Memorandum

CO 208-P

Subject	Date
Asylum Procedures and Adjustment of Status	18 MAY 1984

To
All Regional Commissioners
All District Directors
All Officers-in-Charge

From
Andrew J. Carmichael, Jr.
Associate Commissioner
Examinations

In order to insure consistency in our asylum processing and to improve the quality of asylum adjudications, the procedures and guidance set forth below shall be followed in all district and sub-offices. Please note that they were adopted after consultation with the field and in response to the need expressed both inside and outside the Service for uniformity and consistency in our asylum adjudications. The Operations Instructions will be amended to conform with this guidance, as appropriate. This memorandum shall supercede any previous instructions in these areas.

Portions of Part B of the December 5, 1983 memorandum (CO 209-P) on "Completion of Inspection and Adjustment of Status under section 209 of the Act" are superceded by this memorandum.

ASYLUM

I. EMPLOYMENT AUTHORIZATION:

A. The sole factor to be considered on a request for employment authorization in an initial application for asylum, that is, no previous application for asylum has been decided, is whether or not the application for asylum is "frivolous". This is true for applications filed initially before the district director or immigration judge. "Frivolous" is defined as: "Of little weight or importance; not worth notice; slight; given to trifling; marked with unbecoming brevity."

In the Matter of Cheung, 16 I&N Dec. 244 (BIA 1977), it was held that a request for asylum was frivolous where it was patently without substance. In that case, the application did not state the nature of the persecution to which the alien would allegedly be subject.

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B. The decision to authorize employment shall only be made at the time of interview. The request for employment authorization need not be written.

C. Employment authorization shall be given for the period of time necessary for the district director or immigration judge to initially decide the case.

D. A notice of intent to deny an asylum application shall inform the applicant that any previously authorized employment will be automatically revoked if the asylum application is denied, unless the applicant shows that he/she otherwise qualifies for continued employment authorization.

E. A decision to deny an asylum request shall specify that the applicant's authorization to accept employment is terminated as of the date of the denial notice, unless it has been determined that the applicant continues to be eligible for employment authorization.

F. A request for employment authorization or extension of employment authorization after there has been a denial of the asylum application shall be considered under 8 CFR 109.1(b). If the alien is accorded a grant of voluntary departure; if he/she seeks to renew the application in an exclusion or deportation proceeding; or if the alien seeks an appeal of the immigration judge's denial decision, employment authorization may be given under 8 CFR 109.1(b)(6), (7), or (8). In addition to the requirement that the application be non-frivolous, the alien must satisfy the requirements of the applicable paragraph under this section.

II. INTERVIEW:

A. Effective October 1, 1984, the asylum interview shall only be conducted by an Immigration Officer within the Examinations Section, preferably at the GS-11 or higher grade. In no circumstance shall an officer below the GS-9 grade level conduct an asylum interview or adjudicate an I-589.

B. Up-front adjudications are encouraged. However, all asylum interviews shall be conducted out of the hearing and view of the general public.

C. An asylum applicant shall be permitted to have an interpreter present during the interview if a Service interpreter is unavailable, or the interviewing officer does not have a strong working knowledge of the foreign language. The interpreter shall be placed under oath and directed to translate the applicant's statements literally. The interviewing officer is to remain in control of the interview at all times.

D. The interview shall be conducted in a nonadversarial manner. Supervisors shall periodically observe interviews to insure that

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this instruction is followed.

E. The interviewing officer shall attempt to elicit all the facts germane to the claim. This is particularly important where the applicant is unrepresented and has had little or no formal education.

F. If an applicant fails to appear for a scheduled interview, or otherwise fails to respond within 10 working days thereafter, the I-589 shall be considered abandoned and automatically terminated pursuant to O.I. 103.2(o). The call-in notice, Form G-56, shall contain the notation: "Your asylum application will be deemed abandoned and action thereon will be terminated if you fail to respond to this request."

If an asylum application is automatically terminated, an 8" x 10 1/2" sheet of bond paper shall be placed on top of the record of proceeding endorsed: "Action on Form I-589 automatically terminated pursuant to O.I. 103.2(o)." The endorsement shall be dated and the district director's signature or facsimile shall be affixed thereon.

O.I. 103.2(o) states that automatically terminated cases shall be counted statistically as "completed" and "denied". However, since asylum is a highly visible and sensitive area, such statistical counting adversely affects the approval/denial rate of I-589s. Therefore, for asylum purposes, automatically terminated cases shall be counted statistically as "completed" and "otherwise closed".

An automatically terminated I-589 may be renewed upon written request of the applicant or representative and counted statistically as "received". In such instance, the applicant shall be rescheduled for an interview as soon as possible. For interviewing purposes, the application shall be considered "received" as of the date of original filing (O.I. 103.2(o) and (q)).

G. To insure uniformity in decisions, family members who file individual I-589s should be interviewed separately but on the same date, whenever possible. Requests for advisory opinions on related applicants should be submitted simultaneously to the Bureau of Human Rights and Humanitarian Affairs (BHRHA).

III. BHRHA ADVISORY OPINIONS:

A. An initial advisory opinion shall be requested in all asylum cases. In no instance shall an advisory opinion be requested before the applicant has been interviewed.

B. If additional evidence is submitted after a notice of intent to deny the application has been mailed, the adjudicating officer should decide whether a second advisory opinion is needed. For instance, if the evidence merely restates the case already

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presented (more newspaper articles, general country conditions), the application should not be re-submitted to the BHRHA.

However, if significant evidence is presented which was not previously considered, the case may be re-submitted for a second advisory opinion. If the officer is persuaded that the new evidence establishes a claim, the I-589 shall be approved rather than returned to the BHRHA.

IV. DECISIONS:

A. The regulations (8 CFR 208.8(d) and 8 CFR 103.2(b)(2)) presently afford the applicant an opportunity to inspect, explain, and rebut the advisory opinion if the asylum decision will be adverse to him/her and the decision will be based in whole or in part on the opinion. In all cases in which the grounds of the district director's intended decision coincide with the BHRHA's recommendation, a notice of intent to deny the I-589 must be given. The applicant shall be given a photocopy of the advisory opinion and shall be accorded a minimum of 15 days from the date of anticipated receipt of the notification in which to respond. A request for additional time in which to present evidence in rebuttal shall be granted if it appears reasonable under the circumstances.

Upon review of the evidence submitted in rebuttal, the adjudicating officer shall place a memorandum or worksheet in the record of proceedings to reflect that the entire record has been reviewed and considered. The officer may make any comments or notations he/she feels are pertinent to the case, so that they may be considered in subsequent proceedings.

B. If the district director decides to deny the I-589 on grounds other than those described in the advisory opinion, a notice of intent need not be prepared. In such cases, the district director shall articulate the specific grounds for denial.

C. The applicant shall be formally notified of the decision on the asylum request. Every approval notice shall specify that the asylum status is valid for one year from the date such status was granted, and that employment is authorized. Each notice shall state that the alien should arrange to be interviewed at the end of one year to determine his/her continuing eligibility for asylum or adjustment of status.

D. Eligibility for extended voluntary departure (EVD) has no bearing on an application for asylum. No asylum request shall be approved or denied solely because the applicant qualifies for EVD. Should the asylum application be denied and it is clear that the alien qualifies for EVD, he/she should be informed of the conditions placed upon the EVD status. If it is not clear that the alien qualifies for EVD, the alien shall be informed that he/she may be eligible for EVD and should arrange to be interviewed if he/she does not desire to depart the United States.

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E. If an application for asylum is denied, the "A" file shall be reviewed to determine if the alien appears eligible for reinstatement to his/her prior immigration status. A call-in letter may be forwarded to the alien to resolve this issue.

F. A denied applicant who was in status at the time the application for asylum was made and who is ineligible for reinstatement to his/her former status shall normally be granted a reasonable period of voluntary departure prior to the issuance of an Order to Show Cause (OSC). Upon the expiration of a grant of voluntary departure or all extensions thereof, or upon denial of an asylum application where no voluntary departure is granted, an OSC shall be issued.

V. ADMISSION OF SPOUSE OR CHILD "ACCOMPANYING" OR "FOLLOWING TO JOIN" ASYLEE UNDER SECTION 208(c):

A. Section 208(c) provides that the spouse or child of an alien who is granted asylum may be granted the same status, if accompanying or following to join him/her. The term "accompanying" basically means that the spouse or child must join the principal asylee in the United States within four months. A spouse and/or child are considered to be "following to join", regardless of how much time has passed since the principal was granted asylum. However, the relationship of "spouse" or "child", as defined in section 101(b)(1)(A), (B), (C), (D), or (E), must have existed prior to the time the principal's asylum application was approved.

B. The fact that a spouse or child arrived in the United States before the principal requested asylum or that they were not included in the principal's application before asylum was granted, has no bearing on their entitlement to asylee status under section 208(c). Additionally, their present immigration status and status at entry are not germane to eligibility under this section. Therefore, the reference in the third paragraph of O.I. 208.15 that the spouse or child may not precede the principal alien will be deleted from the Operations Instructions.

C. The spouse or child of an asylum applicant may be included in the principal's application or added to the application at any time prior to a decision.

D. The spouse or child of an alien granted asylee status, who is in the United States but was not included in the principal's asylum application, may also be considered for section 208(c) status. In such a case, the principal asylee will, upon his/her personal request in writing to the district director having jurisdiction over his/her place of residence, be provided with Form I-589 to be filed on behalf of the spouse or child.

Upon the filing of Form I-589, an "A" file shall be created and the relationship of "spouse" or "child" of the principal shall be verified (See O.I. 208.15(b)). If the spouse or child is found

eligible for section 208(c) status, the principal asylee shall be notified in writing. All nonimmigrant visas and I 94's shall be endorsed: "Asylum Status Granted on (date) Pursuant to Section 208(c) of the Immigration and Nationality Act, Valid to (one year later)."

The spouse or child shall then be issued a new I-94. The admission blocks in the I-94 Arrival Record and Departure Record shall be endorsed as follows:

ADMITTED AS AN ASYLEE PURSUANT TO SECTION 208(c) OF THE I & N ACT. IF YOU DEPART THE UNITED STATES, YOU WILL NEED PRIOR PERMISSION FROM THE INS TO RETURN.

EMPLOYMENT AUTHORIZED

PORT _____ **DATE** _____

VALID TO _____

OFFICER _____

The cancelled copy of the old I-94 and the newly issued I-94 Arrival Record shall be copied for inclusion in the spouse's or child's "A" file. The old I-94 should be stapled to the arrival copy of the new I-94 and forwarded separately to the appropriate Document Control Center in accordance with instructions in the NIIS Processing Manual.

E. If a spouse or child is found to be ineligible for section 208(c) status, a written notice explaining the basis for denial shall be prepared and forwarded to the principal asylee.

F. It has been determined that a lawfully admitted permanent resident alien can continue to qualify as a "refugee", as that term is defined in the Refugee Act of 1980 and section 101(a)(42) of the INA. Therefore, a qualified "spouse" and/or "child" of a permanent resident alien admitted to the United States as a refugee or asylee pursuant to section 207 or 208 of the INA shall be entitled to section 207(c)(2) or 208(c) status.

G. O.I. 208.15(b) states that a medical examination will be required for a spouse or child granted asylum pursuant to section 208(c). The instruction is incorrect and will be amended accordingly. However, a medical examination will be required in adjustment of status proceedings under section 209(b), as regulated by 8 CFR 209.2(d).

VI. JURISDICTION:

A. Once an alien has been granted asylum in an exclusion or

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deportation hearing, he or she can only file an application for adjustment of status with the immigration court, unless the immigration judge and trial attorney (on behalf of the district director) consent to a motion to terminate the hearing so that the applicant's adjustment case can be considered by the district director. Form I-471 is to be used in such a case. (8 CFR 209.2(c) and O.I. 242.2)

VII. ADJUSTMENT OF SPOUSE OR CHILD OF ASYLEE:

A. A spouse or child accorded asylum pursuant to section 208(c) must fulfill a one-year period of physical presence in the United States before he or she may seek adjustment of status under section 209(b). The physical presence must begin after the spouse or child was accorded 208(c) status. The approval date of the principal's asylum application is irrelevant.

B. A spouse or child acquired after a grant of asylum to the principal must apply for asylum in his or her own right. Therefore, he or she would not be entitled to apply for adjustment under section 209(b) until at least one year has passed since his/her own asylum application has been granted.

C. An alien granted asylum pursuant to section 208(c) as a "child" who subsequently reaches the age of 21 before an application for adjustment of status can be filed, is no longer eligible for adjustment of status as the "child" of an asylee. However, he/she may be eligible for adjustment in his/her own right.

Since the youth accompanied or followed to join his/her asylee parent to the United States and has resided here for at least one year, the persecution likely to befall the parent would undoubtedly impact on the youth. Should the youth be required to return to his/her country, the fact that the parent sought refuge in the United States increases the likelihood that the youth would be subject to persecution.

As a practical matter, the 21-year-old youth would usually be unable to produce evidence of incidents of persecution personal to him/her, since he/she departed the country as a child. Consequently, the creation of a presumption is necessary in cases such as these. A separate application for asylum shall not be required of such aliens.

It should be noted that a presumption in these cases should not be conclusive. In an unusual case, it might be possible to overcome a presumption with independent evidence showing that no likelihood of persecution exists.