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POST-TRAUMATIC STRESS DISORDER AND ASYLUM: WHY PROCEDURAL SAFEGUARDS ARE NECESSARY

Maureen E. Cummins

In 2011, there were 10.4 million refugees in the world.¹ Many refugees flee their native countries in order to seek protection from other nations when it is unsafe for them to return to their home.² In the recent civil war in Syria, for example, thousands of Syrians fled to neighboring countries such as Lebanon, Turkey, Jordan and Iraq, seeking safety from the violent civil war engulfing their country.³ Many Syrians gave accounts of torture, arbitrary arrests, sexual violence, and inhumane treatment of detainees, among other offenses.⁴ Some of the stories that these refugees share include accounts of government officials torturing people through beatings and electrocution.⁵ These experiences result in physical, emotional, and mental tolls that are difficult to overcome.


². Bureau of Population, Refugees, and Migration, About PRM, U.S. Dep’t of State (Sept. 16, 2010), http://www.state.gov/j/prm/about/index.htm [hereinafter About Bureau of Population, Refugees, and Migration] (noting that the mission of the Bureau of Population, Refugees and Migration of the Department of State is to “...provide protection, ease suffering, and resolve the plight of persecuted and uprooted people around the world on behalf of the American people”).

³. U.N. Refugee Chief Expresses Grave Concern over Numbers of People Displaced by Violence in Syria, Off. U.N. High Comm’r for Refugees (July 20, 2012), http://www.unhcr.org/5009290b6.html (noting that in 48 hours, nearly 30,000 Syrian people have crossed the border into Lebanon in order to flee the violence that has consumed their country).


⁵. Id. at 2.
The United States responds to these crises by accepting refugees and asylum seekers through two separate forms of protection, each with their own process. The first is the overseas resettlement program, where people displaced by internal conflicts in their home countries are referred to U.S. processing centers abroad for admission as refugees to the United States. Typically, these people are first registered as refugees with the United Nations High Commissioner for Refugees, and then the Department of State and the Department of Homeland Security conduct interviews to determine if these people are admissible. For fiscal year 2013, President Obama has approved for up to 70,000 refugees to be admitted to the United States from various regions overseas.

The second process is for individuals who are already in the United States and are seeking asylum through domestic procedures. The Immigration and Nationality Act (INA) sets forth the legal standard by which individuals

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6. U.S. Citizenship and Immigration Servs., *Refugees and Asylum*, Dep't of Homeland Sec., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Sept. 1, 2011) (explaining that there are two humanitarian-based ways whereby people can avail themselves of protection in the United States, through claiming either refugee or asylum status) [hereinafter *Refugees and Asylum*].


8. *Id.* (explaining how the Dep’t of State’s Bureau of Population, Refugees and Migration processes eligible applicants along with the Department of Homeland Security’s U.S. Citizenship and Immigration Services).


10. U.S. Citizenship and Immigration Servs., *Who is Eligible to Apply for Asylum?*, Dep’t of Homeland Sec., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c1d800efdea7fe010VgnVCM1000000e0cd190aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Oct. 29, 2008) (including ports-of-entry, such as airports, as being “in” the United States) [hereinafter *Who is Eligible to Apply for Asylum?*].
can qualify for asylum in the United States. For both the overseas and the domestic program, applicants must meet the definition of "refugee." INA §1101(a)(42) defines "refugee" as:

any person who is outside any country of such person’s nationality...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 . . . .

Not everyone who fits this definition and applies for refugee or asylum status is guaranteed admission. Prior to admission, refugees must undergo extensive interviews, security checks, and medical examinations, while simultaneously avoiding other bars to eligibility. An example of a bar to eligibility would be if the one-year statutory timeline for asylum application has lapsed. In order to be eligible for asylum, an applicant must apply for asylum within one year of entering the United States.

11. See generally Am. Immigration Lawyers Ass’n, Immigration Nationality Act: An AILA Primary Source Reference 53-56 (Randy P. Auerbach ed., 2001) (listing the general procedures, including exceptions, to obtaining asylum in the United States under INA § 208(a-e)) [hereinafter Auerbach INA].


13. Id.

14. 8 U.S.C. § 1158(b)(2) (noting several exceptions, including national security grounds, prior resettlement in another country, or belief the individual has committed serious crimes, where asylum may be denied despite an individual meeting the definition of refugee).


17. See Auerbach INA, supra note 11, at 53 (detailing two narrow exceptions in INA § 208(a)(1)(B-D) to the one-year statutory timeline; if the individual can show either changed or extraordinary circumstances that relate to the delay in filing their asylum application, the one-year deadline might be waived).
Both the domestic and overseas procedures involve thorough interviews conducted by officials from the United States Citizenship and Immigration Services (USCIS) division of the Department of Homeland Security (DHS). In order to be granted admission to the United States, the refugee seeking asylum status must present credible testimony, and demonstrate that a well-founded fear of persecution is the reason why they are seeking protection within the United States. In 2005, Congress passed the REAL ID Act, which adjusted the credibility standard used by DHS and immigration judges to determine whether an individual has a well-founded fear of persecution. Under this new law, DHS and immigration judges must apply the following standard for determining the credibility of asylum applicants:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement...or any other relevant factor . . . .

Credibility is an essential factor for DHS and immigration judges in determining whether an individual has a well-founded fear of persecution and whether he or she may be admitted to the United States.


22. U.S. Citizenship and Immigration Servs., Questions & Answers: Credible Fear Screening, Dep’t of Homeland Sec., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=897f549bf0683210VgnVCM1000000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM1000000082ca60aRCRD (last visited March 2, 2013) (emphasizing that if neither the asylum official nor the immigration judge find the individual has a credible fear, the individual can be removed from the United States) [hereinafter Q & A: Credible Fear Screening].
an immigration judge determines that the individual is not credible, his or her application for admission to the United States as a refugee or asylee is likely to be denied. This new standard has led to arbitrary denials of asylum for individuals who are unable to provide a credible history to establish a well-founded fear of persecution. Without a policy change giving more weight to mental health concerns, such as Post-Traumatic Stress Disorder (PTSD), these arbitrary findings of adverse credibility deny asylum applicants due process under the Fifth Amendment.

The REAL ID Act’s credibility standard has created an obstacle that refugees must overcome when trying to provide credible applications for protection within the United States. Chronic mental health disorders, such as PTSD, produce symptoms which can cause a fact finder to significantly doubt the credibility of asylum seeking refugees. PTSD manifests in people who have been exposed to a terrifying event or string of events such as torture, isolation, collapsed social support, violence, and other forms of

23. *Id.* (noting there is an appeal process after USCIS finds the applicant not credible, while after all appeals are exhausted, the individual could still be removed based on lack of credibility).

24. Jill Streja, *The REAL ID Act: Denying Protection to the World’s Most Vulnerable*, 23 Geo. Immigr. L.J. 569, 578-80 (2009) (stating that the REAL ID Act prevents many legitimate asylum claims from being granted, saying, the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof... By eliminating this explicit ‘reasonableness’ standard when determining whether corroboration is necessary or whether the corroborating evidence that was provided is sufficient to sustain an applicant’s credibility, this provision of the REAL ID Act can lead to arbitrary abuses against legitimate asylum claims.)

25. U.S. Const. amend. V (stating, “[No person] shall be deprived of life, liberty, or property, without due process of law...”).

26. U.S. Citizenship and Immigration Servs., *Asylum Bars*, Dep’t of Homeland Sec., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cf5318a1b3b73210VgnVCM100000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD, (last updated Apr. 1, 2011) (noting several bars the asylum applicant must avoid in order to be granted asylum in the United States).

27. Elisa E. Bolton, *PTSD in Refugees*, Dep’t of Veterans Affairs, Nat’l Ctr. for PTSD (Dec. 20, 2011), http://www ptsd vo.gov/professional/pages/ptsd-refugees.asp (explaining that refugees are particularly vulnerable to PTSD because of their experience of violence, isolation, torture, etc. and the difficulty of treating refugee populations that may be suffering from PTSD) [hereinafter Bolton, *PTSD in Refugees*].
psychological distress. PTSD is a chronic mental health condition that severely impacts an individual’s ability to function, and often leads to depression and other mental health issues.

In the context of asylum applications, PTSD can also impact refugees’ ability to recount any persecution they suffered and can impact their ability to file timely asylum applications. One major issue is whether safeguards should be imposed by DHS during interviews and credibility determinations of people who have been diagnosed with PTSD, and with people who are undiagnosed, but exhibit symptoms of PTSD. A second issue is whether this particular mental health diagnosis should be given more weight in considering when to waive the one-year statutory time limit for people applying for asylum and refugee status in the United States as well as whether Congress should amend the REAL ID Act to account for PTSD. In both instances, the underlying concern is protecting the due process rights afforded by the Fifth Amendment, which has long been found applicable to noncitizens and citizens alike.

In examining the process through which individuals can apply for refugee status or asylum in the United States, PTSD and its symptoms should be grounds for additional due process safeguards when USCIS and immigration courts are reviewing applications for asylum. Part One of this Note will describe PTSD and its symptoms, Part Two will explain the current process

28. Id.


30. Id. (generally people who suffer from PTSD avoid discussing the circumstances that caused their trauma; this becomes a problem in asylum applications where an applicant must discuss their past persecution in order to be considered for asylum).

31. Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) (stating, “The provisions of the fifth, sixth, and thirteenth amendments of the constitution apply as well to Chinese persons who are aliens as to American citizens. The term ‘person,’ used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.”).

32. This Note intends to include United States Circuit Courts, who receive appeals after the individual has been denied admission through the Department of Justice’s Board of Immigration Appeals (BIA).
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for admitting refugees to the United States in both the overseas and domestic programs, and Part Three will analyze the impact of PTSD on the asylum process and will suggest mechanisms for adding due process safeguards for individuals suffering from this mental health disorder. These safeguards are essential since PTSD not only impacts credibility during interviews and court proceedings, but also the statutory time frame in which people must apply for asylum. Therefore, USCIS and immigration courts must implement safeguards in order to prevent the denial of asylum due to symptoms of PTSD, which would deny due process rights and severely impact an already vulnerable population of people in the world.

I. POST-TRAUMATIC STRESS DISORDER

Since applicant credibility is essential for both refugee and asylum applications, any influences on an individual's credibility must be viewed carefully. One influence that could be a substantial obstacle to a successful asylum claim is PTSD. PTSD is a chronic mental health condition that is triggered by a highly stressful and traumatic event or string of events. The symptoms of PTSD fall into three main categories: intrusive memories, avoidance and numbing, and increased anxiety or heightened emotions.

The first category of symptoms, intrusive memories, includes flashbacks to the traumatic event or upsetting dreams that continue to recur over weeks or months following the trauma. This category of symptoms is triggered by thinking about the trauma, or seeing someone or something that reminds the person of the trauma he or she experienced. The second category of PTSD symptoms, avoidance and numbing, includes the person feeling emotionally numb, avoiding activities that once brought joy, a sense of


35. Id.

hopelessness, trouble concentrating, and memory problems.\textsuperscript{37} This category of symptoms often manifests by the person being unable to express his or her emotions or finding it difficult to engage in activities that used to bring joy, such as spending time with family and friends.\textsuperscript{38} Finally, the third category of symptoms, increased anxiety and heightened emotions, includes increased irritability, panic attacks, overwhelming guilt or shame, trouble sleeping, being easily startled or upset, the possibility of hallucinations, and increased risk of self-destructive behavior.\textsuperscript{39} This category of symptoms is also called “hyperarousal” since the individual often feels extremely anxious and has less control over his or her emotions, which manifests in the person lashing out at others more often or feeling constantly jittery or expecting to encounter danger.\textsuperscript{40}

Many of the symptoms of PTSD are similar to depression and can often lead to co-occurring depression or other similar mental health problems.\textsuperscript{41} For example, depression is a mental health illness that can occur after experiencing a traumatic event, causes the person to feel low and sad all the time, and has an impact on daily living.\textsuperscript{42} People who experience depression find it difficult to sleep, focus, and enjoy activities they previously enjoyed.\textsuperscript{43} Many people who suffer from PTSD also suffer from depression, and both disorders significantly impact an individual’s ability to function.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{37} Post-Traumatic Stress Disorder (PTSD), supra note 34.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Dr. Thomas Insel, M.D., Director, Nat’l Inst. Mental Health, Statement on Post-Traumatic Stress Disorder Research at the National Institute of Mental Health before the Committee on Oversight and Government Reform, 110th Cong. (May 24, 2007), http://www.hhs.gov/asl/testify/2007/05/t20070524a.html.
\item \textsuperscript{42} Depression, Trauma, and PTSD, Dep’t of Veterans Affairs, Nat’l Ctr. for PTSD, http://www.ptsd.va.gov/public/pages/depression-and-trauma.asp (last visited March 1, 2013) (describing the link between depression and PTSD) [hereinafter Depression, Trauma, and PTSD.].
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\end{itemize}
PTSD is likely to arise in populations that have been exposed to violence, experienced constant fear of physical harm, or those who were victims or witnesses of serious trauma. The victim tends to experience an intense emotional response to the traumatic situation which can include feelings of horror, shock, helplessness, and the belief that death or physical harm are imminent. The traumatic experience is then constantly replayed in the victim's mind and is manifested as symptoms of PTSD. It has been said that "PTSD is a failure to recover psychologically from the trauma, with consequent impairment of normal functioning." Many of the symptoms of PTSD cause the person to constantly relive the trauma, which impacts daily living. PTSD also significantly impairs the person's social life, work life, and family life.

Refugees and asylum applicants are examples of vulnerable populations that could manifest symptoms of PTSD as a result of the persecution and exposure to trauma in their home countries. This exposure to torture, violence, and other trauma forces people to flee from their homelands, leaving behind their livelihoods, social support, family, culture, and way of life.


46. Id.


48. Dr. Thomas Insel, M.D., Director, Nat'l Inst. Mental Health, Statement on Post-Traumatic Stress Disorder Research at the National Institute of Mental Health before the Committee on Oversight and Government Reform, 110th Cong. (May 24, 2007), http://www.hhs.gov/asl/testify/2007/05/t20070524a.html.

49. What is PTSD, supra note 47 (explaining that one symptom of PTSD forces the victim to constantly relive the trauma).

50. Post-Traumatic Stress Disorder (PTSD), supra note 34.

life. Thus, when refugees arrive in another country seeking safe-haven, they could be suffering from PTSD and other serious mental health issues which were caused by the circumstances that forced them to leave their homeland.

II. U.S. REFUGEE LAW AND PROCESS

The United States Immigration and Nationality Act (INA) codified immigration law and procedure and is found in Chapter 8, Section 1101 of the United States Code. The INA contains several titles, chapters, and sections which include, for example, the admissibility of people seeking either temporary or permanent status in the United States, the system for selecting which people are admissible, and exclusion and removal procedures. Chapters 1 and 4 of Title I of the INA include admissibility requirements for refugees and asylum seekers, as well as grounds for exclusion and removal. Under the INA, the United States implements two different procedures by which people who meet the definition of refugee can seek protection from the United States. The process differs depending on

52. See Bolton, PTSD in Refugees, supra note 27.

53. Id.

54. See Auerbach INA, supra note 11, at 156 (examining the issuance of Visas under INA § 221 and 8 U.S.C. § 1201).

55. Id. at 42 (explaining procedure for granting immigrant status under INA § 204 and 8 U.S.C. § 1154).

56. See id. at 161-223 (outlining inspection, apprehension, examination, exclusion, and removal of refugees and asylum seekers under INA §§ 231-244 and 8 U.S.C. § 1252).

57. See Auerbach INA, supra note 11, at 15 (admissibility requirements under Chapter 1, INA §101(a)(42); see also Auerbach INA, supra note 11, at 161 (exclusion and removal grounds for refugees and asylum seekers under Chapter 4, INA §§ 231-244)).

where the person is located when he or she first requests protection from the United States.\textsuperscript{59}

\textit{A. Overseas Resettlement Program}

One of two processes by which refugees are admitted to the United States is through overseas Resettlement Support Centers (RSC).\textsuperscript{60} This procedure typically begins when people register as refugees with the United Nations High Commissioner for Refugees (UNHCR), who determines whether or not the individual meets its statutory definition of "refugee."\textsuperscript{61} If the UNHCR finds that the individual is a refugee, it can then refer the individual to the United States for resettlement.\textsuperscript{62} There are three types of refugee cases that the United States prioritizes when processing applications: cases that are referred to the United States from UNHCR, a U.S. embassy, or other organization; cases that have been identified by the U.S. Refugee Program that are of "special humanitarian concern;" and cases of family reunification, if other family members have already been resettled in the United States.\textsuperscript{63}

\textsuperscript{59.} Auerbach INA, supra note 11, at 54 (under INA § 208(b)(1), a general condition for granting asylum in the United States is for the person seeking asylum to fall under the definition of refugee, as defined in INA § 101(a)(42)(A), and be already present in the United States).

\textsuperscript{60.} See Refugee Admissions, supra note 7.

\textsuperscript{61.} U.N. Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 150 (1951) (defining refugee as "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.").

\textsuperscript{62.} See Refugee Admissions, supra note 7.

\textsuperscript{63.} U.S. Citizenship and Immigration Servs., The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities, DEP’T OF HOMELAND SEC., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e666f14176543f6d1a/?vgnextoid=796b0eb389683210VgnVCM100000082ca60aRCRD&vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Mar. 25, 2011) (The Department of State’s Bureau of Population, Refugees and Migration (PRM) operates eight regional RSCs where referred eligible individuals can being the process of applying for resettlement within the United States) [hereinafter USRAP Processing Priorities].
Processing at the RSC begins with the collection of biographical information from the applicants, which is forwarded for review to the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS). After review, USCIS conducts screenings to ensure applicants are not terrorists, criminals, or otherwise security threats to the United States. Those screenings consist of interviews whereby a USCIS officer tries to obtain information from the applicant regarding their qualifying refugee status, any other possible country for resettlement, family resettlement status, and whether the person would otherwise meet the criteria of admissibility under U.S. law. Throughout the interview, the USCIS officer evaluates the credibility of the applicant and completes additional security checks. After USCIS finds the applicant credible and not a security risk, the applicant must undergo a medical exam to ensure he or she does not have a "communicable disease of public health significance...." Once approved, and barring any otherwise excludible offenses, the applicant then enters the United States Refugee Admissions Program (USRAP) and obtains protected refugee status.

B. Domestic Asylum Process

The domestic process is similar to the overseas refugee resettlement process except that, in the domestic asylum process, the asylum-seekers are already located physically within the United States and are processed directly through USCIS. Akin to applicants from outside the United

64. See Refugee Admissions, supra note 7.

65. Id.


67. Id.

68. Auerbach INA, supra note 11, at 66 (explaining INA § 212(a)(1)(A)(i)).

69. See Refugee Admissions, supra note 7 (stating there are programs through USRAP which provide assistance upon arrival to the United States, as well as support throughout the resettlement process).

States, asylum-seekers must first fit the INA definition of "refugee" which was adopted from the 1967 United Nations Protocol. Furthermore, under the INA,

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).

There are two ways to apply for asylum: an affirmative asylum application filed with USCIS, or a defensive asylum application filed before an immigration court. Affirmative asylum processing involves individuals who are already in the United States, and are not currently in removal proceedings. Once the asylum-seeker has submitted his application to USCIS, the security screening process involves taking the applicants' fingerprints and performing a background check. Then, USCIS will

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71. Auerbach INA, supra note 11, at 15 (defining “refugee” under INA § 101(a)(42) as “any person who is outside any country of such person’s nationality . . . 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 . . . .”).

72. Id. at 53 (examining INA § 208(a)(1). Section 235 referenced in this section refers to the authority of immigration officials to refer otherwise inadmissible individuals (due to illegal entry or misrepresentation), to an interview by an asylum officer before ordering the individual to be removed from the United States if the individual claims asylum). See id. at 164 (inspection by Immigration Officers under INA § 235).

73. Obtaining Asylum in the United States, supra note 70.

74. Id.

conduct an interview during which the asylum officer will evaluate the credibility of the applicant. If the asylum officer finds the applicant credible and the applicant otherwise meets the requirements for asylum, a decision will be made several weeks later and asylum will likely be granted.

Defensive asylum processing is similar to the affirmative process, except that the individual seeking asylum is doing so as a defense to removal. The individual must already be involved in removal proceedings with an immigration court, which is a function of the Department of Justice’s Executive Office for Immigration Review (EOIR). The process is more adversarial because the asylum claim is heard in immigration court before a judge and opposing counsel from DHS representing the interests of the U.S. Government, rather than before an asylum office from USCIS. Since the asylum claim is heard during a removal proceeding, it is conducted as a trial. The individual (and his or her attorney, if represented) may make opening and closing statements and present witnesses (including expert witnesses on country conditions or psychologists). If the judge denies the claim for asylum, he or she must consider whether other grounds of relief are applicable; if not, then the judge may enter an order for removal.

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77. Id.

78. Obtaining Asylum in the United States, supra note 70.

79. Id.

80. Id. (explaining that “Immigration Judges will hear a defensive asylum claim in adversarial (courtroom-like) proceedings.”).

81. Id.

82. See id.

83. Obtaining Asylum in the United States, supra note 70.
C. Statutory Timeline for Asylum Applications

To claim asylum, the applicant must meet the statutory timeline in order for his application to be reviewed. The INA states that the applicant must show "by clear and convincing evidence that the application has been filed within 1 year after the date of [the applicant]'s arrival into the United States." The one-year period begins upon the applicant's arrival into the United States, and ends on that same date one year later. The burden is on the applicant to prove by clear and convincing evidence that the applicant arrived in the United States and applied for asylum within the same year.

There are two situations, however, where the timeline may be waived. First, the one-year time limit may be waived if the applicant can sufficiently demonstrate that there were extraordinary circumstances resulting in a delay of filing of the application. An extraordinary circumstance can excuse a late filing only if the applicant can prove that the circumstances were "directly related to the [individual's] failure to file the application within the 1-year filing period." Examples of extraordinary circumstances include:

- 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;
- Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental

84. Auerbach INA, supra note 11, at 53 (detailing one year time limit imposed by INA § 208(a)(2)(B)).

85. Id.


87. Id. at 6.

88. Auerbach INA, supra note 11, at 53-54 (waiving timelines under INA § 208(a)(2)(D)).

89. Id.

90. 8 C.F.R. § 208.4(a)(5) (2011).
impairment) during the 1-year period after arrival; Ineffective assistance of counsel . . . 91.

Second, the one-year timeline can be waived if there are changes in circumstances that "materially affect the applicant's eligibility for asylum."92 A "changed circumstance" exists if an individual was present in the United States for longer than one year and, while in the United States, there has been a change to the condition of their home country that would threaten the safety of the individual if he returns.93 If the applicant does not fall into either category of exceptions and fails to submit their asylum application within one year of entry to the United States, his application will not be considered.94

D. Interview Process

If the applicant submits his asylum application within the one-year timeline (or falls under one of the two exceptions) and is applying affirmatively, then USCIS will instruct the applicant to be fingerprinted in order to conduct a background check.95 USCIS will also send notice to the applicant (usually within a month of applying) indicating when the applicant's asylum interview will take place.96 USCIS has training programs for its asylum officers, teaching officers how to make an asylum decision and what factors should be considered during the interview.97 Several

91. Id. § 208.4(a)(5)(i-iii).

92. Auerbach INA, supra note 11, at 53-54 (changing circumstances exception for timing under INA § 208(a)(2)(B)).

93. See AOBTC: One Year Filing Deadline, supra note 86, at 9.

94. Auerbach INA, supra note 11, at 53 (describing how under INA § 208(a)(2)(B), the application will not be considered for asylum unless it is shown by "clear and convincing evidence that the application has been filed within 1 year of the date of [the applicant's] arrival in the United States.").

95. The Affirmative Asylum Process, supra note 75.

96. Id.

factors should be considered when making asylum determinations: the credibility of the applicant; country conditions (including the country’s record of human rights abuses, identification of guerilla forces, and recent political events); U.S. asylum law; and international human rights law.\textsuperscript{98} The first factor, credibility, is extremely important since an asylum applicant will be subject to expedited removal if he is not found credible during his interview with asylum officials.\textsuperscript{99}

Under the INA, an asylum officer will conduct an interview with the applicant and “if the officer determines that [the applicant] does not have a credible fear of persecution, the officer shall order [the applicant] removed from the United States . . . .”\textsuperscript{100} Immigration courts will provide the applicant with a prompt review by an immigration judge to determine, before the removal is executed, whether or not he has a credible fear of persecution.\textsuperscript{101} The INA also says that the applicant will face mandatory detention until he is removed from the United States if the applicant is found not to have a credible fear of persecution.\textsuperscript{102} Therefore, establishing credibility with the asylum officer is critical, otherwise the applicant could be detained and likely removed by an immigration court if the court agrees with the officer’s recommendation for removal.\textsuperscript{103}

If the applicant is applying for affirmative asylum (i.e. the applicant has not been placed in removal proceedings), the interview by the asylum officer is non-adversarial and will include questions to establish the applicant’s identity, eligibility for resettlement in the United States, and

\textsuperscript{98} Id. at 5.


\textsuperscript{100} Auerbach INA, supra note 11, at 166 (examining INA § 235(b)(1)(B)(iii)(I)).

\textsuperscript{101} Id. (examining INA § 235(b)(1)(B)(iii)(III)).

\textsuperscript{102} Id. (examining INA § 235(b)(1)(B)(iii)(IV)).

\textsuperscript{103} Id.
biographical information. A critical portion of the interview is composed of questions related to why the applicant is seeking asylum or refugee status in the United States. The applicant must use as many details as possible to establish his well-founded fear of persecution in order to qualify as a refugee. The asylum officer must then determine if there are any reasons why the applicant would be ineligible for claiming asylum or refugee status in the United States.

During the interview, the asylum officer will evaluate the applicant's credibility as defined by the INA. The REAL ID Act of 2005 developed this new standard. The INA says that the trier of fact (which could be an immigration official or an immigration judge) can:

- base a credibility determination on the demeanor, candor, or responsiveness of applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency of the applicant's or witness's oral and written statements...
- other evidence of record [including reports from Department of State on country conditions], and any inaccuracies and falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

Under this standard, an asylum officer can look to the conduct and openness of the applicant as well as any inaccuracies in his statements, regardless of whether the inaccuracy goes to the heart of their fear of
The asylum officer can also look to other information, such as country reports provided by the Department of State which might corroborate the applicant’s story of persecution or well-founded fear. Since immigration officials have broad authority in making credibility determinations, the applicant has the burden to prove that he or she is eligible for asylum; therefore, it is crucial for the applicant to avoid any credibility pitfalls.

This new standard impacts defensive asylum claims as well, especially since in those claims, the individual is already being considered for removal from the United States. If an individual is using asylum as a defense to removal, he must undergo a trial proceeding instead of an interview. During such trial proceedings, immigration judges use the same credibility standard to determine if the individual has a credible well-founded fear of persecution. Therefore, whether the individual is claiming asylum affirmatively or defensively, overcoming the credibility standard is very important to a successful grant of asylum.

E. Types of Asylum Decisions That Could be Rendered Based on Application Credibility

After the interview process has been completed and a credibility determination has been made, there are five possible decisions that could be rendered:

111. Id.

112. Id.

113. Q & A: Credible Fear Screening, supra note 22 (explaining if an asylum applicant fails to reach the burden of proof to show a credible fear of persecution, the immigration official will initiate expedited removal proceedings).

114. Obtaining Asylum in the United States, supra note 70.

115. Id. (explaining that defensive claims to asylum are handled in a “courtroom-like proceeding”).

116. INA § 208(b)(1)(B)(iii) (quoted in In re S-B-, 24 I&N, at 43 n.1) (explaining that a “trier of fact” makes the credibility determination; a trier of fact can be an immigration judge).

117. AOBTC: Credible Fear, supra note 99, at 15 (explaining how either USCIS or the immigration judge will make a decision regarding the credibility of the well-founded fear of persecution of an asylum applicant).
made: a grant of asylum; referral to an immigration court; recommended approval; notice of intent to deny; or denial of asylum.\textsuperscript{118} After the interview process, if the asylum officer, based on the totality of the circumstances, finds the applicant has a credible fear, otherwise meets the definition of refugee, and is not subject to any bars to admission, the applicant will be granted asylum.\textsuperscript{119} The asylee would then be eligible to apply for employment authorization, a social security card, family immigration benefits, and lawful permanent residence after one year.\textsuperscript{120} If, however, an asylum officer does not believe the applicant has a credible claim, then the burden is on the applicant to renew his application in front of an immigration judge from EOIR, who will either agree with the asylum officer and order the individual removed, or disagree and grant asylum.\textsuperscript{121}

A decision to refer the applicant to an immigration court usually occurs if the applicant is not in valid status at the time of the asylum interview and USCIS was unable to grant asylum during the initial proceedings.\textsuperscript{122} The immigration judge will then review the information compiled by USCIS and make a determination to either grant or deny asylum.\textsuperscript{123} If the applicant has otherwise fulfilled the requirements for asylum, but is awaiting the results of a security check, USCIS will send him or her a "recommended approval."\textsuperscript{124} Once the security checks are completed and there is no security threat determined, asylum will be granted.\textsuperscript{125}

\textsuperscript{118} U.S. Citizenship and Immigration Servs., \textit{Types of Asylum Decisions}, DEP’T OF HOMELAND SEC., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f5e66f614176543fd61a/?vgnextoid=4a49549bf683210VgnVCM100000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Mar. 15, 2011) [hereinafter \textit{Types of Asylum Decisions}].

\textsuperscript{119} See \textit{Types of Asylum Decisions}, supra note 118 (establishing that an asylum officer can grant asylum if the individual meets the definition of refugee and has complied with all processing deadlines (or exceptions) and is otherwise admissible to the United States).

\textsuperscript{120} See \textit{Types of Asylum Decisions}, supra note 118.

\textsuperscript{121} \textit{Obtaining Asylum in the United States}, supra note 70.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} See \textit{Types of Asylum Decisions}, supra note 118.

\textsuperscript{125} Id.
A Notice of Intent to Deny will be issued if USCIS finds that the applicant is legally in the United States but otherwise does not meet the requirements for asylum. The Notice of Intent to Deny will provide the reasons why the asylum application is going to be denied, but also provides the applicant sixteen days to respond and either provide new information to USCIS or explain why their asylum application should be granted. If, after sixteen days the applicant does not respond, or if he does respond but USCIS still finds him ineligible, the applicant will receive a Final Denial letter. The Final Denial cannot be appealed. However, the individual can file a motion to reopen or reconsider in the event of an adverse finding.

F. Role of Department of Justice’s Executive Office of Immigration Review Board of Immigration Appeals, and Federal Circuit Courts

In order to fully understand the process, it's necessary to clarify the role of immigration courts, the Board of Immigration Appeals (BIA) and the federal circuit courts. As mentioned above, the immigration courts are run by EOIR. The main purpose of EOIR is to provide an administrative court process that facilitates removal proceedings. In the context of asylum, immigration courts can hear asylum claims after USCIS refers the applicant to immigration courts or if the asylum applicant is already in removal

126. *Id.* (explaining an appeal procedure whereby the applicant would have 16 days to communicate reasons why they should not be denied asylum, and why the USCIS official should reconsider their determination).

127. *Id.*

128. *Id.*

129. *Id.*


132. *Id.*
In those cases, the immigration judge will make a decision to either grant asylum as a form of relief from removal, or deny asylum thus prompting DHS to begin the process for removal.\textsuperscript{134} The decision of the immigration judge can be appealed to the BIA.\textsuperscript{135} Both the applicant and the DHS can appeal to the BIA, but must appeal within 30 days of the decision of the immigration court.\textsuperscript{136} The BIA is the top administrative body, which has binding authority on immigration judges and DHS officers unless overruled by a federal circuit court or the Attorney General.\textsuperscript{137} It hears certain decisions that are appealed after an immigration judge renders a decision. The BIA applies a "clearly erroneous" standard of review for factual findings, but has a \textit{de novo} standard for questions of law.\textsuperscript{138} If the applicant disagrees with the BIA, he or she (not the DHS) can appeal to a federal circuit court of appeals.\textsuperscript{139} The standard of review by federal circuit courts of administrative interpretations of statutes is determined by a two-step test.\textsuperscript{140} First, if Congress has spoken directly about the precise issue, then the agency and court must abide by congressional intent.\textsuperscript{141} If, however, Congress has not spoken

\begin{footnotes}
\item[133] Obtaining Asylum in the United States, supra note 70 (as discussed in "section II, part B" of this note).
\item[134] See Obtaining Asylum in the United States, supra note 70 (addressing if asylum is denied and no other forms of relief are available, an immigration judge will order the individual removed from the United States); see also EOIR at a Glance, supra note 131 (describing if an immigration judge orders an individual removed, DHS "may remove the person from the United States").
\item[135] See EOIR at a Glance, supra note 131.
\item[136] Id. (noting under “Appeals of Immigration Judge Decisions” should be filed within 30 days of the decision).
\item[139] The Affirmative Asylum Process, supra note 75.
\item[141] Id.
\end{footnotes}
unambiguously on the issue, then courts should defer to agency interpretation. These levels of appeal for an asylum applicant and standards of review are important since the credibility of the asylum application and interview will be reviewed at each level of appeal. Therefore, the establishment of credibility at the initial interview with the asylum officer from USCIS is absolutely critical for a successful asylum claim and, if necessary, subsequent appeals.

III. THE NEED TO PROTECT REFUGEES SUFFERING FROM PTSD

A. The Impact of PTSD on Establishing Credibility

Throughout the asylum application process, the applicant must establish they have a credible fear of persecution. As previously discussed, The REAL ID Act of 2005 continues to have a deep impact on the way immigration judges make credibility decisions. The REAL ID Act changed the credibility standard and requires that immigration officials make credibility determinations based on several factors, including the demeanor, candor or responsiveness of the applicant, the inherent plausibility of the applicant’s account, consistency of previous statements, and consistency of account when viewed with other evidence.

142. Id. at 843.

143. Dep’t of Justice, Exec. Office for Immigration Review, Board of Immigration Appeals Practice Manual, 52 (2008), available at http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap4.pdf (describing the record on appeal, and the items the BIA can review in making its decision under § 4.2(h)).

144. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2006 & Supp. 2012); see Matter of Acosta, 19 I&N Dec. 211, 221-22 (BIA 1985), available at http://www.justice.gov/eoir/vll/intdec/voll9/2986.pdf (stating the definition for “fear of persecution” is: “[A] genuine apprehension or awareness of danger in another country . . . no other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States satisfies the definition of refugee created under the act”).


These factors can be directly impacted by symptoms of PTSD, which may lead to an adverse credibility finding. Some PTSD symptoms such as avoidance, flashbacks, high anxiety, and shame might impact a person's ability to discuss his or her past persecution and traumatic experience.\textsuperscript{147} Flashbacks, for example, are brief memories that might not last very long, or might not be very complete, but can make the person feel as though he or she is reliving the trauma.\textsuperscript{148} Flashbacks often cause extreme anxiety and sometimes a sense of terror in the person and could impact an asylee's credibility if the asylee changes his story or demeanor as a result of reliving the past persecution. Many people suffering from PTSD also form coping mechanisms whereby they try to block certain memories, which can present a problem in asylum application, since the memories and experience of persecution must be established in order for the person to meet the definition of refugee.\textsuperscript{149}

If an applicant for asylum cannot establish credibility, their application will be denied, and removal proceedings will be initiated.\textsuperscript{150} Establishing credibility from the beginning of the process is essential, as asylum applications and the administrative record are often reviewed by multiple entities: USCIS officials will review the application first and evaluate evidence (such as Department of State reports, etc.), any inaccuracies or falsehoods in statements (regardless if the inconsistency or falsehood goes to the heart of the claim), or any relevant factor).

\textsuperscript{147} Post-traumatic stress disorder (PTSD), supra note 34.

\textsuperscript{148} Matthew Friedman, M.D., PTSD History and Overview, Nat’l Ctr. for Posttraumatic Stress Disorder, U.S. Dep’t for Veteran’s Affairs (Dec. 20, 2011), http://www.ptsd.va.gov/professional/pages/ptsd-overview.asp (explaining that the criteria for PTSD includes intrusive recollections whereby the traumatic experience can remain as an overwhelming psychological experience that can manifest in flashbacks).


\textsuperscript{150} 8 U.S.C. § 1158(c)(3) (2006 & Supp. 2012) (describing if an asylum applicant is subject to any grounds of inadmissibility, the applicant will be subject to removal pending a decision by the Attorney General (who is represented by immigration judges of EOIR)).
credibility through the application and interview; then immigration judges from EOIR will review the application if USCIS determines it cannot grant the application; and if the individual is not in valid immigration status, then appeals are heard before the BIA. Finally, once these administrative remedies are exhausted, individuals who are denied asylum may request review by a federal circuit court. At all levels, the credibility of the applicant is critical because each level of review will look to the consistent credibility of the applicant in order to analyze whether the applicant’s fear of persecution is well-founded.151

In *Sanga v. Gonzales*, Mr. Sanga entered the United States without inspection in January 2000 and filed an asylum application (or withholding of removal) in January 2001, four days after the one-year timeline had passed.152 He filed for asylum as well as for protection under the Convention Against Torture and expressed his fear of returning to the Republic of Congo, his home country.153 Sanga’s alleged account of persecution stemmed from the civil war in the Congo, which replaced the government there in 1997.154 Sanga said that he was affiliated with an opposing political party and claimed that government soldiers arrested, beat, sexually assaulted, and threatened him based on his past political activities.155 He also described his father being shot and his sister being raped by government soldiers while he hid in his house with his mother.156 He later described how he, his mother, and his sister later fled to Gabon, a neighboring country.157

Sanga was unable to provide a consistent account of his persecution; there were inconsistencies in his story between his asylum application, his asylum interview with USCIS, and his testimony in front of the Immigration Judge.158 The Immigration Judge denied Sanga’s claim and the BIA

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151. Board of Immigration Appeals Practice Manual, *supra* note 144, at 52 (describing the record on appeal, and what the BIA reviews in making its decisions).


153. *Id.* at 842.

154. *Id.*

155. *Id.*

156. *Id.* at 843.

157. *Id.*

158. *Id.*
dismissed his appeal. The case then reached the Tenth Circuit, the last level of review for Sanga’s asylum claim and withholding of removal. The Tenth Circuit examined the briefs of the parties but did not hear oral arguments. The Tenth Circuit denied asylum and Sanga was subject to removal for failure to file a timely application and failure to establish a credible fear of persecution.

The Tenth Circuit noted that Sanga told the Immigration Judge that he was “too traumatized by what had happened to him to easily divulge the facts” and that he “was too depressed to tell what happened to him initially.” He was diagnosed with PTSD but the Tenth Circuit did not find the diagnosis particularly trustworthy since the court noted the diagnosis was given after an interview with a licensed psychiatrist that lasted less than two hours. The Tenth Circuit stated that the adverse credibility determination was supported by “specific, cogent reasons [found by the Immigration Judge] for disbelieving petitioner’s claims of persecution and torture in that his story changed in material respects in the three times he told it.” Based on the credibility factors incorporated into INA by the REAL ID Act, the Tenth Circuit found specific reasons to deny Mr. Sanga’s claim, particularly based on his inconsistent accounts, a lack of detail, and the implausibility of his claim.

The reasons for the Tenth Circuit’s denial of asylum relate directly to symptoms of PTSD that Sanga exhibited. People who suffer from PTSD are often unable to consistently tell their stories of torture and persecution because they are focused on trying to survive and cope with the traumatizing experience. PTSD can cause difficulty in recalling memories and concentrating, and many people who suffer from PTSD also try to repress

159. Id.


161. Id. at 844.

162. Id. at 843.

163. Id.

164. Id. at 844.

165. Id.
the memories that cause such great anxiety. PTSD can also cause delusions and heightened emotions, so victims of torture may remember their torture differently each time they have to think back on it. Sanga could have experienced some of these symptoms, which would help explain the inconsistencies and implausibility of his story. Sanga's story highlights the need for consistent due process safeguards to be sure that immigration officials consider all relevant factors, such as the symptoms of PTSD, when making asylum determinations.

Safeguards are needed, not only because PTSD symptoms can negatively impact the determination of credibility, but also to create consistency among court determinations. Many of the circuit courts have been inconsistent in their use of PTSD diagnoses as a reason for the courts' adverse credibility findings. For example, despite Sanga exhibiting clear symptoms and receiving a diagnosis of PTSD, the Tenth Circuit and all other lower levels of appeal denied asylum based on a finding of adverse credibility. In a contrasting scenario, the First Circuit vacated and remanded a case because the BIA failed to give enough weight to the diagnosis of PTSD as corroborative evidence of the petitioner's fear of persecution to establish her claim for asylum. In making its decision, the First Circuit noted that the immigration court applied the wrong standard to establish credibility and that it should have taken the PTSD into account as corroborative evidence when making its asylum determination. In reviewing this asylum case where there was a clear diagnosis of PTSD, the First Circuit gave a great deal of weight to the diagnosis and remanded the case when it found that the immigration courts did not consider PTSD as a factor weighing in favor of granting the application. The Ninth Circuit has also indicated that immigration judges must consider an asylum applicant's explanation for the

166. See Post-Traumatic Stress Disorder (PTSD), supra note 34 (explaining that people who suffer from PTSD can have memory problems, trouble concentrating, and delusions).

167. Id.

168. Mukamusoni v. Ashcroft, 390 F.3d 110, 122 (1st Cir. 2004) (remanding case to immigration court based on the BIA's error for failure to consider entire record including medical reports providing the diagnosis for PTSD).

169. Id. at 122 (regarding the lack of corroborative evidence, the BIA demanded a higher standard of corroboration then it should have, which was part of the reason the First Circuit vacated and remanded the case).

170. Id. at 126.
lack of consistency, otherwise the judge is not making a credibility determination based on the totality of the circumstances.\(^{171}\)

In establishing credibility before a USCIS official, whether in immigration courts or circuit courts, safeguards must be in place to avoid PTSD symptoms alone resulting in a denial of asylum. One such safeguard would be implementing a requirement that immigration officials must consider the symptoms of PTSD as a factor before making an adverse credibility finding, particularly if the asylum applicant raises PTSD as a potential cause for his or her inconsistencies. In this way, the substantive due process rights of the individual are protected and fundamental fairness in adjudicating asylum applications is also guarded. This is because when an asylum applicant suffers from PTSD, he or she may not be able to provide a consistent declaration of their fear of persecution and, by denying a person asylum due to an adverse credibility finding that was caused by the symptoms of PTSD, the immigration courts are denying a fair adjudication of the application, which violates due process.

By implementing due process safeguards and weighing PTSD in conjunction with other credibility factors, the United States can continue to aid displaced people and afford them every opportunity to establish a claim to seek protection and begin healing from the trauma and persecution they suffered in their home countries. If new safeguards are not adopted, then it is imperative that immigration lawyers become aware of the symptoms and signs of PTSD in order to effectively assist their clients claiming asylum. If more attention is not given to PTSD and credibility, bona fide refugees and asylees will suffer a second "injury" by being denied protection in the United States.

**B. The Impact of PTSD on Timely Filing of Asylum Applications**

In addition to impacting the ability to deliver consistent and credible statements, PTSD can impact the ability of an individual to file for asylum within one year of arriving to the United States. This is because PTSD can have severe effects on daily living.\(^{172}\) Since some of the symptoms of PTSD include an inability to conduct normal activities because of the intense emotional and psychological scars that PTSD can cause, most people

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\(^{171}\) Shrestha v. Holder, 590 F.3d 1034, 1044 (9th Cir. 2010) (stating that immigration judges must "include the petitioner's explanation for a perceived inconsistency . . . to ignore a petitioner's explanation for a perceived inconsistency and relevant record evidence would be to make a credibility determination on less than the total circumstances in contravention of the REAL ID Act's text").

\(^{172}\) See Post-Traumatic Stress Disorder (PTSD), supra note 34.
suffering from PTSD struggle to overcome their traumatic experience.\footnote{Id.} This can have an impact on refugees seeking asylum since the INA requires that an asylum application must be filed within one-year of entry to the United States, absent any extraordinary or changed circumstances.\footnote{AOBTC: One Year Filing Deadline, supra note 86, at 5 (explaining if the individual arrives in the United States on February 23, 2000, the period to apply would end on February 23, 2001).} For an individual struggling to cope with the traumatic experience they suffered in their home country, a one-year deadline poses an enormous obstacle.

In the case \textit{Matter of L-R-}, L.R. was in the United States for one year and seven months before she filed her claim for asylum.\footnote{The Matter of L.R., Ctr. for Gend. \\& Refugee Studies, http://cgrs.uchastings.edu/campaigns/Matter/200f/20L.R.php (last visited March 1, 2013).} L.R. had fled Mexico and her abusive common-law husband who had continuously raped and beat L.R. and her children, locked her in a room, and started a fire in an attempt to burn her alive.\footnote{Id.} The severity of these assaults along with the constant threat that her husband would kill her and her children led L.R. to flee Mexico with her children and seek refuge in the United States.\footnote{Id.} Her traumatic experiences in Mexico, however, prevented her from successful functioning because she was constantly anxious, fearful, unable to sleep without having nightmares, and exhibited signs of depression.\footnote{Id.} All of these symptoms are commonly found in someone suffering from PTSD.\footnote{See Post-Traumatic Stress Disorder (PTSD), supra note 34.}

L.R. eventually submitted her claim for asylum but was referred to immigration court by USCIS since she filed outside the one-year deadline.\footnote{See The Matter of L.R., Ctr. for Gend. \\& Refugee Studies, supra note 175.} An immigration judge then reviewed affidavits submitted by her attorneys attesting to her diagnosis of PTSD and her acute psychological distress.\footnote{Id.} The immigration judge reviewed the documents and heard arguments that
L.R.'s PTSD "[p]revented her from thinking beyond surviving in the present and from planning for her future."\textsuperscript{182} Despite all of this evidence, however, the judge denied L.R.'s claim for asylum based on her untimely filing and because her persecution was not "on account of a statutorily protected ground."\textsuperscript{183}

Even though her attorneys produced medical reports and evaluations, as well as other affidavits written by psychiatric experts, L.R.'s asylum application was initially denied.\textsuperscript{184} Her claim went on to appeal at the BIA, who remanded her back to immigration court.\textsuperscript{185} The immigration judge, who heard the case at the first trial and also on remand, was reluctant to waive her failure to apply for asylum within one year, but as the expert explained in her remanded trial, her PTSD caused L.R. to be unable to participate in activities that didn’t concern her immediate survival.\textsuperscript{186} L.R. has since been granted asylum but, throughout the initial application process and throughout her appeals, L.R. was denied a fair adjudication because the immigration judge did not give sufficient weight to her mental health condition.\textsuperscript{187} In order for asylum applicants like L.R. to be eligible for a waiver of her failure to submit their asylum applications within one-year of entry, the immigration judge or asylum officer must recognize that symptoms of PTSD constitute an exception to the one-year filing deadline, because they prove a mental health condition which impaired the asylum

\textsuperscript{182} Id.

\textsuperscript{183} Id. (Ms. L.R.'s attorneys argued that she fell into the class of membership in a particular social group, which her attorneys defined as domestic violence victims who cannot escape their abusers).

\textsuperscript{184} Id. (highlighting the expert affidavit written by Dr. Lustig, a psychiatry professor at the University of San Francisco Medical School, where he explained "PTSD frequently causes people to avoid anything that reminds them of their trauma and renders them unable to participate in activities unrelated to immediate survival, such as the process of seeking asylum.").

\textsuperscript{185} Id.

\textsuperscript{186} Id.

applicant from filing within one-year of entry to the United States. In so doing, the immigration judge and asylum officials would provide due process to the asylum applicant by allowing the applicant to apply for asylum despite the delay in filing, and the applicant could present his or her case rather than being dismissed before the case was even heard.

In the case highlighted above, L.R. was initially denied the opportunity to present her case for asylum. In this type of circumstance, the regulations allow for two exceptions whereby the one-year filing deadline is waived, neither of which L.R. was initially able to satisfy. These exceptions include extraordinary circumstances and changed country conditions.\textsuperscript{188} Regulations established by DHS suggest that asylum applications that could qualify for an exemption from the one-year filing deadline include those where the applicant's filing was delayed due to a mental disability stemming from the effects of persecution or violence suffered in the past.\textsuperscript{189} L.R.'s application did not meet this standard because the first immigration judge did not think her delay in filing was directly related to her PTSD. The judge opined that her PTSD did not prevent her daily activities and, thus, should not have been reason to prevent her from filing her application within the one-year deadline.\textsuperscript{190}

Despite the judge's initial findings, L.R.'s attorneys were able to successfully argue on appeal that L.R. met the exception and her untimely filing should be waived. Following this example, immigration courts and asylum officials should adopt a policy to include PTSD as an "extraordinary circumstance" from the initial review of a late-filed application. By adopting a policy that includes PTSD as an "extraordinary circumstance," immigration courts and asylum officials are providing due process to the asylum applicant in allowing him or her to present his or her case and not dismissing it outright. This new policy would fit squarely into DHS regulations, since the regulations state that "serious illness or mental or physical disability, including any effects of persecution or violent harm suffering in the past, during the one-year period of after arrival" could be an extraordinary circumstance that should waive the one-year filing deadline.\textsuperscript{191}

Immigration courts and DHS should automatically consider PTSD an extraordinary circumstance that would waive the one-year filing deadline

\textsuperscript{188} Auerbach INA, supra note 11, at 53-54 (INA § 208(a)(2)(D)).

\textsuperscript{189} Asylum and Withholding of Removal, 8 C.F.R. § 208.4(a)(5)(i) (2011).

\textsuperscript{190} The Matter of L.R., Ctr. for Gend. & Refugee Studies, supra note 175.

\textsuperscript{191} 8 C.F.R. § 208.4(a)(5)(i).
because many of the symptoms of PTSD, such as those suffered by L.R.,
directly relate to a delay in filing for asylum. For example, people who are
suffering from PTSD frequently have flashbacks or trouble sleeping, and
often avoid people and places that would trigger the horrible memories of
the traumatic experience. An individual who is suffering from PTSD may
not file for asylum within one year because they are unable to confront the
source of their trauma, which would include their past and well-founded fear
of persecution. Through implementing a policy of understanding,
immigration courts and DHS could protect the due process rights of asylum
applicants who were, for no reason other than the symptoms of PTSD,
able to file for asylum within one year of entry.

This new policy would not change the burden on the individual to prove
these extraordinary circumstances, but it would allow immigration officials
and courts to take a more lenient approach to individuals who exhibit
symptoms of PTSD. As seen in the case of L.R., PTSD can hamper the
timely filing of an asylum application. Therefore, more recognition of
PTSD and its symptoms is necessary in order to afford this vulnerable
population the opportunity to explain how they should fit into the
extraordinary circumstance of mental health disorder as a result of their
persecution. Without additional safeguards, refugee populations will suffer
a double-injury; first the initial torture, and second a denial of due process
and the opportunity of a safe haven to continue their lives free from
persecution.

C. Consideration of PTSD Regardless of Diagnosis

In order to qualify as a refugee, an individual must be unwilling and
unable to return to their home country because of past persecution or a well-
founded fear of future persecution. The INA requires that the persecution
be on account of race, religion, nationality, membership in a particular social
group, or political opinion. Events surrounding a refugee’s persecution,

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192. Nat’l Inst. of Mental Health, Dep’t of Health & Human Servs., Post Traumatic

193. 8 C.F.R. § 208.4(a)(5) (describing that the burden of proof is on the applicant to
show how “extraordinary circumstances” warrants a waiver of the one-year timeline to
apply for asylum).

194. Auerbach INA, supra note 11, at 15 (INA § 102(a)(42)).
including the initial traumatic experience, compounded with subsequent trauma (such as conditions in refugee camps) heighten the risk for mental health disorders.\(^\text{196}\)

PTSD and other mental health issues frequently develop in scenarios where the individual is confronted with death and physical harm.\(^\text{197}\) In refugee camps in Africa, for example, the UNHCR has noted that there are increased risks for vulnerable civilian refugees to suffer intimidation and harassment, as well as suffer due to a lack of humanitarian relief.\(^\text{198}\) This increases the atmosphere of stress and anxiety amongst civilian refugees and can lead to more frequent experiences of trauma and prolonged denial of medical assistance, which contribute to mental health disorders such as PTSD.

When evaluating an application for asylum or refugee status, the lack of a diagnosis of PTSD should not be a substantive factor in determining if the individual is suffering from PTSD. The types of situations resulting in an individual becoming a refugee are often panicked and overwhelming, and these individuals may not be prepared for the legal battle to seek protection in countries like the United States. For example, since many people either going through the Overseas Resettlement Program or the domestic asylum program are not represented by counsel, they may not have considered getting a mental evaluation for themselves, or may not be able to afford a mental health evaluation.\(^\text{199}\) In addition, there are many attorneys who represent hundreds of clients, and may not have had enough time to get a mental health evaluation completed of their client, especially if the one-year

\(^{195}\) Id. (INA § 101(b)(42)); see also Black's Law Dictionary (9th ed. 2009) (defining "persecution" as a "violent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs.").

\(^{196}\) See Bolton, PTSD in Refugees, supra note 27.

\(^{197}\) Post-traumatic stress disorder (PTSD), supra note 34 (pointing out the heightened risk factors for PTSD as combat exposure, physical attack, and "other extreme, or life-threatening events").


\(^{199}\) See generally Information Guide for Prospective Asylum Applicants, supra note 15 (allowing individual applicants to bring their own attorney at no cost to the U.S. Government).
period to file is almost up. Therefore, immigration officials and judges should take mental health disorders such as PTSD into account when reviewing asylum applicants, whether or not the applicant has a formal diagnosis.

D. Policy Recommendations and Due Process

In order to better address the significant issue of PTSD in asylum applicants, Secretary Napolitano of the DHS and Attorney General Holder of the Department of Justice, must adopt procedures which will allow DHS officials and immigration judges to give more weight to PTSD when they make credibility determinations. The credibility factors that Congress determined were necessary when it passed the REAL ID Act can still be implemented in the spirit of the law; however, the agencies should interpret the law in a way that better ensures that mental health conditions are given sufficient weight before individuals are denied protective asylum and returned to their home countries. The changes implemented by the REAL ID Act have had a big impact on asylum applicants with and without mental health conditions. Since Congress believes that credibility should be given significant weight, DHS and immigration courts must balance that out by weighing PTSD higher when making credibility decisions, in order to provide substantive due process and fundamental fairness to asylum applicants.

Executive agencies have the ability to interpret the law and adopt regulations that enforce and best implement the intended legislation. The concern that asylum applicants are being denied due process because of their mental health condition would be diminished if DHS and immigration courts recognize that PTSD is an “extraordinary circumstance” whereby the one-year filing deadline is waived, and that PTSD must be given more weight when making credibility decisions. In adjusting the policy and regulations

200. The one-year time line cannot be waived unless there are “exceptional circumstances.” Requesting a continuance in order to obtain a mental health evaluation does not fall within the INA’s definition of “exceptional circumstance” even if the attorney only recently retained the asylum applicant, and that applicant’s timeline is almost up. The applicant can appeal, however, and cite ineffective assistance of counsel, or other ethical violations for an attorney who takes a case but is unable to represent their client’s asylum claim affectively. See discussion infra Section II.C.

of adjudicating asylum applicants based on the stringent requirements of the REAL ID Act, immigration courts and DHS will ensure that PTSD is fairly accounted for and that an individual who would otherwise be a bona fide asylee is not unfairly denied the opportunity to present his or her claim or to establish a reason why his or her story is inconsistent.

IV. CONCLUSION

The tragic and violent events of the twentieth and twenty-first centuries have produced an overwhelming number of refugees. While there has been significant international response as a result of the humanitarian challenges of the past 100 years, the United States asylum and refugee programs still face challenges regarding the conflict between maintaining the integrity of our system to benefit only bona fide refugees, and enacting laws and procedures that may prevent bona fide refugees from being granted protection. Refugees who are suffering from PTSD may be bona fide in that they meet the definition of refugee and are not barred on any other grounds for entry to the United States, but may nevertheless be denied asylum because of the symptoms of PTSD.

If a person meets the criteria for refugee-status, they have inherently experienced some type of persecution or have a fear of future persecution. Oftentimes the levels of persecution refugees experience lead to mental health disorders such as PTSD. These mental health challenges make it very difficult for an asylee to be viewed as credible, since they must relive their traumatic experience. Many of the symptoms of PTSD, such as a numbing of emotions, flashbacks, or heightened anxiety, go directly to the issue of credibility, so the individual must attempt to overcome their symptoms of PTSD in order to tell a credible story.

The United States refugee and asylum program must adapt to address the challenges of PTSD and other mental health disorders that impact the timing, credibility and effectiveness of bona fide asylum claims and applications. By implementing additional due process safeguards, immigration officials and courts can ensure that asylum applications are reviewed for PTSD and mental health disorders. As some courts have noted, an asylee who suffers from PTSD can use their PTSD as corroborative evidence that they have suffered some kind of past persecution or torture. This only furthers the contention that PTSD and its symptoms must be given special attention, whether or not the asylee has been given a formal diagnosis. Immigration officials must be aware of the inherent “catch twenty-two” when reviewing asylum claims; that the individual must have suffered some past persecution, and that past persecution often results in mental health disorders such as PTSD which impacts the ability of the individual to discuss their past persecution in a credible manner. It is therefore of the utmost importance that the current asylum process adapt to
reviewing PTSD as a relevant factor in all asylum claims. By doing so, the system will better enable bona fide refugees to find a safe haven in the United States, and pursue happiness, peace, and prosperity despite the persecution suffered in the past.