

Administrative Conference of the United States
Adjudication Committee Meeting, March 12, 2012

March 5, 2012

To Members of the Adjudication Committee

Fr Lenni Benson and Russell Wheeler

Re: Asylum-Related Material from Interim Draft on “Enhancing Quality and Timeliness in Immigration Removal Adjudication”

Below are the recommendations from our report that we suggest the committee take up at its March 12 meeting. They involve shifting some of the immigration courts asylum jurisdiction to other forums.

Please note:

- The accompanying 15-page document contains revised sections of the February 17 interim report.
- Below we have listed the recommendation for discussion on March 12 and the page numbers of the 15-page document that provide the supporting analysis.

See pages 1-4, concerning asylum seeking in the expedited removal context.

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.]
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.)

See pages 4-7, concerning initial Asylum Office adjudication of defensive asylum claims.

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.

See pages 8 – 12, concerning adjudication of the closely related claims of “withholding of removal” or “eligibility for withholding due to the Convention Against Torture”

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.
 - 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.

See pages 12-14, concerning eliminating EOIR's role in maintaining the asylum work authorization clock.

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.

See pages 14-15, concerning streamlining immigration court procedures concerning asylum applications. (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.)

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.¹

¹ 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.