



U.S. Citizenship
and Immigration
Services

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Interoffice Memorandum

To: Prakash Khatri
USCIS Ombudsman

From: Dr. Emilio T. Gonzalez
Director, USCIS

Date: June 20, 2006

Re: Response to the Recommendation to Limit USCIS Adjudication of Asylum Applications to Those Submitted by Individuals in Valid Non-Immigrant Status

Thank you for the opportunity to respond to your recommendation to reform the asylum adjudication process. Two and a half decades of continuing healthy debate over asylum policy has shaped and refined the affirmative asylum process, and we appreciate the USCIS Ombudsman's role in revisiting the potential benefits of an alternative asylum system. The value of establishing both an affirmative and defensive process for asylum applicants, including for those who are not in valid immigration status, was carefully considered after enactment of the Refugee Act in 1980, and was revisited in the early 1990's when the asylum process was successfully reformed. For the reasons outlined in this response, we believe that the rationale upon which the existing dual-process was created continues to be valid, and that the recommendation you put forward is not tailored to meet the goals you seek to accomplish, but instead would undermine our shared goals of enhancing customer service, efficiency and national security.

Your recommendation, if adopted, would represent the most significant change to the U.S. asylum process since the creation of the Asylum Corps in 1990 – an even greater change for asylum seekers than the successful reform measures of 1995. As such, we thought it critical to solicit input from all stakeholders that would be affected by this recommendation, if implemented, in order to fairly and fully evaluate the ramifications of the proposal. We requested meetings with the Office of the United Nations High Commissioner for Refugees (UNHCR), the U.S. Commission on International Religious Freedom (USCIRF), non-governmental organizations involved in representation of asylum-seekers, the Executive Office for Immigration Review (EOIR), and the Office of the Principal Legal Advisor (OPLA) for Immigration and Customs Enforcement (ICE). Because of the impact this recommendation would have on Asylum Officers, we also thought it necessary and appropriate to reach out to the national bargaining unit to solicit union input. We have attempted to incorporate the stakeholders' views into our analysis and response, and have attached to this response the written views we have received from the

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various organizations. The stakeholders uniformly opposed the recommendations for a number of reasons, including those outlined in this response.

In our response, we first analyze the justification and assumed benefits upon which you base your recommendations to limit USCIS adjudication of asylum applications to those filed by applicants with valid immigration status and to charge asylum applicants filing fees. We also address in detail why we believe that virtual elimination of the affirmative asylum process would be detrimental to the nation's asylum system. We next address your recommendation that Immigration and Customs Enforcement (ICE) assume responsibility for credible and reasonable fear screenings. Finally, we address in summary form the number of other recommendations embedded in the proposed regulation you put forward. As no explanation was included for those recommendations, we could not respond to their underlying rationales, but did carefully consider the merits of the proposed changes. We also provide an Executive Summary, given the length of this response.

I. Executive Summary

U.S. laws currently permit asylum seekers, regardless of immigration status, to file asylum applications with USCIS.¹ At the core of the USCIS adjudication process, a specially trained USCIS Asylum Officer conducts a non-adversarial interview with the asylum applicant to elicit information necessary to determine eligibility for asylum status. If USCIS does not find the asylum applicant eligible for asylum status through this process, and the applicant is not in valid immigration status, USCIS refers the applicant to Immigration Court (EOIR), where the Immigration Judge considers the asylum seeker's application *de novo* in adversarial removal proceedings.

Your recommendation proposes to restrict the USCIS adjudication process to asylum applicants in valid immigration status, who constitute roughly 5 to 10 percent of those who currently apply for asylum affirmatively with USCIS. Under your proposed system, the remaining 90 to 95 percent who are not in valid immigration status would be placed directly into removal proceedings before an Immigration Judge without prior access to the USCIS adjudication process. Your recommendation is based on a unique legal interpretation of the Homeland Security Act (HSA) of 2002 and your belief that this new system will result in a number of benefits to the applicant and the government, including a faster and more equitable process for the asylum applicant, a reduction in fraud, national security improvements, an increase in government efficiency, and savings in costs for USCIS.

USCIS opposes this recommendation and disagrees with key assumptions, arguments, and conclusions upon which your proposal rests. Furthermore, we believe that your recommendation, if implemented, would eliminate a valuable, time-tested process for the vast majority of asylum applicants and would thwart many of the goals you seek to achieve.

First, in justifying your recommendation, you assert that the HSA vests authority to adjudicate asylum applications filed by out-of-status applicants solely with EOIR and ICE. This unique

¹ To be eligible to apply with USCIS, asylum applicants must be present in or arriving in the U.S. and not already in removal proceedings.

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interpretation deviates from the most straightforward reading of Section 451(b) of the HSA, which specifically delegates authority to USCIS to adjudicate asylum applications. Implementing memoranda from DHS, consistent with this statutory provision, delegate the adjudication of asylum applications to USCIS as well. Neither the HSA nor the memoranda distinguish between claimants for asylum who are not in valid status from those who are in valid status. Your interpretation of the HSA is also based on a unique view that adjudicating asylum applications for out-of-status applicants is an "enforcement" activity; whereas adjudication of asylum applications for applicants in valid status is not. As explained in our response, there is no rational basis for this interpretation.

Second, your recommendation deprives out-of-status asylum applicants (over 90 percent of the current affirmative applicant pool) of the non-adversarial interview. As a result, traumatized applicants would lose a forum in which they would be able to share sensitive and personal accounts of persecution more freely than in adversarial proceedings. The government would also lose an effective tool for eliciting information to make sound eligibility determinations. Under the existing two-tiered asylum system, the government benefits from both the non-adversarial interview and the subsequent adversarial Immigration Court proceedings to derive the most complete and accurate information about a referred case before reaching a decision.

Third, the recommendation, if implemented, would undo a number of existing measures to combat fraud and protect national security. Removing the non-adversarial interview from the process would eliminate a proven method for uncovering derogatory information about applicants that might raise public safety or national security issues. In addition, elimination of USCIS from the process would mean that ICE trial attorneys and Immigration Judges would no longer be able use USCIS Asylum Officers' groundwork and leads developed during the affirmative process to identify persecutors and individuals who may pose threats to national security. Similarly, under the proposed system, the government would no longer be able to leverage the infrastructure, organization, and resources unique to the USCIS asylum program to monitor, track, and further investigate fraud and national security related trends. The government would lose the expertise, oversight, and inter-office coordination of asylum-trained fraud prevention coordinators and Fraud Detection and National Security (FDNS) officers stationed at each of the eight Asylum Offices. Moreover, USCIS has recently integrated into its security check regime a biometric verification process that checks applicants' fingerprints against the vast new US-VISIT database – a capability that neither EOIR nor ICE trial attorneys currently possess.

Fourth, in direct contradiction to what you assert in your recommendation, past studies have demonstrated that there would be no significant cost savings resulting from the elimination of the affirmative asylum process. In fact, costs to asylum applicants, ICE, and EOIR would likely increase under your recommendation. For out-of-status applicants who must now go directly into adversarial proceedings under your recommendation, the need for paid legal counsel increases. For out-of-status applicants who would have been granted in the affirmative process, the processing time for the grant would increase in Immigration Court and thereby increase costs to both the applicants and EOIR, which would have to take on the approximately 6,750 – 7,000 additional asylum filings annually (cases that would have been granted by USCIS in the current system). The Immigration Courts would also experience increased processing times as a result of this increased workload, if sufficient additional resources were not provided.

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Fifth, your recommendation's constant references to improving the efficiency of the affirmative asylum process are misdirected. Since the implementation of the 1995 asylum reforms, the USCIS asylum program has completed the vast majority of cases within 60 days of receipt. Indeed, the efficiency of USCIS's processing of asylum applications has been hailed as a success of asylum reform, a stark contrast to your characterization of the system as one that "necessitates change so that it is quicker."

II. USCIS response to recommendation to limit USCIS adjudication of asylum applications to those filed by individuals in valid immigration status and to charge asylum-seekers filing fees

A. Justification and Assumed Benefits Upon Which Recommendation is Based

Your recommendation is based on your understanding of the legal mandates of the Homeland Security Act of 2002, and your belief that the recommendation would enhance customer service, prevent fraud and abuse of the asylum system, protect national security, and promote efficiency and government savings. We share each of those goals and continue to investigate ways we can improve the asylum program in order to achieve them. However, for the reasons described in this response, we believe that your recommendation would, in fact, undermine systems in place and those we are working to set in motion to achieve the goals identified by your office.

1. Allocation of responsibility under the Homeland Security Act of 2002

Your recommendation is based in large part on your belief that the adjudication of asylum applications for applicants that are not in valid status is an enforcement activity outside the purview of USCIS responsibilities, as set forth in the Homeland Security Act of 2002 (HSA). On the contrary, the HSA assigned the responsibility for asylum adjudications to USCIS. Specifically, HSA § 451(b) transferred the following functions to USCIS: adjudications of immigrant visa petitions; adjudications of naturalization petitions; adjudications of asylum and refugee applications; adjudications performed at service centers; and all other adjudications performed by the Immigration and Naturalization Service immediately before the Act's effective date. In addition, under the Department of Homeland Security's Delegation Memos 0150 and 0150.1, USCIS was delegated the authority to grant asylum and refugee status.¹ Neither the HSA nor the Delegation Memo distinguished between claimants for asylum, or any other immigration benefit, who are not in valid status from those who are in valid status. Thus, asylum adjudications are squarely within the purview of USCIS.

By contrast, the immigration enforcement functions of the former INS were transferred to the Under Secretary for Border and Transportation Security (BTS) (and now to ICE and CBP) per HSA § 441; functions transferred to BTS included the Border Patrol program; the detention and removal program; the intelligence program; the investigations program; and the inspections program. The Secretary of Homeland Security stated in his delegation of authority to ICE or CBP that, unless

¹ Department of Homeland Security Delegation Memos 0150 and 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, section 2(T).

specifically provided for in the Delegation Memo, ICE was not authorized to adjudicate any application for benefits under the immigration laws or grant any immigration status, including asylum.³

One of the purposes of the HSA was to separate immigration benefit services and immigration enforcement within the Department of Homeland Security in the manner noted above. To ensure that benefit adjudications and immigration enforcement functions would remain separate, HSA § 471(b) prohibited the recombination of USCIS with BTS or the combination, joining, or consolidation of the functions or organizational units of the two bureaus with each other. At the same time, the HSA assigned EOIR the functions it had previously; per HSA § 1102(g) (later codified at section 103(g) of the Immigration and Nationality Act (INA)), the Attorney General, and through him EOIR, retained the authorities and functions that were exercised by EOIR on the day before the effective date on the Immigration Reform, Accountability, and Security Enhancement Act of 2002 (March 1, 2003).⁴

Although Congress with the HSA split up the immigration responsibilities for the adjudication of benefits and enforcement, it did not change the underlying procedure in place for dealing with immigration benefits claims, including asylum adjudications, nor has it made changes to the process of asylum adjudication since the HSA. After HSA was enacted, the Department of Justice promulgated its own set of rules, including 8 C.F.R. § 1208.2(a) and (b), which retained the jurisdictional division over asylum adjudication that existed prior to HSA, reflecting the understanding of both the Department of Homeland Security and the Department of Justice that the HSA did not divest USCIS of jurisdiction over asylum applicants who have not been placed in removal proceedings. Per 8 C.F.R. § 1208.2(b) EOIR has jurisdiction over applicants who file asylum claims after having been served with charging documents, while per 8 C.F.R. § 1208.2 (a), as well as 8 C.F.R. § 208.2(a), USCIS has jurisdiction over asylum claims filed by applicants present in the U.S. or seeking admission at a port of entry who have not been placed in removal proceedings.⁵

As justification for moving the responsibility for the adjudication of asylum applications from out-of-status applicants from USCIS to EOIR, you state in your recommendation that, in adjudicating such applications, USCIS is in effect granting relief from removal, and thus is conducting an enforcement activity. However, you do not define what you consider an "enforcement activity." An enforcement action has been defined as an exercise of an agency's coercive power over an individual's liberty or property (see *Heckler v. Chaney*, 470 U.S. 821 (1985), at 832). The issuance of a Notice To Appear (NTA), which places an alien in removal proceedings, could arguably be considered more of an enforcement action than an adjudication of a benefit claim such as a request for asylum; both ICE and USCIS have the authority to issue NTAs.⁶ By contrast, the consideration of an application for asylum by

³ Department of Homeland Security Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, November 13, 2004, section 3, Reservations.

⁴ Per Public Law 108-7, Div. L, § 105(a)(3), Feb. 20, 2003, 117 Stat. 531, "The provisions of this subtitle, [enacting 6 U.S.C.A. §§ 521 and 522 and amending 8 U.S.C.A. 1103] shall take effect on the date of transfer of functions from the Commissioner of Immigration and Naturalization to The Department of Homeland Security [Mar. 1, 2003]." See 6 U.S.C.A. § 521.

⁵ We recognize that the regulations need to be updated to accurately reflect the new organizational structure created by DHS. However, this is true for almost all of 8 C.F.R., not just for asylum jurisdiction, and should be done in a coordinated fashion, not piecemeal, by section.

⁶ Per Department of Homeland Security Delegation Memo 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, section 2(N); Department of Homeland Security Delegation Memo 7030.2, Delegation of

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USCIS is a benefit adjudication that has enforcement implications. Most benefit adjudications carried out by USCIS, including adjustment of status, temporary protected status, and T and U nonimmigrant status, have implications for enforcement, in that a grant of the benefit entails the right to remain. USCIS in conducting these benefit adjudications is ruling on eligibility, not removability per se. If an out-of-status applicant is found by USCIS to be ineligible for a grant of asylum, he or she will be notified and referred to Immigration Court for adjudication in removal proceedings under 8 C.F.R. 208.14(c)(1). In removal proceedings, per 8 C.F.R. §1240.1, the Immigration Judge may either decide to order the removal of such an applicant or to grant asylum or some other form of relief from removal or protection, which results in the applicant's ability to remain in the United States. Such a grant of asylum by the Immigration Judge is a grant of relief from removal, as the applicant, in removal proceedings, is under threat of removal. An applicant with an asylum application pending before USCIS, however, is not under threat of removal unless USCIS refers the applicant to the Immigration Judge. Prior to that point, the applicant is involved in a benefit adjudication.

The adjudication of asylum claims by USCIS must be distinguished from decisions on withholding of removal under the Refugee Convention or the Convention Against Torture. Withholding is a form of relief from removal that does not confer an immigration status on an alien; a decision on withholding of removal cannot be made without a removal order. Thus, a decision on whether to grant withholding is not a decision on status eligibility. EOIR had responsibility for decisions on withholding under 8 C.F.R. § 208.16(a) prior to the HSA, and continues to make such decisions under 8 C.F.R. § 1208.16(a); USCIS has no role in withholding of removal decisions.⁷

If enforcement implications make benefit adjudications enforcement activities, and hence within the purview of ICE and EOIR, then benefit adjudications cease to exist as a separate category from enforcement actions. However, Congress in the HSA explicitly conceived benefit adjudication and immigration enforcement as separate functions requiring separate entities within DHS to carry them out, and prohibited the recombination of these two functions. In this way, Congress rejected the view that benefit adjudications with enforcement implications should be considered enforcement activities. Your recommendation would be inconsistent with Congressional intent.

As a final point, it is worth noting that the issuance of NTAs, as mentioned above, is arguably more of an enforcement activity than a benefits activity. Under your recommended process, USCIS would issue NTAs to all out-of-status applicants, referring them to the Immigration Court without an adjudication. Given that USCIS currently issues NTAs only to asylum applicants deemed ineligible for asylum, your recommendation would result in a significant increase in the issuance of NTAs by USCIS. While it is clear that USCIS has authority to issue NTAs consistent with the HSA, we note that, to the extent that NTAs are considered enforcement actions, then, enforcement actions by USCIS would

Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement section 2(K),
November 13, 2004.

⁷We recognize that 8 C.F.R. § 208.16(a) authorizes USCIS Asylum Officers to adjudicate claims for withholding of removal in cases in which an applicant is precluded from a grant of asylum due to the limitation on the number of asylum cases that could be granted based on resistance to coercive population control (CPC) measures that existed prior to enactment of the REAL ID Act. However, USCIS has never exercised that authority and, instead, issued conditional grants of asylum to those precluded from a final grant due to the annual limitation on grants of asylum based on CPC. This provision will be removed from the regulation when we next update it.

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increase under your recommendation, which would seem to conflict with the spirit of your recommendation to reduce enforcement activity by USCIS.

2. Customer service

Of the primary contentions advanced in your recommendation, you propose “the system necessitates change so that it is quicker and more equitable for those applicants truly deserving of asylum.” In further citing improvements to customer service that you anticipate your recommendation would bring, you state that an out-of-status applicant who is sent directly to removal proceedings may benefit from “a more thorough and efficient resolution of his/her circumstance, thus reducing the applicant’s overall cost and stress.” In support of these assertions, you point to USCIS’s “high” rate of referral to the Immigration Courts.

The suggestion that USCIS decisions are systematically less thorough or equitable does not bear out in the statistics. Over the past five years, EOIR has consistently approved 20% of the cases it received upon referral from an Asylum Office.⁴ In FY 2005, for example, EOIR completed 43,720 asylum applications. Of that number, the court granted just over 8,170 for a 20% approval rate. Of the cases that were not approved, many were abandoned, withdrawn, denied, or completed for other reasons. Rather than reflecting a broken system, this approval rate indicates a reasonable outcome, given that referred applicants may have gathered additional evidence or sought assistance of counsel to present a stronger case before EOIR. The number of referred cases ultimately approved by EOIR also highlights for us EOIR’s important role as a check and balance.

Your recommendation fails to identify any reasons for believing that the existing system is not equitable. In fact, it appears to us that depriving all asylum seekers who are out-of-status of the benefit of a non-adversarial interview would not make the process more equitable, but would have the opposite effect, creating a system of significant inequities between applicants in valid status and those not in valid status. Many genuine refugees cannot obtain valid travel documents from a government that they are fleeing, and it would appear to us extraordinarily inequitable to deprive those legitimate refugees of the benefit of a non-adversarial interview.

The non-adversarial asylum interview has proven to be a critical means by which the Asylum Officer elicits from apprehensive and often traumatized refugees reliable information necessary to perform a meaningful review of asylum claims. It has remained the cornerstone of the affirmative asylum

⁴ A casual understanding of the relevant statistics published by EOIR and USCIS could lead one to believe that the percentage of cases approved by EOIR after an Asylum Officer referral is much higher, but the actual rate is typically at or below 20% annually. The tendency to mistake the rate of EOIR approval as a much higher proportion of referred cases is due to the presentation used for data released by EOIR. *EOIR Statistical Yearbook* Figure 16. K2 compares only those cases that are denied and granted after referral, which is only a small fraction of the total affirmative asylum cases referred to EOIR by the Asylum Division. Comparing only those cases adjudicated on the merits and excluding those applicants found ineligible by USCIS but who later abandon their applications or get other relief, the approval rate is 45%. However, this number fails to accurately reflect the USCIS “overturn” rate. U.S. Department of Justice, EOIR Office of Planning, Analysis, and Technology, “2005 Affirmative Asylum Statistics,” (Falls Church, VA: Statistical Analysis 2006); U.S. Department of Justice, EOIR Office of Planning, Analysis, and Technology, Online. 15 April 2006. *Fiscal Year 2005 Statistical Yearbook*. [Internet], <<http://www.usdoj.gov/oir/efoia/foiafreq.htm>>, [Internet], <<http://www.usdoj.gov>>, Figure 16, K2.

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process for 15 years, and asylum experts have long recognized the non-adversarial asylum interview as more effective at eliciting detailed and specific information from asylum seekers than a court hearing, which is a formal adversarial process.⁹

Also unclear is the basis upon which you rest the belief that a hearing before an Immigration Judge would result in a more thorough resolution of an asylum applicant's circumstance. In addition to benefiting from the Asylum Officer's affirmative duty to elicit information, as outlined in regulation,¹⁰ on all information relevant to an applicant's eligibility for asylum, applicants who apply affirmatively benefit from the Asylum Officers' extensive training on research and access to a wealth of country conditions information that enable the Asylum Officer to conduct a more comprehensive interview and adjudication. Applicants who are referred after an asylum interview to Immigration Court receive an even more thorough vetting of their cases, having first presented information to USCIS and then being given an additional opportunity to present any additional information to an Immigration Judge. Additionally, as explained in more detail below, the ICE trial attorney and Immigration Judge significantly benefit from the country condition expertise the Asylum Officer will have brought to bear on the interview and the adjudication, prior to referring the case to Immigration Court.

By comparison, applicants sent directly into removal proceedings enter a formalized court hearing, which may inhibit a meritorious applicant "afraid to speak freely. . . [from] giv[ing] a full and accurate account of his case."¹¹ Congress understood this risk when it advised the government to provide asylum applicants with "an opportunity to have their claims considered outside a deportation and/or exclusion proceeding"¹² This ability to have out-of-court hearings furthers the intent of Congress, in enacting the Refugee Act, to set into place "a policy which will treat all refugees fairly and assist all refugees equally."¹³

With respect to case processing speed, it is important to recognize that the 1995 asylum reforms effectively addressed many of the inefficiencies that plagued the asylum system prior to the reforms and enabled INS and USCIS to complete new cases in a timely manner. As a result, in the post-reform era, the USCIS Asylum Division has completed the vast majority of cases filed since reform (January 1995) within 60 days of receipt. The reformed affirmative asylum process has been recognized for its timely

⁹ Hansen, Randall; Martin, Susan; Schoenholtz, Andrew; and Weil, Patrick, "Article: Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America," *Georgetown Immigration Law Journal* (Vol. 14 No. 1, Spring 2000), p. 804; See also Martin, David A. "Reforming Asylum Adjudication: On Navigating the Coast of Bohemia," *University of Pennsylvania Law Review* (Vol. 138, No. 2, May 1990), p. 1295-1302; Martin, David A. "Making Asylum Policy: The 1994 Reforms," *Washington Law Review* (Vol. 70, No. 3, July 1995), p. 727-728; Office of the United Nations High Commissioner for Refugees, *Interviewing Applicants for Refugee Status*, Training with UNHCR: 1995.

¹⁰ 8 C.F.R. § 208.9

¹¹ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: HCR/1P/4/Eng/REV.2, January 1992), p. 45-49 ("[The asylum seeker] finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. . . . A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority."); See also Hansen et al. (Spring 2000), *supra* note 9.

¹² 125 Cong. Rec. 23,233 (1979).

¹³ S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979).

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completion of new cases.¹⁴ Currently, applicants granted in the affirmative process receive resolution of their cases significantly more quickly than do those in Immigration Court who have to go through several hearings. As such, your recommendation would result in a significant delay in granting asylum to approximately 6,750 to 7,000¹⁵ asylum applicants annually who would quickly receive final grants of asylum in the affirmative process. While your recommendation would result in faster final grants of asylum for the approximately 3,000 to 3,325¹⁶ applicants who, under the existing system, would receive grants of asylum by EOIR after an asylum officer referral, the benefit of saving approximately 60 days processing time for those individuals does not outweigh the negative impact on twice as many applicants who would be granted asylum sooner under the existing process and the delays caused to others in immigration proceedings, as explained in the next section.

Although you seek to reduce the applicant's overall cost and stress, it should be noted that your recommendation proposes to impose fees on asylum applications, a measure that would increase – not reduce – costs to asylum applicants. Similarly, legal representation is of greater importance in a court hearing than in the non-adversarial setting, and the need for representation under your proposal would place the burden of additional legal costs on meritorious applicants.

By placing asylum applicants directly into removal proceedings instead of a non-adversarial process, the government would be increasing the stress of applicants, as they would have to present their asylum claims in an adversarial process and face cross-examination – all under a more direct and immediate threat of removal. As just one example, victims of sexual abuse who suffer from psychological trauma often find it impossible to openly describe past harm in the formal courtroom forum.¹⁷ The affirmative asylum interview, by comparison, is designed to provide the most conducive setting to elicit information from a meritorious applicant who has survived life-threatening trauma. USCIS Asylum Officers are highly trained in cross-cultural communication and gender issues to help them place an applicant at ease and elicit the greatest amount of relevant information. Special

¹⁴ Schoenholtz, Andrew I. "Migration and Refuge in the Twenty-First Century: A Symposium in Memory of Arthur Helton: Refugee Protection in the United States Post-September 11," *Columbia Human Rights Law Review* (Vol. 36 No. 1, Spring 2005), p. 335-347.

¹⁵ It is estimated that, after elimination of the backlog at the end of this fiscal year, the Asylum Division will approve annually approximately 6,750 - 7,000 applications of applicants who are not in valid immigration status. Although the Asylum Division does not track this number, the estimate can be extrapolated with a reasonable degree of accuracy with the following method. Estimates based on anecdotal evidence seen by individuals familiar with the asylum process – both governmental and non-governmental – range from 90%-98% of asylum applicants believed to be out of status. A comparison of the average number of referrals and denials over the past several years indicates that 10% the applicants were out of status at the time of decision. Because that number may be inflated by the number of applications processed under the terms of the settlement agreement in *American Baptist Churches vs. Thornburgh (ABC)* over the past several years, which require denials for ineligible class members even if they are out of status, we also compared denial and referral rates of all non-ABC applications received since asylum reform. Those data indicate that approximately only 5% of asylum applicants are in valid status. The number of 6,750-7,000 out-of-status grants is based on recent new receipts approximating 25,000. Formula: 25,000 x 0.90 x 0.3; and 25,000 x 0.95 x 0.3.

¹⁶ Using the same assumptions explained in footnote 15 and the Immigration Judge "overture" rate explained in footnote 8, we anticipate that 15,750 to 16,625 ineligible out of status applicants will apply of which 20% will be granted by the Immigration Judge, for a total of 3,150 to 3,325 applicants.

¹⁷ Rovner, Sandy. "The Torture of the Refugee: Why Judges Don't Believe," *Washington Post* (Washington, D.C.: 2 September 1996); See also Martinez, Antonio, Ph.D. and Fabri, Mary, Psy.D., "The Dilemma of Revitalization: Survivors of Torture Giving Testimony" (The Marjorie Rovner Center: Presentation Paper).

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accommodations are also available; a female victim of sexual assault may request an interview with a female Asylum Officer and other allowances unavailable in the courtroom setting.

For these reasons, we believe that your recommendation would, contrary to its intent, be less equitable, would result in less thorough adjudications, would increase the cost and delays to applicants, and would be more stressful for applicants.

3. Fraud and frivolous filings

Your recommendation mischaracterizes the affirmative asylum process as “a tactic to delay removal because of a pending immigration application.” This conclusion overlooks the critical point that affirmative asylum applicants by definition have not been placed in removal proceedings and do not have the incentive of impending removal that might prompt applicants to hunt for delays. Filing a non-bona fide asylum application would, to the contrary, hasten removal by alerting DHS of the unlawful status and place the applicant on a direct and fast path to removal proceedings. A far easier and more effective way to delay removal would be to evade detection by immigration authorities by not coming forward. Demonstrating a claim for asylum is a difficult endeavor, and an applicant who applies affirmatively for asylum will expose any lack of immigration status. Illegal aliens who never apply for asylum often remain in the United States indefinitely, while any alien not in valid status whose asylum application is denied and who is ordered removed will be subject to a ten year bar to immigration benefits and removal.¹⁸

You further base your recommendation on the unsupported assumption that “a high referral rate appears to indicate an inherently flawed system as well as one prone to fraud and abuse.” As the sole support for this assertion, you cite the referral rate for affirmative asylum applications. Your justification is flawed on several counts. First, a high referral rate does not necessarily indicate abuse and fraud. The current referral rate could just as likely be a byproduct of the complexity of the asylum process and the difficulty of establishing a claim of asylum. The referral rate may also be evidence of the Asylum Officers’ thorough adjudication of each asylum claim, including the discovery of adverse information that would trigger a bar to approval. The approval rate for cases adjudicated on the merits by USCIS is comparable to the approval rate for cases raised defensively in Immigration Court and adjudicated on the merits.¹⁹ It is also consistent with, and in many cases much higher than, the approval rates in other refugee-receiving countries.²⁰

¹⁸ INA 212(a)(9); see also Divine, Robert C.; Chisam, R. Blake, *Immigration Practice 2005-2006* (New York: Juris Publishing, Inc., 2005) p. 10-67 to 10-72.

¹⁹ In FY05, EOIR approved 38% of asylum cases adjudicated on the merits, compared with 32% for USCIS. U.S. Department of Justice, EOIR Office of Planning, Analysis, and Technology, Online. 15 April 2006. *Fiscal Year 2005 Statistical Yearbook*. [Internet], <<http://www.usdoj.gov/eoir/foia/foiafreq.htm>>, [Internet], <<http://www.usdoj.gov>>, Figure 16, K2p; Schoenholtz (Spring 2005), p. 335-347, *supra* note 14.

²⁰ Around the world, asylum approval rates are generally lower than the approval rate in the United States. The following percentages indicate the grant rates for initial asylum adjudications for the 2004 calendar year: United Kingdom 11%, Canada 39%, France 9%, Belgium 26%, Australia 10%, Germany 5%, and Austria 23%. UN High Commissioner for Refugees, *UNHCR 2004 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers, Stateless and other Persons of Concern to UNHCR* (Population and Geographical Data Section Division of Operational Support, Geneva: 17 June 2005) Table 6.

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While we find flaws in the logic of your argument, we do agree that fraud is a serious matter that must be addressed, and we share your goal of eliminating fraud. Our concern is that your recommendation would eliminate effective measures in place to identify fraud in the U.S. asylum system. For example, identifying, monitoring, tracking, and further investigating fraud-related trends is much more manageable and effective in a system of only 8 Asylum Offices that handle all affirmative asylum cases, than in a system of 53 independent Immigration Courts. The 8 Asylum Offices, through a network of FDNS officers and Fraud Prevention Coordinators stationed at each office, can collaborate and leverage the resources of the Asylum Office to track leads at a national level and initiate fraud investigations to assist in the prosecution of fraudulent immigration schemes. Because of the concentration of asylum applications in 8 offices and its access to a fraud prevention infrastructure, the USCIS Asylum Division is in the best position to identify patterns and trends indicating fraud and redirect resources to work closely with law enforcement to obtain successful prosecutions. As just one illustration, Asylum Office personnel recently identified a fraud pattern and assisted with an investigation that led to the indictment of the members of a large crime ring of Indonesian immigration consultants who were also prevented from laying the groundwork for a planned international sex-trafficking scheme.²¹

4. National security

The non-adversarial interview not only provides an appropriate forum for traumatized applicants as discussed above, but it also provides the government with an effective way to uncover information about an applicant's identity and background that might affect public safety and national security. Removing the affirmative asylum process from the majority of asylum cases, as you recommend, would deprive the government of this tool. A central objective of the non-adversarial interview is to gain the trust of an applicant reluctant to communicate with a government official.²² By taking affirmative steps to build a rapport with applicants during the non-adversarial interview, the officer can best elicit "all information concerning [the applicant] and his past experience in as much detail as is necessary," including potentially critical derogatory information.²³

For example, applicants with a history of persecuting others may feel less constrained to describe past aggressions in the informal setting of a non-adversarial asylum interview than in an adversarial proceeding. Applicants may also concede to an Asylum Officer during a non-adversarial interview that he or she has been accused of being a terrorist or was "just following orders" when he or she harmed another person – concrete statements that the Asylum Officer can follow up on to probe whether the applicant is indeed a terrorist. In addition, applicants may reveal during a non-adversarial interview an alias, which can then be used by the Asylum Office to conduct a new FBI name check. By contrast, ICE trial attorneys in Immigration Court are bound by strict rules of order and must elicit information by

²¹ As another example, the San Francisco Asylum Office, through the San Francisco Asylum Anti-Fraud Task Force, in recent years has participated in over 21 separate investigations that have led to the disruption of numerous preparers engaged in the preparation of fraudulent applications, and its work has led to 10 indictments and 7 successful prosecutions.

²² UN High Commissioner for Refugees, *Interviewing Applicants for Refugee Status* (RLD 4/1995), p. 6.

²³ See UN High Commissioner for Refugees (January 1992) p. 49, *supra* note 11; see also Beyer, Gregg A.

"Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities," *The American University Journal of International Law and Policy* (Vol. 9, No. 4, November 1994), p. 65 ("Opponents ... felt the adversarial process did not always elicit enough information or sufficient detail.").

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cross-examination, which is less conducive to building a rapport and eliciting the types of information discussed in this paragraph.

In addition, ICE trial attorneys and Immigration Judges use the Asylum Officers' assessment to identify persecutors and individuals who may pose a threat to U.S. security. Because the hearing is *de novo*, the Immigration Judge is not bound by the Asylum Officer's findings, but the information elicited in the affirmative process is nonetheless extremely valuable in establishing an applicant's identity and impeaching the applicant's testimony.²⁴ The ICE attorney and Immigration Judge also benefit from the country condition information collected by the Asylum Officer, which helps focus the hearing on the central issues in the case.

You assert that your recommendation may enhance national security "as US-VISIT will receive more timely notice of changes to an individual's immigration status and unauthorized duration of stay which is currently not provided to CBP, whereby reducing the 'haystack' that may necessitate an ICE investigation for suspected immigration violators and/or terrorists." While it is not entirely clear, we assume that this assertion is based on the belief that when USCIS issues NTAs to out-of-status applicants, US-VISIT will be updated based on biographical data.²⁵ However, your objective to have USCIS more timely update US-VISIT with information helpful to ICE may be achieved without requiring applicants who are not in valid status to apply for asylum with EOIR. In fact, the USCIS Asylum Division's current efforts to implement a system to enroll and verify asylum applicant's identities biometrically via US-VISIT, as described below, is a much more effective way to accomplish your goal.

The USCIS Asylum Division is currently in the process of implementing a new biometric verification system that will leverage the vast network of DHS and Department of State (DOS) fingerprint databases to check the identities of asylum seekers. Prior to the implementation of this new system, asylum adjudicators had limited access to DHS biometric databases and access to only biographical (non-biometric) visa information and entry information, which were contained in separate databases. This new system enables the Asylum Officers to verify in one data repository the travel history of its asylum applicants whose digital fingerprints have been captured at the ports of entry under the US-VISIT program (which began in 2004), as well as to confirm visa information about the applicants whose digital fingerprints have been captured at the Department of State's overseas consular posts. As an example, the USCIS Asylum Office adjudicating the asylum application will be able to digitally scan the applicant's fingerprints into the system to see that the applicant applied for a visa in Germany in 2005, then came through JFK Airport in New York three months later, perhaps using a different identity. In addition, the asylum applicant's fingerprints will be captured and enrolled into the system so that future authorized DHS and DOS users of the system will be able to view the new encounter in association with the applicant's other encounters.

Another benefit to this new system is that the digital capture of the asylum applicant's biometrics will occur early in the process and will consolidate other biometric capture processes. As a result, the

²⁴ The value of information from the affirmative asylum proceeding was recently recognized by the United States Court of Appeals for the Second Circuit in *Diallo v. Gonzalez*, 455 F.3d 624, 631-3 (2006).

²⁵ We are unclear on how you believe this will happen, as US-VISIT is a biometric-based system and, under your recommendation, USCIS would not have biometric data on the applicants prior to issuance of the NTA.

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applicant's digital fingerprints will be used simultaneously for enrollment into this new verification system, the existing FBI fingerprint database check, and for any future card production (such as employment authorization cards). This consolidation of biometric processes freezes the identity of the asylum applicant at an early stage of the application process and enables USCIS to ensure that identity checks conducted in different systems are based on the same set of digital fingerprints. The ability to verify an asylum applicant's identity and background through biometric matching will significantly enhance the integrity of the asylum program, as adjudicators often have to rely on the oral testimony of asylum seekers who, understandably, may not have supporting documentation or identification or who may have changed their identities if they fled persecution under emergent conditions.

Biometric verification of asylum applicants through US-VISIT provides an additional layer of security and background checks currently not available for cases before EOIR. As part of the design of this new system, USCIS and the US-VISIT Office have worked together to build an interface between the asylum program's case management system (RAPS) and the US-VISIT database, so that US-VISIT hit information can be fed directly into RAPS. This direct feed of US-VISIT data into RAPS provides an early warning system that alerts Asylum Offices to asylum applicants who are on the US-VISIT Watch List at the earliest point possible. We have already deployed this system to several Asylum Offices and expect deployment at all Asylum Offices by the end of June. In addition, we are engaged in discussions with the US-VISIT Office to develop a protocol for updating the US-VISIT database with decisional and status information from RAPS, while adhering to regulations protecting the confidentiality of asylum-related information.

5. Efficiency and cost-savings

You assume that the imposition of fees and the elimination of USCIS asylum adjudication for out-of-status applicants would improve USCIS efficiency by creating a new funding source and by permitting Asylum Corps staff to be redirected to other immigration programs. While the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the INA to make clear that the U.S. government may require asylum applicants to pay a fee, the legacy INS elected not to charge asylum applicants fees for the same reasons articulated when the costs and benefits of levying a fee were carefully weighed during asylum reform. After initially proposing to levy fees on asylum applicants when the asylum program was being reformed, the INS ultimately determined that the burden of adjudicating waivers would quickly consume any proceeds.²⁶ We have again considered the costs and benefits of levying a fee on asylum seekers in light of your recommendation and budgetary considerations of USCIS. We find that levying a fee on asylum applicants, who do not have the right to work, would actually usher in a high percentage of fee waiver filings for the inability to pay, resulting in significantly lower fee revenues than what is produced from the asylum and refugee surcharge today with little impact on budget or efficiency.

Even if USCIS were to benefit financially from imposing fees on asylum applicants, institution of such fees could impose further hardship on persons seeking protection from persecution.²⁷ Asylum

²⁶ 59 Fed. Reg. 62284, 62286 (1994).

²⁷ *Id.*

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applicants often enter the United States with limited money and no prospect of an income. Given the desperate circumstances of many asylum claimants coupled with the prohibition on employment for asylum applicants, we believe that allowing asylum applicants to apply without paying a fee is consistent with the humanitarian objectives of the asylum process.²⁸

Your recommendation cites to the potential benefit of reallocating Asylum Division personnel to other USCIS programs if a majority of the asylum caseload is transferred to the Immigration Courts. There are significant flaws with this reasoning. First, if a majority of the asylum caseload is transferred to the Immigration Courts, USCIS could not justify maintaining the majority of asylum staff positions, which are funded by surcharges on the fees for other benefit applications. The surcharges would either be reduced accordingly, as the cost of adjudicating the majority of asylum claims would be shifted over to EOIR, or eliminated if asylum applicants were to pay fees to cover the costs of adjudication, as you recommend. In either case, USCIS would lose the funding for the positions. Second, if the USCIS asylum process were restricted to only those in valid non-immigrant status, USCIS would lose economy-of-scale, and the cost of adjudicating an asylum application would skyrocket. This cost would be passed onto the applicant via the proposed application fee, which would become prohibitive.

While implementation of your recommendation would eliminate the vast majority of the Asylum Division's workload and the dual-tiered system for those applicants whom USCIS refers to Immigration Court under the existing system, it would not necessarily result in greater efficiency for the U.S. asylum program as a whole. First, as noted above, it would result in greater inefficiency for those asylum applicants that USCIS would have granted under the existing system, mostly within 60 days from the date of filing. Under your recommendation, they would be required to have their claims heard in the more expensive and lengthier process of the Immigration Court, and be required to attend a master calendar hearing before ever getting to the merits hearing. Second, your recommendation fails to acknowledge the impact an expanded court docket would have on the workload of the Immigration Courts, on DHS Trial Attorneys, and on asylum seekers and other aliens in proceedings.²⁹ As noted above, we estimate that EOIR would have to address approximately 6,750 to 7,000 additional applications each year.³⁰

Under the existing system, asylum hearings in Immigration Court gain focus and efficiency from information gleaned in the affirmative interview. In the non-adversarial process preceding the adversarial process, USCIS Asylum Officers develop issues that prosecuting ICE attorneys can use to work the case at a more focused and advanced stage in Immigration Court than if there were no Asylum Office proceeding. It is important to understand that, while the *de novo* process enables the Immigration Judge to make independent determinations of fact and law on new evidence, nothing precludes the regular

²⁸ In addition, the institution of fees on asylum applications, compounded by our restriction on employment authorization, could generate harsh criticism from the international community, where the provision of employment authorization, cash assistance, housing, and medical benefits to asylum seekers is the norm. Hansen et al. (Spring 2000), p. 810-811, *supra* note 9. Housing is provided by England, Germany, Belgium, Australia and France. Cash assistance is provided by the aforementioned countries as well as Canada and Austria. Australia, which charges asylum applicants \$30, is the only country with a significant active asylum program to charge a fee to asylum applicants.

²⁹ See Beyer, Gregg A. "Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities," *The American University Journal of International Law and Policy* (Vol. 9, No. 4, November 1994), p. 63-65 (discussing the impact of an expanded EOIR caseload of initial asylum filings).

³⁰ See note 15.

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practice of relying on an Asylum Officer's work to focus a court proceeding or challenge an applicant's credibility.³¹ Without the benefit of that information, it is anticipated that asylum hearings before EOIR would take significantly longer. The additional time EOIR would be required to spend on asylum cases – both on those that the Asylum Division would have otherwise granted, and on extended hearings for those that no longer benefit from information gleaned during the affirmative process – would not only impact asylum adjudications, but all those in removal proceedings. Since asylum cases must by statute be adjudicated within 180 days, they would take priority over other immigration hearings.

You have justified eliminating adjudications of out-of-status applicants by the Asylum Office because "the asylum division would be less of a financial drain on USCIS revenue."³² While your office understandably is focused on making recommendations to USCIS and does not have authority to make recommendations to ICE or EOIR, we believe it is important to consider the impact of any changes to our processes that affect other governmental departments or agencies and have considered whether your recommendation would result in cost-savings or increases to the U.S. asylum system as a whole. When the question of whether eliminating the two-tiered system for the majority of asylum applicants would result in cost-savings was studied previously, it was determined that there are no significant cost-savings that favor court adjudication of initially filed asylum applications in comparison to the current two-tiered system.³³ We do not believe that there have been any changes to the process that would significantly change the analysis. In fact, we have more evidence today, after more than ten years since asylum reform, that the two-tiered system creates efficiencies for cases in Immigration Court. Even if there were marginal cost-savings as a result of your recommendation, the impact of eliminating the asylum program in the majority of cases would deprive the U.S. government of the benefits the current asylum regime provides by incorporating both the non-adversarial interview and the Immigration Court's adversarial proceedings to derive the most accurate outcome obtainable.

III. Instituting a corps of credible fear and reasonable fear officers in ICE

You recommend that ICE should "have jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31" and that asylum officer positions could be either "assigned or detailed to ICE" to conduct credible fear and reasonable fear interviews. Your recommendation does not contain an explanation for your rationale behind the proposal.

We have serious concerns about the proposal to place credible fear and reasonable fear determinations within the jurisdiction of ICE. Placing responsibility for these threshold protection decisions within the entity that prosecutes the alien's removal proceeding would create a conflict of interest by charging an enforcement entity with authority over a benefit program. As discussed in part II.A.1. of this memorandum, ICE has been designated an enforcement entity in the HSA. To delegate

³¹ In fact, such a use of the Asylum Officer's notes by an Immigration Judge was supported and upheld by a federal circuit court. *Diallo v. Gonzalez*, 455 F.3d 624, 631-3 (2d Cir. 2006).

³² As pointed out above, the surcharge on other benefit applications would need to be decreased commensurate with the decrease in funding need required by USCIS to adjudicate asylum claims. Therefore, it is unclear whether your recommendation would result in making more funds available to USCIS to divert to other benefits.

³³ Martin (July 1995), p. 745-747, *supra* note 9.

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authority to make credible fear and reasonable fear determinations to ICE, an enforcement entity, would violate the statutory bifurcation between USCIS and ICE.

In addition, your proposal to assign ICE the responsibility of conducting credible fear determinations ignores the fact that USCIS Asylum Officers are in a much better position to evaluate whether an individual has met the credible fear standard. The INA defines the credible fear standard as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and other such facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.” (Section 235(b)(1)(B)(v) of the INA). Needless to say, because USCIS Asylum Officers already determine eligibility for asylum under section 208 of the INA, they would be much better poised than ICE officers – who are responsible for enforcement, not adjudicative functions – to identify those applicants who have a significant possibility of establishing eligibility. A recent study by the US Commission on International Religious Freedom described the benefits that the USCIS Asylum Officer Corps brings to credible fear determinations:

Asylum officers are specialists in asylum and refugee law, and are trained in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles. Moreover, U.S. Citizenship and Immigration Services (USCIS), which houses the Corps, must ensure that asylum officers have access to information pertinent to the persecution or torture of persons in other countries to enable them to make well-informed decisions on asylum applications.³⁴

ICE agents do not possess the specialized training in country conditions, asylum law, and interviewing techniques that are required of USCIS Asylum Officers in order to conduct credible fear determinations. While ICE officers certainly could be similarly trained, shifting responsibility for protection screenings to ICE would create unnecessary duplication of government resources and inefficiency.

IV. Miscellaneous recommendations

An array of additional substantive changes to the national asylum program were embedded in the proposed rule without explanation or justification. We have carefully considered each and address them separately in the chart below. We do not discuss each change related to revising the regulation to reflect the new organizational structure established when the Immigration and Nationality Service was dissolved and the Department of Homeland Security was created. While we are in agreement that this needs to be done, we disagree that it should be done in a piecemeal fashion, one section of the regulations at a time. Given the commonality of many sections in the regulations, including definitional regulations, it would be more appropriate and more effective to amend in one rule all 8 C.F.R. provisions relating to USCIS.

³⁴ Hetfield, Mark, “Credible Fear and the Role of the Asylum Officer,” published in The United States Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal*, Vol. 2 (Washington, D.C.: 2005), p. 167-177.

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Recommendation	USCIS Position
<p>The scaling back of training for asylum officers. 8 CFR s. 208.1(b).</p>	<p>We do not intend to adopt this recommendation as it would compromise the ability to provide a meaningful review of asylum claims and reverse regulatory improvements in place since 1990.</p>
<p>Eliminate the exception to the one-year filing deadline for in status applicants. 8 CFR s. 208.4(a)(5)(iv).</p>	<p>We do not intend to adopt this recommendation as there were sound policy reasons to include the exception and you have not presented any argument to the contrary. First, this recommendation would extend a limitation on filing created to encourage illegal aliens to come forward to timely apply for asylum to a group of people who are known to the government and abiding by immigration laws. Second, elimination of this exception would force premature applications for asylum when an individual believes circumstances in his or her home country may improve. With this exception in place, such applicants may remain in valid status in the U.S. while waiting for conditions to improve, without being forced to file a premature application for asylum. See 65 Federal Register 78123 (December 6, 2005).</p>
<p>In reference to the one-year rule, set the length of a reasonable period following changed or extraordinary circumstances to one year. 8 CFR s. 208.4(a)(5) and (4)(II).</p>	<p>We do not intend to adopt this recommendation as it would inappropriately limit the adjudicator's discretion to consider on a case-by-case basis an applicant's individualized situation.</p>
<p>Remove language requiring expedited consideration, where possible, for applicants in custody. 8 CFR s. 208.5(a).</p>	<p>We are unsure of your rationale for this proposal. To the extent that the recommendation is based on a belief that USCIS does not conduct asylum adjudications for individuals in DHS custody, we wish to point out that, in some rare cases – such as class members eligible for benefits of the ABC settlement agreement, but subject to detention – USCIS does conduct such adjudications. We believe that we should, to the extent possible, expedite such adjudications, given the cost to the government of detention and humanitarian considerations for genuine refugees.</p>
<p>Adopt the I-797 for the issuance of all I-94 cards upon asylum approval.</p>	<p>We are in the process of adopting this recommendation. Due to significant technical changes it will require and other priorities – such as automation of employment authorization documents – it will take some time.</p>

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Recommendation	USCIS Position
<p>For purposes of the one-year rule, require "clear and convincing documentary evidence" for the demonstration of changed circumstances. 8 CFR s. 208.4(a)(2)(ii).</p>	<p>We do not intend to adopt this recommendation as it would place unreasonable and unnecessary requirements on applicants given the circumstances of many persons who are fleeing from countries of persecution. We also do not understand the rationale for the recommendation, as we are not aware of any complaints or problems related to asylum officers granting this exception with insufficient evidence.</p>
<p>For purposes of the one-year rule, require "clear and convincing documentary evidence" to establish the date of last entry. 8 CFR s. 208.4(a)(2)(ii).</p>	<p>We do not intend to adopt this recommendation as it would place unreasonable and unnecessary requirements on applicants given the circumstances of many persons who are fleeing from countries of persecution. We also do not understand the rationale for the recommendation, as we are not aware of any complaints or problems related to asylum officers finding that an applicant has established date of last entry with insufficient evidence.</p>
<p>Limit the exceptions to the one-year filing requirement to the circumstances described in the regulation. 8 CFR s. 208.4(a)(2)(ii).</p>	<p>We do not intend to adopt this recommendation. While the actual proposed language appears to eliminate any exception based on extraordinary circumstances, as provided in statute, we assume that the intent of the proposed language is to limit adjudicators' discretion to find changed circumstances only for the changed circumstances specifically identified as examples in the regulation. The Department made clear in promulgating the rule that it was not in a position to anticipate all the types of changed circumstances that materially affect an applicant's eligibility for asylum and therefore justify the failure to apply for asylum within 1 year of the date of last entry. As such, the list was intended to provide examples, not be an exhaustive list. See 65 Federal Register 76123 (December 6, 2005). You have provided no justification for limiting adjudicator's discretion as you propose, and we are not aware of any.</p>
<p>Place a new regulatory limitation on the definition of a reasonable period regarding the filing a previously rejected asylum application in the context of the one-year rule. 8 CFR s. 208.4(a)(5)(v).</p>	<p>We do not intend to adopt this recommendation as it would inappropriately limit the discretion of the adjudicator to take into account the individual circumstances of each asylum applicant. The existing regulations require the applicant to file the new application within a reasonable period after it has been rejected. This enables the officer to take into account the individual circumstances of each applicant.</p>

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Recommendation	USCIS Position
<p>Crew members should be given asylum application forms and then, if found to have a credible fear, be referred to EOIR with a Form I-883. 8 CFR § 208.5(b)(1).</p>	<p>We are confused by this recommendation. First, it is unclear why you recommend that crewmembers be given asylum applications if they are also going to require a credible fear screening before being permitted to seek asylum.</p>
<p>Reduce the validity period of employment authorization documents (EAD) for denied asylum applicants to 60 days or the expiration of the card, which ever is earlier. 8 CFR § 208.7(b)(1)</p>	<p>We agree that this provision needs to be amended and have been working on a proposed rule to clarify a number of issues related to employment authorization documentation. We will consider this recommendation in that context.</p>
<p>Toll nonimmigrant status of applicants who apply for asylum. 8 CFR § 208.14(c)(2).</p>	<p>We would consider this recommendation if further rationale were provided. We do not understand the justification for this recommendation and, without further explanation, must decline to adopt it.</p>
<p>Bar aliens with lawful permanent resident status from applying for asylum. 8 CFR § 208.14(c)(2).</p>	<p>We do not intend to adopt this recommendation as it would place arbitrarily limits on a legal right for applicants due to an unrelated immigration status and is inconsistent with statute, which provides that an alien may apply for asylum "irrespective of such alien's status." INA section 208(a)(1); 8 U.S.C. 1158(a)(1). There are legitimate reasons why an alien with lawful permanent resident may seek to apply for asylum, as asylee status provides greater protection from removal and enable asylees to petition to immediately bring to the U.S. close family members who may also be at risk of persecution.</p>
<p>Allow applicants paroled into the United States to apply for asylum only with the immigration judge, even if in valid immigration status. 8 CFR § 208.14(c)(4).</p>	<p>Again, we do not understand the rationale for this recommendation and decline to adopt it, as it would unnecessarily create hardship for legitimate refugees who do not have access to our refugee resettlement program. There are circumstances where individuals under great risk abroad are paroled into the United States to apply for asylum and, under existing procedures, the USCIS Asylum Division can expedite adjudication of their applications. For example, the USCIS Asylum Division has been able to adjudicate asylum claims of Iraqi and Afghan nationals who have been injured in their assistance to U.S. troops abroad and were paroled into the U.S. either for their safety or for medical reasons. Under your proposal, these traumatized individuals would be required to have their claims heard in immigration court at greater cost to themselves, greater delay, and through an adversarial and more complicated process.</p>

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Recommendation	USCIS Position
<p>Eliminate the procedures for abandonment based on the LPR status of the applicant. 8 CFR § 208.14(g)</p>	<p>We recognize that you may have proposed this particular recommendation because the provision in question would be superfluous if we adopted your larger recommendation to bar those with LPR status from applying for asylum. However, given that we declined to adopt that recommendation, we also decline to adopt this one.</p>
<p>Mall all asylum decisions. 8 CFR § 208.9(d) and § 208.19.</p>	<p>We do not intend to adopt this recommendation for the reasons we already provided to you in response to your first and second recommendations that we do this. Please see our responses to previous Ombudsman's recommendations:</p> <ol style="list-style-type: none">1) Divine, Robert C., Acting Deputy Director, USCIS, "USCIS Response to Recommendation Concerning Service of Asylum Decisions," (Washington, D.C.: Signed Letter, 12 December 2005);2) Divine, Robert C., Acting Deputy Director, USCIS, <i>Recommendation to Issue Notices of Action (I-727) for Asylum Approvals</i>, Memorandum to Prakash Khatri, USCIS Ombudsman (Washington, D.C.: 14 March 2006).
<p>Designate CBP as the entity to initiate removal proceedings for asylum terminations in the case of arriving aliens. 8 CFR § 208.24(g).</p>	<p>We do not intend to adopt this recommendation as CBP does not have the expertise to determine whether grounds for initiating asylum termination apply; for CBP to develop that expertise – one that already exists within USCIS – would be duplicative and wasteful. It would require training sufficient CBP officers to understand the complexity of asylum law and country conditions from refugee-producing countries. A better approach is for CBP to coordinate with the local asylum office when encountering arriving aliens that appear subject to termination of asylum status. Local USCIS Asylum Offices have already, in the past, reached out the CBP regarding this issue and helped coordinate initiation of termination proceedings where appropriate.</p>

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Appendix

In the preparation of the USCIS response to the Ombudsman's recommendation, the Director of the Asylum Division met with key stakeholders in order to better inform the USCIS position on the proposed changes. As such, USCIS solicited comments from stakeholders who would be significantly impacted if the recommendation were adopted, including the Executive Office for Immigration Review, Immigration and Customs Enforcement Office of the Principal Legal Advisor, non-governmental organizations and the advocacy community. In addition, USCIS has solicited input from the United Nations High Commissioner for Refugees and the U.S. Commission on International Religious Freedom. The following summaries are meant to convey the basic positions of a selection of the stakeholders consulted regarding the recommendation of the USCIS Ombudsman.

Executive Office for Immigration Review (Immigration Court)

The Immigration Court expressed its concern that the USCIS Ombudsman recommendation fails to consider the impact that the proposed expansion of the EOIR caseload would have on the Immigration Courts. EOIR believes that, in the absence of sufficient funding, the increase of cases would likely result in extended processing times and delays for all Immigration Court proceedings.

Immigration and Customs Enforcement Office of the Principal Legal Advisor (OPLA / ICE Attorneys)

ICE disputes the underlying premise that adjudication of affirmative asylum applications is an enforcement activity rather than adjudication of a benefit. Moreover, the recommendation would shift credible fear interviews to ICE and result in more and lengthier immigration court hearings on asylum applications, but does not adequately address how ICE would obtain the resources to handle the extra workload. In this regard, ICE believes that the proposal for a fee and fee waiver system for filing asylum applications would be impractical. Finally, the filing of asylum applications directly with the immigration court would not only result in delay in adjudication of those applications and increased expense to the government, but also would hinder fraud detection efforts.

Consultants on the study on expedited removal for the US Commission on International Religious Freedom (USCIRF)

The experts who completed the USCIRF study of expedited removal raised the concern that the USCIS Ombudsman had made significant recommendations concerning the asylum system without referencing the 2005 USCIRF study titled "Asylum Seekers in Expedited Removal" or seeking input from critical stakeholders. The report recommended significant modification of asylum adjudication by EOIR in order to ensure fair and consistent treatment of asylum applicants seeking protection from religious persecution. The authors feared that additional legal costs would burden applicants under the recommendation due to the cost of representation required in Immigration Court and the extended hearings experienced in court proceedings. The panel challenged the Ombudsman's presentation of asylum statistics and immigration law, noting that it is incorrect to characterize refugees as "de facto removable." They also questioned whether ICE possessed the specialization and quality assurance mechanisms necessary to effectively oversee credible fear determinations.

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Office of the United Nations High Commissioner For Refugees (UNHCR)

UNHCR identified what it believes are misperceptions and erroneous conclusions that underlie the Ombudsman's recommendation. Of central concern, the USCIS Ombudsman failed to acknowledge that asylum is understood to be a right of asylum seekers under international law. Although UNHCR believes that asylum programs can be manifested in a variety of systems, the non-adversarial hearing is uniquely suited for asylum adjudication because refugee status should generally be investigated in a forum that is focused on establishing an applicant's trust. UNHCR also fears that the recommendation would eliminate the Asylum Division from the majority of asylum adjudications, thereby depriving the system of officers who are extensively trained in procedures and interviewing techniques that have proven to be the most successful for conducting asylum interviews.

Advocacy Community and Public

The advocacy community and members of the public uniformly expressed their opposition to the recommendation. Commenters emphasized the importance of the affirmative asylum interview and expressed their concern regarding the potential impact that the recommendation would have on meritorious asylum seekers. Asylum Officers were recognized by nearly every commenter as highly able, specialized interviewers who adjudicate asylum claims in a timely fashion and with consistent and reliable results. Many observers also voiced their concern over the financial burden and unnecessary trauma that the recommended measures could cause to particularly vulnerable applicants.

cc: Michael Jackson, Deputy Secretary

Attachments:

1. Letter of Kevin D. Rooney, the Director of the Executive Office for Immigration Review (Immigration Judges)
2. Position paper of Immigration and Customs Enforcement Office of Principal Legal Advisor (OPLA / ICE Attorneys)
3. Letter of Thomas Albrecht, Deputy Regional Representative of UNHCR
4. Letter of the consultants on the study on expedited removal for the US Commission on International Religious Freedom (USCIRF)
5. Joint Letter to USCIS Director Emilio Gonzalez from 58 non-governmental organizations
6. Joint Letter to USCIS Director Emilio Gonzalez from legal service providers in the Washington, D.C. area
7. Letter of Eleanor Acer, Director, Refugee Protection Program, Human Rights First
8. Letter of Donald Kerwin, Executive Director, Catholic Legal Immigration Network
9. Letter of Laura Varela and Ruth Spivack of the Immigrant and Refugee Rights Project of the Washington Lawyers' Committee for Civil Rights & Urban Affairs
10. Letter of Capital Area Immigrants' Rights (CAIR) Coalition
11. Letter of Philip G. Schrag, Professor of Law and Director of the Georgetown Center for Applied Legal Studies
12. Letter of Lynette Parker, Clinical Supervising Attorney for Santa Clara University School of Law

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13. Letter of David L. Cleveland, Catholic Community Services and former chair of AILA Asylum Committee
14. Letter of Elizabeth M. Barna, committee chair, and Paul O'Dwyer, committee member of American Immigration Lawyers Association – New York Chapter
15. Letter of Scott Mossman, private immigration law practitioner writing for ILW.com
16. Letter of Stanly Mailman of Satterlee Stephens Burke & Burke LLP, immigration lecturer, and co-author of *Immigration Law and Procedure* (Matthew Bender)
17. Letter of Denise Gilman and Jaya Ramji-Nogales of the Center for Applied Legal Studies, Georgetown University Law Center
18. Letter of Ivy Lee, Asia Pacific Islander Legal Outreach
19. Letter of Anya Sykes, Ayuda, Inc.
20. Letter of Dr. Bethania Maria, private immigration law practitioner
21. Letter of Jacquelyn Newman, private immigration law practitioner
22. Letter of Melanie E. Griswold, private immigration law practitioner
23. Letter of Jeffrey Martins, private immigration law practitioner