New BIA Decision Mixes Credibility and One-Year Filing Requirements

by Matthew Hoppock | Aug 24, 2015 | Asylum, Immigration, Immigration ArticlesBIA Appeals | 0 comments

Last week the BIA issued a new decision outlining the interaction between the immigration statute's requirement that an applicant file within one year of their entry and the issue of applicant credibility.

Asylum applications must be filed within one year of a person's entry (with a few narrow exceptions). Most people don't know that, especially when they first arrive, so it's especially common to see people with excellent asylum claims but who didn't file in time and thus aren't eligible.

In the Board's most recent decision, *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015), the opposite happened. The person filed an asylum application within one year but it contained errors/false information. When it came time for his last hearing, he made corrections to the application.

The BIA concluded that the corrected application was "properly viewed as a new application" and thus that it didn't meet the one-year filing requirement. The Board said "a subsequent asylum application is properly viewed as a new application if it presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis." So apparently making basic editorial changes and updates isn't necessarily a problem, but asserting an entirely new basis for asylum probably is.

There are serious problems with this decision.

First, the rule is completely inconsistent with the asylum statute, which doesn't say anything about an updated asylum application being treated as a new application and thus triggering a new one-year asylum deadline. What if someone files their first asylum application without any help and doesn't know what to write? For example, the form doesn't contain a space to tell the government which"particular social group" you belong to,

and yet courts have consistently said the applicant must tell the judge which group (even if the applicant has no attorney).

It's no surprise that in those cases the person (hopefully with the help of counsel) wants to update their application before their last hearing. But what in the statute or the regulations authorizes the BIA to treat this as an entirely new application? If anything, the statute bars applicants from filing second asylum applications after one is denied, making it highly unlikely that this is what Congress meant.

Second, the BIA used this new rule (which is inconsistent with the statute) to apply a higher credibility standard, which is similarly not permitted by the statute. In 2005, Congress changed the credibility standard for asylum applications. Applications filed after that date must meet a higher standard. The Board said in *Matter of M-A-F-* that because the immigrant updated his asylum application after the 2005 statutory change, the agency could apply the heightened credibility standard to his application.

Third, the immigrant wasn't represented by an attorney before the BIA, meaning the BIA issued a brand new rule with no notice and without much of an opportunity to argue against it.

Hopefully the immigrant will appeal to the Circuit Court, but that seems unlikely given that they weren't represented by an attorney before the Board.

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