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## Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum

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## REJECTING REFUGEES: HOMELAND SECURITY'S ADMINISTRATION OF THE ONE-YEAR BAR TO ASYLUM<sup>1</sup>

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1. The authors appreciate the cooperation of the United States Department of Homeland Security, and particularly its Asylum Office, which supplied the raw data on which this analysis is based. Many people have asked us why the Department would share its data on asylum adjudication with the public. One answer may be that the public is entitled to the information under the Freedom of Information Act, but the real answer is that the Department is genuinely interested in understanding the effects of the laws that it administers and welcomes the contributions that scholars make to that understanding. The authors also appreciate the assistance of David S. Law, B. Lindsay Lowell, and Kathryn Zeiler in helping us with some statistical hurdles. Any errors are, of course, ours and not theirs. Many thanks to those who have generously provided feedback on our work, including Richard Boswell, Denise Gilman, Anjum Gupta, Geoffrey Heeren, Peter Margulies, Karen Musalo, Jennifer Nagda, Bob Rosenfeld, and David Rubenstein. We acknowledge the research assistance of Katrine Lazar.

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## ABSTRACT

*Since 1980, the Refugee Act has offered asylum to people who flee to the United States to escape persecution in their homeland. In 1996, however, Congress amended the law to bar asylum—regardless of the merits of the underlying claim—for any applicant who fails to apply within one year of entering the United States, unless the applicant qualifies for one of two exceptions to the rule.*

*In the years since the bar was established, anecdotal reports have suggested that genuine refugees, with strong claims to asylum, have been rejected solely because of the deadline. Many scholars and practitioners suspected that this procedural bar had a dramatic effect on the U.S. asylum system. Until now, however, there has been no systematic, empirical study of the effects of the deadline on asylum seekers and the asylum system.*

*The Department of Homeland Security (DHS), which is the first-level adjudicator of affirmative applications for asylum, supplied the authors with a database of asylum claims that has never before been analyzed. This database includes demographic and other characteristics of all principal applicants for asylum before DHS since September 1998—more than 300,000 cases—and the decision reached in each case.<sup>2</sup> In this Article, the authors report, for the very first time, what that database shows about DHS's application of the one-year deadline. They find, among other things, that*

- over the entire time frame studied, DHS determined that nearly a third of all affirmative asylum applicants missed the filing deadline;*
- in the years immediately after the deadline went into effect, Fiscal Year (FY) 1998 through FY 2002, DHS found only 27*

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2. The "demographic and other characteristics" of applicants supplied by DHS did not include the applicants' names, alien numbers, or other identifying information. The terms "cases," "claims," and "applications" are used interchangeably in this Article. Each term refers to a single application filed by a principal applicant and any dependents listed on that person's application. If a spouse or child filed a separate application on the same day with the same service center, that application was treated as a duplicate and was excluded from the database by DHS before we received the data. Our database consists of 383,480 cases of primary applicants. The ratio between applications filed and the total number of persons seeking asylum pursuant to those applications was 1:1.37.

*percent of applicants to be late, but after that period, DHS determined a significantly higher percentage to be late (35 percent from FY 2003 through June 8, 2009);*

- *DHS has rejected the applications, finding no applicable exception, in the cases of 59 percent of those who were determined to have filed late, or 18 percent of all affirmative asylum applicants;*
- *applicants from certain countries, such as the Gambia and Sierra Leone, are much more disadvantaged by the deadline than applicants from certain other countries, such as Haiti and India. The deadline may particularly impact refugees who, upon arrival, were not living among a community of emigrants from their home countries who could warn them about the deadline's existence;*
- *it is likely that as a result of the deadline, since April 1998 DHS has rejected more than 15,000 asylum applications, involving more than 21,000 refugees, that would otherwise have been granted.*

*The authors conclude that because the costs of the one-year deadline exceed its benefits, it should be repealed as proposed by several bills that have been introduced in Congress.<sup>3</sup>*

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3. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 3 (2010); Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 255 (2010); Restoring Protection to Victims of Persecution Act, H.R. 4800, 111th Cong. (2010); Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. § 186 (2009). On July 29, 2010, the Senate Appropriations Committee approved the FY 2011 Department of State, Foreign Operations, and Related Programs Appropriations Bill, S. 3676, which included a provision, section 7080, that eliminates the one-year filing deadline for asylum applications. S. REP. NO. 111-237, at 211-12 (2010). This is the first bill repealing the deadline that has been approved by a congressional committee. At the time this Article went to press, the full Senate had not yet acted on this appropriations bill.



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## I. INTRODUCTION

In 1996, Congress passed sweeping changes to the nation's immigration laws, aimed at tightening America's borders and deporting unauthorized immigrants.<sup>4</sup> Tucked within the voluminous text of this immigration reform bill was a misguided and potentially devastating change to the law that protects those who come to our shores seeking protection from persecution in their homeland.<sup>5</sup> The one-year bar requires asylum seekers to file their applications within one year of entry; those who fail to do so are ineligible for asylum, regardless of the merits of their underlying claim, unless they can prove that they were unable to file timely due to "changed" or "extraordinary" circumstances.<sup>6</sup> As explained further below, the rationales for this dramatic restriction on asylum eligibility are rather murky; it seems that Congress was attempting either to fix a problem of systemic delays that had already been resolved, or to triage weak asylum claims with an instrument so blunt that it undermines the asylum process.<sup>7</sup>

Anecdotal evidence has suggested that the one-year deadline imposes harsh and unfair denials of asylum on applicants, some-

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4. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in various sections of 8 U.S.C. and 18 U.S.C.).

5. 8 U.S.C. § 1158(a)(2)(B) (2006). Since 1980, when Congress passed the Refugee Act, the United States has made asylum available to persons who are physically present in the United States, or arrive at its border, and have a well-founded fear of persecution in their own countries on account of race, religion, nationality, political opinion, or membership in a particular social group. *Id.* § 1158(a)(1)-(2)(A). Satisfying the statutory criteria renders an applicant eligible for asylum, but grants of asylum are considered discretionary. *Id.* § 1158(b)(1)(A). As a result, an eligible applicant may be denied for other reasons, such as making false statements less serious than those that would render the applicant ineligible or failing to pay taxes. Nonetheless, discretionary denials cannot be based on whim. Because such denials are subject to judicial review for abuse of discretion, and therefore must be reasoned, the authors have found denials to be exceedingly rare.

6. *Id.* § 1158(a)(2)(B)-(D). The regulation describing the exceptions appears at 8 C.F.R. § 208.4(a) (2010). Illustrative examples of how this regulation should be applied appear in the DHS training manual for asylum officers. U.S. DEPT OF HOMELAND SEC., ASYLUM OFFICER BASIC TRAINING COURSE: ONE-YEAR FILING DEADLINE 10-12, 23-24, 26-28, 30-31 (2009), available at <http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf> [hereinafter ASYLUM OFFICER BASIC TRAINING COURSE].

7. For the legislative history of this provision and its implementing regulations, see generally PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (2000).

times resulting in their deportation to countries where their liberty and lives are endangered.<sup>8</sup> Though the one-year bar has been in place for over a decade, this study is the first systematic investigation of the effects of this policy and, in particular, how the application of the deadline has affected asylum seekers of different genders, nationalities, religions, ages, and locations in the United States.<sup>9</sup>

DHS, which through its Asylum Office adjudicates most asylum claims in the first instance, was as interested as we were in understanding the effects of the asylum deadline.<sup>10</sup> The agency

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8. See generally HUMAN RIGHTS FIRST, *THE ASYLUM FILING DEADLINE: DENYING PROTECTION TO THE PERSECUTED AND UNDERMINING GOVERNEMENTAL EFFICIENCY* (2010), <http://www.humanrightsfirst.org/pdf/afd.pdf> [hereinafter HUMAN RIGHTS FIRST, *THE ASYLUM FILING DEADLINE*] (reporting more than two dozen case examples of refugees rejected for asylum because of the deadline); Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693 (2008) (providing case studies that illustrate the negative impact of the one-year deadline); Letter from Tori Andrea, on behalf of Human Rights First and many other human rights organizations and experts, to Joseph Langlois, Chief, Asylum Div., U.S. Citizenship & Immigration Servs. (Dec. 7, 2009) (on file with authors).

9. Three of the authors previously examined disparities in the adjudication of asylum cases at all four levels of the process, including appeals. See generally JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM APPLICATION AND PROPOSALS FOR REFORM* (2009) [hereinafter REFUGEE ROULETTE]; Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007). Our study included an examination of disparities in grant rates among officers within each of the eight regional offices of the Asylum Office, but it did not separately investigate the application of the one-year deadline. See generally REFUGEE ROULETTE.

10. As further explained below, DHS adjudicates only "affirmative" applications for asylum. See 8 C.F.R. § 208.4(a). Affirmative applications are those filed by persons who come forward on their own and identify themselves to DHS when they request asylum. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPT OF JUSTICE, *FY 2008 STATISTICAL YEAR BOOK I1* (2009), available at <http://www.justice.gov/eoir/statspub/fy08syb.pdf> [hereinafter DOJ FY 2008 STATISTICAL YEAR BOOK]. Aliens who file affirmatively have not been apprehended by immigration authorities either at the border or after entering the United States. REFUGEE ROULETTE, *supra* note 9, at 15 n.2. Persons who are apprehended and placed into removal (that is, deportation) proceedings may apply for asylum in those proceedings, which are presided over by immigration judges of the Department of Justice. DOJ FY 2008 STATISTICAL YEAR BOOK, *supra*, at I1. These individuals do not have an opportunity to have their asylum claims determined first by DHS, and they are known as "defensive" applicants. *Id.* Affirmative applicants who lose before the Asylum Office and do not maintain an alternative lawful immigration status are then placed into removal proceedings, during which they can present their asylum claims anew. See *id.* These asylum seekers continue to be known as "affirmative" applicants. See *id.* Affirmative cases also include those granted asylum by DHS, as well as those denied asylum who continue to maintain a legal immigration status. See 8 C.F.R. § 1240.11(a). Affirmative cases significantly outnumber defensive cases. OFFICE OF

provided us with data pertaining to its asylum adjudications, excluding information that could identify individuals, in cases filed from the start of FY 1996, two and a half years before the deadline became effective, through June 8, 2009. The database included 383,480 asylum cases in which its officers interviewed asylum applicants and reached decisions. We have examined these data and present our findings in this Article.

Over the twelve-year period since the deadline became effective, DHS has rejected tens of thousands of asylum seekers because they did not apply before the deadline. Each rejected case met one of three outcomes. For those whose asylum cases were also denied in the immigration court and on appeal, the deadline resulted in a final order of removal of the refugees to their home countries, in which they feared imprisonment, torture, or death. The “luckier” refugees, who missed the deadline but could meet a higher burden of proof and establish that persecution in their homeland was more likely than not, were granted a lesser form of protection that left their children and spouses without any derivative immigration status and did not offer a route to citizenship.<sup>11</sup> And even those refugees who were eventually granted asylum in immigration court, either because the judge found the deadline did not apply or that an

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IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 43 tbl.16, available at <http://www.dhs.gov/files/statistics/publications/YrBk08RA.shtm> [hereinafter DHS 2008 YEARBOOK]. In FY 2008, DHS granted asylum to 12,187 applicants and their dependents, *id.*, and referred another 32,946 to immigration courts after deciding not to grant asylum, either because of the one-year deadline or the merits of the cases. That year, DHS also denied asylum to 6,158 individuals who maintained their legal status. E-mail from Michael Hoefer, Dir., Office of Immigration Statistics, Dep't of Homeland Sec., to Andrew I. Schoenholtz (Feb. 24, 2010) (on file with author) [hereinafter Hoefer E-mail] (attaching “Asylum Applications FY 2008” and explaining that the table refers to applications or cases, not persons, and recommending the use of a historical ratio of 1.4 persons per application or case to convert the figures from cases to persons). The immigration court received defensive applications regarding 14,067 individuals. DOJ FY 2008 STATISTICAL YEAR BOOK, *supra*, at 11. So in 2008, affirmative asylum seekers and their dependents constituted about 79 percent of the total. *Id.*

11. Immigration court data collection does not track decisions regarding the one-year filing deadline, and DOJ and DHS do not report information on what happened to cases rejected by DHS for deadline reasons and referred to immigration court. As a result, we do not know how many applicants rejected by the Asylum Office for untimely filing were granted asylum or “withholding of removal” in immigration court, and how many were ordered deported despite valid claims to asylum. See *infra* notes 74-81 and accompanying text for a more detailed description of the differences between asylum and withholding of removal.

exception to the deadline did apply, were subject to the traumatic uncertainty of an unnecessarily long asylum procedure during which they were not authorized to work to support themselves.<sup>12</sup>

Part I of this Article describes DHS's asylum adjudication system. Part I.A describes the process through which DHS asylum officers have evaluated applications for asylum both before and after the imposition of the one-year application deadline in 1998. Part I.B summarizes the history of the deadline, its exceptions, how issues involving the application of the deadline and its exceptions are administered by the asylum officers, and prior critiques of the deadline. Part I.C explains the database that we received from DHS and describes the population of applicants over the thirteen-year period to which the database applies.

Parts II and III describe our findings. Part II reports our study of the population of asylum seekers, exploring who filed on time and who missed the deadline, as well as by how much they missed it. Part III details our study of the cases in which asylum officers found that late-filing applicants (including members of particular subpopulations) qualified for an exception to the deadline based on changed or extraordinary circumstances. Because determinations regarding the applicability of exceptions involved judgments by asylum officers, we also explore the degree to which these officers' decisions in similar sets of cases demonstrate consistency or disparity. Part IV provides our conclusions and our recommendations for legislative and administrative reform. The Methodological Appendix to this Article offers a detailed description of the methodology used in our studies and the database from which we drew our analyses.<sup>13</sup> The Regression Appendix provides the output from the four regression analyses on which the Article relies, and the Estimation Appendix provides confidence intervals and further information on the estimate of arbitrary denials to genuine refugees that we make in Part III.

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12. See generally Cornelis J. Laban et al., *The Impact of a Long Asylum Procedure on Quality of Life, Disability, and Physical Health in Iraqi Asylum Seekers in the Netherlands*, 43 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 507 (2008).

13. In about two years, after publication of a second study on asylum adjudication to be entitled *LIVES IN THE BALANCE* (NYU Press), we intend to make the raw data from DHS on which we performed our analysis available at: <http://www.law.georgetown.edu/humanrights/institute/LivesInTheBalance/>.

As described in more detail in Part IV, we conclude that the one-year deadline is not without some value, but that its benefits are far outweighed by its costs to the government and the public and by the injustice that it causes. Even without the one-year deadline, the asylum adjudication system is, to an unfortunate degree, a game of “refugee roulette.”<sup>14</sup> At least in its application from its inception through early 2009, the deadline injected into the asylum adjudication system several more chance factors that are unrelated to the merits of an applicant’s claim. People from different countries and regions, for example, were affected differently by the deadline because members of certain groups missed the deadline more often than others; this may reflect only the degree of support from conationals already in the United States, rather than the merits of their claims. Similarly, asylum officers determined that some groups of late applicants qualified for exceptions at a much higher rate than other groups, and within particular regional Asylum Offices, where cases are assigned to officers at random, some asylum officers granted exceptions to late applicants at a much higher rate than other officers sitting a few feet away.

Since 1998 DHS has rejected<sup>15</sup> the asylum claims of thousands of refugees because they missed the one-year deadline and did not qualify for an exception. It has placed the vast majority of those applicants in removal proceedings. In fact, in Part III, we estimate that but for the deadline, DHS would likely have granted asylum in about 15,792 additional cases during the period of our study, impacting more than 21,000 refugees. Some of these applicants might later have won asylum from an immigration judge who determined their dates of entry or eligibility for an exception differently than the asylum officer did. We cannot tell how many applicants were successful in court because the data systems used by DHS and the immigration courts do not regularly coordinate and track cases from one agency to the other. To the extent that immigration judges decided these cases the same way that the asylum officers did, however, these refugees were ordered deported

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14. See REFUGEE ROULETTE, *supra* note 9.

15. DHS terms these decisions “rejections” rather than “denials,” consistent with the relevant statutory language. 8 C.F.R. § 208.4(a) (2010); see *infra* note 21 and accompanying text.

not because they lied about their histories of persecution or because they failed to meet the statutory tests for asylum eligibility, but only because they did not file their applications within the one-year period that Congress specified.

### *A. Adjudication Procedures for Affirmative Applications for Asylum*

A foreign national who is physically in the United States may apply affirmatively for asylum by completing DHS Form I-589 and mailing or delivering it to a DHS service center.<sup>16</sup> Nearly 80 percent of all asylum applications are initiated in this manner.<sup>17</sup> These cases are known as “affirmative” applications, and DHS adjudicates them in the first instance, although if DHS does not grant the application, it may be renewed during a removal hearing in a Department of Justice (DOJ) immigration court.<sup>18</sup> The other fifth of asylum applications, termed “defensive” applications, are filed directly in the DOJ immigration court and are never adjudicated by DHS.<sup>19</sup> This Article is concerned only with DHS adjudication and therefore involves only the affirmative asylum cases.

In general, three outcomes are possible before the Asylum Office. First, if an applicant files on time and meets the statutory requirements for asylum, including meeting the one-year deadline or qualifying for an exception, DHS grants the application.<sup>20</sup> Second, if an applicant cannot prove that she filed within a year of entering the United States and has not proven a changed or extraordinary circumstance to justify a later filing, or if the applicant proves such

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16. 8 C.F.R. § 208.4(b).

17. See *supra* note 10.

18. 8 C.F.R. § 1240.11(c).

19. DOJ FY 2008 STATISTICAL YEAR BOOK, *supra* note 10, at 11. Defensive applications include those that are filed by persons arrested in DHS raids or placed in DHS custody after being arrested for crimes unrelated to immigration. REFUGEE ROULETTE, *supra* note 9, at 11. They also include applications filed by persons who arrive at airports or seaports without U.S. visas, or who are apprehended within the United States near a land border, claim to fear returning to their countries, are detained by DHS, and are found to have credible fear of being returned involuntarily. *Id.* at 15 n.2; see 1 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), available at [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf).

20. 8 C.F.R. § 208.14(b).

a circumstance but did not apply within a reasonable time after the circumstance justifying the delay no longer applied, DHS “rejects” the application and “refers” the case to immigration court.<sup>21</sup> Finally, if the applicant files on time or proves a changed or exceptional circumstance but does not prove eligibility for asylum, or is barred by some other law, such as the ban on granting asylum to those who have committed certain crimes,<sup>22</sup> DHS also “refers” the applicant to immigration court for a removal hearing.<sup>23</sup> In immigration court, an applicant who was rejected for failing to meet the deadline, or was referred because of the DHS evaluation of the merits of the claim, has a second chance to prove eligibility for asylum. Unlike DHS adjudications, though, immigration court hearings are adversarial proceedings with DHS attorneys arguing in favor of deporting the applicant.<sup>24</sup>

Asylum officers employed by DHS adjudicate affirmative asylum applications based on the written responses to the questions on Form I-589, corroborating evidence filed by the applicant, and oral responses to questions posed during a personal interview that

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21. *Id.* § 208.14(c).

22. 8 U.S.C. § 1182(a)(2)-(3) (2006).

23. If the applicant has some other lawful immigration status, such as a current student visa at the time DHS decides the case, DHS “denies” the application rather than referring it because the applicant is not subject to removal at that time. 8 C.F.R. § 208.14(c)(2). But fewer than 15 percent of applicants have another lawful status at the time of DHS’s adjudication. In FY 2008, for example, DHS granted asylum in 12,187 cases and referred 32,946 cases to immigration court but “denied” only 6,158 cases—12 percent of the total. Hofer E-mail, *supra* note 10 (attaching “Asylum Applications FY 2008”). Some of the applicants that were granted asylum were likely also persons in lawful status, so the total percentage in lawful status is likely to be slightly larger than 12 percent. *Id.*

24. Occasionally, after reviewing the applicant’s file, hearing the applicant’s testimony in court, and cross-examining the applicant, DHS attorneys state on the record that the government has no objection to a grant of asylum by the immigration judge. But in the vast majority of cases, DHS attorneys challenge applicants’ corroborating evidence, cross-examine applicants to elicit contradictions, argue that applicants do not meet the statutory standards for asylum, and in other ways vigorously oppose a grant of asylum, treating asylum applications in immigration court like other forms of contested civil or criminal litigation, even when applicants are unable to afford or obtain representation. *See, e.g.*, DAVID NGARURI KENNEY & PHILIP G. SCHRAG, *ASYLUM DENIED: A REFUGEE’S STRUGGLE FOR SAFETY IN AMERICA* 147 (2008) (presenting a case study and anecdotal evidence); REFUGEE ROULETTE, *supra* note 9, at 14 (noting customary procedures for DHS attorneys). The only truly nonadversarial investigation of an asylum claim occurs at an asylum officer interview. 8 C.F.R. § 208.9(b).



usually occurs within sixty days after the applicant files the form.<sup>25</sup> Form I-589, which must be completed in English, requires the applicant to provide exhaustive information about her identity, family relationships, education, employment, travel, and reasons for fearing persecution or torture in her home country.<sup>26</sup> In particular, the form requires the applicant to describe her prior political, religious, and ethnic affiliations and activities; any past mistreatment or threats, including arrests, detentions, and torture; and the reasons they fear returning to their home countries.<sup>27</sup> The applicant is required to respond in detail and to provide corroboration. The form directs each applicant to

provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action described. You must attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, explain why.<sup>28</sup>

A friend or relative, or a professional such as an attorney or staff member of a nongovernmental organization, may help an asylum applicant to fill out the form, but that person must also sign the form.<sup>29</sup> Although an affirmative asylum applicant may complete an application by writing brief answers on the form itself, the form encourages an applicant to attach a narrative statement describing past persecution or reasons to fear persecution in the future, and to annex additional documents to prove the applicant's identity and support the claim.<sup>30</sup> These additional documents may include, among other things, statements or affidavits from witnesses, copies of arrest warrants, medical records showing treatment for injuries

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25. 8 C.F.R. § 208.9(e).

26. See U.S. Citizenship & Immigration Servs., Form I-589, Application for Asylum and for Withholding of Removal, available at <http://www.uscis.gov/files/form/i-589.pdf>.

27. *Id.* at 5-6.

28. *Id.* at 5.

29. *Id.* at 9.

30. *Id.* at 5.

received during demonstrations or detentions, and published reports about human rights violations in the applicant's country.<sup>31</sup> Particularly when prepared by professionals, asylum applications can include hundreds of pages of supporting documents.

At the service center, employees enter much of the information from the I-589 form into a computer system known as RAPS (the Refugee Asylum and Parole System).<sup>32</sup> Data in RAPS are visible to all DHS personnel who subsequently participate in the adjudication of the case.<sup>33</sup> The service center personnel send the I-589 form and its attachments to the regional Asylum Office whose catchment area includes the address at which the applicant resides.<sup>34</sup> The applicant is then invited to a personal interview with an asylum officer at the regional office.<sup>35</sup>

At any given time, nearly three hundred asylum officers are on duty in eight regional DHS Asylum Offices.<sup>36</sup> Asylum officers take an initial training course and also receive weekly training on immigration law, human rights conditions around the globe, and interviewing techniques.<sup>37</sup> Within each region, cases are assigned randomly to asylum officers.<sup>38</sup> Officers work under the pressure of high caseloads.<sup>39</sup> An asylum officer does not read an application

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31. See U.S. Citizenship & Immigration Servs., Form I-589 Instructions, Application for Asylum and Withholding of Removal 8, available at <http://www.uscis.gov/files/form/i-589instr.pdf>.

32. U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 7, 133-36 (2007), available at <http://www.uscis.gov/files/nativedocuments/AffrmAsyManFNL.pdf> [hereinafter USCIS ASYLUM MANUAL].

33. See *id.* at 10.

34. See *id.* at 9-10.

35. *Id.* at 10-12.

36. Between FY 2003 and FY 2009, the number of asylum officers active at any particular time ranged between 268 and 334, with a high mean of 308 and a low mean of 286. E-mail from Jedidah Hussey, Deputy Chief, Asylum Div., U.S. Citizenship & Immigration Servs., to Jaya Ramji-Nogales (Aug. 26, 2010) (on file with author). Our database includes many more officers because it spans more than a decade.

37. For a more detailed description of the training that asylum officers receive, see U.S. Citizenship & Immigration Servs., Asylum Division Training Programs, <http://www.uscis.gov/portal/site/uscis> (follow "Refugees & Asylum" hyperlink; then follow "Asylum" hyperlink; then follow "Asylum Division Training Programs" hyperlink) (last visited Nov. 12, 2010).

38. USCIS ASYLUM MANUAL, *supra* note 32, at 17.

39. See U.S. GOV'T ACCOUNTABILITY OFFICE GAO-08-935, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 61-62 (2008) [hereinafter GAO ASYLUM STUDY] (noting that asylum officers are faced with increased adjudication requirements without any corresponding

until the applicant arrives in the office, at which point the case is assigned to the officer.<sup>40</sup> Officers usually have an hour or less to read an application or otherwise prepare for the interview.<sup>41</sup> On average, asylum officers are expected to spend only four hours on each case, including reading the application, conducting any necessary background research on conditions in the applicant's country, interviewing the applicant, checking the applicant's immigration history and fingerprints, and writing a recommendation and report to a supervisory asylum officer.<sup>42</sup>

The interview by the asylum officer is nonadversarial;<sup>43</sup> the asylum officer is charged with determining whether the applicant is eligible for asylum under the applicable statute<sup>44</sup> and regulations.<sup>45</sup> An applicant who does not speak English may bring an interpreter to the interview, but the government does not supply interpretation.<sup>46</sup> The applicant may also bring a lawyer or a lay representative, but the government does not provide representation, even for indigent applicants.<sup>47</sup> Nevertheless, the interview is usually searching. The applicant is sworn, and the asylum officer typically elicits details of the applicant's personal history, comparing the sworn oral answers to the facts asserted in the I-589 application and any attached statements, as well as to published reports, such as

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increase in time to adjudicate their cases).

40. See USCIS ASYLUM MANUAL, *supra* note 32, at 17-18 (describing the random assignment of cases).

41. See GAO ASYLUM STUDY, *supra* note 39, at 58-59 (reporting that time constraints caused asylum officers to "rush through their work").

42. *Id.* at 57-63. The four-hour standard was adopted in 1999 with no empirical data to support it. *Id.* at 61. But 65 percent of asylum officers and 73 percent of supervisors believe that asylum officers need more than four hours to complete a case, 39 percent of asylum officers say that they rush through their work, and 43 percent say that the standard "hindered their ability to properly adjudicate in about half or more of their cases." *Id.* at 58.

43. 8 C.F.R. § 208.9(b) (2010).

44. Under 8 U.S.C. § 1158 (b)(1)(a) (2006), an applicant is eligible if she is a "refugee," a term defined in 8 U.S.C. § 1101(a)(42)(A) as a person who is "unable or unwilling to return to [the applicant's home] 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."

45. 8 C.F.R. § 208.13(b).

46. *Id.* § 208.9(g). For examples of serious errors caused by poor, nonprofessional interpretation at Asylum Office interviews, see WELL-FOUNDED FEAR (PBS television broadcast June 5, 2000).

47. 8 C.F.R. § 208.9(b); see also REFUGEE ROULETTE, *supra* note 9, at 14.

the U.S. State Department's annual human rights reports,<sup>48</sup> about events in the applicant's country. The applicant's representative is not permitted to question the applicant but may make a closing statement at the end of the interview.<sup>49</sup> The applicant has the burden of proving her eligibility,<sup>50</sup> and inconsistencies between the written application and the testimony may doom the application.<sup>51</sup> Similarly, the inability of an applicant to provide sufficient detail about his country or his claim may cause an asylum officer to doubt the applicant's truthfulness, resulting in a decision not to grant asylum.

If the interview reveals a significant error in the data that have been entered into the RAPS system—for example, if RAPS indicates that the applicant has Ethiopian citizenship, but the applicant demonstrates that although she lived for some time in Ethiopia, her nationality is Eritrean—the asylum officer corrects the RAPS entry.<sup>52</sup> However, asylum officers report that they rarely change data in RAPS except to correct the spelling of the applicant's name<sup>53</sup> or change the date on which the applicant entered the United States.<sup>54</sup>

Since April 16, 1998, when the one-year deadline on asylum applications became effective, part of the interview process involves an inquiry into whether the applicant sought asylum within one year of entering the United States.<sup>55</sup> If the applicant was admitted to the United States after being “inspected”—that is, after presenting a passport to an immigration officer at an airport, seaport, or land

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48. 2009 U.S. DEP'T OF STATE ANN. REP. ON HUM. RTS., available at <http://www.state.gov/g/drl/rls/hrrpt/>.

49. 8 C.F.R. § 208.9(d).

50. *Id.* § 208.13(a).

51. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (providing that a trier of fact may base a credibility determination on, among other things, the internal consistency between an applicant's written and oral statements, even with respect to statements that are not material to the applicant's asylum claim).

52. USCIS ASYLUM MANUAL, *supra* note 32, at 37.

53. Telephone Interviews with three former asylum officers, U.S. Citizenship & Immigration Servs. (July & Aug. 2009).

54. As noted *infra* notes 260-61 and accompanying text, the asylum officers' manual directs them to delete a purported date of entry if the asylum applicant has not established proof by clear and convincing evidence, *see* USCIS ASYLUM MANUAL, *supra* note 32, at 126, but not all officers make this change in RAPS.

55. *See* ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 4-5.

border crossing—the determination of whether the deadline was met is generally simple; the asylum officer compares the date of entry stamped on the passport with the date the asylum application was received by DHS. If this comparison shows that the applicant filed more than one year after entry, the asylum officer must inquire into whether the applicant qualifies for one of the exceptions to the one-year rule and, if so, whether the applicant filed within a reasonable period of time after the exception no longer excused the late filing.<sup>56</sup> Persons who entered without inspection, for example, by crossing the Mexican or Canadian border at a place other than a designated border crossing, may apply for asylum, but because their entry dates are not stamped in their passports, they must present other evidence to prove their date of entry.<sup>57</sup>

At the end of the interview, the applicant is directed to return to the regional Asylum Office in two weeks for a written decision.<sup>58</sup> The applicant is not permitted to supply additional documentation or to communicate orally with the asylum officer while the decision is pending, with rare exceptions.<sup>59</sup> After the interview, the asylum officer makes a written recommendation of a disposition, justifying the proposed decision to a supervisory asylum officer by reference to the application and the officer's interview notes.<sup>60</sup> Asylum officers do not have a "deadline quota"; they may accept, reject because of the deadline, or refer on the merits as they see fit. When the asylum officer determines that the application fails for both reasons, that is, the applicant has not met the deadline and is not eligible for asylum on the merits, she must give failure to meet the deadline as the reason for not granting asylum.<sup>61</sup> The supervisory asylum officer

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56. *Id.* at 8. For a discussion of the exceptions, see Part I.B.2.

57. Similarly, applicants who entered with false passports that they then returned to smugglers must present alternative evidence of their date of entry. This evidence may consist of, among other things, bus tickets from the border, airline tickets, or witness testimony. *See id.* at 7-8. It may also consist of proof that they were in another country less than a year before applying for asylum; if so, they must have entered the United States within a year before applying. *Id.* at 25.

58. *See* 8 C.F.R. § 208.19 (2010).

59. *See* USCIS ASYLUM MANUAL, *supra* note 32, at 92.

60. *See id.* at 46-47.

61. In such cases, asylum officers are directed to conduct a thorough inquiry into both issues. *Id.* at 124 ("Regardless of the filing date of an application, Asylum Officers are to give all applicants an asylum interview."). Referral based on the deadline is mandatory for applicants who do not meet the deadline, or establish an exception and file within a

may approve or disapprove the proposed disposition. The supervisor may also ask another asylum officer to review the case.<sup>62</sup>

When the applicant returns, she is given a summary decision in writing.<sup>63</sup> The decision may be a grant of asylum or, if asylum is not granted and the applicant has no other lawful immigration status at the time of the decision, a “referral” to immigration court.<sup>64</sup> The “referral” document (technically called a “notice to appear”) is a summons to be present at a removal hearing in immigration court at which the application for asylum may be renewed.<sup>65</sup> If the applicant does not attend that hearing, or if she appears but is not found eligible for asylum or any other relief, the immigration judge will order her to be removed from the United States to her home country.<sup>66</sup> If she participates in the hearing, her asylum application will be adjudicated *de novo*; that is, the fact that the asylum officer did not think she had proved her eligibility for asylum does not govern the immigration judge’s decision.<sup>67</sup> However, unlike the Asylum Office interview, the immigration court hearing is adversarial in nature; a DHS lawyer will cross-examine the applicant vigorously and will usually argue against asylum and in favor of

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reasonable time, although cases referred based on the deadline need not include an assessment of whether the applicant should be granted asylum on the merits. *Id.* The precedence given to deadline determinations may stem from the peculiar wording of the 1996 law that established the deadline. Instead of providing that an application should be denied if it was not filed on time, the law states that the provisions allowing a person to apply for asylum “shall not apply” to an alien who does not prove entry within a year of the application, 8 U.S.C. § 1158(a)(2)(B) (2006), suggesting that a late application does not advance far enough along in the process to be turned down.

62. USCIS ASYLUM MANUAL, *supra* note 32, at 47.

63. *See id.* at 47-48.

64. In the small percentage of cases in which the applicant does not meet her burden of proof but has another lawful U.S. immigration status at the time of the asylum officer’s decision, such as a still-valid student visa, she is given a “notice of intent to deny” the application instead of a referral, because she is not subject to removal at that time. The notice explains the reasons for the proposed denial in more detail than the summary explanation that is given to applicants who are referred. The applicant is given sixteen days in which to submit a written rebuttal to the notice. *Id.* at 45. If the asylum officer and the officer’s supervisor are not persuaded by the rebuttal, her application is formally denied, but she may remain in the United States until her lawful status expires. *Id.* at 46.

65. The notice to appear is formally issued by the supervisory asylum officer. 8 C.F.R. § 239.1(a)(15) (2010).

66. 8 U.S.C. § 1229a(b)(5).

67. *Id.* § 1229a(c)(1)(A).

removal.<sup>68</sup> Furthermore, any statements that the applicant made on her asylum application and accompanying documents, and the statements that the applicant made in the interview with the asylum officer, as reflected in the officer's notes, may be used to impeach the truthfulness of the applicant.<sup>69</sup>

### *B. The One-Year Deadline*

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress added a new twist to the asylum standards and application procedures. The Act prohibited asylum for anyone who applied more than one year after last entering the United States and imposed on applicants the burden of proving their date of entry by "clear and convincing evidence."<sup>70</sup> An applicant who cannot prove filing within a year of entry can be granted asylum only if she proves the existence of a changed circumstance that materially affects her eligibility for asylum or an extraordinary circumstance relating to the delay.<sup>71</sup> Such a person must also have applied within a "reasonable period" of time after the changed circumstances occurred,<sup>72</sup> or within a "reasonable period given [the extraordinary] circumstances."<sup>73</sup>

The deadline does not bar applicants from being granted "withholding of removal."<sup>74</sup> Like asylum, this status allows an applicant to remain in the United States and, at least temporarily, avoid deportation to a country in which she fears persecution. A person who obtains withholding is allowed to work in the United States.<sup>75</sup> But in an important way, withholding is harder to win than asylum. Although the deadline does not apply, a person seeking withholding must prove that persecution is more probable than not, rather than demonstrating a "well-founded fear" of persecution, a much lower standard.<sup>76</sup> Despite having a higher burden

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68. 8 C.F.R. § 1240.2.

69. *Id.* § 1240.7(a).

70. This standard is codified at 8 U.S.C. § 1158(a)(2)(B).

71. *Id.* § 1158(a)(2)(D).

72. 8 C.F.R. § 208.4(a)(4)(C)(ii).

73. *Id.* § 208.4(a)(5).

74. 8 U.S.C. § 1231(b)(3).

75. 8 C.F.R. § 274a.12(a)(10).

76. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

of proof, an applicant who wins withholding receives far fewer benefits than an asylee. Unlike an asylee, she is not eligible to change her immigration status to that of a lawful permanent resident, and eventually, a citizen.<sup>77</sup> She cannot have her spouse or minor children join her in the United States, or pass along her lawful status to a “derivative” spouse or child in the United States, even though they may be at risk of persecution because of her past activities or her flight from her home country.<sup>78</sup> She can be deported to a country other than the country from which she fled,<sup>79</sup> and during her entire lifetime, her status can be revoked if human rights conditions in her country improve.<sup>80</sup> Furthermore, a DHS asylum officer may not grant withholding of removal to an affirmative asylum applicant who has missed the deadline and does not qualify for an exception. The officer must reject the application and require the applicant to appear for a removal hearing in immigration court, where she may seek a new determination of her eligibility for asylum and may seek withholding in the alternative.<sup>81</sup>

### 1. Legislative History

It is not entirely clear why Congress imposed a deadline. The sponsors of a deadline, Senator Alan Simpson and Representatives Bill McCollum, Chuck Schumer, and Romano Mazzoli, originally proposed a deadline of only thirty days, with virtually no exceptions.<sup>82</sup> In their view, all persons fleeing from persecution would know at once that they wanted asylum and would be able to apply for it immediately; anyone who did not apply for asylum immediately after entering the United States was probably not a genuine refugee.<sup>83</sup> McCollum and Simpson introduced this proposal

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77. 8 C.F.R. § 209.2.

78. *Id.* § 208.21.

79. *Id.* § 208.16(f).

80. *Id.* § 208.24(b)(1).

81. *Id.* § 208.16(a). A late-filing applicant with a lawful immigration status at the time of the asylum officer’s interview would ordinarily qualify for one of the exceptions to the deadline. *See id.* § 208.4(a)(4).

82. The history of the adoption of the one-year deadline is described in SCHRAG, *supra* note 7. The sole exception in the original proposal would have protected applicants who filed more than thirty days after entry because human rights conditions in their home countries had subsequently deteriorated. *Id.* at 83-84.

83. Senator Simpson opined that “if you are truly a refugee, you need to seek refuge [and]



in 1995, the first year in which Republicans held a majority in both houses of Congress since the early 1950s. Other members of Congress apparently thought that the asylum adjudication system was broken because foreign nationals could remain in the United States indefinitely as a result of long delays in the adjudication of their cases. They were apparently unaware, or at least claimed to be unaware, that the problem of long delays had just been solved by recently adopted regulations eliminating temporary work permits for asylum applicants,<sup>84</sup> and they did not pause to consider the fact

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you don't need to sort it out." Telephone Interview with former Senator Alan K. Simpson (July 1, 1998). Representative McCollum thought that those who had fled persecution "have a duty to come forward. There should be some responsibility to make themselves known." Telephone Interview with Carmel Fisk, former legislative assistant to Representative McCollum (May 19, 1998). McCollum told the House Judiciary Committee:

I believe this, that, by far and away, the vast majority of those who come here seeking asylum will know when they set foot on the soil that that's what they want ... and opening the door for [an exception to the deadline based on] any change in circumstances opens the door for a lot of mischief.

SCHRAG, *supra* note 7, at 83 (quoting Transcript of H. Comm. on the Judiciary Mark-up of H.R. 2202 (104th Cong.), Oct. 11, 1995).

84. Before 1995, applicants were permitted to work in the United States while their applications were pending. Some people filed nonmeritorious claims simply to be allowed to work for several months before returning home. As more people did so, the nonmeritorious applications clogged the adjudication system, increasing the amount of time before applications were adjudicated. As the delays grew longer, the incentive to file nonmeritorious cases increased, further lengthening the lag between application and decision. David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 733-37 (1995). The system was changed in January 1995, just a few months before Senator Simpson and Representative McCollum introduced their proposal for a deadline on applications. Since January 1995, applicants have not been allowed to work until asylum is granted, unless, through no fault of the applicant, the government fails to adjudicate the application within 180 days after it is filed. 8 C.F.R. § 208.7(a)(1). The 180-day period includes approximately two months for an initial decision by DHS and, if asylum is denied and the applicant is referred for a removal hearing, four more months for a final decision by a DOJ immigration judge. Any delay caused by the applicant, including a delay granted at the request of the applicant for securing an interpreter at the DHS interview or for obtaining counsel at any stage, stops the 180-day clock and prevents the applicant from working unless and until asylum is granted. *Id.* § 208.7(a)(2). If asylum is not granted by DHS and is then denied by an immigration judge, the applicant is barred from working in the United States during the pendency of any appeals. The operation of this employment clock causes severe hardship for many asylum applicants, particularly those who miss the one-year deadline and are referred to immigration courts, where many judges stop the clock for reasons that are not always the fault of the applicant. For recent criticism of how the clock works in practice, see CTR. FOR IMMIGRANTS' RIGHTS, PENN STATE DICKINSON SCH. OF LAW, UP AGAINST THE ASYLUM CLOCK: FIXING THE BROKEN EMPLOYMENT AUTHORIZATION ASYLUM CLOCK 15-23 (2010), available at [http://law.psu.edu/\\_file/Immigrants/Asylum\\_Clock\\_Paper.pdf](http://law.psu.edu/_file/Immigrants/Asylum_Clock_Paper.pdf).

that a thirty-day deadline was a blunt instrument with which to solve the problem, if it had still existed, of frivolous applications.<sup>85</sup> In the wake of several terrorist attacks in the United States, especially the 1995 Oklahoma City bombing, which had nothing to do with immigrants or asylum applicants, and amid growing anti-immigrant sentiment fueled by certain politicians, members of Congress wanted to demonstrate that they were doing something to make American borders more secure.<sup>86</sup> They supported the thirty-day deadline, among other proposals, to show their determination to do something about closing a border that many Americans, including President Clinton, thought too porous.<sup>87</sup> This restrictive measure was adopted by the House Immigration Subcommittee, the House Judiciary Committee, and the Senate Immigration Subcommittee.<sup>88</sup>

Critics of the thirty-day proposal argued that there were many reasons why some asylum applicants did not apply until they had been in the United States for a long time. In the words of Senator Edward Kennedy, the asylum seekers with the most valid claims,

[those] whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward [before authority figures]. They are individuals who have been, in the most instances, severely persecuted .... [and] brutalized by their own governments .... Many of them are so traumatized by the kinds of persecution and torture that they

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85. The Immigration and Naturalization Service drastically understated the percentage by which asylum claims had dropped as a result of the January 1995 reform. In addition, Representative McCollum's staff assistant, the person primarily responsible for introducing the amendment that created a deadline, was apparently never briefed by INS on the success of the reform before the amendment was adopted by the House subcommittee and took on a life of its own. SCHRAG, *supra* note 7, at 71-72. McCollum himself was unaware, even two months after the subcommittee vote, that INS had changed its rules on work authorization for asylum applicants. *Id.* at 72. But after being briefed by INS, he refused to retreat from his proposal to impose a 30-day deadline. *Id.* at 82.

86. On the connection between several terrorist attacks from 1993 through 1995 and the impetus to restrict immigration, see *id.* at 38-42, 50-51, 62, 152-54.

87. "[O]ur borders leak like a sieve," the President had proclaimed. Remarks and an Exchange with Reporters on Immigration Policy, 1 PUB. PAPERS 1196 (July 27, 1993).

88. See *House Immigration Subcommittee Approves Reform Bill*, 72 INTERPRETER RELEASES 973, 974 (1995); *House Committee Approves Major Reform Bill, Floor Action Next*, 72 INTERPRETER RELEASES 1503 (1995); *Senate Subcommittee Approves Legal Immigration Reform Measure*, 72 INTERPRETER RELEASES 1605 (1995).

have undergone [that] they are psychologically unprepared to [participate in any legal process].<sup>89</sup>

Among other challenges, many asylum applicants were forced to flee with little more than the clothes on their backs. They arrived in the United States traumatized and disoriented, unable to speak English, and their first priorities were to get housed and fed. Many could not afford counsel and often did not know how to locate pro bono attorneys. Often they did not even know that the United States had a formal asylum application procedure.<sup>90</sup>

The critics were unable to defeat completely the idea of imposing a deadline on asylum applications, but in later stages of the legislative process, they were able to win significant modifications of the thirty-day proposal. The limit was changed to one year, and Congress adopted the two important exceptions to the limit—for “changed circumstances” and for “extraordinary circumstances”—that remain in the law today.<sup>91</sup>

## 2. Implementation of the Deadline

The Immigration and Naturalization Service (INS), which was later dissolved and succeeded by DHS, wrote regulations<sup>92</sup> and a training manual<sup>93</sup> for asylum officers to flesh out the meaning of the exceptions. The regulations provide that the “changed circumstances” exception applies not only to the changed conditions in the applicant’s home country but also to activities in which the applicant had become involved, outside of her own country, that placed

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89. 142 CONG. REC. 7300 (1996) (statement of Sen. Kennedy).

90. See, e.g., Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 GEO. IMMIGR. L.J. 95, 96-100 (1996); Philip G. Schrag, *Don't Gut Political Asylum*, WASH. POST, Nov. 12, 1995, at C7, reprinted in 10 GEO. IMMIGR. L.J. 93, 93 (1996).

91. 142 CONG. REC. 25,348 (1996).

92. For a history of the evolution of the regulations interpreting the exceptions, see Michele R. Pistone & Philip G. Schrag, *The 1996 Immigration Act: Asylum Application Deadlines and Expedited Removal—What the INS Should Do*, 73 INTERPRETER RELEASES 1565, 1568-69 (1996); Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 271-78 (1997); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 11-17 (2001).

93. The training manual has gone through several iterations. At the time this Article went to press, the latest version was ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6.

her at greater risk.<sup>94</sup> The regulations define “extraordinary circumstances” to include (1) serious physical or mental illness; (2) legal disability, as in the case of an unaccompanied minor; (3) improper conduct by the applicant’s counsel; (4) the applicant’s having other lawful status in the United States, and therefore no need to seek asylum; and (5) the death or serious illness of a family member or legal representative.<sup>95</sup> The regulations do not list unawareness of the right to seek asylum, or of the existence of the deadline, as an extraordinary circumstance. However, the list of extraordinary circumstances in the regulations is illustrative and not exhaustive, meaning that asylum officers may award exceptions that are not specifically described therein.<sup>96</sup>

The training manual provides additional guidance for asylum officers who must apply the deadline.<sup>97</sup> It discusses in detail most of the exceptions listed in the regulations.<sup>98</sup> Elaborating on the interpretation of “extraordinary circumstances,” the training manual explicitly recognizes that such a circumstance may be based on patterns of facts that do not fall within the specified list of exceptions.<sup>99</sup> It points out that valid reasons not included in the regula-

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94. 8 C.F.R. § 208.4(a)(4) (2010).

95. *Id.* § 208.4(a)(5).

96. *Id.* (stating extraordinary circumstances are not limited to the enumerated list).

97. For example, the manual interprets the “clear and convincing evidence” standard for proof of the date of entry by stating that the proof need not be “conclusive” but should be somewhere between the “preponderance of evidence” standard used in civil trials and the “beyond a reasonable doubt” standard used in criminal trials. *ASYLUM OFFICER BASIC TRAINING COURSE*, *supra* note 6, at 6-7. The training manual is not distributed to immigration judges, who must also apply the deadline, probably because they are part of DOJ rather than DHS. In the authors’ experience, most immigration judges are unaware of the manual’s existence or content, and the DHS attorneys who appear in immigration court, and who work in a different division of DHS than the asylum officers, are also not trained on this manual. For a dramatic example involving the 1994 edition of the training manual, see *KENNEY & SCHRAG*, *supra* note 24, at 156.

98. Some of the guidance is provided by way of example, such as this illustration of the changed circumstances exception:

A Russian citizen of West African ancestry has lived in the United States since 1989. She filed an I-589 in June 2000.... [If government-tolerated abuse of West Africans had existed for a long time and remained constant, her application would be late, but] if there had been [a recent] escalation of violence between ethnic Russians and West Africans ... the applicant would be eligible for an exception, provided the delay in filing is a reasonable period of time.

*ASYLUM OFFICER BASIC TRAINING COURSE*, *supra* note 6, at 12.

99. *Id.* at 20.

tions may prevent an applicant from applying within a year, including “severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization.”<sup>100</sup> Because this list of extraordinary circumstances is not exclusive, asylum officers are allowed some discretion in adjudicating cases in which an applicant appears to have a good reason for missing the deadline. But as in all cases in which officials exercise judgment, different officers may have different views about when it is appropriate to be lenient toward those who do not file on time.

The training manual also provides partial guidance to asylum officers on how to determine whether a late applicant who qualifies for an exception filed his application within a reasonable time given the changed or extraordinary circumstances.<sup>101</sup> Rather than set inflexible rules, the manual encourages the use of good judgment:

Asylum officers are encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file. An applicant’s education and level of sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors should be considered.<sup>102</sup>

The manual goes on to state that in cases in which the reason for lateness was that the applicant previously had a lawful immigration status, waiting more than six months would ordinarily be considered unreasonable.<sup>103</sup> In 2010, the Board of Immigration Appeals, the body that hears appeals from decisions of immigration judges, opined that one year was not per se a reasonable period of time in which to file in such cases, but that this “reasonableness” determination must be made on the facts of the particular cases.<sup>104</sup> The

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100. *Id.*

101. *Id.* at 22-25.

102. *Id.* at 22.

103. *Id.* at 24.

104. *In re T-M-H-*, 25 I. & N. Dec. 193, 195 (B.I.A. 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3673.pdf> (remanding the case to the immigration judge for an evaluation of the applicant’s particular circumstances and noting the six-month requirement in cases in which the applicant qualified for the exception based on prior lawful status).

Board seemed to suggest that any delay of over six months will face a higher evidentiary hurdle to proving that the delay is reasonable.<sup>105</sup>

### 3. Criticisms of the Deadline

Notwithstanding the fact that the statute, regulations, and manual all provide some exceptions, the deadline has been criticized over the years as harsh and unfair.<sup>106</sup> A recent article by Professor Karen Musalo and Marcelle Rice examined 286 cases involving the one-year deadline.<sup>107</sup> Musalo and Rice did not attempt to reach conclusions through quantitative methods, but attempted only to illustrate types of problems in the implementation of the deadline through qualitative research.<sup>108</sup> They concluded from cases that they examined that “[t]he one-year bar .... cause[s] the *refoulement* of legitimate refugees ...., leads to arbitrary and disparate outcomes, deters *bona fide* claims, and squanders precious administrative resources.”<sup>109</sup> They charge that some asylum officers apply the exceptions to the deadline formalistically and without regard to the manual’s instruction<sup>110</sup> that “[a]sylum officers must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists.”<sup>111</sup>

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105. *Id.* at 195-96.

106. See, e.g., HEARTLAND ALLIANCE NAT’L IMMIGRANT JUSTICE CTR. ET AL., THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS (2010), available at <http://www.immigrantjustice.org/policy-resources/oneyeardeadlinereport/oneyeardeadline.html>; HUMAN RIGHTS FIRST, THE ASYLUM FILING DEADLINE, *supra* note 8; Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, IMMIGR. BRIEFING, Aug. 2005, at 1; Musalo & Rice, *supra* note 8; articles cited *supra* notes 8, 90, 92.

107. Musalo & Rice, *supra* note 8. The clients in these cases had been assisted by lawyers or psychologists associated with the Center for Gender and Refugee Studies, the East Bay Sanctuary Covenant, the International Gay and Lesbian Human Rights Commission, or Survivors International. E-mail from Karen Musalo, Clinical Professor & Dir. of the Ctr. for Gender & Refugee Studies, Univ. of Cal. Hastings College of the Law, to Philip G. Schrag (Aug. 26, 2009) (on file with author).

108. Musalo & Rice, *supra* note 8.

109. *Id.* at 722.

110. *Id.* at 697, 699.

111. ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 22.

Similarly, Human Rights First examined case files of asylum claims that were handled by lawyers to whom it had referred potential clients. Based on this study, it found that the deadline “is barring legitimate refugees with well-founded fears of persecution from receiving asylum in the United States and is leading to the unnecessary expenditure of government resources.”<sup>112</sup>

Musalo and Rice give this example, among others, to support their view that asylum officers and immigration judges often apply the deadline with excessive rigidity:

- A Kenyan woman fled to the United States to avoid genital mutilation. She applied after the deadline. A psychologist diagnosed her with post-traumatic stress disorder (PTSD) that seriously impaired her ability to function. But the asylum officer “concluded that the applicant’s disorders could not have directly related to her delay in filing because the applicant attended church during her first year in the United States.”<sup>113</sup>

Other examples from the literature and from reported cases provide equally compelling evidence:

- A Senegalese woman was ordered by her parents to undergo Female Genital Mutilation (FGM). She fled to the United States. For at least four years, she attempted without success to change her parents’ minds so she could safely return to Senegal. She finally applied for asylum when her younger sister was forced to undergo FGM. DHS rejected her claim because she had not met the deadline, and the immigration judge concurred. The judge found the woman credible and observed there was “a reasonable possibility” that she would undergo FGM in Senegal. But she was ordered removed because of her late application and because she could not meet the higher burden of proof to qualify for withholding of removal.<sup>114</sup>

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112. HUMAN RIGHTS FIRST, *THE ASYLUM FILING DEADLINE*, *supra* note 8, at 1.

113. Musalo & Rice, *supra* note 8, at 704. The asylum officer in this case may have overlooked the fact that victims of trauma can sometimes perform ordinary life functions, but applying for asylum requires them to relive and put on paper an account of the horrendous events of their persecution. Dredging up these memories may trigger nightmares, flashbacks, and physical symptoms associated with re-experiencing the trauma. *Id.* at 703-04.

114. *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1048 (2009). Ms.

- A woman from the Gambia was forced into marriage by her mother at the age of fifteen. Her parents had entered her into a marriage contract when she was an infant, and her mother needed the money that had been paid to them under the contract. “Her husband was from a tribe that practiced genital cutting, and after the wedding, despite her strong objections and resistance, she was subjected to the ritual. Her husband forced her to have sex even though it was extremely painful for her. He continued to rape and beat her repeatedly, and also abused their children. She tried to escape several times, including leaving the country, but was always forced to return to him. With the help of her sister, she was finally able to escape to New York. She learned from her children that her husband had sent people to New York to find and kill her. As a result, she remained fearful for her life, ... did not seek help from authorities, and avoided the Gambian community. It was only after she sought treatment for certain medical conditions that her doctor realized she had been genitally cut and ... advised her that she could be eligible for asylum. Despite being clinically diagnosed with PTSD, she was denied asylum on the basis of the one-year bar, but was found eligible for withholding of deportation. The applicant will never be able to bring her children to join her, and they remain in [the] Gambia, where they continue to be beaten and abused by her husband.”<sup>115</sup>
- A Chinese student practiced Falun Gong in secret while in China and then came to the United States to study. In America, he became well-known as a representative for a Falun Gong group at his university. He feared that he would be persecuted for his Falun Gong activities if he returned to China, but he learned about the American system of offering asylum only several years after he first arrived in the United States. DHS rejected his claim because of the deadline. He is awaiting a hearing in

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Gomis’s attorney confirmed that DHS rejected Ms. Gomis because of the deadline. Telephone Interview with Kell Enow, Esq. (Feb. 23, 2010).

115. Khandwala et al., *supra* note 106, at 9.



immigration court, but the court is so backlogged that it cannot schedule the hearing until mid-2011, nearly four years after he first applied for asylum.<sup>116</sup>

- A young Eritrean woman was tortured for her Christian beliefs after the Eritrean government forcibly conscripted her into the military. She applied for asylum four months after arriving in the United States. The Asylum Office rejected her claim because she did not have a passport showing her date of entry. “In Immigration Court, the young woman provided three affidavits and documentary evidence” to establish her date of entry. “The Immigration Judge told her that she fit the definition of a refugee,” but after three years of litigation, offered her only withholding of removal. Even though the court determined she would likely be persecuted in Eritrea, the judge denied her asylum claim for failure to prove that she filed timely.<sup>117</sup>

A case handled by the clinic that two of the authors direct provides still another example:

- The applicant was a gay man from Peru, where the military and the police harass, abuse, assault, and sometimes rape gay men. During his childhood and adolescence, he did not think of himself as gay, but he was twice suspended from school for effeminate conduct. A few years later, he was attacked by a gang of men as he was leaving a gay bar. They called him a faggot, punched him, put out their cigarettes in his arm, and knocked him unconscious. He was hospitalized as a result. He knew that the police would not protect him, so he fled to the United States on a tourist visa. He then obtained a student visa so that he could remain in the United States for post-secondary education. But he was struggling with PTSD and depression, as diagnosed by a psychiatrist, and began taking

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116. HUMAN RIGHTS FIRST, *THE ASYLUM FILING DEADLINE*, *supra* note 8, at 8; Julia Preston, *Reports Say Deadline Hinders Asylum Seekers*, N.Y. TIMES, Sept. 30, 2010, at A28.

117. HUMAN RIGHTS FIRST, *RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION 12* (2010), available at <http://www.humanrightsfirst.org/asylum/refugee-act-symposium/30th-AnnRep-3-12-10.pdf> (citing Interview by Human Rights First with Lynette Tonin, Esq. (May 14, 2009)).

prescribed antidepressants. Even so, he stopped attending school on a full-time basis two years after entering the United States. For the following year, with his school's permission, he took a reduced course load. At the end of that third year, a year after he stopped maintaining full-time student status, he applied for asylum. His representatives argued that his PTSD and depression were an extraordinary circumstance; that his coming to terms with his sexuality and accepting it, after he had lived in the United States for a long time and had a relationship with a man in this country, was a changed circumstance; and that he filed his application for asylum as soon as he was able to do so.

The Asylum Office rejected his case. It found that his change of status when he obtained his student visa was an extraordinary circumstance, but that the one-year delay in filing his application after he ceased to be a full-time student was more than a "reasonable" amount of time.<sup>118</sup>

Because of the unavailability, until now, of the full statistical record of the adjudication of cases involving the deadline, the published regulations, manuals, and critics' commentaries can tell only part of the story of the deadline's effects. The balance of this Article seeks to place these anecdotes in a broader perspective, at least with respect to adjudication by DHS. Unfortunately, we are not able to analyze the application of the deadline by immigration judges, because unlike DHS, DOJ does not collect data on which cases involve challenges to asylum applications based on the deadline, or which denials of asylum are based on the deadline. But at least we can examine, in depth, the effect of the deadline during the

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118. In immigration court, the DHS attorney stated that she found the respondent credible and offered the lesser relief of withholding of removal. His representatives asked the judge to grant asylum. In the alternative, if the judge thought that the deadline was a bar, they asked for an arrangement in which (1) the judge would grant withholding and deny asylum, (2) the government would waive appeal as to withholding, and (3) the applicant would appeal the denial of asylum. The DHS attorney said that, if the applicant did not accept the offer of withholding, she would appeal any grant of relief that the judge awarded. Under this pressure, the applicant accepted the offer of withholding and abandoned his application for asylum.

initial stage of asylum application adjudication. Part I.C describes the database from which our analysis proceeds.

### C. *The Database*

As the Methodological Appendix describes in more detail, DHS provided us with a database consisting of much of the information that it had recorded regarding the asylum adjudications filed between October 1, 1996, and June 8, 2009.<sup>119</sup>

The characteristics of the cases in the database are summarized in Table 1-1, which separates the cases into those filed before the deadline entered into effect and those filed thereafter.<sup>120</sup>

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119. We studied only the cases in which the applicants were genuinely seeking asylum and were actually interviewed by asylum officers. Although most of our analyses focused on the 303,601 such cases filed on or after the deadline went into effect on April 16, 1998, we also made certain comparisons with the 79,879 such cases filed before that date.

For each case that became part of our study, the database included a serial number generated for the purpose of the study; the applicant's date of entry as asserted by the applicant, unless the asylum officer found that the applicant had entered on a different date; the immigration status of the applicant at the time of entry, for example, type of visa, or information that the applicant apparently entered the United States without being inspected at an airport, seaport, or land port of entry; the date of the application for asylum; a code number for the asylum officer who interviewed the applicant and made a recommended decision (DHS generated these code numbers specifically for this study in order to guarantee anonymity; they are entirely different from the codes used by USCIS in its systems and correspondence to identify asylum officers); a code letter A through H, showing in which of the Asylum Office's eight regions a case was adjudicated; the date of the decision by the Asylum Office; the decision of the Office; the nationality and gender of the applicant; the age of the applicant at the time of filing; whether the applicant was represented by counsel at the time of the asylum interview; whether the applicant was also seeking asylum for dependents eligible for protection if the applicant was successful (that is, a spouse and any children under the age of 18, who were in the United States); and the religion of the applicant if the applicant listed a religion. The eight regional Asylum Offices are located in Arlington, VA; Chicago, IL; Houston, TX; Los Angeles, CA; Miami, FL; Newark, NJ; New York, NY; and San Francisco, CA. DHS declined to identify which regional office corresponds to each letter. See Methodological Appendix, *infra*, for a more detailed discussion of the database.

120. Our database of cases before the deadline went into effect on April 16, 1998, includes only those cases filed from October 1, 1995, the beginning of FY 1996, through April 15, 1998. We did not ask DHS for information on cases in FY 1995 or earlier, because many cases during that period were likely filed for the purpose of obtaining temporary work authorization while an asylum application was pending. Work authorization was rarely granted to asylum applicants who filed on or after January 4, 1995. Therefore, all of the cases in our pre-deadline sample were filed by applicants who had no expectation of obtaining work authorization before their asylum cases were adjudicated.

**Table 1-1. Characteristics of Asylum Applicants,  
Pre-Deadline and Post-Deadline<sup>121</sup>**

	<b>Pre- deadline cases</b>	<b>Percentage of pre- deadline total</b>	<b>Post- deadline cases</b>	<b>Percentage of post- deadline total</b>
<i>Total number</i>	79,879		303,601	
<i>Average number per month</i>	2,619		2,270	
<i>Male</i>	54,704	68%	179,217	59%
<i>Female</i>	25,175	32%	124,384	41%
<i>Inspected entrants</i>	33,064	41%	198,213	65%
<i>Uninspected entrants</i>	46,815	59%	105,388	35%
<i>Applicant's region</i>				
Latin America	31,588	40%	77,910	26%
Europe	6,459	8%	24,477	8%
Central Asia	2,263	3%	16,858	6%
North Africa & Middle East	6,289	8%	14,910	5%
Africa	16,596	21%	70,241	23%
South Asia	9,443	12%	17,928	6%
East Asia/Pacific	7,076	9%	79,019	26%
Canada	16	0%	25	0%
Unknown	143	0%	2,233	1%

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121. Pre-deadline cases are those filed before April 16, 1998. See *supra* note 55 and accompanying text.

*Five most  
frequent  
nationalities,  
pre-deadline*<sup>122</sup>

El Salvador	13,574	17%	[2,965]	[1%]
Guatemala	7,605	10%	[6,156]	[2%]
India	7,061	9%	[8,786]	[3%]
Haiti	5,886	7%	[30,552]	[10%]
China	5,143	6%	[59,805]	[20%]

*Five most  
frequent  
nationalities,  
post-deadline*<sup>123</sup>

China	[5,143]	[6%]	59,805	20%
Haiti	[5,886]	[7%]	30,552	10%
Colombia	[360]	[1%]	27,861	9%
Indonesia	[38]	[0%]	11,711	4%
Ethiopia	[2,284]	[3%]	10,571	3%

*Filed within 364  
days*

[36,142]	[45%]	210,979	69%
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*Filed beyond 364  
days*

[43,737]	[55%]	92,622	31%
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*Major religions  
(1% or more)*<sup>124</sup>

Christian	39,060	49%	161,544	53%
Muslim	13,291	17%	37,539	12%
Buddhist	1,670	2%	15,768	5%
Sikh	6,625	8%	7,230	2%
Jewish	1,402	2%	1,784	1%

*Age at filing*

0-17	1,663	2%	3,216	1%
18-29	37,539	47%	114,385	38%
30-39	25,640	32%	102,086	34%
40-49	10,537	13%	57,360	19%
50-99	4,500	6%	26,544	9%

<i>Has dependents in U.S.</i>	11,494	14%	56,921	19%
<i>Has no dependents in U.S.</i>	68,385	86%	246,680	81%
<i>Unrepresented</i>	56,131	70%	170,709	56%
<i>Represented</i>	23,748	30%	132,892	44%
<i>Outcome</i>				
Granted asylum	26,708	33%	121,864	40%
Rejected because of deadline	N/A		54,141	18%
Referred or denied for other reasons	53,171	67%	127,596	42%

Several observations emerge from this table. First, consider only the post-deadline applicants who are the main focus of our study of the effects of the deadline. About 60 percent of these applicants were men, and by far the largest religious group of post-deadline applicants, of those who stated a religion, was Christian. Applicants came in almost equal numbers from Latin America, Africa, and East Asia (predominantly China), and these three regions accounted for three-fourths of all of the affirmative asylum seekers.<sup>125</sup>

Nearly one-fifth of these applicants had a spouse or minor child with them in the United States for whom they were also seeking asylum. Sixty-two percent were at least thirty years old when they applied for asylum. Two-thirds of them arrived in the United States with visas, such as business, tourist, or student visas, whereas the

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122. The brackets indicate numbers and percentages of the five most frequent *pre-deadline* nationalities in the *post-deadline* period.

123. The brackets indicate numbers and percentages of the five most frequent *post-deadline* nationalities in the *pre-deadline* period.

124. 17,314 pre-deadline and 75,496 post-deadline applicants did not list a religion.

125. As noted *supra* note 10, our study consists only of the approximately 80 percent of asylum seekers who apply affirmatively and are therefore allowed to ask DHS for asylum in the first instance; those whom are apprehended before seeking asylum may request that status only from DOJ.

other third entered by crossing a border without presenting themselves to a border patrol inspector. More than half were unrepresented, even by a lay advocate or a friend, at their Asylum Office interviews.

It is also worth comparing the pre-deadline population of applicants with the post-deadline population. We see that, in several respects, major shifts occurred, though we attribute many of these changes primarily to human rights conditions in the world, not to the enactment of a deadline.

Although men outnumbered women by more than two to one in the earlier period, the disparity became less pronounced after 1998.<sup>126</sup> Major changes also took place in the nationalities of the applicants. In the mid-1990s, Guatemalans and Salvadorans were the largest groups of applicants, making up 27 percent of the entire pool, but they comprised only 3 percent of the pool after 1998, probably because persecution and other serious harms associated with civil wars diminished. Chinese applicants, only 6 percent of the total in the earlier period, became 20 percent of the later group, probably because legislation in 1996 clarified that Chinese nationals fleeing sterilization or forced abortion imposed by the “one-child” policy were eligible for asylum.<sup>127</sup> Indians, Guatemalans, and Salvadorans disappeared from the “top five” list after 1998, whereas several new groups of foreign nationals—Colombians, Indonesians, and Ethiopians—made the list.<sup>128</sup>

The group that applied before April 16, 1998, consisted primarily of individuals who had entered without being inspected, whereas two-thirds of those in the post-1998 group were people who had entered with visas and had overstayed their visas before or during the asylum application process.<sup>129</sup> This shift may reflect the

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126. By FY 2008, the ratio had dropped further, from 56 percent to 44 percent.

127. 8 U.S.C. § 1101(a)(42)(B) (2006).

128. Asylum is available not only to people fleeing government persecution, but also to persons fleeing from groups that the government is unwilling or unable to control. See *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26-27 (B.I.A. 1998), available at <http://www.justice.gov/eoir/vll/intdec/vol22/3346.pdf>. In the 1990s, Colombians began to seek asylum because of their fear of the Revolutionary Armed Forces of Colombia (FARC), which the government could not control. Luz E. Nagle, *Colombian Asylum Seekers: What Practitioners Should Know About the Colombian Crisis*, 18 GEO. IMMIGR. L.J. 441, 441, 443 (2004).

129. Our calculation of those who entered with and without inspection is based on the data provided by DHS, which reflect the method of entry that the applicant claimed to have used. In some cases, the applicant may have lied. For example, an applicant who entered without

increasing difficulty of entering the United States after the mid-1990s, when the U.S. government began increasing the number of border guards and sensors, particularly along the Mexican border. Another explanation is that only the former group included a large proportion of Guatemalans and Salvadorans, who were likely to arrive in the United States in the mid-1990s by waving a purported border crossing card while on a truck full of Mexican laborers with valid cards, or by avoiding crossing at a port of entry.<sup>130</sup>

Representation increased significantly over the years. This may reflect a greater perceived need for representation, as antiimmigrant sentiment hardened, particularly in the wake of the 9/11 terrorist attacks, and the asylum laws became more complex.<sup>131</sup> It may also reflect the greater availability of representatives, as immigration and human rights became more prominent public issues. Before 1998, only 30 percent of asylum seekers were

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inspection by crossing a land border may present a false passport, with a visa stamp, belonging to a friend or relative whose picture resembles the applicant. But fingerprints would ordinarily reveal the fraud, and DHS would report that entrant as uninspected. Slightly more frequently, but still rare in our experience, an applicant who entered with a visa may claim to have entered without inspection by crossing a land border. For example, an applicant might enter at an airport by "borrowing" the passport and visa of a relative in a desperate maneuver to seek safety abroad. This applicant might claim to have come across a land border without inspection to avoid possible prosecution of the relative for "lending" the passport. In this scenario, DHS would have a more difficult time rebutting the applicant's claim to have entered without inspection. But inspection documents provide the best way of proving a date of entry to satisfy the one-year deadline, so we do not think that many applicants falsely claim an uninspected entry.

130. Although we know from our clinical experience that some African and Asian asylum seekers do enter without inspection by taking a plane or ship to Latin America and then crossing the Mexican border, most Africans and Asians who are fleeing persecution and seeking asylum in America find a way to obtain a visa, submit to inspection, and thereafter seek asylum.

131. Amendments to the immigration laws in 1996 added not only the bar to asylum based on the deadline, with its complex exceptions, but also an expanded list of prior criminal activity that would preclude a grant of asylum. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in various sections of 8 U.S.C. and 18 U.S.C.). After the attacks in 2001, Congress also imposed more severe bars on anyone who had provided "material support" to a terrorist organization, which was interpreted to cover even those cases in which aid was de minimis and/or had been provided under duress. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 411(a), 115 Stat. 272, 345-48. Beginning in 2005, the law required asylum applicants in many cases to provide corroborating evidence to support even credible testimony of persecution. This requirement is now codified at 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).



represented at this stage of the process; for the post-1998 period, this figure increased to 44 percent.<sup>132</sup>

Unsurprisingly, prompt filing increased dramatically with the law's new requirement: the percentage of those who filed within a year increased by 50 percent, from 46 percent to 69 percent.

Although the more recent asylum seekers are to some extent quite different from their earlier counterparts, Table 1-1 also reveals some similarities. Asylum seekers arrive from all over the world, but in both groups, only five nationalities comprise at least 46 percent of the applicants. Despite the evolutionary changes in the composition of the two populations, some of the percentages shown in the table reveal relatively little change from one population to the other.

The average number of cases filed per month was moderately smaller after the deadline took effect, decreasing from 2,619 to 2,270. This average monthly decline, however, disguises significant increases and decreases in affirmative applications during the study period. Previous research by one of the authors demonstrated that a significant drop of more than one-third took place in 1998 and held for a two- to three-year period.<sup>133</sup> The number of applications began increasing in FY 2000, but a big jump of more than one-third occurred in FY 2001 and held in FY 2002.<sup>134</sup> Applications then fell more than 25 percent in FY 2003, before dropping significantly, again more than 25 percent, in FY 2004.<sup>135</sup>

The number of new Central American claims declined significantly in 1997 and 1998.<sup>136</sup> The then-INS attributed the sharp decline to the termination of the filing period for Central Americans under the *American Baptist Churches (ABC) v. Thornburgh* settlement.<sup>137</sup> The drop that starts in FY 2003 may very well reflect post-9/11 changes, including stronger border-control efforts, the

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132. For applicants who entered in FY 2008, the figure was 61 percent.

133. See Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 337-38 (2005).

134. *Id.* at 338.

135. *Id.*

136. DEPT OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 89-90, available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/RefAsy98text.pdf>.

137. *Id.*

perception of America as less receptive to the foreign-born, and an economic downturn.<sup>138</sup>

The percentage of applicants who were Christian increased somewhat in the later period, whereas the percentage of applicants who were Muslim declined.<sup>139</sup> The population aged somewhat, as only 51 percent of applicants in the earlier period were over thirty, compared with 62 percent in the later years.

One of the most dramatic comparisons between the two populations is that, despite the imposition of the deadline and other new restrictions, the Asylum Office's grant rate rose, going from 33 percent for the pre-deadline applicants to 40 percent for those who applied after it went into force. As we will show, important variations exist within the later period from one fiscal year to another, and the deadline appears to have been applied more strictly in later years than in the period immediately after it entered into force. Nevertheless, the increase is significant, and we think that it is to the credit of DHS that it did not take the enactment of the deadline as a kind of signal that Congress meant to make asylum significantly more difficult to obtain on the merits.

We do not know to what extent various factors affected the change in the grant rate. The increase may reflect the fact that nationals of some of the countries most prominent in the post-deadline group, for example, Chinese, Haitians, and Colombians, may have presented much stronger cases on the whole than the Salvadorans and Guatemalans, who were the largest components of the former group, once the civil wars in Central America ended. The increased rate of representation could have caused the change, for

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138. Researchers at Georgetown University's Institute for the Study of International Migration attributed declines in foreign student visas, for example, to a "perfect storm" of tighter visa procedures reflecting greater security concerns, perceptions of difficulty in obtaining visas, and an economic recession. B. LINDSAY LOWELL, MICAH BUMP & SUSAN MARTIN, *FOREIGN STUDENTS COMING TO AMERICA: THE IMPACT OF POLICY, PROCEDURES, AND ECONOMIC COMPETITION* 1, 49 (2007), available at [http://isim.georgetown.edu/publications/20070201\\_Foreign\\_Students\\_Coming.pdf](http://isim.georgetown.edu/publications/20070201_Foreign_Students_Coming.pdf). We suspect that such factors affected visa applicants and others contemplating migration to the United States in general.

139. In each year from FY 1998 through FY 2001, which ended on September 30, 2001, just after the 9/11 terrorist attacks, Muslims constituted between 13 percent and 22 percent of the asylum applicants. In each year starting with FY 2002, they constituted only 10 percent or 11 percent of the applicants, perhaps reflecting a greater difficulty in obtaining visas to come to the United States. In FY 2009, for which we have only partial data, the percentage of Muslims among asylum applicants was 8.5 percent.

example, because professional advocates presented better evidence. It could be that the asylum officers were more prone to trust the veracity of applicants who had entered at border crossings and presented travel documents, a higher percentage of whom were in the group that filed later. The deadline itself may have increased the grant rate, because asylum officers were more often presented with applicants whose memories were fresher and who may have had better access to corroboration of events that had occurred in the more recent past.

The fact that the grant rate increased after the deadline went into effect may mask the possibility that the increase would have been still larger if this restriction had never become law. We will return to that subject, and to the results of a more sophisticated statistical analysis of the problem, later in this Article.<sup>140</sup>

## II. TIMELINESS

The DHS data reveal interesting and at times surprising patterns in asylum officer determinations of whether asylum seekers filed within the permitted one-year period.<sup>141</sup> Part II describes, for the first time, basic but crucial information about the deadline—what percentage of asylum claims were determined to have been filed late and how late these claims were filed. It also examines whether determinations of lateness differed depending on certain personal characteristics of the asylum seekers—where they came from in terms of region and nationality, their age, how they entered, whether they were represented, their gender, and in which of the eight regional Asylum Offices they filed their affirmative claims.

A grant of asylum brings with it tremendous benefits, including the chance to become a lawful permanent resident and eventually an American citizen. Yet more than 30 percent of asylum applications submitted from April 16, 1998, through June 8, 2009—about 93,000 of the approximately 304,000 claims—were determined to have been filed late. That is a very high number, in both percentage and absolute terms, given the nature of the U.S. government's

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140. See *infra* notes 216-20 and accompanying text.

141. Our count of "late" asylum seekers includes those who may have filed within a year but could not prove their date of entry to the asylum officer by clear and convincing evidence.

protection responsibilities and the potentially deadly consequences of being denied asylum if one is a bona fide refugee.

To confirm the statistical significance of the data analysis presented below, we ran a binary logistic regression on the database of all cases, exploring the dependent variable of timely filing.<sup>142</sup> Unless otherwise noted, these variables were statistically significant<sup>143</sup> and confirmed the findings of the cross-tabulation analysis.<sup>144</sup> In other words, even with all other variables held constant, the relationship between timely filing and each of the independent variables described below was statistically significant.

Just how late were these 93,000 asylum seekers? The largest identifiable late group, about 28,000 people, filed within one year after the deadline had passed, as Figure 2-1 illustrates. They constituted 30 percent of all late filers. For 27 percent of untimely applicants, or about 25,000 asylum seekers, we do not know how late they filed because their date of entry was recorded as blank or “unknowable.”<sup>145</sup> We do know that a significant percentage of applicants filed many years after entering the United States. Some 22,000 individuals, nearly 24 percent of all late filers, filed claims four years or more after entering the United States; 6,184 of these applicants, nearly 7 percent of all late filers, filed for asylum more than ten years after entry.

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142. The regression model contained the following independent variables: the Asylum Office in which the applicant's case was heard, the number of cases previously decided by the asylum officer who heard the applicant's case, whether the applicant entered lawfully, the applicant's geographic region of origin, the state of political and civil rights in the applicant's nation of origin, the applicant's religion, the applicant's gender, whether the applicant had dependents, whether the applicant had representation, the applicant's age at filing, and the fiscal year during which the applicant filed. The Methodological Appendix discusses how we measured and coded these variables and how we created the “timely filing” database. In Parts II.A, C-F, we reference the regression run with the independent variable of asylum applicants' nationalities recoded into geographic regions, with the sole exception of Part II.B on nationality, for which we used the results of the regression run with the independent variable of asylum applicants' nationalities without recoding.

143. The variables were statistically significant at the 0.01 level.

144. For nominal variables, all of the variables that we report in the text had a statistically significant effect on the likelihood of timely filing. However, in some cases, there were some statistically insignificant variables that we did not report. For example, for asylum seekers' geographic region of origin, North America, that is, Canada, was statistically insignificant; we did not report the relevant cross-tabulation result in the text.

145. The database contains 21,256 applicants with blank dates of entry.

**Figure 2-1. DHS Determinations of Lapse Between Entry and Filing**

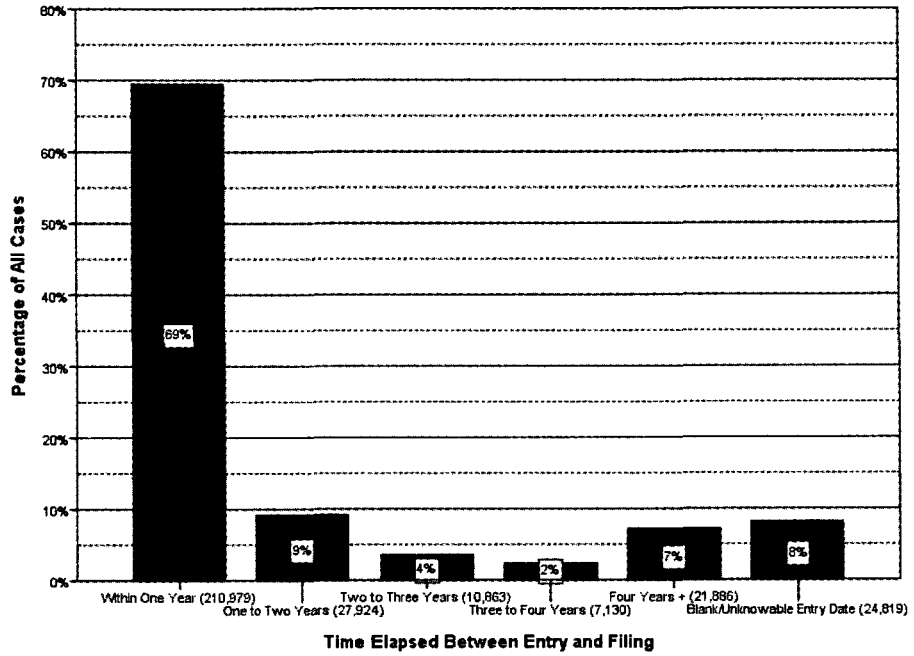
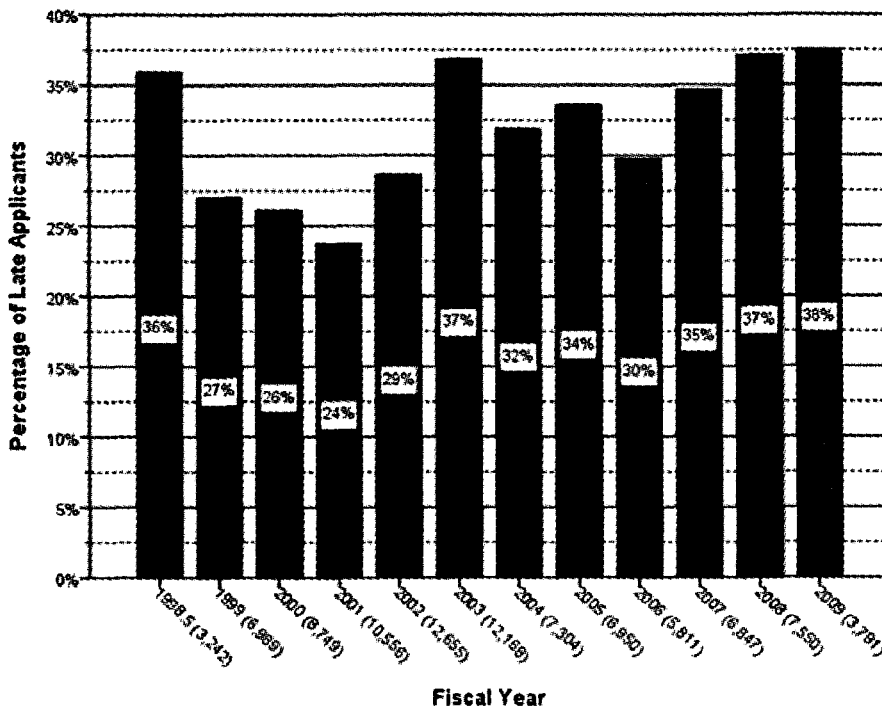


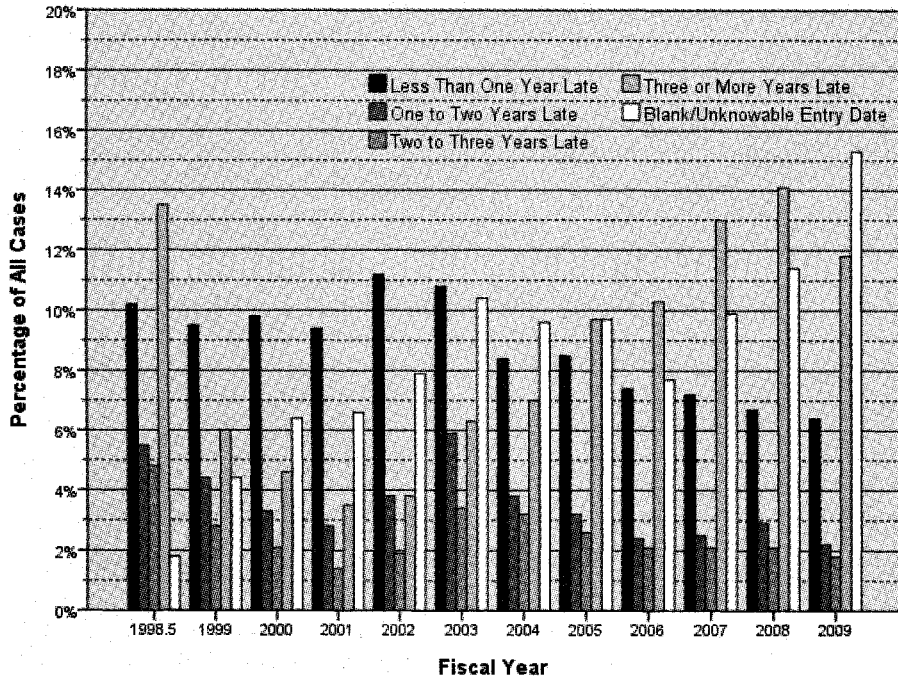
Figure 2-2. Late Cases, by Fiscal Year of Filing



As Figure 2-2 illustrates, in recent years, asylum officers have deemed a higher percentage of cases late than in earlier years. From FY 2000-2002, about 26 percent of asylum seekers filed late. From FY 2007-2009, some 36 percent filed late. That represents a 38 percent increase in the percentage of cases that asylum officers determined were untimely filed.<sup>146</sup>

146. The regression analysis confirms that, with all other variables held constant, timely filing decreased as fiscal year of filing increased.

**Figure 2-3. Lapse Between Entry Date and Date of Filing, by Fiscal Year**



As Figure 2-3 shows, the greatest increase in filers regarded as late occurred within the group of asylum seekers determined to have filed three or more years late. There was a sharp uptick in the percentage of cases filed three or more years late, from 6 percent in 1999 to just under 12 percent in 2009.<sup>147</sup> During the most recent five-year period, FY 2005-2009, the number determined to have filed more than four years after arrival jumped by 26 percent over the previous five-year period, FY 2000-2004. This finding that the percentage of very late filers significantly increased as the years passed is counterintuitive; one would expect that the deadline would minimize late filers over time. Perhaps in recent years there have

147. In 1998, the percentage of applications filed three or more years late was quite high—nearly 15 percent—but we consider this an anomaly caused by the start of the deadline's implementation that year. In subsequent years, from 1999 through 2003, the number hovered consistently around 5 percent.

been more applicants who lack ethnic or national communities that inform them about asylum or the deadline. Or perhaps in the years immediately after the deadline was enacted, there was more word-of-mouth publicity about it, but as the publicity diminished, fewer refugees found out about the requirement that they must file within a year of entry. Still another possibility is that increased news coverage of raids and arrests of undocumented immigrants during the second administration of George W. Bush caused more refugees who had been living in the United States for a long time to apply for asylum rather than remain undocumented, given the higher risk that they would be identified and detained.

Figure 2-3 also shows a large increase in the number of applicants whose date of entry is blank. The proportion of applicants with blank or unknowable entry dates grew dramatically over time, constituting just over 1 percent of all applicants in the second half of FY 1998 and 14 percent of all applicants in FY 2009—more than a 1,000 percent increase in just over a decade.<sup>148</sup> At the same time, as Figure 2-4 illustrates, the percentage of applicants who entered without inspection dropped by 83 percent, from just over 53 percent in the second half of FY 1998 to a fairly consistent 30 percent from FY 2002 through FY 2009.<sup>149</sup> These trends suggest that the growth in blank or unknowable entry dates may have resulted especially from stricter application of evidentiary standards by adjudicators—that is, more applicants missed the deadline because asylum officers were less accepting of proof of entry other than official documentation.

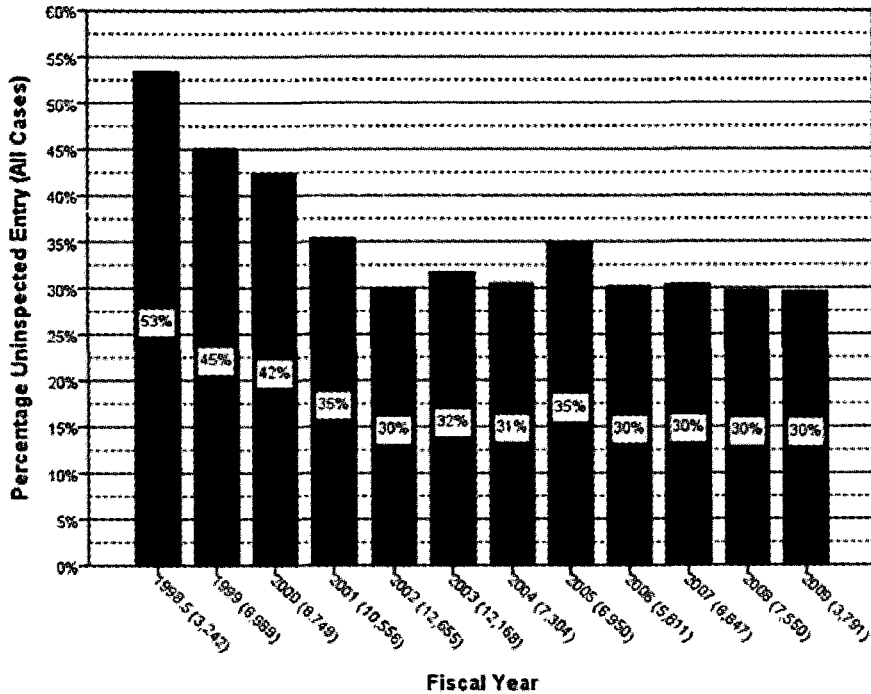
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148. Although we know that instructions on leaving entry dates blank were not incorporated into the asylum officers' procedural manual until 2003, the drop in blank entry dates in 2006 and the increases in 2008 and 2009 lead us to believe that additional factors were at play. See USCIS ASYLUM MANUAL, *supra* note 32; *infra* text accompanying notes 260-61; *infra* Methodological Appendix.

149. In 2005, 35 percent of applicants entered without inspection, and in 2003, 31 percent entered without inspection. In all other years from 2002 to 2009, the percentage was 30 percent.



Figure 2-4. All Applicants, Uninspected Entry, by Fiscal Year



### A. Representation<sup>150</sup>

The data reveal interesting patterns in the characteristics of asylum applicants who were determined to have filed late.<sup>151</sup> To begin with, late filers generally were represented at higher rates

150. Although DHS codes representatives in terms of whether the applicant has an “attorney,” a positive indication in the attorney column does not necessarily mean representation by an attorney, because DHS codes *any* authorized representative as an “attorney.” Applicants may also be represented by persons designated by nonprofit organizations and accredited by DOJ, by law students and law school graduates who have not yet been admitted to the bar, and by reputable individuals whose services are requested by the applicant. Fees may be charged only by attorneys, except that “nominal charges” for representation may be imposed by accredited nonprofit organizations. 8 C.F.R. §§ 292.1, 292.2(a) (2010).

151. Some characteristics that we analyzed did not reveal noteworthy differences in the rates at which asylum officers determined that the applicants filed late. These included whether or not applicants applied with dependents or identified with particular religions.

than timely filers.<sup>152</sup> Almost 50 percent of late filers were represented in contrast with only 41 percent of timely filers.

Why is it that untimely filers were more often represented than timely filers? Asylum seekers who want to be represented may be forced to delay their applications beyond a year because of the information, the time, and the financial resources needed to secure representation, not to mention the psychological obstacles to discussing their claims for asylum.<sup>153</sup> Some asylum seekers may be aware of the one-year filing deadline but not of the exceptions to the deadline or their eligibility for the exceptions. Once the deadline has passed, these asylum seekers might decide not to apply for asylum and might not learn, until they meet with a lawyer, that they are still eligible for asylum. Similarly, some asylum seekers might not understand that the mistreatment they suffered in their home countries could make them eligible for asylum, and might apply only after they meet with lawyers who can explain the potential grounds for their claims. It may also be the case that those who missed the deadline perceived a greater need to obtain counsel to overcome this bar to asylum.

Part of the explanation for the increased representation of late asylum seekers may be that, except for the few asylum seekers who are fortunate enough to obtain free assistance from a nongovernmental organization, law school clinic, or pro bono lawyer, representation is very expensive. Lawyers typically charge several thousand dollars to prepare an asylum application with the necessary supporting evidentiary documents and accompany the applicant to the interview. Some asylum applicants, realizing that they will need a lawyer but are unable to afford one, may postpone filing until they can work, in most cases without authorization, for long enough to be able to hire an attorney, meanwhile missing the filing deadline.

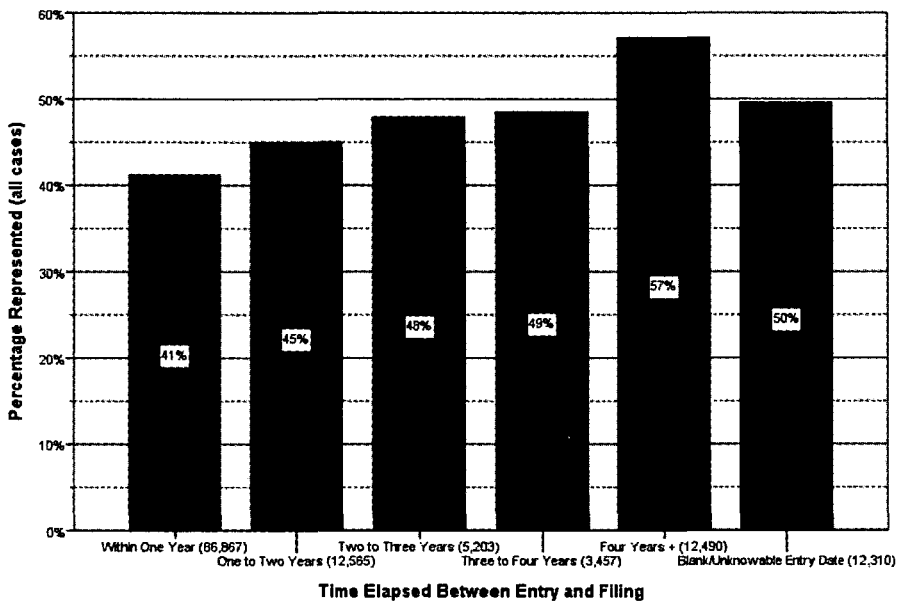
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152. The regression confirms that, with all other variables held constant, represented asylum seekers filed timely less frequently than unrepresented asylum seekers.

153. FELINDA MOTTINO, VERA INST. OF JUSTICE, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN NEW YORK CITY IMMIGRATION COURTS 22, 24, 27 (2000), available at <http://www.vera.org/download?file=514/533.409747%2B%20BMF.pdf> (noting that the "search for counsel" is often a time-consuming and frustrating experience and that "[l]anguage barriers, cultural misunderstandings, and lack of familiarity with U.S. systems and procedures compound the problem"). Mottino's study is the only major study of representation in U.S. immigration courts that examines the challenges of finding counsel based on interviews with noncitizens in removal proceedings.

Figure 2-5 shows an increasing degree of representation for every year of lateness. Interestingly, for each cohort, the majority of asylum seekers were unrepresented—except for the group of asylum seekers who filed four years or more after entry.

**Figure 2-5. Representation by Lapse Between Entry Date and Filing Date**



### *B. Nationality*

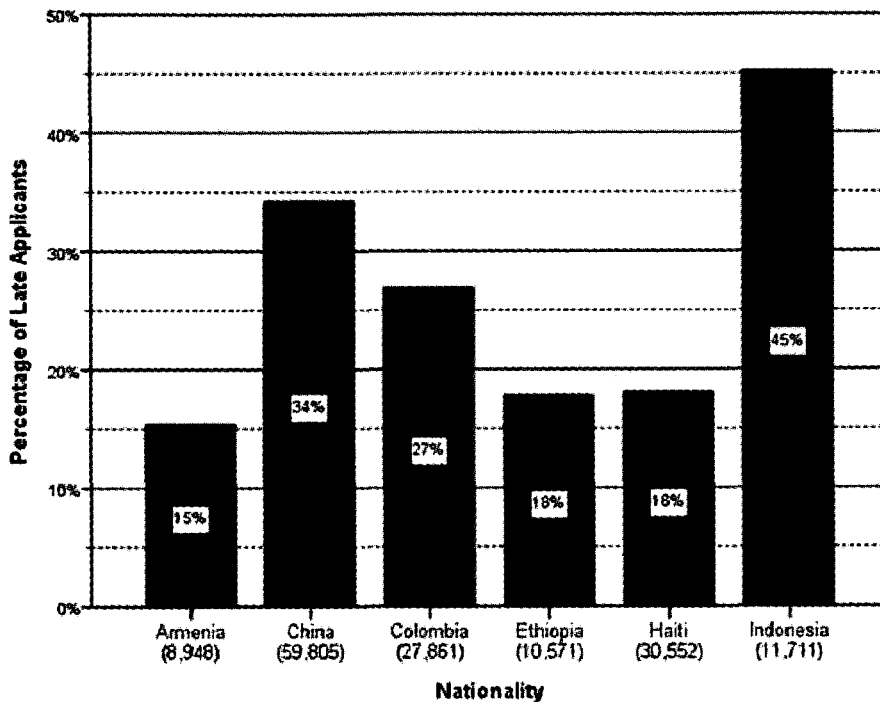
What are the demographic characteristics of those determined to have filed late? Figure 2-6 looks at applicants from the six most frequent nationalities of affirmative asylum seekers: Armenia, China, Colombia, Ethiopia, Haiti, and Indonesia.<sup>154</sup> Considerably fewer Armenians, Ethiopians, and Haitians filed late compared to Chinese, Colombians, and especially Indonesians.<sup>155</sup> Why did only

154. See *supra* Part I tbl.1-1 (specifying the most frequent nationalities in the post-deadline database).

155. The regression analysis found that, with all other variables held constant, Indonesians

15 percent of the Armenians file late, while 45 percent of the Indonesians failed to meet the deadline? One possibility is that the communities of immigrants from those nationalities already in the United States, among whom the new refugees may settle, are differently organized, leading to differences in levels and effectiveness of information sharing regarding the deadline requirement.

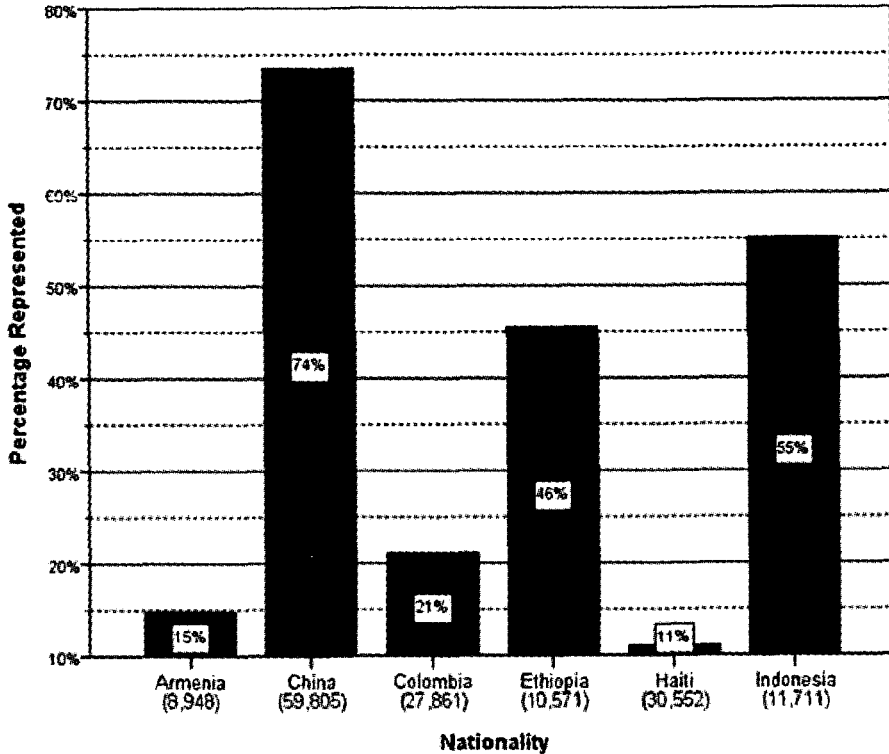
**Figure 2-6. Late Filing by Applicants of the Most Frequent Nationalities**



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filed late most often, followed by Chinese, Colombians, Armenians, Haitians, and Ethiopians.

**Figure 2-7. Representation for the Six Most Common Applicant Nationalities**



As Figure 2-7 shows, the two major nationalities that filed late most frequently, the Chinese with 34 percent and Indonesians with 45 percent, were also most often represented—the Chinese at a rate of 74 percent and the Indonesians at a rate of 55 percent. This matches up with our findings that late filers were generally represented at higher rates than timely filers. Also in line with the representation data, Armenians and Haitians shared similarly low rates of late filing, 15 percent and 18 percent respectively, and very low rates of representation, 15 percent and 11 percent respectively. Ethiopians bucked the pattern, though, with a low rate of late filing of 18 percent and a relatively high rate of representation of 46 percent. This is not surprising, of course, as some communities are

probably better informed about and understand better the value of representation.<sup>156</sup>

**Figure 2-8. Inspected Entry for the Six Most Common Applicant Nationalities**

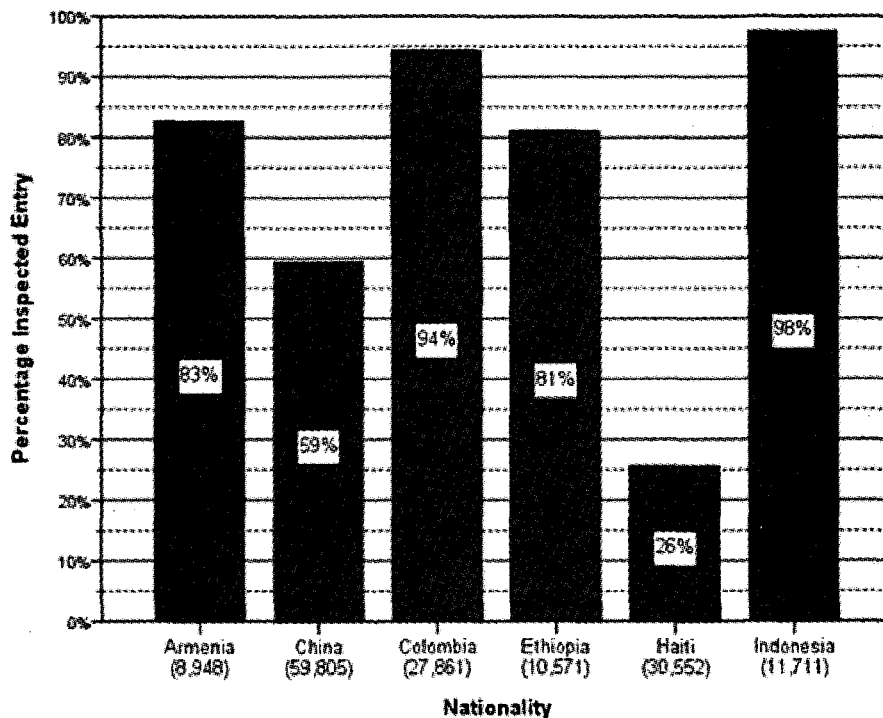


Figure 2-8 shows that for most of the six most common applicant nationalities, the cross-tabulation analysis demonstrated a clear relationship between lawful entry and timely filing, and the regression analysis tells us that, with all other variables held constant, applicants who entered lawfully filed timely more often than those who entered without inspection. As one might expect,

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156. As noted *supra* note 155, the regression analysis shows that, with all other variables held constant, Armenians filed late at a higher rate than Ethiopians and Haitians. In other words, one or more variables other than nationality drove down the rate of late filing by Armenians.

Armenians, Colombians, and Ethiopians, who all had relatively low rates of late filing, overwhelmingly entered through official channels, with rates of inspected entry ranging from 81 percent to 94 percent. Although more Chinese applicants entered with inspection than without inspection, the proportion of inspected entries was significantly lower, at nearly 60 percent, so it is perhaps unsurprising that over one-third of Chinese applicants were found to have filed late. But we see an interesting phenomenon when it comes to the Indonesians, who had the highest rate of inspected entry, 98 percent, but also the highest rate of late filing. Departing from the normal relationship in the opposite direction, Haitians had the highest rate of entry without inspection, 74 percent, but also one of the lowest rates of late filing. We wondered what was causing these counterintuitive results.

What do we know about the Haitian and Indonesian asylum applicant pool that might explain these outcomes? Haitians have a large and long-standing diaspora in the United States. Nearly one in every twenty Haitians resides in the United States.<sup>157</sup> In 2008, there were about 535,000 Haitian immigrants in the United States, nearly half of whom were naturalized U.S. citizens.<sup>158</sup> Nearly a quarter of these Haitians had lived in the United States since before 1980,<sup>159</sup> with over a third residing in the Miami area and almost a third residing in the greater New York City area.<sup>160</sup> It could be that the relatively tight-knit and well-established Haitian community helps its nationals to file for asylum within a year, and has figured out a way to prove their date of entry without providing official documentation.

The Indonesian immigrant community in the United States, in contrast, is relatively small and perhaps not as well organized in supporting its newly arrived nationals. As of 2005, there were only 75,000 Indonesian immigrants in the United States,<sup>161</sup> approxi-

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157. See Aaron Terrazas, *Haitian Immigrants in the United States*, MIGRATION INFO. SOURCE, Jan. 2010, <http://www.migrationinformation.org/USFocus/display.cfm?ID=770>.

158. *Id.*

159. U.S. Census Bureau, *United States Foreign-Born Population Data Tables: Haiti*, tbl.FBP-1 (2000), available at <http://www.census.gov/population/cen2000/stp-159/STP-159-haiti.pdf> [hereinafter *Haiti Data Tables*].

160. Terrazas, *supra* note 157.

161. Graeme Hugo, *Indonesia's Labor Looks Abroad*, MIGRATION INFO. SOURCE, Apr. 2007, <http://www.migrationinformation.org/Profiles/display.cfm?ID=594>.

mately a third of whom arrived before 1980.<sup>162</sup> In 2000, less than 37 percent of the Indonesians in the United States had obtained U.S. citizenship.<sup>163</sup> Moreover, most Indonesian asylum seekers face serious language barriers to obtaining information about the asylum process and legal representation. These patterns in the data give rise to a concern that factors such as community networks and cultural obstacles might play an important role in enabling asylum seekers to file timely.<sup>164</sup> This makes us worry that the one-year filing deadline is an inaccurate and inappropriate tool for weeding out weak asylum claims.

We are reluctant to push this hypothesis too far, however, as other data are more ambiguous. For example, among the six largest groups of applicants in FY 2008, Haitians and Ethiopians had the highest rates of filing on time, 88 percent and 83 percent respectively. Although there were large numbers of Haitian individuals living in the United States—419,315,<sup>165</sup> including 8,707 recent (2003-2007) successful asylum applicants—the number of Ethiopian-born individuals living in the United States was much smaller—69,530, including 2,722 recent Ethiopian asylees.<sup>166</sup> It may be that the quality of social networks is more important than the quantity of conationals, or it may be that the relationship we hypothesize does not hold true in all cases. Further research is needed on social networks among recent immigrants and new asylum seekers of the same nationality and, in particular, the extent to which new asylum seekers are assisted either by established residents with whom they share ethnicity or by those with recent experience with DHS.

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162. U.S. Census Bureau, *United States Foreign-Born Population Data Tables: Indonesia*, tbl.FBP-1 (2000), available at <http://www.census.gov/population/cen2000/stp-159/STP-159-indonesia.pdf>.

163. *Id.*

164. See Khalid Koser, *Social Networks and the Asylum Cycle: The Case of Iranians in the Netherlands*, 31 INT'L MIGRATION REV. 591, 602-03 (1997) (discussing the role of social networks in providing assistance to recently arrived migrants).

165. *Haiti Data Tables*, *supra* note 159.

166. U.S. Census Bureau, *United States Foreign-Born Population Data Tables: Ethiopia*, tbl.FBP-1 (2000), available at <http://www.census.gov/population/cen2000/stp-159/stp159-ethiopia.pdf>.



### C. Gender

Women filed about 41 percent of the claims in this database. Women had a rate of untimely filing 13 percent higher than men—32.7 percent, in contrast with 29 percent.<sup>167</sup>

The degree of filing within two, three, and four years of entry is similar for both males and females, as Figure 2-9 shows. Strikingly, however, women filed very late claims at a rate more than 50 percent higher than men. Almost 10 percent of female asylum seekers filed at least four years after entry. This difference may be due to the particular nature of the persecution inflicted upon these women. Women are more likely to have suffered sexual violence than men and therefore may be more reluctant to reveal to government officials—or anyone else—what happened to them in their home countries.<sup>168</sup> It may take many years before they are psychologically prepared to present an asylum claim. Moreover, women claiming asylum based on gendered grounds, such as domestic violence and female genital mutilation, may not be aware that they are eligible for asylum when they first arrive in the United States, and as a result might not file within a year of entry. This theory is supported by the finding that female asylum seekers who filed very late were represented at a higher rate than male asylum seekers<sup>169</sup>—perhaps because women who did not have a lawyer did not know that they were eligible for asylum.<sup>170</sup>

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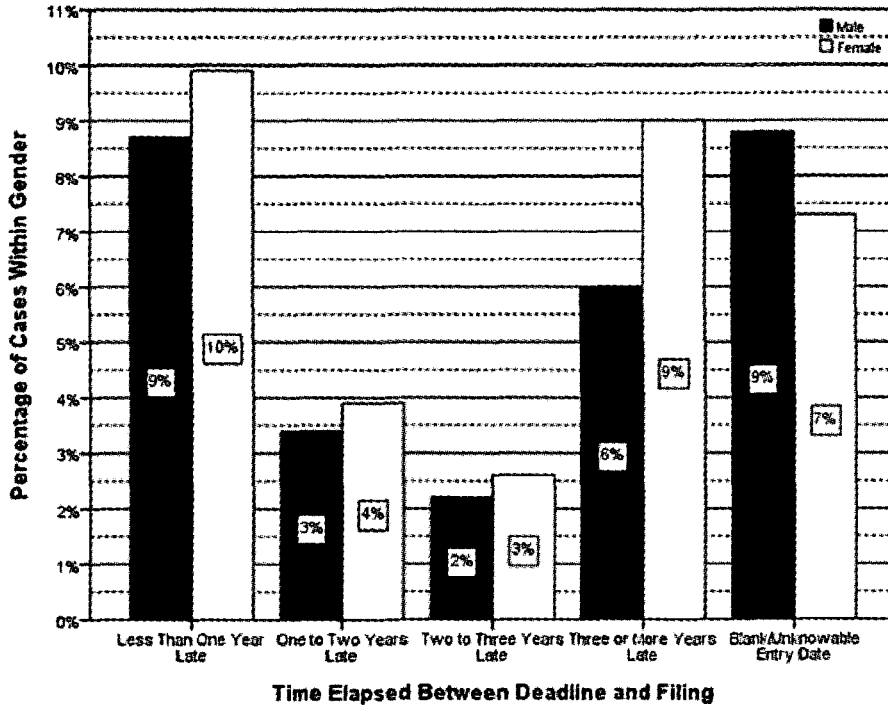
167. The regression confirms that, with all other variables held constant, women filed timely less often than men.

168. Diana Bogner, Jane Herlihy & Chris R. Brewin, *Impact of Sexual Violence on Disclosure During Home Office Interviews*, 191 *BRIT. J. PSYCHIATRY* 75 (2007).

169. The data reveal that 62.5 percent of the 11,184 women who filed four or more years after entry were represented, compared with only 51 percent of the 10,702 men who filed four or more years after entry.

170. Legal recognition of gender-based claims is relatively new. Some asylum applicants may think, until counseled by a lawyer, that only governmental persecution on account of political or religious activities would qualify an applicant for protection.

**Figure 2-9. Gender and Lapse Between Deadline and Filing Date**



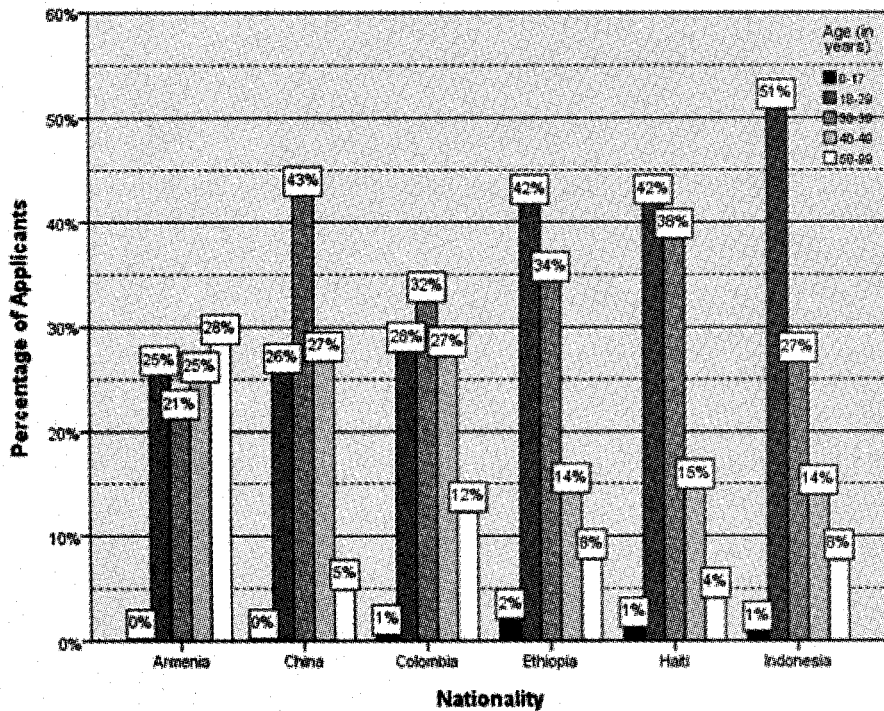
Finally, women filed late more often than men despite the fact that they entered without inspection less often than men did—31.1 percent versus 37.2 percent.<sup>171</sup> This, too, suggests that other factors, such as the nature of persecution suffered by women, accounted for a large degree for higher levels of late filing.

<sup>171</sup>. See *infra* Part II.E (showing correlation between entry without inspection and late filing).

### D. Age

As noted above,<sup>172</sup> more than two-thirds of asylum applicants filed their claims between the ages of eighteen and thirty-nine, although as Figure 2-10 demonstrates, different nationalities produce very different populations of applicants in terms of their ages.

**Figure 2-10. Age of Applicants from the Most Frequent Nationalities**



172. *Supra* Part I tbl.1-1.

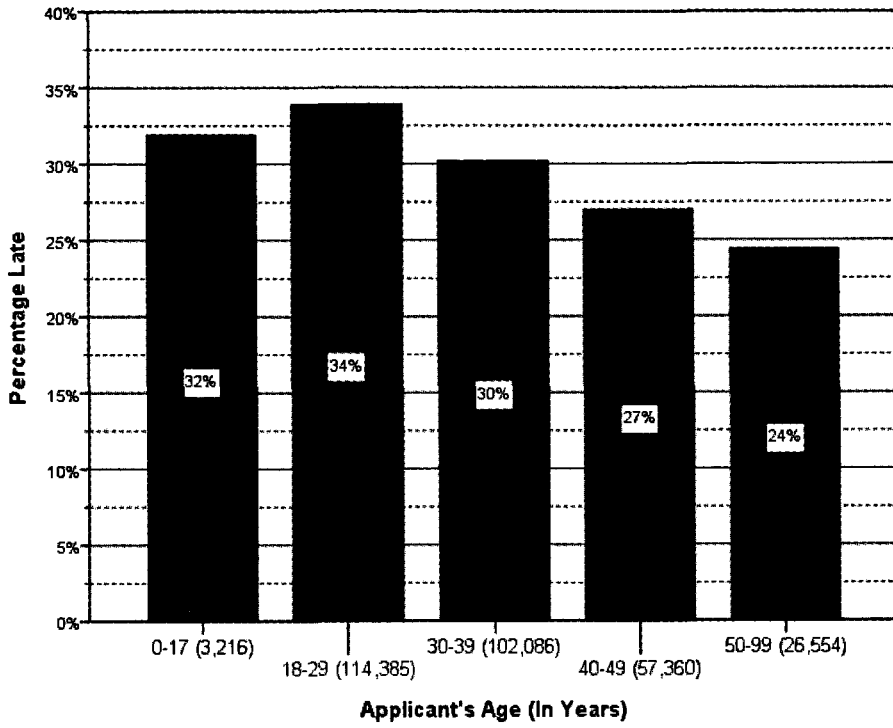
Figures 2-11 and 2-12 show that younger adult asylum seekers as a whole missed the deadline more frequently than older adult asylum seekers. Although about one in four claimants over fifty years old filed late, more than one in three between the ages of eighteen and twenty-nine did so. This relationship holds up for those who filed in each fiscal year that we studied. For example, in FY 2003, over 40 percent of asylum seekers between the ages of eighteen and twenty-nine filed late compared to less than 30 percent of those ages fifty and over. In other words, asylum seekers over fifty filed on time over 20 percent more often than those ages eighteen to twenty-nine.

We know that young adults are more likely to enter without inspection—nearly 9 percent of that group had a blank or unknowable entry date as compared to just under 3 percent of the older group—and therefore not have official documentation of entry. Yet even with all other variables, including mode of entry, held constant, the regression analysis confirms that older asylum seekers filed timely more often than younger asylum seekers.<sup>173</sup>

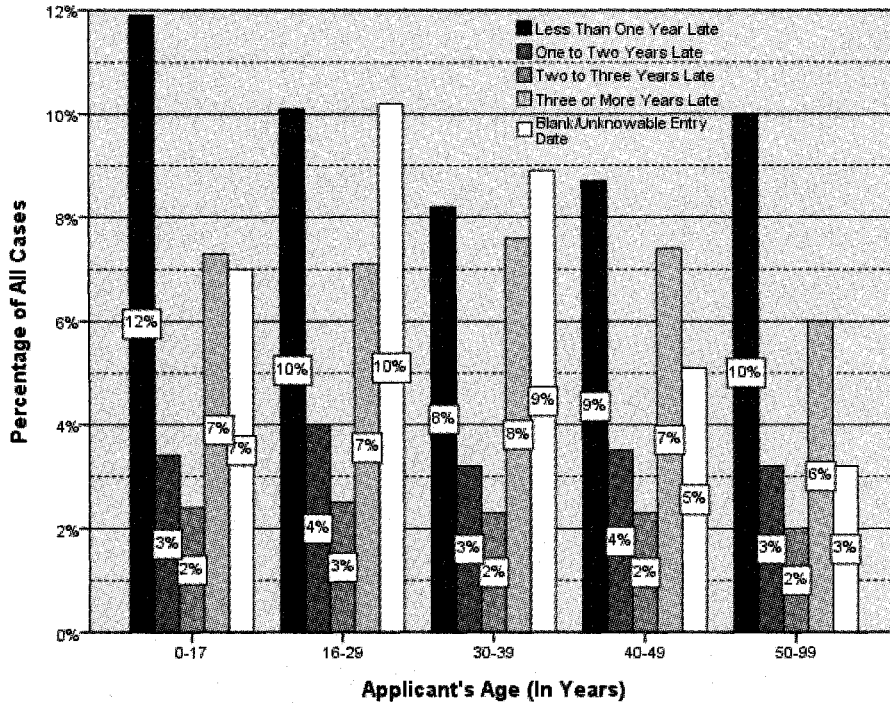
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173. If we consider only inspected applicants, the differences were smaller, but older applicants still filed timely more often than younger applicants. In all, 29 percent of those who were under age eighteen and 29 percent of those who were eighteen to twenty-nine years old filed late, whereas 26 percent of those between thirty and thirty-nine and 24 percent of those age forty and over were late.

Figure 2-11. Untimely Filing by Age



**Figure 2-12. Age and Lapse Between Deadline and Filing Date**



### *E. Mode of Entry*

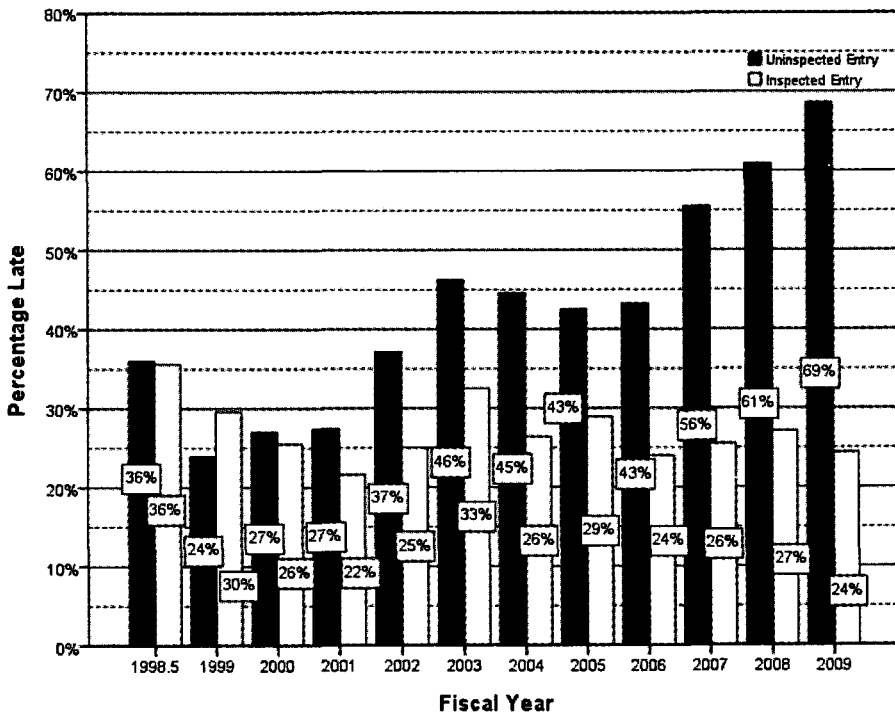
As noted earlier,<sup>174</sup> almost two-thirds of asylum seekers in our database gained admission to the United States lawfully. Late filing was determined in nearly 45 percent more applicants who entered the United States without inspection than applicants who were inspected upon entry—38 percent of uninspected entrants, but only 26 percent of inspected entrants, filed late.<sup>175</sup>

174. *Supra* Part I tbl.1-1.

175. The regression analysis confirms that, with all other variables held constant, inspected applicants filed timely more often than uninspected applicants.

This degree of difference in late filing has changed significantly over time. As Figure 2-13 shows, those entering lawfully have been deemed late filers at a fairly consistent rate. Those entering without inspection, however, have increasingly been deemed late filers over time.

**Figure 2-13. Late Filing by Year and Mode of Entry**



The most recent years, 2007-2009, show an enormous increase in determinations of late filings to the point that almost 70 percent of those who entered without inspection were determined to have filed late claims in 2009, compared to only 24 percent in 1999—a nearly 200 percent increase in a decade. This increase has occurred despite the fact that the percentage of applicants who have entered without inspection has remained almost constant.<sup>176</sup>

176. See *supra* Part II fig.2-4.

What might account for this difference regarding the mode of entry and this serious increase in late filing? It is possible that since 9/11, asylum officers have required a higher degree of proof of the date of entry for those who entered without inspection than they had required previously. Those who are inspected most often have an immigration officer's "Arrival and Departure" record card stapled to their passports, including a date stamp indicating when they arrived in the United States. But those who enter without being inspected do not have such official evidence to corroborate their date of entry.

It may also be that asylum officers perceived inspected applicants to be more credible than uninspected applicants. When we examine asylum grant rates during the same period, applicants who were inspected at entry received asylum at higher rates than the uninspected, regardless of whether they filed late or timely. That is, untimely inspected asylum applicants who met an exception to the deadline were granted asylum at a rate of 54 percent, and timely inspected applicants had a grant rate of 51 percent. But timely uninspected applicants faced a much lower grant rate on the merits, 44 percent, and untimely but excepted uninspected applicants fared worse, with a 33 percent grant rate. The moral of the story is that, even when they were timely, the uninspected lost out on the merits. Of course, applicants, whether inspected or not, who were untimely and did not qualify for an exception were the biggest losers, as they faced a grant rate of 0 percent.

#### *F. Asylum Offices*

What about lateness of filings at the different Asylum Offices? The eight regional Asylum Offices determined asylum seekers to have filed late at very different rates. In Region H, for example, applicants were found to have filed late nearly twice as often compared to those in Regions B, C, and F.<sup>177</sup> As shown in Figure 2-15, those applying in Regions A and G were found to have filed late, but by less than a year, about twice as frequently as those in Region F, and those in Region H were found to have filed very late—four or

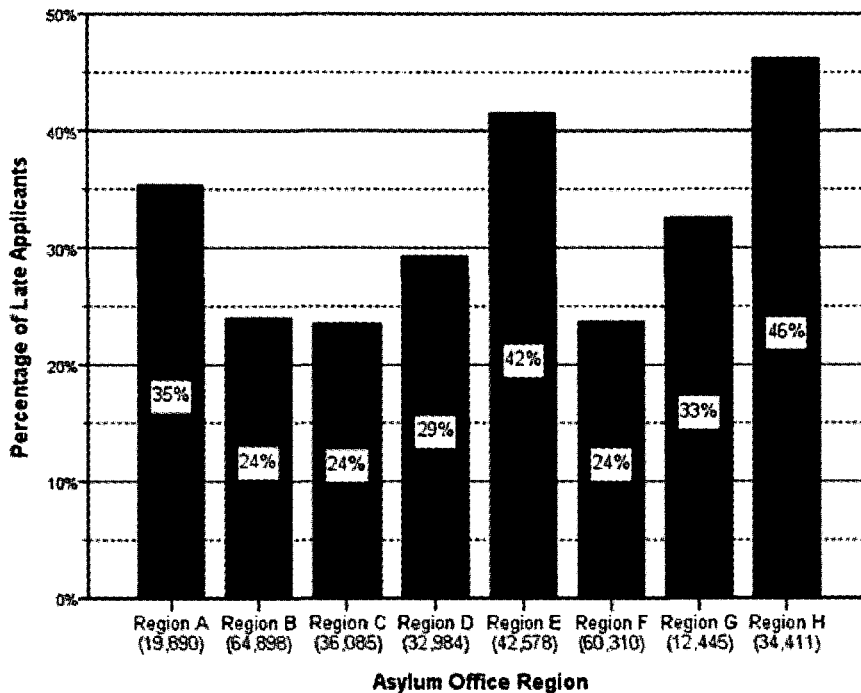
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177. See *infra* Part II.F fig.2-14.



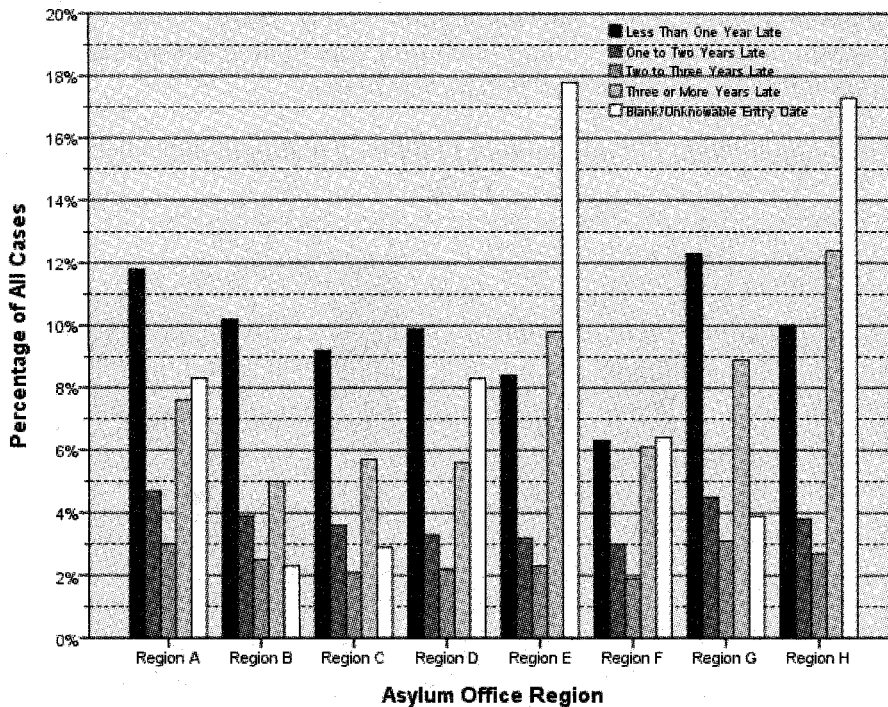
more years after arrival—more than twice as often as those in Region B.<sup>178</sup>

**Figure 2-14. Untimely Filing by Regional Asylum Office**



178. The regression analysis found that, with all other variables held constant, applicants before the Asylum Office in Region H were most often untimely, followed by Regions E, A, G, D, F, C, and B. Figure 2-14, based on crosstabs of the data, reflects this order with one slight difference: according to the crosstabs, applicants in Regions B, C, and F filed untimely at identical rates.

**Figure 2-15. Lapse Between Deadline and Filing Date by Regional Asylum Office**



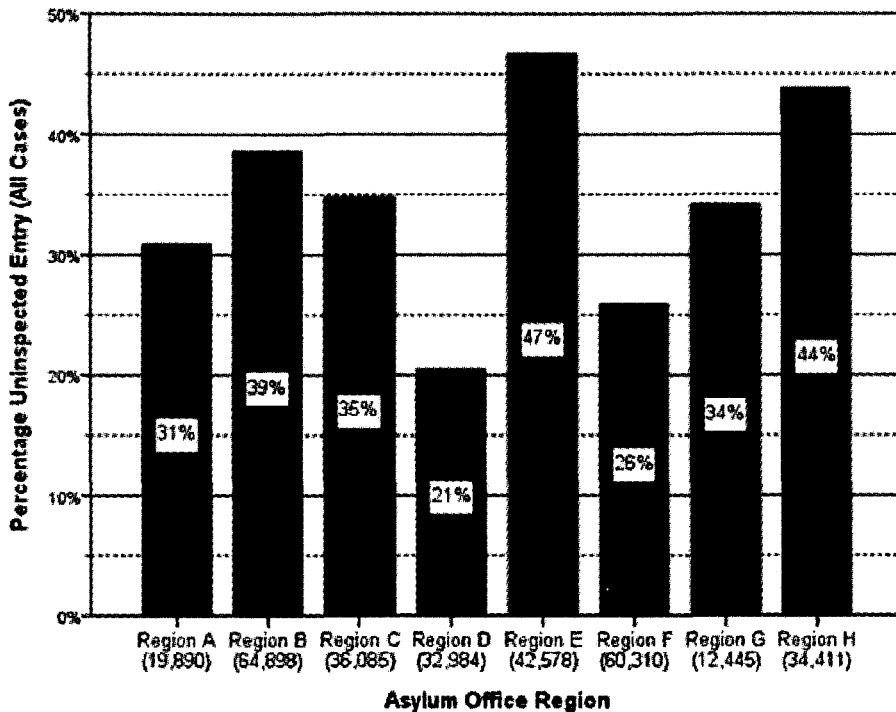
We wondered whether these differences between Asylum Office regions reflected the mode of entry of the relevant asylum applicant populations. As discussed above, those who entered without inspection and therefore without the best proof of their dates of entry were more often unable to prove timely filing compared to those inspected upon entry.<sup>179</sup> This relationship holds true for Regions E and H, which had the highest level of both late and uninspected filers.<sup>180</sup> But as with nationality, uninspected mode of entry did not always result in late filing. Region B had the third highest rate of uninspected entrants, at 39 percent, and one of the lowest propor-

179. See *supra* Part II.E.

180. See *infra* Part II.F fig.2-16.

tions of late filers, at 24 percent. Region A had the third lowest rate of uninspected entrants, at 31 percent, and the third highest proportion of late filers, at 35 percent. These data suggest the possibility that these differences in timely filing rates between Asylum Offices may reflect different operating assumptions or procedures in the different regional offices.

**Figure 2-16. Uninspected Entry and Regional Asylum Office**



\* \* \*

The data reveal that a very large percentage and absolute number of asylum seekers have been deemed to have filed late. This failure to meet a procedural requirement has major consequences for those who suffered or reasonably fear persecution, and for the U.S. government. A number of characteristics of asylum seekers correlated with lateness and sometimes the degree of lateness. These include representation, gender, age, nationality, regional

office in which they filed, and mode of entry. We think it is very troubling that a procedural bar to asylum should affect refugees differently depending on these factors, which do not have anything to do with the severity of the persecution that the asylum seekers faced, the reasons why they were persecuted, or the credibility of their testimony. Unfortunately, the arbitrariness that is injected into asylum adjudication by these factors is compounded by how these same factors correlate with asylum officers' evaluations of how the changed and extraordinary circumstances exceptions apply to the applicants. How those officers applied the exceptions is the subject of the next Part of this Article.

### III. THE REJECTIONS

In Part II, we reviewed the numbers and demographic characteristics of applicants who did not establish to the satisfaction of asylum officers that they filed their asylum applications within one year of entering the United States. We saw that 92,622 individuals, or 30.5 percent of all affirmative asylum applicants, fell into this "untimely" category during the period of our study. This figure understates the proportion of asylum seekers affected by the deadline. It does not take into account those who failed to apply because they knew that they missed the deadline and therefore judged that the risk of applying late, and revealing themselves to immigration authorities, was greater than the risk of remaining in the United States without authorization.

In Part III, we examine the relationships between the larger pool of all untimely applicants and the smaller pool of those who were ultimately rejected by DHS because they did not qualify for exceptions to the deadline. We ask what proportion of untimely applicants were actually rejected, and to what extent the rejection rate changed over time and was different for certain demographic subgroups within the population of untimely applicants. We examine the extent to which asylum officers, to whom cases are randomly assigned within each of the eight regional offices, vary in the degree to which they find that applicants qualified for an exception. And we offer an informed estimate of the extent to which the rejected applicants would have won asylum if Congress had not imposed a one-year deadline.

### A. *Introductory Note*

We begin Part III.A with a note on terminology, discretion, and the limitations of the data provided to us. Following the practice of DHS officials, in Part III we use the term “rejectable” to refer to a case in which the applicant could not prove, by “clear and convincing evidence,” that he or she filed an application for asylum within one year after entering the United States.<sup>181</sup> “Rejectable” cases, in other words, are those to which the one-year deadline could apply. The law imposes a high burden of proof on applicants, many of whom lack documentation of their date of entry, and invests asylum officers with authority to determine whether an applicant has met that burden or is rejectable.<sup>182</sup>

The term “rejected” refers to a case that was referred to immigration court because of the applicant’s failure to prove timely filing or an acceptable exception—that is, a case to which the one-year deadline was actually applied as a bar. A rejection precludes the asylum officer from making a decision on the merits of the case. But an asylum officer can determine that a rejectable applicant’s reason for filing late constitutes a “changed circumstance” or an “extraordinary circumstance,” the two exceptions that Congress provided to the deadline.<sup>183</sup> The statute provides an illustrative but not exhaustive list of exceptions to the one-year deadline, enabling asylum officers to approve exceptions that are not enumerated therein.<sup>184</sup>

If the applicant qualifies for an exception, the asylum officer then has the authority to determine whether the applicant filed within a reasonable period of time after the circumstance that prevented timely filing was no longer applicable.<sup>185</sup> Asylum officers, therefore,

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181. Here, as elsewhere, we use the shorthand terms “late,” “rejectable,” and “untimely” interchangeably. We use the term “timely” to mean that the applicant was found to have filed within a year of entry.

182. Of course, the database for our studies of rejectable cases includes only cases that were filed after April 15, 1998, the date the one-year filing bar went into effect, and were determined to be untimely.

183. 8 U.S.C. § 1158(a)(2)(D) (2006).

184. See *supra* text accompanying note 102 (providing a more detailed description of the exceptions).

185. For example, during the period of the study, DHS apparently followed advice from DOJ to the effect that waiting more than six months to apply for asylum after lawful status under a visa expired was unreasonable. ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 24. DHS did not deem waiting more than six months per se unreasonable in other

may make as many as three separate determinations pertaining to the deadline in a particular case: (1) whether the applicant filed on time or was rejectable; (2) whether a rejectable applicant qualified for an exception; and (3) whether an applicant who qualified for an exception filed within a reasonable period after the exception was no longer applicable.

DHS statistics reveal which untimely applicants were deemed to qualify for an exception,<sup>186</sup> so we can analyze statistically who these people are, as well as who did not qualify, in relationship to the larger body of untimely filers. Unfortunately, DHS does not separately code (a) untimely filers for whom no exception was even arguably applicable; (b) untimely filers for whom an exception might be applicable but who did not establish that exception “to the satisfaction of the Attorney General”,<sup>187</sup> and (c) untimely filers to whom an exception applied but who were deemed not to have filed within a reasonable period of time after the exception was no longer operative. We were therefore unable to evaluate the rate at which exceptions were applied in relationship to exceptions that were asserted or might have been applicable, nor were we able to determine whether cases were rejected because the asylum officer found that the asylum seeker had not established the existence of the potentially applicable exception, or because the asylum officer accepted the exception but decided that the applicant did not file quickly enough. Similarly, DHS does not record the nature of any potentially applicable exception, so we were unable to analyze statistically the types of exceptions that were offered by the asylum seeker or examined by the asylum officer and the proportions in

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situations, but some asylum officers may have applied the six-month rule in other contexts, for example, when the applicant filed more than six months after learning that human rights conditions in her country had deteriorated. *See* Letter from Tori Andrea to Joseph Langlois, *supra* note 8.

186. We coded three types of applicants as having qualified for an exception and having filed for asylum while the exception applied, or within a reasonable period of time thereafter: (1) those whose date of entry was more than a year before their application, or was blank, and who were granted asylum; (2) those whose date of entry was more than a year before their date of application, or was blank, and who were referred to immigration court for a reason other than late filing; and (3) those whose date of entry was more than a year before their date of application, or was blank, and who were denied asylum for a reason other than late filing. The third category refers only to the small number of individuals who were in a lawful status when DHS reached a decision on their applications.

187. 8 U.S.C. § 1158(a)(2)(D).

which they were accepted. Moreover, DHS does not record the end date of accepted exceptions nor the length of time after those end dates that applicants filed asylum claims, so we were also unable to analyze the range of post-exception filing time periods and which of those were deemed to be “reasonable.” Nevertheless, the data that DHS does record enabled us to make some interesting observations about the exercise of discretion by DHS officials.

To confirm the statistical significance of the data analysis presented below, we ran a binary logistic regression on the database of all cases, exploring the dependent variable of rejection.<sup>188</sup> Unless otherwise noted, these variables were statistically significant<sup>189</sup> and confirmed the findings of the cross-tabulation analysis.<sup>190</sup> In other words, even with all other variables held constant, the relationship between rejection rates and each of the independent variables described below was statistically significant.

### *B. The Rejection Rate*

From April 16, 1998, when the one-year deadline went into effect, through June 8, 2009, DHS rejected 54,141 applicants because either they could not prove that they filed on time; or, if they conceded that they did not file on time, then in the view of DHS officials, they failed to prove the existence of a changed or extraordinary circumstance justifying a late application; or, having proved their eligibility for an exception, they failed to file within a reason-

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188. The regression model contained the following independent variables: the Asylum Office in which the applicant's case was heard, number of cases previously decided by the asylum officer who heard the applicant's case, whether the applicant entered lawfully, the applicant's geographic region of origin, the state of political and civil rights in the applicant's nation of origin, the applicant's religion, the applicant's gender, whether the applicant had dependents, whether the applicant had representation, the applicant's age at filing, the length of time elapsed between the applicant's date of entry and date of filing, and the fiscal year during which the applicant filed. The Methodological Appendix discusses how we measured and coded these variables and how we created the “rejected” database. In the text below, we reference the regression run with the independent variable of asylum applicants' nationalities recoded into geographic regions, with the sole exception of the section on nationality, for which we used the results of the regression run with the independent variable of asylum applicants' nationalities without recoding.

189. The variables were statistically significant at the 0.01 level.

190. For nominal variables, all of the variables that we report in the text had a statistically significant effect on the likelihood of rejection. However, in some cases, as in our study of timeliness, there were some statistically insignificant variables that we did not report.

able period of time in light of the exception. These rejected cases constituted 17.8 percent of all of the asylum cases that DHS adjudicated and 59 percent of all cases that were filed more than a year after entry.

Figure 3-1 shows the outcomes by fiscal year of all of the cases in the database, including those filed in the two and a half years before the filing deadline was imposed as well as those filed timely.

**Figure 3-1. Case Outcome by Fiscal Year**

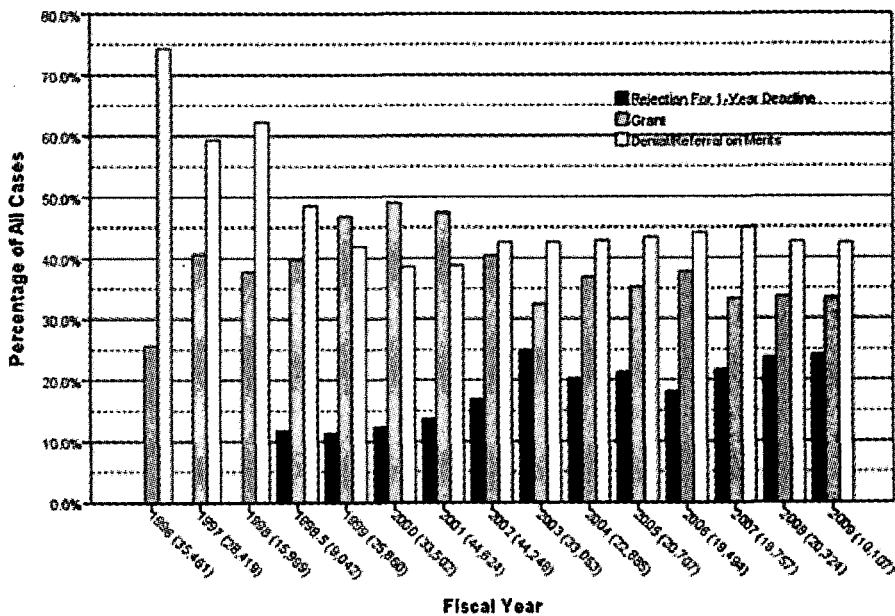


Figure 3-1 shows that rejections based on the deadline can be grouped into three periods. In cases filed before April 16, 1998, there were no rejections based on the deadline because the deadline had not yet taken effect. From the onset of the deadline through FY 2002, between 11 percent and 17 percent of cases were rejected because of the deadline. Then, in FY 2003, there was a sudden increase to 25 percent in the percentage of rejected cases. And in every year but one since the end of FY 2002, the rejection rate has



topped 20 percent, with the rate near 25 percent once again in the last year and a half covered by our study.

Figure 3-1 also shows that from FY 1999 through FY 2009, the rate at which cases were denied or referred on the merits held steady at roughly 43 percent. Of course, if the rate of merits denials held steady, and the rejection rate went up, the grant rate had to fall during the years in question—and it did. In every year from the second half of FY 1998, when the deadline first took effect, through FY 2002, that rate equaled or exceeded 40 percent. But in FY 2003 it dropped to about 33 percent, and it never reached 40 percent again. In the last two and a half years covered by this study, it remained at about 33 percent.<sup>191</sup> Grant rates rose steadily until FY 2000, peaked in FY 2000 and 2001, and fell thereafter.

What are the reasons for the decline in grant rates after FY 2001? It may be that stricter enforcement of the deadline statute, as applied during and particularly after FY 2002, contributed to the drop. Not only did the rate of merits rejections remain fairly constant from FY 1999 onward, but former DHS asylum officers have anecdotally told us that they were informally advised by superiors around FY 2002 to apply the deadline more stringently, and the statistical evidence suggests that the advice was followed.

Though we believe that DHS officials may have imposed stricter limits starting in FY 2002 or 2003, we do not know why. It could be that the 9/11 attacks, just as FY 2002 was starting, heightened suspicion of immigrants generally, including asylum seekers. It could be that the transfer of functions, including asylum adjudication, from INS to the new Department of Homeland Security in the middle of FY 2003 imposed a new enforcement culture on adjudica-

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191. Through FY 2004, the DHS Yearbook of Immigration Statistics showed the asylum grant rate by year—however, the Bush administration ended that practice starting with the FY 2005 statistics. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 55 tbl.18 (2004), available at <http://www.dhs.gov/files/statistics/publications/YrBk04RA.shtm>. The DHS FY 2004 grant rate table reports grant rates from FY 1996 through FY 2004. The table shows significantly lower grant rates, particularly for FY 1997, FY 1998, and FY 1999, compared to those computed from the database that DHS provided to us. The most likely explanation of the difference is that the DHS computations included a substantial number of cases filed by Mexican nationals, who were excluded from our database. See *infra* note 253. In addition, the Yearbook statistics are based on the date of completion, so they include many cases from the backlog of over 400,000 cases filed from the late 1980s through December 1997; our data are based only on the fiscal year of filing.

tion officials. It could be that INS was especially lenient in applying a new law in the years immediately following its entry into force, and that the “honeymoon” was over by FY 2002. It could be that senior officials of the Bush administration passed a message down the line to be more strict in allowing anyone to immigrate or even to spend more than a few months in the United States.<sup>192</sup> Of course, a combination of these factors may have been responsible.

Part of the decrease appears to result from a falloff in the percentage of applicants after FY 2001 who filed within a year. This percentage was 64 percent in the six months after the deadline went into effect and then climbed, running around 73 percent to 76 percent between FY 1999 and FY 2001, although it dropped to about 65 percent in the subsequent years.<sup>193</sup> It is not clear whether this decline in timely filing resulted from fewer applicants filing within a year of entry, from some asylum officers becoming less accepting of applicants’ claimed entry dates unsupported by official entry documents, thus creating a smaller pool of timely applicants, or from both of these factors.

A major aspect of the adjudication of untimely asylum applications is the adjudication of exceptions to the deadline. As noted above, 59 percent of all rejectable cases were rejected over the entire period studied. But the rate of rejection was not uniform among years, nor was it uniform among subpopulations of asylum seekers.

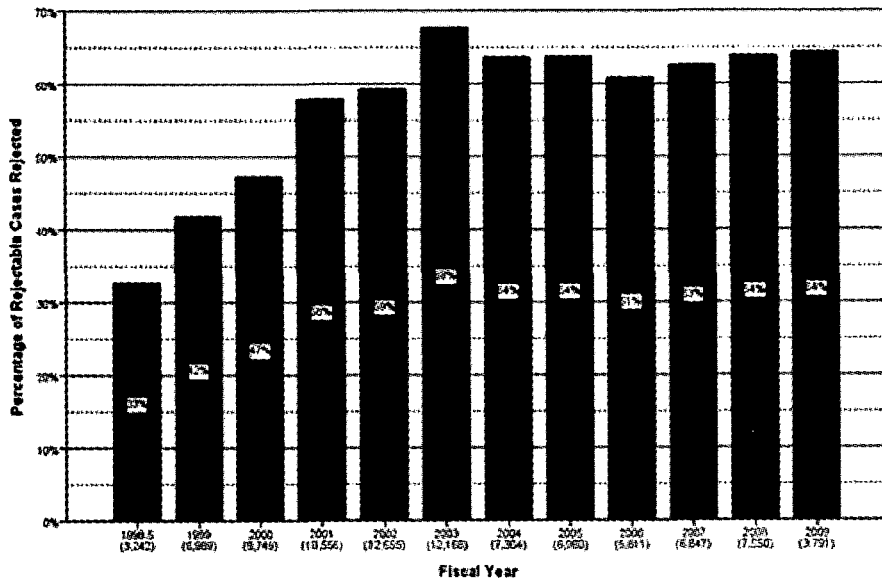
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192. Admissions of refugees to the United States through the State Department’s overseas refugee program fell from about 70,000 persons in FY 2001 to about 25,000 persons in FY 2002. 2008 DEPT OF HOMELAND SEC. ANN. FLOW REP.: REFUGEES & ASYLEES 1 fig.1, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf). The number of student visas issued by the Department of State fell from 319,517 in FY 2001 to 256,534 in FY 2002. DEP’T OF STATE, CLASSES OF NONIMMIGRANTS ISSUED VISAS, FISCAL YEARS 1998-2002 tbl.XVI(A), available at <http://travel.state.gov/pdf/FY2002%20table%20XVI.pdf>.

193. See *supra* Part II fig.2-3.

Figure 3-2 shows the rate, by fiscal year, at which these rejectable cases were rejected.

**Figure 3-2. Rejectable Cases Rejected by Fiscal Year**



Here, too, we see the steady climb in the rejection rate after the first few years in which the deadline was in force.<sup>194</sup> In the first three years, DHS rejected an increasing number of rejectable cases, ranging from 33 percent in the second half of FY 1998 to 47 percent in FY 2000. But in FY 2001, the rate jumped to 58 percent, reached a high of 68 percent in FY 2003, and in subsequent years was never less than 61 percent.<sup>195</sup>

194. The percentages are higher in this figure than in Figure 3-1 because the baseline is rejectable cases rather than all cases.

195. The regression analysis confirmed that, with all other variables held constant, cases were more often rejected as years went by.

*C. Magnitude of Lateness*

The rate of rejection varied depending on how much later than one year the applicant filed. Those who filed less than two years after entry were rejected at a rate of 32 percent, but those who filed more than two years after entry were in every case rejected at a rate of at least 57 percent. Our regression analysis confirmed that the longer the lapse, the more likely an asylum seeker was rejected.

Moreover, having a missing entry date was like losing your ticket in a parking garage; applicants with no date of entry were penalized even more severely than those who filed four or more years after entry. Asylum applicants who could not establish any date of entry faced an 84 percent rejection rate—35 percent higher than the 62 percent rejection rate faced by those who filed four or more years after entry, and 65 percent higher than the 51 percent rejection rate faced by the entire cohort of those who could establish an entry date.

If we look more closely at the rejection rate for applicants who filed only shortly after the deadline, we can see that those who were only a few days late were often determined to qualify for an exception. Figure 3-3 shows the rejection rate for those who were late but who missed the deadline by 31 or fewer days.

**Figure 3-3. Rejection Rate for Applicants Late 31 or Fewer Days**

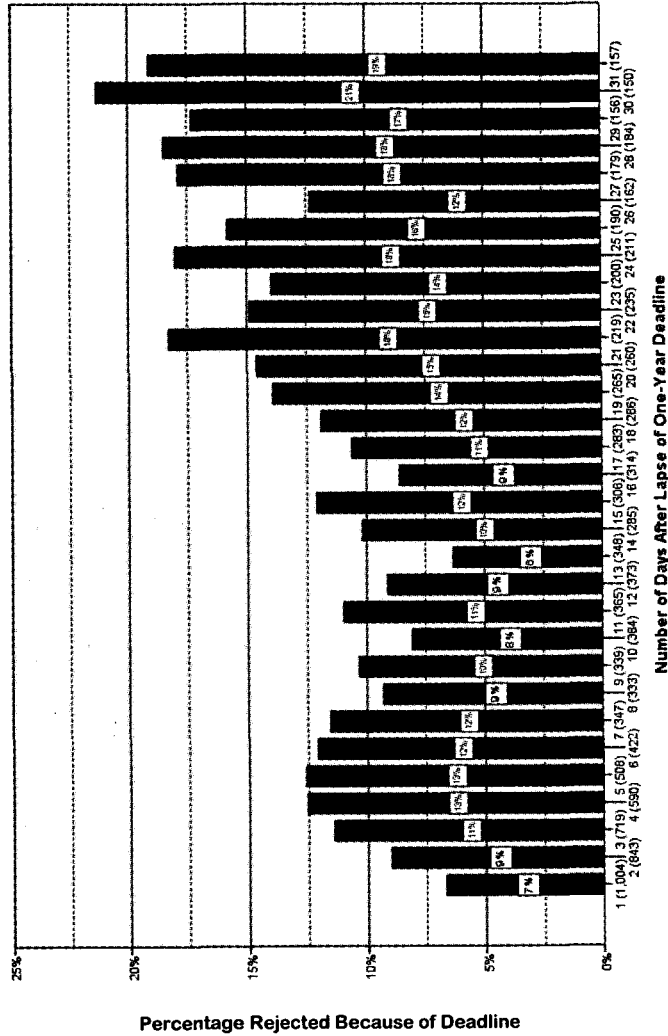
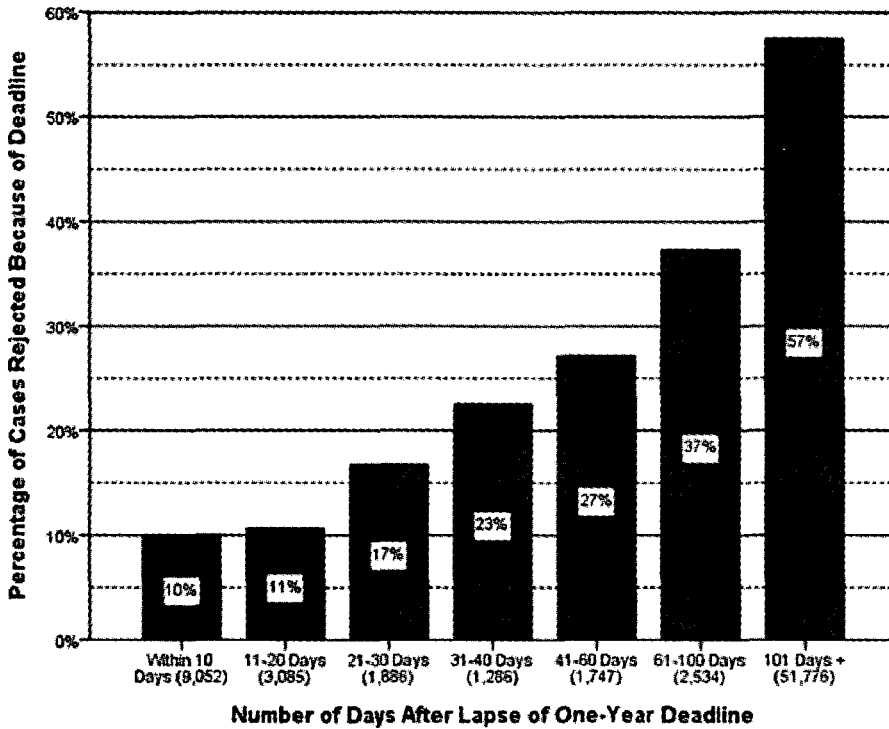


Figure 3-3 shows that the rejection rate remained at 15 percent or less for those who filed between the 365th and the 384th day after entry, or 20 days late, but that it began to climb after that, reaching 21 percent by 30 days after entry. Figure 3-4 reveals what happened to those who filed still later.

**Figure 3-4. Rejections by Number of Days After Deadline**

These two figures are not surprising, except that the statute reads as if it created an on-off switch at the one-year mark, whereas the two graphs show that in practice, asylum officers have created in the aggregate a sliding scale. Tardier filings resulted in greater rates of rejection based on the deadline.<sup>196</sup>

196. As we have noted, *supra* notes 71-73 and accompanying text, the deadline is subject to exceptions, and the exceptions are themselves subject to a requirement of filing within a reasonable period of time after the exception is no longer applicable. We do not think that the "reasonable time" rule accounts for the sliding scale demonstrated by the graph, however. The "reasonable time" rule applies only if an exception is involved, and the exceptions involve events that would ordinarily produce substantial delays, that is, months if not years, including changed country conditions, post-traumatic stress disorder, and the expiration of lawful status. Figures 3-3 and 3-4 show that the rejection rate climbs steadily even within the first sixty days of late filing.

#### *D. Asylum Seeker Characteristics*

We were also interested in whether there were differences in rejection rates for different populations who filed more than a year after entry. Not all differences among the characteristics of the applicant pool correlated with disparate rejection rates. Women who were late filers were rejected at about the same rate as men; the rate was 56 percent for women and 60 percent for men.<sup>197</sup> Late applicants with dependents were rejected at a rate of 52 percent, but those without dependents were turned down at a rate of 60 percent, perhaps reflecting some sympathy on the part of asylum officers for those with dependents.<sup>198</sup> Except for applicants who were younger than eighteen years old, for whom the regulations provide a particular exception to the deadline, the rate of rejection was not affected much by the applicant's age.

One particularly important attribute, however, was whether the applicant was represented when interviewed by an asylum officer.<sup>199</sup> In all, 44 percent of applicants were represented. As we have seen,<sup>200</sup> applicants who filed late were more often represented—73 percent versus 65 percent—than applicants who filed timely. Among applicants who filed late, and therefore were rejectable, those who were represented were less often rejected—55 percent compared with 62 percent. The regression confirms that, with all other variables held constant, represented asylum seekers were rejected less often than unrepresented asylum seekers.

As we have noted, late filers may be more likely to have representation because lawyers could help them understand that they may actually be eligible for asylum in cases in which the law might be surprisingly protective, such as sexual orientation and domestic violence cases, to someone from a different legal and political

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197. The regression analysis confirms that, with all other variables held constant, female asylum seekers were rejected slightly less often than male asylum seekers.

198. The regression analysis confirms that, with all other variables held constant, asylum seekers with dependents were rejected slightly less often than asylum seekers without dependents. Cf. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 9, at 341-42 (finding that immigration judges granted asylum 48.2 percent of the time to applicants with dependents but only 42.3 percent of the time to applicants without dependents).

199. As noted *supra* note 150, representation does not necessarily mean representation by an attorney.

200. See *supra* text accompanying note 152.

culture. It also may be that legal representatives help late-filing asylum seekers to understand the exceptions to the deadline and their eligibility for these exceptions. In any case, our finding that represented rejectable asylum seekers were less often rejected based on the deadline confirms many studies showing the effect of representation on asylum claims.<sup>201</sup>

Figure 3-5 shows the rate at which cases were rejected, broken down by the region from which the asylum applicants fled, for only those rejectable applicants who were inspected at entry.<sup>202</sup>

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201. See Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in II REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 232, 239 (2005), available at [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/ERS\\_Rpt\\_VolII.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_Rpt_VolII.pdf); REFUGEE ROULETTE, *supra* note 9, at 44-45; Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 1, available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 742 (2002). We were not surprised that the magnitude of the difference was fairly small—much smaller, for example, than the difference in the success rates of represented and unrepresented asylum applicants in immigration court. See REFUGEE ROULETTE, *supra* note 9, at 45-46. The Asylum Office interview is nonadversarial, and asylum officers are likely to take special care, in that setting, to bring out whatever facts may help an unrepresented applicant, even if the applicant, because of the lack of representation, does not know of the relevance of those facts or the need to present them. See, e.g., Kuck, *supra*, at 239 (describing the interview process as nonadversarial); REFUGEE ROULETTE, *supra* note 9, at 12.

202. We looked only at inspected applicants for this regional analysis because otherwise the differing percentages of persons who entered without inspection from each region would strongly influence the reported percentages of rejections. Figure 3-5 excludes 10 Canadian cases and 833 cases that DHS coded as persons of “unknown” origin among the 92,622 late applicants. Africa refers to sub-Saharan Africa. A full description of geographic regions broken down by nationalities is provided at our website: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance/>.



**Figure 3-5. Rejectable Cases Rejected by Asylum Applicant's Region of Origin, Inspected Entry Only**

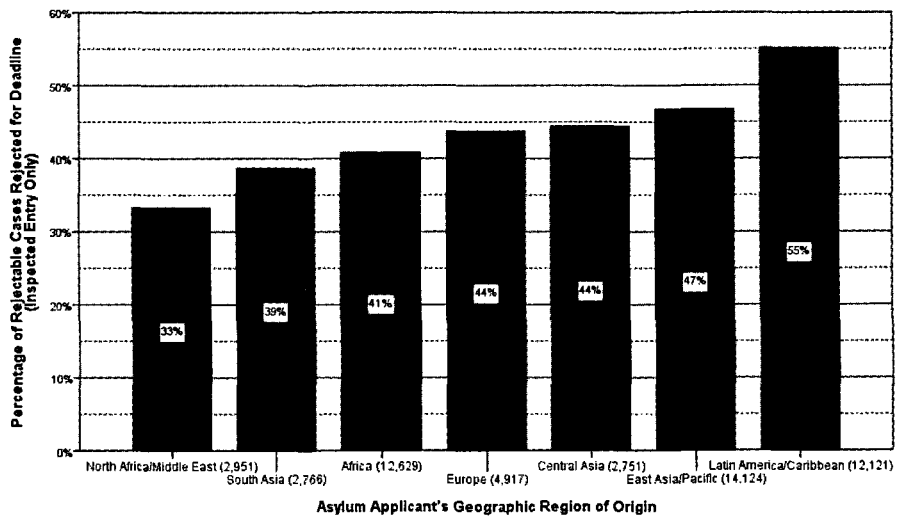


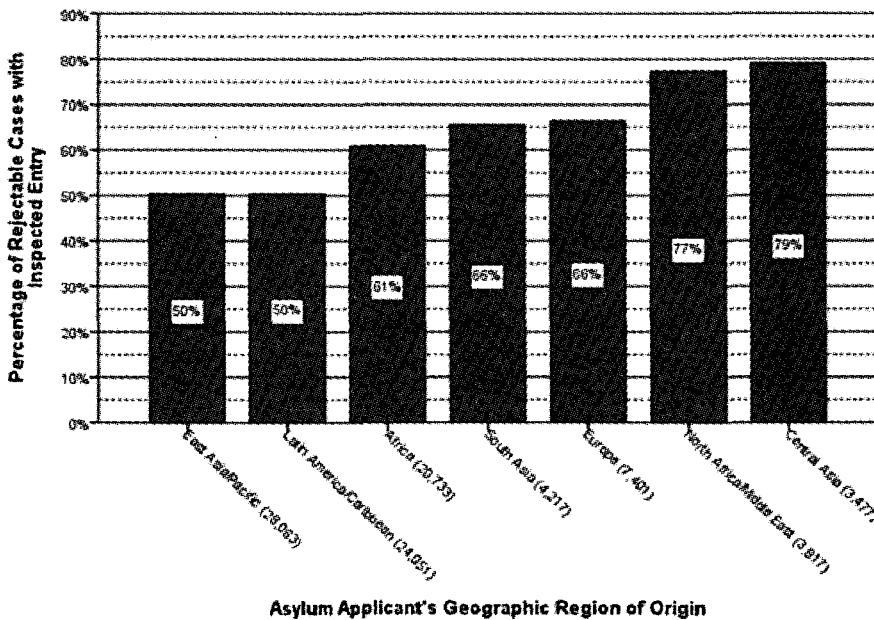
Figure 3-5 shows that there were important differences in the ultimate rejection rates among inspected untimely filers, depending on their region of origin, and that those from North Africa and the Middle East fared best—only 33 percent of late applicants from that part of the world did not qualify for an exception—but those from East Asia or Latin America and the Caribbean experienced significantly higher rejection rates, of 47 percent and 55 percent, respectively.<sup>203</sup> Inspected Central Asian and European applicants

203. If we look at all inspected applicants, including those who filed timely, the relationship similarly holds. Latin Americans and East Asians face rejection rates of 15 percent and 12 percent, respectively; North Africans and Middle Easterners have the lowest rejection rates, at 8 percent. In between, we see Europeans at 12 percent, sub-Saharan Africans at 11 percent, South Asians at 10 percent, and Central Asians at 9 percent. Looking at all rejectable applicants, including those who entered without inspection, the relationship is also similar. Latin Americans and East Asians are most likely to be rejected—at rates of 64 percent and 62 percent, respectively—and North Africans and Middle Easterners are least likely to be rejected, at 34 percent. We do, however, see some shifting in the middle: inspected Central Asian applicants are less likely to be rejected than inspected African and South Asian applicants.

were more often rejected than inspected African and South Asian applicants.

We were interested to learn that the findings of the regression analysis were slightly different, with East Asians most often rejected, followed by Central Asians and then Latin Americans. In the regression results, Africans were the next most likely to be rejected, followed by Europeans; then, as in the cross-tabulations, South Asians followed by North Africans and Middle Easterners. These findings indicate that one or more variables other than nationality and inspected entry impacted outcomes.

**Figure 3-6. Inspected Entry by Asylum Applicant's Region of Origin, Rejectable Cases Only**



Why is it that late inspected Latin American applicants were 66 percent more often rejected than late inspected North African and Middle Eastern applicants? Perhaps part of the answer lies in Figure 3-6, which tells us that there are significantly more uninspected rejectable entrants from Latin America and the Caribbean

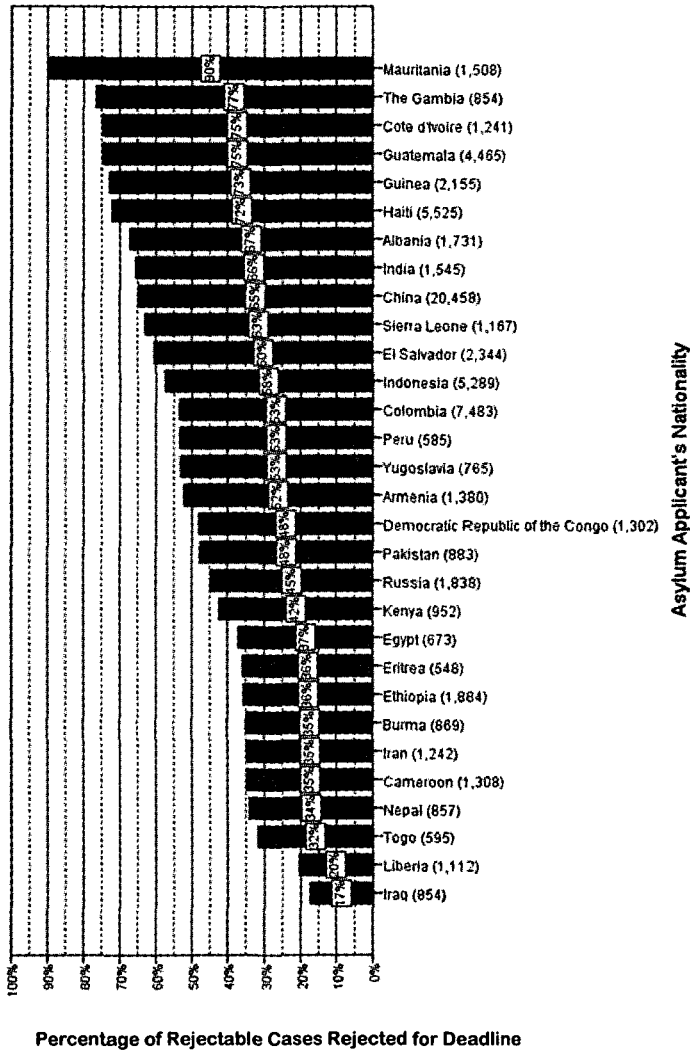
and from East Asia than there are from North Africa and the Middle East. This is not the whole explanation, because we see low numbers of uninspected rejectable applicants from Central Asia but relatively high rejection rates for inspected applicants from that region. But it could be that the large numbers of undocumented applicants from Latin America and East Asia contribute to negative perceptions of applicants—even those who enter lawfully and are inspected—from these regions in some of the eight Asylum Offices.

Figure 3-7 shows the differences in the rejection rate of late filers from countries from which more than five hundred rejectable cases were decided during the time frame of our study.<sup>204</sup>

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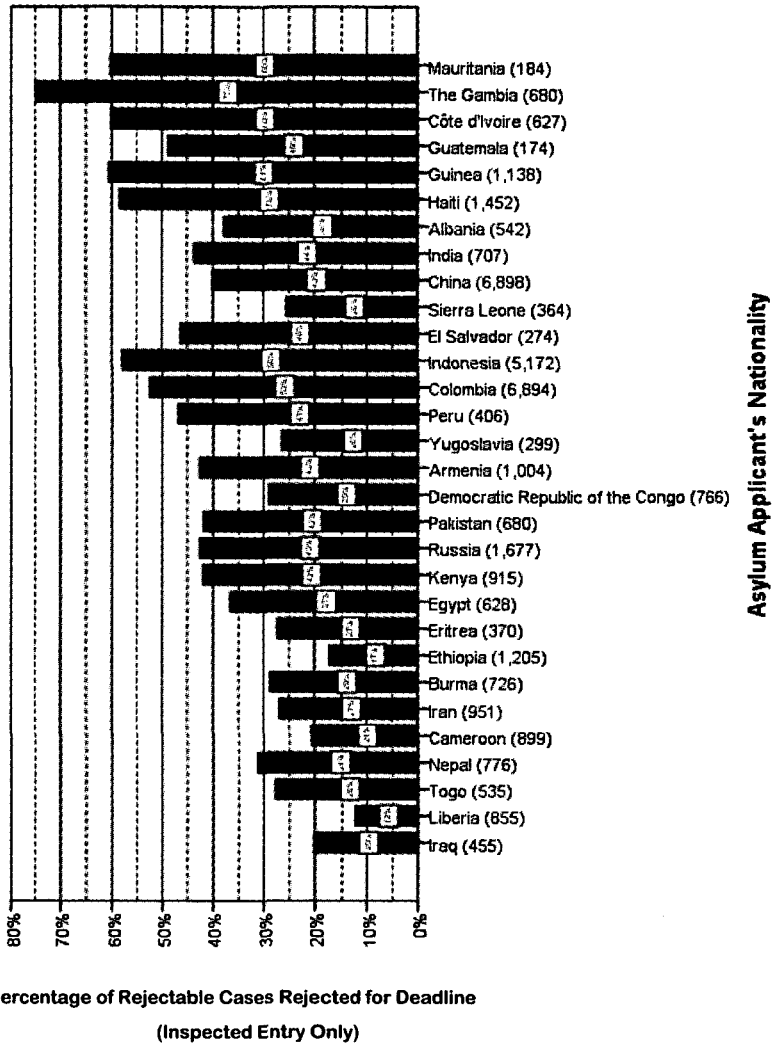
204. There were thirty-seven countries from which more than 500 rejectable cases were decided during the time frame of our study. The results of the regression analysis run with the independent variable of nationality showed that seven of those nationalities— Belarus, Mali, Somalia, Ukraine, Uzbekistan, Venezuela, and Zimbabwe—were not statistically significant to the .05 level. We excluded these countries from Figure 3-7. For the thirty nationalities that were significant to the .05 level, with all other variables held constant, the order of likelihood of rejection was different than in Figure 3-7. The significant nationalities were arrayed, from most to least likely to be rejected, in the following order: Mauritania, the Gambia, Côte d'Ivoire, Indonesia, Haiti, Guinea, China, Guatemala, Russia, Colombia, Pakistan, Kenya, Burma, Egypt, Armenia, Eritrea, India, Peru, Democratic Republic of the Congo, Albania, Yugoslavia, Togo, Sierra Leone, Nepal, Iran, Cameroon, El Salvador, Ethiopia, Iraq, and Liberia. The major differences between the regression and the cross-tabulation analysis displayed in Figure 3-7 are that nationals of Burma, Colombia, Egypt, Eritrea, Indonesia, Kenya, Pakistan, and Russia were more frequently rejected than the cross-tabulation analysis indicated, and nationals of Albania, El Salvador, Guatemala, India, Sierra Leone, and Yugoslavia were less frequently rejected than the cross-tabulation analysis indicated. Other differences were a matter of five or fewer percentage points on the graph.

Figure 3-7. Rejectable Cases Rejected by Nationality



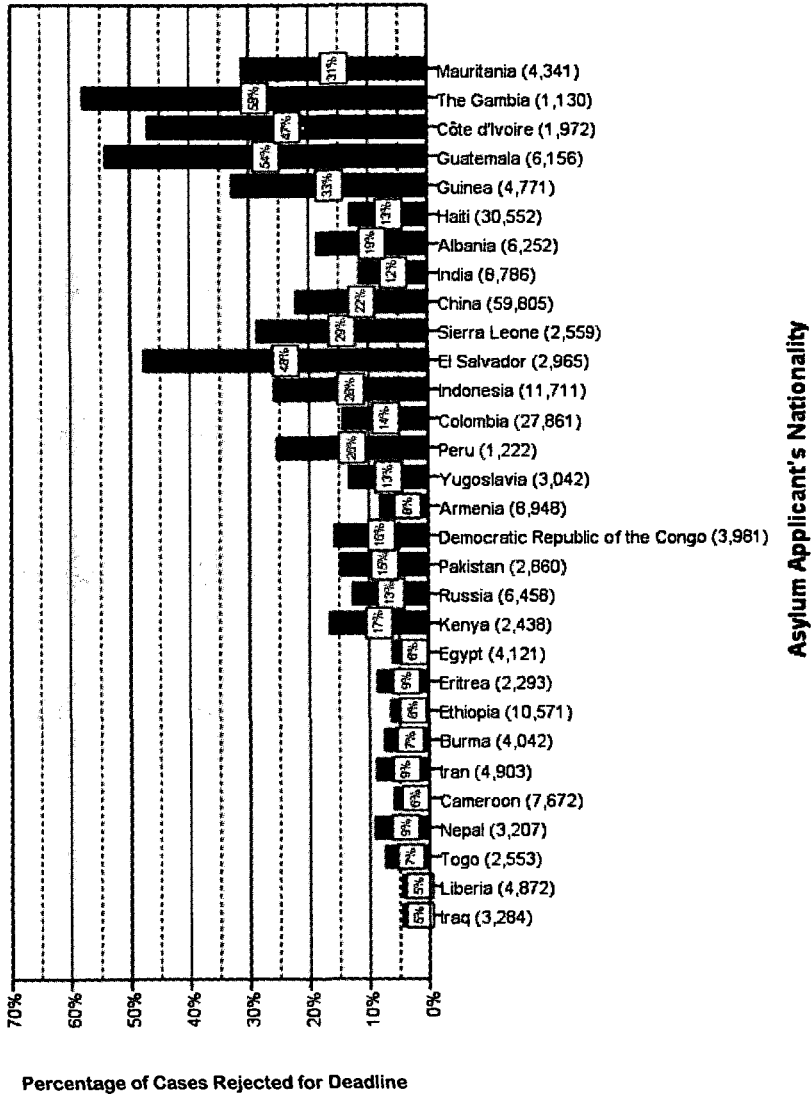
It shows that although those who filed late from certain countries, including Iraq, Liberia, Togo, Nepal, and several others, were found eligible for an exception at very high rates, those from certain other countries, such as Mauritania, the Gambia, and Côte d'Ivoire, had much lower rates at which exceptions were found.

**Figure 3-8. Rejectable Cases Rejected by Nationality, Inspected Entry Only**



If we look only at untimely applicants who were inspected at entry from these countries in Figure 3-8, we see a similar pattern. Applicants from Iraq, Liberia, Togo, and Nepal were still likely to benefit from exceptions to the deadline, but applicants from Mauritania, the Gambia, and Côte d'Ivoire faced substantially higher rejection rates.

**Figure 3-9. Deadline Rejections by Nationality, All Applicants**



We also can graph the percentage of *all* applicants from these countries, rather than those who filed more than a year after entry, who were rejected by asylum officers. Figure 3-9 presents this data, with the countries of origin listed in the same order as in Figure 3-7.

In Figure 3-9, we see very different overall rates of rejection for nationals of different countries. For example, only 13 percent of Haitians were rejected because of the deadline, compared with 58 percent of Gambians. Comparing Figures 3-7 and 3-9, it is evident that although Haitians and Gambians who were late were rejected at about the same rate—72 percent and 77 percent, respectively—the deadline has a much smaller effect on Haitians because a much higher percentage of them applied on time.<sup>205</sup> Similarly, although late Indians and Sierra Leoneans were rejected at similar rates—66 percent and 63 percent, respectively—because a significantly higher percentage of Indians filed timely, more than double the percentage of Sierra Leoneans were rejected on the deadline.<sup>206</sup> These results probably reflect the much better developed social network of Indians and Haitians in the United States, compared to Sierra Leoneans and Gambians, and the support that those who are already here are able to give to newly arrived refugees.<sup>207</sup> It is an example of how the one-year deadline can have a differential impact on various groups of refugees in ways that were probably not contemplated by Congress and that are completely unrelated to the degree or nature of persecution in their home countries.

Figure 3-10 breaks the data down by religion, for those who stated a major religion.<sup>208</sup> We start the discussion of the religion

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205. Eighty-two percent of Haitians, but only 24 percent of Gambians, were determined to have filed on time.

206. Only 54 percent of Sierra Leoneans were determined to have filed on time, compared with 82 percent of Indians.

207. Haitians and Indians are present in the United States in far greater numbers than Gambians and Sierra Leoneans. The 2000 Census numbers for individuals born in those countries are as follows: Haitians, 419,315; Gambians, 5,765; Indians, 1,022,550; Sierra Leoneans, 20,830. U.S. Census Bureau, *United States Foreign-Born Populations, Foreign-Born Profiles*, available at <http://www.census.gov/population/www/socdemo/foreign/STP-159-2000t.html>. See *supra* notes 157-60 and accompanying text for further discussion of the characteristics of the foreign-born from Haiti in the United States. We do not mean to suggest that the relationship between the impact of the deadline and the prevalence of coethnic persons in the United States is as simple as comparing these numbers would suggest. Support systems are not measured by numbers alone, as they involve the extent to which coethnic persons are dispersed or live in cities in which new immigrants arrive; the degree of organization of the community; the community's mean age, education, wealth, and social cohesion; how well the community has already adapted to American life; and other factors. Nevertheless, we think that our hypothesis is worthy of further study.

208. Not all religions were significant to a .05 significance level; the religious affiliations that were significant are Christian, Buddhist, Hindu, Other, Muslim, Sikh, and Unknown. Bahai, Druze, Jain, Jewish, and Zoroastrian were not significant at the .05 level and were not

data by noting that of 92,622 rejectable asylum applicants, 13,315 were classified as being members of “other” religions and 10,230 were classified as being of an “unknown” religion. As a result, the discussion below is descriptive only of the data we obtained and should be treated as tentative. Despite these limitations, we find that the data offer interesting patterns that are worth cautious consideration.

**Figure 3-10. Rejectable Cases Rejected by Religion**

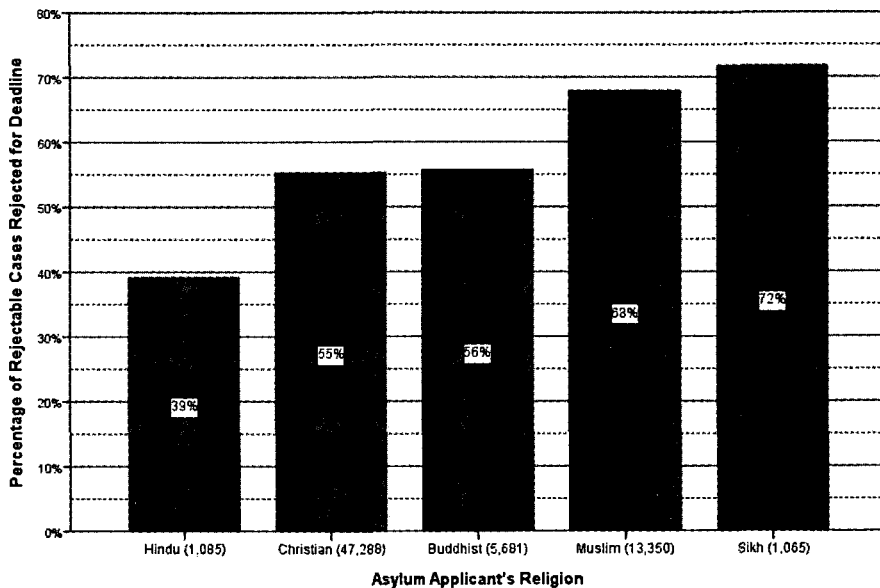


Figure 3-10 shows that among untimely filers who identified themselves by stating a religion, Hindus were rejected at the lowest rate, 39 percent, while Muslims and Sikhs were rejected at a rate more than 70 percent higher than the rate at which Hindus were turned down, or 68 percent and 72 percent, respectively. This is similar to, but slightly different from, the regression, which found Sikhs most likely to be rejected, followed by Muslims, Christians, Hindus, and Buddhists. Again, we wondered whether another

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included in the figures. We also excluded Other and Unknown from Figure 3-10.

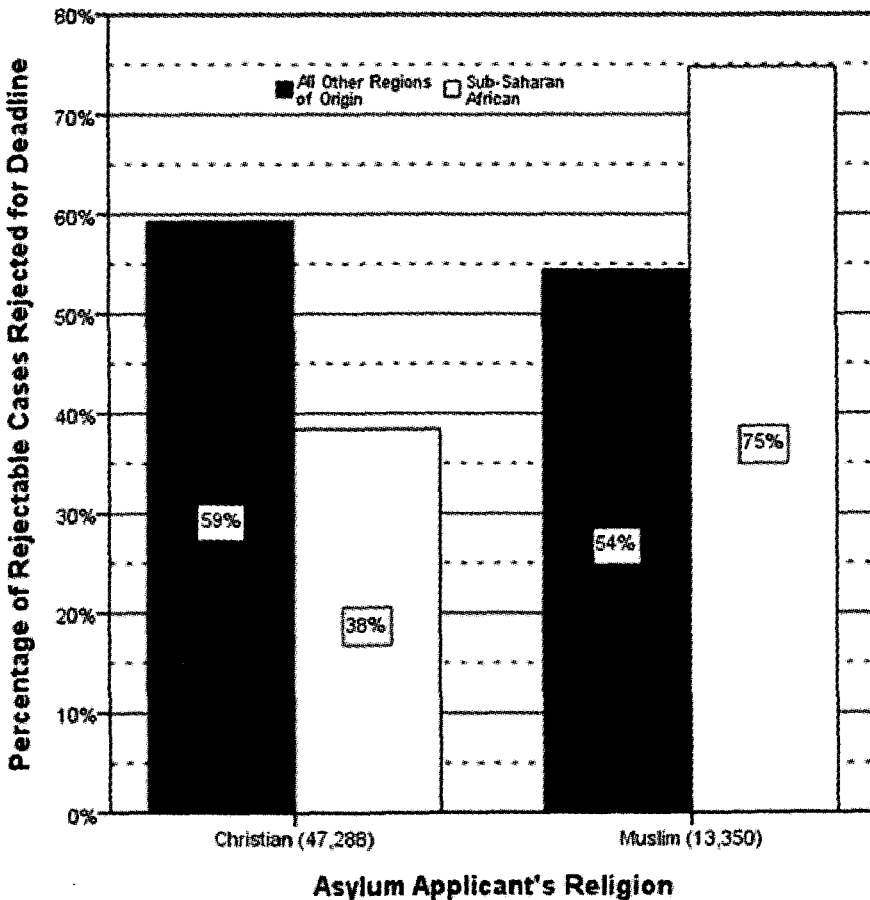


variable might be driving the differences in rejection rates by religion. We decided to explore religion and nationality.

Unsurprisingly, the vast majority, or 1,049 of 1,065, of rejectable Sikhs came from India. Over half, 3,394 of 5,681, of rejectable Buddhists came from China, a country with a long-standing and well-documented pattern of persecution of Buddhists. Similarly, nearly half, 497 of 1,085, of rejectable Hindus came from Nepal, a country that is majority Hindu but whose residents have suffered persecution at the hands of secularist Maoist rebels. Given the large number of Christian applicants, it was not surprising that they did not fit much of a pattern. Of the 47,288 rejectable Christians, over 1,000 came from each of the following countries: Armenia, Cameroon, China, Colombia, the Democratic Republic of the Congo, El Salvador, Ethiopia, Guatemala, Haiti, Indonesia, and Venezuela.

Digging deeper into the numbers, it turns out that 67 percent of the 13,350 rejectable Muslim asylum applicants during the time period studied came from sub-Saharan Africa, and that of the 11,535 rejectable sub-Saharan African asylum applicants rejected because of the one-year deadline, 58 percent were Muslim. To slice the numbers a different way, Figure 3-11 shows that 75 percent of rejectable sub-Saharan African Muslims were rejected for failure to meet the one-year deadline; in contrast, 38 percent of rejectable sub-Saharan African Christians were rejected. In striking contrast, for applicants coming from outside of sub-Saharan Africa, Christians and Muslims were rejected at almost the same rate. And even if we look at only inspected or uninspected applicants from sub-Saharan Africa, the differences are remarkable. In the former group, 61 percent of Muslims were rejected compared to only 31 percent of Christians; in the latter group, 86 percent of Muslims were rejected compared to only 64 percent of Christians. We are not sure what causes these disparities, but the particularly high rejection rates faced by sub-Saharan African Muslims raise additional concerns about whether the one-year deadline and its exceptions have been and can be applied fairly.

**Figure 3-11. Rejectable Cases Rejected by Religion and Region of Origin**



*E. Disparities Across and Within Asylum Offices*

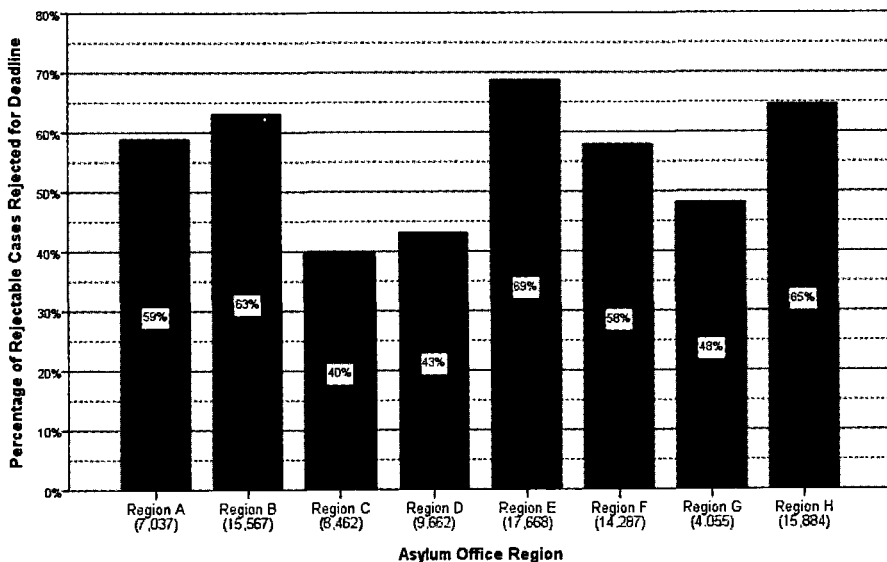
We next examined differences in rejection rates in different Asylum Offices, and differences in rejection rates of asylum officers in the same regional office to whom cases were randomly assigned. In our earlier research, we found significant disparities across and

within Asylum Offices in terms of their rates of granting asylum.<sup>209</sup> With the new data that DHS has supplied, we were able to look at disparities in the frequency of rejecting untimely applicants.

### *1. Disparities Across Asylum Office Regions*

Figure 3-12 shows that the rate at which rejectable cases are rejected varies significantly according to the region of the country in which the asylum officers, and perhaps more importantly, supervisory personnel, work.

**Figure 3-12. Rejectable Cases Rejected by Asylum Office Region**

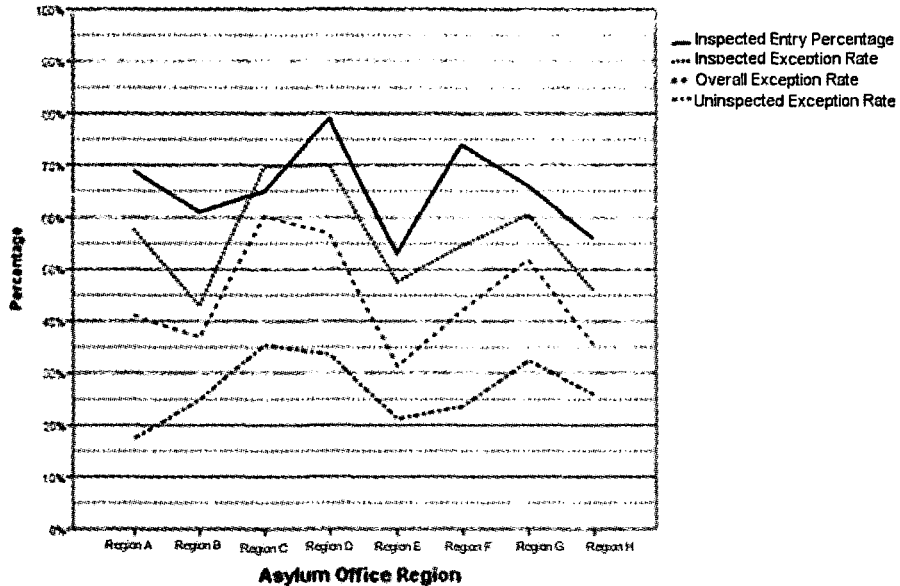


209. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 9, at 310-25.

As Figure 3-12 shows, in two of the eight regions, this rate is 43 percent or lower, but in three other regions the rate is 63 percent or higher. Were these disparities due simply to easily explainable factors such as population differences in the different regions, or were there other factors at play? The regression analysis found statistically significant differences in outcomes between Asylum Office regions, even holding variables such as nationality of the asylum seeker constant. We were interested to learn, however, that the regression showed a different pattern in the Asylum Office regions' rejection rates than our cross-tabulations did. According to the regression, Region B was the most likely to reject and Region C was the least likely to reject asylum seekers. In the middle, arrayed from most to least likely to reject, we had Region E, Region A, Region F, Region H, Region G, and Region D. This revealed that there are other variables driving the differences between Asylum Office regions. To investigate this puzzle further, we explored rejection rates by applicants' modes of entry.

We started with a bird's-eye view, comparing how the eight regional Asylum Offices treated untimely applicants. The data points in Figure 3-13 indicate for each regional office (a) the rate at which they found all late applicants to have qualified for an exception; (b) the uniformly higher rate at which they determined that exceptions existed for those applicants who had presented themselves for inspection when they entered the United States, that is, applicants who had entered the United States lawfully, even if they no longer had a lawful status when they applied for asylum; (c) the uniformly lower rate at which they determined that exceptions existed for those applicants who did not present themselves for inspection when they entered the United States; and (d) the percentage of applicants in the region in question who had presented themselves for inspection.

**Figure 3-13. Award Rate for Exceptions by Asylum Office Region**



This Figure showcases two important, and to us, surprising findings. First, a wide disparity among regions existed in the rate at which they awarded exceptions to inspected applicants, with three regions awarding exceptions to about 45 percent of inspected applicants and two regions awarding exceptions to about 70 percent, a rate that is about 55 percent higher. In addition, there seems to be a strong correlation between the percentage of inspected applicants in a region and the rate at which that region's officers granted exceptions to all late applicants, including those who had not been inspected.

Figure 3-13 also compares the rates at which the officers in the eight regions, in the aggregate, found that exceptions applied to the rejectable asylum seekers. These disparities in grant and exception rates may be caused to some degree by the different locations of the Asylum Offices. Some of the eight regions, for example, those nearer to the Mexican border, may have had a larger percentage of uninspected late applicants; and uninspected applicants who filed

within a year may have been rejectable, to a larger degree, because they could not prove any date of entry or applicability of any exception. Knowing the identity of the regional offices would probably help our understanding of these differences.

## *2. Disparities Within Asylum Office Regions*

For a more meaningful measure of consistency or disparity, we examined the rate at which the asylum officers within each region rejected rejectable applicants. By limiting our investigation to a particular region, we eliminate any effects caused by particular populations, for example, applicants from a particular country or region, having settled in certain regions of the United States. Within each region, furthermore, cases are assigned by clerks randomly to the various asylum officers. Therefore, the rate at which each officer within the same office rejected late applicants should be approximately the same. We might expect some variation, of course—perhaps as much as 25 percent from the mean in that office. But we would not expect a very large degree of variation from officer to officer considering essentially the same pool of applicants.<sup>210</sup>

We can see from Figure 3-14 that the disparities in individual asylum officer rejection rates within and between Asylum Offices are striking. The boxplot provides the median rejection rate for each office, which is the black line in the middle of each box; the middle 50 percent of rejection rates for each office, which is the box; and the most and least extreme rejection rates for each office, which are the ends of the lines sticking out of the boxes.<sup>211</sup> As discussed above,

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210. We do not know whether a 25 percent rate of deviation from the norm is reasonable or acceptable. We use it here only as a means of comparing the rates of deviations from the norm among regional offices. Note that the 25 percent variance lines apply to different mean rejection rate numbers in different regions. It would be possible instead to measure variance by selecting an absolute number of percentage points, rather than by a percentage of a percentage, by which an officer diverged from the mean. But that method of measuring disparity has problems of its own. See REFUGEE ROULETTE, *supra* note 9, at 308-09. Our Refugee Roulette study relied on a 50 percent deviation rate. We selected a 25 percent deviation rate for this study because the disparities are not as egregious as those we found in Refugee Roulette, enabling us to use a finer instrument to explore the disparities that do exist.

211. The asterisks and circles seen in the boxplot for Regions B, E, F, G, and H, known as “outlier flags,” demonstrate an individual officer’s rejection rate in relation to how the middle

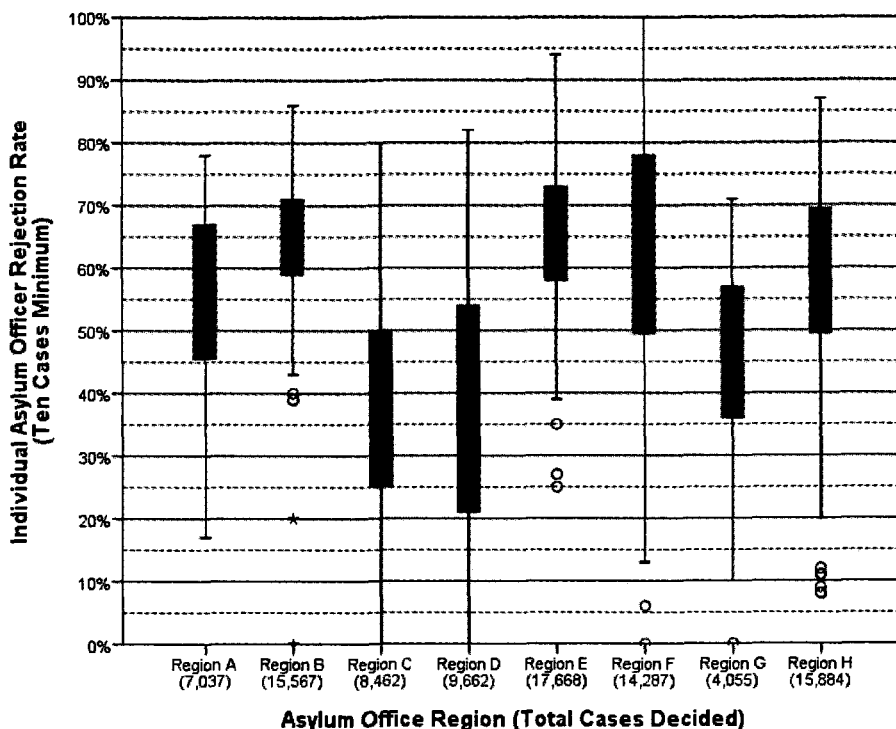
there are significant differences in mean rejection rates across Asylum Office regions, from 40 percent in Region C to 69 percent in Region E. The boxplot tells us that there are also significant disparities among asylum officers within each region, as we discuss further below, and that there are also significant disparities from region to region in the degree of disparities among officers within a regional office. For example, in Region B, the middle 50 percent of asylum officers reject cases at rates of between 58 percent and 71 percent, a thirteen percentage point spread. But in Region F, with a mean rejection rate nearly identical to that of Region B, the middle 50 percent of asylum officers reject cases at rates of between 49 percent and 78 percent, a twenty-nine percentage point spread.<sup>212</sup>

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half of the sample behaves. When a case is 1.5 to 3 box lengths away from the end of the box, it is flagged by a circle. Likewise, when a case is more than 3 box lengths away, it is flagged by an asterisk as an extreme outlier.

212. The mean rejection rates in Figure 3-14 are different from those in Figure 3-12 because Figure 3-14 takes into account only the asylum officers in each region who decided at least 25 rejectable cases.

**Figure 3-14. Individual Asylum Officer Rejection Rates by Asylum Office Region**



We next looked closely at each of these Asylum Office regions to further explore these disparities. To avoid any distortion that would come from examining the rejection rate of officers who decided only a few cases, for example, two cases, both of which or neither of which resulted in an exception, we limited this study to officers who had adjudicated the cases of at least one hundred late-filing applicants.

The boxplot identifies the officers of Region B as fairly consistent in their rejection rates. Figure 3-15, in which each bar represents the rejection rate of an individual asylum officer, shows the rate at which the asylum officers in Region B who considered at least one



hundred cases of late filers excepted those late-filing individuals.<sup>213</sup> Asylum officers whose rejection rates were over 25 percent disparate from the mean are shaded black.

**Figure 3-15. Rejectable Cases Rejected by Asylum Officer, Region B**

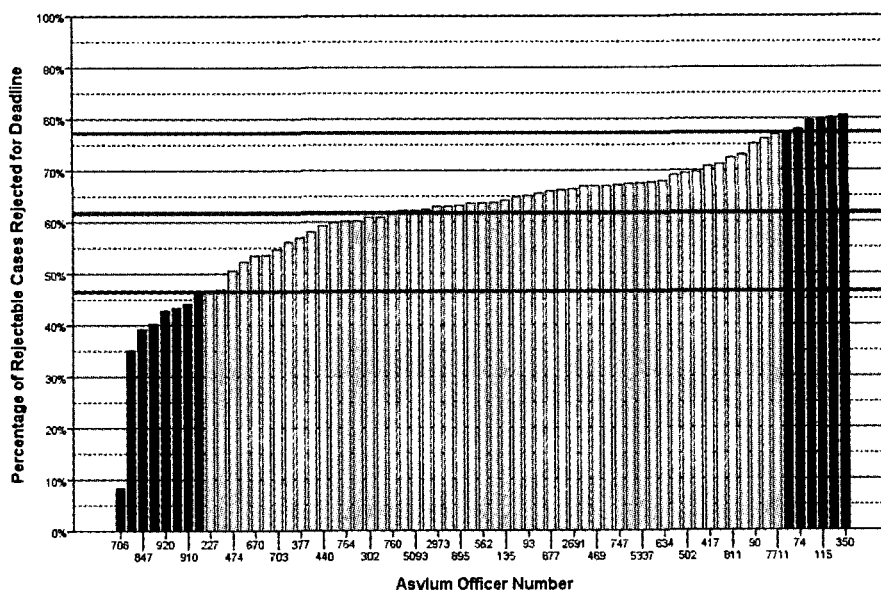
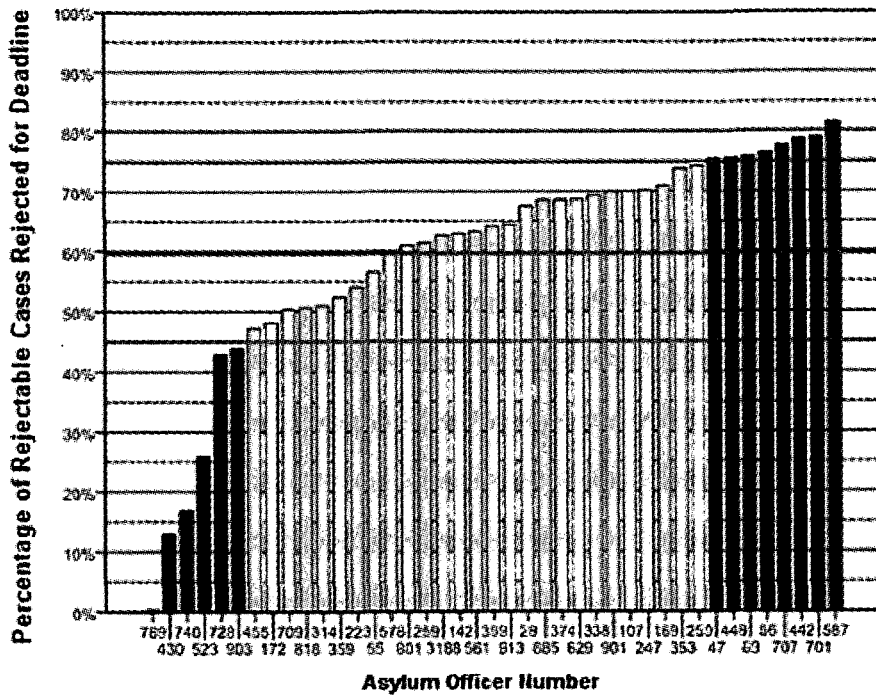


Figure 3-15 shows that nearly all officers rejected these applicants between 50 percent and 75 percent of the time. The mean rejection rate in Region B was 62 percent, and only 14 of 65, or 22 percent, of the asylum officers had exception rates higher or lower than this mean by more than 25 percent.

213. Figures 3-15 through 3-17 include three horizontal lines in addition to those showing the percentage of rejectable cases. The middle line represents the mean rejection rate for the region in question. The top and bottom lines show the percentage of rejectable cases that are rejected that would be 25 percent above and below that mean. The horizontal axis specifies the DHS serial number given to the authors for each of the asylum officers who adjudicated at least one hundred late cases. The officers whose rejection rates are above the higher line or below the lower line are those whose rates are shaded in these graphs.

Figure 3-16 shows the pattern for Region F, in which the boxplot revealed a considerably greater range and more disparity.

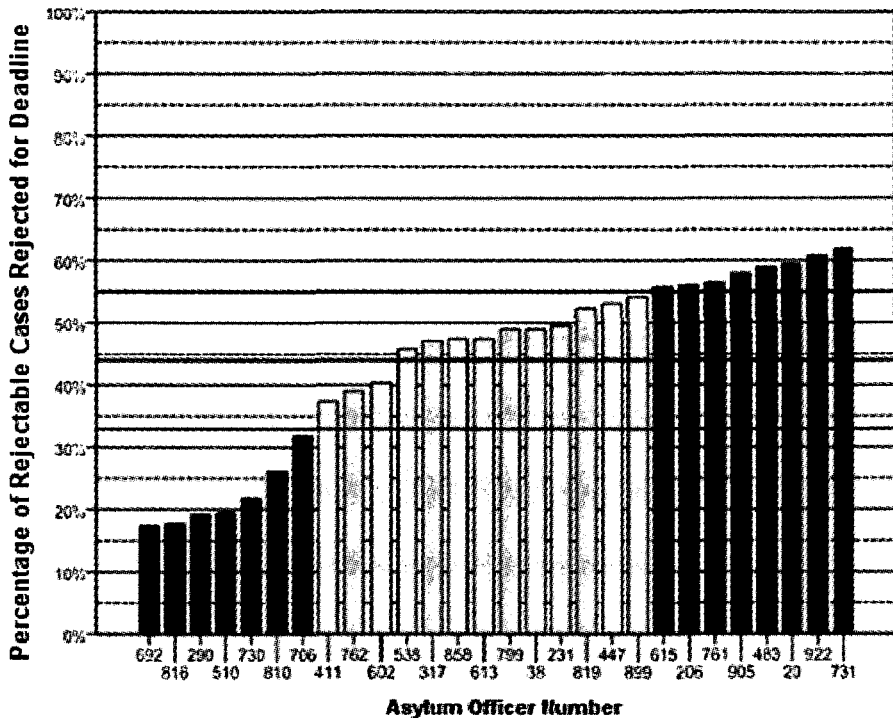
**Figure 3-16. Rejectable Cases Rejected by Asylum Officer, Region F**



Here, the officers are spread out over a much larger range, with rejection rates between 0.4 percent and 82 percent. The mean rejection rate in Region F was 60 percent, and 14 of 41, or 34 percent, of the officers who decided more than one hundred cases of late-filed applicants, deviated from this mean by more than 25 percent.

Figure 3-17 shows the pattern for Region D, which the boxplot demonstrated to be very disparate. The pattern demonstrates even more disparity than Region F. The rejection rate varied from 17 percent to 62 percent, with a mean of 44 percent, and 54 percent of the officers deviated from this mean by more than 25 percent.

**Figure 3-17. Rejectable Cases Rejected by Asylum Officer, Region D**



*F. Were Bona Fide Refugees Denied Asylum Because of the Deadline?*

Our analysis shows that from 1998 through 2009, the deadline did not operate evenly across the population of asylum seekers. First, subpopulations of asylum applicants, whether classified by region of origin, age, nationality, or other characteristics, varied in the degree to which they applied within the deadline, perhaps reflecting different degrees of support in coethnic communities in the United States or other factors. Second, among those who applied beyond the deadline, certain subpopulations were found to qualify for exceptions at different rates than others, though there is no reason to think that these differences reflected the merits of their

cases. Among other factors, for example, those with representation fared better than those who lacked a representative, and those from some countries were much more affected by the deadline than those from other countries. Finally, even within particular regional Asylum Offices, where cases are assigned randomly to asylum officers so that they all decide approximately the same mix of cases, individual asylum officers granted exceptions at very different rates, in yet another example of “refugee roulette.”

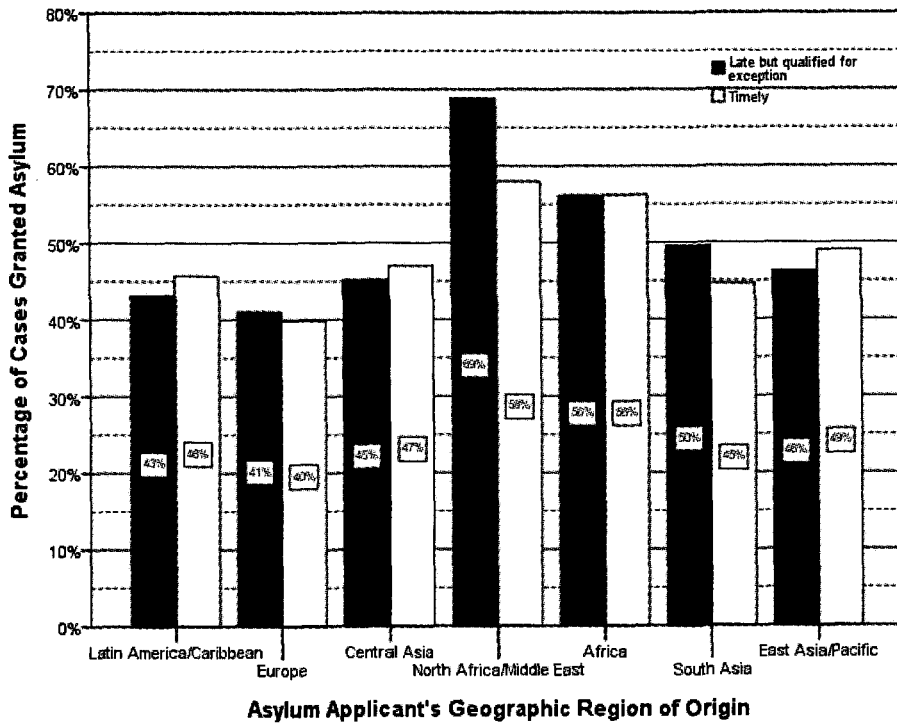
None of this would matter, however, if the late applicants who were rejected were undeserving of asylum; that is, if they would have been ineligible for asylum in any event because they did not have bona fide cases, or worse, had fraudulent claims. To explore this question, we first compared the grant rate for timely applicants with the grant rate for late applicants who qualified for an exception. If late applicants had generally weaker cases than timely applicants, we would expect the late-but-excepted applicants to have lower grant rates than the timely applicants.

In fact, we found that the grant rate for both of these categories was exactly the same: 49 percent in each case.<sup>214</sup> Furthermore, this approximate equality persisted for virtually all subcategories of applicants. Men who filed on time won asylum 47 percent of the time; men who were late and qualified for an exception prevailed 48 percent of the time. For women, the corresponding percentages were 51 percent and 50 percent. Represented asylum seekers who filed within the deadline won asylum at a rate of 51 percent; those who qualified for an exception won at a rate of 52 percent. For unrepresented applicants, the corresponding figures were 47 percent and 47 percent. As Figure 3-18 shows, for every region of the world from which substantial numbers of applicants arrive, the excepted, late applicants had approximately the same grant rate, or, in the case of North Africa and the Middle East, a higher grant rate, as timely applicants.

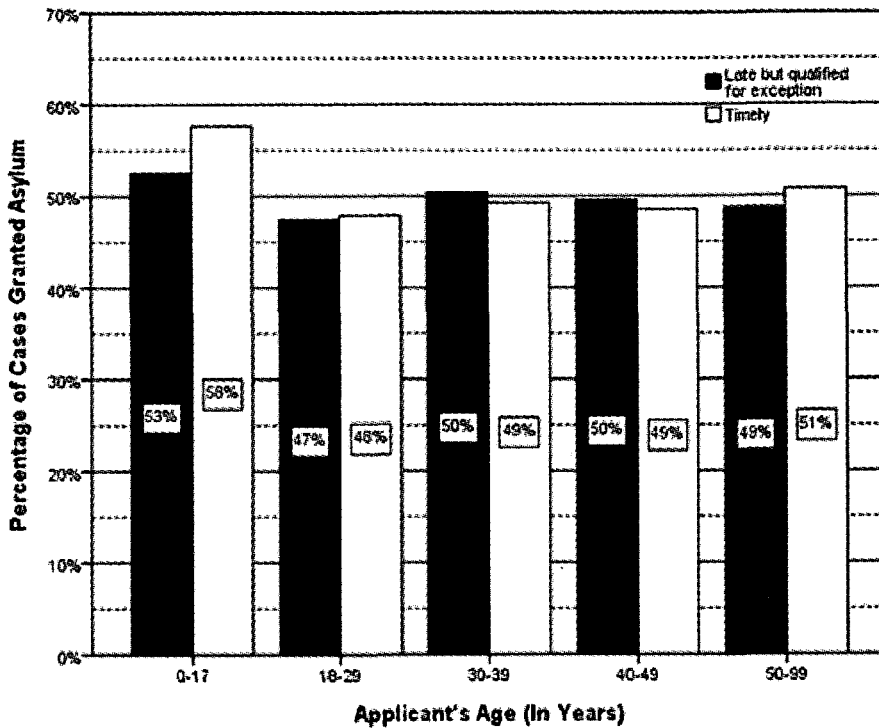
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214. The overall grant rate for late filers was much lower because it was, of course, zero for late filers who did not qualify for an exception, resulting in a grant rate of only 20 percent for all late filers—both those who qualified for and those who did not qualify for an exception.

**Figure 3-18. Grant Rates for Timely Applicants and Rejectable Applicants Who Qualified for an Exception, by Region of Origin**

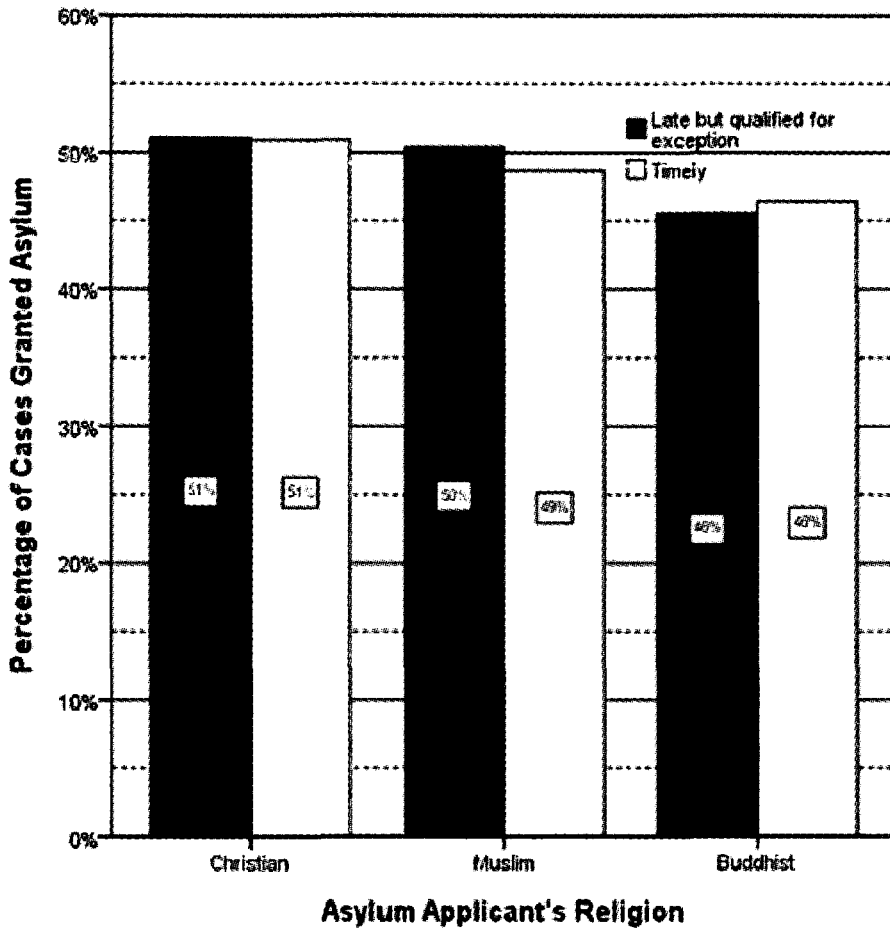


**Figure 3-19. Grant Rates for Timely Applicants and Rejectable Applicants Who Qualified for an Exception, by Age at Filing**



Similarly, these relationships generally held true for each age bracket among the applicants.

**Figure 3-20. Grant Rates for Timely Applicants and Rejectable Applicants Who Qualified for an Exception, by Stated Religion**



They also generally held true for Christian, Muslim, and Buddhist applicants.<sup>215</sup>

215. As noted in Part I, the database contained only small numbers of Sikhs and Jews, and many applicants in the study did not state a religion.

Among inspected applicants who filed within the deadline, the grant rate was 51 percent; and among late applicants who qualified for an exception and had been inspected at the time of entry, the grant rate was very similar at 54 percent. There was, however, a significant difference in the grant rate for applicants who had entered without inspection in the two groups. For those who proved that they filed within one year, the grant rate was 43 percent, but it was only 33 percent for those who were late but qualified for an exception.

These correspondences may suggest that the pools of applicants who filed on time and those who filed late but qualified for an exception were similar. But it is a further stretch to conclude that those who were actually rejected because of the deadline were also similar in their characteristics, except for having filed late, to those who filed on time, and that they too would have had a grant rate as high as the two other groups.

For a first pass at comparing these two groups, we simply listed the demographic characteristics of the individuals populating each group. Table 3-1 shows this comparison.



**Table 3-1. Who Is in the Database? A Comparison of Timely Filers and Rejected Filers**

	<b>Timely applicants</b>	<b>Rejected applicants</b>
<i>Gender</i>		
Female	40%	42%
<i>Region</i>		
Latin America	26%	28%
Europe	8%	7%
Central Asia	6%	3%
N. Africa & Middle East	5%	2%
Africa	24%	21%
South Asia	6%	4%
East Asia/Pacific Islands	24%	32%
<i>Most frequent nationalities</i>		
China	19%	24%
Haiti	12%	7%
Colombia	10%	7%
<i>Religion</i>		
Christian	54%	48%
Muslim	12%	17%
Buddhist	5%	6%
<i>Has dependents in U.S.</i>	19%	17%
<i>Unrepresented</i>	59%	53%
<i>Inspected</i>	69%	44%

Perusal of this table suggests that while the makeup of the two pools of applicants is not identical, they are remarkably similar. There is a somewhat higher percentage of Chinese and a somewhat lower percentage of Haitians and Colombians in the pool of rejected applicants, but the differences are not huge—except in the category of inspected applicants. As would be expected, a much lower percentage of inspected applicants appear in the pool of those who were ultimately rejected, because uninspected applicants have a harder time proving any particular date of entry by clear and convincing evidence.

Table 3-2 compares the demographics among three groups of applicants, considering only those applicants who were inspected.

**Table 3-2. Demographic Characteristics of Timely and Untimely Applicants (Inspected Entrants Only), April 16, 1998, through June 8, 2009**

<b>Percentage of each category listed to the right who were</b>	<b>Timely applicants</b>	<b>Late applicants who qualified for an exception</b>	<b>Late applicants who did not qualify for an exception</b>
<i>Male</i>	58%	54%	54%
<i>Inspected</i>	100%	100%	100%
<i>From</i>			
Latin America	22%	19%	28%
Europe	8%	10%	9%
Central Asia	7%	5%	5%
North Africa & Middle East	6%	7%	4%
Africa	23%	26%	22%
South Asia	6%	6%	4%
East Asia/Pacific	27%	26%	28%
<i>From</i>			
China	20%	15%	12%
Haiti	4%	2%	4%
Colombia	13%	12%	15%
Indonesia	4%	8%	12%
Ethiopia	5%	4%	1%
<i>Religion</i>			
Christian	60%	58%	58%
Muslim	9%	11%	15%
Buddhist	5%	6%	4%
Sikh	2%	1%	1%
Jewish	1%	1%	1%

<i>Age</i>			
0-17	1%	1%	0%
18-29	32%	42%	31%
30-39	33%	30%	34%
40-49	23%	18%	24%
50-99	11%	9%	11%
<i>Has dependents in</i>			
U.S.	23%	25%	27%
<i>Unrepresented</i>	54%	46%	53%

Tables 3-1 and 3-2 demonstrate that although there are a few demographic differences among the subpopulations considered in the columns of each table, they are fairly similar virtually across the board. These tables hint at the possibility that because the populations of late, rejected applicants are similar in many respects to the population of timely and untimely but excepted applicants, the late applicants, particularly the 65 percent of them who were inspected upon entry, would have been granted asylum at a rate something like the 49 percent rate at which asylum was granted to timely and untimely but excepted applicants if there had been no deadline.

To refine our estimate of the percentage and number of rejected asylum claims that would have been granted by DHS if no deadline existed, we used an out-of-sample prediction. We performed a binary logistic regression on untimely but excepted cases.<sup>216</sup> This regression provided coefficients that described how certain variables in the database affected an applicant's chances of receiving asylum. We then applied the regression equation to those cases rejected because of the deadline. For each case, the values for the database variables were plugged into the regression equation, and the

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216. To perform the prediction, the toughest methodological question was the determination of the comparison group. There were three possible choices: (1) timely applicants, (2) untimely and excepted applicants, and (3) pre-deadline cases. We decided against pre-deadline cases because of the changes in world conditions since the enactment of the deadline and the uncertainty of comparing two sets of data with relatively little in common. Because we were concerned about selection effects between timely and untimely applicants, we chose the untimely and excepted as our comparison group. The predicted grant rate using timely applicants as the comparison group was 39.36 percent, slightly lower than the number we report below that relies on untimely but excepted applicants as the comparison group.

computation provided the probability of that particular case being granted asylum. The mean of these values was then found to determine the percentage of all rejected cases in which asylum would have been granted had the one-year deadline not been in effect.<sup>217</sup>

The total percentage of rejected asylum claims that would have been granted was predicted to be 43.6 percent.<sup>218</sup> Applying this percentage to the 36,220 asylum applicants who did not have blank dates of entry in DHS's records,<sup>219</sup> we estimate that an additional 15,792 asylum claims would have been granted during the eleven years after April 16, 1998, if the deadline had not been in force. This number is already unacceptably high, but it impacts an even

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217. One could object that the number of rejected applicants who would have been granted asylum cannot be estimated by comparing their personal characteristics to those of applicants who filed untimely but were excepted because DHS only collected data on some of those personal characteristics, such as age, gender, nationality, representation, religion, and so forth. It might be argued that some other characteristic, as to which DHS did not collect and code data, would distinguish late-but-excepted from rejected applicants. For example, perhaps a very high proportion of late-but-excepted applicants smiled at their interviewers, which influenced the interviewers positively, but only a few rejected applicants smiled at their interviewers. This objection, based on potential variables that nobody thought important enough to consider, applies to all statistical social science projections. It is, of course, worth pausing to consider whether it is valid in the context of our study. We think not, for two reasons: First, we have a very large database, so factors other than those for which coded data was available are less likely to influence one population more than another, as compared to an analysis based on a small database. Second, we have not been able to think of any plausible uncoded variable that would cause the merits of the cases of rejected asylum applicants to be radically stronger or weaker than the merits of the cases of late-but-excepted filers.

218. The precise percentage was 43.62 percent. The prediction generated standard error values for each rejected case, which were used to calculate confidence intervals. The standard errors ranged from .0115 to 1.121 with an average standard error of .0266. For further discussion of the confidence intervals, see *infra* Estimation Appendix.

219. This number is artificially low because asylum would likely have been granted to at least some of the 17,921 individuals with blank entry dates, some of whom surely would have qualified for an exception and then would have been found to have meritorious cases. In fact, 3.5 percent of those who had blank entry dates and sought asylum between October 1, 1995, and April 15, 1998, were granted asylum, and 19.9 percent of those who had blank entry dates and qualified for exceptions after the deadline became effective won asylum. Applying these percentages to the 17,921 applicants after April 15, 1998, who were not excepted, we might guess that between 627 and 3,566 additional applicants could have won asylum if there had been no deadline. But we could not subject this estimate to the rigorous regression analysis described in the text, so we made the extremely conservative assumption that none of these 17,921 applicants would have won asylum. See *infra* Methodological Appendix for further explanation.

greater number of individuals, as many asylum applicants have dependents. Including dependents, we estimate that 21,635 genuine refugees were denied asylum by DHS during the time frame studied solely because of the deadline.<sup>220</sup>

As noted earlier, some of these rejected asylum seekers ultimately may have been granted asylum by immigration judges who concluded either that they did prove entry within one year, or that they did not but qualified for an exception and filed within a reasonable period of time after the exception was no longer operative. Alternatively, they may have avoided removal from the United States by winning “withholding of removal” in immigration court. Because the immigration courts do not collect statistics on how many cases involve deadline issues or publish data on how immigration judges rule on cases referred by DHS due to the deadline, however, we do not have the information to report what happened to rejected cases after they were referred to immigration court. So we are left with the likelihood that between 1998 and 2009, more than 15,000 asylum applications (involving more than 21,000 refugees) would have been granted but were instead rejected because of the one-year deadline.

#### IV. CONCLUSIONS AND POLICY RECOMMENDATIONS

##### *A. Summary of Conclusions*

The one-year bar on asylum applications has apparently had at least one salutary effect common to all statutes of limitations: the deadline seems to have pushed many applicants to file more promptly than they would have without a deadline. In FY 1996, which ended just as Congress was passing the deadline, only 39.6 percent of asylum applicants filed within one year of arrival, but of those who filed since the deadline took effect, at least 69.5 percent

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220. E-mail from Jedidah Hussey, Deputy Chief, Asylum Div., U.S. Citizenship & Immigration Servs., to Jaya Ramji-Nogales (Aug. 26, 2010) (on file with author) (providing raw numbers of 106,690 asylum applicants and 38,935 dependents with cases completed before the Asylum Office between FY 1998 and FY 2009, from which we calculated the applicant to dependent ratio of 1:1.37). Note that this timeframe is a close but inexact match with the time frame of our prediction, which analyzes cases filed between April 16, 1998, and June 9, 2009.

did so within one year of entry.<sup>221</sup> We regard this development positively, because as a result, asylum officers and immigration judges are on the whole adjudicating cases in which memories of the details of past persecution are fresher and corroborating evidence is more readily obtainable. On the other hand, we say that the deadline has only “apparently” had this effect because we have no way of knowing how many genuine refugees fail to file at all because they missed the deadline. That is, in a world without a deadline, a person with a strong asylum claim who was, for example, unaware for three years of the right to seek asylum would be likely to file upon learning of it. In a world with a deadline, such a person might file for asylum after three years and hope to justify late filing by showing a changed or extraordinary circumstance, but might instead decide not to file for asylum, because the act of applying would bring her to the government’s attention thereby risking deportation. The deadline, therefore, might not be prompting as much early filing as these percentage comparisons appear to show, because they do not take into account the people who filed late in the world as it existed before the deadline became law, but who do not file in the world as it now exists.

Against this probably positive side of a one-year deadline, members of Congress must also examine the costs, some of which we do not have sufficient data to quantify. First, there is the cost to the taxpayers of determining, in tens of thousands of cases every year, whether the applicant met the deadline—an investigation that asylum officers and, in the cases that they refer, immigration judges did not have to undertake before 1998. Second, to the extent that those who miss the deadline no longer apply and identify themselves to the government by so doing, the United States has a larger population of long-term undocumented foreign nationals than it would otherwise, an outcome that serves no one well.

In our view, however, the principal cost of the one-year deadline is its potential impact on genuine refugees who are excluded from a grant of asylum by this restriction, which is unrelated to the merits of their claims. We identify this as the “principal” cost

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221. The percentage of those who applied within a year may be even higher, because 69.5 percent represents only the percentage of applicants able to prove by clear and convincing evidence that they entered within a year.

because human life is potentially at stake. Those genuine refugees who are actually deported for failure to meet the deadline risk imprisonment, torture, or murder in their home countries.<sup>222</sup> Others, who meet the higher standard for withholding of removal but are barred from asylum, lose the opportunity to obtain permanent protection in the United States for themselves. They are also unable to obtain any protection for their spouses and children, who either remain abroad, separated from the refugee and possibly at risk precisely because their refugee relative has fled, or, after having accompanied their refugee relative to the United States, must quickly find a route to lawful immigration status or risk deportation. Even those refugees who are rejected because of the deadline by the Asylum Office but eventually granted asylum in the immigration court or on appeal suffer unnecessarily long asylum procedures during which they are not authorized to work to support themselves. We do not know how frequent any of these outcomes are because data on immigration judges' one-year deadline determinations are not systematically collected.<sup>223</sup> But we were able to investigate the very first stage of the chain, the adjudication of asylum applications by DHS, and the findings of our study warrant serious concern.

The starting point of our study, and an important finding, is that more than 30 percent of applicants for asylum in the time frame studied were determined to have filed for asylum more than a year after entry. To what extent these determinations of untimely filing

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222. Although there are no statistically sound data on the consequences of return for genuine refugees, and, to our knowledge, no systematic study of the fates of returned asylum seekers, there have been several journalistic reports of murders of unsuccessful asylum seekers after they were deported from the United States, Australia, Britain, and other countries. See Paul Bibby, *Deported Refugee Shot Dead*, SYDNEY MORNING HERALD, Aug. 2, 2008, at 1, available at <http://www.smh.com.au/news/world/deported-refugee-killed/2008/08/01/1217097536265.html>; Greg Campbell & Joel Dyer, *Death by Deportation*, BOULDER WKLY., May 27, 2004, available at <http://archive.boulderweekly.com/052704/coverstory.html>; Krystel Rolle, *Haitian Political Asylum Seeker Killed: 37-Year-Old Shot in Dominican Republic*, NASSAU GUARDIAN, May 1, 2009, at A5, available at [http://archive.nassauguardian.net/pubfiles/nas/archive/images\\_pages/05012009\\_A05.pdf](http://archive.nassauguardian.net/pubfiles/nas/archive/images_pages/05012009_A05.pdf); Anne Barrowclough, *Afghan Asylum Seekers Sent Home by Australia 'Killed by Taleban'*, TIMES ONLINE, Oct. 27, 2008, <http://www.timesonline.co.uk/tol/news/world/article5025923.ece>; *Darfur Asylum-Seeker Kicked Out of UK, then 'Murdered' in Sudan*, HUFFINGTON POST, Apr. 17, 2009, [http://www.huffingtonpost.com/2009/03/17/darfur-asylum-seeker-kick\\_n\\_175730.html](http://www.huffingtonpost.com/2009/03/17/darfur-asylum-seeker-kick_n_175730.html).

223. Moreover, there are no data on the number of asylum applicants who lose their claims based on the deadline and are actually deported.

were accurate, and to what extent they simply reflected an applicant's inability to produce official documentation of entry within a year of filing, we do not know, but we do know that almost 93,000 asylum claims fell within the scope of this procedural bar in the first eleven years of its implementation.

Many of those who missed the filing deadline did not miss it by much; nearly one-third of those who filed untimely did file within two years of entry to the United States, though approximately another quarter filed four or more years after entry. Moreover, the percentage of cases with blank entry dates grew significantly over time, even though the percentage of applicants who entered without inspection remained fairly consistent. These data suggest that asylum officers may have applied stricter evidentiary standards over time in determining applicants' dates of entry.

Perhaps one of the most counterintuitive findings of our study was that late asylum seekers were more often represented than asylum seekers who filed timely. As discussed in detail above, this phenomenon may have multiple causes.<sup>224</sup> It may be that many who missed the deadline perceived a greater need to obtain counsel to overcome this bar to asylum. However, research has demonstrated that asylum seekers face a multitude of barriers to securing representation. These include lack of knowledge about the deadline and its exceptions in particular and with the U.S. legal system and procedures in general, very limited financial resources for major legal costs, lack of time during the work day to search for counsel, and language and cultural challenges. Given that inability to obtain representation within a year of entry is not an enumerated exception to the one-year bar, this statistic gives rise to a concern that the deadline fails to account for such legitimate grounds for delay, rendering some genuine refugees ineligible for asylum on technical procedural grounds rather than on the merits of their cases.

Exploring the nationalities of asylum seekers, we uncovered further reason for concern. Looking at the six most frequent nationalities of affirmative asylum filers since April 1998—Armenian, Chinese, Colombian, Ethiopian, Haitian, and Indonesian applicants—we found some uneven relationships, confirmed by the regression analysis, between entry without inspection and late

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224. See *supra* notes 150-53 and accompanying text.



filing. This led us to suspect that other variables, such as community networks and cultural obstacles, account for different rates of timely filing.

Female asylum seekers filed later than male asylum seekers in general, and filed significantly later—three or more years after the deadline had passed—in much higher numbers, perhaps because the nature of persecution suffered by women made it more difficult for them to share their stories with anyone, let alone a government official. Older applicants more often entered through official means and filed timely in comparison to younger applicants. And applicants who entered without inspection not only filed later than inspected entrants, but were also increasingly deemed late filers in recent years. These data lead to a concern that asylum officers may have increasingly applied stricter evidentiary standards over time, rendering proof of timely filing more and more difficult for those without official documentation of entry, despite instructions from Asylum Headquarters that testimony alone can be sufficient evidence of timely filing.

Finally, we learned that the eight regional Asylum Offices determined that asylum seekers filed late at very different rates. The regression analysis confirmed that, holding other variables such as nationality constant, different Asylum Offices had different rates of determining timeliness, leading us to worry that differences in operation assumptions and procedures in the different Asylum Offices caused these variations.

After examining the patterns in the data describing groups of applicants who did not prove timely filing, our analysis next turned to the application by DHS of the statutory exceptions to the deadline. That is, we compared untimely cases that asylum officers rejected because of the deadline with untimely cases that such officers excepted from the deadline because of changed or extraordinary circumstances. Again, we cannot tell from the data whether cases were rejected because no exceptions existed, because potential exceptions were not proved, or because one or more exceptions applied but the applicant failed to file within a reasonable period. Despite this shortcoming, the data reveal interesting and at times surprising relationships between the variables examined and rejection rates.

Our first finding in the rejection analysis was that nearly 60 percent of all asylum applicants deemed untimely filers were actually rejected because they had not met the deadline. To slice the data a different way, from April 1998 through mid-June 2009, 54,141 people, or almost 18 percent of all asylum applicants in our database, were determined to be ineligible for asylum because they did not file on time.

We found that rejection rates varied by year of filing. For example, FY 2003 saw an increase in rejections because of the deadline accompanied by a drop in referrals on the merits, although grant rates remained about the same. We believe that this growth in deadline rejections was due to stricter enforcement of the deadline that began in that year. This higher rejection rate has remained fairly constant since it peaked in FY 2003.

Moreover, rejection rates varied by magnitude of lateness; that is to say, asylum seekers who filed less than one year after the deadline had passed were rejected much less often than those who filed more than a year after the deadline had passed. Applicants who could not prove any date of entry faced particularly high rates of rejection. Generally, the later an applicant filed, the greater the chance that she was rejected based on the deadline.

We next explored characteristics of asylum seekers and their relationship to rates of rejection based on the one-year filing deadline. Our findings concerning representation confirmed those of numerous prior studies about the effects of representation on asylum outcomes; unrepresented late applicants were rejected more often than represented late applicants.

Exploring the applicants' regions of origin, untimely Latin Americans and East Asians faced the highest rejection rates, even when we looked only at those applicants who were inspected at entry. Of the inspected population, late North Africans and Middle Easterners were least often rejected on the deadline.

Perhaps the most dramatic finding of our rejection rate analysis was the enormous disparity in rejection rates across nationalities. Although 17 percent of untimely Iraqis were rejected, 77 percent of late Gambians were barred from asylum by the deadline. Looking only at inspected entrants, the disparity across these two nationalities is similarly striking: only 20 percent of untimely Iraqis were rejected but 75 percent of late Gambians were barred from asylum

by the deadline. Moreover, an exploration of the impact of the deadline on *all*, not just untimely, applicants by nationality demonstrates that, because some nationalities had a higher percentage of late filers than others, some national groups were much more affected by the deadline than others. For example, although *late* Haitians and Gambians faced a similar rate of rejection, just 13 percent of *all* Haitians were rejected because of the deadline compared to nearly 60 percent of *all* Gambians. These data give rise to a concern that, in practice, groups of refugees are rejected due to attributes that have little or no relationship to the degree of persecution in their home countries.

We discovered a particularly striking dynamic relating to religion. Late Muslim and Sikh applicants were more often denied on the deadline than practitioners of other religions. Exploring the data further, we discovered that untimely Muslim applicants from sub-Saharan Africa faced particularly high rejection rates, in contrast with Muslims from other parts of the world and Christians from sub-Saharan Africa. Again, we do not know what caused this disparity, but given that Muslims and Christians from outside of sub-Saharan Africa faced nearly identical rates of rejection, these data raise additional concerns about whether the one-year deadline and its exceptions have been and can be applied fairly.

We also found significant disparities in rates of rejection across and within Asylum Offices. The mean rejection rates at the eight Asylum Offices were quite different; notably, these rejection rates showed a relationship with the percentage of uninspected applicants in each region. This finding gives rise to a concern about the impact of asylum officers' or supervisory asylum officers' perceptions of immigrants on the deadline determination process.<sup>225</sup> The range of variation between asylum officers also varied by region,

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225. Some past and present asylum officers have told us off the record that they believe that the general outlook—skeptical or accepting of applicants' claims—on the part of supervisory asylum officers, who must sign off on each recommended decision, strongly influences the grant rates of the asylum officers who serve under them. Each Asylum Office employs several supervisory asylum officers at any particular time, and during the eleven-year period of our study, many different supervisory asylum officers served in each regional office. DHS is not able to ascertain from its computerized data files the identity of the supervisory asylum officer who was assigned to each case, so we were not able to determine from the data we were given whether there is a relationship between particular supervisory asylum officers and the rejection rates of the asylum officers who were supervised by them.

with some regions showing remarkable consistency across officers and others showing disturbingly low levels of consistency.

Of course, none of this would matter if all of the rejected asylum applicants had weak cases on the merits. We began to explore this question by comparing grant rates and demographic characteristics of timely applicants, late-but-expected applicants, and rejected applicants. We saw remarkable consistency in grant rates between the first two groups, even when broken out by each demographic characteristic, and striking similarities in these characteristics across all three groups. We then performed an out-of-sample prediction, which provided the most important finding of this study: about 44 percent of rejected asylum cases, or an additional 15,792 claims,<sup>226</sup> would likely have been granted had the one-year deadline not existed over the time period studied. Moreover, these denials impacted an additional 5,843 refugees whose asylum claims were subsumed under those of their parents or spouses. Although the limitations of the data collection practices of DHS and DOJ prevent us from knowing whether these applicants were eventually granted asylum, withholding of removal, or actually deported, we are deeply troubled that the deadline has operated to bar genuine refugees from asylum. And though there are no data that would allow us to determine scientifically what has happened to refugees who have been returned to the country in which they fear persecution, our study warrants serious concern that the one-year filing bar has resulted in the deportation of a significant number of refugees, who may have faced beatings, sexual assault, torture, and even death in their home countries.

### *B. Policy Recommendations*

In addition to these serious problems with the deadline in practice—its uneven application to different groups and uneven administration even with respect to those in the same group—we have two very profound concerns about the deadline, even as an ideal type. First, the deadline is ineffective in its goal of deterring fraud. It is both overinclusive and underinclusive, in that it requires

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226. As explained in more detail *supra* note 219, this estimate is quite conservative, as it excludes claims with blank dates of entry.

DHS to reject otherwise meritorious applicants who did not file within a year of entry but imposes no barrier to the full evaluation of fraudulent applications if they were filed within a year of entry.<sup>227</sup> Second, the deadline is a waste of government time and resources. We detail these concerns below.

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227. In our view, a person sophisticated enough to concoct a fraudulent application is more likely to be aware of the deadline and to file within the allowable period than to miss the deadline and have to jump his application over an additional hurdle.

**Table 4.1. Costs of the Asylum Deadline**

<i>Proof of entry within a year of filing</i>	<i>Strength of asylum claim on the merits</i>	<i>Problem</i>
Clear and convincing evidence	Strong	Waste of government time and resources; additional hurdle for genuine refugee
Clear and convincing evidence	Weak	Waste of government time and resources
None or insufficient	Strong	Genuine refugee denied asylum and possibly returned to persecution
None or insufficient	Weak	Waste of government time and resources
Does not apply for fear of deadline	Strong	Genuine refugee without access to asylum and increased undocumented population
Does not apply for fear of deadline	Weak	Increased undocumented population

Consider the various categories of people who seek asylum. For those who have proof of entry within a year of filing, an estimated 69.5 percent of asylum applicants, the inquiry into whether they can establish timely filing by clear and convincing evidence is simply a waste of time and government resources. Genuine refugees in that situation are forced through an additional procedural hurdle that consumes their energy and resources. As to those who have a strong claim on the merits but either did not file timely or cannot prove that they filed timely, and to whom no exceptions are applied, the asylum officer must reject the application. Then, if the immigration judge does the same, these genuine refugees are denied asylum and possibly face beatings, torture, or death simply because

of the deadline, unless they meet the high burden of proof for withholding of removal. For those with a weak case on the merits who cannot establish timely filing and to whom no exception is applied, the asylum officer must also reject the case. But if the one-year bar did not exist, the asylum officer would have referred the case anyway, on the merits rather than because of the deadline. As a result of the deadline, the officer must waste government resources to inquire into the timeliness of the application, following the DHS requirement that asylum officers must conduct a full interview in all cases.<sup>228</sup>

Finally, there are those applicants who do not apply for asylum because they cannot prove that they filed within a year of entry. We have no way of knowing how many such individuals exist, but we suspect that the deadline forces many potential refugees underground. If the one-year bar did not exist, these individuals would come forward to claim asylum, thereby revealing their presence in the United States to DHS. The deadline is surely counterproductive in these instances in that it bars access to asylum for genuine refugees and increases the undocumented immigrant population. The argument applies with even more force to someone with a plausible but weak claim who would have lost on the merits. That person is someone who should be encouraged to file an asylum application. If the claim is considered and denied, the person should be ordered deported. Instead, that person is now likely not to file a claim at all and to go underground instead.

Moreover, the deadline adds unnecessary expense to the asylum process. Record-keeping limitations at DOJ and DHS prevent us from knowing what proportion of immigration courts' denials of asylum are based on failure to meet the deadline. Nor do these agencies publish data on what proportion of asylum officers' deadline-based referrals are affirmed or overturned by immigration judges. We do know that if this turned out to be a high proportion, it would show that many errors by the asylum officers were being corrected by the immigration judges, but at a very high cost to both

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228. USCIS ASYLUM MANUAL, *supra* note 32, at 124 ("Regardless of the filing date of an application, Asylum Officers are to give all applicants an asylum interview. This includes pre-interview familiarization with general country conditions and post-interview research of specific country conditions relevant to the applicant's situation, where applicable.").

the applicants and taxpayers.<sup>229</sup> Preparing for adversarial immigration court hearings often requires months of time by lawyers and thousands of dollars in legal fees for applicants. In addition, the hearing itself usually requires several hours of time for the DHS lawyers who advocate for removal of the applicant; immigration judges; court interpreters, who at this stage of the asylum process are paid for by the government; and supporting staff members.

In short, the only benefit of the deadline is that it ensures that evidence is fresher for the adjudicators. We believe that the very severe problems with the deadline heavily outweigh this positive benefit. Congress should repeal the deadline for the sake of genuine asylum seekers, the efficiency and accuracy of asylum adjudication, and the reduction of unnecessary government expenditure.<sup>230</sup>

When Congress first adopted the deadline, Senator Orrin Hatch, the floor manager of the legislation in which the provision was included, pledged that “if the time limit and its exceptions do not provide adequate protection to those with legitimate claims of asylum, I will remain committed to revisiting this issue in a later Congress.”<sup>231</sup> Fourteen years later, that time has come. Five recently introduced bills contain provisions that would repeal the deadline. Congress should adopt such a repeal.<sup>232</sup>

While awaiting congressional repeal of the deadline, the executive branch should adopt several policies to minimize its dangers.

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229. If it turned out to be a low proportion, any valid critique of the deadline as adjudicated by asylum officers would also apply to the immigration judges.

230. It should be clear that we believe that responsibility for the problems of efficiency and fairness that result from the deadline lies with Congress, not with the asylum officers who are tasked with administering it. The authors have met many asylum officers and greatly admire their commitment to making accurate judgments, their willingness to listen on a daily basis to testimony of persecution and torture that few of us would ever want to know about, and their pride in doing a difficult job for which the public gives them scant reward and little credit. The one-year deadline not only burdens their work but forces them to reject otherwise valid claims for asylum, putting many of them under the strain of having to turn away some whose experiences are traumatic and heartbreaking. We suspect that if members of Congress had done the work of asylum officers for even a week, they would never have imposed a one-year deadline on asylum applications.

231. 142 CONG. REC. 25,348 (1996) (statement of Sen. Hatch).

232. If Congress does not adopt full repeal, it should increase the deadline from one year to two years. This could increase the percentage of applicants who meet the deadline from 69.5 percent to 78.7 percent. *See supra* Part II fig.2-2. However, it is possible that the actual increase in the percentage of applicants who meet the deadline would be somewhat smaller or larger, as the change in the law might itself affect these numbers.



First, DHS should amend its regulations to expand the list of “extraordinary circumstances” that asylum officers should recognize as legitimate reasons for missing the deadline. The list currently in the regulations consists of only six such reasons, although the regulations explicitly state that the list is nonexclusive.<sup>233</sup> Less formal DHS training materials reiterate the list’s nonexclusivity<sup>234</sup> and further advise that

other circumstances that are not specifically listed in the nonexclusive list in the regulations, but which may constitute extraordinary circumstances, depending on the facts of the case, include, but are not limited to, severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization.<sup>235</sup>

This advice is commendable, but it is vague and still incomplete. The list in the regulations should remain nonexclusive, but it should be expanded to include the factors listed in DHS’s guidance, such as severe family or spousal opposition, extreme isolation, profound language barriers, profound difficulties in acclimatization, and several other common circumstances that cause late filing.<sup>236</sup> These additional circumstances include the following: unawareness of the existence of the right to seek asylum; unawareness of the time limit on applications; detention within the United States; fear that efforts to obtain the corroborating evidence necessary for a successful asylum application will endanger family members in the applicant’s home country; victimization by a person other than an attorney, including a person pretending to be an attorney, who purported to be helping the applicant file an application; and inability, despite genuine and timely effort, to obtain a representative who could help compile the supporting evidence and file the application.<sup>237</sup> Expanding the list as suggested could help reduce

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233. 8 C.F.R. § 208.4(a)(5)(i)-(vi) (2010).

234. ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 13.

235. *Id.* at 20.

236. *See id.*

237. We do not suggest that an asylum officer would have to accept the word of the applicant that any of these circumstances occurred. The applicant would have to *prove* the existence of one of these factors to the satisfaction of the officer, just as an applicant must now

the degree of disparity in the application of the exception and reduce some of the differential impact of the deadline on particular groups, as documented in this Article.

DHS should expand its training course and manual to require that asylum officers consider a broader range of evidence in determining the entry date for uninspected applicants. According to DHS policy, testimony alone, if clear and convincing, is sufficient to prove an asylum applicant's date of entry.<sup>238</sup> Yet some advocates report that asylum officers are unwilling to consider either affidavit evidence or several pieces of circumstantial evidence that, in combination, support an approximate date of entry into the United States.<sup>239</sup> Circumstantial evidence of these types need not be dispositive but should always be considered.

DHS should also train its officers to take into account the unique challenges asylum applicants face when the officers decide whether the applicants meet the deadline and whether a late applicant qualifies for an exception. Genuine refugees may have legitimate reasons for their inability to produce documentation of entry. In

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prove with respect to one of the six "extraordinary circumstances" listed in the regulations.

238. The DHS training manual states that "testimony can be sufficiently clear and convincing to lead an asylum officer to a 'firm belief' that the applicant arrived within one year before the filing date." ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 8. But the large number of cases that are rejected based on the deadline leads us to recommend that the message be reinforced. This is also the law in determining asylum eligibility. 8 C.F.R. § 208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.")

239. We recommend that DHS instruct its asylum officers to consider more carefully the following types of evidence: (1) tickets for travel out of the home country that show travel to a third country, particularly in situations in which, if the time of travel between the third country and the United States is considered, entry into the United States should be calculated within the one-year filing period; (2) certified airline or ship manifests showing that a particular flight or ship route exists and that the vessel traveled that route on the dates that the applicant claims via testimony that she traveled; (3) tickets for travel in the United States shortly after crossing the border; (4) affidavits from workers at migrant shelters in northern Mexico who recognize the individual as having stayed at the shelter during a certain time period, or who have checked a list of individuals who stayed during that time period and found the applicant's name; (5) affidavits from individuals who traveled to the United States with the applicant; (6) affidavits from individuals who housed the applicant before or shortly after crossing the border; (7) affidavits from individuals in the home country with knowledge of the timing of the applicant's departure, or who received communications from the applicant about his travel to the United States and the dates of that travel; and (8) affidavits from family or friends in the area where the applicant arrived in the United States that state his arrival date. E-mail from Denise Gilman, Clinical Professor & Co-Dir. of the Immigration Law Clinic, Univ. of Tex., to Jaya Ramji-Nogales (July 6, 2010) (on file with author).

cases in which an officer deems an application late, training and supervision should also ensure that asylum officers do not simply listen passively, but rather dig for all possible exceptions for which an asylum seeker might be eligible.<sup>240</sup> Asylum seekers unfamiliar with the system and the law might not come up with such exceptions on their own. Finally, DHS should ensure that asylum officers are assessing appropriately, on a case-by-case basis, the “reasonable period” for filing after an officer applies an exception. In particular, DHS should ensure that asylum officers understand that a delay of more than six months might be reasonable.<sup>241</sup>

We have recommendations for DHS and DOJ regarding the statistics they keep on the one-year filing deadline and asylum cases more generally, so that Congress and the public can be better informed. With additional data, policymakers will have greater knowledge of the extent to which refugees are ordered removed due to the deadline. More data would enable government officials and researchers to make recommendations for systemic reform based on evidence, rather than speculation.

First, DOJ should keep statistics on one-year deadline cases at the immigration court and the Board of Immigration Appeals. Furthermore, DHS and DOJ should institute a joint recordkeeping

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240. *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997), available at <http://www.justice.gov/eoir/vll/intdec/vol21/3303.pdf>; 8 C.F.R. § 1208.9(b); ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 21-22 (“While the burden of proof is on the applicant to show that there are changed circumstances that now materially affect his or her eligibility for asylum, many applicants affected by changed circumstances may not be able to articulate this. The unique nature of assessing an applicant’s need of protection places the officer in a ‘cooperative’ role with the applicant. It is an asylum officer’s affirmative duty ‘to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.’” (quoting 8 C.F.R. § 208.9(b))).

241. Congress thought that it was reasonable for applications to be filed within a year. As long as the year remains the standard, the “reasonable time” period should also generally be no less than a year. At the very least, decisions should be made on a case-by-case basis without any presumption that filing more than six months late is not reasonable. *Cf. supra* note 103 and accompanying text. For example, in cases in which the basis for an exception is that the applicant was in lawful status, the DHS training materials state that “guidance offered by the Department of Justice states that more than a six-month delay would usually be considered unreasonable,” citing language that appeared in the Federal Register in 2000, before the Department of Homeland Security was created. ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 24. We would encourage the Asylum Office to examine the totality of the circumstances in each case rather than follow such a blunt approach that cannot take into account such circumstances. In any event, that DOJ guidance did not purport to apply to the reasonable time for filing after the occurrence of circumstances other than the termination of lawful status.

system that can track cases as they move from the asylum office to the immigration court to the Board. Second, DHS and DOJ should create separate codes for applicants rejected on the deadline to distinguish between late asylum seekers (1) for whom no exception is applicable, (2) who might be eligible for an exception but cannot meet the evidentiary standard required to prove that such an exception applies, and (3) who establish eligibility for an exception but fail to apply within a reasonable period of the end of the condition giving rise to the exception. Third, in cases of late applicants who meet one of the exceptions to the deadline, DHS and DOJ should code the type of exception applied so that analysts can understand how wedded asylum officers, immigration judges, and appeals board members are to the enumerated exceptions and determine which obstacles most commonly prevent asylum seekers from applying on time. Fourth, for all applicants, DHS and DOJ should code the time period between the end of the condition giving rise to the exception and the date of filing, thereby enabling a reliable assessment of the “reasonable period” requirement and its implementation by asylum officers. Fifth, DHS and DOJ should code for type of representation, distinguishing, for example, between accredited representatives, law firms, and law school clinics.<sup>242</sup> We know that represented asylum seekers generally were much less likely to be rejected on the one-year deadline than those who were unrepresented. It would be valuable to know whether the type of representation makes a significant difference in grant rates and, for those who do not file within the deadline, rejection rates.<sup>243</sup> Finally, we strongly encourage DHS and DOJ to work together closely to find the best possible way to use current data to provide information on what happened to those rejected and referred to

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242. Representatives must file a “G-28” form when they assist applicants. USCIS ASYLUM MANUAL, *supra* note 32, at 24. This form indicates the type of representative who is filing it, facilitating coding of the type we suggest. *Id.*

243. One recent empirical study, controlling for other variables, found that experienced public defenders were significantly more successful than those who had spent less time on the job. David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment To Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1173 (2007). It would be ideal if DHS and scholars could learn what characteristics of applicants’ lawyers correlate with success, but that investigation would probably involve too much work for both the agency and the lawyers, who would be called upon to reveal information about themselves. It would require only some additional coding, however, for DHS to distinguish among members of the bar, law students, and other permitted representatives.

immigration court in terms of outcome since the deadline came into effect.

Our previous Refugee Roulette study indicated that random factors, such as the identity of the adjudicator, deeply affect the asylum adjudication process.<sup>244</sup> The one-year deadline adds an additional random factor, because it is not, nor can it be, evenly applied to all applicants. First, various groups of applicants are deemed timely in differing degrees, probably reflecting not only differences in immigrant support systems that advise applicants to file promptly, but also the extent to which different asylum officers or their supervisors apply strict or generous evidentiary standards in determining entry dates. The asylum officers grant exceptions to late applicants at rates that differ for different groups, and different officers, even within regional offices, grant exceptions to late applicants at varying rates. Thus, even aside from the inherent unfairness of refusing asylum to people for reasons beyond their control, the deadline introduces irrelevant sociological factors, such as the existence of coethnic support groups in the applicant's community, and factors related to the attitudes of the adjudicators, into the determination of who obtains refuge in America. The deadline has not been, and probably cannot be, administered in a way that treats late applicants fairly and equally. The best solution to these problems is the one now before Congress: the deadline's total repeal.

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244. See REFUGEE ROULETTE, *supra* note 9.

## METHODOLOGICAL APPENDIX

The DHS U.S. Citizenship and Immigration Services (USCIS) provided us with data drawn from its Refugee Asylum and Parole System (RAPS), a computerized database used to track the processing of asylum claims through the affirmative asylum process.<sup>245</sup> USCIS staff at one of four regional service centers enter new asylum cases into the system, inputting data that asylum seekers provide on Form I-589, Application for Asylum and for Withholding of Removal.<sup>246</sup> As discussed further below, Asylum Office personnel have access to RAPS in order to update and correct the database with information provided by asylum applicants at their interviews.<sup>247</sup> The data sets provided by USCIS contained 552,760 asylum decisions rendered between October 1, 1996, and June 8, 2009.<sup>248</sup> Some cases involved both an applicant and a spouse or child who was already in the United States. To avoid duplication of data, USCIS eliminated the separate entries of dependents from the database. But as discussed further below, the existence of one or more dependents in the United States was noted in the record of the principal applicant.<sup>249</sup>

DHS provided us with fifteen variables for each case: asylum officer identification number, asylum officer region, case identification number, filing date, date of entry, status at entry, nationality, gender, religion, ethnic group, age at filing, dependents, representation, final disposition code, and final decision date.<sup>250</sup>

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245. USCIS ASYLUM MANUAL, *supra* note 32, at 2-3, 7. RAPS also allows users to determine the status of asylum cases in the immigration court system. *Id.* at 3.

246. *Id.* at 2-3, 7. USCIS service centers are located in California, Nebraska, Vermont, and Texas. USCIS Home Page, <http://www.uscis.gov/portal/site/uscis> (follow "About Us" hyperlink; then follow "Contact Us" hyperlink) (last visited Nov. 12, 2010).

247. USCIS ASYLUM MANUAL, *supra* note 32, at 2-3, 7. In rare cases, generally involving reapplication after denial and filing by an applicant who had previously been included as a dependent on another asylum application, in which direct filing with the Asylum Office is permitted, the data provided on Form I-589 are inputted by Asylum Office personnel. *Id.* at 7.

248. These data were provided in Excel format; we used StatTransfer to convert it to SPSS and Stata for purposes of analysis.

249. E-mails from Sally Armstrong, Mgmt. & Program Analyst, Asylum Div., Office of Refugee, Asylum & Int'l Operations, U.S. Citizenship & Immigration Servs., to Philip G. Schrag (Apr. 30, 2009, and May 5, 2009) (on file with author).

250. Once we have completed the second portion of this study, which will examine the

DHS provided the data to us organized by the fiscal year in which the case was filed.<sup>251</sup> As a result, our data will not match up with DHS published statistics, which are organized by year of decision.<sup>252</sup> The FY 1998 data set was split into two parts: those who filed before and those who filed after April 16, 1998, the effective date of the one-year deadline. The FY 2009 data set included only cases that had been decided as of June 8, 2009.

We began by excluding data that were not relevant to our analysis. First, we eliminated the cases of all Mexican nationals. During the years in question, the vast majority of Mexican asylum applicants were not genuine asylum seekers; they applied for asylum in order for DHS to deny them and refer them to immigration court, where they could seek another form of relief.<sup>253</sup> We

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dependent variable of asylum grant rates, we will make the original data, as well as keys to relevant codes, and other information available at this website: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance/>. This is a website associated with this Article and the book *LIVES IN THE BALANCE* (NYU Press, forthcoming 2013), also by Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach. Certain links are currently live. The original data from DHS from which the two studies were performed will be posted on this site after *LIVES IN THE BALANCE* is published.

251. The U.S. Senate website defines the federal government's fiscal year as "[t]he accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends; for example, fiscal year 2006 begins on October 1, 2005 and ends on September 30, 2006." United States Senate, Glossary, [http://www.senate.gov/reference/glossary\\_term/fiscal\\_year.htm](http://www.senate.gov/reference/glossary_term/fiscal_year.htm) (last visited Nov. 12, 2010).

252. See, e.g., DEPT OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS (2010), available at <http://www.dhs.gov/files/statistics/publications/yearbook.shtm>.

253. The database that we used excluded 62,568 cases filed by Mexican nationals. According to the U.S. Headquarters Asylum Division of DHS, a very large proportion of these claims were filed only to enable Mexicans who were residing in the United States to receive referrals to immigration court, where they could abandon their asylum claims and seek some other type of immigration benefit to which they believed they were entitled, such as cancellation of removal. See Schoenholtz, *supra* note 133, at 338 n.62. Cancellation of removal, which can be granted by an immigration judge but not by an asylum officer, allows a foreign national to remain in the United States if the judge finds that the applicant (a) has resided in the United States for at least ten years before being served with a notice to appear in immigration court, (b) has been of good moral character during that period, (c) has not been convicted of certain offenses, and (d) has a spouse, parent, or child who is an American citizen or lawful permanent U.S. resident and who would suffer an "exceptional and extremely unusual hardship" if the applicant was removed. 8 U.S.C. § 1229b(b) (2006). DHS did not claim, nor do we believe, that there are not a number of valid Mexican asylum claims during the years covered by the database. But we respect the DHS judgment that many of the Mexican claims were for other purposes. In order to keep the focus of the study on how the deadline affected asylum seekers, we have excluded the Mexican claims from our analysis.

eliminated 62,568 Mexican cases. Second, we removed from the data all cases that had not yet been completed as of June 8, 2009 (the end date for our data set) and cases that had been administratively closed (such as cases in which applicants did not appear for their interviews or discontinued their applications).<sup>254</sup> There were 2,462 cases that had not been decided and 121,959 cases that were administratively closed. We excluded only 102,484 undecided and administratively closed cases because of category overlap; that is, some cases that remained undecided or were administratively closed were also Mexican cases, and for that reason had already been eliminated from the database. Third, we eliminated cases in the data set that the Asylum Office did not adjudicate. For example, the database included the cases of individuals who entered as dependents of successful asylum applicants.<sup>255</sup> Because these entries did not represent new individual asylum determinations, we eliminated 2,955 such cases. Finally, we removed from the data cases that had obviously been miscoded in such a way that they could not be used to address questions about the impact of the filing deadline. Specifically, these were cases in which the dates of entry were later than the dates of application. Asylum seekers cannot apply for asylum from abroad, and DHS informed us that these were coding errors. There were 1,875 cases in the database for which the date of entry was later than the date of application; we excluded only 1,273 for this reason as the others were already excluded on other grounds. In total, we eliminated 169,280 cases from the data, leaving 383,480 cases for our analysis.

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254. Cases that had been administratively closed with no decision had final decision codes beginning with "C."

255. Asylum seekers can include their spouses and minor children in their applications for protection. If their applications are successful, asylum is also granted to these dependents. If an asylee's dependents live overseas, they can then enter the United States with asylee status. We identified these cases using the following *status at entry* codes: AS1, AS2, AS3, and AY. See our website for further description and explanation of *status at entry* codes: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance>.



*Regression Analyses*

We ran a total of four binary logistic regressions to confirm the statistical significance of the data we reported in descriptive form. Two of these regressions explored the dependent variable of timely filing; the other two used rejection on the deadline as the dependent variable. The independent variables were essentially the same in each regression, but we ran additional regressions because we grouped the asylum seeker nationality variable into asylum seeker geographic region of origin, which required us to run separate regressions. We describe these dependent and independent variables further below. The timeliness regressions analyzed the entire database of asylum seekers, but the rejection regressions analyzed only asylum applicants who filed more than a year after entry.

The independent variables common to all four regressions are Asylum Office region, asylum officer cases decided, the fiscal year in which the applicant filed for asylum, applicant's mode of entry, human rights conditions in the applicant's country of origin, applicant's gender, applicant's religion, whether the applicant had dependents, whether the applicant was represented by an attorney or other representative, and applicant's age at filing. One of the timeliness regressions also included applicant's nationality, and the other replaced this variable with applicant's geographic region of origin, as the latter variable was derived from the former. Similarly, one of the rejection regressions also included applicant's nationality, and the other replaced this variable with applicant's geographic region of origin, as again, the latter variable was derived from the first. Both of the rejection regressions also included the independent variable lapse between date of entry and date of filing.

These regression analyses generally confirmed the cross-tabulation analysis; we have noted in the text of the Article when they did not. The results of these regression analyses are provided in the Regression Appendix.

*Estimation*

We ran an out-of-sample prediction to determine how many late applicants barred by the deadline would have been granted asylum in the absence of the deadline. We performed a binary logistic

regression on untimely and excepted cases, using the dependent variable of grant rate and the following independent variables: asylum officer's region, whether the applicant had dependents, the applicant's filing date, the applicant's geographic region of origin, the applicant's gender, the lapse between the applicant's date of entry and date of filing, whether the applicant was inspected at entry, the applicant's religion, and whether the applicant was represented. This regression calculated coefficients, which were then applied through a regression equation to cases rejected because of the deadline. This provided us with the probability that each particular case would be granted asylum. We then used the mean of these values to determine the percentage of all rejected cases that would have received asylum had the one-year deadline not been in effect.<sup>256</sup>

We could not include applicants with blank dates of entry in this estimation, because we could not determine the lapse between date of entry and date of filing for these asylum seekers.

### *Dependent Variables*

*Timely.* We created a binary variable that signifies timely filing, a value of 1, or untimely filing, a value of 0. Where the *final decision code* described below did not indicate that the case had been denied based on the deadline, code D5, or referred to immigration court because of the deadline, code I5, and the lapse variable described below was 364 or fewer days,<sup>257</sup> we considered the asylum

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256. See *supra* text accompanying notes 216-20 (providing results of this estimation).

257. If the 364th day fell on a weekend or a federal holiday, neither we nor DHS counted the case as late if filed on the following business day. If February 29 of a leap year was one of the days between entry and filing, we treated the case as not late if it was filed on the 365th day after entry, or if the 365th day was a nonbusiness day, on the next business day. The following were treated as holidays: New Year's Day, Martin Luther King, Jr. Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. At least until 2009, DHS regarded a person as late if the person filed 365 days after entry, though a 2009 Ninth Circuit case held that DHS should have used 366 as the number of days in question. *Minasyan v. Mukasey*, 553 F.3d 1224, 1227-28 (9th Cir. 2009). DHS changed its practice in March 2009, after *Minasyan* was decided. ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 5. We used 364 days because that is how DHS calculated timely filing until the final months of the time frame studied. See, e.g., U.S. DEP'T OF HOMELAND SEC., ASYLUM OFFICER BASIC TRAINING COURSE: ONE-YEAR FILING DEADLINE 4 (Mar. 15, 2001), available at [http://www.asylumlaw.org/docs/united\\_states/one\\_year\\_lesson\\_March2001.pdf](http://www.asylumlaw.org/docs/united_states/one_year_lesson_March2001.pdf).

application to have been filed timely. Under all other conditions, such as when no entry date was listed, or *lapse* exceeded 364 days, or *lapse* was 364 days or less but the DHS final decision code was D5 or I5, we considered the asylum application to have been filed untimely.

*Final decision code* (FDEC). DHS provided us with nineteen decision codes that we combined into three categories: (1) denial/referral, (2) grant, and (3) administrative closure.<sup>258</sup> As described above, we eliminated from our data the cases that had been administratively closed as well as those with no final decision.

*Lapse*. This variable calculates the number of days between entry into the United States and the date of filing the asylum claim. The *date of entry* and *date of filing* variables are discussed below. Following the DHS practice in determining whether an asylum seeker filed timely, we did not count the day of entry but we did count day of filing in our calculation of the *lapse* variable.<sup>259</sup> If no date of entry for the applicant was listed, *lapse* is blank.

*Date of entry*. Each case listed the applicant's date of entry, which was generally taken from the answer to question 18 on Form I-589, Application for Asylum and for Withholding of Removal, as filled out by the asylum seeker. Also, 21,256 cases had blank dates of entry.

If the date of entry field is left blank in the asylum application, national procedures direct the regional service centers that initially process these applications to leave the field blank in RAPS and suggest that staff may review supporting documentation to establish the date of entry.<sup>260</sup> However, regional service centers may devise regional procedures that are more stringent than these instructions. For example, if the date of entry is blank, the Vermont Service Center instructs staff to look at the applicant's list of prior residences in the I-589 and use the earliest date of U.S. residence. Similarly, the Nebraska Service Center instructs staff to use the last date of departure from their country or the date listed on the applicant's Form I-94 Arrival-Departure Record—but if no date is found, the I-589 will be refused and returned to the applicant as

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258. These decision codes are available at the Georgetown Human Rights Institute website: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance/>.

259. ASYLUM OFFICER BASIC TRAINING COURSE, *supra* note 6, at 5.

260. USCIS ASYLUM MANUAL, *supra* note 32, at 126.

incomplete. In the same situation, the California Service Center instructs staff to leave the date of entry field blank. And, in the same circumstance, the Texas Service Center returns the I-589 to the applicant as incomplete. Both the California Service Center and the Vermont Service Center provide instructions for completing the date where it is incomplete on the I-589.<sup>261</sup>

In addition, the asylum officers who adjudicate claims are required to update the computerized system, including adding entry dates where appropriate.<sup>262</sup> The instructions on how to address blank dates of entry have changed over time. In May 1998, with the implementation of the one-year deadline, the Asylum Division altered the computerized system to allow the date of entry field to be left blank. At that time, asylum officers were instructed to enter a date of entry only when the asylum seeker presented documentary evidence, such as an I-94 or passport, or credible testimony as to that date, or when a computer record of the lawful entry existed.<sup>263</sup> These procedures were not fully incorporated into the USCIS Asylum Manual until 2003; indeed, the USCIS Asylum Manual did not address leaving the date of entry field blank until 2003.<sup>264</sup> As a result, not all asylum applicants who left the date of entry blank on their initial I-589 ended up with a blank date of

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261. E-mail from Mary Margaret Stone, Chief of Operations, Asylum Div., Office of Refugee, Asylum & Int'l Operations Directorate, U.S. Citizenship & Immigration Servs., to Philip G. Schrag (Sept. 11, 2009) (on file with author).

262. See USCIS ASYLUM MANUAL, *supra* note 32, at 3, 126.

263. In addition, leaving the date of entry blank results in an "unknown date of entry" on the NTA, which may cause problems with the different EOIR jurisdictions.

264. The 2003 guidance is as follows:

The date of entry is recorded in RAPS according to whether the applicant met his or her burden of proof. Regardless of the claimed manner of entry, whenever the applicant has failed to meet the burden of proof with respect to his or her last arrival date, no date shall be entered into the DOE (Date of Entry) field on the I589 or OSG screens. When the field is left blank, the words "UNKNOWN DOE" will automatically be printed on the NTA and the I-213 (where applicable). Asylum officers must address any credibility issues relating to the date of entry in the assessment. For guidance on the applicant's burden of proof and determining the appropriate standards of proof required for entry dates, see AOBTC Lesson Plans *One-Year Filing Deadline* and *Asylum Eligibility Part IV—Burden of Proof and Evidence*.

U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 129 (2003), available at [http://www.ilw.com/resources/Affirmative\\_Asylum.pdf](http://www.ilw.com/resources/Affirmative_Asylum.pdf). This language is incorporated into the 2007 edition of the USCIS Asylum Manual with two slight grammatical alterations. See USCIS ASYLUM MANUAL, *supra* note 32, at 126.

entry in our database; the extent to which this occurred varied by region and likely by asylum officer.

*Rejection on the deadline.* Relying on the *recoded final decision code* variable described below, we created a binary *rejected for deadline* variable that found a deadline rejection, value of 1, when the *recoded final decision code* had a value of 2, and found there was no deadline rejection, value of 0, when the *recoded final decision code* had a value of 1 or 3.

*Recoded final decision code.* Using the FDEC *final decision code* variable provided by DHS and described above, we grouped asylum applicants into three categories related to the one-year filing deadline: (1) asylum granted, code G1, which was awarded a value of 1; (2) asylum denied or referred based on deadline, code D5 or I5, which was awarded a value of 2; and (3) asylum denied or referred on merits, all other FDEC codes, including FDEC codes beginning with “R,” which represent cases that were reopened and then denied or referred on the merits, which was awarded a value of 3.<sup>265</sup>

*Grant.* Relying on the *recoded final decision code* variable described above, we grouped asylum applicants into two categories— asylum granted, code G1, which was awarded a value of 1, and all other final decision values, including denials and referrals on the deadline and the merits, which were awarded a value of 0.

### *Independent Variables*

*Age at filing.* DHS provided us with the asylum seeker’s age at filing.

*Asylum officer number of cases decided.* Using the asylum officer identification number provided to us by DHS, we sorted each asylum officer’s cases by the final decision date provided by DHS. We then ranked each case by asylum officer identification number. When two cases were decided on the same day, both were assigned the average of the ranks.<sup>266</sup>

*Asylum officer region.* Asylum cases are filed and adjudicated in eight Asylum Offices that cover specific geographic regions,

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265. These decision codes are available at the Georgetown Human Rights Institute website: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance/>.

266. For instance, if two cases would be the eleventh and twelfth cases, each would be assigned 11.5.

identified to us by DHS only as Regions A through H. DHS declined to tell us which regional Asylum Offices correspond to these letters.

*Dependents.* DHS provided us with a “yes” or “no” answer to the question of whether an asylum seeker had dependents. We therefore have two groups of applicants: asylum seekers with no dependents in the United States listed on their application, and asylum seekers with one or more dependents in the United States listed on their application.

*Ethnic group.* DHS provided us with an ethnic group variable for each asylum applicant. Unfortunately, the overwhelming majority of entries in this field—514,757 of 552,760, or approximately 93 percent—were “OTHER” (446,016) or “UNKNOWN” (68,741). Apparently, most applicants did not enter this information on the application form. We did not use this field for any purpose.

*Filing date.* DHS provided us with the filing date for each asylum applicant.

*Fiscal year.* DHS provided the data in cohorts by fiscal year of decision.

*Gender.* DHS provided us with the gender of each asylum applicant. We awarded male gender a value of 0 and female gender a value of 1.

*Inspection at entry.* Using the *status at entry* variable provided by DHS and described below, we categorized all asylum applicants who entered EWI, or “entered without inspection,” and UU, or “unknown,” used interchangeably over the years with EWI, as “uninspected at entry,” and all other asylum seekers as “inspected at entry.”

*Status at entry.* The *status at entry* variable coded whether the asylum applicant was inspected at entry, and if so, on what type of visa she entered the United States. Those who entered without inspection or visas were coded EWI, “entered without inspection,” or UU, “unknown.” Those who entered with visas or visa waiver documents were coded for the type of visa, for example, B2 for tourist and F1 for student. When an applicant testified that he or she used fraudulent documents to enter the United States and presented these documents to the asylum officer, the asylum officer coded his or her case SDF, or “suspected document fraud.”<sup>267</sup>

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267. A complete listing of visa types is available at the Georgetown Human Rights Institute website: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance/>.

*Nationality.* DHS provided us with nationality abbreviations for each asylum case. Most abbreviations are self-explanatory, but a few took some work to decode. For example, DECON is Democratic Republic of the Congo, and UINEA is Guinea. Ivory Coast has two different designations, COTED and IVORY, and these were both converted to IVORY. Belarus has two designations, BELAR and BYELO, and these were both converted to BELAR. The code STATE is used for stateless persons.

*Geographic region of origin.* Using the World Bank definition of the regions of the world,<sup>268</sup> we divided nationalities into eight regions. Although the World Bank combines Europe and Central Asia, we made separate regions for those two categories. Only Canada was placed in the North America region, as Mexicans were excluded from the database.<sup>269</sup> Stateless persons and persons of unknown nationality were treated as regions of their own.<sup>270</sup>

*Human rights conditions in country of origin.* Using the Freedom House indices for civil liberties and political rights for the years 1997 through 2008, or editions 1998-2008, we created a combined score for both indices for each country of origin.<sup>271</sup> Using the final decision date provided to us by DHS, we used the prior year score for cases decided between January and March and the current year score for cases decided between April and December. That is, for a case decided in February of 2002, we used the human rights indices for 2001; for a case decided in May of 2002, we used the human rights indices for 2002. We used this approach to accurately reflect the information before asylum officers, who rely most heavily on the U.S. State Department Country Human Rights Practices reports for their country conditions research. These State Department reports are published in late March or early April each year, so the time lag renders our data more accurate.

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268. The World Bank, <http://www.worldbank.org> (follow "Countries" hyperlink) (last visited Nov. 12, 2010).

269. See *supra* note 253 and accompanying text.

270. Our division of countries into regions is available at the Georgetown Human Rights Institute website: <http://www.law.georgetown.edu/humanrightsinstitute/LivesInTheBalance/>.

271. See FREEDOM HOUSE, FREEDOM IN THE WORLD RATINGS, available at <http://www.freedomhouse.org/uploads/fiw/FIWALLScores.xls> (years 1998-2006), and <http://www.freedomhouse.org/template.cfm?page=15> (years 2002-2010) (last visited Nov. 12, 2010). We simply added the two scores together to create a combined score.

*Religion.* DHS provided us with the religion of each asylum applicant. We combined some of these into one category. DHS uses three categories for Christians, including Christian, Catholic, and Orthodox, all of which we coded as Christian. Likewise, DHS uses three categories for Muslims, including Muslim, Shiite, and Sunni, all of which we recoded as Muslim. We recoded Parsi (PARSI) as Zoroastrian (ZOROA) because Parsis are a particular group of Zoroastrians. DHS uses both BADDH and BUDDH for Buddhist; we converted BADDH to BUDDH.

In all, 48,872 asylum seekers had “unknown” and 26,624 had “other” entered in the religion field, for a total of 75,496 cases. The National Service Center I-589 procedures direct staff to leave a field blank in RAPS if the field is blank on the I-589 unless otherwise directed.<sup>272</sup> In the case of religion, the procedures specifically direct staff to enter “OTHER” if the asylum seeker does not designate a religion on the asylum application.<sup>273</sup>

The national procedures are the minimum requirements for processing at the service center. Each service center may devise local procedures that are more stringent. The Nebraska, Texas, and Vermont Service Centers instruct staff to enter “OTHER” if the religion designated by the applicant is not included in the list of religions in RAPS. The Vermont Service Center instructs staff to use “UNKNO” where the applicant states “none,” “N/A,” “no religion,” or “unknown.” The California Service Center instructs staff to pick the code that most closely matches the religion listed on the I-589. If the applicant leaves the religion field blank on the I-589, staff must enter “UNKNO.” The Texas Service Center also instructs “UNKNO” to be used where the religion field is blank. If California Service Center staff cannot determine the religion written, then they must enter “OTHER.”<sup>274</sup>

Moreover, the table of religions in RAPS lists only nineteen choices, including “OTHER” and “UNKNO.” Although the table lists major religions of the world, it does not list many subgroups or denominations. As a result, if an asylum applicant describes herself as a member of a religious subgroup that is not listed in RAPS, service center staff might enter “OTHER” or “UNKNO” rather than

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272. *Id.*

273. *Id.*

274. E-mail from Mary Margaret Stone, *supra* note 261.



selecting the larger religion to which that subgroup belongs. For example, if the applicant lists Anglican, Episcopal, or Methodist on the I-589, service center staff may not select “PROTE” on RAPS. There is also no specific category for Agnostic, Atheist, “none,” or traditional religions, which might as a result be classified as “other” or “unknown.”

Section II.L.1.g of the USCIS Asylum Manual instructs asylum officers to make changes to information in RAPS, such as religion, if these fields were changed on the I-589 during the interview.<sup>275</sup> It does not, however, give instructions on when to use “OTHER” versus “UNKNO.” As a result, the Asylum Division believes that the terms “other” and “unknown” are being used interchangeably in the religion field.<sup>276</sup> Moreover, these terms can mean anything from an illegible or blank religion entry on Form I-589 to atheism or even a traditional religion. Since “other” and “unknown” were often used interchangeably, we combined them into a single category for purposes of analysis.

*Representation.* Although DHS names this field “attorney,” “representative” is a more accurate term as this variable captures the presence of lawyers, law students, accredited representatives from nongovernmental organizations, and other “reputable individual[s] of good moral character” who provide free assistance to asylum applicants.<sup>277</sup> DHS coded all of these types of representation as a “yes” in the “attorney” field without making distinctions among them.

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275. USCIS ASYLUM MANUAL, *supra* note 32, at 37.

276. E-mail from Mary Margaret Stone, *supra* note 261.

277. 8 C.F.R. §§ 292.1-292.2 (2010).

## REGRESSION APPENDIX

*Timeliness Regressions*

		Coefficient	Standard Error	Significance (p value)
Step 1a	Asylum Office Region B			.000
	Asylum Office Region A	-.859	.023	.000
	Asylum Office Region C	-.256	.021	.000
	Asylum Office Region D	-.730	.021	.000
	Asylum Office Region E	-.995	.020	.000
	Asylum Office Region F	-.288	.020	.000
	Asylum Office Region G	-.734	.026	.000
	Asylum Office Region H	-1.137	.020	.000
	Entry with inspection	.666	.010	.000
	<i>Asylum seeker's region of origin</i>			
	East Asia/Pacific			.000
	Latin America/Caribbean	.144	.020	.000
	Europe	.897	.020	.000
	Central Asia	.748	.024	.000
	North Africa/Middle East	.320	.023	.000
	Africa	.548	.016	.000
	South Asia	.668	.027	.000
	North America	1.200	.418	.004
	<i>Asylum seeker's religion</i>			
	Christian			.000
	Baha'i	.399	.164	.015
	Buddhist	-.036	.022	.098
	Druze	-.189	.688	.783
Hindu	.139	.043	.001	
Jainist	-1.058	.787	.179	

		Coefficient	Standard Error	Significance (p value)
	Jewish	-.396	.056	.000
	Muslim	-.224	.015	.000
	Other	-.021	.012	.098
	Sikh	1.370	.045	.000
	Unknown	-.168	.017	.000
	Zoroastrian	-.887	.303	.003
	Asylum seeker's gender	-.184	.009	.000
	Asylum seeker's dependents	-.115	.011	.000
	Representation	-.276	.009	.000
	Asylum seeker's age at filing	.093	.005	.000
	Fiscal year of filing	-.043	.002	.000
	Asylum officer's caseload	.027	.002	.000
	Human rights conditions in asylum seeker's country of origin	.167	.002	.000
	Constant	84.700	3.021	.000

#### **Omnibus Tests of Model Coefficients**

		Chi-square	df	Sig.
Step 1	Step	30246.916	43	.000
	Block	30246.916	43	.000
	Model	30246.916	43	.000

#### **Hosmer and Lemeshow Test**

	Chi-square	df	Sig.
Step 1	1453.494	8	.000

		Coefficient	Standard Error	Significance (p value)
Step 1a	Asylum Office Region B			.000
	Asylum Office Region A	-.217	.026	.000
	Asylum Office Region C	.328	.025	.000
	Asylum Office Region D	-.346	.024	.000
	Asylum Office Region E	-.461	.023	.000
	Asylum Office Region F	.262	.023	.000
	Asylum Office Region G	-.148	.028	.000
	Asylum Office Region H	-.576	.023	.000
	Entry with inspection	.759	.011	.000
	<i>Asylum seeker's nationality</i>			
	China			.000
	Afghanistan	.811	.081	.000
	Albania	.876	.042	.000
	Algeria	-.330	.108	.002
	Angola	.105	.128	.412
	Antigua	-.541	1.454	.710
	Argentina	-1.685	.149	.000
	Armenia	.576	.040	.000
	Australia	-1.339	.860	.120
	Austria	20.410	17810.930	.999
	Azerbaijan	.909	.075	.000
	Bahamas	-1.241	.544	.022
	Bahrain	.406	.808	.615
Bangladesh	-.227	.077	.003	
Barbados	21.104	40192.970	1.000	
Belarus	.172	.052	.001	
Belgium	-.469	.592	.428	
Belize	-1.399	.432	.001	
Benin	.005	.242	.984	
Bhutan	.852	.296	.004	
Bolivia	-.825	.220	.000	

	Coefficient	Standard Error	Significance (p value)
Bosnia	.351	.129	.006
Botswana	1.093	1.140	.338
Brazil	-.998	.088	.000
Bulgaria	.367	.088	.000
Burkina Faso	-.366	.105	.000
Burma	.153	.042	.000
Burundi	.471	.091	.000
Cambodia	.261	.148	.077
Cameroon	.893	.036	.000
Canada	.101	.420	.810
Cape Verde	-.634	1.229	.606
Central African Republic	.148	.129	.251
Chad	.863	.121	.000
Chile	-.790	.233	.001
Colombia	.100	.037	.006
Comoros	20.812	19940.929	.999
Costa Rica	-2.076	.559	.000
Côte d'Ivoire	-.849	.052	.000
Croatia	.170	.200	.398
Cuba	.446	.090	.000
Cyprus	-1.137	.880	.197
Czech Republic	-1.105	.421	.009
Democratic Republic of the Congo	.222	.041	.000
Denmark	21.074	28395.460	.999
Djibouti	1.187	.495	.017
Dominica	-1.578	.815	.053
Dominican Republic	-.463	.338	.172
Ecuador	-1.016	.162	.000
Egypt	.805	.046	.000
El Salvador	-1.442	.062	.000

	Coefficient	Standard Error	Significance (p value)
Equatorial Guinea	-.940	.684	.170
Eritrea	.409	.053	.000
Estonia	-.388	.153	.011
Ethiopia	.948	.036	.000
Fiji	-.433	.085	.000
Finland	22.191	40192.970	1.000
France	.273	.338	.419
Gabon	-.124	.282	.659
Georgia	-.174	.068	.011
Germany	.900	.332	.007
Ghana	.176	.178	.323
Greece	.939	.634	.139
Grenada	-.696	.886	.432
Guatemala	-1.129	.043	.000
Guinea	-.121	.038	.001
Guinea-Bissau	-.464	.259	.074
Guyana	-.390	.265	.141
Haiti	.937	.029	.000
Honduras	-1.112	.118	.000
Hungary	-.095	.319	.767
India	.258	.071	.000
Indonesia	-.543	.036	.000
Iran	.038	.037	.305
Iraq	.167	.044	.000
Ireland	20.465	28369.006	.999
Israel	.567	.164	.001
Italy	.062	.518	.905
Jamaica	-1.069	.151	.000
Japan	-.791	.601	.188
Jordan	-.626	.096	.000
Kazakhstan	.059	.101	.558
Kenya	-.318	.051	.000

	Coefficient	Standard Error	Significance (p value)
Kiribati	21.364	40192.970	1.000
Kuwait	-.503	.304	.098
Kyrgyzstan	-.044	.111	.690
Laos	-.594	.165	.000
Latvia	-.103	.152	.500
Lebanon	-.306	.095	.001
Liberia	.631	.041	.000
Libya	-.867	.299	.004
Lithuania	-.592	.141	.000
Macedonia	.318	.121	.009
Madagascar	.655	.804	.416
Malawi	-.865	.371	.020
Malaysia	-1.202	.141	.000
Maldives	20.465	17919.305	.999
Mali	-1.545	.102	.000
Malta	20.976	40192.970	1.000
Mauritania	.296	.041	.000
Mauritius	1.328	.799	.097
Moldova	.428	.104	.000
Mongolia	-.352	.096	.000
Montenegro	-.500	.884	.572
Morocco	-1.093	.219	.000
Mozambique	20.993	28382.315	.999
Namibia	-1.086	.917	.236
Nauru	20.590	28404.915	.999
Nepal	.213	.057	.000
Netherlands	20.974	12880.596	.999
New Zealand	-.867	1.416	.540
Nicaragua	-.573	.152	.000
Niger	-.190	.098	.053
Nigeria	-.325	.080	.000
North Korea	-1.448	.721	.044

	Coefficient	Standard Error	Significance (p value)
Norway	20.282	40192.970	1.000
Oman	.256	1.174	.828
Pakistan	.125	.046	.006
Panama	-1.281	.470	.006
Papua New Guinea	-21.520	28360.081	.999
Paraguay	-.766	.429	.074
Peru	-.597	.069	.000
Philippines	-1.571	.123	.000
Poland	-1.131	.143	.000
Portugal	-2.375	.774	.002
Qatar	-.618	.770	.422
Romania	.543	.096	.000
Russia	.007	.035	.834
Rwanda	.839	.090	.000
Saudi Arabia	-.554	.279	.047
Senegal	-.731	.097	.000
Serbia	.585	.119	.000
Seychelles	-1.056	1.418	.457
Sierra Leone	.064	.051	.205
Singapore	-.637	.370	.085
Slovakia	-.859	.298	.004
Slovenia	.212	.772	.783
Somalia	1.178	.038	.000
South Africa	-.188	.157	.230
South Korea	-.400	.343	.244
Spain	-.269	.500	.591
Sri Lanka	.487	.076	.000
St. Lucia	-2.041	1.126	.070
St. Vincent	-22.149	40192.970	1.000
Sudan	1.026	.062	.000
Suriname	-2.182	.758	.004
Swaziland	-.733	.922	.427



	Coefficient	Standard Error	Significance (p value)
Sweden	.369	.683	.589
Switzerland	-.708	1.020	.488
Syria	-.562	.117	.000
Taiwan	-1.088	.356	.002
Tajikistan	.286	.204	.161
Tanzania	-.937	.141	.000
Thailand	-1.300	.358	.000
The Gambia	-1.414	.077	.000
Togo	.427	.052	.000
Tonga	-2.902	.767	.000
Trinidad and Tobago	-1.485	.278	.000
Tunisia	-1.115	.307	.000
Turkey	.108	.105	.301
Turkmenistan	.308	.152	.042
Uganda	.229	.064	.000
Ukraine	-.194	.060	.001
United Arab Emirates	-1.416	.568	.013
United Kingdom	.060	.384	.876
Uruguay	.000	.345	1.000
Uzbekistan	.031	.053	.560
Venezuela	-.113	.045	.013
Vietnam	-.809	.139	.000
Yemen	-.229	.122	.061
Yugoslavia	1.030	.054	.000
Zambia	-.440	.170	.010
Zimbabwe	-1.242	.051	.000
<i>Asylum seeker's religion</i>			
Christian			.000
Baha'i	.565	.166	.001
Buddhist	-.026	.023	.261
Druze	.415	.687	.546
Hindu	.035	.054	.518

	Coefficient	Standard Error	Significance (p value)
Jainist	-1.082	.783	.167
Jewish	.029	.057	.609
Muslim	-.068	.020	.001
Other	-.020	.013	.141
Sikh	1.022	.068	.000
Unknown	-.093	.018	.000
Zoroastrian	-.835	.303	.006
Asylum seeker's gender	-.164	.009	.000
Asylum seeker's dependents	-.085	.012	.000
Representation	-.253	.010	.000
Asylum seeker's age at filing	.083	.005	.000
Fiscal year of filing	-.030	.002	.000
Asylum officer's caseload	.028	.002	.000
Human rights conditions in asylum seeker's country of origin	.062	.005	.000
Constant	59.792	3.300	.000

#### **Omnibus Tests of Model Coefficients**

	Chi-square	df	Sig.
Step 1	41102.168	208	.000
Step Block	41102.168	208	.000
Model	41102.168	208	.000

#### **Hosmer and Lemeshow Test**

	Chi-square	df	Sig.
Step 1	328.124	8	.000

*Rejection Regressions*

		Coefficient	Standard Error	Significance (p value)	
Step 1a	Asylum Office Region B			.000	
	Asylum Office Region A	-.286	.039	.000	
	Asylum Office Region C	-1.100	.038	.000	
	Asylum Office Region D	-1.045	.038	.000	
	Asylum Office Region E	-.216	.036	.000	
	Asylum Office Region F	-.369	.035	.000	
	Asylum Office Region G	-.560	.043	.000	
	Asylum Office Region H	-.461	.035	.000	
	Entry with inspection	-.729	.021	.000	
	<i>Asylum seeker's region of origin</i>				
	East Asia/Pacific			.000	
	Latin America/Caribbean	-.447	.034	.000	
	Europe	-.571	.037	.000	
	Central Asia	-.376	.046	.000	
	North Africa/Middle East	-.760	.045	.000	
	Africa	-.543	.030	.000	
	South Asia	-.752	.050	.000	
	North America	.668	1.120	.551	
	<i>Asylum seeker's religion</i>				
	Christian			.000	
Baha'i	.055	.369	.882		
Buddhist	-.257	.041	.000		
Druze	2.383	1.242	.055		
Hindu	-.159	.079	.044		
Jainist	-.723	1.202	.548		
Jewish	-.170	.101	.094		
Muslim	.580	.030	.000		
Other	.099	.024	.000		

		Coefficient	Standard Error	Significance (p value)
	Sikh	.901	.098	.000
	Unknown	-.076	.034	.024
	Zoroastrian	-.023	.517	.964
	Asylum seeker's gender	-.157	.017	.000
	Asylum seeker's dependents	-.172	.020	.000
	Representation	-.458	.018	.000
	Asylum seeker's age at filing	.213	.009	.000
	Fiscal year of filing	.076	.003	.000
	Asylum officer's caseload	.005	.003	.099
	Human rights conditions in asylum seeker's country of origin	-.097	.004	.000
	Lapse between entry date and filing date	.000	.000	.000
	Constant	-151.092	6.074	.000

#### **Omnibus Tests of Model Coefficients**

		Chi-square	df	Sig.
Step 1	Step	6311.420	37	.000
	Block	6311.420	37	.000
	Model	6311.420	37	.000

#### **Hosmer and Lemeshow Test**

	Chi-square	df	Sig.
Step 1	53.715	8	.000

		Coefficient	Standard Error	Significance (p value)
Step 1a	Asylum Office Region B			.000
	Asylum Office Region A	-.079	.044	.073
	Asylum Office Region C	-.890	.042	.000
	Asylum Office Region D	-.774	.042	.000
	Asylum Office Region E	-.021	.039	.581
	Asylum Office Region F	-.152	.039	.000
	Asylum Office Region G	-.355	.047	.000
	Asylum Office Region H	-.337	.039	.000
	Entry with inspection	-.776	.025	.000
	<i>Asylum seeker's nationality</i>			
	China			.000
	Afghanistan	-.703	.198	.000
	Albania	-.610	.090	.000
	Algeria	-.339	.182	.062
	Angola	-.308	.253	.223
	Antigua	20.915	40192.970	1.000
	Argentina	.664	.219	.002
	Armenia	-.375	.083	.000
	Australia	-1.605	.953	.092
	Azerbaijan	-.330	.185	.075
	Bahamas	-1.020	.646	.115
	Bahrain	21.332	28105.001	.999
	Bangladesh	-.699	.131	.000
Belarus	-.165	.097	.088	
Belgium	-1.987	1.127	.078	
Belize	-.388	.618	.530	
Benin	-.744	.388	.055	
Bhutan	-.431	.696	.536	
Bolivia	-.496	.322	.123	
Bosnia	-1.210	.246	.000	
Botswana	20.978	40192.970	1.000	

	Coefficient	Standard Error	Significance (p value)
Brazil	-.063	.131	.630
Bulgaria	-.931	.172	.000
Burkina Faso	.054	.158	.730
Burma	-.316	.087	.000
Burundi	-1.065	.214	.000
Central African Republic	-.154	.255	.545
Cambodia	.442	.256	.084
Cameroon	-.826	.087	.000
Canada	.756	1.125	.501
Cape Verde	19.693	28340.599	.999
Chad	-1.205	.268	.000
Chile	-.648	.339	.056
Colombia	-.277	.067	.000
Costa Rica	-.786	.513	.126
Cote d'Ivoire	.357	.089	.000
Croatia	-.920	.365	.012
Cuba	-1.194	.199	.000
Cyprus	-1.090	1.014	.282
Czech Republic	1.010	.766	.187
Democratic Republic of the Congo	-.555	.083	.000
Djibouti	-1.057	1.164	.364
Dominica	-.702	.910	.441
Dominican Republic	-.864	.484	.074
Ecuador	-.460	.228	.044
Egypt	-.319	.091	.000
El Salvador	-.965	.094	.000
Equatorial Guinea	-20.555	23122.216	.999
Eritrea	-.389	.118	.001
Estonia	-.349	.242	.151
Ethiopia	-1.103	.084	.000

	Coefficient	Standard Error	Significance (p value)
Fiji	-.253	.150	.092
France	-1.073	.565	.058
Gabon	-.758	.496	.126
Georgia	.039	.123	.751
Germany	-1.480	.648	.022
Ghana	-.708	.312	.023
Greece	-22.187	23165.018	.999
Grenada	-2.722	1.323	.040
Guatemala	-.182	.074	.013
Guinea	.180	.074	.016
Guinea-Bissau	-.010	.444	.983
Guyana	.051	.435	.907
Haiti	.207	.058	.000
Honduras	-1.224	.153	.000
Hungary	.076	.549	.890
India	-.465	.134	.001
Indonesia	.344	.066	.000
Iran	-.809	.079	.000
Iraq	-1.208	.118	.000
Israel	-.619	.294	.035
Italy	-1.203	.849	.157
Jamaica	-.405	.207	.051
Japan	-1.530	.850	.072
Jordan	-.053	.152	.728
Kazakhstan	-.174	.178	.330
Kenya	-.304	.090	.001
Kuwait	-1.061	.544	.051
Kyrgyzstan	.183	.192	.340
Laos	.591	.271	.029
Latvia	-.758	.249	.002
Lebanon	-.300	.158	.057
Liberia	-1.977	.104	.000

	Coefficient	Standard Error	Significance (p value)
Libya	-.678	.513	.186
Lithuania	.200	.222	.368
Macedonia	-.895	.230	.000
Madagascar	-.003	1.452	.998
Malawi	.694	.594	.243
Malaysia	-.419	.200	.036
Mali	.021	.129	.869
Mauritania	.957	.120	.000
Mauritius	19.760	40192.970	1.000
Moldova	-1.014	.200	.000
Mongolia	-.377	.160	.019
Montenegro	-2.218	1.622	.171
Morocco	-.612	.306	.045
Namibia	-.200	1.244	.872
Nepal	-.793	.108	.000
New Zealand	-21.153	40192.970	1.000
Nicaragua	-.392	.243	.107
Niger	-.576	.171	.001
Nigeria	-.136	.135	.316
North Korea	.076	1.046	.942
Oman	21.612	40192.970	1.000
Pakistan	-.300	.086	.000
Panama	.105	.691	.879
Papua New Guinea	-.361	1.428	.801
Paraguay	-1.711	.690	.013
Peru	-.540	.116	.000
Philippines	.421	.175	.016
Poland	.792	.221	.000
Portugal	-.395	.704	.575
Qatar	1.728	1.237	.163
Romania	.077	.186	.681
Russia	-.191	.066	.004



	Coefficient	Standard Error	Significance (p value)
Rwanda	-1.625	.271	.000
Saudi Arabia	-.631	.498	.205
Senegal	.129	.155	.404
Serbia	-1.022	.274	.000
Seychelles	-21.542	40192.970	1.000
Sierra Leone	-.791	.100	.000
Singapore	-1.762	.793	.026
Slovakia	-.774	.391	.048
Slovenia	20.281	22016.808	.999
Somalia	.071	.121	.557
South Africa	-.485	.253	.055
South Korea	.320	.682	.639
Spain	-.823	.811	.310
Sri Lanka	-.952	.147	.000
St. Lucia	19.990	19680.813	.999
St. Vincent	-21.287	40192.970	1.000
Sudan	-1.337	.169	.000
Suriname	-.890	.576	.122
Swaziland	21.143	28320.028	.999
Sweden	-22.042	22670.722	.999
Switzerland	-1.665	1.436	.246
Syria	.566	.193	.003
Taiwan	-.915	.498	.066
Tajikistan	-.148	.377	.695
Tanzania	.430	.195	.027
Thailand	-.664	.465	.153
The Gambia	.545	.104	.000
Togo	-.744	.106	.000
Tonga	20.454	11158.542	.999
Trinidad and Tobago	-1.023	.296	.001
Tunisia	.174	.429	.684
Turkey	-.565	.188	.003

	Coefficient	Standard Error	Significance (p value)
Turkmenistan	-.413	.296	.164
Uganda	-.045	.114	.690
Ukraine	-.186	.109	.088
United Arab Emirates	.159	.684	.816
United Kingdom	-1.053	.638	.099
Uruguay	.191	.671	.776
Uzbekistan	.043	.096	.658
Venezuela	-.153	.082	.063
Vietnam	-.146	.237	.538
Yemen	-.174	.211	.408
Yugoslavia	-.655	.109	.000
Zambia	1.112	.290	.000
Zimbabwe	.064	.071	.367
<i>Asylum seeker's religion</i>			
Christian			.000
Baha'i	.187	.374	.617
Buddhist	-.137	.045	.002
Druze	1.378	1.236	.265
Hindu	-.061	.098	.534
Jainist	-.933	1.207	.440
Jewish	-.389	.105	.000
Muslim	.293	.040	.000
Other	-.004	.026	.890
Sikh	.660	.137	.000
Unknown	.000	.036	.991
Zoroastrian	.043	.529	.935
Asylum seeker's gender	-.167	.017	.000
Asylum seeker's dependents	-.193	.021	.000
Representation	-.443	.019	.000
Asylum seeker's age at filing	.234	.009	.000

	Coefficient	Standard Error	Significance (p value)
Fiscal year of filing	.068	.003	.000
Asylum officer's caseload	.006	.003	.056
Human rights conditions in asylum seeker's country of origin	-.103	.009	.000
Lapse between entry date and filing date	.000	.000	.000
Constant	-135.138	6.584	.000

**Omnibus Tests of Model Coefficients**

	Chi-square	df	Sig.
Step 1	8011.662	191	.000
Step Block	8011.662	191	.000
Model	8011.662	191	.000

**Hosmer and Lemeshow Test**

	Chi-square	df	Sig.
Step 1	42.510	8	.000

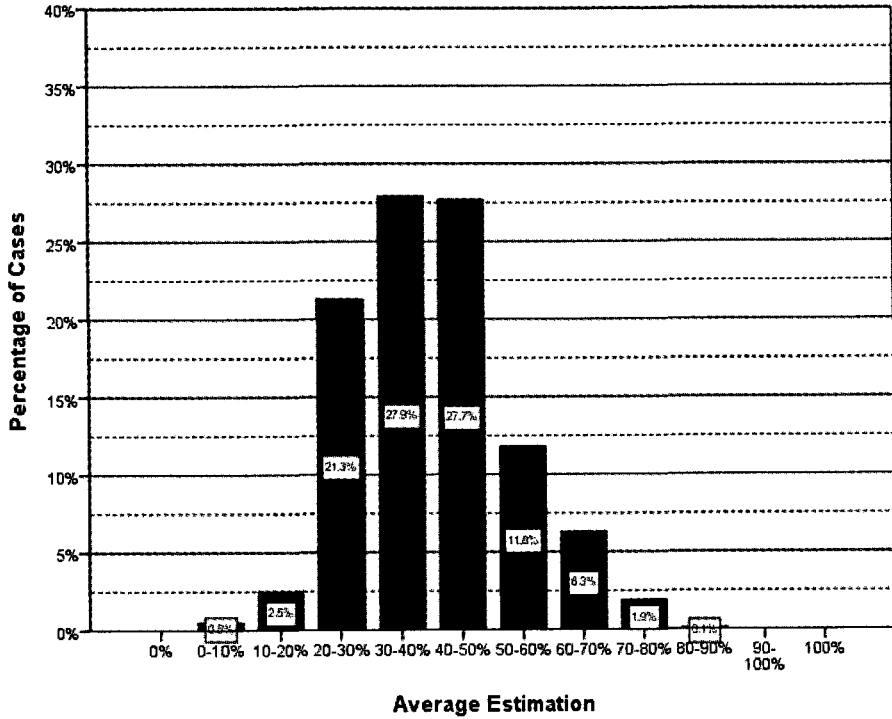
## ESTIMATION APPENDIX

Figures 4-1, 4-2, and 4-3 display the values obtained through the estimation and creation of 95 percent confidence intervals.<sup>278</sup> Figure 4-1 shows that 97.6 percent of all cases had at least a 20 percent probability of being granted asylum, and just over 80 percent had at least a 30 percent probability of being granted asylum. Even with an extremely conservative estimate that relies on the lower bounds of the 95 percent confidence interval, more than 90 percent of all rejected cases had at least a 20 percent chance of being granted asylum.

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278. Any values that were below 0 percent and above 100 percent for confidence intervals were simply transformed into 0 percent or 100 percent, respectively.

**Figure 4-1. Distribution of Predicted Probabilities of Grants for Rejected Cases**



**Figure 4-2. Distribution of Lower Bounds for 95 Percent Confidence Interval**

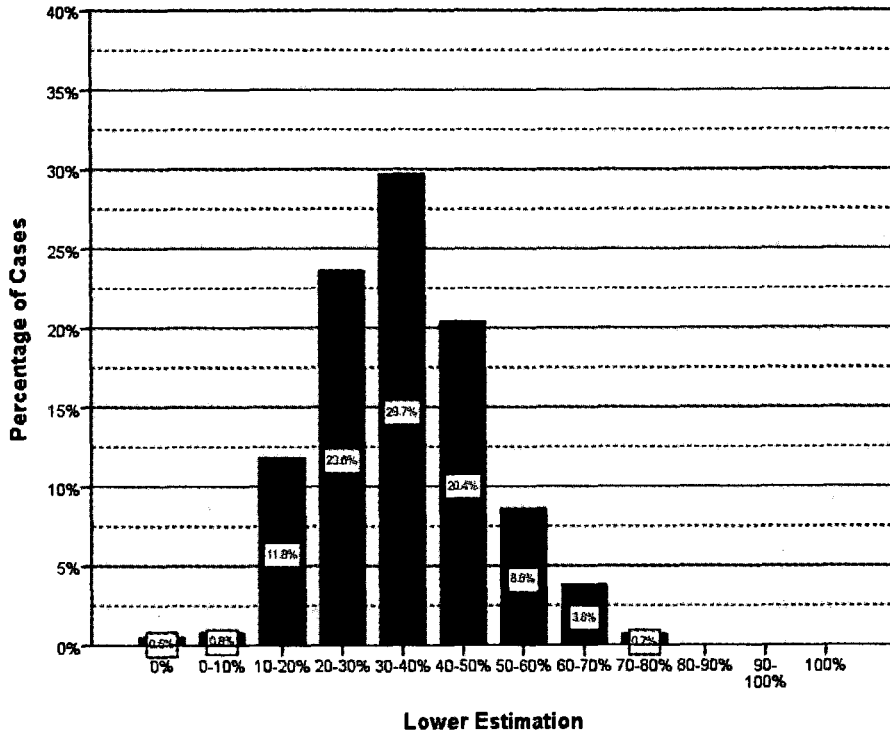


Figure 4-3. Distribution of Upper Bounds for 95 Percent Confidence Interval

