

Enhancing Quality and Timeliness in Immigration Removal Adjudication

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[Authors' note: This material is a revision of several sections of our larger interim report and recommendations, dated February 17, 2012. The material is also updated based on our survey results and comments and suggestions received by the authors and ACUS. The page references listed at the beginning of each section are to the February 17, 2012 version of the draft and revised report, and the recommendations have been reformatted and renumbered for consistency with the interim draft. After the Committee on Adjudications has had an opportunity to discuss these recommendations, the material will be reinserted into the master report.]

[Pp. 1- top of 12 replaces text at 40-47 of Feb. 17 interim draft]

b. Preliminary Administrative Adjudication of All Asylum Applications

People seek asylum by several means: they can request it when they are subject to expedited removal, and they can apply for it outside the expedited removal context.

The ABA Commission on Immigration and others have recommended greater participation by the USCIS Refugee, Asylum, and International Operations Directorate (Asylum Office) in adjudicating asylum applications.¹

[1] Expedited Removal

This subsection concerns people seeking asylum within the expedited removal process.

Congress created the expedited removal system to allow the government to remove, immediately and without court involvement, people apprehended at the border who lack documents or used fraud to seek entry.² If a DHS officer determines that a non-citizen is subject to expedited removal and the individual expresses a fear of return, the officer will delay removal until an asylum officer can conduct a credible fear interview, DHS usually must detain the person until an asylum officer determines whether the person has a “credible fear” of persecution or torture if returned to the home country. (A “credible fear” determination involves a less demanding standard than an asylum determination, which requires a “well-founded fear” of persecution on account of one of five protected grounds: political opinion, religion, nationality, race or membership in a particular social group.) An asylum officer who concludes that the individual has met the credible fear standard prepares an NTA, thus starting removal proceedings so that a judge can decide the asylum claim. If the asylum officer does not find a credible fear, the person could be subject to expedited removed unless he or she initiates review by an immigration judge. If the judge rejects the asylum claim in these expedited cases, there is no appeal to the BIA.

The ABA Immigration Commission (and before it, in 2005, the U.S. Commission on International Religious Freedom) recommended expanding the asylum officer’s authority from credible fear determination only to the authority to grant asylum, thus possibly keeping the case out of the immigration courts. According to data reported by the ABA Commission, in the 2000-2004 period, asylum officers made positive credible fear determinations in 5,000 cases, and immigration courts granted relief (mainly asylum but also withholding or deferral of removal) in

¹ *Id.* at 1-61-1-64.

² As previously discussed there are other situations. *Supra* at _____.

28 percent of them. If asylum officers had had authority to grant asylum where the applicant met the statutory standard of well-founded fear, and if they had granted asylum at rates identical to those of the immigration courts, the courts would have seen 1,400 fewer receipts and DHS 1,400 fewer cases to litigate. According to the ABA Commission, the change proposed regarding expedited removal asylum claims would require regulatory but not statutory change.³

DHS in 2008 recommended against implementation of a similar recommendation,⁴ Pointing to the “accelerated timeframe and nature of the credible fear process,” DHS said that having asylum officers conduct a credible fear review and the more demanding review of an asylum claim could deprive applicants of the time and resources to develop a well-documented asylum claim or obtain legal counsel to assist them. DHS also said it would need additional asylum officers to conduct the asylum adjudication and that the applicants would need additional time to meet identity and security check requirements, thus lengthening the time in detention. DHS also expressed a concern that the asylum interview might have to be conducted using video technology and asylum officers were not confident that the in-depth interview could be conducted using only video.⁵

Despite these objections, the ABA Commission said “if the goal is to streamline the adjudication of asylum claims in the immigration system *as a whole*, then the proposal deserves serious consideration.”⁶ We agree for three reasons. First, the Asylum Office is qualified to make these assessments in the affirmative filing context. Second, the adjudication by the Asylum Office reduces immigration court workload. Third, this additional authority provides an expedited process for at least some subset of those individual who arrive at the border sufficiently prepared to establish eligibility for asylum; aiding this vulnerable population is humane and appropriate.

Human Rights First (HRF), a national non-profit organization that is very experienced in assisting asylum applicants, commented on our draft report that the credible fear interviews are often conducted under very challenging circumstances...” with communication significantly impeded by high levels of background noise in the detention centers . . . , poor sound quality on the telephones made available to the Asylum Office to call contract interpreters, and, in many cases, poor quality interpretation.” HHIF did not oppose this proposal, but said that because some applicants would need more time to prepare and develop their application for protection, once an individual has met the credible fear standard, the application process should move to the usual “affirmative” asylum interview process. That should be possible if DHS releases individuals from detention once the Asylum Officer determines the individual has met the credible fear standard.

Authorizing the Asylum Office to grant asylum may avoid delays in asylum grants caused by immigration court backlogs. By statute, if an asylum seeker does not file an application within

³ *ABA Comm’n on Immigr. Rept., 2010, supra* note _____ ; INA § 235(b)(1)(A)(ii)(2010); regulations implementing the review are found at 8 C.F.R. § 1235.6 (2009).

⁴ Letter from Stewart Baker, Assistant Secretary for Policy, DHS, to Felice Gaer, Chair, U.S. Commission on International Religious Freedom (Nov. 28, 2008) (on file with author); *USCIRF Disappointed that DHS Action on Expedited Removal Process Falls Short*, U.S. COMM’N ON INT’L FREEDOM, (Jan. 9, 2009), http://www.uscirf.gov/index.php?option=com_content&task=view&id=2340&Itemid=126 (Gaer’s response to letter from Baker).

⁵ *Id.*

⁶ *Id.*

one year of entry, the application can be time barred. A 2010 HRF study⁷ and an independent report by several scholars⁸ said that immigration courts rejected a growing number of applications due to the time bars. These scholars report that in 2010, 53,400 people (in expedited removal and otherwise) were subject to the time bars and that if the adjudication could have been heard first before the asylum office, more than 15,000 applicants and their derivative family members could have completed their cases within the deadline and without need for the immigration court review. We also heard some anecdotal reports that in Texas and several other courts, individuals who are subject to expedited removal are seeking protection at the border, are paroled (released from detention) into the U.S. and have passed a credible fear interview yet missed the one year filing deadline because the busy immigration courts could not hear their cases within the time deadline and these *pro se* applicants did not know they needed to press the court for an earlier hearing date due to the court's rule requiring both a hearing to allow the in-person filing of an application for asylum. This procedure is also one we recommend changing to allow more flexibility.

Some commentators on our draft report questioned the adequacy of Asylum Office resources and whether our proposal if implemented might actually extend detention for some individuals. While the DHS might choose to implement this concept by paroling all individuals who meet the credible fear standard, if they do not, our proposal to allow a grant of asylum may not fit those situations where the Asylum Officer has insufficient information and knows that to determine eligibility, the applicant will need more time and process to complete the application. This proposal would only authorize the Asylum Office to grant cases if the application begins in the expedited removal context. Further, we assume that in this subset of cases, the individual applicant would also be eligible for parole and the asylum application process could be completed in the manner used in affirmative applications as we recommend for all asylum adjudications within the immigration courts.

DHS commentators informally questioned whether this procedure would duplicate resources and whether it would decrease efficiency. In cases where the DHS determined that detention was warranted, the recommendation might expand the length of detention. They noted that it is not clear what would happen if the parole applicant does not appear at the Asylum Office or fails to complete the asylum application. Under the expedited removal statutes and regulations the individual is usually detained but if granted parole and fails to successfully complete the asylum process, the DHS would have the ability to revoke the parole and to resume the expedited removal process. The burden would fall to the applicant to seek review of a denied asylum application before the immigration court – this is similar to existing procedure where the immigration court may, upon the individual's request, review the finding of an asylum officer that the person lacks credible fear. This happens in a very small number of cases. It is possible this review would increase under the new procedure but that would be similar to the right to de novo review of the asylum adjudication before the immigration court if an affirmative application for asylum is not granted by the Asylum Office. These informal DHS comments are correct that using this procedure in all cases would create an additional layer of adjudication to

⁷ See Human Rights First, "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency," available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

⁸ Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum," *William and Mary L. Rev.* (Dec. 2010), available at <http://wmlawreview.org/files/Schrag.pdf>.

the asylum applicant at the border (once before the asylum office and review before the IJ) but these cases would still be barred from further BIA review by statute. Our recommendation is to provide the Asylum Office with flexibility to adjudicate cases in the first instance but does not mandate that every case that passes the “credible fear” standard be diverted to the Asylum Office for full adjudication.

These DHS commentators also suggested that several regulations would have to be amended to expand the Asylum Office adjudication in this context and we have noted that in our revised recommendation.

Recommendations 5-6

5. That USCIS, in order to expedite the asylum process:
 - a. seek to amend 8 C.F.R. § 235.6 and related regulatory provisions to authorize the asylum officer to approve qualified asylum applications in the expedited removal context. If necessary, USCIS should allocate additional resources to complete the asylum adjudication in this context as there are significant cost savings for other components of DHS and for EOIR.
 - b. seek to amend regulations to clarify that an individual who meets the credible fear standard, could be allowed to complete a non-adversarial asylum application with the asylum officer. Further, once that officer is satisfied that the individual has a well-founded fear of persecution or fear of torture, the officer may grant parole into the U.S. and recommend that DHS allow the individual to be released from detention on parole pending completion of the asylum process including required security and identity checks. [Existing procedures would remain in place for those cases where the asylum officer does not find the applicant met the “credible fear” standard.]⁹
6. That USCIS clarify that in those cases where the non-citizen meets the credible fear standard but the officer believes that the case cannot be adequately resolved based on the initial interview and the asylum application prepared in conjunction with that interview or in cases where the officer believes there are statutory bars to full asylum eligibility, the officer may prepare the NTA and refer the case to the immigration court as is done now. The fact that some cases could not be adequately resolved at this stage should not preclude the possibility of granting asylum as soon and as efficiently as possible in other cases.

(We recommend in the next section that all asylum cases, even those where an NTA was filed with the immigration court, be adjudicated in the first instance by the Asylum Office. We have not made this recommendation in the expedited removal context because Congress designed a streamlined procedure for expedited removal in INA § 235.)

[2] Affirmative and defensive asylum applications

Affirmative applications for asylum are those that non-citizens who are not in removal proceedings file with the Asylum Office. If the Asylum Office cannot grant asylum and the

⁹ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NO.11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE CREDIBLE FEAR OF PERSECUTION OR TORTURE (2009) available at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

person cannot document valid immigration status, the Asylum Office refers the matter to the immigration courts by filing an NTA. In contrast, if ICE establishes that a person who is already in removal proceedings is subject to removal, the person may initiate a claim for asylum with the court (a defensive application). In these cases, there is no referral to the Asylum Office unless the asylum-seeker is an unaccompanied minor.¹⁰ The ABA Commission recommended that Congress authorize judges to divert defensive applications to the Asylum Office for adjudication. If the Asylum Office did not grant asylum, it would refer the case back to the immigration court to consider the claim. We agree. (It is possible that a statutory amendment is unnecessary for this change. The immigration court adjourns cases to allow other USCIS components to adjudicate visa petitions, and it may be that a similar procedure could be adopted here without any statutory change.)

How much of an immigration court workload reduction might this change accomplish? Total asylum cases received in the immigration courts declined from about 57,000 in 2006 to 32,961 in 2010.¹¹ Table B shows the immigration court asylum cases disposed on the merits over the last five years. Overall, both affirmative and defensive completions have declined. Grants have hovered in the 50-61 percent range for affirmative applications and in the 33-39 percent range for defensive applications.

Table B: Immigration Court Asylum Cases Decided On The Merits¹²

FY	All	Asylum Applications Completions on the Merits					
		Affirmative			Defensive		
		Total	Denial	Grants	Total	Denials	Grants
06	29,751	18,550	9,020	9,530 51%	11,201	7,457	3,744 33%
07	27,727	16,380	7,953	8,427 51%	11,347	6,921	4,426 39%
08	24,043	14,407	7,051	7,356 51%	9,636	6,116	3,520 37%
09	21,626	13,202	5,940	7,262 55%	8,424	5,394	3,030 36%
10	19,413	11,596	4,508	7,088 61%	7,817	5,046	2,771 35%
11	22,075	12,333	4,155	8,178 66%	9,742	6,416	3,326 34%

The ABA Commission reported that in 2008, 77 percent of defensive asylum applications in the immigration courts were initiated after the NTA's filing (i.e., did not come after an expedited

¹⁰ See William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. N.110-457 (2008).

¹¹ *Statistical Year Book, 2010*, *supra* note _____ at I1.

¹² *Id.* at K.

removal/credible fear review). Had the proposal been in effect in 2010, and assuming for the sake of analysis that 77 percent of 2010's defensive claims were NTA-prompted; the judges would have referred about 6,000 claims (77 percent of 7,817) to the Asylum Office. If the Asylum Office grant rate was the same as the judges' (35 percent), about 2,100 cases referred to the Asylum Office would have ended there and left the immigration court docket. The benefit to the defensive asylum seeker might include more rapid resolution of approvable cases (in the expedited removal context, because the officer would be familiar with the case from the credible fear determination), an initial assessment in a less formal setting by an asylum officer trained to conduct interviews involving sensitive issues, and access to a resource center for researching country conditions not usually available to busy immigration judges. One commentator on our earlier draft said it is not clear that the same asylum office would conduct the credible fear interview and continue with the full asylum interview. HRF noted that non-adversarial interviews are the model used to evaluate asylum claims in most of the countries of the world.

Overall, as Table B shows, the total number of immigration court asylum grants to defensive seekers is not great—2,771 in 2010. (They rose to 3,326 in 2011.¹³) But asylum applications are concentrated in a relatively few courts. In 2010, five courts accounted for 62 percent of the asylum receipts, and in those courts, asylum claims were on average 30 percent of all proceedings received.¹⁴ The 2011 figures were, for those same courts, 58 percent of the asylum receipts, where asylum claims were on average 26 percent of all proceedings received. The Congressional Research Service reported similar data on asylum and withholding of removal applications.¹⁵

Moreover, the ABA Commission points out a possible auxiliary benefit of having asylum officers first consider defensive claims, related to the fact that a significant portion of asylum claims never reach a merits determination, but rather are withdrawn or abandoned (in absentia), or the respondent may receive another form of relief or a change of venue. In 2010, as noted, there were 32,961 asylum receipts,¹⁶ but as seen in Table B immigration courts completed only 19,413 claims on the merits, a significant difference even recognizing that receipts in one year are not all disposed of in the same year.¹⁷ The ABA Commission points out that the percentage of affirmative asylum applicants who withdraw or abandon the asylum claim is greater than the comparable figure for defensive claims; it reasons that involvement of the asylum officer may explain some of the difference and if so, involving them in defensive claims might increase withdrawals and abandonments.¹⁸

¹³ OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, FY 2011 STATISTICAL YEAR BOOK, K2 (2012) available at www.justice.gov/eoir/statpub/fy11syb.pdf. [Hereinafter *Statistical Year Book, 2011*].

¹⁴ *Id.* at I3, B4. FY 2011 STATISTICAL YEAR BOOK, at I2, B3.

¹⁵ See RUTH ELLEN WASEM, CONG. RESEARCH SERV. R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY (2011) available at <http://www.fas.org/sgp/crs/homesec/R41753.pdf>.

¹⁶ *Statistical Year Book, 2010*, *supra* note _____, at I1-3.

¹⁷ In 2011 there were 41,000 asylum receipts; immigration courts completed only 22,075 claims on the merits. *Statistical Yearbook, 2011* at I2.

¹⁸ One commentator suggested that the high rate of abandonment of asylum claims may be due to an increasing phenomenon where people file a claim for asylum affirmatively knowing it is likely to be referred to the immigration court because the Asylum Office cannot grant the case. Once within the immigration court the individual abandons the asylum application and seeks relief known as cancellation of removal – a special limited form of relief for people who have lived at least ten years within the U.S., have good moral character, and whose removal would result in exceptional and extremely unusual hardship to a U.S. Citizen or LPR spouse, parent, or child. See INA § 240A(b); 8 U.S.C. § 1229b(b). There is no affirmative process of seeing cancellation benefits

In our interviews, some judges recognized the workload relief the proposal might provide and others said that asylum cases offer an interesting respite from the daily grind of removal cases. We asked in our survey about the judges' agreement with this statement: "Judges should have the authority to allow the asylum office to adjudicate all defensive asylum claims, reserving for unsuccessful applicants the right to seek the judge's de novo consideration of the application." Of the 157 judges who responded, 93 (59.2 percent) agreed (37.5 percent strongly). It does not appear, moreover, that agreement was motivated much by a desire to reduce workload, although not knowing the courts of the judges in the survey makes definitive statements risky (and, to be sure, some judges commented, for example, "[t]his could alleviate the court of some of its burden due to an ever-increasing case load.") Nevertheless, agreement with the statement was strongest (72.7 percent) among judges who said they average one to five merits hearings per week; of those who said they averaged 16 or more such hearings a week, 52.9 percent agreed with the asylum statement. Cross tabulations with other responses similarly did not suggest that judges who are most concerned about too many cases were more inclined than others to favor shifting the defensive asylum claims initially to the Asylum Office.

In our interviews, the immigration judges noted that referral of defensive asylum claims is currently used in the case with juveniles and that under current procedure in the juvenile cases the matter is "adjourned" or continued rather than administratively closed and that the cases may appear for years on their dockets. Further, these judges were not confident that the Asylum Office notified the court when an asylum application was approved. These judges and several court administrators thought a better procedure would be for the cases to be administratively closed. Administrative closure would also allow the court administrators to relocate files and give a more accurate picture of the long range docket of the court. Furthermore, requiring children and/or their guardians to return to the immigration court to check on the status of an adjudication before the Asylum Office is burdensome and a drain on the resources of the court as well as the many pro bono and non-profit organizations that represent these children. We are recommending administrative closure for all cases referred to the Asylum Office, not just juvenile cases, as the more efficient method.

USCIS officials told us that, although the Asylum Office workload had been falling in recent years, the Asylum Office would need additional resources were it to assume the initial responsibility for adjudicating defensive asylum claims. (The office was able to handle juvenile cases without additional hiring, but the numbers were relatively small.)¹⁹ Although the Asylum Office is fee-supported, the fees come, not from asylum applicants but from surcharges imposed on other benefit applicants, creating an unpredictable source of financing. (In 2006, the USCIS rejected a USCIS Ombudsman recommendation that the agency begin to charge a fee with asylum applications.)²⁰ USCIS officials also questioned whether the reduction in immigration

without being in removal proceedings. Many people exploring reforms would like to suggest such an opportunity. We did not propose that change in this report because we thought it would require statutory change and the current benefit within the courts is capped at 4,000 grants per year.

¹⁹ The AO reported the overall volume of these specific cases was small FY2010 778, FY2011 577. Further, the AO returned 247 cases in 2010 and 306 cases in 2011 because it determined it did not have jurisdiction over the asylum jurisdiction. See email from Ted Kim *infra* note 22.

²⁰ See Emilio T. Go, Director, U.S. Citizenship & Immigration Services, *Response to Recommendation to Limit USCIS Adjudication of Asylum Applications to Those Submitted by Individuals in Valid Non-Immigrant Status*, U.S. DEP'T HOMELAND SECURITY (June 20, 2006) available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_24_Asymlum_Status_USCIS_Response-06-20-06.pdf.

court asylum cases would be sufficient to justify the administrative and possible legislative changes it might require.

All commentators on our earlier draft who referenced fees for asylum applications opposed the idea, saying it was wrong to charge for adjudicating an international obligation and noting that many asylum seekers have fled their home countries with few if any resources. We agree that fees are difficult for many people, and even if a fee waiver is available, the adjudication of that waiver requires time and resources. However, our recommendation only suggests exploring the possibility. Most immigration petitions for status, including some that offer protection to victims of crime or to unaccompanied juveniles, do have a fee for adjudication and for those who cannot afford the fee, the agency adjudicates a needs based waiver.

Recommendations, 7-8

7. That EOIR seek to facilitate consideration of defensive asylum applications by:
 - a. amending its regulations to provide where the respondent seeks asylum or withholding of removal as a defense to removal, the judge should administratively close the case to allow the respondent to file the asylum application and/or a withholding of removal application in the Asylum Office. If the Asylum Office does not grant the application for asylum or withholding, or if the respondent does not comply with Asylum Office procedures, the Asylum Office would refer the case to ICE counsel to prepare a motion to re-calendar the case. [This recommendation is related to the recommendation below concerning the authority to adjudicate applications for withholding of removal; the basic concept is to allow the non-adversarial asylum process to complete a full adjudication of potential eligibility for humanitarian relief available under the INA.]
 - b. amending its current procedure of having judges “adjourn” asylum cases involving unaccompanied juveniles while the case is adjudicated within the Asylum Office and instead have the judge administratively close the case. If the Asylum Office cannot grant the asylum or other relief to the juvenile, the Asylum Office can refer the case to ICE counsel to initiate a motion to re-calendar the removal proceeding before the judge.
8. That USCIS, to help implement these recommendations, evaluate whether a fee is appropriate for the *defensive* filing of an asylum application. There are other forms of relief sought as a defense to removal proceedings where the respondent must pay a fee for a DHS adjudication; e.g., adjustment of status applications. If the respondent is indigent, the regulations provide for fee waivers. The fee should help sustain the resources of the USCIS Asylum Office. While there are many concerns about charging fees to vulnerable populations, the INA already contains statutory authority for a fee-based asylum petition.

[3] *Asylum Office Adjudication of Eligibility for the Closely Related Claims of Withholding of Removal or Eligibility for Withholding Due to the Convention Against Torture (CAT)*

When individuals affirmatively file for asylum, asylum officers interview them about whether they meet the statutory criteria of a well-founded fear of persecution on account of membership in a protected group. Some are statutorily ineligible for asylum but qualify for a more limited

type of protection known as withholding of removal.²¹ There are basically two ways to qualify for withholding of removal. One is to establish that if returned to the country of origin the individual will more likely than not be subjected to persecution and harm. The second is to establish eligibility for protection under the U.N. Convention Against Torture by establishing a likelihood of torture if returned. This second form of withholding is also called “restriction on removal.” Withholding prohibits the government from removing the individual to a specific country. People who are granted withholding may not sponsor relatives or travel internationally, but are eligible for work authorization.

Just as we recommend that the Asylum Office be the first entity to adjudicate asylum claims, we recommend a change to prevent the piecemeal adjudication of some cases where the individual has established a likelihood of persecution or torture but is ineligible for asylum due to a statutory bar. These individuals may be eligible for withholding and their adjudication should also begin with the Asylum Office.

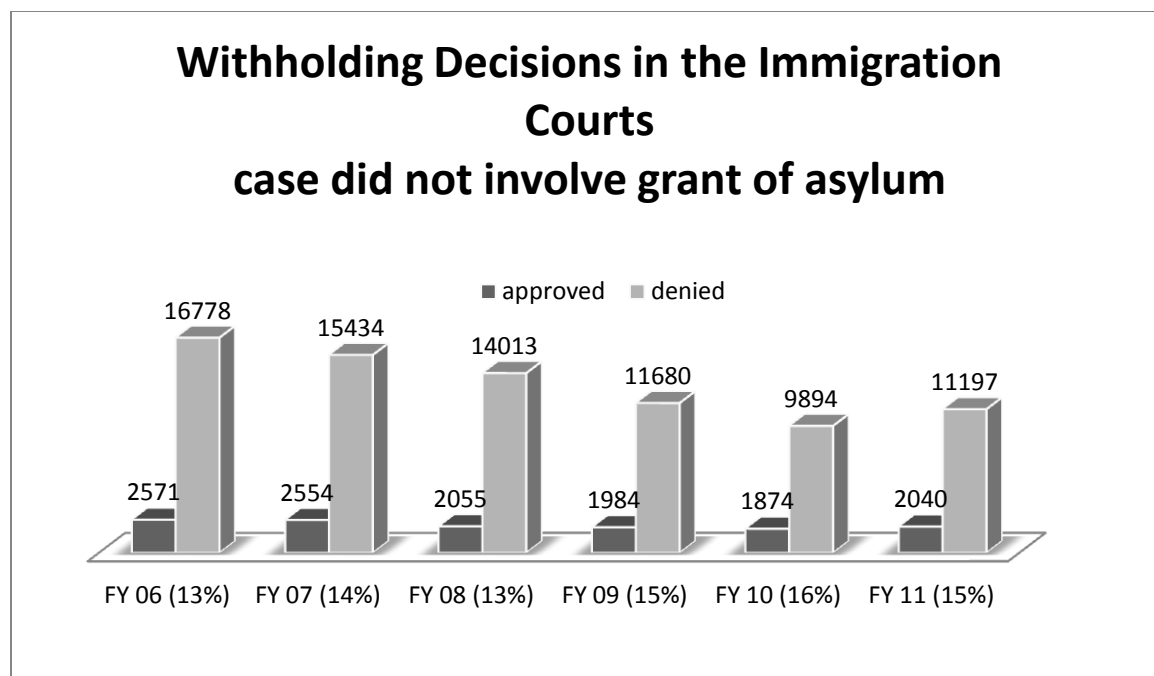
Specifically, we propose that the Asylum Office make the necessary factual and legal findings to determine eligibility for withholding or restriction on removal at this stage. It is difficult to know how this change might reduce the number of cases referred to the immigration court. Even if granted withholding, applicants might be motivated to seek de novo review of eligibility for asylum. Several commentators said the opposite impact would occur, that individuals granted withholding protection would never pursue the more expansive relief of asylum because they would not fully understand the limited protection offered in withholding and the inability of the individual to secure permanent resident status or to sponsor immediate family for reunification – rights that do exist if the individual is granted asylum.

We make this recommendation to create a unified adjudication of eligibility for asylum and the related humanitarian protections. It may reduce the number of cases in the courts because in 2010, the courts approved withholding in 1,874 (16 percent) of the cases where asylum was not granted (or may not have been sought). An important distinction between asylum and withholding is that asylum relief includes a path to permanent residence and derivative benefits for immediate family.²² An individual granted withholding of removal cannot travel internationally because a person who departs voluntarily has no right to return to the U.S. (withholding alone confers no formal status to the individual.)

Chart 5: Withholding Decisions in the Immigration Courts

²¹ INA § 241(b)(3) (2010); 8 U.S.C. §§ 1231(b)(3) (2006).

²² E-mail from Ted Kim, Deputy Chief, Refugee, Asylum, & Int’l Operations Directorate, U.S. CIS, to author (Jan 2, 2012) (on file with authors) (suggesting that most people would be incentivized to seek immigration judge review of a denied asylum application, even if granted withholding, thus negating the potential for increased efficiency in the immigration court).



Source: Year Book 2010 K-4, Year Book 2011 K-4. The Year Book explains that these cases do not include cases where asylum was also granted.

Currently, the Asylum Office is not authorized to grant withholding of removal or grant restriction on removal under CAT. This was not always the case. The authority of the Asylum Office to adjudicate withholding in most cases was eliminated in 1995.²³ Congress has delegated the authority to formally withhold removal to the Attorney General and therefore the immigration courts. However, it might be possible for this authority to be delegated by regulation to the Asylum Office. Alternatively, DHS currently has the authority to place individuals under supervised release and to grant work authorization and identity documents. Regulations could make clear that this form of supervised release would have the same protections as a grant of withholding of removal and that no individual would be subject to removal under this procedure without an opportunity for a hearing before the immigration court.

Several commentators pointed out that a grant of withholding is made after the judge has found that the individual is removable. The BIA explains the significance in *Matter of I-S- & C-S-*: “Although entering an order of removal prior to granting withholding may appear to be a technicality, it is not an insignificant one. It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld. Indeed, the statute providing for withholding of removal is entitled ‘Detention and Removal of Aliens *Ordered Removed*.’ Section 241 of the Act. This title clearly suggests that a removal order must precede any grant of withholding of removal.”²⁴ A grant of withholding of removal relates only to a specific country (i.e. withholding of removal to Nigeria). DHS is not precluded from removing an alien granted withholding of removal to a third country.

There is little evidence, however, of DHS’s affirmatively seeking to remove individuals after a grant of withholding based on changed country conditions or of seeing third countries. If DHS

²³ 59 Fed. Reg. 62284, 62301 (Dec. 5, 1994).

²⁴ 24 I&N Dec. 432, 433 (BIA 2008) (emphasis in original)

believes that the issuance of the order removal must, in all cases, precede the grant of protection equivalent to the withholding of removal, then this proposal is unlikely to move forward. However, DHS may have the flexibility to create categories of supervisory release and to exercise its prosecutorial discretion in these cases where the applicant demonstrates significant threats of harm or torture. The goal is to offer protection to those who establish eligibility as quickly as possible and to minimize the use of the resources of the immigration court to readjudicate issues that have been or could be developed in the Asylum Office.

Under current procedure, if the asylum officer finds the individual is subject to one of the bars to asylum eligibility,²⁵ e.g., applied later than one year without a qualifying justifying exception²⁶ or has a conviction for a particularly serious crime, or one of the other statutory bars, the asylum officer tells the applicant that the USCIS cannot grant the relief sought and files an NTA. This is not called a denial of asylum but a “referral” to the immigration court.

If the Asylum Office could grant withholding of removal or the equivalent protection of supervisory release and work authorization, some people would not seek further review of their pretermitted claim for asylum in the immigration courts. In our interviews some judges also thought the Asylum Office should have this authority because the inquiry about eligibility for withholding protections is very similar to the inquiry of eligibility for asylum and the asylum officer is capable of adjudicating the legal qualifications. Some of the people we interviewed argued that the asylum applicant should continue to have the right to litigate his or her claim for asylum in the immigration courts. The Asylum Office interview is non-adversarial and the applicant is frequently unrepresented or the role of the representative is less robust in the adjudication process. The opportunity to present the claim *de novo* in the immigration court is seen a serious protection of the individual’s rights.

Commentators on our earlier draft said the asylum office might be inclined to offer applicants withholding in lieu of full asylum even in cases where there was no statutory bar to asylum eligibility and that many pro se applicants would not realize what they would give up if they did not seek asylum before the immigration court. Some proposed hybrid approaches that would allow the applicant to accept a grant of withholding protection but then the Asylum Officer findings that the individual met the higher qualifications of a more likely than not persecution would be binding upon DHS if the applicant pursued a *de novo* review of asylum eligibility (a lesser standard of fear of persecution) within the immigration courts. Under current procedure, no finding of the Asylum Officer in cases referred to the Immigration Court is binding on DHS and the entire case is subject to *de novo* review.

We propose only that USCIS and DHS consider a reform of the adjudication process to allow preservation of the positive findings of “well-founded fear of persecution” or “probable persecution” and thus narrow the open issues such as statutory bars for immigration court review. While it is one-side, we are uncomfortable recommending that if the findings of the Asylum Officer are binding on DHS they should also be binding on the applicant because so many people are self-represented in the asylum office and many of the traditional hall marks of due process protections in administrative proceedings are not available in the informal asylum interview process. Some examples of differences in the informal process as opposed to the

²⁵ INA § 208(b)(2) (2010); 8 U.S.C. § 1158(b)(2) (2006).

²⁶ See INA § 208(a)(2) (2010); 8 U.S.C. § 1158(a)(2) (2006).

process before the immigration court are a lack of a record, lack of formal translation, limited role of advocates, limited ability of witnesses to testify in support, etc.

Based on comments received from judges and others we have rescinded parts of our earlier recommendation that would have created temporary immigration judges out of a cadre of senior asylum adjudicators.

Recommendation, 9

9. That DHS, in order to facilitate Asylum Office adjudication of certain closely related claims:
 - a. seek to amend 8 C.F.R. § 208.16 to authorize the Asylum Office to adjudicate eligibility for withholding and restriction on removal. If the Asylum Office grants withholding or restriction on removal there would be no automatic referral to the immigration court. Implementation of this recommendation would contravene DHS's current reading of its organic statute as restricting withholding decisions to the Attorney General and the immigration courts.²⁷
 - b. Alternatively, amend the regulations to authorize the Asylum Office grant "supervisory release", identity documents and work authorization to individuals who meet the legal standards for withholding or restriction on removal;
 - c. develop a procedure in cases where withholding or supervisory release are offered where the Asylum Office should issue a Notice of Decision explaining the impediments to asylum and informing the applicant of his or her right to seek de novo review of the asylum eligibility before the Immigration Court. This Notice must explain the significant benefit differences between asylum and withholding protections.
 - d. develop a procedure to allow the applicant to seek immigration court review and upon receipt of the request, the Asylum Office would initiate a referral to the immigration court.

[Pp. 12-top of 14 replaces material at 51-53 of Feb. 17 draft]

b. Eliminating EOIR's Role in Asylum Work Authorization Clock

In 1995, Congress overhauled the asylum application process, putting into place a number of constraints and incentives to try to deter weak or frivolous asylum applications. In particular, the changes decoupled the grant of work authorization with the filing of an application for asylum or similar protective relief and required DHS to withhold work authorization for asylum applicants until the government has had at least 150 days to adjudicate the asylum application. If a case is approved prior to that time, DHS grants work authorization. If DHS cannot approve an application for asylum or the application is presented for the first time as a defense to removal, the work authorization "clock" continues to run while the court adjudicates the asylum case. (The regulations authorize DHS to grant work authorization to individuals who seek cancellation of removal and to those who have a final order of removal but are under an order of

²⁷ See *supra* note 15 (describing and explain the delegations of authority to the various components of DHS in the Homeland Security Act).

supervision.²⁸ Asylum is the only category with an employment authorization “waiting period.” The regulations require a wait of 150 days to apply for work authorization and an additional 30 days for government objection.)²⁹

The current regulations, however, stop the clock that counts days toward work authorization eligibility where judges attribute the delay in adjudication to the respondent. While the grant of work authorization is solely within the authority of DHS, since the inception of these rules, the EOIR has used its record of proceedings to keep track of the reasons for adjournments and, as clarified recently,³⁰ the judge makes a specific finding about whether the respondent is responsible for the delay in adjudication, such as rejecting an available earlier date for a hearing or failing to process required biometric data. This is a controversial area. A lawsuit was recently filed against DHS and EOIR for their role in the management of the asylum work authorization clock.³¹

In our interviews, court administrators consistently reported that staff (often senior staff) devoted at least 20 percent of their time to investigating queries about the “asylum clock.” Respondents or their attorneys contact court personnel, who direct them to file a written request for information about the adjournment code used to continue the hearing. In some situations, the respondent or counsel objected that the judge did not intend the work authorization clock to stop and ask for an investigation of the code lodged in the record, which requires the court administrator to listen to the recording of the hearing and determine if the entered coding is consistent with the judge’s findings. Even after this investigation, some objections continue, requiring a reference to the respective ACIJ.

The work authorization clock is an important tool in deterring frivolous asylum claims, but the lengthy delays in many of the immigration courts have extended the adjudication process far beyond 180 days. It appears, according to TRAC data, that only the immigration courts within prisons and a handful of detention centers adjudicate cases (all, not just asylum) in less than 180 days on average.³² As of December 2011, according to TRAC data, the average wait nationally was 490, and in cases involving relief from removal (a subset that includes asylum) the average time to completion was 723 days. In short, diligent asylum applicants can face long delays to obtain work authorization eligibility simply because the court cannot docket another proceeding in the interim. Further, total applications for asylum have fallen, as shown in Table B above,³³ and largely stayed well below the high rates experienced in the mid and late 1980s.

We propose that DHS change its adjudication rules to allow a presumption of work authorization eligibility 150 days after the application has been filed. In cases where DHS believes the respondent has frustrated the adjudication or unreasonably delayed the adjudication of the

²⁸ See 8 C.F.R. § 1274a.12(c)(10) (2010).

²⁹ 8 C.F.R. § 1274a.12(c)(8)(i) (2010) and 8 C.F.R. § 208.7 (2010).

³⁰ See Brian O’Leary, Chief Judge, *Operating Policies and Procedures Memorandum 11-02: The Asylum Clock*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at <http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf>.

³¹ A.B.T. et al. v. U.S. Citizenship and Immigration Services, No. 11-02108 (D. Wash. filed Dec. 15, 2011).

³² . See Transactional Records Access Clearinghouse, *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, SYRACUSE UNIV., (Sept. 30, 2011) http://trac.syr.edu/phptools/immigration/court_backlog. See Transactional Records Access Clearinghouse, *Immigration Court Processing Time by Outcome*, SYRACUSE UNIV., (Sept. 30, 2011) http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

³³ See Table B: Immigration Court Asylum Cases Decided On The Merits, *supra* at 2.

asylum application, DHS can refuse the grant of work authorization or refuse to extend it beyond the initial authorization period. This single change would allow the judges to focus on the adjournment codes for purposes of managing their dockets and reminding the judge and the parties of the next steps in the case. This change would also regain a substantial amount of senior administrator time.

DHS officials commented informally that this proposal shifts the burden (of determining whether the applicant has unreasonably delayed the adjudication of the asylum application) to DHS and in particular to USCIS adjudicators who process the employment authorization requests. We have amended our recommendation to make clear the procedure ICE counsel would follow to establish the factual record of why the employment authorization document should not be granted.

The vast majority of comments we received on the proposal that EOIR stop using adjournment codes as a basis to stop or start the work authorization clock were supportive. Many advocates believe that the bars to work authorization are frequently the result of crowded immigration dockets and the complexity of completing an asylum application and all the accompanying biometric and security data. There was also a concern about the inability to secure work authorization pending an appeal to the BIA of an immigration judge's denial of asylum, an appeal that can require many months or even years to complete. Work authorization by itself is an important issue for the applicants but the work authorization card is also a form of government issued identification that can be very important to people who are without documentation or fleeing a country of persecution where they are unable or unwilling to seek passports or other documentation of identity.

Recommendations, 11-12

11. That EOIR stop using adjournment codes to track the delays in asylum adjudication, informing DHS that it will no longer code adjournments or record the reasons for adjournment in the recording of proceeding for the purpose of tracking the number of days an asylum application is pending.
12. That DHS revise its regulations and procedures to allow asylum and withholding applicants to apply for work authorization provided that at least 150 days have passed since the filing of an asylum application. The DHS would have 30 additional days to consider the application for work authorization. If ICE counsel believes the applicant unreasonably delayed the filing of the application, ICE counsel would make a formal written motion to the immigration judge and serve it on the Respondent or counsel for the Respondent articulating the factual and legal basis for the ICE objection to the issuance of work authorization. Respondent would have 15 days to respond to the motion. The Immigration Judge could then rule on whether the ICE motion should be granted.

[Pp. 14-15 replaces material at 80-81 of Feb. 17 draft.]

{The Committee on Adjudication discussed the Feb. 17 version of this material at its Feb. 22 meeting. Because it touches on asylum adjudication we repeat it here, revised to take account of comments offered on Feb. 22.]

[5] Streamline Procedures within the Immigration Court to Avoid Delays in Asylum Application Adjudication

Under current procedures, when a respondent indicates an intention to seek asylum, the judge sets a deadline for the submission of the application. In most instances, the judge requires an in-person application and the respondent and any representative to appear in court so that the court can confirm receipt of the application and the judge can deliver specific advisals. (Those advisals, however, are already part of the written asylum application warning of the consequences for filing fraudulent or frivolous asylum applications.) In busy immigration courts, after this brief proceeding to accept the application and provide the advisals, the judge will set the date for the individual hearing on the application. The delay to the individual hearing can be months or even a year from the date of the submission of the application. These delays frequently mean the application must be updated or supplemented before the individual hearing and that new biometric background checks may be needed.

The American Immigration Council's Legal Action Center's comments on our January 12 draft agreed that the in-person filing requirement created delays and while generally supportive of the proposal, expressed concern that a change in the procedure would also require a corresponding change in the "work authorization clock". We have adjusted our recommendations accordingly.

EOIR officials expressed concerns, informally, about eliminating the in-person filings. Immigration proceedings are recorded and an "out of court room" adival would not be part of the record of proceedings. Shifting the communication of the advisals to court personnel could be very difficult both in staffing and in maintaining consistency. We note these objections but

believe the oral advisals and confirmation of the applicant's understanding could take place during the merits hearing and that scheduling a hearing to receive the filing of the asylum application adds to the burden on all of the parties and in busy immigration courts can significantly delay the final adjudication because of the lack of hearing time.

Further if our recommendation of referral of the asylum application to the USCIS Asylum Office is adopted, the need for this hearing might be eliminated because adjudication would not be immediately before the court. Only in cases where the Asylum Office could not grant the application and referred the case back to court would the advisals be issued by the judge.

Recommendation, 25

25. That OCIJ, to facilitate the processing of defensive asylum applications
- a. Amend the Practice Manual that requires the filing of a defensive asylum application in open court to allow appropriate employees of the court (possibly judicial law clerks or senior staff trained by the court administrators) to accept the submission of the asylum application and provide the required statutory advisals, or
 - b. Alternatively the OCIJ could issue an OPPM
 - 1) explaining appropriate procedures for the initial filing of the asylum application without the participation of the immigration judge;
 - 2) authorizing court personnel to schedule a telephonic status conference with the judge and ICE attorney in any situation where the respondent or his/her representative expresses a lack of understanding.
 - 3) noting that court personnel may renew, at the merits hearing, the advisal of the danger of filing a frivolous application and allow an opportunity for the respondent to withdraw the application;
 - 4) making clear that the filing with court personnel qualifies as a filing with the court for the purposes of triggering the 180 day work authorization period.³⁴

³⁴ In another part of our report, we suggest eliminating these types of work authorization clock issues entirely by allowing an assumption of eligibility for work authorization after an application has been pending for 180 days. In our draft report we used the 150 days found in the statute, the regulations allow DHS 30 additional days for adjudication of the work authorization for a total of 180 days.