No. 19-1212

In the Supreme Court of the United States

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

INNOVATION LAW LAB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX
(VOLUME 1)

JEFFREY B. WALL
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioners

JUDY RABINOVITZ
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, N.Y. 10004
jrabinovitz@aclu.org
(212) 549-2618

Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: APR. 10, 2020
CERTIORARI GRANTED: OCT. 19, 2020

TABLE OF CONTENTS

Page

Volume 1

[†] The administrative record included a public notice describing this document, rather than the document itself. See Pet. App. 164a-165a. All parties agree that this document is part of the administrative record.

Table of Contents—Continued: Page

Table of Contents—Continued: Page

Table of Contents—Continued: Page

Volume 2

Table of Contents—Continued: Page

Table of Contents—Continued: Page

Table of Contents—Continued: Page

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 19-15716

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, PLAINTIFFS-APPELLEES

v.

CHAD F. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; ANDREW DAVIDSON, CHIEF OF ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW ALBENCE, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; US IMMIGRATION AND CUSTOMS ENFORCEMENT, DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/19	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes.

DATE	DOCKET NUMBER	PROCEEDINGS
		The schedule is set as follows: Mediation Questionnaire due on 04/17/2019. Transcript ordered by 05/10/2019. Transcript due 06/10/2019. Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Customs and Border Protection, U.S. Department of Homeland Security, US Immigration and Customs Enforcement, United States Citizenship and Immigration Services and Ronald D. Vitiello opening brief due 07/19/2019. Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic answering brief due 08/19/2019. Appellant's optional reply brief is due 21 days after service of the answering brief due 08/19/2019. [11259911] (JMR) [Entered: 04/10/2019 03:53 PM]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/11/19	3	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello EMERGENCY Motion to stay lower court action. Date of service: 04/11/2019. [11261528] [19-15716] (Reuveni, Erez) [Entered: 04/11/2019 09:03 PM]
4/12/19	4	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic response opposing motion ([3] Motion (ECF Filing), [3] Motion (ECF Filing)). Date of service: 04/12/2019. [11261704] [19-15716] (Rabinovitz, Judy) [Entered: 04/12/2019 09:08 AM]
4/12/19	5	Filed (ECF) Appellants US Immigration and Customs Enforcement, Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan,

DATE	DOCKET NUMBER	PROCEEDINGS
		Kirstjen Nielsen, Todd C. Owen, U.S. Customs and Border Protection, USCIS, USDHS and Ronald D. Vitiello reply to response (). Date of service: 04/12/2019. [11262595] [19-15716] (Reuveni, Erez) [Entered: 04/12/2019 03:25 PM]
4/12/19	6	Filed order (DIARMUID F. O'SCANNLAIN, WILLIAM A. FLETCHER and PAUL J. WATFORD) The court has received appellants' emergency motion for a stay. The district court's April 8, 2019 preliminary injunction order is temporarily stayed pending resolution of the emergency stay motion. The opposition to the emergency motion is due at 9:00 a.m. Pacific Time on April 16, 2019. The optional reply in support of the emergency motion is due at 9:00 a.m. Pacific Time on April 17, 2019. [11262714] (ME) [Entered: 04/12/2019 04:16 PM]
4/15/19	7	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Customs and Border Protection, US

DATE	DOCKET NUMBER	PROCEEDINGS
		Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello Mediation Questionnaire. Date of service: 04/15/2019. [11264025] [19-15716] (Reuveni, Erez) [Entered: 04/15/2019 02:10 PM]
		* * * * *
4/16/19	9	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic response opposing motion ([3] Motion (ECF Filing), [3] Motion (ECF Filing)). Date of service: 04/16/2019. [11264929] [19-15716] (Rabinovitz, Judy) [Entered: 04/16/2019 08:29 AM]
4/16/19	10	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense

DATE	DOCKET NUMBER	PROCEEDINGS
		Clinic Correspondence: Exhibits for response to motion [9]. Date of service: 04/16/2019. [11264934] [19-15716]—[COURT UPDATE: Updated docket text to reflect correct ECF filing type. 04/17/2019 by SLM] (Rabinovitz, Judy) [Entered: 04/16/2019 08:31 AM]
4/17/19	11	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello reply to response( ). Date of service: 04/17/2019. [11266493] [19-15716] (Reuveni, Erez) [Entered: 04/17/2019 08:16 AM]
		* * * * *
4/23/19	18	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense

DATE	DOCKET NUMBER	PROCEEDINGS
		Clinic citation of supplemental authorities. Date of service: 04/23/2019. [11274563] [19-15716] (Rabinovitz, Judy) [Entered: 04/23/2019 05:15 PM]
4/24/19	19	Filed Audio recording of oral argument. **Note**: Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/[11275675] (BJK) [Entered: 04/24/2019 01:55 PM]
		* * * * *
5/6/19	21	Filed letter dated 05/03/2019 re: Non party letter from Sallie E. Shawl—misc statements in support of plaintiffs/appellees. Paper filing deficiency: None. [11289641] (CW) [Entered: 05/07/2019 02:45 PM]
5/7/19	22	Filed Per Curiam Opinion (DIARMUID F. O'SCANNLAIN, WILLIAM A. FLETCHER and PAUL J. WATFORD) (Concurrences by Judge Watford and Judge Fletcher) In January 2019, the Department of Homeland Security (DHS) issued the Migrant Protection Protocols

DATE	DOCKET NUMBER	PROCEEDINGS
		(MPP), which initiated a new inspection policy along the southern border. Before the MPP, immigration officers would typically process asylum applicants who lack valid entry documentation for expedited removal. If the applicant passed a credible fear screening, DHS would either detain or parole the individual until her asylum claim could be heard before an immigration judge. (SEE OPINION FOR FULL TEXT) The motion for a stay pending appeal is GRANTED. [11289987] (RMM) [Entered: 05/07/2019 04:45 PM]
5/13/19	23	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic motion for reconsideration of non-dispositive Judge Order of 05/07/2019. Date of service: 05/13/2019. [11295040] [19-15716] (Rabinovitz, Judy) [Entered: 05/13/2019 12:39 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/22/19	26	Submitted (ECF) Opening Brief for review. Submitted by Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello. Date of service: 05/22/2019. [11306600] [19-15716] (Ramkumar, Archith) [Entered: 05/22/2019 08:15 PM]
5/22/19	27	Submitted (ECF) excerpts of record. Submitted by Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello. Date of service: 05/22/2019. [11306603] [19-15716] (Ramkumar, Archith) [Entered: 05/22/2019 08:22 PM]
5/23/19	28	Filed clerk order: The opening brief [26] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered

DATE	DOCKET NUMBER	PROCEEDINGS
		to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The Court has reviewed the excerpts of record [27] submitted by appellants. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [11307022] (LA) [Entered: 05/23/2019 10:29 AM]
5/24/19	29	Filed order (DIARMUID F. O'SCANNLAIN, WILLIAM A. FLETCHER and PAUL J. WATFORD): Appellees' motion for reconsideration of the panel's decision to publish the stay order (Dkt. [23]) is DENIED. [11308257] (AF) [Entered: 05/24/2019 08:41 AM]
		* * * * *
6/19/19	34	Submitted (ECF) Answering Brief for review. Submitted by

DATE	DOCKET NUMBER	PROCEEDINGS
		Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic. Date of service: 06/19/2019. [11338415] [19-15716] (Rabinovitz, Judy) [Entered: 06/19/2019 11:42 PM]
6/19/19	35	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic. Date of service: 06/19/2019. [11338416] [19-15716]—[COURT UPDATE: Attached corrected PDF of excerpts. 06/20/2019 by RY] (Rabinovitz, Judy) [Entered: 06/19/2019 11:45 PM]
6/19/19	36	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California,

DATE	DOCKET NUMBER	PROCEEDINGS
		Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic Motion to take judicial notice of. Date of service: 06/19/2019. [11338418] [19-15716] (Rabinovitz, Judy) [Entered: 06/19/2019 11:49 PM]
6/20/19	37	Filed clerk order: The answering brief [34] submitted by appellees is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The Court has reviewed the supplemental excerpts of record [35] submitted by appellees. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk.

DATE	DOCKET NUMBER	PROCEEDINGS
		[11339490] (KT) [Entered: 06/20/2019 02:32 PM]
		* * * * *
6/26/19	39	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by LOCAL 1924. Date of service: 06/26/2019. [11345407] [19-15716] (Mangi, Adeel) [Entered: 06/26/2019 01:33 PM]
		* * * * *
6/26/19	41	Filed clerk order: The amicus brief [39] submitted by Local 1924 is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be submitted to the principal office of the Clerk. [11345524] (LA) [Entered: 06/26/2019 02:05 PM]
6/26/19	43	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)).

DATE	DOCKET NUMBER	PROCEEDINGS
		Submitted by Former U.S. Government Officials. Date of service: 06/26/2019. [11345820] [19-15716] (Schoenfeld, Alan) [Entered: 06/26/2019 03:29 PM]
6/26/19	44	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Amnesty International, The Washington Office on Latin America, The Latin America Working Group, and The Institute for Women in Migration ("IMUMI"). Date of service: 06/26/2019. [11345933] [19-15716] (Wang, Xiao) [Entered: 06/26/2019 04:05 PM]
		* * * * *
6/26/19	46	Filed clerk order: The amicus brief [43] submitted by Former U.S. Government Officials is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be

DATE	DOCKET NUMBER	PROCEEDINGS
		submitted to the principal office of the Clerk. [11346140] (LA) [Entered: 06/26/2019 05:44 PM]
6/26/19	47	Filed clerk order: The amicus brief [44] submitted by Amnesty International-USA, Washington Office on Latin America, Latin America Working Group, and IMUMI is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be submitted to the principal office of the Clerk. [11346144] (LA) [Entered: 06/26/2019 05:45 PM]
6/26/19	48	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by The Office of the United Nations High Commissioner for Refugees. Date of service: 06/26/2019. [11346192] [19-15716]—[COURT UPDATE: Attached corrected PDF of brief,

DATE	DOCKET NUMBER	PROCEEDINGS
		removed unnecessary motion, updated docket text to reflect content of filing. 07/02/2019 by LA] (Reyes, Ana) [Entered: 06/26/2019 07:00 PM]
6/26/19	49	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by HUMAN RIGHTS FIRST. Date of service: 06/26/2019. [11346211] [19-15716] (Igra, Naomi) [Entered: 06/26/2019 10:05 PM]
		* * * * *
6/27/19	51	Filed clerk order: The amicus brief [49] submitted by Human Rights First is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be submitted to the principal office of the Clerk. [11346596] (LA) [Entered: 06/27/2019 10:24 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
7/2/19	56	Filed clerk order: The amicus brief [48] submitted by Office of the United Nations High Commissioner for Refugees is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: green. The paper copies shall be submitted to the principal office of the Clerk. [11352606] (LA) [Entered: 07/02/2019 03:28 PM]
		* * * * *
7/10/19	59	Submitted (ECF) Reply Brief for review. Submitted by Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello. Date of service: 07/10/2019. [11359989]

DATE	DOCKET NUMBER	PROCEEDINGS
		[19-15716] (Reuveni, Erez) [Entered: 07/10/2019 07:27 PM]
7/11/19	60	Filed clerk order: The reply brief [59] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [11360213] (LA) [Entered: 07/11/2019 09:32 AM]
		* * * * *
10/1/19	70	ARGUED AND SUBMITTED TO FERDINAND F. FERNANDEZ, WILLIAM A. FLETCHER and RICHARD A. PAEZ. [11450728] (ER) [Entered: 10/01/2019 05:35 PM]
10/1/19	71	Filed Audio recording of oral argument. **Note**: Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.

DATE	DOCKET NUMBER	PROCEEDINGS
		gov/media/ [11451490] (BJK) [Entered: 10/02/2019 12:10 PM]
10/3/19	72	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic Correspondence: Plaintiffs' correction to representation made in oral argument. Date of service: 10/03/2019 [11452728] [19-15716] (Rabinovitz, Judy) [Entered: 10/03/2019 10:48 AM]
10/30/19	73	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello citation of supplemental authorities. Date of service: 10/30/2019. [11483551] [19-15716] (Reuveni, Erez) [Entered: 10/30/2019 02:13 PM]
10/31/19	74	Filed (ECF) Appellees Al Otro Lado, Central American Resource

DATE	DOCKET NUMBER	PROCEEDINGS
		Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic citation of supplemental authorities. Date of service: 10/31/2019. [11485256] [19-15716] (Rabinovitz, Judy) [Entered: 10/31/2019 03:18 PM]
11/13/19	75	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic citation of supplemental authorities. Date of service: 11/13/2019. [11497729] [19-15716] (Rabinovitz, Judy) [Entered: 11/13/2019 01:24 PM]
11/14/19	76	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS,

DATE	DOCKET NUMBER	PROCEEDINGS
		USDHS and Ronald D. Vitiello citation of supplemental authorities. Date of service: 11/14/2019. [11499071] [19-15716] (Reuveni, Erez) [Entered: 11/14/2019 12:11 PM]
		* * * * *
11/21/19	81	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic citation of supplemental authorities. Date of service: 11/21/2019. [11506691] [19-15716] (Rabinovitz, Judy) [Entered: 11/21/2019 09:44 AM]
11/26/19	82	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello citation of supplemental authorities. Date of service: 11/26/2019. [11512235] [19-15716] (Reuveni,

DATE	DOCKET NUMBER	PROCEEDINGS
		Erez) [Entered: 11/26/2019 06:30 AM]
12/2/19	83	Filed (ECF) Appellants Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Ronald D. Vitiello citation of supplemental authorities. Date of service: 12/02/2019. [11516626] [19-15716] (Reuveni, Erez) [Entered: 12/02/2019 06:29 AM]
12/3/19	84	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic citation of supplemental authorities. Date of service: 12/03/2019. [11519502] [19-15716] (Rabinovitz, Judy) [Entered: 12/03/2019 01:59 PM]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/28/20	87	Appellants Kevin K. McAleenan, Lee Francis Cissna, John L. Lafferty and Ronald D. Vitiello in 19-15716 substituted by Appellants Chad F. Wolf, Kenneth T. Cuccinelli, Andrew Davidson and Matthew Albence in 19-15716 [11612131] (TYL) [Entered: 02/28/2020 08:47 AM]
2/28/20	88	Filed order (FERDINAND F. FERNANDEZ, WILLIAM A. FLETCHER and RICHARD A. PAEZ) Appellees' motion for judicial notice (Dkt. Entry 36) is hereby GRANTED. [11612163] (AKM) [Entered: 02/28/2020 08:57 AM]
2/28/20	89	FILED OPINION (FERDINAND F. FERNANDEZ, WILLIAM A. FLETCHER and RICHARD A. PAEZ) We lift the emergency stay imposed by the motions panel, and we affirm the decision of the district court. AFFIRMED. Judge: FFF Dissenting, Judge: WAF Authoring. FILED AND ENTERED JUDGMENT. [11612187] —[Edited 02/28/2020 (attached corrected PDF—typos corrected) by AKM]—[Edited 03/02/2020

DATE	DOCKET NUMBER	PROCEEDINGS
		(attached corrected PDF—additional typos corrected) by AKM] (AKM) [Entered: 02/28/2020 09:08 AM]
2/28/20	90	Filed (ECF) Appellants Matthew Albence, Kenneth T. Cuccinelli, Andrew Davidson, Todd C. Owen, U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Chad F. Wolf EMERGENCY Motion for miscellaneous relief [Emergency motion under Circuit Rule 27-3 for an immediate stay pending disposition of petition for certiorari or an immediate administrative stay]. Date of service: 02/28/2020. [11613665] [19-15716] (Reuveni, Erez) [Entered: 02/28/2020 05:21 PM]
2/28/20	91	Filed (ECF) Appellants Matthew Albence, Kenneth T. Cuccinelli, Andrew Davidson, Todd C. Owen, US Immigration and Customs Enforcement, USCIS, USDHS and Chad F. Wolf EMERGENCY Motion for miscellaneous relief [(CORRECTED) Emergency motion under Circuit Rule 27-3 for an immediate stay pending

DATE	DOCKET NUMBER	PROCEEDINGS
		disposition of petition for certiorari or an immediate administrative stay]. Date of service: 02/28/2020. [11613675] [19-15716] (Reuveni, Erez) [Entered: 02/28/2020 05:28 PM]
2/28/20	92	Filed (ECF) Appellants Matthew Albence, Kenneth T. Cuccinelli, Andrew Davidson, Todd C. Owen, US Immigration and Customs Enforcement, U.S. Customs and Border Protection, USCIS and Chad F. Wolf EMERGENCY Motion for miscellaneous relief [CORRECTED (operative version) Emergency motion under Circuit Rule 27-3 for an immediate stay pending disposition of petition for certiorari or an immediate administrative stay]. Date of service: 02/28/2020. [11613700] [19-15716] (Reuveni, Erez) [Entered: 02/28/2020 05:50 PM]
2/28/20	93	Filed order (FERDINAND F. FERNANDEZ, WILLIAM A. FLETCHER and RICHARD A. PAEZ) The emergency request for an immediate stay of this court's February 28, 2020 deci-

DATE	DOCKET NUMBER	PROCEEDINGS
		sion pending disposition of a petition for certiorari is granted pending further order of this court. Appellees are directed to file a response by the close of business on Monday, March 2, 2020. Any reply is due by the close of business on Tuesday, March 3, 2020.—[COURT UPDATE—replaced order with corrected version, corrected typo—02/28/2020 by SVG][11613715] (SVG) [Entered: 02/28/2020 07:05 PM]
3/2/20	94	Filed (ECF) Appellees Al Otro Lado, Central American Resource Center of Northern California, Centro Legal De La Raza, Innovation Law Lab, Tahirih Justice Center and University of San Francisco School of Law Immigration and Deportation Defense Clinic response to motion ([92] Motion (ECF Filing), [92] Motion (ECF Filing)). Date of service: 03/02/2020. [11615573] [19-15716] (Rabinovitz, Judy) [Entered: 03/02/2020 04:42 PM]
3/3/20	95	Filed (ECF) Appellants Matthew Albence, Kenneth T. Cuccinelli, Andrew Davidson, Todd C. Owen,

DATE	DOCKET NUMBER	PROCEEDINGS
		U.S. Customs and Border Protection, US Immigration and Customs Enforcement, USCIS, USDHS and Chad F. Wolf reply to response (). Date of service: 03/03/2020. [11617160] [19-15716] (Reuveni, Erez) [Entered: 03/03/2020 04:34 PM]
3/4/20	96	Filed Order for PUBLICATION (FERDINAND F. FERNANDEZ, WILLIAM A. FLETCHER and RICHARD A. PAEZ) (Partial Concurrence & Partial Dissent by Judge Fernandez) We stay, pending disposition of the Government's petition for certiorari, the district court's injunction insofar as it operates outside the Ninth Circuit. We decline to stay, pending disposition of the Government's petition for certiorari, the district court's injunction against the MPP insofar as it operates within the Ninth Circuit. The Government has requested in its March 3 reply brief, in the event we deny any part of their request for a stay, that we "extend the [administrative] stay by at least seven days, to March 10, to afford the Supreme Court an

DATE	DOCKET NUMBER	PROCEEDINGS
		orderly opportunity for review." We grant the Government's request and extend our administrative stay entered on Friday, February 28, until Wednesday, March 11. If the Supreme Court has not in the meantime acted to reverse or otherwise modify our decision, our partial grant and partial denial of the Government's request for a stay of the district court's injunction, as described above, will take effect on Thursday, March 12. So ordered on March 4, 2020. [11618488]—[Edited 03/11/2020 (attached reformatted pdf) by AKM] (AKM) [Entered: 03/04/2020 03:56 PM]
3/11/20	97	Received copy of US Supreme Court order filed on 03/11/2020—. The application for stay presented to Justice Kagan and by her referred to the Court is granted, and the district court's April 8, 2019 order granting a preliminary injunction is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay

DATE	DOCKET NUMBER	PROCEEDINGS
		shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Sotomayor would deny the application. PANEL [11626152] (CW) [Entered: 03/11/2020 11:41 AM]
		* * * * *
4/15/20	99	**Supreme Court Case Info** Case number: 19-1212 Filed on: 04/10/2020 Cert Petition Action 1: Pending [11661959] (RR) [Entered: 04/15/2020 01:51 PM]
10/19/20	100	**Supreme Court Case Info** Case number: 19-1212 Filed on: 04/10/2020 Cert Petition Action 1: Granted, 10/19/2020 [11864022] (JFF) [Entered: 10/19/2020 02:44 PM]
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO)

Docket No. 3:19-cv-00807-RS

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, PLAINTIFFS-APPELLEES

v.

CHAD F. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; ANDREW DAVIDSON, CHIEF OF ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW ALBENCE, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; US IMMIGRATION AND CUSTOMS ENFORCEMENT, DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/14/19	1	COMPLAINT for Declaratory and Injunctive Relief against Lee

DATE	DOCKET NUMBER	PROCEEDINGS
		Francis Cissna, John Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitello (Filing fee $400.00, receipt number 0971-13093503.). Filed by Central American Resource Center of Northern California, Innovation Law Lab, Tahirih Justice Center, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Al Otro Lado. (Attachments: # 1 Civil Cover Sheet) (Newell, Jennifer) (Filed on 2/14/2019) Modified on 2/22/2019 (gbaS, COURT STAFF). (Entered: 02/14/2019)
2/14/19	2	Case assigned to Magistrate Judge Joseph C. Spero. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents

DATE	DOCKET NUMBER	PROCEEDINGS
		upon the opposing parties. For information, visit *E-Filing A New Civil Case* at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 2/28/2019. (as, COURT STAFF) (Filed on 2/14/2019) (Entered: 02/14/2019)
		* * * * *
2/14/19	4	ADMINISTRATIVE MOTION for Leave to Proceed Pseudonymously filed by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center.

DATE	DOCKET NUMBER	PROCEEDINGS
		Responses due by 2/19/2019. (Attachments: # 1 Declaration, # 2 Proposed Order)(Newell, Jennifer) (Filed on 2/14/2019) (Entered: 02/14/2019)
2/15/19	5	Declaration of John Doe; Gregory Doe; Bianca Doe; Dennis Doe; Alex Doe; Christopher Doe; Evan Doe; Frank Doe; Kevin Doe; Howard Doe; Ian Doe in Support of 4 ADMINISTRATIVE MOTION for Leave to Proceed Pseudonymously filed by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center. (Attachments: # 1 Declaration of John Doe, # 2 Declaration of Gregory Doe, # 3 Declaration of Bianca Doe, # 4 Declaration of Dennis Doe, # 5 Declaration of Alex Doe, # 6 Declaration of Christopher Doe, # 7 Declaration of Evan Doe, # 8 Declaration of Frank Doe, # 9 Declaration of Kevin Doe, # 10 Declaration of Howard Doe, # 11 Declaration of

DATE	DOCKET NUMBER	PROCEEDINGS
		Ian Doe) (Related document(s) 4) (Newell, Jennifer) (Filed on 2/15/2019) (Entered: 02/15/2019)
		* * * * *
2/15/19	10	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center.. (Newell, Jennifer) (Filed on 2/15/2019) (Entered: 02/15/2019)
		* * * * *
2/15/19	12	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center.. (Newell, Jennifer) (Filed on 2/15/2019) (Entered: 02/15/2019)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
2/19/19	14	CLERK'S NOTICE of Impending Reassignment to U.S. District Judge (klhS, COURT STAFF) (Filed on 2/19/2019) (Entered: 02/19/2019)
		* * * * *
2/19/19	16	**ORDER, Case reassigned to Judge Richard Seeborg. Magistrate Judge Joseph C. Spero no longer assigned to the case. This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. See General Order 65 and http://cand.uscourts.gov/cameras. Signed by Executive Committee on 2/19/19. (Attachments: # 1 Notice of Eligibility for Video Recording) (haS, COURT STAFF) (Filed on 2/19/2019) (Entered: 02/19/2019)**
		* * * * *
2/20/19	19	CLERK'S NOTICE re Motion to Consider Whether Cases Should Be Related (Dkt. No. 110 in 3:18-cv-06810-JST East Bay Sanctuary Covenant et al v. Trump et al). The court has reviewed the motion and determined that no

DATE	DOCKET NUMBER	PROCEEDINGS
		cases are related and no reassignments shall occur. (wsn, COURT STAFF) (Filed on 2/20/2019) (Entered: 02/20/2019)
2/20/19	20	MOTION for Temporary Restraining Order filed by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center. (Attachments: # 1 Memorandum in Support of Temporary Restraining Order, # 2 Declaration of Taslim Tavarez, # 3 Declaration of Rubi Rodriguez, # 4 Declaration of Tahirih Justice Center, # 5 Declaration of Centro Legal de la Raza, # 6 Declaration of Innovation Law Lab, # 7 Declaration of Al Otro Lado, # 8 Declaration of CARECEN of Northern CA, # 9 Declaration of USF Law School Deportation Defense Clinic, # 10 Declaration of Adam Isacson, # 11 Declaration of Kathryn Shepherd, # 12 Declaration of Aaron Reichlin-

DATE	DOCKET NUMBER	PROCEEDINGS
		Melnick, # 13 Declaration of Daniella Burgi-Palomino, # 14 Declaration of Stephen W. Manning, # 15 Declaration of Steven H. Schulman, # 16 Declaration of Cecilia Menjivar, # 17 Declaration of Jeremy Slack, # 18 Proposed Order, # 19 Complaint) (Newell, Jennifer) (Filed on 2/20/2019) (Entered: 02/20/2019)
		* * * * *
2/25/19	35	Certificate of Interested Entities by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center (Newell, Jennifer) (Filed on 2/25/2019) (Entered: 02/25/2019)
		* * * * *
2/25/19	37	MOTION to Transfer Case *to the Southern District of California* filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration

DATE	DOCKET NUMBER	PROCEEDINGS
		Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement. Responses due by 3/11/2019. Replies due by 3/18/2019. (Attachments: # 1 Exhibit A—CDCal Transfer Order, # 2 Exhibit B—NDCAL MTI Order, # 3 Proposed Order Granting Transfer) (York, Thomas) (Filed on 2/25/2019) (Entered: 02/25/2019)
		* * * * *
3/1/19	42	OPPOSITION/RESPONSE (re 20 MOTION for Temporary Restraining Order) filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Attachments: # 1 Proposed Order) (Reuveni, Erez) (Filed on 3/1/2019) (Entered: 03/01/2019)

DATE	DOCKET NUMBER	PROCEEDINGS
3/1/19	43	NOTICE by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello (*filing of the administrative record) (Reuveni, Erez*) (Filed on 3/1/2019) (Additional attachment(s) added on 4/23/2019: **Administrative Record** # 1 Part 1, # 2 Part 2, # 3 Part 3, # 4 Part 4, # 5 Part 5, # 6 Part 6, # 7 Part 7, # 8 Part 8, # 9 Part 9, # 10 Part 10 (1 of 2), # 11 Part 10 (2 of 2)) (gbaS, COURT STAFF). (Entered: 03/01/2019)
3/1/19	44	Administrative Motion to File Under Seal filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Attachments: # 1

DATE	DOCKET NUMBER	PROCEEDINGS
		Declaration of Archith Ramkumar, # 2 Proposed Order, # 3 Unredacted Version of Exhibit A) (Ramkumar, Archith) (Filed on 3/1/2019) (Entered: 03/01/2019)
3/1/19	45	MOTION to Strike 20 MOTION for Temporary Restraining Order filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. Responses due by 3/6/2019. Replies due by 3/8/2019. (Attachments: # 1 Proposed Order) (Ramkumar, Archith) (Filed on 3/1/2019) (Entered: 03/01/2019)
3/4/19	46	OPPOSITION/RESPONSE (re 37 MOTION to Transfer Case *to the Southern District of California*) filed by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law

DATE	DOCKET NUMBER	PROCEEDINGS
		Lab, Tahirih Justice Center. (Attachments: # 1 Declaration (Supplemental) of Laura Victoria Sanchez (CARECEN), # 2 Declaration (Supplemental) of Jacqueline Brown Scott (USF Clinic), # 3 Declaration (Supplemental) of Eleni Wolfe-Roubatis (Centro Legal), # 4 Declaration (Third) of Stephen W. Manning (Law Lab), # 5 Declaration (Supplemental) of Rena Cutlip-Mason (Tahirih), # 6 Declaration of Miguel Marquez (Santa Clara County), # 7 Declaration of Emilia Garcia and Exhibits) (Eiland, Katrina) (Filed on 3/4/2019) (Entered: 03/04/2019)
		* * * * *
3/6/19	49	Amicus Curiae Brief by Immigration Reform Law Institute. (gbaS, COURT STAFF) (Filed on 3/6/2019) (Entered: 03/06/2019)
3/6/19	50	OPPOSITION/RESPONSE (re 45 MOTION to Strike 20 MOTION for Temporary Restraining Order) filed by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration

DATE	DOCKET NUMBER	PROCEEDINGS
		and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center. (Attachments: # 1 Proposed Order for Briefing Schedule, # 2 Proposed Order for Consideration of Plaintiffs' Evidence) (Veroff, Julie) (Filed on 3/6/2019) (Entered: 03/06/2019)
3/6/19	51	MOTION Consideration of Plaintiffs' Evidence re 20 MOTION for Temporary Restraining Order filed by Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center. Responses due by 3/8/2019. (Attachments: # 1 Proposed Order for Briefing Schedule, # 2 Proposed Order for Consideration of Plaintiffs' Evidence) (Veroff, Julie) (Filed on 3/6/2019) (Entered: 03/06/2019)
3/7/19	52	REPLY (re 20 MOTION for Temporary Restraining Order) filed by Al Otro Lado, Central

DATE	DOCKET NUMBER	PROCEEDINGS
		American Resource Center of Northern California, Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Innovation Law Lab, Tahirih Justice Center. (Rabinovitz, Judy) (Filed on 3/7/2019) (Entered: 03/07/2019)
3/7/19	53	REPLY (re 37 MOTION to Transfer Case *to the Southern District of California*) filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (York, Thomas) (Filed on 3/7/2019) (Entered: 03/07/2019)
		* * * * *
3/8/19	55	REPLY (re 45 MOTION to Strike 20 MOTION for Temporary Restraining Order) filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen,

DATE	DOCKET NUMBER	PROCEEDINGS
		U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Ramkumar, Archith) (Filed on 3/8/2019) (Entered: 03/08/2019)
3/8/19	56	OPPOSITION/RESPONSE (re 51 MOTION Consideration of Plaintiffs' Evidence re 20 MOTION for Temporary Restraining Order) filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Ramkumar, Archith) (Filed on 3/8/2019) (Entered: 03/08/2019)
3/8/19	57	Statement *regarding scheduling motion practice on Plaintiffs yet-to-be-filed Motion to Set a Briefing Schedule for a Motion to Complete the Record"* by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen

DATE	DOCKET NUMBER	PROCEEDINGS
		Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Reuveni, Erez) (Filed on 3/8/2019) (Entered: 03/08/2019)
3/18/19	58	NOTICE by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security (York, Thomas) (Filed on 3/18/2019) (Entered: 03/18/2019)
		* * * * *
3/22/19	64	**Minute Entry for proceedings held before Judge Richard Seeborg: Motion for Preliminary Injunction Hearing held on 3/22/2019. Motion taken under submission; Court to issue an order. Total Time in Court: 2 hours 10 minutes. Court Reporter: Jo Ann Bryce.** **Plaintiff Attorney: Judy Rabinovitz, Katrina Eiland, Eunice**

DATE	DOCKET NUMBER	PROCEEDINGS
		Lee, Julie Veroff, Lee Gelernt, Melissa Crow, Blaine Bookey, Jennifer Chang Newell. Defendant Attorney: Scott Stewart, Erez Reuveni. ***(This is a text-only entry generated by the court. There is no document associated with this entry.)*** **(cl, COURT STAFF) (Date Filed: 3/22/2019) (Entered: 03/22/2019)**
		* * * * *
3/27/19	67	Transcript of Proceedings held on 3/22/19, before Judge Richard Seeborg. Court Reporter Jo Ann Bryce, telephone number 510-910-5888, joann_bryce@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction after 90 days. After that date, it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 65 Tran-

DATE	DOCKET NUMBER	PROCEEDINGS
		script Order,) Release of Transcript Restriction set for 6/25/2019. (Related documents(s) 65) (jabS, COURTSTAFF) (Filed on 3/27/2019) (Entered: 03/27/2019)
		* * * * *
4/2/19	69	NOTICE by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello (York, Thomas) (Filed on 4/2/2019) (Entered: 04/02/2019)
4/3/19	70	Supplemental Brief re 68 Order filed byLee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Related document(s) 68) (Reuveni, Erez) (Filed on 4/3/2019) (Entered:

DATE	DOCKET NUMBER	PROCEEDINGS
		04/03/2019)
4/3/19	71	Supplemental Brief re 68 Order filed by University of San Francisco School of Law Immigration and Deportation Defense Clinic, Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Innovation Law Lab, Tahirih Justice Center. (Related document(s) 68) (Rabinovitz, Judy) (Filed on 4/3/2019) (Entered: 04/03/2019)
		* * * * *
4/8/19	73	**ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION. Signed by Judge Richard Seeborg on 4/8/19. (cl, COURT STAFF) (Filed on 4/8/2019) (Entered: 04/08/2019)**
4/8/19	74	**ORDER Granting Motion to File Under Seal re 44 Administrative Motion to File Under Seal filed by Ronald D. Vitiello. Signed by Judge Richard Seeborg on 4/8/19. (cl, COURT STAFF) (Filed on 4/8/2019) (Entered: 04/08/2019)**
4/10/19	75	NOTICE OF APPEAL to the 9th

DATE	DOCKET NUMBER	PROCEEDINGS
		Circuit Court of Appeals filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. Appeal of Order, Terminate Motions 73 (Appeal fee FEE WAIVED.) (Reuveni, Erez) (Filed on 4/10/2019) (Entered: 04/10/2019)
		* * * * *
4/22/19	77	USCA Case Number **19-15716** for 75 Notice of Appeal, filed by Ronald D. Vitiello, U.S. Department of Homeland Security, U.S. Customs and Border Protection, John L. Lafferty, Todd C. Owen, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Kirstjen Nielsen, Kevin K. McAleenan, Lee Francis Cissna. (gbaS, COURT STAFF) (Filed on 4/22/2019) (Entered: 04/22/2019)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/16/19	83	OPINION of USCA as to 75 Notice of Appeal, filed by Ronald D. Vitiello, U.S. Department of Homeland Security, U.S. Customs and Border Protection, John L. Lafferty, Todd C. Owen, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Kirstjen Nielsen, Kevin K. McAleenan, Lee Francis Cissna. (Attachments: # 1 Concurrence, # 2 Dissent) (gbaS, COURT STAFF) (Filed on 5/16/2019) (Entered: 05/16/2019)
		* * * * *
5/20/19	87	MOTION to Stay filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. Responses due by 6/3/2019. Replies due by 6/10/2019. (Attachments: # 1 Proposed Order)

DATE	DOCKET NUMBER	PROCEEDINGS
		(Ramkumar, Archith) (Filed on 5/20/2019) (Entered: 05/20/2019)
		* * * * *
5/24/20	90	ORDER of USCA as to 75 Notice of Appeal, filed by Ronald D. Vitiello, U.S. Department of Homeland Security, U.S. Customs and Border Protection, John L. Lafferty, Todd C. Owen, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Kirstjen Nielsen, Kevin K. McAleenan, Lee Francis Cissna. **USCA No. 19-15716**. (wsnS, COURT STAFF) (Filed on 5/24/2019) (Entered: 05/24/2019)
		* * * * *
6/3/19	92	OPPOSITION/RESPONSE (re 87 MOTION to Stay) filed by University of San Francisco School of Law Immigration and Deportation Defense Clinic, Al Otro Lado, Central American Resource Center of Northern California, Centro Legal de la Raza, Immigration Reform Law Institute, Innovation Law Lab, Tahirih Justice Center. (Rabinovitz, Judy) (Filed

DATE	DOCKET NUMBER	PROCEEDINGS
		on 6/3/2019) (Entered: 06/03/2019)
6/10/19	93	REPLY (re 87 MOTION to Stay) filed by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Ramkumar, Archith) (Filed on 6/10/2019) (Entered: 06/10/2019)
7/15/19	94	**ORDER by Judge Richard Seeborg granting 87 Motion to Stay. (cl, COURT STAFF) (Filed on 7/15/2019) (Entered: 07/15/2019)**
		* * * * *
10/15/19	98	Statement *Jointly Filed Regarding Status of Appeal* by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforce-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment, Ronald D. Vitiello. (Ramkumar, Archith) (Filed on 10/15/2019) (Entered: 10/15/2019)
		* * * * *
1/10/20	104	JOINT Statement Regarding Status of Appeal by Lee Francis Cissna, John L. Lafferty, Kevin K. McAleenan, Kirstjen Nielsen, Todd C. Owen, U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Ronald D. Vitiello. (Ramkumar, Archith) (Filed on 1/10/2020) Modified on 1/12/2020 (gbaS, COURT STAFF). (Entered: 01/10/2020)
		* * * * *
2/28/20	106	ORDER of USCA as to 75 Notice of Appeal, filed by Ronald D. Vitiello, U.S. Department of Homeland Security, U.S. Customs and Border Protection, John L. Laf-

DATE	DOCKET NUMBER	PROCEEDINGS
		ferty, Todd C. Owen, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Kirstjen Nielsen, Kevin K. McAleenan, Lee Francis Cissna. (gbaS, COURT STAFF) (Filed on 2/28/2020) (Entered: 02/28/2020)
2/28/20	107	USCA Opinion as to 75 Notice of Appeal, filed by Ronald D. Vitiello, U.S. Department of Homeland Security, U.S. Customs and Border Protection, John L. Lafferty, Todd C. Owen, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, Kirstjen Nielsen, Kevin K. McAleenan, Lee Francis Cissna. (gbaS, COURT STAFF) (Filed on 2/28/2020) (Entered: 02/28/2020)
2/28/20	108	ORDER of USCA as to 75 Notice of Appeal **19-15716**. *The emergency request for an immediate stay of this court's February 28, 2020 decision pending disposition of a petition for certiorari is granted pending further order of this court.* (wsnS, COURT

DATE	DOCKET NUMBER	PROCEEDINGS
		STAFF) (Filed on 2/28/2020) (Entered: 03/02/2020)
3/4/20	109	ORDER of USCA as to 75 Notice of Appeal **19-15716**. (wsnS, COURT STAFF) (Filed on 3/4/2020) (Entered: 03/05/2020)
		* * * * *
3/18/20	111	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Rabinovitz, Judy) (Filed on 3/18/2020) (Entered: 03/18/2020)
3/18/20	112	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Reuveni, Erez) (Filed on 3/18/2020) (Entered: 03/18/2020)
		* * * * *
4/16/20	114	U.S. Supreme Court Notice that the petition for a writ of certiorari was filed on 4/10/2020 and placed on the docket 4/14/2020 as No. **19-1212**. (gbaS, COURT STAFF) (Filed on 4/16/2020) (Entered: 04/16/2020)
		* * * * *
10/19/20	118	U.S. Supreme Court Notice that the petition for a writ of certiorari is granted. (gbaS, COURT STAFF) (Filed on

DATE	DOCKET NUMBER	PROCEEDINGS	
		10/19/2020)	(Entered:
		10/20/2020)	

Policy Number:
11088.1

FEA Number:
306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

Feb. 12, 2019

MEMORANDUM FOR: Executive Associate Directors
Principal Legal Advisor

FROM: Ronald D. Vitiello
/s/ RONALD D. VITIELLO
Deputy Director and
Senior Official Performing
the Duties of the Director

SUBJECT: Implementation of the Migrant Protection Protocols

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols*, in which she provided guidance for the implementation of the Migrant Protection Protocols (MPP) announced on December 20, 2018, an arrangement between the United States and Mexico to address the migration crisis along our southern border. Pursuant to the Secretary's direction, this memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) about its role in the implementation of the MPP.

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) allows the Department of Homeland Security

(DHS), in its discretion, with regard to certain aliens who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, . . . [to] return the alien[s] to that territory pending a proceeding under [INA] section 240." Consistent with the MPP, third-country nationals (i.e., aliens who are not citizens or nationals of Mexico) who are arriving in the United States by land from Mexico may be returned to Mexico pursuant to INA section 235(b)(2)(C) for the duration of their INA section 240 removal proceedings. DHS will not use the INA section 235(b)(2)(C) process in the cases of unaccompanied alien children, aliens placed into the expedited removal (ER) process of INA section 235(b)(1), and other aliens determined, in the exercise of discretion, not to be appropriate for such processing (which may include certain aliens with criminal histories, individuals determined to be of interest to either Mexico or the United States, and lawful permanent residents of the United States).

The direct placement of an alien into INA section 240 removal proceedings (and, in DHS's discretion, returning the alien to Mexico pursuant to INA section 235(b)(2)(C) pending those proceedings) is a separate and distinct process from ER. Processing determinations, including whether to place an alien into ER or INA section 240 proceedings (and, as applicable, to return an alien placed into INA section 240 proceedings to Mexico under INA section 235(b)(2)(C) as part of MPP), or to apply another processing disposition, will be made by U.S. Customs and Border Protection (CBP), in CBP's enforcement discretion.

MPP implementation began at the San Ysidro port of entry on or about January 28, 2019, and it is intended that MPP implementation will expand eventually across the southern border. In support of MPP, ICE Enforcement and Removal Operations (ERO) will provide appropriate transportation when necessary, for aliens returned to Mexico under the MPP, from the designated port of entry to the court facility for the scheduled removal hearings before an immigration judge and back to the port of entry for return to Mexico by CBP after such hearings. ERO also will be responsible for effectuating removal orders entered against aliens previously processed under INA section 235(b)(2)(C), including post- removal order detention. ICE attorneys will represent DHS in the related removal proceedings pursuant to 6 U.S.C. § 252(c).

As instructed by the Secretary, in exercising prosecutorial discretion concerning the potential return of third-country nationals to Mexico under INA section 235(b)(2)(C), DHS officials should act consistently with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Specifically, a third-country national who affirmatively states a fear of return to Mexico (including while in the United States to attend a removal hearing) should not be involuntarily returned under INA section 235(b)(2)(C) if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless described in INA section 241(b)(3)(B) as having engaged in certain criminal, persecutory, or terrorist activity), or would more likely than not be tortured, if so

returned pending removal proceedings. *Non-refoulement* assessments will be made by U.S. Citizenship and Immigration Services (USCIS) asylum in accordance with guidance issued by the Director of USCIS.

Within ten (10) days after this memorandum, relevant ICE program offices are directed to issue further guidance to ensure that MPP is implemented in accordance with the Secretary's memorandum, this memorandum, and policy guidance and procedures, in accordance with applicable law.

This document provides internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of DHS.

Attachment:

DHS Secretary Memorandum, *Policy Guidance for Implementation of Migrant Protection Protocols*, dated January 25, 2019.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615-AC34

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

[EOIR Docket No. 18-0501; A.G. Order No. 4327-2018]

RIN 1125-AA89

Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Interim final rule; request for comment.

SUMMARY: The Department of Justice and the Department of Homeland Security ("DOJ," "DHS," or, collectively, "the Departments") are adopting an interim final rule governing asylum claims in the context of aliens who are subject to, but contravene, a suspension or limitation on entry into the United States through the southern border with Mexico that is imposed by a presidential proclamation or other presidential order ("a proclamation") under section 212(f) or 215(a)(1) of the Immigration and Nationality Act ("INA"). Pursuant to statutory authority, the Departments are amending their respective existing regulations to provide that aliens subject to such a proclamation concerning the

southern border, but who contravene such a proclamation by entering the United States after the effective date of such a proclamation, are ineligible for asylum. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where they would be processed in a controlled, orderly, and lawful manner. This rule would apply only prospectively to a proclamation issued after the effective date of this rule. It would not apply to a proclamation that specifically includes an exception for aliens applying for asylum , nor would it apply to aliens subject to a waiver or exception provided by the proclamation. DHS is amending its regulations to specify a screening process for aliens who are subject to this specific bar to asylum eligibility. DOJ is amending its regulations with respect to such aliens. The regulations would ensure that aliens in this category who establish a reasonable fear of persecution or torture could seek withholding of removal under the INA or protection from removal under regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

DATES:

Effective date: This rule is effective November 9, 2018.

Submission of public comments: Written or electronic comments must be submitted on or before January 8, 2019. Written comments postmarked on or before that date will be considered timely. The electronic

Federal Docket Management System will accept comments prior to midnight eastern standard time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 18-0501, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 18-0501 on your correspondence. This mailing address may be used for paper, disk, or CD-ROM submissions.

• *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, Contact Telephone Number (703) 305-0289 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT:

Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, Contact Telephone Number (703) 305-0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Departments also invite comments that relate to the economic or federalism effects that might result from this rule. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that supports the recommended change.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 18-0501. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person 's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONALLY IDENTIFIABLE INFORMATION" in the first paragraph of your comment and precisely and prominently identify the information of which you seek redaction.

If you want to submit confidential business information as part of your comment , but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first

paragraph of your comment and precisely and prominently identify the confidential business information of which you seek redaction. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.* Personally identifiable information and confidential business information provided as set forth above will be placed in the public docket file of DOJ's Executive Office of Immigration Review ("EOIR"), but not posted online. To inspect the public docket file in person, you must make an appointment with EOIR. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for the contact information specific to this rule.

II. Purpose of This Interim Final Rule

This interim final rule ("interim rule" or "rule") governs eligibility for asylum and screening procedures for aliens subject to a presidential proclamation or order restricting entry issued pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), or section 215(a)(1) of the INA, 8 U.S.C. 1185(a)(1), that concerns entry to the United States along the southern border with Mexico and is issued on or after the effective date of this rule. Pursuant to statutory authority, the interim rule renders such aliens ineligible for asylum if they enter the United States after the effective date of such a proclamation, become subject to the proclamation, and enter the United States in violation of the suspension or limitation of entry established by the proclamation. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby chan-

nel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner. Aliens who enter prior to the effective date of an applicable proclamation will not be subject to this asylum eligibility bar unless they depart and reenter while the proclamation remains in effect. Aliens also will not be subject to this eligibility bar if they fall within an exception or waiver within the proclamation that makes the suspension or limitation of entry in the proclamation inapplicable to them, or if the proclamation provides that it does not affect eligibility for asylum.

As discussed further below, asylum is a discretionary immigration benefit. In general, aliens may apply for asylum if they are physically present or arrive in the United States, irrespective of their status and irrespective of whether or not they arrive at a port of entry, as provided in section 208(a) of the INA, 8 U.S.C. 1158(a). Congress, however, provided that certain categories of aliens could not receive asylum and further delegated to the Attorney General and the Secretary of Homeland Security ("Secretary") the authority to promulgate regulations establishing additional bars on eligibility that are consistent with the asylum statute and "any other conditions or limitations on the consideration of an application for asylum" that are consistent with the INA. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

In the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Public Law 104-208, Congress, concerned with rampant delays in proceedings to remove illegal aliens, created expedited pro-

cedures for removing inadmissible aliens, and authorized the extension of such procedures to aliens who entered illegally and were apprehended within two years of their entry. *See generally* INA 235(b), 8 U.S.C. 1225(b). Those procedures were aimed at facilitating the swift removal of inadmissible aliens, including those who had entered illegally, while also expeditiously resolving any asylum claims. For instance, Congress provided that any alien who asserted a fear of persecution would appear before an asylum officer, and that any alien who is determined to have established a "credible fear"—meaning a "significant possibility . . . that the alien could establish eligibility for asylum" under the asylum statute—would be detained for further consideration of an asylum claim. *See* INA 23S(b)(1), (b)(1)(B)(v), 8 U.S.C. 1225(b)(1), (b)(1)(B)(v).

When the expedited procedures were first implemented approximately two decades ago, relatively few aliens within those proceedings asserted an intent to apply for asylum or a fear of persecution. Rather, most aliens found inadmissible at the southern border were single adults who were immediately repatriated to Mexico. Thus, while the overall number of illegal aliens apprehended was far higher than it is today (around 1.6 million in 2000), aliens could be processed and removed more quickly, without requiring detention or lengthy court proceedings.

In recent years, the United States has seen a large increase in the number and proportion of inadmissible aliens subject to expedited removal who assert an intent to apply for asylum or a fear of persecution during that process and are subsequently placed into removal proceedings in immigration court. Most of those aliens

unlawfully enter the country between ports of entry along the southern border. Over the past decade, the overall percentage of aliens subject to expedited removal and referred, as part of the initial screening process, for a credible-fear interview jumped from approximately 5% to above 40%, and the total number of credible-fear referrals for interviews increased from about 5,000 a year in Fiscal Year ("FY") 2008 to about 97,000 in FY 2018. Furthermore, the percentage of cases in which asylum officers found that the alien had established a credible fear—leading to the alien's placement in full immigration proceedings under section 240 of the INA, 8 U.S.C. 1229a—has also increased in recent years. In FY 2008, when asylum officers resolved a referred case with a credible-fear determination, they made a positive finding about 77% of the time. That percentage rose to 80% by FY 2014. In FY 2018, that percentage of positive credible-fear determinations has climbed to about 89% of all cases. After this initial screening process, however, significant proportions of aliens who receive a positive credible-fear determination never file an application for asylum or are ordered removed in absentia. In FY 2018 , a total of about 6,000 aliens who passed through credible-fear screening (17% of all completed cases, 27% of all completed cases in which an asylum application was filed, and about 36% of cases where the asylum claim was adjudicated on the merits) established that they should be granted asylum.

Apprehending and processing this growing number of aliens who cross illegally into the United States and invoke asylum procedures thus consumes an ever increasing amount of resources of DHS, which must surveil, apprehend, and process the aliens who enter the country. Congress has also required DHS to detain all

aliens during the pendency of their credible-fear proceedings, which can take days or weeks. And DOJ must also dedicate substantial resources: Its immigration judges adjudicate aliens' claims, and its officials are responsible for prosecuting and maintaining custody over those who violate the criminal law. The strains on the Departments are particularly acute with respect to the rising numbers of family units, who generally cannot be detained if they are found to have a credible fear, due to a combination of resource constraints and the manner in which the terms of the Settlement Agreement in *Flores* v. *Reno* have been interpreted by courts. *See* Stipulated Settlement Agreement, *Flores* v. *Reno,* No. 85-cv-4544 (N.D. Cal. Jan. 17, 1997).

In recent weeks, United States officials have each day encountered an average of approximately 2,000 inadmissible aliens at the southern border. At the same time, large caravans of thousands of aliens, primarily from Central America, are attempting to make their way to the United States, with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation. Central American nationals represent a majority of aliens who enter the United States unlawfully, and are also disproportionately likely to choose to enter illegally between ports of entry rather than presenting themselves at a port of entry. As discussed below, aliens who enter unlawfully between ports of entry along the southern border, as opposed to at a port of entry, pose a greater strain on DHS's already stretched detention and processing resources and also engage in conduct that seriously endangers themselves, any children traveling with them, and the U.S. Customs and Border Protection ("CBP") agents who seek to apprehend them.

The United States has been engaged in sustained diplomatic negotiations with Mexico and the Northern Triangle countries (Honduras, El Salvador, and Guatemala) regarding the situation on the southern border, but those negotiations have, to date, proved unable to meaningfully improve the situation.

The purpose of this rule is to limit aliens' eligibility for asylum if they enter in contravention of a proclamation suspending or restricting their entry along the southern border. Such aliens would contravene a measure that the President has determined to be in the national interest. For instance, a proclamation restricting the entry of inadmissible aliens who enter unlawfully between ports of entry would reflect a determination that this particular category of aliens necessitates a response that would supplement existing prohibitions on entry for all inadmissible aliens. Such a proclamation would encourage such aliens to seek admission and indicate an intention to apply for asylum at ports of entry. Aliens who enter in violation of that proclamation would not be eligible for asylum. They would, however, remain eligible for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for protections under the regulations issued under the authority of the implementing legislation regarding Article 3 of the CAT.

The Departments anticipate that a large number of aliens who would be subject to a proclamation-based ineligibility bar would be subject to expedited-removal proceedings. Accordingly, this rule ensures that asylum officers and immigration judges account for such aliens' ineligibility for asylum within the expedited-removal process, so that aliens subject to such a bar will

be processed swiftly. Furthermore, the rule continues to afford protection from removal for individuals who establish that they are more likely than not to be persecuted or tortured in the country of removal. Aliens rendered ineligible for asylum by this interim rule and who are referred for an interview in the expedited-removal process are still eligible to seek withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or protections under the regulations issued under the authority of the implementing legislation regarding Article 3 of the CAT. Such aliens could pursue such claims in proceedings before an immigration judge under section 240 of the INA, 8 U.S.C. 1229a, if they establish a reasonable fear of persecution or torture.

III. Background

A. Joint Interim Rule

The Attorney General and the Secretary of Homeland Security publish this joint interim rule pursuant to their respective authorities concerning asylum determinations.

The Homeland Security Act of 2002, Public Law 107-296, as amended, transferred many functions related to the execution of federal immigration law to the newly created Department of Homeland Security. The Homeland Security Act of 2002 charges the Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. 1103(a)(1), and grants the Secretary the power to take all actions "necessary for carrying out" the provisions of the INA, *id.* 1103(a)(3). The Homeland Security Act of 2002 also transferred to

DHS some responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). Those authorities have been delegated to U.S. Citizenship and Immigration Services ("USCIS"). USCIS asylum officers determine in the first instance whether an alien's affirmative asylum application should be granted. *See* 8 CFR 208.9.

But the Homeland Security Act of 2002 retained authority over certain individual immigration adjudications (including those related to defensive asylum applications) in DOJ, under the Executive Office for Immigration Review ("EOIR") and subject to the direction and regulation of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g). Thus, immigration judges within DOJ continue to adjudicate all asylum applications made by aliens during the removal process (defensive asylum applications), and they also review affirmative asylum applications referred by USCIS to the immigration court. *See* INA 101(b)(4), 8 U.S.C. 1101(b)(4); 8 CFR 1208.2; *Dhakal* v. *Sessions,* 895 F.3d 532, 536-37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals ("BIA" or "Board"), also within DOJ, in turn hears appeals from immigration judges' decisions. 8 CFR 1003.1. In addition, the INA provides "[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling." INA 103(a)(1), 8 U.S.C. 1103(a)(1). This broad division of functions and authorities informs the background of this interim rule.

B. Legal Framework for Asylum

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that precludes an alien from being subject to removal, creates a path to lawful permanent resident status and citizenship, and affords a variety of other benefits, such as allowing certain alien family members to obtain lawful immigration status derivatively. *See R-S-C* v. *Sessions,* 869 F.3d 1176, 1180 (10th Cir. 2017); *see also, e.g.,* INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed and can travel abroad with prior consent); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for asylee's spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b) (allowing the Attorney General or Secretary to adjust the status of an asylee to that of a lawful permanent resident); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for naturalization of lawful permanent residents). Aliens who are granted asylum are authorized to work in the United States and may receive certain financial assistance from the federal government. *See* INA 208(c)(1)(B), (d)(2), 8 U.S.C. 1158(c)(1)(B), (d)(2); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A); 8 U.S.C. 1613(b)(1); 8 CFR 274a.12(a)(5); *see also* 8 CFR 274a.12(c)(8) (providing that asylum applicants may seek employment authorization 150 days after filing a complete application for asylum).

Aliens applying for asylum must establish that they meet the definition of a "refugee," that they are not subject to a bar to the granting of asylum, and that they merit a favorable exercise of discretion. INA 208(b)(1), 240(c)(4)(A), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A); *see Moncrieffe* v. *Holder,* 569 U.S. 184, 187 (2013) (describ-

ing asylum as a form of "discretionary relief from removal"); *Delgado* v. *Mukasey,* 508 F.3d 702, 705 (2d Cir. 2007) ("Asylum is a discretionary form of relief. . . . Once an applicant has established eligibility . . . it remains within the Attorney General's discretion to deny asylum."). Because asylum is a discretionary form of relief from removal, the alien bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise discretion to grant relief. *See* INA 208(b)(1), 240(c)(4)(A), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A); *Romilus* v. *Ashcroft,* 385 F.3d 1, 8 (1st Cir. 2004).

Section 208 of the INA provides that, in order to apply for asylum, an applicant must be "physically present" or "arriv[e]" in the United States, "whether or not at a designated port of arrival" and "irrespective of such alien's status"—but the applicant must also "apply for asylum in accordance with" the rest of section 208 or with the expedited-removal process in section 235 of the INA. INA 208(a)(1), 8 U.S.C. 1158(a)(1). Furthermore, to be granted asylum, the alien must demonstrate that he or she meets the statutory definition of a "refugee," INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), and is not subject to an exception or bar, INA 208(b)(2), 8 U.S.C. 1158(b)(2). The alien bears the burden of proof to establish that he or she meets these criteria. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i); 8 CFR 1240.8(d).

For an alien to establish that he or she is a "refugee," the alien generally must be someone who is outside of his or her country of nationality and "is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account

of race, religion, nationality, membership in a particular social group, or political opinion." INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A).

In addition, if evidence indicates that one or more of the grounds for mandatory denial may apply, an alien must show that he or she does not fit within one of the statutory bars to granting asylum and is not subject to any "additional limitations and conditions . . . under which an alien shall be ineligible for asylum" established by a regulation that is "consistent with" section 208 of the INA. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see* 8 CFR 1240.8(d). The INA currently bars a grant of asylum to any alien: (1) Who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" a protected ground; (2) who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"; (3) for whom there are serious reasons to believe the alien "has committed a serious nonpolitical crime outside the United States" prior to arrival in the United States; (4) for whom "there are reasonable grounds for regarding the alien as a danger to the security of the United States"; (5) who is described in the terrorism-related inadmissibility grounds, with limited exceptions; or (6) who "was firmly resettled in another country prior to arriving in the United States." INA 208(b)(2)(A)(i)-(vi), 8 U.S.C. 1158(b)(2)(A)(i)-(vi).

An alien who falls within any of those bars is subject to mandatory denial of asylum. Where there is evidence that "one or more of the grounds for mandatory denial of the application for relief may apply," the applicant in immigration court proceedings bears the burden of establishing that the bar at issue does not apply.

8 CFR 1240.8(d); *see also, e.g., Rendon* v. *Mukasey,* 520 F.3d 967, 973 (9th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the aggravated felony bar to asylum); *Gao* v. *U.S. Att'y Gen.,* 500 F.3d 93, 98 (2d Cir. 2007) (applying 8 CFR 1240.8(d) in the context of the persecutor bar); *Chen* v. *U.S. Att'y Gen.,* 513 F.3d 1255, 1257 (11th Cir. 2008) (same).

Because asylum is a discretionary benefit, aliens who are eligible for asylum are not automatically entitled to it. After demonstrating eligibility, aliens must further meet their burden of showing that the Attorney General or Secretary should exercise his or her discretion to grant asylum. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (the "Secretary of Homeland Security or the Attorney General may grant asylum to an alien" who applies in accordance with the required procedures and meets the definition of a "refugee"). The asylum statute's grant of discretion "is a broad delegation of power, which restricts the Attorney General's discretion to grant asylum only by requiring the Attorney General to first determine that the asylum applicant is a 'refugee.'" *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994), *overruled on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam). Immigration judges and asylum officers exercise that delegated discretion on a case-by-case basis. Under the Board's decision in *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987), and its progeny, "an alien's manner of entry or attempted entry is a proper and relevant discretionary factor" and "circumvention of orderly refugee procedures" can be a "serious adverse factor" against exercising discretion to grant asylum, *id.* at 473, but "[t]he dan-

ger of persecution will outweigh all but the most egregious adverse factors," *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

C. Establishing Bars to Asylum

The availability of asylum has long been qualified both by statutory bars and by administrative discretion to create additional bars. Those bars have developed over time in a back-and-forth process between Congress and the Attorney General. The original asylum provisions, as set out in the Refugee Act of 1980, Public Law 96-212, simply directed the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee" within the meaning of the title. *See* 8 U.S.C. 1158(a) (1982); *see also INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-29 (1987) (describing the 1980 provisions).

In the 1980 implementing regulations, the Attorney General, in his discretion, established several mandatory bars to granting asylum that were modeled on the mandatory bars to eligibility for withholding of deportation under the existing section 243(h) of the INA. *See* Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980) ("The application will be denied if the alien does not come within the definition of refugee under the Act, is firmly resettled in a third country, or is within one of the undesirable groups described in section 243(h) of the Act, *e.g.*, having been convicted of a serious crime, constitutes a danger to the United States.").

Those regulations required denial of an asylum application if it was determined that (1) the alien was "not a refugee within the meaning of section 101(a)(42)" of the INA, 8 U.S.C. 1101(a)(42); (2) the alien had been "firmly resettled in a foreign country" before arriving in the United States; (3) the alien "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion"; (4) the alien had "been convicted by a final judgment of a particularly serious crime" and therefore constituted "a danger to the community of the United States"; (5) there were "serious reasons for considering that the alien ha[d] committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States"; or (6) there were "reasonable grounds for regarding the alien as a danger to the security of the United States." *See id.* at 37394-95.

In 1990, the Attorney General substantially amended the asylum regulations while retaining the mandatory bars for aliens who persecuted others on account of a protected ground, were convicted of a particularly serious crime in the United States, firmly resettled in another country, or presented reasonable grounds to be regarded as a danger to the security of the United States. *See* Asylum and Withholding of Deportation Procedures, 55 FR 30674, 30683 (July 27, 1990); *see also Yang* v. *INS,* 79 F.3d 932, 936-39 (9th Cir. 1996) (upholding firm-resettlement bar); *Komarenko,* 35 F.3d at 436 (upholding particularly-serious-crime bar). In the Immigration Act of 1990, Public Law 101-649, Congress added an additional mandatory bar to applying for or being granted asylum for "[a]n[y] alien who has been

convicted of an aggravated felony." Public Law 101-649, sec. 515.

In IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, Congress amended the asylum provisions in section 208 of the INA, 8 U.S.C. 1158. Among other amendments, Congress created three exceptions to section 208(a)(1)'s provision that an alien may apply for asylum, for (1) aliens who can be removed to a safe third country pursuant to bilateral or multilateral agreement; (2) aliens who failed to apply for asylum within one year of arriving in the United States; and (3) aliens who have previously applied for asylum and had the application denied. Public Law 104-208, div. C, sec. 604(a); *see* INA 208(a)(2)(A)-(C), 8 U.S.C. 1158(a)(2)(A)-(C).

Congress also adopted six mandatory exceptions to the authority of the Attorney General or Secretary to grant asylum that largely reflect pre-existing bars set forth in the Attorney General's asylum regulations. These exceptions cover (1) aliens who "ordered, incited, or otherwise participated" in the persecution of others on account of a protected ground; (2) aliens convicted of a "particularly serious crime"; (3) aliens who committed a "serious nonpolitical crime outside the United States" before arriving in the United States; (4) aliens who are a "danger to the security of the United States"; (5) aliens who are inadmissible or removable under a set of specified grounds relating to terrorist activity; and (6) aliens who have "firmly resettled in another country prior to arriving in the United States." Public Law 104-208, div. C, sec. 604(a); *see* INA 208(b)(2)(A)(i)-(vi), 8 U.S.C. 1158(b)(2)(A)(i)-(vi). Congress further added that aggravated felonies, defined in 8 U.S.C. 1101(a)(43), would

be considered "particularly serious crime[s]." Public Law 104-208, div. C, sec. 604(a); *see* INA 201(a)(43), 8 U.S.C. 1101(a)(43).

Although Congress enacted specific exceptions, that statutory list is not exhaustive. Congress, in IIRIRA, expressly authorized the Attorney General to expand upon two of those exceptions-the bars for "particularly serious crimes" and "serious nonpolitical offenses." While Congress prescribed that all aggravated felonies constitute particularly serious crimes, Congress further provided that the Attorney General may "designate by regulation offenses that will be considered" a "particularly serious crime" that "constitutes a danger to the community of the United States." INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii). Courts and the Board have long held that this grant of authority also authorizes the Board to identify additional particularly serious crimes (beyond aggravated felonies) through case-by-case adjudication. *See, e.g., Ali* v. *Achim*, 468 F.3d 462, 468-69 (7th Cir. 2006); *Delgado* v. *Holder*, 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc). Congress likewise authorized the Attorney General to designate by regulation offenses that constitute "a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." INA 208(b)(2)(A)(iii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(iii), (B)(ii). Although these provisions continue to refer only to the Attorney General, the Departments interpret these provisions to also apply to the Secretary of Homeland Security by operation of the Homeland Security Act of 2002. *See* 6 U.S.C. 552; 8 U.S.C. 1103(a)(1).

Congress further provided the Attorney General with the authority, by regulation, to "establish additional limitations and conditions, consistent with [section 208 of the INA], under which an alien shall be ineligible for asylum under paragraph (1)." INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). As the Tenth Circuit has recognized, "the statute clearly empowers" the Attorney General to "adopt[] further limitations" on asylum eligibility. *R-S-C,* 869 F.3d at 1187 & n.9. By allowing the imposition by regulation of "additional limitations and conditions," the statute gives the Attorney General and the Secretary broad authority in determining what the "limitations and conditions" should be. The additional limitations on eligibility must be established "by regulation," and must be "consistent with" the rest of section 208 of the INA. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

Thus, the Attorney General in the past has invoked section 208(b)(2)(C) of the INA to limit eligibility for asylum based on a "fundamental change in circumstances" and on the ability of an applicant to safely relocate internally within the alien's country of nationality or of last habitual residence. *See* Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000). The courts have also viewed section 208(b)(2)(C) as conferring broad discretion, including to render aliens ineligible for asylum based on fraud. *See R-S-C,* 869 F.3d at 1187; *Nijjar* v. *Holder,* 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud can be "one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation").

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), also establishes certain procedures for consideration of asylum applications. But Congress specified that the Attorney General "may provide by regulation for any other conditions or limitations on the consideration of an application for asylum," so long as those limitations are "not inconsistent with this chapter." INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B).

In sum, the current statutory framework leaves the Attorney General (and, after the Homeland Security Act, the Secretary) significant discretion to adopt additional bars to asylum eligibility. Beyond providing discretion to further define particularly serious crimes and serious nonpolitical offenses, Congress has provided the Attorney General and Secretary with discretion to establish by regulation any additional limitations or conditions on eligibility for asylum or on the consideration of applications for asylum, so long as these limitations are consistent with the asylum statute.

D. Other Forms of Protection

Aliens who are not eligible to apply for or be granted asylum, or who are denied asylum on the basis of the Attorney General's or the Secretary's discretion, may nonetheless qualify for protection from removal under other provisions of the immigration laws. A defensive application for asylum that is submitted by an alien in removal proceedings is also deemed an application for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* 8 CFR 208.30(e)(2)-(4), 1208.3(b), 1208.16(a). An immigration judge may also consider an alien's eligibility for withholding and deferral of removal under regulations is-

sued pursuant to the authority of the implementing legislation regarding Article 3 of the CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277, div. G, sec. 2242(b); 8 CFR 1208.3(b); *see also* 8 CFR 1208.16-1208.17.

These forms of protection bar an alien's removal to any country where the alien would "more likely than not" face persecution or torture, meaning that the alien would face a clear probability that his or her life or freedom would be threatened on account of a protected ground or a clear probability of torture. 8 CFR 1208.16(b)(2), (c)(2); *see Kouljinski* v. *Keisler,* 505 F.3d 534, 544-45 (6th Cir. 2007); *Sulaiman* v. *Gonzales,* 429 F.3d 347, 351 (1st Cir. 2005). Thus, if an alien proves that it is more likely than not that the alien's life or freedom would be threatened on account of a protected ground, but is denied asylum for some other reason—for instance, because of a statutory exception, an eligibility bar adopted by regulation, or a discretionary denial of asylum—the alien may be entitled to statutory withholding of removal if not otherwise barred for that form of protection. INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 1208.16; *see also Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) ("[W]ithholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood."). Likewise, an alien who establishes that he or she will more likely than not face torture in the country of removal will qualify for CAT protection. *See* 8 CFR 208.16(c), 1208.16(c). But, unlike asylum, statutory withholding and CAT protection do not: (1) Prohibit the Government from removing the alien to a third country where the alien would not face the requisite probability of persecution

or torture; (2) create a path to lawful permanent resident status and citizenship; or (3) afford the same ancillary benefits (such as protection for derivative family members). *See R-S-C,* 869 F.3d at 1180.

E. Implementation of Treaty Obligations

The framework described above is consistent with certain U.S. obligations under the 1967 Protocol Relating to the Status of Refugees ("Refugee Protocol"), which incorporates Articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention"), as well as U.S. obligations under Article 3 of the CAT. Neither the Refugee Protocol nor the CAT is self-executing in the United States. *See Khan* v. *Holder,* 584 F.3d 773, 783 (9th Cir. 2009) ('[T]he [Refugee] Protocol is not self-executing."); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (the CAT "was not self-executing"). These treaties are not directly enforceable in U.S. law, but some of the obligations they contain have been implemented through domestic implementing legislation. For example, the United States has implemented the non-refoulement provisions of these treaties —i.e., provisions prohibiting the return of an individual to a country where he or she would face persecution or torture—through the withholding of removal provisions at section 241(b)(3) of the INA and the CAT regulations, not through the asylum provisions at section 208 of the INA. *See Cardoza-Fonseca,* 480 U.S. at 440-41; Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277, div. G, sec. 2242(b); 8 CFR 208.16(c), 208.17-208.18; 1208.16(c), 1208.17-1208.18.

Limitations on the availability of asylum that do not affect the statutory withholding of removal or protection under the CAT regulations are consistent with these

provisions. *See RS-C,* 869 F.3d at 1188 & n.11; *Cazun* v. *Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016).

Limitations on eligibility for asylum are also consistent with Article 34 of the Refugee Convention, concerning assimilation of refugees, as implemented by section 208 of the INA, 8 U.S.C. 1158. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See Cardoza-Fonseca,* 480 U.S. at 441; *Garcia,* 856 F.3d at 42; *Cazun,* 856 F.3d at 257 & n. 16; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *R-S-C,* 869 F.3d at 1188; *Ramirez-Mejia,* 813 F.3d at 241. As noted above, Congress has long recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. Courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited "penalty" under Article 31(1) of the Refugee Convention. *Cazun,* 856 F.3d at 257 & n.16; *Mejia,* 866 F.3d at 588. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing the issuance of international travel documents for refugees "lawfully staying" in a country's territory, mandates that every person who might qualify for statutory withholding must also be

granted asylum. *Garcia*, 856 F.3d at 42; *R-S-C*, 869 F.3d at 1188.

IV. Regulatory Changes

A. Limitation on Eligibility for Asylum for Aliens Who Contravene a Presidential Proclamation Under Section 212(f) or 215(a)(1) of the INA Concerning the Southern Border

Pursuant to section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), the Departments are revising 8 CFR 208.13(c) and 8 CFR 1208.13(c) to add a new mandatory bar on eligibility for asylum for certain aliens who are subject to a presidential proclamation suspending or imposing limitations on their entry into the United States pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), or section 215(a)(1) of the INA, 8 U.S.C. 1185(a)(1), and who enter the United States in contravention of such a proclamation after the effective date of this rule. The bar would be subject to several further limitations: (1) The bar would apply only prospectively, to aliens who enter the United States after the effective date of such a proclamation; (2) the proclamation must concern entry at the southern border; and (3) the bar on asylum eligibility would not apply if the proclamation expressly disclaims affecting asylum eligibility for aliens within its scope, or expressly provides for a waiver or exception that entitles the alien to relief from the limitation on entry imposed by the proclamation.

The President has both statutory and inherent constitutional authority to suspend the entry of aliens into the United States when it is in the national interest. *See United States ex rel. Knauff* v. *Shaughnessy*, 338

U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty" that derives from "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation."); *see also Proposed Interdiction of Haitian Flag Vessels,* 5 Op. O.L.C. 242, 244-45 (1981) ("[T]he sovereignty of the Nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the government," and even without congressional action, the President may "act[] to protect the United States from massive illegal immigration.").

Congress, in the INA, has expressly vested the President with broad authority to restrict the ability of aliens to enter the United States. Section 212(f) states: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. 1182(f). "By its plain language, [8 U.S.C.] § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States," including the authority "to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA." *Trump* v. *Hawaii,* 138 S. Ct. 2392, 2408-12 (2018). For instance, the Supreme Court considered it "perfectly clear that 8 U.S.C. 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian immigrants the ability to disembark on our shores," thereby preventing them from entering the United

States and applying for asylum. *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993).

The President's broad authority under section 212(f) is buttressed by section 215(a)(1), which states it shall be unlawful "for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. 1185(a)(1). The presidential orders that the Supreme Court upheld in *Sale* were promulgated pursuant to both sections 212(f) and 215(a)(1)—*see* 509 U.S. at 172 & n.27; *see also* Exec. Order 12807 (May 24, 1992) ("Interdiction of Illegal Aliens"); Exec. Order 12324 (Sept. 29, 1981) ("Interdiction of Illegal Aliens") (revoked and replaced by Exec. Order 12807)—as was the proclamation upheld in *Trump* v. *Hawaii*, *see* 138 S. Ct. at 2405. Other presidential orders have solely cited section 215(a)(1) as authority. *See, e.g.*, Exec. Order 12172 (Nov. 26, 1979) ("Delegation of Authority With Respect to Entry of Certain Aliens Into the United States") (invoking section 215(a)(1) with respect to certain Iranian visa holders).

An alien whose entry is suspended or limited by a proclamation is one whom the President has determined should not enter the United States, or only should do so under certain conditions. Such an order authorizes measures designed to prevent such aliens from arriving in the United States as a result of the President's determination that it would be against the national interest for them to do so. For example, the proclamation and order that the Supreme Court upheld in *Sale*, Proc. 4865 (Sept. 29, 1981) ("High Seas Interdiction of Illegal Aliens"); Exec. Order 12324, directed the Coast Guard to

interdict the boats of tens of thousands of migrants fleeing Haiti to prevent them from reaching U.S. shores, where they could make claims for asylum. The order further authorized the Coast Guard to intercept any vessel believed to be transporting undocumented aliens to the United States, "[t]o make inquiries of those on board, examine documents, and take such actions as are necessary to carry out this order," and "[t]o return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws." Exec. Order 12807, sec. 2(c).

An alien whose entry is suspended or restricted under such a proclamation, but who nonetheless reaches U.S. soil contrary to the President's determination that the alien should not be in the United States, would remain subject to various procedures under immigration laws. For instance, an alien subject to a proclamation who nevertheless entered the country in contravention of its terms generally would be placed in expedited-removal proceedings under section 235 of the INA, 8 U.S.C. 1225, and those proceedings would allow the alien to raise any claims for protection before being removed from the United States, if appropriate. Furthermore, the asylum statute provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival)," and "irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C.] 1225(b)." INA 208(a)(1), 8 U.S.C. 1158(a)(1). Some past proclamations have accordingly made clear that aliens subject to an entry bar

may still apply for asylum if they have nonetheless entered the United States. *See, e.g.,* Proc. 9645, sec. 6(e) (Sept. 24, 2017) ("Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats") ("Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.").

As noted above, however, the asylum statute also authorizes the Attorney General and Secretary "by regulation" to "establish additional limitations and conditions, consistent with [section 208 of the INA], under which an alien shall be ineligible for asylum," INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), and to set conditions or limitations on the consideration of an application for asylum, INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). The Attorney General and the Secretary have determined that this authority should be exercised to render ineligible for a grant of asylum any alien who is subject to a proclamation suspending or restricting entry along the southern border with Mexico, but who nonetheless enters the United States after such a proclamation goes into effect. Such an alien would have engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest: That the alien should not enter the United States.

The basis for ineligibility in these circumstances would be the Departments' conclusion that aliens who contravene such proclamations should not be eligible for asylum. Such proclamations generally reflect sensitive

determinations regarding foreign relations and national security that Congress recognized should be entrusted to the President. *See Trump* v. *Hawaii,* 138 S. Ct. at 2411. Aliens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States. For instance, previous proclamations were directed solely at Haitian migrants, nearly all of whom were already inadmissible by virtue of other provisions of the INA, but the proclamation suspended entry and authorized further measures to ensure that such migrants did not enter the United States contrary to the President's determination. *See, e.g.,* Proc. 4865; Exec. Order 12807.

In the case of the southern border, a proclamation that suspended the entry of aliens who crossed between the ports of entry would address a pressing national problem concerning the immigration system and our foreign relations with neighboring countries. Even if most of those aliens would already be inadmissible under our laws, the proclamation would impose limitations on entry for the period of the suspension against a particular class of aliens defined by the President. That judgment would reflect a determination that certain illegal entrants—namely, those crossing between the ports of entry on the southern border during the duration of the proclamation—were a source of particular concern to the national interest. Furthermore, such a proclamation could authorize additional measures to prevent the entry of such inadmissible aliens, again reflecting the national concern with this subset of inadmis-

sible aliens. The interim final rule reflects the Departments' judgment that, under the extraordinary circumstances presented here, aliens crossing the southern border in contravention of such a proclamation should not be eligible for a grant of asylum during the period of suspension or limitation on entry. The result would be to channel to ports of entry aliens who seek to enter the United States and assert an intention to apply for asylum or a fear of persecution, and to provide for consideration of those statements there.

Significantly, this bar to eligibility for a grant of asylum would be limited in scope. This bar would apply only prospectively. This bar would further apply only to a proclamation concerning entry along the southern border, because this interim rule reflects the need to facilitate urgent action to address current conditions at that border. This bar would not apply to any proclamation that expressly disclaimed an effect on eligibility for asylum. And this bar would not affect an applicant who is granted a waiver or is excepted from the suspension under the relevant proclamation, or an alien who did not at any time enter the United States after the effective date of such proclamation.

Aliens who enter in contravention of a proclamation will not, however, overcome the eligibility bar merely because a proclamation has subsequently ceased to have effect. The alien still would have entered notwithstanding a proclamation at the time the alien entered the United States, which would result in ineligibility for asylum (but not for statutory withholding or for CAT protection). Retaining eligibility for asylum for aliens who entered the United States in contravention of the proclamation, but evaded detection until it had ceased, could

encourage aliens to take riskier measures to evade detection between ports of entry, and would continue to stretch government resources dedicated to apprehension efforts.

This restriction on eligibility to asylum is consistent with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1). The regulation establishes a condition on asylum eligibility, not on the ability to apply for asylum. *Compare* INA 208(a), 8 U.S.C. 1158(a) (describing conditions for applying for asylum), *with* INA 208(b), 8 U.S.C. 1158(b) (identifying exceptions and bars to granting asylum). And, as applied to a proclamation that suspends the entry of aliens who crossed between the ports of entry at the southern border, the restriction would not preclude an alien physically present in the United States from being granted asylum if the alien arrives in the United States through any border other than the southern land border with Mexico or at any time other than during the pendency of a proclamation suspending or limiting entry.

B. Screening Procedures in Expedited Removal for Aliens Subject to Proclamations

The rule would also modify certain aspects of the process for screening claims for protection asserted by aliens who have entered in contravention of a proclamation and who are subject to expedited removal under INA 235(b)(1), 8 U.S.C. 1225(b)(1). Under current procedures, aliens who unlawfully enter the United States may avoid being removed on an expedited basis by making a threshold showing of a credible fear of persecution at a initial screening interview. At present, those aliens are often released into the interior of the United

States pending adjudication of such claims by an immigration court in section 240 proceedings especially if those aliens travel as family units. Once an alien is released, adjudications can take months or years to complete because of the increasing volume of claims and the need to expedite cases in which aliens have been detained. The Departments expect that a substantial proportion of aliens subject to an entry proclamation concerning the southern border would be subject to expedited removal, since approximately 234,534 aliens in FY 2018 who presented at a port of entry or were apprehended at the border were referred to expedited-removal proceedings.[1] The procedural changes within expedited removal would be confined to aliens who are ineligible for asylum because they are subject to a regulatory bar for contravening an entry proclamation.

1. Under existing law, expedited-removal procedures —streamlined procedures for expeditiously reviewing claims and removing certain aliens—apply to those individuals who arrive at a port of entry or those who have entered illegally and are encountered by an immigration officer within 100 miles of the border and within 14 days of entering. *See* INA 235(b), 8 U.S.C. 1225(b); Designating Aliens For Expedited Removal, 69 FR 48877, 48880 (Aug. 11, 2004). To be subject to expedited removal, an alien must also be inadmissible under INA 212(a)(6)(C) or (a)(7), 8 U.S.C. 1182(a)(6)(C) or (a)(7),

---

[1] As noted below, in FY 2018, approximately 171,511 aliens entered illegally between ports of entry, were apprehended by CBP, and were placed in expedited removal. Approximately 59,921 inadmissible aliens arrived at ports of entry and were placed in expedited removal. Furthermore, ICE arrested some 3,102 aliens and placed them in expedited removal.

meaning that the alien has either tried to procure documentation through misrepresentation or lacks such documentation altogether. Thus, an alien encountered in the interior of the United States who entered in contravention of a proclamation and who is not otherwise amenable to expedited removal would be placed in proceedings under section 240 of the INA. The interim rule does not invite comment on existing regulations implementing the present scope of expedited removal.

Section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), prescribes procedures in the expedited-removal context for screening an alien's eligibility for asylum. When these provisions were being debated in 1996, legislators expressed particular concern that "[e]xisting procedures to deny entry to and to remove illegal aliens from the United States are cumbersome and duplicative," and that "[t]he asylum system has been abused by those who seek to use it as a means of 'backdoor' immigration." *See* H.R. Rep. No. 104-469, pt. 1, at 107 (1996). Members of Congress accordingly described the purpose of expedited removal and related procedures as "streamlin[ing] rules and procedures in the Immigration and Nationality Act to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." *Id.* at 157; *see Am. Immigration Lawyers Ass'n* v. *Reno,* 18 F. Supp. 2d 38, 41 (D.D.C. 1998), *aff'd,* 199 F.3d 1352 (DC Cir. 2000) (rejecting several constitutional challenges to IIRIRA and describing the expedited-removal process as a "summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation").

Congress thus provided that aliens "inadmissible under [8 U.S.C.] 1182(a)(6)(C) or 1182(a)(7)" shall be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. 1158] or a fear of persecution." INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); *see* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii) (such aliens shall be referred "for an interview by an asylum officer"). On its face, the statute refers only to proceedings to establish eligibility for an affirmative grant of asylum and its attendant benefits, not to statutory withholding of removal or CAT protection against removal to a particular country.

An alien referred for a credible-fear interview must demonstrate a "credible fear," defined as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [8 U.S.C. 1158]." INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). According to the House report, "[t]he credible-fear standard [wa]s designed to weed out nonmeritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process." H.R. Rep. No. 104-69, at 158.

If the asylum officer determines that the alien lacks a credible fear, then the alien may request review by an immigration judge. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). If the immigration judge concurs with the asylum officer's negative credible-fear determination, then the alien shall be removed from the United States without further review by either the Board or the courts. INA 235(b)(1)(B)(iii)(I), (b)(1)(C),

8 U.S.C. 1225(b)(1)(B)(iii)(I), (b)(1)(C); INA 242(a)(2)(A)(iii), (e)(5), 8 U.S.C. 1252(a)(2)(A)(iii), (e)(5); *Pena v. Lynch,* 815 F.3d 452, 457 (9th Cir. 2016). By contrast, if the asylum officer or immigration judge determines that the alien has a credible fear-i.e., "a significant possibility . . . that the alien could establish eligibility for asylum," INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v)-then the alien, under current regulations, is placed in section 240 proceedings for a full hearing before an immigration judge, with appeal available to the Board and review in the federal courts of appeals, *see* INA 235(b)(1)(B)(ii), (b)(2)(A), 8 U.S.C. 1225(b)(1)(B)(ii), (b)(2)(A); INA 242(a), 8 U.S.C. 1252(a); 8 CFR 208.30(e)(5), 1003.1. The interim rule does not invite comment on existing regulations implementing this framework.

By contrast, section 235 of the INA is silent regarding procedures for the granting of statutory withholding of removal and CAT protection; indeed, section 235 predates the legislation directing implementation of U.S. obligations under Article 3 of the CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277, sec. 2242(b) (requiring implementation of CAT); IIRIRA, Public Law 104-208, sec. 302 (revising section 235 of the INA to include procedures for dealing with inadmissible aliens who intend to apply for asylum). The legal standards for ultimately granting asylum on the merits versus statutory withholding or CAT protection are also different. Asylum requires an applicant to ultimately establish a "well-founded fear" of persecution, which has been interpreted to mean a "reasonable possibility" of persecution—a "more generous" standard than the "clear probability" of persecution or torture standard that applies to statutory withholding or

CAT protection. *See INS* v. *Stevic,* 467 U.S. 407, 425, 429-30 (1984); *Santosa* v. *Mukasey,* 528 F.3d 88, 92 & n.1 (1st Cir. 2008); *compare* 8 CFR 1208.13(b)(2)(i)(B) *with* 8 CFR 1208.16(b)(2), (c)(2). As a result, applicants who establish eligibility for asylum are not necessarily eligible for statutory withholding or CAT protection.

Current regulations instruct USCIS adjudicators and immigration judges to treat an alien's request for asylum in expedited-removal proceedings under section 1225(b) as a request for statutory withholding and CAT protection as well. *See* 8 CFR 208.3(b), 208.30(e)(2)-(4), 1208.3(b), 1208.16(a). In the context of expedited-removal proceedings, "credible fear of persecution" is defined to mean a "significant possibility" that the alien "could establish eligibility for asylum under section 1158," not CAT or statutory withholding. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Regulations nevertheless have generally provided that aliens in expedited removal should be subject to the same process for considering statutory withholding of removal claims under INA 241(b)(3), 8 U.S.C. 1231(b)(3), and claims for protection under the CAT, as they are for asylum claims. *See* 8 CFR 208.30(e)(2)-(4).

Thus, when the Immigration and Naturalization Service provided for claims for statutory withholding of removal and CAT protection to be considered in the same expedited-removal proceedings as asylum, the result was that if an alien showed that there was a significant possibility of establishing eligibility for asylum and was therefore referred for removal proceedings under section 240 of the INA, any potential statutory withholding and CAT claims the alien might have were referred as well. This was done on the assumption that that it

would not "disrupt[ ] the streamlined process established by Congress to circumvent meritless claims." Regulations Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999). But while the INA authorizes the Attorney General and Secretary to provide for consideration of statutory withholding and CAT claims together with asylum claims or other matters that may be considered in removal proceedings, the INA does not require that approach, *see Foti* v. *INS,* 375 U.S. 217, 229-30 & n.16 (1963), or that they be considered in the same way.

Since 1999, regulations also have provided for a distinct "reasonable fear" screening process for certain aliens who are categorically ineligible for asylum and can thus make claims only for statutory withholding or CAT protections. *See* 8 CFR 208.31. Specifically, if an alien is subject to having a previous order of removal reinstated or is a non-permanent resident alien subject to an administrative order of removal resulting from an aggravated felony conviction, then he is categorically ineligible for asylum. *See id.* § 208.31(a), (e). Such an alien can be placed in withholding-only proceedings to adjudicate his statutory withholding or CAT claims, but only if he first establishes a "reasonable fear" of persecution or torture through a screening process that tracks the credible-fear process. *See id.* § 208.31(c), (e). Reasonable fear is defined by regulation to mean a "reasonable possibility that [the alien] would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal." *Id.* § 208.31(c). "This . . . screening process is modeled on the credible-fear screening process, but requires the alien to meet a

higher screening standard." Regulations Concerning the Convention Against Torture, 64 FR at 8485; *see also Garcia* v. *Johnson,* No. 14-CV-01775, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing "fair and efficient procedures" in reasonable-fear screening that would comport with U.S. international obligations).

Significantly, when establishing the reasonable-fear screening process, DOJ explained that the two affected categories of aliens should be screened based on the higher reasonable-fear standard because, "[u]nlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are ineligible for asylum," and may be entitled only to statutory withholding of removal or CAT protection. Regulations Concerning the Convention Against Torture, 64 FR at 8485. "Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher." *Id.*

2. Drawing on the established framework for considering whether to grant withholding of removal or CAT protection in the reasonable-fear context, this interim rule establishes a bifurcated screening process for aliens subject to expedited removal who are ineligible for asylum by virtue of entering in contravention of a proclamation, but who express a fear of return or seek statutory withholding or CAT protection. The Attorney General and Secretary have broad authority to implement the immigration laws, *see* INA 103, 8 U.S.C. 1103,

including by establishing regulations, *see* INA 103, 8 U.S.C. 1103(a)(3), and to regulate "conditions or limitations on the consideration of an application for asylum," *id.* 1158(d)(5)(B). Furthermore, the Secretary has the authority—in her "sole and unreviewable discretion," the exercise of which may be "modified at any time"—to designate additional categories of aliens that will be subject to expedited-removal procedures, so long as the designated aliens have not been admitted or paroled nor continuously present in the United States for two years. INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii). The Departments have frequently invoked these authorities to establish or modify procedures affecting aliens in expedited-removal proceedings, as well as to adjust the categories of aliens subject to particular procedures within the expedited-removal framework.[2]

This rule does not change the credible-fear standard for asylum claims, although the regulation would expand the scope of the inquiry in the process. An alien who is subject to a relevant proclamation and nonetheless has entered the United States after the effective date of such a proclamation in contravention of that proclamation would be ineligible for asylum and would thus not be able to establish a "significant possibility . . . [of]

---

[2] *See, e.g.,* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769 (Jan. 17, 2017); Designating Aliens For Expedited Removal, 69 FR 48877; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 FR 10620 (March 8, 2004); New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 FR 31945 (June 11, 1998); Asylum Procedures, 65 FR 76121; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999).

eligibility for asylum under section 1158." INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As current USCIS guidance explains, under the credible-fear standard, "[a] claim that has no possibility, or only a minimal or mere possibility, of success, would not meet the 'significant possibility' standard." USCIS, Office of Refugee, Asylum, & Int'l Operations, Asylum Div., *Asylum Officer Basic Training Course, Lesson Plan on Credible Fear* at 15 (Feb. 13, 2017). Consistent with section 235(b)(1)(B)(iii)(III) of the INA, the alien could still obtain review from an immigration judge regarding whether the asylum officer correctly determined that the alien was subject to a limitation or suspension on entry imposed by a proclamation. Further, consistent with section 235(b)(1)(B) of the INA, if the immigration judge reversed the asylum officer's determination, the alien could assert the asylum claim in section 240 proceedings.

Aliens determined to be ineligible for asylum by virtue of contravening a proclamation, however, would still be screened, but in a manner that reflects that their only viable claims would be for statutory withholding or CAT protection pursuant to 8 CFR 208.30(e)(2)-(4) and 1208.16(a). After determining the alien's ineligibility for asylum under the credible-fear standard, the asylum officer would apply the long-established reasonable-fear standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted. If the asylum officer determined that the alien had not established the requisite reasonable fear, the alien then could seek review of that decision from an immigration judge (just as the alien may under existing 8 CFR 208.30 and 208.31), and would be subject to removal only if the immigration judge agreed with the

negative reasonable-fear finding. Conversely, if either the asylum officer or the immigration judge determined that the alien cleared the reasonable-fear threshold, the alien would be put in section 240 proceedings, just like aliens who receive a positive credible-fear determination for asylum. Employing a reasonable-fear standard in this context, for this category of ineligible aliens, would be consistent with the Department of Justice's longstanding rationale that "aliens ineligible for asylum," who could only be granted statutory withholding of removal or CAT protection, should be subject to a different screening standard that would correspond to the higher bar for actually obtaining these forms of protection. *See* Regulations Concerning the Convention Against Torture, 64 FR at 8485 ("Because the standard for showing entitlement to these forms of protection . . . is significantly higher than the standard for asylum . . . the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.").

The screening process established by the interim rule will accordingly proceed as follows. For an alien subject to expedited removal, DHS will ascertain whether the alien seeks protection, consistent with INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). All aliens seeking asylum, statutory withholding of removal, or CAT protection will continue to go before an asylum officer for screening, consistent with INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to a proclamation entry bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien oth-

erwise demonstrates sufficient facts pertaining to asylum eligibility), then the alien will have established a credible fear.

If, however, an alien lacks a significant possibility of eligibility for asylum because of the proclamation bar, then the asylum officer will make a negative credible-fear finding. The asylum officer will then apply the reasonable-fear standard to assess the alien's claims for statutory withholding of removal or CAT protection.

An alien subject to the proclamation-based asylum bar who clears the reasonable-fear screening standard will be placed in section 240 proceedings, just as an alien who clears the credible-fear standard will be. In those proceedings, the alien will also have an opportunity to raise whether the alien was correctly identified as subject to the proclamation ineligibility bar to asylum, as well as other claims. If an immigration judge determines that the alien was incorrectly identified as subject to the proclamation, the alien will be able to apply for asylum. Such aliens can appeal the immigration judge's decision in these proceedings to the BIA and then seek review from a federal court of appeals.

Conversely, an alien who is found to be subject to the proclamation asylum bar and who does not clear the reasonable-fear screening standard can obtain review of both of those determinations before an immigration judge, just as immigration judges currently review negative credible-fear and reasonable-fear determinations. If the immigration judge finds that either determination was incorrect, then the alien will be placed into section 240 proceedings. In reviewing the determinations, the immigration judge will decide de novo whether the alien is subject to the proclamation asylum bar. If, however,

the immigration judge affirms both determinations, then the alien will be subject to removal without further appeal, consistent with the existing process under section 235 of the INA. In short, aliens subject to the proclamation eligibility bar to asylum will be processed through existing procedures by DHS and EOIR in accordance with 8 CFR 208.30 and 1208.30, but will be subject to the reasonable-fear standard as part of those procedures with respect to their statutory withholding and CAT protection claims.[3]

2. The above process will not affect the process in 8 CFR 208.30(e)(5) for certain existing statutory bars to asylum eligibility. Under that regulatory provision, many aliens who appear to fall within an existing statutory bar, and thus appear to be ineligible for asylum, can nonetheless be placed in section 240 proceedings if they are otherwise eligible for asylum and obtain immigration judge review of their asylum claims, followed by further review before the BIA and the courts of appeals. Specifically, with the exceptions of stowaways and aliens

---

[3] Nothing about this screening process or in this interim rule would alter the existing procedures for processing alien stowaways under the INA and associated regulations. An alien stowaway is unlikely to be subject to 8 CFR 208.13(c)(3) and 1208.13(c)(3) unless a proclamation specifically applies to stowaways or to entry by vessels or aircraft. INA 101(a)(49), 8 U.S.C. 1101(a)(49). Moreover, an alien stowaway is barred from being placed into section 240 proceedings regardless of the level of fear of persecution he establishes. INA 235(a)(2), 8 U.S.C. 1225(a)(2). Similarly, despite the incorporation of a reasonable-fear standard into the evaluation of certain cases under credible-fear procedures, nothing about this screening process or in this interim rule implicates existing reasonable-fear procedures in 8 CFR 208.31 and 1208.31.

entering from Canada at a port of entry (who are generally ineligible to apply for asylum by virtue of a safe-third-country agreement), 8 CFR 208.30(e)(5) provides that "if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the [INA] . . . [DHS] shall nonetheless place the alien in proceedings under section 240 of the [INA] for full consideration of the alien's claim."

The language providing that the agency "shall nonetheless place the alien in proceedings under section 240 of the [INA]" was promulgated in 2000 in a final rule implementing asylum procedures after the 1996 enactment of IIRIRA. *See* Asylum Procedures, 65 FR at 76137. The explanation for this change was that some commenters suggested that aliens should be referred to section 240 proceedings "regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the [INA]. The Department has adopted that suggestion and has so amended the regulation." *Id.* at 76129.

This rule will avoid a textual ambiguity in 8 CFR 208.30(e)(5), which is unclear regarding its scope, by adding a new sentence clarifying the process applicable to an alien barred under a covered proclamation. *See* 8 CFR 208.30(e)(5) (referring to an alien who "appears to be subject to one or more of the mandatory bars to . . . asylum contained in section 208(a)(2) and 208(b)(2) of the [INA]"). By using a definite article ("the mandatory bars to . . . asylum") and the phrase "contained in," 8 CFR 208.30(e)(5) may refer only to aliens who are subject to the defined mandatory bars

"contained in" specific parts of section 208 of the INA, such as the bar for aggravated felons, INA 208(b)(2)(B)(i), 8 U.S.C. 1558(b)(2)(B)(i), or the bar for aliens reasonably believed to be a danger to U.S. security, INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv). It is thus not clear whether an alien subject to a further limitation or condition on asylum eligibility adopted pursuant to section 208(b)(2)(C) of the INA would also be subject to the procedures set forth in 8 CFR 208.30(e)(5). Notably, the preamble to the final rule adopting 8 CFR 208.30(e)(5) indicated that it was intended to apply to "any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the [INA]," and did not address future regulatory ineligibility under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). Asylum Procedures, 65 FR at 76129. This rule does not resolve that question, however, but instead establishes an express regulatory provision dealing specifically with aliens subject to a limitation under section 212(f) or 215(a)(1) of the INA.

C. Anticipated Effects of the Rule

1. The interim rule aims to address an urgent situation at the southern border. In recent years, there has been a significant increase in the number and percentage of aliens who seek admission or unlawfully enter the United States and then assert an intent to apply for asylum or a fear of persecution. The vast majority of such assertions for protection occur in the expedited-removal context, and the rates at which such aliens receive a positive credible-fear determination have increased in the last five years. Having passed through the credible-fear screening process, many of these aliens are re-

leased into the interior to await further section 240 removal proceedings. But many aliens who pass through the credible-fear screening thereafter do not pursue their claims for asylum. Moreover, a substantial number fail to appear for a section 240 proceeding. And even aliens who passed through credible-fear screening and apply for asylum are granted it at a low rate.

Recent numbers illustrate the scope and scale of the problems caused by the disconnect between the number of aliens asserting a credible fear and the number of aliens who ultimately are deemed eligible for, and granted, asylum. In FY 2018, DHS identified some 612,183 inadmissible aliens who entered the United States, of whom 404,142 entered unlawfully between ports of entry and were apprehended by CBP, and 208,041 presented themselves at ports of entry. Those numbers exclude the inadmissible aliens who crossed but evaded detection, and interior enforcement operations conducted by U.S. Immigration and Customs Enforcement ("ICE"). The vast majority of those inadmissible aliens—521,090—crossed the southern border. Approximately 98% (396,579) of all aliens apprehended after illegally crossing between ports of entry made their crossings at the southern border, and 76% of all encounters at the southern border reflect such apprehensions. By contrast, 124,511 inadmissible aliens presented themselves at ports of entry along the southern border, representing 60% of all port traffic for inadmissible aliens and 24% of encounters with inadmissible aliens at the southern border.

Nationwide, DHS has preliminarily calculated that throughout FY 2018, approximately 234,534 aliens who presented at a port of entry or were apprehended at the

border were referred to expedited-removal proceedings. Of that total, approximately 171,511 aliens were apprehended crossing between ports of entry; approximately 59,921 were inadmissible aliens who presented at ports of entry; and approximately 3,102 were arrested by ICE and referred to expedited removal.[4] The total number of aliens of all nationalities referred to expedited-removal proceedings has significantly increased over the last decade, from 161,516 aliens in 2008 to approximately 234,534 in FY 2018 (an overall increase of about 45%). Of those totals, the number of aliens from the Northern Triangle referred to expedited-removal proceedings has increased from 29,206 in FY 2008 (18% of the total 161,516 aliens referred) to approximately 103,752 in FY 2018 (44% of the total approximately 234,534 aliens referred, an increase of over 300%). In FY 2018, nationals of the Northern Triangle represented approximately 103,752 (44%) of the aliens referred to expedited-removal proceedings; approximately 91,235 (39%) were Mexican; and nationals from other countries made up the remaining balance (17%). As of the date of this rule, final expedited-removal statistics for FY 2018 specific to the southern border are not available. But the Departments' experience with immigration enforcement

---

[4] All references to the number of aliens subject to expedited removal in FY 2018 reflect data for the first three quarters of the year and projections for the fourth quarter of FY 2018. It is unclear whether the ICE arrests reflect additional numbers of aliens processed at ports of entry. Another approximately 130,211 aliens were subject to reinstatement, meaning that the alien had previously been removed and then unlawfully entered the United States again. The vast majority of reinstatements involved Mexican nationals. Aliens subject to reinstatement who express a fear of persecution or torture receive reasonable-fear determinations under 8 CFR 208.31.

has demonstrated that the vast majority of expedited-removal actions have also occurred along the southern border.

Once in expedited removal, some 97,192 (approximately 41% of all aliens in expedited removal) were referred for a credible-fear interview with an asylum officer, either because they expressed a fear of persecution or torture or an intent to apply for protection. Of that number, 6,867 (7%) were Mexican nationals, 25,673 (26%) were Honduran, 13,433 (14%) were Salvadoran, 24,456 (25%) were Guatemalan, and other nationalities made up the remaining 28% (the largest proportion of which were 7,761 Indian nationals).

In other words: Approximately 61% of aliens from Northern Triangle countries placed in expedited removal expressed the intent to apply for asylum or a fear of persecution and triggered credible-fear proceedings in FY 2018 (approximately 69% of Hondurans, 79% of Salvadorans, and 49% of Guatemalans). These aliens represented 65% of all credible-fear referrals in FY 2018. By contrast, only 8% of aliens from Mexico trigger credible-fear proceedings when they are placed in expedited removal, and Mexicans represented 7% of all credible-fear referrals. Other nationalities compose the remaining 26,763 (28%) referred for credible-fear interviews.

Once these 97,192 aliens were interviewed by an asylum officer, 83,862 cases were decided on the merits (asylum officers closed the others).[5] Those asylum officers found a credible fear in 89% (74,574) of decided

---

[5] DHS sometimes calculates credible-fear grant rates as a proportion of all cases (positive, negative, and closed cases). Because this

cases—meaning that almost all of those aliens' cases were referred on for further immigration proceedings under section 240, and many of the aliens were released into the interior while awaiting those proceedings.[6] As noted, nationals of Northern Triangle countries represent the bulk of credible-fear referrals (65%, or 63,562 cases where the alien expressed an intent to apply for asylum or asserted a fear). In cases where asylum officers decided whether nationals of these countries had a credible fear, they received a positive credible-fear finding 88% of the time.[7] Moreover, when aliens from

---

rule concerns the merits of the screening process and closed cases are not affected by that process, this preamble discusses the proportions of determinations on the merits when describing the credible-fear screening process. This preamble does, however, account for the fact that some proportion of closed cases are also sent to section 240 proceedings when discussing the number of cases that immigration judges completed involving aliens referred for a credible-fear interview while in expedited-removal proceedings.

[6] Stowaways are the only category of aliens who would receive a positive credible-fear determination and go to asylum-only proceedings, as opposed to section 240 proceedings, but the number of stowaways is very small. Between FY 2013 and FY 2017, an average of roughly 300 aliens per year were placed in asylum-only proceedings, and that number includes not only stowaways but all classes of aliens subject to asylum-only proceedings. 8 CFR 1208.2(c)(1) (describing 10 categories of aliens, including stowaways found to have a credible fear, who are subject to asylum-only proceedings).

[7] Asylum officers decided 53,205 of these cases on the merits and closed the remaining 10,357 (but sent many of the latter to section 240 proceedings). Specifically, 25,673 Honduran nationals were interviewed; 21,476 of those resulted in a positive screening on the merits, 2,436 received a negative finding, and 1,761 were closed-meaning that 90% of all Honduran cases involving a merits determination resulted in a positive finding, and 10% were denied. Some 13,433 Salvadoran nationals were interviewed; 11,034 of those resulted in a positive screening on the merits 1,717 were denied, and

those countries sought review of negative findings by an immigration judge, they obtained reversals approximately 18% of the time, resulting in some 47,507 cases in which nationals of Northern Triangle countries received positive credible-fear determinations.[8] In other words: Aliens from Northern Triangle countries ultimately received a positive credible-fear determination 89% of the time. Some 6,867 Mexican nationals were interviewed; asylum officers gave them a positive credible-fear determination in 81% of decided cases (4,261), and immigration judges reversed an additional 91 negative credible-fear determinations, resulting in some 4,352 cases (83% of cases decided on the merits) in which Mexican nationals were referred to section 240 proceedings after receiving a positive credible-fear determination.

These figures have enormous consequences for the asylum system writ large. Asylum officers and immigration judges devote significant resources to these screening interviews, which the INA requires to happen within a fixed statutory timeframe. These aliens must also be detained during the pendency of expedited-removal proceedings. *See* INA 235(b), 8 U.S.C.

---

682 were closed-meaning that 86% of all Salvadoran cases involving a merits determination resulted in a positive finding, and 14% were denied. Some 24,456 Guatemalan nationals were interviewed; 14,183 of those resulted in a positive screening on the merits, 2,359 were denied, and 7,914 were closed-meaning that 8696 of all Guatemalan cases involving a merits determination resulted in a positive finding, and 14% were denied. Again, the percentages exclude closed cases so as to describe how asylum officers make decisions on the merits.

[8] Immigration judges in 2018 reversed 18% (288) of negative credible-fear determinations involving Hondurans, 19% (241) of negative credible-fear determinations involving Salvadorans, and 17% (285) of negative credible-fear determinations involving Guatemalans.

1225(b); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 834 (2018). And assertions of credible fear in expedited removal have rapidly grown in the last decade—especially in the last five years. In FY 2008, for example, fewer than 5,000 aliens were in expedited removal (5%) and were thus referred for a credible-fear interview. In FY 2014, 51,001 referrals occurred (representing 21% of aliens in expedited removal). The credible-fear referral numbers today reflect a 190% increase from FY 2014 and a nearly 2000% increase from FY 2008. Furthermore, the percentage of cases in which asylum officers found that aliens had established a credible fear—leading to the aliens being placed in section 240 removal proceedings—has also increased in recent years. In FY 2008, asylum officers found a credible fear in about 3,200 (or 77%) of all cases. In FY 2014, asylum officers found a credible fear in about 35,000 (or 80%) of all cases in which they made a determination. And in FY 2018, asylum officers found a credible fear in nearly 89% of all such cases.

Once aliens are referred for section 240 proceedings, their cases may take months or years to adjudicate due to backlogs in the system. As of November 2, 2018, there were approximately 203,569 total cases pending in the immigration courts that originated with a credible-fear referral—or 26% of the total backlog of 791,821 removal cases. Of that number, 136,554 involved nationals of Northern Triangle countries (39,940 cases involving Hondurans; 59,702 involving Salvadoran nationals; 36,912 involving Guatemalan nationals). Another 10,736 cases involved Mexican nationals.

In FY 2018, immigration judges completed 34,158 total cases that originated with a credible-fear referral.[9] Those aliens were likely referred for credible-fear screening between 2015 and 2018; the vast majority of these cases arose from positive credible-fear determinations as opposed to the subset of cases that were closed in expedited removal and referred for section 240 proceedings. In a significant proportion of these cases, the aliens did not appear for section 240 proceedings or did not file an application for asylum in connection with those proceedings. In FY 2018, of the 34,158 completions that originated with a credible-fear referral, 24,361 (71%) were completed by an immigration judge with the issuance of an order of removal. Of those completed cases, 10,534 involved in absentia removal orders, meaning that in approximately 31% of all initial completions in FY 2018 that originated from a credible-fear referral, the alien failed to appear at a hearing. Moreover, of those 10,534 cases, there were 1,981 cases where an asylum application was filed, meaning 8,553 did not file an asylum application and failed to appear at a hearing. Further, 40% of all initial completions originating with a credible-fear referral (or 13,595 cases, including the

---

[9] All descriptions of case outcomes before immigration judges reflect initial case completions by an immigration judge during the fiscal year unless otherwise noted. All references to applications for asylum generally involve applications for asylum, as opposed to some other form of protection, but EOIR statistics do not distinguish between, for instance, the filing of an application for asylum or the filing of an application for statutory withholding. As noted, an application for asylum is also deemed an application for other forms of protection, and whether an application will be for asylum or only for some other form of protection is often a post-filing determination made by the immigration judge (for instance, because the one-year filing bar for asylum applies).

8,553 aliens just discussed) were completed in FY 2018 without an alien filing an application for asylum. In short, in nearly half of the cases completed by an immigration judge in FY 2018 involving aliens who passed through a credible-fear referral, the alien failed to appear at a hearing or failed to file an asylum application.

Those figures are consistent with trends from FY 2008 through FY 2018, during which time DHS pursued some 354,356 cases in the immigration courts that involved aliens who had gone through a credible-fear review (*i.e.,* the aliens received a positive credible-fear determination or their closed case was referred for further proceedings). During this period, however, only about 53% (189,127) of those aliens filed an asylum application, despite the fact that they were placed into further immigration proceedings under section 240 because they alleged a fear during expedited-removal proceedings.

Even among those aliens who received a credible-fear interview, filed for asylum, and appeared in section 240 proceedings to resolve their asylum claims—a category that would logically include the aliens with the greatest confidence in the merits of their claims—only a very small percentage received asylum. In FY 2018 immigration judges completed 34,158 cases that originated with a credible-fear referral; only 20,563 of those cases involved an application for asylum, and immigration judges granted only 5,639 aliens asylum. In other words, in FY 2018, less than about 6,000 aliens who passed through credible-fear screening (17% of all completed cases, 27% of all completed cases in which an asylum application was filed, and about 36% of cases where the asylum claim was adjudicated on the merits) estab-

lished that they should be granted asylum. (An additional 322 aliens received either statutory withholding or CAT protection.) Because there may be multiple bases for denying an asylum application and immigration judges often make alternative findings for consideration of issues on appeal, EOIR does not track reasons for asylum denials by immigration judges at a granular level. Nevertheless, experience indicates that the vast majority of those asylum denials reflect a conclusion that the alien failed to establish a significant possibility of persecution, rather than the effect of a bar to asylum eligibility or a discretionary decision by an immigration judge to deny asylum to an alien who qualifies as a refugee.

The statistics for nationals of Northern Triangle countries are particularly illuminating. In FY 2018, immigration judges in section 240 proceedings adjudicated 20,784 cases involving nationals of Northern Triangle countries who were referred for credible-fear interviews and then referred to section 240 proceedings (*i.e.*, they expressed a fear and either received a positive credible-fear determination or had their case closed and referred to section 240 proceedings for an unspecified reason). Given that those aliens asserted a fear of persecution and progressed through credible-fear screening, those aliens presumably would have had the greatest reason to then pursue an asylum application. Yet in only about 54% of those cases did the alien file an asylum application. Furthermore, about 38% of aliens from Northern Triangle countries who were referred for credible-fear interviews and passed to section 240 proceedings did not appear, and were ordered removed in absentia. Put differently: Only a little over half of aliens from Northern Triangle countries who claimed a

fear of persecution and passed threshold screening submitted an application for asylum, and over a third did not appear at section 240 proceedings.[10] And only 1,889 aliens from Northern Triangle countries were granted asylum, or approximately 9% of completed cases for aliens from Northern Triangle countries who received a credible-fear referral, 17% of the cases where such aliens filed asylum applications in their removal proceedings, and about 23% of cases where such aliens' asylum claims were adjudicated on the merits. Specifically, in FY 2018, 536 Hondurans, 408 Guatemalans, and 945 Salvadorans who initially were referred for a credible-fear interview (whether in FY 2018 or earlier) and progressed to section 240 proceedings were granted asylum.

---

[10] These percentages are even higher for particular nationalities. In FY 2018, immigration judges adjudicated 7,151 cases involving Hondurans whose cases originated with a credible-fear referral in expedited-removal proceedings. Of that 7,151, only 49% (3,509) filed an application for asylum, and 44% (3,167) had their cases completed with an in absentia removal order because they failed to appear. Similarly, immigration judges adjudicated 5,382 cases involving Guatemalans whose cases originated with a credible-fear referral; only 46% (2,457) filed an asylum application, and 41% (2,218) received in absentia removal orders. The 8,251 Salvadoran cases had the highest rate of asylum applications (filed in 65% of cases, or 5,341), and 31% of the total cases (2,534) involved in absentia removal orders. Numbers for Mexican nationals reflected similar trends. In FY 2018, immigration judges adjudicated 3,307 cases involving Mexican nationals who progressed to section 240 proceedings after being referred for a credible-fear interview; 49% of them filed applications for asylum in these proceedings, and 25% of the total cases resulted in an in absentia removal order.

The Departments thus believe that these numbers underscore the major costs and inefficiencies of the current asylum system. Again, numbers for Northern Triangle nationals—who represent the vast majority of aliens who claim a credible fear—illuminate the scale of the problem. Out of the 63,562 Northern Triangle nationals who expressed an intent to apply for asylum or a fear of persecution and received credible-fear screening interviews in FY 2018, 47,507 received a positive credible-fear finding from the asylum officer or immigration judge. (Another 10,357 cases were administratively closed, some of which also may have been referred to section 240 proceedings.) Those aliens will remain in the United States to await section 240 proceedings while immigration judges work through the current backlog of nearly 800,000 cases—136,554 of which involve nationals of Northern Triangle countries who passed through credible-fear screening interviews. Immigration judges adjudicated 20,784 cases involving such nationals of Northern Triangle countries in FY 2018; slightly under half of those aliens did not file an application for asylum, and over a third were screened through expedited removal but did not appear for a section 240 proceeding. Even when nationals of Northern Triangle countries who passed through credible-fear screening applied for asylum (as 11,307 did in cases completed in FY 2018), immigration judges granted asylum to only 1,889, or 17% of the cases where such aliens filed asylum applications in their removal proceedings. Immigration judges found in the overwhelming majority of cases that the aliens had no significant possibility of persecution.

These existing burdens suggest an unsustainably inefficient process, and those pressures are now coupled

with the prospect that large caravans of thousands of aliens, primarily from Central America, will seek to enter the United States unlawfully or without proper documentation and thereafter trigger credible-fear screening procedures and obtain release into the interior. The United States has been engaged in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries (Guatemala, El Salvador, and Honduras) about the problems on the southern border, but those negotiations have, to date, proved unable to meaningfully improve the situation.

2. In combination with a presidential proclamation directed at the crisis on the southern border, the rule would help ameliorate the pressures on the present system. Aliens who could not establish a credible fear for asylum purposes due to the proclamation-based eligibility bar could nonetheless seek statutory withholding of removal or CAT protection, but would receive a positive finding only by establishing a reasonable fear of persecution or torture. In FY 2018, USCIS issued nearly 7,000 reasonable-fear determinations (*i.e.,* made a positive or negative determination)—a smaller number because the current determinations are limited to the narrow categories of aliens described above. Of those determinations, USCIS found a reasonable fear in 45% of cases in 2018, and 48% of cases in 2017. Negative reasonable-fear determinations were then subject to further review, and immigration judges reversed approximately 18%.

Even if rates of positive reasonable-fear findings increased when a more general population of aliens became subject to the reasonable-fear screening process, this process would better filter those aliens eligible for

that form of protection. Even assuming that grant rates for statutory withholding in the reasonable-fear screening process (a higher standard) would be the same as grant rates for asylum, this screening mechanism would likely still allow through a significantly higher percentage of cases than would likely be granted. And the reasonable-fear screening rates would also still allow a far greater percentage of claimants through than would ultimately receive CAT protection. Fewer than 1,000 aliens per year, of any nationality, receive CAT protection.

To the extent that aliens continued to enter the United States in violation of a relevant proclamation, the application of the rule's bar to eligibility for asylum in the credible-fear screening process (combined with the application of the reasonable-fear standard to statutory withholding and CAT claims) would reduce the number of cases referred to section 240 proceedings. Finally, the Departments emphasize that this rule would not prevent aliens with claims for statutory withholding or CAT protection from having their claims adjudicated in section 240 proceedings after satisfying the reasonable-fear standard.

Further, determining whether an alien is subject to a suspension of entry proclamation would ordinarily be straightforward, because such orders specify the class of aliens whose entry is restricted. Likewise, adding questions designed to elicit whether an alien is subject to an entry proclamation, and employing a bifurcated credible-fear analysis for the asylum claim and reasonable-fear review of the statutory withholding and CAT claims, will likely not be unduly burdensome. Although DHS has generally not applied existing mandatory bars

to asylum in credible-fear determinations, asylum officers currently probe for this information and note in the record where the possibility exists that a mandatory bar may apply. Though screening for proclamation-based ineligibility for asylum may in some cases entail some additional work, USCIS will account for it under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, as needed, following issuance of a covered proclamation. USCIS asylum officers and EOIR immigration judges have almost two decades of experience applying the reasonable-fear standard to statutory withholding and CAT claims, and do so in thousands of cases per year already (13,732 in FY 2018 for both EOIR and USCIS). *See, e.g.*, Memorandum for All Immigration Judges, et al., from The Office of the Chief Immigration Judge, Executive Office for Immigration Review at 6 (May 14, 1999) (explaining similarities between credible-fear and reasonable-fear proceedings for immigration judges).

That said, USCIS estimates that asylum officers have historically averaged four to five credible-fear interviews and completions per day, but only two to three reasonable-fear case completions per day. Comparing this against current case processing targets, and depending on the number of aliens who contravene a presidential proclamation, such a change might result in the need to increase the number of officers required to conduct credible-fear or reasonable-fear screenings to maintain current case completion goals. However, current reasonable-fear interviews are for types of aliens (aggravated felons and aliens subject to reinstatement) for whom relevant criminal and immigration records take time to obtain, and for whom additional interviewing and administrative processing time is typically required. The population of aliens who would be subject to this

rule would generally not have the same type of criminal and immigration records in the United States, but additional interviewing time might be necessary. Therefore, it is unclear whether these averages would hold once the rule is implemented.

If an asylum officer determines that credible fear has been established but for the existence of the proclamation bar, and the alien seeks review of such determination before an immigration judge, DHS may need to shift additional resources towards facilitating such review in immigration court in order to provide records of the negative credible-fear determination to the immigration court. However, ICE attorneys, while sometimes present, generally do not advocate for DHS in negative credible-fear or reasonable-fear reviews before an immigration judge.

DHS would, however, also expend additional resources detaining aliens who would have previously received a positive credible-fear determination and who now receive, and challenge, a negative credible-fear and reasonable-fear determination. Aliens are generally detained during the credible-fear screening, but may be eligible for parole or release on bond if they establish a credible fear. To the extent that the rule may result in lengthier interviews for each case, aliens' length of stay in detention would increase. Furthermore, DHS anticipates that more negative determinations would increase the number of aliens who would be detained and the length of time they would be detained, since fewer aliens would be eligible for parole or release on bond. Also, to the extent this rule would increase the number of aliens who receive both negative credible-fear and

reasonable-fear determinations, and would thus be subject to immediate removal, DHS will incur increased and more immediate costs for enforcement and removal of these aliens. That cost would be counterbalanced by the fact that it would be considerably more costly and resource-intensive to ultimately remove such an alien after the end of section 240 proceedings, and the desirability of promoting greater enforcement of the immigration laws.

Attorneys from ICE represent DHS in full immigration proceedings, and immigration judges (who are part of DOJ) adjudicate those proceedings. If fewer aliens are found to have credible fear or reasonable fear and referred to full immigration proceedings, such a development will allow DOJ and ICE attorney resources to be reallocated to other immigration proceedings. The additional bars to asylum are unlikely to result in immigration judges spending much additional time on each case where the nature of the proclamation bar is straightforward to apply. Further, there will likely be a decrease in the number of asylum hearings before immigration judges because certain respondents will no longer be eligible for asylum and DHS will likely refer fewer cases to full immigration proceedings. If DHS officers identify the proclamation-based bar to asylum (before EOIR has acquired jurisdiction over the case), EOIR anticipates a reduction in both in-court and out-of-court time for immigration judges.

A decrease in the number of credible-fear findings and, thus, asylum grants would also decrease the number of employment authorization documents processed by DHS. Aliens are generally eligible to apply for and receive employment authorization and an Employment

Authorization Document (Form 1-766) after their asylum claim has been pending for more than 180 days. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii); 8 CFR 1208.7(a)(1)(2). This rule and any associated future presidential proclamations would also be expected to have a deterrent effect that could lessen future flows of illegal immigration.

3. The Departments are not in a position to determine how all entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter the United States through the southern border in the near future. The focus of this rule is on the tens of thousands of aliens each year (97,192 in FY 2018) who assert a credible fear in expedited-removal proceedings and may thereby be placed on a path to release into the interior of the United States. The President has announced his intention to take executive action to suspend the entry of aliens between ports of entry and instead to channel such aliens to ports of entry, where they may seek to enter and assert an intent to apply for asylum in a controlled, orderly, and lawful manner. The Departments have accordingly assessed the anticipated effects of such a presidential action so as to illuminate how the rule would be applied in those circumstances.

a. *Effects on Aliens.* Such a proclamation, coupled with this rule, would have the most direct effect on the more than approximately 70,000 aliens a year (as of FY 2018) estimated to enter between the ports of entry and

then assert a credible fear in expedited-removal proceedings.[11] If such aliens contravened a proclamation suspending their entry unless they entered at a port of entry, they would become ineligible for asylum, but would remain eligible for statutory withholding or CAT protection. And for the reasons discussed above, their claims would be processed more expeditiously. Conversely, if such aliens decided to instead arrive at ports of entry, they would remain eligible for asylum and would proceed through the existing credible-fear screening process.

Such an application of this rule could also affect the decision calculus for the estimated 24,000 or so aliens a year (as of FY 2018) who arrive at ports of entry along the southern border and assert a credible fear in expedited-removal proceedings.[12] Such aliens would likely face increased wait times at a U.S. port of entry, meaning that they would spend more time in Mexico.

---

[11] The Departments estimated this number by using the approximately 171,511 aliens in FY 2018 who were referred to expedited removal after crossing illegally between ports of entry and being apprehended by CBP. That number excludes the approximately 3,102 additional aliens who were arrested by ICE, because it is not clear at this time whether such aliens were ultimately processed at a port of entry. The Departments also relied on the fact that approximately 41% of aliens in expedited removal in FY 2018 triggered credible-fear screening.

[12] The Departments estimated this number by using the approximately 59,921 aliens in FY 2018 who were referred to expedited removal after presenting at a port of entry. That number excludes the approximately 3,102 additional aliens who were arrested by ICE, because it is not clear at this time whether such aliens were ultimately processed at a port of entry. The Departments also relied on the fact that approximately 41% of aliens in expedited removal in FY 2018 triggered credible-fear screening.

Third-country nationals in this category would have added incentives to take advantage of Mexican asylum procedures and to make decisions about travel to a U.S. port of entry based on information about which ports were most capable of swift processing.

Such an application of this rule could also affect aliens who apply for asylum affirmatively or in removal proceedings after entering through the southern border. Some of those asylum grants would become denials for aliens who became ineligible for asylum because they crossed illegally in contravention of a proclamation effective before they entered. Such aliens could, however, still obtain statutory withholding of removal or CAT protection in section 240 proceedings.

Finally, such a proclamation could also affect the thousands of aliens who are granted asylum each year. Those aliens' cases are equally subject to existing backlogs in immigration courts, and could be adjudicated more swiftly if the number of non-meritorious cases declined. Aliens with meritorious claims could thus more expeditiously receive the benefits associated with asylum.

b. *Effects on the Departments' Operations.* Applying this rule in conjunction with a proclamation that channeled aliens seeking asylum to ports of entry would likely create significant overall efficiencies in the Departments' operations beyond the general efficiencies discussed above. Channeling even some proportion of aliens who currently enter illegally and assert a credible fear to ports of entry would, on balance, be expected to help the Departments more effectively leverage their resources to promote orderly and efficient processing of inadmissible aliens.

At present, CBP dedicates enormous resources to attempting to apprehend aliens who cross the southern border illegally. As noted, CBP apprehended 396,579 such aliens in FY 2018. Such crossings often occur in remote locations, and over 16,000 CBP officers are responsible for patrolling hundreds of thousands of square miles of territory, ranging from deserts to mountainous terrain to cities. When a United States Border Patrol ("Border Patrol" or "USBP") agent apprehends an alien who enters unlawfully, the USBP agent takes the alien into custody and transports the alien to a Border Patrol station for processing—which could be hours away. Family units apprehended after crossing illegally present additional logistical challenges, and may require additional agents to assist with the transport of the illegal aliens from the point of apprehension to the station for processing. And apprehending one alien or group of aliens may come at the expense of apprehending others while agents are dedicating resources to transportation instead of patrolling.

At the Border Patrol station, a CBP agent obtains an alien's fingerprints, photographs, and biometric data, and begins asking background questions about the alien's nationality and purpose in crossing. At the same time, agents must make swift decisions, in coordination with DOJ, as to whether to charge the alien with an immigration-related criminal offense. Further, agents must decide whether to apply expedited-removal procedures, to pursue reinstatement proceedings if the alien already has a removal order in effect, to authorize voluntary return, or to pursue some other lawful course of action. Once the processing of the alien is completed, the USBP temporarily detains any alien who is referred for removal proceedings. Once the USBP determines

that an alien should be placed in expedited-removal proceedings, the alien is expeditiously transferred to ICE custody in compliance with federal law. The distance between ICE detention facilities and USBP stations, however, varies. Asylum officers and immigration judges review negative credible-fear findings during expedited-removal proceedings while the alien is in ICE custody.

By contrast, CBP officers are able to employ a more orderly and streamlined process for inadmissible aliens who present at one of the ports of entry along the southern border-even if they claim a credible fear. Because such aliens have typically sought admission without violating the law, CBP generally does not need to dedicate resources to apprehending or considering whether to charge such aliens. And while aliens who present at a port of entry undergo threshold screening to determine their admissibility, see INA 235(b)(2), 8 U.S.C. 1225(b)(2), that process takes approximately the same amount of time as CBP's process for obtaining details from aliens apprehended between ports of entry. Just as for illegal entrants, CBP officers at ports of entry must decide whether inadmissible aliens at ports of entry are subject to expedited removal. Aliens subject to such proceedings are then generally transferred to ICE custody so that DHS can implement Congress's statutory mandate to detain such aliens during the pendency of expedited-removal proceedings. As with stations, ports of entry vary in their proximity to ICE detention facilities. The Departments acknowledge that in the event all of the approximately 70,000 aliens per year who cross illegally and assert a credible fear instead decide to present at a port of entry, processing times at ports

of entry would be slower in the absence of additional resources or policies that would encourage aliens to enter at less busy ports. Using FY 2018 figures, the number of aliens presenting at a port of entry would rise from about 124,511 to about 200,000 aliens if all illegal aliens who assert a credible fear went to ports of entry. That would likely create longer lines at U.S. ports of entry, although the Departments note that such ports have variable capacities and that wait times vary considerably between them. The Departments nonetheless believe such a policy would be preferable to the status quo. Nearly 40% of inadmissible aliens who present at ports of entry today are Mexican nationals, who rarely claim a credible fear and who accordingly can be processed and admitted or removed quickly.

Furthermore, the overwhelming number of aliens who would have an incentive under the rule and a proclamation to arrive at a port of entry rather than to cross illegally are from third countries, not from Mexico. In FY 2018, CBP apprehended and referred to expedited removal an estimated 87,544 Northern Triangle nationals and an estimated 66,826 Mexican nationals, but Northern Triangle nationals assert a credible fear over 60% of the time, whereas Mexican nationals assert a credible fear less than 10% of the time. The Departments believe that it is reasonable for third-country aliens, who appear highly unlikely to be persecuted on account of a protected ground or tortured in Mexico, to be subject to orderly processing at ports of entry that takes into account resource constraints at ports of entry and in U.S. detention facilities. Such orderly processing would be impossible if large proportions of third-country nationals continue to cross the southern border illegally.

To be sure, some Mexican nationals who would assert a credible fear may also have to spend more time waiting for processing in Mexico. Such nationals, however, could still obtain statutory withholding of removal or CAT protection if they crossed illegally, which would allow them a safeguard against persecution. Moreover, only 178 Mexican nationals received asylum in FY 2018 after initially asserting a credible fear of persecution in expedited-removal proceedings, indicating that the category of Mexican nationals most likely to be affected by the rule and a proclamation would also be highly unlikely to establish eligibility for asylum.

Regulatory Requirements

A. Administrative Procedure Act

While the Administrative Procedure Act ("APA") generally requires agencies to publish notice of a proposed rulemaking in the Federal Register for a period of public comment, it provides an exception "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). This exception relieves agencies of the notice-and-comment requirement in emergency situations, or in circumstances where "the delay created by the notice and comment requirements would result in serious damage to important interests." *Woods Psychiatric Inst.* v. *United States,* 20 Cl. Ct. 324, 333 (1990), *aff'd,* 925 F.2d 1454 (Fed. Cir. 1991); *see also Nat'l Fed'n of Federal Emps.* v. *Nat'l Treasury Emps. Union,* 671 F.2d 607, 611 (D.C. Cir. 1982); *United States* v. *Dean,* 604 F.3d 1275, 1279 (11th Cir. 2010). Agencies have previously relied on this exception in promulgating a host of

immigration-related interim rules.[13] Furthermore, DHS has invoked this exception in promulgating rules related to expedited removal-a context in which Congress recognized the need for dispatch in addressing large volumes of aliens by giving the Secretary significant discretion to "modify at any time" the classes of aliens who would be subject to such procedures. *See* INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I).[14]

---

[13] *See, e.g.,* Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (interim rule citing good cause to immediately require additional documentation from certain Caribbean agricultural workers to avoid "an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule"); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 2, 2003) (interim rule claiming good cause exception for suspending certain automatic registration requirements for nonimmigrants because "without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews" over six months).

[14] *See, e.g.,* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR at 4770 (claiming good cause exception because the ability to detain certain Cuban nationals "while admissibility and identity are determined and protection claims are adjudicated, as well as to quickly remove those without protection claims or claims to lawful status, is a necessity for national security and public safety"); Designating Aliens For Expedited Removal, 69 FR at 48880 (claiming good cause exception for expansion of expedited-removal program due to "[t]he large volume of illegal entries, and attempted illegal entries, and the attendant risks to national security presented by these illegal entries," as well as "the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and

The Departments have concluded that the good-cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule. Notice and comment on this rule, along with a 30-day delay in its effective date, would be impracticable and contrary to the public interest. The Departments have determined that immediate implementation of this rule is essential to avoid creating an incentive for aliens to seek to cross the border during pre-promulgation notice and comment under 5 U.S.C. 553(b) or during the 30-day delay in the effective date under 5 U.S.C. 553(d).

DHS concluded in January 2017 that it was imperative to give immediate effect to a rule designating Cuban nationals arriving by air as eligible for expedited removal because "pre-promulgation notice and comment would . . . endanger[] human life and hav[e] a potential destabilizing effect in the region." Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR at 4770. DHS in particular cited the prospect that "publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule." *Id.* DHS found that "[s]uch a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of

---

crimes associated with human trafficking and alien smuggling operations").

the United States and threatening its international relations." *Id.* DHS concluded: "[A] surge could result in significant loss of human life." *Id.; accord, e.g.,* Designating Aliens For Expedited Removal, 69 FR 48877 (noting similar destabilizing incentives for a surge during a delay in the effective date); Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR at 5907 (finding the good-cause exception applicable because of similar short-run incentive concerns).

These same concerns would apply here as well. Prepromulgation notice and comment, or a delay in the effective date, could lead to an increase in migration to the southern border to enter the United States before the rule took effect. For instance, the thousands of aliens who presently enter illegally and make claims of credible fear if and when they are apprehended would have an added incentive to cross illegally during the comment period. They have an incentive to cross illegally in the hopes of evading detection entirely. Even once apprehended, at present, they are able to take advantage of a second opportunity to remain in the United States by making credible-fear claims in expedited-removal proceedings. Even if their statements are ultimately not found to be genuine, they are likely to be released into the interior pending section 240 proceedings that may not occur for months or years. Based on the available statistics, the Departments believe that a large proportion of aliens who enter illegally and assert a fear could be released while awaiting section 240 proceedings. There continues to be an "urgent need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien

smuggling operations." Designating Aliens For Expedited Removal, 69 FR at 48878.

Furthermore, there are already large numbers of migrants—including thousands of aliens traveling in groups, primarily from Central America—expected to attempt entry at the southern border in the coming weeks. Some are traveling in large, organized groups through Mexico and, by reports, intend to come to the United States unlawfully or without proper documentation and to express an intent to seek asylum. Creating an incentive for members of those groups to attempt to enter the United States unlawfully before this rule took effect would make more dangerous their already perilous journeys, and would further strain CBP's apprehension operations. This interim rule is thus a practical means to address these developments and avoid creating an even larger short-term influx; an extended notice-and-comment rulemaking process would be impracticable.

Alternatively, the Departments may forgo notice-and-comment procedures and a delay in the effective date because this rule involves a "foreign affairs function of the United States." 5 U.S.C. 553(a)(1). The flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States. *See, e.g.,* Exec. Order 13767 (Jan. 25, 2017). Presidential proclamations invoking section 212(f) or 215(a)(1) of the INA at the southern border necessarily implicate our relations with Mexico and the President's foreign policy, including sensitive and ongoing negotiations with

Mexico about how to manage our shared border.[15] A proclamation under section 212(f) of the INA would reflect a presidential determination that some or all entries along the border "would [be] detrimental to the interests of the United States." And the structure of the rule, under which the Attorney General and the Secretary are exercising their statutory authority to establish a mandatory bar to asylum eligibility resting squarely on a proclamation issued by the President, confirms the direct relationship between the President's foreign policy decisions in this area and the rule.

For instance, a proclamation aimed at channeling aliens who wish to make a claim for asylum to ports of entry at the southern border would be inextricably related to any negotiations over a safe-third-country agreement (as defined in INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A)), or any similar arrangements. As noted, the vast majority of aliens who enter illegally today come from the Northern Triangle countries, and large portions of those aliens assert a credible fear. Channeling those aliens to ports of entry would encourage these aliens to first avail themselves of offers of asylum from Mexico.

Moreover, this rule would be an integral part of ongoing negotiations with Mexico and Northern Triangle

---

[15] For instance, since 2004, the United States and Mexico have been operating under a memorandum of understanding concerning the repatriation of Mexican nationals. Memorandum of Understanding Between the Department of Homeland Security of the United States of America and the Secretariat of Governance and the Secretariat of Foreign Affairs of the United Mexican States, on the Safe, Orderly, Dignified and Humane Repatriation of Mexican Nationals (Feb. 20, 2004). Article 6 of that memorandum reserves the movement of third-country nationals through Mexico and the United States for further bilateral negotiations.

countries over how to address the influx of tens of thousands of migrants from Central America through Mexico and into the United States. For instance, over the past few weeks, the United States has consistently engaged with the Security and Foreign Ministries of El Salvador, Guatemala, and Honduras, as well as the Ministries of Governance and Foreign Affairs of Mexico, to discuss how to address the mass influx of aliens traveling together from Central America who plan to seek to enter at the southern border. Those ongoing discussions involve negotiations over issues such as how these other countries will develop a process to provide this influx with the opportunity to seek protection at the safest and earliest point of transit possible, and how to establish compliance and enforcement mechanisms for those who seek to enter the United States illegally, including for those who do not avail themselves of earlier offers of protection. Furthermore, the United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement, and this rule will strengthen the ability of the United States to address the crisis at the southern border and therefore facilitate the likelihood of success in future negotiations.

This rule thus supports the President's foreign policy with respect to Mexico and the Northern Triangle countries in this area and is exempt from the notice-and-comment and delayed-effective-date requirements in 5 U.S.C. 553. *See Am. Ass'n of Exporters & Importers-Textile & Apparel Grp.* v. *United States,* 751 F.2d 1239, 1249 (Fed. Cir. 1985) (noting that foreign affairs exception covers agency actions "linked intimately with the Government's overall political agenda concerning relations with another country"); *Yassini* v. *Crosland,* 618 F.2d 1356, 1361 (9th Cir. 1980) (because an immigration

directive "was implementing the President's foreign policy," the action "fell within the foreign affairs function and good cause exceptions to the notice and comment requirements of the APA").

Invoking the APA's foreign affairs exception is also consistent with past rulemakings. In 2016, for example, in response to diplomatic developments between the United States and Cuba, DHS changed its regulations concerning flights to and from the island via an immediately effective interim final rule. This rulemaking explained that it was covered by the foreign affairs exception because it was "consistent with U.S. foreign policy goals"—specifically, the "continued effort to normalize relations between the two countries." Flights to and From Cuba, 81 FR 14948, 14952 (Mar. 21, 2016). In a similar vein, DHS and the State Department recently provided notice that they were eliminating an exception to expedited removal for certain Cuban nationals. The notice explained that the change in policy was subject to the foreign affairs exception because it was "part of a major foreign policy initiative announced by the President, and is central to ongoing diplomatic discussions between the United States and Cuba with respect to travel and migration between the two countries." Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR at 4904-05.

For the foregoing reasons, taken together, the Departments have concluded that the foreign affairs exemption to notice-and-comment rulemaking applies.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

This interim final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

This interim final rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Order 12866, Executive Order 13563, and Executive Order 13771 (Regulatory Planning and Review)

This interim final rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866 because the rule is exempt under the foreign-affairs exemption in section 3(d)(2) as part of the actual exercise of diplomacy. The rule is consequently also exempt from Executive Order 13771 because it is not a significant regulatory action under Executive Order 12866. Though the potential costs, benefits, and transfers associated with some proclamations may have any of a range of economic impacts, this rule itself does not have an impact aside from enabling future action. The Departments have discussed what some of the potential impacts associated with a proclamation may be, but these impacts do not stem directly from this rule and, as such, they do not consider them to be costs, benefits, or transfers of this rule.

This rule amends existing regulations to provide that aliens subject to restrictions on entry under certain proclamations are ineligible for asylum. The expected effects of this rule for aliens and on the Departments' operations are discussed above. As noted, this rule will result in the application of an additional mandatory bar to asylum, but the scope of that bar will depend on the substance of relevant triggering proclamations. In addition, this rule requires DHS to consider and apply the proclamation bar in the credible-fear screening analysis, which DHS does not currently do. Application of the new bar to asylum will likely decrease the number of asylum grants. By applying the bar earlier in the process, it will lessen the time that aliens who are ineligible for asylum and who lack a reasonable fear of persecution or torture will be present in the United States. Finally, DOJ is amending its regulations with respect to aliens who are subject to the proclamation bar to asylum

eligibility to ensure that aliens who establish a reasonable fear of persecution or torture may still seek, in proceedings before immigration judges, statutory withholding of removal under the INA or CAT protection.

Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not propose new or revisions to existing "collection[s] of information" as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

• 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229, 8 CFR part 2.

• 2. In § 208.13, add paragraph (c)(3) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3) *Additional limitation on eligibility for asylum.* For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

• 3. In § 208.30, revise the section heading and add a sentence at the end of paragraph (e)(5) to read as follows:

§ 208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act.

* * * * *

(e) * * *

(5) * * * If the alien is found to be an alien described in 8 CFR 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration

of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture if the alien establishes a reasonable fear of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable fear of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the reasonable fear findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

* * * * *

Approved:

Dated: November 5, 2018.

Kirstjen M. Nielsen,

Secretary of Homeland Security.

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR parts 1003 and 1208 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

• 4. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28

U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

• 5. In § 1003.42, add a sentence at the end of paragraph (d) to read as follows:

§ 1003.42 Review of credible fear determination.

* * * * *

(d) * * * If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 1208.13(c)(3) and is determined to lack a reasonable fear under 8 CFR 208.30(e)(5), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 1208.13(c)(3) prior to any further review of the asylum officer's negative determination.

* * * * *

PART 1208-PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

• 6. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229.

• 7. In § 1208.13, add paragraph (c)(3) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3) *Additional limitation on eligibility for asylum.* For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

• 8. In § 1208.30, revise the section heading and add paragraph (g)(1) to read as follows:

§ 1208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act.

* * * * *

(g) * * *

(1) *Review by immigration judge of a mandatory bar finding.* If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 1208.13(c)(3) and is determined to lack a reasonable fear under 8 CFR 208.30(e)(5), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR

208.13(c)(3) or 1208.13(c)(3), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence removal proceedings under section 240 of the Act. If the immigration judge concurs with the credible fear determination that the alien is an alien described in 8 CFR 208.13(c)(3) or 1208.13(c)(3), the immigration judge will then review the asylum officer's negative decision regarding reasonable fear made under 8 CFR 208.30(e)(5) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g)(2).

* * * * *

Dated: Nov. 6, 2018.

Jefferson B. Sessions III,

Attorney General.

[FR Doc. 2018-24594 Filed 11-8-18; 4:15 pm]

BILLING CODE 4410-30-P; 9111-97-P

Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act

Press Release 14

Press Release

Autor
Secretaría de Relaciones Exteriores

Fecha de publicación
20 de diciembre de 2018

Categoría
Comunicado

At 8 a.m. this morning, the Government of the United States informed the Mexican Government that the U.S. Department of Homeland Security (DHS) intends to invoke a section of its immigration law that would enable it to return non-Mexican individuals to our country for the duration of their immigration proceedings in the United States.

Mexico reaffirms its sovereign right to implement its immigration policy and admit or deny entry into its territory to foreign citizens. Therefore, the Government of Mexico has decided to take the following steps on behalf of migrants, especially minors, whether accompanied or not, and to protect the right of those who wish to begin and continue the process of applying for asylum in United States territory:

1. For humanitarian reasons, it will authorize the temporary entrance of certain foreign individuals coming from the United States who entered that country at a port of entry or who were detained between ports of entry, have been interviewed by U.S. immigration authorities, and have received a notice to appear before an immigration judge. This is based on current Mexican legislation and the international commitments Mexico has signed, such as the Convention Relating to the Status of

Refugees, its Protocol, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

2. It will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a "stay for humanitarian reasons" and they would be able to enter and leave national territory multiple times.

3. It will ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law. They will be entitled to equal treatment with no discrimination whatsoever and due respect will be paid to their human rights. They will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.

4. It will ensure that the measures taken by each government are coordinated at a technical and operational level in order to put mechanisms in place that allow migrants who have receive a notice to appear before a U.S. immigration judge have access without interference to information and legal services, and to prevent fraud and abuse.

The actions taken by the governments of Mexico and the United States do not constitute a Safe Third Country arrangement, in which migrants in transit would be required to apply for asylum in Mexico. They are aimed at facilitating the follow-up to applications for asylum in

the United States. This does not imply that foreign individuals face any obstacles to applying for asylum in Mexico.

The Government of Mexico reiterates that all foreign individuals must comply with the law while they are in national territory.

Contesta nuestra encuesta de satisfacción.

Twittear

Compartir (https://www.facebook.com/sharer/sharer.php?

u=http://www.gob.mx/sre/prensa/155060&src=sdkpreparse)

Imprime la página completa

FY2016-2019 YTD ATD FAMU vs. Non-FAMU Absconder Rates

FY16 ATD Absconder Rates: FAMU vs. Non-FAMU			
Metric	FAMU	Non-FAMU	Overall
Absconders	2,626	1,567	4,193
Terminations	8,459	12,921	21,380
Absconder Rate	31.0%	12.1%	19.6%

FY17 ATD Absconder Rates: FAMU vs. Non-FAMU			
Metric	FAMU	Non-FAMU	Overall
Absconders	4,628	2,424	7,052
Terminations	20,131	16,053	36,184
Absconder Rate	23.0%	15.1%	19.5%

FY18 ATD Absconder Rates: FAMU vs. Non-FAMU			
Metric	FAMU	Non-FAMU	Overall
Absconders	8,299	3,182	11,481
Terminations	30,322	19,903	50,225
Absconder Rate	27.4%	16.0%	22.9%

FY19 through November Absconder Rates: FAMU vs. Non-FAMU			
Metric	FAMU	Non-FAMU	Overall
Absconders	2,281	539	2,820
Terminations	8,911	4,364	13,275
Absconder Rate	25.6%	12.4%	21.2%

USBP Arrest Data 10/1/2013 through 11/30/2018.
Data from BI Inc. Participants Reports, 9/30/2016, 9/30/2017, & 9/30/2018.
Family Unit (FAMU) subject apprehensions represent all OBP apprehensions of adults (18 years old and over) with a FAMU classification.

Fiscal Year 2018 ICE Enforcement and Removal Operations Report

Overview

This report summarizes U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) activities in Fiscal Year (FY) 2018. ERO identifies, arrests, and removes aliens who present a danger to national security or a threat to public safety, or who otherwise undermine border control and the integrity of the U.S. immigration system. ICE shares responsibility for administering and enforcing the nation's immigration laws with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services.

During FY2018, ICE ERO continued its focus on priorities laid out by two primary directives issued in 2017. On January 25, 2017, President Donald J. Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States* (EO), which set forth the Administration's immigration enforcement and removal priorities. Subsequently, the Department of Homeland Security's (DHS) February 20, 2017 implementation memorandum, *Enforcement of the Immigration Laws to Serve the National Interest* provided further direction for the implementation of the policies set forth in the EO. Together, the EO and implementation memorandum expanded ICE's enforcement focus to include removable aliens who (1) have been convicted of any

criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Department continued to operate under the directive that classes or categories of removable aliens are not exempt from potential enforcement.

ICE ERO continued efforts under the direction of the 2017 EO and implementation memorandum by placing a significant emphasis on interior enforcement by protecting national security and public safety and upholding the rule of law. This report represents an analysis of ICE ERO's FY2018 year-end statistics and illustrates how ICE ERO successfully fulfilled its mission while furthering the aforementioned policies.

FY2018 Enforcement and Removal Statistics

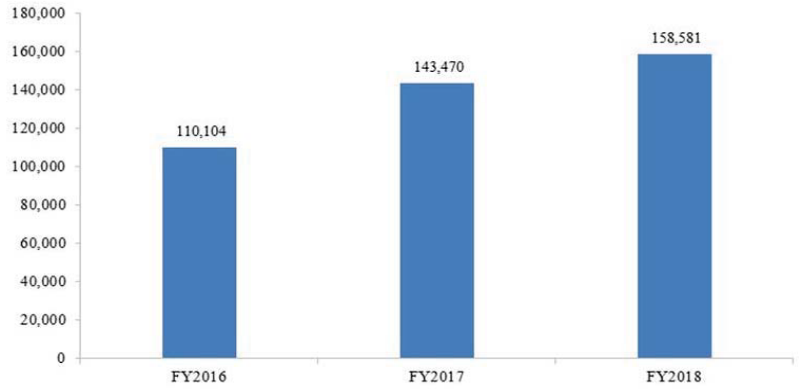
As directed in the EO and implementation memorandum, ICE does not exempt classes or categories of removable aliens from potential enforcement. This policy directive is reflected in ERO's FY2018 enforcement statistics, which show consistent increases from previous fiscal years in the following enforcement metrics: (1) ICE ERO overall administrative arrests; (2) an accompanying rise in overall ICE removals tied to interior enforcement efforts; (3) ICE removals of criminal aliens from interior enforcement; (4) ICE removals of sus-

pected gang members and known or suspected terrorists; (5) positive impact on ICE removals from policy initiatives including visa sanctions and diplomatic relations; (6) ICE ERO total book-ins and criminal alien book-ins; and (7) ICE ERO Detainers.

ICE ERO Administrative Arrests

An administrative arrest is the arrest of an alien for a civil violation of U.S. immigration laws, which is subsequently adjudicated by an immigration judge or through other administrative processes. With 158,581 administrative arrests in FY2018, ICE ERO recorded the greatest number of administrative arrests[1] as compared to the two previous fiscal years (depicted below in Figure 1), and the highest number since FY2014. ICE ERO made 15,111 more administrative arrests in FY2018 than in FY2017, representing an 11 percent increase, and a continued upward trend after FY2017's 30 percent increase over FY2016.

Figure 1. FY2016 – FY2018 ERO Administrative Arrests



[1] ERO administrative arrests include all ERO programs. All statistics are attributed to the current program of the processing officer of an enforcement action.

Administrative Arrests of Immigration Violators by Criminality

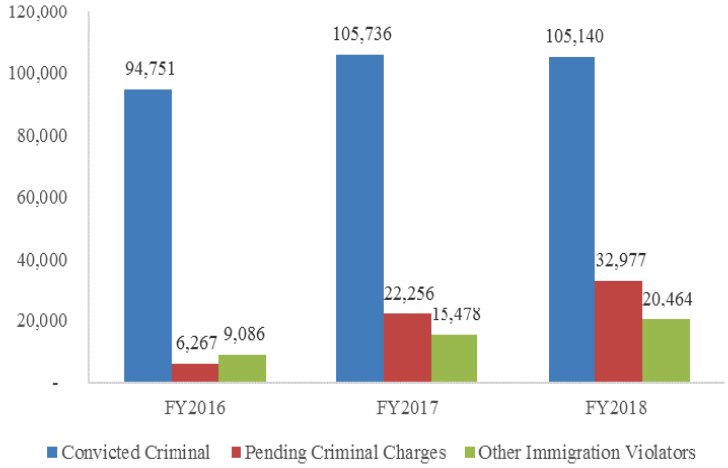
ICE remains committed to directing its enforcement resources to those aliens posing the greatest risk to the safety and security of the United States. By far, the largest percentage of aliens arrested by ICE are convicted criminals[2] (66 percent), followed by immigration violators with pending criminal charges[3] at the time of their arrest (21 percent). In FY2018, ERO arrested 138,117 aliens with criminal histories (convicted criminal and pending criminal charges) for an increase of 10,125 aliens over FY2017. This continued the growth seen in FY2017 when ERO arrested 26,974 more aliens with criminal histories than in FY2016 for a 27 percent gain. While the arrests of convicted criminals remained relatively level from FY 2017 to FY2018 at 105,736 and 105,140 respectively, administrative arrests with pending criminal charges increased by 48 percent. This continues the upward trend seen in FY2017, where arrests with pending charges increased by 255 percent over FY2016. Figure 2 provides a breakdown of FY2016, FY2017, and FY2018 administrative arrests by criminality.

---

[2] Immigration violators with a criminal conviction entered into ICE systems of record at the time of the enforcement action.

[3] Immigration violators with pending criminal charges entered into ICE system of record at the time of the enforcement action.

Figure 2. FY2016 – FY2018 ERO Administrative Arrests by Criminality



Below, Table 1 tallies all pending criminal charges and convictions by category for those aliens administratively arrested in FY2018 and lists those categories with at least 1,000 combined charges and convictions present in this population. These figures are representative of the criminal history as it is entered in the ICE system of record for individuals administratively arrested. Each administrative arrest may represent multiple criminal charges and convictions, as many of the aliens arrested by ERO are recidivist criminals.

Table 1. FY2018 Criminal Charges and Convictions for ERO Administrative Arrests

Criminal Charge Category	Criminal Charges	Criminal Convictions	Total Offenses
Traffic Offenses - DUI	26,100	54,630	**80,730**
Dangerous Drugs	21,476	55,109	**76,585**
Traffic Offenses	30,594	45,610	**76,204**
Immigration	11,917	51,249	**63,166**
Assault	20,766	29,987	**50,753**
Obstructing Judiciary, Congress, Legislature, Etc.	11,189	11,863	**23,052**
Larceny	5,295	15,045	**20,340**
General Crimes	8,415	10,973	**19,388**
Obstructing the Police	5,754	10,155	**15,909**
Fraudulent Activities	4,201	8,661	**12,862**
Burglary	2,829	9,834	**12,663**
Weapon Offenses	3,672	8,094	**11,766**
Public Peace	4,029	7,236	**11,265**
Invasion of Privacy	2,255	5,090	**7,345**
Sex Offenses (Not Involving Assault or Commercialized Sex)	1,913	4,975	**6,888**
Stolen Vehicle	1,693	4,568	**6,261**
Family Offenses	2,465	3,526	**5,991**
Robbery	1,139	4,423	**5,562**
Sexual Assault	1,610	3,740	**5,350**
Forgery	1,632	3,526	**5,158**
Damage Property	1,872	2,597	**4,469**
Stolen Property	1,335	3,127	**4,462**
Liquor	1,995	2,290	**4,285**
Flight / Escape	1,090	2,264	**3,354**
Kidnapping	791	1,294	**2,085**
Homicide	387	1,641	**2,028**
Health / Safety	522	1,242	**1,764**
Commercialized Sexual Offenses	729	1,010	**1,739**
Threat	583	791	**1,374**

Notes: Immigration crimes include "illegal entry," "illegal reentry," "false claim to U.S. citizenship," and "alien smuggling." "Obstructing Judiciary& Congress& Legislature& Etc.," refers to several related offenses including, but not limited to: Perjury; Contempt; Ob-

structing Justice; Misconduct; Parole and Probation Violations; and Failure to Appear. "General Crimes" include the following National Crime Information Center (NCIC) charges: Conspiracy, Crimes Against Person, Licensing Violation, Money Laundering, Morals—Decency Crimes, Property Crimes, Public Order Crimes, Racketeer Influenced and Corrupt Organizations Act (RICO), and Structuring.

As a result of ERO's enhanced enforcement efforts directed at restoring the integrity of the immigration system, the percentage of administrative arrests of other immigration violators[4] increased from FY2017 (11 percent) to FY2018 (13 percent). Of this population of immigration violators arrested in FY2018, Table 2 shows that 57 percent were processed with a notice to appear[5] while 23 percent were ICE fugitives[6] or subjects who had been previously removed, illegally re-entered the country (a federal felony under 8 U.S.C § 1326) and served an order of reinstatement.[7] Both the number of fugitive and illegal reentry arrests continued a three-

---

[4] "Other Immigration Violators" are immigration violators without any known criminal convictions or pending charges entered into ICE system of record at the time of the enforcement action.

[5] A Notice to Appear (Form I-862) is the charging document that initiates removal proceedings. Charging documents inform aliens of the charges and allegations being lodged against them by ICE.

[6] A fugitive is any alien who has failed to leave the United States following the issuance of a final order of removal, deportation, or exclusion.

[7] Section 241(a)(5) of the Immigration and Nationality Act (INA) provides that DHS may reinstate (without referral to an immigration court) a final order against an alien who illegally reenters the United States after being deported, excluded, or removed from the United States under a final order.

year trend by increasing 19 percent and 9 percent, respectively, in FY2018.

Table 2. FY2016 – FY2018 ERO Administrative Arrests of Other Immigration Violators by Arrest Type[8]

ERO Administrative Arrest Type	FY2016		FY2017		FY2018	
	Arrests	Percentage	Arrests	Percentage	Arrests	Percentage
Other Immigration Violators	**9,086**	**100%**	**15,478**	**100%**	**20,464**	**100%**
Notice to Appear	3,390	37%	7,642	49%	11,570	57%
Fugitives	1,605	18%	2,350	15%	2,791	14%
Reinstatement	758	8%	1,695	11%	1,846	9%
Other	3,333	37%	3,791	24%	4,257	21%

At-Large Arrests

An ERO at-large arrest is conducted in the community, as opposed to a custodial setting such as a prison or jail.[9] While at-large arrests remained consistent, with a 1 percent overall increase from 40,066 in FY2017 to 40,536 in FY2018 (Figure 3), at-large arrests levels remain significantly higher compared to the 30,348 from FY2016. At-large arrests of convicted criminal aliens decreased by 13 percent in FY2018 as shown in Figure 4. However, this group still constitutes the largest proportion of at-large apprehensions (57 percent). Increases year-over-year in at-large arrests of aliens with pending criminal charges (35 percent) and other immigration violators (25 percent) offset the decrease in arrests of convicted criminals. The increased enforcement of these

[8] "Other" types of arrests of Other Immigration Violators include, but are not limited to, arrests for Expedited Removal, Visa

Waiver Program Removal, Administrative Removal, and Voluntary Departure/Removal.

[9] ERO administrative arrests reported as "at-large" include records from all ERO Programs with Arrest Methods of Located, Non-Custodial Arrest, or Probation and Parole.

populations without criminal convictions add to the increases seen in FY2017 for pending criminal charges (213 percent) and other immigration violators (122 percent). Again, this demonstrates ERO's commitment to removing criminal aliens and public safety threats, while still faithfully enforcing the law against all immigration violators.

Figure 3. FY2016 – FY2018 At-Large Administrative Arrests

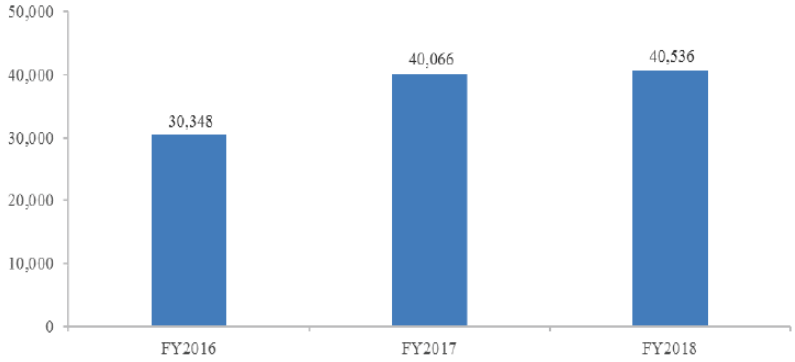
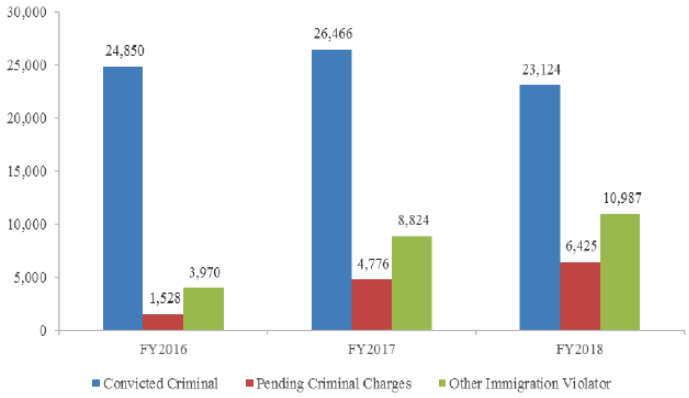


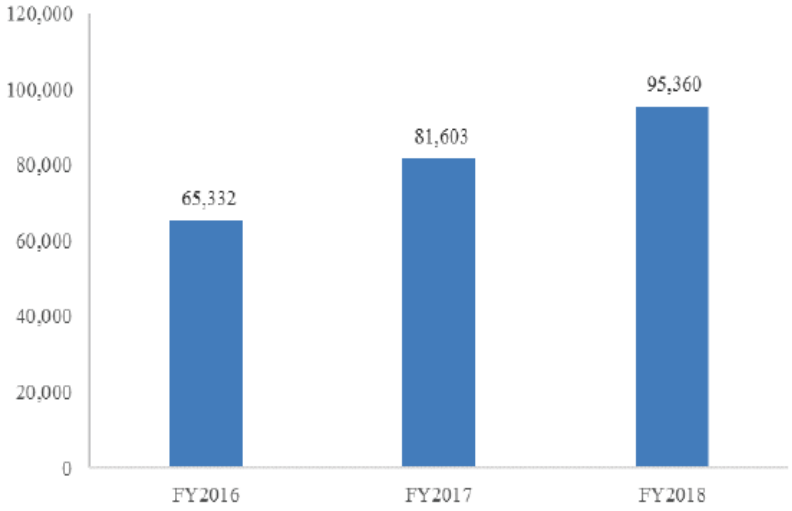
Figure 4. FY2016 – FY2018 At-Large Administrative Arrests by Criminality



Rise in ICE Removals through enhanced Interior Enforcement

The apprehension and removal of immigration violators is central to ICE's mission to enforce U.S. immigration laws. In addition to the 11 percent increase in ERO administrative arrests from FY2017 to FY2018, ERO also made significant strides in removing aliens arrested in the interior of the country (Figure 5). Such removals stem from an ICE arrest and is the ultimate goal of the agency's interior immigration enforcement efforts. Interior ICE removals continued to increase in FY2018, as ICE removed 13,757 more aliens in this category than it did in FY2017, a 17 percent increase (Figure 5). The increases in both ERO administrative arrests and removals based on these interior arrests demonstrate the significant successes ICE achieved during FY2018, as well as the increased efficacy with which the agency carried out its mission.

Figure 5. FY2016 – FY2018 Interior ICE Removals



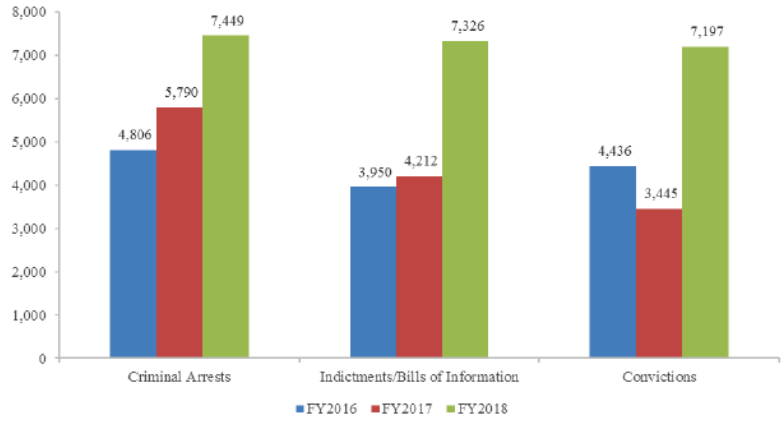
Criminal Arrests and Prosecutions

While ICE ERO showed significant gains in all meaningful enforcement metrics, perhaps none are more impressive nor have made more of an impact on public safety than its prosecutorial efforts. In conjunction with the United States Attorney's Office, ERO enforces violations of criminal immigration law through the effective prosecution of criminal offenders.

In FY2018, ERO's efforts resulted in the prosecutions of offenses which include, but are not limited to: 8 U.S.C § 1325, Illegal Entry into the United States; 8 U.S.C § 1326, Illegal Re-Entry of Removed Alien; 18 U.S.C § 1546, Fraud and Misuse of Visas, Permits and Other Documents; 18 U.S.C § 111, Assaulting and/or Resisting an Officer; and 18 U.S.C § 922(g)(5), Felon in Possession of a Firearm.

In FY2017, ERO made 5,790 criminal arrests resulting in 4,212 indictments or Bills of Information and 3,445 convictions. While these FY2017 numbers showed moderate increases over FY2016 in criminal arrests and indictments or Bills of Information, in FY2018 ERO made 7,449 criminal arrests resulting in 7,326 indictments or Bills of Information and 7,197 convictions. This surge in enforcement efforts directed at criminal aliens and repeat offenders reflects a 29 percent increase in criminal arrests, a 74 percent increase in indictments or Bills of Information, and a 109 percent increase in criminal convictions to reverse a downturn from FY2017 (Figure 6).

Figure 6. FY2016 – FY2018 Prosecution Statistics



Initial Book-ins to ICE Custody

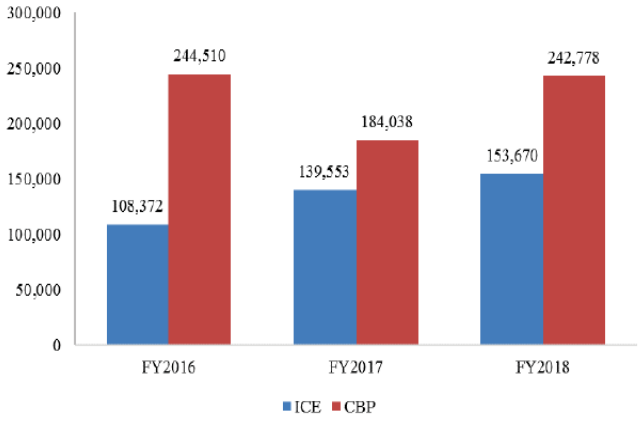
An initial book-in is the first book-in to an ICE detention facility to begin a new detention stay. This population includes aliens initially apprehended by CBP who are transferred to ICE for detention and removal. As seen in Figure 7, while overall ICE initial book-ins went down in FY2017 (323,591) compared to FY2016 (352,882), total book-ins increased in FY2018 to 396,448, illustrating the ongoing surge in illegal border crossings.

Figure 7 shows the number of book-ins resulting from ICE and CBP enforcement efforts for FY2016, FY2017, and FY2018.[10] Notably, book-ins from CBP increased 32 percent in FY2018 to 242,778, while book-ins from ICE arrests continued an upward trend from FY2017's

[10] CBP enforcement efforts represent records that were processed by Border Patrol, Inspections, Inspections-Air, Inspections-Land, and Inspections-Sea.

29 percent increase with an additional increase of 10 percent in FY2018.

Figure 7. FY2016 – FY2018 Initial Book-ins to ICE Detention by Arresting Agency



Detainers

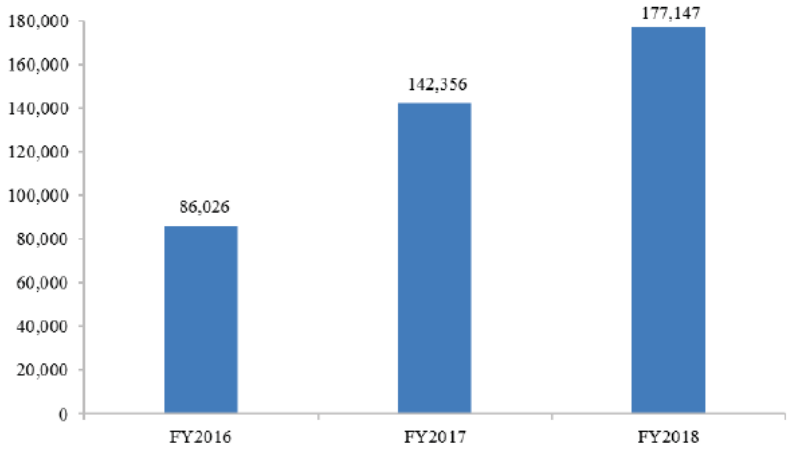
A detainer is a request to the receiving law enforcement agency to both notify DHS as early as practicable before a removable alien is released from criminal custody, and to maintain custody of the alien for a period not to exceed 48 hours beyond the time the alien would otherwise have been released to allow DHS to assume custody for removal purposes. ICE issues detainers to federal, state, and local law enforcement agencies only after establishing probable cause that the subject is an alien who is removable from the United States and to provide notice of ICE's intent to assume custody of a subject detained in that law enforcement agency's custody. The detainer facilitates the custodial transfer of an alien to ICE from another law enforcement agency. This process may reduce potential risks to ICE officers and to the general public by allowing arrests to be made in a controlled, custodial setting as opposed to at-large arrests in the community.

The cooperation ICE receives from other law enforcement agencies is critical to its ability to identify and arrest aliens who pose a risk to public safety or national security. Some jurisdictions do not cooperate with ICE as a matter of state or local law, executive order, judicial rulings, or policy. All detainers issued by ICE are accompanied by either: (1) a properly completed Form I-200 (Warrant for Arrest of Alien) signed by a legally authorized immigration officer; or (2) a properly completed Form I-205 (Warrant of Removal/Deportation) signed by a legally authorized immigration officer, both of which include a determination of probable cause of removability.

Issued Detainers

In FY2018, ERO issued 177,147 detainers—an increase of 24 percent from the 142,356 detainers issued in FY2017 (Figure 8). This number demonstrates the large volume of illegal aliens involved in criminal activity and the public safety risk posed by these aliens, as well as ERO's commitment to taking enforcement action against all illegal aliens it encounters. The rise in detainers issued continues the trend from FY2017's 65 percent growth over FY2016 and shows a consistent focus on interior enforcement, particularly for those aliens involved in criminal activity, despite continued opposition and lack of cooperation from uncooperative jurisdictions.

Figure 8. FY2016 – FY2018 ERO Detainers Issued



ICE Removals

Integral to the integrity of the nation's lawful immigration system is the removal of immigration violators who are illegally present in the country and have received a final order of removal.[11] A removal is defined as the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on such an order.[12] ICE removals include both aliens arrested by ICE and aliens who were apprehended by CBP and turned over to ICE for repatriation efforts.

---

[11] ICE removals include removals and returns where aliens were turned over to ICE for removal efforts. This includes aliens processed for Expedited Removal (ER) or Voluntary Return (VR) that are turned over to ICE for detention. Aliens processed for ER and not detained by ERO or VRs after June 1st, 2013 and not detained by ICE are primarily processed by the U.S. Border Patrol. CBP should be contacted for those statistics.

[12] Ibid.

In FY2018, ICE saw a significant increase in both overall removals as well as removals where ICE was the initial arresting agency.

Figure 9 displays total ICE removals for FY2016, FY2017, and FY2018 and highlights the 13 percent increase from 226,119 to 256,085 in FY2018. After a drop in FY2017 overall removals stemming from historic lows in border crossings, ICE removals rebounded in FY2018, with the previously identified 17 percent increase stemming from both strengthened ICE interior enforcement efforts as well as an 11 percent increase in removals of border apprehensions.

Figure 10 breaks down ICE removals by arresting agency, which demonstrates a 46 percent increase from FY2016 to FY2018 (from 65,332 to 95,360) in removals tied to ICE arrests.

Figure 9. FY2016 – FY2018 ICE Removals

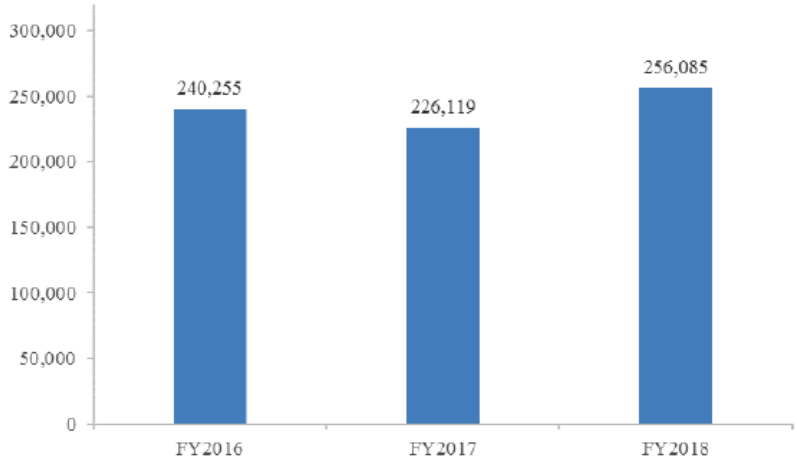


Figure 10. FY2016 – FY2018 ICE Removals by Arresting Agency

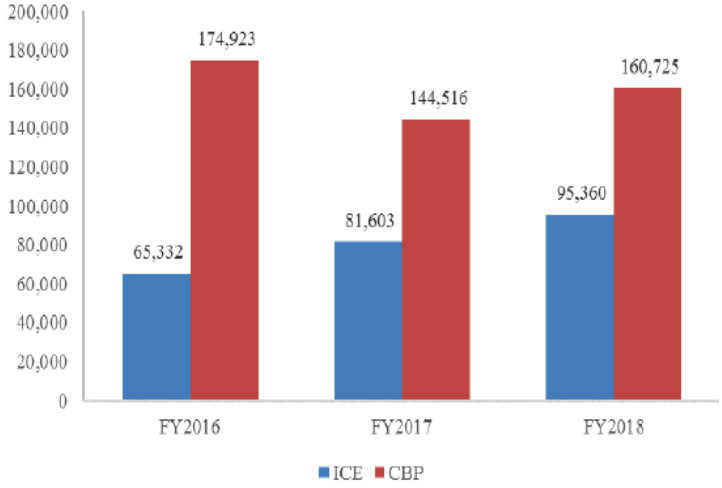
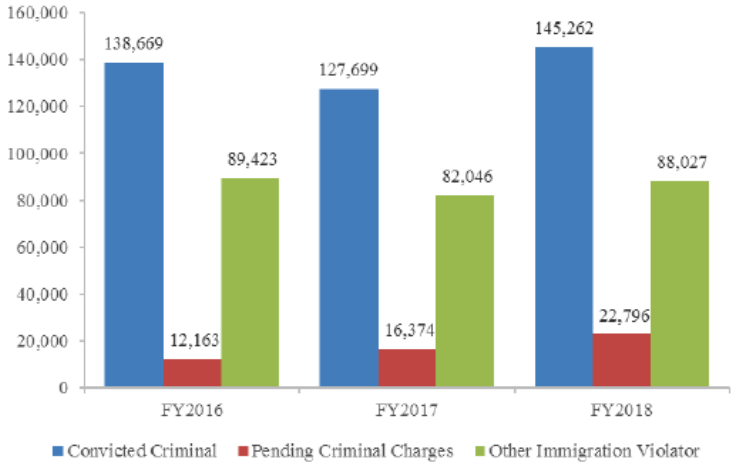


Figure 11 shows the breakdown of ICE removals based on criminal history. ICE removals of convicted criminals followed overall removal trends with a small decrease from 138,669 in FY2016 to 127,699 in FY2017, while rising to 145,262 in FY2018, a 14 percent increase. Over this same period, ICE removals of aliens with pending criminal charges has steadily increased from 12,163 in FY2016 to 16,374 in FY2017 for a 35 percent increase and to 22,796 in FY2018 for another 39 percent increase over the previous year.

Figure 11. FY2016 – FY2018 ICE Removals by Criminality



ICE Removals to Ensure National Security and Public Safety

ICE removals of known or suspected gang members and known or suspected terrorists (KST) are instrumental to ICE's national security and public safety missions, and the agency directs significant resources to identify, locate, arrest, and remove these aliens.

ICE identifies gang members and KSTs by checking an alien's background in federal law enforcement databases, interviews with the aliens, and information received from law enforcement partners. This information is flagged accordingly in ICE's enforcement systems. These populations are not mutually exclusive, as an alien may be flagged as both a known or suspected gang member, and a KST. As seen in Figure 12, ICE removals of known and suspected gang members increased by 162 percent in FY2017, more than doubling from the previous year. These critical removals increased again in FY2018, rising by 9 percent from FY2017. ICE's KST

removals also rose significantly between FY2016 and FY2017 (Figure 13), increasing by 67 percent, while removals of aliens in this group were relatively level in FY2018, with ICE conducting 42 removals compared to 45 in FY2017.

Figure 12. FY2016 – FY2018 ICE Removals of Known or Suspected Gang Members

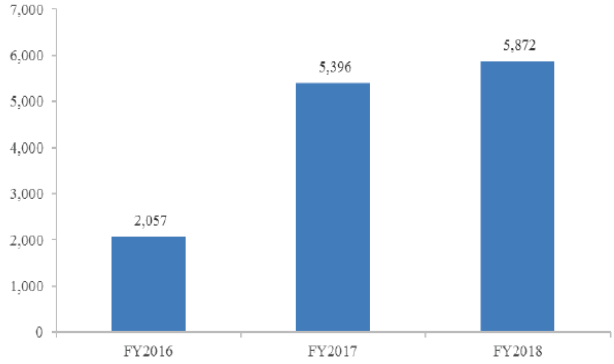
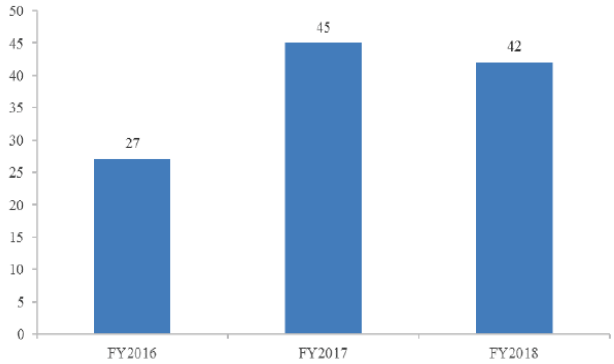


Figure 13. FY2016 – FY2018 ICE Removals of Known or Suspected Terrorists



Removals of USBP Family Unit and Unaccompanied Alien Children Apprehensions

Since the initial surge at the Southwest border SWB) in FY2014, there has been a significant increase in the arrival of both family units (FMUAs) and unaccompanied

alien children (UACs). In FY2018, approximately 50,000 UACs and 107,000 aliens processed as FMUAs were apprehended at the SWB by the U.S. Border Patrol (USBP). These numbers represent a marked increase from FY2017, when approximately 41,000 UACs and 75,000 FMUA were apprehended by USBP. While USBP routinely turns FMUA apprehensions over to ICE for removal proceedings, ICE is severely limited by various laws and judicial actions from detaining family units through the completion of removal proceedings. For UAC apprehensions, DHS is responsible for the transfer of custody to the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances. HHS is similarly limited in their ability to detain UACs through the pendency of their removal proceedings. When these UACs are released by * * *

* * * * *

Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Reasonable Fear of Persecution and Torture Determinations***
Rev. Date	February 13, 2017; Effective as of Feb 27, 2017.
Lesson Description	The purpose of this lesson is to explain when reasonable fear screenings are conducted and how to determine whether the alien has a reasonable fear of persecution or torture using the appropriate standard.
Terminal Performance Objective	When a case is referred to an Asylum Officer to make a "reasonable fear" determination, the Asylum Officer will be able to correctly determine whether the applicant has established a reasonable fear of persecution or a reasonable fear of torture.
Enabling Performance Objectives	1. Indicate the elements of "torture" as defined in the Convention Against Torture and the regulations. (AIL5) (AIL6)

2. Identify the type of harm that constitutes "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6)
3. Describe the circumstances in which a reasonable fear screening is conducted. (APT2)(OK4)(OK6)(OK7)
4. Identify the standard of proof required to establish a reasonable fear of torture. (ACRR8)(AA3)
5. Identify the standard of proof required to establish a reasonable fear of persecution. (ACRR8)(AA3)
6. Examine the applicability of bars to Asylum and withholding of removal in the reasonable fear context. (ACRR3)

Instructional Methods Lecture, practical exercises

Student Materials/ References United Nations. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (see RAIO Training Module, *International Human Rights Law)*

	Ali v. Reno; Mansour v. INS; Matter of S-V-; Matter of G-A-; Sevoian v. Aschcroft; In re J-E-; Matter of Y-L-; Auguste v. Ridge; Ramirez Peyro v. Holder; Roye v. Att'y Gen. of U.S.
	Reasonable Fear forms and templates (are found on the ECN website) Written test
Method of Evaluation	Written test
Background Reading	1. Reasonable Fear Procedures Manual (Draft). 2. Martin, David A. Office of the General Counsel. *Compliance with Article 3 of the Convention against Torture in the cases of removable aliens,* Memorandum to Regional Counsel, District Counsel, All Headquarters Attorneys (Washington, DC: May 14, 1997), 5 p. 3. Lafferty, John, Asylum Division, *Updated Guidance on Reasonable Fear Note-Taking,* Memorandum to All Asylum Office Staff (Washington, DC: May 9, 2014), 2p. plus attachments.

4. Lafferty, John, Asylum Division, *Reasonable Fear Detennination Checklist and Written Analysis,* Memorandum to All Asylum Office Staff (Washington, DC: Aug. 3, 2015), 1p. plus attachments.

5. Langlois, Joseph E. INS Office of International Affairs. *Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999,* Memorandum to Asylum Office Directors, SAOs, AOs (Washington, D.C.: March 18, 1999), 16 p. plus attachments.

6. Langlois, Joseph E. Asylum Division, Office of International Affairs. *Withdrawal of Request of Reasonable Fear Determination,* Memorandum to Asylum Office Directors, et al. (Washington, DC: May 25, 1999), 1p. plus attachment (including updated version of Withdrawal of Request of Reasonable Fear Determination form, 6/13/02 version).

7. Pearson, Michael *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001), 7p. plus attachments.

8. Langlois, Joseph L. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries* (Washington, DC: February 22, 2001), 3p. plus attachments.

9. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

10. Langlois, Joseph E. Asylum Division. *Reasonable Fear*

Procedures Manual, Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

11. Langlois, Joseph E. Asylum Division. *Issuance of Updated Credible Fear and Reasonable Fear Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

12. Ted Kim, Asylum Division. *Implementation of Reasonable Fear Processing Timelines and APSS Guidance,* Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

13. Pearson, Michael *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001), 7p. plus attachments.

14. Langlois, Joseph L. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries* (Washington, DC: February 22, 2001), 3p. plus attachments.

15. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

16. Langlois, Joseph E. Asylum Division. *Reasonable Fear Procedures Manual,* Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

17. Langlois, Joseph E. Asylum Division. *Issuance of Updated Credible Fear and Reasonable Fear Procedures,* Memorandum for

Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

18. Ted Kim, Asylum Division. *Implementation of Reasonable Fear Processing Timelines and APSS Guidance,* Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO. (3)

Knowledge of the Asylum Division jurisdictional authority. (4)

Skill in identifying information required to establish eligibility. (4)

Skill in identifying issues of claim. (4)

Knowledge of relevant policies, procedures, and guidelines of establishing applicant eligibility for reasonable fear of persecution of torture. (4)

Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)

Skill in organizing case and research materials (4)

Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence. (5)

Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

TABLE OF CONTENTS

Presentation	References
I. INTRODUCTION	
This lesson instructs asylum officers on the substantive elements required to establish a reasonable fear of persecution or torture. More detailed instruction on procedures for conducting interviews and processing cases referred for reasonable fear determinations are provided in the Reasonable Fear Procedures Manual and separate procedural memos. For guidance on interviewing techniques to elicit information in a non-adversarial manner, asylum officers should review the RAIO Training Modules: *Interviewing—Introduction to the Non-Adversarial Interview; Interviewing—Eliciting Testimony; and Interviewing—Survivors of Torture and Other Severe Trauma.*	
II. BACKGROUND	
Federal regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers, after a final administrative removal order has been issued under section 238(b) of the Immigration and Nationality Act (INA),	8 C.F.R. § 208.31; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,*

or after a prior order of removal, exclusion, or deportation has been reinstated under section 241(a)(5) of the INA. These are cases in which an individual ordinarily is removed without being placed in removal proceedings before an immigration judge.

Congress has provided for special removal processes for certain aliens who are not eligible for any form of relief from removal. At the same time, however, obligations under Article 33 of the *Refugee Convention relating to the Status of Refugees* and Article 3 of *the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* ("Convention Against Torture", "the Convention", or "CAT") still apply in these cases. Therefore, withholding of removal under either section 241(b)(3) of the INA or under the regulations implementing the Convention Against Torture may still be available in these cases. Withholding of removal is not considered to be a form of relief from removal, because it is specifically limited to the country where the individual is at risk and does not prohibit the individual's removal

64 Fed. Reg. 8478 (Feb. 19, 1999).

from the United States to a country other than the country where the individual is at risk.

The purpose of the reasonable fear determination is to ensure compliance with U.S. treaty obligations not to return a person to a country where the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition, or where person would be tortured, and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to streamlined removal proceedings.

These treaty obligations are based on Article 33 of the *1951 Convention relating to the Status of Refugees;* and Article 3 of the Convention the Against Torture.

Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims.

III. JURISDICTION

See Reasonable Fear Procedures Manual (Draft).

A. Reinstatement under Section 241(a)(5) of the INA

1. Reinstatement of Prior Order — INA § 241(a)(5); 8 C.F.R. § 241.8.

   Section 241(a)(5) of the INA requires DHS to reinstate a prior order of exclusion, deportation, or removal, if a person enters the United States illegally after having been removed, or after having left the United States after the expiration of an allotted period of voluntary departure, giving effect to an order of exclusion, deportation, or removal.

   Once a prior order has been reinstated under this provision, the individual is not permitted to apply for Asylum or any other relief under the INA. However, that person may apply for withholding of removal under section 24l(b)(3) of the INA (based on a threat to life or freedom on account

of a protected characteristic in the refugee definition) and withholding of removal or deferral of removal under the Convention Against Torture.

There are certain restrictions on issuing a reinstatement order to people who may qualify to apply for NACARA 203 pursuant to the Legal Immigration Family Equity Act (LIFE). The LIFE amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act."

Langlois, Joseph E. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 22, 2001).

Pearson, Michael. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 24I (a)(5) (Reinstatement) to NACARA 203*

Beneficiaries (Washington, DC: February 23, 2001).

In all cases, section 241(a)(5) applies retroactively to all prior removals, regardless of the date of the alien's illegal reentry. There are other issues that may affect the validity of a reinstated prior order, such as questions concerning whether the applicant's departure executed a final order of removal. An Asylum Prescreening Officer (APSO) who is unsure about the validity of a reinstated prior removal order should consult the Reasonable Fear Procedures Manual, a supervisor, or the Headquarters Quality Assurance Branch.

See Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

Note: In the Fifth Circuit, an individual's departure from the U.S. after issuance of an NTA, but prior to the order of removal, does not strip an immigration judge of jurisdiction to order that individual removed; thus, that individual can be subject to reinstatement if previously ordered removed in absentia. *See U.S. v Ramirez-Carcamo*, 559 F.3d 384 (5th Cir. 2009).

2. Referral to Asylum Officer

   If a person subject to reinstatement of a prior order of removal expresses a fear of return to the intended country of removal, the DHS officer must refer the case to an asylum officer for a reasonable fear determination, after the prior order has been reinstated.

   8 C.F.R. §§ 208.31(a)-(b), 241.8(e).

3. Country of Removal

   Form 1-871, *Notice of Intent/Decision to Reinstate Prior Order* does not designate the country where DHS intends to remove the alien. Depending on which removal order is being reinstated under INA § 241(a)(5), that order may or may not designate a country of removal. For example, Form 1-860, *Notice and Order of Expedited Removal,* does not indicate a country of removal, but an IJ order of removal resulting from section 240 proceedings does designate a country of removal. Regardless of which type of prior order is being reinstated, DHS must indicate

where it proposes to remove the alien in order for the APSO to determine if the alien has a reasonable fear of persecution or torture in that particular country.

The asylum officer need only explore the person's fear with respect to the countries designated or the countries proposed. For example, if the applicant was previously ordered removed to country X, but is now claiming to be a citizen of country Y, the asylum officer should explore the person's fear with respect to both countries. If the person expresses a fear of return to any other country, the officer should memorialize it in the file to ensure that the fear is explored should DHS ever contemplate removing the person to that other country.

B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)

1. DHS removal order Under certain circumstances, DHS may issue an order ofremoval if DHS determines that a person is deportable under section 237(a)(2)(A)(iii) of the INA (convicted by final judgment of an aggravated felony after having been admitted to the U.S.). This means that the person may be removed without removal proceedings before an immigration judge.	INA § 238(b).
2. Referral to an asylum officer If a person who has been ordered removed by DHS pursuant to section 238(b) of the INA expresses a fear of persecution or torture, that person must be referred to an asylum officer for a reasonable fear determination.	8 C.F.R. §§ 208.31(a)-(b), 238.1(f)(3). Note that regulations require the DHS to give notice of the right to request withholding of removal to a particular country, if the person ordered removed fears persecution or torture in that
3. Country of Removal The removal order under section 238(b) should designate a country of	

removal, and in some cases, will designate an alternative country.

country. 8 C.F.R. § 238.1(b)(2)(i).

IV. DEFINITION OF "REASONABLE FEAR"

Regulations define "reasonable fear of persecution or torture" as follows:

8 C.F.R. § 208.31(c).

> The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

A few points to note, which are discussed in greater detail

later in the lesson, are the following:

1. The "reasonable possibility" standard is the same standard required to establish eligibility for asylum (the "well-founded fear" standard).

2. Like asylum, there is an "on account of" requirement necessary to establish reasonable fear of *persecution:* the persecution must be on account of a protected characteristic in the refugee definition.

3. There is no "on account of" requirement necessary to establish a reasonable fear of *torture.*

4. Mandatory and discretionary bars are not considered in a determination of reasonable fear of *persecution* or reasonable fear of *torture.*

8 C.F.R. § 208.31(c); Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

V. STANDARD OF PROOF

The standard of proof to establish "reasonable fear of persecution or torture" is the

See RAIO Training Modules, *Well-Founded*

"reasonable possibility" standard. This is the same standard required to establish a "well-founded fear" of persecution in the asylum context. The "reasonable possibility" standard is lower than the "more likely than not standard" required to establish eligibility for withholding of removal. It is higher than the standard of proof required to establish a "credible fear" of persecution. The standard of proof to establish a "credible fear" of persecution or torture is whether there is a significant possibility of establishing eligibility for asylum or protection under the Convention Against Torture before an immigration judge.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, the precedent for the Circuit in which the applicant resides is used in determining whether the applicant has a reasonable fear of persecution or torture. Note that this differs from the credible

Fear and *Evidence*.

fear context in which the Circuit interpretation most favorable to the applicant is used.

VI. IDENTITY

The applicant must be able to credibly establish his or her identity by a preponderance of the evidence. In many cases an applicant will not have documentary proof of identity or nationality. However credible testimony alone can establish identity and nationality. Documents such as birth certificates and passports are accepted into evidence if available. The officer may also consider information provided by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP).

See RAIO Training Module, *Refugee Definition*.

VII. PRIOR DETERMINATIONS ON THE MERTIS

An adjudicator or immigration judge previously may have made a determination on the merits of the claim. This is most common .in the case of an applicant who is subject to reinstatement of a prior order. For example the appli-

cant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge and the immigration judge may have made a determination on the merits that the applicant was ineligible.

The APSO must explore the applicant s claim according deference to the prior determination unless there is clear error in the prior determination. The officer should also inquire as to whether there are any changed circumstances that would otherwise affect the applicant's eligibility.

VIII. CREDIBILITY

A. Credibility Standard

In making a reasonable fear determination the asylum officer must evaluate whether the applicant's testimony is credible.

The asylum officer should assess the credibility of the assertions underlying the applicant s claim, considering the totality of the

circumstances and all relevant factors.

The U.S. Supreme Court has held that to properly consider the totality of the circumstances, "the whole picture . . . must be taken into account." The Board of Immigration Appeals (BIA) has interpreted this to include taking into account the whole of the applicant's testimony as well as the individual circumstances of each applicant.

United States v. Cortez, 449 U.S. 411 417 (1981).

See RAIO Training Module, *Credibility; see also Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995) and *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Reasonable Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*

a. The asylum officer must gather sufficient information to determine whether the alien has a reasonable fear of persecution or torture. The applicant's credibility should be evaluated (1) only after all information is elicited and (2) in

light of "the totality of the circumstances, and all relevant factors."

b. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

c. The applicant's ability or inability to provide detailed descriptions of the main points of the claim is critical to the credibility evaluation. The applicant's willingness and ability to provide those descriptions may be directly related to the asylum officer's skill at placing the applicant at ease and eliciting all the information necessary to make a

proper decision. An asylum officer should be cognizant of the fact that an applicant's ability to provide such descriptions may be impacted by the context and nature of the reasonable fear screening process.

2. Properly Identifying and Probing Credibility Concerns During the Reasonable Fear Interview

   a. *Identifying Credibility Concerns*

      In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: *Credibility* and *Evidence.*

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. These include: internal consistency, external consistency, plausibility, demeanor, candor, and responsiveness.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. In order to rely on "lack of detail" as a credibility factor, however, asylum officers must pose questions regarding the type of detail sought.

While demeanor, candor, responsiveness, and detail provided are to be taken into account in the reasonable fear context

when making a credibility determination, an adjudicator must take into account cross-cultural factors, effects of trauma, and the nature of the reasonable fear interview process—including detention, relatively brief and often telephonic interviews, etc.—when evaluating these factors in the reasonable fear context.

b. *Informing the Applicant of the Concern and Giving the Applicant an Opportunity to Explain*

When credibility concerns present themselves during the course of the reasonable fear interview, the applicant must be given an opportunity to address and explain them. The asylum officer must follow up on all

credibility concerns by making the applicant aware of each portion of the testimony, or his or her conduct, that raises credibility concerns, and the reasons the applicant's credibility is in question. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

C. Assessing Credibility in Reasonable Fear when Making a Reasonable Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors.

2. When considering the totality of the circumstances in determining whether the assertions underlying the applicants claim are credible, the following factors must be considered as they

See also RAIO Training Module, *Interviewing-Survivors of Torture*; RAIO Training Module, *Interviewing-Working with an Interpreter*.

Asylum officers must ensure that

may impact an applicant's ability to present his or her claim:

(i) trauma the applicant has endured;

(ii) passage of a significant amount of time since the described events occurred;

(iii) certain cultural factors, and the challenges inherent in cross-cultural communication;

(iv) detention of the applicant;

(v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other differences that may affect the objectivity of the interpreter or the applicant's comfort level; and unfamiliarity with speakerphone technology, the use of an interpreter who is not trained to work with persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a particular social group, or political opinion are not used as interpreters. *See International Religious Freedom Act of 1998*, 22 U.S.C. § 6473(a); RAIO Training Module, *IRFA (International Religious Freedom Act)*.

terpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

3. The asylum officer must have followed up on all credibility concerns during the interview by making the applicant aware of each concern, and the reasons the applicant's testimony is in question. The applicant must have been given an opportunity to address and explain all such concerns during the reasonable interview.

4. Generally, trivial or minor credibility concerns in and of themselves will not be sufficient to find an applicant not credible.

   Nonetheless, on occasion such credibility concerns may be sufficient to support a negative reasonable fear determination considering the totality of the circumstances and all relevant factors. Such concerns should only be the basis of a

negative determination if the officer attempted to elicit sufficient testimony, and the concerns were not adequately resolved by the applicant during the reasonable fear interview.

5. The officer should compare the applicant's testimony with any prior testimony and consider any prior credibility findings. The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination that the claim was or was not credible. It is important that the asylum officer ask the individual about any inconsistencies between prior testimony and the testimony provided

at the reasonable fear interview.

In any case in which the asylum officer's credibility determination differs from the credibility determination previously reached by another adjudicator on the same allegations, the asylum officer must provide a sound explanation and support for the different finding.

6. All reasonable explanations must be considered when assessing the applicant's credibility. The asylum officer need not credit an unreasonable explanation.

   If, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the officer finds that the applicant has provided a reasonable explanation, a positive credibility determination may be appropriate when considering the totality of the circumstances and all relevant factors.

If, however, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the applicant fails to provide an explanation, or the officer finds that the applicant did not provide a reasonable explanation, a negative credibility determination based upon the totality of the circumstances and all relevant factors will generally be appropriate.

D. Documenting a Credibility Determination

1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail or

other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the reasonable fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information. Unresolved credibility issues should not form the basis of a negative credibility determination.

IX. ESTABLISIDNG A REASONABLE FEAR OF PERSECUTION

To establish a reasonable fear of persecution, the applicant must show that there is a reasonable possibility he or she will suffer persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. As explained above,

this is the same standard asylum officers use in evaluating whether an applicant is eligible for asylum. However, the reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish eligibility for withholding of removal in Immigration Court.

In contrast to an asylum adjudication, the APSO may not exercise discretion in making a positive or negative reasonable fear determination and may not consider the applicability of any mandatory bars that may apply if the applicant is permitted to apply for withholding of removal before the immigration judge.

A. Persecution

The harm the applicant fears must constitute persecution. The determination of whether the harm constitutes persecution for purposes of the reasonable fear determination is no different from the

See Discussion of "persecution" in RAIO Training Module, *Persecution*.

determination in the affirmative asylum context. This means that the harm must be serious enough to be considered persecution, as described in case law, the *UNHCR Handbook*, and USCIS policy guidance. Note that this is different from the evaluation of persecution in the credible fear context, where the applicant need only demonstrate a significant possibility that he or she could establish that the feared harm is serious enough to constitute persecution.

B. Nexus to a Protected Characteristic

8 C.F.R. § 208.31(c).

As in the asylum context, the applicant must establish that the feared harm is on account of a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). This means the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the

applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition.

The applicant does not bear the burden of establishing the persecutor's exact motivation. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

Although the applicant bears the burden of proof to establish a nexus between the harm and the protected ground, asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Evidence of motive can be either direct or circumstantial. Reasonable inferences regarding the motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin and

any relevant country of origin information, especially if the applicant is having difficulty answering questions regarding motivation.

There is no requirement that the persecutor be motivated only by the protected belief of characteristic of the applicant. As long as there is reasonable possibility that at least one central reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic, the applicant may establish the harm is "on account of" a protected characteristic in the reasonable fear context.

C. Past Persecution

1. Presumption of future persecution

   If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of persecution in the future on the basis of the original claim. This presumption may be

See 8 C.F.R. § 208.16(b)(1)(i).

overcome if a preponderance of the evidence establishes that,

a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all circumstances, it would be reasonable to expect the applicant to do so.

2. Severe past persecution and other serious harm

A finding of reasonable fear of persecution cannot be based on past persecution alone, in the absence of a reasonable possibility of future persecution. A reasonable fear of persecution may be found only if there is a reasonable possibility the applicant

In contrast, a grant of asylum may be based on the finding that there are compelling reasons for the applicant's unwillingness to return arising from the severity

will be persecuted in the future, regardless of the severity of the past persecution or the likelihood that the applicant will face other serious harm upon return. This is because withholding of removal is accorded only to provide protection against future persecution and may not be granted without a likelihood of future persecution.

As noted above, a finding of past persecution raises the presumption that the applicant's fear of future persecution is reasonable.

of past persecution or where the applicant establishes that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country, even if there is no longer a reasonable possibility the applicant would be persecuted in the future. 8 C.F.R. § 208.13(b)(1)(iii).

D. Internal Relocation

As in the asylum context, the evidence must establish that the applicant could not avoid future persecution by relocating within the country of feared persecution or that, under all the circumstances, it would be unreasonable to expect him or her to do so. In cases in which the persecutor is a government or is government-sponsored, or the applicant has established

See Discussion of internal relocation in RAIO Training Module, *Well-Founded Fear*; *see also* 8 C.F.R. § 208.16(b)(3).

persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

E. Mandatory Bars

Asylum officers may *not* take into consideration mandatory bars to withholding of removal when making reasonable fear of persecution determinations.

8 C.F.R. § 208.31(c)

See Reasonable Fear Procedures Manual (Draft).

If the asylum officer finds that there is a reasonable possibility the applicant would suffer persecution on account of a protected characteristic, the asylum officer must refer the case to the immigration judge, regardless of whether the person has committed an aggravated felony, has persecuted others, or is subject to any other mandatory bars to withholding of removal.

However, during the interview the officer must develop the record fully by exploring whether the applicant may be subject to a mandatory bar.

If the officer identifies a potential bar issue, the officer should consult a supervisory officer and follow procedures outlined in the Reasonable Fear Procedures Manual on "flagging" such information for the hearing.

The immigration judge will consider mandatory bars in deciding whether the applicant is eligible for withholding of removal under section 241(b)(3) of the Act or CAT.

8 C.F.R. §§ 208.16(c)(4)(d). Please note there are no bars to deferral of removal under CAT.

The following mandatory bars apply to withholding of removal under section 241(b)(3)(A) for cases commenced April 1, 1997 or later:

(1) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the

INA § 241(b)(3)(B); 8 C.F.R. §§ 208.16(d)(2), (d)(3) (for applications for withholding of deportation adjudicated in

individual's race, religion, nationality, membership in a particular social group, or political opinion;

(2) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(3) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;

(4) there are reasonable grounds to believe that the alien is a danger to the security of the United States (including anyone described in subparagraph (B) or (F) of section 212(a)(3)); or

(5) the alien is deportable under Section 237(a)(4)(D) (participated in Nazi persecution, genocide, or the

proceedings commenced prior to April 1, 1997, mandatory denials are found within section 243 (h)(2) of the Act as it appeared prior to that date).

commission of any act of torture or extrajudicial killing. Any alien described in clause (i), (ii), or (iii) of section 212(a)(3)(E) is deportable.)

X. CONVENTION AGAINST TORTURE–BACKGROUND

This section contains a background discussion of the Convention Against Torture, to provide context to the reasonable fear of torture determinations. As a signatory to the Convention Against Torture the United States has an obligation to provide protection where there are substantial grounds to believe that an individual would be in danger of being subjected to torture. Notably, there are no bars to protection under the Convention Against Torture. Torture is an act universally condemned and so repugnant to basic notions of human rights that even individuals who are undeserving of refugee protection, will not be returned to a

country where they are likely to be tortured. An overview of the Convention Against Torture may be found in the RAIO Module: *International Human Rights Law*.

A. U.S. Ratification of the Convention and Implementing Legislation

The United States Senate ratified the Convention Against Torture on October 27, 1990. President Clinton then deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994, and the Convention entered into force for the United States thirty days later, on November 20, 1994.

Recognizing that a treaty is considered "law of the land" under the United States Constitution, the Executive Branch took steps to ensure that the United States was in compliance with its treaty obli-

Similarly, the Department of State considered whether a person would be subject to torture when addressing requests for extradition.

gations, even though Congress had not yet enacted implementing legislation. The INS adopted an informal process to evaluate whether a person who feared torture and was subject to a final order of deportation, exclusion, or removal would be tortured in the country to which the person would be removed. The United States relied on this informal process to ensure compliance with Article 3 in immigration cases until the CAT rule was promulgated.

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to implement in immigration cases the United States' obligations under Article 3 of the Convention Against Torture, subject to any reservations, understandings, and declarations contained in the United States Senate resolution to ratify the Convention.

Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998).

Pursuant to the statutory directive, the Department of Justice regulations provide a mechanism for individuals fearing torture to seek protection under Article 3 of the Convention in immigration cases. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the "reasonable fear" screening process. *See* 8 C.F.R. §§ 208.16-208.18.

B. Article 3

1. *Non-Refoulement*

Article 3 of the Convention provides:

> No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This provision does not prevent the removal of a person to a country where he or she would

not be in danger of being subjected to torture. Like withholding of removal under section 241(b)(3) of the INA, which is based on Article 33 of the Convention relating to the Status of Refugees, protection under Article 3 of the Convention Against Torture is country-specific.

In addition, this obligation does not prevent the United States from removing a person to a country at any time if conditions have changed such that it no longer is likely that the individual would be tortured there.

See 8 C.F.R. §§ 208.17(d)-(f), 208.24 for procedures for terminating withholding and deferral of removal.

2. U.S. Ratification Document

When ratifying the Convention Against Torture, the U.S. Senate adopted a series of reservations, understandings and declarations, which modify the U.S. obligations under

Article 3, as described in the section below on the Convention definition of torture. These reservations, understandings, and declarations are part of the substantive standards that are binding on the United States and are reflected in the implementing regulations.

XI. DEFINITION OF TORTURE

Torture has been defined in a variety of documents and in legislation unrelated to the Convention Against Torture. However, only an act that falls within the definition described in Article 1 of the Convention, as modified by the U.S. ratification document may be considered "torture" for purposes of making a reasonable fear of torture determination. These substantive standards are incorporated in the regulations at 8 C.F.R. § 208.18(a) (1999).

See RAIO Training Module, *Interviewing Survivors of Torture and Other Severe Trauma*, background reading associated with that lesson; Alien Tort Claims Act, codified at 28 U.S.C. § 1350.

Article 1 of the Convention defines torture as:

See also 8 C.F.R. §§ 208.18(a)(1), (3).

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate adopted several important "understandings" regarding the definition of torture, which are included in the implementing regulations and are discussed below. These "understandings" are binding on adjudicators interpreting the definition of torture.

136 Cong. Rec. S17429 at S17486-92 (daily ed. October 27, 1990); 8 C.F.R. § 208.18(a).

A. Identity of Torturer

The torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Convention Against Torture, Article 1.

1. Public official

The torturer or the person who acquiesces in the torture must be a public official or other person acting in an official capacity in order to invoke Article 3 Convention Against Torture protection. A non-governmental actor could be found to have committed torture within the meaning of the Convention *only if* that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in an official capacity.

Convention against Torture, Article 1. *See also* Committee on Foreign Relations Report, Convention Against Torture, Exec. Report 101-30, August 30, 1990 (hereinafter "Committee Report"), p. 14; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478, 8483 (Feb. 19, 1999); *Ali v. Reno,* 237 F.3d 591, 597 (6th Cir. 2001).

The phrase "acting in an official capacity" modifies both "public official" and "other person," such that a public official must be "acting in an official capacity" to satisfy the state action element of the torture definition.

Matter of Y-L-, A-G-, R-S-R, 23 I&N Dec. 270 (AG 2002); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)

When a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition is not satisfied. On this topic, the Second Circuit provided that, "[a]s two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons."

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).

To determine whether a public official is acting in a private capacity or in an official capacity, APSOs must elicit testimony to determine whether the public official was acting within the scope of their authority and/or under color of law. A determination that the public official is acting under either of the scope of their authority or under color of law would result in a determination that the public official was acting "in an official capacity".

Although the regulation does not define "acting in an official capacity," the Attorney General equated the term to mean "under color of law" as interpreted by cases under the civil rights act.

See Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001); *Ahmed v. Mukasey,* 300 Fed. Appx. 324 (5th Cir. 2008) (unpublished).

Thus, a public official is acting in an official ca-

Ramirez Peyro v. Holder, 574 F.3d

pacity when "he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law."

893 (8th Cir. 2009).

To establish whether a public official is acting in an official capacity (i.e. under the color of law), the applicant must establish a nexus between the public official's authority and the harmful conduct inflicted on the applicant by the public official. The Eighth Circuit addressed "acting in an official capacity" in its decision in *Ramirez Peyro v. Holder.* The court indicated such an inquiry is fact intensive and includes considerations like "whether the officers are on duty and in uniform, the motivation behind the officer's actions and whether the officers had access to the victim because of

See U.S. v. Colbert, 172 F.3d 594, 596-597 (8th Cir 1999); *West v. Atkins,* 487 U.S. 42, 49 (1988).

their positions, among others." *Id.*

Following the guidance provided in *Ramirez Peyro v. Holder*, the Fifth Circuit also addressed "acting in an official capacity" by positing "[w]e have recognized on numerous occasions that acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives." Citing directly to *Ramirez Peyro v. Holder*, the Fifth Circuit determined that "proving action in an officer's official capacity 'does not require that the public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power. Rather . . . the use of official authority by low-level

Mamorato v. Holder, 376 Fed. Appx. 380, 385 (5th Cir. 2010) (unpublished).

officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.'"

In this context, the court points to two published cases as examples. First, *Bennett v. Pippin,* 74 F.3d 578, 589 (5th Cir. 1996), in which the court found "that an officer's action was 'under color of state law' where a sheriff raped a woman and used his position to ascertain when her husband would be home and threatened to have her thrown in jail if she refused." The Fifth Circuit compared this case to *Delcambre v. Delcambre,* 635 F.2d 407, 408 (5th Cir. 1981) (per curiam), in which the court found "no action under color of law where a police chief assaulted his sister-in-law over personal

See also Miah v. Mukasey, 519 F. 3rd 784 (8th Cir. 2008) (elected official was not acting in his official capacity in his rogue efforts to take control of others property).

arguments about family matters, but did not threaten her with his power to arrest."

As *Marmorato v. Holder* illustrates with its citation to *Bennett v. Pippin*, an official need not be acting in the scope of their authority to be acting under color of law.

It is unsettled whether an organization that exercises power on behalf of the people subjected to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a "government actor." It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control.

2. Acquiescence

When the "torturer" is not a public official or

See Matter of S-V-, Int. Dec. 3430 (BIA 2000) (concurring opinion); *see also Habtemichael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004) (remanding for agency determination as to the extent of the Eritrean People's Liberation Front's (EPLF) control over parts of Ethiopia during the period when the applicant was conscripted by the EPLF);

other individual acting in an official capacity, a claim under the *Convention Against Torture* only arises if a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

D-Muhumed v. U.S. Atty. Gen., 388 F.3d 814 (11th Cir. 2004) (denying protection under CAT because "Somalia currently has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power."); *but see* the Committee Against Torture decision in *Elmi v. Australia*, Comm. No. 120/1998 (1998) (finding that warring factions in Somalia fall within the phrase "public official(s) or other person(s) acting in an official capacity). Note that the United

	Nations Committee Against Torture a monitoring body for the implementation and observance of the Convention Against Torture. The U.S. recognizes the Committee, but does not recognize its competence to consider cases. The BIA considers the Committee's opinions to be advisory only. *See Matter of S-V-*, I&N Dec. 22 I&N Dec. 1306, 1313 n.1 (BIA 2000).
A public official cannot be said to have "acquiesced" in torture unless, prior to the activity constituting torture, the official was "aware" of such activity and thereafter breached a legal re-	8 C.F.R. § 208.18(a)(7).

sponsibility to intervene to prevent the activity.

The Senate ratification history explains that the term "awareness" was used to clarify that government acquiescence may be established by evidence of *either* actual knowledge *or* willful blindness. "Willful blindness" imputes knowledge to a government official who has a duty to prevent misconduct and "deliberately closes his eyes to what would otherwise have been obvious to him."

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); Committee Report (Aug. 30, 1990), p. 9; *see also* S. Hrg 101-718 (July 30, 1990), *Statement of Mark Richard, Dep. Asst. Attorney General, DOJ Criminal Division*, at 14.

In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narcotraffickers who were not attached to the government, the Board of Immigration Appeals (BIA) indicated that more than awareness or inability to control is

Matter of S-V-, Int. Dec. 3430 (BIA 2000).

required. The BIA held that for acquiescence to take place the government officials must be "willfully accepting" of the torturous activity of the non-governmental actor.

Several federal circuit courts of appeals have rejected the BIA's "willful acceptance" phrase in favor of the more precise "willful blindness" language that appears in the Senate's ratification history.

For purposes of threshold reasonable fear screenings, asylum officers must use the *willful blindness* standard.

Pieschacon-Villegas v. Att'y Gen. of U.S., 671 F.3d 303 (3d Cir. 2011); *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *Diaz v. Holder*, 2012 WL 5359295 (10th Cir. 2012) (unpublished); *Silva-Rengifo v. Atty. Gen. of U.S.*, 473 F.3d 58, 70 (3d Cir. 2007); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240 (4th

Cir. 2004); *Azanor v. Aschcroft,* 364 F.3d 1013 (9th Cir. 2004); *Amir v. Gonzales,* 467 F.3d 921, 922 (6th Cir. 2006); *Zheng v. Ashcroft,* 332 F.3d 1186 (9th Cir. 2003); *Ontunez-Turcios v. Ashcroft,* 303 F.3d 341, 354-55 (5th Cir. 2002); *Ali v. Reno,* 237 F.3d 591, 597 (6th Cir. 2001).

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is "whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens." The court rejected the notion that acquiescence requires a public official's "actual knowledge" and

Zheng v. INS, 332 F.3d 1186 (9th Cir. 2003).
Azanor v. Ashcroft, 364 F.3d 1013, 1020 (9th Cir. 2004).

"willful acceptance." The Ninth Circuit subsequently reaffirmed that the state actor's acquiescence to the torture must be "knowing," whether through actual knowledge or imputed knowledge ("willful blindness"). Both forms of knowledge constitute "awareness."

The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating "torture requires only that government officials know of or remain willfully blind to act and thereafter breach their legal responsibility to prevent it."

a. Relevance of a government's ability to control a non-governmental en-

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (finding that even if the Egyptian police who would carry out the abuse were not acting in an official capacity, "the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain

tity from engaging in acts of torture

The requirement that the torture be inflicted by or at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity is distinct from the "unable or unwilling to protect" standard used in the definition of "refugee".

Although a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under CAT, that inquiry does not turn on a government's ability to control persons or groups engaged in torturous activity.

In *De La Rosa v. Holder* the Second Circuit stated "it is not clear to this Court why

willfully blind to the torture and breach their legal responsibility to prevent it").

Pieschacon v. Attorney General, 671 F.3d 303 (3d Cir. 2011) (quoting from *Silva-Rengifo v. Att'y Gen. of U.S.,* 473 F.3d 58, 65 (3d Cir. 2007)); *see also Gomez v. Gonzales,* 447 F.3d 343 (C.A.5, 2006); *Reyes-Sanchez v. U.S. Atty. Gen.,* 369 F.3d 1239 (C.A.11, 2004) ("That the police did not catch the culprits does not mean that they acquiesced in the harm.").

De La. Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010).

the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

In a similar case, the Third Circuit reman- *Pieschacon-Villegas v. Attorney General*, 671

ded to the BIA, indicating that the fact that the government of Colombia was engaged in war against the FARC, it did not in itself establish that it could not be consenting or acquiescing to torture by members of the FARC.	F.3d 303 (3d Cir. 2011); *Gomez-Zuluaga v. Attorney General*, 527 F.3d 330 (3d Cir. 2008).
Evidence that private actors have general support, without more, in some sectors of the government may be insufficient to establish that the officials would acquiesce to torture by the private actors. Thus, a Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.	*Ontunez-Tursios;* 303 F.3d 341 (5th Cir. 2002).

There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture. For example, in *Ali v. Reno,* the Danish police arrested and incarcerated the male relatives of a domestic violence victim while charges against them were pending. Only after the victim requested that the male relatives not be punished were they released.

Ali v. Reno, 237 F.3d 591, 598 (6th Cir. 2001).

In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that "[u]se of official authority by low level officials, such a police officers, can work to place actions under the color of law even when they act without state sanction."

574 F.3d 893, 901 (8th Cir. 2009).

Therefore, even if country conditions show that a national government is fighting against corruption, that fact may not mean there is no acquiescence/consent by a local public official to torture. The Fifth Circuit visited this issue in *Marmorato v. Holder*, in which the court found that the immigration judge misinterpreted "in official capacity" when it found that the *consent or acquiescence* standard could never be satisfied in a country like Italy, but only in nations with "rogue governments" with "no regard for human rights or civil rights. The Fifth Circuit rejected "any notion that a petitioner's entitlement to relief depends upon whether his country of removal could be included on some hypothetical list of 'rogue' nations."

The Convention Against Torture is designed to protect against future instances of torture. Therefore, the asylum officer should consider whether there is a reasonable possibility that:

See Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that there is no "acquiescence" to torture unless officials know about the torture before it occurs).

1. A public official would have prior knowledge or would willfully turn a blind eye to avoid gaining knowledge of the potential activity constituting torture; and
2. The public official would breach a legal duty to intervene to prevent such activity.

Evidence of how an official or officials have acted in the past (toward the applicant or others similarly situated) may shed light on how the official or officials may act in the future. "Official as well as unofficial country reports are probative evidence and can, by themselves, provide

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

sufficient proof to sustain an alien's burden under the INA ."

B. Torturer's Custody or Control over Individual

The definition of torture applies only to acts directed against persons in the offender's custody or physical control.

8 C.F.R. § 208.18(a)(6); Committee Report, p. 9 (Aug. 30, 1990).

The United States Circuit Court of Appeals for the Ninth Circuit held that an applicant need not demonstrate that he or she would likely face torture while in a public official's custody or physical control. It is enough that the alien would likely face torture while under private individuals' exclusive custody or control if such torture were to take place with consent or acquiescence of a public official or other individual acting in an official capacity.

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004).

For example, the Seventh Circuit has posited *in dictum* that "[p]robably more often than not the victim of a murder is within the murderer's physical control for at least a

Comollari v. Ashcroft, *378* F.3d 694, 697 (7th Cir. 2004).

short time before the actual killing . . . " However, the court provided "that would not be true if for example the murderer were a sniper or a car bomber".

Pre-custodial police operations or military combat operations are outside the scope of Convention protection.

Establishing whether the act of torture may occur while in the offender's custody or physical control is very fact specific and in practicality it is very difficult to establish. While the applicant bears the burden of establishing "custody or physical control", the burden must be a reasonable one and this element may be established solely by circumstantial evidence.

While the law is unsettled as to the meaning of "in the offender's custody or physical control", when considering this element, APSOs must give applicants the benefit of doubt.

C. Specific Intent

For an act to constitute torture, it must be specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain is not torture under the Convention definition.

8 C.F.R. §§ 208.18(a)(1), (5); *Auguste v. Ridge,* 395 F.3d 123, 146 (3d Cir. 2005); 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). See Committee Report, pp 14, 16.

Where the evidence shows that an applicant may be specifically targeted for punishment that may rise to the level of torture, the harm the applicant faces is specifically intended.

Kang v. Att'y Gen. of the U.S., 611 F.3d 157 (3d Cir. 2010) (distinguishing the facts from those in *Auguste v. Ridge*).

However an act of legitimate self-defense or defense of others would not constitute torture.

Also, harm resulting from poor prison conditions generally will not constitute torture when such conditions were not intended to inflict severe physical or mental pain or suffering.

Matter of J-E-, 23 I&N Dec. 291, 300-01 (BIA 2002); *but see Matter of G-A-*, 23 I&N Dec. 366, 372 (BIA 2002) (finding that where deliberate acts of torture

For example, in *Matter of J-E-* the BIA considered a request

for protection under the *Convention Against Torture* by a Haitian national who claimed that upon his removal to Haiti, as a criminal deportee, he would be detained indefinitely in substandard prison conditions by Haitian authorities. The BIA found that such treatment does not amount to torture where there is no evidence that the authorities are "intentionally and deliberately maintaining such prison conditions in order to inflict torture." Like other elements of the reasonable fear of torture analysis, the evidence establishing specific intent can be circumstantial.

are pervasive and widespread and where authorities use torture as a matter of policy, the specific intent requirement can be satisfied); *see also Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004); *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004).

It is important to analyze the specific facts of each case in order to accurately determine the *specific intent* element. For example, in a case that was very similar to the facts in *Matter of J-E-*, the Eleventh Circuit directed the BIA to consider whether a Haitian criminal deportee, who was mentally ill and infected with the AIDS virus satisfied the *specific intent* element where

Jean-Pierre v. U.S. Attorney General, 500 F.3d 1315 (11th Cir. 2007).

there was evidence that mentally ill detainees with HIV are singled out for forms of punishment that included earboxing (being slapped simultaneously on both ears), beatings with metal rods, and confinement to crawl spaces where detainees cannot stand up was eligible for withholding of removal under the CAT. In distinguishing the facts from *Matter of J-E-*, the court stated that in *J-E-*, the petitioner did not establish that he would be individually and intentionally singled out for harsh treatment and only produced evidence of generalized mistreatment and isolated instances of torture.

Note that, in contrast, when determining asylum eligibility, there is no requirement of specific intent to inflict harm to establish that an act constitutes persecution: "requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought

See Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

to guarantee under the Convention Against Torture."

1. Reasons torture is inflicted

   The Convention definition provides a **non**-exhaustive list of possible reasons torture may be inflicted. The definition states that torture is an act that inflicts severe pain or suffering on a person *for such purposes as:*

   a. obtaining from him or a third person information or a confession,

   b. punishing him for an act he or a third person has committed or is suspected of having committed,

   c. intimidating or coercing him or a third person, or

   d. for any reason based on discrimination of any kind

8 C.F.R. § 208.18(a)(1).

Note: All discrimination is not torture.

2. No nexus to protected characteristic required.

   Unlike the non-return (*non-refoulment*) obligation in

the *Convention relating to the Status of Refugees*, the *Convention Against Torture* does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

D. Degree of Harm

"Torture" requires severe pain or suffering, whether physical or mental. Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

8 C.F.R. § 208.18(a)(1).

8 C.F.R. § 208.18(a)(2).

See Matter of J-E-, 23 I&N Dec. 291 (BIA 2002) (citing to *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978) (discussing the severe nature of torture)).

The Report of the Committee on Foreign Relations, accompanying the transmission of the Convention to the Senate for ratification, explained:

Committee Report, p. 13.

> The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . . " The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

See, RAIO Training Module, *Interviewing-Survivors of Torture and other Severe Trauma*, section *Forms of Torture.*

Types of harm that may be considered torture include, but are not limited to the following:

1. rape and other severe sexual violence;

Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003).

2. application of electric shocks to sensitive parts of the body;
3. sustained, systematic beating;
4. burning;
5. forcing the body into positions that cause extreme pain, such as contorted positions, hanging, or stretching the body beyond normal capacity;
6. forced non-therapeutic administration of drugs; and
7. severe mental pain and suffering.

Matter of G-A-, 23 I&N Dec. 366, 372 (BIA 2002).

Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. In some cases, whether the harm above constitutes torture will depend upon its severity and cumulative effect.

The BIA in *Matter of G-A-* held that treatment that included "suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and . . . severe and repeated beatings

Matter of G-A-, 23 I&N Dec. 366, 370 (BIA 2002).

with cables or other instruments on the back and on the soles of the feet . . . beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness" when intentionally and deliberately inflicted constitutes torture.

E. Mental Pain or Suffering

8 C.F.R. § 208.18(a)(4); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

a. The intentional infliction or threatened infliction of severe physical pain or suffering;

b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

c. The threat of imminent death; or

d. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

F. Lawful Sanctions

Article 1 of the Convention provides that pain or suffering "arising only from, inherent in or incidental to lawful sanctions" does not constitute torture.

8 C.F.R. § 208.18(a)(3).

8. Definition of *lawful sanctions*

"Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the *Convention Against Torture* to prohibit torture."

8 C.F.R. § 208.18(a)(3).

The supplementary information published with the implementing regulations explains that this provision "does not require that, in order to come within the exception, an action must be one that would be authorized by United States law. It must, however, be legitimate, in the sense that a State cannot defeat the purpose of the Convention to prohibit torture."	Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478 (Feb. 19, 1999).
Note that "lawful sanctions" do not include the intentional infliction of severe mental or physical pain during interrogation or incarceration after an arrest that is otherwise based upon legitimate law enforcement considerations.	*See* 8 CFR § 208.18; *Khouzam v. Ashcroft,* 361 F.3d 161 (2d Cir. 2004).
9. Sanctions cannot be used to circumvent the Convention	
A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. In other words, the fact	8 C.F.R. § 208.18(a)(3); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

that a country's law allows a particular act does not preclude a finding that the act constitutes torture.

Example: A State Party's law permits use of electric shocks to elicit information during interrogation. The fact that such treatment is formally permitted by law does not exclude it from the definition of torture.

10. Failure to comply with legal procedures

    Failure to comply with applicable legal procedural rules in imposing sanctions does not *per se* amount to torture. — 8 C.F.R. § 208.18(a)(8).

11. Death penalty

    The Senate's ratification resolution expresses the "understanding" that the *Convention Against Torture* does not prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution. — 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

The supplementary information to the implementing regulations explains,

> "The understanding does not mean . . . that any imposition of the death penalty by a foreign state that fails to satisfy United States constitutional requirements constitutes torture. Any analysis of whether the death penalty is torture in a specific case would be subject to all requirements of the Convention's definition, the Senate's reservations, understandings, and declarations, and the regulatory definitions. Thus, even if imposition of the death penalty would be inconsistent with United States constitutional standards, it would not be torture if it were imposed in a legitimate manner to punish violations of law. Similarly, it would not be torture if it failed to meet any

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478, 8482-83 (Feb. 19, 1999).

other element of the definition of torture."

XII. ESTABLISHING A REASONABLE FEAR OF TORTURE

To establish a reasonable fear of torture, the applicant must show that there is a reasonable possibility the applicant would be subject to torture, as defined in the *Convention Against Torture,* subject to the reasonable, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 C.F.R. §§ 208.31(c), 208.18(a).

A. Torture

In evaluating whether an applicant has established a reasonable fear of torture, the asylum officer must address each of the elements in the torture definition and determine whether there is a *reasonable possibility* that each element is satisfied.

1. Severity of feared harm

Is there a reasonable possibility the applicant will suffer severe pain and suffering?

If the feared harm is mental suffering, does it meet each of the requirements listed in the Senate "understandings," as reflected in the regulations?

2. State action

Is there a reasonable possibility the pain or suffering would be inflicted by or at the instigation of a public official or other person acting in an official capacity?

If not, is there a reasonable possibility the pain or suffering would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity?

3. Custody or physical control

Is there a reasonable possibility the feared harm would be inflicted while the applicant is in the custody or physical control of the offender?

4. Specific intent

Is there a reasonable possibility the feared harm would be specifically intended by the offender to inflict severe physical or mental pain or suffering?

5. Lawful sanctions

Is there a reasonable possibility the feared harm would not arise only from, would not be inherent in, and would not be incidental to, lawful sanctions?

If the feared harm arises from, is inherent in, or is incidental to, lawful sanctions, is there a reasonable possibility the sanctions would defeat the

object and purpose of the Convention?

B. No Nexus Requirement

There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition. While there is a "specific intent" requirement that the harm be intended to inflict severe pain or suffering, the reasons motivating the offender to inflict such pain or suffering need not be on account of a protected characteristic of the victim.

Rather, the Convention definition provides a non-exhaustive list of possible reasons the torture may be inflicted, as described in section IX.C. above. The use of the modifier "for such purposes" indicates that this is a non-exhaustive list, and that severe pain and suffering inflicted for other reasons may also constitute torture.

See Committee Report, p. 14.

Note that the reasons for which a government has inflicted torture on individuals in the past may be important

See Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that the BIA did

in determining whether the government is likely to torture the applicant.

not abuse its discretion in denying a motion to reopen to consider a Convention claim when country conditions indicate that the government in question usually uses torture to extract confessions or in politically-sensitive cases and there is no reason to believe that the applicant falls into either category).

C. Past Torture

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a *presumption* that it is *more likely than not* the applicant will be subject to torture in the future. However, regulations require that any past torture be *considered* in evaluating whether the applicant is likely

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999); 8 C.F.R. § 208.16(c)(3).

to be tortured, because an applicant's experience of past torture may be *probative* of whether the applicant would be subject to torture in the future.

However, for purposes of the reasonable fear screening, which requires a lower standard of proof than is required for withholding of removal, that an applicant who demonstrates that he or she has been tortured in the past should generally be found to have met his or her burden of establishing a reasonable possibility of torture in the future, absent evidence to the contrary.

Conversely, past harm that does not rise to the level of torture does not mean that torture will not occur in the future, especially in countries were torture is widespread.

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the *Convention Against Torture. See Abdel-Masieh v. INS*, 73 F.3d 579, 584 (5th Cir. 1996) (past actions do not create "an outer limit" on the government's future actions against an individual).

D. Internal Relocation

Regulations require the immigration judge to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured,

8 C.F.R. § 1208.16(c)(3)(ii).

in assessing whether the applicant can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in assessing whether there is a reasonable possibility that he or she would be tortured.

Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of relocation. In deciding whether the applicant has satisfied his or her burden, the adjudicator must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal.

8 C.F.R. §§ 208.16(c)(2), (3)(ii).

Maldonado v. Holder, 786 F.3d 1155, (9th Cir. 2015) (overruling *Hassan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004) ("Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one

	factor is determinative. . . . Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.")
Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the reasonable fear context.	*See, e.g., Comollari v. Ashcroft,* 378 F.3d 694, 697-98 (7th Cir. 2004).
Unlike the persecution context, the regulations implementing CAT do not explicitly reference the need to evaluate the reasonableness of internal relocation. Nonetheless, the regulations provide that "all evidence relevant to the possibility of future torture shall be considered . . . " Therefore, asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.	8 C.F.R. § 208.16(c)(3)(iv). 8 C.F.R. § 208.13(b)(3); *See* RAIO Training Module, *Well Founded Fear*.

E. Mandatory Bars

Although certain mandatory bars apply to a grant of withholding of removal under the Convention Against Torture, no mandatory bars may be considered in making a reasonable fear of torture determination.	8 C.F.R. §§ 208.16(d)(2); 208.31(c).
Because there are ***no*** bars to protection under Article 3, an immigration judge must grant deferral of removal to an applicant who is barred from a grant of withholding of removal, but who is likely to be tortured in the country to which the applicant has been ordered removed. Therefore, the reasonable fear screening process must identify and refer to the immigration judge aliens who have a reasonable fear of torture, even those who would be barred from withholding of removal, so that an immigration judge can determine whether the alien should be granted *deferral of removal.*	8 C.F.R. § 208.17(a).
APSOs must elicit information regarding any potential bars to withholding of removal during the interview.	

The officer must keep in mind that the applicability of these bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a reasonable fear of persecution or torture. In such cases, the officer should consult a supervisory officer and follow procedures on "flagging" such information for the hearing as outlined in the Reasonable Fear Procedures Manual.

XIII. EVIDENCE

A. Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the Convention Against Torture, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. §§ 208.16(b); 208.16(c)(2).

As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite

burden of proof. Asylum officers should follow the guidance in the RAIO Modules, *Credibility,* and *Evidence,* and HQASY memos on this issue in evaluating whether lack of corroboration affects the applicant's ability to establish a reasonable fear of persecution or torture.

B. Country Conditions

Country conditions information is integral to most reasonable fear determinations, whether the asylum officer is evaluating reasonable fear of persecution or reasonable fear of torture.

See RAIO Training Module, *Country of Origin Information (COI) Researching and Using COI in RAIO Adjudications.*

The Convention Against Torture specifically requires State Parties to take country condition information into account, where applicable, in evaluating whether a person would be subject to torture in a particular country.

"[T]he competent authorities shall take into account all relevant considerations, including, where applicable

Convention Against Tortures Article 3, para. 2.

> the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The implementing regulations reflect this treaty provision by providing that all evidence relevant to the possibility of future torture must be considered, including, but not limited to, evidence of gross flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal.

8 C.F.R. §§ 208.16(c)(3).

As discussed in the supplementary information to the regulations, "the words 'where applicable' indicate that, in each case, the adjudicator will determine whether and to what extent evidence of human rights violations in a given country is in fact a relevant factor in the case at hand. Evidence of the gross and flagrant denial of freedom of the press, for example, may not tend to show that an alien would be tortured if referred to that country."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

Analysis of country conditions requires an examination into the likelihood that the applicant will be persecuted or tortured upon return. Some evidence indicating that the feared harm or penalty would be enforced against the applicant should be cited in support of a positive reasonable fear determination.	*See Matter of M-B-A-*, 23 I&N Dec. 474, 478-79 (BIA 2002) (finding that a Nigerian woman convicted of a drug offense in the United States was ineligible for protection under the Convention where she provided no evidence that a Nigerian law criminalizing certain drug offenses committed outside Nigeria would be enforced against her).
In *Matter of G-A-*, the BIA found that an Iranian Christian of Armenian descent who lived in the U.S. for more than 25 years and who had been convicted of a drug-related crime is likely to be subjected to torture if returned to Iran. The BIA considered the combination of the harsh and discriminatory treatment of ethnic and	*Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

religious minorities in Iran, the severe punishment of those associated with narcotics trafficking, and the perception that those who have spent an extensive amount of time in the U.S. are opponents of the Iranian government or even U.S. spies to determine that, in light of country conditions information, the individual was entitled to relief under the Convention Against Torture.

In *Matter of J-F-F-*, the Attorney General held that the applicant failed to meet his evidentiary burden for deferral of removal to the Dominican Republic under the Conventions Against Torture. Here, the IJ improperly " . . . strung together [the following] series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become 'rowdy'; that this behavior would lead the police to incarcerate him; and that the police would tor-

Matter of J-F-F-, 23 I&N Dec. 912, 917 n.4 (AG 2006) ("An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur." Rather, it "is the likelihood of all necessary events coming together that must more likely than not lead to torture,

ture him while he was incarcerated." The Attorney General determined that this hypothetical chain of events was insufficient to meet the applicant's burden of proof. In addition to considering the likelihood of each step in the hypothetical chain of events, the adjudicator must also consider whether the entire chain of events will come together to result in the probability of torture of the applicant.

and a chain of events cannot be more likely than its least likely link.") *(citing Matter of Y-L-*, 23 I&N Dec. 270, 282 (AG 2002)).

"Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA".

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

The Ninth Circuit has also addressed the use of country conditions in withholding cases, holding in *Kamalthas v. INS* that the "BIA failed to consider probative evidence in the record of country conditions which confirm that Tamil males have been subjected to widespread torture in Sri Lanka."

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001).

XIV. INTERVIEWS

A. General Considerations

Interviews for reasonable fear determinations should generally be conducted in the same manner as asylum interviews. They should be conducted in a non-adversarial manner, separate from the public and consistent with the guidance in the RAIO Combined Training lessons regarding interviewing.

See Reasonable Fear Procedures Manual (Draft). 8 C.F.R. § 208.31(c).

The circumstances surrounding a reasonable fear interview may be significantly different from an affirmative asylum interview. A reasonable fear interview may be conducted in a jail or other detention facility and the applicant may be handcuffed or shackled. Such conditions may be particularly traumatic for individuals who have escaped persecution or survived torture and may impact their ability to testify. Additionally, the applicant may have an extensive criminal record. Given these circumstances, officers should take particular care to maintain a

8 C.F.R. § 208.31(c).

Officers should read to the applicant paragraph 1.19 on Form 1-899, which de-

non-adversarial tone and atmosphere during reasonable fear interviews.

scribes the purpose of the interview.

At the beginning of the interview, the asylum officer should determine whether the applicant has an understanding of the reasonable fear process and answer any questions the applicant may have about the process.

B. Confidentiality

The information regarding the applicant's fear of persecution and/or fear of torture is confidential and cannot be disclosed without the applicant's written consent, unless one of the exceptions in the regulations regarding the confidentiality of the asylum process apply. At the beginning of the interview, the asylum officer should explain to the applicant the confidential nature of the interview.

8 C.F.R. § 208.6.

C. Interpretation

If the applicant is unable to proceed effectively in English, the asylum officer must use a commercial interpreter with which USCIS has a contract to conduct the interview.

8 C.F.R. § 208.31(c).

If the applicant requests to use a relative, friend, NGO or other source as an interpreter, the asylum officer should proceed with the interview using the applicant's interpreter. However, asylum officers are required to use a contract interpreter to monitor the interview to verify that the applicant's interpreter is accurate and neutral while interpreting.

Asylum officers may conduct interviews in the applicant's preferred language provided that the officer has been certified by the State Department, and that local office policy permits asylum officers to conduct interviews in languages other than English.

The applicant's interpreter must be at least 18 years old. The interpreter must not be:

- the applicant's attorney or representative,
- a witness testifying on behalf of the applicant, or
- a representative or employee of the applicant's country of nationality, or if the applicant is stateless, the applicant's country of last habitual residence.

See Reasonable Fear Procedures Manual (Draft)

D. Note Taking

Interview notes must be taken in a Question & Answer (Q&A) format. It is preferable that the interview notes be typed. When the interview notes are taken longhand, the APSO must ensure that they are legible. Interview notes must accurately reflect what transpired during the reasonable fear interview so that a reviewer can reconstruct the interview by reading the interview notes. In addition, the interview notes should substantiate the asylum officer's decision.

8 C.F.R. § 208.31(c).

Lafferty, John, Asylum Division, *Updated Guidance on Reasonable Fear Note-Taking,* Memorandum to All Asylum Office Staff (Washington, DC), May 9, 2014.

See also Reasonable Fear Procedures Manual (Draft).

The Reasonable Fear Q&A interview notes are not required to be a *verbatim* transcript.

Although interview notes are not required to be a *verbatim* record of everything said at the interview, they must provide an accurate and complete record of the specific questions asked and the applicant's specific answers to demonstrate that the APSO gave the applicant every opportunity to establish a reasonable fear of persecution, or a reasonable

fear of torture. In doing so, the Q&A notes must reflect that the APSO asked the applicant to explain any inconsistencies as well as to provide more detail concerning material issues. This type of record will provide the SAPSO with a clear record of the issues that may require follow-up questions or analysis, as well as assist the asylum officer in the identification of issues related to credibility and analysis of the claim after the interview.

Before ending the interview, the APSO must provide a summary of the material facts related to the protection claim and read it to the applicant who, in turn, will have the opportunity to add, or correct facts. The interview record is not considered complete until the applicant agrees that the summary of the protection claim is complete and correct.

E. Representation

The applicant may be represented by counsel or by an accredited representative at the interview. The representative must submit a signed form G-28. The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview.

The representative may present a statement at the end of the interview and, where appropriate, should be allowed to make clarifying statements in the course of the interview, so long as the representative is not disruptive. The asylum officer, in his or her discretion, may place reasonable limits on the length of the statement.

See Reasonable Fear Procedures Manual (Draft).

8 C.F.R. § 208.31(c); *see* discussion on role of the representative in the RAIO Training Module, *Interviewing-Introduction to the Non Adversarial Interview.*

F. Eliciting Information

The APSO must elicit all information relating both to fear of persecution and fear of torture, even if the asylum officer determines early in the interview that the applicant has established a reasonable fear of either.

See RAIO Training Module, *Interviewing-Eliciting Testimony*, section 3.0: "Officer's Duty to Elicit Testimony".

Specifically, the asylum officer must explore each of the following areas of inquiry, where applicable:

1. What the applicant fears would happen to him/her if returned to a country (elicit details regarding the specific type of harm the applicant fears)

2. Whom the applicant fears
3. The relationship of the feared persecutor or torturer to the government or government officials
4. Was a public official or other individual acting in an official capacity? Often the public official is a police officer. The following is a brief list of questions that may be asked when addressing whether a police officer was acting in an official capacity:
    a. Was the officer on duty?
    b. Was the officer in uniform?
    c. Did the officer show a police badge or other

"Eliciting" testimony means fully exploring an issue by asking follow-up questions to expand upon and clarify the interviewee's responses before moving on to another topic.

The list of areas of inquiry is not exhaustive. There may be other areas of inquiry that arise in the course of the interview. Also, the asylum officer is not required to explore the areas of inquiry in the sequence listed below. As in an asylum interview, each interview has a flow of information unique to the applicant.

type of official credential?

d. Did the officer have access to the victim because of his/her authority as a police officer?

e. If a potential torturer is not a public official or someone acting in official capacity, is there evidence that a public official or other person acting in official capacity had ,or would have prior knowledge of the torture and breached, or would breach a legal duty to prevent the torture, including acting a manner that can be considered to be willfully blind to the torture? Is the torturer part of the government in that country (including local government)?

f. If not, would a government or public official know what they were doing?

g. Would a government or public official think it was okay?

h. If you believe that the government would think this was okay or that the government is corrupt, why do you think this?

i. What experiences have you or people you know of had with the authorities that make you think they would think it was okay if someone was tortured?

j. Would the (agents of harm?) person or persons inflicting torture be told by the government or public official to do that?

k. Did you report any past harm to a public official?

l. What did the public official say to you when you reported it?

m. Did the public official ask you questions about

the incident? Did public officials go to crime scene to investigate?

n. Did you ever speak with police after you reported incident?

o. Did you inquire about any investigation? If so, please provide details.

p. Do you know if anyone was ever investigated or charged with crime?

5. The reason(s) someone would want to harm the applicant. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

6. Whether the applicant has been and/or would be in the feared offender's custody or control

a. How do you think you will be harmed?

   b. How will the feared offender find you?

7. Whether the harm the applicant fears may be pursuant to legitimate sanctions

   a. Would anyone have a legal reason to punish you in your home country?

   b. Do you think you will be given a trial if you are arrested?

   c. What will happen to you if you are put in prison?

8. Information about any individuals similarly situated to the applicant, including family members or others closely associated with the applicant, who have been threatened, persecuted, tortured, or otherwise harmed

9. Any groups or organizations the applicant is associated with that would place him/her at risk of persecution or torture, in light of country conditions information

10. Any actions the applicant has taken in the past (either

in the country of feared persecution or another country, including the U.S.) that would place him/her at risk of persecution or torture, in light of country conditions information

11. Any harm the applicant has experienced in the past:
    a. a description of the type of harm
    b. identification of who harmed the applicant
    c. the reason the applicant was harmed
    d. the relationship between the person(s) who harmed the applicant and the government
    e. whether the applicant was in that person(s) custody or control
    f. whether the harm was in accordance with legitimate sanctions

When probing into a particular line of questioning, it is important to keep asking questions that elicit details so that information relating to the is-

sues above is thoroughly elicited. It is also important to ask the application questions such as, "Is there anyone else or anything else you are afraid of, other than what we've already discussed?" until the applicant has been given an opportunity to present his or her entire claim.

The asylum officer should also elicit information relating to exceptions to withholding of removal, if it appears that an exception may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the interview Q&A notes, where applicable.

XV. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION

See Reasonable Fear Procedures Manual (Draft).

An applicant may withdraw his or her request for protection from removal at any time during the reasonable fear process. When an applicant expresses a desire to withdraw the request for protection, the asylum officer must conduct an interview to determine whether

the decision to withdraw is entered into knowingly and willingly. The asylum officer should ask sufficient questions to determine the following:

- The nature of the fear that the applicant originally expressed to the DHS officer,
- Why the applicant no longer wishes to seek protection and whether there are any particular facts that led the applicant to change his or her mind,
- Whether any coercion or pressure was brought to bear on the applicant in order to have him or her withdraw the request, and
- Whether the applicant clearly understands the consequences of withdrawal, including that he or she will be barred from any legal entry into the United States for a period that may run from 5 years to life.

An elicitation of the nature of the fear that the applicant originally expressed does not require a full elicitation of the facts of the applicant's case. Rather, information regarding whether the request to withdraw is knowing and voluntary is central to determining whether processing the withdrawal of the claim for protection is appropriate. The determination as to whether the request to withdraw is knowing and voluntary is unrelated to whether the applicant has a fear of future harm. Processing the withdrawal of the claim for protection is appropriate when the decision was made knowingly and voluntarily even when the applicant still fears harm.

XVI. SUMMARY

A. Applicability

Asylum officers conduct reasonable fear of persecution or torture screenings in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been

reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

B. Definition of Reasonable Fear of Persecution

A reasonable fear of persecution must be found if the applicant establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

C. Definition of Reasonable Fear of Torture

A reasonable fear of torture must be found if the applicant establishes there is a reasonable possibility he or she will be tortured.

D. Bars

No mandatory bars may be considered in determining whether an individual has established a reasonable

fear of persecution or torture.

E. Credibility

The same factors apply in evaluating whether an applicant's testimony is credible as apply in the asylum adjudication context. The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

F. Effect of Past Persecution or Torture

1. If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of future persecution on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

a. due to a fundamental change in circumstances, the fear is no longer well-founded, or

b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If the applicant establishes past torture, it may be presumed that the applicant has a reasonable fear of future torture, unless a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.

G. Internal Relocation

To establish a reasonable fear of persecution, the applicant must establish that it would

be unreasonable for the applicant to relocate. If the government is the feared offender, it shall be presumed that internal relocation would not be reasonable, unless a preponderance of the evidence establishes that, under all the circumstances, internal relocation would be reasonable.

Asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in reasonable fear of torture determinations. Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the reasonable fear context. Asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

H. Elements of the Definition of Torture

1. The torturer must be a public official or other person acting in an official capacity, or someone acting with

the consent or acquiescence of a public official or someone acting in official capacity.

2. The applicant must be in the torturer's control or custody.
3. The torturer must specifically intend to inflict severe physical or mental pain or suffering.
4. The harm must constitute severe pain or suffering.
5. If the harm is mental suffering, it must meet the requirements listed in the regulations, based on the "understanding" in the ratification instrument.
6. Harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture. However, sanctions that defeat the object and purpose of the Torture Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.
7. There is no requirement that the harm be inflicted

"on account" of any ground.

I. Evidence

Credible testimony may be sufficient to sustain the burden of proof, without corroboration. However, there may be cases where a lack of corroboration affects the applicant's credibility and ability to establish the requisite burden of proof. Country conditions information, where applicable, must be considered.

J. Interviews

Reasonable fear screening interviews generally should be conducted in the same manner as interviews in the affirmative asylum process, except DHS is responsible for providing the interpreter. The asylum officer must elicit all relevant information.

CBP Enforcement Actions - OIS ANALYSIS
OVERALL
FY18 Q1 - Q3 data - Outcomes as of End of Q3
Source: DHS Office of Immigration Statistics (OIS)

	Overall			Overall		
	USBP	OFO	CBP	USBP	OFO	CBP
Total Initial Actions	286,277	96,627	382,904	74.76%	25.24%	N/A
Repatriations	149,983	25,324	175,307	52.39%	26.21%	45.78%
Removed	138,978	13,933	152,911	48.55%	14.42%	39.93%
ER	75,397	13,292	88,689	26.34%	13.76%	23.16%
Reinstatement	62,264	9	62,273	21.75%	0.01%	16.26%
Other	1,317	632	1,949	0.46%	0.65%	0.51%
Returned	11,005	11,391	22,396	3.84%	11.79%	5.85%
No Confirmed Departure	136,294	71,303	207,597	47.61%	73.79%	54.22%
VD and Final Order	4,482	2,222	6,704	1.57%	2.30%	1.75%
In Absentia Final Order Issued	1,449	676	2,125	0.51%	0.70%	0.55%
Not in Absentia Final Order Issued	2,720	1,497	4,217	0.95%	1.55%	1.10%
Voluntary Departure Granted	313	49	362	0.11%	0.05%	0.09%
In Proceedings	90,585	41,484	132,069	31.64%	42.93%	34.49%
Relief	289	14,210	14,499	0.10%	14.71%	3.79%
Non-Removable	138	100	238	0.05%	0.10%	0.06%
Data Pending	40,800	13,287	54,087	14.25%	13.75%	14.13%

U.S. Customs and Border Protection

CBP STAT: Statistical Tracking and Analysis Team

Department of Homeland Security
U.S. Citizenship and Immigration Services,
Asylum Division

BRIEFING PAPER ON EXPEDITED REMOVAL AND CREDIBLE FEAR PROCESS

I. OVERVIEW OF EXPEDITED REMOVAL PROCESS

The expedited removal provisions of the Immigration and Nationality Act (INA) became effective April 1, 1997. Under the expedited removal provisions, where an immigration officer (usually CBP) determines that an alien arriving at a port of entry is inadmissible because the alien engaged in fraud or misrepresentation (section 212(a)(6)(C) of the INA) or lacks proper documents (section 212(a)(7) of the INA), the individual is ordered removed from the U.S. without a hearing before an immigration judge. However, if an individual expresses a fear of persecution or torture or an intention to apply for asylum, the case is referred to a USCIS asylum officer for a credible fear protection screening. In 2004, pursuant to notice published in the Federal Register, expedited removal was expanded beyond ports of entry to include those individuals apprehended within 100 air miles of the border and within 14 days of illegal entry.

II. CREDIBLE FEAR PROCESS

Any individual who asserts a fear of persecution or torture or an intention to seek asylum during the course of the expedited removal process is referred to an asylum officer for an interview to determine if the individual has a credible fear of persecution or torture. A credible fear of persecution or torture is established when there

is a significant possibility, taking into account the credibility of the statements made by the individual in support of his or her claim and such other facts as are known to the officer, that the individual could establish eligibility for asylum under Section 208 of the INA or withholding of removal or deferral of removal under the Convention Against Torture. (8 C.F.R. § 208.30(e)(2) & (3)). The "significant possibility" standard used in credible fear cases is intended to be a low threshold screening process in order to capture all potential refugees. The purpose of the credible fear screenings is to identify all individuals who may have viable claims in order to prevent the removal of a refugee or someone who would be tortured without a full hearing on the claim; asylum officers do not adjudicate actual asylum applications during this preliminary screening process.

If the asylum officer finds that an individual has established a credible fear of persecution or torture, the individual is placed into removal proceedings (under Section 240 of the INA) where he or she is afforded the opportunity to apply for asylum before the Immigration Court. If the asylum officer finds that the individual has not established a credible fear of persecution or torture, the individual may ask an Immigration Judge to review the asylum officer's determination. If the individual does not ask for review, or if the Immigration Judge does not overturn the asylum officer's decision,[1] then the individual is removed from the U.S. under the expedited removal order.

---

[1] If an individual neither requests nor declines review of the determination, the individual is still referred to the Immigration Judge for review of the credible fear determination.

The majority of individuals in the credible fear process are subject to mandatory detention while their cases are pending. (8 C.F.R. § 235.3(b)(4)(ii)). Individuals found to have a credible fear are subject to continued detention, but ICE may use its discretion to parole them from custody on a case-by-case basis.

For those individuals apprehended between ports of entry, the individual may ask an Immigration Judge to review their custody determination. On January 4, 2010, ICE changed its parole policy for arriving aliens found to have a credible fear by requiring each case to be considered for parole without requiring a specific request.[2] The Asylum Division coordinated and assisted ICE in the implementation of those changes, including the development of a notice to such aliens to gather and provide information helpful to a parole determination.

The Asylum Division's goals are to complete 85% of all credible fear screenings within 14 days of referral to an asylum officer. Since establishing these completion goals, the Asylum Division has routinely met the 85% goal and usually exceeds it by completing more than 90% of cases within 14 days.

In July 2013, USCIS accelerated the processing goal from 85 % of all credible fear screenings within 14 days, to an 8-day average target. At the end of the FYl3, the Asylum Division was processing credible fear cases at an overall 8-day average.

---

[2] The revised parole policy does not apply to individuals placed into ER upon apprehension between ports of entry.

III. STATISTICS

Table A: Consistently, a small percentage of individuals subjected to expedited removal have been referred for a credible fear interview.

Fiscal Year	Subjected to Expedited Removal	Referred for a Credible Fear Interview	Percentage
2006	104,440	5,338	5%
2007	100,992	5,252	5%
2008	117,624	4,995	4%
2009	111,589	5,369	5%
2010	119,876	8,959	7%
2011	137,134	11,217	8%
2012	188,187	13,880	7%
2013	241,442	36,035	15%
2014	240,908	51,001	21%
2015	192,120	48,052	25%
2016	243,494	94,048	39%
2017	Unavailable	78,564	Unavailable

Note: The "Subject to Expedited Removal" data in 2006 and 2007 include apprehensions performed by Border Patrol and aliens determined inadmissible at Ports of Entry. The "Subject to Expedited Removal" data from 2008 to 2015 include apprehensions performed by Border Patrol, ICE Enforcement and Removal Operations, and aliens determined inadmissible at ports of entry.
Source: U.S. Department of Homeland Security.

Table B: A high percentage of those referred for a credible fear interview meet the credible fear standard.

Credible Fear Cases	FY-18	FY-17	FY-16	FY-15	FY-14	FY-13
Referrals from CBP or ICE	99,035	78,564	94,048	48,052	51,001	36,035
Completed	97,728	79,710	92,990	48,415	48,637	36,174
CF Found	74,677	60,566	73,081	33,988	35,456	30,393
CF Not Found	9,659	8,245	9,697	8,097	8,977	2,587
Closed	13,392	10,899	10,212	6,330	4,204	3,194
Of all referred cases completed by USCIS, % where CF was found	76%	76%	79%	70%	73%	84%

Source: USCIS Global Database

Table C: Top Five Nationalities Referred for a Credible Fear Interview

FY 2018		FY2017		FY2016		FY2015	
Nationality	Referrals	Nationality	Referrals	Nationality	Referrals	Nationality	Referrals
Honduras	26,404	El Salvador	20,127	El Salvador	32,831	El Salvador	14,376
Guatemala	25,612	Honduras	16,751	Honduras	19,881	Honduras	7,590
El Salvador	13,745	Guatemala	15,900	Guatemala	15,773	Guatemala	7,253
India	8,113	Mexico	4,977	Mexico	7,815	Mexico	7,088
Mexico	6,943	Haiti	4,211	India	3,237	India	1,881

FY2014		FY2013		FY2012	
Nationality	Referrals	Nationality	Referrals	Nationality	Referrals
El Salvador	19,262	El Salvador	10,935	El Salvador	4,087
Honduras	8,254	Honduras	6,871	Honduras	2,405
Guatemala	6,732	Guatemala	5,573	Guatemala	2,015
Mexico	4,878	India	2,974	Mexico	1,299
Ecuador	3,300	Mexico	2,612	Ecuador	863

Source: Global Database

TESTIMONY OF

Robert E. Perez
Acting Deputy Commissioner
U.S. Customs and Border Protection

BEFORE

U.S. Senate

Committee on Homeland Security
and Governmental Affairs

ON

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

Sept. 18, 2018
Washington, DC

Introduction

Chairman Johnson, Ranking Member McCaskill, and distinguished Members of the Committee, thank you for the opportunity to appear before you today on behalf of U.S. Customs and Border Protection (CBP).

As America's unified border agency, CBP protects the United States from terrorist threats and prevents the illegal entry of persons and contraband, while facilitating lawful travel and trade. CBP works tirelessly to detect illicit smuggling of people and trafficking of drugs, weapons, and money, while facilitating the flow of cross-border commerce and tourism.

CBP is responsible for securing approximately 7,000 miles of land border, 95,000 miles of shoreline, 328 ports of entry, and the associated air and maritime space from the illegal entry of people and contraband into the United States. The border environment in which CBP works is dynamic and requires continual adaptation to respond to emerging threats and changing conditions. Recently, we have seen an increase in the levels of migration at our southwest border.

There are many factors that influence an individual's decision to attempt to migrate to the United States. These individuals are often driven by so-called "push factors," such as violent conditions in the country of origin, or "pull factors," such as immigration loopholes that increase the probability of being released into the interior of the United States. The result has been an increase in southwest border migration, both at our ports of entry and between them. Comparing July 2018 to July 2017, the overall numbers of individuals encountered are up nearly 57 percent; the largest increase

has been in the number of family units, which increased more than 142 percent since last year. Although FY 2017 was an anomalously low year for southwest border migration, the sharp increase is a cause for concern.

From October 1, 2017, to July 31, 2018, the U.S. Border Patrol apprehended more than 317,000 individuals between ports of entry. In the same period of time, the Office of Field Operations determined that more than 105,000 individuals presenting themselves at ports of entry were inadmissible.

After CBP encounters an alien who has unlawfully entered or is inadmissible to the United States, the alien is processed and, in general, is temporarily held in CBP custody before being transferred to U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) or, in the case of unaccompanied alien children (UAC), to the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). Increased migration due to push and pull factors causes a strain on U.S. Citizenship and Immigration Services (USCIS), CBP, and ICE operations and stresses the system at various points in the processing, holding, detention, and placement continuum. Increasing numbers of aliens held in CBP facilities divert CBP resources from addressing a number of serious threats to our nation, including transnational criminal organizations, dangerous narcotics, and harmful agricultural products.

The rise in migration is, in part, a consequence of the gaps created by layers of laws, judicial rulings, and policies. Today, I would like to testify about the operational impact these laws, judicial decisions, and policies

—however well-intentioned—have on CBP's ability to fulfill its mission.

***Flores* Settlement Agreement**

The 1997 *Flores Settlement Agreement* requires the government to release alien minors from detention without unnecessary delay, or, under the current operational environment, to transfer them to non-secure, licensed programs "as expeditiously as possible." The settlement agreement also sets certain standards for the holding and detention of minors, and requires that minors be treated with dignity, respect, and receive special concern for their particular vulnerability.

The Department of Homeland Security (DHS) maintains that the settlement agreement was drafted to apply only to unaccompanied minors. In 2014, DHS increased the number of family detention facilities in response to the surge of alien families crossing the border. Soon after, the U.S. District Court for the Central District of California interpreted *Flores* as applying not only to UAC, but also to those children who arrived with their parents or legal guardians. This ruling limited DHS's ability to detain family units during their immigration proceedings. In general, pursuant to this and other court decisions interpreting the *Flores Settlement Agreement*, DHS rarely holds accompanied children and their parents or legal guardians for longer than 20 days.

However, an unintended consequence of the limitations on time-in-custody mandated by the *Flores Settlement Agreement* and court decisions interpreting it is that adults who arrive in this country alone are treated differently than adults who arrive with a child.

UAC Provision of Trafficking Victims Protection Reauthorization Act of 2008

There are similar unintended consequences associated with the UAC provision enacted in the *Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA). The provision requires that, once a child is determined to be a UAC, the child be transferred to ORR within 72 hours, absent exceptional circumstances, unless the UAC is a national or habitual resident of a contiguous country and is determined to be eligible to withdraw his or her application for admission and be repatriated to that contiguous country immediately. CBP complies with the *Flores Settlement Agreement*, court orders, and the TVPRA and processes, and holds all UAC accordingly.

UAC who are nationals or habitual residents of Mexico or Canada require additional consideration. Under the UAC provision of the TVPRA, a UAC who is a national or habitual resident of Canada or Mexico may be permitted to withdraw his or her application for admission and be repatriated immediately, as long as CBP determines that he or she has not been a victim of severe forms of trafficking in persons, and there is no credible evidence that the UAC is at risk of being trafficked upon return to the country of nationality or of last habitual residence; has no fear of returning owing to a credible fear of persecution; and has the ability to make an independent decision to withdraw his or her application for admission. CBP uses CBP Form 93 to screen these contiguous country UAC to determine whether they meet the requirements of the TVPRA. Under current procedures, CBP also screens all UAC using CBP Form 93

to determine whether they have been, or are likely to be, victims of human trafficking or have a fear of return.

The CBP Form 93 includes examples of trafficking indicators and requires the processing Border Patrol Agent or CBP Officer to pursue age appropriate questions to help identify if a UAC may have been, or is likely to be, the victim of trafficking; has a fear of return; or, for contiguous country UAC, is able to make an independent decision to withdraw an application for admission. Based on the totality of the situation, including visual and verbal responses, the Border Patrol Agent or CBP Officer determines if the UAC is a victim or potential victim of trafficking or has a fear of return. CBP conducts these screenings at the processing location—generally at a port of entry or Border Patrol station.

For Mexican and Canadian UAC who cannot be returned immediately because they do not meet one or more of these requirements or who do not choose to withdraw their application for admission, and for all UAC from countries other than Mexico or Canada, the UAC provision of the TVPRA requires that they be served a Notice to Appear, placed in formal removal proceedings under Section 240 of the Immigration and Nationality Act, and transferred to the care and custody of ORR. If an immigration judge orders a UAC removed or grants voluntary departure, ICE arranges for the UAC's safe return to their country of nationality.

Upon determining that a UAC is unable to withdraw his or her application for admission, or chooses not to, CBP notifies both the local ICE Field Office Juvenile Coordinator (FOJC) and HHS/ORR. Once HHS/ORR notifies CBP and ICE that a bed is available for the UAC, either ICE, CBP, or DHS contractors transport the

UAC to an HHS/ORR shelter facility. CBP maintains custody of the UAC while awaiting notification from HHS/ORR that facilities are available—again, usually for no longer than 72 hours, absent exceptional circumstances.

CBP operates short-term detention facilities for, as defined in 6 U.S.C. § 211(m), detention for 72 hours or fewer before repatriation to a country of nationality or last habitual residence. In order to comply with the TVPRA and other statutory requirements, CBP prioritizes UAC for processing. However, HHS/ORR's ability to quickly place UAC in shelters or with adequate sponsors is severely limited by any increases in UAC apprehensions—such as those we have seen in recent months.

Because of the TVPRA, UAC are often released to adult sponsors in the community, and some subsequently fail to show up for court hearings or comply with removal orders.

Asylum Claims

CBP carries out its mission of border security while adhering to U.S. and legal international obligations for the protection of vulnerable and persecuted persons. The laws of the United States, as well as international treaties to which we are a party, allow people to seek asylum on the grounds that they fear being persecuted outside of the United States because of their race, religion, nationality, membership in a particular social group, or political opinion. CBP understands the importance of complying with these laws, and takes its legal obligations seriously.

Accordingly, CBP has designed policies and procedures based on these legal standards, in order to protect vulnerable and persecuted persons in accordance with these legal obligations.

If a CBP officer or agent encounters an alien who is subject to expedited removal at or between ports of entry, and the person expresses fear of being returned to his or her home country, CBP processes that individual for a credible or reasonable fear screening with an asylum officer from USCIS for adjudication of that claim. CBP officers and agents neither make credible fear determinations, nor weigh the validity of the claims.

Importance of Border Security

Ultimately, enforcement of immigration laws is the foundation of a secure border and a secure nation. Each action taken by lawmakers, the judiciary, policymakers, and operators—while made in good faith by people grappling with complex issues—can have unintended consequences on the functioning of the immigration system as a whole. DHS leaders have worked closely with other Administration officials and members of Congress to address existing loopholes that allow individuals and dangerous transnational criminal organizations to exploit our immigration laws. I look forward to continuing to work with the Committee toward this goal.

Thank you for the opportunity to appear before you today. I look forward to your questions.

U.S. Immigration and Customs Enforcement

STATEMENT

OF

MATTHEW T. ALBENCE

EXECUTIVE ASSOCIATE DIRECTOR
ENFORCEMENT AND REMOVAL OPERATIONS
U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"Reinterpretation of Flores Settlement and Its Impact on Family Separation and Catch and Release"

BEFORE THE

UNITED STATES SENATE
HOMELAND SECURITY AND GOVERNMENTAL
AFFAIRS COMMITTEE

Tuesday, Sept. 18, 2018
342 Senate Dirksen Office Building

Introduction

Chairman Johnson, Ranking Member McCaskill, and distinguished members of the Committee:

My name is Matthew T. Albence, and I am the Executive Associate Director of U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations and the Senior Official Performing the Duties of the Deputy Director. Thank you for the opportunity to appear before you today to discuss the impact of the *Flores* Settlement Agreement (FSA) on ICE's critical mission of protecting the homeland, securing the border, enforcing criminal and civil immigration laws in the interior of the United States, and ensuring the integrity of our nation's immigration system.

Our nation's immigration laws are extremely complex, and in many cases, outdated and full of loopholes. Moreover, the immigration laws have been increasingly subject to litigation before the federal courts, which has resulted in numerous court decisions, orders, and injunctions that have made it increasingly difficult for ICE to carry out its mission. The current legal landscape often makes it difficult for people to understand all that the dedicated, courageous, professional officers, agents, attorneys, and support staff of ICE do to protect the people of this great nation. To ensure the national security and public safety of the United States, our officers faithfully execute the immigration laws enacted by Congress, which may include enforcement action against any alien encountered in the course of their duties who is present in the United States in violation of immigration law.

Executive Orders

During his first two weeks in office, President Trump signed a series of Executive Orders that laid the policy groundwork for the Department of Homeland Security (DHS) and ICE to carry out the critical work of securing our borders, enforcing our immigration laws, and ensuring that individuals who pose a threat to national security or public safety, or who otherwise are in violation of the immigration laws, are not permitted to enter or remain in the United States. These Executive Orders established the Administration's policy of effective border security and immigration enforcement through the faithful execution of the laws passed by Congress.

On June 20, 2018, President Trump signed an Executive Order entitled, *Affording Congress an Opportunity to Address Family Separation.* This Executive Order clarified that it is the policy of the Administration to rigorously enforce our immigration laws, including by pursuing criminal prosecutions for illegal entry under 8 U.S.C. § 1325(a), until and unless Congress directs otherwise. The goal of this Executive Order was to allow DHS to continue its judicious enforcement of U.S. immigration laws, while maintaining family unity for those illegally crossing the border. However, the FSA, as interpreted by court decisions, makes it operationally unfeasible for DHS and ICE to simultaneously enforce our immigration laws and maintain family unity, and DHS supports legislation that replaces this decades-old agreement with a contemporary solution that effectively addresses current immigration realities and border security requirements.

Challenges and Legislative Fixes

Since the initial surge at the Southwest border in Fiscal Year (FY) 2014, there has been a significant increase in the arrival of both family units and unaccompanied alien children (UACs) at the Southern border, a trend which continues despite the Administration's enhanced enforcement efforts. Thus far in FY 2018, as of the end of August, approximately 53,000 UACs and 135,000 members of alleged family units have been apprehended at the Southern border or deemed inadmissible at Ports of Entry. These numbers represent a marked increase from FY 2017, when approximately 49,000 UACs and 105,000 members of family units were apprehended or deemed inadmissible throughout the entire fiscal year.

Most of these family units and UACs are nationals of the Central American countries of El Salvador, Guatemala, and Honduras. While historically Mexico was the largest source of illegal immigration to the United States, the number of Mexican nationals attempting to cross the border illegally has dropped dramatically in recent years. This is significant, because removals of non-Mexican nationals take longer, and require ICE to use additional detention capacity, expend more time and effort to secure travel documents from the country of origin, and arrange costly air transportation. Additionally, pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), UACs from countries other than Canada and Mexico may not be permitted to withdraw their applications for admission, further encumbering the already overburdened immigration courts. With an immigration court backlog of over 700,000 cases on the non-detained docket alone, it takes years for many of these cases to work their way through

the immigration court system, and few of those who receive final orders are ever actually returned to their country of origin. In fact, only approximately 3% of UACs from Honduras, El Salvador, or Guatemala encountered at the Southwest border in FY 2014 had been removed or returned by the end of FY 2017, despite the fact that by the end of FY 2017 approximately 26% of this cohort had been issued a final removal order.[1]

One of the most significant impediments to the fair and effective enforcement of our immigration laws for family units and UACs is the FSA. In 1997, the former Immigration and Naturalization Service (INS) entered into the FSA, which was intended to address the detention and release of unaccompanied minors. Since it was executed, the FSA has spawned over twenty years of litigation regarding its interpretation and scope and has generated multiple court decisions resulting in expansive judicial interpretations of the original agreement in ways that have severely limited the government's ability to detain and remove UACs as well as family units. Pursuant to court decisions interpreting the FSA, DHS can generally only detain alien minors accompanied by a family member in a family residential center for approximately 20 days before releasing them, and the TVPRA generally requires that DHS transfer any UAC to the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances. However, when these UACs are released by HHS, or family

[1] This figure includes aliens who accepted an order of voluntary departure but whose departure from the United States has not been confirmed. Approximately 44% of the cohort remained in removal proceedings as of the end of FY 2017.

units are released from DHS custody, many fail to appear for court hearings and actively ignore lawful removal orders issued against them. Notably, for family units encountered at the Southwest border in FY 2014, as of the end of FY 2017, 44% of those who remained in the United States were subject to a final removal order, of which 53% were issued *in absentia*. With respect to UACs, the Department of Justice's Executive Office for Immigration Review reports that from the beginning of FY 2016 through the end of June in FY 2018, nearly 19,000 UACs were ordered removed *in absentia*—an average of approximately 568 UACs per month.

This issue has not been effectively mitigated by the use of Alternatives to Detention (ATD), which has proved to be substantially less effective and cost-efficient in securing removals than detention. Specifically, while the ATD program averages 75,000 participants, in FY 2017, only 2,430 of those who were enrolled in the ATD program were removed from the country—this accounts for only one percent of the 226,119 removals conducted by ICE during that time. Aliens released on ATD have their cases heard on the non-detained immigration court dockets, where cases may linger for years before being resolved. Thus, while the cost of detention per day is higher than the cost of ATD per day, because those enrolled in the ATD program often stay enrolled for several years or more, while those subject to detention have an average length of stay of approximately 40 days, the costs of ATD outweighs the costs of detention in many cases. Nor are the costs of ATD any more justified by analyzing them on a per-removal basis. To illustrate, in FY 2014, ICE spent $91 million on ATD, which resulted in 2,157 removals; by FY 2017, ICE spending on

ATD had more than doubled to $183 million but only resulted in 2,430 removals of aliens on ATD—an increase of only 273 removals for the additional $92 million investment, and an average cost of $75,360 per removal. Had this funding been utilized for detention, based on FY 2017 averages, ICE could have removed almost ten times the number of aliens as it did via ATD.

Moreover, because family units released from custody and placed on ATD abscond at high rates—rates significantly higher than non-family unit participants—many family units must be apprehended by ICE while at large. Specifically, in FY 2018, through July 31, 2018, the absconder rate for family units on ATD was 27.7%, compared to 16.4% for non-family unit participants. Such at-large apprehensions present a danger to ICE officers, who are the victims of assaults in the line of duty at alarmingly increasing rates. In FY 2017 and FY 2018, through the end of August, ICE's Office of Professional Responsibility and/or the DHS Office of the Inspector General investigated 73 reported assaults on ICE officers, 17 of which have resulted in an arrest, indictment, and/or conviction to date. Additionally, because ICE lacks sufficient resources to locate, arrest, and remove the tens of thousands of UACs and family units who have been ordered removed but are not in ICE custody, most of these aliens remain in the country, contributing to the more than 564,000 fugitive aliens on ICE's docket as of September 8, 2018.

Unfortunately, by requiring the release of family units before the conclusion of immigration proceedings, seemingly well-intentioned court rulings, like those related to the FSA, and legislation like the TVPRA in its current form create legal loopholes that are exploited by

transnational criminal organizations and human smugglers. These same loopholes encourage parents to send their children on the dangerous journey north, and further incentivizes illegal immigration. As the record numbers indicate, these loopholes have created an enormous pull-factor. Amendments to the laws and immigration court processes are needed to help ensure the successful repatriation of aliens ordered removed by an immigration judge. Specifically, the following legislative changes are needed:

Enforcement and Removal Operations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR THE RECORD

FROM: David A. Marin /s/ DAVID MARIN
Acting Deputy Executive Associate Director

SUBJECT: U.S. Immigration and Customs Enforcement Data Regarding Detention, Alternatives to Detention Enrollment and Removals as of December 23, 2018, Related to Rulemaking Entitled, Procedures to Implement Section 235(b)(2)(C) of the Immigration and Nationality Act, RIN 1651-AB13

Purpose:

This memorandum includes detention, alternatives to detention enrollment, and removal data as of December 23, 2018. The data in the tables below were compiled by U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations as part of periodic internal U.S. Department of Homeland Security reporting a snapshot in time. This data is derived from various manual and systematic data sources to report ongoing operations. This memorandum is intended for inclusion in the administrative record for the above-referenced rulemaking.

ICE ERO	Adult Removals	Adults Transferred	UAC Transferred
Number of Individuals	824	438	300
Completion Date	12/20/2018	12/20/2018	12/23/2018
Flights	8	4	N/A

UAC Pending Transport	FMUA Pending Transport
210	6

ICE ERO	Daily Adult Population	FMUA Population (FRC)	ATD Enrollment
Number of Individuals	45,150	1,711	93,635
Capacity	43,324	~2,500	81,024
Percent Capacity	104%	68%	116%

Statistics Yearbook
Fiscal Year 2017

Prepared by the Planning, Analysis, & Statistics Division

Contact Information
Office of Policy
Communications and Legislative Affairs Division
5107 Leesburg Pike, Suite 1902
Falls Church , VA 22041
(703) 305-0289
(703) 605-0365 (fax)

Disclaimer
The Statistics Yearbook has been prepared as a public service by the Executive Office for Immigration Review and is strictly informational in nature. In no way should any information in the Statistics Yearbook, in whole or in part, be regarded as legal advice or authority, or be understood in any way to enlarge upon, or otherwise modify or interpret, any existing legal authority, including, but not limited to, the Immigration and Nationality Act and Title 8 of the Code of Federal Regulations.

TABLE OF CONTENTS

LISTING OF TABLES

LISTING OF FIGURES

A NOTE ON FORMAT

Since publication of the Executive Office for Immigration Review (EOIR) fiscal year (FY) 2016 Statistics Yearbook EOIR has reassessed the format of its annual yearbook, leading to some delay in the release of the FY 2017 Statistics Yearbook. For the FY 2017 Yearbook, EOIR has improved the graphics and the layout to make the data easier to understand. It has also endeavored to improve the precision of reported statistics and their utility for operations and public interest. Further, EOIR's ongoing public release of data reports, many of which have already reported FY 2017 data contained in the Yearbook, and the periodic public release of EOIR's overall Case Data file, which contains almost all data from FY 2017 that is otherwise presented in the Yearbook, potentially render the release of an annual yearbook obsolete. Nevertheless, EOIR anticipates releasing the FY 2018 Statistics Yearbook on a much more expeditious timetable, though its primary commitment will continue to be updates to its online data.

Please refer any questions on these improvements to EOIR's Office of Policy, Communications and Legislative Affairs Division.

THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

EOIR is responsible for adjudicating immigration cases. On behalf of the Attorney General, EOIR interprets and administers federal immigration laws and regulations through immigration court cases, appellate reviews, and administrative hearings in certain types of immigration-related cases. EOIR consists of three adjudicatory bodies: The Office of the Chief Immigration Judge (OCIJ), the Board of Immigration Appeals (BIA), and the Office of the Chief Administrative Hearing Officer (OCAHO).

OCIJ provides overall program direction and establishes priorities for 338 immigration judges (IJ) located in 61 immigration courts throughout the nation. The BIA hears appeals from certain decisions rendered by IJs and by district directors of Department of Homeland Security (DHS) in a wide variety of cases. OCAHO conducts hearings in civil penalty cases arising from the unlawful employment of aliens, unfair immigration-related employment practices, and civil document fraud.

Although this Statistics Yearbook addresses each of EOIR's three adjudicatory bodies, most of the data presented comes from immigration court cases. Most immigration court cases involve removal proceedings. A removal proceeding has two parts. First, an immigration judge assesses whether an alien is removable as charged under the applicable law. If an immigration judge determines that the alien is not removable, then

the immigration judge will terminate proceedings.[1] If the immigration judge sustains the charge or charges of removability, proceedings continue. A finding of removability by itself never guarantees that an alien will be ordered removed or that the alien will actually be removed. Rather, if the alien is found removable, the judge must also make a second determination as to whether the alien is eligible for any relief or protection that would allow the alien to remain in the United States. Examples of such relief or protection include asylum, withholding of removal, protection under the Convention Against Torture, adjustment of status, cancellation of removal for lawful permanent residents, cancellation of removal for certain non-permanent residents, and certain waivers provided by the Immigration and Nationality Act.[2]

The removal proceeding begins when the DHS (either U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), or U.S.

---

[1] Although applicable regulation distinguish between the dismissal of proceedings and the termination of proceedings, EOIR classifies both of them as "terminations" for statistical purposes because the outcomes are substantively identical.

[2] Although relief (*e.g.* asylum) and protection (*e.g.* withholding of removal) are legally distinct outcomes, EOIR classifies both of them as "relief" for statistical purposes because the outcomes are similar in that for both, an alien is generally allowed to remain in the United States. Additionally, voluntary departure is a form of relief from removal, but it carries an alternate order of removal if the departure is not timely effectuated. Consequently, EOIR classifies it as a separate outcome for statistical purposes and does not count it as either relief or an order of removal.

Customs and Border Protection (CBP)) serves an individual with a charging document, called a Notice to Appear (NTA), and files it with an immigration court.

Aliens in removal proceedings, called respondents, have a right to legal representation at no expense to the government. EOIR also provides a list of *pro bono* legal service providers to any respondent who appears in removal proceedings without representation.

During the removal proceeding, the immigration court schedules an initial hearing, referred to as a master calendar hearing, before an immigration judge. At this hearing, the immigration judge informs the respondent of his or her rights and addresses representation. The judge may also take pleadings, determine removability, and ascertain apparent eligibility for any relief or protection provided for by law. If a judge finds an alien removable and the alien wishes to apply for relief or protection from removal, the judge will schedule an individual merits hearing on the alien's application where both parties (the respondent and DHS) may present arguments and evidence regarding that application. If the immigration judge finds the alien eligible for relief or protection from removal, the judge will then grant the application.

If an immigration judge finds an alien is removable and ineligible for any relief or protection from removal, the judge will order the alien removed. ICE is then responsible for any subsequent detention and removal activities. The issuance of a removal order does not guarantee the actual physical removal of an alien from the United States.

Within 30 days of the immigration judge's decision in a removal case, either party or both parties may appeal the decision to the BIA. If the BIA decision is adverse to the alien, the alien may file a petition for review of that decision with the appropriate federal circuit court of appeals within 30 days.

In certain circumstances, a party to a removal case may also file a motion with the immigration court to reconsider or reopen the case after an immigration judge or the BIA has rendered a decision.

In certain circumstances, for aliens detained by DHS or aliens recently released from custody by DHS, an immigration judge may consider requests to redetermine the conditions of custody or to ameliorate the conditions of release. Any alien may make such a request, and an immigration judge will preside over a hearing on the request, commonly called a "bond hearing." Whether an immigration judge grants the request ultimately depends on the facts and applicable law of each case. Either party or both parties may appeal the immigration judge's bond decision to the BIA.

STATISTICS YEARBOOK KEY DEFINITIONS

The following definitions are applicable to the FY 2017 Yearbook. Please note that prior Yearbooks may have utilized different definitions and that some terms may have different usages or definitions outside the Yearbook context.

Immigration court matters include cases, bond redeterminations , and motions to reopen, reconsider and recalendar.

Immigration court cases include twelve case types, di vided into four categories. I-862 case types include removal, deportation, and exclusion cases. I-863 case types include asylum-only, withholding-only, credible fear review, reasonable fear review, and claimed status review cases. Other case types include rescission nonremoval Nicaraguan Adjustment and Central American Relief Act (NACARA), departure control, and continued detention review cases.

Immigration court receipts is the total number of charging documents, bond redeterminations, and motions to reopen, reconsider, and recalendar received within the reporting period.

Immigration court matter completions is the total number of immigration judge decisions on cases and bond redeterminations, plus the total number of denied motions to reopen, reconsider, and recalendar.

Initial case completion (ICC) is the first dispositive decision rendered by an immigration judge. For instance, an I-862 removal case is completed by an order of removal, relief, voluntary departure, termination, or other.

An order granting a continuance, changing venue, or administratively closing a case is not a dispositive decision and, thus, does not constitute a case completion.

Subsequent case completion refers to any dispositive decision by an immigration judge after an ICC.

IMMIGRATION COURTS

PENDING CASELOAD

Figure 1. The number of pending immigration court cases has grown by 84 percent since the end of FY 2013, and by 26 percent since the end of FY 2016.

Figure 1. OCIJ Pending Caseload

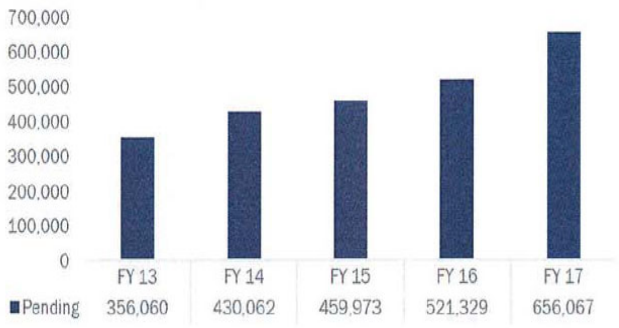


Figure 2. The BIA's pending caseload decreased 32 percent from FY 2013 to FY 2017.

Figure 2. BIA Pending Caseload

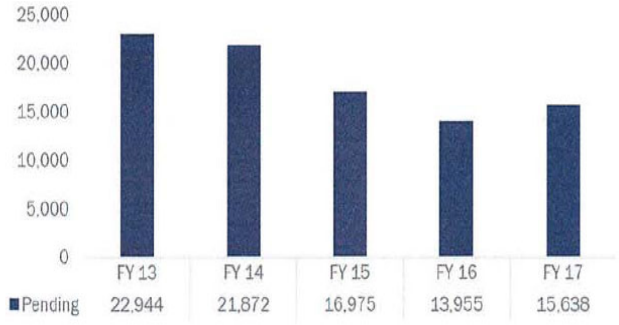


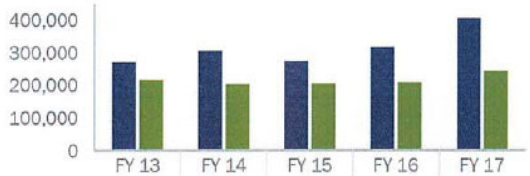
Table 1. Immigration Courts Pending Cases

Immigration Court	Pending Cases as of 9/30/2017
Adelanto	1,258
Arlington	38,966
Atlanta	19,159
Aurora	417
Baltimore	29,516
Batavia	317
Bloomington	6,210
Boston	22,505
Buffalo	1,466
Charlotte	12,981
Chicago	29,197
Cleveland	7,835
Dallas	16,940
Denver	10,660
Detroit	4,385
El Paso	4,879
El Paso SPC	440
Elizabeth	672
Eloy	1,096
Fishkill	119
Florence	589
Harlingen	2,498
Hartford	4,019
Honolulu	628
Houston	48,872
Houston SPC	1,219
Imperial	3,444
Kansas City	6,353
Krome	722
Las Vegas	3,652
LaSalle	318
Los Angeles (N)	61,885
Los Angeles (D)	526
Louisville	4,631
Memphis	10,858
Miami	32,486
New Orleans	8,483
New York City	84,090
Newark	33,532
Oakdale	268
Omaha	8,653
Orlando	10,410
Otay Mesa	808
Otero	196
Pearsall	765
Philadelphia	9,729
Phoenix	7,287
Port Isabel	527
Portland	4,215
Saipan	98
Salt Lake City	2,612
San Antonio	27,484
San Diego	4,530
San Francisco	47,878
San Juan	219
Seattle	8,789
Stewart	807
Tacoma	980
Tucson	723
Ulster	156
Varick	662
York	448
Total	**656,067**

TOTAL I-862 MATTERS RECEIVED AND COMPLETED

Figure 3. The number of I-862 matters the immigration courts received increased by 28 percent between FY 2016 and FY 2017. The number of I-862 matters the immigration courts completed increased by 17 percent from FY 2016 to FY 2017.

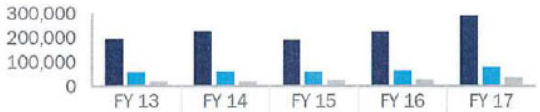
Figure 3. Total I-862 Immigration Court Matters



	FY 13	FY 14	FY 15	FY 16	FY 17
Receipts	271,726	307,017	274,920	316,343	405,947
Completions	217,123	203,325	204,909	207,230	243,128

Figure 4. New NTAs constitute the bulk of the courts' work.

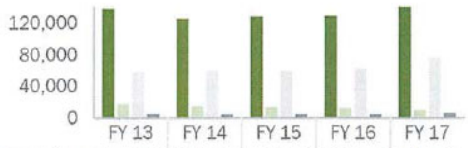
Figure 4. I-862 Immigration Court Matters Received by Type



	FY 13	FY 14	FY 15	FY 16	FY 17
New NTAs	193,690	226,670	189,676	224,963	291,258
Bonds	57,673	60,476	60,067	63,421	78,483
Motions	20,363	19,871	25,177	27,959	36,206
Total	271,726	307,017	274,920	316,343	405,947

Figure 5. The majority of matters completed are I-862 ICCs.

Figure 5. I-862 Immigration Court Matters Completed by Type



	FY 13	FY 14	FY 15	FY 16	FY 17
Initial Case Completions	137,329	124,649	127,452	128,201	149,581
Subsequent Case Completions	17,511	14,448	13,650	12,433	10,164
Bonds	57,531	59,852	59,543	62,197	77,278
Motions (Not Granted)	4,752	4,376	4,264	4,399	6,105
Total	217,123	203,325	204,909	207,230	243,128

Table 2. Total I-862 Immigration Court Matters Received by Court

Immigration Court	FY 2016 Total Matters	FY 2017				Rate of Change: Total Matters
		Total Matters	New NTAs	Bonds	Motions	
Adelanto	7,664	8,486	3,681	4,754	51	11%
Arlington	13,547	15,488	12,317	1,492	1,679	14%
Atlanta	8,524	11,714	8,625	2,064	1,025	37%
Aurora	3,044	3,848	2,016	1,776	56	26%
Baltimore	8,825	14,583	12,880	750	953	65%
Batavia	2,981	2,491	1,226	1,239	26	-16%
Bloomington	3,192	4,748	2,740	1,369	639	49%
Boston	7,791	11,042	8,396	1,499	1,147	42%
Buffalo	534	782	588	0	194	46%
Charlotte	5,880	9,449	8,416	479	554	61%
Chicago	9,787	11,509	7,718	2,700	1,091	18%
Cleveland	3,006	4,112	2,859	806	447	37%
Dallas	11,501	13,236	11,393	1,183	660	15%
Denver	1,824	2,714	2,053	241	420	49%
Detroit	2,697	3,753	2,210	1,197	346	39%
El Paso	1,091	1,741	1,422	38	281	60%
El Paso SPC	3,950	3,462	2,171	1,248	43	-12%
Elizabeth	5,442	4,931	2,336	2,551	44	-9%
Eloy	7,154	8,040	3,582	4,383	75	12%
Fishkill	170	169	157	0	12	-1%
Florence	5,300	3,991	2,486	1,448	57	-25%
Harlingen	3,554	3,429	2,448	0	981	-4%
Hartford	1,586	2,648	2,202	244	202	67%
Honolulu	413	591	422	122	47	43%
Houston	13,116	14,224	12,994	3	1,227	8%
Houston SPC	10,454	14,363	8,859	5,279	225	37%
Imperial	3,869	4,311	2,340	1,882	89	11%
Kansas City	3,337	5,254	3,538	1,329	387	57%
Krome	6,750	8,507	4,349	4,032	126	26%
Las Vegas	3,179	4,447	2,817	1,166	464	40%
LaSalle	4,979	5,998	3,071	2,902	25	20%
Los Angeles (N)	16,209	26,188	21,300	14	4,874	62%
Los Angeles (D)	4,786	4,697	1,939	2,721	37	-2%
Louisville	1,325	1,860	1,572	7	281	40%
Memphis	5,143	6,430	5,278	41	1,111	25%
Miami	11,921	16,575	13,918	53	2,604	39%
New Orleans	3,866	5,180	4,616	0	564	34%
New York City	18,445	27,131	23,895	5	3,231	47%
Newark	5,163	8,708	7,872	2	834	69%
Oakdale	4,206	4,782	2,405	2,329	48	14%
Omaha	2,993	4,504	3,283	745	476	50%
Orlando	5,271	8,241	6,012	1,100	1,129	56%
Otay Mesa	3,284	4,938	2,145	2,751	42	50%
Otero	350	1,904	1,179	715	10	444%
Pearsall	6,658	8,168	5,366	2,764	38	23%
Philadelphia	3,036	4,013	3,493	2	518	32%
Phoenix	2,721	3,335	2,378	3	954	23%
Port Isabel	3,895	4,062	2,605	1,394	63	4%
Portland	1,558	1,357	1,108	13	236	11%
Saipan	21	115	111	1	3	448%
Salt Lake City	2,004	1,258	887	110	261	-56%
San Antonio	6,146	7,999	5,062	1,613	1,324	30%
San Diego	2,752	2,842	2,125	9	708	3%
San Francisco	17,127	20,328	15,162	3,171	1,995	19%
San Juan	251	336	135	17	184	34%
Seattle	2,687	2,757	2,164	0	593	3%
Stewart	4,295	7,769	5,021	2,669	79	81%
Tacoma	6,556	6,648	3,185	3,418	45	1%
Tucson	680	608	489	0	119	-11%
Ulster	300	241	222	0	19	-20%
Varick	3,133	3,253	1,451	1,721	81	4%
York	4,420	5,659	2,568	2,919	172	28%
Total	**316,343**	**405,947**	**291,258**	**78,483**	**36,206**	**22%**

Key
25%+ growth in Total Matters Received
25%+ decrease in Total Matters Received

Table 3. Total I-862 Immigration Court Matters Completed by Court and Type

Immigration Court	FY 2016 Total Matters	FY 2017					Rate of Change: Total Matters
		Total Matters	Initial Case Completions	Subsequent Case Completions	Bonds	Motions Not Granted	
Adelanto	5,227	6,636	1,873	70	4,677	16	27%
Arlington	6,877	6,509	4,628	313	1,404	164	-5%
Atlanta	7,185	7,473	4,873	213	2,015	372	4%
Aurora	2,108	2,856	1,013	30	1,794	19	35%
Baltimore	4,645	4,264	3,066	292	757	149	-8%
Batavia	1,903	1,837	562	25	1,244	6	-3%
Bloomington	2,059	2,795	1,358	84	1,235	118	36%
Boston	4,579	4,851	2,882	384	1,520	65	6%
Buffalo	710	601	497	65	0	39	-15%
Charlotte	4,652	4,505	3,731	203	479	92	-3%
Chicago	5,705	7,879	4,688	378	2,699	114	38%
Cleveland	2,005	2,439	1,522	104	776	37	22%
Dallas	8,659	8,148	6,574	250	1,140	184	-6%
Denver	735	1,781	1,336	151	229	65	142%
Detroit	2,097	2,959	1,629	92	1,138	100	41%
El Paso	938	1,421	1,214	60	38	109	51%
El Paso SPC	2,793	2,677	1,421	30	1,203	23	-4%
Elizabeth	3,780	4,043	1,441	54	2,527	21	7%
Eloy	5,332	6,685	2,174	48	4,436	27	25%
Fishkill	125	163	150	6	0	7	30%
Florence	3,126	2,362	924	21	1,394	23	-24%
Harlingen	2,338	2,535	1,794	206	0	535	8%
Hartford	1,214	1,263	898	91	240	34	4%
Honolulu	521	634	485	33	113	3	22%
Houston	6,137	7,302	6,776	355	3	168	19%
Houston SPC	6,037	9,564	4,513	55	4,947	49	58%
Imperial	2,369	2,434	519	25	1,873	17	3%
Kansas City	2,156	3,238	1,796	109	1,282	51	50%
Krome	5,083	7,062	3,002	86	3,899	75	39%
Las Vegas	2,646	3,766	2,338	216	1,147	65	42%
LaSalle	3,935	5,016	2,111	30	2,860	15	27%
Los Angeles (N)	11,641	11,807	9,761	1,312	14	720	1%
Los Angeles (D)	3,866	4,265	1,372	63	2,815	15	10%
Louisville	816	845	751	33	6	55	4%
Memphis	2,990	3,636	3,267	153	42	174	22%
Miami	5,833	7,950	6,814	695	51	390	36%
New Orleans	2,124	2,698	2,496	121	0	81	27%
New York City	14,662	12,887	11,445	1,059	1	382	-12%
Newark	3,179	3,176	2,801	253	9	113	0%
Oakdale	2,907	3,850	1,460	21	2,334	35	32%
Omaha	1,611	2,625	1,697	122	765	41	63%
Orlando	3,105	5,333	3,780	359	1,056	138	72%
Otay Mesa	2,094	3,587	764	31	2,772	20	71%
Otero	238	1,804	1,116	5	679	4	658%
Pearsall	3,533	4,137	1,420	17	2,685	15	17%
Philadelphia	1,659	1,871	1,653	155	2	61	13%
Phoenix	1,797	2,320	2,093	159	3	65	29%
Port Isabel	2,450	2,599	1,160	36	1,367	36	6%
Portland	785	614	530	63	13	8	-22%
Saipan	21	25	18	4	1	2	19%
Salt Lake City	1,714	1,286	991	89	148	58	-25%
San Antonio	2,904	5,226	3,157	262	1,481	326	80%
San Diego	1,306	1,708	1,432	115	6	155	31%
San Francisco	10,357	10,115	6,267	392	3,268	188	-2%
San Juan	193	158	105	24	17	12	-18%
Seattle	2,115	1,806	1,540	167	0	99	-15%
Stewart	3,799	6,979	4,153	86	2,694	46	84%
Tacoma	5,053	5,866	2,278	39	3,530	19	16%
Tucson	679	729	672	43	0	14	7%
Ulster	204	218	199	9	0	10	7%
Varick	2,468	2,560	892	53	1,598	17	4%
York	3,451	4,750	1,709	145	2,852	44	38%
Total	**207,230**	**243,128**	**149,581**	**10,164**	**77,278**	**6,105**	**17%**

Key
25%+ growth in Total Matters Completed
25%+ decrease in Total Matters Completed

CASES RECEIVED AND COMPLETED BY TYPE

Table 4. Immigration Court Cases Received by Case Type

Type of Case	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Removal	193,689	226,669	189,674	224,962	291,258
Credible Fear	1,770	6,507	6,644	7,464	6,532
Withholding Only	2,328	3,145	3,061	3,261	3,388
Reasonable Fear	1,156	1,778	2,608	2,521	2,476
Asylum Only	393	294	255	227	399
Rescission	46	31	45	27	37
Claimed Status	31	22	21	11	6
Continued Detention Review	0	3	2	1	0
Deportation	1	1	2	1	0
NACARA	2	4	1	0	0
Total	**199,416**	**238,454**	**202,313**	**238,475**	**304,096**

Table 5. Immigration Court Initial and Subsequent Case Completions by Case Type

Type of Case	FY 2013		FY 2014		FY 2015		FY 2016		FY 2017	
	Initial	Subsequent	Initial	Subsequent	Initial	Subsequent	Initial	Subsequent	Initial	Subsequent
Deportation	601	1,592	472	1,157	452	1,100	477	1,082	381	818
Exclusion	48	154	35	103	19	103	35	83	22	62
Removal	136,680	15,765	124,142	13,188	126,981	12,447	127,689	11,268	149,178	9,284
Credible Fear	1,726	0	6,353	0	6,624	2	7,492	0	6,533	0
Reasonable Fear	1,135	0	1,707	0	2,559	0	2,536	2	2,437	0
Claimed Status	28	2	22	0	19	0	14	1	4	1
Asylum Only	307	72	296	75	230	49	200	51	261	64
Rescission	35	5	28	3	26	5	28	2	33	1
Continued Detention Review	2	0	2	0	3	0	2	0	0	0
NACARA	2	5	1	1	2	0	1	1	3	2
Withholding Only	1,300	64	2,553	107	2,209	127	2,501	132	2,865	163
Total	**141,864**	**17,659**	**135,611**	**14,634**	**139,124**	**13,833**	**140,975**	**12,622**	**161,717**	**10,395**

I-862 Case Completions by Decision

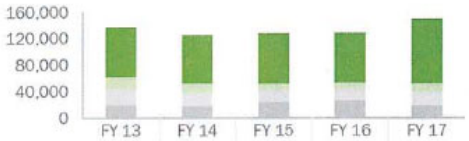
Figure 6. I-862 ICCs increased 17 percent from FY 2016 to FY 2017.

Figure 6. I-862 Case Completions

	FY 13	FY 14	FY 15	FY 16	FY 17
Subsequent Case Completion	17,511	14,448	13,650	12,433	10,164
Initial Case Completion	137,329	124,649	127,452	128,201	149,581
Total	154,840	139,097	141,102	140,634	159,745

Figure 7. All I-862 case outcomes except termination increased in FY 2017.

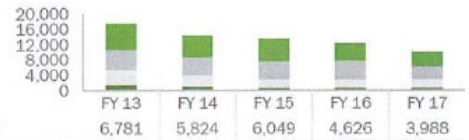
Figure 7. I-862 ICCs by Decision



	FY 13	FY 14	FY 15	FY 16	FY 17
Other	499	366	436	481	514
Removal	75,384	72,715	75,727	75,092	97,457
Voluntary Departure	17,902	13,666	9,911	9,055	13,603
Relief	24,456	20,297	17,614	17,248	19,456
Termination	19,088	17,605	23,764	26,325	18,551
Total	137,329	124,649	127,452	128,201	149,581

Figure 8. For I-862 cases, subsequent case completions have decreased by about seven percent between FY 2013 and FY 2017.

Figure 8. I-862 Subsequent Case Completions by Decision



	FY 13	FY 14	FY 15	FY 16	FY 17
Removal	6,781	5,824	6,049	4,626	3,988
Termination	5,381	4,625	4,699	5,006	3,286
Relief	3,905	2,897	2,204	2,129	2,166
Voluntary Departure	1,192	836	507	459	540
Other	252	266	191	213	184
Total	17,511	14,448	13,650	12,433	10,164

Figure 9. Administrative closures decreased by about 40 percent from FY 2016 to FY 2017.

Figure 9. Administrative Closures

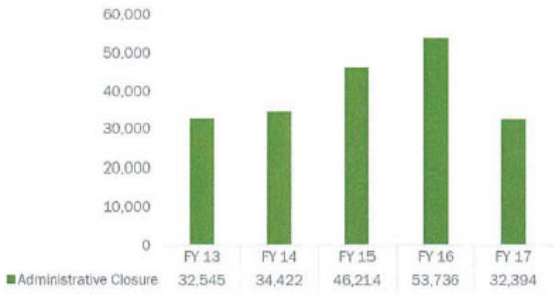


Figure 10. For I-862 cases, changes of venue have increased 35 percent since FY 2013 and transfers have increased 23 percent in the same period.

Figure 10. Total I-862 Changes of Venue and Transfers

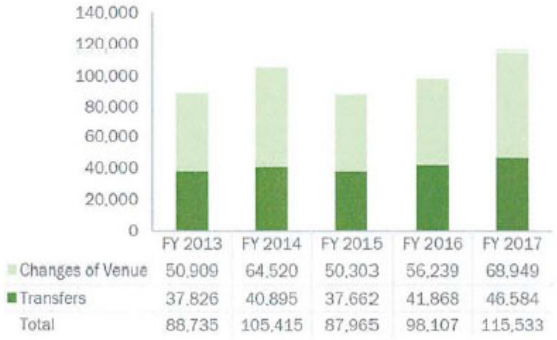


Table 6. Credible Fear (CF) and Reasonable Fear (RF) Review ICCs by Decision

Disposition	FY 13		FY 14		FY 15		FY 16		FY 17	
	CF	RF	CF	RF	CF	RF	CF	RF	CF	RF
Affirmed DHS Decision	1,503	977	5,232	1,439	5,219	2,053	5,333	1,915	4,851	1,811
Vacated DHS Decision	206	131	1,055	230	1,347	451	2,088	571	1,647	588
Other	18	30	67	43	65	64	74	57	38	45
Total	**1,727**	**1,138**	**6,354**	**1,712**	**6,631**	**2,568**	**7,495**	**2,543**	**6,536**	**2,444**

Table 7. FY 2017 I-862 Changes of Venue and Transfers

Immigration Court	Changes of Venue	Transfers	Total
Adelanto	2,327	30	2,357
Arlington	2,154	2,053	4,207
Atlanta	2,543	2,961	5,504
Aurora	1,080	18	1,098
Baltimore	915	31	946
Batavia	394	442	836
Bloomington	216	668	884
Boston	432	981	1,413
Buffalo	516	110	626
Charlotte	660	37	697
Chicago	1,845	2,042	3,887
Cleveland	324	507	831
Dallas	593	2,068	2,661
Denver	697	170	867
Detroit	303	627	930
El Paso	1,648	243	1,891
El Paso SPC	20	1,188	1,208
Elizabeth	24	1,406	1,430
Eloy	1,933	1	1,934
Fishkill	28	25	53
Florence	1,887	11	1,898
Harlingen	3,675	232	3,907
Hartford	227	208	435
Honolulu	24	50	74
Houston	7,335	2,706	10,041
Houston SPC	210	5,556	5,766
Imperial	1,949	2,146	4,095
Kansas City	602	797	1,399
Krome	1,765	509	2,274
Las Vegas	486	669	1,155
LaSalle	1,219	186	1,405
Los Angeles (N)	3,598	317	3,915
Los Angeles (D)	148	1,367	1,515
Louisville	197	210	407
Memphis	559	831	1,390
Miami	1,839	23	1,862
New Orleans	1,496	10	1,506
New York City	3,061	232	3,293
Newark	1,868	765	2,633
Oakdale	826	454	1,280
Omaha	250	657	907
Orlando	781	464	1,245
Otay Mesa	281	1,274	1,555
Otero	6	407	413
Pearsall	444	3,775	4,219
Philadelphia	626	294	920
Phoenix	1,443	21	1,464
Port Isabel	36	1,242	1,278
Portland	265	60	325
Saipan	0	0	0
Salt Lake City	331	211	542
San Antonio	5,723	1,757	7,480
San Diego	1,635	279	1,914
San Francisco	1,436	2,375	3,811
San Juan	57	9	66
Seattle	376	3	379
Stewart	926	0	926
Tacoma	1,249	1	1,250
Tucson	181	2	183
Ulster	64	32	96
Varick	123	505	628
York	1,093	329	1,422
Total	**68,949**	**46,584**	**115,533**

I-862 ICCs BY COUNTRY OF NATIONALITY

EOIR IJs hear cases from many different nationalities each year.

Figure 11. About 75 percent of I-862 ICCs in FY 2017 were cases of nationals from Mexico, Guatemala, Honduras, or El Salvador.

Table 8. In the last five years, Mexico, Guatemala, Honduras, El Salvador, China, Ecuador, Dominican Republic, Cuba, and India were nine of the top ten countries of nationality.

Figure 11. I-862 ICCs by Nationality

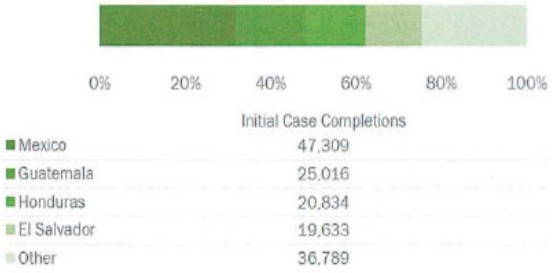


Table 8. I-862 ICCs by Top 25 Countries of Nationality

Rank	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
1	Mexico	Mexico	Mexico	Mexico	Mexico
2	Guatemala	Guatemala	Honduras	Guatemala	Guatemala
3	El Salvador	Honduras	Guatemala	Honduras	Honduras
4	Honduras	El Salvador	El Salvador	El Salvador	El Salvador
5	China	China	China	China	China
6	Cuba	Cuba	Ecuador	Ecuador	Haiti
7	Dominican Republic	Dominican Republic	Dominican Republic	Dominican Republic	Ecuador
8	Jamaica	Ecuador	India	Cuba	Dominican Republic
9	Ecuador	India	Cuba	India	Cuba
10	India	Jamaica	Jamaica	Jamaica	India
11	Colombia	Colombia	Haiti	Colombia	Brazil
12	Philippines	Haiti	Colombia	Haiti	Jamaica
13	Haiti	Philippines	Peru	Brazil	Colombia
14	Brazil	Peru	Philippines	Somalia	Nicaragua
15	Peru	Nicaragua	Nicaragua	Nicaragua	Romania
16	Nicaragua	Brazil	Brazil	Peru	Peru
17	Nigeria	Nepal	Somalia	Ghana	Philippines
18	Russia	Nigeria	Nigeria	Philippines	Nepal
19	Nepal	Ethiopia	Ethiopia	Nigeria	Pakistan
20	Pakistan	Russia	Nepal	Pakistan	Ghana
21	Ethiopia	Egypt	Bangladesh	Nepal	Nigeria
22	Kenya	Pakistan	Pakistan	Bangladesh	Eritrea
23	Canada	Vietnam	Ghana	Canada	Venezuela
24	Vietnam	Kenya	Vietnam	Romania	Canada
25	Egypt	Canada	Canada	Egypt	Cameroon

I-862 ICCs BY LANGUAGE

In parallel to the many nationalities that come before IJs, there are similarly hundreds of languages in which hearings are conducted. EOIR provides interpretation services for all aliens in proceedings as appropriate.

Figure 12. About 85 percent of I-862 ICCs in FY 2017 were cases of Spanish- or English-speaking aliens.

Table 9. In the last five years, seven of the top ten languages were Spanish, English, Mandarin, Creole, Punjabi, Arabic, or Russian.

Figure 12. I-862 ICCs by Language

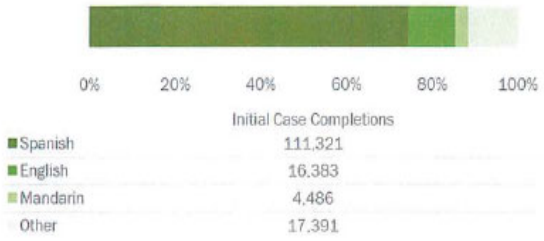


Table 9. I-862 ICCs by Top 25 Languages

Rank	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
1	Spanish	Spanish	Spanish	Spanish	Spanish
2	English	English	English	English	English
3	Mandarin	Mandarin	Mandarin	Mandarin	Mandarin
4	Unknown Language	Unknown Language	Unknown Language	Unknown Language	Creole
5	Russian	Russian	Arabic	Arabic	Unknown Language
6	Arabic	Arabic	Russian	Punjabi	Punjabi
7	Punjabi	Punjabi	Punjabi	Russian	Portuguese
8	Creole	Creole	Creole	Portuguese	Arabic
9	Portuguese	French	Somali	Mam	Russian
10	French	Portuguese	French	Creole	Mam
11	Korean	Korean	Portuguese	Somali	French
12	Foo Chow	Nepali	Quiche	Quiche	Quiche
13	Nepali	Somali	Nepali	French	Nepali
14	Amharic	Foo Chow	Bengali	Nepali	Tigrigna - Eritrean
15	Tagalog	Amharic	Mam	Foo Chow	Romanian-Moldovan
16	Romanian-Moldovan	Vietnamese	Foo chow	Bengali	Konjobal
17	Vietnamese	Gujarati	Korean	Amharic	Somali
18	Gujarati	Quiche	Amharic	Korean	Bengali
19	Tigrigna - Eritrean	Mam	Vietnamese	Tigrigna - Eritrean	Urdu
20	Urdu	Tagalog	Tigrigna - Eritrean	Konjobal	Foo Chow
21	Indonesian	Urdu	Gujarati	Romanian-Moldovan	Korean
22	Armenian	Albanian	Albanian	Urdu	Albanian
23	Somali	Armenian	Konjobal	Albanian	Amharic
24	Albanian	Indonesian	Tagalog	Vietnamese	Vietnamese
25	Tamil	Tigrigna - Eritrean	Urdu	Armenian	Gujarati

I-862 ICCs for Detained Cases

Detention locations include DHS Service Processing Centers (SPC), DHS contract detention facilities, state and local government jails, and Bureau of Prisons institutions. For the purpose of Figure 13, Institutional Hearing Program (IHP) cases are considered detained cases as are cases of unaccompanied alien children (UAC) in the custody of the Department of Health and Human Services.

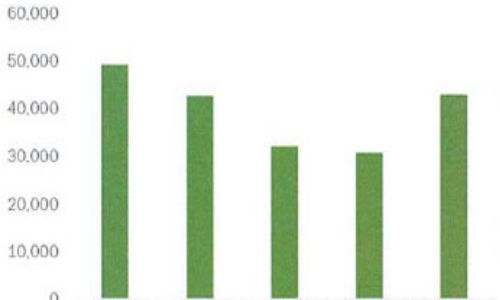
Figure 13. Detained I-862 ICCs increased 36 percent from FY 2016 to FY 2017.

Figure 13. I-862 ICCs by Detention Status

	FY 13	FY 14	FY 15	FY 16	FY 17
Initial Case Completions for Detained Aliens	58,813	51,145	40,358	39,912	54,098
Initial Case Completions for All Aliens	137,329	124,649	127,452	128,201	149,581
Percent Detained	43%	41%	32%	31%	36%

Figure 14. The number of standard detained completions – aliens at least 18 years of age that are not at an IHP location, are not UAC or in HHS custody, and are not considered to have competency concerns or to be subject to the *Franco* litigation – have increased 39 percent from FY 2016 to FY 2017.

Figure 14. I-862 Standard Detained ICCs



	FY 13	FY 14	FY 15	FY 16	FY 17
Completions	49,121	42,605	32,104	30,749	42,881

Table 10. FY 2017 I-862 Detained ICCs

Immigration Court	Completions
Adelanto	1,848
Arlington	1,132
Atlanta	2,072
Aurora	1,001
Baltimore	423
Batavia	539
Bloomington	735
Boston	804
Buffalo	0
Charlotte	8
Chicago	1,734
Cleveland	547
Dallas	3,095
Denver	91
Detroit	905
El Paso	113
El Paso SPC	1,421
Elizabeth	1,439
Eloy	2,152
Fishkill	150
Florence	921
Harlingen	62
Hartford	228
Honolulu	145
Houston	46
Houston SPC	4,513
Imperial	338
Kansas City	687
Krome	2,966
Las Vegas	1,036
LaSalle	2,106
Los Angeles (N)	58
Los Angeles (D)	1,368
Louisville	0
Memphis	26
Miami	198
New Orleans	5
New York City	6
Newark	2
Oakdale	1,459
Omaha	695
Orlando	729
Otay Mesa	750
Otero	1,115
Pearsall	1,419
Philadelphia	11
Phoenix	69
Port Isabel	1,158
Portland	5
Saipan	3
Salt Lake City	179
San Antonio	464
San Diego	29
San Francisco	1,491
San Juan	26
Seattle	0
Stewart	4,143
Tacoma	2,276
Tucson	379
Ulster	199
Varick	876
York	1,703
Total	**54,098**

I-862 Institutional Hearing Program Cases Received and Completed

IHP is a cooperative effort between EOIR, DHS, and various federal, state, and municipal corrections agencies. IJs and court staff either travel to IHP facilities to conduct IHP hearings, or the IJs conduct the hearings by video teleconferencing.

Figure 15. New IHP case receipts declined in FY 2017.

Figure 15. I-862 IHP Receipts and ICCs

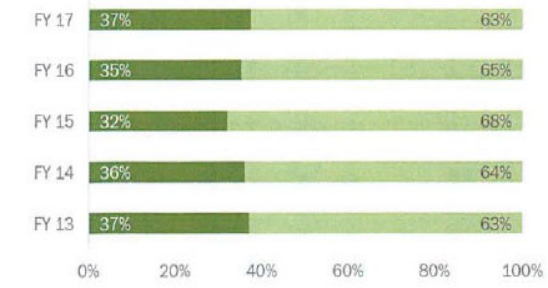
Table 11. I-862 IHP ICCs by Decision

Disposition	FY 13	FY 14	FY 15	FY 16	FY 17
Removal	3,277	3,075	2,573	2,726	2,333
Voluntary Departure	2	3	7	28	10
Termination	80	86	91	94	53
Relief	23	27	39	117	63
Other	3	0	4	8	4
Total Completions	**3,385**	**3,191**	**2,714**	**2,973**	**2,463**

I-862 ICCs WITH APPLICATIONS FOR RELIEF

Figure 16. The percent of completed I-862 cases with applications for relief has been roughly constant over the past five years.

Figure 16. I-862 ICCs by Application Filling Status



	FY 13	FY 14	FY 15	FY 16	FY 17
With Applications	50,834	44,974	40,789	45,094	56,035
Without Applications	86,495	79,675	86,663	83,107	93,546
Total	137,329	124,649	127,452	128,201	149,581

Table 12. FY 2017 I-862 ICCs with Applications for Relief

Immigration Court	Initial Case Completions	Number of Completions with Applications	Percent with Applications
Adelanto	1,873	837	45%
Arlington	4,628	1,644	36%
Atlanta	4,873	1,050	22%
Aurora	1,013	320	32%
Baltimore	3,066	981	32%
Batavia	562	178	32%
Bloomington	1,358	490	36%
Boston	2,882	1,496	52%
Buffalo	497	208	42%
Charlotte	3,731	675	18%
Chicago	4,688	1,530	33%
Cleveland	1,522	535	35%
Dallas	6,574	1,243	19%
Denver	1,336	491	37%
Detroit	1,629	664	41%
El Paso	1,214	287	24%
El Paso SPC	1,421	208	15%
Elizabeth	1,441	698	48%
Eloy	2,174	526	24%
Fishkill	150	32	21%
Florence	924	224	24%
Harlingen	1,794	540	30%
Hartford	898	394	44%
Honolulu	485	315	65%
Houston	6,776	2,735	40%
Houston SPC	4,513	991	22%
Imperial	519	190	37%
Kansas City	1,796	529	29%
Krome	3,002	1,283	43%
Las Vegas	2,338	1,054	45%
LaSalle	2,111	346	16%
Los Angeles (N)	9,761	4,663	48%
Los Angeles (D)	1,372	511	37%
Louisville	751	48	6%
Memphis	3,267	1,069	33%
Miami	6,814	2,531	37%
New Orleans	2,496	337	14%
New York City	11,445	7,622	67%
Newark	2,801	1,064	38%
Oakdale	1,460	265	18%
Omaha	1,697	640	38%
Orlando	3,780	1,815	48%
Otay Mesa	764	281	37%
Otero	1,116	298	27%
Pearsall	1,420	436	31%
Philadelphia	1,653	680	41%
Phoenix	2,093	1,040	50%
Port Isabel	1,160	602	52%
Portland	530	347	65%
Saipan	18	2	11%
Salt Lake City	991	477	48%
San Antonio	3,157	890	28%
San Diego	1,432	451	31%
San Francisco	6,267	3,199	51%
San Juan	105	42	40%
Seattle	1,540	970	63%
Stewart	4,153	710	17%
Tacoma	2,278	959	42%
Tucson	672	233	35%
Ulster	199	66	33%
Varick	892	457	51%
York	1,709	636	37%
Total	**149,581**	**56,035**	**37%**

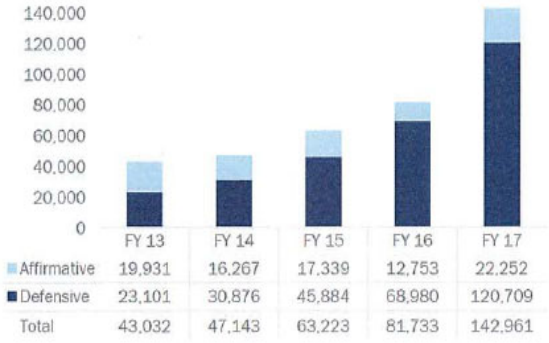
Key
>50% of completions had applications
<15% of completions had applications

ASYLUM CASES RECEIVED AND COMPLETED

There are two types of asylum processes – defensive and affirmative. The defensive asylum process applies to aliens who appear before EOIR and who request asylum before an IJ. The affirmative asylum process applies to aliens who initially file an asylum application with USCIS and, subsequently, have that application referred by USCIS to EOIR.

Figure 17. Defensive asylum receipts have increased significantly (423 percent) from FY 2013 to FY 2017. In the same period, affirmative asylum receipts have increased 12 percent.

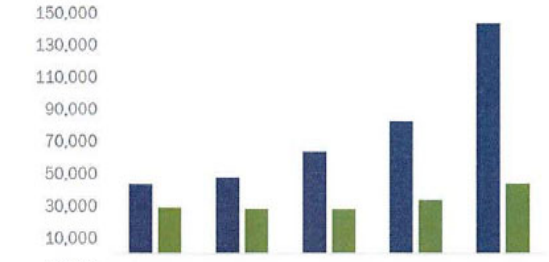
Figure 17. Asylum Receipts



	FY 13	FY 14	FY 15	FY 16	FY 17
Affirmative	19,931	16,267	17,339	12,753	22,252
Defensive	23,101	30,876	45,884	68,980	120,709
Total	43,032	47,143	63,223	81,733	142,961

Figure 18. Asylum receipts increased 232 percent from FY 2013 to FY 2017; completions increased by 51 percent over the same period.

Figure 18. Asylum Receipts and ICCs



	FY 13	FY 14	FY 15	FY 16	FY 17
Receipts	43,032	47,143	63,223	81,733	142,961
Completions	28,623	27,788	27,699	33,116	43,137

Table 13. Asylum ICCs by Court for FY 2017

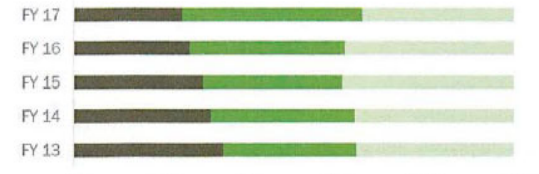
Immigration Court	Completions
Adelanto	738
Arlington	1,377
Atlanta	756
Aurora	225
Baltimore	831
Batavia	145
Bloomington	354
Boston	861
Buffalo	71
Charlotte	464
Chicago	955
Cleveland	409
Dallas	793
Denver	329
Detroit	365
El Paso	91
El Paso SPC	150
Elizabeth	531
Eloy	354
Fishkill	5
Florence	170
Harlingen	364
Hartford	316
Honolulu	289
Houston	2,493
Houston SPC	546
Imperial	143
Kansas City	352
Krome	1,011
Las Vegas	726
LaSalle	202
Los Angeles (N)	3,697
Los Angeles (D)	424
Louisville	31
Memphis	749
Miami	1,740
New Orleans	231
New York City	7,108
Newark	759
Oakdale	178
Omaha	434
Orlando	1,451
Otay Mesa	232
Otero	277
Pearsall	336
Philadelphia	500
Phoenix	603
Port Isabel	477
Portland	304
Saipan	0
Salt Lake City	286
San Antonio	808
San Diego	382
San Francisco	2,643
San Juan	10
Seattle	887
Stewart	541
Tacoma	776
Tucson	156
Ulster	13
Varick	235
York	453
Total	**43,137**

ASYLUM CASES COMPLETED BY DECISION

An asylum application also generally serves as an application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA). As such, EOIR reports on these two forms of relief from removal contemporaneously. Grant rates are calculated as percentages of all completed cases of the given type.

Figure 19. In the past five years, asylum grants have increased by about nine percent.

Figure 19. Asylum ICCs by Decision



	FY 13	FY 14	FY 15	FY 16	FY 17
Grants	9,753	8,638	8,170	8,730	10,654
Denials	8,665	9,152	8,752	11,695	17,677
Other	10,193	9,996	10,775	12,690	14,805

Figure 20. The defensive grant rate is consistently lower than that of affirmative asylum applications. Similarly, the defensive denial rate is significantly higher than the affirmative asylum denial rate.

Figure 20. Affirmative and Defensive Asylum ICCs by Decision

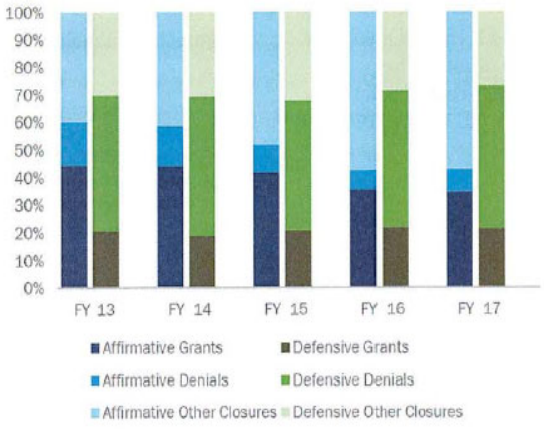


Figure 21. Administrative closures of asylum cases decreased by about 48 percent from FY 2016 to FY 2017.

Figure 21. Administrative Closures of Asylum Cases

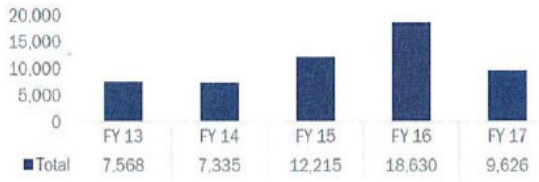


Figure 22. The grant rate for either asylum or withholding of removal has decreased about 30 percent in the last five years.

Figure 22. Asylum and Withholding of Removal ICCs by Decision

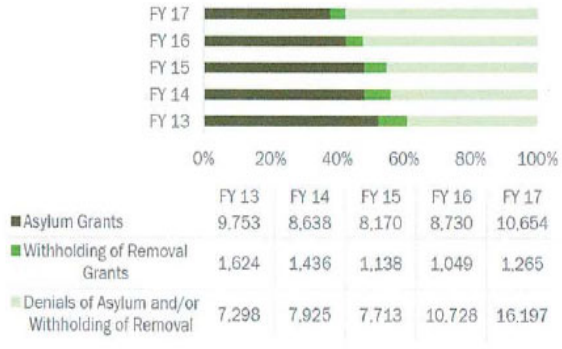


Figure 23. The withholding of removal grant rate has decreased about 48 percent from FY 2013 to FY 2017.

Figure 23. Withholding of Removal ICCs by Decision

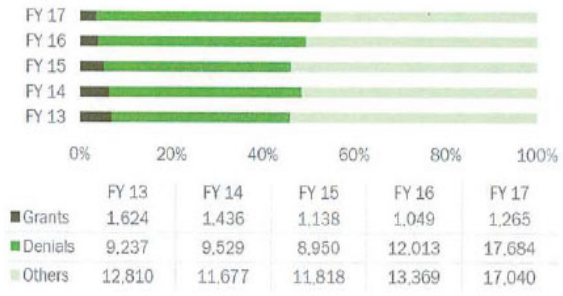


Table 14. Asylum Decision Rate by Immigration Court

Immigration Court	Grants		Denials		Other Closures		Administrative Closure		Total
	Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Adelanto	98	13%	498	67%	142	19%	0	0%	738
Arlington	424	22%	411	21%	542	28%	557	29%	1,934
Atlanta	23	3%	481	59%	252	31%	55	7%	811
Aurora	29	13%	147	65%	49	22%	1	0%	226
Baltimore	355	36%	221	22%	255	26%	166	17%	997
Batavia	30	21%	83	57%	32	22%	1	1%	146
Bloomington	53	13%	184	46%	117	29%	50	12%	404
Boston	332	30%	194	18%	335	31%	235	21%	1,096
Buffalo	17	18%	30	31%	24	25%	25	26%	96
Charlotte	32	7%	289	59%	143	29%	22	5%	486
Chicago	336	29%	294	26%	325	28%	192	17%	1,147
Cleveland	39	7%	175	33%	195	37%	114	22%	523
Dallas	74	9%	511	62%	208	25%	34	4%	827
Denver	97	20%	95	20%	137	28%	157	32%	486
Detroit	46	11%	184	43%	135	32%	58	14%	423
El Paso	3	2%	43	25%	45	26%	80	47%	171
El Paso SPC	4	3%	88	59%	58	39%	0	0%	150
Elizabeth	199	37%	238	45%	94	18%	0	0%	531
Eloy	8	2%	186	53%	160	45%	0	0%	354
Fishkill	0	0%	4	80%	1	20%	0	0%	5
Florence	4	2%	77	45%	89	52%	0	0%	170
Harlingen	7	2%	52	14%	305	82%	6	2%	370
Hartford	96	24%	110	28%	110	28%	84	21%	400
Honolulu	214	73%	53	18%	22	8%	3	1%	292
Houston	205	8%	1,736	68%	552	22%	43	2%	2,536
Houston SPC	39	7%	350	64%	157	29%	1	0%	547
Imperial	24	16%	79	54%	40	27%	4	3%	147
Kansas City	59	13%	176	39%	117	26%	105	23%	457
Krome	55	5%	553	55%	403	40%	2	0%	1,013
Las Vegas	39	4%	462	48%	225	24%	228	24%	954
LaSalle	7	3%	147	72%	48	24%	1	0%	203
Los Angeles (N)	379	6%	1,082	18%	2,236	38%	2,244	38%	5,941
Los Angeles (D)	34	8%	303	71%	87	21%	0	0%	424
Louisville	0	0%	4	7%	27	47%	27	47%	58
Memphis	133	16%	465	54%	151	18%	109	13%	858
Miami	269	13%	923	45%	548	27%	311	15%	2,051
New Orleans	24	7%	112	30%	95	26%	137	37%	368
New York City	3,915	41%	1,000	10%	2,193	23%	2,541	26%	9,649
Newark	174	18%	98	10%	487	51%	191	20%	950
Oakdale	22	12%	117	66%	39	22%	0	0%	178
Omaha	34	6%	187	35%	213	40%	95	18%	529
Orlando	186	11%	846	52%	419	26%	190	12%	1,641
Otay Mesa	44	19%	143	61%	45	19%	2	1%	234
Otero	39	14%	193	70%	45	16%	0	0%	277
Pearsall	70	21%	211	63%	55	16%	0	0%	336
Philadelphia	178	29%	129	21%	193	32%	104	17%	604
Phoenix	71	7%	42	4%	490	50%	370	38%	973
Port Isabel	39	8%	371	78%	67	14%	0	0%	477
Portland	100	28%	113	31%	91	25%	57	16%	361
Saipan	0	0%	0	0%	0	0%	0	0%	0
Salt Lake City	39	12%	155	46%	91	27%	50	15%	335
San Antonio	126	14%	468	52%	214	24%	87	10%	895
San Diego	62	13%	183	40%	137	30%	78	17%	460
San Francisco	1,300	39%	437	13%	906	27%	670	20%	3,313
San Juan	5	45%	2	18%	3	27%	1	9%	11
Seattle	201	20%	496	49%	190	19%	121	12%	1,008
Stewart	13	2%	441	81%	87	16%	2	0%	543
Tacoma	130	17%	461	59%	185	24%	1	0%	777
Tucson	17	10%	120	71%	19	11%	12	7%	168
Ulster	0	0%	6	43%	7	50%	1	7%	14
Varick	33	14%	124	53%	78	33%	0	0%	235
York	69	15%	294	65%	90	20%	1	0%	454
Total	**10,654**	**20%**	**17,677**	**34%**	**14,805**	**28%**	**9,626**	**18%**	**52,762**

ASYLUM GRANTS BY COUNTRY OF NATIONALITY

Figure 24. In FY 2017, the top four nationalities accounted for 57 percent of asylum grants. China alone accounted for 26 percent of all asylum grants.

Table 15. For each of the five years, six of the top 10 countries from which aliens were granted asylum were China, El Salvador, Guatemala, India, Nepal, and Ethiopia.

Figure 24. Asylum Grants by Country of Nationality

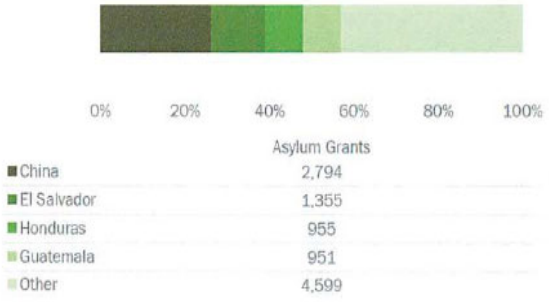


Table 15. Asylum Grants by Top 25 Countries of Nationality

Rank	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
1	China	China	China	China	China
2	Nepal	India	Guatemala	El Salvador	El Salvador
3	Ethiopia	Ethiopia	Honduras	Guatemala	Honduras
4	India	Nepal	India	Honduras	Guatemala
5	Egypt	Egypt	El Salvador	Mexico	Mexico
6	Soviet Union	El Salvador	Nepal	India	India
7	Eritrea	Guatemala	Ethiopia	Nepal	Nepal
8	Russia	Eritrea	Mexico	Ethiopia	Eritrea
9	El Salvador	Soviet Union	Somalia	Somalia	Cameroon
10	Guatemala	Honduras	Soviet Union	Eritrea	Ethiopia
11	Mexico	Somalia	Egypt	Egypt	Syria
12	Cameroon	Russia	Eritrea	Soviet Union	Egypt
13	Pakistan	Cameroon	Russia	Cameroon	Bangladesh
14	Sri Lanka	Mexico	Syria	Bangladesh	Soviet Union
15	Guinea	Pakistan	Bangladesh	Albania	Albania
16	Honduras	Venezuela	Cameroon	Russia	Pakistan
17	Somalia	Iraq	Nigeria	Syria	Haiti
18	Mali	Gambia	Albania	Burkina Faso	Somalia
19	Moldavia (Moldova)	Sri Lanka	Haiti	Pakistan	Guinea
20	Venezuela	Moldavia (Moldova)	Colombia	Nigeria	Ecuador
21	Indonesia	Colombia	Gambia	Ghana	Burkina Faso
22	Colombia	Syria	Pakistan	Iran	Ghana
23	Gambia	Albania	Iraq	Kirghizia (Kyrgyzstan)	Ukraine
24	Bangladesh	Burkina Faso	Burkina Faso	Guinea	Nigeria
25	Burkina Faso	Nigeria	Kirghizia (Kyrgyzstan)	Ukraine	Venezuela

CONVENTION AGAINST TORTURE

In 1999, the Department of Justice implemented regulations regarding the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT). There are two forms of protection under the Convention Against Torture, withholding of removal and deferral of removal.

Table 16. Convention Against Torture Cases by Decision

Granted			Denied	Other	Withdrawn	Abandoned	Not Adjudicated	Total
Withholding	Deferral	Total						
760	175	935	17,061	25,249	6,455	2,044	14	51,758

Table 17. Convention Against Torture Completions by Court

Immigration Court	Completions
Adelanto	1,588
Arlington	2,269
Atlanta	883
Aurora	352
Baltimore	821
Batavia	203
Bloomington	405
Boston	733
Buffalo	163
Charlotte	579
Chicago	969
Cleveland	503
Dallas	825
Denver	460
Detroit	614
El Paso	200
El Paso SPC	198
Elizabeth	717
Eloy	806
Fishkill	33
Florence	517
Harlingen	311
Hartford	378
Honolulu	190
Houston	2,094
Houston SPC	856
Imperial	758
Kansas City	467
Krome	1,145
Las Vegas	973
LaSalle	247
Los Angeles (N)	3,699
Los Angeles (D)	665
Louisville	84
Memphis	786
Miami	2,219
New Orleans	354
New York City	5,915
Newark	791
Oakdale	215
Omaha	245
Orlando	1,863
Otay Mesa	846
Otero	321
Pearsall	539
Philadelphia	582
Phoenix	393
Port Isabel	603
Portland	426
Saipan	5
Salt Lake City	352
San Antonio	1,213
San Diego	645
San Francisco	3,541
San Juan	9
Seattle	1,002
Stewart	639
Tacoma	1,100
Tucson	116
Ulster	77
Varick	589
York	667
Total	**51,758**

I-862 Applications for Relief other than Asylum

In addition to asylum, there is a variety of types of relief from removal available to aliens in immigration proceedings. These include, but are not limited to, different forms of cancellation of removal, adjustment of status, and different types of waivers.

Table 18. I-862 Cases Grants of Relief

Fiscal Year	Relief Granted to Lawful Permanent Residents (LPR)		Relief Granted to Non-LPR				
	Relief Granted Under Section 212(c)	Cancellation of Removal	Not Subject to Annual Cap of 4,000 Grants			Subject to Annual Cap of 4,000 Grants	
			Adjustment of Status to LPR	Suspension of Deportation	Cancellation of Removal	Suspension of Deportation	Cancellation of Removal
FY 13	667	3,874	5,033	71	325	0	4,031
FY 14	551	3,220	3,281	69	275	2	3,847
FY 15	439	2,592	2,198	53	279	2	3,827
FY 16	385	2,239	1,854	31	247	1	3,735
FY 17	401	2,202	1,860	54	304	0	3,716

I-862 *In Absentia* Orders

When an alien fails to appear for a hearing, the IJ may conduct a hearing in the alien's absence (*in absentia*). The *in absentia* rate refers to the proportion of all IJ decisions at the ICC where the removal order is issued *in absentia*.

Figure 25. From FY 2016 to FY 2017, the overall I-862 *in absentia* rate increased by about eight percent. In the same period, the never detained *in absentia* rate increased 18 percent. The released rate increased 13 percent.

Figure 25. I-862 *In Absentia* Rates

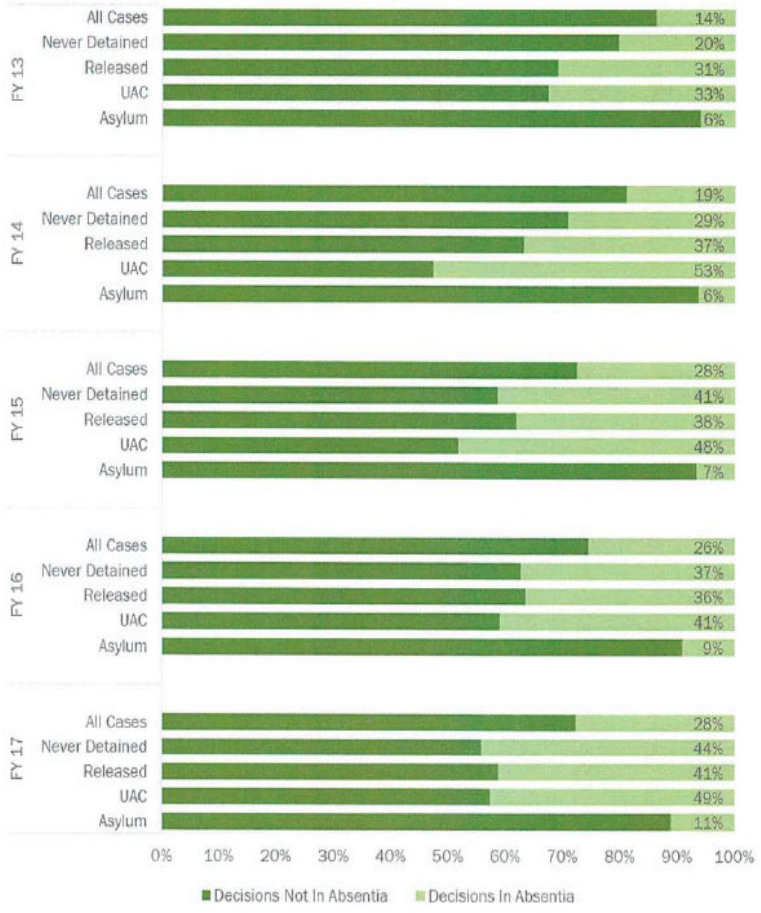


Table 19. I-862 *In Absentia* Orders and ICCs by Respondent Type

FY	Decision Subset	All Cases	Never Detained Cases	Released Cases	UAC Cases	Asylum Cases
FY 13	In Absentia Orders	18,747	10,394	8,278	836	1,742
	Initial Case Completion	136,761	51,152	26,798	2,565	28,459
FY 14	In Absentia Orders	23,440	13,676	9,662	1,882	1,748
	Initial Case Completion	124,238	46,874	26,223	3,576	27,584
FY 15	In Absentia Orders	35,166	24,646	10,464	6,481	1,847
	Initial Case Completion	127,350	59,550	27,442	13,435	27,644
FY 16	In Absentia Orders	32,755	23,437	9,254	6,191	3,017
	Initial Case Completion	128,145	62,852	25,380	15,095	33,082
FY 17	In Absentia Orders	41,384	30,010	11,292	6,759	4,776
	Initial Case Completion	149,436	67,966	27,376	13,872	43,013

IMMIGRATION JUDGE HIRING

To better manage its caseload, EOIR focused on increased hiring of immigration judges in FY 2017.

Figure 26. The number of IJs on board increased 17 percent in FY 2017.

Figure 26. Immigration Judge Hiring

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Total IJs Hired	17	39	4	8	0	20	56	64
Total IJs on Board	245	273	267	262	249	254	289	338

TOTAL CASES RECEIVED AND COMPLETED

The majority of cases BIA reviews arise from decisions IJs make in removal, deportation, or exclusion cases. A full list of case types heard by BIA originating from OCIJ is below. For purposes of this Statistics Yearbook, these types of cases are collectively referred to as appeals from IJ decisions.

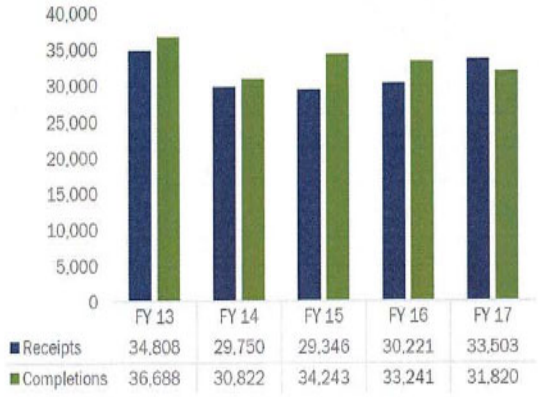
- Case appeals from the decisions of IJs in removal, deportation, and exclusion cases at the court level;
- Appeals filed from the decisions of IJs on motions to reopen;
- Motions to reopen and/or reconsider filed in cases already decided by the BIA;
- Appeals pertaining to bond, parole, or detention;
- Interlocutory appeals; and
- Cases (or appeals) remanded from the Federal Court.

The BIA also has jurisdiction to review appeals arising from certain decisions that DHS officials render. These types of appeals are listed below. For purposes of this Statistics Yearbook, appeals from these DHS decisions are referred to as DHS decision appeals.

- Family-based visa petitions adjudicated by DHS district directors or regional service center directors;
- Waivers of inadmissibility for non-immigrants under INA § 212(d)(3)(A)(ii); and
- Fines and penalties imposed upon carriers for violations of immigration laws.

Figure 27. In FY 2017 completions decreased slightly while receipts increased slightly.

Figure 27. Total BIA Cases Received and Completed



	FY 13	FY 14	FY 15	FY 16	FY 17
Receipts	34,808	29,750	29,346	30,221	33,503
Completions	36,688	30,822	34,243	33,241	31,820

CASES RECEIVED AND COMPLETED BY TYPE

BIA has jurisdiction over appeals from IJ decisions and certain DHS decisions. The majority of appeals from IJ decisions are from case appeals, and the majority of appeals from DHS decisions are from visa petitions.

Figure 31. Appeals from IJ decisions make up most of the BIA's work. Completions of appeals from IJ decisions increased about three percent in FY 2017. Completions from DHS decisions decreased by about 32 percent.

Figure 28. BIA Receipts and Completions by Case Type

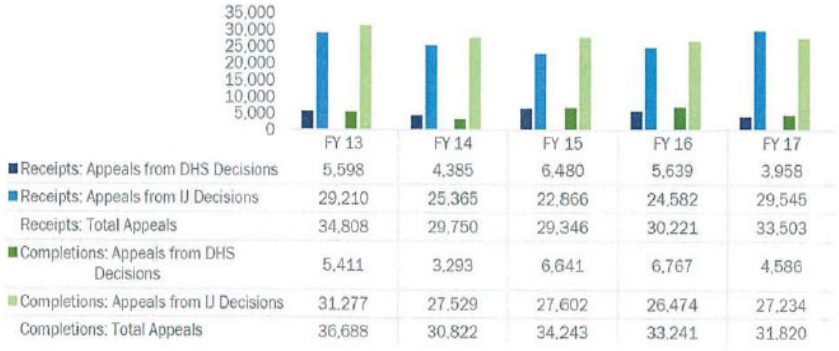


Table 20. BIA Receipts and Completions by Type

Appeal Type	FY 2013		FY 2014		FY 2015		FY 2016		FY 2017	
	Receipts	Comp.	Receipts	Comp.	Receipts	Comp.	Receipts	Comp.	Receipts	Comp.
Total Appeals from IJ Decisions	**29,210**	**31,277**	**25,365**	**27,529**	**22,866**	**27,602**	**24,582**	**26,474**	**29,545**	**27,234**
Case Appeal	16,495	17,933	13,557	15,775	11,475	15,474	12,737	14,563	17,106	15,966
Appeal of IJ Motion to Reopen	1,639	1,839	1,516	1,691	1,454	1,659	1,453	1,631	1,785	1,960
Motion to Reopen/Reconsider-BIA	7,692	8,603	6,691	6,394	5,908	6,427	5,639	5,586	5,898	5,000
Bond Appeal	1,816	1,700	2,091	1,990	2,253	2,220	3,002	2,805	3,621	3,124
Bond MTR	28	24	32	35	52	47	57	45	33	43
Interlocutory Appeal	209	194	163	169	240	216	352	287	433	404
Federal Court Remand	1,331	984	1,314	1,474	1,484	1,559	1,341	1,556	669	737
Continued Detention Review	0	0	0	0	0	0	1	1	0	0
Zero Bond Appeal	0	0	1	1	0	0	0	0	0	0
Total Appeals from DHS Decisions	**5,598**	**5,411**	**4,385**	**3,293**	**6,480**	**6,641**	**5,639**	**6,767**	**3,958**	**4,586**
Decisions on Visa Petitions	5,539	5,348	4,333	3,266	6,435	6,573	5,612	6,734	3,911	4,550
212(d)(3)(A) Waiver Decisions	55	60	49	25	45	65	26	33	45	33
Decisions on Fines and Penalties	4	3	3	2	0	3	1	0	2	3
Grand Total	**34,808**	**36,688**	**29,750**	**30,822**	**29,346**	**34,243**	**30,221**	**33,241**	**33,503**	**31,820**

APPEALS FROM IJ DECISIONS COMPLETED BY COUNTRY OF NATIONALITY

BIA hears appeals from IJ decisions involving hundreds of nationalities. Appeals from IJ decisions arise primarily in cases of aliens from Mexico and Central America.

Figure 29. Over half of completed appeals from IJ decisions involve an alien from one of three countries.

Table 21. For the past five years, nine countries ranked among the top ten: Mexico, El Salvador, Guatemala, Honduras, China, India, Haiti, Jamaica, and Dominican Republic.

Figure 29. Completed Appeals from IJ Decisions by Nationality

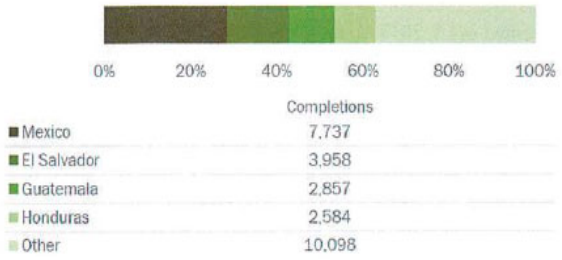


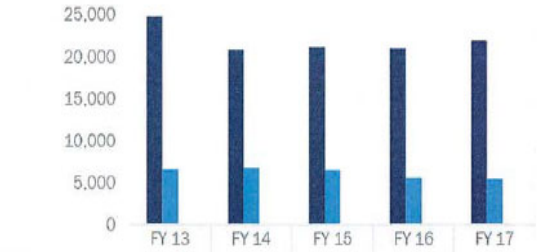
Table 21. BIA Appeals from ICCs by Top 25 Countries of Nationality

Rank	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
1	Mexico	Mexico	Mexico	Mexico	Mexico
2	China	China	El Salvador	El Salvador	El Salvador
3	El Salvador	El Salvador	China	China	Guatemala
4	Guatemala	Guatemala	Guatemala	Guatemala	Honduras
5	Honduras	Honduras	Honduras	Honduras	China
6	India	India	India	India	India
7	Colombia	Jamaica	Haiti	Haiti	Haiti
8	Jamaica	Colombia	Jamaica	Jamaica	Jamaica
9	Indonesia	Haiti	Colombia	Dominican Republic	Dominican Republic
10	Dominican Republic	Dominican Republic	Dominican Republic	Colombia	Ecuador
11	Haiti	Brazil	Brazil	Bangladesh	Colombia
12	Brazil	Indonesia	Nigeria	Ecuador	Bangladesh
13	Pakistan	Nigeria	Ecuador	Brazil	Brazil
14	Nigeria	Peru	Philippines	Nigeria	Nigeria
15	Venezuela	Pakistan	Peru	Philippines	Ghana
16	Philippines	Ecuador	Indonesia	Peru	Philippines
17	Ecuador	Philippines	Nicaragua	Indonesia	Pakistan
18	Peru	Kenya	Bangladesh	Armenia	Somalia
19	Kenya	Venezuela	Pakistan	Nicaragua	Peru
20	Nicaragua	Nicaragua	Nepal	Ghana	Nicaragua
21	Armenia	Ghana	Kenya	Nepal	Venezuela
22	Nepal	Russia	Armenia	Pakistan	Kenya
23	Albania	Nepal	Venezuela	Venezuela	Cameroon
24	Russia	Albania	Russia	Kenya	Cuba
25	Ghana	Armenia	Ghana	Albania	Nepal

APPEALS FROM IJ DECISIONS (I-862) COMPLETED BY REPRESENTATION STATUS

Figure 30. Representation rate for appeals has remained roughly constant across the past five years, reaching a high of 80 percent of completed appeals from IJ decisions represented in FY 2017.

Figure 30. Completed Appeals from IJ Decisions (I-862 Cases) by Representation Status



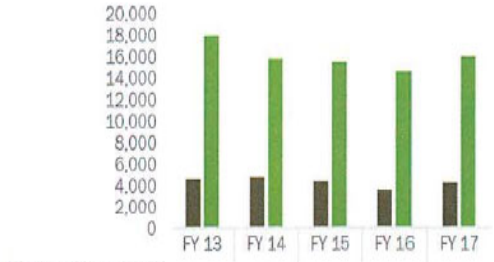
	FY 13	FY 14	FY 15	FY 16	FY 17
Represented	24,742	20,804	21,130	20,935	21,810
Unrepresented	6,535	6,725	6,472	5,539	5,424
Total	31,277	27,529	27,602	26,474	27,234
% Represented	79%	76%	77%	79%	80%

CASE APPEALS FROM IJ DECISION (I-862 ICCS) COMPLETED FOR DETAINED CASES

BIA handles detained cases (including aliens in IHP) as priority cases. For the purposes of Figure 31, figures for detained cases include IHP cases and cases of unaccompanied alien children in the custody of the Department of Health and Human Services.

Figure 31. The percent of completed case appeals from ICCs in I-862 detained cases has stayed approximately constant over the past five years, within a five-percentage point spread.

Figure 31. Complete Case Appeals from I-862 ICCs by Detention Status



	FY 13	FY 14	FY 15	FY 16	FY 17
Detained Case Appeal Decisions	4,589	4,796	4,398	3,577	4,243
Total Case Appeal Decisions	17,933	15,775	15,474	14,563	15,966
Percent Detained	26%	30%	28%	25%	27%

Table 22. The percent of total detained IHP completions has been consistently between six and seven percent for the past five years.

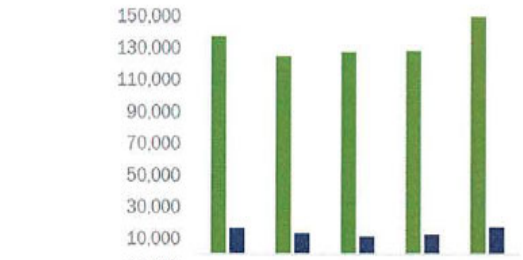
Table 22. BIA Detained Completions

Fiscal Year	Total Detained Completions	IHP Completions	Percent IHP Completions
FY 13	4,589	302	7%
FY 14	4,796	273	6%
FY 15	4,398	280	6%
FY 16	3,577	265	7%
FY 17	4,243	293	7%

IJ DECISIONS (I-862 ICCS) APPEALED

Figure 32. The percentage of ICCs being appealed has fluctuated between nine and 12 percent across the past five fiscal years.

Figure 32. I-862 ICCs Appealed to BIA



	FY 13	FY 14	FY 15	FY 16	FY 17
IJ Decisions	137,329	124,649	127,452	128,201	149,581
Case Appeals Received	16,495	13,557	11,475	12,737	17,106
Percent Appealed	12%	11%	9%	10%	11%

OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

TOTAL CASES RECEIVED AND COMPLETED

OCAHO is headed by the Chief Administrative Hearing Officer, who is responsible for the general supervision of administrative law judges (ALJs), management of OCAHO and review of ALJ decisions relating to illegal hiring, employment eligibility verification violations and document fraud. OCAHO's ALJs hear cases and adjudicate issues arising under provisions of the INA relating to:

- Knowingly hiring, recruiting or referring for a fee unauthorized aliens, or the continued employment of unauthorized aliens, failure to comply with employment eligibility verification requirements, and/or requiring indemnity bonds from employees in violation of section 274A of the INA (employer sanctions provisions);
- Unfair immigration-related employment practices in violation of section 274B of the INA (anti-discrimination provisions); and
- Immigration-related document fraud in violation of section 274C of the INA (document fraud provisions).

Employer sanctions and document fraud complaints are brought by the U.S. Department of Homeland Security. Anti-discrimination complaints may be brought by the U.S. Department of Justice's Immigrant and Employee Rights Section or private litigants. All final agency decisions may be appealed to the appropriate federal circuit court of appeals.

Figure 33. Completions continued to outpace receipts in FY 2017. Note that completions may have been for cases received in a prior fiscal year.

Figure 33. OCAHO Receipts and Completions

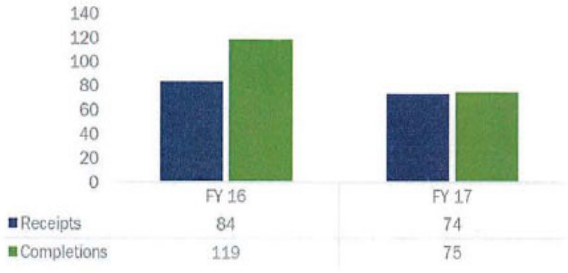
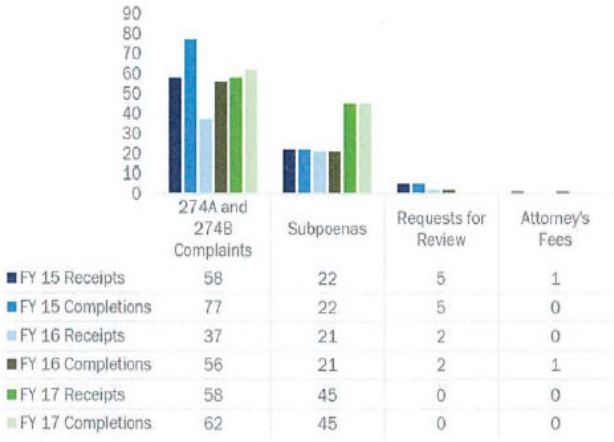


Figure 34. The bulk of OCAHO's workload is 274A and 274B complaints.

Figure 34. OCAHO Receipts and Completions by Type

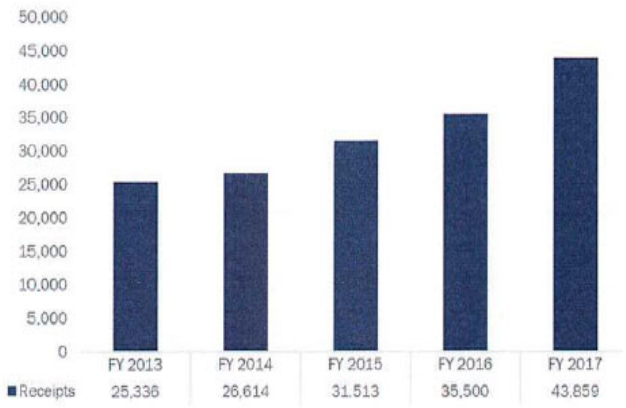


FREEDOM OF INFORMATION ACT (FOIA)

FOIA RECEIPTS

Figure 35. Since FY 2013, the number of FOIA requests received by EOIR has increased by about 73 percent.

Figure 35. FOIA Receipts



Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions, Migration Policy Institute

(June 13, 2014)

* * * * *

Additionally, according to Kids In Need of Defense (KIND), an estimated 30 percent of unaccompanied minors are ordered removed in absentia because they fail to appear at their initial or later hearings. The Vera Institute of Justice estimates 40 percent of unaccompanied children are potentially eligible for relief.

Why Is This Happening?

There are deep root causes for this child migration, and for the recent surge in arrivals. While there is consensus that there are significant push and pull factors at work, there is not agreement as to which are more important. And inevitably, the issue of unaccompanied child migration has become ensnared in the broader political fight over immigration reform.

For the White House, push factors in the countries of origin account for the surge. Many children are "fleeing violence, persecution, abuse, or trafficking," Attorney General Eric Holder said recently, referring to sustained violence in Central America. For congressional Republicans, who lay their unwillingness to take up immigration legislation at the feet of an administration they view as insufficiently focused on enforcement, the surge owes to President Obama's policies. House Judiciary Committee Chairman Robert Goodlatte (R-VA) termed the surge in arrivals an "administration-made disaster" created because "word has gotten out around

the world about President Obama's lax immigration enforcement policies, and it has encouraged more individuals to come to the United States illegally, many of whom are children from Central America."

In reality, there is no single cause. Instead , a confluence of different pull and push factors has contributed to the upsurge. Recent U.S. policies toward unaccompanied children, faltering economies and rising crime and gang activity in Central American countries, the desire for family reunification, and changing operations of smuggling networks have all converged.

There is some evidence of a growing perception among Central Americans that the U.S. government's treatment of minors, as well as minors traveling in family units, has softened in recent years. These child-friendly policies in many ways directly flow from TVPRA. In addition to the screening and ORR transfer requirements described above, the law also requires the United States to ensure safe repatriation of minors and established standards for custody, created more child-friendly asylum procedures, and relaxed eligibility for SIJ visa status. Some also contend that minors are spurred to migrate by the false idea that they could benefit under the Obama administration's Deferred Action for Childhood Arrivals (DACA) program, which offers a reprieve from deportation for certain young unauthorized immigrants who have lived in the United States since 2007.

Furthermore, while these minors are all placed in removal proceedings, it is not clear that they are ultimately repatriated to their home countries. According to U.S. Immigration and Customs Enforcement (ICE) data, the agency carried out 496 repatriations (removals

and returns) of juveniles from Guatemala, Honduras, and El Salvador in 2013, down from 2,311 in 2008.

On the other hand, strong evidence also points to increasingly grave conditions in Central America as principal drivers of the new influx. A number of investigations by journalists and studies by nongovernmental organizations have found that children are fleeing their home countries to escape violence, abuse, persecution, trafficking, and economic deprivation. To be sure, murder, poverty, and youth unemployment rates paint a bleak picture of conditions that children may face in Honduras, Guatemala, and El Salvador in particular. Rising gang violence in some of these countries has become an undeniable factor in many children's decision to migrate.

A recent UN High Commissioner for Refugees (UNHCR) study based on interviews with more than 400 unaccompanied minors found that 48 percent had experienced violence or threats by organized-crime groups, including gangs, or drug cartels, or by state actors in their home countries, and 22 percent reported experiencing abuse at home and violence at the hands of their caretakers. Thirty-nine percent of Mexican children reported being recruited into or exploited by human smuggling organizations.

Additionally, family separation has long been a strong motivation for unaccompanied minors to migrate. Immigration to the United States from Central America and Mexico in high numbers over the last decade has led adults, now settled in the United States, to send for the children they left behind. UNHCR researchers found that 81 percent of the children they interviewed cited

joining a family member or pursuing better opportunities as a reason for migrating to the United States. While the family separation dynamic is not a new one, home-county conditions have added urgency to it. Lastly, stronger, more sophisticated smuggling infrastructure and networks are surely playing a role in facilitating the rise in children's attempts to cross the border by themselves.

Whatever mix of factors has triggered the surge, there is universal concern about the harrowing journey that children endure as they travel north. These children are frequently * * *

* * * * *

Symposium: The U.S.-Mexico Relationship in International Law and Politics, Contiguous Territories: The Expanded Use of "Expedited Removal" in the Trump Era, 33 Md. J. Int'l Law 268 (2018)

* * * * *

* * * scenarios present themselves where individuals could be immediately "returned" to the contiguous territories without clear instructions, or under a misimpression they have been actually deported and then barred from re-entry. Under these situations, the removal proceedings to which they are actually entitled would be rendered a mere nullity. They would be allegedly "awaiting" a proceeding outside the U.S. which could be completed without them were they not to show up for their hearing. If they for whatever reason do not appear on the appointed day for their hearing, an in absentia order of removal can be issued against them.[8]

The text of the President's executive order expanding expedited removal to the entire country and for those arriving aliens caught within two years from entry was operationalized in an implementing memorandum, by then-Department of Homeland Security ("DHS") Secretary John Kelly.[9] In that memorandum former Secretary Kelly noted that INA § 235(b)(2)(C) permits the return of "aliens to contiguous countries."[10] In so doing, the Secretary opined that the rationale for the return pending "the outcome of removal proceedings saves the Department's detention and adjudication resources for other priority aliens."[11] Importantly, the provision appears to be intended to be limited to those "aliens so apprehended who do not pose a risk of a subsequent illegal entry or attempted illegal entry. . . ."[12] The

memorandum also specifically addresses operationalization of the contiguous territories provision with respect to unaccompanied alien children ("UACs"), noting that as to those children the requirements ***271** of 8 U.S.C. § 1232 must be followed."[13] Clearly, the provision is still to be applied to such children with the express proviso found in the memorandum that "the law and U.S. international treaty obligations" be followed and so long as the children pose "no risk of recidivism."[14]

A close reading of the memorandum of February 20, 2017 reveals a lot about how the contiguous territories provision is expected to be implemented. First, the provision is envisioned by the federal agency at issue, DHS, to be used on certain classes of undocumented immigrants and not others.[15] The imposition of the phrase "who do not pose a risk of a subsequent illegal entry or attempted illegal entry" tells us that the agency (at least from the point of view of the publicly available policy) does not apparently want to utilize the provision for individuals with a high risk of illegal re-entry. It begs the question how the agency is going to determine this issue. It also is problematic in that people may not be given any choice in the matter. When an individual is not given a preference, they may be forcibly returned to a contiguous territory where they could be subjected to persecution, crime, homelessness or, worse for some, expulsion back to their point of origin to face persecution there.

It is troubling that the implementing memorandum contains absolutely no discussion of safeguards in the neighboring country for those who are returned pending removal.[16] The lack of safeguards, such as adequate

housing, protection, access to counsel, food or other procedural protections are missing. With respect to the nature of the removal proceedings which will be available to the returned person, there is mention of the Executive Office for Immigration Review consulting with U.S. Customs and Border Protection and Immigration and Customs Enforcement "to establish a functional, interoperable video teleconference system to ensure maximum capability to conduct video teleconference removal hearings for those aliens so returned to the contiguous country."[17] The inclusion of video equipment means that the future removal hearings do not have to be held in any established immigration court location, but could be held anywhere that video equipment is available. Such mobility implies that the hearings in such cases may be held at the border itself where presumably the returned immigrant's fate would be decided without ***272** their ever having to be officially "re-entered" into the United States.

As noted by at least one commentator, the return of a person to the contiguous territory, e.g., Mexico, pending further proceedings leads to three logical possibilities: (1) the person is a citizen of Mexico, (2) the person is a citizen of some third country but has valid immigration status in Mexico; or (3) the person is a citizen of some third country but lacks valid immigration status in Mexico.[18] In the first and third cases, according to the blog, the returning of the person to Mexico under these circumstances would be "deeply problematic."[19] As will be discussed in a further section of this article, the provision if utilized in this deleterious way could violate U.S. treaty obligations, such as the 1987 U.N. Convention Against Torture (the U.S. is a state party), 1967 Protocols relating to the Status of Refugees (the U.S. is

a state party), among other international instruments and norms, as well as portions of U.S. domestic law, most notably INA § 241(b)(3), relating to mandatory withholding of removal for those whose life or freedom would be threatened (enshrining the principle of non-refoulement).

A similar point also was made by the Harvard Immigration and Refugee Clinical Program, in a monograph discussing the impact of President Trump's executive orders on asylum seekers.[20] As explained in that paper, the principle of non-refoulement states that "No Contracting Stale shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, or membership of a particular social group or political opinion."[21] The Harvard Clinic noted that the implementation of the President's executive order, in section 7, is unclear and implementation would require cooperation from Mexico and Canada.[22] Furthermore, they note that in the event the U.S. sends "asylum seekers back to Mexico pending a formal removal proceeding, there is significant likelihood that Mexico would send those asylum seekers ***273** back to their countries of origin."[23] The monograph then goes on to cite statistics showing an increase in deportations from Mexico, and especially to countries in the Central American northern triangle countries of El Salvador, Guatemala, and Honduras.[24] "Lawyers have noted multiple violations of due process for asylum seekers in Mexico; crime against migrants (including human trafficking, kidnapping, and rape) is widespread and largely goes unprosecuted.[25]

A final point to notice by way of introduction is that the contiguous territories provision contains no express time or geographical limitation found in the INA. Even the related expedited removal provisions for those found to have entered without inspection without valid entry documents or through fraud or misrepresentation are limited to those found within the U.S. within two years.[26] Since no limit exists on the contiguous territories provision, it is possible that DHS could return those found within the U.S. who are deemed to be "arriving aliens" even where a person has actually been in the country far longer than the two-year period. It is problematic furthermore because those who are caught within the U.S. and who entered from a contiguous territory (no matter when they entered, may now presumably be "returned" immediately to Mexico without seeing an immigration judge and without the possibility of any protection in the neighboring country, a place they may fear persecution, or where they have little or no connection and no way to support themselves while awaiting a future hearing which may be wholly inaccessible to them.

II. POSSIBLE LEGAL CHALLENGES IN UNITED STATES FEDERAL COURTS

A. Habeas Corpus and the Real ID Act of 2005—limits imposed on habeas by the INA

Petitioning for a writ of habeas corpus presents one way to seek to remedy the use or abuse of the contiguous territories provision. Necessarily, any immigrant's options for relief in this regard are going to be severely limited by several factors. First, the person may be no ***274** longer present in the U.S. Second, she may lack access to counsel, and especially counsel who are able to navigate federal court procedures required to seek to

enjoin the Department of Home land Security from "returning" an arriving alien to a contiguous territory under the INA. Furthermore, there are various sections of the INA which limit jurisdiction in federal district court, following the Real ID Act of 2005.[27] INA § 242 [8 U.S.C. § 1252] has provisions which restrict courts from even hearing actions to challenge expedited removal proceedings, more generally. In the words of the statute, "no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [8 U.S.C. § 1225(b)(1)]. . . . "[28] Because the contiguous territories provision is in 8 U.S.C. § 1225(b)(2)(C) and ***not*** 1225(b)(1), then the restriction on judicial review (at least with respect to this limiting statutory provision) should not be used as a valid reason to restrict judicial review over a contiguous territories claim.[29]

As the Real ID Act of 2005 made clear, federal district courts no longer have jurisdiction over challenges to final orders of removal.[30] Instead, pursuant to 8 U.S.C. § 1225(a), petitioners must exhaust their administrative remedies before the immigration judge ("IJ") and Board of Immigration Appeals ("BIA") and then bring a challenge in the form of a petition for review to a final order exclusively in the circuit court of appeals. Unfortunately, this jurisdiction-stripping provision often means that petitioners will have to await a remedy to their constitutional challenges until the appropriate circuit court of appeals reviews their case. Many times, however, a "victory" at the circuit court level may be an illusory one where the petitioner has already been deported and cannot be found or is unable to return to the U.S.[31]

The jurisdiction-stripping provision, in 8 U.S.C. § 1252, does not *275 foreclose all habeas cases since they still can be brought to challenge the conditions of, and the reasons for, a person's confinement if in violation of law. If a person is being held "in custody" by the federal government in violation of a federal statute or the United States Constitution, then habeas may permit a federal district court to remedy the violation.[32] The argument will turn on whether a federal court will exercise jurisdiction over a person who has been "returned" (or about to be returned) to a contiguous territory. One issue will be whether that person is still "in custody" for purposes of habeas jurisdiction. Given how expansively the definition of "in custody" has been interpreted, there should be no question that such an immigrant is 'in custody" for purposes of a valid habeas claim.[33] Another issue may be the appropriate venue in cases where an immigrant is returned and no longer in the * * *

* * * * *

The border is tougher to cross than ever. But there is still one way into America. — The Washington Post

11/29/18

* * * * *

* * * telling them to come back later. Harbury and others have criticized the practice as unlawful, but DHS officials say that port officers have multiple responsibilities and that busy border crossings have capacity limits.

It was Harbury who provided ProPublica with the surreptitious audio recording of a child screaming for her mother that dealt a severe blow to the family-separation policy. She has absorbed the stories of thousands of asylum seekers over the decades and increasingly views her job with the urgency of an emergency responder. She intends to help as many asylum seekers enter the United States as possible, because she believes she is saving their lives.

"These people have the most horrifying stories I have ever heard," she said. "I don't think people have better claims than those running from the cartels."

The shelter in Reynosa was crowded with newly deported Mexicans, many still carrying their belongings in plastic bags provided by the U.S. government. Immigration and Customs Enforcement had dropped off 85 deportees the previous night, and several complained harshly of bad food and bysmal conditions in U.S. detention.

The nuns had asked Harbury to help a young mother stranded for more than a week, Maria Magdalena Gon-

zalez, 21, and her son, Emiliano, 3. A gangster in Gonzalez's home state of Guerrero was threatening to kill her for rejecting his advances, she said. But when she and her son tried to approach the U.S. border crossing a few days earlier to seek asylum, they had been turned away.

With more and more Central Americans showing up at the port of entry, U.S. officers had set up an impromptu checkpoint over the middle of the Rio Grande, blocking them from setting foot on the U.S. side to start the asylum process.

Those who fail to cross are put at risk, because cartel lookouts ply the Mexican side of the bridge, watching for Central Americans who have been turned away. The migrants are prime targets for kidnapping because criminal groups assume they have relatives living in the United States with enough money to pay a ransom.

Harbury was there to make sure Gonzalez and her son weren't rejected again.

* * * * *

MIGRANT CARAVAN · Published December 7

San Diego non-profits running out of space for migrant caravan asylum seekers

By Barnini Chakraborty | Fox News

San Diego's chief Border Patrol agent describes what happened when migrants stormed the border on New Year's Day

Rodney Scott says violence has increased about 300 percent since the caravan arrived.

SAN DIEGO, Calif. - A group of San Diego-based nonprofits claim they are running out of money and space to house, clothe and feed hundreds of asylum-seeking families ICE agents have been quietly transporting in and dumping onto the streets.

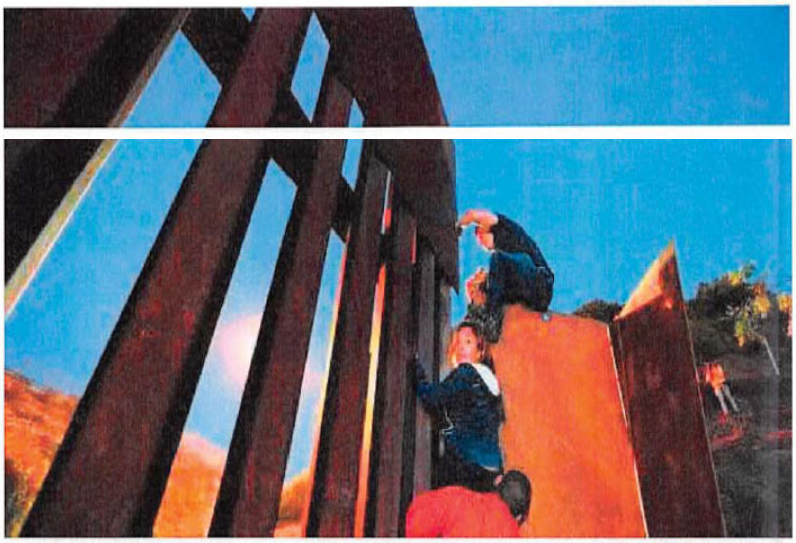
The San Diego Rapid Response Network (SDRRN), a coalition of human rights, service and faith-based organizations, is urging government officials to develop and implement "a sustainable plan to keep vulnerable asylum-seeking families off the streets and help them reach their final destination."

The organization claims that U.S. Immigration and Customs Enforcement has released hundreds of migrants into San Diego—the largest land border crossing in the world.

The problem, SDRRN says, is that the recent influx is too much to handle.

"The shelter can accommodate only about 150 people, with average stays of 24 to 48 hours," Edward Sifuentes, a spokesman for the ACLU of San Diego & Imperial Counties, said. "It stays filled to capacity because as quickly as one group of families moves on, others are released by immigration authorities."

MIGRANT CARAVAN HURTS TOURISM IN TIJUANA: 'THEY'RE KIND OF SCARED'



Central American migrants planning to surrender to U.S. border guards climb over the U.S. border wall from Playas de Tijuana, Mexico, late Monday, Dec. 3. (AP Photo/Rebecca Blackwell)

Sifuentes warns that "the need for migrant shelter and related services is expected to escalate in coming weeks as hundreds gather in Tijuana hoping to claim asylum in the U.S."

Once asylum seekers are processed, federal agents drop off them off at various shelters and Greyhound bus stations around the city at the person's request.

Norma Chavez-Peterson, the executive director of the ACLU of San Diego and Imperial Counties, said the network's resources have been stretched to their thinnest point yet. The network is on their fifth shelter location in six weeks, and for the first time has had to turn families away due to capacity.

"We're at a moment of a lack of capacity, we cannot sustain this any longer," Chavez-Peterson said. "We need a higher level of leadership."

During a press conference at Our Lady of Mount Carmel in San Ysidro, Chavez-Peterson outlined what the network needs to continue to fill the gaps of care for asylum seekers. In a series of meetings with state and local government leaders, she has advocated for an infusion of cash and physical resources, along with a concrete plan of sustainability.

Specifically, she said the network needs a high-capacity facility that can house up to 200 people, along with the resources to hire staff, security, provide food, travel money, and cover some transportation costs for the asylum seekers. Most urgent among these is a secure, stable shelter.

Often, though, the migrants themselves have nowhere to go, Vino Panjanor, executive director of Catholic Charities at the Diocese of San Diego, told Fox News. If they by chance have a place to go, they typically have no way of getting there.

"These migrant families consist of small children as young as a 3-day old baby," he said. "We don't have resources. We are working on shoe-string budgets. This started on Oct. 26. It's week 5. It's not sustainable."

Several other humanitarian groups echoed Panjanor's sentiments and say they are running out of options.

HONDURAN WOMAN, 19, IN MIGRANT CARAVAN SCALES BORDER WALL TO GIVE BIRTH IN US AFTER 2,000-MILE TRIP

The San Diego Rapid Response Network claims that U.S. Immigration and Customs Enforcement has released hundreds of migrants into San Diego – the largest land border crossing in the world. The problem, SDRRN says, is that the recent influx is too much to handle. (San Diego Rapid Response Network)

"SDRRN's efforts were intended as a stopgap measure, but the growing number of asylum-seeking families in need is surpassing the network's collective ability to provide basic resources, including food, shelter, emergency healthcare and travel assistance," the organization told Fox News in a written statement.

Since setting up an emergency shelter in November, SDRRN has helped more than 1,700 migrants released by federal immigration authorities. Those released have been initially processed by Homeland Security and are waiting for their scheduled ICE hearing which can be months away. Without a safe place to go, many wander the streets homeless and hungry.

"We have to take some to the ER for medical help," Panjanor said. "This isn't a political issue. We aren't taking a political stand. It's a humanitarian one."

ICE told Fox News: "Family units that are released will be enrolled in a form of ICE's Alternatives to Detention or released on another form of supervision."

It added: "ICE continues to work with local and state officials and NGO partners in the area so they are prepared to provide assistance with transportation or other services."

Not satisfied, SDRRN has reached out to local and state leaders pleading for help.

California's Gov.-elect Gavin Newsom, a Democrat who frequently takes on the Trump administration over immigration issues, recently said the state government needs to step up and make a greater effort in supporting asylum seekers.

Since setting up an emergency shelter in November, SDRRN has helped more than 1,700 migrants released by federal immigration authorities. (San Diego Rapid Response Network)

"We're all in this together," he said. "I feel a deep sense of responsibility to address the issues that we as a border community face and I think we need to humanize this issue, not politicize the issue."

For now, it seems that migrants are stuck in San Diego.

Many, though not all, have fled countries like Honduras after receiving death threats from brutal street thugs such as MS-13 and the 18th Street gang. Some are also running from corrupt government officials in their home countries that have made living there sheer hell.

The migrants are also having a tough time returning to Mexico. Residents there are fed up by thousands of Central American asylum seekers pushing their way onto Mexican soil. Some have circled encampments and shouted at migrants.

In one case, things got so bad that an 8-month pregnant woman, her husband and toddler son, scaled a portion of the border wall after feeling unsafe at a caravan stopping point near the Tijuana-San Diego border.

Late last month, Mexicans in Tijuana marched down the street with one clear message to the migrants: Get out!

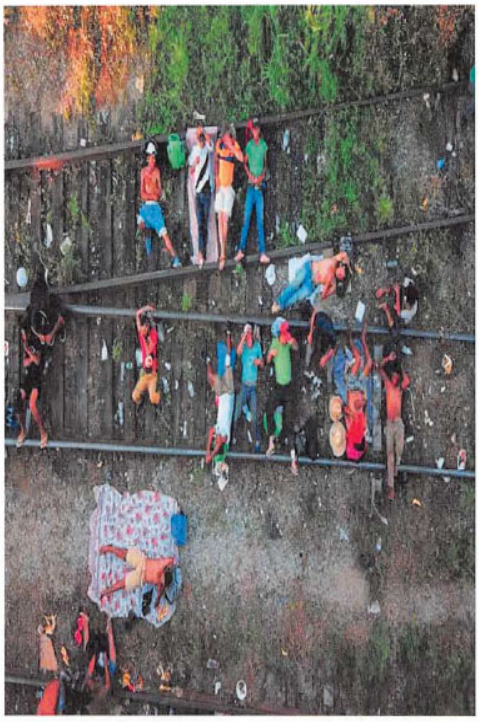
"We want the caravan to go; they are invading us," Patricia Reyes, a 62-year-old protester, hiding from the sun under an umbrella, told NPR. "They should have come into Mexico correctly, legally, but they came in like animals."

Fox News' Andrew Keiper contributed to this report.

*You can find Barnini Chakraborty on Twitter @**Barnini***

'We're heading north!' Migrants nix offer to stay in Mexico

By CHRISTOPHER SHERMAN yesterday



ARRIAGA, Mexico (AP)—Hundreds of Mexican federal officers carrying plastic shields blocked a Central American caravan from advancing toward the United States on Saturday, after a group of several thousand migrants turned down the chance to apply for refugee status and obtain a Mexican offer of benefits.

Mexican President Enrique Pena Nieto has announced what he called the "You are at home" plan, offering shelter, medical attention, schooling and jobs to Central Americans in Chiapas and Oaxaca states if migrants apply, calling it a first step toward permanent refugee status. Authorities said more than 1,700 had already applied for refugee status.

But a standoff unfolded as federal police officers blocked the highway, saying there was an operation underway to stop the caravan. Thousands of migrants waited to advance, vowing to continue their long trek toward the U.S. border.

At a meeting brokered by Mexico's National Human Rights Commission, police said they would reopen the highway and only wanted an opportunity for federal authorities to explain the proposal to migrants who had rejected it the previous evening. Migrants countered that the middle of a highway was no place to negotiate and said they wanted to at least arrive safely to Mexico City to discuss the topic with authorities and Mexican lawmakers.

The caravan of Central American migrants is now traveling through southern Mexico - estimated at around 7,000 people, nearly all Hondurans - has attracted headlines in the United States less than two weeks before the midterm elections. (Oct 24)

They agreed to relay information back to their respective sides and said they would reconvene,

Orbelina Orellana, a migrant from San Pedro Sula, Honduras, said she and her husband left three children behind and had decided to continue north one way or another.

"Our destiny is to get to the border," Orellana said.

She was suspicious of the government's proposal and said that some Hondurans who had applied for legal status had already been sent back. Her claims could not be verified, but migrants' representatives in the talks asked the Mexican government to provide a list of anyone who had been forced to return.

The standoff comes after one of the caravan's longest days of walking and hanging from passing trucks on a 60-mile (100 kilometer) journey to the city of Arriaga.

The bulk of the migrants were boisterous Friday evening in their refusal to accept anything less than safe passage to the U.S. border.

"Thank you!" they yelled as they voted to reject the offer in a show of hands. They then added: "No, we're heading north!"

Sitting at the edge of the edge of the town square, 58-year-old Oscar Sosa of San Pedro Sula, Honduras concurred.

"Our goal is not to remain in Mexico," Sosa said. "Our goal is to make it to the (U.S). We want passage, that's all."

Still 1,000 miles (1,600 kilometers) from the nearest U.S. border crossing at McAllen, Texas, the journey could be

twice as long if the group of some 4,000 migrants heads for the Tijuana-San Diego frontier, as another caravan did earlier this year. Only about 200 in that group made it to the border.

While such migrant caravans have taken place regularly over the years, passing largely unnoticed, they have received widespread attention this year after fierce opposition from U.S. President Donald Trump.

On Friday, the Pentagon approved a request for additional troops at the southern border, likely to total several hundred, to help the U.S. Border Patrol as Trump seeks to transform concerns about immigration and the caravan into electoral gains in the Nov. 6 midterms.

Defense Secretary Jim Mattis signed off on the request for help from the Department of Homeland Security and authorized the military staff to work out details such as the size, composition and estimated cost of the deployments, according to a U.S. official who spoke on condition of anonymity to discuss planning that has not yet been publicly announced.

Stoking fears about the caravan and illegal immigration to rally his Republican base, the president insinuated that gang members and "Middle Easterners" are mixed in with the group, though he later acknowledged there was no proof of that.

At a church in Arriaga that opened its grounds to women and children Friday, Ana Griselda Hernandez, 44, of Mapala, Honduras, said she and two friends traveling with children had decided to pay for a bus ride from Pijijiapan, because the 4-year-old and 5-year-old would have never covered the 60-mile distance.

"It's difficult because they walk very slowly," she said. She pointed out scabbed-over blisters on her feet, a testament to the fact they had walked or hitched rides since leaving their country.

The caravan is now trying to strike out for Tapanatepec, about 29 miles (46 kilometers) away.

Up until now, Mexico's government has allowed the migrants to make their way on foot, but has not provided them with food, shelter or bathrooms, reserving any aid for those who turn themselves in.

Police have also been ejecting paid migrant passengers off buses, enforcing an obscure road insurance regulation to make it tougher for them to travel that way.

On Friday, authorities were cracking down on smaller groups trying to catch up with the main caravan, detaining about 300 Hondurans and Guatemalans who crossed the Mexico border illegally, said an official with the national immigration authority.

Migrants, who enter Mexico illegally every day, usually ride in smugglers' trucks or buses, or walk at night to avoid detection. The fact that the group of about 300 stragglers was walking in broad daylight suggests they were adopting the tactics of the main caravan, which is large enough to be out in the open without fear of mass detention.

However, it now appears such smaller groups will be picked off by immigration authorities, keeping them from swelling the caravan's ranks.

On Friday evening, Irineo Mujica, whose organization People without Borders is supporting the caravan, accused Mexican immigration agents of harassment and urged migrants to travel closely together.

"They are terrorizing us," he said.

——

Associated Press writers Mark Stevenson and Peter Orsi in Mexico City contributed to this report.

Migrants travel through Mexico on a cargo train, known locally as "The Beast."

1

EXECUTIVE SUMMARY

An estimated 500,000 people cross into Mexico every year.[1] The majority making up this massive forced migration flow originate from El Salvador, Honduras, and Guatemala, known as the Northern Triangle of Central

[1] Source: UNHCR MEXICO FACTSHEET. February 2017. Last visited 18 April 2017. Data compiled by UNHCR based on SEGOB and INM official sources.

America (NTCA), one of the most violent regions in the world today.

Since 2012, the international medical humanitarian organization Doctors Without Borders/Médecins Sans Frontiéres (MSF) has been providing medical and mental health care to tens of thousands of migrants and refugees fleeing the NTCA's extreme violence and traveling along the world's largest migration corridor in Mexico. Through violence assessment surveys and medical and psychosocial consultations, MSF teams have witnessed and documented a pattern of violent displacement, persecution, sexual violence, and forced repatriation akin to the conditions found in the deadliest armed conflicts in the world today[2].

For millions of people from the NTCA region, trauma, fear and horrific violence are dominant facets of daily life. Yet it is a reality that does not end with their forced flight to Mexico. Along the migration route from the NTCA, migrants and refugees are preyed upon by criminal organizations, sometimes with the tacit approval or complicity of national authorities, and subjected to violence and other abuses—abduction, theft, extortion, torture, and rape—that can leave them injured and traumatized.

Despite existing legal protections under Mexican law, they are systematically detained and deported—with devastating consequences on their physical and mental health. In 2016, 152,231 people from the NTCA were

---

[2] The Geneva Declaration on Armed Violence and Development, Global Burden of Armed Violence 2015: Every Body Counts, October 2015, Chapter Two, http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch2_pp49-86.pdf

detained/presented to migration authorities in Mexico, and 141,990 were deported.

The findings of this report, based on surveys and medical programmatic data from the past two years, come against the backdrop of heightened immigration enforcement by Mexico and the United States, including the use of detention and deportation. Such practices threaten to drive more refugees and migrants into the brutal hands of smugglers or criminal organizations.

From January 2013 to December 2016, MSF teams have provided 33,593 consultations to migrants and refugees from the NTCA through direct medical care in several mobile health clinics, migrant centers and hostels—known locally as albergues—across Mexico. Through these activities, MSF has documented the extensive levels of violence against patients treated in these clinics, as well as the mental health impact of trauma experienced prior to fleeing countries of origin and while on the move.

Since the program's inception, MSF teams have expressed concern about the lack of institutional and government support to the people it is treating and supporting along the migration route. In 2015 and 2016, MSF began surveying patients and collecting medical data and testimonies. This was part of an effort by MSF to better understand the factors driving migration from the NTCA, and to assess the medical needs and vulnerabilities specific to the migrant and refugee population MSF is treating in Mexico.

The surveys and medical data were limited to MSF patients and people receiving treatment in MSF-supported

clinics. Nevertheless, this is some of the most comprehensive medical data available on migrants and refugees from Central America. This report provides stark evidence of the extreme levels of violence experienced by people fleeing from El Salvador, Honduras, and Guatemala, and underscores the need for adequate health care, support, and protection along the migration route through Mexico.

In 2015, MSF carried out a survey of 467 randomly sampled migrants and refugees in facilities the organization supports in Mexico. We gathered additional data from MSF clinics from 2015 through December 2016. Key findings of the survey include:

Reasons for leaving:

- Of those interviewed, almost 40 percent (39.2%) mentioned direct attacks or threats to themselves or their families, extortion or gang-forced recruitment as the main reason for fleeing their countries.
- Of all NTCA refugees and migrants surveyed, 43.5 percent had a relative who died due to violence in the last two years. More than half of Salvadorans surveyed (56.2 percent) had a relative who died due to violence in this same time span.
- Additionally, 54.8% of Salvadorans had been the victim of blackmail or extortion, significantly higher than respondents from Honduras or Guatemala.

Violence on the Journey:

- 68.3 percent of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States.
- Nearly one-third of the women surveyed had been sexually abused during their journey.
- MSF patients reported that the perpetrators of violence included members of gangs and other criminal organizations, as well as members of the Mexican security forces responsible for their protection.

According to medical data from MSF clinics from 2015 through December 2016:

- One-fourth of MSF medical consultations in the migrants/refugee program were related to physical injuries and intentional trauma that occurred en route to the United States.
- 60 percent of the 166 people treated for sexual violence were raped, and 40 percent were exposed to sexual assault and other types of humiliation, including forced nudity.
- Of the 1,817 refugees and migrants treated by MSF for mental health issues in 2015 and 2016, close to half (47.3 percent) were victims of direct physical violence en route, while 47.2 percent of this group reported being forced to flee their homes.

The MSF survey and project data from 2015-2016 show a clear pattern of victimization—both as the impetus for many people to flee the NTCA and as part of their expe-

rience along the migration route. The pattern of violence documented by MSF plays out in a context where there is an inadequate response from governments, and where immigration and asylum policies disregard the humanitarian needs of migrants and refugees.

Despite the existence of a humanitarian crisis affecting people fleeing violence in the NTCA, the number of related asylum grants in the US and Mexico remains low. Given the tremendous levels of violence against migrants and refugees in their countries of origin and along the migration route in Mexico, the existing legal framework should provide effective protection mechanisms to victimized populations. Yet people forced to flee the NTCA are mostly treated as economic migrants by countries of refuge such as Mexico or the United States. Less than 4,000 people fleeing El Salvador, Honduras, and Guatemala were granted asylum status in 2016[3]. In addition, the government of Mexico deported 141,990 people from the NTCA. Regarding the situation in US, by the end of 2015, 98,923 individuals from the NTCA had submitted requests for refugee or asylum status according to UNHCR[4]. Nevertheless, the number of asylums status granted to individuals from the NTCA has been comparatively low, with just 9,401 granted status since FY 2015[5].

---

[3] Source: UNHCR MEXICO FACTSHEET. February 2017.

[4] Regional Response to the Northern Triangle of Central America Situation. UNHCR. Accessed on 01/02/2017 at http://reporting.unhcr.org/sites/default/files/UNHCR%20-%20NTCA%20Situation%20Supplementary%20Appeal%20-%20June%20202016.pdf

[5] Source: MSF calculations based on information from US Homeland Security. Yearbook of Immigration Statistics 2015.

As a medical humanitarian organization that works in more than 60 countries, MSF delivers emergency aid to people affected by armed conflict, epidemics, disasters, and exclusion from health care. The violence suffered by people in the NTCA is comparable to the experience in war zones where MSF has been present for decades, Murder, kidnappings, threats, recruitment by non-state armed actors, extortion, sexual violence and forced disappearance are brutal realities in many of the conflict areas where MSF provides support.

The evidence gathered by MSF points to the need to understand that the story of migration from the NTCA is not only about economic migration, but about a broader humanitarian crisis.

While there are certainly people leaving the NTCA for better economic opportunities in the United States, the data presented in this report also paints a dire picture of a story of migration from the NTCA as one of people running for their lives. It is a picture of repeated violence, beginning in NTCA countries and causing people to flee, and extending through Mexico, with a breakdown in people's access to medical care and ability to seek protection in Mexico and the United States.

It is a humanitarian crisis that demands that the governments of Mexico and United States, with the support of countries in the region and international organizations, rapidly scale up the application of legal protection measures—asylum, humanitarian visas, and temporary protected status—for people fleeing violence in the NTCA region; immediately cease the systematic deportation of NTCA citizens; and expand access to medical, mental health, and sexual violence care services for migrants and refugees.

2

INTRODUCTION:
CARING FOR REFUGEES AND MIGRANTS

MSF has worked with migrants and refugees in Mexico since 2012, offering medical and psychological care to thousands of people fleeing the Northern Triangle of Central America (NTCA). Since the MSF program started, the organization has worked in several locations along the migration route: Ixtepec (Oaxaca State); Arriaga (Chiapas); Tenosique (Tabasco); Bojay (Hidalgo); Tierra Blanca (Veracruz State); Lechería-Tultitlán, Apaxco, Huehuetoca (State of Mexico); San Luis Potosi (San Luis Potosi State); Celaya (Guanajuato State); and Mexico City. Locations have changed based on changes in routes used by migrants and refugees or the presence of other organizations. MSF's services have mainly been provided inside hostels, or albergues, along the route. In some locations, MSF set up mobile clinics close to the rail roads and train stations.

In addition, MSF teams have trained 888 volunteers and staff at 71 shelters and hostels in "psychological first aid"—in which patients are counseled for a short period of time before they continue their journey. Health staff and volunteers in key points along the transit route, at 41 shelters and 166 medical facilities, received training on counseling related to sexual and gender-based violence (SGBV).

From January 2013 to December 2016, MSF teams carried out 28,020 medical consultations and 5,573 mental health consultations. More than 46,000 individuals attended psychosocial activities organized by our teams to

address the following topics: stress on the road, violence on the road, mental health promotion and prevention, myths and truths about the migration route, and developing tools to deal with anxiety.

Some of the people treated by MSF report extreme pain and suffering due to physical and emotional violence inflicted on them on the migration route. In 2016, MSF, in collaboration with the Scalabrinian Mission for Migrants and Refugees (SMR), opened a rehabilitation center for victims of extreme violence and other cruel, inhuman or degrading treatment. Since then MSF has treated 93 patients who required longer-term mental health and rehabilitation services.

Torture is inflicted by governmental security actors, while criminal organizations inflict extreme degrees of violence on these already vulnerable populations. Migrants and refugees are often easy prey, and they face severe difficulties in making any formal legal complaint. Some patients reported having been kidnapped, repeatedly beaten for days or even weeks for the purposes of extortion and ransom, or sometimes to frighten or intimidate other migrants and refugees. Attacks often include sexual assault and rape.

Migrant and refugee patients attended by MSF from 2013-2016

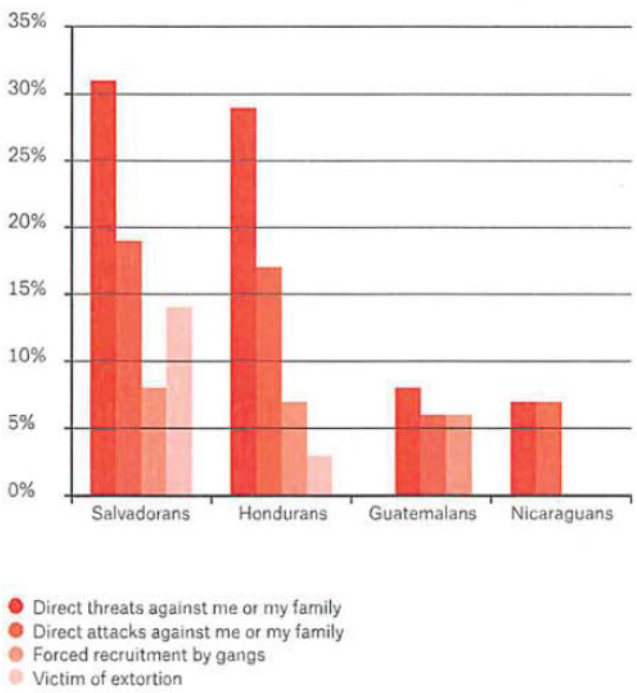
- Center Route: From Tierra Blanca to Querétaro
- Northeast Route: From Querétaro to Ciudad Acuña
- Northwest Route: From Querétaro to Tijuana
- North Route: From Querétaro to Puerto Palomas
- Southeast Route: From Tenosique to Tierra Blanca
- Southwest Route: From Tapachula to Tierra Blanca

- Capital City
- Transmigrant project, town of interest
- Health facities
- International boundary
- Coastline

* * * * *

Direct attacks, threats, extortion or a forced recruitment attempt by criminal organizations were given as main reasons for survey respondents to flee their countries, with numbers significantly higher in El Salvador and Honduras. Of the surveyed population, 40 percent left the country after an assault, threat, extortion or a forced recruitment attempt.

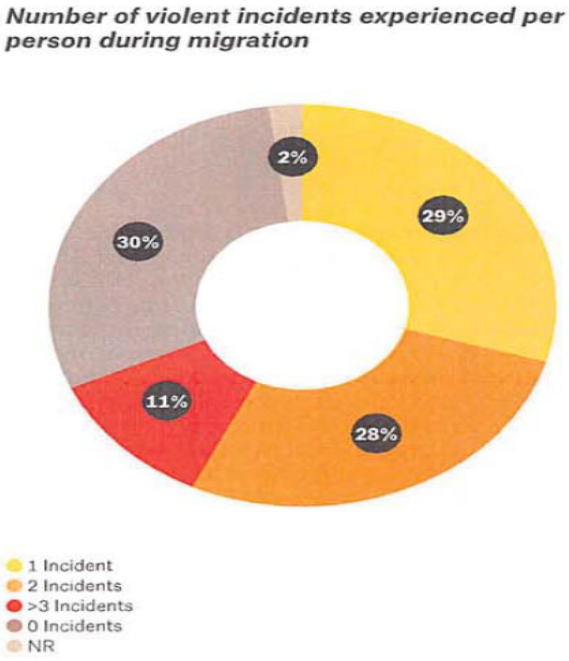
Migration related to direct violence



Regarding exposure to violence along the migration route through Mexico

The findings related to violence in the survey are appalling: more than half the sample population had experienced recent violence at the time they were interviewed: 44 percent had been hit, 40 percent had been pushed, grabbed or asphyxiated, and 7 percent had been shot.

Of the migrants and refugees surveyed in Mexico, 68.3 percent of people from the NTCA reported that they were victims of violence during their transit. Repeated exposure to violence is another reality for the population from NTCA crossing Mexico. Of the total surveyed population, 38.7 percent reported more than one violent incident, and 11.3 percent reported more than three incidents.



In a migration context marked by high vulnerability like the one in Mexico, sexual violence, unwanted sex, and transactional sex in exchange for shelter, protection or for money was mentioned by a significant number of male and female migrants in the surveys. Considering a comprehensive definition of those categories, out of the 429 migrants and refugees that answered SGBV questions, **31.4 percent of women and 17.2 percent of men had been sexually abused during their transit through Mexico.** Considering only rape and other forms of direct sexual violence, 10.7 percent of women and 4.4 percent of men were affected during their transit through Mexico.

The consequences of violence on the psychological well-being and the capacity to reach out for assistance are striking: 47.1 percent of the interviewed population expressed that the violence they suffered had affected them emotionally.

Hondurarn—Male—30 years old—"I am from San Pedro Sula, I had a mechanical workshop there. Gangs wanted me to pay them for "protection", but I refused, and then they wanted to kill me. First they threatened me; they told me that if I stayed without paying, they would take my blood and one of my children. In my country, killing is ordinary; it is as easy as to kill an animal with your shoe. Do you think they would have pitied me? They warn you, and then they do it, they don't play, and so they came for me. Last year in September, they shot me three times in the head, you can see the scars. Since then my face is paralyzed, I cannot speak well, I cannot eat. I was in a coma for 2 months. Now I cannot move fingers on this hand. But what hurts most is that I cannot live in my own country, is to be afraid every day that

they would kill me or do something to my wife or my children. It hurts to have to live like a criminal, fleeing all the time."

* * * * *

Of the 1,817 refugees and migrants seen by MSF in 2015-2016, 47.3 percent of patients survived "physical violence" as a precipitating event for the mental health consultation. Injuries included gunshot wounds, blunt force trauma from kicks and punches, mutilation of body parts during kidnappings, wounds from machete attacks, breaking of bones by blows from baseball bats, and wounds from being thrown out of a running train. In most cases, incidents registered under "physical violence" by MSF occurred along the migration route in Mexico.

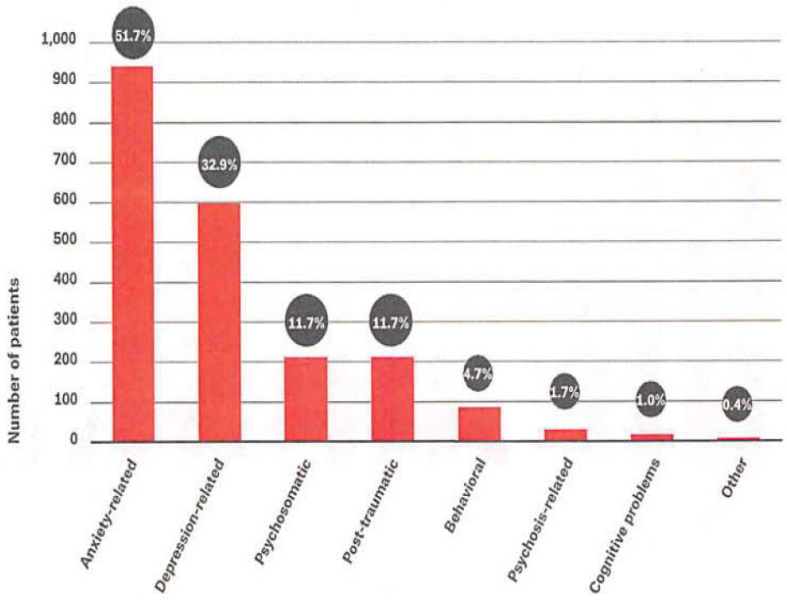
The "precipitating event" most frequently mentioned during consultations was "Forced to flee/internally displaced/refugee/migrant"—registered by 47.2 percent of patients. This covers the period before people made the decision to flee.

Being a "victim of threats" (44.0 percent) and having "witnessed violence or crime against others" (16.5 percent) are the third and fourth most common risk factors. Witnesses to violence included patients forced to watch while others were tortured, mutilated, and/or killed—often in scenarios where they were deprived of their liberty, such as during a kidnapping for extortion.

The anguish and stress that migrants and refugees face both in their home countries and along the migration route make this population particularly vulnerable to anxiety, depression and post-traumatic stress disorder. The following graphic shows the main categories of

symptoms presented by the 1,817 MSF patients seen in mental health consultations during 2015 and 2016.

Symptoms identified in mental health consultations during 2015 and 2016



* * * * *

A group of transgender women pose for a picture in the Tenosique migrant shelter in 2017. LGBTQ people are often at the highest risk of harassment and abuse both in their countries of origin and on their routes as migrants. Some shelters provide separate living spaces for greater security and support.

6

LIMITED ACCESS TO PROTECTION IN MEXICO

Legal framework applicable to the protection of refugees in Mexico

The Americas region already has relatively robust normative legal frameworks to protect refugees: the countries of Central and North America either signed the 1951 convention on refugees or its 1967 protocol and all have asylum systems in place. Furthermore, Mexico has been at the forefront of international efforts to pro-

tect refugees: its diplomats promoted the 1984 Cartagena Declaration on Refugees, which expands the definition to those fleeing "generalized violence".

In 2010, UNHCR established a guideline[15] for the consideration of asylum and refugee status for victims of gang violence, inviting concerned countries to apply broader criteria to the refugee definition of the 1951 Convention. In relation to these specific patterns of violence, the UNHCR concluded that direct or indirect threats (harm done to family members) and consequences (forced displacement, forced recruitment, forced "marriage" for women and girls, etc.) constituted "well-founded grounds for fear of persecution" and bases for the recognition of the refugee status or the application of the non-refoulement principle, the practice of not forcing refugees or asylum seekers to be returned to a country where their life is at risk or subject to persecution. Mexico integrated those recommendations and the right to protection stated in Article 11 of Mexico's constitution in its 2011 Refugee Law[16]. This law considers broad inclusion criteria for refugees—stating, alongside the internationally recognized definition from the 1951 Convention, the eligibility of persons fleeing situations of generalized violence, internal conflict, massive violations of human rights or other circumstances severely impacting public order.

---

[15] UNHCR Guidance Note on Refugee Claims Related to Victims of Organized Gangs - March 2010. Available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4bb21fa02&skin=0&query=organized%20gangs

[16] Available in Spanish at http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPCAP_301014.pdf

After Brazil Declaration of December 2014 and in line with its 2010 recommendations, the UNHCR established specific guidelines for the access to international protection mechanisms for asylum seekers from El Salvador and Honduras.

Nevertheless, despite the relatively adequate legal framework and the goodwill expressed in regional and international forums, the reality at the field level is extremely worrying: seeking asylum, getting refugee status, or even securing other forms of international protection, such as complementary measures in Mexico and the United States, remains almost impossible for people fleeing violence in the NTCA.

Detentions and deportations from Mexico

The number of undocumented migrants from the NTCA detained[17] in Mexico has been growing exponentially for the last five years, rising from 61,334 in 2011 to 152,231 in 2016. Migrants from NTCA account for 80.7 percent of the total population apprehended in Mexico during 2016. The number of minors apprehended is extremely worrying as it nearly multiplied by 10 in the last five years, from 4,129 in 2011 to 40,542 in 2016[18]. Of children under 11 years old, 12.7 percent were registered as travelling through Mexico as unaccompanied minors (without an adult relative or care taker).

---

[17] SEGOB. Mexico. Boletín Estadistico Mensual 2016. Eventos de extranjeros presentados ante la autoridad migratoria, según continente y país de nacionalidad, 2016. Accessed on 06/09/2017. http://www. politicamigratoria.gob.mx/work/models/SEGOB/CEM/PDF/Estadisticas/Boletines_Estadisticos/2016/Boletin_2016.pdf

[18] Ibid.

Despite the exposure to violence and the deadly risks these populations face in their countries of origin, the non-refoulement principle is systematically violated in Mexico. In 2016, 152,231 migrants and refugees from the NTCA were detained/presented to migration authorities in Mexico and 141,990 were deported[19]. The sometimes swift repatriations (less than 36 hours) do not seem to allow sufficient time for the adequate assessment of individual needs for protection or the determination of a person's best interest, as required by law.

Refugee and asylum recognition in Mexico

In 2016, Mexican authorities processed 8,781 requests for asylum from the NTCA population[20]. Out of the total asylum requests, less than 50 percent were granted. Despite the fact that Mexico appears to be consolidating its position as a destination country for asylum seekers from the NTCA, and that the recognition rate improved from last year's figures, people fleeing violence in the region still have limited access to protection mechanisms. Many asylum seekers have to abandon the process due to the conditions they face during the lengthy waiting period in detention centers.

Protection for refugee and migrant victims of violence while crossing Mexican territory

Foreign undocumented victims or witnesses of crime in Mexico are entitled by law to regularization on humani-

[19] Ibid.

[20] Source: UNHCR MEXICO FACTSHEET. February 2017.

tarian grounds and to get assistance and access to justice[21]. In 2015, a total of 1,243 humanitarian visas were granted by Mexico for victims or witnesses of crime from the NTCA[22]. These numbers might seem implausible, however the vast majority of patients (68.3 percent) in MSF's small cohort of migrants and refugees report having been victims of violence and crime.

Lack of access to the asylum and humanitarian visa processes, lack of coordination between different governmental agencies, fear of retaliation in case of official denunciation to a prosecutor, expedited deportation procedures that do not consider individual exposure to violence: These are just some of the reasons for the gap between rights and reality.

Failure to provide adequate protection mechanisms has direct consequences on the level of violence to which refugees and migrants are exposed. The lack of safe and legal pathways effectively keeps refugees and migrants trapped in areas controlled by criminal organizations.

* * * * *

---

[21] Ley General de Migración - Article 52 Section V-a. See also Article 4 for a definition of the "victims" covered by the law.

[22] Source: Boletín Mensual de Estadisticas Migratorias 2015. Secretaría de Gobernación. Gobierno de México. Accessed on 01/02/2017.

A Central American migrant in Tenosique shows the identification card issued by Mexico's National Institute of Migration, which enables him to stay in Mexico with legal protections.

8

CONCLUSION: ADDRESSING THE GAPS

As a medical humanitarian organization providing care in Mexico, in particular to migrants and refugees, since 2012, MSF staff has directly witnessed the medical and humanitarian consequences of the government's failure to implement existing policies meant to protect people fleeing violence and persecution in El Salvador. Guatemala and Honduras, as described in the report.

As of 2016, MSF teams have provided 33,593 consultations through direct assistance to patients from NTCA with physical and mental traumas. People tell our staff

that they are fleeing violence, conflict and extreme hardship. Instead of finding assistance and protection, they are confronted with death, different forms of violence, arbitrary detention and deportation. The dangers are exacerbated by the denial of or insufficient medical assistance, and the lack of adequate shelter and protection.

Furthermore, the findings of this report—the extreme levels of violence experienced by refugees and migrants in their countries of origin and in transit through Mexico —comes against a backdrop of increasing efforts in Mexico and the United States to detain and deport refugees and migrants with little regard for their need for protect ion.

Medical data, patient surveys, and terrifying testimonies illustrate that NTCA countries are still plagued by extreme levels of crime and violence not dissimilar from the conditions found in the war zones. Many parts of the region are extremely dangerous, especially for vulnerable women, children, young adults, and members of the LGBTQ community. As stated by MSF patients in the report, violence was mentioned as a key factor for 50.3 percent of Central Americans leaving their countries. Those being denied refugee or asylum status or regularization under humanitarian circumstances are left in limbo. Furthermore, being deported can be a death sentence as migrants and refugees are sent back to the very same violence they are fleeing from. The principle of non-refoulement must be respected always, and in particular for people fleeing violence in the NTCA.

A stunning 68.3 percent of migrants and refugees surveyed by MSF reported having been victims of violence on the transit route to the United States.

Mexican authorities should respect and guarantee—in practice and not only in rhetoric—the effective protection and assistance to this population according to existing legal standards and policies.

There is a longstanding need to strengthen the Refugee Status Determination System (RSD). It must ensure that individuals in need of international protection and assistance are recognized as such and are given the support—including comprehensive health care, to which they are all entitled. Access to fair and effective RSD procedures must be granted to all asylum-seekers either in Mexico, the US, Canada and the region.

Governments across the region—mainly El Salvador, Guatemala, Honduras, Mexico, Canada and the United States—should cooperate to ensure that there are better alternatives to detention, and should adhere to the principle of non-refoulement. They should increase their formal resettlement and family reunification quotas, so that people from NTCA in need of protection and asylum can stop risking their lives and health.

Attempts to stem migration by fortifying national borders and increasing detention and deportation, as we have seen in Mexico and the United States, do not curb smuggling and trafficking operations. Instead, these efforts increase levels of violence, extortion and price of trafficking. As described in the report, these strategies have devastating consequences on the lives and health of people on the move.

The impact of forced migration on the physical and mental well-being of people on the move—in particular refugees and migrants, and, among them, the most vulnerable categories represented by women, minors, and LGBTQ individuals—requires immediate action. The response should ensure strict respect of the law and the adequate allocation of resources to provide access to health care and humanitarian assistance, regardless of the administrative status of the patient (as enshrined by Mexican law).

Addressing gaps in mental health care, emergency care for wounded, and strengthening medical and psychological care for victims of sexual violence by ensuring the implementation of adequate protocols, including provision of and access to the PEP kit, is fundamental to treating refugee patients with dignity and humanity.

As witnessed by MSF teams in the field, the plight of an estimated 500,000 people on the move from the NTCA described in this report represents a failure of the governments in charge of providing assistance and protection. Current migration and refugee policies are not meeting the needs and upholding the rights of assistance and international protection of those seeking safety outside their countries of origin in the NTCA. This unrecognized humanitarian crisis is a regional issue that needs immediate attention and coordinated action, involving countries of origin, transit, and destination.

© CHRISTINA SIMONS

An MSF psychologist meets with a young patient in Mexico in 2016.

Migration Transit Zone Conditions and Mexico's Migration Policies

Conditions of migration facing unaccompanied children likely play a considerable role in determining whether they emigrate to the United States. While the persistence of economic stagnation, poverty, and criminal violence may explain why flows of unaccompanied minors have increased, the journey through Central America and Mexico to the United States has become more costly and dangerous. Unauthorized migrants from Central America, often lacking legal protection in Mexico because of their immigration status, have reportedly become increasingly vulnerable to human trafficking, kidnapping, and other abuses.[45] Corrupt Mexican officials have been found to be complicit in activities such as robbery and abuse of authority.[46] While Mexico has stepped up immigration enforcement in some areas (see below), enforcement along train routes frequently used by Central American child migrants continues to be lacking.[47]

As U.S. border security has tightened, more unauthorized Central American migrants have reportedly turned

---

[45] Steven Dudley, *Transnational Crime in Mexico and Central America: Its Evolution and Role in International Migration*, Woodrow Wilson International Center for Scholars & Migration Policy Institute, November 2012, http://www.wilsoncenter.org/sites/default/files/transnational_crime_mexico_centralamerica.pdf.

[46] Adam Isacson, Maureen Meyer, and Gabriela Morales, *Mexico's Other Border: Security, Migration, and the Humanitarian Crisis as the Line with Central America*, Washington Office on Latin America (WOLA), June 2014, available at http://www.wola.org/news/new_wola_report_mexicos_other_border (hereinafter referred to as WOLA, *Mexico's Other Border Security*.)

[47] Ibid.

to smugglers (*coyotes*),[48] who in turn must pay money to transnational criminal organizations (TCOs) such as Los Zetas, to lead them through Mexico and across the U.S.-Mexico border.[49] The Administration has estimated that 75-80% of unaccompanied child migrants are now traveling with smugglers.[50] Some smugglers have reportedly sold migrants into situations of forced labor or prostitution (forms of human trafficking) in order to recover their costs; other smugglers' failure to pay Los Zetas has reportedly resulted in massacres of groups of migrants.[51] Mass grave sites, where migrants have been executed by TCOs have been recovered in recent years.

The Mexican government appears to be attempting to balance enforcement and humanitarian concerns in its migration policies. Implementation of its new laws and policies has been criticized both by those who favor more enforcement and those who favor more migrants' rights.[52] In addition to stepping up efforts against human trafficking and passing new laws to stiffen penalties for alien smuggling (2010) and human trafficking (2012),

---

[48] Human Smuggling typically involves the provision of a service, generally procurement or transport, to people who knowingly consent to that service in order to gain illegal entry into a foreign country. For more information, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Rosen.

[49] See Caitlin Dickson, "How Mexico's Cartels are Behind the Border Kid Crisis," *The Daily Beast*, June 23, 2014.

[50] White House, Office of the Vice President, "Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala," press release, June 20, 2014.

[51] Oscar Martinez, "How the Zetas Tamed Central America's 'Coyotes,'" *Insight Crime*, May 1, 2014.

[52] WOLA, *Mexico's Other Border Security.*

Mexico enacted a comprehensive migration reform law in 2011 and secondary legislation to implement that law in 2012. Previously, Mexico's immigration law, the General Population Act (GPA) of 1974, limited legal immigration and restricted the rights of foreigners in Mexico, with unauthorized migrants subject to criminal penalties. In 2008, the Mexican Congress reformed the GPA to decriminalize simple migration offenses, making unauthorized migrants subject to fines and deportation, but no longer subject to imprisonment. In May 2011, it passed a broader reform of the GPA.[53]

Contrary to some media reports, Mexico's 2011 law did not create a transit visa for migrants crossing through Mexico, as civil society groups had been advocating. As a result of the law Mexico now requires visas for Central Americans entering its territory (aside from those on temporary work permits or those possessing a valid U.S. visa).

According to many migration experts, implementation of Mexico's 2011 migration law has been uneven. While some purges of corrupt staff within the National Migration Institute (INM) in the Interior Ministry have

---

[53] Mexico's 2011 migration reform was aimed at (1) guaranteeing the rights and protection of all migrants in Mexico; (2) simplifying Mexican immigration law in order to facilitate legal immigration; (3) establishing the principles of family reunification and humanitarian protection as key elements of the country's immigration policy; and (4) concentrating immigration enforcement authority within the National Migration Institute (INM) in the Interior Ministry in order to improve migration management and reduce abuses of migrants by police and other officials. For a general description of the law in English, see Gobierno Federal de México. "Mexico's New Law on Migration," September 2011, available at http://usmex.ucsd.edu/assets/028/12460.pdf.

occurred in the past year, implementation of the migration law has been hindered by the government's failure to more fully overhaul INM.[54] Some experts maintain that Mexico lacks the funding and institutions to address traditional migration flows, much less the increasing numbers of U.S.-bound unaccompanied children that its agents are detaining. Mexico has only two shelters for migrant children and no foster care system in which to place those who might be granted asylum.

Despite provisions to improve migrants' rights included in the 2011 migration law, the Mexican government also continues to remove large numbers of Central American adult migrants, arrest smugglers of those migrants, and return unaccompanied child migrants to Central America.[55] According to INM, Mexico detained 86,929 foreigners in 2013, 80,079 of whom were removed (79,416 people were removed in 2012). Of those who were removed, some 97.4% originated in the northern triangle countries of Central America. In the first four months of 2014, Mexico removed some 24,000 people from the northern triangle countries, 9% more than during that

---

[54] Reforms that migration experts have recommended include raising hiring standards for immigration agents, regulating how migrants should be treated, and strengthening internal and external controls over migration agents. Sonja Wolf et. al., *Assessment of the National Migration Institute: Towards an Accountability System for Migrant Rights in Mexico*, INSYDE, 2014.

[55] From January through May 2014, the Mexican government arrested 431 people for breaking provisions in the migration law; most of those individuals were accused of smuggling-related crimes. Gobierno de Mexico, Sistema Institucional de Información Estadística (SIIE), "Incidencia Delictiva del Fuero Federal, 2014."

period in 2013.[56] Child protection officers from INM accompanied 8,577 children to their countries of origin in 2013 and 6,330 from January through May 2014; 99% of those children originated in northern triangle countries.[57]

With U.S. support, the Mexican government in 2013 started implementing a southern border security plan that has involved the establishment of 12 naval bases on the country's rivers and three security cordons that stretch more than 100 miles north of the Mexico-Guatemala and Mexico-Belize borders.[58]

---

[56] Gobierno de Mexico, Secretaría de Gobernación, Instituto Nacional de Migración, *Boletín de Estadistica* Migratorias, 2013, 2014 statistics are available at http://www.politicamigratoria. gob.mx/.

[57] Gobierno de Mexico, Secretaría de Gobernación, Instituto Nacional de Migración, "*Reintegra INM a Más de 14 Mil Niños Migrantes con sus Familias*," Boletín 31/14, June 11, 2014.

[58] The State Department has provided $6.6 million of mobile Non-Intrusive Inspection Equipment (NIIE) and approximately $3.5 million in mobile kiosks, operated by Mexico's National Migration Institute, that capture the (continued . . .)

Congress of the United States
Washington, DC 20515

Nov. 30, 2018

Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Trump:

As Members of Congress who sit on the House Foreign Affairs Committee and the House Appropriations Committee, we write to express our grave concerns about reports of a so-called "Remain in Mexico" policy for asylum seekers being negotiated between your administration and the incoming Mexican government. This policy would reportedly force individuals seeking asylum to stay in Mexico as their asylum cases move through the U.S. court system.

Current law is clear. 8 U.S.C. 1158(a)(1) states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section . . . " Furthermore, 8 U.S.C. 1231(b)(3)(A) states: "[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race,

religion, nationality, membership in a particular social group, or political opinion."

Restated, federal law expressly provides asylum seekers permission to seek asylum no matter the manner in which they have entered the United States. Furthermore, the Attorney General may not remove asylum seekers from the United States when doing so threatens their lives or freedom—the very qualifications of an asylum seeker in the first place. Finally, forcing asylum seekers to wait in Mexico for indefinite periods of time in dangerous conditions would make it all but impossible for families, children and other vulnerable individuals to access asylum and receive meaningful review of their claims under U.S. law. Consequently, the proposed "Remain in Mexico" policy would violate these laws.

We strongly encourage you to refrain from adopting new policies that are inconsistent with existing federal law, and to refrain from encouraging other governments —such as Mexico's incoming government—to enter into agreements with the United States that violate our nation's laws and undermine American values. The United States has been and should continue to be a beacon of light for other countries, and it is in the best interest of Americans and Mexicans alike to enforce existing asylum laws with dignity, respect, and efficiency. We must work together to ensure the safety and well-being of those seeking asylum.

You have repeatedly said that the law must be followed with respect to persons crossing America's borders. We hope you will stay true to this conviction with respect to individuals seeking asylum in America.

Sincerely,

/s/ GRACE MENG
GRACE MENG
Member of Congress

/s/ JOAQUIN CASTRO
JOAQUIN CASTRO
Member of Congress

/s/ DAVID PRICE
DAVID PRICE
Member of Congress

Cc:

Secretary of State Mike Pompeo

Secretary of Homeland Security Kirstjen Nielsen

Acting Attorney General Matthew Whitaker

John S. Creamer, Chargé d'Affaires, U.S. Embassy in Mexico

President-elect of Mexico, Andrés Manuel López Obrador