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**Procedural Failures During the Expedited Removal Process**

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**Procedural Failures During the Expedited Removal Process**

**by**

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**Thesis**

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## **Abstract**

### **Procedural Failures During the Expedited Removal Process**

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This thesis contributes to our understanding of the impediments to protection faced by asylum seekers subject to the “expedited removal,” or summary deportation, provisions of the Immigration and Nationality Act. By studying various texts, from the statute itself, to agency policy memoranda, to human rights reports, I compare the law of expedited removal as it is written and interpreted by the government, to the law as it is actually applied. I then argue that asylum seekers caught up in the expedited removal process are not being given the procedural protections that they deserve. This topic is of particular interest in light of recent immigration enforcement policy changes ordered by the Trump administration. Specifically, President Trump has extended expedited removal to cover noncitizens with substantial ties to the United States. While many academics have studied immigration enforcement, I hope to add to the conversation by looking deeply at the texts that make up the law of expedited removal, and contrasting the procedures outlined in these texts with de facto procedures in the field. As a future

immigration lawyer, I believe that it is important to add to lay understanding of the law of expedited removal, and the impediments to protection that asylum seekers face when they are placed in expedited removal proceedings.

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## 1. Introduction

This thesis is about expedited removal, the legal process through which the United States summarily deports certain classes of noncitizens. More specifically, it is about the ways in which the procedures used by immigration agents during the expedited removal process fail protection seekers. While this thesis is not about asylum law *per se*, our international and domestic obligations to protection seekers form an important backdrop for any conversation about expedited removal proceedings. This is because expedited removal is a process that quickly deports certain classes of people while simultaneously filtering off members of that class who fear returning to their countries of origin. The people who are filtered, and who subsequently pass a fear interview, are then placed in a process to determine whether they will be granted asylum. This procedural relationship ties expedited removal to asylum law, and means that procedural failures in the expedited removal process constitute failures, on the part of the United States, to meet international legal obligations.

Below, I describe the law of expedited removal as it is written in government texts, and I discuss areas in which the U.S. government officials charged with enforcing the law fall short. Throughout, my understanding of the law and policy of expedited removal and, in particular, of the agency actions that lead to poor enforcement standards, is grounded in knowledge of the immigration laws themselves, clinical experience working with the populations effected by those laws, and social sciences scholarship that brings to light the ideological foundations for informal procedures that deny some protection seekers the right to seek refuge in the United States. From the moment that

individuals subject to expedited removal first interact with immigration officials, the statute and regulations comprising the law are often improperly applied. As a result, protection seekers may be sent back to dangerous situations in their home countries without being given a meaningful opportunity to seek asylum.

This paper sets out to answer several questions. The first two questions have to do with the rights of protection seekers caught in the expedited removal process. What legal rights are these protection seekers entitled to under international law, and what legal rights, in terms of procedural protections, are they entitled to under domestic law? The third question follows from the first two. What are protection seekers in expedited removal actually getting from the components of the Department of Homeland Security charged with enforcing the expedited removal provisions? Finally, I ask whether, based on the answers to the first three questions, the Department of Homeland Security is failing to provide individuals in expedited removal proceedings with the protections to which they are entitled under international and domestic law. Through my research, I found that expedited removal procedures, as they are carried out by the Department of Homeland Security, often violate the human rights of protection seekers. While these violations arguably do not contravene domestic law (the due process rights of non-resident aliens who have not been admitted are not well-defined), there is no doubt that the Department of Homeland Security is failing to uphold our international legal obligations under the Convention and Protocol Relating to the Status of Refugees.

The paper is organized as follows. First, I briefly discuss my methods. I then move on to a section on the law of expedited removal. That section begins with

information on asylum and our international legal obligations, and then moves on to domestic law, covering statutes, regulations, and agency policy guidance, as well as applicable Constitutional law principles. After laying out the legal framework for expedited removal, I move on to a section on the procedures used by U.S. Customs and Border Protection (CBP). This section includes analysis of procedural failures by CBP. The following sections describes the procedures used by U.S. Citizenship and Immigration Services (USCIS), followed by analysis of procedural failures by USCIS. Finally, I conclude with a brief section reviewing my findings.

## **2. Methods**

This thesis is the result of interdisciplinary research; I used various types of sources to unpack and analyze the rights of protection seekers, and the procedures used by DHS. First, I looked to the law itself. Through traditional legal research, I found the relevant legal texts, including statutes, regulations, and agency policy documents. For the sub-sections on the Constitutional rights of protection seekers in expedited removal, I looked to Supreme Court case law. After finding the appropriate legal sources I used legal reasoning to interpret and explain the law. For the sections on the text of the expedited removal provisions, I relied on traditional statutory interpretation. For the Constitutional law sections, I read various legal opinions to understand the state of the law, and then explained my findings. To understand how DHS does its job, I looked to two types of data. The first, and primary type of data that I looked at were reports undertaken by the United States Commission on International Religious Freedom, and Human Rights Watch. The second type of data I used was insight gained by participating

in the expedited removal process through representation of clients subject to expedited removal. For context on the ideological origins of the rights violations described in this paper, I reviewed literature on anti-immigrant, and nativist discourse in the United States, as well as on immigration enforcement. In particular, I was influenced by the work of Leo Chavez, an anthropologist who writes about anti-immigrant discourse in the United States.<sup>1</sup>

### **3. The Law of Expedited Removal**

Immigration law in the United States consists of statutes, regulations, case law and agency policy. This chapter will describe expedited removal, the law governing the summary deportation of noncitizens from the United States. The goal of this chapter will be to explain how these different sources of law interact to create a (somewhat) coherent summary deportation process.

Nearly all immigration law in the United States is codified in the vast, labyrinthine, Immigration and Nationality Act (INA), otherwise known as Title 8 of the United States Code (USC).<sup>2</sup> The INA contains thousands of pages, hundreds of definitions, and abundant cross-references. It is a difficult code to read and make sense of, even for full-time immigration lawyers. The statutes creating expedited removal are found at INA § 235(b).

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<sup>1</sup> See Leo Chavez, *The Latino Threat* (Stanford (CA: Stanford University Press, 2008), 21-43.

<sup>2</sup> Immigration practitioners, EOIR immigration courts, and the Department of Homeland Security, tend to refer to the INA and to the section numbers used within the INA when speaking about the statute and when writing legal documents. The INA is also codified in Title 8 of the U.S. Code., and outside of the immigration bar, practitioners tend to refer to immigration statutes by their 8 USC section numbers. Throughout this paper, I will refer to statutes by their INA section numbers.

When Congress passes a law, it is codified in the United States Code, but the statutes written in the Code are not self-implementing and do not explain how the Executive should go about making Congress' policy goals a reality. Therefore, Executive Branch agencies, which are the subject-matter experts charged, in our tripartite system of government, with making statute-based policy happen, write rules and procedures for accomplishing each statute's goals. These rules and procedures are found in the Code of Federal Regulations (CFR), which is divided into discrete sections called "titles," which are akin to chapters of a book. The CFR title containing rules and procedures for enforcing the INA is Title 8 (8 CFR), and 8 CFR contains the rules for both DHS and The Executive Office for Immigration Review (EOIR). The DHS and EOIR sections are nearly identical, but have different section numbers (the DHS sections are in the hundreds and the EOIR sections are in the thousands). The regulations governing expedited removal procedures are found at 8 CFR §§ 235.3., and 1235.3., respectively.

Executive Branch agencies also make policy through agency memoranda and other internal guidance that interprets statutes and regulations. DHS (and legacy INS), have produced many interpretive documents related to expedited removal and enforcement priorities in the time since IIRIRA became effective in 1997. I will be discussing two memoranda, the August 11, 2004 memorandum entitled "Designating Aliens for Expedited Removal," and a memorandum issued on February 20, 2017, entitled "Implementing the President's Border Security and Immigration Enforcement Improvements Policies."

Before I proceed with a discussion of the law of expedited removal, I will discuss the United States' international obligations. These obligations are the product of multi-lateral human rights treaties to which the United States is a party. Domestic refugee and asylum law is, essentially, the codification of our international legal obligations to make them binding in the United States, and expedited removal implicates both our domestic and international refugee protection obligations. For that reason it is useful to place expedited removal in context by discussing the nature of those obligations.

### **Asylum in Historical Context**

This section will briefly describe the recent history of asylum law. My focus is on post-World War II international human rights law, in particular the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1984 Convention Against Torture. These treaties form the international legal foundation for asylum and refugee law in the United States. However, because international treaties are not self-executing, they are not automatically binding law in the United States. This means that we meet our international legal obligations by codifying them in domestic law. Domestic refugee and asylum law is found at 8 United State Code (also known as the Immigration and Nationality Act), and Title 8 of the Code of Federal Regulations. As I wrote in the introduction, this paper is not about asylum law *per se*, but asylum is implicated in any discussion about expedited removal, because failures in the expedited removal process can lead to failures, on the part of the United States, to meet our international legal obligations. In this section I will explain the nature of those obligations.

The now-unraveling 20<sup>th</sup> Century refugee protection consensus was a reaction to World War II and the problem of groups displaced by Nazi persecution and later dissolution or realignment of state boundaries. Importantly, it also came about as a result of the rise of post-war internationalist ideology, a reaction to the horrific consequences of German, Italian, and Japanese hyper-nationalism in the preceding decades. This ideology manifested itself most visibly and powerfully in the creation of the United Nations (UN) in 1945. In 1951, the young organization ratified the Convention Relating to the Status of Refugees. The 1951 Convention contains the legal definition of “refugee” at Article 1:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This definition, now almost 70 years old, contains the fundamental elements of asylum law. To be granted refugee status (or asylum), a protection seeker must show an adjudicator that she suffered, or will suffer, persecution on account of one of five protected grounds, and that her government is unable or unwilling to do anything about it. The basic formula has not changed, and a variation of the UN definition is found in United States domestic law at 8 USC 101(a)(42).<sup>3</sup>

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<sup>3</sup>“The term ‘refugee’ means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]” INA § 101(a)(42).



The 1951 Convention, while groundbreaking, was extremely limited both temporally and geographically. The Convention limited refugee status to people displaced by events that took place in Europe before January 1, 1951.<sup>4</sup> The limitation to European refugees displaced by events that took place in the immediate post-war time period is a strong indication of the very focused intent of the original proponents of international refugee protections, and helps us understand why placing contemporary asylum seekers within the framework built by the 1951 Convention can be difficult. This remains true even in light of the 1967 Protocol Relating to the Status of Refugees, which lifted the 1951 Convention's temporal and geographic limitations on refugee status. This meant an expansion of the law's reach to cover protection seekers located anywhere in the world and affected by events taking place at any point in time. While that expansion made the international refugee protections dramatically more inclusive temporally and geographically, it did not make the refugee definition substantively more inclusive, as the types of persecution qualifying individuals for protection did not change.

While the elements of asylum law are fundamental to asylum adjudication, the most important international human rights law doctrine to understand in the context of expedited removal is the prohibition on returning noncitizens to countries where they will be persecuted or tortured, known as *nonrefoulement*. This is because protection seekers in expedited removal proceedings cannot attempt to prove eligibility for asylum unless they are able to successfully escape the expedited removal process. If they are not able to

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<sup>4</sup> Individual states could declare that refugee protections would apply to individuals outside of Europe, but the default rule applied only to European refugees. *See* 1951 Convention at Article I(B)(1)(b).

leave the expedited removal process they will be *refouled* through summary removal to their countries of origin. The original 1951 Convention contained the prohibition on returning refugees to states where they will be persecuted based on one of the five protected grounds listed in the refugee definition. The prohibition is found at Article 33, paragraph 1 of the Convention, and states that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

Article 33, along with Article 1 of the 1951 Convention, form the foundation for modern asylum law in that, together, they assert that it is a violation of human rights for states to return individuals to countries where they will be persecuted on account of a protected ground. When a contracting state purposefully, or through flawed procedures, returns a refugee to his country of origin, that state has breached its international legal obligations.

Seventeen years later, the 1984 Convention Against Torture further expanded the doctrine of *nonrefoulement*, which initially applied only to refugees, to protect people who would be tortured if returned to their countries of origin. This prohibition is found at Article 3 and states that: [n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This was a significant development, making it possible for protection seekers to avoid *refoulement* even when they are unable to show a

nexus between the harm they suffered in their country of origin and membership in a protected group.

Currently, there are tensions in the asylum process caused by disparities between post-war refugee definitions, which were based, primarily, on the problem of displaced Eastern European Jews, and the demographics of people displaced by contemporary neoliberal policies. Modern asylum seekers (as opposed to refugees) come overwhelmingly from countries with lower levels of development than the United States, and asylum seekers caught on the southern border of the United States come overwhelmingly from Mexico, and the Northern Triangle countries of Central America (Honduras, Guatemala, and El Salvador). This is not to say that asylum seekers from other regions do not come to the U.S.-Mexico border; protection seekers from around the world are encountered along the border in Texas, Arizona, and California. However, the vast majority of *protection seekers* in expedited removal proceedings are from Honduras, Guatemala, and El Salvador, with an additional large number from Mexico.<sup>5</sup> The drafters of the 1951 Convention could not have anticipated this scenario, but in the absence of a substantial revision of the original definitions to make them more compatible with contemporary refugee demographics and push factors, we are stuck with the original terms.

### **Statutes and Regulations**

In this subsection I will unpack the statutes, regulations, and policy memoranda that make up the law of expedited removal. I begin with a discussion of the classes of

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<sup>5</sup> More Mexican nationals are processed than any other nationality [Cite].

noncitizens subject to expedited removal and then introduce the procedures used to determine inadmissibility, and flag protection seekers.

#### Persons subject to expedited removal

The INA provisions governing the classes of noncitizens subject to expedited removal are found at INA § 235(b)(1), which reads, in relevant part, as follows:

(i) If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

...

(iii) Application to certain other aliens, (I) In general:

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in sub clause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

Subsection 235(b)(1)(i) describes the first class of noncitizens subject to expedited removal. This class is made up of aliens who arrive at U.S. ports-of-entry and seek

admission to the country.<sup>6</sup> The INA defines an “alien” as “any person not a citizen or national of the United States,” INA §101(a)(3), and calls aliens who arrive at a port-of-entry “arriving aliens,” which is a term of art referring to “applicant[s] for admission coming or attempting to come into the United States at a port-of-entry.”<sup>7</sup>

The second class of noncitizens potentially subject to expedited removal are described in INA § 235(b)(1)(iii). That section states that aliens who have not been admitted or paroled into the United States may be subject to expedited removal if they have not been physically present in the United States for at least two years. Once designated, the burden is on the noncitizen to show “to the satisfaction of the immigration officer” that she has met the physical presence requirement.

INA 235(b)(1)(i) applies to arriving aliens who are inadmissible for one of two reasons: 1) because they are in possession of fraudulent entry documents, or 2) because they do not have valid entry documents. Documents in the first category are purposefully

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<sup>6</sup> The statute exempts Cuban nationals from being subject to expedited removal. *See* INA § 235(b)(i)(F).

<sup>7</sup> The full definition for “arriving alien” reads as follows:

The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act. 8 CFR § 1.2.

Admission means: “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. INA § 101(a)(13).

faked, and documents in the second category either do not exist or are insufficient. 235(b)(1)(i) refers to these categories of inadmissible aliens by their section numbers, INA § 212(a)(6)(C), and INA § 212(a)(7).<sup>8</sup> INA § 212 contains descriptions of the classes of noncitizens who are “inadmissible,” meaning they are ineligible to receive visas and ineligible to be admitted to the United States. INA § 212(a).

While arriving aliens with fake or nonexistent entry documents are always subject to expedited removal, the class of noncitizens described in clause (iii) are not. Instead, for expedited removal to apply to this group, the commissioner or director of CBP, ICE, or USCIS must designate a class of noncitizens, defined by length of time in the United States, location within the United States, or both, up to and including noncitizens physically present anywhere within the United States who have not been in the country for more than two years.<sup>9</sup> In order to designate a class of noncitizens as being subject to expedited removal, the commissioner or director must publish a notice in the Federal Register. However, if she determines that the delay required to publish a notice in the

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<sup>8</sup> INA § 212(a)(6)(C). Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

INA § 212(a)(7). Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission-- (I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title[.]

<sup>9</sup> Commissioner: 8 CFR § 1.2, (d), 8 CFR 1001(d) The term Commissioner means the Commissioner of the Immigration and Naturalization Service prior to March 1, 2003. Unless otherwise specified, references to the Commissioner on or after that date mean those officials of the Department of Homeland Security who have succeeded to the functions of the Commissioner of the former Service, as provided in 8 CFR chapter I.

Federal Register would hurt the interests of the United States, or otherwise impede the effective enforcement of the immigration laws, the designation of a new class of noncitizens as being subject to expedited removal is effective as soon as it is issued.

#### 2004 Memorandum

On August 11, 2004, the Department of Homeland Security issued a memo expanding the classes of noncitizens subject to expedited removal. The memo made all unadmitted or paroled noncitizens inadmissible under sections 212(a)(6)(c) or 212(a)(7) (possession of no valid entry documents, or of fraudulent entry documents) apprehended within 100 air miles of the border, who could not prove to the satisfaction of an immigration officer that they had been in the United States for more than fourteen days, subject to summary removal procedures under INA § 235(b). This was a significant expansion of expedited removal, which, from the time it went into effect in April 1997, until the issuance of the memo, had only effected individuals arriving at ports of entry. As discussed above, the INA explicitly allows for an expansion of the group of people potentially subject to expedited removal, up to and including unadmitted or paroled noncitizens inadmissible under sections 212(a)(6)(c) or 212(a)(7) anywhere within the United States who have not been physically present for at least two years. The August 11, 2004, memorandum did not take full advantage of this statutory authority, but it did dramatically expand expedited removal. The memorandum gave the following reasoning for the expansion:

DHS believes that exercising its statutory authority to place these individuals in expedited removal proceedings will enhance national security and public safety by facilitating prompt immigration

determinations, enabling DHS to deal more effectively with the large volume of persons seeking illegal entry, and ensure removal from the country of those not granted relief, while at the same time protecting the rights of the individuals affected.

Designating Aliens for Expedited Removal, 69 FR 48877, FR 28-04.

The Code of Federal Regulations (8 CFR), adds to the INA provisions by reiterating that expedited removal applies to arriving aliens, as well as noncitizens who have not been “admitted or paroled following an inspection by an immigration officer at a designated port-of-entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility.” 8 CFR § 235.3(b)(1)(ii). That is, the individuals described in the previous paragraph. The Regulations also reiterate that the Commissioner may apply the expedited removal provisions to the fullest extent allowed by the INA either: 1) following a notice in the Federal Register, or 2) immediately, if the Commissioner determines that the interest of the country or enforcement of the immigration laws would be negatively affected by the delay required for notice and comment. *See* 8 CFR 235.3(b)(1)(ii).

#### Expedited Removal Procedures

Individuals who are encountered by immigration officials at a port-of-entry, or who are described in a notice pursuant to INA 235(b)(1)(iii)(II), and who are suspected of being subject to expedited removal, undergo certain limited procedures to determine inadmissibility. INA § 235(b)(1)(A)(1) refers only to the final stage of the process, stating that after an inadmissibility determination is made by an immigration officer, the



officer “shall order the alien removed from the United States without further review [unless the alien expresses fear of persecution in her country of origin].” INA § 235(b)(1)(A)(1). Procedures for determining inadmissibility are located in the Regulations, at 8 CFR § 235.3(b)(2)(i). I will briefly outline these procedures here, and they will be discussed in-depth in section four, below.

8 CFR 235.3(b)(2)(i) requires an immigration officer examining an individual suspected of being subject to expedited removal to take certain steps to determine whether the individual is inadmissible under §§ 212(a)(6)(C) or 212(a)(7) of the INA. This determination is made primarily through the use of a document called Form I-867A/B.<sup>10</sup> Form I-867A contains several paragraphs of information that the immigration official is required to read to the noncitizen, including information about the nature of the “interview,” the extent of the noncitizen’s rights during the expedited removal process, and the following statement:

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

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<sup>10</sup> “In every case in which the expedited removal provisions will be applied and before removing an alien from the United States pursuant to this section, the examining immigration officer shall create a record of the facts of the case and statements made by the alien. This shall be accomplished by means of a sworn statement using Form I-867AB, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act.” 8 CFR § 235.3(b)(2)(i).

After the immigration officer reads all of the information on the Form I-867, she takes a statement from the noncitizen regarding “identity, alienage, and inadmissibility.” 8 CFR§ 235.3(b)(2)(i). At this point the immigration officer moves on to Form I-867B, which contains four questions meant to elicit information regarding a noncitizens fear of returning to her country of origin. As will be discussed in detail below, it is critical that the immigration officer read these questions to prevent the *refoulement* of a noncitizen. *Id.* After Forms I-867A and B are completed, the immigration officer is required to read the noncitizen’s responses back to her, and to have sign and initial each page and any corrections made to the statement. *Id.*

At this point, the immigration officer will use Form I-860, which functions as both a charging document and a removal order. The officer is required to read the charges indicated on the I-860 to the noncitizen and the noncitizen must have an opportunity to respond to the charges. *See* 8 CFR§ 235.3(b)(2)(i). After the noncitizen is given an opportunity to respond to the charges on the I-860, the immigration official conducting the interview must obtain approval of the inadmissibility determination made on the form from a supervisor. *Id.* At this point, the noncitizen is served with the document and asked to acknowledge receipt by signing. *Id.* Once the I-860 is served on the noncitizen, she is promptly removed. For aliens from non-contiguous countries, this can mean waiting for an ICE charter aircraft to fill up with other noncitizens who are being repatriated. Additionally, the person being removed will be subject to a five-year ban on reentry. *See* INA § 212(a)(9)(A)(i).

## Detention during expedited removal proceedings

The INA and the Regulations require noncitizens placed in expedited removal proceedings to be detained throughout the expedited removal process. *See* INA § 235(b)(1)(B)(iii)(IV); 8 CFR § 235.3(b)(2)(iii). This means that the noncitizen is not eligible to be released pending an admissibility determination or pending removal after inadmissibility has been determined. Exceptions to this rule may be made by the Attorney General when the noncitizen has a medical emergency, or release is required “to meet a legitimate law enforcement objective.” 8 CFR § 235.3(b)(2)(iii). The mechanism for release in these limited situations is humanitarian parole, as described at INA § 212(d)(5).<sup>11</sup> However, the situations in which humanitarian parole may be used under 8 CFR § 235.3(b)(2)(iii) are more restricted than the general humanitarian parole guidelines at 212(d)(5)(A).

When a noncitizen in expedited removal proceedings successfully expresses a fear of returning to his home country, he is scheduled for an interview to determine whether he has a colorable claim for protection (this is called the “credible fear interview” or the “reasonable fear interview”). The noncitizen is required to be detained throughout this stage, which can take weeks. He will only be eligible for release from detention if he

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<sup>11</sup> INA § 212(d)(5)(A) reads as follows:

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

“passes” the screening interview. *See* INA § 235(b)(1)(B)(iii)(IV); 8 CFR 235.3(b)(4)(ii). If he is not determined to have a colorable claim for protection he will remain detained under he is removed. *See* INA § 235(b)(1)(B)(iii)(IV); 8 CFR 235.3(b)(4)(ii). The same humanitarian parole exceptions to mandatory detention that apply under 8 CFR § 235.3(b)(2)(iii) apply to noncitizens waiting for a credible fear determination. *See* 8 CFR § 235.3(b)(4)(ii).

#### Administrative review not available

Administrative review of expedited removal proceedings is precluded by the INA and the Regulations. This means that noncitizens who have been issued an expedited order of removal cannot appeal the order to an EOIR immigration judge, or to the Board of Immigration Appeals. *See* INA § 235(b)(1)(C); 8 CFR 235.3(b)(2)(ii). The statute and Regulations carve out an exception to this rule for individuals who claim under oath to be US citizens, or lawfully admitted permanent residents (LPRs), as well as for refugees under INA § 207, and for asylees under INA § 208. *See* INA § 235(b)(1)(C); 8 CFR § 235.3(b)(5).

#### Exceptions to Summary Removal: Claims for Relief

The expedited removal provisions are not meant to prevent protection seekers from applying for asylum in the United States. The INA and the Regulations establish procedures that take noncitizens who fear returning to their home countries out of expedited removal proceedings and place them in full-scale removal proceedings under

INA § 240. INA § 235(b)(1)(A)(ii)<sup>12</sup> The process for taking noncitizens out of expedited removal proceedings and placing them in removal proceedings under § 240 will be discussed in detail below.

### The Trump Executive Orders and Implementing Memoranda

On January 25, 2017, President Trump signed an executive order on immigration enforcement entitled “Border Security and Immigration Enforcement Improvements.” That executive order was then implemented through a Department of Homeland Security memorandum released on February 20, 2017, and entitled “Implementing the President’s Border Security and Immigration Enforcement Improvements Priorities.” In this subsection I will analyze the content and impact of the February 20, 2017, memorandum implementing President Trump’s expedited removal policies.<sup>13</sup> For the purposes of this subsection, the relevant section of the memorandum is section G, entitled “Expanding Expedited Removal Pursuant to Section 235(b)(1)(A)(iii)(I) of the INA.” Section G, is best read as both a legal policy document and a political statement directed at President Trump’s base. The section starts out with several paragraphs explaining the statutory

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<sup>12</sup> INA § 235(b)(1)(A)(ii): Claims for asylum:

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph B.

<sup>13</sup> President Trump signed numerous executive orders during his first days in office, including an executive order entitled “Enhancing Public Safety in the Interior of the United States,” which was signed on the same day as the executive order discussed in-depth in this section. That order and its implementing memorandum, “Enforcement of the Immigration Laws to Serve the National Interest,” are relevant to immigration enforcement, as they contain, among other things, changes to enforcement priorities, but an in-depth analysis of their content is outside the scope of this paper.

foundation for expedited removal, as well as Secretary Kelly's legal authority to apply expedited removal procedures to noncitizens anywhere in the country who have fraudulent papers or no papers, and who have been here less than two years. At this point, the document changes gears and becomes purely a political statement. I will analyze each paragraph below.

The surge of illegal immigration at the southern border has overwhelmed federal agencies and resources and has created a significant national security vulnerability to the United States. Thousands of aliens apprehended at the border, placed in removal proceedings, and released from custody have absconded and failed to appear at their removal hearings. Immigration courts are experiencing a historic backlog of removal cases, primarily proceedings under section 240 of the INA for individuals who are not currently detained.

This paragraph starts with a sentence that represents the feelings of many of President Trump's supporters. In particular, many believe that the protection seekers crossing the southern border present a security threat to the United States. The second sentence of this paragraph is true. Many people do not appear for their removal hearings, and this presents a significant rule of law quandary. The third sentence is also true; immigration courts face terrible backlogs that leave people in legal limbo for years. However, Secretary Kelly does not explain why increasing the number of people in removal proceedings will decrease the immigration court backlog. It is possible that the Secretary's thinking is that people who are placed in expedited removal proceedings, who do not have claims for protection, will not be "clogging up the system." Still, increasing enforcement will inevitably increase the strain on the immigration court system, as some of the

noncitizens swept up in enforcement actions in the interior of the country, who are now subject to expedited removal, will have at least colorable claims for protection. If these people are able to make it through the credible fear process, they will be placed in removal proceedings with merits hearing scheduled years into the future.

During October 2016 and November 2016, there were 46,184 and 47,215 apprehensions, respectively, between ports of entry on our southern border. In comparison, during October 2015 and November 2015 there were 32,724 and 32,838 apprehensions, respectively, between ports of entry on our southern border. This increase of 10,000- 15,000 apprehensions per month has significantly strained DHS resources.

There is no explanation for how this policy would lead to fewer apprehensions.

Ramping up enforcement in the interior will further strain resources without decreasing the number of people at the border. It should also be noted that fewer people are coming to the southern border than we have seen in decades. While we did see an increase in Central American asylum seekers in 2014 and up to the present, overall numbers are still low, and fewer Mexicans than ever are crossing the border. This is relevant, as the President and his supporters have frequently directed racist and factually incorrect rhetoric at Mexico and people of Mexican descent.

Furthermore, according to EOIR information provided to DHS, there are more than 534,000 cases currently pending on immigration court dockets nationwide- a record high. By contrast, according to some reports, there were nearly 168,000 cases pending at the end of fiscal year (FY) 2004 when section 235(b)(1)(A)(i) was last expanded. This represents an increase of more than 200% in the number of cases pending completion. The average removal case for an alien who is not detained has been pending for more than two years before an immigration judge.

Again, there seems to be an assumption that people newly subject to expedited removal because of this policy change will not seek protection in the United States. It is also troubling that procedural protections are being taken away to (ostensibly) reduce administrative backlogs. Further, it is troubling that the Secretary does not consider push factors in his analysis. Many international events have taken place in the years since 2004, and these events have displaced a large number of people. In Mexico, a flare up in drug-trafficking violence along the border (and now in the interior) pushed many people into the United States, and in the Northern Triangle of Central America, powerful gangs have become quasi-state actors, displacing large portions of the population. If people are being displaced by persecution, it does not make sense, if we take our international obligations seriously, to respond by decreasing procedural protections for asylum seekers in the United States.

In some immigration courts, aliens who are not detained will not have their cases heard by an immigration judge for as long as five years. This unacceptable delay affords removable aliens with no plausible claim for relief to remain unlawfully in the United States for many years.

It is somewhat misleading to characterize noncitizens who are awaiting adjudication of their case as being “unlawfully in the United States.” While it might be true that they entered the country illegally, they are not accruing unlawful presence while waiting to have their application adjudicated. They are certainly not flaunting the law. It is also important to note that aliens subject to expedited removal who are not detained are either not affected by this memo, or



they have passed a credible or reasonable fear interview. None of the people affected by this memo will be released from detention unless they have demonstrated to an asylum officer that they have at least a significant possibility of prevailing on the merits of their claim.

Section G concludes with another technical paragraph, directing DHS to publish the new expedited removal policy in the Federal Register, and directing CBP and ICE to follow the new policy. The February 20, 2017, memorandum is an interesting document. It does significant discursive work, speaking to a base of anti-immigrant Trump supporters, while also announcing a legal policy. Reading the executive orders and memoranda signed and released in the early spring of 2017, it became clear that these texts were less legal documents than propaganda. The February 20, 2017 memorandum is a perfect example of this. Poor logic and bad facts are intermingled with nativist political discourse in an agency policy document that will have a real impact on the lives of many people. As of the writing of this paper, the new rules have not gone into effect, but Secretary Kelly has directed his subordinates at DHS to publish the required notice in the Federal Register. As soon as the notice is published the expansion of expedited removal will come into force.

### **Constitutional Issues: The Due Process Rights of Non-Citizens**

This section discusses the Constitutional rights of noncitizens during the expedited removal process. The question of what due process rights, if any, noncitizens are entitled to, has been litigated since the end of the 19<sup>th</sup> Century. While some questions

have been more or less resolved, it remains unsettled whether unadmitted non-resident aliens have Constitutional rights. It might sound shocking that individuals physically within the United States would not be able to avail themselves of the legal protections guaranteed to “all persons” by the Constitution, but the reality is that noncitizens applying for admission to the country are on very flimsy legal footing in terms of their ability to demand meaningful procedural due process. One primary reason for this is the legal ability of a noncitizen to be physically within the United States while simultaneously being unadmitted. This “legal fiction” places noncitizens who are detained in the United States pending either a positive credible fear determination or the issuance of an expedited removal order (*see* sections 4 and 5, below), in essentially the same shoes as a noncitizen standing at the physical border of the country.

#### Early Case Law

The Supreme Court did not meaningfully address immigration until the end of the 19th Century. In 1889, the Court released its ruling in *Chae Chan Ping v. United States*, generally known as the “Chinese Exclusion Case,” and the first case to establish the doctrine of federal plenary power over immigration. *Black’s Law Dictionary* defines “plenary” as “full; complete; entire,” and in the constitutional context federal plenary power over an area of law refers to the federal government’s absolute, unchecked authority to regulate that area. This means that when the political branches of government act in this area, the judiciary is not empowered to rule on the constitutionality of that action. This doctrine is a striking departure from the rule, first established in *Marbury*, that it is the job of the judiciary to interpret the constitutionality of the actions of the

political branches. In *Chae Chan Ping*, the Court cited an opinion by the author of the *Marbury*, Chief Justice Marshall, in which Marshall wrote that:

*The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.*

*The Exchange*, 7 Cranch 116, 136, cited in *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (emphasis added). Relying on *The Exchange*, the Court in *Chae Chan Ping* held that:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

*Chae Chan Ping*, 130 U.S. at 609. The basic idea articulated in *Chae Chan Ping*, that the power to regulate immigration comes not from any constitutional provision, but instead from the United States' status as a sovereign nation, has not been seriously questioned in the nearly 150 years since the case was published. Today, when the executive acts on immigration, particularly when it acts with the express authority of Congress, the President is considered to be acting at the apex of his power. For the most part, the judiciary stays out of the way unless fundamental rights are implicated, and even then, as I will explain below, courts are reluctant to extend significant procedural protections.

Three years after *Chae Chan Ping*, in *Ekiu v. United States*, 142 U.S. 651 (1892), the Court further articulated the plenary power doctrine, both reaffirming the notion that the ability to regulate immigration is inherent in sovereignty and holding that “[t]he decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Ekiu*, 142 U.S. at 651. Over half a century later, in *United States ex rel. Knauff v. Schaughnessy*, 338 U.S. 537, 544 (1950), the Court reiterated its hard line stance on the due process rights of noncitizens, holding that “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *Knauff*, 338 U.S. at 544. Three years later, in *Schaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 224–25 (1953), the Court extended their holding in *Knauff* to include resident aliens with significant ties to the United States, going so far as to find that the government could indefinitely detain a respondent on Ellis Island without any opportunity for a hearing. The court in *Mezei* relied on the legal fiction that the respondent, although physically on Ellis Island, was legally treated “as if stopped at the border,” adding that “[n]either respondent's harborage on Ellis Island nor his prior residence [in the United States] transforms this into something other than an exclusion proceeding.” *Mezei*, 345 U.S. at 224.

#### Recent Case Law

Since the turn of the 21<sup>st</sup> century, and in particular after 9/11, case law on the due process rights of noncitizens has been dynamic. The Supreme Court has consistently held that indefinite detention is not constitutional without significant due process. Starting in

2001, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that the government may not indefinitely detain removable aliens past the 90 day removal period without allowing for periodic review of the need for continued detention.<sup>14</sup> Then, two years later in *Demore v. Kim*, 538 U.S. 510 (2003), the Court held that the government may categorically detain a lawful permanent resident during the pendency of removal proceedings. While *Zadvydas* was a (mild) check on the government's ability to detain noncitizens for extended periods of time without individualized review, *Demore* was an extension of that ability to the pre-removal period. Two more years passed before the Court extended the *Zadvydas* protections to inadmissible aliens with removal orders. See *Clark v. Martinez*, 543 U.S. 371 (2005). The holding in *Clark* prevented the government from indefinitely detaining, without periodic review, inadmissible aliens (as opposed to removable permanent residents) who have been ordered removed. Then, in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court held that alien "enemy combatants" held indefinitely at Guantanamo Bay Naval Base had a right to challenge their detention. Notice that all of these cases have to do with the ability of a noncitizen to challenge indefinite, arguably arbitrary, detention. While these are difficult cases, they present a different, and perhaps less contentious set of issues than the question of whether inadmissible noncitizens are entitled to meaningful due process during the inadmissibility and fear determination stages of expedited removal proceedings. This is because most of us instinctively understand the injustice of locking up a human being for an indefinite amount of time without a neutral adjudicator deciding whether the restriction on liberty is

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<sup>14</sup> See 8 U.S.C. § 1231(a)(1).

necessary. It is less instinctively clear whether a noncitizen, who is effectively knocking on the door, is entitled to meaningful procedural protections before a sovereign nation decides whether to let her in. The Courts have not given us clarity on the issue, and in April 2017, the Supreme Court denied certiorari in *Castro v. Department of Homeland Security*, 835 F.3d 422 (3d Cir. 2016), leaving a circuit split on the question of whether an unadmitted noncitizen with no ties to the United States may challenge the government action leading to her detention. Ultimately, it is unclear what, if any, procedural protections unadmitted aliens are entitled to during the expedited removal process. Of course, immigration officers, like all government agents, are prohibited from engaging in “arbitrary and capricious” violations of their own organic statutes, implementing regulations, and other rules, but the possibility of a cause of action under the Administrative Procedures Act is a far cry from the right to meaningful due process under the Fifth Amendment.<sup>15</sup> In the end, however, there is no doubt that under international law, protection seekers may not be sent back to countries where their lives will be threatened on account of a protected characteristic, or where they will be tortured with the acquiescence of the government. This remains true whether domestic law allows for lax procedures that lead to *refoulement*, in violation of our international legal obligations, and common decency.

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

While expedited removal dates back to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the homeland security state

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<sup>15</sup> See 5 U.S.C. §§ 701-06.

as we know it today was born in the aftermath of 9/11. Before September 11, 2001, the threat of international terrorism was not of particular concern to most Americans, and the immigration enforcement bureaucracy was not tied directly to a larger security state. In the pre-9/11 world, no one described the United States as the “homeland;” the incredible amount of discursive work performed in the decade after 9/11 to build a massive homeland security state premised on an endless global war on terrorism requiring a constant state of emergency had not yet been done. Before March 1, 2003, the components of DHS (CBP, ICE, and USCIS) charged with enforcing the immigration laws did not exist in their current form. In the approximately 15 years since the Homeland Security Act, the legislation creating the Department of Homeland Security from a hodgepodge of existing federal agencies, was signed into law, the homeland security state has grown exponentially. DHS has become the third largest federal bureaucracy, and the Border Patrol, a paramilitary component of DHS, has become, by far, the largest federal law enforcement agency. At the same time, today’s massive, militarized Border Patrol retains much of the organizational culture that it developed during its seven decades as a component of legacy INS.

### **CBP Expedited Removal Procedures**

This section will describe the procedures used by CBP to process noncitizens subject to expedited removal. As mentioned above, CBP consists of both Customs and Border Protection Agents working under the Office of Field Operations (OFO)—these are the blue-uniformed officers that we interact with at the airport—and Border Patrol Agents. Both types of agents enforce immigration laws, CBP OFO Agents do so at ports

of entry and Border Patrol Agents do so along the border between ports of entry. I will concentrate in this section on the procedures used by the Border Patrol (BP), as the population that I am most interested in interacts primarily with BP after crossing the border without authorization.<sup>16</sup> Most unauthorized border crossers who come into contact with the Border Patrol do so in the western deserts or the riparian scrublands of the Rio Grande Valley of South Texas. The following subsection will describe the law and procedure governing these interactions.

Initially, a determination must be made that an individual not encountered at a port-of-entry, and not in possession of valid entry documents, has not been in the United States for at least 14 days. The Trump administrations' new policies on expedited removal for individuals described by INA § 235(b)(1)(A)(iii) mean that, once the new rules go into effect, this moment will take place much more frequently outside of the border region, and therefore that the consequences of the determination will affect more people. Unfortunately, there is little guidance on the exact procedure, if any, that takes place when a noncitizen encounters a Border Patrol agent. The burden is on the noncitizen to convince the CBP agent that she has been here for at least 14 days. While the consequences of a finding that a noncitizen cannot prove physical presence in the United States for at least 14 days are significant, effectively stripping a noncitizen of meaningful procedural protections, the procedure at this stage is not memorialized in the statute, the Regulations, or the CBP Inspector's Field Manual. Because of this, we do not

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<sup>16</sup> With that said, a significant percentage of Central American protection seekers present at a port of entry and are then placed in expedited removal proceedings as arriving aliens.



know when this determination takes place (i.e. before or after arrest), we do not know whether the individual suspected of being subject to expedited removal is given time to collect any relevant documentation or evidence, and we do not know if the individual is allowed access to counsel.

If the subject is placed in expedited removal, she will have no chance to collect additional evidence or to meaningfully contest inadmissibility and removability. On the other hand, if the subject is placed in full removal proceedings under INA § 240, she has the right to consult with counsel, and to make her case in a full hearing before an immigration judge.

Once a border patrol agent determines that a noncitizen will be subjected to expedited removal, the noncitizen will generally be taken to a Border Patrol sub-station for the next stage of proceedings. At this stage the immigration officer must determine whether the noncitizen is inadmissible based on 212(a)(6)(C) or 212(a)(7) (fake entry documents or lack of entry documents). The procedure for making this determination centers around Form I-867A/B.

Form I-867 contains two parts, I-867A, entitled "Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act," and I-867B, entitled "Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act."

The purpose of the I-867A is to advise the noncitizen of her rights, and to determine whether she is inadmissible. It includes warnings such as the following:

This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be

subject to criminal or civil penalties, or barred from receiving immigration benefits in the future.

This warning is followed by a paragraph about *nonrefoulement* and the opportunity to undergo a fear interview. The bottom third of the page is left blank and is meant to contain the officer's written record of the interview. The I-867B is essentially a continuation of the I-867A, and contains the following four questions, which are required to be asked by the CBP agent:

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

These four questions are meant to prevent *refoulement* of noncitizens subject to expedited removal. When a noncitizen answers these questions in a way that indicates a fear of returning to the country of origin, the noncitizen is required to be referred to USCIS for further screening. The I-867B also contains the "jurat" mentioned in its title, which, simply means that it is a statement on an affidavit saying when, where, and before whom it was signed. In the context of the I-867, it is a signature line where the alien swears that all of her statements are true.

The inadmissibility determinations and expedited removal orders made via these station-house interviews conducted using Form I-867 must be given supervisory review

by, at least, a “second line supervisor.” A “second line supervisor” in law enforcement would typically be a manager who supervises an officer charged with directly supervising line officers. In the Border Patrol, this will typically be a “Field Operations Supervisor,” otherwise known as a “watch commander.” This person is a GS-14, and is akin to the shift manager.

If an immigration agent successfully recognizes a protection seeker’s claim of fear, the protection seeker is scheduled for a fear interview with USCIS. Generally, the protection seeker will be transferred from the Border Patrol sub-station, or nearby short-term detention facility, to a detention facility used for longer-term detention. It can take up to several weeks for a screening interview to be scheduled with USCIS, and the protection seeker will, absent truly extraordinary circumstances, be detained until she “passes” the screening interview (*see* below, section five, for details on asylum screening interviews).

### **Analysis of CBP Procedures**

Multiple reports by both governmental and non-governmental agencies have found that CBP does a poor job of screening protection seekers. These reports tend to find that CBP over performs its enforcement role at the expense of its responsibility to ensure that the U.S. fulfils its international refugee protection obligations.

The U.S. Commission on International Religious Freedom (USCIRF), a non-partisan Congressional commission, has released two reports on expedited removal since ER became the law of the land in 1996. The first report, released in 2005, found that CBP did a poor job of determining which noncitizens subject to expedited removal were

potential protection seekers. USCIRF then released a follow-up “report card” in 2007 to report on how well U.S. government agencies were implementing the 2005 report’s suggestions. Then, in 2016, USCIRF released a full follow-up to the 2005 report. The findings in the follow up report, on U.S. Customs and Border Protection’s practices during the expedited removal process, were extremely discouraging. It was troubling to read how CBP agents behaved even under close supervision, and one wonders how do the agents do their jobs when they aren’t being observed. Or are these violations of procedure evidence only of incompetence? Either way, the result is a situation in which CBP agents hurt protection seekers by intentionally breaking the law, or by incompetently enforcing it. It was also discouraging to see that USCIRF observers reported many of the same procedural deficiencies in 2014-15 that they observed during research for the 2005 study. In the decade between the release of the 2005 and 2016 studies, expedited removal was vastly expanded, and CBP grew exponentially, but CBP procedures and culture remained dangerously flawed.

In a section titled “Attitudes toward Asylum,” USCIRF reported that CBP attitudes about asylum are negative and based on ignorance of country conditions, and ignorance of CBP’s role as an agency. USCIRF was troubled by the skepticism expressed by CBP employees of asylum claims both generally and by citizens of certain countries, as well as their ignorance of the “potential negative implications their skepticism might have for case processing.” Put more directly, USCIRF was concerned that CBP agents did not seem to understand that their bias has the potential to lead to the deaths of protection seekers who are unjustly returned to their home countries. The quotations

below are from the 2016 report. These excerpts are dramatic examples of the profound ignorance of some CBP officers regarding conditions in sending countries, and the motivations of protection seekers:

1. “[Two] different [Office of Field Operations (OFO)] officers told USCIRF that migrants, especially Mexicans, believe they will be let into the country if they say they are afraid or want political asylum, and then they retract those claims when they learn they will be detained. One stated that ‘political asylum is putting smugglers out of business.’ Another OFO officer told USCIRF that he believes that many individuals who claim fear on arrival are not really afraid, because ‘those with real fear can apply overseas and bring their family.

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

2. “A BP agent at one station drew a distinction between ‘legitimate’ asylum seekers who present themselves at ports of entry, as opposed to those apprehended along the border. USCIRF also heard this view from a BP headquarters official, who said that asylum seekers show up at ports of entry, they do not get apprehended by BP.”
3. “Another BP agent stated that Mexican asylum seekers all tell the same story about fleeing the cartels, which he viewed as indicating coaching , if not fraud.” It is telling that the BP agent assumed that a large quantity of Mexican asylum seekers with claims related to drug cartels indicated not widespread persecution by drug trafficking organizations, but instead dishonesty on the part of the asylum seekers. This is one of many examples of ignorance of country conditions mixed with anti-Latino bias that come up frequently in this context. The mixture can be deadly for protection seekers. Another agent at the same BP station disclosed that he “believes that the vast majority of those claiming fear did not meet the definition for asylum, *although he did [not] recognize that this was not BP’s job to determine.*”
4. “One BP agent implied that all fear claims made to ICE are invalid, stating that they result from individuals talking to other detainees and receiving the Know Your Rights orientation. *The same agent “drew a*

*distinction between Central Americans and other asylum seekers, saying that Central Americans always have family in the United States, 'unlike Somalis, for example, who are coming here because they really want to get away' from their country.*"(emphasis added)

5. USCIRF also relates the story of a BP supervisor who was incredulous regarding Chinese religion-based asylum claims, and told USCIRF that "Chinese individuals often say they are Christian but cannot even name the church they attend; when USCIRF informed him that many Chinese Christians worship at home he seemed surprised.<sup>17</sup>"

### Consequences

When CBP agents fail to properly screen potential asylum seekers who find themselves in expedited removal proceedings there are cascading consequences for the protection seekers. First, *refouled* protection seekers can face serious harm in their countries of origin when they are sent back without being given the opportunity to seek asylum. Second, protection seekers who are unlawfully removed to their home countries through the expedited removal process, and then return to seek protection in the United States, are at a distinct disadvantage compared to protection seekers who have not been previously removed. This is because provisions of the INA have been interpreted to preclude previously removed protection seekers from eligibility to apply for, or be granted, asylum. However, the United States is prevented by treaty obligations and the international legal principle of *non-refoulement* from deporting any person to a country in which he or she will be persecuted or tortured. The requirement to abstain from returning noncitizens to situations in which they will be harmed led to the creation of a form of protection called "withholding of removal." Withholding of removal is a bare bones form

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<sup>17</sup> Human Rights Watch, "Barriers to Protection" at 31.

of relief. Grantees are not removed to their immediate countries of origin, and they are given an Employment Authorization Document (a work permit), but they are not given a path to citizenship and they may not sponsor family members. Withholding of removal also fails to give grantees true stability, as it is theoretically revocable (should the situation in their country of origin improve, or should a third country accept the grantee). Paradoxically, withholding of removal is both objectively less desirable, and significantly more difficult to obtain than asylum. It is more difficult to be granted withholding of removal than asylum for several reasons. First, while the burden of proof is always on the applicant for relief from removal, the standard of proof for asylum differs from the standard of proof for withholding of removal. Applicants for withholding of removal must prove to the immigration judge that it is “more likely than not” that they will be persecuted or tortured if returned to their country of origin. This is in contrast to asylum’s “well-founded fear” standard.

#### A Note on ICE Referrals to USCIS

Data from DHS suggests that the biases, and ignorance of some CBP officers weakens their ability to flag protection seekers for further screening. Human Rights Watch reports that, despite CBP’s proactive duty to identify potential protection seekers from the pool of noncitizens placed in expedited removal, and refer those potential protection seekers to USCIS, the majority of credible and reasonable fear referrals come from Immigration and Customs Enforcement (ICE). Individuals in expedited removal proceedings typically come into contact with ICE after they are screened by Customs and Border Protection. This is because CBP makes an inadmissibility determination using the

process discussed above, and then transfers noncitizens with expedited removal orders to ICE Enforcement and Removal Operations (ERO). ERO is charged with actually executing the removal orders by physically deporting noncitizens (in the case of Central Americans, this means flying deportees home via an ICE chartered flight). Often, there are not enough people from a given country, with final expedited removal orders, to fill a plane. This means that people have to wait until enough people from, say, Honduras, are ready to be deported. During this time, people waiting to be deported are detained, and communicate with ICE ERO staff members about the status of their cases. Data compiled by Human Rights Watch suggests that the majority of Northern Triangle credible and reasonable fear referrals come from these interactions. This is troubling, as ICE staff members do not have a proactive duty to flag noncitizens who fear returning to their countries of origin. These referrals are coming about in an ad hoc way, when a protection seeker happens to mention to the ICE official that they do not want to return to their country because they fear persecution or torture. Because ICE has no legal duty to ask about a noncitizen's fear of returning to their country of origin, it is likely that many people do not bring up their fear of returning home. However, even if this is not the case, the fact that CBP is letting these people slip through the system is evidence of, at best, a lack of diligence, and at worst active abdication of the agency's legal duty to prevent *refoulement*.<sup>18</sup>

## **5. U.S. Citizenship and Immigration Services (USCIS)**

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<sup>18</sup> Human Rights Watch provides the following example: [i]n 2012, three-quarters of the credible fear referrals conducted by USCIS came from agencies other than CBP, and in the same year CBP referred only 615 or the 2,405 Hondurans who received credible fear interviews.



In this section I will describe the Credible Fear Interview, and Reasonable Fear Interview processes focusing primarily on the regulations, and on interpretations of relevant legal standards found in agency training materials governing this important hurdle in the asylum process. USCIS asylum officer training materials play an important role in defining the legal standards used in credible and reasonable fear interviews. In the years since expedited removal went into effect, there have been several iterations of these training materials. Below, I discuss the 2014 Credible Fear Lesson Plan in detail, as it contained significant, and controversial, changes to the credible fear standard of proof. In the wake of the January 2017 Executive Orders signed President Trump, new credible and reasonable fear training materials were released. These new materials did not contain significant changes to the relevant legal standards, and I will not be discussing them specifically.<sup>19</sup>

After explaining the relevant procedures and legal standards used in credible and reasonable fear interviews, I will look at the integrity of the process by unpacking reports on credible and reasonable fear interview procedures in the real world. For that analysis, I will rely primarily on two sources, the most recent USCIRF report on expedited removal procedures, and a report by Human Rights Watch on the same topic. I will discuss the degree to which credible and reasonable fear interviews conducted in the field diverge from the practices dictated by the relevant authorities.

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<sup>19</sup> The new lesson plans can be viewed in full at: <http://www.aila.org/infonet/raio-asylum-division-training-course-reasonable>.

The first subsection will describe the CFI and RFI procedural framework. Understanding this framework, and what it requires of asylum officers, is crucial in order to understand the analysis presented later in the section. Sub-section two will analyze the ways in which the CFI and RFI processes fall short.

### **Credible and Reasonable Fear Interview Procedures**

In this subsection I will describe credible and reasonable fear interview procedures, as well as the relevant legal standards of proof used in credible and reasonable fear interviews. Procedures for conducting credible and reasonable fear interviews are found primarily in Title 8 of the Code of Federal Regulations, and in agency training materials. However, before I unpack these procedures and legal standards I will briefly discuss the training received by the people charged with making credible and reasonable fear determinations.

#### **Asylum Officer Training**

The INA defines an Asylum Officer as an immigration officer who has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full time adjudicators of asylum applications under INA § 208, and who is supervised by an immigration officer meets the same requirements and has substantial experience adjudicating asylum applications. *See* INA § 235(b)(1)(E).

Asylum officers receive extensive training on conducting credible and reasonable fear interviews. This training features instruction on the statutory provisions and regulations governing expedited removal, as well as relevant case law. Additionally, all asylum officers must complete the Asylum Officer Basic Training Course, a five-week

course that includes modules on various topics related to adjudicating affirmative asylum claims. Additionally, the course includes lessons on both the credible and reasonable fear standard and on the procedures for determining whether a noncitizen in expedited removal should be found to have a credible or reasonable fear of returning to their home country. The credible fear lesson, for example, is extensive, lists seven total “performance objectives,” cites to ten different documents for background reading, and consists of 47 pages of material. The reasonable fear lesson is 35 pages and includes six performance objectives and four background reading documents. Asylum officers are tested on their knowledge of the credible and reasonable fear standards through a written test.

While the instruction that asylum officers receive is rigorous and comprehensive, it is important to remember that it is limited in that it is designed for non-lawyers. The asylum officer position is considered a legal claims or adjudicator position, but it does not require a law degree and, while many asylum officers are lawyers, many others are not. Above, in section five, I discussed the serious problem of Border Patrol Agents “playing lawyer” by unlawfully judging the strength of protection seekers’ claims. This problem is less severe in the asylum officer corps. This is because asylum officers are statutorily charged with evaluating claims, have more stringent educational requirements than Border Patrol agents, and receive the extensive training mentioned above. However, it is still somewhat problematic that non-lawyers are responsible for making these life or death legal determinations, often in less than ideal circumstances, and under the pressure of a never ending stream of applicants. Indeed, it is well known that asylum officers, the

government employees who conduct credible and reasonable fear interviews have extremely heavy caseloads. Like the immigration enforcement and benefits systems as a whole, the expedited removal asylum screening system is faced with too many cases to adjudicate, in too little time, with too few resources. It is worth noting that, while DHS has grown exponentially in the short time that it has been in existence, funding is disproportionately directed towards enforcement in the form of “boots on the ground” in the border region. It is also worth noting that an asylum officers’ primary focus is meant to be the adjudication of affirmative asylum applications, but that a large portion of asylum officers spend a large portion of their time conducting credible and reasonable fear interviews.

Asylum officer training materials will be used throughout this section to define and interpret legal terms of art. These materials give fantastic insight into agency thinking on the credible and reasonable fear process, as training materials serve as statements of agency policy and agency interpretation of the INA and the regulations. Once we know how USCIS defines, and tells its asylum officers to define, legal standards of proof, we have against which we can analyze asylum officer divergence from agency policy.

#### Procedures for all fear interviews

The following procedures are used for both credible fear interviews and reasonable fear interviews. As a reminder, once a noncitizen in expedited removal proceedings expresses fear of returning to her home country to a CBP or ICE agent, she is required to be referred to the USCIS Asylum Office for an interview to determine whether she has a viable claim for asylum or withholding of removal. If the asylum officer finds that she

does has a colorable claim, she will be placed in removal proceedings before EOIR to present her claim. The following procedures take place directly after the initial referral from CBP or ICE to USCIS.

As discussed in section two, above, noncitizens in expedited removal proceedings who are waiting for a credible or reasonable fear determination are required to be detained unless there is a compelling humanitarian reason (as defined by DHS) to parole the noncitizen. *See* INA § 235(b)(1)(B)(iii)(IV); 8 CFR § 235.3(b)(4)(ii).

#### Access to Counsel

The regulations state that noncitizen is required to be given access to, and time to consult with, “any person or persons of his or her choosing,” but limits this access by requiring that the consultation “be made shall be made available in accordance with the policies and procedures of the detention facility where the alien is detained, shall be at no expense to the government, and shall not unreasonably delay the process. *See* 8 CFR 235.3(b)(4)(ii). It should be noted that most immigration detention facilities are managed by government contractors such as the Geo Group, and CoreCivic (previously Corrections Corporation of America). Because of this, the “policies and procedures of the detention facility where the alien is detained” are the policies of private corporations with little, if any, accountability to the public. In my experience, these companies have no incentive to facilitate access to counsel, and often have arbitrary policies that cannot be appealed. Further, these detention facilities are often located in rural areas, which isolates protection seekers and makes it more difficult to obtain counsel, particularly within the short timeframe for credible and reasonable fear interviews.

### Nature of interview and interview setting

The asylum officer is required to conduct the interview in a non-adversarial manner. This requirement is meant to ensure neutrality in the credible or reasonable fear process. Although the asylum officer has an inquisitorial role, she does not act a prosecutor, or “adversary.” Her role is to determine whether the applicant has a credible fear of persecution or torture, not to prove that she does not. The regulations go on to state that: “[t]he purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” To further the goal of eliciting all information necessary to make a determination, interviews are required to take place in private. *See* 8 CFR § 208.3. These interviews take place either face to face at an ICE detention center or by telephone, with the applicant speaking from the detention center to an asylum officer in a different location. The exponential rise in the number of credible and reasonable fear interviews over the last several years has meant that the majority of credible and reasonable fear interviews take place via telephone. When the applicant speaks a language other than English, the interview is conducted through an interpreter. This means that three people in three separate locations take part in a typical credible or reasonable fear interview. The use of telephones to conduct such emotionally-charged, extremely personal interviews is troubling as a matter of common decency, but more importantly for the men and women being interviewed, it presents a barrier between interviewer and interviewee that makes it more difficult for the adjudicator (that is, the interviewer) to assess credibility.

## Determination

Asylum Officers are required to write a factual summary of the credible or reasonable fear interview. The asylum officer is supposed to then read the factual summary to the applicant, and to give the applicant an opportunity to make any corrections to the asylum officer's interpretation of the substance of the interview. The regulations require the factual summary and review to be completed at the same time as the interview. 8 CFR § 208.30(d)(6); USCIS, RAIIO, CFI Lesson at 44.

## Immigration Judge Review

Finally, applicants for both asylum and withholding of removal have the right to "appeal" the decision of an asylum officer to an EOIR immigration judge (IJ). This process, known colloquially as "IJ review," should take place within seven days of the initial credible or reasonable fear determination. Like the majority of CFIs and RFIs, the vast majority of IJ reviews do not take place in person. However, unlike asylum interviews, which generally take place via telephone, IJ reviews generally take place via televideo, a "Skype"-like technology. The IJ's decision is final; if she affirms the asylum officer's negative determination, the applicant will be removed, and if she reverses the asylum officer's decision, the applicant will be placed in full removal proceedings under INA § 240. By statute, there is no right to administrative or judicial review of the IJ's decision. *See* 8 CFR 208.30(g)(2)(iv)(A).

## **Credible Fear Standard of Proof: The "Significant possibility" Standard**

In this section I will explain the standard of proof used in credible fear interviews. I will rely primarily on asylum officer training materials to unpack the meaning of

standard of proof used by asylum officers to determine whether an applicant has a credible fear of persecution.

Credible fear is established when an applicant is able to show to an asylum officer that there is a “significant possibility” that she will prevail in a full removal hearing to adjudicate her claim for asylum. INA § 235 (b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(2), (3).

The “significant possibility” standard of proof has not been defined in the INA nor the regulations, and it has not been interpreted in case law. Thus, the “significant possibility” standard is nothing like a bright line rule. The 2003 Credible Fear Lesson Plan freely admits that the “significant possibility” standard is undefined: [n]either the statute nor the immigration regulations define the “significant possibility” standard of proof, and the standard has not yet been discussed in immigration case law. The 2003 Lesson Plan included a quotation by Senator Orrin Hatch of the Senate Judiciary Committee. During Senate debate regarding the enactment of expedited removal Senator Hatch, a conservative Republican, stated that he considered the credible fear standard to be “a low screening standard for admission into the usual full asylum process.”<sup>20</sup> Among other changes, the 2014 Lesson Plan removed this language. The 2014 Lesson Plan also emphasizes that the significant possibility standard is higher than UNHCR’s “not manifestly unfounded” standard, and bolds the line: “A claim that has no possibility, or only a minimal or mere possibility, of success, would not meet the “significant possibility” standard.” However, the Lesson Plan states, without emphasis, that the

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<sup>20</sup> Senate, “Proceedings and Debates of the 104th Congress, Second Session,” *Congressional Record*, Vol. 142 No. 136, September 27, 1996.



“significant possibility” standard does not require the applicant to show that she is more likely than not to succeed on the merits of her claim in a full removal hearing under § 240.

#### Use of D.C. Circuit Case Law

Cognizant of the fact that asylum officers have very little to go on in making credible fear determinations, the Credible Fear Lesson Plan looks to DC Circuit case law for guidance on the “significant possibility” standard:

In a non-immigration case, the “significant possibility” standard of proof has been described to require the person bearing the burden of proof to “demonstrate a substantial and realistic possibility of succeeding.” While this articulation of the “significant possibility” standard was provided in a non-immigration context, the “substantial and realistic possibility” of success description is a helpful articulation of the “significant possibility” standard as applied in the credible fear process.

2014 Lesson Plan at 15. While the case cited by the Lesson Plan, *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (DC Cir. 1999), is not an immigration case, that fact alone would not necessarily make it unusual or unpersuasive. There are other areas, classification of crimes as immigration consequence-inducing aggravated felonies based on federal sentencing case law, for example, where this kind of comparison makes some sense, but in this case it is not particularly helpful. *Holmes* is a tort case about whether a *prima facie* civil claim for spoliation of evidence had been made. One element of the cause of action for spoliation of evidence was “a significant possibility of success of the potential civil action” if the missing evidence were available. In order to decide the case, the court in *Holmes* had to figure out what was meant by “significant possibility.” To do this, they

looked to their own case law on the new tort of spoliation of evidence and found that, in a previous opinion in the same case, “significant possibility” was defined as “a substantial and realistic possibility.” In other words, under DC case law, a significant possibility of success in a tort claim for spoliation of evidence is a “substantial and realistic possibility.” By itself, the phrase “substantial and realistic possibility” is not particularly useful, as it leaves “substantial” and “realistic” undefined. To be fair, the DC Circuit tells us that a “significant possibility” is less than a preponderance of the evidence, and more than “significant evidence.” We know that a preponderance is more likely than not, or greater than 50-50, but we do not know, without more information, what “significant evidence” means. In any case, none of this seems useful for determining the probability of success of a potential applicant for asylum’s claim. Unlike the categorical and modified categorical methods, which more closely compare apples to apples (they compare statutory definitions of crimes to statutory definitions of crimes), USCIS’s use of the D.C. Circuit’s implied definition of “significant possibility” from a personal injury case seems out of place and not particularly helpful.

The “significant possibility” standard has not remained the same throughout the life of expedited removal. The Asylum Officer Basic Training Course interpretation of the meaning of the significant possibility standard was, arguably, revised in 2014, through a revision of the Credible Fear Lesson Plan. Some commenters have interpreted the new Lesson Plan’s definition of “significant possibility” as requiring a heightened standard of proof, pointing, in particular, to the Plan’s emphasis on the nexus element of a claim for protection under both asylum under section 208 and withholding of removal

under section 241(b). See below for further discussion of changes made for the 2014 Credible Fear Lesson Plan.

Ultimately, the Lesson Plan adopts the DC Circuit's interpretation, summing up the "significant possibility" section of the Lesson Plan by stating that "the credible fear 'significant possibility' standard of proof can be best understood as requiring that the applicant 'demonstrate a *substantial and realistic possibility* of succeeding[,]'" and adding that applicants need not show that they are more likely than not to succeed in a full hearing on the merits of their claim. (cite). While it is not unheard of to use non-binding case law in order to help an adjudicator think through a legal question, it *is* unusual to use case law with such a tenuous connection to the legal issue at hand to interpret such an important standard of proof.

### **The Reasonable Fear Interview**

In this section I will explain the standard of proof used in reasonable fear interviews. The primary difference between the reasonable fear interview and the credible fear interview is, in fact, the standard of proof used by the asylum officer to determine whether the applicant will be allowed to move on to the next stage of the asylum process. As above, I will use asylum officer training materials on reasonable fear to unpack the standard of proof used in reasonable fear interviews. However, before I explain the reasonable fear standard of proof, I will explain reinstatement of removal and withholding of removal in order to provide some context for understanding the purpose of the reasonable fear interview.

When protection seekers are removed to their home countries through the expedited removal process, and then return to seek protection in the United States, they are at a distinct disadvantage compared to protection seekers who have not been previously removed. Immigration authorities “reinstate” the protection seeker’s previous order or removal in a process called “reinstatement of removal.”<sup>21</sup> These protection seekers are at a disadvantage, because provisions of the INA have been interpreted to preclude previously removed protection seekers from eligibility to apply for, or be granted, asylum. However, the United States is prevented by treaty obligations and the international legal principle of *non-refoulement* from deporting any person to a country in which he or she will be persecuted or tortured. The requirement to abstain from returning noncitizens to situations in which they will be harmed led to the creation of a statutory form of protection called “withholding of removal.” Withholding of removal is a bare bones form of relief. Grantees are not removed to their immediate countries of origin, and they are given a work permit, but, unlike asylees, they are not given a path to LPR status or citizenship, and they may not sponsor family members. Withholding of removal also fails to give grantees true stability, as it is theoretically revocable (should the situation in their country of origin improve, or should a third country accept the grantee).

Paradoxically, withholding of removal is both objectively less desirable, and significantly more difficult to obtain than asylum. It is more difficult to be granted withholding of removal than asylum for several reasons. While the burden of proof is always on the applicant for relief from removal, the standard of proof for asylum differs

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<sup>21</sup> See INA § 241(a)(5).

from the standard of proof for withholding of removal. Applicants for withholding of removal must prove to the immigration judge that it is “more likely than not” that they will be persecuted or tortured if returned to their country of origin. This is in contrast to asylum’s “well-founded fear” standard. The regulations governing reasonable fear interviews are found at 8 CFR 208.31.

#### Reasonable Fear Standard of Proof: The “Reasonable Possibility” Standard

The burden that the applicant must satisfy in a reasonable fear interview is different from the burden she must satisfy in a credible fear interview. Instead of showing a significant possibility of success on the merits of her claim, she must show that there is a *reasonable* possibility that she will prevail. A “reasonable possibility,” in the reasonable fear context is the same standard as the “well-founded fear” of persecution standard in the asylum context. As the reasonable fear interview is intended to be a threshold or screening interview, the screening standard is lower than the “more likely than not standard” needed to prevail on the actual merits of a claim for withholding of removal or protection under the Convention Against Torture. However, the standard is higher than the “significant possibility” standard of proof required to show credible fear.<sup>22</sup> The standard of proof in a reasonable fear interview is higher than the standard of proof in a credible fear interview, because the relief being sought in the former requires a higher standard or proof than that being applied for in the latter. As mentioned above, an applicant for asylum must show a “well-founded fear” of future persecution<sup>23</sup>, while an

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<sup>22</sup> USCIS, Reasonable Fear Lesson Plan at 8.

<sup>23</sup> This is sometimes characterized as a 10% chance of future persecution.

applicant for withholding of removal must show that it is more likely than not that she will be persecuted in the future if returned to her country of origin. Ultimately, it is more difficult to be granted withholding of removal than it is to be granted asylum. The increased difficulty for protection seekers in expedited removal proceedings starts with the reasonable fear interview, a critical hurdle that most people face without legal representation or knowledge of U.S. immigration law.

### **Analysis of USCIS Procedures**

In this section I will analyze the credible and reasonable fear procedures used by USCIS. Notably, the criticisms faced by USCIS differ greatly from those faced by CBP. CBP officers often show hostility towards protection seekers and asylum seekers in general. Border Patrol, in particular, has a paramilitary, almost warfighting culture in which immigrants are the enemy. In contrast, USCIS asylum officers engage in non-adversarial interviews to determine whether noncitizens should be given protection. USCIS does not have an oppositional, prosecutorial or law enforcement culture. For this reason, the failures of USCIS asylum officers can be primarily traced back to overwork and problematic guidance on legal standards.

For this analysis I will rely primarily on a report by the United States Commission on International Religious Freedom (USCIRF). I will also rely on reporting done by Human Rights Watch. As discussed above, USCIRF released an initial report in 2005. While the primary findings of that report will not be reviewed here, I will discuss Mark Hetfield's "Report on Credible Fear Determinations," which was released as part of the 2005 report. Mr. Hetfield's work was included in volume II, as an expert affidavit.

Mr. Hetfield's reports that, in response to the enactment of expedited removal laws, USCIS put in place procedures to ensure that noncitizens in expedited removal proceedings are not subject to *refoulement*. The study finds that these procedures are adequate. Interestingly, and in contrast to this paper's concern with a lack of protections for asylum seekers in the CFI and RFI process, the 2005 report raises concerns about too many people passing their CFIs, and points to procedural incentives to not fail applicants as an issue to be addressed. The report also briefly discusses an issue that continues to be a concern, particularly in light of the Asylum Office's 2014 Credible Fear Lesson update, and the 2017 Executive Orders and agency memoranda on the credible fear process. This concern is the distinction between the asylum screening standard generally used and accepted by the international community, and the asylum screening standard used by the United States. The international community generally uses the "not manifestly unfounded" standard, while, as discussed above, the U.S. uses the "significant possibility" burden of proof, in the context of a credible fear standard. Both standards have credibility and nexus requirements, but the credible fear standard is both more developed and more difficult to meet. In contrast to the credible fear standard discussed above, the "not manifestly unfounded" standard requires that claim be "not clearly fraudulent," and "related to criteria for refugee status"—a low bar.

On August 2, 2016, the United States Committee on International Religious Freedom (USCIRF) released a study on the procedural treatment of protection seekers who find themselves in expedited removal proceedings. The report was called "Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal," and was an

update to USCIRF's much longer "Report on Asylum Seekers in Expedited Removal," which was released in 2005.<sup>24</sup> The 2016 update, was a necessary, if insufficiently detailed, addition to USCIRF's body of work on expedited removal. The update was needed in light of changed political conditions, and a dramatic expansion in the number of people subject to expedited removal. As the USCIRF report states, in 2005, 9,465 noncitizens were placed in expedited removal proceedings, but in 2015, 48,052 found themselves in these proceedings. (2016 report at 34). The drastic expansion in the use of expedited removal made a fresh look at expedited removal procedures a necessity.

The credible fear section of USCIRF's 2016 report focused on three concerns, two of which I will discuss below. The first concern had to do with changes to the Credible Fear Lesson Plan made by USCIS in 2014. The second concern had to do with checklist, used nationwide since 2014, that streamlines the credible fear decision-making process. The third concern had to do with the widespread use of telephonic interviews.

#### 2014 Lesson Plan

As mentioned above, in 2014, USCIS updated the Credible Fear Lesson Plan used to train new asylum officers on the procedures and legal standards used in credible fear interviews. The stated goal of the Credible Fear Lesson Plan, both before and after the 2014 revision, was and is to "explain how to determine whether an alien subject to expedited removal . . . has a credible fear of persecution or torture using the credible fear standard." According to the stated performance objective an asylum officer will "be able

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<sup>24</sup> USCIRF also released a "report card" in 2007, two years after the release of the initial study. The purpose of the report card was to update the legislators, and the public, on the progress of recommendations made by USCIRF in the 2005 report.



to correctly make a credible fear determination consistent with the policies, procedures, and regulations that govern whether an applicant has established a credible fear of persecution or a credible fear of torture.” This makes the Lesson Plan extremely important, as it functions, in practice, as the ultimate authority for asylum officers seeking to determine whether an applicant has a credible fear of persecution or torture. Asylum officers do not typically conduct legal research or look beyond agency policy documents. Instead, as non-attorneys (in practice if not by training) they rely on agency interpretive documents to make determinations. For this reason, changes to the Lesson Plan impact many protection seekers who find themselves before an asylum officer.

The USCIRF report states that USCIS headquarters felt that positive credible fear determinations were inflated—in other words, USCIS headquarters felt that too many people were passing their CFIs, and that this might indicate that the CFI standard was not being strictly followed in all cases. USCIS headquarters’ concern with “potentially inflated credible fear determination rates” coincided with the dramatic increase, in the years leading up to the release of the updated plan, in CFIs being conducted. The stated goal of the revision was to “remind officers of the legal requirements of the credible fear screening process,” “and to “reemphasize the requirements that asylum seekers must show a nexus between their personal fear claims and a protected ground.” The goal of reemphasizing the nexus element of an applicant’s asylum claim was set in response to the perceived problem of asylum officers making positive credible fear determinations based solely on a finding that an applicant belongs to a protected group (a group made up of individuals persecuted based on their political opinion, race, religion, nationality, or

other particularized group characteristic), without a further finding that the applicant was or would be persecuted on account of membership in the group. These changes to the curriculum could also be seen as updates to the “significant possibility” standard, as nexus is one element of asylum and applicants must show a significant possibility of being able to prevail on a claim for asylum, which means showing a significant possibility of proving all of the elements needed to prevail on that claim, of which nexus is one.<sup>25</sup> USCIRF reports that the 2014 Lesson Plan “raised concerns among some stakeholders that the credible fear standard had been raised to require an in-depth assessment more like a full adjudication of asylum claims.”<sup>26</sup>

#### Credible Fear Checklist: The I-870

Asylum officers throughout the country must now use a standardized form, known as the Form I-870, to conduct credible fear interviews. The form contains a checklist meant to aid asylum officers with fear determinations under the new standard. USCIRF reports that the checklist was piloted by the Houston Asylum Office in 2013, and was subsequently adopted throughout the country. According to USCIRF, “USCIS found it to be an efficient tool and with the surge of credible fear referrals in 2014, began using it nationwide. The checklist replaced the previous format of the written analysis for credible fear determinations. At the end of the interview, asylum officers continue to be

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<sup>25</sup> Human Rights Watch reports that, before the lesson plan was implemented, in January 2014, 83 percent of protection seekers passed their credible fear interviews, but that six months later that number had fallen to 63 percent. Human Rights Watch, “You Don’t Have Rights Here” at 25.

<sup>26</sup> USCIRF, “Barriers to Protection” at 36.

required to write a short summary of relevant facts.”<sup>27</sup> The checklist works in tandem with the 2014 Lesson Plan to bring the credible fear interview, intentionally or not, closer to a full hearing on the merits of the asylum seeker’s claim. This is problematic, as the CFI is supposed to be a threshold, or screening interview, even under the 2014 guidance. Unlike CBP agents, asylum officers *are* supposed to evaluate a protection seeker’s claim, but the asylum officer’s evaluation is still limited. The CFI is only meant to weed out frivolous claims by establishing that there is a significant possibility that the asylum seeker will prevail in a full hearing on the merits of her claim. Under the 2014 guidance, the ability to show a nexus between persecution and a protected characteristic is relevant even at the CFI stage, but this does not convert the CFI into a full-scale adjudication. It is understandable that USCIS would want to make it easier for asylum officers to make complicated determinations, particularly when faced with an overwhelming case load, but the current move towards quasi-adjudications on the merits contradicts the intent of Congress, and unfairly places asylum seekers in a position in which they are forced to make a complex claim for protection without a meaningful opportunity to present evidence or consult with counsel.

[ILLUSTRATION: CFI Checklist]

Telephonic Interviews

USCIS has significantly expanded the use of telephone interviews for CFIs and RFIs. In 2009 two percent of all credible fear interviews were conducted by phone. In FY2014, 59 percent of credible fear interviews were conducted telephonically. The total

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<sup>27</sup> USCIRF, “Barriers to Protection” at 36.

number of CFIs in 2009 and FY2014 also differed dramatically; in 2009 5,369 interviews were conducted, and in FY2014 51,001 interviews took place. Notably, USCIRF reported that:

The greatest use of telephonic interviews is for asylum seekers in Expedited Removal who crossed the southern border. This is due to the high numbers of that population, the lack of space in detention facilities for asylum officers to conduct in-person interviews, and the remote locations of the detention facilities.<sup>28</sup>

The overwhelming use of telephonic interviews for detained asylum seekers is troubling, as the lack of in person communication cues makes it significantly more difficult for asylum officers to accurately make determinations. USCIRF reports, and personal clinical experience confirms, that asylum seekers have trouble telling their traumatic stories, even in circumstances far more conducive to clear re-telling than those under which USCIS conducts fear interviews. Additionally:

Some legal service providers [report that] that telephonic credible fear interviews are shorter, less accurate, and more confusing than in-person interviews . . . [and that] telephonic interviews limit asylum officers' ability to assess asylum seekers' credibility.<sup>29</sup>

These impediments, both to the clear retelling of traumatic personal narratives and to the ability of asylum officers to judge credibility, weigh in favor of reducing the use of telephonic interviews. It is not just to diminish the procedural protections to which protection seekers are entitled in order to reduce logistical problems caused by understaffing. The dramatic increase in CFI and RFI requests demands action, but further chipping away at the quality of the already meager

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<sup>28</sup> USCIRF, "Barriers to Protection" at 36.

<sup>29</sup> *Id.*

procedural protections afforded to protection seekers in expedited removal is not the answer. Instead, DHS should hire more staff.<sup>30</sup>

## 6. Conclusion

Expedited removal procedures, as they are carried out by the Department of Homeland Security, often violate the rights of protection seekers. While these violations arguably do not contravene domestic statutory and Constitutional law, there is no doubt that DHS procedures violate both the spirit of the law, in terms of the legal protections ostensibly guaranteed to all people physically in the United States by the Constitution, as well as our international legal obligations.

It is unclear what due process rights, if any, noncitizens subject to expedited removal are entitled to under the Fifth Amendment. The current case law tends to hold that all people, irrespective of alienage, have a right to challenge their indefinite detention via a writ of habeas corpus, but case law on indefinite detention does not speak directly to the question of what due process rights noncitizens in expedited removal are entitled to before an immigration officer determines that the noncitizen will be removed. Of course, noncitizens are entitled to the procedures written in the regulations, and in agency policy guidance, but violations of those procedures do not necessarily equal constitutional violations. Instead, under current case law, these types of procedural violations are likely only grounds for a cause of action under the Administrative Procedures Act.

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<sup>30</sup> “When USCIS started using telephonic credible fear interviews, it instituted quality assurance mechanisms to take into account some of the concerns discussed above. Initially, asylum officers were required to conduct a follow-up interview with persons determined not to have a credible fear either in-person or by videoconference. However, that requirement ended in June 2013; follow-up interviews are now left to the discretion of asylum office directors.” USCIRF at

The apparent lack of meaningful procedural protections under domestic law does nothing to diminish the fact that the U.S. government is bound by international law to refrain from sending noncitizens back to countries where they will face persecution or torture. When the United States does not make a good faith effort to prevent *refoulement*, it violates, at a minimum, the United Nations Convention Relating to the Status of Refugees, and the Convention Against Torture. With that said, when the United States sends protection seekers into harm's way it does more than violate international law. It also betrays the fundamental values that have made America a beacon of hope and a place of refuge for so many people. It is imperative that the immigration officers charged with enforcing the expedited removal laws respect the humanity and fundamental human rights of the noncitizens with whom they interact on a daily basis. This means taking seriously all aspects of enforcement. In the context of expedited removal, immigration officers must dutifully screen noncitizens for fear interviews with USCIS, and USCIS asylum officers must not treat credible and reasonable fear interviews as full scale asylum adjudications. If we do not take our obligations seriously, we will continue to violate international law, as well as the ethical duty to our treat fellow humans with empathy and compassion.

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

Office: \_\_\_\_\_ File No: \_\_\_\_\_

Statement by: \_\_\_\_\_

In the case of: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Gender (circle one): Male Female

At: \_\_\_\_\_ Date: \_\_\_\_\_

Before: \_\_\_\_\_  
(Name and Title)

In the \_\_\_\_\_ language, Interpreter \_\_\_\_\_ Employed by \_\_\_\_\_

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

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

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

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

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

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

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

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

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

A:

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

A:

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

A:

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

A:

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

Signature: \_\_\_\_\_

Sworn and subscribed to before me at \_\_\_\_\_  
on \_\_\_\_\_

\_\_\_\_\_  
Signature of Immigration Officer

Witnessed by: \_\_\_\_\_

**Record of Determination/Credible Fear Worksheet**

District Office Code	Asylum Office Code	Alien's File Number	Alien's Last/ Family Name
Asylum Officer's Last Name	Asylum Officer's First Name	Alien's Nationality	

*All statements in italics must be read to the applicant*

**SECTION I:**

**INTERVIEW PREPARATION**

- 1.1 \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ Date of arrival [MM/DD/YY]
- 1.2 \_\_\_\_\_ Port of arrival
- 1.3 \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ Date of detention [MM/DD/YY]
- 1.4 \_\_\_\_\_ Place of detention
- 1.5 \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ Date of AO orientation [MM/DD/YY]
- 1.6 \_\_\_\_\_ If orientation more than one week from date of detention, explain delay
- 1.7 \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ Date of interview [MM/DD/YY]
- 1.8 \_\_\_\_\_ Interview site
- 1.9  Applicant received and signed Form M-444 and relevant *pro bono* list on \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ Date signed [MM/DD/YY]
- 1.10 Does applicant have consultant(s)?  Yes  No
- 1.11 If yes, consultant(s) name, address, telephone number and relationship to applicant  
\_\_\_\_\_  
\_\_\_\_\_
- 1.12 Persons present at the interview (check which apply)
- 1.13  Consultant(s)
- 1.14  Other(s), list: \_\_\_\_\_
- 1.15  No one other than applicant and asylum officer
- 1.16 Language used by applicant in interview:
- 1.17 \_\_\_\_\_  Yes  No  
Interpreter Service, Interpreter ID Number. Interpreter Has Forms Time Started Time Ended
- 1.18 \_\_\_\_\_  Yes  No  
Interpreter Service, Interpreter ID Number. Interpreter Has Forms Time Started Time Ended
- 1.19 \_\_\_\_\_  Yes  No  
Interpreter Service, Interpreter ID Number. Interpreter Has Forms Time Started Time Ended
- 1.20  Interpreter was not changed during the interview
- 1.21  Interpreter was changed during the interview for the following reason(s):
- 1.22  Applicant requested a female interpreter replace a male interpreter, or *vice versa*
- 1.23  Applicant found interpreter was not competent
- 1.24  Applicant found interpreter was not neutral
- 1.25  Officer found interpreter was not competent
- 1.26  Officer found interpreter was not neutral
- 1.27  Bad telephone connection
- 1.28  Asylum officer read the following paragraph to the applicant at the beginning of the interview:

Alien's File Number:

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

SECTION II: BIOGRAPHIC INFORMATION

2.1 Last Name/ Family Name [ALL CAPS]

2.2 First Name 2.3 Middle Name

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

2.6 Other names and dates of birth used

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

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

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

2.13 Marital status: Single Married Legally separated Divorced Widowed

2.14 Did spouse arrive with applicant? Yes No

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

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

2.17 Children: Yes No

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

Table with 6 columns: Date of birth (MM/DD/YY), Name, Citizenship, Present location (if w/PA, list A-Numbers), Did child arrive with PA?, Is child included in PA's claim?. It contains three rows of data for children.

Alien's File Number:

_____	_____	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
				Yes	No	Yes	No
_____	_____	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
				Yes	No	Yes	No
_____	_____	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
				Yes	No	Yes	No

Alien's File Number:

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

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

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

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

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

Name

Relationship

Address

Telephone Number

Citizen

Legal Permanent Resident

Other

**SECTION III:**

**CREDIBLE FEAR INTERVIEW**

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

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

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

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

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

c. If YES to questions a and/or b, was it or is it because of any of the following reasons? (Check each of the following boxes that apply).

Race  Religion  Nationality  Membership in a particular social group  Political Opinion

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Alien's File Number:

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

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

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

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

**SECTION IV:**

**CREDIBLE FEAR FINDINGS**

**A. Credible Fear Determination:**

Credibility

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

Nexus

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

(Define the social group): \_\_\_\_\_

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

Credible Fear Finding

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

**B. Possible Bars:**

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



Alien's File Number:

C. Identity:

- 4.25  Applicant's identity was determined with a reasonable degree of certainty (check the box(es) that applies):
- 4.26  Applicant's own credible statements. (If testimony is credible overall, this will suffice to establish the applicant's identity with a reasonable degree of certainty).
- 4.27  Passport which appears to be authentic.
- 4.28  Other evidence presented by applicant or in applicant's file (List): \_\_\_\_\_
- 4.29  Applicant's identity was not determined with a reasonable degree of certainty. (Explain on the continuation sheet.)

**SECTION V: ASYLUM OFFICER / SUPERVISOR NAMES AND SIGNATURES**

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

ADDITIONAL INFORMATION/CONTINUATION
