



**UNITED STATES COMMISSION ON
INTERNATIONAL RELIGIOUS FREEDOM**

**Report on Asylum Seekers
in Expedited Removal**

VOLUME I: FINDINGS & RECOMMENDATIONS

As authorized by Section 605 of the International Religious Freedom Act of 1998



**REPORT ON
ASYLUM SEEKERS
IN
EXPEDITED REMOVAL**

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U.S. Commission on International Religious Freedom
800 North Capitol Street, NW
Suite 790
Washington, DC 20002
202-523-3240
202-523-5020 (fax)

www.uscirf.gov

United States Commission on International Religious Freedom

Preeta D. Bansal

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Nina Shea*

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Deputy Director of Policy

Mark Hetfield

Immigration Counsel

Asylum Seekers in Expedited Removal Subcommittee

Preeta D. Bansal

Michael Cromartie

Bishop Ricardo Ramirez

Michael K. Young

Felice D. Gaer, *ex officio*

* Due to personal demands on her time, Commissioner Shea did not review or participate in the Study.

STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL

AUTHORS

REFUGEE AND ASYLUM EXPERTS

Mark Hetfield, *Editor and Director of Study*
(*U.S. Commission on International Religious Freedom*)

Kate Jastram
(*University of California at Berkeley, Boalt Hall School of Law*)

Allen S. Keller, M.D.
(*NYU School of Medicine, Bellevue-NYU Program for Survivors of Torture*)

Charles H. Kuck*
(*Weathersby, Howard, and Kuck, LLC, Atlanta*)

DETENTION ADVISOR

Craig Haney, Ph.D.
(*University of California at Santa Cruz*)

CHIEF METHODOLOGIST

Fritz Scheuren, Ph.D.
(*National Opinion Research Center, University of Chicago*)

LEADING RESEARCH STAFF

Patrick Baier, *Statistician*
(*National Opinion Research Center*)

Cory Fleming, *Statistician*
(*National Opinion Research Center*)

Tala Hartsough, *Research Coordinator*
(*University of California at Berkeley, Boalt Hall School of Law*)

Susan Kyle, *Research Coordinator*
(*U.S. Commission on International Religious Freedom*)

Andrew Rasmussen, Ph.D., *Research Director*
(*Bellevue-NYU Program for Survivors of Torture*)

Kim Reeves, *Research Coordinator*
(*Bellevue-NYU Program for Survivors of Torture*)

Barry Rosenfeld, Ph.D., *Port of Entry Study Methodologist*
(*Fordham University*)

* Replaced Robert C. Divine, who resigned on June 30, 2004 to accept an appointment at the Department of Homeland Security as the Chief Counsel to U.S. Citizenship and Immigration Services.

RESEARCHERS

U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM

Claire Morris Clark
Robin Gary
Anne Marie Harkins
Karen Luong

NATIONAL OPINION RESEARCH CENTER

Ali Mushtaq

UNIVERSITY OF CALIFORNIA AT BERKELEY BOALT HALL SCHOOL OF LAW

Michael Burstein
Shelley Cavalieri
Carol Chacon
Amy Cucinella
Allison Davenport
Kathleen Glynn
Steven Herman
Olivia Horgan
Tara Lundstrom
Lauri Owen
Kyra Sanin
Rani Singh
Rebecca Tanner
Kaja Tretjak
Kristie Whitehorse

BELLEVUE-NYU PROGRAM FOR SURVIVORS OF TORTURE

Monica Aguirre	Jonathan Hill
Christopher Barrett	Jessica Hood
Pamela Blair	Marissa Huang
Rona Carter	Allison Korn
Charlotte Labys	Charlotte Labys
Tracy Chu	Christina Luna
Adam Cohen	Jane Marshall
R. Meghan Davis	Christina Mathieson
Nirva Delva	Melody Moezzi
Mariel Diaz	Valentina Nikulina
Tia Dole	Lorelei Prevost
Darlene Dowling	Claudia Rincón
Cristina Fernandez	Jamie Rosenman
Lara Gamble	Evan Silverman
Sanida Halebic	Sylvia Sullivan

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ASYLUM SEEKERS IN EXPEDITED REMOVAL

A Study Authorized by Section 605 of the International Religious Freedom Act of 1998
(The entire study is available at www.uscirf.gov)

EXECUTIVE SUMMARY

THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM

The U.S. Commission on International Religious Freedom (USCIRF) was established by the International Religious Freedom Act of 1998 (IRFA). USCIRF is an independent and bipartisan federal agency created to monitor religious freedom in other countries and advise the President, Secretary of State and Congress on how best to promote it.

IRFA also authorized the Commission to appoint experts to conduct a study to advise whether certain legislative changes to asylum, enacted in 1996, were impairing America's obligation – and founding tradition – of offering refuge to those suffering persecution.

The Study examined how the new immigration procedure – known as “Expedited Removal” – was affecting asylum seekers, regardless of whether or not the claim was based on religion, race, nationality, membership in a particular social group, or political opinion.

EXPEDITED REMOVAL

In 1996, President Bill Clinton signed the Illegal Immigration and Immigrant Responsibility Act (IIRAIRA), the most comprehensive immigration reform legislation in over 30 years. Among other reforms, the legislation established Expedited Removal, which was intended to strengthen the security of America's borders, without closing them to those fleeing persecution.

Specifically, prior to IIRAIRA, immigration inspectors could not compel an improperly documented alien to depart the United States. The inspector had the discretion to offer the alien the opportunity to withdraw his application for admission, or to refer the alien to an immigration judge for a hearing. If the inspector did refer the alien to an immigration judge, the alien could be detained until the hearing, but would generally be released due to bed-space shortages.

Under IIRAIRA, immigration inspectors were authorized to summarily remove aliens who lacked appropriate travel documents, or who obtained their travel documents through fraud or misrepresentation. Concerned, however, that *bona fide* asylum seekers not be removed to countries where they may be persecuted, Congress also included provisions to prevent the Expedited Removal of refugees fleeing persecution.¹ Specifically, an alien who indicates an

¹ Under the 1967 Protocol to the 1951 Convention relating to the Status of Refugees, which the United States has ratified, as implemented by the Refugee Act of 1980 and other amendments to the Immigration and Nationality Act, the United States may not return any individual to a country where that individual may face persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion. In addition, the United

intention to apply for asylum or a fear of return is entitled to a “credible fear interview” by an asylum officer. If the asylum officer determines that an alien has a “significant possibility” of establishing eligibility for asylum, he is entitled to ask the immigration judge for relief from removal.² If credible fear is not found, the asylum officer orders the alien removed (although this decision is subject to review by an immigration judge).

Congress also required that aliens, including asylum seekers, subject to Expedited Removal be detained until the United States physically removes them, after which they may not return to the United States for five years. If an asylum officer determines that an alien has credible fear, however, the alien may be considered for release while waiting for an asylum hearing. While decisions of release (“parole”) are discretionary, agency memoranda instruct that “parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”³

On March 1, 2003, the Immigration and Naturalization Service (INS), the lead agency on Expedited Removal, was abolished by the Homeland Security Act of 2002. The functions of the former INS were dispersed to various components within the newly created Department of Homeland Security. The immigration judges, however, remained in the Executive Office for Immigration Review (EOIR) within the Department of Justice.⁴

Expedited Removal is mandatory for aliens arriving at ports of entry. Congress, however, also authorized the Attorney General to exercise discretion in applying Expedited Removal in the interior of the United States to undocumented aliens apprehended within two years after entry. On November 13, 2002, Expedited Removal was expanded by the INS to apply to undocumented non-Cubans who entered the United States by sea within the prior two years.

On August 11, 2004, the Department of Homeland Security announced that, effective immediately, it was exercising its discretion to further expand Expedited Removal authority to the Border Patrol for undocumented aliens apprehended within 14 days after entry and within 100 miles of the border, in the Tucson and Laredo Border Patrol sectors.⁵

States has ratified and implemented regulations to execute the Convention Against Torture (CAT), and may not remove anyone to a country where (s)he is in danger of being tortured.

² “Credible fear” is defined in section 235(b)(1)(B)(v) of the Immigration and Nationality Act, 8 USC 1225(b)(1)(B)(5) (2004).

³ INS Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in *75 Interpreter Releases* 270 (Feb. 23, 1998).

⁴ EOIR oversees the Immigration Judges who review negative credible fear determinations made by asylum officers and who hear asylum claims from aliens placed in Expedited Removal. It also houses the Immigration Judges’ appellate review unit, the Board of Immigration Appeals (BIA).

⁵ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (2004).

THE STUDY

In the International Religious Freedom Act of 1998 (IRFA), Congress authorized the USCIRF to appoint experts to examine whether immigration officers, in exercising Expedited Removal authority over aliens who may be eligible for asylum, were:

- (1) Improperly encouraging withdrawals of applications for admission;
- (2) Incorrectly failing to refer such aliens for credible fear determinations;
- (3) Incorrectly removing such aliens to countries where such aliens may face persecution; or
- (4) Improperly detaining such aliens, or detaining them under inappropriate conditions.

Congress authorized the USCIRF-appointed experts to have virtually unrestricted access to Expedited Removal proceedings.

IRFA also required the Government Accountability Office (GAO) to complete its own study on asylum seekers in Expedited Removal, which was released in September 2000. That study found that, in spite of some deficiencies in the process, INS was generally in compliance with its own Expedited Removal procedures. GAO, however, relied primarily on the review of INS records, statistical analyses, and whether INS was following its own procedures. GAO chose not to critically review legal determinations made by INS or the Executive Office for Immigration Review.

The Commission began its effort in the Fall of 2003, after the absorption of most Expedited Removal operations into the Department of Homeland Security (DHS). Like the GAO, USCIRF appointed experts chose to avoid reviewing legal analyses performed by the Departments of Homeland Security and Justice, focusing instead on building on the file review and statistical analyses gathered by GAO. The USCIRF Study, however, also differed from the GAO effort in several respects. Specifically, the USCIRF-appointed experts chose to:

- Observe inspections at seven major ports of entry (GAO did not collect data from observations of Expedited Removal proceedings);
- Compare the detention standards to correctional standards, and ascertain whether correctional standards were “appropriate” for a non-criminal asylum seeker population (GAO instead accepted the INS detention standards, and measured INS compliance with some of those standards);
- Review the use of documents created during the Expedited Removal process are used as evidence during asylum hearings; and
- Examine the impact of representation on asylum claimants subject to Expedited Removal.

In collecting data for the Study, under the guidance of a chief methodologist and other experts in research methods, the experts:

- Observed, and collected data from, 404 secondary inspections and interviewed 194 aliens in Expedited Removal proceedings (with 155 of those aliens being both interviewed and observed);

- Reviewed randomly selected subsamples of an additional 339 files from the Ports of Entry; 32 files of aliens who dissolved their asylum claims; 163 records of proceeding from the Board of Immigration Appeals; and 321 Alien Files of Asylum Seekers who were referred for credible fear;
- Surveyed all eight asylum offices and 19 detention facilities;
- Interviewed, and collected data from, 39 asylum seekers who were dissolving their asylum claim;
- Reviewed 50 files provided by DHS of negative credible fear determinations; and
- Compiled nation-wide statistics with the assistance of EOIR and DHS.

OVERVIEW OF FINDINGS AND RECOMMENDATIONS OF THE USCIRF STUDY

The Study found mandatory procedures in place to ensure that asylum seekers are protected under Expedited Removal. Some procedures were applied with reasonable consistency, but compliance with others varied significantly, depending upon where the alien arrived, and which immigration judges or inspectors addressed the alien's claim. Most procedures lacked effective quality assurance measures to ensure that they were consistently followed. Consequently, the outcome of an asylum claim appears to depend not only on the strength of the claim, but also on which officials consider the claim, and whether or not the alien has an attorney. Similarly, while DHS has developed criteria relating to the release of detained asylum seekers, the implementation of these criteria also varies widely from place to place.

There are a few areas, however, where the Study identified problems other than inconsistent practices. For example, with regard to detention, the Study found that asylum seekers are consistently detained in jails or jail-like facilities, which the experts found inappropriate for non-criminal asylum seekers. There were, however, a small number of exceptions to this rule, the most prominent being a contract facility in Broward County, Florida, which represents a secure, but appropriate and non-correctional, environment for non-criminal asylum seekers.

The Study also found that asylum seekers without a lawyer had a much lower chance of being granted asylum (2 percent) than those with an attorney (25 percent). This difference was consistent whether the alien resided – or was detained – in an area with a high rate of representation, or a low rate of representation. The Study does, however, identify a number of locations where public-private initiatives involving DHS, the Executive Office for Immigration Review, and non-governmental organizations, have put legal assistance within reach of more detained asylum seekers. These programs, however, are limited to only a few select locations.

With regard to credible fear determinations, the Study found that asylum officers screened-in more than 90 percent of credible fear applicants, and made a negative credible fear finding in only 1 percent of cases. Quality assurance procedures – requiring much more extensive documentation and review of negative claims than of positive ones, may have created a built-in bias in the credible fear screening, undermining the objectivity of the process.

Each stage of the Expedited Removal Process relies upon the information collected in previous stages:

- (1) The alien is referred by Customs and Border Protection (CBP) for a credible fear interview, or removed; then
- (2) Referred by an asylum officer at U.S. Citizenship and Immigration Services (USCIS) for an asylum hearing, or ordered removed (subject to immigration judge review of the negative credible fear determination); then
- (3) Detained or paroled by Immigration and Customs Enforcement (ICE); and then
- (4) With the participation in the courtroom by an ICE Trial Attorney, granted or denied asylum, withholding, or Convention Against Torture (CAT) relief by the immigration judge (in the Department of Justice Executive Office for Immigration Review – EOIR).

The impediments to communication and information sharing within DHS, however, are serious. By the end of the process – the asylum hearing – unreliable and/or incomplete documentation from CBP and USCIS is susceptible to being misinterpreted by the ICE Trial attorney, misapplied by the Immigration Judge, and may ultimately result in the denial of the asylum-seeker’s claim. The Study did not seek to determine whether asylum claims were incorrectly denied, but did determine that immigration judges, even within the same court, had significantly different rates of granting or denying asylum claims. Furthermore, in denying asylum applications on the basis of credibility, immigration judges frequently cited documents which the Study found to be unreliable and incomplete records. The unreliability of the documentation was documented by the Port of Entry study (Keller, et al), and its incompleteness and its use in immigration proceedings were documented by the File Review (Jastram, et al).

The Study also noted that Expedited Removal has been expanded twice in recent years, without first addressing the flaws in the system which undermine the protections for asylum seekers.

The Study urges the incoming Secretary of Homeland Security to ensure that it is no longer he – but a high ranking official who reports to him – who is responsible for coordinating refugee and asylum matters among the various bureaus. Without day-to-day oversight of asylum policy and its implementation department-wide, the flaws in the system identified in this Study cannot be effectively addressed, leaving asylum seekers in Expedited Removal at risk of being returned to countries where they may face persecution.

SPECIFIC FINDINGS AND RECOMMENDATIONS

FINDINGS

Question One

ARE IMMIGRATION OFFICERS, EXERCISING EXPEDITED REMOVAL AUTHORITY, IMPROPERLY ENCOURAGING ASYLUM SEEKERS TO WITHDRAW APPLICATIONS FOR ADMISSION?

Department of Homeland Security (DHS) regulations, and Customs and Border Protection (CBP) procedures and training materials make it clear to CBP inspectors that the withdrawal of an application for admission is “strictly voluntary” and “must not be coerced in

any way.” While most officers observed complied with these procedures, in one port of entry the Study observed a few instances in which immigration officers improperly encouraged asylum seekers to withdraw their applications for admission.

Question Two

ARE IMMIGRATION OFFICERS, EXERCISING EXPEDITED REMOVAL AUTHORITY, INCORRECTLY FAILING TO REFER ASYLUM SEEKERS FOR A CREDIBLE FEAR INTERVIEW?

DHS regulations state that an immigration inspector must refer an alien for a credible fear determination if that alien indicates “an intention to apply for asylum, a fear of torture, or a fear of return to his or her country.” In accordance with these regulations, nearly 85 percent (67/79) of arriving aliens observed by the Study expressing a fear of return were referred for a credible fear interview. CBP Guidelines, however, provide the inspector with more discretion than the regulations, allowing the inspector to decline referral in cases where the fear claimed by the applicant is unrelated to the criteria for asylum. Indeed, in 15 percent (12/79) of observed cases when an arriving alien expressed a fear of return to the inspector, the alien was not referred. Moreover, among these twelve cases were several aliens who expressed fear of political, religious, or ethnic persecution, which are clearly related to the grounds for asylum. Of particular concern, in seven of these twelve cases, the inspector incorrectly indicated on the sworn statement that the applicant claimed he had no fear of return.

DHS regulations require immigration inspectors to follow a standard script informing each alien that (s)he may ask for protection if (s)he has a fear of returning home. In approximately half of inspections observed, inspectors failed to inform the alien of the information in that part of the script. Aliens who did receive this information were seven times more likely to be referred for a credible fear determination than those who were not.

While DHS guidance requires that asylum seekers at land ports of entry be placed in Expedited Removal and referred for a credible fear interview, the Study interviewed two groups of aliens (one from the Middle East, the other from East Africa) who requested the opportunity to apply for asylum but were refused and “pushed back” at primary inspection. We became aware of these cases only because, in each case, the asylum seekers tried again on a different day and were referred into Expedited Removal as well as for a credible fear interview. CBP has stated that it is “very concerned and dismayed that this is happening contrary to policy, and is taking steps to address this.”⁶

Question Three

ARE IMMIGRATION OFFICERS, EXERCISING AUTHORITY UNDER EXPEDITED REMOVAL, INCORRECTLY REMOVING ASYLUM SEEKERS TO COUNTRIES WHERE THEY MAY FACE PERSECUTION?

⁶ Letter from Michael J. Hrinyak, Acting Executive Director, Immigration Policy and Programs, Office of Field Operations, to Mark Hetfield, USCIRF (February 2, 2005). See also “Aliens Seeking Asylum at Land Border Ports of Entry,” Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, to Regional Directors (2/6/2002).

The second Study question concerned bona fide asylum seekers who are improperly denied a referral for a credible fear determination. While such asylum seekers may be removed to a country where they may face persecution, those findings are not repeated here. Rather, to respond to this question, the focus is on asylum seekers who are removed after the credible fear interview. In addressing this question, it is also appropriate to examine asylum seekers ordered removed by the immigration judge at the conclusion of their asylum hearing, focusing on the characteristics of the proceeding which are unique to cases that originate in Expedited Removal.

Asylum officers reach a negative credible fear determination in only one percent of cases referred. Moreover, a negative credible fear determination is subject to strict quality assurance procedures by Asylum headquarters, and may then be reviewed by an immigration judge, who vacates negative credible fear findings reached by asylum officers more than ten percent of the time.

Under the current system, immigration judges – not asylum officers – determine eligibility for asylum for aliens in Expedited Removal proceedings. We found very significant variations in the asylum approval rates of individual judges. Furthermore, in nearly 40% of the immigration judge decisions examined where relief was denied, the judge cited that the applicant’s testimony was inconsistent with his or her initial asylum claim, as expressed to the immigration inspector or the asylum officer at the time of the credible fear interview. In nearly one-fourth of these cases, the Judge found that the asylum-seeker’s testimony was not credible because the alien “added detail” to the prior statements. Such negative credibility findings fail to take into account that the records of these prior statements are, according to the findings of the Study, often unreliable and incomplete. Finally, immigration judges granted relief to 25 percent of represented asylum applicants but only two percent of unrepresented asylum seekers.

After being denied asylum, an alien who continues to claim a fear of persecution or torture may appeal a negative immigration judge decision to the Board of Immigration Appeals (BIA). While the BIA sustained 23 percent of Expedited Removal asylum appeals in FY2001, only two to four percent of such appeals have been granted since 2002, when the court began allowing the issuance of “summary affirmances” rather than detailed decisions. Statistically, it is highly unlikely that any asylum seeker denied by an immigration judge will find protection by appealing to the BIA.

Question Four

ARE IMMIGRATION OFFICERS, EXERCISING AUTHORITY UNDER EXPEDITED REMOVAL, DETAINING ASYLUM SEEKERS IMPROPERLY OR UNDER INAPPROPRIATE CONDITIONS?

Asylum seekers subject to Expedited Removal must, by law, be detained until an asylum officer has determined that they have a credible fear of persecution or torture, unless release (parole) is necessary to meet a medical emergency need or legitimate law enforcement objective. The Study found that most asylum seekers are detained in jails and in jail-like facilities, often with criminal inmates as well as aliens with criminal convictions. While DHS has established detention standards, these detention facilities closely resemble, and are based on, standards for correctional institutions.

In one particularly innovative Immigration and Customs Enforcement (ICE) contract facility, located in Broward County, Florida, asylum seekers are detained in a secure facility which does not closely resemble a jail. While Broward could be the model in the United States for the detention of asylum seekers, it is instead the exception among the network of 185 jails, prisons and “processing facilities” utilized by DHS to detain asylum seekers in Expedited Removal.

DHS policy favors the release of asylum seekers who have established credible fear, identity, community ties, and no likelihood of posing a security risk. However, there was little documentation in the files to allow a determination of how these criteria were actually being applied by ICE.

In FY2003, only 0.5 percent of asylum seekers subject to Expedited Removal in the New Orleans district were released prior to a decision in their case. In Harlingen, Texas, however, nearly 98 percent of asylum seekers were released. Release rates in other parts of the country varied widely between those two figures.

RECOMMENDATIONS

Recommendation One

IN ORDER TO MORE EFFECTIVELY PROTECT BOTH HOMELAND SECURITY AND BONA FIDE ASYLUM SEEKERS, THE DEPARTMENT OF HOMELAND SECURITY SHOULD CREATE AN OFFICE- HEADED BY A HIGH-LEVEL OFFICIAL- AUTHORIZED TO ADDRESS CROSS CUTTING ISSUES RELATING TO ASYLUM AND EXPEDITED REMOVAL.

Recommendation Two

THE BURDEN ON THE DETENTION SYSTEM, THE IMMIGRATION COURTS, AND BONA FIDE ASYLUM SEEKERS IN EXPEDITED REMOVAL THEMSELVES SHOULD BE EASED BY ALLOWING ASYLUM OFFICERS TO GRANT ASYLUM IN APPROVABLE CASES AT THE TIME OF THE CREDIBLE FEAR INTERVIEW, JUST AS THEY ARE ALREADY TRAINED AND AUTHORIZED TO DO FOR OTHER ASYLUM SEEKERS. ALIENS WHO ESTABLISH CREDIBLE FEAR BUT, FOR WHATEVER REASON, HAVE NOT YET ESTABLISHED AN APPROVABLE ASYLUM CLAIM, SHOULD CONTINUE TO BE REFERRED TO AN IMMIGRATION JUDGE.

Recommendation Three

DHS SHOULD ESTABLISH DETENTION STANDARDS AND CONDITIONS APPROPRIATE FOR ASYLUM SEEKERS. THE AGENCY SHOULD ALSO PROMULGATE REGULATIONS TO PROMOTE MORE CONSISTENT IMPLEMENTATION OF EXISTING PAROLE CRITERIA, TO ENSURE THAT ASYLUM SEEKERS WITH A CREDIBLE FEAR OF PERSECUTION- WHO ESTABLISH IDENTITY AND THAT THEY POSE NEITHER A FLIGHT NOR A SECURITY RISK- ARE RELEASED FROM DETENTION.

Recommendation Four

EXPAND EXISTING PRIVATE-PUBLIC PARTNERSHIPS TO FACILITATE LEGAL ASSISTANCE FOR ASYLUM SEEKERS SUBJECT TO EXPEDITED REMOVAL, AND IMPROVE ADMINISTRATIVE REVIEW AND QUALITY

ASSURANCE PROCEDURES TO IMPROVE CONSISTENCY IN ASYLUM DETERMINATIONS BY IMMIGRATION JUDGES.

Recommendation Five

THE DEPARTMENT OF HOMELAND SECURITY SHOULD IMPLEMENT AND MONITOR QUALITY ASSURANCE PROCEDURES TO ENSURE MORE RELIABLE INFORMATION FOR HOMELAND SECURITY PURPOSES, AND TO ENSURE THAT ASYLUM SEEKERS ARE NOT TURNED AWAY IN ERROR.

SPECIFICALLY, IT SHOULD:

- CREATE A RELIABLE INTER-BUREAU SYSTEM THAT TRACKS REAL-TIME DATA OF ALIENS IN EXPEDITED REMOVAL PROCEEDINGS.
- RECONCILE CONFLICTING FIELD GUIDANCE TO REQUIRE THAT ANY EXPRESSION OF FEAR AT THE PORT OF ENTRY MUST RESULT IN EITHER A REFERRAL FOR A CREDIBLE FEAR DETERMINATION OR, IN CASES WHERE THE INSPECTOR OR BORDER PATROL AGENT BELIEVES THE ALIEN WOULD “CLEARLY NOT QUALIFY” FOR ASYLUM OR CAT RELIEF, CONTACT WITH AN ASYLUM OFFICER TO SPEAK TO THE ALIEN VIA A TELEPHONIC INTERPRETATION SERVICE TO DETERMINE WHETHER OR NOT THE ALIEN NEEDS TO BE REFERRED.
- IMPROVE QUALITY ASSURANCE BY EXPANDING AND ENHANCING THE VIDEOTAPE SYSTEMS CURRENTLY USED AT HOUSTON AND ATLANTA TO ALL MAJOR PORTS OF ENTRY AND BORDER PATROL STATIONS TO UNINTRUSIVELY RECORD ALL SECONDARY INTERVIEWS, AND CONSIDER EMPLOYING THE USE OF UNDERCOVER “TESTERS” TO VERIFY THAT EXPEDITED REMOVAL PROCEDURES ARE BEING PROPERLY FOLLOWED.
- INCLUDE, ON SWORN STATEMENT FORM I-867B, AN EXPLANATION OF THE SPECIFIC PURPOSE FOR WHICH THE DOCUMENT IS DESIGNED TO SERVE, AND ITS LIMITATIONS.
- ENHANCE THE EFFICIENCY OF THE EXPEDITED REMOVAL PROCESS BY AMENDING DHS QUALITY ASSURANCE PROCEDURES FOR THE CREDIBLE FEAR INTERVIEW TO SUBJECT NEGATIVE AND POSITIVE DETERINATIONS TO SIMILAR QUALITY ASSURANCE PROCEDURES.

Recommendation Summary

THIS STUDY HAS PROVIDED TEMPORARY TRANSPARENCY TO EXPEDITED REMOVAL – A PROCESS WHICH IS OPAQUE NOT ONLY TO THE OUTSIDE WORLD, BUT EVEN WITHIN THE DEPARTMENT OF HOMELAND SECURITY. AS A RESULT OF THIS TRANSPARENCY, SERIOUS – BUT NOT INSURMOUNTABLE – PROBLEMS WITH EXPEDITED REMOVAL HAVE BEEN IDENTIFIED. THE STUDY’S RECOMMENDATIONS CONCERNING BETTER DATA SYSTEMS, QUALITY ASSURANCE MEASURES, ACCESS TO REPRESENTATION, AND A DHS REFUGEE COORDINATOR WOULD ALL CONTRIBUTE TO A MORE TRANSPARENT AND EFFECTIVE EXPEDITED REMOVAL PROCESS. WE ALSO RECOMMEND THAT CONGRESS REQUIRE THE DEPARTMENTS OF JUSTICE AND HOMELAND SECURITY TO PREPARE AND SUBMIT REPORTS, WITHIN 12 MONTHS OF THE RELEASE OF THIS STUDY, DESCRIBING AGENCY ACTIONS TO ADDRESS THE FINDINGS AND RECOMMENDATIONS OF THIS STUDY.

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

A Study Authorized by Section 605 of the International Religious Freedom Act of 1998

INTRODUCTION

The U.S. Commission on International Religious Freedom (USCIRF) was established by the International Religious Freedom Act of 1998 (IRFA). As stated in the preamble of the Commission's founding legislation,

The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.

The Commission is an independent and bipartisan federal agency created to monitor religious freedom in other countries and advise the President, Secretary of State and Congress on how best to promote it.

Consistent with the language in the preamble of the legislation, IRFA also authorized the Commission to appoint experts to conduct a study to advise whether certain legislative changes to asylum, enacted in 1996, were impairing America's obligation – and founding tradition – of offering refuge to those suffering religious persecution.

The Congress authorized the Commission to appoint experts to examine how the new immigration procedure – known as “Expedited Removal” – was affecting asylum seekers, regardless of whether or not the claim was based on religion, race, nationality, membership in a particular social group, or political opinion.

As authorized by section 605 of IRFA, the Commission appointed independent experts to undertake the Study. While not involved in the development of the Study methodology, the Commissioners formed an active subcommittee to liaise with the experts, and visit some of the ports of entry, Border Patrol stations, asylum offices, and detention centers with them.

After substantial discussion and deliberation, the Commission concurs with the findings and recommendations of the experts. The Commission is convinced that, if carried out, these recommendations will allow Expedited Removal to protect our borders while protecting *bona fide* asylum seekers. This is how Expedited Removal was intended to work, and how it often does work.

The Commission regrets, however, that serious problems were also identified, which put some asylum seekers at risk of improper return (*refoulement*). We also found that most asylum seekers in Expedited Removal are detained under conditions which may be suitable in the criminal justice system, but are entirely inappropriate for asylum seekers fleeing persecution.

Nevertheless, we and the experts are confident that these issues can be addressed without amending to the Immigration and Nationality Act.

WHAT IS EXPEDITED REMOVAL?

Prior to 1996, if an alien arrived in the United States – to seek asylum or for any other purpose – but lacked the proper documentation, an immigration inspector could refer the alien to an immigration judge for an “exclusion” hearing. The inspector, however, could not compel the alien to leave the United States. While aliens awaiting an exclusion proceeding could be detained by the Immigration and Naturalization Service (INS), limited INS bedspace meant that they were frequently not detained while waiting to see an immigration judge.

After the 1993 bombing of the World Trade Center, questions were raised about whether immigration inspectors could protect our borders if they were powerless to turn away improperly documented aliens. There was growing concern that terrorists and other aliens without valid identity documents could exploit the system to enter and disappear into the United States. At the same time, human rights advocates argued that bona fide asylum seekers are often forced to flee without proper documents. They asserted that authorizing immigration inspectors to summarily remove arriving aliens would result in the return (*refoulement*) of legitimate asylum seekers to countries where they may face persecution.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), the most comprehensive immigration reform legislation in over 30 years. Among other reforms, the legislation established Expedited Removal, which was intended to strengthen the security of America’s borders, without closing them to those fleeing persecution.

Under Expedited Removal, an alien without proper documents at the port of entry may be ordered removed by an immigration inspector. In most cases, the alien may neither consult with an attorney nor be heard before an immigration judge.

Congress also included provisions to prevent the Expedited Removal of refugees fleeing persecution.¹ Specifically, an alien who indicates an intention to apply for asylum or a fear of return is entitled to a credible fear screening by an asylum officer.

Congress also required that aliens, including asylum seekers, subject to Expedited Removal be detained until the United States physically removes them, after which they may not return to the United States for five years. If an asylum officer determines that an alien has a credible fear of persecution, however, the alien may be considered for release. While decisions of release (“parole”) are discretionary, memoranda of the Immigration and Naturalization

¹ Under the 1967 Protocol to the 1951 Convention relating to the Status of Refugees, to which the United States is a signatory, as implemented by the Refugee Act of 1980 and other amendments to the Immigration and Nationality Act, the United States may not return any individual to a country where that individual may face persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion. In addition, the United States ratified the Convention Against Torture (CAT), and may not remove anyone to a country where (s)he is, in danger of being tortured.

Service (INS), at that time the lead agency on Expedited Removal, instruct that “parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”²

Expedited Removal is mandatory for aliens arriving at ports of entry. Congress, however, also authorized the Attorney General to exercise discretion in applying Expedited Removal in the interior of the United States to undocumented aliens apprehended within two years after entry. When the Department of Justice implemented Expedited Removal by regulation on March 15, 1997, however, Attorney General Janet Reno limited the application of Expedited Removal to arriving aliens at ports of entry.

CONGRESSIONALLY AUTHORIZED STUDIES ON EXPEDITED REMOVAL

In IIRAIRA, Congress also required the General Accounting Office (GAO) to conduct a study on the Expedited Removal, including “the effectiveness of procedures in processing asylum claims by undocumented aliens who assert a fear of persecution...”³

The GAO released its report in 1998. Less than seven months later, Congress passed the International Religious Freedom Act of 1998 (IRFA), which directed the General Accounting Office to undertake a second study – one specifically focused on the impact of Expedited Removal on asylum seekers. The GAO was asked to address four questions:

Whether, with regard to aliens who may be eligible for asylum in Expedited Removal proceedings, immigration officers were:

- (1) Improperly encouraging such aliens to withdraw their applications for admission;*
- (2) Incorrectly failing to refer such aliens for an interview by an asylum officer for a determination of whether they have a credible fear of persecution (within the meaning of section 235(b)(1)(B)(v) of the Immigration and Nationality Act);*
- (3) Incorrectly removing such aliens to a country where they may be persecuted; or*
- (4) Detaining such aliens improperly or in inappropriate conditions.*

In addition, Congress authorized the nascent U.S. Commission on International Religious Freedom (USCIRF), an independent government commission created by IRFA, to

² INS Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in *75 Interpreter Releases* 270 (Feb. 23, 1998).

³ 8 USC 1225 note (1996). The GAO released this report on March 31, 1998. (ILLEGAL ALIENS: Changes in the Process of Denying Aliens Entry Into the United States. GAO/GGD-98-91.).

appoint independent experts to address the same four questions on Expedited Removal that were posed to the GAO. Congress granted both GAO and the USCIRF experts “unrestricted access” to Expedited Removal proceedings.

On September 1, 2000, the General Accounting Office released its Expedited Removal study, as required by IRFA.⁴ The GAO Study relied primarily on a review of alien records and statistics maintained by the INS, but did not directly address the four questions posed to it by Congress.⁵ The GAO found that (1) INS was “generally” following its procedures for documenting the Expedited Removal process at selected ports; (2) INS was “generally” following its procedures for documenting the credible fear process at selected asylum offices; (3) in response to the GAO’s preliminary findings, INS had clarified requirements for documentation needed for aliens who recanted their fear of persecution or torture; and (4) “many” released aliens found to have credible fear did not appear for their merits hearings.

POST 9/11 CHANGES TO EXPEDITED REMOVAL

After the terrorist attacks against the United States on September 11, 2001, a number of significant changes to Expedited Removal occurred.

On November 13, 2002, INS Commissioner James Ziglar announced that, effective immediately, he was expanding Expedited Removal to apply to undocumented non-Cubans who entered the United States by sea within the prior two years. The rationale was to “deter surges in illegal mass migration at sea” which would threaten “national security by diverting valuable United States Coast Guard and other resources from counter-terrorism and homeland security responsibilities.”⁶

On March 1, 2003, the INS, the lead agency on Expedited Removal, was abolished by the Homeland Security Act of 2002. The functions of the former INS were transferred to the newly created Department of Homeland Security. The Executive Office for Immigration Review (EOIR), however, remained within the Department of Justice.⁷

The former INS functions related to Expedited Removal were dispersed among the different parts of the Department of Homeland Security (DHS). Immigration inspections, after being merged into Customs and Border Patrol were absorbed as separate components of the Bureau of Customs and Border Protection (CBP). The detention function, as well as the trial attorneys who represent the government before immigration judges, were absorbed into the Bureau of Immigration and Customs Enforcement (ICE). And the Asylum Division, whose

⁴ ILLEGAL ALIENS: Opportunities Exist to Improve the Expedited Removal Process GAO/GGD-00-176).

⁵ According to discussions between Mark Hetfield and James Blume, Assistant Director (retired), GAO, the General Accounting Office declined to directly address the four questions, because it believed it would require GAO to re-evaluate legal decisions made by INS, which GAO felt would be inappropriate. Furthermore, GAO felt that the four questions were too qualitative for it to develop a feasible methodology to address them.

⁶ Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (2002).

⁷ EOIR oversees the Immigration Judges who review negative credible fear determinations made by asylum officers and who hear asylum claims from aliens placed in Expedited Removal. It also houses the Immigration Judges’ appellate review unit, the Board of Immigration Appeals (BIA).

officers conduct the “credible fear” screening in Expedited Removal proceedings, was placed in the United States Citizenship and Immigration Services (USCIS).

Asylum seekers in Expedited Removal were further affected on the eve of the invasion of Iraq. Two days after the creation of DHS, the White House announced “Operation Liberty Shield.” This initiative mandated that “asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period...to (allow) authorities to maintain contact with asylum seekers while the validity of their claim (is determined).”⁸

THE USCIRF STUDY

In the meantime, the Commission decided to proceed with appointing experts to conduct the study to answer the four questions on asylum seekers in Expedited Removal posed by Congress in IRFA. The Commission had been concerned by anecdotal reports of irregularities at ports of entry and in INS detention centers. In addition, with the dissolution of INS and the absorption of Expedited Removal into the Department of Homeland Security, the Commission concluded the importance of examining Expedited Removal in an environment dramatically different than the one studied by GAO. The Commission also intended the study to distinguish itself from the earlier GAO effort by employing direct observation of Expedited Removal proceedings at ports of entry. The GAO Study had relied primarily on file review, instead of observing Expedited Removal proceedings themselves.

In May 2003, the Commission appointed its first expert, Mark Hetfield, to direct the Expedited Removal Study. While Mr. Hetfield secured access to Expedited Removal proceedings with the Department of Justice and the Department of Homeland Security, the Commission appointed a lead methodologist and additional experts to conduct the Study, representing a broad swath of experience and expertise in government, inter-governmental and non-governmental organizations, academia, and private practice.

The Study employed a multi-pronged approach in order to answer the questions posed by Congress. The methodology of the Study combined the file review, site visits, surveys and statistical analyses similar to those performed by the General Accounting Office, as well as methods not applied by the GAO, including monitors stationed at major ports of entry and “exit interviews” with aliens being expeditiously removed and asylum seekers referred for credible fear interviews.

Study experts and Commissioners did preliminary site visits to inspection and detention facilities in the following areas: Arizona; Atlanta; Chicago; Detroit; Houston; Laredo; Los Angeles; Miami; New York/Newark; Puerto Rico; San Ysidro; San Francisco; and Washington,

⁸ White House Fact Sheet: Operation Liberty Shield. (March 17, 2003). Operation Liberty Shield was terminated one month later. Department of Homeland Security Press Release: Remarks by Secretary of Homeland Security Tom Ridge to the National Press Club (April 29, 2003). While all asylum seekers in Expedited Removal proceedings must be detained until an asylum officer determines whether they have a credible fear of persecution, release after the credible fear determination is usually at the discretion of the ICE Area Director. Operation Liberty Shield temporarily revoked the use of that discretion to release aliens from certain countries.

D.C. During these visits, experts and commissioners met with inspectors (CBP), detention officials (ICE), asylum officers (USCIS); immigration judges (EOIR); asylum seekers who have experienced Expedited Removal proceedings; and non-governmental organizations. In Washington, Commission experts also met with officials from DHS Headquarters, the Executive Office for Immigration Review, and the Regional Office of the United Nations High Commissioner for Refugees (UNHCR) for the United States and the Caribbean.

After the Commission commenced the Study, Expedited Removal continued to evolve and expand. On August 11, 2004, the Department of Homeland Security announced that, effective immediately, it was further expanding Expedited Removal authority to the Border Patrol for undocumented aliens apprehended within 14 days after entry and within 100 miles of the Mexican or Canadian border. DHS announced that Expedited Removal would be applied primarily to non-Mexicans and non-Canadians, but that undocumented migrants from Mexico and Canada with histories of immigration or criminal violations would also be subject to the procedure.⁹

In light of this, the Study experts, along with two Commissioners, met with DHS officials in the Tucson Border Patrol Sector. Experts also traveled to Laredo, Texas to observe the early application of Expedited Removal by the Border Patrol. These two sectors were the first in which the Border Patrol exercised Expedited Removal authority.

In February 2005, the Commission experts concluded the Study and finalized their reports after receiving valuable feedback on earlier drafts from the GAO (now known as the Government Accountability Office), as well as from the interested bureaus and offices within the Departments of Justice and Homeland Security. The Commission acknowledges and appreciates the cooperation with the Study demonstrated by all of these agencies.

THE STUDY'S CONCLUSIONS

The findings and recommendations of the Study represent the consensus reached among the experts. The Commission concurs with those findings and recommendations. We remain convinced that implementing the recommendations contained in this Study will advance Congress' objective to establish a system which protects our borders but also protects asylum seekers. In particular, the Commission hopes that the new leadership at the Department of Homeland Security will act on the Study's over-arching recommendation, that a high level Refugee Coordinator office at DHS be established. Once that occurs, DHS will have a forum in which to more effectively tackle these concerns, and ensure that Expedited Removal can co-exist with our tradition of allowing those who flee persecution – religious or otherwise – to find refuge on our shores

REFUGEE PROTECTION AND ASYLUM TRENDS

Finally, the Study uncovered statistics which, the Commission believes require further investigation and analysis. Since September 11, while the number of aliens traveling to the

⁹ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (2004).

United States has declined by 20 percent, the number of asylum seekers who arrive through Expedited Removal proceedings has plummeted by 50 percent.

Under U.S. law, an alien has a legal right to apply for asylum once he or she arrives in the United States. No one, however, has a legal right to travel to the United States in order to apply for asylum. Indeed, increasing numbers of DHS employees stationed overseas are being enlisted to help foreign airline personnel identify improperly documented aliens to prevent them from boarding planes to the United States. Whatever the implications of these actions are for national security, they will likely have an adverse impact on the number of bona fide asylum seekers fleeing to the United States, as they are often unable to obtain legitimate travel documents from the state which persecutes them. Moreover, U.S. Consular officers have long denied visas when they suspect the applicant intends to apply for asylum after landing in the United States.

Recognizing that asylum seekers who cannot get a visa to the United States may still have serious protection needs, the Department of State, in consultation with Congress, developed discretionary mechanisms to allow such individuals to be referred for resettlement. One such mechanism allows embassies and consular officers to refer individuals with protection needs to the U.S. Refugee Program. In order to promote better understanding and use of this protection mechanism, section 602 of IRFA requires the Secretary of State to “provide sessions on refugee law and adjudications and on religious persecution to each individual seeking a commission as a United States consular officer.” The Commission has raised concerns regarding the State Department’s failure to implement this requirement.¹⁰

Given the dramatic decline in the number of asylum seekers entering the United States, we would urge Congress to authorize a study on the reasons for the decline and the extent to which consular officers are being trained in, and utilizing, the refugee referral mechanism, referred to in section 602 of IRFA.

Indeed, the data collected in this Study answered the four questions about Expedited Removal posed to the experts by Congress, but poses many more. We do not consider publication and release to mark the end of this study. It is our hope that the hundreds of pages of data compiled will continue to be reviewed and analyzed by others to provide further guidance on how the process can be improved.



Preeta D. Bansal
Chair
U.S. Commission on International
Religious Freedom

¹⁰ USCIRF Annual Report 2004, p. 101.

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

A Study Authorized by Section 605 of the International Religious Freedom Act of 1998

EXPERTS

Mark Hetfield, J.D., Study Director (*Report on Credible Fear Determinations*)

Mark Hetfield joined the US Commission on International Religious Freedom in May 2003 after fourteen years of working in immigration and refugee law at the U.S. Immigration and Naturalization Service (INS) as well as in the private and non-profit sectors, serving in New York, Rome, Washington, Port-au-Prince, and Guam. In addition to practicing immigration law and supervising INS Adjudicators, he has served as Director of International Operations as well as Washington Representative for a faith-based NGO focused on refugee protection and resettlement. Mr. Hetfield is a specialist in Russia and the former Soviet Union. He holds a Bachelor of Science in Foreign Service (BSFS) from Georgetown University, where he earned a certificate in Russian Area Studies. He also graduated cum laude with a juris doctor from Georgetown University Law Center.

Kate Jastram, M.A., J.D. (*A-File and Record of Proceeding Analysis of Expedited Removal*)

Kate Jastram teaches refugee law, advanced asylum issues, and global migration issues at the University of California, Berkeley, Boalt Hall School of Law. Prior to joining the faculty at UC-Berkeley, she worked for the Office of the United Nations High Commissioner for Refugees; her responsibilities included serving as UNHCR's Deputy Representative for the United States and the Caribbean from 1994-1997. Before that, she directed a pro bono asylum program in Minneapolis, and practiced immigration law in San Francisco. Her scholarly work has focused on human rights and migration issues; recent publications include "Human Rights in Refugee Tribunals" (forthcoming, *Refugee Law Quarterly*) and "Family unification, including migration of children" (*Migration and Legal Norms*, 2003). Ms. Jastram received her B.A. from San Francisco State University 1980, her M.A. from Sarah Lawrence College 1982, and her J.D. from UC Berkeley (Boalt Hall) in 1986.

Allen Keller, M.D. (*Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*)

Dr. Allen Keller is Assistant Professor of Medicine at New York University School of Medicine and Director of the Bellevue/NYU Program for Survivors of Torture. Since 1995, the Bellevue/NYU Program has provided comprehensive, multi-disciplinary care to more than 1,500 victims of torture, many of whom are asylum seekers or asylees, and their families from over 70 countries. Dr. Keller is recognized internationally as an expert in the evaluation and treatment of torture victims and asylum seekers. Dr. Keller is on the advisory board of Physicians For Human Rights (PHR) and has written and spoken about a number of issues relating to health and human rights including the evaluation and treatment of torture victims, political asylum, access to health care for prisoners, and the medical and social consequences of land mines. Dr. Keller has conducted several studies on refugee/asylum seeker populations in the United States, Eastern Europe, and India. In 2003, Dr. Keller completed a study examining the health of asylum seekers

detained in the United States by the INS. This study, jointly conducted by the Bellevue/NYU Program and PHR, was the first of its kind. In 2003, Dr. Keller received the Barbara Chester Award, an international award given to a clinician in recognition of outstanding care provided to victims of torture. He was also honored in 1999 and again in 2001 with the NYU School of Medicine Humanism in Medicine Award.

Charles H. Kuck, J.D.* (*Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*)

Charles H. Kuck is an Adjunct Professor of Law at the University of Georgia, School of Law. Mr. Kuck is also the managing partner of Weathersby, Howard & Kuck, LLC., located in Atlanta, Georgia. Mr. Kuck practices all areas of family, business and removal based immigration law, including federal court immigration litigation. Mr. Kuck is Editor-in-Chief of AILA's *Litigation Toolbox*, and currently serves as the elected National Treasurer of AILA. He previously served as an elected Director of AILA for six years. Among other activities, he has chaired AILA's USCIS HQ Liaison Committee and AILA's UPL/CPAR Committee. He also served as chair of AILA's 2002 Annual Conference. Mr. Kuck is a past recipient of AILA's Minsky Young Lawyer Award, and Catholic Social Services' Pro Bono Award. Mr. Kuck has written numerous articles on U.S. immigration law and policy, and has spoken to many industry, legal and professional groups on these same issues.

DETENTION ADVISOR

Craig Haney, J.D., Ph.D. (*Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*)

Craig Haney received his Ph.D. in psychology and J.D. degrees from Stanford University in 1978. One of the principal researchers on the highly publicized "Stanford Prison Experiment" in 1971, he has been studying the psychological effects of living and working in actual prison environments since then. His work has taken him to dozens of maximum security prisons across the United States and in several different countries where he has evaluated conditions of confinement and interviewed prisoners about the mental health consequences of incarceration. Professor Haney has published widely on prison-related topics in a variety of scholarly journals, including the *American Psychologist*, and *Psychology, Public Policy, and Law*. In addition, he has a forthcoming book that focuses on the nature and psychology of contemporary imprisonment and will be published by the American Psychological Association in 2005. He also has served as a consultant to various governmental agencies, including the White House, Department of Justice, California Legislature, and various state and federal courts. His research, writing, and testimony have been cited in many judicial opinions that address the psychological consequences of incarceration. Professor Haney has testified as an expert witness in many trials around the country, addressing a variety of important issues in the areas of criminal justice and constitutional law.

* Replaced **Robert C. Divine**, who participated as an expert in the Study from October 2003 through June 2004, when he resigned to accept an appointment as Chief Counsel at United States Citizenship and Immigration Services at the Department of Homeland Security.

LEAD METHODOLOGIST AND STATISTICIAN

Fritz Scheuren, Ph.D. (*Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003; Statistical Report on Detention, FY 2000-2003; Statistical Report on Immigration Court Proceedings, FY 2000-2004*)

Fritz Scheuren is the Vice-President for Statistics at the National Opinion Research Center (NORC) and a statistical consultant for the Human Rights Data Analysis Group of the AAAS Science and Human Rights Program. Dr. Scheuren has also been recently named president elect of the American Statistical Association (ASA). He has had a long career of public service and presently focuses on human rights activities, working on projects for the U.S. Commission on International Religious Freedom, on Native American Trust Fund issues, and, most recently, on improvements in vote counting for the 2004 presidential election. He has also consulted on the methods of statistical analysis for Peru's Truth and Reconciliation Commission. Dr. Scheuren has received numerous awards and honors including: the ASA Founders Award (1998); Shiskin Award for contributions to U.S. Economic Statistics (1995); Finalist, Senior Executive Association Executive Excellence Award, (1992); Elected Member, the International Statistical Institute (1988); Elected Fellow, the American Association for the Advancement of Science (1984); Elected Fellow, the American Statistical Association (1981).

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

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BACKGROUND INFORMATION

MANDATE OF THE STUDY

Four questions asked of the U.S. Commission on International Religious Freedom (The Commission) experts by Section 605 of the International Religious Freedom Act:

Whether, with regard to individuals potentially eligible for asylum or Convention Against Torture relief in Expedited Removal proceedings, immigration officers are:

- (A) Improperly encouraging such aliens to withdraw their applications for admission.
- (B) Incorrectly failing to refer such aliens for an interview by an asylum officer for a determination of whether they have a credible fear of persecution.
- (C) Incorrectly removing such aliens to a country where they may be persecuted.
- (D) Detaining such aliens improperly or in inappropriate conditions.

The Experts appointed by the Commission were authorized unfettered access to the Expedited Removal process in order to conduct the Study. Expedited Removal proceedings are normally closed. The applicants may not even have family members or an attorney present during Expedited Removal proceedings conducted at ports of entry.

EXPERTS APPOINTED TO CONDUCT THE STUDY

Mark Hetfield, (Director of the Study, Commission Staff)

Prof. Kate Jastram, (UC-Berkeley Boalt Hall School of Law)

Allen Keller, M.D. (NYU School of Medicine, Bellevue Program for Survivors of Torture)

Charles H. Kuck, (Attorney, Atlanta, Georgia, National Treasurer, American Immigration Lawyers Association)

METHODOLOGIST

Fritz Scheuren, Ph.D. (Vice President, Statistics, NORC of the University of Chicago and President, American Statistical Association)

DETENTION ADVISOR

Craig Haney, Ph.D. (Professor of Psychology, UC-Santa Cruz)

AN OVERVIEW OF THE EXPEDITED REMOVAL PROCESS

Expedited Removal, initiated on March 1, 1997 pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), allows immigration inspectors at ports of entry to remove (deport) aliens on-the-spot when they conclude that the aliens are seeking entry to the United States through misrepresentation, lack of documentation or fraudulent documents. Previously, such aliens could only be removed after an exclusion hearing before an immigration judge.

It is important to emphasize that asylum seekers represent only a small percentage of aliens placed in Expedited Removal. In FY2003, out of 177,040 aliens who were found to be subject to Expedited Removal, only 5,376 (3 percent) were asylum seekers referred for a credible fear determination.

Under Expedited Removal, an alien with a “credible fear” of persecution may not be expeditiously removed without first having access to an immigration judge to make an asylum claim.

The process works as follows:

(1) Inspection

At the port of entry, an inspector determines that an alien has presented him or herself for admission with (a) fraudulent documents; (b) no documents; (c) facially valid documents obtained by misrepresentation of a material fact; or (d) the intent to apply for asylum. In such cases, the inspector will take a sworn statement and order that the alien be removed. Prior to the sworn statement, the inspector is to read three paragraphs to the alien from Form I-867A, which explains (1) the Expedited Removal process and the five year bar which applies if the alien is ordered removed; (2) the penalties for failing to tell the truth; and (3) that the alien should inform the inspector – “privately and confidentially” – if the alien has any fear or concern about being returned home, since U.S. law “provides protection to certain persons who face persecution, harm or torture upon return.”

During the sworn statement, the alien is asked four questions which are written on Form I-867B to elicit information about whether the applicant has any fear of being returned (for any reason). If the alien indicates that (s)he has such a fear, (s)he is referred for a “credible fear” interview before an asylum officer. Throughout his or her time in the secondary inspection area, the alien is not permitted to meet with, or contact, counsel (or anyone else other than Customs and Border Patrol personnel).

(2) Detention and Non-Adversarial Credible Fear Interview

After a “cooling off” period of at least 48 hours, during which the alien must remain in the custody of the Department of Homeland Security (DHS), an asylum officer interviews the alien to determine whether the fear expressed by the alien is “credible” and whether there is a nexus to a fear of torture or to the five grounds for asylum (political opinion, race, religion, nationality, or membership in a particular social group), or a fear of torture (for relief under the Convention Against Torture). A negative credible fear determination may be appealed to an immigration judge for a final unreviewable determination. During the credible fear interview, an alien may have an advisor of his choosing present, but during the interview the advisor is not permitted to represent the applicant (and may only speak if the asylum officer permits him to at the end of the interview). The Asylum officer’s notes and findings are written on Form I-870 (“Record of Determination/Credible Fear Worksheet”).

If credible fear is not found, an Expedited Removal Order is issued, and the alien is removed from the United States.

(3) Adversarial Asylum Hearing

If the asylum officer finds “credible fear,” the alien is referred to an adversarial proceeding before an immigration judge to determine whether the applicant’s fear is “well-founded” and is tied to one of the five grounds for asylum, or if the alien is eligible for relief under Withholding of Removal or the Convention Against Torture. During the months-long wait for an asylum hearing, the DHS Bureau of Immigration and Customs Enforcement (ICE) has discretionary authority to release – or detain – the alien. Practices and policies on release (“parole”) vary widely from office to office, and there is no appeal from a negative parole determination.

During the asylum hearing before the immigration judge, the alien may be represented by counsel (at no expense to the government). If the immigration judge finds that the alien qualifies for asylum or relief under the Convention Against Torture, the order to remove him or her is vacated and, in most cases, the alien is eligible for employment authorization and, ultimately, lawful permanent residence (a “Green Card”). The immigration judge’s ruling may, however, be appealed to the Board of Immigration Appeals (BIA) – either by the alien or by the DHS Security Trial Attorney who represented the Department before the immigration judge.

If asylum is not granted (and the alien does not appeal), the Expedited Removal order is reinstated and executed.

(4) Discretionary Uses of Expedited Removal

Expedited Removal is mandatory for aliens arriving at ports of entry. Congress, however, also authorized the Attorney General to exercise discretion in applying Expedited Removal in the interior of the United States to undocumented aliens

apprehended within two years after entry. When the DOJ implemented Expedited Removal by regulation on March 15, 1997, however, Attorney General Janet Reno limited the application of Expedited Removal to arriving aliens at ports of entry.

On November 13, 2002, the INS Commissioner announced that, effective immediately, he was expanding Expedited Removal to apply to undocumented non-Cubans who entered the United States by sea within the prior two years.

On August 11, 2004, DHS announced that, effective immediately, it was further expanding Expedited Removal authority to the Border Patrol for undocumented aliens apprehended within 14 days after entry and within 100 miles of the Mexican or Canadian border. DHS announced that Expedited Removal would be applied primarily to non-Mexicans and non-Canadians, but that undocumented migrants from Mexico and Canada with histories of immigration or criminal violations would also be subject to the procedure.

Any alien ordered “Expeditionously Removed” at any stage in the proceeding is subject to a five-year bar from applying to re-enter the United States (DHS may also use its discretion to allow an alien subject to Expedited Removal to withdraw his or her application for admission, which would *not* impose such a bar).

GLOSSARY OF EXPEDITED REMOVAL TERMS

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

A successful asylee may remain in the United States, work, and eventually adjust to lawful permanent residence (a Green Card) and citizenship. (The number of asylees who may adjust to lawful permanent resident status, however, is limited to 10,000 per year, by statute). Consequently, asylum seekers must now expect to wait longer than ten years to obtain a Green Card.

Affirmative Asylum is the process in which aliens 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 without prejudice but, if the claim is denied and no other relief is available, will result in a removal order against the alien. All proceedings before an immigration judge are adversarial, meaning the asylee will face a DHS trial attorney who usually opposes the grant of asylum, but the asylee may also be represented by counsel (at no expense to the government).

Defensive Asylum is the process by which someone who is in removal (or “deportation”) proceedings may claim asylum in an adversarial hearing before an immigration judge. Under the regulations, aliens in Expedited Removal only have access to the Defensive Asylum process.

ARRIVING ALIEN – An applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States 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 CORPS – A national corps of asylum officers, with offices in New York, Newark, Miami, Chicago, Los Angeles, San Francisco, Houston, and Arlington, Virginia, who adjudicate Affirmative Asylum claims (see “Affirmative Asylum”). They also determine whether aliens referred from Expedited Removal have a “credible fear” of persecution. This entitles the alien to see an immigration judge to prove that (s)he is entitled to a full grant of asylum.

ASYLUM REFORM OF 1995 – Prior to 1995, asylum applicants, including arriving aliens, were entitled to employment authorization upon applying for asylum. This, combined with a years long backlog wait for asylum, overwhelmed the asylum system with frivolous claims, further exacerbating the backlog. The 1995 Reform addressed the issue by instituting a “last in, first out” policy, meaning that the most recent asylum

applications would be adjudicated first, with employment authorization granted only to some of those whose applications were not adjudicated within six months after application. Unsuccessful asylum applicants are now referred to an immigration judge who, if (s)he does not grant asylum or some other form of relief, will order the alien removed. This decoupling of asylum from work authorization has largely ended abusive asylum claims and put the backlog under control. However, for at least six months after applying for asylum, asylum-seekers are now entitled to neither employment authorization nor public assistance, making it difficult for many to legally support themselves.

BIA (THE 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. Even after the creation of the Department of Homeland Security, EOIR and the BIA remained in the Department of Justice.

CAT – See Convention Against Torture Relief

CBP (BUREAU FOR CUSTOMS AND BORDER PROTECTION) – CBP, established on March 1, 2003, is an arm of the Department of Homeland Security. It contains the Border Patrol as well as the Immigration, Customs and Agricultural inspectors at ports of entry (Immigration Inspectors initiate Expedited Removal proceedings, and have unreviewable authority to decide whether the alien may see an asylum officer for a credible fear determination before being removed).

CONVENTION AGAINST TORTURE RELIEF (CAT) – A form of relief from removal given to aliens, including those in Expedited Removal, who establish before an immigration judge that it is more likely than not that (s)he will be persecuted upon return to his or her country of nationality or last habitual residence. CAT is distinguishable from asylum in several ways, some of which include: (1) statutory bars to asylum (for criminal or terrorist grounds, etc.) do not apply to CAT applicants; (2) the burden of proof is higher for CAT claimants (torture must be “more likely than not” upon return for CAT claimants, as opposed to a “well-founded fear of persecution” for asylum applicants); (3) a CAT claimant need not establish any connection between the treatment feared and his race, religion, nationality, political opinion, or membership in a particular social group; and (4) while CAT relief may lead to employment authorization for aliens not subject to mandatory detention, it will not lead to lawful permanent residence (a “Green Card”) and may be revoked once torture is no longer probable upon return.

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, he or she can only see an immigration judge to make an application for asylum if the immigration inspector at the port of entry refers him or her for a credible fear interview, *and* if the asylum officer conducting the interview decides the applicant has a “credible fear” of persecution in the country of origin. As implemented, credible fear is a very low threshold to establish.

In the statute, 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...Section 235(b)(1)(B)(v) of the Immigration and Nationality Act.

DETENTION STANDARDS – The hundreds of pages of standards to which DHS holds itself and its private contractors accountable concerning the treatment of aliens in detention. Federal, state, and local jails may, however, adopt their own standards provided they “meet or exceed” the ICE detention standards.

DHS (DEPARTMENT OF HOMELAND SECURITY) – Created by an act of Congress on March 1, 2003. Among more than 20 other agencies, DHS absorbed the former Immigration and Naturalization Service, and dispersed immigration responsibilities into various bureaus. The major ones are the CBP – the Bureau of Customs and Border Protection (Border Patrol and Inspections), ICE – the Bureau of Immigration and Customs Enforcement (Detention and Removal), and USCIS – the Bureau of Citizenship and Immigration Services (the only Bureau in which immigration is by itself; i.e. not housed with customs or other non-immigration functions. USCIS adjudicates immigration benefits, including asylum, green cards, citizenship, and temporary visitor and worker classifications).

DISSOLVE – The term used to describe an alien who is referred for a credible fear interview, but who decides not to pursue his application before a credible fear or an asylum determination is made.

DRO – The DHS Immigration and Customs Enforcement office of Detention and Removal Operations (ICE-DRO).

EOIR (EXECUTIVE OFFICE FOR IMMIGRATION REVIEW) – EOIR is within the Department of Justice. EOIR houses Immigration judges as well as the Board of Immigration Appeals. While EOIR is a quasi-judicial institution, it is not independent, but is subject to review by the Attorney General.

EXCLUSION PROCEEDINGS – The legal proceedings before an immigration judge, prior to the enactment of IIRAIRA, to determine whether or not an arriving alien referred by an immigration inspector may be admitted or “excluded.”

ICE (THE BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, OR BICE) – Together with some customs enforcement functions, the ICE Detention and Removal Operations (DRO) is responsible for the detention and removal of aliens, including those in Expedited Removal. It also houses the government trial attorneys who represent DHS in immigration court, including those stemming from Expedited Removal cases, being entertained by an immigration judge.

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, immigration judges decide whether aliens 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 aliens subject to Expedited Removal who are referred to them after a “credible fear” determination).

INA – The Immigration and Nationality Act.

INS (THE IMMIGRATION AND NATURALIZATION SERVICE) – The agency, housed in the Department of Justice, which oversaw the administration and enforcement of immigration laws. Abolished by an act of Congress effective March 1, 2003, INS functions were assumed by the Department of Homeland Security (DHS). Officials or functions within DHS which were formerly in INS are often referred to as “Legacy INS,” as opposed to “Legacy Customs,” etc.

MANDATORY DETENTION – Until an alien 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 DHS custody. After a positive credible fear determination, DHS policies (though no applicable regulations have been promulgated) allow the applicant to be released (“paroled”) while waiting for an asylum hearing if (s)he is not a flight risk, has some ties to the community, and if identity has been established.

ORR (OFFICE OF REFUGEE RESETTLEMENT) – Within the Department of Health and Human Services, ORR shares responsibility with the State Department for coordinating assistance for resettled refugees in the U.S. As of March 1, 2003, ORR also assumed responsibility from INS for all alien minors in detention for immigration reasons.

PAROLE – Refers to discretionary authority of the Department of Homeland Security to allow an alien 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, has ties to the community, and has established identity.

REFUGEE – An individual who meets the refugee definition but, unlike an asylum applicant, is overseas at the time of application. Contrary to a popular misconception, refugee applications are not generally accepted by U.S. Embassies overseas, but may only be filed by individuals who fall into one of the “Processing Priority” groups defined by the Department of State. These priorities do not apply to asylum applicants.

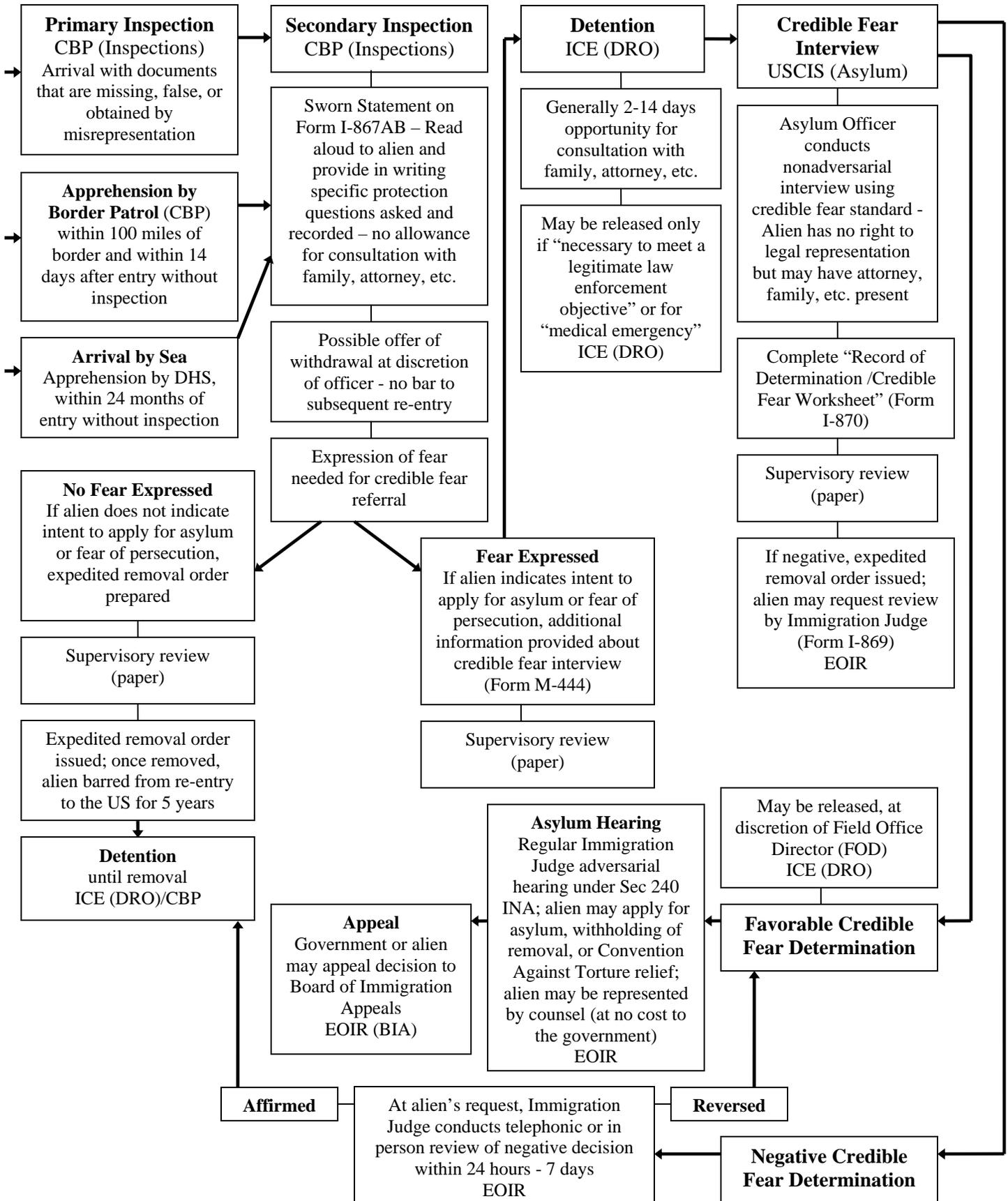
REFUGEE DEFINITION – Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself 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.

UNHCR – The Office of the United Nations High Commissioner for Refugees, established by the United Nations General Assembly in 1951 to provide international protection to refugees and to seek permanent solutions to their problems.

USCIS (THE BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, OR BCIS) – The Bureau in the Department of Homeland Security which administers benefits under the Immigration and Nationality Act, such as refugee status, asylum, green cards, temporary worker and visitor classifications, and naturalization.

VISA WAIVER – The program allows individuals from certain countries (which have a very low incidence of visa violators or over-stayers) to visit the United States for up to 90 days without a visa. Argentina and Uruguay were recently removed from this list, which now includes Canada, Japan, Singapore, Brunei, and Western Europe. Applicants who attempt to enter the United States under a visa waiver, but whom the immigration inspectors believe are attempting to do so through misrepresentation or fraud, are subject to removal without a hearing, but may seek an asylum-only hearing before an immigration judge. While visa waiver applicants are not subject to Expedited Removal, the process by which they are removed is similar to Expedited Removal by its summary nature. Moreover, any alien from a non-visa waiver country who attempts to enter the country under a visa waiver using false documents is not placed in Expedited Removal, but is treated according to the visa waiver provisions.

The Asylum Application Process Expedited Removal Proceedings

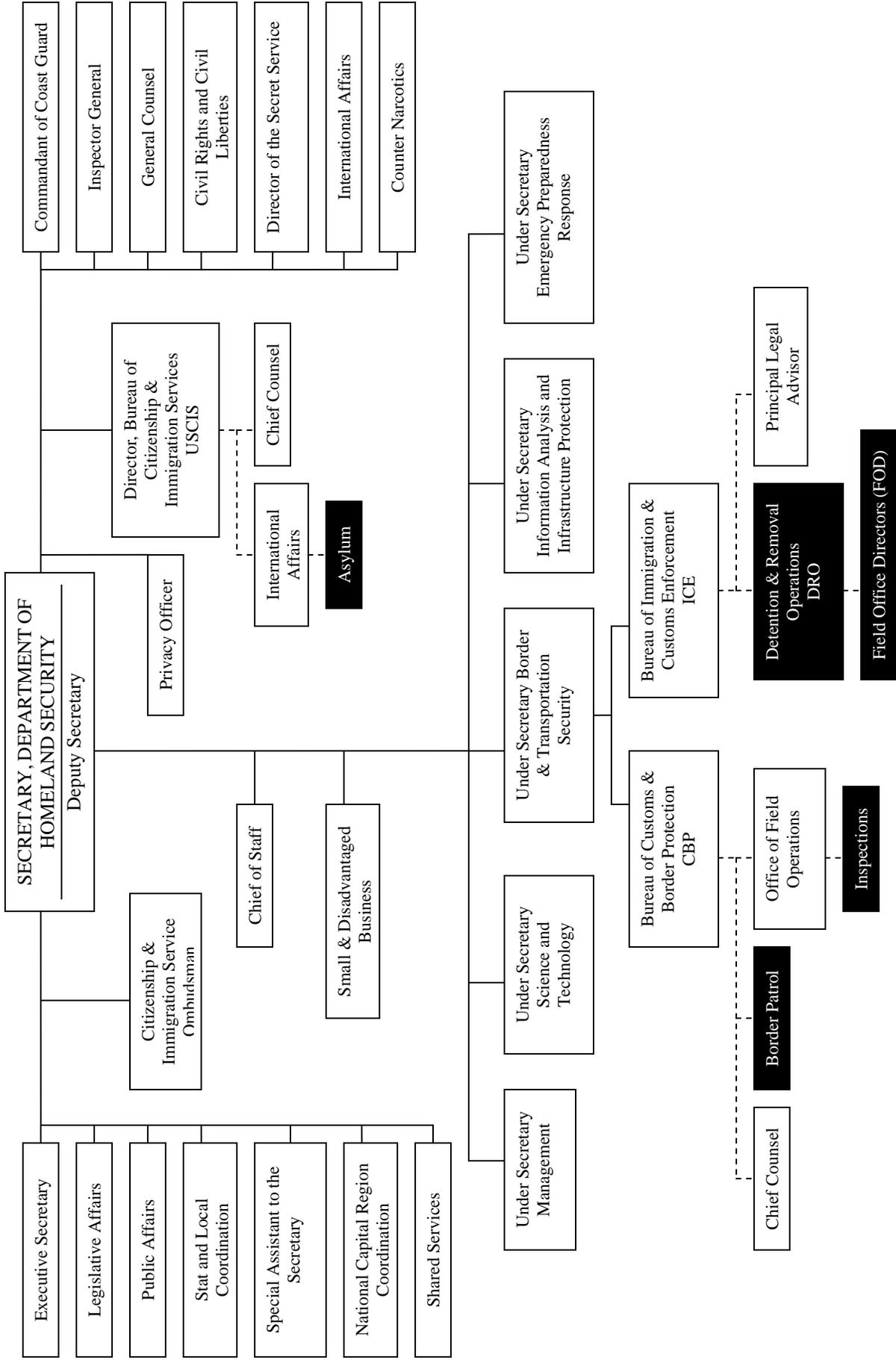


The Asylum Application Process Expedited Removal Proceedings

Acronyms

BIA:	Board of Immigration Appeals (within EOIR)
CBP:	Customs and Border Protection (DHS)
DHS:	Department of Homeland Security
DOJ:	Department of Justice
DRO:	Detention and Removal Operations (within ICE)
EOIR:	Executive Office for Immigration Review (DOJ)
FOD:	Field Office Director (DRO-ICE)
ICE:	Immigration and Customs Enforcement (DHS)
USCIS:	U.S. Citizenship and Immigration Services (DHS)

Department of Homeland Security Organizational Chart



-- Components with direct role on Expedited Removal darkened

-- Dotted lines denote subcomponents involved in Expedited Removal issues. Only subcomponents with a role in Expedited Removal are included on this chart.

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

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QUICK STATISTICS

INSPECTIONS

Aliens inspected in FY 2001: **331,304,422ⁱ**
Aliens inspected in FY 2003: **264,335,230ⁱⁱ**

Aliens subject to Expedited Removalⁱⁱⁱ (ER) FY 2001: **215,398^{iv}**
Aliens subject to ER FY 2003: **177,040^v**

Aliens subject to ER who were allowed to withdraw their application for admission to the U.S. FY 2001: **134,023^{vi}**

Aliens subject to ER who were allowed to withdraw their application for admission to the U.S. FY 2003: **128,328^{vii}**

Aliens who were expeditiously removed FY 2001: **69,055^{viii}**
Aliens who were expeditiously removed FY 2003: **43,336^{ix}**

Aliens referred for credible fear determination FY 2001: **12,320^x**
Aliens referred for credible fear determination FY 2003: **5,376^{xi}**

% of aliens subject to ER who arrived by air FY 2000-2003: **12%^{xii}**
% of aliens referred for credible fear determinations who arrived by air FY 2000-2003: **86%^{xiii}**

Top 3 land ports of entry (POEs) for aliens expeditiously removed FY 2000-2003:^{xiv}

San Ysidro, CA 43.8% of expedited removals at land/sea POEs
58.8% of credible fear referrals at land/sea POEs

Calexico, CA 12.2% of expedited removals at land/sea POEs
2.9% of credible fear referrals at land/sea POEs

Nogales, AZ 9.1% of expedited removals at land/sea POEs
Less than 1% of credible fear referrals to land/sea POEs

Top 3 airports for aliens expeditiously removed FY 2000-2003:^{xv}

New York 29.4% of expedited removals at airports
6.4% of credible fear referrals at airports

Miami 15.7% of expedited removals at airports
41.1% of credible fear referrals at airports

Los Angeles **11.1% of expedited removals at airports**
20.8% of credible fear referrals at airports

CREDIBLE FEAR (ASYLUM)

% of aliens referred for credible fear determination in FY 2000-2003 who were approved for credible fear: **93%**^{xvi}

DETENTION

Average length of detention in FY 2003 for asylum seekers subject to ER: **64 days**^{xvii}

% of asylum seekers subject to ER in FY 2003 detained for 90 days or more: **32%**^{xviii}

% of asylum seekers subject to ER released prior to final decision in asylum case
FY 2001: **86.1%**^{xix}

% of asylum seekers subject to ER released prior to final decision in asylum case
FY 2003: **62.5%**^{xx}

3 districts with highest rate of release prior to asylum decision FY 2003:^{xxi}

Harlingen, TX **97.6%** (620/635)

San Antonio, TX **94%** (109/116)

Chicago, IL **81.1%** (120/148)

3 districts with lowest rate of release prior to asylum decision FY 2003:^{xxii}

New Orleans **0.5%** (1/191)

Newark, NJ **3.8%** (14/391)

New York, NY **8.4%** (18/215)

Number of facilities used by Department of Homeland Security (DHS) to detain asylum seekers in ER FY 2003: **182**^{xxiii}

ASYLUM HEARINGS

Top 5 nationalities of aliens in ER referred for asylum hearing FY 2000-2004:^{xxiv}

China **9277** (31.1% of total cases completed)

Colombia **3152** (10.6% of total cases completed)

Cuba **3079** (10.3% of total cases completed)

Haiti **2675** (9% of total cases completed)

Sri Lanka **1785** (3% of total cases completed)

Total **29835**

% of asylum seekers subject to ER granted relief (asylum or CAT relief) FY 2000-2004:
28%^{xxv}

% of asylum seekers subject to ER denied relief or withdrew application for relief FY 2000-2004: **72%**^{xxvi}

% of unrepresented asylum seekers subject to ER granted relief FY 2000-2004: **2%**^{xxvii}

% of represented asylum seekers subject to ER granted relief FY 2000-2004: **25%**^{xxviii}

APPEALS

% of appeals filed by asylum seekers subject to ER sustained by Board of Immigration Appeals (BIA) FY 2001: **23%** (53/291)^{xxix}

% of appeals filed by asylum seekers subject to ER sustained by BIA FY 2002:

2% (19/1251)^{xxx}

% of appeals filed by asylum seekers subject to ER sustained by BIA FY 2003:

3% (58/2750)^{xxxi}

% of appeals filed by asylum seekers subject to ER sustained by BIA FY 2004:

4% (49/2879)^{xxxii}

ⁱ 1/4/05 email from John Bjerke, Statistician, Office of Detention and Removal (DRO), Immigration and Customs Enforcement (ICE), DHS

ⁱⁱ Id.

ⁱⁱⁱ Includes aliens who were expeditiously removed, referred for a credible fear determination, or withdrew their application for admission (i.e. aliens who could otherwise have been expeditiously removed).

^{iv} Fleming and Scheuren, *Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, DHS table 2, (Feb 2005).

^v Id.

^{vi} Id.

^{vii} Id.

^{viii} Id.

^{ix} Id.

^x Id.

^{xi} Id.

^{xii} Fleming and Scheuren, *Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, DHS table 1a, (Feb 2005).

^{xiii} Fleming and Scheuren, *Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, DHS chart 2 and table 2, (Feb 2005).

^{xiv} Fleming and Scheuren, *Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, DHS table 6 and 1, (Feb 2005).

^{xv} Fleming and Scheuren, *Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, DHS table 3 and 1, (Feb 2005).

^{xvi} Hetfield, *Report on Credible Fear Determinations*, Asylum Table 1.0, (Feb 2005).

^{xvii} Fleming and Scheuren, *Statistical Report on Detention, FY 2000-2003*, DRO table 6.3, (Feb 2005).

^{xviii} Id.

^{xix} Fleming and Scheuren, *Statistical Report on Detention, FY 2000-2003*, DRO chart 7, (Feb 2005).

^{xx} Id.

^{xxi} Id.

^{xxii} Id., n>100

^{xxiii} Fleming and Scheuren, *Statistical Report on Detention, FY 2000-2003*, DRO table 4.1, (Feb 2005).

^{xxiv} Kyle, Fleming and Scheuren, *Statistical Report on Immigration Court Proceedings, FY 2000-2004*, EOIR table A, (Feb 2005).

^{xxv} Id.

^{xxvi} 65% denied relief, 7% withdrew their application for asylum or CAT relief.

^{xxvii} Kyle, Fleming and Scheuren, *Statistical Report on Immigration Court Proceedings, FY 2000-2004*, EOIR table P, (Feb 2005).

^{xxviii} Id.

^{xxix} Kyle, Fleming and Scheuren, *Statistical Report on Immigration Court Proceedings, FY 2000-2004*, EOIR table T, (Feb 2005).

^{xxx} Id.

^{xxxi} Id.

^{xxxii} Id.

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

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HIGHLIGHTS OF THE STUDY METHODOLOGY

By Susan Kyle and Fritz Scheuren

The Study employed a varied methodology to examine the treatment of asylum seekers in Expedited Removal. In all there have been eleven reports, including this one, produced by the experts engaged by the U.S. Commission on International Religious Freedom (USCIRF or “the Commission”) to conduct the work. The methods used in each of these reports are highlighted briefly below.

Stress is placed on the interlocking nature of what was learned and our belief that together the results provide a solid basis for the conclusions in the Commission’s final report (“the Study”).¹ Naturally, as with any statistical work, data limitations abound and hence the results obtained need to be treated with the usual caution. Nevertheless, we are confident that the main findings are sound.

USE OF EXISTING ADMINISTRATIVE DATA

Some results come directly from the extensive operating administrative systems of the Department of Homeland Security (DHS) and the Department of Justice (DOJ). These results, covering most of the period from FY2000 to FY2003 or FY2004, were not subject to sampling error, but they did suffer from other forms of deficiencies, mainly because a full integration of DHS systems has yet to be accomplished.²

Partly to combat these deficiencies, several samples were drawn from operating DHS and DOJ systems during the spring and summer of 2004. These samples were designed to help interpret the extensive overall statistical tabulations provided by agency personnel, whose assistance was invaluable.³

As with the 2000 Government Accountability Office (GAO) Study, heavy reliance was placed on an extensive series of alien file (A-file) sample reviews of asylum seekers, including those who later dissolved their claim.⁴ Additionally, a Records of Proceeding sample and a sample of A-files of aliens who were either expeditiously removed or withdrew their application for admission at ports of entry were reviewed.⁵ These file reviews allowed us to deepen our

¹ US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Feb 2005.

² Cory Fleming and Fritz Scheuren, *Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, Feb 2005; Susan Kyle, Cory Fleming, and Fritz Scheuren, *Statistical Report on Immigration Court Proceedings, FY 2000-2004*, Feb 2005; Tala Hartsough, *A-file Forms Abstracted for Analysis* (Working Paper), Aug 2004.

³ Kate Jastram and Tala Hartsough, *A-file and Record of Proceedings Analysis of Expedited Removal*, Feb 2005.

⁴ United States General Accounting Office, *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process*, GAO/GGD-00-176, September 2000.

⁵ The Records of Proceeding sample was provided by the DOJ, while the A-file sample was provided by the DHS.

understanding of the extensive 100 percent tallies generated for the Study, and to look in some detail at issues not focused on in the existing general purpose electronic administrative systems.

While the file reviews were based on moderately large samples, sampling error remains a factor. Since the data were specially captured for the Commission, other limitations arose that had to be addressed by a series of quality checks (and cross-checks) introduced to keep measurement errors small. The controls employed are deemed to be sufficient to assure the reliability sought for samples of the size used. There were and are concerns raised by the fact that not all the files sought for the sample could be obtained.

AUGMENTING ADMINISTRATIVE DATA WITH DIRECT OBSERVATIONS AND INTERVIEWS

Reliance on the existing DHS and DOJ systems alone was viewed as insufficient. This was, in fact, among the criticisms made of the earlier GAO Study. To address these criticisms, direct observations of secondary inspection were made to augment what was being learned from the DHS record reviews and the statistics gleaned from DHS and DOJ operating systems. Specially recruited and trained data collectors, operating under close supervision, made these observations at various land and air ports of entry around the country.⁶

The observers used carefully tested, highly structured data gathering instruments. The goal of these instruments was to capture independently what was actually happening at secondary inspection. The A-file records created by the inspector were obtained, along with an observational record by the independent observer. Whenever possible, the asylum seekers themselves were interviewed immediately after secondary inspection. The three versions of the secondary inspection process (inspector, independent observer, and asylum seeker) were then analyzed together and the consistency of each assessed, relative to the other two.

To buttress this strong observational Study design, many additional checks were made. For example, two observers coded the same experience independently and then compared the results obtained to develop inter-observer reliability measures. Only data that passed these reliability tests was brought forward for the analyses that undergird the main results.

As in any sample, these observational data are subject to sampling errors. The observations were, moreover, taken from a judgmentally selected set of ports of entry. The ports of entry chosen were, however, based on the largest volume of Expedited Removals (e.g., San Ysidro), credible fear referrals (e.g., Miami), and geographic diversity (e.g., Los Angeles and New York).

Another limitation was the timing of the studies (mainly early to mid summer), their short duration (the median was four weeks at each location), and the number of researchers allowed present during each shift. Nevertheless, the Report offers a major new perspective on asylum seekers subject to Expedited Removal. Moreover this part of the Study confirms, complements, and adds to key insights learned from the file reviews, both those completed by this Study and those completed earlier by the GAO.

⁶ Allen Keller, Andrew Rasmussen, Kim Reeves, and Barry Rosenfeld, *Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*, Feb 2005.

OTHER DATA COLLECTION EFFORTS

Detention of asylum seekers is a major aspect of the Expedited Removal process and, as such, deserved special attention. Extensive statistical tabulations, provided by DHS, were requested and analyzed.⁷ Additionally, there were numerous site visits to jails and other detention facilities housing asylum seekers waiting for their cases to be heard. Nineteen detention centers, with the largest populations of asylum seekers, participated in a telephonic survey to enable us to learn about their policies and practices, and examine how asylum seekers treatment was similar or different from that of persons incarcerated for other reasons.⁸ Interviews with 39 asylum seekers dissolving their claims were also analyzed to determine what effect, if any, detention had on their decisions to dissolve their claims.

The Study also examined a series of alternative legal representation models and, in particular, the extent to which representation by an attorney was a factor in the final disposition of an asylum seekers case.⁹ Complementing this were interviews conducted with DHS asylum officials to look at the credible fear determination process.¹⁰ Finally, the Study undertook a series of analyses of DOJ final disposition statistics for FY 2000-2003. Court-by-court differences in final dispositions were examined and within courts differences judge-by-judge.¹¹ Since in an observational Study like the one sponsored by the Commission, attributing cause cannot be done directly, the reports that cover these points are silent as to why these statistical disparities are so large. At a minimum, the large statistically significant difference found would seem to warrant a systematic root cause analysis.

SOME OVERALL CONCLUSIONS

In these methodological highlights there has been a frank, albeit brief, discussion of the overall strengths and especially the weaknesses of the work done. In many ways, the work is pioneering and thus subject to all the caveats of a first time effort. Still, the interlocking nature of the work and its multi-team character lead to the conclusion that its main results are sound and merit reliance. The work has greatly profited from a thorough agency review where misunderstandings, mostly in exposition and occasionally on matters of fact, were clarified.

Clearly, more analyses are needed of the storehouse of data and statistics created. To this end, a considerable effort has been made to document the work done, to put the data in a reusable form, and to make it possible for an outside review of the work to be conducted by an independent organization, subject, of course, to the strict confidentiality provisions to which the Commission experts have been subjected.

⁷ Cory Fleming and Fritz Scheuren, *Statistical Report on Detention, FY 2000-2003*, Feb 2004.

⁸ Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*, Feb 2005.

⁹ Charles Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, Feb 2005.

¹⁰ Mark Hetfield, *Report on Credible Fear Determination*, Feb 2005.

¹¹ Patrick Baier, *Selected Statistical Analyses of Immigration Judge Rulings on Asylum Applications, FY 2000-2003*, Feb 2005.

In conclusion, a good result has been accomplished which can, with due care, be relied upon. More analyses of the data are worthwhile and further studies, especially those seeking causal links, are highly recommended.

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

A Study Authorized by Section 605 of the International Religious Freedom Act of 1998

U.S. AND INTERNATIONAL ASYLUM STANDARDS

By Kate Jastram

The International Religious Freedom Act of 1998 (IRFA) authorized the United States Commission on International Religious Freedom to appoint experts to conduct a study (the Study) on whether immigration officers performing duties under Section 235(b) of the Immigration and Nationality Act with respect to aliens who may be eligible to be granted asylum or protection from torture are engaging in any of the following conduct:

- (A) *Improperly* encouraging such aliens to withdraw their applications for admission,
- (B) *Incorrectly* failing to refer such aliens for an interview by an asylum officer for a determination of whether they have a credible fear of persecution,
- (C) *Incorrectly* removing such aliens to a country where they may be persecuted, or
- (D) Detaining such aliens *improperly* or in *inappropriate* conditions (emphasis added).

The first two questions posed by IRFA concern entry procedures at the border.¹ The third Study question addresses the ultimate aim of the procedures, which is to allow U.S. officials to identify aliens in need of protection. Without accurately identifying those in need of protection, the United States cannot meet its obligation under both domestic and international law not to return persons fleeing from persecution or torture. The fourth Study question calls for an examination of policies and practices relating to the detention of asylum seekers.

For the purposes of determining the standards by which to assess whether Department of Homeland Security and Department of Justice actions are ‘improper’, ‘incorrect’ or ‘inappropriate’, guidance was sought from relevant domestic and international law norms. This chapter sets forth those standards.

THE FIRST THREE STUDY QUESTIONS, ON PROCEDURES:
OVERALL LEGAL FRAMEWORK

Standards from U.S. law

Under U.S. law, Congress may establish procedures to deal with aliens seeking entry.² In enacting Expedited Removal as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress chose to transfer the authority to deport certain aliens from immigration judges to immigration inspectors.

¹ In August 2004, Expedited Removal was expanded in certain sectors to include aliens encountered within 100 miles of the border who have been present in the United States for less than 14 days. Expedited Removal procedures in the interior are carried out by the Border Patrol. The expansion of Expedited Removal took place after our period of data collection had ended; we therefore did not examine the actions of the Border Patrol.

² “Whatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned.” *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

At the same time, Congress provided special protections for asylum seekers subject to Expedited Removal that go far beyond the process afforded to other aliens in Expedited Removal. By so doing, Congress crafted a procedure in which asylum seekers, even those arriving with false documents or no documents at all, will still be able to present their claims for protection to an immigration judge. This procedure requires DHS officials responsible for inspections and for asylum pre-screening to move the asylum seeker's case forward to the immigration court if certain minimal threshold requirements are met.³

Standards from international law

International law does not address the means by which States should determine who is entitled to the protection of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,⁴ or that of the Convention against Torture. The Refugee Convention and Protocol, and the Convention against Torture, are silent on procedures. States parties are obliged as a matter of international law to protect certain categories of persons from forced return; how States go about identifying which aliens may not be forcibly returned is a matter for domestic law. From the perspective of international law, the procedures used to determine asylum and torture protection claims are sufficient if they meet their intended purpose, which is to protect eligible claimants from forced return.⁵

Nevertheless, the inter-governmental Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), of which the United States is a member, has provided general guidance on minimum basic procedural standards for refugee status determinations, including standards for expeditious procedures designed to handle asylum claims that are manifestly unfounded or abusive.⁶ These standards call for issuing clear instructions to border officials to refer asylum seekers to a higher authority; giving the 'necessary facilities' to the asylum seeker for submitting his or her claim; ensuring a personal interview by a qualified official; and providing the possibility of review of a negative decision before removal.

³ Courts have dismissed challenges to these procedures, albeit in the context of the limited possibilities prescribed by Congress for judicial review; INA 242(e)(3) required that all lawsuits challenging Expedited Removal be filed in the U.S. District Court for the District of Columbia within 60 days of its implementation on April 1, 1997. There were three lawsuits filed, which the District Court consolidated into one case and dismissed. The Court of Appeals for the District of Columbia Court affirmed. *American Immigration Lawyers Association v. Reno*, 1999 F.3d 1352 (D.C. Cir. 2000) (affirmed District Court's dismissal); *American Immigration Lawyers Association v. Reno*, 18 F. Supp.2d 38 (D.D.C., Aug. 20, 1998) (dismissed three consolidated challenges to Expedited Removal on jurisdictional grounds).

⁴ The United States is a State Party to the 1967 Protocol relating to the Status of Refugees, which incorporates the substantive provisions of the 1951 Convention relating to the Status of Refugees.

⁵ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, para. 189.

⁶ UNHCR Executive Committee Conclusions No. 8 (1977) on Determination of Refugee Status; No. 15 (1979) on Refugees without an Asylum Country; No. 28 (1982) Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, Inter Alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedures; and No. 30 (1983) on The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.

THE FIRST STUDY QUESTION:
IMPROPERLY ENCOURAGING WITHDRAWALS

Standards from U.S. law

The Immigration and Nationality Act provides for an alien applying for admission to be permitted, in the discretion of the Secretary of Homeland Security, to withdraw his or her application for admission and depart immediately from the United States.⁷ Regulations further specify that any such withdrawal must be voluntary.⁸

THE SECOND STUDY QUESTION:
INCORRECTLY FAILING TO REFER FOR A CREDIBLE FEAR DETERMINATION

Standards from U.S. law

The Immigration and Nationality Act requires inspectors to make a credible fear referral for aliens who indicate either an intention to apply for asylum or a fear of persecution.⁹ Regulations require a referral for those who fear torture, persecution, or any other fear of returning to the country of origin.¹⁰

⁷Immigration and Nationality Act (INA) Sec. 235(a)(4): “Withdrawal of application for admission.-An alien applying for admission may, in the discretion of the [Secretary of Homeland Security] and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.”

⁸ 8 Code of Federal Regulations (CFR) Sec. 235.4: “Withdrawal of application for admission. The [Secretary of Homeland Security] may, in his or her discretion, permit any alien applicant for admission to withdraw his or her application for admission in lieu of removal proceedings under section 240 of the Act or Expedited Removal under section 235(b)(1) of the Act. The alien's decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission.”

⁹INA Sec. 235 (b)(1)(A) “Screening (ii) Claims for asylum.-If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) and the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).”

¹⁰ 8 CFR 235.3 (b)(4) Claim of asylum or fear of persecution or torture. If an alien subject to the Expedited Removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with [8 CFR 208.30](#).

THE THIRD STUDY QUESTION:
INCORRECTLY REMOVING AN ASYLUM SEEKER TO PERSECUTION

Credible fear: Standards from U.S. law

The Refugee Act of 1980 was designed to bring the U.S. into compliance with the U.N. Refugee Protocol.¹¹ The fundamental obligation which the United States assumed in ratifying the Refugee Protocol is the prohibition on returning a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.¹²

Asylum seekers subject to Expedited Removal must first establish that they have a credible fear of persecution or torture in order to present their full claim for protection to an immigration judge. A credible fear is defined as 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 asylum officer, that the alien could establish eligibility for asylum.¹³

Manifestly unfounded or abusive: Standards from international law

The UNHCR Executive Committee's guidance on expeditious procedures recommends that such procedures be used for persons whose claims are manifestly unfounded or abusive, defined as clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Refugee Convention.¹⁴ In UNHCR's view, a lack of appropriate documentation or the use of false documents should not in itself render a claim abusive or fraudulent.¹⁵

Interpreting the refugee definition: Standards from U.S. and international law

There is an extensive body of case law in the United States, ranging from the Board of Immigration Appeals, through the federal courts of appeal, to the U.S. Supreme Court, which provides interpretive guidance to immigration judges on various aspects of the refugee definition.¹⁶ Different elements of the refugee definition have been the subject of agency memos¹⁷, federal regulations¹⁸, and statute¹⁹. Because the refugee definition under U.S. law is

¹¹ "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

¹² Art. 33 of the Convention relating to the Status of Refugees; the corresponding provision under U.S. law is restriction on removal, found in INA Sec. 241(b)(3).

¹³ INA Sec. 235 (b)(1)(B)(v).

¹⁴ UNHCR Executive Committee Conclusion No. 30 (1983) on The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, para (d).

¹⁵ See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (31 May 2001), para. 50 (l).

¹⁶ For guidance on this body of law, see, e.g., Anker, *The Law of Asylum in the United State*; Germain, *AILA's Asylum Primer*, 3d ed.; and Musalo, Moore and Boswell, *Refugee Law and Policy*, 2d ed.

¹⁷ See, e.g., *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, to All INS Asylum Officers HQASM Coordinators, May 26, 1995).

¹⁸ See, e.g., 8 C.F.R. Sec. 208.15 on firm resettlement.

the same as the international definition, U.S. adjudicators can and do draw upon UNHCR's expertise.²⁰

Given this body of legal standards, which are also employed by immigration judges in asylum cases whether or not originating in Expedited Removal, as well as by asylum officers in the context of affirmative applications, the Study did not assess whether immigration judges had correctly applied the refugee definition to the cases before them. Instead, the Study focused on evidentiary issues particular to the Expedited Removal process.

Evidentiary issues: Standards from U.S. law

In contrast to the abundance of guidance on applying the refugee definition, U.S. law and procedures provide less direction to immigration judges on evidentiary matters such as credibility determinations. Credibility is a particularly important issue in asylum adjudication, since most asylum seekers are not able to supply documentary evidence to corroborate their claims of persecution, except perhaps for human rights reports on conditions in their country of origin. Some asylum seekers do not even have valid personal identification documents — precisely the reason why they are subject to Expedited Removal — because escaping from their persecutors would be even more dangerous or simply impossible if they attempted it with their own passport or identification papers.

For this reason, U.S. law recognizes that the asylum seeker's credible testimony alone may be sufficient to establish his or her claim, as long as it is consistent with available information on human rights conditions in the country of origin.²¹ The nature of asylum adjudications places great emphasis on the judge's assessment of the asylum seeker's credibility.²²

U.S. case law is clear that 'adding detail' to the claim is not a basis for an adverse credibility finding when an asylum seeker provides more complete information to the immigration judge than to the inspector or the asylum officer.²³

Evidentiary issues: Standards from international law

UNHCR advises generally that it may be necessary for the adjudicator to clarify any apparent inconsistencies and to resolve any contradictions, and stresses that the adjudicator will

¹⁹ See, e.g. INA Sec. 101(a)(42)(B), adding to the refugee definition by specifying that persecution for resistance to coercive population control measures be deemed to be persecution on account of political opinion.

²⁰ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, cited by the U.S. Supreme Court as providing "significant guidance" in construing U.S. obligations under the Refugee Protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n. 22 (1987). UNHCR periodically issues additional or updated guidelines, see, e.g., *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (HCR /GIP/04/06) (28 April 2004).

²¹ 8 C.F.R. Sec. 208.13(a).

²² The Immigration Judge Benchbook, Part. 1, Ch. One, I. A. 6.(Oct. 2001), advises that detailed credibility findings are a must in asylum cases.

²³ *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004), *Chen v. Ashcroft*, 376 F.3d 215, 224 (3d Cir. 2004).

need to gain the confidence of the asylum seeker in order to assist him or her to fully explain the claim.²⁴

Representation: Standards from U.S. law

Aliens seeking admission are not entitled to counsel, even at their own expense, in primary or secondary inspection, unless they become subject to a criminal investigation. An asylum seeker referred for a credible fear interview may consult with a person or persons of his or her choosing prior to the interview, at no expense to the government.²⁵ An asylum seeker may be represented at the merits hearing on his or her asylum claim, at no expense to the government, by counsel of his or her choosing.²⁶

Representation: Standards from international law

UNHCR advises that at all stages of the procedure, including at the admissibility stage, asylum seekers should receive guidance and advice on the procedure and have access to legal counsel. Where free legal aid is available, asylum seekers should have access to it in case of need.²⁷

THE FOURTH STUDY QUESTION: IMPROPER DETENTION AND INAPPROPRIATE CONDITIONS

The fourth Study question raises two distinct issues pertaining to detention. The first issue has to do with who should be detained; i.e. whether detention in a given asylum seeker's case is proper or improper. The second issue calls for an assessment of the conditions of confinement, specifically, whether they are inappropriate for asylum seekers.

Detention decisions: Standards from U.S. law

Whether an asylum seeker subject to Expedited Removal is being detained improperly under U.S. law depends in part on where he or she is in the process, and in part on which one of several potentially overlapping standards governs. Detention is mandatory until a positive credible fear determination is made²⁸, unless parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.²⁹

²⁴ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, paras. 199-200.

²⁵ INA Sec. 235(b)(1)(B)(iv).

²⁶ INA Sec. 240 (b)(4)(A).

²⁷ See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12 (31 May 2001), para.50 (g).

²⁸ INA Sec. 235(b)(1)(B)(IV) Mandatory Detention.-Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

²⁹ 8 CFR 235.3(b)(2)(iii) Detention and parole of alien in Expedited Removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section [212\(d\)\(5\)](#) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

Once the asylum seeker is found to have a credible fear of persecution, he or she is referred to a removal hearing under Sec. 240 of the INA, and is still required to be detained.³⁰ Parole may be considered for urgent humanitarian reasons or significant public health benefit.³¹ These reasons could include serious medical conditions, pregnancy, or continued detention not in the public interest.³²

In addition, then-INS promulgated internal parole guidelines in 1997 for asylum seekers who have a credible fear of persecution.³³ These guidelines clarified that parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct. As noted in a subsequent memo, “although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community.”³⁴

³⁰ INA Sec. 235 (b) (1)(B) (ii) Referral of certain aliens.-If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

³¹ INA Sec. 212 (d) (5)(A) The Attorney General may, except as provided in subparagraph (B) or in section [214\(f\)](#), in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

³² 8 CFR § 212.5 (b): “The parole of aliens within the following groups who have been or are detained in accordance with § 235.3 (b) (*Expedited Removal*) or (c) (*arriving aliens placed in proceedings under section 240 of the Act, includes those who passed credible fear*) of this chapter would generally be justified only 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: (1) aliens who have serious medical conditions...; (2) women who have been medically certified as pregnant; (3) juveniles; (4) aliens who will be witnesses in proceeding being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or (5) aliens whose continued detention is not in the public interest....”

³³ INS Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in *75 Interpreter Releases* 270 (Feb. 23, 1998).

³⁴ INS Memorandum, *INS Detention Use Policy*, (Oct. 9, 1998) reproduced at *75 Interpreter Releases* 1505, 1523 (Nov. 2, 1998).

Overview of Standards for Release

Authority: INA § 212(d)(5)(A); 8 CFR § 212.5

Language: “The Attorney General may, except as provided for in subparagraph (B) (*related to refugees*) or in section 214 (f) (*crewmembers*), in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit **any alien applying for admission** to the United States....”

For Arriving Aliens	For Arriving Aliens in Expedited Removal	For Asylum Seekers in ER determined to have credible fear
<p>8 CFR § 212.5 (c): “In the case of all other arriving aliens, except those detained under § 235.3 (b) (<i>Expedited Removal</i>) or (c) (<i>arriving aliens placed in proceedings under section 240 of the Act, includes those who passed credible fear</i>) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate.”</p>	<p>8 CFR § 212.5 (b): “The parole of aliens within the following groups who have been or are detained in accordance with § 235.3 (b) (<i>Expedited Removal</i>) or (c) (<i>arriving aliens placed in proceedings under section 240 of the Act, includes those who passed credible fear</i>) of this chapter would generally be justified only 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: (1) aliens who have serious medical conditions...; (2) women who have been medically certified as pregnant; (3) juveniles; (4) aliens who will be witnesses in proceeding being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or (5) aliens whose continued detention is not in the public interest....”</p>	<p>8 CFR § 235.3 (c): “Arriving aliens placed in proceedings under section 240 of the Act. Except as otherwise provided in this chapter, any arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act. Parole of such alien shall only be considered in accordance with § 212.5 (b) of this chapter.”</p>

	<p>But see: (limiting instances of parole) 8 CFR § 235.3 (b)(2)(iii): “Detention and parole of alien in Expedited Removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”</p> <p>And see: 8 CFR § 235.3 (b)(4)(ii): “Detention pending credible fear interview. Parole...may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”</p>	<p>But see: INS Memorandum “Expedited Removal: Additional Policy Guidance,” 1997: “Parole Consideration for Detainees Who Meet Credible Fear Standard....Parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”</p>
	<p>And see: INS Memorandum for Regional Officers, “Detention Guidelines Effective October 9, 1998”: “Any alien placed in Expedited Removal must be detained until removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under § 240 (for example, upon a finding of ‘credible fear of persecution’).” <i>Appears that parole criteria will be applied to those who fall under (2) above.</i></p>	<p>And see: INS Memorandum for Regional Officers, “Detention Guidelines Effective October 9, 1998”: “Any alien placed in Expedited Removal must be detained until removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under § 240 (for example, upon a finding of ‘credible fear of persecution’).” <i>Appears that parole criteria will be applied to those who fall under (2) above.</i></p>

Detention decisions: Standards from international law

International law clearly states that refugees are not to be penalized for their illegal entry or presence.³⁵ UNHCR’s Executive Committee, of which the United States is a member, has formulated recommendations on the detention of refugees and asylum seekers, noting at the outset that detention should normally be avoided.³⁶ If necessary, detention should be imposed

³⁵ Art. 31, Convention relating to the Status of Refugees.

³⁶ UNHCR Executive Committee Conclusion No. 44 (1986) on Detention of Refugees and Asylum Seekers, para. (b).

only to verify identity, to determine the elements of the claim, to deal with cases where asylum seekers have destroyed documents in order to mislead the authorities in the country of asylum, or to protect national security or public order. UNHCR has issued additional guidance on detention, which elaborates on the Executive Committee recommendations.³⁷

Conditions of confinement: Standards from U.S. law

Regulations require that immigration detention centers provide 24 hour supervision of detainees, conform with any applicable federal, state or local safety and emergency codes, provide food service, and guarantee access to emergency medical care.³⁸

DHS has established national detention standards, which specify the living conditions appropriate for detainees in three areas: detainee services, health services, and security and control. These standards have been collated and published in the [Detention Operations Manual](#). The Manual provides uniform policies and procedures concerning the treatment of individuals detained by Immigration and Customs Enforcement's (ICE) Detention and Removal Operations (DRO).³⁹

Implementation of the detention standards is mandatory for all DHS Service Processing Centers, Contract Detention Facilities, and state and local government facilities that house DHS detainees for more than 72 hours. ICE-DRO monitors these facilities for compliance. Additional standards are supplied by the American Correctional Association, which administers the only national accreditation program for adult correctional institutions.⁴⁰

U.S. law does not provide standards specific to non-criminal asylum seekers in detention. Instead, the relevant standards mentioned above are based on a correctional model, and were initially imported into immigration practice to deal with criminal aliens.

Conditions of confinement: Standards from international law

UNHCR's Executive Committee has recommended that national legislation and administrative practice make the necessary distinction between refugees and asylum seekers, and other aliens.⁴¹ UNHCR's guidelines on detention advise that States must avoid commingling asylum seekers and common criminals, and stress the importance of separate detention facilities to accommodate asylum seekers. The guidelines set forth specific standards on a number of other aspects of conditions of detention⁴² perhaps best summed up by the overall advice that conditions should be "humane with respect shown for the inherent dignity of the person."

³⁷ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (Feb. 1999).

³⁸ 8 C.F.R. 235.3.

³⁹ The Detention Operations Manual can be found at <http://www.ice.gov/graphics/dro/opsmanual/index.htm>, last consulted Jan. 23, 2004.

⁴⁰ See <http://www.aca.org>, last consulted Jan. 23, 2004.

⁴¹ UNHCR Executive Committee Conclusion No. 44 (1986) on Detention of Refugees and Asylum Seekers, para. (d).

⁴² UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (Feb. 1999).

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

A Study Authorized by Section 605 of the International Religious Freedom Act of 1998

FINDINGS

QUESTION ONE

(1) ARE IMMIGRATION OFFICERS, EXERCISING EXPEDITED REMOVAL AUTHORITY, IMPROPERLY ENCOURAGING ASYLUM SEEKERS TO WITHDRAW APPLICATIONS FOR ADMISSION?

Department of Homeland Security (DHS) regulations, and Customs and Border Protection (CBP) procedures and training materials make it clear to CBP inspectors that the withdrawal of an application for admission is “strictly voluntary” and “must not be coerced in any way.” While most officers observed complied with these procedures, in one port of entry the Study observed a few instances in which immigration officers improperly encouraged asylum seekers to withdraw their applications for admission.

Specific Findings

A. Department of Homeland Security (DHS) policy and training aims to prevent immigration inspectors from encouraging asylum seekers to withdraw their applications for admission.

DHS procedures make it clear to inspectors that a withdrawal of an application for admission “is strictly voluntary, and should not be coerced in any way.” Moreover, the training materials instruct that “if an alien is (subject to Expedited Removal but offered withdrawal), a sworn statement should be taken whenever possible, using Form I-867A and B. This ensures that all the facts of the case are recorded, especially in potentially controversial cases, and protects against accusations of coercing the alien into withdrawing, especially when there may have been an issue of fear of persecution.”

B. In only one port of entry (Houston) did the Study observe inspectors pressuring individuals to retract their fear claims (4/4 cases in which fear was expressed).

In two of these four cases, the aliens actually withdrew their applications for admission. However, in the other two instances, the asylum seekers persisted with their credible fear claims and were referred to an asylum officer. In these four cases the officers used strong language to coerce applicants into withdrawing.

There were, however, cases in other ports of entry in which CBP officers told aliens about other consequences of pursuing asylum claims “off script.” Two were told that because they entered illegally they might not have a chance to present their cases. Five were told they would be held in detention for three weeks or more, three of these for over a month. Because it was sometimes difficult to differentiate between appropriate factual responses to alien questions and deliberate attempts to discourage fear claims, the Study did not consider these disclosures to

reflect deliberate coercion; nevertheless they could arguably be construed as encouraging asylum seekers to withdraw their claims.

C. Customs and Border Protection (CBP) quality assurance mechanisms are inadequate to ensure that all officers comply with the policy that all withdrawals be “strictly voluntary.”

As described above, even when being monitored, a few inspectors engaged in conduct encouraging asylum seekers to withdraw their applications for admission. While a handful of ports of entry use video cameras to help protect inspectors from allegations of coercive behavior, most ports rely primarily on supervisory review of paper files to determine whether inspectors are following procedures. Paper files created by an unobserved inspector are not sufficient to monitor whether that inspector engaged in improper coercive conduct. The Study was not made aware of any other quality assurance mechanisms in place, such as direct observations of interviews by supervisors.

While the regulations require that Forms I-876A and B must be used for any alien who is ordered expeditiously removed, the regulations do not *require* that they be used for withdrawals. Rather, CBP training materials instruct immigration inspectors to use those forms “whenever possible.” According to the CBP Inspector Training Materials on Expedited Removal, the forms should be used to prevent allegations that immigration inspectors improperly encouraging asylum seekers to withdraw their applications for admission. Form I-867A contains a script that informs the applicant that, if ordered removed, (s)he will be barred from re-entry for “a period of 5 years or longer.” (This is in contrast to a withdrawal, which does not carry with it any such bar.)

The script also requires the CBP inspector to inform the alien that if (s)he has any reason to fear persecution, torture, or other harm upon being returned to his or her home country, (s)he should inform the inspector during the interview and may seek protection from return under U.S. law.

The inspector is not required to inform the alien of the possibility of withdrawing his or her application for admission, which does not carry the penalties associated with Expedited Removal. This is because withdrawal is offered only at the discretion of the inspector. The alien does not have the “right” to request a withdrawal of his or her application for admission.

The Study found that, when Form I-867A is used, aliens are frequently informed of the penalties of Expedited Removal but not of the availability of protection if they fear being returned. When subject to Expedited Removal, a potential asylum seeker who is offered withdrawal may be led to believe (s)he has only two choices: (1) to withdraw his or her application for admission, without penalty or (2) to be expeditiously removed with a five year bar from admission. Even in cases which resulted in the issuance of an order of Expedited Removal, the Study found that a significant percentage of aliens are not informed of a third choice: the right to apply for protection from return. Inspectors observed using Form I-867A and B during the Study failed to convey the protection information to the applicant approximately half of the time, even though that information was on the I-867A script.

D. The role of asylum officers in the “dissolve” process reduces the risk that asylum seekers will be improperly encouraged to withdraw their applications for admission.

The Study examined whether aliens might be “improperly encouraged” to withdraw their applications for admission by DHS detention officers after they have been referred for credible fear. We interviewed 45 aliens who were dissolving (i.e. abandoning) their asylum claims while in detention, and asked each of them whether any DHS official had encouraged them to withdraw their applications for admission. While a substantial number reported that the conditions of their detention influenced their decision to withdraw their application for admission, no one in this sample indicated that any detention official had improperly encouraged him or her to withdraw his or her application for asylum.

DHS has procedures in place at detention facilities to ensure against improper withdrawals of applications for admission. Specifically, before a detention officer can permit an alien to withdraw his or her application for admission or otherwise abandon his or her credible fear claim, an asylum officer “must speak to the alien to ensure that (s)he is aware of the consequences of dissolving an asylum claim, and to ascertain why the alien no longer wishes to remain in the credible fear process...(The asylum officer) must also read and explain the contents of the (form) *Request for Dissolution of Credible Fear* to the alien.¹ If, after the (asylum officer) explains the contents of the form, the alien changes his or her mind and wants to remain in the credible fear process, the (officer) continues processing the alien through the credible fear process.”²

The role of asylum officers (who belong to U.S. Citizenship and Immigration Services (USCIS), a different agency than Immigration and Customs Enforcement, Office of Detention and Removal Operations (ICE-DRO), whose detention officials would authorize the withdrawal) in the dissolution process leaves detained asylum seekers less vulnerable to improperly encouraged withdrawals than aliens at ports of entry. ICE cannot authorize an applicant to withdraw his application for admission until an asylum officer has had the opportunity to talk to the alien and document the voluntary nature of his decision to dissolve the credible fear claim and, if applicable, withdraw the application for admission. This is different than the withdrawal of applications for admission at ports of entry, as the decision to authorize withdrawals is solely at the discretion of CBP inspectors.

¹ The dissolution form confirms that an asylum officer explained to the applicant that (s)he has “freely and voluntarily” decided to stop pursuing protection from removal, that (s)he understands that DHS will either permit him or her to withdraw his or her application for admission or issue an order of removal which would bar him or her from seeking readmission to the US for five years or more. The form also reiterates that, if the alien changes his or her mind again any time prior to departure from the United States, (s)he may again ask for protection from removal through the credible fear process. Finally, the alien is required to state the reason (s)he has decided not to ask for protection at this time.

² USCIS Credible Fear Procedures Manual, p. 35.

QUESTION TWO

(2) ARE IMMIGRATION OFFICERS, EXERCISING EXPEDITED REMOVAL AUTHORITY, INCORRECTLY FAILING TO REFER ASYLUM SEEKERS FOR A CREDIBLE FEAR INTERVIEW?

DHS regulations state that an immigration inspector must refer an alien for a credible fear determination if that alien indicates “an intention to apply for asylum, a fear of torture, or a fear of return to his or her country.” In accordance with these regulations, nearly 85 percent (67/79) of arriving aliens observed by the Study expressing a fear of return were referred for a credible fear interview. CBP Guidelines, however, provide the inspector with more discretion than the regulations, allowing the inspector to decline referral in cases where the fear claimed by the applicant is unrelated to the criteria for asylum. Indeed, in 15 percent (12/79) of observed cases when an arriving alien expressed a fear of return to the inspector, the alien was not referred. Moreover, among these twelve cases were several aliens who expressed fear of political, religious, or ethnic persecution, which are clearly related to the grounds for asylum. Of particular concern, in seven of these twelve cases, the inspector incorrectly indicated on the sworn statement that the applicant stated he had no fear of return.

While DHS guidance requires that asylum seekers at land ports of entry be placed in Expedited Removal and referred for a credible fear interview, the Study interviewed two groups of aliens (one from the Middle East, the other from East Africa) who requested the opportunity to apply for asylum but were refused and “pushed back” at primary inspection. We became aware of these cases only because in each case, the asylum seekers tried again on a different day and were referred into Expedited Removal as well as for a credible fear interview. CBP has stated that it is “very concerned and dismayed that this is happening contrary to policy, and is taking steps to address this.”³

Specific Findings

A. DHS policy does not clearly define whether all expressions of fear by an alien in Expedited Removal proceedings should result in a referral for a credible fear determination.

DHS policy requires that immigration inspectors ask scripted questions from the Form I-867B to determine whether the alien should be referred for a credible fear interview on the basis of a fear of return.⁴ DHS instructs its inspectors that for any alien who responds to these questions by expressing a fear of return, verbally or otherwise, a CBP inspector must refer the alien for a credible fear determination. Section 17.15 of the Inspector Field Manual, however, is not entirely consistent with DHS regulations. The Manual states that an inspector may choose

³ Letter from Michael J. Hrinyak, Acting Executive Director, Immigration Policy and Programs, Office of Field Operations, to Mark Hetfield, USCIRF (February 2, 2005). See also “Aliens Seeking Asylum at Land Border Ports of Entry,” Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, to Regional Directors (2/6/2002).

⁴ Those four 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 returned to your home country or country of last residence”; and (4) “Do you have any questions or is there anything else you would like to add.”

not to refer a case when the alien's expression of fear "would clearly not qualify that individual for asylum." We observed examples of failures to refer aliens who expressed a fear of return that may have ensued from this unclear guidance.

- B. DHS regulations require immigration inspectors to follow a standard script informing each alien that (s)he may ask for protection if (s)he has a fear of returning home. In approximately half of inspections observed, inspectors failed to inform the alien of the information in that part of the script. Aliens who did receive this information were seven times more likely to be referred for a credible fear determination than those who were not.**

- C. DHS inspectors observed by Study researchers asked, "Do you have any fear or concern about being returned to your home country or being removed from the United States?" 94 percent of the time; DHS inspectors observed by Study researchers asked, "Would you be harmed if you were returned to your home country or country of last residence?" 87 percent of the time. At least one of these questions was asked 95 percent of the time.**

- D. Approximately 85 percent (67/79) of arriving aliens whom the Study observed expressing a fear of return were referred for a credible fear interview, in accordance with DHS regulations. However, in 15 percent of observed cases (12/79) where an arriving alien expressed a fear of return to the inspector, that alien was not referred.**

The 12 cases that were not referred included expressions of economic fear but also fear related to political, religious, or ethnic persecution, as well as unspecified fear, fear of spouse abuse, and fear of smugglers. Under DHS regulations, all of these aliens should have been referred for a credible fear interview.

- E. While monitoring the San Ysidro land border port of entry, researchers interviewed two groups of aliens who were previously refused a referral to secondary inspection, despite expressing an intention to apply for asylum. Aliens at busy land ports of entry are particularly vulnerable to improper denials of credible fear referrals, even though this is contrary to DHS policy.**

While monitoring the San Ysidro port of entry, the Study became aware of two instances in which primary inspectors improperly refused entry to the United States for applicants lacking proper documentation and "pushed back" those applicants without referring them to secondary inspection or creating a record of the primary inspection. In contrast, at airports, aliens cannot simply be put on a return flight without an inspector documenting the interaction. Moreover, primary inspections at any busy port of entry are difficult for observers or supervisors to monitor. This is particularly true in San Ysidro, where primary inspectors inspect an average of 25,000 pedestrians per day and 50,000 automobile passengers, with 24 lanes of traffic. Nevertheless, while in San Ysidro, Study researchers encountered two small groups of aliens who reported asking for asylum at primary inspection, but were nevertheless refused a referral to secondary

inspection or a credible fear determination in clear violation of DHS procedures.⁵ These aliens came to the attention of the Study after they made a subsequent, successful request for a credible fear referral the following day.

F. Files of cases resulting in Expedited Removal generally included the required documents used to screen aliens to determine whether the alien had a fear of return, and whether he or she should be referred for a credible fear interview. The reliance of Customs and Border Protection (CBP) on file reviews for quality assurance, however, is insufficient to ensure that aliens who express a fear of return are referred for a credible fear determination.

CBP does not have sufficient controls in place to ensure that inspectors are referring all aliens who express a fear of return for a credible fear determination. While a handful of ports of entry use video cameras to help protect inspectors from allegations of improper conduct during secondary inspections, most ports rely heavily on paper files to determine whether inspectors are following procedures. While the paper files generally appear to be complete, Study observations indicate that paper files created by the inspector are not always reliable indicators of whether that inspector should have referred an alien for a credible fear determination. Study researchers found that the file often indicated that all four fear questions were asked of the alien, even when they were not. Conversely, when the questions were asked, the file occasionally indicated they had not been. Of special concern in the 12 cases mentioned above where the alien responded to the fear question by asserting that (s)he had a fear of return, seven of the files memorializing those inspections incorrectly indicated that the alien responded that (s)he had no fear of return.

⁵ While field guidance was distributed on February 6, 2002 instructing INS Inspectors on these procedures for referring asylum seekers at land ports of entry, it appears that the Inspectors Field Manual has not yet been updated to reflect those instructions, in spite of an indication in the memorandum that it would be.

QUESTION THREE

(3) ARE IMMIGRATION OFFICERS, EXERCISING AUTHORITY UNDER EXPEDITED REMOVAL, INCORRECTLY REMOVING ASYLUM SEEKERS TO COUNTRIES WHERE THEY MAY FACE PERSECUTION?

The second Study question concerned bona fide asylum seekers who are improperly denied a referral for a credible fear determination. While such asylum seekers may be removed to a country where they may face persecution, those findings are not repeated here. Rather, to respond to this question, the focus is on asylum seekers who are removed after the credible fear interview. In addressing this question, it is also appropriate to examine asylum seekers ordered removed by the immigration judge at the conclusion of their asylum hearing, focusing on the characteristics of the proceeding which are unique to cases that originate in Expedited Removal.

Asylum officers reach a negative credible fear determination in only one percent of cases referred. Moreover, a negative credible fear determination is subject to strict quality assurance procedures by Asylum headquarters, and may then be reviewed by an immigration judge, who vacates negative credible fear findings reached by asylum officers more than ten percent of the time.

Under the current system, immigration judges – not asylum officers – determine eligibility for asylum for aliens in Expedited Removal proceedings. We found very significant variations in the asylum approval rates of individual judges. Furthermore, in nearly 40% of the immigration judge decisions examined where relief was denied, the judge cited that the applicant's testimony was inconsistent with his or her initial asylum claim, as expressed to the immigration inspector or the asylum officer at the time of the credible fear interview. In nearly one-fourth of these cases, the Judge found that the asylum-seeker's testimony was not credible because the alien "added detail" to the prior statements. Such negative credibility findings fail to take into account that the records of these prior statements are, according to the findings of the Study, often unreliable and incomplete. Finally, immigration judges granted relief to 25 percent of represented asylum applicants but only two percent of unrepresented asylum seekers.

After being denied asylum, an alien who continues to claim a fear of persecution or torture may appeal a negative immigration judge decision to the Board of Immigration Appeals (BIA). While the BIA sustained 23 percent of Expedited Removal asylum appeals in FY2001, only two – four percent of such appeals have been granted since 2002, when the court began allowing the issuance of "summary affirmances" rather than detailed decisions. Statistically, it is highly unlikely that any asylum seeker denied by an immigration judge will find protection by appealing to the BIA.

Specific Findings

- A. DHS and the Executive Office for Immigration Review (EOIR) have implemented a screening standard and procedures which ensure that asylum officers conducting the credible fear screening do not incorrectly remove asylum seekers subject to Expedited Removal to countries where they may face persecution.**

According to statistics compiled for the Study, in FY2003 90 percent of aliens referred were found to have a credible fear of persecution, nine percent withdrew their credible fear claims, and only one percent were found by the asylum officer not to have a credible fear. Furthermore, among those aliens who requested that an immigration judge review the negative credible fear determination, ten percent were ultimately found to have a credible fear. In addition to the right of review by an immigration judge, USCIS requires that the Asylum office at USCIS headquarters review every negative credible fear determination.

The Form I-870 documents that an alien has a credible fear of persecution due to “a significant possibility” that during a full asylum hearing, (1) “the applicant would be found to be credible”; and (2) the applicant has a fear of torture or would establish a fear of return which could have a nexus to one of the grounds for asylum. Nevertheless, because USCIS imposes much more labor intensive quality assurance procedures for negative credible fear findings than for positive ones, the agency may be inadvertently encouraging its asylum officers to find “credible fear” even in cases where it may not be warranted.

B. The “Record of Sworn Statement” (Form I-867A and B) records created at ports of entry during the Expedited Removal process are often incomplete and less than reliable. Reliance on these records by immigration judges for purposes of assessing the credibility of an asylum applicant’s testimony in court could, therefore, lead to the incorrect removal of asylum seekers to countries where they may face persecution. In 31 percent (43/137) of transcripts reviewed, immigration judges denying asylum cited the asylum seeker’s statement made to the immigration inspector at the port of entry, as recorded on Form I-867A and B.

The Form I-867A and B is written in question and answer format, implying that it is a verbatim transcript. Moreover, it includes a paragraph informing the applicant that (s)he may apply for protection if (s)he has a fear of return. The Study observed that this paragraph, which is part of the sworn statement “verbatim” script, is in fact read to the applicant only 44 percent of the time (164/354). In addition, while each of the required questions relating to the applicant’s fear of return was asked approximately 95 percent of the time, in 32 of the 37 cases when a particular fear question was not asked, the sworn statement in the file inaccurately indicated that it had been asked – and answered. Finally, the form indicates that the information on the sworn statement was read back to and verified by the alien. However, the statement was not, in fact, reviewed by the alien, interpreter, or interviewing officer in 72 percent of the cases observed (268/373).

The Inspector Field Manual instructs immigration inspectors taking the sworn statement: “Do **not** go into detail on the nature of the alien's fear of persecution or torture (emphasis in original).” Nevertheless, in 23.3 percent of cases (10/43) reviewed in which the judge cited the sworn statement as a basis for denying asylum, the judge found that the applicant was not credible because the alien’s testimony in court reflected additional detail not in the original document from the port of entry.

Finally, with the exception of Houston and Atlanta airports, the ports of entry observed did not create an audio or videotape of the secondary inspection interview, but relied entirely on

an unwitnessed statement as transcribed by the interviewing officer. Even in Atlanta and Houston, where secondary inspections are videotaped, the videos are taped over within a few months. They are, therefore, seldom available to the government or the alien during consideration of the alien's asylum application before the immigration judge.

C. The asylum officer's notes from the asylum seeker's credible fear interview, as recorded on the Form I-870, are generally incomplete summaries of the asylum seeker's claim and not a verbatim transcript of the credible fear interview itself. Nevertheless, in 29 percent (40/137) of transcripts reviewed, immigration judges denying asylum on credibility grounds cited these notes.

In a survey conducted at all eight regional asylum offices, the offices unanimously affirmed the Study's characterization that the statement taken at the time of the credible fear interview is used "to record just the basics of a positive determination, to show whether the alien has met the threshold for credible fear. The credible fear statement does not generally represent a complete description of the alien's asylum claim." Nonetheless, in 25 percent (10/40) of the cases in which the credible fear notes were cited as a basis to find that the applicant lacked credibility, the immigration judge specified that the applicant was not credible because at the immigration hearing, (s)he added detail to the claim originally expressed during the credible fear interview.

After a revision of the Form I-870 (November 21, 2003), the form indicated that: "The 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." While this language on the form I-870 was not in effect until after the period covered by the Study, it nevertheless confirms the limitations of the evidentiary value of the form.

D. The outcomes of asylum claims for asylum seekers who were placed in Expedited Removal vary significantly across courts and judges.

The Study identified wide statistical variations of grant rates of individual immigration judges for asylum seekers in Expedited Removal proceedings, even among aliens of the same nationality or among judges with the same caseload sitting in the same court.

E. In recent years, there has been a substantial decrease in the granting of alien appeals by the Board of Immigration Appeals (BIA).

Moreover, statistics gathered in the Study demonstrate that since the BIA decision to permit "affirmances without opinion" (rather than opinions specifying the reasons for the decision) for asylum, withholding, and relief under the Convention Against Torture (CAT), the BIA, in deciding appeals filed by asylum seekers subject to Expedited Removal, has gone from reversing 23 percent of immigration judge decisions to reversing only two to four percent of such decisions. With wide variations in asylum approval rates among judges (discussed above), and only two to four percent of those decisions now being overturned on appeal, the BIA may now offer little protection from the possibility of erroneous immigration judge decisions.

F. Asylum seekers subject to Expedited Removal who are represented by an attorney are granted relief 25 percent of the time; this contrasts with asylum seekers representing themselves, who are granted relief two percent of the time.

Asylum hearings before an immigration judge are adversarial proceedings, where an asylum applicant faces not only the immigration judge but also a DHS trial attorney who almost without exception argues that the alien should be removed. Asylum applicants in Expedited Removal proceedings are entitled to counsel, but only at no expense to the government. The Executive Office for Immigration Review (EOIR), the Arlington Asylum Office (in cooperation with the Capital Area Immigrants' Rights Coalition), and numerous non-profit organizations have developed various programs which assist detained asylum seekers in receiving legal advice and finding legal counsel. Most of these, however, are largely dependent on the local supply of legal representation. However, many of the approximately 185 detention facilities used by DHS to house asylum seekers subject to Expedited Removal are in areas, which are served by neither of these programs nor by private asylum attorneys.

QUESTION FOUR

(4) ARE IMMIGRATION OFFICERS, EXERCISING AUTHORITY UNDER EXPEDITED REMOVAL, DETAINING ASYLUM SEEKERS IMPROPERLY OR UNDER INAPPROPRIATE CONDITIONS?

Asylum seekers subject to Expedited Removal must, by law, be detained until an asylum officer has determined that they have a credible fear of persecution or torture, unless release (parole) is necessary to meet a medical emergency need or legitimate law enforcement objective. The Study found that most asylum seekers are detained in jails and in jail-like facilities, often with criminal inmates as well as aliens with criminal convictions. While DHS has established detention standards, these detention facilities closely resemble, and are based on, standards for correctional institutions.

In one particularly innovative Immigration and Customs Enforcement (ICE) contract facility, located in Broward County, Florida, asylum seekers are detained in a secure facility which does not closely resemble a jail. While Broward could be the model in the United States for the detention of asylum seekers, it is instead the exception among the network of 185 jails, prisons and “processing facilities” utilized by DHS to detain asylum seekers in Expedited Removal.

DHS policy favors the release of asylum seekers who have established credible fear, identity, community ties, and no likelihood of posing a security risk. However, there was little documentation in the files to allow a determination of how these criteria were actually being applied by ICE.

In FY2003, only 0.5 percent of asylum seekers subject to Expedited Removal in the New Orleans district were released prior to a decision in their case. In Harlingen, Texas, however, nearly 98 percent of asylum seekers were released. Release rates in other parts of the country varied widely between those two figures.

Specific Findings

- A. The law and regulations require that aliens in Expedited Removal be detained until it is determined that they have a credible fear of return unless parole is necessary to meet a medical emergency or legitimate law enforcement objective.**
- B. The overwhelming majority of asylum seekers in Expedited Removal are detained in jails and jail-like facilities, often with criminal inmates and aliens with criminal convictions.**

The standards applied by ICE for all of their detention facilities are identical to, and modeled after, correctional standards for criminal populations. In some facilities with “correctional dormitory” set-ups, there are large numbers of detainees sleeping, eating, going to the bathroom and showering out in the open in one brightly lit, windowless and locked room. Recreation in ICE facilities often consists of unstructured activity of no more than one hour per day in a small outdoor space surrounded by high concrete walls or a chain link fence. All

detainees must wear prison uniforms, and a guard is posted in each dormitory room all day and night. Conditions do vary from facility to facility, but nearly all are prisons or prison like. In contrast, the Executive Committee of the United Nations High Commissioner for Refugees, of which the United States is a member, has recommended that national legislation and administrative practice make the necessary distinction between criminals, refugees and asylum seekers, and other aliens.⁶

C. DHS detains some asylum seekers in Expedited Removal in a secure facility which does not resemble a conventional jail and at a cost comparable to that of other DHS detention centers.⁷ The facility, located in Broward County, Florida, has the potential to be copied in other locations, but has not yet been.

The Broward County facility allows detainees to walk outside in a secure grassy courtyard during all daylight hours, use the toilet and the shower without anyone else watching, wear civilian clothing, and freely walk to class or other programmed activities without an armed escort.

D. DHS Policy Guidance, while not set in regulation, favors the release of asylum seekers who establish credible fear, identity, community ties, and who do not pose a security or flight risk.

E. The decision-making criteria applied by Immigration and Customs Enforcement (ICE) in considering parole are not readily discernible from the information contained in the file.

ICE has not developed a form that documents the decision-making process for parole. Thus, it cannot be easily ascertained from ICE records whether the criteria are being appropriately applied to asylum seekers subject to Expedited Removal.

F. The USCIS (U.S. Citizenship and Immigration Services) Form I-870, completed by an asylum officer during the credible fear interview, collects information relating to some of the criteria which DHS guidance indicates should be applied to parole decisions. The asylum officer, however, does not make a recommendation to ICE concerning release. ICE and USCIS, however, seem to have different interpretations of key definitions relevant to the release criteria. For example, while

⁶ UNHCR Executive Committee Conclusion No. 44 (1986) on Detention of Refugees and Asylum Seekers, paragraphs (a), (d) and (f). In that conclusion, the Executive Committee “(a) *Noted* with deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation; ... (d) *Stressed* the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum seekers, and that of other aliens; and (f) *Stressed* that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered...”

⁷ The Broward County facility costs DHS approximately \$83 per bed per night, compared to a national average cost of \$85.

ICE does not define its interpretation of release criteria, USCIS determines identity on the basis of “a reasonable degree of certainty.”

According to the file review, 20 percent of asylum seekers whom USCIS determined identity with a reasonable degree of certainty and collected community ties information were not released from detention by ICE prior to their asylum hearing. From most of these files, the Study could not ascertain the basis for ICE’s decision whether or not to release the alien.

G. The Study found no evidence that ICE is consistently applying release criteria.

Statistical review also revealed that while the average ICE district releases 63 percent of asylum seekers prior to their asylum hearing, release rates varied in major districts from .5 percent (New Orleans) to 97.6 percent (Harlingen). With such variations, the Study concludes that the formal release criteria are not being consistently applied. Moreover, the Study’s statistical review found that variations in parole rates from ICE facilities across the country are associated with factors other than the established parole criteria, including port of entry and country of origin.

H. DHS regularly places aliens with facially valid documents in Expedited Removal and mandatory detention, for the sole reason that they expressed an intention to apply for asylum.

According to the review of 353 files, 18 asylum seekers with facially valid documents were placed in Expedited Removal proceedings and were subject to mandatory detention, solely because they informed the inspector of an intention to apply for asylum. Six of these asylum seekers volunteered their intention to apply for asylum at primary inspection. According to CBP, such asylum seekers “in most cases” are subject to Expedited Removal because, while they hold a temporary visa, their intention to apply for asylum indicates that they intend to reside in the United States permanently.⁸

⁸ In its policy memorandum on the topic, DHS (then INS) does not define “most cases.” See “Aliens Seeking Asylum at Land Border Ports of Entry,” Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, to Regional Directors (2/6/2002).

ASYLUM SEEKERS IN EXPEDITED REMOVAL:

A Study Authorized by Section 605 of the International Religious Freedom Act of 1998

RECOMMENDATIONS

OVERVIEW

In establishing Expedited Removal, Congress included a number of safeguards and mandated that the Attorney General ensure that legitimate asylum seekers fleeing persecution or torture would not be “expeditiously removed” to the countries they had fled. The Immigration and Naturalization Service (INS), indeed, implemented procedures intended to protect bona fide asylum seekers from involuntary return, and those procedures remain in effect today. INS (now Department of Homeland Security) officers were, and continue to be, trained in these procedures.¹ With some exceptions, however, such procedures have not been enforced through effective quality assurance measures. The Study observed several failures to comply with a number of required procedures. It also observed some aliens who expressed a fear but were nevertheless returned without being referred to an asylum officer, as the CBP inspector is required to do by law.

DHS detention practices are ill-suited to the non-criminal asylum seeking population

Prior to the establishment of Expedited Removal, criminal aliens generally took priority over arriving asylum seekers in the allocation of INS detention bed space. With the establishment of Expedited Removal, however, INS was required to detain nearly all arriving asylum seekers. In spite of this, INS did not create any program to oversee the new challenges posed by its growing population of non-criminal asylum seekers in detention. No new procedures or trainings were created within INS to address challenges posed by its mandate to detain non-criminal asylum seekers at least until their credible fear hearing. The Study found that asylum seekers subject to Expedited Removal are detained under the same conditions as criminal inmates, and that standardized procedures have not been implemented to determine whether – or not – an asylum seeker should be released.

Agency Coordination

On March 1, 2003, INS was abolished and its components separated into different lines of reporting within the newly created Department of Homeland Security (DHS). Four different components of DHS are now involved in Expedited Removal. Under the current structure of DHS, any differences among these agencies must be resolved by the Secretary or Deputy Secretary of Homeland Security. This makes it exceedingly difficult to address inter-bureau issues regarding Expedited Removal, as those officials already oversee an amalgamation of 22 former federal agencies, including INS. As a practical matter, procedural difficulties regarding credible fear, parole, and conditions of detention cannot compete with the myriad of demands on the Secretary’s time and attention and indeed should be resolved at lower levels. In addition, the prominent role in asylum matters retained by the Executive Office for Immigration Review

¹ INS, an agency within the Department of Justice, was abolished by the Homeland Security Act of 2002 and its functions were folded into the Department of Homeland Security (DHS) in March 2003.

(EOIR), which remained in the Department of Justice, further complicates the capability of DHS to address cross-cutting issues of Expedited Removal policy, implementation and quality assurance.

While the refugee and asylum programs are housed within U.S. Citizenship and Immigration Services (USCIS) at DHS, neither USCIS nor any other office has been given the authority to resolve, or even to act as a forum on, inter-bureau issues relating to the impact of Expedited Removal on asylum seekers and refugees. Rather, DHS has relied on ad hoc “working groups,” such as the recently formed working group on credible fear determinations, to address particular issues after they arise.

Expansion of a System with Serious Flaws

Congress mandated that Expedited Removal be applied to improperly documented aliens at ports of entry. It also permitted Expedited Removal to apply, at Departmental discretion, to aliens apprehended within 24 months after an entry without inspection. In November 2003, the Commissioner of the INS exercised his discretion to expand Expedited Removal to aliens who entered without inspection by sea within 24 months prior to apprehension. In August 2004, the Secretary of Homeland Security further expanded Expedited Removal to aliens who enter without inspection by land and are apprehended within 100 miles of the border within 14 days after their last entry. Both of these expansions of Expedited Removal occurred at a time when coordination among the different actors in Expedited Removal was particularly difficult, i.e. as the INS was being disassembled and its components placed in different sections of DHS.

The Study has cited several ways in which asylum seekers who express a fear of return are nevertheless at some risk of being returned without being permitted to speak to an asylum officer. If referred, they are almost certain to be detained in jail or under jail-like conditions.

We are concerned that Expedited Removal has been expanded several times without an official mechanism – such as a Refugee Coordinator - to resolve the problems which arise in its implementation, particularly those requiring inter-bureau or inter-agency cooperation. We are also concerned that the following recommendations would be difficult to implement without such a mechanism.

RECOMMENDATION ONE

IN ORDER TO MORE EFFECTIVELY PROTECT BOTH HOMELAND SECURITY AND BONA FIDE ASYLUM SEEKERS, THE DEPARTMENT OF HOMELAND SECURITY SHOULD CREATE AN OFFICE- HEADED BY A HIGH-LEVEL OFFICIAL- AUTHORIZED TO ADDRESS CROSS CUTTING ISSUES RELATING TO ASYLUM AND EXPEDITED REMOVAL.

- 1.1 The Department of Homeland Security should create an office headed by a high-level Refugee Coordinator, with authority to coordinate DHS policy and regulations, and to monitor the implementation of procedures affecting refugees or asylum seekers, particularly those in the Expedited Removal process.***

The Study found that responsibilities for the treatment of asylum seekers in Expedited Removal are divided among several entities within DHS; therefore, resolving policy or procedural issues in this area currently requires the involvement of the Secretary or Deputy Secretary.²

The Study also found that there was no effort or program at DHS to assess on an agency-wide basis the treatment of asylum seekers in Expedited Removal. Nor were there adequate quality control measures in place to assess the impact on asylum seekers of the individual pieces of the process.

The Study also identifies significant problems in implementing and maintaining the safeguards for asylum seekers that Congress established. In order for these problems to be addressed, and given the current structure and lines of authority at DHS, a coordinating office is necessary to (a) ensure consistent asylum policy and legal interpretations Department-wide; (b) coordinate implementation of necessary changes set forth in the Study's recommendations; and (c) monitor the system on an agency-wide basis to see that changes take hold and that emerging problems are addressed as they arise. For example, the office would address problems identified in this Study concerning credible fear referrals at ports of entry; credible fear determinations; decisions concerning withdrawals of applications for admission; dissolutions of credible fear claims; the development of detention standards and facilities specific to asylum seekers; and information relating to parole criteria and conditions of detention specific to asylum seekers. Addressing these problems would require a consistent DHS-wide asylum and refugee policy, as well as inter-bureau discussions of how the various pieces of the process function and relate to one another.³

With the expansion of Expedited Removal authority, there are now four entities within DHS that can enter an Expedited Removal order: CBP Inspectors at ports of entry (for arriving aliens); Border Patrol (for aliens apprehended in the interior pursuant to the inland Expedited Removal procedures promulgated on August 11, 2004); the Office of Asylum (for aliens who fail to establish a credible fear of persecution); and Immigration and Customs Enforcement (ICE). It is critical to have these four entities treating asylum seekers by the same rules and procedures,

² Although overall DHS was cooperative, difficulties in liaising with the agency during this study re-enforced the conclusion concerning the need for an individual with coordinating authority across bureaus. Specifically, DHS was unable to name any individual in a position to act as the primary liaison between the Department and Commission experts. While DHS assigned USCIS as the nominal primary contact, conducting the Study required establishing separate working relationships with Detention and Removal Operations within the Bureau of Immigration and Customs Enforcement (ICE-DRO), Inspections, Border Patrol, USCIS, the Office of Immigration Statistics, as well as the Executive Office for Immigration Review (EOIR), in the Department of Justice. While the Study was being conducted, the experts were unable to discern who at DHS had responsibility for inter-bureau policy or DHS-wide operational asylum issues. Nevertheless, all agencies with whom we worked were cooperative in working with the Study. A number of agency officials confirmed that inter-bureau differences in approach are currently difficult to resolve.

³ We recognize, however, that such an office need not be focused exclusively on Expedited Removal issues, but other inter-bureau refugee and asylum issues as well; e.g. refugee issues arising from interdictions of aliens at sea; asylum issues arising from the Memorandum of Understanding on Asylum with Canada; the detention of asylum seekers other than those in Expedited Removal proceedings; linkages between overseas enforcement programs and the refugee resettlement program, etc.

and to ensure that information is being adequately shared. At this point, such coordination is only possible if done by the Office of the Secretary. The Secretary should delegate this responsibility to an individual who is authorized to coordinate the various entities' work relating to the protection of refugees and asylum seekers. Otherwise, with the recent expansions of Expedited Removal, and its serious flaws, the United States' tradition of protecting asylum seekers – not to mention those asylum seekers' lives – continues to be at risk.

RECOMMENDATION TWO

DECREASE THE BURDENS ON IMMIGRATION COURTS, THE DETENTION SYSTEM, AND THE APPLICANTS BY PERMITTING ASYLUM OFFICERS TO GRANT ASYLUM CLAIMS DURING THE CREDIBLE FEAR INTERVIEW.

2.1 The burden on the detention system, the immigration courts, and bona fide asylum seekers in Expedited Removal themselves should be eased by allowing asylum officers to grant asylum in approvable cases at the time of the credible fear interview, just as they are already trained and authorized to do for other asylum seekers.

With some amendments to the regulations, the credible fear interview could further expedite both the removal of aliens without bona fide asylum claims and the adjudication of asylum claims. These changes would reduce the time spent in, and government funds spent on, detention.

Asylum officers are already trained and authorized to adjudicate asylum claims; therefore, they should be permitted to grant asylum at the time of the credible fear interview for those asylum seekers in Expedited Removal who are able to establish that they meet the criteria at that early juncture. This is precisely what asylum officers do for asylum seekers whose claims are addressed in the “affirmative asylum” process. In that process, asylum officers are already trained in, and accustomed to, adjudicating full asylum applications from applicants who entered without inspection, or who successfully passed through the inspection process in spite of a lack of proper documentation.

Under this proposal, at the time of the credible fear interview, asylum officers would either (1) order the alien removed if (s)he fails to meet the credible fear standard (subject to review by an immigration judge); (2) grant the applicant asylum if (s)he establishes a well-founded fear of persecution; or (3) refer the alien to an immigration judge for a *de novo* proceedings if the alien's fear is credible but the case requires further consideration or corroboration to warrant a grant of asylum. Allowing asylum officers to grant asylum at this stage would reduce demands on detention beds, EOIR resources, trial attorney time, and reduce the time the bona fide asylum seeker spends in detention.

Moreover, in informal interviews with asylum seekers in Expedited Removal, it became evident that the high screen-in rate at the credible fear stage may give aliens a false sense of confidence about their eligibility for asylum. By allowing for an asylum determination at the time of the credible fear interview, an asylum seeker who is merely referred to an immigration judge rather than granted asylum may be in a position to better understand whether or not (s)he is

eligible for asylum. Therefore, this reform may lead to more aliens dissolving their asylum claims and spending less time in detention.

However, such reform would require an understanding among attorneys and aliens that continuances could not be granted by an asylum officer to delay the credible fear interview and that asylum seekers who needed more time would still have the benefit of a referral to an immigration judge. This reform would not require a change in the Immigration and Nationality Act, as the statute does not specify who shall make the asylum determination in the case of an asylum seeker with a credible fear of persecution.

INS had once endorsed this idea in the early years of Expedited Removal. One argument against the proposal was that an asylum officer's decision not to approve an asylum claim at the time of the credible fear interview could prejudice the immigration judge's consideration of the asylum claim. However, this concern is not supported by statistics made available to the Study by EOIR. As seen in EOIR Table V, each year immigration judges grant asylum to approximately 20 percent of affirmative cases referred to them by asylum officers. This compares with an approval rate of approximately 25 percent for credible fear cases referred to immigration judges by asylum officers. By granting relief in 20 percent of cases where asylum officers have declined to, immigration judges do not appear to be prejudiced by asylum officer determinations in the affirmative process. With proper training and an understanding that compressed time frames may make it difficult for asylum seekers in Expedited Removal to establish eligibility at the time of the credible fear interview, immigration judges would not likely be prejudiced by asylum officer decisions not to grant asylum at the credible fear stage.

RECOMMENDATION THREE

ESTABLISH DETENTION STANDARDS AND CONDITIONS APPROPRIATE FOR ASYLUM SEEKERS. DHS SHOULD ALSO PROMULGATE REGULATIONS TO PROMOTE MORE CONSISTENT IMPLEMENTATION OF EXISTING PAROLE CRITERIA, TO ENSURE THAT ASYLUM SEEKERS WITH A CREDIBLE FEAR OF PERSECUTION- AND WHO POSE NEITHER A FLIGHT NOR A SECURITY RISK- ARE RELEASED FROM DETENTION.

3.1 DHS should address the inconsistent application of its parole criteria by codifying the criteria into formal regulations.

The INS established criteria for the release of asylum seekers (i.e. credible fear, community ties, establishment of identity, and not a suspected security risk) and these criteria continue, in theory, to be in effect at DHS. The Study, however, found that rates of release vary dramatically in different parts of the country and there is no evidence that these criteria are being applied consistently. Codification of the parole criteria into regulations will help ensure that DHS consistently detains those aliens who do not meet the criteria and releases those who do.

3.2 DHS should develop standardized forms and national review procedures to ensure that its parole criteria are more consistently applied nation-wide.

In addition to codifying its criteria in formal regulations, DHS should create standardized forms and review procedures to address inconsistent application of its release criteria for asylum

seekers. In trying to understand the wide variations in release rates, the Study found no evidence of quality assurance procedures to ensure that these criteria are being followed. Nor do DHS files usually include the information or forms necessary to ascertain whether or not the criteria are being applied. Detention and Removal Operations (ICE-DRO) should develop a form, perhaps modeled after the USCIS Form I-870, as well as associated national review procedures, to assess consistent application of the parole criteria. This will help ensure that asylum seekers who do not pose a security risk and who establish a credible fear of persecution, community ties, and identity are not improperly detained. The form would require DHS to document its assessment of each of the parole criteria.

3.3 When non-criminal asylum seekers in Expedited Removal are detained, they should not be held in prison-like facilities, with the exception of those specific cases in which DHS has reason to believe that the alien may pose a danger to others. Rather, non-criminal asylum seekers should be detained in “non-jail-like” facilities such as the model developed by DHS and INS in Broward County, Florida. DHS should formulate and implement nationwide detention standards created specifically for asylum seekers. The standards should be developed under the supervision of the proposed Office of the Refugee Coordinator, and should be implemented by an office dedicated to the detention of non-criminal asylum seekers, developing a small number of centrally managed facilities specific to and appropriate for, asylum seekers. The current DHS standards – based entirely on a penal model -- are inappropriate.

U.S. law and DHS regulations are silent on whether asylum seekers should have detention standards that are different from those applied to other aliens. The Executive Committee of the United Nations High Commissioner on Refugees (UNHCR) has, however, spoken on the subject. Specifically, in UNHCR Executive Committee Conclusion No. 44 (1986) on Detention of Refugees and Asylum Seekers, the Executive Committee noted “deep concern” that large numbers of asylum seekers are the “subject of detention” and “stressed the importance for national legislation or administrative practice to make the necessary distinction between the situation of refugees and asylum seekers, and that of other aliens” and “stressed that conditions of detention of refugees and asylum seekers must be humane and that, in particular, refugees and asylum seekers shall, whenever possible, not be accommodated with persons detained as common criminals....”

We have found that detained asylum seekers in Expedited Removal are subjected to conditions of confinement that are virtually identical to those in prisons or jails. These conditions create a serious risk of institutionalization and other forms of psychological harm. They are inappropriate, particularly for an already traumatized population of asylum seekers, and unnecessary. ICE’s own “non-jail-like detention” model in Broward County, Florida has demonstrated that asylum seekers may be securely detained in an environment which does not resemble a jail and which is no more expensive than more secure facilities. Broward is, however, the only such non-jail-like detention facility among the 185 jails, prisons, and detention centers where ICE detains asylum seekers.

The Study concurs with the UNHCR Executive Committee that asylum seekers have different issues and needs than those faced by prisoners or even other aliens, and standards should be developed in recognition of this important distinction. While DHS has its own

“Detention Standards” to ensure that aliens are detained under acceptable conditions, these standards are virtually identical to, and indeed are based on, correctional standards. Asylum seekers who are not criminals should not be treated like criminals.

We recommend that the proposed Office of the Refugee Coordinator oversee the development and implementation of those standards, and that an office be established to oversee the centralized development and management of non-jail-like asylee detention facilities. Standards appropriate for asylum seekers cannot be implemented in the existing decentralized network of 185 detention facilities, nearly all of which are either jails or jail-like detention centers.

3.4 DHS should ensure that personnel in institutions where asylum seekers are detained are given specialized training to better understand and work with a population of asylum seekers, many of whom may be psychologically vulnerable due to the conditions from which they are fleeing.

In the Study’s survey of approximately 20 detention facilities that house more than 70 percent of the population of asylum seekers subject to Expedited Removal, only one facility indicated that line officers or guards were explicitly told which detainees were asylum seekers. In addition, staff at very few facilities were given any specific training designed to inform them of the special needs or concerns of asylum seekers, and in only one facility did the staff receive any training to enable them to recognize or address any of the special problems which victims of torture or other victims of trauma may have experienced. As noted above, asylum seekers have different needs than, and should be distinguished from, other aliens. Indeed, unlike other migrants, bona fide asylum seekers have a well-founded fear of persecution, and may also have special needs and problems stemming from that fear. This distinction underscores the need for specialized training for guards and other detention center employees.

3.5 DHS should exercise discretion and not place a properly documented alien in Expedited Removal – and mandatory detention – when the sole basis for doing so is the alien’s expression of a desire to apply for asylum at the port of entry.

Under DHS policy, when an alien at a port of entry indicates a desire to seek asylum, that alien is placed in Expedited Removal after being charged with inadmissibility as an intending immigrant under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act for having misrepresented the purpose of obtaining a visa to the United States. According to DHS, the intention to apply for asylum is not permissible with a visa for a temporary stay in the United States. The Study reviewed 353 files of aliens referred for credible fear from FY2002 to FY2003, and found 18 asylum seekers who had valid documents and were placed in Expedited Removal proceedings after expressing an intention to apply for asylum.⁴

⁴ Recently, this practice was the subject of press attention, when the 81 year old Reverend Joseph M. Dantica, a frequent visitor to the United States in possession of a valid visitor visa from Haiti, was placed in Expedited Removal proceedings. Rev. Dantica was placed in Expedited Removal because, when asked by the inspector how long he intended to remain, the Reverend responded that he intended to apply for “temporary asylum.” Dantica was sent to the Krome detention center in Florida, where he collapsed during his credible fear interview and died shortly thereafter.

The Study questions whether it is necessary or desirable to place such aliens with facially valid documents and whose identity is not in doubt in Expedited Removal and mandatory detention solely because the alien expresses an intention to apply for asylum. We urge DHS to revisit its presumption that an intention to apply for asylum is tantamount to an intention to “immigrate” to the United States. Asylee status is not “immigrant” status. In fact, asylees may not apply for “immigration” status (i.e. lawful permanent residence) until twelve months after they receive asylum. Even then, asylees can only become lawful permanent residents after an “asylum adjustment” number becomes available, which now takes more than a decade.

RECOMMENDATION FOUR

EXPAND EXISTING PRIVATE-PUBLIC PARTNERSHIPS TO FACILITATE LEGAL ASSISTANCE FOR ASYLUM SEEKERS SUBJECT TO EXPEDITED REMOVAL, AND IMPROVE ADMINISTRATIVE REVIEW AND QUALITY ASSURANCE PROCEDURES TO IMPROVE CONSISTENCY IN ASYLUM DETERMINATIONS BY IMMIGRATION JUDGES.

4.1 Statistics specific to Expedited Removal establish that asylum seekers without legal representation are at a significant disadvantage in presenting their asylum claim to the immigration judge. At the same time, other studies have shown that legal assistance actually improves the efficiency of the removal hearing process. Two programs in particular should be expanded:

4.1.a The Legal Orientation Program (LOP), administered by the Executive Office for Immigration Review (EOIR) in partnership with non-governmental organizations (NGO’s), should be expanded beyond the seven facilities in which it is currently administered.

With approval rates of 25 percent for represented asylum seekers in Expedited Removal and 2 percent for those who are unrepresented, the findings of the Study clearly underscore that unrepresented applicants have serious difficulties presenting their claim for asylum in an adversarial asylum proceeding. The LOP, directed by EOIR in partnership with numerous NGOs, has proven to be an effective and efficient model of facilitating representation for asylum seekers and other detainees at seven facilities. EOIR and a major study by the Department of Justice have demonstrated that such programs not only assist aliens with meritorious claims, but assist the government as well. Because they provide aliens without a realistic possibility of relief a better understanding of their prospects, legal orientation programs result in more efficient use of court and detention resources.

Regrettably, while Congress instructed that INS (now ICE) transfer \$1 million in appropriated funds to EOIR for the LOP program each year from FY2002-2004, the funds for FY2003 have yet to be transferred. ICE did, however, agree to transfer \$1 million in FY2005 funding on February 1, 2005. LOP funding should continue and, to the extent possible, be expanded system-wide.

4.1.b Each of the local eight asylum offices should form partnerships with service providers in their area to ensure that asylum seekers have an attorney to consult with during the credible fear process. Such a collaborative project between the Arlington,

Virginia Asylum Office and the Capital Area Immigrants Rights Coalition has already demonstrated that it can enhance the efficiency of the asylum process.

The partnership developed between the Arlington asylum office (DHS-USCIS) and the Capital Area Immigrants' Rights Coalition, which endeavors to facilitate legal assistance for asylum seekers awaiting a credible fear interview, serves as another efficiency model. Specifically, since the launch of the program, the frequency of asylum seekers dissolving their claims in Arlington has increased by 50 percent, and it now has the highest dissolve rate of any asylum office in the country. After receiving legal counseling, an alien with no available relief is more likely to retract his or her claim and ask to be returned home, saving the government detention and immigration court costs and the alien wasted time in detention. Moreover, in many cases, legal assistance facilitated for purposes of the credible fear interview extends to representation at the time of the asylum hearing and helps ensure that asylum seekers with valid claims will not be returned to countries where they may face persecution.

Both of these public-private partnerships should be expanded for asylum seekers subject to Expedited Removal on a national basis to supplement other effective, but under-resourced, models of pro bono representation in various parts of the United States. Facilitating asylum seekers' access to legal assistance, however, will remain logistically difficult until DHS implements the Study's recommendation that detained asylum seekers be concentrated in a limited number of detention centers appropriate to asylum seekers.

4.1.c ICE and EOIR should also collaborate with local service providers to ensure that NGO's, particularly those that conduct "Know Your Rights Presentations" at DHS detention facilities in LOP, should have access to aliens in Expedited Removal proceedings, including those aliens who have not been referred for a credible fear determination, so long as such interviews do not delay the Expedited Removal process.

The LOP model, and similar programs such as the "Know Your Rights Presentations" conducted by the Florence Immigrant and Refugee Rights Project (FIRRP), may also be useful in helping DHS identify cases which should be referred for a credible fear interview. When Commissioners and Study Experts visited Arizona in August 2004 in order to learn about the implementation by the Border Patrol of Expedited Removal, Border Patrol officials erroneously assured the delegation that all aliens in Expedited Removal would, while detained, be able to attend "Know Your Rights" presentations at the detention facility in Florence. According to subsequent conversations with other DHS officials and the FIRRP, which conducts such presentations, the only aliens who are able to meet with FIRRP are those scheduled for a hearing with an immigration judge. By definition, this limitation means that the only aliens in Expedited Removal who may meet with FIRRP are those whom Border Patrol has referred for a credible fear determination *and* who have then been found to have a credible fear of persecution by an asylum officer. By facilitating meetings with all aliens in Expedited Removal, DHS could both instill confidence that the Expedited Removal process is properly referring asylum seekers for a credible fear determination, and also allow organizations to bring to DHS' attention aliens who should *not* be returned without first seeing an asylum officer.

EOIR has already taken steps in this direction by allowing its contractors in the Legal Orientation Program to provide "self-help" training workshops when needed for unrepresented

aliens interested in pursuing relief from removal or subject to special procedures. The Study hopes that EOIR will be given the necessary resources to help ensure that aliens have the information they need to make the system both more efficient, and more just as well.

4.2 The Study found significant variations in immigration judge grant rates for asylum claims referred through the Expedited Removal process. This is true not only from court to court, but also from judge to judge within individual courts. The Study also found that many immigration judges are relying heavily on Expedited Removal documents, which the Study found to be incomplete and less than reliable. We recommend that these quality assurance and administrative review issues be addressed in the following ways:

4.2.a The Board of Immigration Appeals (BIA) should revisit its recently adopted practice of allowing summary affirmances for asylum, withholding, and Convention Against Torture (CAT) relief since there are indications that this practice may be undermining the Board's effectiveness as the primary review mechanism for decisions by immigration judges.

The BIA is the primary means for reviewing immigration judge decisions and correcting judicial error. Three years ago, in order to “increase efficiency,” the BIA authorized the use of one-sentence summary affirmances of immigration judge decisions. Since that time, the sustain rate for appeals filed by asylum seekers subject to Expedited Removal has fallen from 23 percent to 4 percent. This difference has not been adequately explained by EOIR and should be thoroughly investigated. By making it significantly easier to affirm - rather than vacate - an immigration judge decision, the BIA may be inadvertently undermining its effectiveness as a quality assurance mechanism. The application of summary affirmances to cases involving asylum, withholding and CAT relief should be revisited to ensure that the review process is equitable.

4.2.b EOIR should reinstate funding for immigration judge training and consider additional quality assurance procedures (i.e. peer review) to address the significant variations in approval and denial rates among immigration judges. In particular, immigration judges should be provided training specific to issues related to the reliability of DHS forms that they use to ascertain the credibility of testimony; e.g. the Forms I-867 and I-870 analyzed by this study.

The Study's statistical findings on the variability of immigration judge decisions on relief for asylum seekers in Expedited Removal highlight the need for these differences to be examined and explained in order to develop and implement appropriate training and quality assurance mechanisms. Moreover, immigration judges should be trained and otherwise advised on the mechanics of the Expedited Removal process (i.e. the extremely limited probative value of the I-867 and I-870 forms). Other methods of quality assurance, e.g. peer review panels, should be considered as well. Yet, due to budget shortfalls, the immigration judges have not held a training conference for several years. Such trainings are necessary, and should be re-established.

RECOMMENDATION FIVE

IMPLEMENT AND MONITOR QUALITY ASSURANCE PROCEDURES TO ENSURE MORE RELIABLE INFORMATION FOR HOMELAND SECURITY PURPOSES, AND TO ENSURE THAT ASYLUM SEEKERS ARE NOT TURNED AWAY IN ERROR.

System Wide

5.1 Create a reliable inter-bureau system that tracks real-time data of aliens in Expedited Removal proceedings.

The Office of Immigration Statistics within DHS is currently dependent on each of the organizational components (USCIS, ICE, CBP) spread across this vast agency – and beyond (with the EOIR in the Department of Justice) – in order to obtain statistics on immigration activities in general, and Expedited Removal/Asylum activities in particular. There is currently no capability to track statistics of aliens from the beginning of the Expedited Removal process – at the port of entry, through detention, and up until the completion of the hearing before the immigration judge at the Department of Justice. Most of the statistics in this Study had to be cobbled together from different non-interactive systems with different data. Other statistics sought – such as breakdowns by nationality of aliens permitted to withdraw their applications for admission – were simply not being tracked by DHS databases. Quality assurance and integrated operations cannot be done until DHS develops an agency-wide (and beyond) system that tracks real time data of aliens in Expedited Removal proceedings. The lack of reliable real time data shared among the bureaus in the DHS raises concerns about its ability to protect not only asylum seekers, but homeland security as well.

Simply put, DHS should have an information system that will allow it to readily monitor the types of issues which were examined during the Study.

Inspections and Border Patrol

5.2 Reconcile conflicting field guidance to require that any expression of fear at the port of entry must result in either a referral for a credible fear determination or, in cases where the inspector or Border Patrol agent believes the alien would “clearly not qualify” for asylum or CAT relief, contact with an asylum officer to speak to the alien via a telephonic interpretation service to determine whether or not the alien needs to be referred.

CBP regulations and guidance provide conflicting instructions to CBP officers on whether all expressions of fear by the alien during inspection should result in a referral to an asylum officer. We recommend that the conflicting guidance be clarified. When an inspector has a question about whether the fear is related to the grounds for asylum, the regulations do not provide him or her with discretion to make that determination, and the alien should be referred to an asylum officer. The Field Manual, however, authorizes inspectors not to refer aliens whose expression of fear “would clearly not qualify that individual for asylum.” DHS guidance also instructs immigration inspectors to contact the asylum office point(s) of contact “when necessary

to obtain guidance on questionable cases involving an expression of fear or a potential asylum claim.”

Immigration inspectors and Border Patrol agents are not trained in asylum law and should not make determinations about whether a fear is related to the grounds of asylum or CAT relief. On the other hand, if an alien’s expression of fear has no relationship to the grounds for asylum or CAT relief, there is no benefit to subjecting the alien to detention for several days at government expense.

DHS should require that, when an alien expresses a fear of return, the immigration inspector or Border Patrol agent must either (1) refer the alien for a credible fear determination or (2) when the inspector believes the alien’s expression of fear is not related to grounds for relief, initiate an interview, with appropriate privacy, between the alien and an asylum officer via a telephonic interpretation service. The asylum officer would then determine whether the alien should be referred for a credible fear determination and provide a short form documenting the consultation for the file.

5.3 DHS should improve quality assurance by expanding and enhancing the videotape systems currently used at Houston and Atlanta to all major ports of entry and Border patrol stations to unintrusively record all secondary interviews, and consider employing the use of undercover “testers” to verify that Expedited Removal procedures are being properly followed.

The Study found current CBP quality assurance procedures to be inadequate and to rely entirely on “self-reporting” by immigration inspectors. The Study has shown that sworn statements taken at ports of entry are often inaccurate and are almost always unverifiable. The unintrusive video-taping systems currently in place in Houston and Atlanta should be expanded to all major ports of entry and the tapes should be reviewed and retained for a sufficient period of time to be useful for quality assurance purposes. The Study found the tapes to be useful because they may be used to protect aliens from improper conduct by inspectors, and to protect inspectors from specious allegations of improper conduct. In addition, video should also be used by CBP to monitor the accuracy of sworn statements and the proper implementation of all CBP procedures. As a quality assurance measure, CBP should also consider utilizing “testers” (undercover actors) who could verify that aliens with fraudulent documents are placed in Expedited Removal and that asylum seekers are properly referred for a credible fear determination. A “tester” would have the benefit of verifying compliance with procedures without the intrusiveness of a third-party monitor in the room, which would likely have an effect on the conduct of the officer.⁵ In the meantime, however, CBP should monitor ports of entry on a periodic basis much in the way this Study has done.

Primary inspection at land ports of entry, however, is much more difficult to monitor due to the volume of inspections performed. While monitoring San Ysidro, the Study became aware of two separate incidents in which religious asylum seekers from Africa and the Middle East were turned away at primary inspection instead of being referred to Expedited Removal

⁵ Testers are already routinely used by DHS at the Transportation Security Administration (TSA), which employs them to test the effectiveness of airport passenger and baggage screening procedures.

proceedings and a credible fear interview as required. In both cases, the asylum seekers were eventually referred to secondary inspection, but only after returning on a subsequent day and describing their difficulties to the secondary inspector. When a secondary inspector or an asylum officer becomes aware of such incidents, employees should be reminded of their responsibility to refer such cases for secondary inspection and the incident should be reported to both CBP and Asylum Headquarters.

5.4 Sworn Statement Form I-867B should include an explanation of the specific purpose for which the document is designed to serve, and its limitations.

The Study found that immigration judges frequently deny asylum claims on the basis of aliens “adding detail” to claims originally expressed in the sworn statement taken by CBP officers at the secondary inspection. The Study also found that such forms are often incomplete and less than reliable. CBP should amend its sworn statement forms (I-867B) in the same way that USCIS recently amended its credible fear assessment form (I-870), with a prominently displayed notation that the form is not a transcript and, echoing the language in the Inspector Field Manual, is “not intended to go into detail about any fear of persecution or torture.”

5.5 Current DHS procedures concerning the administration of the Form I-867A and B should be maintained, but should be more vigorously monitored.

Current CBP procedures are designed to protect bona fide asylum seekers from being removed without a hearing. They already require that immigration inspectors (1) explain the Expedited Removal process to the alien by reading the script on the Form I-867A; (2) ask the alien all four of the “fear questions,” as written on Form I-867B; (3) review the alien’s Sworn Statement, as recorded on the Form I-867A and B, by reading it back to the alien (with the assistance of an interpreter, if necessary); (4) inquire whether the alien understood what was read back to him; and (5) correct any inaccuracies pointed out by the alien and ask him or her sign the statement to confirm its accuracy.

The Study, however, found lapses in compliance with these procedures. Implementation of the procedures, could be maintained and enforced through more effective quality assurance efforts including the use of videotapes, testers, as well as ongoing training.

Finally, while the use of language specific videotape presentations to explain the Expedited Removal and credible fear process to the alien could be a useful tool to help ensure that the alien better understands the process, at least one port of entry sometimes plays a video tape in lieu of the officer reading the script to the alien. This practice falls short of the Inspector Field Manual guidance that an immigration inspector must be “absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her.” A videotape presentation is a good addition to, but should not substitute for, the required steps mentioned above.

Asylum

5.6 The efficiency of the Expedited Removal process should be enhanced by amending DHS quality assurance procedures for the credible fear interview.

The credible fear determination by an asylum officer, which – by law – is reviewable by an immigration judge, has proven successful at ensuring that bona fide asylum seekers referred from the port of entry will not be removed without a full asylum hearing. The credible fear process fails, however, at making asylum more efficient by failing to screen out invalid claims and thus putting more strain on detention and immigration court resources. With a screen-in rate consistently exceeding 90 percent, and a negative determination rate of approximately 1 percent, some view the credible fear process itself as somewhat lacking in credibility. The Asylum Division subjects negative determinations to a much more intensive quality assurance process than positive determinations. This lopsided treatment may be resulting in lopsided credible fear determinations. We would suggest that this bias in favor of positive credible fear determinations be addressed by subjecting them to similar quality assurance procedures as negative determinations, and that immigration judges continue to review negative determinations, unless the asylum seeker indicates he does not wish for the decision to be reviewed.

RECOMMENDATION SUMMARY

THIS STUDY HAS PROVIDED TEMPORARY TRANSPARENCY TO EXPEDITED REMOVAL – A PROCESS WHICH IS OPAQUE NOT ONLY TO THE OUTSIDE WORLD, BUT EVEN WITHIN THE DEPARTMENT OF HOMELAND SECURITY. AS A RESULT OF THIS TRANSPARENCY, SERIOUS – BUT NOT INSURMOUNTABLE – PROBLEMS WITH EXPEDITED REMOVAL HAVE BEEN IDENTIFIED. THE STUDY’S RECOMMENDATIONS CONCERNING BETTER DATA SYSTEMS, QUALITY ASSURANCE MEASURES, ACCESS TO REPRESENTATION, AND A DHS REFUGEE COORDINATOR WOULD ALL CONTRIBUTE TO A MORE TRANSPARENT AND EFFECTIVE EXPEDITED REMOVAL PROCESS. WE ALSO RECOMMEND THAT CONGRESS REQUIRE THE DEPARTMENTS OF JUSTICE AND HOMELAND SECURITY TO PREPARE AND SUBMIT REPORTS, WITHIN 12 MONTHS OF THE RELEASE OF THIS STUDY, DESCRIBING AGENCY ACTIONS TO ADDRESS THE FINDINGS AND RECOMMENDATIONS OF THIS STUDY.