



UNITED STATES COMMISSION ON
INTERNATIONAL RELIGIOUS FREEDOM

Expedited Removal Study¹ Report Card: 2 Years Later

Why a report card? The United States Commission on International Religious Freedom (USCIRF or Commission) published its *Report on Asylum Seekers in Expedited Removal* (Study) on February 8, 2005. Congress authorized the Commission to do the Study and posed four questions on how well the responsible agencies were implementing U.S. law regarding the protection of asylum seekers. Despite the passage of two years, most of the Study's recommendations have yet to be implemented; Senators Joseph I. Lieberman (ID-CT) and Sam Brownback (R-KS) recently asked the Commission to report on progress made by the Departments of Justice (DOJ) and Homeland Security (DHS). Today, the Commission issues this report card assessing how well these Federal Government agencies have implemented the Study's recommendations, to assure that Congressional safeguards for *bona fide* asylum seekers are translated into practice.

What is Expedited Removal? Congress included Expedited Removal in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to provide for the prompt removal of aliens arriving without proper documents. Such aliens can be returned to their country of origin without delay, but also without the safeguard of a hearing before an immigration judge. Concerned by the obvious risk that refugees—who often travel without proper documents—might mistakenly be returned to their persecutors, Congress put in place special procedures for their protection. Asylum seekers are detained while a preliminary assessment (the “credible fear determination”) is made as to whether his or her case warrants consideration by an Immigration Judge (IJ). If so, they are allowed to appear before an IJ, and may, at the government's discretion, be paroled while their asylum case is pending. If not, they are put back in the regular Expedited Removal process, and removed promptly.

Who is responsible? At least five separate entities play a role in Expedited Removal. Within DHS, Customs and Border Protection (CBP) first encounters aliens, either at a port-of-entry or anywhere within 100 miles of U.S. land or sea borders, and is responsible for identifying those subject to Expedited Removal, and from that group, those seeking asylum. Immigration and Customs Enforcement (ICE) is responsible for detaining asylum seekers until Citizenship and Immigration Services (USCIS) makes the credible fear determination. For those asylum seekers found to have a credible fear, the DOJ's Executive Office for Immigration Review (EOIR) takes over: Immigration Judges hear

¹ U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (2005), vols. I & II. The findings and recommendations are in Vol. I, pp. 50-62 and 63-76, respectively. The experts' reports are in vol. II, pp. 1-443. Also available at www.uscirf.gov.

the cases, and the Board of Immigration Appeals (BIA or Board) reviews any appeals. With so many immigration officers involved in so many locations, coordination has been and remains a major challenge within DHS, and between DHS and DOJ.

The Study—questions and methodology: Congress asked the Commission to answer four questions about whether immigration officers exercising Expedited Removal authority are:

- improperly encouraging asylum seekers to withdraw applications for admission;
- incorrectly failing to refer asylum seekers for a credible fear interview;
- incorrectly removing asylum seekers to countries where they may face persecution; and
- detaining asylum seekers improperly or under inappropriate conditions.

Both DHS and DOJ cooperated with the Commission, whose designated experts had unrestricted access to the internal workings of Expedited Removal. For more than 15 months, the Study team observed more than 400 inspections at seven ports of entry, analyzed more than 900 case files, surveyed all eight asylum offices, and conducted site visits and/or surveyed 25 detention facilities, including two juvenile facilities.

Overall findings: The Study found that Expedited Removal was intended by Congress to protect the integrity of our borders while also protecting *bona fide* asylum seekers. The Study, however, identified serious implementing flaws which place asylum seekers at risk of being returned from the U.S. to countries where they may face persecution. The Study also found that asylum seekers were detained inappropriately, under prison-like conditions and in actual jails. A summary of the specific findings and recommendations is set out below, along with the grades given to each agency two years later.

Two years later: The Study received extensive media coverage and—because of the unprecedented access that Study experts had to this largely opaque process—has proved an invaluable resource for policymakers and scholars. Commissioners had very positive follow up meetings in 2005 with the Secretary of Homeland Security and with the Director of EOIR to brief these officials directly on the Study’s findings and recommendations.

However, two years later, most of the Study’s recommendations have not been implemented. The Commission’s overarching recommendation was that Expedited Removal not be expanded until the serious problems identified by the Study—which place vulnerable asylum seekers at risk—were resolved. Despite this recommendation, and the failure to resolve the problems cited in the study, DHS has in fact expanded Expedited Removal from a port-of-entry program to one that covers the entire land and sea border of the United States. DHS has also moved to expand Expedited Removal to include most Salvadorans who are otherwise entitled to special procedural protections at the border due to a long-standing court injunction in the *Orantes v Gonzales* case.

Department of Homeland Security: DHS has not made any public response to the Study, despite a 2005 request from the Senate Appropriations Committee in Report 109-083 to consult with EOIR and report by February 2006 on various aspects of the agency's implementation of Study recommendations. The House of Representatives Appropriations Committee in Report 109-79 also urged DHS to consider implementation of specific Study recommendations. It should be emphasized that none of the Study's recommendations require action by Congress. However, because of concern over the agencies' failures to address the Study, Senators Lieberman and Brownback prepared legislation in 2006 that would mandate implementation of a number of the Commission's recommendations.

The Commission has repeatedly invited DHS to respond to the Study, most recently in January 2007 to assist in the preparation of this report card. Despite its lack of response to Congress and the Commission, DHS has shed some light on its responses to the Study's recommendations in the context of the *Orantes* litigation, information which will be noted where relevant in this report card.

Department of Justice: At the invitation of EOIR, Commission staff participated in a video briefing to all Immigration Judges on the Study's findings. In addition, Commission staff and Study experts briefed the DOJ review team that examined the Immigration Courts and the Board of Immigration Appeals in 2006. That DOJ review led to the Attorney General's announcement in August 2006 of 22 measures to improve the performance of the immigration court system, which respond in part to the Commission's recommendations. The Commission was also pleased to receive information from EOIR in preparation of this report card.

The report card: The report card is organized by agency starting with Customs and Border Protection, then moving on to Immigration and Customs Enforcement, Citizenship and Immigration Services, DHS as a whole, then DOJ/ Executive Office for Immigration Review, and finishing with DHS and DOJ jointly. In each case, the report card provides the question that Congress posed, a summary of the Study's findings and Commission recommendations, and the implementation grade along with the Commission's explanation.

CBP (inspections and the border): Overall Grade F

Congress' question: *Are immigration officers incorrectly failing to refer asylum seekers for a credible fear interview?*

Study findings: DHS procedures require that immigration officers read a script to all aliens in Expedited Removal advising them that they should ask for protection without delay if they have any reason to fear being returned home. Yet in more than 50 percent of the Expedited Removal interviews observed during the Study, this information was not given.

DHS procedures require that an asylum seeker review the sworn statement taken by the immigration officer, make any necessary corrections for errors in interpretation, etc., and then sign the statement. The Study found, however, that 72 percent of the time, the asylum seeker signs the sworn statement without the opportunity to review it.

The Study found that sworn statements taken by officers are not verbatim, are not verifiable, often indicate that information was conveyed to the asylum seeker which was never, in fact, conveyed, and sometimes contain questions that were never asked. Sworn statements look like verbatim transcripts but are not. The Study found that these unreliable documents are often used against asylum seekers when their cases go before an Immigration Judge.

DHS regulations also require that, when an asylum seeker expresses a fear of return, he or she must be referred to an Asylum Officer to determine whether the fear is “credible.” Yet, in nearly 15 percent of the cases which Study experts observed directly and in person, asylum seekers who expressed a fear of return were nevertheless removed without a referral to an Asylum Officer. Of those cases, nearly half of the files indicated that the asylum seeker had not expressed any fear.

RECOMMENDATIONS TO CBP

Expand existing videotape systems to all ports of entry and border patrol stations; have ‘testers’ verify that procedures are correctly followed.

F

Reconcile conflicting field guidance to clarify the requirement that any alien expressing fear be referred for a credible fear interview.

F

Inform Immigration Judges that forms used at ports of entry and the border are not verbatim transcripts of the alien’s entire asylum claim, despite their appearance, so that they can be given the proper weight.

F

Save scarce detention resources by not placing asylum seekers with valid travel documents in Expedited Removal.

F

Improve monitoring so that existing border procedures are correctly followed.

F

DHS has not provided the Commission with a response to its request for information on steps taken by CBP to address these five recommendations, nor does publicly available information indicate that any of them have been implemented. Furthermore, information regarding border procedures recently disclosed by DHS during the course of the *Orantes* litigation reveals that supervisors continue to rely almost exclusively on file reviews of Expedited Removal orders, and that the DHS officials involved had no knowledge of DHS adopting USCIRF’s recommendations.

ICE (detention): Overall Grade D

Congress' question: *Are immigration officers detaining asylum seekers improperly or under inappropriate conditions?*

Study findings: Although DHS has established national criteria to determine when asylum seekers in Expedited Removal should be released from detention pending their asylum hearing, the Study found no evidence that these criteria are actually being implemented. There are wide variations in release rates across the country. For example, New Orleans released only 0.5 percent of asylum seekers, New Jersey released less than 4 percent, and New York, 8 percent. Yet San Antonio released 94 percent of asylum seekers, Harlingen 98 percent, and Chicago 81 percent. The average asylum seeker with a credible fear of persecution is detained at government expense for 60 days; one-third are held for 90 days or more.

Congress also asked whether asylum seekers are detained under inappropriate conditions. Based on extensive site visits and a survey, the Study found that the facilities where asylum seekers are detained resemble, in every essential respect, conventional jails. Many facilities are, in fact, jails and prisons, and in some of these facilities, asylum seekers sleep alongside U.S. citizen convicts serving criminal sentences or criminal aliens—even though ICE detention standards do not permit non-criminal detainees to be co-mingled with criminals. ICE has experimented with alternatives to detention, and has opened one secure facility—in Broward County, Florida—which does not resemble a penal institution. Broward, unfortunately, remains the exception. The overwhelming majority of asylum seekers referred for credible fear are detained – for weeks or months and occasionally years – in penal or penitentiary-like facilities.

RECOMMENDATIONS TO ICE

Train detention center personnel to work with non-criminal, psychologically vulnerable asylum-seekers.

C

DHS has not provided the Commission with a response to its request for information on steps taken by ICE to address this recommendation. However, in January 2007, the Director of the DHS Office of Civil Rights and Civil Liberties confirmed earlier unofficial statements by ICE that they had jointly developed new training modules for ICE personnel on cultural awareness and asylum issues. No time frame was given for the completion of the modules or their implementation, nor have copies been made available.

Work with the Immigration Courts to ensure that detained aliens in Expedited Removal, including those who have not been referred for a credible fear determination, have access to legal service providers.

D

See recommendations to DHS and DOJ together.

Change detention standards so that non-criminal asylum seekers are not detained under penal conditions.

F

DHS has not provided the Commission with a response to its request for information on steps taken by ICE to address this recommendation, nor does publicly available information indicate that it has been implemented. To the contrary, a December 2006 Audit Report by the DHS Office of the Inspector General (OIG) found instances of non-compliance with existing ICE Detention Standards at all five of the facilities surveyed, three of which were also included in the Commission's Study. In addition, an April 2006 DHS OIG Audit Report recommended that ICE expedite the development of alternatives to detention.

Codify existing parole criteria into regulations.

F

DHS has not provided the Commission with a response to its request for information on steps taken by ICE to address this recommendation, nor does publicly available information indicate that it has been implemented.

Ensure consistent and correct parole decisions by developing standardized forms and national review procedures to ensure their proper application.

F

DHS has not provided the Commission with a response to its request for information on steps taken by ICE to address this recommendation, nor does publicly available information indicate that it has been implemented. The April 2006 DHS OIG Audit Report recommended that ICE improve its data management systems to have the capability to track information on the rationale underlying parole decisions.

USCIS (Asylum Office): Overall grade B

Congress' question: *Are immigration officers incorrectly removing asylum seekers to countries where they may face persecution?*

Study findings: The Study found that, despite their expertise, Asylum Officers play only a limited role in Expedited Removal. This is so even though Asylum Officers have the authority to grant asylum outside the context of Expedited Removal, in the affirmative asylum process. Credible fear determinations are made in a brief interview and are not intended to document the asylum seeker's entire claim. The Study found a high rate of positive credible fear determinations, reflecting the deliberately generous preliminary screening standard used in order to assure that a refugee is not mistakenly returned. The Study did note, however, that review procedures for negative credible fear determinations were more onerous, and might have the unintended consequence of encouraging positive determinations.

The Study also found that the partnership between the Arlington, Va. Asylum Office and the Capital Area Immigrants Rights Coalition to ensure legal advice for credible fear determinations was a success worth replicating. It not only provides detained asylum

seekers with legal advice, but has also improved efficiency by increasing the number of asylum seekers who, after consulting with counsel, chose not to pursue their claims.

RECOMMENDATIONS TO USCIS

Subject both positive and negative credible fear findings to similar review procedures.

A

USCIS took action on this recommendation in April 2006 by issuing a memorandum regarding the increase of quality assurance review for positive credible fear determinations as well as by releasing an updated Asylum Officer Basic Training Course Lesson Plan.

Expand the existing *pro bono* program for the credible fear process to all eight Asylum Offices.

B

USCIS announced in December 2006 that it welcomes approaches by the NGO community to expand this model to the other seven Asylum Office cities. As in Arlington, Va., NGOs will need to secure the necessary funding themselves.

Allow Asylum Officers to grant asylum at the credible fear stage.

F

See recommendations to DHS and DOJ together.

**DHS (agency-wide coordination):
Overall grade D**

Congress' questions: *All Study questions are relevant to DHS in its coordinating role.*

Study findings: The Study found extensive problems with overall management and coordination of the Expedited Removal process. Quality assurance practices are insufficient; data management systems are inadequate, and indeed posed a major challenge for the conduct of the Study itself; communication between the necessary DHS bureaus is lacking; and there was no mechanism to address system-wide issues.

RECOMMENDATIONS TO DHS AGENCY-WIDE

Create a high-level Refugee Coordinator position.

C

DHS appointed a Senior Advisor for Refugee and Asylum Policy in February 2006, but has not made information publicly available on his authority, responsibilities, or the resources at his disposal.

In a June 2006 meeting, the Senior Adviser informed the Commission that his four areas of responsibility were: coordination within the agency; provision of policy advice to the Assistant Secretary for Policy and through him to the Secretary and Deputy Secretary; relationship with other government entities and NGOs; and temporary responsibility for overall immigration policy.

The Commission recommended that this position have three main functions:

(1) Ensuring consistent asylum policy and legal interpretations Department-wide.

DHS has not provided the Commission with a response to its request for information on steps taken to address this aspect of the recommendation, nor does publicly available information indicate that it has been implemented.

(2) Coordinating implementation of necessary changes set forth in the Study's recommendations.

The Senior Adviser for Refugee and Asylum Policy informed the Commission in June 2006 that DHS was in the process of internal discussions regarding a formal response to the Study, but that no decision had been made at that time. No further information has been made available, and information obtained in November 2006 in the course of the *Orantes* litigation indicates that Study recommendations have not been carried out. A third inquiry to DHS in January 2007 did not produce a response.

(3) Monitoring the system on an agency-wide basis to see that changes take hold and that emerging problems are addressed as they arise.

Based on available information about the Senior Adviser's reporting lines and the resources at his disposal, as well as his additional responsibilities for matters other than refugee policy coordination, it appears that the post has not been given a sufficient level of authority to serve the purpose intended by the Commission's recommendation.

The Commission is concerned that the study recommendations cannot be implemented unless the Senior Advisor, supported by a fully staffed office, has sufficient authority within the Department to carry forward the changes that are necessary.

The grade given for this recommendation relates to an assessment of the position as created, and not the performance of the office-holder.

Address implementation and coordination issues before expanding Expedited Removal.

F

Since the Commission released its Study in February 2005, Expedited Removal has been expanded from a port-of-entry program to one that covers the entire perimeter of the United States, land and sea, to a line 100 miles from the border. DHS also moved to dissolve the *Orantes* injunction, which currently exempts most Salvadorans who entered the United States without inspection from Expedited Removal. Yet as this report card shows, the vast majority of the Study's recommendations remain unaddressed and unimplemented.

Create a reliable data management system that allows for real-time information on asylum seekers in Expedited Removal.

F

DHS has not provided the Commission with a response to its request for information on steps taken to address this recommendation, nor does publicly available information indicate that it has been implemented. To the contrary, the DHS OIG Audit Report found in April 2006 that ICE lacks data analysis capabilities to manage the detention and removal

program in an efficient and effective manner, and recommended that the Detention and Removal Office expedite developing, testing and implementing a data management system that is capable of meeting ICE's requirements.

Allow Asylum Officers to grant asylum at the credible fear stage.

F

See recommendations to DHS and DOJ together.

**DOJ/EOIR (immigration adjudication):
Overall grade C+**

Congress' question: *Are immigration officers incorrectly removing asylum seekers to countries where they may face persecution?*

Study findings: As noted above, the Study found that sworn statements taken at ports of entry and the border are inaccurate and incomplete, and that credible fear determinations are not intended to document the asylum seeker's entire claim. Nevertheless, IJs relied heavily on these incomplete and/or unreliable records to assess credibility. In 57 percent of all cases, sworn statements and/or credible fear determination records were used to impeach the asylum seeker. In 39 percent of all cases, the IJ cited these documents in denying the claim.

In addition, the Study found that whether or not an asylum seeker is granted asylum depends largely on whether he or she is able to find *pro bono* counsel. One in four asylum seekers who are represented are granted asylum, whereas only one in 40 unrepresented asylum seekers succeed. The outcome of the asylum seeker's case also seemed to depend largely on chance; namely, the IJ who is assigned to hear the case. Among IJs sitting in the same city who hear a significant number of asylum cases, some grant close to zero percent of applications while others grant 80 percent.

While asylum seekers can appeal, one cannot rely on the appeal process to correct these disparities among IJs—the BIA reverses IJs in only two to four percent of asylum cases. A particular concern is the use of “summary affirmances without opinion” whereby a single Board member can endorse the result reached by an IJ without providing a reasoned written opinion discussing the issues raised on appeal. This practice, while allowing the Board to work through some of its backlog, can reduce confidence in the rigor of the Board's review and has led to an increase in appeals of BIA decisions to federal circuit courts. Another drawback of summary affirmances is that they do not provide any guidance to IJs, since any errors short of requiring reversal of the decision are not caught or corrected by the Board.

RECOMMENDATIONS TO DOJ/EOIR

Reinstate funding for Immigration Judge training.

A

As noted above, in 2005 at the invitation of EOIR, Commission staff participated in a video briefing to all Immigration Judges on the Study's findings. The Commission notes that the Attorney General announced 22 measures in August 2006 to improve immigration adjudication. In January 2007, EOIR advised the Commission that it is expanding and improving training for all IJs. A five-day training conference for IJs in August 2006 included a presentation on religious freedom by USCIRF and the Department of State's Office of International Religious Freedom. IJs also attended a mandatory workshop concerning asylum law and procedures, as well as a workshop on improving oral decisions. Another training conference for all IJs will be held in August 2007. Circuit-specific reference materials were provided to all IJs at the August 2006 conference and have been updated since. In November 2006, all IJs received an in-depth outline on asylum credibility and corroborating evidence in the federal Courts of Appeals, and will continue to receive timely and relevant resource materials.

A one-week training course for new IJs in March 2007 will include lectures on asylum, withholding of removal and protection under the Convention against Torture; a discussion of credibility developments under the REAL-ID Act; and a mock asylum hearing. Judges will continue to be provided materials on the International Religious Freedom Act of 1998 and will certify that they have read such materials.

Expand the Legal Orientation Program (LOP), conducted by NGOs under EOIR's direction, in order to provide legal information to detained aliens, improve their access to *pro bono* counsel, reduce detention costs, and increase Immigration Court efficiency.

B

In January 2007, EOIR advised the Commission that the number of LOP program sites doubled from six to 12 in FY06, with an additional four pilot sites for unaccompanied minors in the custody of the Office of Refugee Resettlement. Funding increased from \$1 million in FY05 to \$2 million in FY06 and is expected to remain at that level in FY07 and FY08. The program aims to reach one-third of detained aliens in Immigration Court proceedings. In addition, as part of the Attorney General's measures to improve immigration adjudication, EOIR has formed a Committee on Pro Bono to oversee the expansion and improvement of its *pro bono* programs

Improve the quality of Immigration Court decisions.

C

The Commission notes that the Attorney General announced 22 measures in August 2006 to improve immigration adjudication. EOIR advised the Commission in January 2007 that it anticipates that additional training and materials will foster greater consistency without compromising adjudicatory independence.

EOIR further advised that DOJ and EOIR are continuing to explore mechanisms to address the Commission's recommendation that EOIR consider the implementation of "quality assurance procedures (i.e. peer review) to address the significant variations in approval and denial rates among immigration judges." At this time, this process remains under internal review within the Department.

Work with ICE to ensure that detained aliens in Expedited Removal, including those who have not been referred for a credible fear determination, have access to legal service providers.

C

See recommendations to DHS and DOJ together.

Improve administrative review of asylum appeals.

C-

The Commission notes that the Attorney General announced 22 measures in August 2006 to improve immigration adjudication. In January 2007, EOIR advised the Commission the BIA has decreased the number of summary affirmances dramatically, from 36 percent of all Board decisions in FY03 to 15 percent in FY06, and 10 percent in the first quarter of FY07. EOIR also noted that when four new Board members are added to the existing 11, as planned, the Board will have greater resources to write longer decisions where appropriate.

EOIR further advised that it is drafting a rule to allow the Board to increase the number of written opinions, to allow Board members to refer difficult cases to three-Board-member panels, and to facilitate the publication of more cases. However, the Commission notes that this does not respond directly to the Study's recommendation that all asylum appeals receive written decisions.

Allow Asylum Officers to grant asylum at the credible fear stage.

F

See recommendations to DHS and DOJ together.

DHS and DOJ Together: Grades from C-F

Congress' question: *Are immigration officers incorrectly removing asylum seekers to countries where they may face persecution?*

Study findings: The Study found a need for DHS and DOJ to work together to improve the fairness and efficiency of dealing with asylum seekers in Expedited Removal.

RECOMMENDATIONS TO DHS AND DOJ TOGETHER

ICE and EOIR should work together to ensure that detained aliens in Expedited Removal, including those who have not been referred for a credible fear determination, have access to legal service providers.

C (EOIR)

D (ICE)

EOIR's Statement of Work for the Legal Orientation Program provides a basis for this recommendation to be carried out, in that it calls for their NGO contractors to offer group orientations to all detained aliens who are, or may, be placed in immigration removal proceedings. However, in January 2007, EOIR advised the Commission that it had experienced limited success in implementing this recommendation, and explained that efforts have been dependent upon the detention facility's logistical capabilities (i.e.

identifying those in Expedited Removal proceedings and bringing them to a suitable space on a regular schedule), as well as staff resources at the non-profit organization carrying out such programs.

DHS has not provided the Commission with a response to its request for information on steps taken by ICE to address this recommendation.

Allow Asylum Officers to grant asylum at the credible fear stage.

F

(shared by DHS, USCIS, and EOIR)

This recommendation requires consultation between, and action by, USCIS and DHS in its coordinating function as well as by EOIR. Neither DHS nor EOIR has provided the Commission with a response to its request for information on steps taken to address this recommendation, nor does publicly available information indicate that it has been implemented.

Grading Key: Recommendation, or similar action to address the issue which was the objective of the recommendation, has been:

- A** Adopted and implemented.
- B** Largely adopted with progress in implementation.
- C** Largely adopted with little progress, or only partially adopted and implemented - with evidence that some efforts to address the objective of the recommendation continue to be underway.
- D** Minimally addressed, but with little or no demonstration of an ongoing commitment to address the objective of the recommendation.
- F** Rejected, or there is no evidence of meaningful action being taken to address the objective of the recommendation.

Table of Abbreviations

BIA	Board of Immigration Appeals, part of DOJ within EOIR
CBP	Customs and Border Protection, part of DHS
DHS	Department of Homeland Security
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review, part of DOJ
ICE	Immigration and Customs Enforcement, part of DHS
IJ	Immigration Judge
LOP	Legal Orientation Program, within EOIR
OIG	Office of the Inspector General, part of DHS
<i>Orantes</i>	<i>Orantes-Hernandez v Gonzales</i> , No. 82-1107KN (C.D.Cal.)
USCIRF	U.S. Commission on International Religious Freedom
USCIS	U.S. Citizenship and Immigration Services, part of DHS