab A, *Aff. of Client CLIENT* at ¶ 33. Ms. CLIENT traveled to Texas in December 2002 because a friend said she could find her a lawyer there, but that attorney was unwilling to assist her for what Ms. CLIENT could afford to pay. Id. Persistent, Ms. CLIENT continued to seek legal assistance to file her



claim. The Notre Dame Immigration Clinic was ultimately able to accept Ms. CLIENT as a client in October 2003.

Legislative history related to IIRIRA shows that the unavailability of counsel qualifies as an extraordinary circumstance related to a delay in filing. Ms. CLIENT's good faith efforts to secure legal representation between September 2001 and October 2003 demonstrate that her inability to find counsel to represent her was not a result of her own action or inaction. Given Ms. CLIENT's total lack of familiarity with the American legal system and the severe physical and mental disabilities that she suffered during the period following her arrival in the United States, the Court should find that Ms. CLIENT's inability to find legal representation was directly related to her delay in filing and should therefore toll the one-year deadline.

**2. Ms. CLIENT Filed her I-589 Within a Reasonable Period of Time**

In order to merit exception from the one-year filing requirement, the applicant must file his or her application in a reasonable period of time given the changed or extraordinary circumstances, to the satisfaction of an asylum officer, immigration judge, or Board of Immigration Appeals. 8 C.F.R. §208.4(a)(5).

Ms. CLIENT contacted a legal service provider in December 2001, but that office was able to take her case. *See* Tab A, *Aff. of Client CLIENT* at ¶ 33. Throughout most of 2002, Ms. CLIENT's physical and mental health difficulties were exceptionally severe, as evidenced by hospital visits in mid-2002 for extensive bleeding and a pelvic infection. *Id.* at ¶ 32. In December 2002, Ms. CLIENT traveled to Texas on her friend's advice to seek legal help there, but the attorney to whom she was referred refused to help her. *Id.* at ¶ 33. In June 2003, Ms. CLIENT suffered injuries from a car accident which added to her already extensive list of physical infirmities. *Id.* at ¶ 34.

Despite her best efforts, Ms. CLIENT was unable to find a legal services provider to take her case until October 2003. Because Ms. CLIENT still suffers from the trauma related to the persecution which forms the basis for her asylum claim, the preparation of a properly detailed affidavit and supporting documentation was a time-consuming process. Under these circumstances, we ask the Court to determine that her filing date of May 2004 was a reasonable one.

## SAMPLE ONE-YEAR ARGUMENT

*Extraordinary Circumstance:  
Social Isolation, Language & Cultural Barriers*

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### **II. The Board erred in denying petitioner's appeal as a matter of law.**

#### **A. Extreme social isolation, including profound language and cultural barriers, constitutes an extraordinary circumstance exception to the one-year filing deadline under 8 C.F.R. Section 208.4(a)(5).**

The facts surrounding petitioner's failure to file his asylum application within one year of entry fall under the extraordinary circumstances exception to the one-year filing deadline. 8 C.F.R. § 208.4(a)(5). While the regulations do not include extreme social isolation as an exception to the one-year deadline, the regulations specifically state extraordinary circumstances are "not limited to" the six circumstances mentioned. *Id.* To qualify as exceptions, the regulations only require that the "circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1 year period, and that the delay was reasonable under the circumstances." *Id.* The circumstances facing petitioner meet all three requirements for the extraordinary circumstances exception.

The circumstances facing petitioner in his first year in the United States were certainly not caused by his own action or inaction. The social isolation facing petitioner was a product of his Burmese background and his living in a situation where he was extremely socially isolated in his community and also isolated from individuals in the Burmese community in his area and the United States. Petitioner's initial and brief acquaintances in New York connected him to a woman in Greensboro, North Carolina, who offered him a place to stay (A.R. 42, 74; JA 29, 57). The woman was living alone with her two children (A.R. 42-43; JA 29-30). Petitioner did not speak English (A.R. 43; JA 30). He did not work while he was living with the woman, nor did he interact with other Burmese people in his community (A.R. 43-44; JA 30-31). Petitioner remained in Greensboro, North Carolina until he went to live in New York in August of 1999 (A.R. 44, 74; JA 31, 57).

With the profound language and cultural barrier, petitioner's social isolation ended only when he met other Burmese nationals who were politically savvy enough to advise him on filing an application for asylum. This did not happen until a friend from New York contacted petitioner (A.R. 44, 74; JA 31, 57). He then moved to New York and met other political

activists who months later provided him the necessary information on filing an asylum application.

Further, petitioner's social and cultural isolation were directly related to his inability to file within the one-year deadline. His inability to meet other Burmese nationals directly related to his failure to meet the one-year deadline. Petitioner's very limited English and his isolation in a small city in North Carolina made it impossible for him to learn about both the possibility of filing for asylum and the one-year filing deadline. Other than the family with whom he stayed, petitioner had not met any Burmese nationals in Greensboro for the first year he lived there. Socially and culturally, petitioner was, in effect, a prisoner in his home. It was not until his social and cultural isolation ended that he became aware of the possibility of filing for asylum.

The above factors are not only directly related to petitioner's ability to timely file for asylum, but they are also facts that understandably caused the late filing. Furthermore, these factors are very similar to other similar exceptions recognized in the regulations, such as unaccompanied minor, 8 C.F.R. Section 208.4(a)(5)(ii), or a serious illness or mental or physical disability, 8 C.F.R. Section 208.4(a)(5)(I). The factors facing petitioner that

caused the late filing were simply beyond his control to effectively overcome.

**B. The immigration judge erred in not considering the Service's suggestions in the asylum officer's training manual regarding the one-year filing deadline on what constitutes an extraordinary circumstance exception to the deadline.**

The circumstances affecting petitioner's inability to timely file for asylum are explicitly recognized by the Service in its training manual for asylum officers:

Other circumstances that are not specifically listed in the **non-exclusive list in the regulations**, but which may constitute extraordinary circumstances, depending on the facts of the case, include severe family or spousal opposition, **extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimation**. Any such factor or group of factors must have had a severe enough impact on the alien's functioning to have produced a significant barrier to timely filing.

(A.R at 206; JA 71)

Petitioner faced extreme social isolation within his community because the family he stayed with was his only contact with the outside world (except for one brief acquaintance who produced numerous political contacts a number of months later) for the first year. He also faced a profound language barrier such that he could not

engage in conversation with anyone other than members of the family with whom he originally stayed. Because of his extreme social and cultural isolation, petitioner could not overcome the significant barriers to acclimate to American society.

The fact that some of the above circumstances suggested to asylum examiners were not mentioned in the regulations does not prevent the circumstances from constituting an exception to the one-year filing deadline. The regulations contemplate other circumstances as falling under the extraordinary circumstances exception. Yet the immigration judge ruled petitioner's circumstances of extreme social and cultural isolation, which kept petitioner from even knowing about the possibility of filing for asylum, could never constitute extraordinary circumstances under the statute. "If respondent were correct that merely no[t] knowing about asylum would constitute an extraordinary circumstance, then the statute would never apply." (A.R. 26; JA 13).

In making such a statement the immigration judge was ruling that extreme cultural and social isolation could never constitute extraordinary circumstance, in opposition to the Service's instructions given to asylum officers and contrary to the actual intent of the regulations which stated that the list was not exclusive. Further, to constitute an extraordinary

circumstance under the regulation, the circumstances only had to meet the above three requirements. However, instead of conducting “an individualized analysis of the facts of the particular case,” as required by *In re Y-C-*, 23 I&N Dec. at 288, the immigration judge outright dismissed petitioner’s circumstances, finding they did not constitute an exception to the one-year deadline. In his opinion, the immigration judge stated that recognition of petitioner’s circumstances as creating an exception would somehow negate the application of the one-year requirement in all cases, as if every late-filing asylum applicant could establish extreme social and cultural isolation. This conclusion is unwarranted in law or fact.

**C. Petitioner filed for asylum within a reasonable time after becoming aware of the one-year deadline.**

Once petitioner became aware of his right to apply for asylum<sup>1</sup>, he did so within a reasonable period of time, as required in the regulations (A.R. at 206; JA 71). Petitioner heard from his friend and political associate of the right to apply for asylum nearly a year and eight to nine months after he arrived in the United States, around the end of May or the beginning of June in 2000 (A.R. 45; JA 32). The application was signed and dated June 30,

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<sup>1</sup> The immigration judge concluded that petitioner knew about asylum in September of 1999, whereas petitioner testified he only found about asylum in May or June of 2001. This conclusion is without any support in the record.



2000, and was sent to the Service within a week after he signed and dated the application (A.R. 47; JA 34). Petitioner's friend and political associate, Win Thaug, also testified that he helped petitioner fill out the application, by hand (instead of waiting to obtain use of a typewriter), and sent the form to the Service soon after June 30, 2000, the date on the application (A.R. 23-24, 71; JA 10-11, 55).

Petitioner, who was living with his friend, Win Thaug, never received a receipt notice from the Service after he filed his asylum application (A.R. 47; JA 34). Petitioner and Mr. Thaug lived together at the same address from the time of the mailing of the application in June 2000 until January of 2001 and never had a problem with receiving mail during that period of time (A.R. 57; JA 44). The only notice petitioner received from the Service after filing the application was a notice regarding his fingerprints appointment in January of 2001 (A.R. 47; JA 34).

The immigration judge refused to accept petitioner's version of when he mailed the application because the application was stamped by the Service on January 8, 2001 (A.R. 27; JA 14). However, if the Service did not have record of receipting the application until months later, the fault cannot lie with petitioner who clearly stated he mailed the application only days after it was signed. Furthermore, there exists no plausible explanation

why petitioner would wait five to six months after signing and dating the application to mail it to the Service. It is much more believable that the Service, which has had a very notorious history of misplacing and even losing applications, simply misplaced the application for a number of months before stamping the asylum application and beginning the adjudication process. Whatever the reason for the Service's delay, petitioner should not suffer the extreme consequence of denial of asylum because of the Service's error, the only logical explanation for the delay in the Service "receipt" of the application.

Finally, petitioner stated under oath that the only notice he received after filing his application was the notice for his fingerprinting in January of 2001 (A.R. 47; JA 34). The Department of Homeland Security did not contest petitioner's statement that he was fingerprinted in January of 2001. This unchallenged statement lends credence to petitioner's claim that he mailed the application to the Service months earlier. Fingerprinting by the Service at that time was not normally immediately scheduled after filing an asylum application. In fact, fingerprinting was usually scheduled many months after filing the asylum application, which lends further support to petitioner's claim that he filed his asylum application soon after he dated the

application in June of 2000 (and the application was lost or misplaced for a period of time and was not stamped until months after receipt).

## **SAMPLE ONE-YEAR ARGUMENT**

*Changed & Extraordinary Circumstance:  
New Threats, Cultural Barriers  
& Lack of Knowledge Regarding Basis for Asylum*

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**A. Ms. T.’s Asylum Application Meets an Exception to the One-Year Filing Deadline**

An applicant seeking asylum in the United States must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States. 8 U.S.C. § 1158(a)(2)(B). However, an applicant may be exempt from this requirement if “changed circumstances” materially affected the applicant’s eligibility for asylum. 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)(i). The regulation also requires that the applicant apply for asylum within a “reasonable period” given those changed circumstances. 8 C.F.R. § 1208.4(a)(4)(ii). The alien’s delayed awareness of the changed circumstances extends to the reasonableness of the period within which the application must be made. *Id.*

Changed circumstances are defined, in pertinent part, as “[c]hanges in conditions in the applicant’s country of nationality or, if the applicant is stateless, country of last habitual residence,” and/or “[c]hanges in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum...” 8 C.F.R. § 208.4(a)(4)(i)(A)-(B). At Ms. T.’s asylum interview, U.S. Citizenship and Immigration Services agreed that Ms. T. “established changed circumstances materially affecting [her] eligibility for asylum” but found that she failed to file her application within a reasonable period of time given those changed circumstances. (Referral Notice, attached hereto as Ex. E) Ms. T. can establish

changed circumstances and can demonstrate that she filed her application within a reasonable period of time given those changed circumstances.

1. Ms. T. Received a Letter From Her Sister and This Constituted Changed Circumstances

Although FGM is prevalent in Mali and is an ever-present threat for Mali's female citizens, Ms. T. became aware of the immediate threat it posed to her daughter less than three months prior to applying for asylum. In June 2009, only three months before Ms. T. filed her application for asylum, she received a letter from her sister A., who lives in Mali. (A. T. Letter) In the letter, A. implores Ms. T. not to return to Mali, explaining that if she returns, she will be found and Aminata will be circumcised. *Id.*

2. Ms. T. Was Unsure of Her Ability to Seek Asylum, Constituting Extraordinary Circumstances

In May of 2009, Ms. T. met a Sudanese woman in the waiting room of a hospital. (T. Aff. ¶ 46) The Sudanese woman had escaped a situation similar to Ms. T.'s experience in Mali and advised Ms. T. that the United States protected women who had undergone FGM. She advised Ms. T. to contact the National Immigrant Justice Center ("NIJC") to discuss whether she might be eligible for asylum. *Id.* Until that conversation, Ms. T. did not know that asylum was an option for her. *Id.* Ms. T. contacted NIJC and shortly thereafter was put in touch with her current counsel who helped her prepare her application for asylum.

Ms. T.'s lack of knowledge regarding her eligibility for asylum is reasonable. There have been significant recent developments in case law regarding FGM. It is only recently that past FGM has been held to create a presumption of future persecution. *See In re A-T*, 24 I&N Dec. 617 (A.G. 2008).

3. Ms. T. Filed Her Application Within a Reasonable Period of Time in Light of the Changed Circumstances and Extraordinary Circumstances

An applicant must file his or her application within a reasonable period of time after the aforementioned change in circumstances. *See* 8 C.F.R. § 208.4(a)(4)(ii). A determination of what constitutes a reasonable period of time is a case by case analysis that ultimately depends on: (1) the reasons given to justify the delay; and (2) the length of time that passed between the change in circumstances and the filing of the asylum application. *See Wakkary v. Holder*, 558 F.3d 1049, 1057 (9th Cir. 2009).

Asylum adjudicators may consider education, level of sophistication, lack of knowledge regarding asylum as a form of relief, the amount of time it takes to obtain legal assistance, when the applicant became aware of the changed circumstances and any other relevant factors when determining whether an asylum application was filed within a reasonable period. *Wang v. Keisler*, 254 Fed. Appx. 572, 574-75 (9th Cir. 2007); *Asylum Officer Basic Training* (2006) at 19. In terms of a timeframe that may constitute a reasonable period, many courts have held that a six month delay may serve as a reasonable presumptive deadline. *Wakkary*, 558 F.3d at 1058; *see also Asylum Officer Basic Training*, at 19 (suggesting that a four month delay in filing would be reasonable but an eighteen month delay in filing would not be reasonable). Additionally, asylum officers are also “encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file.” *Id.*

Accordingly, Ms. T. filed her application within a reasonable period of time after learning of the changed circumstances. *See* Asylum Procedure, 65 Fed. Reg. 76121, 76124 (Dec. 6, 2000) (to be codified at 8 C.F.R. pt. 208). Ms. T. did not learn that asylum was even an option for her until May 2009, when she spoke with a woman who

referred her to NIJC. Ms. T. promptly contacted NIJC who referred her to counsel. Additionally, it was not until June 2009, when Ms. T. received the letter from her sister A., that Ms. T. was made aware of the substantial threat to her daughter if she were to return to Mali. Ms. T.'s application was filed September 8, 2009, three months after receiving the letter from A. and four months after learning that she was potentially eligible for asylum.

# Memo

To: Whom it may concern  
From: Jeff Watts, MD—Chairman, Department of Psychiatry  
CC: Eric Berndt, Attorney—National Immigration Justice Center  
Date: 12/1/2010  
Re: Information regarding Mr. First Redacted

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I am writing this letter on behalf of my patient, Mr. First Redacted. His date of birth is June 15, 1965. He has given me written permission to provide you information on his past and present psychiatric history and treatment.

As a preface, I would like to say that I am writing in connection with any asylum matter. I say that in order to underscore my sincerity in assisting with this particular man. As the Chairman of the Department of Psychiatry overseeing services at three indigent hospitals, numerous outpatient clinics, and two detention centers, I am constantly reminded of the blessings that many of us have and the struggles, needs, and demands that many others have in their quest for adequate healthcare. In my clinical duties at the CORE Center, I have focused my efforts in providing psychiatric care and conducting substance abuse research in indigent persons with HIV/AIDS for the past decade. I serve as a consultant with the American Psychiatric Association's Committee on HIV/AIDS and educate other health care professionals about the mental aspects, stigma, and treatment issues associated with this intersecting population of the mentally ill with HIV. As the CORE Center is the largest provider of HIV services in the Midwest and serves the indigent, it is through this venue that I have come to know Mr. Issa Redacted.

Mr. Redacted has been an active client of mine since July 2007. He was originally evaluated by one of our psychologists (Dr. Milton Armston) before being referred to me. This psychosocial assessment from June 7, 2007, by Dr. Armston denotes both historical points and a general timeline for this asylum hearing. From this assessment as well as my medical progress notes, I want to summarize a few areas that I hope will be of assistance in clarifying Mr. Redacted's treatment and mental status.

### **Initial HIV Diagnosis and Cognitive Disorders:**

Mr. Redacted was not diagnosed with HIV until early April 2007 when he presented with a Herpes Zoster infection on his face. This Zoster infection (also known as "shingles") only occurs in the severely immunocompromised (e.g. elderly, HIV/AIDS). We cannot place a definitive date on Mr. Redacted's initial infection period, but his advanced presentation to the point of having AIDS at onset suggests infection a year or more prior to his diagnosis. From a neuropsychiatric aspect, cognitive or memory problems can be either mild, moderate (termed HIV minor cognitive motor disorder), or severe (HIV/AIDS dementia). When patients present at the AIDS stage with higher HIV viral load and lymphocyte (CD4) counts less than 100 as Mr. Redacted did, they nearly all have memory problems with half having the moderate version and some having full-blown dementia.



I cannot state what Mr. Redacted's cognitive state was in April 2007. However, he was still very forgetful with horrible attention and organization of thought when I met with him in July. This affirms his problems with memory, cognition, and processing that may have been caused by the neurologic toxicity of HIV in the memory areas of our brain or a combination of this neurologic damage with severe psychiatric problems as noted below.

It is likely that Mr. Redacted was suffering from cognitive problems from the HIV/AIDS for nearly a year prior to his diagnosis which would have contributed to employment problems as well as problems completing multi-step tasks (including timely applications in the immigration process).

### **Psychiatric Disorder:**

It is significant to note that Mr. Redacted does not use alcohol or drugs and reports no past psychiatric treatment prior to his major hospitalization. He was in therapy regarding his sexual orientation and his previous marriage when living in California, but was not on medication in the past. After his HIV diagnosis, Mr. Redacted became extremely depressed, disorganized, and hopeless. He reports that he prayed constantly after the diagnosis for an answer and that answer was to jump from the building.

When I first evaluated him, he had been treated for a few months, but was still very depressed, detached, disorganized in his thoughts, and mildly psychotic. As a standard protocol, I would typically manage patients medically on a monthly basis. Mr. Redacted's case so concerned me (of the possibility of another suicide attempt) that I saw him weekly for a few weeks then every other week. I have kept his diagnosis as ***Major Depression with Psychotic Features***. The hallmarks of this disorder include severe depressed mood, loss of interests, changes in appetite, and poor concentration/attention. As noted above, these latter cognitive symptoms would have exacerbated the neurotoxic effects of the HIV on the memory areas of the brain leading to pronounced memory problems. If the major depression becomes very severe, then you can see the suicidal intent, delusions, and psychosis that Mr. Redacted experienced.

### **Sexuality and Sexual Orientation:**

Mr. Redacted's sexual activities and sexual orientation vacillated between celibacy to heterosexual with sinful homosexual urges to bisexual to homosexual back to celibacy and so on during the course of our treatment. His struggle with his sexual orientation is consistent with many gay, lesbian, and bisexual young adults and is well documented in scientific literature. His past and present connection with his Christian faith and his involvement with specific churches led to periods of intense shame and guilt around both his sexual urges and his sexual acts. He describes a true love with his former wife along with sexual activities until verbal abuse began in the relationship. To this day, he is not completely comfortable with his orientation and states he is not sure whether he could be in an open relationship with a man. However, he does say that he is trying to deal with his psychological and spiritual conflicts with his therapist and his pastor.

### **Current Status:**

Mr. Redacted is now stabilized both psychiatrically and medically with a varied regimen of antiretroviral medication and psychotropics. These medications have changed over time but he now reports normal appetite, sleep, and mood. He still has occasional concentration problems and decreased energy but these may be residual aspects of his HIV/AIDS. His CD4 or lymphocyte count has now exceeded the 200 mark (which is the definition of AIDS), and his adherence to HIV medication has helped the physical aspects (including these lab values) but also his cognitive problems as antiretrovirals are the primary treatments for memory problems in HIV/AIDS. He faithfully attends his appointments and his church and is hoping to get possible asylum to live here in the United States.

### **Possible Future Concerns:**

Upon discussion of different immigration concerns and possible asylum, Mr. Redacted is definitely doing his part to remain in the United States. However, he draws from his faith in having contentment about placing his fate in the hands of God, his lawyer, and the government. I am neither a world-wide expert on HIV treatment in Africa or homosexuality in Africa. However, Mr. Redacted's assertions of the repercussions of any homosexual acts as well as the lack of HIV treatment would result in a near death sentence should he return to Burkina Faso. From a medical standpoint, off his antiretrovirals, he would rapidly return to his nadir CD4 which is extremely low. We know this from literature of patients undergoing trials on HIV treatment interruptions. He would quickly become confused, psychotic, and disorganized as before and likely die without the HIV treatment. Again, I do not know of specific and available treatments in Burkina Faso, but Mr. Redacted does need these treatments whether there or in the United States. Although his depression would also return, I think he would be so incapacitated by the HIV that the depression would just be a horrible addition to the bleak picture.

I hope this above information provides both his legal counsel and the United States government with useful and detailed information about this interesting but unfortunate man. Please contact me with further questions at (312) 572-4550. I appreciate your consideration in this matter.



## +John H. Stroger, Jr. Hospital of Cook County

1901 West Harrison Street, Chicago, Illinois 60612  
312.864.6000 • TDD 312.864.0100

Cook County Bureau of Health Services

John H. Stroger, Jr.  
President  
Board of Cook County Commissioner

Robert Simon, MD  
Interim Chief  
Bureau of Health Services

Robert Weinstein, MD  
Chief Operating Officer

April 17, 2009

USCIS  
Chicago Asylum Office  
401 South LaSalle Street  
8th Floor  
Chicago, IL 60605.

Re: Statement Regarding First Redacted's Application for Asylum

My name is Lori J. Quilty and as a clinical social worker employed in the mental health department at The Ruth M. Rothstein CORE Center in Chicago, IL, I am writing this statement to attest to Mr. Redacted's fear concerning a possible return to Africa given his sexuality and his HIV status.

I have been licensed (LCSW) by the State of Illinois as a clinical social worker since 2002. Since earning a Masters in Social Work (2000), my work as a clinician has been focused in the area of trauma and its impact on an individual's development. As a clinician at The CORE Center, I have worked with homosexual, bisexual and transgendered clients who have experienced an array of trauma and are suffering from a variety of mental health issues.

Mr. Redacted has been in care at the clinic since June 2007 and I have been working with him since December 2008. Mr. Redacted presented to The CORE Center after a psychiatric hospitalization due to a possible suicide attempt. At his initial assessment in the screening clinic Mr. Redacted endorsed symptoms of both depression and psychosis. Furthermore, Mr. Redacted had recently been informed of his HIV positive status.

Per Mr. Redacted's report and clinical records, he developed significant depressive symptoms following his HIV diagnosis and was referred to both individual psychotherapy and psychiatric services for medication management. From all accounts, Mr. Redacted was compliant with treatment and met with his previous therapist until that therapist left his position. He continues to see my colleague, Dr. Jeff Watts, for psychiatric medication management.

During our sessions we have discussed Mr. Redacted's past life experiences, sexuality, physical illness, mental illness and the impact these experiences have in his life. He recounts a childhood where he felt different from others and recalls his father being more accepting of his cousin than him because he was too "feminine-like." When Mr. Redacted went to boarding school in his later teen years, he recalls having his first homosexual encounter. Although it was at this time that he realized that he was not the only one with this sexual orientation, it has taken him many years to truly accept himself as a homosexual male.

Mr. Redacted's cultural and religious beliefs have impeded the normal development of his identity and acceptance of himself. He fears public ridicule and rejection from those in his country if he were to live his life "outwardly" as a homosexual male. It is most likely this internalized homophobia and his notion of a "normal" family that led to his marriage. Mr. Redacted stated that at the time of his marriage both he and his wife identified as bisexual and that the union was for the purpose of having children and relieving family and cultural pressure to marry.

It has been two years since Mr. Redacted's HIV diagnosis. The initial depression he experienced was severe. He reported suicidal ideation, depressed mood, feelings of hopelessness, isolating behaviors, and difficulty sleeping. According to his reports, he struggled with his daily functioning, which is typical in people dealing with depression. Since that time Mr. Redacted has made significant improvements. He takes his psychotropic medication daily and has been engaged in mental health counseling. It is my opinion that he will continue to benefit from counseling and medication management as he grows into his identity as a homosexual HIV positive male.

Given his description of a country where he will be mistreated due to his sexual orientation and HIV status, Mr. Redacted's fears are real. This is particularly concerning as I have seen him grow more accepting of himself as a homosexual male. He has been open with me about recent sexual encounters with a male and expresses a desire to help others who have struggled in ways that he has. Mr. Redacted is committed to his physical, emotional and spiritual well-being. It is my professional opinion that he will continue to take care of himself and also work towards helping others.

Please do not hesitate to contact me if you require further information regarding Mr. Redacted's case.

Sincerely,

Lori J. Quilty, LCSW  
Behavioral Health Services  
The Ruth M. Rothstein CORE Center