



BARRIERS TO PROTECTION

THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL

U.S. Commission on International Religious Freedom



Barbed wire is seen at Casa del Migrante in Reynosa, Mexico. Casa del Migrante provides housing, food, clothing and medical care to people who are planning to cross the border and to those who have been deported from the United States (Reuters/Eric Thayer).

U. S. C O M M I S S I O N O N I N T E R N A T I O N A L R E L I G I O U S F R E E D O M

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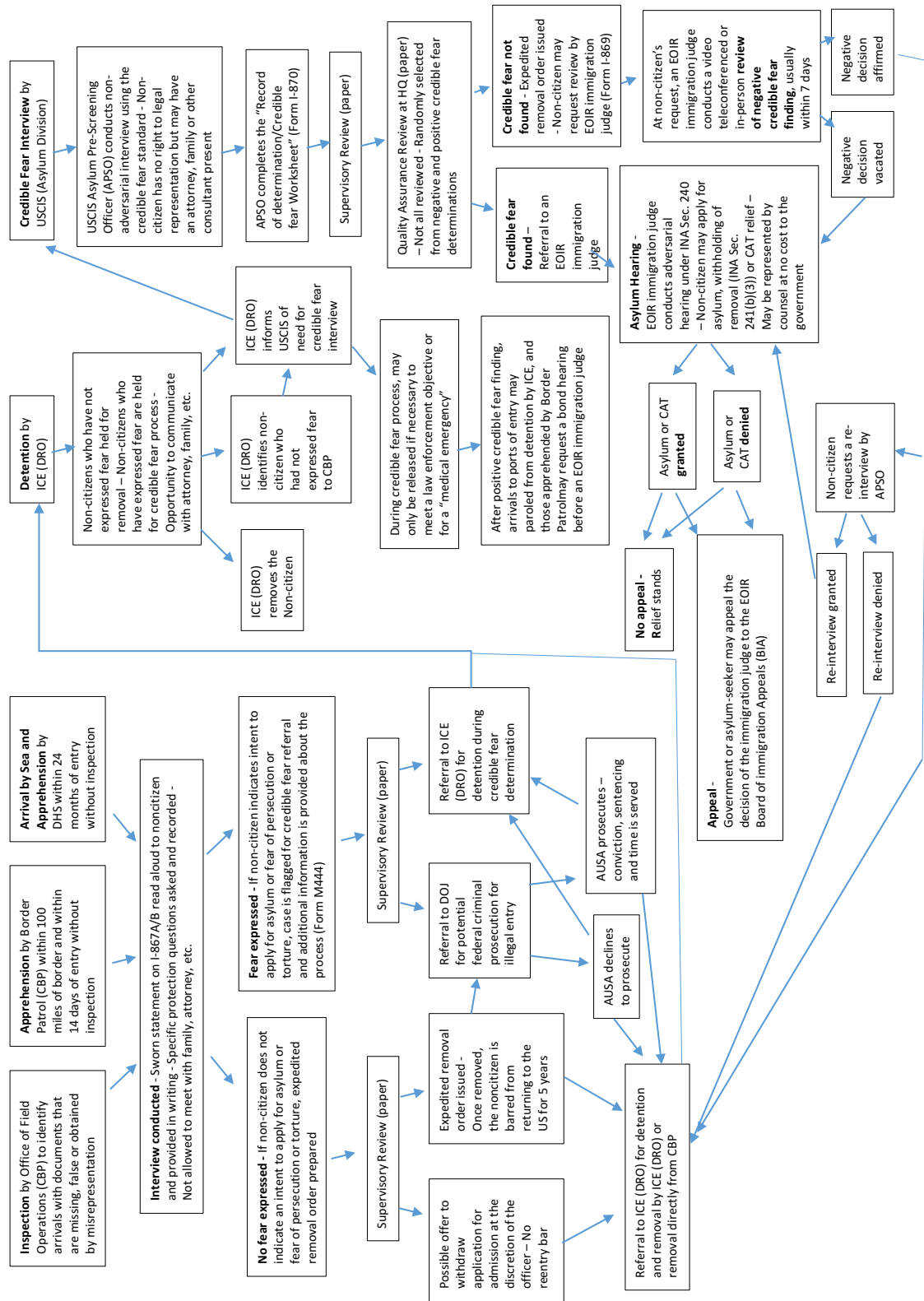
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ACRONYMS

ABA	American Bar Association
ATD	Alternatives to Detention
BIA	Board of Immigration Appeals
BP	U.S. Border Patrol
CBP	U.S. Customs and Border Protection
DHS	Department of Homeland Security
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review
HPI/GPI	Honduran and Guatemalan Pilot Initiatives
ICE	U.S. Immigration and Customs Enforcement
IIRIRA	1996 Illegal Immigration Reform and Immigrant Responsibility Act
INA	Immigration and Nationality Act
ISAP	Intensive Supervision Appearance Program
LOP	Legal Orientation Program
OFO	U.S. Customs and Border Protection Office of Field Operations
OIG	Department of Homeland Security Office of Inspector General
ORR	Department of Health and Human Services Office of Refugee Resettlement
PBND	2011 Performance Based National Detention Standards
RCA	Risk Classification Assessment
UAC	Unaccompanied non-citizen children
USCIRF	U.S. Commission on International Religious Freedom
USCIS	U.S. Citizenship and Immigration Services
VTC	video teleconference

EXPEDITED REMOVAL PROCESS FLOW CHART



EXECUTIVE SUMMARY

Unprecedented numbers of individuals worldwide are forcibly displaced by conflict or persecution or migrating in search of improved economic opportunities. For example, in 2015, more than one million refugees and migrants undertook treacherous journeys across the Mediterranean Sea to reach Europe. In fiscal year 2014, 52,000 unaccompanied non-citizen children and 68,000 family units from Central America crossed into the United States from Mexico.

These large, mixed flows of people require that nations have credible, effective immigration laws and processes to identify and protect *bona fide* refugees and asylum seekers. In the United States, one such system is the Expedited Removal process. Under Expedited Removal, foreign nationals arriving in the United States without proper documentation or with fraudulent documentation can be returned to their countries of origin without delay, and without the immigration court removal hearings, unless they establish a credible fear of persecution or torture. This report examines the U.S. government's treatment of asylum seekers in Expedited Removal.

Expedited Removal is a complicated administrative process carried out by multiple agencies of the U.S. Department of Homeland Security (DHS), including U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). For asylum seekers, DHS's U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ) also are involved.

CBP first encounters non-citizens when they apply for admission to the United States at U.S. ports of entry, or after they cross the U.S. border, and identifies those subject to Expedited Removal and, from that group, those seeking asylum. During this initial processing, CBP officials are required to explain Expedited Removal and its consequences, advise non-citizens to ask for protection without delay if they have any fear or concern about being returned home, and ask four questions related to fear of return. CBP then turns non-citizens subject to Expedited Removal over to ICE for detention and removal. While in ICE detention, those who claimed fear of return are screened by USCIS asylum officers to determine if their fear is credible, defined as "a significant possibility" of establishing eligibility for protection. If USCIS finds a credible fear of persecution or torture, the asylum officer places the non-citizen in removal proceedings before an EOIR immigration judge, in which he or she may apply for asylum or other relief or protection from removal, and ICE may release the asylum seeker from detention while the immigration court proceeding is pending. If USCIS does not find credible fear, the non-citizen may request a review by an immigration judge, but if credible fear is again denied the person is removed promptly thereafter.

These large, mixed flows of people require that nations have credible, effective immigration laws and processes to identify and protect bona fide refugees and asylum seekers.

The International Religious Freedom Act of 1998 authorized the U.S. Commission on International Religious Freedom (USCIRF) to designate experts to conduct a study to assess the situation of asylum seekers in Expedited Removal. USCIRF released its first assessment in the 2005 *Report on Asylum Seekers in Expedited Removal*, which documented serious flaws placing asylum seekers at risk of return to countries where they could face persecution and inappropriate, prison-like detention conditions. To address these problems, USCIRF made a series of recommendations designed both to help protect U.S. borders and ensure the fair and humane treatment of *bona fide* asylum seekers.

This follow-up report, based on field research and a review of public information conducted by USCIRF between 2012 and 2015, evaluates the current situation of asylum seekers in Expedited Removal and the implementation of USCIRF's 2005 recommendations. The research revealed that, although DHS had taken some measures in response to the 2005 study, there were continuing and new concerns about the processing and detention of asylum seekers in Expedited Removal, and most of USCIRF's 2005 recommendations had not been implemented. Furthermore, since USCIRF's original research, both the U.S. government's use of Expedited Removal and the number of individuals in Expedited Removal seeking asylum have grown significantly. As a result, flaws in the system now potentially affect even more asylum seekers.

Key findings include:

- There continues to be a need for a high-ranking DHS official to coordinate refugee and asylum issues among the various agencies involved in Expedited Removal.
- USCIRF's observations and research revealed continuing and new concerns about CBP officers' interviewing practices and the reliability of the records they create, including: flawed Border Patrol internal guidance that conflates CBP's role with that of USCIS; certain CBP officers' outright skepticism, if not hostility, toward asylum claims; and inadequate quality assurance procedures.
- CBP's and USCIS' reliance on technology to process and interview increased numbers of border crossers has improved efficiency, but the impersonal nature of the interviews raises concerns that this may be at the expense of identifying and protecting asylum seekers.
- USCIS' 2014 revised lesson plan for asylum officers on credible fear and a new detailed interview checklist may have moved what should be a screening interview closer to a full asylum adjudication.
- ICE continues to detain asylum seekers before their credible fear interviews, and, in some cases even after being found by USCIS to have credible fear, under inappropriate penal conditions.

- ICE's 2009 directive on parole, and its increased use of Alternatives to Detention, have improved opportunities for release of asylum seekers found to have a credible fear, in line with USCIRF's 2005 recommendations.
- ICE's failure to develop uniform procedures to determine bond amounts and its extensive use of ankle bracelets over other alternatives, without individually assessing each asylum seeker's non-appearance risk, raise serious concerns.
- Detained asylum seekers with whom USCIRF met lack any real understanding of their rights, responsibilities, and, if relevant, the next steps in their asylum cases.
- The prioritization of funding for the agencies involved in the enforcement aspects of Expedited Removal has resulted in adjudication delays and backlogs at both USCIS and EOIR.
- CBP's referral of non-citizens who claim fear to DOJ for prosecution for illegal entry or illegal re-entry without first allowing USCIS to assess their fear claim is problematic and may violate the United States' international obligations.
- The U.S. government's detention of mothers and children in Expedited Removal who expressed fear of return is inherently problematic and several courts have found that the facilities used do not comply with the U.S. government's own standards for child detention as defined in a 1997 legal settlement, the *Flores* Agreement.
- CBP's and ICE's implementation of the Honduran and Guatemalan Pilot Initiatives to detain separately and remove speedily adults from these two countries who do not claim fear has the negative effect of limiting these non-citizens' opportunities to learn about their legal rights.

KEY RECOMMENDATIONS INCLUDE

To the Secretary of Homeland Security

- Appoint a high-ranking official with sufficient authority and resources to make the reforms necessary to ensure the protection of asylum seekers in Expedited Removal and to oversee implementation.
- Reiterate to all agencies and officers implementing Expedited Removal that their law enforcement mandate includes fully implementing U.S. laws and regulations governing the protection of individuals seeking refuge from return to persecution or torture.
- Request that the DHS Office of Inspector General audit the Expedited Removal process for compliance with laws and policies regarding the protection of asylum seekers.

To CBP

- Video record all Expedited Removal processing interviews and require supervisory and headquarters review of the recordings of a sampling of interviews for quality assurance purposes.
- Retrain all officers and agents on their role in the Expedited Removal process, the proper procedures for interviewing non-citizens, and the special needs and concerns of asylum seekers and other vulnerable populations.
- Establish a dedicated corps of specially-trained, non-uniformed interviewers to interview women and children to identify fear claims, and ensure that female interviewers are included.
- Track the results of interviews conducted by virtual processing against those conducted in person to determine if the two methods are producing materially different outcomes.
- Develop a document that briefly and clearly explains the Expedited Removal process, its consequences, the right to seek protection for those who fear return, and the right to request a private interview, and provide this document to all individuals, in a language they understand, as soon as possible when they come into CBP custody.

To USCIS

- Track whether credible fear interview referrals are coming from CBP or ICE to better understand when in the process most fear claims are being raised.
- Reaffirm in the asylum officers' lesson plan that the credible fear standard is a screening standard requiring a showing of a "significant possibility" of eligibility for asylum, not a full assessment of the merits of the case.
- Continue to track the results of credible fear interviews conducted telephonically and those conducted in person to determine if the two methods are producing materially different outcomes.
- Allow asylum officers to convert and adjudicate appropriate Expedited Removal cases in which credible fear is found as affirmative asylum cases.

To ICE

- Detain all adult asylum seekers who must be detained, whether before or after a credible fear determination, in civil facilities only.
- Require an individualized re-assessment of the need for custody for all detainees with a positive credible fear finding, and apply a presumption

KEY RECOMMENDATIONS INCLUDE (CONTINUED)

of bond for detainees with credible fear who do not fall under the 2009 parole directive.

- Increase the use of Alternatives to Detention, such as monitored release, for asylum seekers, beyond bond and parole opportunities.
- Expand the Know Your Rights presentations that provide detainees with basic legal information to all facilities that house asylum seekers.
- If families are placed in Expedited Removal, detain them only in facilities that meet the standards of the *Flores* Agreement and individually re-assess the need for custody after credible fear is found, with a presumption of release.
- Ensure that programs that detain nationals of particular countries separately do not have the effect of preventing them from learning about the right to seek asylum.

To EOIR

- Retrain immigration judges that the interview record created by CBP is not a verbatim transcript of the interview and does not document the individual's entire asylum claim in detail, and should be weighed accordingly.
- Expand the Legal Orientation Program available in some facilities to all detention facilities housing asylum seekers, and provide it to detainees before their credible fear interviews.

To CBP, USCIS, and DOJ

- Work together to develop procedures to allow USCIS to conduct credible fear interviews for non-citizens being referred for prosecution who express fear before DOJ pursues their criminal cases.

To Congress

- Authorize and fund another independent, comprehensive study of the treatment of asylum seekers in Expedited Removal at all stages of the process.
- Request the Government Accountability Office to conduct a study to assess whether non-citizens removed to their home countries under Expedited Removal have faced persecution or torture after their return.
- Increase funding for the adjudicatory aspects of Expedited Removal to enable USCIS and EOIR to address backlogs, conduct timely adjudications, and provide due process.
- Increase funding to EOIR to expand the Legal Orientation Program to all facilities housing asylum seekers and to enable it to be provided to detained asylum seekers before their credible fear interviews.

BACKGROUND

The International Religious Freedom Act of 1998 authorized the U.S. Commission on International Religious Freedom (USCIRF) to designate experts to conduct a study to assess whether Expedited Removal was being implemented consistent with the United States' legal obligations to protect individuals fleeing persecution or torture. Pursuant to this authorization, USCIRF experts conducted extensive research in 2003 and 2004 and released the findings in 2005 in a two-volume report, *The Report on Asylum Seekers in Expedited Removal* (the 2005 Study).¹ The 2005 Study found serious flaws in the processing and detention of asylum seekers in Expedited Removal, and made a series of recommendations to the responsible agencies in the Departments of Homeland Security and Justice (DHS and DOJ). None of the recommendations required Congressional action.

Under Expedited Removal, foreign nationals arriving in the United States without documentation or with fraudulent documentation can be returned to their countries of origin without delay, and without immigration court removal hearings, unless they establish a credible fear of persecution or torture. Key problems documented in the 2005 Study included:

- incorrect interviewing and unreliable record-keeping practices by immigration officers at ports of entry;
- failures to refer asylum seekers for credible fear determinations;
- inappropriately punitive detention conditions;
- wildly varying rates of parole (release) of asylum seekers from detention; and
- inconsistent asylum adjudications by immigration judges.

USCIRF Recommendations included:

- appointing a high-level DHS official to address cross-cutting issues related to asylum seekers and Expedited Removal;
- videotaping processing interviews for quality assurance purposes and employing “testers” to ensure that required procedures are followed;
- increasing the training and supervision of officials and immigration judges and review of decisions;
- permitting asylum officers to grant asylum at the credible fear interview stage in appropriate cases;

¹USCIRF, *Report on Asylum Seekers in Expedited Removal, Volume 1: Findings & Recommendations, and Volume II: Expert Reports* (2005).

- modifying detention practices to better suit asylum seekers;
- codifying existing parole guidelines into regulations and better documenting and monitoring such decisions; and
- expanding asylum seekers' access to legal information and representation.

Since the release of the 2005 Study, USCIRF has continued to monitor the implementation of these recommendations and issued several follow-up reports, finding progress in some areas but no changes in others.² In 2008, DHS sent to USCIRF a letter describing measures it had taken in response to the 2005 Study and recommendations.³

After the conclusion of the research for the 2005 Study but before its release, DHS expanded Expedited Removal from a port of entry program to one that applies to non-citizens without documentation or with fraudulent documentation apprehended within 100 air miles of the U.S. border and within 14 days of entering the United States without inspection.⁴ Further, the number of non-citizens in Expedited Removals, as well as the number of individuals in Expedited Removal claiming fear of return, increased.

In light of the expansion of Expedited Removal and USCIRF's assessment that DHS and DOJ had inconsistently implemented the 2005 Study's recommendations, USCIRF again reviewed the treatment of asylum seekers in Expedited Removal to assess developments since 2005. This review was less extensive than the research for the 2005 Study, and focused on the aspects of the process carried out by DHS.

²USCIRF, *Expedited Removal Study Report Card: 2 Years Later* (2007); USCIRF, *Assessing the U.S. Government's Detention of Asylum Seekers: Further Attention Needed to Fully Implement Reforms* (2013).

³Letter from Stewart Baker, Assistant Secretary for Policy, DHS, to Felice D. Gaer, Chair, USCIRF, November 28, 2008.

⁴Initially, the expansion applied to only two Border Patrol sectors, though it quickly was further expanded to apply along the entire border.

METHODOLOGY

The findings in this report⁵ are based on primary observations of the processing, detention, and adjudication of non-citizens subject to the Expedited Removal process who claim fear of return; interviews with asylum seekers in Expedited Removal; meetings with DHS officials at headquarters and in the field; conversations with immigration attorneys and asylum service providers; and a review of public information. In 2014 and 2015, USCIRF⁶ traveled to California, New York, New Jersey, Florida, Puerto Rico, and Texas to inspect and observe Expedited Removal processing and adjudications and meet with officials at five ports of entry, four Border Patrol stations, and five asylum offices. USCIRF also inspected 15 immigrant detention facilities around the United States, met with DHS and facility officials, and interviewed detainees seeking asylum between 2012 and 2015.

Part of USCIRF's research coincided with the surge, in the spring and summer of 2014, of Central Americans, many of whom were family units or unaccompanied children, illegally entering the United States (referred to as the Surge). Adults and family units, the majority of whom were female-headed households, were placed in the Expedited Removal process.⁷ Many of these non-citizens claimed a fear of return and sought asylum in the United States. As a result, this report includes findings on the U.S. government's response to the 2014 Surge and its use of Expedited Removal for these populations.

⁵USCIRF is grateful to DHS for its cooperation with this research, and thanks the many officials, at both headquarters and in the field, who facilitated visits and shared their time and knowledge. USCIRF also thanks its other interlocutors, particularly the detained asylum seekers who volunteered to share their experiences in Expedited Removal.

⁶Co-Director for Policy and Research Elizabeth K. Cassidy and Senior Policy Analyst Tiffany M. Lynch were the primary researchers and authors of this report. Summer 2014 Immigration Law Fellows Adriana Coppola and Jennifer Chan provided research assistance. Commissioner Eric P. Schwartz participated in the August 2015 site visit to Texas.

⁷Under U.S. law, unaccompanied non-citizen children (UACs) not from Canada or Mexico are processed by the guidelines set forth in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

THE EXPEDITED REMOVAL PROCESS

Expedited Removal was added to the Immigration and Nationality Act (INA) by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Before IIRIRA, immigration inspectors generally could not compel arriving non-citizens to depart the United States; they could only allow them to withdraw their applications for admission voluntarily or refer them for exclusion hearing before immigration judges. Those referred to immigration judges could be detained during their exclusion proceedings, but many were released via parole due to bed space shortages.

Expedited Removal⁸ allows DHS officials to return non-citizens arriving in the United States without proper authorization to their countries of origin without delay and without an immigration court proceeding. To ensure the protection of *bona fide* refugees, a non-citizen who expresses a fear of returning home is referred to a DHS asylum officer for a credible fear determination and must be detained, with very limited exceptions. If the asylum officer finds a credible fear of persecution or torture, the asylum seeker may, at the government's discretion, be released from detention until an immigration judge determines whether the applicant qualifies for asylum, withholding of removal, or protection under the Convention Against Torture. If the asylum officer does not find credible fear, the non-citizen may ask an immigration judge to make a *de novo* determination of credible fear. If that too is denied, the individual is ordered removed and removed promptly.

Expedited Removal is a complicated process involving multiple agencies in DHS and DOJ. DHS's U.S. Customs and Border Protection (CBP) first encounters non-citizens at ports of entry or after crossing the border, and identifies those subject to Expedited Removal. From that group, CBP identifies asylum seekers through interviews, during which officials are required to explain the Expedited Removal process and its consequences; advise non-citizens to ask for protection without delay if they have any reason to fear being returned home; and ask four questions related to fear of return. Office of Field Operations (OFO) officers interview non-citizens at ports of entry; Border Patrol (BP) agents interview those who are apprehended crossing the border.

Once OFO or BP completes the initial interview process, CBP turns the non-citizens over to DHS's U.S. Immigration and Customs Enforcement (ICE),⁹ the DHS agency responsible for detaining and removing unauthorized non-citizens. Individuals in Expedited Removal who claimed a fear of return in CBP or ICE custody are detained until an asylum officer from

Expedited Removal is a complicated process involving multiple agencies in DHS and DOJ:

- *U.S. Customs and Border Protection (CBP)*
- *U.S. Immigration and Customs Enforcement (ICE)*
- *U.S. Citizenship and Immigration Services (USCIS)*
- *Executive Office for Immigration Review (EOIR)*
- *Board of Immigration Appeals (BIA)*

⁸INA section 235(b)(1), 8 U.S.C. § 1225, and its implementing regulations.

⁹This typically takes 24-48 hours.

DHS's U.S. Citizenship and Immigration Services (USCIS) interviews them and determines if their fear is credible.¹⁰ The non-adversarial credible fear interview typically takes place within 14 days after USCIS receives the referral. If USCIS does not find credible fear, the non-citizen may ask an immigration judge for a final and unreviewable decision on credible fear, generally made within a week.

If USCIS makes a positive credible fear determination, the individual is placed in immigration court removal proceedings and ICE has the discretion to release the asylum seeker while DOJ is considering the case. Immigration judges at DOJ's Executive Office for Immigration Review (EOIR) conduct removal proceedings where credible fear has been found, and the Board of Immigration Appeals (BIA) reviews any appeals. Immigration judges also have the power to release on bond asylum seekers in removal proceedings after a credible fear finding if the asylum seeker requests a bond redetermination. The adversarial immigration court process is lengthy and can take months or years to complete, depending on whether the individual is detained or released and whether s/he pursues appeals.

Non-citizens removed pursuant to Expedited Removal generally are subject to a five-year ban on admission to the United States, violation of which may result in criminal prosecution and a permanent bar to admission. Previously-removed non-citizens who re-enter the United States illegally are subject to a different summary removal process, called reinstatement of removal.¹¹ Individuals subject to reinstatement of removal are ineligible to apply for asylum; they can only seek withholding or deferral of removal based on a likelihood of persecution or torture, a harder standard to meet and a more limited status if granted.

¹⁰ Credible fear is found if an asylum officer determines there is "a significant possibility" that the person could establish eligibility for asylum.

¹¹ If an individual receiving a reinstatement of removal order claims a fear of return to CBP or ICE, the person is still referred to a USCIS asylum officer, but for what is referred to as a reasonable fear interview and determination.

THE EXPANSION OF EXPEDITED REMOVAL

Congress made Expedited Removal mandatory for non-citizens arriving without proper authorization at ports of entry, and gave the Executive Branch discretion to apply it to unauthorized non-citizens apprehended in the interior of the United States within two years of entry. When Expedited Removal initially was implemented in March 1997, the Justice Department applied it only to arriving non-citizens at ports of entry. In November 2002, the Immigration and Naturalization Service expanded Expedited Removal to apply to undocumented non-Cubans who entered the United States by sea within the prior two years. In August 2004, DHS further expanded Expedited Removal to apply to undocumented non-Cubans apprehended within 14 days after entry within 100 miles of the U.S. international land border. Initially implemented in the Laredo, Texas and Tucson, Arizona sectors only, this expansion was broadened in September 2005 to cover the entire southwest U.S. border.

With these expansions, the number of non-citizens removed from the United States pursuant to Expedited Removal has increased, to a high of 193,032, representing 44 percent of all removals, in fiscal year (FY) 2013, according to DHS statistics:

FISCAL YEAR	EXPEDITED REMOVALS	PERCENT OF REMOVALS
1997	23,487	20%
1998	76,671	44%
1999	89,070	49%
2000	85,588	46%
2001	69,923	39%
2002	34,624	23%
2003	43,920	23%
2004	51,014	21%
2005	87,888	35%
2006	110,663	40%
2007	106,196	33%
2008	112,716	32%
2009	105,787	27%
2010	109,867	29%
2011	122,320	31%
2012	163,498	39%
2013	193,032	44%

Source: DHS Office of Immigration Statistics, Annual Reports on Immigration Enforcement Actions and Statistical Yearbooks.

The four largest source countries for non-citizens removed through Expedited Removal in recent years have been Mexico, Guatemala, Honduras, and El Salvador. According to DHS statistics, nationals from these four countries accounted for 98 percent of all Expedited Removals in FY2013,

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97 percent in FY2012, 96 percent in FY2011, and 92 percent in FY2010.¹² Of these, Mexicans represented the largest share; they were 75 percent of all Expedited Removals in FY2013, 77 percent in FY2012, 83 percent in FY2011, and 77 percent in FY2010.¹³

As Expedited Removals have increased, so too have claims of fear by non-citizens in that process. Between 2000 and 2009, USCIS typically received approximately 5,000 credible fear interview requests annually, according to the agency’s ombudsman.¹⁴ In FY2009, the number rose to around 8,000; in FY2012, it was around 13,000; and in FY2013, it was around 36,000.¹⁵ In FY2014, USCIS’ credible fear receipts topped 51,000.¹⁶

Additionally, since the 2004 expansion of Expedited Removal to the border area, cases involving non-citizens apprehended crossing the border between ports of entry (“inland CF” cases) have become an increasingly large share of USCIS’s credible fear receipts, as compared to cases involving non-citizens arriving at ports of entry (“port of entry CF” cases):

FISCAL YEAR	INLAND CF	PERCENT OF TOTAL	PORT OF ENTRY CF	PERCENT OF TOTAL	TOTAL
2005	925	10%	8,540	90%	9,465
2006	2,953	55%	2,382	45%	5,335
2007	3,448	66%	1,804	34%	5,252
2008	3,273	66%	1,722	34%	4,995
2009	3,865	72%	1,504	28%	5,369
2010	6,337	71%	2,622	29%	8,959
2011	7,974	71%	3,243	29%	11,217
2012	10,688	77%	3,192	23%	13,880
2013	27,332	76%	8,703	24%	36,035
2014	40,817	80%	10,177	20%	51,001

Source: Statistics Provided at USCIS Asylum Division Quarterly Stakeholder Meetings, August and November 2014

These increases have occurred in a context of uneven resource growth for the enforcement and judicial aspects of the U.S. immigration system,

¹² DHS Office of Immigration Statistics, Annual Reports on Immigration Enforcement Actions 2009-2013.

¹³ *Id.*

¹⁴ USCIS Ombudsman, *Annual Report 2014*, pg. 38.

¹⁵ *Id.*

¹⁶ USCIS Ombudsman, *Annual Report 2015*, pg. 59. To handle this surge, USCIS has prioritized credible and reasonable fear interviews (where the individuals are detained) over affirmative asylum interviews, hired additional asylum officers, and sought greater efficiencies in its interviewing processes. Meanwhile, however, the agency has experienced a growing backlog of affirmative asylum cases (those filed directly with USCIS by non-citizens already in the United States, which also have increased in the past few fiscal years). As of the end of December 2014, USCIS had 73,103 pending affirmative asylum cases, an increase of 700 percent over the backlog at the end of FY2011. *Id.*

with the U.S. government prioritizing enforcement over adjudication. The Migration Policy Institute reports that CBP’s and ICE’s budgets increased almost 300 percent from FY2002 to FY2013, whereas EOIR’s grew by only 70 percent. As a result, the immigration courts had become “a significant choke point in the removal system.”¹⁷ By the end of August 2014, the immigration courts had 456,644 pending individual removal cases that had been waiting an average of 635 days, both of which were new all-time highs.¹⁸ This backlog was an increase of over 100,000 cases from the number at the beginning of FY2014.¹⁹

Between FY2010 and FY2014, EOIR received a total of around 32,000 to 45,000 affirmative and defensive asylum cases each year, and decided around 17,000 to 20,000:

FISCAL YEAR	RECEIVED	GRANTED	DENIED	ABANDONED	WITHDRAWN	OTHER
2010	32,830	8,519	8,336	1,646	6,274	7,529
2011	42,810	10,137	9,280	1,430	5,136	5,293
2012	45,555	10,715	8,503	1,296	5,356	8,022
2013	39,929	9,945	8,826	1,440	6,409	11,409
2014	41,920	8,775	9,222	1,510	5,796	11,311

Source: U.S. Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, Immigration Courts Asylum Statistics FY 2010-2014.

¹⁷ Migration Policy Institute, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (2014), pg. 17-18.

¹⁸ Transactional Records Access Clearinghouse (TRAC), *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts* (2015).

¹⁹ *Id.*

FINDINGS AND RECOMMENDATIONS

MANAGEMENT AND COORDINATION

The 2005 Study found extensive problems with DHS's overall management and coordination of the Expedited Removal process, including poor communication among the responsible agencies, insufficient quality assurance and data management practices, and no mechanism to address system-wide issues. USCIRF's main recommendation to address these flaws was that the Secretary of Homeland Security appoint a high-ranking official to coordinate refugee and asylum matters among the various agencies and implement reforms.

Although then-Secretary Michael Chertoff appointed a Senior Advisor for Refugee and Asylum Policy in 2006, that position was never at the level, nor had the authority and resources, necessary to address USCIRF's findings. The position did not report to the Secretary or Deputy Secretary, but rather was within the DHS Office of Policy. The position was filled from 2006 to 2011, but since then has been vacant.

USCIRF's current research revealed continuing and new concerns about the treatment of asylum seekers in Expedited Removal and confirmed that most recommendations from the 2005 Study remain unimplemented. A high-ranking official, with the Secretary's clear support and sufficient authority and resources, is still needed to implement the required reforms, ensure consistent asylum policy and practice, manage the Expedited Removal system, and address issues as they arise.

USCIRF's current research revealed continuing and new concerns about the treatment of asylum seekers in Expedited Removal and confirmed that most recommendations from the 2005 Study remain unimplemented. A high-ranking official, with the Secretary's clear support and sufficient authority and resources, is still needed to implement the required reforms, ensure consistent asylum policy and practice, manage the Expedited Removal system, and address issues as they arise.

RECOMMENDATIONS

To the Secretary of Homeland Security

- As recommended in 2005, appoint a high-ranking official with sufficient authority and resources to make the reforms necessary to ensure the protection of asylum seekers in Expedited Removal and to oversee implementation, including by chairing a regular interagency working group of all agencies involved in the Expedited Removal process.
- Reiterate to all agencies and officers implementing Expedited Removal that their law enforcement mandate includes fully implementing U.S. laws and regulations governing the protection of individuals seeking refuge from return to persecution or torture.
- Request that the DHS Office of Inspector General audit the Expedited Removal process for compliance with laws and policies regarding the protection of asylum seekers.

To Congress

- Authorize and fund another independent, comprehensive study of the treatment of asylum seekers in Expedited Removal at all stages of the process.
- Request the Government Accountability Office to conduct a study to assess whether non-citizens removed to their home countries under Expedited Removal have faced persecution or torture after their return.

Why did you leave your home country or country of last residence?

Do you have any fear or concern about being returned to your home country or being removed from the United States?

Would you be harmed if you are returned to your home country or country of last residence?

Do you have any questions or is there anything else you would like to add?

INITIAL PROCESSING

As discussed above, CBP first encounters non-citizens at ports of entry or after they cross the border and identifies those subject to Expedited Removal and from that group, those seeking asylum. OFO officers process non-citizens arriving at ports of entry and BP agents process non-citizens apprehended along the border through interviews taken as sworn statements on Form I-867. Form I-867 seeks to ensure that non-citizens who fear return are identified and not erroneously returned to countries where they may face persecution. The form has two parts: (1) side A (see Appendix A) includes a required script explaining the Expedited Removal process and its consequences and advising non-citizens to ask for protection without delay if they have any reason to fear being returned home;²⁰ and (2) side B (see Appendix B) includes four required questions relating to fear of return.²¹

²⁰Form I-867 Side A reads as follows:

I am an officer of the United States Department of Homeland Security. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

U.S. Law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Department of Homeland Security.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

²¹The four questions on Form I-867 Side B are:

Why did you leave your home country or country of last residence?

Do you have any fear or concern about being returned to your home country or being removed from the United States?

Would you be harmed if you are returned to your home country or country of last residence?

Do you have any questions or is there anything else you would like to add?

At the time of the research for the 2005 Study, Expedited Removal applied at OFO ports of entry only. More than two dozen trained researchers and several expert supervisors observed more than 400 secondary inspection interviews at seven ports of entry, spending from two to six weeks at each site. They also reviewed case files and spoke with interviewees.

Their findings were alarming. In more than half of the interviews observed in the research for the 2005 Study, OFO officers failed to read the required information advising the non-citizen to ask for protection without delay if s/he feared return. At least one of the four required fear questions was asked approximately 95 percent of the time, but in 86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered. And in 72 percent of the cases, asylum seekers were not allowed to review and correct the form before signing, as required. Thus, USCIRF found that, although they resemble verbatim transcripts, the I-867 sworn statements were neither verbatim nor reliable, often indicating that information was conveyed when in fact it was not and sometimes including answers to questions that never were asked. Yet immigration judges often used these unreliable documents against asylum seekers when adjudicating their cases.²²

Additionally, in nearly 15 percent of the cases observed in the research for the 2005 Study, asylum seekers who expressed a fear of return were removed without referral to a USCIS asylum officer for a credible fear determination. Moreover, in nearly half of those cases, the files indicated that the asylum seeker had not expressed any fear. Some of these non-referrals may have been because of problematic language in the CBP Field Manual in use at the time stating that an officer may decline referral where the fear claimed by the applicant “would clearly not qualify that individual for asylum,” but several involved expressions of fear of political, religious, or ethnic persecution. Finally, at one port of entry, the researchers found a few instances when CBP officers improperly pressured asylum seekers to retract their fear claims and withdraw their applications for admission.

To address these interviewing and recordkeeping flaws, USCIRF recommended that CBP: (1) videotape all Expedited Removal processing interviews for quality assurance review purposes, and use undercover “testers” to further verify that correct procedures are being followed; (2) revise field guidance to make clear that any expression of fear must result in a referral for a credible fear determination; and (3) amend Form

²²As the 2005 Study noted, the records created by CBP during initial interviews or by USCIS asylum officers during credible fear interviews are often used by ICE trial attorneys to impeach asylum seekers’ credibility and/or cited by immigration judges in denying relief. USCIS has since amended the Form I-870, on which it documents credible fear interviews, to include a statement that “[t]he following notes are not a verbatim transcript of this interview . . . There may be areas of the individual’s claim that were not explored or documented for purposes of this threshold screening.” CBP has not similarly modified the I-867.

I-867 to include a prominently displayed notation that it is not a verbatim transcript and is not intended to document the applicant’s entire asylum claim in detail.

For the current research, one or two USCIRF staff visited five OFO ports of entry and four BP stations on a series of trips during 2014 and 2015, touring the facilities, meeting with officers, and observing a few in-person interviews.²³ At three ports of entry (Los Angeles International Airport, John F. Kennedy International Airport, and Otay Mesa Port of Entry) and one BP station (McAllen Station), USCIRF observed a total of five partial, in-person interviews. During four of these interviews, USCIRF observed the taking of the I-867 sworn statement but not the interviewee’s review and signing (see Appendix C and Appendix D); for the fifth, the reverse was observed.²⁴ At McAllen and El Paso Border Patrol stations, USCIRF observed both sides of the virtual processing that is now used for most Expedited Removal cases involving border-crossers in the Rio Grande Valley CBP sector.

Interviewing and Record Keeping Practices

Despite the small sample of CBP interviews observed, USCIRF found several examples of non-compliance with required procedures, including: failure to read back the answers to the interviewee and allow him to correct errors before signing, as required;²⁵ interviewing individuals together instead of separately and in private; failure to read the required script from the I-867A; and failure to record an answer correctly. For example, in one case, a BP agent did not read the I-867A script until the end of the interview, after he had already asked and filled out answers to the four fear questions on the I-867B. In another case, in response to the last of the four I-867B questions (“[d]o you have any questions or is there anything else you would like to add?”), the interviewee asked how long the process would take, and the agent answered that he did not know and could not say. On the sworn statement, however, the interviewer indicated “no” to question four.

Despite the small sample of CBP interviews observed, USCIRF found several examples of non-compliance with required procedures

²³The ports of entry were: John F. Kennedy International Airport, Los Angeles International Airport, Hidalgo Port of Entry, Otay Mesa Port of Entry, and San Ysidro Port of Entry. The Border Patrol sites were: Chula Vista Station, El Paso Station, McAllen Station (twice), and Ramey Station. The time spent at each facility ranged from a half-day to two days.

²⁴The other OFO ports and BP stations were not conducting any Expedited Removal interviews when USCIRF was there. All observations were done with the consent of the interviewee. The observations were partial because the full interview process took longer than the amount of time USCIRF was at the sites.

²⁵Asked why, the OFO officer told USCIRF that he only reads back the contents if the interviewee requests it because it takes too long, and that the interviewee’s initialing each page simply indicates that s/he received a copy of that page. A supervisor later confirmed that reading back the form is required and initialing signifies approval of the contents, and said he would remind all interviewing officers.

The credible fear interviews USCIRF observed at USCIS asylum offices²⁶ further raised concerns about CBP's interviewing and record-keeping practices. In three of the five observed credible fear interviews, asylum seekers' I-867 forms indicated "no" answers to the fear questions in his or her BP interview, but the asylum seeker said that s/he had articulated a fear or was not asked. These individuals were referred for credible fear interviews when they raised a fear of return to ICE while detained awaiting removal. For example, in one credible fear interview, the asylum seeker's form indicated he did not express a fear of return, but he told the asylum officer that the agents had not asked him if he was afraid, they only asked for his identifying information. He also said he had a letter from a helpful police officer in El Salvador saying he had been threatened by gang members, which he said the agent told him he would have to present to the asylum officer but then took and kept. In another, a woman's form also showed no expression of fear, but said she was coming to the United States to work; however, the asylum seeker stated in the credible fear interview that she remembers saying to BP that she was afraid to return to Guatemala and that she did not say she was coming to the United States to seek employment. She said "I had a good job in Guatemala but had to leave it because I needed protection."

Asylum officers reported to USCIRF that this was a common occurrence. They also said that they were seeing many forms with identical answers,²⁷ and others with clearly erroneous ones (*i.e.* the form said that the individual was asked, and answered, whether she was pregnant when the person is a man).²⁸

While many asylum seekers in ICE detention centers reported that CBP officers did ask them about fear of return, others reported that CBP officers did not ask them the fear questions, asked them incorrectly, recorded "no" when interviewees answered "yes," inquired into their fear claims in detail, and/or dismissed assertions of fear. Some said their statement was not read back to them and/or that they were pressured to sign documents. For example, a detained asylum seeker from Nepal, apprehended at the southern border in Texas, reported that the BP agents asked her questions and she gave answers, but they did not write down what she said, they wrote down that she was coming to the United States to work. Another detained Nepali asylum seeker who crossed the border told

²⁶ USCIRF visited the Los Angeles, Houston, New Jersey, New York, and Miami asylum offices. The credible fear interviews were observed at the New Jersey and New York offices.

²⁷ This could be explained by the use of the interviewing templates discussed in the *Introduction of Virtual Processing* section.

²⁸ Similarly, a *pro bono* attorney with whom USCIRF met on one of our trips told us of a case where a 4-year-old child's file indicated that he said that he came to the United States to work.

These reports are consistent with information from USCIS, which told USCIRF anecdotally that the majority of their credible fear interview referrals come from ICE, not CBP.

USCIRF that the BP agents only asked him questions about his identity and did not ask him about fear. A detained asylum seeker from Somalia, who entered through an OFO port of entry and announced his intent to apply for asylum on arrival, said that the interviewing officer asked him the fear questions and told him that he would need proof of his story. However, at the end of the interview, he was asked to sign his statement and did so, but it was not translated back to him before signing.

Of particular concern are reports of CBP officials denying non-citizens in Expedited Removal the opportunity to claim fear. For example, a Guatemalan asylum seeker in ICE custody who had previously been deported told USCIRF that on her first apprehension by BP, she “was not given the opportunity to talk;” instead, she said that when she tried to explain why she had fled to the United States, the agent forced her to sign papers instead. One Central American man said he was told “whether you sign or not, we are going to deport you.” Others said BP agents told them that “it’s better if you just ask to be deported” or “we’re going to throw you out.” USCIRF heard an especially troubling account from a detained Bangladeshi asylum seeker. He recounted that he and two other Bangladeshis arrived at an OFO land port of entry and immediately asked the first officer they encountered for asylum. He said that officer turned them away, telling them to seek asylum in Mexico. They returned an hour later and the same officer again told them to go back to Mexico. However, he said that this time they refused and were taken inside, interviewed by a different officer, processed, and sent to ICE detention.

These reports are consistent with information from USCIS, which told USCIRF anecdotally that the majority of their credible fear interview referrals come from ICE, not CBP. In the credible fear interviews USCIRF observed, the asylum officers proactively asked each asylum seeker during the interview if CBP asked him or her about fear of return. Under the circumstances, USCIRF considers this to be a good practice.

In another troubling finding, USCIRF observed fear claims being examined beyond the four required questions, such as OFO officers and BP agents asking detailed questions about why the individual left his or her country or asking what an individual knows about the asylum process. When USCIRF asked one interviewing officer how he documents the raising of a fear claim, he responded that he asks “how it all started” and then asks about each arrest or incident in order. He further explained that he is “looking for the little details,” which he records on the I-867.

Detainees in ICE custody reported similar experiences. For example, an ICE detainee from Ethiopia, who came to a port of entry and said he stated immediately that he was a refugee, told USCIRF that the interviewing officer asked him about the situation in his country and asked “a lot of follow-up questions” about his problems. Another detained Somali, also a

port of entry arrival, said that he was asked twice if he feared returning to his country and then was asked in detail about why he could not go back.

U.S. law requires that CBP simply document that a person in Expedited Removal expressed fear and then notify and send that person's file to USCIS, which is responsible for examining and assessing the fear claim. Positively, supervising OFO and BP officers interviewed by USCIRF stated, correctly, that interviewing officers are not supposed to ask too many questions regarding the situation that the individual fled and fears.

Additionally, a conversation with two interviewing BP agents revealed both a lack of knowledge of, and non-compliance with, DHS policy on withdrawals of fear claims. One agent said that interviewees who claim fear often ask what will happen next, and he tells them that the process may take a long time and that, in his experience, many people get sent back in the end, especially in gang-related cases. He said that after hearing this some people say that they do have a fear of return but do not want to wait and ask to be sent home. He felt, and the other agent agreed, that this required him to adjust the answers on Form I-867 to reflect that the individual does not want to seek asylum and should not be referred for a credible fear determination.

U.S. law requires that CBP simply document that a person in Expedited Removal expressed fear and then notify and send that person's file to USCIS, which is responsible for examining and assessing the fear claim.

Quality Assurance

CBP has not implemented USCIRF's 2005 recommendations to videotape interviews for quality assurance purpose and use testers. CBP does subject all secondary inspection decisions to two levels of supervisory review, but this consists of reviews of the file and conversations with the officer, not observing the interview. In addition, beginning four years ago, OFO started a quarterly headquarters review of information submitted by its field offices on all port of entry Expedited Removal cases, but this also does not include interview observations.²⁹ BP does not conduct such a headquarters review.

²⁹ As described to USCIRF by OFO, every quarter each field office collects and reports to headquarters information on five aspects of such cases: (1) was the question and answer sufficient?; (2) was the narrative done correctly?; (3) was there supervisory concurrence?; (4) were the fear questions addressed?; and (5) was the correct charge under INA section 212 used? OFO headquarters reviews the information and reports back to the field offices and to the Assistant Commissioner. OFO stated that, in the year between April 2014 and April 2015, the ports of entry handled around 220,000 adverse actions, of which about 29,000 were Expedited Removals. Of those 29,000, the headquarters review found errors in only 15, according to OFO. Most of these were what OFO described as procedural errors, such as using the wrong form, failing to use a translator, or interviewing a mother on behalf of a child. Only one involved an error where a person who claimed fear was removed; OFO stated that they worked with the State Department to bring the individual back to the United States for a credible fear interview with USCIS. In addition, OFO officials told USCIRF that they recently developed and started offering a new eight-hour refresher course on five core categories of adverse actions, including Expedited Removal, based on information learned through the headquarters review process. As of October 2015, this training reportedly had been provided to supervisors and officers at 10 locations.

In February 2015, agents in McAllen told USCIRF that 100,000 people had been processed this way since virtual processing started in mid-2013. However, USCIRF is concerned that processing efficiency is coming at the expense of identifying and protecting asylum seekers.

The Introduction of Virtual Processing

Since 2013, BP's central processing facility for non-citizens apprehended in the Rio Grande Valley sector, McAllen Station, has used virtual processing for interviews of most first-time apprehensions who speak English or Spanish.³⁰ Agents in McAllen do the initial collection and checks of identifying information, and then assign the cases to a BP agent at the El Paso, Texas, or El Centro, California, stations, who complete the Form I-867. The non-citizen sits at a bank of computers in McAllen, in front of a monitor and, using a phone handset, is interviewed by an El Paso or El Centro BP agent through Skype and an internet-based communicator. As with in-person interviews, supervisory review is only of the paper files. USCIRF visited the El Paso Station and observed the interviewing agents, work in a room that looks like a computer lab, with a dozen terminals. Supervisors at McAllen and El Paso stations said the virtual processing improves processing efficiencies and allows agents in sectors other than the Rio Grande Valley, who otherwise do not do much processing, to refresh and maintain their skills.

BP reports that virtual processing has allowed McAllen Station to double its processing output with half the manpower. In February 2015, agents in McAllen told USCIRF that 100,000 people had been processed this way since virtual processing started in mid-2013.³¹ Indeed, USCIRF observed the efficiencies of virtual processing – as an individual was being video interviewed, USCIRF saw McAllen BP agents pulling together that individual's paper file while other agents prepared other individuals for their interviews.

However, USCIRF is concerned that processing efficiency is coming at the expense of identifying and protecting asylum seekers. Agents are given incentives for speedy processing. BP agents at Mc Allen told USCIRF that fewer than 10 percent of the applicants processed there claim fear and this low rate had been consistent over the past several years. This seems inconsistent with the dramatic increase in fear claims assessed by USCIS, especially from individuals apprehended in the Rio Grande Valley sector, since FY2013.

USCIRF is particularly concerned by the use of interviewing “templates” observed during the virtual processing. As they conducted the virtual interviews, the El Paso agents relied on Microsoft Word documents with standardized questions and responses, from which they copied and pasted text into the E3 software that BP uses for processing. In another

³⁰Virtual processing is not used for unaccompanied minors under the age of 14 or non-citizens who may be referred to prosecution, even if they speak English or Spanish.

³¹BP began the virtual processing then because their projections were predicting an increase in arrivals, although the surge in 2014 exceeded even those projections.

effort to improve efficiency, McAllen Station created the templates, which are organized by county and case type (Expedited Removal, family Expedited Removal, etc.) and cover the narrative and sworn statement sections of the interview process. USCIRF observed that when a BP agent opened the templates to begin the interview, answers were already included and would require deletion by the agent. While using a standard list of questions on its own could be a good practice, having prepared answers seemed to prompt the interviewers to use leading questions in important areas. This risks suggesting to the interviewee that what the agent said is the correct answer, as opposed to eliciting an independent response. For example, instead of asking “why did you come to the United States?,” USCIRF observed an interviewer ask “why did you come to the United States – to live and work and provide a better life for your children?” USCIRF also observed one agent cutting and pasting the answers from the template into the sworn statement even before the interviewee had finished giving his answers.

The impersonal nature of the virtual interviews also is problematic. Facial expressions and other non-verbal cues are important ways for BP agents to tell if an interviewee is uncomfortable articulating a fear claim at the counter and needs a private interview. The director of virtual processing in El Paso recognized this, and admitted that it is harder to read these signals in a virtual interview. Furthermore, during USCIRF observations, the interviewing agents rarely looked into the camera to make eye contact with the interviewees, focusing instead on their own computer screen or keyboard. This makes it even less likely that they would detect any non-verbal cues.

Finally, occasional malfunctioning of technology presents concerns. BP agents at both McAllen and El Paso said they feel that the virtual processing generally runs smoothly, technology permitting. Unfortunately, USCIRF observed several technical problems that interrupted interviews, including Microsoft Word or computers crashing and cameras freezing. One interviewer who experienced multiple crashes did not give any explanation to the interviewee for the interruptions.

Privacy

At the various OFO and BP facilities USCIRF visited, interviews are conducted in settings that range from private or semi-private offices to large rooms where multiple interviews are done simultaneously. All four of the partial, in-person interviews USCIRF observed at OFO ports of entry were conducted in private rooms, but in one case, a mother was interviewed with her young daughter present. Because telephonic interpretation was required, the partial, in-person interview observed at a BP station was conducted in a semi-private room set up for two officers but being used at the time by one. However, three individuals from the same country were interviewed together. They had been apprehended as a group and,

While using a standard list of questions on its own could be a good practice, having prepared answers seemed to prompt the interviewers to use leading questions in important areas.

according to the supervisor, interviewing them as a group “helps us get through the process.”

At BP facilities, there typically is a counter with around eight agents at computers processing different individuals or groups at the same time, with other interviewees waiting nearby. At one such facility, USCIRF noted that asylum seekers might be afraid to express fear with others around them, but the agents said they did not view this as a problem and placed the burden on the interviewee to ask for a private room. BP officials said that most BP facilities do not have the space to permit private interview spaces. A positive exception was BP’s Ramey Station, which, after a recent renovation, has private interview rooms with acoustic padding to stop sound from carrying. The supervisor reported that the renovation “has been a big asset,” further stating that “Before, the people would be frightened to express fear. The private rooms also help with intelligence gathering because people are more forthcoming.”

The experience of a detained Somali asylum seeker with whom USCIRF spoke at an ICE facility underlines the need for private interviews. He arrived with a group of Somalis at an OFO port of entry and was interviewed at the windows in the waiting room, where “everyone could hear each other.” He said that when asked why he had come to the United States, he whispered his answer because he feared the other Somalis would hear him answer that he is from a persecuted minority tribe. When the officer could not hear what he was saying, he had to write it down.

An open, counter set-up is used for the virtual interviews at McAllen Station. The agents there stated that they believe virtual processing provides more privacy than speaking to an agent in-person at a counter, since it is harder to overhear someone who is speaking into a telephone handset. One agent said “the subjects open up more over videoconferencing because it’s more confidential.” USCIRF observed groups of people clustered together to be interviewed virtually, with one person speaking on the phone handset and others crowded around him or her, sitting on the same fixed stool or immediately adjacent stools. BP agents said that this seating arrangement was to keep the virtual processing moving along, since groups that travel together have the same route information, and also so that agents “don’t have to wait [between interviews] for the next body to be brought out.” Asked what would happen if an interviewee who had a fear felt uncomfortable talking about it in front of others, the agents said that the interviewer would notice that and would ask the person if s/he wanted a private interview. However, as discussed above, such non-verbal cues may not be easy to detect in virtual interviews.

McAllen Station is planning to move its processing to a new facility nearby, the Ursula facility. When USCIRF asked if the new facility would have partitions between the computer stations to improve privacy, the agents said CBP had deemed this impossible for security and staffing

reasons. However, in an improvement, they did say that at the new facility, groups will not have to sit clustered together in front of the screen; rather, one person at a time will be at the computer station and the others will wait on benches placed farther away from the counter.

Interpretation

OFO uses other officers as interpreters whenever possible, rather than telephonic interpretation.³² In two of the interviews USCIRF observed at ports of entry, the OFO officer who was supposed to be serving as the interpreter instead acted as a second interviewer. In one of these cases, the interpreting officer questioned the applicant more aggressively than the interviewing officer did. In the other, in addition to asking questions, the interpreting officer had difficulty translating and a supervisor who spoke the language had to step in.

OFO occasionally uses airline employees as interpreters at airport ports of entry. Although supervisors said they do not use state airline employees to interpret if they believe the individual is an asylum seeker from that country, this still is potentially problematic. Airline employees are not professional interpreters, and an airline can be fined if a passenger is denied admission to the United States and returned. USCIRF observed a preliminary interview, not an I-867 sworn statement interview, where the airline employee clearly was answering the officer's questions herself instead of interpreting. Positively, the officer stopped the interview, dismissed the airline employee, and used a different interpreter.

All BP agents are required to speak Spanish as a condition of their employment. They conduct interviews in Spanish themselves, although some lawyers and NGOs with whom USCIRF met expressed concerns about their ability to do so adequately, particularly for interviewees who speak local dialects. For languages other than Spanish, BP agents are supposed to use professional telephonic interpretation, but this does not always occur. A supervisory BP agent complained about the need to use telephonic interpretation, because it slows down processing and the interviewing agent cannot tell if the interpretation is accurate or not.

USCIRF heard from BP, as well as USCIS, about ongoing difficulties in finding telephonic interpreters for Central American indigenous languages. BP agents at McAllen said that indigenous language speakers usually speak some Spanish, but get to a point in the interview where their Spanish is insufficient. The agent then switches from virtual processing to an in-person interview, using another "subject" (meaning another non-citizen being processed) to interpret. The agents also reported that sometimes they reach

³²To serve as interpreters, OFO officers must be certified as proficient in the language by the State Department and must renew that certification every year.

The interviewing problems USCIRF observed raise questions about the adequacy of CBP's training and guidance on Expedited Removal processing

out to the relevant consulate, which they said usually can provide interpreters relatively quickly. Both of these approaches are inappropriate ways to secure interpretation for a person who might be an asylum seeker.

Detainees at ICE facilities interviewed by USCIRF reported instances where interpretation was not used for Expedited Removal processing interviews. For example, a detained Ethiopian asylum seeker who arrived at an OFO port of entry said that he was a Somali speaker but there was no Somali interpretation available; instead, another Somali non-citizen in custody interpreted. However, he stated that this person did not go over with him in detail what was written down on the forms, he just told him where to sign. Another detained Somali who arrived at a port of entry said that no Somali interpreter was available for his interview so he spoke as best he could in English.

Interviewer Training and Guidance

The interviewing problems USCIRF observed raise questions about the adequacy of CBP's training and guidance on Expedited Removal processing. In response to USCIRF inquiries on these topics, OFO and BP provided some general information about their training, but USCIRF was not allowed to review the content and therefore cannot assess its substance. The relevant training was described as follows: As part of their 89-day basic training course, new OFO officers receive a two-hour lecture on Expedited Removal processing and two hours of practical exercises. After the academy, new officers are assigned to a port of entry, where they observe processing for 11 weeks, then have three more weeks of classroom training that includes a module on all adverse actions, including Expedited Removal. After this, they begin conducting processing themselves, initially with a more experienced officer observing. BP agents' 19 weeks of basic training includes a two-hour lecture on Expedited Removal processing, plus 30 minutes of practical exercises. Following this, they are assigned to a station, where they are paired with mentors. After about three weeks at a station, the new agents receive a one to one-and-a-half hour review lesson on Expedited Removal, which reiterates what was covered in basic training. Despite the foregoing, neither OFO nor BP agents in the field interviewed by USCIRF said they received any specific training on interviewing or on working with victims of persecution or torture.

USCIRF was, however, permitted to see the current internal guidance on Expedited Removal fear claims. The OFO guidance accurately describes the process, but the BP guidance does not. On a positive note, as of 2012, OFO no longer uses the Field Manual with the problematic language noted in the 2005 Study that suggested that CBP inspectors can assess an applicant's fear. The current OFO guidance on processing

Expedited Removal cases, contained in an October 2014 memo/muster,³³ is an improvement, and accurately describes the steps OFO officers are required to follow to give a non-citizen in Expedited Removal the opportunity to express fear. Unfortunately, it is not clear what guidance was used between 2012 and 2014.

The October 2014 document consists of a one-page cover memo and a three-page muster.³⁴ The cover memo cites a 1997 statement of the then-INS Commissioner about the importance of protecting the rights of aliens in Expedited Removal, particularly those who fear persecution. The muster states that when an alien expresses fear, it is against DHS policy to encourage withdrawal, fail to refer to USCIS, improperly remove, or detain in inappropriate conditions; that OFO officers should not estimate the time the alien will spend in detention; and that if an alien answers yes to a fear question or asks for asylum and then asks to be sent home, the OFO officer must consult with the USCIS asylum office. If a supervising asylum officer cannot be reached, the case must be referred. It reminds OFO officers that aliens who express fear cannot be removed until an asylum officer has interviewed them to determine if they have credible fear. Finally, it states that it is CBP's responsibility to protect the alien's identity and not reveal to any foreign national or government that the alien might have sought refuge in the United States.

By contrast, the BP guidance erroneously conflates the roles of BP agents and USCIS asylum officers. This guidance is contained in a "Muster Module about Credible Fear Determination," (see Appendix E) which consists of a one-page cover memo from BP headquarters dated November 2014 and two one-page musters dated September 2014.³⁵ Both musters are titled "Credible Fear Determination," with one addressing Expedited Removal and the second on unaccompanied non-citizen children's cases. Although the documents correctly state that BP agents must ask the four required fear questions and record the responses, they conflate this questioning with the credible fear process and instruct BP agents on how to determine credible fear. The text provides the legal standard for credible fear of persecution twice, and also includes the legal standard for credible fear of torture. It includes a text box that

The [OFO] muster states that when an alien expresses fear, it is against DHS policy to encourage withdrawal, fail to refer to USCIS, improperly remove, or detain in inappropriate conditions. It reminds OFO officers that aliens who express fear cannot be removed until an asylum officer has interviewed them to determine if they have credible fear. By contrast, the BP guidance erroneously conflates the roles of BP agents and USCIS asylum officers.

³³ According to OFO, memo/musters are sent to each field office, and, when circulated, are read and distributed to officers at the muster at the beginning of each of that day's shifts. They also are available in OFO's electronic library. OFO is working on a replacement to the Field Manual, the Officer's Reference Tool, but it is not yet complete. Chapter 11 was made available on the OFO intranet in July 2015; it contains the existing memo/musters on admissibility.

³⁴ OFO would not provide the 2014 document but permitted USCIRF to read it at their offices and take notes.

³⁵ Border Patrol headquarters told USCIRF that the previous guidance was a March 2009 policy memo, which USCIRF did not review.

CBP encounters large numbers of largely Central American women and children, many of whom could have protection needs, but it does not have enough female agents or officers to have women interviewing women and children.

reads as follows: “An individual will be found to have a credible fear of persecution if he/she establishes that there is a ‘significant possibility’ that he/she could establish in a full hearing before an Immigration Judge that he/she has been persecuted or has a well-founded fear of persecution or harm on account of his/her race, religion, nationality, membership in a particular social group, or political opinion if returned to his/her country.” Further, the BP muster suggests agents should go beyond the four required fear questions to have a “dialogue” with the interviewee in order to assess if s/he has credible fear. For example, the muster on UAC cases states that “agents are not limited to asking only [the four required] questions. . . . The provided questions are intended to establish a dialogue with the UAC that may allow agents to gather additional information to assist in their determination.” This is not the role of BP agents, but rather of USCIS asylum officers. USCIS, however, is not mentioned anywhere in the documents.

Processing of Women and Children

CBP encounters large numbers of largely Central American women and children, many of whom could have protection needs,³⁶ but it does not have enough female agents or officers to have women interviewing women and children. This is particularly true at BP, which is only 4.5 to five percent female, although it has been trying to recruit more women. As a result, the officers and agents who interview women and children to identify those with fear claims are overwhelmingly men who receive no specific training on working with children and families. Asked about their interactions with children, BP agents at McAllen Station admitted that many children do not want to talk to a male agent in uniform.

Another concern relates to CBP’s approach to processing family units with children under the age of 14. The agency’s policy is to interview children over 14 individually. If a child is under that age, the mother or parent answers the questions for the child, and this is indicated on the form. This is potentially problematic, as a child could have a fear claim independent of his or her parents, or because of them. Asked about these scenarios, BP agents responded to USCIRF that they had never seen that come up and moreover, that they were confident that, since the child had made it to the safety of the United States, s/he would voice any concerns s/he had.

³⁶ See, e.g., UNHCR, *Children on the Run* (2014) (finding that, of 404 unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico who arrived in the United States in or after October 2011, no less than 58 percent had actual or potential international protection needs); UNHCR, *Women on the Run* (2015) (finding that, in El Salvador, Guatemala, Honduras, and some parts of Mexico, women face a startling degree of violence in their daily lives and receive no protection).

Attitudes toward Asylum

CBP has two vital roles in Expedited Removal: first, to ensure that inadmissible non-citizens are not permitted to enter the United States and second, to ensure that non-citizens who fear persecution or torture have the opportunity to seek asylum, even if they otherwise would be inadmissible. These dual roles are not easy to balance, especially in the post-9/11 era and under the strain of large numbers of arrivals. OFO officers and BP agents must be able to alternate between examining non-citizens who arrive without proper documents and identifying and providing protection to those who need it. Given these requirements, USCIRF was concerned by the skepticism some CBP officials openly expressed of asylum claims, either generally or from certain nationalities. Moreover, these officers and agents appeared to have little recognition of the potential negative implications their skepticism might have for case processing.

For example, two different OFO officers told USCIRF that migrants, especially Mexicans, believe they will be let into the country if they say they are afraid or want political asylum, and then try to retract those claims when they learn they will be detained. One stated that “political asylum is putting the smugglers out of business.” Another OFO officer told USCIRF that he believes that many individuals who claim fear on arrival are not really afraid, because “those with real fear can apply overseas and bring their family.”³⁷ However, he also said that if a person claims fear “I would never try to talk anybody out of it.” USCIRF observed this officer conduct a confrontational interview, where he and another officer (who was supposed to be interpreting but instead acted as a second interviewer) aggressively questioned a non-citizen and responded to his answers with obvious distrust based on their skepticism of his intentions for entry and his supposed fear claim. The individual in fact was not claiming fear of return, but the officers assumed that he was going to because another citizen of the same country who arrived on the same flight had sought asylum earlier that day.³⁸

A BP agent at one station drew a distinction between “legitimate” asylum seekers who present themselves at ports of entry, as opposed to those apprehended along the border. USCIRF also heard this view from a BP headquarters official, who said that asylum seekers show up at ports of entry, they do not get apprehended by BP.

Another BP agent stated that Mexican asylum seekers all tell the same stories about fleeing the cartels, which he viewed as indicating coaching,

CBP has two vital roles in Expedited Removal: first, to ensure that inadmissible non-citizens are not permitted to enter the United States and second, to ensure that non-citizens who fear persecution or torture have the opportunity to seek asylum, even if they otherwise would be inadmissible.

³⁷This seems to be a reference to applying for resettlement as a refugee through the U.S. Refugee Admissions Program, a different legal process than asylum. A person cannot apply for asylum from overseas under U.S. law.

³⁸USCIRF also observed part of the interview of the asylum seeker from the same country by a different officer/interpreter team, and it was conducted respectfully and calmly.

if not fraud. A second agent at the same station said that hearing the same stories over and over made the agents “jaded” and that he believed the vast majority of those claiming fear did not meet the definition for asylum, although he did recognize that this was not BP’s job to determine.

One BP agent implied that all fear claims made to ICE are invalid, stating that they result from individuals talking to other detainees and receiving the Know Your Rights orientation.³⁹ He also drew a distinction between Central Americans and other asylum seekers, saying that Central Americans almost always have family in the United States, “unlike Somalis, for example, who are coming here because they really want to get away” from their country. A supervisor at this station expressed skepticism about Chinese claims of religious persecution, telling USCIRF that Chinese individuals often say they are Christian but cannot even name the church they attend; when USCIRF informed him that many Chinese Christians worship in homes, not churches, he seemed surprised.

To be sure, not all claims of fear are credible or warrant asylum under U.S. law, and persecution is more common in some countries than others. Nevertheless, it is not CBP’s role to assess the credibility or merits of fear claims, but rather to ask if a person is afraid of return, record the answer, and, if it is yes, refer the person to USCIS. The agency must do so fairly and accurately for all individuals it encounters. The comments described above may indicate that this may not always be happening, especially when considered in light of BP’s flawed internal guidance (discussed above) and evidence of discrepancies between CBP’s referrals and USCIS’ credible and reasonable fear caseloads for certain populations.⁴⁰

³⁹ See *Information Provided in ICE Custody* section.

⁴⁰ Human Rights Watch, “*You Don’t Have Rights Here: U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm*,” pg. 21-24 (2014). Human Rights Watch analyzed CBP data on apprehensions and dispositions between October 2010 and September 2012, and found that only 0.1 of Mexicans, 0.8 percent of Guatemalans 1.9 percent of Hondurans, and 5.5 percent of Salvadorans in Expedited Removal or Reinstatement of Removal were referred to USCIS for credible or reasonable fear screening, as compared to 21 percent of migrants from other countries in the same proceedings in the same years. *Id.* at 21-22. Meanwhile, however, both the number and proportion of the three Central American nationalities in USCIS’s caseload increased, with most referrals coming from other agencies, like ICE, that are not required to ask systematically about fear. *Id.* at 24. For example, USCIS’ credible and reasonable fear caseload of Hondurans increased from 1,108 individuals in 2006 to 8,539 in 2013. *Id.* In 2012, USCIS did 2,405 credible fear interviews of Hondurans, but CBP referred only 615 of these. *Id.*

RECOMMENDATIONS

To CBP

- As recommended in 2005, amend Form I-867 to include a prominently displayed notation that it is not a verbatim transcript of the interview and is not intended to document the individual's entire asylum claim in detail.
- As recommended in 2005, videorecord all Expedited Removal processing interviews at all OFO ports of entry and BP stations, including virtual processing interviews, and require supervisory and headquarters review of the recordings of a sampling of interviews for quality assurance purposes. Until videorecording is established, require supervisors to sit in on and observe a sampling of interviews, and use testers to further verify that proper interviewing procedures are being followed.
- Retrain all OFO officers and BP agents on their role in the Expedited Removal process, the proper procedures for interviewing non-citizens, and the special needs and concerns of asylum seekers and other vulnerable populations.
- Remove any and all language in internal guidance that suggests that OFO officers or BP agents have the authority to reject or assess claims of fear or eligibility for asylum.
- Establish a dedicated corps of specially-trained, non-uniformed interviewers to interview women and children to identify fear claims, and ensure that female interviewers are included. Until such a corps is established, use female OFO officers and BP agents to interview women and children whenever possible, and continue to work to increase the number of women in these positions.
- Track the results of interviews conducted by virtual processing against those conducted in person, to determine if the two methods are producing materially different outcomes.
- Ensure that all interviewees have access to completely private interviews and that parents are not interviewed with their children present.
- Use only professional interpreters, not officers, agents, or any other individual, during the I-867 interviews, and do not use airline employees as interpreters at any point in the inspection process.

To USCIS

- Continue the good practice of asking asylum seekers during credible fear interviews about discrepancies in their fear claims documented in the I-867 forms and fear claims raised with ICE authorities in detention.
- Track whether credible fear interview referrals are coming from CBP or ICE to better understand when in the Expedited Removal process most fear claims are being raised.

To EOIR

- Retrain immigration judges about the fact that Form I-867 it is not a verbatim transcript of the interview and is not intended to document the individual's entire asylum claim in detail, and instruct them that it should be weighed accordingly.

The credible fear screening is to determine if the person has “a significant possibility” of establishing eligibility for asylum or eligibility for protection under the Convention Against Torture through withholding of removal or deferral of removal and therefore is entitled to a full hearing before an immigration judge.

CREDIBLE FEAR SCREENING

Within DHS, the USCIS Asylum Division is responsible for screening for credible fear persons who express to CBP or ICE a fear of persecution or torture if returned to their countries of origin. Under IIRIRA, the credible fear screening is to determine if the person has “a significant possibility” of establishing eligibility for asylum or eligibility for protection under the Convention Against Torture through withholding of removal or deferral of removal and therefore is entitled to a full hearing before an immigration judge. The credible fear screening is not a full adjudication; rather it is an initial review meant to quickly identify potentially meritorious claims and screen out frivolous ones.

Credible fear screenings are done by asylum officers, who have received training on relevant U.S. and international legal standards and non-adversarial interview techniques. Asylum officers are required by law to have access to information about the conditions in asylum seekers’ countries of origin to make well-informed credible fear determinations.⁴¹

The 2005 Study found that USCIS had developed procedures and protections to help ensure that *bona fide* asylum seekers in Expedited Removal were not returned to countries erroneously where they could face persecution.

Since the release of the 2005 Study, the number of persons in Expedited Removal claiming fear has grown from 9,465 in FY2005 to 51,001 in FY2014.⁴² Wait times for credible fear interviews also increased. In order to address increased workloads, USCIS increased its authorized staffing levels by 100 asylum officers in FY2014 and began to hire and train new officers; redeployed staff to conduct the increased volume of credible fear interviews;⁴³ and increased the use of telephonic interviews.

In addition, as fear claims in Expedited Removal increased, so too did the rate of positive credible fear findings. To address what USCIS headquarters felt were potentially inflated credible fear determination rates, USCIS in 2014 issued a revised credible fear lesson plan for asylum officer training to reinforce and remind officers of the legal requirements of the credible fear screening process and updated their quality assurance procedures.

⁴¹The use of country of origin information is required in the INA, section 208(b)(1)(B)(iii).

⁴²Referrals to USCIS for credible fear screenings in FY2015 fell to 48,052.

⁴³USCIS’ movement of asylum officers from the affirmative asylum process to address credible fear and reasonable fear delays has led to a growing backlog of affirmative asylum filings, which have also risen during this time period. As of the end of 2014, USCIS had over 73,000 affirmative asylum cases pending.

New Lesson Plan

When the U.S. Congress considered the enactment of Expedited Removal, Senator Orrin Hatch of the Senate Judiciary Committee affirmed that “[T]he (credible fear) standard . . . is intended to be a low screening standard for admission into the usual full asylum process.”⁴⁴

In February 2014, USCIS issued a revised lesson plan to train asylum officers on evaluating asylum seekers’ fear (see Appendix F). USCIS headquarters told USCIRF that the purpose of the revised lesson plan was to re-emphasize the requirement that asylum seekers must show a nexus between their personal fear claims and a protected ground.⁴⁵ Namely, each asylum seeker must demonstrate that s/he personally experienced, or if returned would personally experience, persecution as a member of a group that is persecuted based on a protected ground; a positive credible fear determination cannot be made simply because an asylum seeker belongs to such a group. DHS further reported to USCIRF that the change in the lesson plan clarified the standard of proof and that the lesson plan makes it clear that “[e]ssentially, the asylum officer is applying a threshold screening standard . . .”⁴⁶

Nevertheless, the lesson plan’s language raised concerns among some stakeholders that the credible fear standard had been raised to require an in-depth assessment more like a full adjudication of asylum claims. For example, the new lesson plan eliminated the above statement from Senator Hatch about the low screening standard, but bolded language declaring that a claim that has no possibility, or only a minimal or mere possibility, of success would not meet the “significant possibility” standard.⁴⁷ Positively, the revised lesson plan does reiterate that the purpose of the credible fear interview is to “quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch”⁴⁸ and to allow immigration judges to further examine the former. It also reminds asylum officers that asylum seekers are not required to show that the chances of success are more likely than not.⁴⁹

To assist this determination, asylum officers now are required to use a standard checklist for the credible fear interview. The checklist initially

When the U.S. Congress considered the enactment of Expedited Removal, Senator Orrin Hatch of the Senate Judiciary Committee affirmed that “[T]he (credible fear) standard . . . is intended to be a low screening standard for admission into the usual full asylum process.”

⁴⁴ Senate, “Proceedings and Debates of the 104th Congress, Second Session,” *Congressional Record*, Vol. 142 No. 136, September 27, 1996.

⁴⁵ International and U.S. refugee law recognize five protected grounds: race, religion, nationality, membership in a particular social group and political opinion.

⁴⁶ U.S. Citizenship and Immigration Services, *Lesson Plan Overview*, February 28, 2014, pg. 12

⁴⁷ *Id.* pg. 14

⁴⁸ *Id.*, pg. 11.

⁴⁹ *Id.*, pg. 14.

Following the deployment of the new lesson plan, credible fear grant rates fell from 81.4 percent in February 2014 to 70.2 percent for FY2015 and 77.15 percent for FY2016 through February 2016.

was piloted by the Houston Asylum Office in April 2013. USCIS found it to be an efficient tool and with the surge of credible fear referrals in 2014, began using it nationwide. The checklist replaced the previous format of the written analysis for credible fear determinations. At the end of the interview, asylum officers continue to be required to write a short summary of relevant facts (see Appendix G).

Asylum officers interviewed by USCIRF provided mixed assessments of the revised lesson plan and checklist. They noted that they are helpful to increase the specifics and knowledge of an asylum seeker's claim. At the same time, they said the credible fear interview is intended to be a screening but the checklist leads them to develop a fuller analysis and record of the claim, bringing it close to the point of a full adjudication on the merits. They said interviews under the new lesson plan are more detailed and take longer. Asylum officers estimated that most credible fear interviews are now around 1 hour and 15 minutes.

Following the deployment of the new lesson plan, credible fear grant rates fell from 81.4 percent in February 2014 to 70.2 percent for FY2015 and 77.15 percent for FY2016 through February 2016.

Telephonic Interviews

USCIS also has expanded significantly its reliance on telephonic interviews for credible fear screenings. Only two percent of all 5,369 credible fear interviews were conducted by phone in 2009. By contrast, 59 percent of the 51,001 interviews were done that way in FY2014, according to the USCIS Ombudsman.⁵⁰ The greatest use of telephonic interviews is for asylum seekers in Expedited Removal who crossed the southern border. This is due to the high numbers of that population, the lack of space in detention facilities for asylum officers to conduct in-person interviews, and the remote locations of the detention facilities.

The move toward telephonic credible fear interviews has raised concerns. Asylum seekers interviewed by telephone may find it more difficult to recount fully to the asylum officer, through an interpreter, the details of violent and traumatic events. Some legal service providers reported to USCIRF that telephonic credible fear interviews are shorter, less accurate, and more confusing than in-person interviews. Additionally, telephonic interviews limit asylum officers' ability to assess asylum seekers' credibility. Indeed, the USCIS 2014 credible fear lesson plan recognizes this limitation, stating that telephonic interviews "further limits the reliability of and ability to evaluate [demeanor, candor, and responsiveness]

⁵⁰U.S. Citizenship and Immigration Services Ombudsman, *Annual Report 2015*, June 29, 2015, pg. 62.

in the credible fear context.”⁵¹ USCIS told USCIRF it has attempted to use videoconferencing for credible fear interviews, but connectivity and other technical issues prevented the expansion of this option. Despite these concerns, USCIS headquarters reported to USCIRF that positive fear determination rates are slightly higher for telephonic interviews than for in-person interviews.

When USCIS started using telephonic credible fear interviews, it instituted quality assurance mechanisms to take into account some of the concerns discussed above. Initially, asylum officers were required to conduct a follow-up interview with persons determined not to have a credible fear either in person or by videoconference. However, that requirement ended in June 2013; follow-up interviews are now left to the discretion of asylum office directors.

Quality Assurance

In the 2005 Study, USCIRF drew attention to an imbalance in USCIS’ review and quality assurance procedure: negative credible fear determinations required 100 percent headquarters review and extra documentation, whereas positive determinations did not. USCIRF cautioned that this discrepancy could create a bias in favor of positive credible fear determinations. In June 2014, USCIS headquarters implemented a new procedure to review randomly 10 percent of all pre-decisional positive and negative credible fear determinations. This was a return to a quality assurance policy that USCIS first implemented in 2006 following the release of USCIRF’s 2005 Study, but ceased for unknown reasons.

RECOMMENDATIONS

To USCIS

- Reaffirm in the Asylum Officers’ Lesson Plan that the credible fear standard is a screening standard requiring a showing of a “significant possibility” of eligibility for asylum, not a full assessment of the merits of the case.
- Continue to track the results of credible fear interviews conducted telephonically and those conducted in person to determine if the two methods are producing materially different outcomes, and in the meantime reinstate in-person re-interviews, when requested by the non-citizen, of negative credible fear findings from telephonic interviews.
- Continue the good practice of headquarters’ review of a statistical sampling of both positive and negative credible fear determinations for quality assurance purposes, as recommended in 2005.

⁵¹U.S. Citizenship and Immigration Services, *Lesson Plan Overview*, February 28, 2014, pg. 18.

DETENTION

As previously discussed, U.S. law requires that all asylum seekers subject to Expedited Removal be detained⁵² (see Appendix H) until a USCIS asylum officer makes a credible fear determination.⁵³ ICE's Office of Enforcement and Removal Operations is responsible for the detention of asylum seekers.⁵⁴ After USCIS determines that an asylum seeker has a credible fear of persecution or torture, ICE has the discretion to release or continue to detain him or her while the asylum case is pending.⁵⁵ ICE reports that in FY2014, it detained 35,598 credible fear applicants, that the average length of their detention was 58 days, and that 89.72 percent of them spent 90 days or less in detention.

The 2005 Study found that asylum seekers were detained inappropriately, under prison-like conditions and in actual jails.

The 2005 Study found that asylum seekers were detained inappropriately, under prison-like conditions and in actual jails. The overwhelming majority of asylum seekers referred for credible fear were detained, for weeks or months and occasionally years, in penal or penitentiary-like facilities. In some of these facilities, asylum seekers slept alongside U.S. citizen convicts serving criminal sentences or criminal aliens, even though ICE detention standards do not permit non-criminal detainees to be co-mingled with criminals. To address these concerns, USCIRF recommended that ICE reform its detention standards so that non-criminal asylum seekers are not detained under penal conditions.

It was not until 2009 that ICE initiated a process to implement USCIRF's 2005 recommendations. In February 2009, then-DHS Secretary Janet Napolitano appointed Dr. Dora Schriro as Special Advisor on Immigration and Customs Enforcement and Detention and Removal, and charged her to evaluate the U.S. immigrant detention system. In October 2009, Dr. Schriro released a report of her findings, which, like USCIRF's 2005 Study, found that asylum seekers were being held under inappropriate conditions. She noted in her report that immigration detention serves an administrative, not punitive, purpose, and that the

⁵² INA section 236(c). Mandatory detention of asylum seekers in Expedited Removal has two administrative purposes: (1) it provides time to verify the identities of asylum seekers who have no, faulty, or fraudulently-obtained documents, and (2) it ensures that asylum seekers appear for their hearings or removals.

⁵³ These generally occur within an average of nine days, according to USCIS.

⁵⁴ Beginning in FY2012, Congress mandated that ICE maintain 34,000 beds daily. In FY2015, the average daily cost for detention was \$127.08 per person per day. Asylum seekers and other immigrant detainees are held in a variety of facilities: ICE-owned Service Processing Centers; privately-owned immigrant-dedicated Contract Detention Facilities; immigrant-dedicated county jail facilities, with which ICE has intergovernmental agency service agreements (IGSAs); and shared-use county jails, also through IGSAs. Almost every detention facility used by ICE is modeled on penal detention facilities that house criminals.

⁵⁵ Jeh Charles Johnson, *MEMORANDUM: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Department of Homeland Security, November 20, 2014

majority of immigrant detainees could be classified as having a low propensity for violence.⁵⁶ Dr. Schriro reported that ICE relied on correctional incarceration standards to detain immigrant populations, including asylum seekers, in facilities built and operated as jails or prisons to incarcerate pre-trial and/or sentenced offenders.⁵⁷ She recommended that ICE: develop new standards, assessments, and classification tools to inform care, custody restrictions, and services consistent with risk level and medical needs; expand access to legal materials and counsel, visitation, and religious practices; and develop specific systems to serve women, families, and asylum seekers. She also recommended that detention facilities housing asylum seekers be located near transportation centers, consulates, *pro bono* counsel, immigration courts, USCIS asylum offices, and 24-hour emergency medical care, and be designed to provide specialized care to asylum seekers.⁵⁸

Based on Dr. Schriro's report, in October 2009, ICE announced that, within three to five years, it planned to:

- revise its detention standards to reflect conditions appropriate for immigration detainees, design facilities located and operated solely to detain non-criminal immigrants, and convert the T. Don Hutto Family Residential Facility in Texas from a family detention facility to a detention center for adult females;
- review its contracts with detention facilities to ensure that they comply with the new standards;
- devise a risk assessment and custody classification tool to place detainees in appropriate facilities;
- increase oversight by hiring ICE detention managers at selected facilities and by allowing for more frequent routine and random inspections to ensure appropriate conditions of custody and compliance with the revised detention standards; and
- improve detainee healthcare by forming two advisory committees and hiring experts to independently review complaints and denials of medical requests.⁵⁹

Dr. Schriro reported that ICE relied on correctional incarceration standards to detain immigrant populations, including asylum seekers, in facilities built and operated as jails or prisons to incarcerate pre-trial and/or sentenced offenders.

⁵⁶ Dr. Dora Schriro, *Immigration Detention Overview and Recommendations, Immigration and Customs Enforcement*, October 6, 2009, pg. 2.

⁵⁷ *Id.*, pg. 2.

⁵⁸ *Id.*, pg. 3.

⁵⁹ U.S. Immigration and Customs Enforcement, *Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiative*, October 6, 2009.

USCIRF found that asylum seekers continue to be detained under inappropriate penal conditions before their credible fear interviews, and in some cases, even after being found to have a credible fear. Of particular concern is ICE's use of criminal prisons and jails and private immigration detention facilities designed like criminal prisons to hold increasing numbers of asylum seekers.

Detention Conditions

Between 2012 and 2015, USCIRF visited 12 adult detention facilities⁶⁰ (see Appendix I) throughout the United States to observe facility conditions, meet with officials, and interview asylum seekers. The adult facilities ranged from those based on a civil detention model, to those based on a penal model, to county jails also housing convicted criminals. USCIRF found that asylum seekers continue to be detained under inappropriate penal conditions before their credible fear interviews, and in some cases, even after being found to have a credible fear.⁶¹ Of particular concern is ICE's use of criminal prisons and jails and private immigration detention facilities designed like criminal prisons to hold increasing numbers of asylum seekers. ICE holds detainees at approximately 181 facilities nationwide, and it reports that approximately 22,948 of ICE's 32,786 detention beds are in facilities that ICE views as appropriate to house asylum seekers.

However, USCIRF remains concerned that vast majority of asylum seekers in Expedited Removal continue to be detained in immigrant detention centers with high degrees of external and internal security, no freedom of movement, and no privacy. This contradicts not only USCIRF's 2005 recommendations but ICE's own 2009 policies that asylum seekers should be held in civil detention facilities which are externally secure but allow for internal freedom of movement, broad-based and accessible indoor and outdoor recreation opportunities, contact visits, privacy, and the ability to wear non-institutional clothing.

⁶⁰ USCIRF also inspected three family detention facilities between 2012 and 2015. See the Surge section for an analysis of the family detention facilities' conditions. The adult facilities were: Broward Transitional Center, Delaney Hall Detention Facility, El Centro Service Processing Center, Eloy Detention Center, Florence Detention Center, Karnes County Civil Detention Center, Krome Service Processing Center, James A. Musick Facility, Mira Loma Detention Center, Otay Detention Facility, Pinal County Adult Detention Center, and T. Don Hutto Residential Center. The family facilities were: Berks Family Shelter, South Texas Family Residential Center, and Karnes County Residential Center.

⁶¹ This finding is despite ICE's 2009 reform plan to house asylum seekers under civil conditions and some positive steps taken to implement those reforms. In 2012, ICE opened two civil detention facilities, Delaney Hall Detention Facility in New Jersey and Karnes County Civil Detention Center in Texas, the latter of which was specifically designed and built based on a civil detention model. Additionally, starting in 2009, ICE moved some asylum seekers to Broward Transitional Center in Broward, Florida, and reformed the T. Don Hutto Residential Center in Texas. Some of ICE's inability to further implement its reforms was due to circumstances beyond its control. The agency sought to open another new civil detention facility in Illinois, but local objections stopped these plans. In response to the surge of asylum seekers (including families) from Central America in 2014, ICE converted the Karnes County Civil Detention Center to a family detention center, moving the facility's male asylum seekers and other immigrant detainees to other, more penal institutions. Additionally, ICE ended contracts with some of the less restrictive penal-model detention centers, again moving male asylum seekers and other immigrant detainees to more penal facilities.

In the USCIRF-inspected adult detention facilities:

- 100 percent were secure facilities with hardened perimeters that look like prison or jail complexes. Perimeters were secured with fencing, razor wire, barbed wire/concertina coils, and multiple locked doors.
- 100 percent had some form of internal security barriers and restrictions on freedom of movement, such as barbed wire fencing, armed guards, secured doors, escort requirements, and video and sound surveillance. For example, 75 percent of the facilities required armed guards to escort detainees within the facility, 92 percent performed searches of living quarters, and 75 percent used pat downs on detainees. 100 percent had headcounts or census counts, some as many as eight times per day.
- Most facilities afforded little privacy to asylum seekers. In 75 percent of the facilities, asylum seekers slept in open, dorm-style bedrooms housing 50 to 100 persons that constantly were surveilled by sound and sight, either by guards in the dorms or electronic monitoring, with open showers and toilets.
- Many facilities offered little or no programming or activities and detainees spent the majority of time in their housing units. In 58 percent of the facilities, asylum seekers had limited, set times for recreation, meals, or law library visits. In 50 percent, the outdoor recreation space was a concrete slab outside the dorm area accessible for one hour per day, regardless of detainees' risk level. In these facilities, other than that one hour and the specific time slots allotted for meals, visitation, library visits, and religious services, the only recreation options were game tables and TVs within the dorms.
- In 67 percent of the facilities, asylum seekers wore prison-like jumpsuits with colors corresponding to their risk level.

ICE's four civil detention facilities – Broward Transitional Center, Delaney Hall Detention Facility, T. Don Hutto Residential Center, and Karnes County Civil Detention Center – afford greater freedom of movement and privacy than other facilities, while also preserving security. However, these facilities house only 17 percent of asylum seekers in ICE detention. At all four of these facilities:

- External security was provided by perimeter fences, razor wire, barbed wire, or concertina coils, and locked entry doors. Internal security was upheld through the use of video and sound monitoring, guards posted throughout the facilities,⁶² headcounts or census counts, and living quarter searches.

⁶² Guards wear khakis and polo shirts rather than correctional officer uniforms.

Although ICE revised its immigration detention standards twice since 2005, they continue to be based on penal, not civil, models of detention.

- Asylum seekers were permitted to move, unescorted and relatively freely, throughout the facility without having to walk through security fencing or centrally-locked doors or ask a guard's permission. Some limitations remained, however; this freedom of movement was limited to daylight hours, some areas were off limits without an escort, and all detainees were required to be at specified locations at certain times for census or head counts.
- Except at Hutto, bedrooms and common areas were separate. Housing units slept two to eight people. Showers and toilets were private, either behind closed doors in the bedrooms or blocked by full-length privacy curtains in the common areas. The exception to private bathrooms was Delaney Hall, where toilets and showers were in a dormitory-style shared bathroom, showers were open, and the toilets only have half-length doors.
- While only the Hutto facility allowed residents to wear street clothes, the uniforms at the other civil facilities were t-shirts and sweat suits, as opposed to color-coded prison jumpsuits.⁶³

Detention Standards

Although ICE revised its immigration detention standards twice since 2005, they continue to be based on penal, not civil, models of detention. Both the 2008 standards and 2011 Performance Based National Detention Standards (PBNDS) are based on the American Correctional Association's (ACA) jail detention standards for pre-trial felons. The 2011 PBNDS did expand access to medical, mental health, legal, and religious services; institute an extensive complaint process; and increase visitation and recreation opportunities. However, the PBNDS do not require uniform implementation; some state and local facilities that hold both criminal and immigrant detainees are not required to implement these standards and therefore continue to hold asylum seekers under correctional standards. These facilities hold 80 percent of ICE's detention population.

By contrast, the American Bar Association (ABA) has developed civil immigration detention standards that are similar to some of the better practices USCIRF observed during its inspections of ICE's less restrictive facilities. These standards call for security measures to be directly related to the security or safety concerns of facility detainees. The ABA recommends that for non-dangerous immigrant populations, including asylum seekers, ICE normalize living conditions at detention facilities to make them more like "secure" nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities, rather than jails or jail-like settings. The ABA standards recommend ample

⁶³ At the time of USCIRF's initial Study, Broward allowed detainees to wear street clothes, but this is no longer the facility's policy.

common space, freedom of movement, allowing detainees to wear their own clothes, expanded access to legal information and services, expanded medical care, and extended access to indoor and outdoor recreation.⁶⁴

Risk Classification Assessment

Since 2013, ICE has used a Risk Classification Assessment (RCA) tool to guide ICE officers' decisions on detention, release, and level of supervision for each individual who comes into ICE's custody, including asylum seekers in Expedited Removal, except those subject to mandatory detention who will be removed within 5 days. RCA decisions are made on intake, through a scoring system with as many as 178 questions. The RCA considers several factors related to an immigrant detainee's risks to public safety and of flight (i.e., criminal history, gang affiliation, prior removal, community ties). It also is meant to help ICE identify medical needs, and requires officers to "determine whether there is any special vulnerability that may impact custody and classification determinations," such as past experience of trauma or torture.

The RCA places all immigrants detained in ICE custody, including asylum seekers, into one of three custody oversight levels – low, moderate, or high custody – corresponding to their security risks and criminal histories. Low-level detainees have no criminal history or only minor offenses, whereas high-level detainees have serious criminal charges. The vast majority of asylum seekers are classified for low-level custody, according to ICE officials, and under ICE regulations may not interact or be housed with high-level detainees.

This system should allow ICE to identify asylum seekers and give them priority for housing in civil detention facilities, but USCIRF's monitoring suggested that this was not always the case. For instance, USCIRF interviewed asylum seekers held in penal detention facilities when less jail-like and more appropriate facilities were nearby. USCIRF also met with asylum seekers housed in the same facility as violent criminal immigrant detainees (but in different "pods"), resulting in more restrictive conditions than necessary.

Victims of Torture

Asylum seekers detained under Expedited Removal can include individuals who were victims of torture before arriving in the United States.⁶⁵ USCIRF has long expressed concern that penal detention conditions risk

USCIRF has long expressed concern that penal detention conditions risk re-traumatizing asylum seekers who experienced or fear persecution or torture and can lead them to prematurely terminate their asylum applications and return to their countries of origin, simply to get out of detention.

⁶⁴ See American Bar Association, *ABA Civil Immigration Detention Standards*, August 2014.

⁶⁵ According to Detention Watch Network, ICE detained more than 6,000 victims of torture between October 2010 and February 2013 as they sought asylum and 10,319 survivors of torture were granted asylum in the United States in fiscal year 2012.

USCIRF's detention center visits reinforced the concerns about detention staff's insufficient awareness of, or training on, the special needs and concerns of asylum seekers and/or torture victims.

re-traumatizing asylum seekers who experienced or fear persecution or torture and can lead them to prematurely terminate their asylum applications and return to their countries of origin, simply to get out of detention. Research also has shown that prolonged detention of torture victims can cause severe chronic emotional distress, including chronic anxiety and dread, dangerous and physically damaging levels of stress, depression and suicide, and post-traumatic stress disorder (PTSD).⁶⁶

Ideally, asylum seekers who were victims of torture with special medical needs would be identified through the RCA or the medical screening done by ICE on intake. Unfortunately, DHS' Office of Inspector General reported that ICE officers lack the necessary medical training to identify victims of torture, in addition to failing to provide privacy when asking the RCA special vulnerability questions.⁶⁷ Physicians for Human Rights has found that many asylum seekers and survivors of torture are overlooked, ignored, or inadequately treated because of ICE medical staff's high caseloads and because these detainees are generally unable or afraid to advocate for themselves.

USCIRF recommended in 2005 that ICE train detention center personnel to work with non-criminal, psychologically vulnerable asylum-seekers. In 2007, ICE and the DHS Office of Civil Rights and Civil Liberties jointly released a training module for detention officers on cultural awareness and concerns particular to asylum seekers. As part of the 2009 detention reforms, ICE now provides more specialized training to on-site detention monitors, including curricula on *At Risk Detainees in Detention* and on assistance on interacting with culturally- and religiously-diverse populations and victimized populations.

Unfortunately, USCIRF's detention center visits reinforced the concerns about detention staff's insufficient awareness of, or training on, the special needs and concerns of asylum seekers and/or torture victims. Cultural awareness training is mandatory only at ICE facilities, not at other facilities used by the agency. At only two detention centers did officers indicate to USCIRF that they had received what they viewed as specific training on identifying and interacting with victims of torture, but further questioning determined that this training only addressed cultural sensitivity issues. This continued lack of training and sensitivity is especially disappointing given ICE's other efforts to raise detention staff's awareness of other vulnerabilities, including a campaign to identify, treat, and raise awareness of victims of trafficking and sexual and gender-based violence while in ICE custody.

⁶⁶ Physicians for Human Rights, a non-governmental organization, reported in a 2003 study that among 70 detained asylum seekers interviewed, 77 percent reported clinically significant levels of anxiety, 85 percent depression, and 50 percent PTSD.

⁶⁷ Department of Homeland Security Office of the Inspector General, *U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)*, February 4, 2015, pg. 12.

Even more worrisome was the opinion expressed to USCIRF by several officers at immigrant detention facilities that “real” asylum seekers would not mind the conditions or length of detention, reflecting a lack of awareness of the psychological trauma that long-term detention can cause to vulnerable individuals.

Release of Asylum Seekers

As noted above, asylum seekers in Expedited Removal are subject to mandatory detention until an asylum officer determines that they have a credible fear of persecution. After that determination, asylum seekers who demonstrate that they are neither flight nor security risks may be released while their cases continue.⁶⁸ ICE has the legal authority and discretion to release such asylum seekers, and the release policies it applies depend on where the person entered the United States. Those who enter the United States at a port of entry are eligible for release under a 2009 parole guidance memo; those who enter between the ports of entry or are apprehended within 100 miles of the border can be released through bond, order of recognizance, notice to appear, order of supervision, or Alternatives to Detention (ATD)⁶⁹ programs.

In 2011, then-ICE Assistant Secretary John Morton issued multiple memoranda to all field office directors urging them to exercise prosecutorial discretion in immigration enforcement, including detention (see Appendix J). Because ICE does not have the bed space to detain all immigrants in removal proceedings, Morton’s March 2011 memorandum directed field offices to prioritize detention bed space for: aliens subject to mandatory detention or aliens who met other enforcement priorities; those who posed a risk to national security or public safety; recent illegal entrants; and fugitives. It also provided that ICE field office directors should not expend detention resources on individuals known to be suffering from serious physical or mental illness; who are disabled, elderly pregnant, or nursing; who demonstrate that they are primary caretakers of children or an infirm person; or whose detention was otherwise not in the public interest.⁷⁰ In June 2011, Morton clarified that victims of serious crimes or individuals likely to be granted relief from removal, including asylum seekers, should be positively reviewed in favor of release.⁷¹

⁶⁸ INA section 235.

⁶⁹ See *Alternatives to Detention* section

⁷⁰ John Morton, U.S. Immigration and Customs Enforcement, *MEMORANDUM: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, March 2, 2011.

⁷¹ John Morton, U.S. Immigration and Customs Enforcement, *MEMORANDUM: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, June 17, 2011.

Secretary Johnson further noted that those apprehended under Expedited Removal who “qualify for asylum or another form of relief under our laws . . . should not therefore be an enforcement priority.”

On November 20, 2014, DHS Secretary Jeh Johnson issued a new memorandum to all agencies responsible for Expedited Removal regarding prioritizing the removal and detention of undocumented immigrants, rescinding and overriding the 2011 Morton memorandum⁷² (see Appendix K). The memorandum urges the use of prosecutorial discretion to prioritize national security, border security, and public safety at all stages, including the earliest, of Expedited Removal and other civil immigration enforcement processes.⁷³ Listed under the Priority 1 category for apprehension, detention, and removal are: “aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States.”⁷⁴ However, Secretary Johnson further noted that those apprehended under Expedited Removal who “qualify for asylum or another form of relief under our laws . . . should not therefore be an enforcement priority.”⁷⁵

Parole

The 2005 Study found that ICE was not applying consistently nationwide its criteria for the parole of asylum seekers in Expedited Removal with positive credible fear determinations. For example, New Orleans released only 0.5 percent of asylum seekers, New Jersey released less than four percent, and New York, eight percent. Yet San Antonio released 94 percent of asylum seekers, Harlingen 98 percent, and Chicago 81 percent. To address this concern, USCIRF recommended that ICE codify its parole criteria into regulations and ensure consistent and correct parole decisions by developing standardized forms and national review procedures.

Instead, ICE issued a new parole directive in November 2007 (see Appendix L) that, in addition to the previous requirements of credible fear, community ties, and no security risk, required asylum seekers to apply for parole affirmatively and to prove that their release would have an undefined “public benefit.”⁷⁶ In December 2009, however, ICE again issued new parole guidelines for asylum seekers in Expedited Removal (see Appendix M). USCIRF welcomed the 2009 directive, noting that it was in line with the 2005 Study’s recommendations in favor of release and again urged that it be codified into regulations.

Under the 2009 directive, asylum seekers who enter the United States at ports of entry are automatically reviewed by ICE for parole eligibility

⁷²Jeh Charles Johnson, Department of Homeland Security, *MEMORANDUM: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, November 20, 2014.

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶ICE Policy Directive No. 7-1.0, “Parole of Arriving Aliens Found to Have a ‘Credible Fear’ of Persecution or Torture,” November 6, 2007.

after USCIS determines they have a credible fear of persecution or torture. ICE deportation officers affirmatively instruct asylum seekers found to have a credible fear that they will be interviewed for parole and that they have two weeks to submit supporting materials to establish identity and community ties (see Appendix N). ICE then must notify asylum seekers of parole decisions no more than seven days after the interview. The directive also requires that parole determinations are documented on a *Record of Determination/Parole Determination Worksheet* (see Appendix O), which are reviewed for quality assurance purposes, and that field offices maintain national and local parole determination statistics.⁷⁷

Deportation officers grant parole after verifying that the asylum seeker has established credible fear, identity, community ties, and that s/he is not a security risk.⁷⁸ If these four requirements are met, the officer must find “exceptional overriding factors” to deny parole. Parole denials require an explanation and must be signed by a field office director or deputy director, and can be appealed based upon changed circumstances or additional evidence.⁷⁹

ICE reports that, under the new guidelines, 1,786 credible fear applicants were released on parole in FY 2014. Some asylum seekers approved for parole remain in detention because they could not meet other requirements for release, such as a bond payment.

Positive parole determinations are routinely accompanied by a requirement to pay a bond prior to release to guarantee asylum seekers’ court appearances. ICE reports that the RCA provides recommended bond amounts based on the detainee’s answers to standardized questions, among other factors, and that an ICE officer may impose a greater or lesser amount. However, during USCIRF monitoring visits at ICE detention centers and in meetings with ICE officials and legal service providers, the RCA was not mentioned when questions were raised about how bond amounts were determined and there did not appear to be a uniform mechanism to determine such amounts. For instance, USCIRF heard of bond amounts ranging from \$1,500 minimum to \$7,000. When ICE officials were asked how a bond rate was determined, one detention supervisor said they give a blanket \$2,000 bond rate because “that is a number we are comfortable with from the INS days.” An ICE official at headquarters said bond rates are determined in different areas based on bed space – rates are lower

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⁷⁷ ICE Policy Directive No. 11002.1, “Parole of Arriving Aliens Found to Have a ‘Credible Fear’ of Persecution or Torture” December 8, 2009.

⁷⁸ ICE conducts security and criminal background checks utilizing biographical and biometric information, including fingerprint checks and biographical questioning that is checked against multiple databases.

⁷⁹ ICE Policy Directive No. 11002.1, “Parole of Arriving Aliens Found to Have a ‘Credible Fear’ of Persecution or Torture” December 8, 2009.

when there are fewer beds available since there is nowhere to detain the individual and vice versa.

Alternatives to Detention

As noted, the parole directive discussed above applies only to asylum seekers who arrive at a port of entry, a minority of the asylum seekers placed into Expedited Removal. Asylum seekers who do not arrive at a port of entry can be released through a bond,⁸⁰ order of recognizance,⁸¹ Notice to Appear (see Appendix P), order of supervision, or ATD programs.⁸²

In 2008, Congress directed ICE to develop a plan to implement ATD programs nationally. By the end of 2009, ATD programs operated in all 24 field offices. ATD programs include electronic monitoring, telephonic or in-person reporting requirements, and/or case management support and supervision services to ensure court appearances. ATDs have been proven to have high rates of compliance and are cost effective. In FY2016 through February 29, 2016, ATD programs yielded a 99.45 percent appearance rate and as of January 31, 2016, cost only \$4.45 per person, per day, according to ICE.

ICE's primary ATD program is the Intensive Supervision Appearance Program (ISAP) II, which involves either electronic monitoring only or electronic monitoring plus case management. The electronic monitoring component uses ankle bracelets enabled with Global Positioning Systems or voice recognition software for telephonic reporting. Case management services are provided by the contractor and include: encouraging participants to comply with immigration proceedings, obtaining travel documents, and planning for return to their country of origin; providing information on transportation, medical care, religious services, legal resources, and other community resources; scheduling unannounced visits to the participant's work and/or living address; scheduling participant visits to the contractor's office; and reporting to ICE any instances of program noncompliance.

When reviewing asylum seekers for possible placement in an ATD program or release after a positive credible fear determination, ICE officers are to consider their security and flight risks. However, it appears that electronic monitoring is being used extensively without full individualized assessments of whether an asylum seeker is a non-appearance risk. ICE's ATD electronic monitoring programs that require asylum seekers to wear ankle bracelets stigmatize asylum seekers as criminals.

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⁸⁰ According to ICE's most recent report on detained asylum seekers required by section 903 of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), 17,021 credible fear applicants were released on bond in FY2015.

⁸¹ According to the most recent HRIFA report, 1,971 credible fear applicants were released on orders of recognizance in FY2014.

⁸² At the time of USCIRF's 2005 Study, Expedited Removal was limited to ports of entry. As such, the 2005 report did not examine ICE's Alternatives to Detention programs.

In contrast to electronic monitoring, ICE also contracts with Lutheran Immigration and Refugee Services (LIRS) and Catholic Charities to operate small community-based supervision programs. These programs offer case management, legal, and social services to help asylum seekers better understand the ongoing legal requirements of their cases and prepare them to be contributing members of society. These programs also have high compliance rates, with 99.4 percent of participants appearing before court or removal proceedings, according to ICE.

RECOMMENDATIONS

To ICE

- As recommended in 2005, detain all adult asylum seekers who must be detained, whether before or after a credible fear determination, in civil facilities only.
- As recommended in 2005, ensure that staff at any facility where asylum seekers are detained are specially trained in dealing with vulnerable populations such as victims of persecution or torture.
- Require an individualized re-assessment of the need for custody for all detainees with a positive credible fear finding, not just for arriving aliens eligible for parole under the 2009 parole directive, and apply a presumption of bond for detainees found to have credible fear who do not fall under the parole directive.
- Codify the 2009 parole directive into regulations, and continue to document and monitor parole decisions to ensure that the directive's criteria are being properly applied.
- Create a national standardized bond calculation and worksheet to make individualized bond determinations.
- Increase the use of Alternatives to Detention, such as monitored release, for asylum seekers, beyond bond and parole opportunities.

One overriding impression from USCIRF's interviews of detained asylum seekers is their insufficient understanding of what is happening to them in the Expedited Removal process, and the fear, stress and uncertainty that this causes.

ACCESS TO INFORMATION AND COUNSEL

One overriding impression from USCIRF's interviews of detained asylum seekers is their insufficient understanding of what is happening to them in the Expedited Removal process, and the fear, stress and uncertainty that this causes.

Information Provided in CBP Custody

Non-citizens in CBP custody are provided little information about Expedited Removal and their rights within it. As previously discussed, CBP is required to read to all non-citizens in their custody a brief script from Form I-867A informing them of their right to raise a fear of return during their intake interview. Additionally, at the end of the interview, CBP is required to give to those who express a fear of return a Form M-444⁸³ (see Appendix Q), which explains the credible fear process,⁸⁴ and a list of *pro bono* legal providers.⁸⁵

However, these forms are not written in layperson's terms and sometimes are not provided in the non-citizen's native language. For example, at one port of entry USCIRF observed, Form M-444 was only available in English and Spanish; a French-speaking asylum seeker was given the English version and the OFO officer who was interpreting the interview read it to him in French. A detained asylum seeker from India USCIRF met at an ICE facility reported that the BP agents who interviewed him "did not explain the process and they did not give [him] any papers in Bengali." USCIRF met with many detained asylum seekers who similarly reported that despite having been given forms, they did not understand what was going to happen to them when they left CBP custody. In fact, some still did not understand the process, even after having had credible fear interviews and, in some cases, immigration court appearances.

Information Provided in ICE Custody

Once asylum seekers are in ICE custody, they can attend Know Your Rights presentations and, at some facilities, participate in a Legal Orientation Program (LOP).⁸⁶ The Know Your Rights program includes a video that is shown on televisions in ICE facilities, including in the intake area, NGO-conducted orientation sessions, and an information packet,

⁸³The M-444 is provided in one of 12 languages and also may be translated verbally by the interpreter. The M-444 explains the credible fear process and that the asylum seeker has the right to consult with someone before the interview and/or have a consultant present at the interview.

⁸⁴At Otay Mesa Port of Entry, USCIRF was told that they show a video that explains the M-444 form, although USCIRF did not see the video. This seems to be a unique practice.

⁸⁵In addition, Salvadorans receive a court-ordered *Orantes* form that also advises them of the right to apply for asylum and asks about fear.

⁸⁶See *Legal Orientation Program* section.

which are available in multiple languages. Even so, some asylum seekers with whom USCIRF met did not recall seeing the video or attending NGO sessions. In a positive practice, Broward Transitional Center and T. Don Hutto Residential Center hold regular town-hall meetings with detainees to highlight detainee rights and facility rules. ICE officials also told USCIRF that they are working with the ABA on a written guide to the Know Your Rights video that would help reinforce its information.

A particular concern is that released asylum seekers lack a real understanding of their responsibilities and the next steps in their asylum cases. As USCIRF observed, upon release asylum seekers receive a large packet of documents in English explaining the immigration process and the terms of their release. However, most asylum seekers do not understand the contents of these documents because of language or education barriers. As one pro bono attorney explained to USCIRF, an outgoing orientation is needed because without it the system “sets [asylum seekers] up for failure.”

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Information Provided by USCIS

USCIS asylum offices also provide information about the credible fear process to asylum seekers during the interview as required by regulations and procedures. At the interview, the asylum officer asks if the asylum seeker received the M-444 and list of legal service providers and understands the credible fear process. If the asylum seeker does not understand the process, the asylum officer explains it to him or her. If the asylum seeker has not received the M-444 or legal service provider list, it is provided at that time. At the interview, the asylum officer also determines whether the asylum seeker has a consultant whom he or she wishes to have present. During the interview, the asylum officer reads two standard paragraphs explaining the purpose and importance of the interview and what will happen after the interview.

The Legal Orientation Program

To help increase detainees’ access to legal information and representation, EOIR administers the LOP, which is carried out in partnership with NGOs. At the time of the 2005 Study, the LOP operated in only seven detention facilities, and one of the Study’s recommendations was to expand it. The LOP program is now at 26 sites and its materials are available in all facilities. Nevertheless, the full program still does not reach all of ICE’s facilities and detainees.

The LOP includes a comprehensive presentation about immigration court procedures and basic legal information. Presentations are done in group settings and in some programs are followed up with one-on-one sessions about individual cases and referrals for pro bono representation. Asylum seekers receive formal notice of the program only after they have

The rural locations of many of the facilities where asylum seekers are detained continue to make it very difficult, as a practical matter, for individuals to obtain legal advice. Lack of counsel not only disadvantages detainees but also burdens the system, since unrepresented cases are more difficult and time consuming for adjudicators to decide.

passed their credible fear interview and their case has been referred to an immigration judge. Many USCIRF interlocutors, including USCIS asylum officers, favored expanding the LOP program so that detainees could participate before their credible fear interviews. Some detention facilities provide the LOP-operating NGOs a list of new arrivals, in addition to the normal LOP practice of compiling lists from the immigration court docket. This is a good practice that increases the likelihood of an asylum seeker receiving at least some legal information before his or her credible fear interview. USCIRF found during its detention center visits that a number of detained asylum seekers were unfamiliar with the LOP, including ones who had passed their credible fear interviews.

LOP presentations and individual sessions have proven effective in helping detainees make more informed decisions, increasing their likelihood of representation, clearing the immigration court docket of meritless cases, and speeding case adjudications, resulting in fewer court hearings and shorter detentions. A 2012 DOJ internal review of the LOP found that between fiscal years 2009-2011, the immigration proceedings for ICE detainees who participated in the LOP were completed an average of 12 days faster than those who did not participate, and ICE saved on average roughly \$677 in detention costs for each LOP participant.⁸⁷ The review also found that LOP participants receive fewer in *absentia* removal orders, and that ICE detention center staff reported that providing access to legal information through the LOP improves detention conditions and reduces behavior problems.

ICE officials told USCIRF that, in addition to the self-help legal materials currently available at facilities, the agency is looking to increase access to Lexis/Nexis and other legal services, and that they would welcome expanded availability of the LOP and other legal rights presentations.

Access to Counsel

In the 2005 Study, USCIRF found that one in four asylum seekers represented by *pro bono* attorneys were granted asylum, compared to only one in 40 unrepresented asylum seekers. In 2008, the U.S. Government Accountability Office also found that having an attorney more than doubled an asylum seeker's chance of being granted asylum.⁸⁸

Representation rates often are linked to detention facility locations, with asylum seekers detained in or near metropolitan areas having higher rates of legal representation than those detained in rural areas. The rural locations of many of the facilities where asylum seekers are detained continue to make

⁸⁷U.S. Department of Justice, *Cost Savings Analysis - The EOIR Legal Orientation Program*, April 4, 2012, pg. 2-3.

⁸⁸U.S. Asylum System Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges, Government Accountability Office, September 2008, pg. 30.

it very difficult, as a practical matter, for individuals to obtain legal advice. Of the detention facilities USCIRF visited, most were in remote areas, with the exception of Broward Transitional Center and Delaney Hall Detention Facility, which are close to Miami and Newark/New York City, respectively.

Very few of the detained asylum seekers with whom USCIRF met when visiting facilities were represented by counsel, and many complained that they did not understand the complex immigration law and process. Lack of counsel not only disadvantages detainees but also burdens the system, since unrepresented cases are more difficult and time consuming for adjudicators to decide.

Access to counsel extends beyond asylum seekers hiring counsel; asylum seekers and their attorneys must be able to communicate. USCIRF and others have observed that this may be difficult while asylum seekers are in ICE custody. Immigration attorneys reported to USCIRF that ICE or detention center personnel restricted lawyers' access, failed to provide any information regarding an attorney's detained client unless the attorney had an original signed Form G-28 on file, changed the rules regarding access, and imposed restrictions on office supplies that could be brought into the detention facilities. They also said that some ICE officers discouraged detainees from seeking legal representation.

RECOMMENDATIONS

To CBP

- In consultation with stakeholders, develop a document, drawing from the resources of the Know Your Rights and LOP programs, that briefly and clearly explains the Expedited Removal process, its consequences, the right to seek protection for those who fear return, and the right to request a private interview, and provide this document to all individuals, in a language they understand, as soon as possible when they come into OFO or BP custody.

To ICE

- Expand the Know Your Rights presentations to all facilities that house asylum seekers.
- Ensure that all detainees receive a Know Your Rights presentation in person as soon as possible after their arrival at the facility and, in the case of those in the credible fear process, before their credible fear interviews.

To EOIR

- Expand the LOP to all detention facilities housing asylum seekers, and provide it to detainees before their credible fear interviews.

To Congress

- Increase funding to EOIR to expand the LOP to all facilities housing asylum seekers and to enable legal orientation to be provided to detained asylum seekers before their credible fear interviews.

One solution to reduce the immigration courts' caseload and backlog is to allow asylum officers to adjudicate defensive asylum claims, as USCIRF recommended in the 2005 Study.

ADJUDICATION OF ASYLUM CLAIMS

After USCIS asylum officers find a credible fear of persecution or torture, asylum seekers in Expedited Removal file for asylum and present the merits of their cases to EOIR immigration judges. Hearings are conducted in an adversarial setting against a DHS trial attorney. In 2005, USCIRF found that whether or not an asylum seeker is granted asylum depends largely on chance, namely, the immigration judge who is assigned to hear the case and if the asylum seeker has counsel.

Like the other agencies responsible for Expedited Removal, EOIR has had difficulty keeping up with the expansion of Expedited Removal and increased number of persons claiming fear. Between fiscal years 2009 and 2013, EOIR's total caseload pending adjudication grew by 56 percent, from 229,000 to 358,000. By the end of August 2014, that number had grown to 450,000. To address this backlog, EOIR in 2015 requested an additional \$22.6 million in new resources to, among other things, hire an additional 35 immigration judges and expand the LOP.⁸⁹

The remote locations of most detention facilities and a shortage of immigration judges has increased EOIR's use of video teleconference (VTC) for hearings, including merits hearings. The Justice Department reports that as of October 2011, 58 of the 59 immigration courts had at least one VTC unit.⁹⁰ VTC use raises fair-hearing and effective-representation concerns. With the judge and lawyers in one place and the asylum seeker in another, translation accuracy, credibility assessments and lawyer-client consultations are made more difficult. VTC proponents, however, argue that it can increase legal representation and speed case adjudications.

One solution to reduce the immigration courts' caseload and backlog is to allow asylum officers to adjudicate defensive asylum claims, as USCIRF recommended in the 2005 Study. Asylum officers have the legal background and training to adjudicate asylum claims, and do so for affirmative asylum cases. Further, having an asylum officer review a credible fear claim and then having an immigration judge review an asylum claim creates significant redundancy without necessarily adding value.

DHS' 2007 official response to the 2005 Study said that allowing asylum officers to grant asylum after the credible fear interview could deprive applicants of the time and resources to develop a well-documented asylum claim or obtain legal counsel to assist them. DHS also said it would have to hire additional asylum officers to conduct asylum adjudications, and applicants would have to be detained longer while the identity and security

⁸⁹ U.S. Department of Justice, *U.S. Department of Justice FY 2015 Budget Request Fact Sheet*, August 3, 2014.

⁹⁰ Lenni B. Benson & Russell R. Wheeler, *Administrative Conference of the United States: Enhancing Quality and Timeliness of Immigration Removal Adjudication*, July 7, 2012, pg. 89-90.

check requirements were completed. During interviews in 2014 and 2015 some asylum officers noted that the credible fear interview is intended to be a screening and that their role is not to dig in deeply. They also said that many asylum seekers do not have sufficient documentation at the credible fear interview stage to support a grant of asylum.

However, applicants could still be released upon a finding of credible fear, even if the asylum officer had to defer some aspects of the adjudication for later completion. Moreover, as with the affirmative asylum system, decisions in cases that the asylum officer cannot grant due to complications relating to the asylum claim itself should be referred to an immigration judge.

RECOMMENDATIONS

To USCIS

- As recommended in 2005, allow asylum officers to convert and adjudicate appropriate Expedited Removal cases in which credible fear is found as affirmative asylum cases, in order to ease the burden on the immigration courts and speed the adjudication of strong cases.

To Congress

- Increase funding for the adjudicatory aspects of Expedited Removal, which has not kept pace with the funding for enforcement and detention, to enable USCIS and EOIR to address backlogs, conduct timely adjudications, and provide due process.

The DHS OIG recently found that BP's practices on criminal referrals for individuals who express a fear of return are inconsistent and, in some cases, problematic. As the OIG report noted, "refer[ring for prosecution] aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968."

PROSECUTION OF ASYLUM SEEKERS

Among its enforcement options, BP has the authority to refer apprehended non-citizens to DOJ for criminal prosecution for illegal entry or illegal re-entry. The DHS OIG recently found that BP's practices on criminal referrals for individuals who express a fear of return are inconsistent and, in some cases, problematic. In some locations, individuals who claim fear are routinely referred for prosecution, and do not undergo the USCIS credible or reasonable fear determination process until after they have been prosecuted and, if convicted, serve their time.⁹¹ As the OIG report noted, "refer[ring for prosecution] aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968."⁹²

Officials at BP headquarters told USCIRF that the agency was working on internal guidance on this issue, as recommended in the OIG report.⁹³ Nonetheless, they insisted on the importance of retaining the ability to prosecute fear claimants, saying "if we were to forego prosecuting those who claim credible fear, that would spread like wildfire." They stated that the intent is to impose a consequence so that people do not illegally return to the United States, not to prosecute asylum seekers. Finally, BP headquarters officials noted that criminal prosecutions are subject to a Federal Rule of Criminal Procedure requirement to present the case to a magistrate judge within 48 hours of a decision to prosecute, which does not allow enough time for a USCIS credible fear interview.

RECOMMENDATION

To DHS and DOJ

- CBP, USCIS, and DOJ should work together to develop procedures to allow USCIS to conduct credible fear assessments for non-citizens being referred for prosecution who express fear before DOJ pursues their criminal cases.

⁹¹ BP supervisors at McAllen Station acknowledged to USCIRF that this is the process they practice.

⁹² DHS Office of Inspector General, *Streamline: Measuring its Effect on Illegal Border Crossing* (2015), p. 16.

⁹³ The OIG recommended that BP develop and implement in all sectors consistent guidance on this question. In response, BP concurred in this recommendation, stating that it recognized "that detainees need to have the appropriate avenue to make claims pertaining to credible fear" and noting that the BP Chief recently had "sent a guidance memorandum and muster modules to the field to emphasize and further address credible fear determinations in expedited removal cases." *Id.*, pg. 17. These, however, are the problematic musters discussed in the *Interviewer Training and Guidance* section.

THE 2014 SURGE

In the spring and summer of 2014, a surge of Central Americans, many of whom were female-headed households, illegally entered the United States (referred to as the Surge). Adults and family units were placed in the Expedited Removal process. In FY2014, CBP apprehended 68,684 family units, a 356 percent increase over FY2013 numbers.⁹⁴ DHS responded aggressively to this spike, and by September the number of unaccompanied children and family units crossing into South Texas were at their lowest levels in almost two years. Of all of CBP's apprehensions in FY2014, 66,638 were from El Salvador, 81,116 were from Guatemala, and 91,475 were from Honduras.⁹⁵

In response to the 2014 Surge, the Obama Administration increased the use of detention as a deterrent.⁹⁶ In June 2014, the President declared the Surge a “humanitarian situation” and announced a series of U.S. government responses, including deterrence actions, enforcement initiatives, foreign cooperation, and increased capacity to detain, care for and transport unaccompanied children. Key among the deterrence actions was “increased detainment and removal of adults with children and increased immigration court capacity to speed cases.”⁹⁷ In July 2014, DHS Secretary Jeh Johnson stated, “DHS is looking to increase our capacity to hold and expedite the removal of the increasing number of adults with children illegally crossing the Southwest border. Doing so will help ensure more timely and effective removals, and deter others from taking the dangerous journey and illegally crossing into the United States.”⁹⁸

In the summer of 2015, the Administration discontinued using general deterrence of illegal immigration as a factor in custody determinations for families and reformed its detention policy in response to a series of lawsuits and complaints about the detention conditions of women and their children.

DHS agencies involved in Expedited Removal also surged their staff and increased their use of technology to process fear claims more quickly. For example, in FY2014, USCIS hired an additional 100 asylum officers in the spring and summer, used former asylum officers working elsewhere

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⁹⁴ Department of Homeland Security, *CBP Border Security Report Fiscal Year 2014*, December 19, 2014, pg. 1

⁹⁵ *Id.*

⁹⁶ The White House, *FACT SHEET: Emergency Supplemental Request to Address Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border*, July 8, 2014.

⁹⁷ *Id.*

⁹⁸ Department of Homeland Security, *Statement by Secretary Jeh Johnson Before the House Committee on Homeland Security*, June 24, 2014.

at DHS on a temporary duty basis to assist with credible fear screenings, and redirected the work of asylum officers nationwide. In the summer and fall of 2014, USCIRF met with USCIS staff at the Los Angeles, New York, Newark, and Houston asylum offices, all of which were conducting credible fear interviews of asylum seekers who entered the United States in the Rio Grande Valley sector.

Conditions in CBP Custody

The 2014 Surge strained the capacity of CBP facilities, particularly in Texas' Rio Grande Valley, the area where most Central Americans arrived. McAllen Station agents reported that during the summer of 2014 it was receiving 300-350 family units and 400-450 unaccompanied children per day. The children and families received the most media attention, but the numbers of single adults also surpassed previous years.

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Ports of entry and border patrol stations are too small and are not designed or equipped to house large numbers of people for long periods, but had to do so in 2014 when the numbers of families and children overwhelmed the detention capacities of ICE and the Department of Health and Service's Office of Refugee Resettlement (ORR).⁹⁹ As a result, CBP had to adapt by keeping increased supplies on hand (such as snacks, drinks, blankets, diapers, clothing, and toiletries) and contracting for food service. Officers and agents themselves generously contributed toys and other supplies for children, such as car seats.

McAllen BP Station's capacity to house women and children for longer timeframes improved when they opened a new facility nearby, called the Ursula facility, which can hold up to 1,000 people. BP also now has medical contractors on site at both McAllen Station and the Ursula facility. However, while the Ursula facility is larger than a BP station and provides showers and hot meals, it is not equivalent to a long-term detention facility, nor is it meant to be. The caged "pods," which can hold 250 people each, are made of chain-link fence and have benches, mats, and televisions. The toilets are porta-potties. The lights stay on 24 hours a day. McAllen BP agents told USCIRF in February 2015 that most detainees spend about 24 hours at Ursula, but in the summer of 2014 some children were there for up to 20 days because ORR was unable to take them.

Adult detainees USCIRF interviewed at ICE facilities who were apprehended in the Rio Grande Valley during the 2014 Surge spoke of being held for up to nine days in cold, overcrowded BP facilities, which they often referred to as "ice boxes." They had to sleep on the floor, the food was poor, and they were unable to bathe or clean themselves. Many said they

⁹⁹ ORR is the U.S. government agency responsible for the care and custody of unaccompanied non-citizen children.

were poorly treated, including some saying they were “treated like dogs.” Others said that when they complained about the cold temperatures, BP agents would make it even colder. Others said that BP agents kicked people sleeping on the floor to wake them up.

Detention as a Deterrent

In keeping with the Administration’s detention policy discussed above, Central American asylum seekers determined to have a credible fear were either denied the opportunity to be released through a bond or an ATD, or were offered prohibitively high bond rates. USCIRF heard from several NGOs and legal service providers of bond rates as high as \$7,500, much higher than the statutory minimum of \$1,500. ICE officials at Broward Transitional Center, which detains many Central American asylum seekers, told USCIRF that they received “instructions from headquarters that all persons who illegally entered the United States in the Rio Grande Valley sector were not to be released.”

The use of detention as a deterrent is counter to both international refugee law and the administrative purposes of immigration detention. DHS Special Advisor on Immigration and Customs Enforcement and Detention and Removal Dr. Schriro reaffirmed those administrative purposes in her 2009 report.

Detention of Women and Children

Prior to the 2014 Surge, ICE operated only one detention center to house families,¹⁰⁰ Berks Family Shelter in Bucks County, Pennsylvania, with a maximum of 100 beds.¹⁰¹ The Surge of asylum-seeking families in 2014 left ICE without the bed space to house the thousands of new detainees subject to Expedited Removal, many of whom claimed fear of return. In response, ICE pursued two strategies: (1) it opened new family detention facilities, increasing its capacity to detain women and children from 100 beds to currently almost 3,100 beds; and (2) if its family detention center beds were full, it released the women and children under a Notice to Appear to check in with an ICE field office and present their case before an immigration judge.

In June 2014, ICE started detaining women and children at the Federal Law Enforcement Training Center in Artesia, New Mexico. On August 1, 2014, it transitioned the Karnes County Civil Detention Center in Karnes, Texas to a family detention facility (renamed the Karnes County Residential

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¹⁰⁰ICE defines a family as an adult parent or legal guardian accompanied by a person under 18 years of age.

¹⁰¹In 2009, ICE closed its other family detention center, T. Don Hutto Residential Center, in response to complaints that it was not an acceptable facility to house children.

Despite the positive application of adult civil detention standards at Dilley and Karnes, USCIRF's position is that both present an institutional and jail-like setting inappropriate for children and counter to the U.S. government's own standards for child detention as defined in a 1997 legal settlement known as the Flores Agreement. The Flores Agreement requires ICE and DHS to hold children in their custody in the least restrictive setting, in non-secure facilities licensed to care for dependent, not delinquent, minors.

Center). Previously, Artesia was a CBP training facility and Karnes was an all-male immigrant civil detention facility. In November 2014, ICE closed Artesia. One month later, the agency opened a brand new facility, the South Texas Family Residential Center, in Dilley, Texas. Altogether, ICE now has almost 3,100 dedicated family detention beds. The South Texas Family Residential Center is ICE's largest detention center, with 2,400 beds on a 55-acre site.

ICE detains only female-headed households at Dilley and Karnes; husbands are detained separately at a different ICE detention facility. Male-headed households may be detained at Berks or released under a Notice to Appear.

Detention Conditions

USCIRF inspected the Berks, Dilley, and Karnes family detention centers (see Appendix R). All three facilities have some of the best practices of adult civil detention centers, including freedom of movement, the wearing of street or non-institutional clothes, private housing units holding only a few families at one time, private toilets and showers, and extended recreation time. USCIRF observed classrooms, daycare areas, and playgrounds at Dilley and Karnes that seek to address the educational and recreational needs of children detained at the facilities.

Nevertheless, despite the positive application of adult civil detention standards at Dilley and Karnes, USCIRF's position is that both present an institutional and jail-like setting inappropriate for children and counter to the U.S. government's own standards for child detention as defined in a 1997 legal settlement known as the *Flores* Agreement.¹⁰² Both are secure facilities that look like prison or jail complexes, with hardened perimeters secured with fencing, razor wire, and/or barbed wire/concertina coils, and multiple locked external doors. Internally, the women's and children's freedom of movement is restricted by locked doors and prohibitions on accessing some areas, as well as set schedules. Headcounts are another measure of internal security. In USCIRF's view, these conditions create a prison-like environment contrary to the *Flores* Agreement, which requires ICE and DHS to hold children in their custody in the least restrictive setting, in non-secure facilities licensed to care for dependent, not delinquent, minors.

The conditions at Dilley and Karnes differ significantly from those observed at the Berks County Residential Center, a nursing home facility that was transitioned into an ICE family detention center. The Berks facility does not have a hardened perimeter fence, and residents are permitted to walk the grounds outside of the facility and to go on field trips. Residents

¹⁰²DHS's position is that the *Flores* Agreement does not extend to accompanied minors, and that even assuming that *Flores* does extend to accompanied children, DHS's detention conditions are consistent with its legal obligations.

also have full freedom of movement within the facility and self-scheduling during daylight hours.

Court Orders to End Family Detention

In February 2015, DHS was sued for violating the terms of the 1997 *Flores* Agreement. On July 24, 2015, the U.S. District Court for the Central District of California ruled that the current detention of immigrant children and their mothers violated that agreement. In her ruling, Judge Dolly Gee said ICE's policy of blanket detention of all families with children in the current family detention centers does not comply with *Flores*' prohibition on holding a child (except in rare, dangerous cases) in a secure facility (meaning a facility from which they are not free to leave), or in a facility that is not licensed for the care of dependent children.¹⁰³ Judge Gee ordered the U.S. government to release children with their parent unless the parent poses a significant flight risk or public safety threat that cannot be mitigated by alternatives to detention, including bond and orders of supervision.¹⁰⁴ In a subsequent August 21, 2015 order, Judge Gee clarified her ruling to provide that, in the case of an "influx of minors into the United States," the *Flores* Agreement provides DHS with "some flexibility" on the timing for release, "so long as the minor is placed with an authorized adult or in a non-secure licensed facility . . . 'as expeditiously as possible.'" At the time of this writing, the U.S. government has appealed the decisions to the U.S. Court of Appeals for the Ninth Circuit.

Similarly, on February 20, 2015 the U.S. District Court for the District of Columbia in another case, *RILR v. Johnson*, issued a preliminary injunction that put an immediate halt to the government's policy of detaining families solely for deterrence purposes.¹⁰⁵ The injunction was subsequently dissolved, but the court can reinstate it.

Detention Conditions' Impact on Mothers and Children

Of particular concern is the impact of detention on mothers' and children's mental and physical health. Detaining women and children can cause or exacerbate trauma. During USCIRF's inspections of the Dilley and Karnes family detention centers, service providers reported that some children experienced depression, post-traumatic stress disorder, bed wetting, loss of appetite, weight loss, developmental regressions, anxiety, and social withdrawal. Family detention also negatively impacts mothers' mental health, many of whom are reported to suffer from post-traumatic stress

Judge Dolly Gee said ICE's policy of blanket detention of all families with children in the current family detention centers does not comply with Flores.

¹⁰³ U.S. District Court Central District of California, *Jenny L. Flores, et al v. Jeh Johnson, et al*, July 24, 2015.

¹⁰⁴ *Id.*

¹⁰⁵ U.S. District Court for the District of Columbia, *RILR v. Johnson*, February 20, 2015.

disorder resulting from the trauma they experienced in their home countries and/or along the journey to the United States. Detention also restricts mothers' ability to parent, make decisions for, and provide routines for their children.

In June 2015, the American Immigration Lawyers Association, Women's Refugee Commission, and American Immigration Council filed a complaint with DHS' Office of Civil Rights and Civil Liberties detailing the detrimental impact of detention on detained women and children and asking the Office to investigate the psychological and physiological impact of family detention on children and mothers. At the time of this writing, the investigation is ongoing.

Release of Women and Children

As noted above, ICE has released many asylum-seeking Central American women and children under Notices to Appear solely due to lack of bed space, not on individualized custody and supervision assessments. USCIRF observed this practice in McAllen, Texas. The McAllen Border Patrol station keeps an updated list of bed space at all three ICE family detention facilities. If there are no family beds available, BP releases the women and children with bus tickets and Notices to Appear, telling them to check in at an ICE office and initiate their cases before an immigration judge at their final destination. Release orders and instructions are in English and presented to the women without a full explanation.

USCIRF met with volunteers of the McAllen, Texas Catholic Charities who support the released women and children after they are discharged and before they leave McAllen. Catholic Charities started working with the women and children in June 2014, after learning that they were being dropped off at the bus station and left to wait there for their buses. Under the current procedure, the women and children are taken to a Catholic Charities facility, where they are provided with showers, meals, and changes of clothes and then taken to the bus station closer to their departure times. During the summer of 2014, Catholic Charities provided these services for up to 2,400 women and children daily; at the time of USCIRF's visit in February 2015, it was 300 per day. The volunteers said that the released mothers were scared and did not understand the process. To attempt to address this, volunteer lawyers come to the charity to explain to as many women as possible the release orders and instructions and answer their questions.

2015 Reforms

In May 2015, in response to criticism of family detention, ICE Director Sarah Saldaña announced a series of reforms, stating that DHS would: (1) implement a review process for cases of families detained more than 90 days to determine the necessity of continued custody; (2) end the

invocation of general deterrence as a factor in custody determinations in all cases involving families; (3) appoint an expert Federal Advisory Committee to advise ICE on family detention centers; (4) designate a senior ICE official to coordinate and review family detention facility policies and engage with stakeholders; and (5) increase efforts to monitor the conditions at these centers and to ensure that detained families have access to counsel, social workers, educational services, and comprehensive medical care.¹⁰⁶

A month later, Secretary Johnson announced additional reforms, stating that DHS would: (1) offer release through a bond or other mechanism to asylum-seeking families determined by USCIS to have credible fear; (2) use newly-established criteria to offer bond “at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety,” and (3) have asylum officers conduct credible fear and reasonable fear interviews within a reasonable timeframe.¹⁰⁷

USCIRF’s visits to Dilley and Karnes followed the announced reforms. USCIRF was told that women and children were being released pursuant to the new policy, but that release decisions were not transparent or organized. However, USCIRF also was told by legal assistance providers at the detention facilities that more women and children were being detained at the facilities. USCIRF also was told that the women who were being released by ICE typically were being put in an electronic monitoring ATD program rather than receiving a bond, and then successfully appealing ICE’s release decision to immigration judges, who ruled that they should be released through a bond.

Problems Adjudicating Fear Claims of Mothers and Children

Adjudicating fear claims of mothers and children from Central America present unique problems. Asylum officers told USCIRF that these claims usually were related to gang violence, extortion, and domestic violence, and that many of the mothers are found to have a credible fear of persecution or torture.

However, legal assistance providers and other NGOs also told USCIRF that, in their view, some Central American mothers have been erroneously found not to have a credible fear of persecution or torture. They argue that when asylum officers have had to interview mothers with their child or children present, the women may have withheld information about their

Adjudicating fear claims of mothers and children from Central America present unique problems.

¹⁰⁶ U.S. Immigration and Customs Enforcement, *ICE Announces Enhanced Oversight for Family Residential Centers*, May 13, 2015

¹⁰⁷ Department of Homeland Security, *Statement by Secretary Jeh C. Johnson on Family Residential Centers*, June 24, 2015

fear claim because they were uncomfortable giving details in front of their children or feared upsetting them. To address this problem, USCIS told USCIRF that sometimes one asylum officer would watch the children as another asylum officer conducted the credible fear interview, and/or the asylum officer would ask a mother prior to the start of the credible fear interview if she would like to be interviewed in front of her children or separately.

Another complication is that children may have a separate fear claim from that of the parent. The First, Second, Sixth, Seventh, and Ninth Circuits have recognized that children’s asylum claims should be treated differently from adult claims. These circuits have held that (1) a reduced threshold for persecution applies to children’s cases, (2) objective evidence can establish a child’s well-founded fear of persecution, and (3) persecution of a child’s family member must be considered in evaluating whether the child suffered persecution. Positively, current USCIS practice is that if the mother does not establish credible fear of persecution or torture, the asylum officer will, with the mother’s permission, interview her children to assess whether there may be other claims. All USCIS asylum officers are trained to interview children.

BP agents at McAllen with whom USCIRF met explained that the approach helps combat overcrowding and also “addresses the issue of coaching” since the individuals do not have contact with other ICE detainees and do not receive the Know Your Rights program.

The Honduran and Guatemalan Pilot Initiatives

Another DHS response to the Surge is a CBP/ICE effort known as “HPI” and “GPI,” for the Honduran and Guatemalan Pilot Initiatives, which USCIRF learned about on a visit to McAllen, Texas. After being processed at McAllen Station, Hondurans and Guatemalans who do not claim fear are not immediately turned over to ICE for detention. Instead, they are taken to BP’s Harlingen Station for “staging” and interviews by representatives of their consulates. They remain in BP custody for four or five days and are then are turned over to ICE for a day and removed, as compared to otherwise being in ICE custody for around 30 days. USCIRF was told that HPI and GPI are being used in the Rio Grande Valley, Laredo, and El Paso BP sectors, and being considered by Tucson. BP agents at McAllen with whom USCIRF met explained that the approach helps combat overcrowding and also “addresses the issue of coaching” since the individuals do not have contact with other ICE detainees and do not receive the Know Your Rights program. Although the agents stated that these individuals can still claim fear at any time up to removal, and, if one did so, s/he would be turned over to ICE and then USCIS, an effect of preventing individuals from learning about the right to seek asylum is troubling. DHS headquarters, however, disputed the BP agents’ characterization and described the pilots as a tool to efficiently effectuate removals and reduce time in custody.

RECOMMENDATIONS

To ICE:

- If families are placed in Expedited Removal, detain them only in facilities that meet the standards of the *Flores* Agreement and individually re-assess the need for custody after credible fear has been found, with a presumption of release.
- Ensure that programs that detain nationals of particular countries separately do not have the effect of preventing them from accessing Know Your Rights presentations and the LOP.

To USCIS:

- Continue the good practices of interviewing parents and children separately and assessing the child's/children's potential claims if the parent does not have a credible fear.

GLOSSARY OF TERMS

Asylum – The legal protective status accorded within the United States to non-citizens who meet the refugee definition found in section 101(a)(42) of the Immigration and Nationality Act (INA). (See “Refugee Definition”).

Affirmative Asylum is the process in which non-citizens in the United States may voluntarily present themselves to ask for asylum through a non-adversarial interview with an asylum officer. An applicant who does not convince an asylum officer that s/he meets the refugee definition is referred to an immigration judge. The immigration judge then decides the asylum claim *de novo* but, if the claim is denied and no other relief is available, will enter a removal order against the alien. All proceedings before an immigration judge are adversarial, meaning the asylum seeker will face a Department of Homeland Security (DHS) trial attorney who usually opposes the grant of asylum, but the asylum seeker may also be represented by counsel (at no expense to the government).

Defensive Asylum is the process by which a non-citizen who is in removal proceedings (also commonly referred to as deportation proceedings) may seek asylum in an adversarial hearing before an immigration judge. Under the regulations, non-citizens in Expedited Removal only have access to the defensive asylum process.

Arriving Alien – A non-citizen coming or attempting to come into the United States at a port of entry, seeking transit through the United States at a port of entry, or interdicted in international or U.S. waters and brought into the United States by any means, whether or not to a designated port of entry, and regardless of the means of transport. 8 CFR 1.1(q).

Asylum Officer – A U.S. Citizenship and Immigration Services (USCIS) employee who determines whether non-citizens placed in Expedited Removal have a credible fear of persecution or torture. A finding of credible fear entitles the non-citizen to see an immigration judge to prove that s/he is entitled to a full grant of asylum. Asylum officers are specialists with training on relevant U.S. and international legal standards and non-adversarial interview techniques and are required by law to have access to information about the conditions in asylum seekers’ countries of origin to make well-informed credible fear determinations. Asylum officers also review affirmative asylum cases.

ATD (Alternatives to Detention) – A program operated by the U.S. Immigration and Customs Enforcement (ICE) agency that provides non-citizens whose detention is not required by statute an appropriate level of supervision during removal proceedings to ensure compliance. ATD programs include electronic monitoring, telephonic or in-person reporting requirements, and/or case management support and supervision services to ensure court appearances.

BIA (Board of Immigration Appeals) – This is the administrative body, part of the Executive Office for Immigration Review (EOIR), which decides appeals from decisions by immigration judges. EOIR and the BIA are in the Department of Justice (DOJ).

Bond – The amount paid by a non-citizen released by the Immigration and Customs Enforcement agency under parole or an Alternatives to Detention (ATD) program during removal proceedings to ensure compliance.

BP (Border Patrol) – The Border Patrol guards the flow of legal immigration and goods to stem the illegal entry of non-citizens and contraband into the United States across the Mexican and Canadian international land borders, as well as through the coastal waters surrounding the Florida Peninsula and the island of Puerto Rico. BP agents interview non-citizens who unlawfully crossed the border and are apprehended within the United States.

CBP (Customs and Border Protection) – CBP, established on March 1, 2003, is an arm of the Department of Homeland Security. It contains the Office of Field Operations (OFO) and Border Patrol (BP). OFO and BP officials initiate Expedited Removal proceedings, and have unreviewable authority to decide whether the non-citizen may see an asylum officer for a credible fear determination before being removed.

Credible Fear – A legal standard implemented as part of Expedited Removal Proceedings in March 1997 under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Once an arriving alien is placed in Expedited Removal, s/he can only see an immigration judge to make an application for asylum or protection under the Convention Against Torture if an Office of Field Operations (OFO) or Border Patrol (BP) official refers him or her for a credible fear interview, and if the U.S. Citizenship and Immigration Services (USCIS) asylum officer conducting the interview decides the applicant has a credible fear of persecution or torture in the country of origin. As implemented, credible fear is a low threshold to establish. The term “credible fear of persecution” means that there is “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum. . .” Immigration and Nationality Act (INA) section 235(b)(1)(B)(v).

DHS (Department of Homeland Security) – Created by an act of Congress on March 1, 2003, DHS absorbed more than 20 agencies, including the former Immigration and Naturalization Service (INS), and dispersed INS’s immigration responsibilities into various bureaus. The bureaus of U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) are responsible for executing Expedited Removal Proceedings.

EOIR (Executive Office for Immigration Review) – EOIR is within the Department of Justice (DOJ) and houses immigration judges as well as the

Board of Immigration Appeals (BIA). While EOIR is a quasi-judicial institution, it is not independent, but is subject to review by the Attorney General.

Expedited Removal – Expedited Removal was added to the Immigration and Nationality Act (INA) by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Expedited Removal allows Department of Homeland Security (DHS) officials to return non-citizens arriving in the United States without proper authorization to their countries of origin without delay and without an immigration judge hearing. To ensure the protection of *bona fide* asylum seekers, a non-citizen who expresses a fear of returning home is referred to a DHS asylum officer for a credible fear determination and must be detained until that determination, with very limited exceptions. If the asylum officer finds credible fear, an immigration judge determines whether the applicant qualifies for asylum, withholding of removal, or protection under the Convention Against Torture. If the asylum officer does not find credible fear, the asylum seeker may ask an immigration judge to make a *de novo* determination of credible fear. If that too is denied, the individual is ordered removed and removed promptly.

Form I-867 – Form I-867 is the sworn statement of interviews of non-citizens taken by U.S. Customs and Border Protection officials. The form is designed to ensure that those who fear return are identified and not erroneously returned to countries where they may face persecution. The form has two parts: (1) side A includes a required script explaining the Expedited Removal process and its consequences and advising non-citizens to ask for protection without delay if they have any reason to fear being returned home; and (2) side B includes four required questions relating to fear of return.

Honduran and Guatemalan Pilot Initiatives – A process used in the Rio Grande Valley, Laredo, and El Paso Border Patrol (BP) sectors whereby Hondurans and Guatemalans in Expedited Removal who do not claim fear are not immediately turned over to U.S. Immigration and Customs Enforcement (ICE) for detention. Instead, they are taken to BP's Harlingen Station for staging and interviews by representatives of their consulates. They remain in BP custody for four or five days and are then turned over to ICE for a day and deported, as compared to otherwise being in ICE custody for around 30 days.

ICE (U.S. Immigration and Customs Enforcement) – Together with some customs enforcement functions, the ICE office of Enforcement and Removal Operations (ERO) is responsible for the detention and removal of aliens, including those in Expedited Removal. It also houses the government trial attorneys who represent the Department of Homeland Security (DHS) in immigration court, including in proceedings stemming from Expedited Removal cases.

IIRAIRA (The Illegal Immigration Reform and Immigrant Responsibility Act of 1996) – The most comprehensive immigration reform in decades, IIRAIRA established the Expedited Removal process.

Immigration Judge – Working for the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ), immigration judges decide whether non-citizens brought before them by the Department of Homeland Security should be removed or should be accorded some form of relief, including asylum or Convention Against Torture relief for non-citizens subject to Expedited Removal who are referred to them after a credible fear determination.

INA (Immigration and Nationality Act) – The Immigration and Nationality Act (INA) of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of U.S. immigration law.

Know Your Rights – The Know Your Rights programs are operated in U.S. Immigration and Customs Enforcement (ICE) detention centers. They include a video that is shown on televisions in ICE facilities, including in the intake area, NGO-conducted orientation sessions, and an information packet, and are available in multiple languages.

LOP (Legal Orientation Program) – The LOP includes a comprehensive presentation to U.S. Immigration and Customs Enforcement (ICE) detainees about immigration court procedures and basic legal information. Presentations are done in group settings and in some programs are followed up with one-on-one sessions about individual cases and referrals for *pro bono* representation. Asylum seekers receive formal notice of the program only after they have passed their credible fear interview and their case has been referred to an immigration judge. The LOP program is now at 26 detention sites and its materials are available in all facilities.

Mandatory Detention – Until a non-citizen subject to Expedited Removal is found to have a credible fear of persecution, the Immigration and Nationality Act (INA) requires that s/he remain in Department of Homeland Security (DHS) custody. After a positive credible fear determination, DHS policies (though no applicable regulations have been promulgated) allow the asylum seeker to be released (under parole, bond, order of recognizance, notice to appear, order of supervision, or Alternatives to Detention (ATD) programs) while waiting for his or her asylum hearing if s/he is not a flight risk, has some ties to the community, and has established identity.

Muster – Musters are directives sent to each U.S. Customs and Border Protection (CBP) field office. When circulated, they are read and distributed to officers at the muster at the beginning of each of that day's shifts.

OFO (Office of Field Operations) – Office of Field Operations (OFO) is the largest U.S. Customs and Border Protection agency and is responsible for border security and facilitating the lawful trade and travel at U.S. ports

of entry. Individuals seeking entry into the United States are inspected at Ports of Entry by OFO officers who determine their admissibility.

Parole – Parole refers to discretionary authority of the Department of Homeland Security (DHS) to allow a non-citizen to enter the United States for humanitarian reasons (or the public interest), even though s/he does not have a valid visa or immigration status. It also refers to releasing an “arriving alien” from detention. While not in the regulations, field guidance endorses considering parole for asylum seekers who have received a positive credible fear determination, if an ICE detention officer determines that the applicant is not a flight risk nor a danger, has ties to the community, and has established identity.

Performance Based National Detention Standards – The hundreds of pages of standards to which DHS holds itself and its private contractors accountable concerning the treatment of non-citizens in detention. The standards, however, are not binding on federal, state, and local jails that lease detention bed space to ICE. The 2011 Performance Based National Detention Standards (PBNDS) are based on the American Correctional Association’s (ACA) jail detention standards for pre-trial felons, although they did expand access to medical, mental health, legal, and religious services; institute an extensive complaint process; and increase visitation and recreation opportunities.

Port of Entry – Specific air, sea, and land entries into the United States. U.S. Customs and Border Protection secures 328 ports of entry throughout the country.

Refugee Definition – Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42)(A) of the Immigration and Nationality Act.

RCA (Risk Classification Assessment) – The U.S. Immigration and Customs Enforcement (ICE) agency uses the Risk Classification Assessment (RCA) tool to guide ICE officers’ decisions on detention, release, and level of supervision for each individual who comes into ICE’s custody, including asylum seekers in Expedited Removal, except those subject to mandatory detention who will be removed within 5 days. RCA decisions are made on intake, through a scoring system with as many as 178 questions.

Rio Grande Valley Sector – One of nine Border Patrol Sectors located along the United States southwest border. The Rio Grande Valley Sector covers more than 34,000 square miles of Southeast Texas, including 316 river miles along the Rio Grande and 317 miles of coast along the Gulf of

Mexico, and has nine stations, two checkpoints, air and marine operations and an intelligence office.

USCIS (U.S. Citizenship and Immigration Services) - The bureau in the Department of Homeland Security (DHS) which administers benefits under the Immigration and Nationality Act (INA), such as refugee status, asylum, lawful permanent residence, temporary worker and visitor classifications, and naturalization.

APPENDICES

- A. Form I-867A
- B. Form I-867 B
- C. Form I-877
- D. Form I-860
- E. U.S. Customs and Border Protection, Michael Fisher, *Memorandum: Muster Module about Credible Fear Determination*, November 26, 2014.
- F. John Lafferty, U.S. Citizenship and Immigration Services, *Memorandum: Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, "Credible Fear of Persecution and Torture Determinations,"* February 28, 2014.
- G. Form I-870
- H. Form I-286
- I. ICE Detention Facility Site Visit Comparison Chart
- J. John Morton, U.S. Immigration and Customs Enforcement, *Memorandum: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, June 17, 2011.
- K. Jeh Charles Johnson, Department of Homeland Security, *Memorandum: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, November 20, 2014
- L. U.S. Immigration and Customs Enforcement, ICE Directive No. 7-1.0: *Parole of Arriving Aliens Found to Have a "Credible Fear" of Persecution or Torture*, November 6, 2007
- M. U.S. Immigration and Customs Enforcement, ICE Directive No. 11002.1: *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, December 8, 2009
- N. ICE Form 71-012
- O. ICE Form 71-013
- P. Form I-862
- Q. Form M-444
- R. ICE Family Detention Facility Site Visit Comparison Chart

APPENDIX A

**Record of Sworn Statement in Proceedings
under Section 235(b)(1) of the Act**

U.S. Department of Homeland Security

Office: _____ File No: _____

Statement by: _____

In the case of: _____

Date of Birth: _____ Gender (circle one): Male Female

At: _____ Date: _____

Before: _____
(Name and Title)

In the _____ language. Interpreter _____ Employed by _____

I am an officer of the United States Department of Homeland Security. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Department of Homeland Security.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

Page 1 of _____

I-867A (08/01/07)

APPENDIX B

**Jurat for Record of Sworn Statement in
Proceedings under Section 235(b)(1) of the Act**

U.S. Department of Homeland Security

Q: Why did you leave your home country or country of last residence?
A.

Q: Do you have any fear or concern about being returned to your home country or being removed from the United States?
A.

Q: Would you be harmed if you are returned to your home country or country of last residence?
A.

Q: Do you have any question or is there anything else you would like to add?
A.

I have read (or have had read to me) this statement, consisting of ____ pages (including this page). I state that my answers are true and correct to the best of my knowledge and that this statement is a full, true and correct record of my interrogation on the date indicated by the above named officer of the Department of Homeland Security. I have initialed each page of this statement (and the corrections noted on page(s) _____).

Signature: _____

Sworn and subscribed to before me at _____
on _____.

Signature of Immigration Officer

Witnessed by: _____

Page ____ of ____

I-867B (08/01/07)

APPENDIX C

U.S. Department of Homeland Security		Record of Sworn Statement in Administrative Proceedings	
Office: _____		File No: _____	
Statement by: _____			
In the case of: _____			
At: _____		Date: _____	
Before: _____		In the _____ language.	
	<small>(Name and Title)</small>		
Interpreter: _____		Interpreter employed by: _____	
<p>I am an officer of the United States Department of Homeland Security, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding _____</p> <p>_____</p> <p>_____</p>			
Page 1 of _____		Initials: _____	I-877 (Rev. 08/01/07)

APPENDIX D

U.S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

File No: _____

Date: _____

In the Matter of: _____

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) (6)(C)(i); (6)(C)(ii); (7)(A)(i)(I); (7)(A)(i)(II); (7)(B)(i)(I); and/or (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

Name and title of immigration officer (Print)

Signature of immigration officer

**ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT**

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

Name and title of immigration officer (Print)

Signature of immigration officer

Name and title of supervisor (Print)

Signature of supervisor, if available

Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on _____
(Date)

Signature of immigration officer

Form I-860 (Rev. 08/01/07)

APPENDIX E

1300 Pennsylvania Avenue NW
Washington, DC 20229

OBP 50/12.1-C



**U.S. Customs and
Border Protection**

NOV 26 2014

MEMORANDUM FOR: All Chief Patrol Agents
All Division Chiefs

FROM: Michael J. Fisher
Chief
U.S. Border Patrol

SUBJECT: Muster Module about Credible Fear Determination

The Expedited Removal (ER) process allows for the removal of certain aliens without an immigration hearing unless the alien indicates an intention to apply for asylum, expresses a fear of persecution, fear of torture, or a fear of return. It is important to maintain the integrity of the ER process by ensuring that the required questions are being asked and that detainees are being provided with the appropriate avenue to make claims pertaining to Credible Fear.

Each attached Muster Module addresses Credible Fear Determination -the first is general in nature, and the second focuses on Unaccompanied Alien Children (UAC). These documents have been developed to remind U.S. Border Patrol agents of their responsibility to ask credible fear questions during processing, as well as at the time of arrest using Form I-826, *Notice of Rights and Request for Disposition*.

Please ensure that each Muster Module is briefed at muster and displayed in a prominent location that will allow viewing by all agents. As an additional means of communicating this topic to agents, I encourage each sector to adapt the material into slides for use in the sector Information Display System.

Staff may direct questions to Assistant Chief Donna L. Twyford in the Operational Programs, Specialty Programs, and Planning Branch within the Operations Division at U.S. Border Patrol Headquarters, (202) 325-1246.

Attachments



MUSTER MODULE



CREDIBLE FEAR DETERMINATION

United States Border Patrol

September 2014 / 001

What is Credible Fear?

"Credible fear of persecution" is defined in Section 235(b)(1)(B)(v) of the INA as: "a significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208 [of the INA]."

"Credible fear of torture" is defined as: a significant possibility that an alien is eligible for withholding of removal or deferral of removal under the Convention Against Torture.

An individual will be found to have a credible fear of persecution if he/she establishes that there is a "significant possibility" that he/she could establish in a full hearing before an Immigration Judge that he/she has been persecuted or has a well-founded fear of persecution or harm on account of his/her race, religion, nationality, membership in a particular social group, or political opinion if returned to his/ her country

Notice of Rights and Request for Disposition, Form I-826:

Upon apprehension agents are reminded that per Form I-826 each alien must:

- be advised of his/her rights, and
- be asked the Request for Disposition questions with the appropriate box selected and respondent initials recorded

Expedited Removal (ER) Process and Credible Fear Determination:

The ER process allows for the removal of certain aliens without an immigration hearing unless the alien indicates an intention to apply for asylum, expresses a fear of persecution, a fear of torture, or a fear of return.

During ER processing it is incumbent on all agents to ask and complete the questions on the Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, Form I-867B and document the responses in the fields provided. These questions should be utilized to establish a dialogue whereby an alien can indicate his/her credible fear. In the event that an alien makes a credible fear claim agents should select the available box within e3 processing and complete the Information about Credible Fear Interview Form M-444.

Distributed by: USBP HQ, Specialty Programs and Planning Branch



MUSTER MODULE



CREDIBLE FEAR DETERMINATION

United States Border Patrol

September 2014 / 002

Unaccompanied Alien Children (UAC):

Agents are reminded that all UAC must be screened for possible victimization using CBP Form 93. CBP Form 93 includes four specific questions related to determining if a UAC may have a credible fear claim. The four questions must be asked in their entirety and the answers must be documented.

The questions are:

1. Why did you leave your home country or country of last residence?
2. Do you have any fear or concern about being returned to your home country or being removed from the United States?
3. Would you be harmed if you were returned to your home country or country of last residence?
4. Do you have any questions or is there anything else that you would like to add?

The credible fear process is designed to offer protection to aliens fleeing persecution from their country's government or from their government's inability to protect them.

UAC Questioning:

Agents are not limited to asking only those questions on CBP Form 93. The provided questions are intended to establish a dialogue with the UAC that may allow agents to gather additional information to assist in their determination.

When asking additional questions or conversing with a UAC, agents should be cognizant of the inherent vulnerabilities that UAC have and take extra care to make sure that they do not dissuade the UAC from answering or influence the UAC to change his/her answers.

Additionally, agents should be aware of how their body language and demeanor is being perceived and refrain from using any gestures or body language that may be construed by the UAC as intimidating or threatening.

Distributed by: USBP HQ, Specialty Programs and Planning Branch

APPENDIX F

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
*Refugee, Asylum and International
Operations Directorate*
Washington, DC 20529




**U.S. Citizenship
and Immigration
Services**

FEB 28 2014

HQRAIO 120/9.15b

Memorandum

TO: Asylum Office Directors / Deputy Directors
Supervisory Asylum Officers
Quality Assurance/Training Asylum Officers
Asylum Officers

FROM: John Lafferty 
Chief, Asylum Division

SUBJECT: Release of Updated Asylum Division Officer Training Course (ADOTC)
Lesson Plan, *Credible Fear of Persecution and Torture Determinations*

This memorandum announces the release of a revised version of the ADOTC Lesson Plan, *Credible Fear of Persecution and Torture Determinations*, dated February 28, 2014 (the revised Credible Fear Lesson Plan) and describes the major changes in the lesson from previous versions.

I. Background

Credible fear referrals to the Asylum Division in fiscal year (FY) 2013 surpassed total receipts for credible fear referrals over the five-year period from FY 2007 to FY 2011 and rose from FY 2012 by more than 250%. In light of the increased allocation of resources devoted to credible fear adjudications and the attention on these adjudications, the Asylum Division undertook a comprehensive review of the previous credible fear lesson plan, which was most recently revised on March 7, 2013 and last underwent significant changes on April 14, 2006. As part of this review, we met with representatives from each Asylum Office and shared draft versions of the revised Credible Fear Lesson Plan with U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection. Attached is the revised Credible Fear Lesson Plan, dated February 28, 2014. The lesson plan is also available electronically through the Asylum Division's Enterprise Collaboration Network ("ECN") site at:

<http://ecn.uscis.dhs.gov/team/raio/PerMgt/Training/Lesson%20Plans/Forms/ASYview.aspx>.

www.uscis.gov

II. The Revised Credible Fear Lesson Plan

Because revisions were made throughout the revised Credible Fear Lesson Plan, this memorandum will not describe all the changes from previous versions. The significant changes to the lesson plan focus on three major areas.

First, the revisions to the lesson plan seek to reinforce the Asylum Division's interpretation of the statutory "significant possibility" standard as requiring that the applicant "demonstrate a substantial and realistic possibility of succeeding."¹ In light of concerns that the application of the "significant possibility" standard has lately been interpreted to require only a minimal or mere possibility of success, the revised Credible Fear Lesson Plan clearly states that a claim that has no possibility or only a minimal or mere possibility does not meet the "significant possibility" standard.

Second, the revised Credible Fear Lesson Plan incorporates substantive updates to the Refugee, Asylum and International Operations Combined Training Lesson Plans (RAIO Lesson Plans) from recent years and examines the application of this guidance to credible fear determinations. The revised Credible Fear Lesson Plan is not meant to be viewed in isolation; Asylum Officers must continue to refer to the latest applicable RAIO Lesson Plans for the most recent guidance on determining asylum eligibility. The revised Credible Fear Lesson Plan, however, adopts the analytical framework of various RAIO Lesson Plans to ensure that credible fear of persecution determinations apply the correct substantive law through the "significant possibility" lens. For example, *Section VII. Establishing a Credible Fear of Persecution* now discusses separately the issues of Past Persecution and Well-Founded Fear of Persecution. Both sub-sections follow their RAIO Lesson Plan equivalent as viewed in the credible fear context. This provides the opportunity to discuss areas of law that were omitted from previous versions of the lesson plan, such as the role of internal relocation in the well-founded fear of persecution analysis.

Finally, the revised Credible Fear Lesson Plan modifies guidance on credible fear of torture screenings to hew more closely to the regulations implementing the Convention Against Torture (the Convention or CAT).² Asylum Officers screening for viable CAT claims must now consider all the elements of the Convention definition of torture, such as consideration of the issues of custody and control, and lawful sanctions as falling outside of the definition; these were previously omitted from the credible fear analysis. Moreover, the severity and specific intent requirement is modified to reflect the Convention definition: an act must be specifically intended to inflict severe physical or mental pain or suffering. Previous versions of the lesson plan required only that the feared offender intend to take some action that would result in serious harm to the applicant. The modifications also describe when mental pain or suffering can constitute torture. Instruction involving the Convention's state action requirement is expanded to detail when a public official acts in an official capacity and to shed further light on the issue of acquiescence. Lastly, the revised Credible Fear

¹ Joseph E. Langlois, Asylum Division, Office of International Affairs, *Increase of Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Apr. 17, 2006).

² 8 C.F.R. §§ 208.16 -.18.

Release of Revised ADOTC Credible Fear Lesson Plan
HQRAIO 120/9.15b
Page 3

Lesson Plan instructs that the regulatory requirement that internal relocation be considered when evaluating the possibility of future torture is applied to credible fear determinations. These modifications to how relief under CAT is analyzed in the credible fear context do not change the "significant possibility" standard or alter the screening function of the credible fear process. The intention, rather, is to focus on the "significant possibility" standard, taking into account regulatory requirements for CAT claims.

III. Implementation

The revised Credible Fear Lesson Plan is effective immediately. Headquarters staff will travel to each Asylum Office to provide training on the revised Credible Fear Lesson Plan. This lesson plan will also be used at the upcoming ADOTC. Furthermore, we will examine whether any conforming changes to the ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* and the Credible Fear Determination Checklist are necessary and issue a revision to those documents as appropriate.

Please contact the Asylum Division Quality Assurance Branch Chief and/or email the Asylum QA – Credible Fear mailbox if you have any questions.

Attachment (1): ADOTC Lesson Plan, Credible Fear of Persecution and Torture Determinations

Alien's File Number:

The purpose of this interview is to determine whether you may be eligible for asylum or protection from removal to a country where you fear persecution or torture. I am going to ask you questions about why you fear returning to your country or any other country you may be removed to. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. Please feel comfortable telling me why you fear harm. U.S. law has strict rules to prevent the disclosure of what you tell me today about the reasons why you fear harm. The information you tell me about the reasons for your fear will not be disclosed to your government, except in exceptional circumstances. The statements you make today may be used in deciding your claim and in any future immigration proceedings. It is important that we understand each other. If at any time I make a statement you do not understand, please stop me and tell me you do not understand so that I can explain it to you. If at any time you tell me something I do not understand, I will ask you to explain.

SECTION II: BIOGRAPHIC INFORMATION

2.1 _____
Last Name/ Family Name [ALL CAPS]

2.2 _____ 2.3 _____
First Name Middle Name

2.4 ____/____/____ 2.5 Gender Male Female
Date of birth [MM/DD/YY]

2.6 _____
Other names and dates of birth used

2.7 _____ 2.8 _____
Country of birth Country (countries) of citizenship (list all)

2.9 _____
Address prior to coming to the U.S. (List Address, City/Town, Province, State, Department and Country).

2.10 _____ 2.11 _____ 2.12 _____
Applicant's race or ethnicity Applicant's religion All languages spoken by applicant

2.13 Marital status: Single Married Legally separated Divorced Widowed

2.14 Did spouse arrive with applicant? Yes No

2.15 Is spouse included in applicant's claim? Yes No

2.16 If currently married (including common law marriage) list spouse's name, citizenship, and present location (if with applicant, provide A-Number):

2.17 Children: Yes No

2.18 List any children (Use the continuation section to list any additional children):

Date of birth (MM/DD/YY)	Name	Citizenship	Present location (if w/PA, list A-Numbers)	Did child arrive with PA?	Is child included in PA's claim?
_____	_____	_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
_____	_____	_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
_____	_____	_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

Alien's File Number:				
				<input type="checkbox"/> Yes
				<input type="checkbox"/> No
				<input type="checkbox"/> Yes
				<input type="checkbox"/> No
				<input type="checkbox"/> Yes
				<input type="checkbox"/> No
				<input type="checkbox"/> Yes
				<input type="checkbox"/> No

Alien's File Number:

2.19 Does applicant claim to have a medical condition (physical or mental), or has the officer observed any indication(s) that a medical condition exists? If YES, answer questions 2.20 and 2.21 and explain below. Yes No

2.20 Has applicant notified the facility of medical condition? Yes No

2.21 Does applicant claim that the medical condition relates to torture? Yes No

2.22 Does the applicant have a relative, sponsor or other community ties, including spouse or child already listed above? Yes No

2.23 If YES, provide information on relative or sponsor (use continuation section, if necessary):

Name Relationship

Address Telephone Number

Citizen Legal Permanent Resident Other

SECTION III:

CREDIBLE FEAR INTERVIEW

The following notes are not a verbatim transcript of this interview.

These notes are recorded to assist the individual officer in making a credible fear determination and the supervisory asylum officer in reviewing the determination.

There may be areas of the individual's claim that were not explored or documented for purposes of this threshold screening.

The asylum officer must elicit sufficient information related to both credible fear of persecution and credible fear of torture to determine whether the applicant meets the threshold screening. Even if the asylum officer determines in the course of the interview that the applicant has a credible fear of persecution, the asylum officer must still elicit any additional information relevant to a fear of torture. Asylum officers are to ask the following questions and may use the continuation sheet if additional space is required. If the applicant replies YES to any question, the asylum officer must ask follow-up questions to elicit sufficient details about the claim in order to make a credible fear determination.

3.1 a. Have you or any member of your family ever been mistreated or threatened by anyone in any country to which you may be returned? Yes No

b. Do you have any reason to fear harm from anyone in any country to which you may be returned? Yes No

c. If YES to questions a and/or b, was it or is it because of any of the following reasons? (Check each of the following boxes that apply). Race Religion Nationality Membership in a particular social group Political Opinion

Alien's File Number:

- 3.2 At the conclusion of the interview, the asylum officer must read the following to applicant:

If the Department of Homeland Security determines you have a credible fear of persecution or torture, your case will be referred to an immigration court, where you will be allowed to seek asylum or withholding of removal based on fear of persecution or withholding of removal under the Convention Against Torture. The Field Office Director in charge of this detention facility will also consider whether you may be released from detention while you are preparing for your hearing. *If the asylum officer determines that you do not have a credible fear of persecution or torture, you may ask an Immigration Judge to review the decision. If you are found not to have a credible fear of persecution or torture and you do not request review, you **may be removed** from the United States as soon as travel arrangements can be made. Do you have any questions?*

- 3.3 At the conclusion of the interview, the asylum officer must read a summary of the claim, consisting of the responses to Questions 3.1 a-c and information recorded in the Additional Information/Continuation section, to applicant.

****Typed Question and Answer (Q&A) interview notes and a summary and analysis of the claim must be attached to this form for all negative credible fear decisions. These Q&A notes must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear.

SECTION IV: CREDIBLE FEAR FINDINGS

A. Credible Fear Determination:

Credibility

- 4.1 There is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing.
- 4.2 Applicant found **not** credible because (check boxes 4.3-4.5, which apply):
- 4.3 Testimony was internally inconsistent on material issues.
- 4.4 Testimony lacked sufficient detail on material issues.
- 4.5 Testimony was not consistent with country conditions on material issues.

Nexus

- 4.6 Race 4.7 Religion 4.8 Nationality 4.9 Membership in a Particular Social Group

(Define the social group): _____

- 4.10 Political Opinion 4.11 Coercive Family Planning [CFP] 4.12 No Nexus

Credible Fear Finding

- 4.13 Credible fear of **persecution** established.
- OR**
- 4.14 Credible fear of **torture** established.
- OR**
- 4.15 Credible fear of persecution NOT established and there is not a significant possibility that the applicant could establish eligibility for withholding of removal or deferral of removal under the Convention against Torture.

B. Possible Bars:

- 4.16 Applicant could be subject to a bar(s) to asylum or withholding of removal (check the box(es) that applies and explain on the continuation sheet):
- 4.17 Particularly Serious Crime 4.18 Security Risk 4.19 Aggravated Felon
- 4.20 Persecutor 4.21 Terrorist 4.22 Firmly Resettled
- 4.23 Serious Non-Political Crime Outside the United States
- 4.24 Applicant does **not** appear to be subject to a bar(s) to asylum or withholding of removal.

Alien's File Number:

C. Identity:

- 4.25 Applicant's identity was determined with a reasonable degree of certainty (check the box(es) that applies):
- 4.26 Applicant's own credible statements. (If testimony is credible overall, this will suffice to establish the applicant's identity with a reasonable degree of certainty).
- 4.27 Passport which appears to be authentic.
- 4.28 Other evidence presented by applicant or in applicant's file (List): _____

- 4.29 Applicant's identity was **not** determined with a reasonable degree of certainty. (Explain on the continuation sheet.)

SECTION V: ASYLUM OFFICER / SUPERVISOR NAMES AND SIGNATURES

5.1 _____	5.2 _____	5.3 _____ / _____ / _____
Asylum officer name and ID CODE (print)	Asylum officer's signature	Decision date
5.4 _____	5.5 _____	5.6 _____ / _____ / _____
Supervisory asylum officer name	Supervisor's signature	Date supervisor approved decision

ADDITIONAL INFORMATION/CONTINUATION

APPENDIX H

DEPARTMENT OF HOMELAND SECURITY NOTICE OF CUSTODY DETERMINATION

Alien's Name: _____

A-File Number: _____

Date: _____

Event ID: _____

Subject ID: _____

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

- Detained by the Department of Homeland Security.
- Released (check all that apply):
 - Under bond in the amount of \$ _____
 - On your own recognizance.
 - Under other conditions. [Additional document(s) will be provided.]

Name and Signature of Authorized Officer

Date and Time of Custody Determination

Title

Office Location/Address

You may request a review of this custody determination by an immigration judge.

- I acknowledge receipt of this notification, and
 - I **do** request an immigration judge review of this custody determination.
 - I **do not** request an immigration judge review of this custody determination.

Signature of Alien

Date

The contents of this notice were read to _____ in the _____ language.
(Name of Alien) (Name of Language)

Name and Signature of Officer

Name or Number of Interpreter (if applicable)

Title

APPENDIX I

SITE COMPARISON CHART OF USCIRF-VISITED ICE ADULT DETENTION FACILITIES						
Detention Facility Name	Types of Detainees	Security Procedures	Freedom of Movement	Privacy	Uniforms	Services, Recreation and Programming Opportunities
Broward Transitional Center	non-citizen men and women w/out criminal convictions	entry to facility is locked; fixed guards outside of living areas; cameras and 24-hour lighting in common areas; random searches of living areas; headcounts every 8 hours	freedom of movement during lights-on hours; can access non-housing units during open hours; escorts required only to reach asylum offices	6 beds per room with private toilets and showers in rooms; detainees can be alone in room	men in orange; women in gray	recreation time during lights on; extended outdoor time; extended programmatic activities
Delany Hall Detention Facility	non-citizen men and women w/out criminal convictions	locked doors throughout facility; pat downs after visits and random after recreation; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting in common areas; random searches of living areas; headcounts 8 times a day	freedom of movement during lights-on hours; can access non-housing units during open hours; escorts required to reach cafeteria and visitation rooms	10 beds per room; toilets and showers are open in bathroom; detainees can be alone in room	maroon shirts and gray pants	recreation time during lights on; extended outdoor time; access to email
El Centro Service Processing Center¹	non-citizen men and women w/out criminal convictions and criminal non-citizen men	locked doors throughout facility; pat downs after working and meals; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas; headcounts 4 times a day	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; escorts are required at all times	large open dorm rooms with dozens of other detainees; toilets and showers are open; detainees cannot be alone in room	blue for low level detainees; orange for medium level detainees; red for high level detainees	1 hour outdoor/recreation time; no programmatic activities offered
Eloy Detention Center	non-citizen men with and w/out criminal convictions	locked doors throughout facility; pat downs after rec and visitation; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas; headcounts every 4 hours	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; escorts are required at all times	pods with 2-men cells; toilets open in cell; shower rooms	green for level low detainees; tan for level medium detainees; blue for level high detainees	1 hour outdoor/recreation time; extended programmatic activities offered

SITE COMPARISON CHART OF USCIRF-VISITED ICE ADULT DETENTION FACILITIES

Detention Facility Name	Types of Detainees	Security Procedures	Freedom of Movement	Privacy	Uniforms	Services, Recreation and Programming Opportunities
Florence Service Processing Center	non-citizen men w/out criminal convictions	locked doors throughout facility; pat downs after rec and visitation; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas; headcounts every 4 hours	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; escorts are required at all times	large open dorm rooms with dozens of other detainees; toilets and showers are open but in a separate room from the dorm; detainees can be alone in room	blue for low level detainees; orange for medium level detainees	extended outdoor time
Karnes County Civil Detention Center²	non-citizen men w/out criminal convictions	entry to facility is locked; fixed guards outside of living areas; cameras and 24-hour lighting in common areas; searches of living areas on if items missing; no headcounts but electronic check-in 5 times a day	24/7 freedom of movement; detainees can access non-housing units freely; no escorts are required	8 beds per room with private toilets and showers in rooms; detainees can be alone in room	blue pants and gray shirts	24 hour outdoor/recreation time; extended programmatic activities; 100 pre-approved Public Advocate internet sites
Krome Service Processing Center	criminal non-citizen men	locked doors throughout facility; pat downs after working and meals; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; escorts are required at all times	large open dorm rooms with dozens of other detainees; toilets and showers are open; detainees cannot be alone in room	blue for low level detainees; orange for medium level detainees; red for high level detainees	1 hour outdoor/recreation time; no programmatic activities offered

SITE COMPARISON CHART OF USCIRF-VISITED ICE ADULT DETENTION FACILITIES

Detention Facility Name	Types of Detainees	Security Procedures	Freedom of Movement	Privacy	Uniforms	Services, Recreation and Programming Opportunities
James A. Musick Facility	non-citizen men and women w/out criminal convictions and criminal men and women	locked doors throughout facility; random pat downs; fixed guards inside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas; headcounts 5 times a day	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; male detainees can access outside recreation area during lights-on, but women only when female criminal prisoners are not outside; no escorts are required, but detainees' movements are watched	large open dorm rooms with dozens of other detainees; doors on toilets but showers are open in bathroom; detainees cannot be alone in room	lime green uniforms	at least 4.5 hours recreation/outdoor time; no programmatic activities offered
Mira Loma Detention Center³	non-citizen men w/out criminal convictions and criminal non-citizen men	locked doors throughout facility; pat downs; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas; headcounts 5 times a day	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; no escorts are required if detainee has a pass, but detainees' movements are watched	large open dorm rooms with dozens of other detainees; toilets and showers have doors; detainees cannot be alone in room	blue for low level detainees; orange for medium level detainees; red for high level detainees	1 hour outdoor/recreation time in main yards but can access dorm yards during lights-on; extended programmatic activities
Otay Detention Facility	non-citizen men and women w/out criminal convictions and criminal non-citizen men	locked doors throughout facility; pat downs; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; escorts are required at all times	large open dorm rooms with dozens of other detainees; toilets and showers are open; detainees cannot be alone in room	blue for low level detainees; orange for medium level detainees; red for high level detainees	1-1.5 hours outdoor/recreation time; no programmatic activities offered

SITE COMPARISON CHART OF USCIRF-VISITED ICE ADULT DETENTION FACILITIES

Detention Facility Name	Types of Detainees	Security Procedures	Freedom of Movement	Privacy	Uniforms	Services, Recreation and Programming Opportunities
Pinal County Jail	non-citizen men with and w/out criminal convictions	locked doors throughout facility; pat downs after working and meals; fixed guards outside of living areas; constant sight and surveillance of living areas; cameras and 24-hour lighting throughout facility; random searches of living areas; headcounts 6 times a day	freedom of movement is restricted; detainees can access non-housing units only during scheduled times; escorts are required at all times	pods with 6-10 men cells; toilets open in cell; 4 open showers in shower rooms	Blue arm bands describe level of custody	can access dorm yards during lights-on; no programmatic activities offered
T. Don Hutto Residential Center	non-citizen women w/out criminal convictions	entry to facility is locked; fixed guard in housing unit; constant sight and surveillance in housing unit; 24-hour lighting; cameras in hallways and cafeteria; random searches of living areas; no headcounts but detainees check into dorm three times a day	freedom of movement during lights on hours; can access non-housing units during open hours; no escorts required for movement	2 beds per rooms; toilets in rooms behind privacy curtains; showers in common areas behind privacy curtains; detainees can be alone in rooms	no uniforms; detainees cannot wear revealing or tight clothing	recreation time during lights-on; extended outdoor time; extended programmatic activities; 30 minutes Internet daily

¹ ICE closed El Centro Service Processing Center in 2014

² ICE converted the Karnes County Civil Detention Center into the Karnes County Residential Center, to hold families, in 2014

³ ICE ended its contract with Mira Loma Detention Center in 2012

APPENDIX J

Policy Number: 10075.1
FEA Number: 306-112-0026

Office of the Director


U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536



U.S. Immigration and Customs Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director 

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil
Immigration Enforcement Priorities of the Agency for the
Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

www.ice.gov

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement¹. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

¹ The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director² and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

² Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

communication with represented individuals³ and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

³ For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.

APPENDIX K

Secretary
U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson 
Secretary

SUBJECT: **Policies for the Apprehension, Detention and
Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

www.dhs.gov

The Department of Homeland Security (DHS) and its immigration components- CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens*, June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases*, November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations*, December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

- (a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- (b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
- (c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;
- (d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and
- (e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

- (a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

- (b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;¹ sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);
- (c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and
- (d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal² on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

¹ In evaluating whether the offense is a significant misdemeanor involving "domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. See generally, John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011.

² For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

APPENDIX L

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT Parole of Arriving Aliens Found to Have a “Credible Fear” of Persecution or Torture

DISTRIBUTION:	ICE
DIRECTIVE NO.:	7-1.0
ISSUE DATE:	November 6, 2007
EFFECTIVE DATE:	November 6, 2007
REVIEW DATE:	November 6, 2009
SUPERSEDES:	See Section 3.

1. **PURPOSE.** The purpose of this ICE policy directive is to ensure transparency, consistency and quality assurance in ICE decisions on the parole requests of arriving aliens seeking asylum in the United States. This Directive provides guidance to Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider parole requests by arriving aliens processed under the expedited removal provisions of section 235 of the Immigration and Nationality Act (INA) who have been found to have a “credible fear” of persecution or torture by U.S. Citizenship and Immigration Services (USCIS) or an immigration judge (IJ) of the Executive Office for Immigration Review. While preserving DRO’s discretion to make case-by-case parole determinations, this Directive seeks to promote consistently high-quality parole decision-making and, accordingly, establishes a quality assurance process and includes record-keeping requirements to ensure accountability and compliance with the procedures set forth in this guidance.
 - 1.1 This Directive does not apply to aliens in DRO custody under INA Section 236(a). This Directive applies only to arriving aliens who have been found by USCIS or an IJ to have a “credible fear” of persecution or torture.
2. **AUTHORITIES/REFERENCES.**
 - 2.1. INA §§ 208, 212(d)(5), 235(b), and 241(b)(3), 8 U.S.C. §§ 1158, 1182(d)(5), 1225(b), and 1231(b)(3); 8 C.F.R. §§ 1.1(q), 208.30(e)-(f), 212.5 and 235.3.
 - 2.2. Department of Homeland Security Delegation Number 7030.2, “Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement” (Nov. 13, 2004).
 - 2.3. ICE Delegations of Authority to the Directors, Detention and Removal and Investigations and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement, No. 0001 (June 6, 2003).
3. **SUPERSEDED POLICIES AND GUIDANCE.** All other ICE or former Immigration and Naturalization Service (INS) directives, memoranda, bulletins, manuals, handbooks, and other guidelines and procedures, including those

specifically listed below, no longer apply to DRO parole determinations under INA § 212(d)(5) for arriving aliens who have been determined to have a credible fear of persecution or torture.

- 3.1. Memorandum from Victor X. Cerda, DRO Acting Director, Expedited Removal Guidance 3 (Sept. 14, 2004);
 - 3.2. Memorandum from Michael J. Garcia, ICE Assistant Secretary, Detention Policy Where an Immigration Judge has Granted Asylum and ICE has appealed (Feb. 9, 2004);
 - 3.3. Memorandum from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, Detention Guidelines Effective October 9, 1998 (Oct. 7, 1998); and
 - 3.4. Memorandum from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997).
4. **BACKGROUND.** Arriving aliens processed under the INA’s expedited removal provisions may pursue asylum and related forms of protection from removal if they successfully demonstrate to USCIS or an IJ a “credible fear” of persecution or torture. Aliens who establish a credible fear of persecution or torture are to be detained for further consideration of the application for asylum. INA § 235(b)(1)(B)(ii). Such aliens, however, may be paroled on a case-by-case basis for “‘urgent humanitarian reasons’ or ‘significant public benefit,’ provided the aliens present neither a security risk nor a risk of absconding.” 8 C.F.R. § 212.5(b); see also 8 C.F.R. § 235.3(c) (providing that aliens referred for INA § 240 removal proceedings, including those who have credible fear of persecution or torture, may be paroled under § 212.5(b) standards).

The applicable regulations describe five categories of aliens who, on a case-by-case basis and depending upon whether the alien presents a flight or security risk, may meet the parole standards: (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. 8 C.F.R. § 212.5(b).

Given that the expedited removal statute is generally oriented towards detention, the regulations governing parole determinations make clear that aliens are only to be paroled in limited circumstances and only on a case-by-case basis. Accordingly, this Directive clarifies the applicable parole standards under 8 C.F.R. § 212.5(b) as they relate to arriving aliens determined to have a credible

fear of persecution or torture. The Directive also provides standardized procedures and analytical guidance for DRO Field Offices' parole decisions for arriving aliens and mandating uniform recordkeeping and review requirements for such decisions. Parole remains an inherently discretionary determination entrusted to the agency, but this Directive will serve to guide the exercise of that discretion.

5. **DEFINITIONS.**

- 5.1. **Arriving alien.** For purposes of this Directive, "arriving alien" has the same definition as provided for in 8 C.F.R. §§ 1.1(q) and 1001.1(q).
- 5.2. **Credible fear.** Consistent with INA § 235(b)(1)(B)(v), and for purposes of this Directive, with respect to an alien processed under INA § 235(b) "expedited removal" process, "credible fear" of persecution or torture is a finding by USCIS or an IJ that indicates a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the interviewing USCIS officer, that the alien may be able to establish eligibility for asylum under INA § 208 or entitlement to withholding or removal under INA § 241(b)(3) or protection under the Convention Against Torture.
- 5.3. **Parole.** For purposes of this Directive, "parole" is an administrative measure used by ICE to temporarily authorize (without lawfully admitting) the release of an inadmissible arriving alien found to have a "credible fear" of persecution or torture from DRO custody. Parole does not constitute a lawful admission or a determination of admissibility, *see* INA §§ 212(d)(5)(A), 101(a)(13)(B), and reasonable conditions may be imposed on the parole, *see* 8 C.F.R. § 212.5(d). Parole may only be used, in the discretion of ICE and under such conditions as ICE may prescribe, in individually compelling cases for urgent humanitarian reasons or for significant public benefit.
- 5.4. **Urgent humanitarian reasons and significant public benefit.** For purposes of this Directive, the terms "urgent humanitarian reasons" and "significant public benefit" include the five categories set forth at 8 C.F.R. § 212.5(b), as those five categories are further explained in paragraphs 8.3.1 through 8.3.5 of this Directive.

6. **POLICY.**

- 6.1. Generally, subject to any applicable legal restrictions on removal, it is ICE policy to remove all aliens with final orders of removal irrespective of any type of immigration relief or protection that an alien may elect or may have elected to pursue during the course of the alien's immigration proceedings.

- 6.2. Continued custody of aliens who pose a risk of flight throughout the course of their immigration proceedings is the most effective way of ensuring their appearance at all immigration hearings and appointments.
- 6.3. Parole decisions under INA § 212(d)(5) are to be made only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit.” Arriving aliens found by USCIS to have a “credible fear” of persecution or torture may be individually considered for parole by DRO if they fall within one of the categories set forth at 8 C.F.R. § 212.5(b), subject to the terms of this Directive.
- 6.4. While each alien’s parole request will be unique and should be analyzed individually, DRO Field Offices shall uniformly document their parole decision-making processes using the *Record of Determination/Parole Determination Worksheet*. Field Office personnel are authorized to exercise their judgment and to document additional factors appropriate for consideration based on the facts of each particular case.
- 6.5. Consistent with the terms of this Directive, DRO shall maintain national and local statistics on parole determinations and have a quality assurance process in place to monitor parole decision-making, as provided for in section 8 of this Directive.
- 6.6. In conducting parole determinations for arriving aliens in custody after they are found to have a “credible fear” of persecution or torture, DRO shall follow the procedures set forth in section 8 of this Directive.
- 6.7. DRO shall provide any such alien who submits a written request for INA § 212(d)(5) parole with a written response if the decision is to deny parole.
- 6.8. Generally, a decision to grant or deny parole shall be initially prepared by a DRO officer assigned such duties within his or her respective DRO Field Office. The decision shall pass through at least one level of supervisory review and concurrence must be finally approved by the Field Office Director (FOD) or Deputy FOD, where authorized by the FOD.

7. **RESPONSIBILITIES.**

- 7.1. The **DRO Director** is responsible for the overall management of the parole decision-making process for arriving aliens in DRO custody following determinations that they have a “credible fear” of persecution or torture.
- 7.2. The **DRO Assistant Director for Operations** is responsible for:
 - 7.2.1. Ensuring high nationwide quality and consistency of DRO parole decision-making and recordkeeping in cases of arriving aliens found to have a “credible fear” of persecution or torture;

- 7.2.2. Overseeing monthly tracking of parole statistics by all DRO Field Offices for such cases; and
- 7.2.3. Overseeing an effective national quality assurance program that monitors the Field Offices to ensure consistent compliance with this Directive.
- 7.3. **DRO Field Office Directors** are responsible for:
 - 7.3.1. Implementing this policy and quality assurance processes;
 - 7.3.2. Maintaining a log of parole adjudications for “credible fear” cases within their respective geographic areas of responsibility (AORs), including copies of the ICE *Record of Determination/Parole Determination Worksheet*;
 - 7.3.3. Providing monthly statistical reports on parole requests received from arriving aliens found to have a “credible fear;”
 - 7.3.4. Making the final decision to grant or deny parole requests made by arriving aliens found to have a “credible fear” of persecution or torture within their respective AOR’s or, alternatively, delegating such responsibility to their Deputy FODs (DFODs) (in which case, the FOD nevertheless retains overall responsibility for his or her office’s respective compliance with this Directive) regardless of delegating signatory responsibility to the DFOD; and
 - 7.3.5. Ensuring that DRO field personnel within their respective AORs who will be assigned to receive and prepare responses to parole requests are familiar with this Directive and corresponding legal authorities.
- 7.4. **DRO Deputy Field Office Directors** are responsible for reviewing, and forwarding for their respective FODs’ approval, proposed parole decisions prepared by their subordinates in the cases of arriving aliens found to have a “credible fear” or persecution or torture. Alternatively, DFODs delegated responsibility under paragraph 7.3.4 of this Directive are responsible for discharging final decision-making authority over parole requests in such cases within their respective AORs.
- 7.5. As applicable, **DRO field personnel** assigned parole-related duties by their local chains-of-command are responsible for fully and accurately completing the ICE *Record of Determination/Parole Determination Worksheet*, in accordance with this Directive and corresponding legal authorities.
- 8. **PROCEDURES.**
 - 8.1. Upon receipt of a written INA § 212(d)(5) parole request by an arriving alien found to have a “credible fear” of persecution or torture, the receiving DRO Field Office shall assign the request to a DRO officer familiar with the requirements of this Directive and corresponding legal authorities, who will complete the ICE

Record of Determination/Parole Determination Worksheet, which sets forth the correct two-part analysis applicable to parole requests in such cases.

- 8.2. **Step One.** Step one of the parole analysis is a threshold assessment of whether the alien's parole request and any supporting documents establish: (1) the alien's identity; (2) that he or she does not pose a risk of flight; and (3) that he or she is not a danger to the community.
- 8.2.1. **Identity.** Identity is a critical element in qualifying for parole. Asylum applicants who arrive in the United States without any identifying documents or who present fraudulent documents or claims raise significant security concerns. Field Office personnel must review all relevant documentation offered by an alien, as well as other information available about the alien to determine whether the alien is who he or she claims to be. If an alien lacks valid government-issued documents that support his or her assertion of identity, Field Office personnel should request that the alien provide government-issued documentation of identity. If the alien cannot reasonably provide valid government-issued evidence of identity, the alien can provide for consideration affidavits from third parties, if the affiants include copies of valid, government issued photo-identification document, and fully establish their identity and address. Without such additional documentation, affidavits from third parties may not suffice for establishing identity for parole purposes, particularly if the alien attempted to enter the U.S. through fraud.
- 8.2.2. **Flight Risk.** An alien determined to have a credible fear of persecution or torture must present sufficient evidence demonstrating his or her likelihood of appearing when required. Factors appropriate for consideration in determining whether an alien has made the required showing include, but are not limited to: community and family ties, employment history, manner of entry and length of residence in the United States, stability of residence in the United States, record of appearance for prior court hearings, prior immigration history, ability to post bond, property ownership, and possible relief from removal available to the alien. An alien must be able to post bond in an amount deemed sufficient for reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so, and to ensure that the alien will comply with all periodic reporting conditions.
- 8.2.3. **Danger to the Community.** An alien must demonstrate that he or she will not pose a risk to the security of the community. Evidence to the contrary may include, but is not limited to, past criminal history in the United States and abroad, national security interests, concerns of public safety or danger to the community, prior immoral acts or participation in subversive activities, and any detention history that shows that he or she has harmed himself or herself or others.
- 8.3. **Step Two.** Step two of the parole analysis is an assessment of whether the alien has established that he or she falls within one or more of the five categories enumerated in 8 C.F.R. § 212.5(b) and it is determined on a case-by-case basis

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that parole is justified for “urgent humanitarian reasons” or “significant public benefit,” provided the alien presents neither a security risk nor a risk of absconding. The five categories are aliens in 8 C.F.R. § 212.5(b): (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. While Step One and Step Two of the parole analysis should be individually documented during the decision-making process, officers must take care to consider whether any interrelationship exists between them, such as where an alien’s pregnancy or serious medical condition might reduce his or her risk of flight, or where a juvenile’s young age would suggest that he or she poses little danger to the community.”

- 8.3.1. Serious Medical Condition. Based on a finding of urgent humanitarian need or significant public benefit, a favorable exercise of discretion may be considered on a case-by-case basis whenever a medical or psychological evaluation, diagnosis, treatment plan, or other documentation provided by a qualified medical or psychological professional indicates the existence of a serious medical condition or an impairment that makes detention problematic or inappropriate. DRO may consult with medical professionals to determine the severity of any alien’s medical condition.
- 8.3.2. Women Medically Certified as Pregnant. Parole for a woman medically certified as pregnant should be considered on a case-by-case basis.
- 8.3.3. Juveniles. ICE detains a small number of accompanied alien minors under the age of 18. When adjudicating parole requests from juvenile aliens, FODs shall consult with the Juvenile and Family Residential Management Unit (JFRMU) at Headquarters about these parole requests.
- 8.3.4. Witnesses. Parole under this category should require a substantial showing from the alien as to why serving as a witness for some limited purpose justifies release from custody. Factors to consider in this discretionary determination may include: whether the law enforcement agency, prosecutor, judicial, administrative, or legislative body before which the alien is to serve as a witness has presented a formal request; whether some other law enforcement agency will take custody of the alien (usually referred to as a Bench Warrant or Writ); and whether the alien’s potential testimony could endanger him or her and why the alien would be safer in the community-at-large than in a secure detention setting.
- 8.3.5. Public Interest. Parole on public interest grounds requires careful consideration of whether, consistent with ICE’s mission to protect the United States, uphold public safety, and enforce the immigration laws, a specific alien’s case is appropriate for

parole because of some public interest. Because the term “public interest” is not amenable to a single, standard definition, the decision to grant parole on this basis must be documented by a well-reasoned justification.

- 8.4. Assigned DRO officers should, where appropriate, request that parole applicants provide any supplementary information that would aid the officers in reaching a decision. The *ICE Record of Determination/Parole Determination Worksheet* should be annotated to document the request for supplementary information and any response from the detainee.
- 8.5. After conducting this two-part analysis, preparing and signing the *ICE Record of Determination/Parole Determination Worksheet*, and in the case of a denial of parole, drafting a written response to the alien, the assigned DRO officer shall forward these materials and the parole request documentation to his or her first-line supervisor for review and concurrence. If the DRO officer believes parole is warranted in the public interest under 8 C.F.R. § 212.5(b)(5) and paragraph 8.3.5 of this Directive, the officer shall draft a full written justification for supervisory review.
- 8.6. Upon his or her concurrence, the first-line supervisor shall sign the *ICE Record of Determination/Parole Determination Worksheet*, and forward this form and other documentation to the FOD (or, where applicable, the DFOD) for final approval.
- 8.7. The FOD (or, where applicable, the DFOD) shall review the parole documentation, consult with the preparing officer and supervisor as necessary, and either grant or deny parole by completing the *ICE Record of Determination/Parole Determination Worksheet*, and in the case of a denial, signing the written response to the alien. If the FOD (or, where applicable, the DFOD) believes that parole is warranted in the public interest under 8 C.F.R. § 212.5(b)(5) and paragraph 8.3.5 of this Directive, he or she shall document the well-reasoned justification for parole.
- 8.8. Following a final decision by the FOD to deny parole (or, where applicable, the DFOD), the Field Office shall provide a standardized written response to the alien or, if represented, to the alien’s legal representative, indicating that the parole request was denied. If parole is granted, the Field Office shall provide the alien with a stamped I-94 Form that authorizes parole under INA Section 212 (d) (3) (5)(A) in accordance with DRO guidelines.
- 8.9. The parole request, supporting documents, a copy of the decision sent to the alien (if applicable), the *ICE Record of Determination/Parole Determination Worksheet*, and any other documents related to the parole request or adjudication should be placed in the alien’s A-file in a record of proceeding format. In addition, a copy of the *ICE Record of Determination/Parole Determination Worksheet*, shall be stored and maintained under the authority of the FOD for use in preparing monthly reports.

- 8.10. The FOD shall submit monthly parole reports to the Assistant Director for Operations as directed by DRO Headquarters.
- 8.11. At least once every six months, the Assistant Director for Operations shall conduct a thorough and objective quality assurance review of the Field Offices' parole decision-making as directed by DRO Headquarters. The quality assurance review will become part of the Deportation Officer's Field Operations Manual.
9. **ATTACHMENT.** *ICE Record of Determination/Parole Determination Worksheet.*
10. **NO PRIVATE RIGHT STATEMENT.** This Directive is an internal policy statement of ICE. It is not intended to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Approved: _____

Julie Myers
Julie L. Myers
Assistant Secretary
U.S. Immigration and Customs Enforcement

APPENDIX M

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture

DISTRIBUTION:	ICE
DIRECTIVE NO.:	11002.1
ISSUE DATE:	December 8, 2009
EFFECTIVE DATE:	January 4, 2010
SUPERSEDES:	See section 3.
FEA NUMBER:	601-05

1. **PURPOSE.** The purpose of this ICE policy directive is to ensure transparent, consistent, and considered ICE parole determinations for arriving aliens seeking asylum in the United States. This directive provides guidance to Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider the parole of arriving aliens processed under the expedited removal provisions of section 235 of the Immigration and Nationality Act (INA) who have been found to have a "credible fear" of persecution or torture by U.S. Citizenship and Immigration Services (USCIS) or an immigration judge of the Executive Office for Immigration Review. This directive establishes a quality assurance process that includes record-keeping requirements to ensure accountability and compliance with the procedures set forth herein.
 - 1.1. This directive does not apply to aliens in DRO custody under INA § 236. This directive applies only to arriving aliens who have been found by USCIS or an immigration judge to have a credible fear of persecution or torture.
2. **AUTHORITIES/REFERENCES.**
 - 2.1. INA §§ 208, 212(d)(5), 235(b), and 241(b)(3); 8 U.S.C. §§ 1158, 1182(d)(5), 1225(b), and 1231(b)(3); 8 C.F.R. §§ 1.1(q), 208.30(e)-(f), 212.5 and 235.3.
 - 2.2. Department of Homeland Security Delegation Number 7030.2, "Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Custom Enforcement" (Nov. 13, 2004).
 - 2.3. ICE Delegations of Authority to the Directors, Detention and Removal and Investigations and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement, No. 0001 (June 6, 2003).
3. **SUPERSEDED POLICIES AND GUIDANCE.** The following ICE directive is hereby superseded:
 - 3.1. ICE Policy Directive No. 7-1.0, "Parole of Arriving Aliens Found to Have a 'Credible Fear' of Persecution or Torture" (Nov. 6, 2007).

4. **BACKGROUND.**

- 4.1. Arriving aliens processed under the expedited removal provisions of INA §235(b) may pursue asylum and related forms of protection from removal if they successfully demonstrate to USCIS or an immigration judge a credible fear of persecution or torture.
- 4.2. Arriving aliens who establish a credible fear of persecution or torture are to be detained for further consideration of the application for asylum. INA § 235(b)(1)(B)(ii). Such aliens, however, may be paroled on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit,” provided the aliens present neither a security risk nor a risk of absconding. 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c) (providing that aliens referred for INA § 240 removal proceedings, including those who have a credible fear of persecution or torture, may be paroled under § 212.5(b) standards).
- 4.3. The applicable regulations describe five categories of aliens who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk: (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. *See* 8 C.F.R. § 212.5(b). *But compare* 8 C.F.R. § 235.3(b)(4)(ii) (stating that arriving aliens who have not been determined to have a credible fear will not be paroled unless parole is necessary in light of a “medical emergency or is necessary for a legitimate law enforcement objective”).
- 4.4. While the first four of these categories are largely self-explanatory, the term “public interest” is open to considerable interpretation. This directive explains how the term is to be interpreted by DRO when it decides whether to parole arriving aliens determined to have a credible fear. The directive also mandates uniform record-keeping and review requirements for such decisions. Parole remains an inherently discretionary determination entrusted to the agency; this directive serves to guide the exercise of that discretion.

5. **DEFINITIONS:**

- 5.1. **Arriving Alien.** For purposes of this directive, “arriving alien” has the same definition as provided for in 8 C.F.R. § 1.1(q) and 1001.1(q).
- 5.2. **Credible Fear.** For purposes of this directive, with respect to an alien processed under the INA § 235(b) “expedited removal” provisions, “credible fear” means a finding by USCIS or an immigration judge that, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts

as are known to the interviewing USCIS officer or immigration judge, there is a significant possibility that alien could establish eligibility for asylum under INA § 208, withholding of removal under INA § 241(b)(3), or protection from removal under the Convention Against Torture.

- 5.3. **Parole.** For purposes of this directive, “parole” is an administrative measure used by ICE to temporarily authorize the release from immigration detention of an inadmissible arriving alien found to have a credible fear of persecution or torture, without lawfully admitting the alien. Parole does not constitute a lawful admission or a determination of admissibility, *see* INA §§ 212(d)(5)(A), 101(a)(13)(B), and reasonable conditions may be imposed on the parole, *see* 8 C.F.R. § 212.5(d). By statute, parole may be used, in the discretion of ICE and under such conditions as ICE may prescribe, only for urgent humanitarian reasons or for significant public benefit. As interpreted by regulation, “urgent humanitarian reasons” and “significant public benefit” include the five categories set forth in 8 C.F.R. § 212.5(b) and listed in paragraph 4.3 of this directive, including the general category of “aliens whose continued detention is not in the public interest.”

6. **POLICY.**

- 6.1. As soon as practicable following a credible fear determination by USCIS for an arriving alien detained by DRO, DRO shall provide the alien with the attached *Parole Advisal and Scheduling Notification*. This form informs the alien that he or she will be interviewed for potential parole from DRO custody and notifies the alien of the date of the scheduled interview and the deadline for submitting any documentary material supporting his or her eligibility for parole. The contents of the notification shall be explained to such aliens in a language they understand. In determining whether detained arriving aliens found to have a credible fear should be paroled from custody, DRO shall proceed in accordance with the terms of this directive.
- 6.2. Each alien’s eligibility for parole should be considered and analyzed on its own merits and based on the facts of the individual alien’s case. However, when an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors (as described in paragraph 8.3 of this directive), parole the alien on the basis that his or her continued detention is not in the public interest. DRO Field Offices shall uniformly document their parole decision-making processes using the attached *Record of Determination/Parole Determination Worksheet*.
- 6.3. Consistent with the terms of this directive, DRO shall maintain national and local statistics on parole determinations and have a quality assurance process in place to monitor parole decision-making, as provided for in sections 7 and 8 of this directive.

- 6.4. In conducting parole determinations for arriving aliens in custody after they are found to have a credible fear of persecution or torture, DRO shall follow the procedures set forth in section 8 of this directive.
- 6.5. DRO shall provide every alien subject to this directive with written notification of the parole decision, including a brief explanation of the reasons for any decision to deny parole. When DRO denies parole under this directive, it should also advise the alien that he or she may request redetermination of this decision based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding. DRO shall ensure reasonable access to translation or interpreter services if notification is provided to the alien in a language other than his or her native language and the alien cannot communicate effectively in that language.
- 6.6. Written notifications of parole decisions shall be provided to aliens subject to this directive and, if represented, their representative within seven days of the date an alien is initially interviewed for parole or the date the alien requests a parole redetermination, absent reasonable justification for delay in providing such notification.
- 6.7. A decision to grant or deny parole shall be prepared by a DRO officer assigned such duties within his or her respective DRO Field Office. The decision shall pass through at least one level of supervisory review, and concurrence must be finally approved by the Field Office Director (FOD), Deputy FOD (DFOD), or Assistant FOD (AFOD), where authorized by the FOD.
7. **RESPONSIBILITIES.**
- 7.1. The **DRO Director** is responsible for the overall management of the parole decision-making process for arriving aliens in DRO custody following determinations that they have a credible fear of persecution or torture.
- 7.2. The **DRO Assistant Director for Operations** is responsible for:
- 1) Ensuring considered, consistent DRO parole decision-making and recordkeeping nationwide in cases of arriving aliens found to have a credible fear;
 - 2) Overseeing monthly tracking of parole statistics by all DRO Field Offices for such cases; and
 - 3) Overseeing an effective national quality assurance program that monitors the Field Offices to ensure compliance with this directive.
- 7.3. **DRO Field Office Directors** are responsible for:
- 1) Implementing this policy and quality assurance processes;

- 2) Maintaining a log of parole adjudications for credible fear cases within their respective geographic areas of responsibility, including copies of the *Record of Determination/Parole Determination Worksheet*;
- 3) Providing monthly statistical reports on parole decisions for arriving aliens found to have a credible fear;
- 4) Making the final decision to grant or deny parole for arriving aliens found to have a credible fear within their respective areas of responsibility or, alternatively, delegating such responsibility to their DFODs or AFODs (in which case, FODs nevertheless retain overall responsibility for their office's compliance with this directive regardless of delegating signatory responsibility to DFODs or AFODs); and
- 5) Ensuring that DRO field personnel within their respective areas of responsibility who will be assigned to make parole determinations are familiar with this directive and corresponding legal authorities.

7.4. **DRO Deputy Field Office Directors** are responsible for reviewing, and forwarding for their respective FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or torture. Alternatively, DFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.5. **Assistant Field Office Directors** are responsible for reviewing, and forwarding for their respective DFODs' or FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or torture. Alternatively, AFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.6. As applicable, **DRO field personnel** so assigned by their local chains-of-command are responsible for providing detained arriving aliens found to have a credible fear with the attached *Parole Advisal and Scheduling Notification* and for fully and accurately completing the attached *Record of Determination/Parole Determination Worksheet* in accordance with this directive and corresponding legal authorities.

8. **PROCEDURES.**

8.1. As soon as practicable following a finding that an arriving alien has a credible fear, the DRO Field Office with custody of the alien shall provide the attached *Parole Advisal and Scheduling Notification* to the alien and explain the contents of the notification to the alien in a language he or she understands, through an interpreter if

necessary. The Field Office will complete the relevant portions of the notification, indicating the time when the alien will receive an initial interview on his or her eligibility for parole and the date by which any documentary evidence the alien wishes considered should be provided, as well as instructions for how any such information should be provided.

- 8.2 Unless an additional reasonable period of time is necessary (e.g., due to operational exigencies or an alien's illness or request for additional time to obtain documentation), no later than seven days following a finding that an arriving alien has a credible fear, a DRO officer familiar with the requirements of this directive and corresponding legal authorities must conduct an interview with the alien to assess his or her eligibility for parole. Within that same period, the officer must complete the *Record of Determination/Parole Determination Worksheet* and submit it for supervisory review. If the officer concludes that parole should be denied, the officer should draft a letter to this effect for the FOD's, DFOD's, or AFOD's signature to be provided to the alien or the alien's representative and forward this letter for supervisory review along with the completed *Record of Determination/Parole Determination Worksheet*. The letter must include a brief explanation of the reasons for denying parole and notify the alien that he or she may request redetermination of parole based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding.
- 8.3. An alien should be paroled under this directive if DRO determines, in accordance with paragraphs (1) through (4) below, that the alien's identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.

1) Identity.

- a) Although many individuals who arrive in the United States fleeing persecution or torture may understandably lack valid identity documentation, asylum-related fraud is of genuine concern to ICE, and DRO must be satisfied that an alien is who he or she claims to be before releasing the alien from custody.
- b) When considering parole requests by an arriving alien found to have a credible fear, Field Office personnel must review all relevant documentation offered by the alien, as well as any other information available about the alien, to determine whether the alien can reasonably establish his or her identity.
- c) If an alien lacks valid government-issued documents that support his or her assertion of identity, Field Office personnel should ask whether the alien can obtain government-issued documentation of identity.

- d) If the alien cannot reasonably provide valid government-issued evidence of identity (including because the alien reasonably does not wish to alert that government to his or her whereabouts), the alien can provide for consideration sworn affidavits from third parties. However, third-party affiants must include copies of valid, government issued photo-identification documents and fully establish their own identities and addresses.
- e) If government-issued documentation of identity or third-party affidavits from reliable affiants are either not available or insufficient to establish the alien's identity on their own, Field Office personnel should explore whether the alien is otherwise able to establish his or her identity through credible statements such that there are no substantial reasons to doubt the alien's identity.

2) Flight Risk.

- a) In order to be considered for release, an alien determined to have a credible fear of persecution or torture must present sufficient evidence demonstrating his or her likelihood of appearing when required.
- b) Factors appropriate for consideration in determining whether an alien has made the required showing include, but are not limited to, community and family ties, employment history, manner of entry and length of residence in the United States, stability of residence in the United States, record of appearance for prior court hearings and compliance with past reporting requirements, prior immigration and criminal history, ability to post bond, property ownership, and possible relief or protection from removal available to the alien.
- c) Field Office personnel shall consider whether setting a reasonable bond and/or entering the alien in an alternative-to-detention program would provide reasonable assurances that the alien will appear at all hearings and depart from the United States when required to do so.
- d) Officers should exercise their discretion to determine what reasonable assurances, individually or in combination, are warranted on a case-by-case basis to mitigate flight risk. In any event, the alien must be able to provide an address where he or she will be residing and must timely advise DRO of any change of address.

3) Danger to the Community.

- a) In order for an alien to be considered for parole, Field Office personnel must make a determination whether an alien found to have a credible fear poses a danger to the community or to U.S. national security.
- b) Information germane to the determination includes, but is not limited to, evidence of past criminal activity in the United States or abroad, of activity contrary to U.S. national security interests, of other activity giving rise to concerns of public safety or danger to the community (including due to serious mental illness), disciplinary infractions or incident reports, and any criminal or detention history that shows that the alien has harmed or would likely harm himself or herself or others.
- c) Any evidence of rehabilitation also should be weighed.

4) Additional Factors.

- a) Because parole remains an inherently discretionary decision, in some cases there may be exceptional, overriding factors that should be considered in addition to the three factors discussed above. Such factors may include, but are not limited to, serious adverse foreign policy consequences that may result if the alien is released or overriding law enforcement interests.
- b) Field Office personnel may consider such additional factors during the parole decision-making process.

- 8.4. Assigned DRO officers should, where appropriate, request that parole applicants provide any supplementary information that would aid the officers in reaching a decision. The *Record of Determination/Parole Determination Worksheet* should be annotated to document the request for supplementary information and any response from the detainee.
- 8.5. After preparing and signing the *Record of Determination/Parole Determination Worksheet*, and in the case of a denial of parole, drafting a written response to the alien, the assigned DRO officer shall forward these materials and the parole request documentation to his or her first-line supervisor for review and concurrence.
- 8.6. Upon his or her concurrence, the first-line supervisor shall sign the *Record of Determination/Parole Determination Worksheet* where indicated and forward it, along with any related documentation, to the FOD (or, where applicable, the DFOD or AFOD) for final approval.
- 8.7. The FOD (or, where applicable, the DFOD or AFOD) shall review the parole documentation, consult with the preparing officer and supervisor as necessary, and

either grant or deny parole by signing the *Record of Determination/Parole Determination Worksheet* where indicated and, in the case of a denial, signing the written response to the alien.

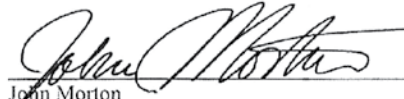
- 8.8. Following a final decision by the FOD to deny parole (or, where applicable, the DFOD or AFOD), the Field Office shall provide the written response to the alien or, if represented, to the alien's legal representative, indicating that parole was denied. If parole is granted, the Field Office shall provide the alien with a date-stamped I-94 Form bearing the following notation: "**Paroled under 8 C.F.R. § 212.5(b). Employment authorization not to be provided on this basis.**"
- 8.9. If an alien makes a written request for redetermination of an earlier decision denying parole, the Field Office may, in its discretion, reinterview the alien or consider the request based solely on documentary material already provided or otherwise of record.
- 8.10. The supporting documents and a copy of the parole decision sent to the alien (if applicable), the completed *Record of Determination/Parole Determination Worksheet*, and any other documents related to the parole adjudication should be placed in the alien's A-file in a record of proceeding format. In addition, a copy of the *Record of Determination/Parole Determination Worksheet* shall be stored and maintained under the authority of the FOD for use in preparing monthly reports.
- 8.11. On a monthly basis, FODs shall submit reports to the Assistant Director for Operations, or his or her designee, detailing the number of parole adjudications conducted under this directive within their respective areas of responsibility, the results of those adjudications, and the underlying basis of each Field Office decision whether to grant or deny parole. The Assistant Director for Operations, or his or her designee, in conjunction with appropriate DRO Headquarters components, will analyze this reporting and collect individual case information to review in more detail, as warranted. In particular, this analysis will rely on random sampling of all reported cases for in-depth review and will include particular emphasis on cases where parole was not granted because of the presence of additional factors, per paragraph 8.3(4) of this directive. Any significant or recurring deficiencies identified during this monthly analysis should be explained to the affected Field Office, which will take appropriate corrective action.
- 8.12. At least once every six months, the Assistant Director for Operations, or his or her designee, shall prepare a thorough and objective quality assurance report, examining the rate at which paroled aliens abscond and the Field Offices' parole decision-making, including any noteworthy trends or corrective measures undertaken based upon the monthly quality assurance analysis required by paragraph 8.11 of this directive.

9. **ATTACHMENTS.**

- *Parole Advisal and Scheduling Notification.*
- *Record of Determination/Parole Determination Worksheet.*

10. **NO PRIVATE RIGHTS CREATED.** This directive is an internal policy statement of ICE. It is not intended to, shall not be construed to, may not be relied upon to, and does not create, any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Approved: _____



John Morton
Assistant Secretary
U.S. Immigration and Customs Enforcement

APPENDIX N

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

PAROLE ADVISAL AND SCHEDULING NOTIFICATION

Alien's Claimed Name(s) (including AKAs) _____
_____ A#(s) _____
Detention Facility Name and Location _____
Field Office _____

NOTICE TO THE ALIEN

Because you have been determined to have a "credible fear" of persecution or torture, U.S. Immigration and Customs Enforcement (ICE) will consider whether to parole you from custody pending the resolution of your immigration proceedings. As an Asylum Officer may have already explained to you, ICE may grant you parole if you can establish to ICE's satisfaction: (1) your identity; (2) that you are likely to appear for all scheduled hearings and enforcement appointments (including for removal from the United States if you are ordered removed); and (3) that you do not present a security risk to the United States or a danger to the community.

1) Documents that *May Prove Identity*

- **Passport**
 - o Your *original*, valid passport *OR*
 - o Copy of your passport AND one or more of the other identity documents listed here
- **National ID Card**
 - o Your *original*, valid national ID card *OR*
 - o Copy of your national ID card AND one or more of the other identity documents listed here
- **Birth Certificate**
 - o Your *original* birth certificate AND one or more of the other identity documents listed here
 - o Copy of your birth certificate AND one or more of the other identity documents listed here
- **Affidavit (Letter) from a Person Who Can Confirm Your Identity**
 - o *Must* include your full name, your date of birth, your nine-digit A-number, and your country of origin
 - o *Must* be signed by a lawful permanent resident (green card holder) or citizen of the United States of America and include a copy of the person's passport or green card
 - o *Must* include the person's full name and her/his address and phone number(s)
 - o *Must* state how and for how long he or she has known you

2) Documents that *May Prove that You are Not a Flight Risk*

- **Affidavit (Letter) from a Person or Community Organization Who Will Support You**
 - o *Must* include your full name, your date of birth, your nine-digit A-number, and your country of origin
 - o *Must* include the person's/organization's full name and her/his address and phone number(s)
 - o *Must* be signed by a lawful permanent resident (green card holder) or citizen of the United States of America and include a copy of the person's passport or green card
 - o *Must* state that you will reside at the address listed and that the person/organization is willing to support you – for example, provide you housing and food – while you are in immigration proceedings
 - o *Must* include a copy of a utility or telephone bill, with the person's/organization's name and current address matching the address of residence included in the affidavit
 - o *Can* include details of any other ties that you have to where you will live (family, friends, etc.)
- **In addition to the Affidavit of Sponsorship, you may also submit**
 - o Letters from others in the community where you will live, showing their support. Note: *must* include the writer's name, address, contact information, and immigration status.
 - o Documentation of any legal, medical or social services you will receive upon release

3) Documents that May Prove that You are Not a Danger to the Community

- **Evidence of acquittal or dismissal of any criminal charges**
- **Certificates** for rehabilitation classes or evidence of other positive accomplishments (completion of a degree or training, long-term employment, volunteer activities, activities with your place of worship)
- **Affidavit attesting to your rehabilitation**
 - o *Must* include your full name, your date of birth, your nine-digit A-number, and your country of origin
 - o *Must* be signed by a lawful permanent resident (green card holder) or citizen of the United States of America and include a copy of her/his passport or green card
 - o *Must* include the person's full name and her/his address and phone number(s)
 - o *Must* state how and for how long he or she has known you
 - o *Must* explain why she/he believes that you have been rehabilitated

If you would like ICE to consider any documents as part of its assessment whether to parole you from detention, you must provide those documents as soon as possible to allow ICE sufficient time to review the documents thoroughly before your interview. You may also request additional time to obtain documents for ICE's consideration, but should make that request as soon as possible.

ICE has scheduled you for an interview to assess whether you meet these qualifications. That interview will take place at the time and place indicated below.

Your parole interview has been scheduled with an ICE officer at the following date and time:

_____ @ _____
(Month, Day, Year) (Time – Indicate "a.m." or "p.m.")

Please provide any paperwork you would like considered (or any request for additional time to gather paperwork) no later than

_____, to:
(Month, Day, Year)

Officer Name Address/City/State/Zip

Office Telephone Number Fax

(ICE Detention and Removal Operations Field Office Personnel: Indicate Manner in Which Alien Should Provide Documentation)

Following your interview, you will be notified in writing of ICE's decision, usually within 7 days. If your request is denied, you will receive a written explanation of the denial.

PROOF OF SERVICE

Asylum Seeker's Signature: _____

Date: _____

ICE Officer's Name: _____

Language Used: _____ Interpreter Number (if applicable): _____

APPENDIX O

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

RECORD OF DETERMINATION/PAROLE DETERMINATION WORKSHEET

Alien's Claimed Name(s) (including AKAs) _____
 _____ A#(s) _____
 Detention Facility Name and Location _____
 Field Office _____

This worksheet should be completed pursuant to section 212(d)(5) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 212.5 for each arriving alien in U.S. Immigration and Customs Enforcement (ICE) custody following a determination by a U.S. Citizenship and Immigration Services asylum officer or an immigration judge of the Executive Office for Immigration Review that the alien has a "credible fear" of persecution or torture, within the meaning of INA § 235(b)(1)(B)(v) and 8 C.F.R. § 208.30(e)(2)-(3). Such an alien will have been initially processed under the INA's expedited removal provisions and should have a completed Form I-870 (Record of Determination/ Credible Fear Worksheet) in his or her A-file. For those aliens initially denied parole, a letter to that effect must be prepared for the signature by the Office of Detention and Removal Operations (DRO) Field Office Director or, where that authority has been delegated, to the Deputy Field Office Director or Assistant Field Office Director, in whose area of responsibility the alien is detained. The letter should provide a brief explanation of the reasons for denial of parole and notify the alien that he or she may request redetermination of parole based upon changed circumstances or additional evidence relevant to the alien's identity and whether and to what extent the alien poses a danger to the community or a flight risk.

The parole decision includes four determinations. First is an assessment of the alien's identity. Second is whether the alien is likely to appear at all scheduled hearings and enforcement appointments, including for removal upon issuance of a final order of removal. Third is whether the alien presents a security risk to the United States or a danger to the community. Fourth is whether there are any additional factors that may militate in favor of or against release, including, in particular, any exceptional, overriding reasons why an otherwise eligible alien should not be paroled. In completing this worksheet, DRO personnel should consult ICE Policy Directive Number 11002.1, entitled "Parole of Arriving Aliens Found to have a Credible Fear of Persecution or Torture" (effective on January 4, 2010).

This entire worksheet must be completed in every case. Use blank 8" x 11" paper if additional writing space is required. Include copies of all evidence that supports the decision to parole or not parole the alien with this worksheet.

Part I. Foreign Language

- Was a parole interview conducted in a language other than English? Yes No
(If "No," proceed to Part II)
- In what language was the interview conducted: _____
- Was an interpreter used? Yes No
- Do the interviewing officer, alien, and interpreter (if applicable) understand one another? Yes No

Comments: _____

Part II. Determination

A. Identity

- Does the individual have valid, government-issued documentation of identity? Yes No
- In the absence of government-issued documentation of identity, are there any third-party affidavits from affiants, who are themselves able to establish their own identity and address, that support the validity of the individual's claimed identity? Yes No
- Has the individual otherwise established his or her identity through credible statements such that there are no substantial reasons to doubt the individual's identity as stated by the individual? Yes No
- Identify any statements or evidence that relate to the individual's identity and explain why the evidence does or does not satisfy the standard:

B. Risk of Flight

- Does the individual have an address where he or she will reside (including, if applicable, residence provided by a community-based service provider)? Yes No
- Does the individual have any substantial ties to the community (e.g., relatives, organizations)? Yes No
- Are there any substantial reasons to believe the individual will not appear as required for all scheduled hearings and enforcement appointments? Yes No
- If substantial reasons exist to consider the individual a flight risk, is there an alternative to detention (ATD) program available? Yes No
- If ATD is unavailable, would imposition of a bond ensure the individual's appearance? Yes No
- Has the individual established that he or she does not pose a substantial risk of flight (taking into account such conditions or ATD options as may be applied)? Yes No
- Please explain your conclusion: _____

C. Danger to the Community

- Is there any substantial reason to believe that the individual poses an actual danger to the community or U.S. national security? Yes No
- Identify any evidence offered that relates to the individual's potential danger to the community or national security (including any mitigating evidence such as proof of rehabilitation) and explain why it does or does not justify continued detention: _____

D. Additional Factors (Including any Exceptional, Overriding Factors why Parole Should Not Be Granted)

- Are there any additional factors relevant to whether the alien should be released? Yes No
- Please explain: _____

Part III. Signatures and Approval

• Initial Preparer's Recommendation Grant Parole Deny Parole

(Name and Title of Preparing Officer) (Signature of Preparing Officer) (Date of Recommendation)

- Please explain your recommendation: _____

• Supervising Official's Assessment Grant Parole Deny Parole

(Name and Title of Supervising Official) (Signature of Supervising Official) (Date of Assessment)

- Please explain your assessment: _____

• Deciding Official's Conclusion Grant Parole Deny Parole

(Name and Title of Deciding Official) (Signature of Deciding Official) (Date of Decision)

- Please explain your conclusion: _____

APPENDIX P

DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: _____

In the Matter of:

Respondent: _____ currently residing at:

(Number, street, city and ZIP code)

(Area code and phone number)

- You are an arriving alien.
- You are an alien present in the United States who has not been admitted or paroled.
- You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to: 8CFR 208.30 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

(Complete Address of Immigration Court, including Room Number, if any)

on _____ at _____ to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.

(Signature and Title of Issuing Officer)

Date: _____

(City and State)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 1003.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court and the Department of Homeland Security immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to your local DHS office, listed on the internet at <http://www.ice.gov/contact/ero>, as directed by DHS and required by statute and regulation. Immigration regulations at 8 CFR 1241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Immigration and Nationality Act (the Act).

U.S. Citizenship Claims: If you believe you are a United States citizen, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office of Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before:

(Signature of Respondent)

Date: _____

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on _____, in the following manner and in compliance with section 239(a)(1) of the Act.

in person by certified mail, returned receipt # _____ requested by regular mail

Attached is a credible fear worksheet.

Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

(Signature and Title of officer)

APPENDIX Q

Event No: [REDACTED]

U.S. Department of Homeland Security

Information about Credible Fear Interview

Purpose of this notice

The purpose of this notice is to explain what will happen while you are in detention, what rights you have, and what may happen to you as a result of statements you make. It is important that you understand your rights and what will happen. **PLEASE READ THIS NOTICE CAREFULLY.**

You have been detained because the U.S. Department of Homeland Security (DHS) believes that you may not have the right to stay in the United States. You have indicated an intention to apply for asylum or a fear of persecution or return to your country. You will be interviewed by a specially-trained asylum officer to determine if you have a "credible fear of persecution." You will be detained until that interview takes place. If the DHS finds that you have a credible fear of persecution, you may or may not be released.

Right to consult with other persons

Normally, the interview will not take place sooner than 48 hours after you arrive at the detention facility. You may use this time to rest and consult with family members, friends, or other representatives. In unusual circumstances, you may be given additional time to contact someone. If you need this additional time, you should inform a DHS officer. You may request that the interview take place sooner if you are prepared to discuss your fears or claim immediately.

You may consult with a person or persons of your choosing, provided that such consultation is at no expense to the government and does not delay the process. A person of your choice can be present with you at your interview. A list of representatives who may be able to speak to you free of charge is attached to this notice. You may use the telephone while you are in detention to call a representative, friend or family member in the United States, collect or at your own expense. If you wish to call someone, you should inform an DHS officer for assistance. You also may contact the United States Office of the United Nations High Commissioner for Refugees, at (202) 296-5191 from 9:00 a.m - 5:00 p.m. (eastern standard time), Monday thru Friday.

Description of credible fear interview

The purpose of the credible fear interview is to determine whether you might be eligible to apply for asylum before an immigration judge. This interview is not your formal asylum hearing. It is only to help us determine whether there is a significant possibility that you may qualify as a refugee.

At your interview, you will have the opportunity to explain to the asylum officer why you think you should not be returned to your home country. If you want to apply for asylum in the United States, or think you will be harmed, persecuted or tortured if you return to your home country, you must show an asylum officer that you have a credible fear of being harmed or persecuted because of your race, religion, nationality, membership in a particular social group or political opinion, or that it is likely that you will be tortured.

If the officer determines that you have a credible fear or persecution or that you might face torture if you are returned to your home country, you may be eligible to remain in the United States.

It is very important that you tell the officer all the reasons why you have concerns about returning to your home country or are afraid to return to your home country. There are regulations protecting the confidentiality of asylum claims.

It is also very important that you tell the truth during your interview. Although the purpose of this interview is not to gather evidence against you, failure to tell the truth could be used against you in this or any future immigration proceeding.

Form M-444 (Rev. 08/01/07)

Need for interpreter or special consideration

If you do not speak English well or if you prefer to be interviewed in your own language, DHS will provide an interpreter for the interview. The interpreter has been told to keep the information you discuss confidential. If the interpreter is not translating correctly or you don't feel comfortable with the interpreter, you may request another interpreter. The officer will take written notes.

If you will need to tell the asylum officer information that is very personal and very difficult to talk about, you may request a female officer and female interpreter, or a male officer and male interpreter. The DHS will provide them if they are available. You will also have the opportunity to speak with the asylum officer separately from your family if you so desire.

Consequences of failure to establish credible fear and review of determination

If the asylum officer determines that you do not have a credible fear of persecution, you may request to have that decision reviewed by an immigration judge. The immigration judge's review will be in person or by telephone or video connection. The review will happen as soon as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days from the date of the asylum officer's decision. You may consult with a person or person of your choosing before the review by the immigration judge, provided it does not cause unreasonable delay. You will be given a copy of the asylum officer's record of determination to examine prior to the review by the immigration judge. If any of the information is incorrect, you should notify the immigration judge. The immigration judge may decide that you do have a credible fear and that you are eligible for a full asylum hearing before an immigration judge. If you are ordered removed, you may be barred from reentry to the United States for a period of 5 years or longer.

Interpreter Certification		
I	_____	(name of interpreter) certify that I am fluent in both the _____ SPANISH
and English languages, that I interpreted the above information from English to _____ SPANISH		_____ completely and accurately, and that the recipient understood my interpretation.
		_____ Signature of interpreter
		_____ Date

Alien Acknowledgment of Receipt	
I acknowledge that I have been given notice concerning my credible fear interview. I understand that I may consult with a person or persons of my choosing prior to the interview as long as it does not unreasonably delay the process and is at no expense to the Government.	
Witnessed by _____	
_____ Alien's signature	
_____ Date	

Form M-444 (Rev. 08/01/07)

APPENDIX R:

SITE COMPARISON CHART OF USCIRF-VISITED ICE FAMILY DETENTION FACILITIES						
Detention Facility Name	Types of Detainees	Security Procedures	Freedom of Movement	Privacy	Uniforms	Services, Recreation and Programming Opportunities
Berks Family Shelter	non-citizen male- and female-headed families w/out criminal convictions	entry to facility is locked; cameras and 24- hour lighting in common areas; searches of living areas if items missing; no headcounts	24/7 freedom of movement; detainees can access non-housing units freely; no escorts are required	large rooms with changing numbers of other detainees depending on family sizes; toilets have doors and showers have curtains; detainees can be alone in room	no uniforms	extended outdoor/ recreation time; no programmatic activities offered; field trips offered
Karnes County Residential Center	non-citizen female-headed families w/out criminal convictions	entry to facility is locked; cameras and 24- hour lighting in common areas; searches of living areas if items missing;	24/7 freedom of movement during daylight hours; detainees can access non-housing units freely; no escorts are required	8 beds per room; private toilet and shower in room	no uniforms	extended recreation and programmatic activities offered; limited internet; school classes and daycare for children
South Texas Family Residential Center	non-citizen female-headed families w/out criminal convictions	entry to facility is locked; cameras and 24- hour lighting in common areas; searches of living areas if items missing; 3 headcounts per day	Set schedules for meals, services, recreation and programming opportunities; 24/7 freedom of movement within “neighbor-hoods” and no escort required for movement between the neighbor-hoods, as well as common buildings	Up to 12 people or 2 families per “apart-ment” with bunks and dayrooms; curtains in room for privacy; separate areas with private showers and toilets	Color-coded street clothes to match residential “neighbor-hood”	extended recreation and programmatic activities offered; limited internet; school classes and daycare for children





**UNITED STATES COMMISSION ON
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