U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Rodkin, David Jason
Law Offices of David J. Rodkin
401 Broadway Suite 705
New York, NY 10013-3028

DHS/ICE Office of Chief Counsel - NYC
26 Federal Plaza, 11th Floor
New York, NY 10278

Name: D[redacted], A[redacted]

A [redacted]526

Date of this notice: 5/22/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Greer, Anne J.
Wendtland, Linda S.

Userteam: Docket

For more unpublished BIA decisions, visit
www.irac.net/unpublished/index/

Immigrant & Refugee Appellate Center, LLC | www.irac.net

File: [redacted] 526 – New York, NY Date: MAY 22 2017

In re: A[redacted] D[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David J. Rodkin, Esquire

ON BEHALF OF DHS: Cathy Ng
Associate Legal Advisor[1]

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum

FACTS

The respondent appeals the June 2, 2015, oral decision of the Immigration Judge, denying her application for asylum under section 208 of the Immigration and Nationality Act, but granting her withholding of removal under section 241(b)(3) of the Act. The record will be remanded.

The respondent, a native and citizen of the People's Republic of China, was born on June 21, 1989; she entered the United States in December 2006 on a non-immigrant visa, when she was 17 years old (I.J. at 1; Exh. 1; Tr. at 10). The respondent ceased complying with the terms of her visa in January 2007, while she was still 17 years old (I.J. at 1). The respondent applied for asylum on August 2, 2010, at which time she was 21 years old (I.J. at 1).

Upon the stipulation of both parties, the Immigration Judge found the respondent eligible for withholding of removal; the sole issue was whether the asylum application was timely filed (I.J. at 2; Tr. at 30-31). The Immigration Judge found that the application was not timely filed and pretermitted the respondent's asylum application.

[1] The DHS did not submit a brief in response to the appeal, but did submit a brief in response to our request for supplemental briefing.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

ISSUES

On appeal, the issue is whether the respondent's asylum application may be considered timely filed. That is, given that she did not meet the general deadline, we must assess whether her youthful status establishes an extraordinary circumstance directly related to her ability to timely file, and whether the filing occurred within a reasonable time in view of any such circumstance.

In order to answer these questions, we solicited and received supplemental briefs from the parties and amici to address the following: (1) whether a minor is a person under 18 or 21 years of age; (2) whether situations exist when being under 21 years of age (even if not a minor) would constitute an extraordinary circumstance warranting an exemption from the general 1-year deadline for filing an asylum application, and if so, what factors should be considered; and (3) how the "reasonable period" of time for filing after the termination of an age-related extraordinary circumstance should be assessed under the framework set forth in *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010).[2]

DISCUSSION

With certain exceptions not relevant here, an alien who is physically present in the United States, irrespective of status, may apply for asylum. *See* section 208(a)(1) of the Act. The alien generally must show by clear and convincing evidence that an application for relief was filed within 1 year after the date of his or her arrival in the United States. *See* section 208(a)(2)(B) of the Act. However, failure to meet the 1-year deadline does not give rise to an absolute bar to filing an asylum application. Notwithstanding this time limit, an asylum application may be considered if the alien demonstrates, to the satisfaction of the Attorney General, the existence of either changed circumstances that materially affect the applicant's eligibility for asylum, or extraordinary circumstances directly relating to the delay in filing an application within the 1-year period. *See* section 208(a)(2)(D) of the Act; *see also* 8 C.F.R. § 1208.4(a)(2).

In the present case, it is undisputed that the respondent filed her application more than 1 year after her arrival. The respondent makes no claim of changed circumstances. Instead, she argues that extraordinary circumstances prevented her from meeting the filing deadline—specifically, that she was under a legal disability until she turned 21 years old (Resp. Brief at 1-2).

[2] We acknowledge the helpful supplemental briefing submitted on the question whether special consideration should be given to young adults. In many of the briefs we received, the amici provided evidence that those under 21 years may still lack the maturity needed to acquire the necessary information for wise decision-making. *See, e.g.*, Brief for National Immigrant Justice Center (NIJC) and the American Immigration Lawyers Association (AILA) as *Amici Curiae* at 20-24; Brief for Sanctuary for Families and The Door as *Amici Curiae* at 15-20.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

In the context of this case, the term "extraordinary circumstances" is defined in the regulations as follows:

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

8 C.F.R. § 1208.4(a)(5). Accordingly, we next address the meaning of "minor" in the context of a "[l]egal disability" that can potentially constitute an extraordinary circumstance.

For purposes of the asylum filing deadline, a minor is a person less than 18 years old

There is no definition for the term "minor" in the Act or the pertinent regulations; it is, admittedly, unclear. Section 101(b)(1) of the Act defines a "child" as "an unmarried person under twenty-one years of age" and uses this term throughout the Act. [3] *See* sections 101(a)(15)(E), (I), (N), (O), (P), (R), (T), (U), & (V) of the Act. However, the Act separately refers to a "minor child" or "minor children" without providing a definition. *See* sections 101(a)(15)(F), (H), (J), (K), (L), (M), & (Q) of the Act; section 245(d) of the Act.

[3] Notably, an "unaccompanied alien *child*" is defined, in part, as a person who "has not attained 18 years of age." 6 U.S.C. § 279(g)(2)(B) (emphasis added). *See e.g.*, *Mazariegos-Diaz v. Lynch*, 605 F. App'x 675, 676 (9th Cir. 2015) (unpublished) (concluding that an alien who entered the United States when he was 16 years old, and who filed for asylum at 20 years old, was no longer an unaccompanied alien child at the time of filing and had not timely filed for purposes of asylum). Individuals coming within that definition are exempted from the 1-year deadline altogether, under section 208(a)(2)(E) of the Act, as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, section 235(d)(7)(A) of the Act, Pub. L. No. 110-457, 122 Stat. 5044, 5080. The parties here have not raised any meaningful arguments claiming the applicability of that provision.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

The modification and use of the term "child" to "minor child" in the statute suggests a change in meaning, or it could render the term "minor" superfluous.[4] An understanding of the term "minor" to mean a person under 18 years of age is reflected in section 212(a)(9)(B)(iii)(I) of the Act. This section, entitled "Minors," provides an exception from a ground of inadmissibility for alien minors, and refers to them as persons who are "under 18 years of age." *Id.* Mindful of the principle that when Congress defines a term in one part of a statute, the same definition is presumed to apply to other parts of the statute, we hold today that a "minor," for purposes of the 1-year bar, is a person under 18 years of age. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993) (observing that "language used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute").

Similarly, our case law has consistently suggested that a minor is a person less than 18 years of age. For example, in *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002), we observed that an alien who filed after he had been in the United States for 1 year, but before he turned 18 years old, "was still a minor" at the time of filing. *Id.* at 288. The concurring opinion similarly observed that the alien proffered his application to the Immigration Judge "while still a minor," though he was 19 years of age at the time of the appeal. *Id.* at 290. This language, using the past tense, suggests that the alien was no longer a minor at the time of the decision—at age 19—but was a minor when he filed his application at 18 years old. This conclusion is similarly bolstered by our understanding of the term "minor" in other contexts. *See Matter of V-F-D-*, 23 I&N Dec. 859, 862 (BIA 2006) (observing for purposes of the sexual abuse of a minor aggravated felony that the "term 'minor' is commonly defined as 'a person who is under the age of legal competence,' which in most States is 18." (internal citation omitted)).

Furthermore, at least two courts of appeals have similarly understood a "minor" to be a person under 18 years of age. *See Ogayonne v. Mukasey*, 530 F.3d 514, 519 (7th Cir. 2008) (observing that the alien's application was "filed over eighteen months after she turned eighteen, well after the one-year deadline"); *Tjong Wen Tjen v. Gonzales*, 185 F. App'x 282 (4th Cir. 2006) (unpublished) (according substantial deference to the Board's interpretation of the term "unaccompanied minor" in 8 C.F.R. § 1208.4(a)(5)(ii) to mean an alien under the age of 18 years).

---

[4] We recognize that in *Matter of Le*, 25 I&N Dec. 541 (BIA 2011), we concluded that, for purposes of adjustment eligibility after admission on a K-2 nonimmigrant visa, the term "minor child" under section 101(a)(15)(K)(iii) of the Act is synonymous with the term "child" under section 101(b)(1) of the Act. However, we conclude that *Matter of Le*, *supra*, is distinguishable from the instant case because that case emphasized the unique legislative history regarding K-visas, along with USCIS guidance on such visas. *Id.* at 546-47. Even so, we noted in *Matter of Le*, *supra*, that, if we were interpreting the term independently, we would conclude that "minor child" meant a person under 18 years, given that "minor" is commonly understood to apply to persons under 18 years. *Id.* at 547. Our interpretation in the K-visa context unified our interpretation with USCIS and the federal courts. Similarly, as discussed below, our interpretation in this case unifies the interpretation of "minor" in this context with USCIS and the federal courts of appeals. *See generally Lora v. Shanahan*, 804 F.3d 601, 615 (2d Cir. 2015) (observing that disparate outcomes for similarly situated cases are disfavored).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

In addition, the United States Citizenship and Immigration Services (USCIS) trains asylum officers to conduct hearings with "minors" and defines a minor as a person under 18 years of age. *See* USCIS Asylum Division, Guidelines for Children's Asylum Claims (2009).[5] Thus, we construe the ambiguous language here by concluding that a minor, for purposes of the 1-year bar (including the reference to "unaccompanied minors[s]" at 8 C.F.R. § 1208.4(a)(5)(ii)), is a person who is under 18 years of age.[6]

Notably, USCIS effectively excuses all applicants under 18 years old (including those who are "accompanied") from the filing deadline requirement, understanding it to be a per se "legal disability" under 8 C.F.R. § 1208.4(a)(5)(ii). *See* USCIS Asylum Division, Guidelines for Children's Asylum Claims (2009) at 46. Today, we clarify that we agree: asylum applicants under 18 years old are understood to suffer from a per se legal disability excusing them from the filing deadline. To the extent our prior case law has left this ambiguous, we now clarify our position, and unify it with the practice being conducted by USCIS. *C.f. Matter of Y-C-*, *supra*.

Extraordinary circumstances that may permit filing after becoming an adult: Factors to consider

We now address whether, even though the status of being a "minor" terminates at age 18, extraordinary circumstances may exist to warrant an exemption from the 1-year asylum filing deadline for persons between the ages of 18 and 21 years old. The slow maturation of the brain, into early adulthood, has been consistently recognized by the Supreme Court. *See*, *e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2465 n.5 (2012) ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." (internal quotations and citation omitted)); *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("[A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, [a] lack of maturity and

---

[5] A*vailable at*: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf (last visited 2/13/17); *see also* https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves (updated 1/13/2016) (stating that a minor is someone under 18 years old). Although these USCIS guidelines are not binding on the Board, they provide a helpful perspective.

[6] The respondent also encourages us to address the remand issued by the United States Court of Appeals for the Ninth Circuit in *Al-Mousa v. Mukasey*, 518 F.3d 738 (9th Cir. 2008). In that case, the alien had applied for asylum after turning 18 years old, but prior to turning 21 years old. However, the Ninth Circuit subsequently withdrew that decision, and issued an alternate, unpublished decision in its wake, in which it determined it had no jurisdiction to address the timeliness of the filing of the asylum application at all, because of a failure to exhaust administrative remedies. *See Al-Mousa v. Mukasey*, 294 F. App'x 277 (9th Cir. 2008) (unpublished). The current case resolves many of the issues raised in *Al-Mousa*.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

an underdeveloped sense of responsibility are found in youth more often than in adults . . . [J]uveniles have less control, or less experience with control, over their own environment." (internal quotations and citation omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").

Outside of case law, there is ample evidence that emotional maturity occurs at different rates, and may be slowed by outside events. For example, the USCIS guidelines caution adjudicators that the applicant should be regarded "as a child first and an asylum-seeker second" because certain factors, including experiencing violence, physical or mental disabilities, and lack of protection and care by significant adults, may result in a child seeming "much older or much younger than their chronological age." *See* USCIS Asylum Division, Guidelines for Children's Asylum Claims (2009) at 12-14. Increased use of technology has uncovered that the brain's prefrontal cortex, which is used in future planning, emotional regulation, and impulse control, continues to develop into the early 20s. Brief for National Women's Advocacy Project (NIWAP), et al. as *Amici Curiae* at 12. Studies have found that it is especially difficult for minors to make reasoned decisions when the situation generates negative emotions, such as fear or anxiety. *See* Brief for Catholic Legal Immigration Network, Inc. (CLINIC) and Public Counsel et al. as *Amici Curiae* at 10-14.

Further, we recognize that the extraordinary circumstance exception was intended to be construed broadly, with particular care taken for minors. *See* 142 Cong. Rec. S11838-01, S11840 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch) (Senators stating that the extraordinary circumstance exception was intended to cover "a broad range of circumstances that may have changed and that affect the applicant's ability to obtain asylum" including "situations that we in Congress may not be able to anticipate at this time."); *see also* section 208(a)(2)(E) of the Act (exempting unaccompanied alien children under 18 years from the 1-year filing deadline).

As discussed above, although brain development varies, we conclude that it makes sense to draw the line for "minor" at 18 years of age, in accordance with other legal practice and principles. Yet, we are persuaded that some consideration of an applicant's age may be appropriate, particularly given the examples of care extended to those who are not yet 21 years old. *See e.g.*, section 101(27)(J) of the Act (pertaining to Special Immigrant Juveniles, extended until applicant is 21 years); section 208(b)(3)(B) of the Act (Child Status Protection Act permits derivative child of asylee until age 21 years); sections 101(a)(15)(T), (U) of the Act (extending protection as a derivative until age 21 years); section 204(a)(1)(D)(v) of the Act (permitting a visa under the Violence Against Women Act, under some circumstances, until the applicant is 25 years old); *see also* Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351 (permitting foster care to be extended from 18 years up to 21 years).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

In addition, young adults—those not yet 21 years old—may have more difficulty recovering from trauma, locating housing, or obtaining legal assistance. *See* Brief for Sanctuary for Families and The Door as *Amici Curiae* at 18 (observing that "[y]outh under 21 also do not have access to Office of Refugee Resettlement shelters, sponsors, and legal orientation programs, which are reserved for children under 18 years of age, and pro bono resources marshaled to support juvenile dockets around the country are also targeted for children under 18."), 19 ("In the experience of [*amici*], some youth, particularly those eligible for asylum who have fled abuse or persecution, lack any support structure at all and may become homeless."); NIWAP at 17 ("[A] growing body of research has identified that exposure to violence and trauma negatively impacts the development of emotional and cognitive faculties, including executive functioning, in children and adolescents.").

Given the evidence above, we find it appropriate to acknowledge that the consideration of various factors is appropriate in determining whether the applicant's situation was "*directly* related to the failure to meet the 1-year deadline," such that it could be considered an extraordinary circumstance. 8 C.F.R. § 1208.4(a)(5) (emphasis added). These factors include, but are not limited to, an applicant's age, language proficiency, time in the United States, interactions with legal service providers, physical and mental health and well-being, socio-economic and family status, and housing or detention situation. All factors should be considered on a case-by-case basis, in the totality of the circumstances.[7] Thus, an applicant's age alone will not suffice, but in combination with other factors, if shown that they were directly responsible for the failure to timely file, may constitute an extraordinary circumstance.

"Reasonable period of time" following extraordinary circumstances involving youth

We now turn to whether the respondent filed her application within a "reasonable period" after the occurrence of an extraordinary circumstance in connection with her becoming an adult. As established above, the respondent's status as a minor under 8 C.F.R. § 1208.4(a)(5)(ii) ended when she turned 18 years old, on June 21, 2007. She had been in the country for 1 year by December 2007; she filed her application on August 2, 2010 (I.J. at 1). Therefore, the respondent must demonstrate that, during the period after December 2007, she experienced an extraordinary circumstance which was "directly related to the failure to meet the 1-year deadline," and that the filing of her application in August 2010 occurred within a reasonable period given that circumstance. 8 C.F.R. § 1208.4(a)(5).

[7] We appreciate the feedback on case-by-case adjudication offered by the Brief for the Federation for American Immigration Reform (FAIR) as *Amicus Curiae*.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

We acknowledge that the respondent filed 2 months after turning 21 years old. We have addressed the length of a "reasonable period" of time for filing an asylum application, specifically in the context of time following changed circumstances. *See Matter of T-M-H- & S-W-C-*, *supra*. In that case, we undertook a review of the legislative history prior to enacting the term in the Act and regulations and concluded that, "a delay of less than 6 months may be reasonable under the circumstances" and in some "rare cases" a "delay of 1 year or more may be justified." *Id.* Today, for the reasons we previously expounded upon in *Matter of T-M-H- & S-W-C-*, *supra*, we similarly reiterate that this framework applies for both changed circumstances and extraordinary circumstances, including in the case of persons who have previously been excused on the basis of youth. Thus, if the respondent is able to establish an extraordinary circumstance excusing her from filing between the ages of 18 and 21 years old, we would conclude her application is timely filed within a "reasonable period" following her 21st birthday.

As the record currently stands, we cannot discern whether the respondent may have experienced any such extraordinary circumstance. The DHS has noted a number of factors which suggest the respondent was functioning as an adult, including that she married and had a child, held a steady address, was employed, and knowingly violated the terms of her visa (DHS Supp. Brief at 17-18). However, this evidence was not clearly before the Immigration Judge. Similarly, the respondent did not have the benefit of our decision—laying out the importance of establishing specific factors which may be "directly related" to the delay in filing—before making her argument to the Immigration Judge. Because these factors are necessarily findings of fact, we conclude it is prudent to remand for the Immigration Judge to make any and all necessary findings in the first instance. *See Matter of A-H-*, 23 I&N Dec. 774, 790-91 (A.G. 2005) (noting that Board may remand a case for additional fact-finding when deemed "necessary and appropriate," and stating that Board's authority to remand for further fact-finding ensures that Board "is not denied essential facts that bear on the appropriate resolution of a case").

On remand, the Immigration Judge shall give the respondent an opportunity to demonstrate whether she suffered from an extraordinary circumstance for over 2 years, "directly related" to her untimely filing. As with all other extraordinary circumstances, the burden remains on the respondent to establish that such a circumstance existed by a preponderance of the evidence. *See Matter of M-A-F-*, 26 I&N Dec. 651, 656 (BIA 2015) (acknowledging that the burden for establishing a changed or extraordinary circumstance related to the delay in filing for asylum is "to the satisfaction of the Attorney General"); *Matter of Locicero*, 11 I&N Dec. 805, 808 (BIA 1966) (interpreting the "satisfaction of the Attorney General" standard as equivalent to "a preponderance of evidence"). The Immigration Judge shall consider any evidence presented by the respondent in light of the arguments proffered by the DHS that the respondent was functioning as an adult. We express no opinion regarding the outcome of this case.

ORDER: The record is remanded for the Immigration Judge to conduct further proceedings and for the entry of a new decision consistent with this order.

FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net