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**REDUCING HOMELAND INSECURITIES:  
ENDING ABUSE OF THE ASYLUM AND CREDIBLE  
FEAR PROGRAM**

by

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March 2015

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**REDUCING HOMELAND INSECURITIES: ENDING ABUSE  
OF THE ASYLUM AND CREDIBLE FEAR PROGRAM**

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## **ABSTRACT**

This thesis investigates gaps in the credible fear process within the asylum context and provides recommendations for improving the process. As the number of individuals who file credible fear and asylum applications rises, the specter of individuals filing meritless applications increases. Applications for protection filed by criminals, terrorists, and opportunists threaten U.S. national security and public safety, and weaken the integrity of the nation's asylum system. This thesis explores how the flaws in the asylum and credible fear process should be addressed to minimize fraud and abuse in the system. The findings of this thesis are that frivolous applications are being filed, and that criminals and terrorists are gaming the system. The research also concludes that current safeguards insufficiently protect the nation after an individual's asylum approval. The author recommends the formation of an Asylum Review Board to provide additional layers of protection after an individual's asylum claim is approved.

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## LIST OF ACRONYMS AND ABBREVIATIONS

AAPM	Affirmative Asylum Procedures Manual
APSS	Asylum Pre-Screening System
ARB	Asylum Review Board
BIA	Board of Immigration Appeals
CARSI	Central American Regional Security Initiative
CBP	United States Customs and Border Protection
CF	credible fear
C.F.R.	Code of Federal Regulations
CRS	Congressional Research Service
DHS	Department of Homeland Security
DO	Detention Officers
DOJ	Department of Justice
DOS	Department of State
EOIR	Executive Office of Immigration Review
ERO	Enforcement and Removal Operations
FDNS	Fraud Detection and National Security
FEMA	Federal Emergency Management Agency
FY	Fiscal Year
GAO	Government Accounting Office
HRIFA	Haitian Refugee Immigration Fairness Act of 1998
HSDL	Homeland Security Digital Library
HSI	Homeland Security Investigations
I&N Dec.	Immigration & Naturalization Decisions
IG	inspector general
ICE	Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigration Responsibility Act of 1996
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and Greater Syria
LPR	lawful permanent resident

M18	Eighteen Street gang
MS-13	Mara Salvatrucha gang
NACARA	Nicaraguan Adjustment and Central American Relief Act
NTA	notice to appear
OIG	Office of Inspector General
PD	policy directive
POE	port of entry
RAIO	Refugee, Asylum and International Operations
TBA	tri-border area
TRAC	Transactional Records Access Clearing House
UNHCR	United Nations High Commissioner for Refugees
U.S.	United States
USCIS	United States Citizenship and Immigration Services

## EXECUTIVE SUMMARY

During the summer of 2012, a major shift began in the number of undocumented individuals crossing from the Mexican border into the United States. While the number of individuals apprehended by U.S. Customs and Border Protection (hereafter referred to simply as CBP) and detained by U.S. Immigration and Customs Enforcement (hereafter referred to simply as ICE) grew overall, the flow also included a significant increase in persons seeking asylum. During fiscal year (FY) 2013, 36,026 detainees requested a credible fear interview with an asylum officer to determine whether they were eligible to apply for asylum. The Asylum Division officers found 85.33 percent of the applicants had credible fear. During FY2014, the number of individuals asking for credible fear interviews continued to grow, reaching 59,941. The proportion who was granted credible fear declined to 70 percent of all cases. Once asylum officers determine an individual has a credible fear of persecution, they refer the individual to immigration court to apply for asylum. A grant of asylum ensures the applicant is able to remain indefinitely in the United States, work, and petition for family members to join them in the United States.

The Immigration and Nationality Act (INA) section 235(b)(1)(B)(v) defines credible fear to mean that “there is 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 the INA section 235(b)(1)(B)(ii), 8 U.S.C section 125(b)(1)(B)(ii)].”<sup>1</sup> The INA defines the term “alien” to mean any person not a citizen or national of the United States.<sup>2</sup> Accordingly, the credible fear interview is an attempt to ascertain whether applicants have a fear of persecution if they return to their country of origin and whether their supporting claims are credible. In other words, is the applicant making truthful statements about the claimed fear and the reason for coming to the United States (U.S.).

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<sup>1</sup> Immigration and Nationality Act (INA) sections 235(b)(1)(B)(ii) and (v). See also, 8 U.S.C. section 125(b)(1)(B)(ii).

<sup>2</sup> INA section 101(a)(3). See also, 8 U.S.C. section 1101(a)(3).

If the fear is genuine and relates to one of five grounds of persecution contained in U.S. law, then the applicant is eligible to apply for asylum.

The challenge to the integrity of the asylum system begins with the detection of fraud in more than 70 percent of all credible fear and asylum cases. Applicants are examined several times, including at time of apprehension or when background and biometric checks expire before applications for asylum are approved. Fingerprint scans are valid for 15 months and if the application is not processed during those 15 months, new biometrics data must be collected.<sup>3</sup> Electronic checks complement personal interviews as they may uncover individuals' criminal history or association with terrorism. Yet, despite these checks, individuals with fraudulent claims or applicants with nefarious purposes may be granted asylum status.

Once granted asylum, an asylum officer or immigration judge has the authority to terminate the case if fraud is discovered or an incorrect decision has been made.<sup>4</sup> Yet, such reversals rarely occur. Policies and procedures limit the value of the interviews for determining fraudulent claims and the design of the overall process allows applicants intent on abusing the system to circumvent the screen. Therefore, reforms are needed to identify unworthy applicants even after an application is approved and then to terminate these cases.

This thesis recommends the establishment of an independent Asylum Review Board (ARB) with the authority to terminate asylum status of individuals who should not have been approved. The ARB should have the authority to terminate asylum approvals regardless of whether the cases were approved by the Asylum Division or in immigration court. The ARB should also have the authority to conduct additional checks and interviews. For instance, the ARB should periodically re-examine individuals who successfully obtained an asylum grant to determine if their asylum claim remains viable. The monitoring should include efforts to determine if the individual returned to the country where persecution was originally alleged, which would trigger a concern about

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<sup>3</sup> "Background Checks," March 30, 2011, <http://www.uscis.gov/adoption/background-checks>.

<sup>4</sup> INA section 208(c)(2); See also, 8 C.F.R., section 208.24.

the validity of the initial claim. If the ARB officer determines that individual asylees violated their immigration status or should not have been approved asylum status, the officer should be able to revoke their asylum status and institute removal procedures.

Although these recommendations may affect the current jurisdictional limits of the Asylum Division and immigration courts, an Asylum Review Board would have substantial benefits. It would attack the high level of fraud in the credible fear and asylum process and ensure the integrity of the asylum system overall through curtailing the number of fraudulent filings while raising the proportion of all claims that protect individuals from genuine persecution. System integrity would reduce risks to homeland security through limiting threats from illegal entry and would enhance the ability of the nation to communicate its humanitarian values to the world.

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## I. INTRODUCTION

### A. PROBLEM STATEMENT

Each year, countless economic migrants make their way to the United States. The number of individuals who arrive at the southwest border illegally has steadily grown from fiscal year (FY) 2009 to late 2014. At the end of FY2014, 479,371 individuals were apprehended at the southwest border.

These apprehensions represent an upward trend of more than 63 percent from 2011, which saw 327,577 illegal individuals apprehended at the southwest border.<sup>1</sup> Among these migrants seeking a better life have been an increasing number of individuals who also claim to be fleeing violence and persecution. In FY2009, 5,523 individuals applied for protection with the Asylum Division after being apprehended, compared to 33,283 filings in FY2013. During the first three quarters of FY2014, which offer the latest available figures, the Asylum Division received 36,334 new filings.<sup>2</sup> The higher numbers and the complex reasons for the migration have pushed the asylum process, and especially credible fear determinations, to the forefront of national attention and congressional inquiries.

This thesis examines the credible fear process in the context of asylum proceedings related specifically to claims made by those attempting to cross the U.S. southwest border illegally. For current purposes, the Southwest border comprises the land spanning approximately 2,000 miles from the Gulf of Mexico off the Texas coast, across New Mexico and Arizona, to the Pacific Coast in California. Border crossings, of course, are only part of the total attempts to reach safety, and the United States is only one of the countries experiencing an expanding influx. The United Nations High Commissioner for Refugees (UNHCR) reported for 2013 that the United States processed 263,662 refugees

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<sup>1</sup> “United States Border Patrol, Sector Profile—Fiscal Year 2014 (Oct. 1st through Sept. 30th),” 2011, [http://www.cbp.gov/sites/default/files/documents/U.S. Border Patrol Fiscal Year 2011 Sector Profile.pdf](http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202011%20Sector%20Profile.pdf).

<sup>2</sup> “Credible Fear Workload Report Summary FY 2014 Total Caseload,” July 31, 2014, [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Credible\\_Fear\\_and\\_Reasonable\\_Fear\\_FY14\\_Q3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Credible_Fear_and_Reasonable_Fear_FY14_Q3.pdf).

and had 84,343 asylum claims pending.<sup>3</sup> In contrast, Canada accepted 14,397 asylum applications in that year and the 22 European Union countries registered 398,200 asylum seekers. Applications overall increased 32 percent from the previous year and reflect a general upward trend.<sup>4</sup>

While most migrants come to the United States for a better economic life and personal safety, others intend to commit crimes or acts of terrorism. Despite their different motives, however, those who attempt to enter the United States illegally share the need to circumvent immigration laws. The desire to enter the United States is overshadowed by a fear of being caught by border or immigration officials. They attempt to enter surreptitiously, some with valid identification, such as birth certificates or national identification cards, while others, perhaps the majority, arrive at the border with no identification. While some slip through undetected, others do not reach their destination and are apprehended by U.S. Customs Border Protection (CBP).

Apprehension at the time of illegal entry begins the expedited removal process. After capturing biometric information, such as a photo, fingerprints, and signature of applicants over the age of 14, initial questioning focuses on the individuals' background and reason for having entered the United States illegally. CBP transfers the apprehended persons to U.S. Immigration and Customs Enforcement (ICE), which administratively detains and returns them to their countries of origin. For most apprehended illegal migrants, this expedited removal process does not require judicial review.

During any stage of the expedited removal process, individuals may claim fear of return to their countries. This expression of fear begins the "credible fear" process and halts the removal process, essentially stopping the deportation of individuals. At that point, an asylum officer from the U.S. Citizenship and Immigration Services (USCIS) will schedule an interview with the applicants to determine whether the individuals are eligible for an asylum hearing before an immigration judge.

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<sup>3</sup> "UNHCR Statistical Yearbook 2013: Statistical Annexes," 2013, <http://www.unhcr.org/54cf9bc29.html>.

<sup>4</sup> "Asylum Levels and Trends in Industrialized Countries, 2013," 2014, <http://www.unhcr.org/5329b15a9.html>.

The entire process may be riddled with fraud. For example, between December 2013 and February 2014, the House Judiciary Committee claimed that more than 70 percent of credible fear applications are fraudulent.<sup>5</sup> Fraud in an asylum application refers to an intentional and knowing deception, either through providing false testimony or evidence. Fraudulent and frivolous applications subject the individual applicant to permanent restrictions on their eligibility to file for future immigration benefits, fines, or even imprisonment. Still thousands routinely risk the penalties for a chance to gain residence in the United States.

In practice, however, the risk of detection is not very high. The Asylum Division and the immigration courts rarely require their officers to go back to examine and then terminate approved asylum claims. Few checks occur to verify applicants' claims about events related to their persecution claims and, when contradictions emerge during an interview, asylum officers have few legally sufficient means to challenge the applicants' credibility. Applicants may feel they have nothing to lose by submitting frivolous claims to gain entry to the United States.

The process itself also may enable applicants to misrepresent facts or events, or submit falsified documentary evidence. Asylum officers often need to consider instances in which genuine asylum seekers—who have bonafide claims of persecution—misrepresent their identities to escape their persecutors. Bonafide asylum seekers, for instance, may present false documentation or tell false stories on how they escaped in order to avoid repercussions to their families and friends still at home. Fraud may be a “built in” part of the experience of asylum. Certainly, during some of the worst experiences of persecution in 20th century history, fraud was a means to an end as hundreds of thousands fled Nazi and communist oppression.

Faced with this reality, the asylum process “excuses” certain misrepresentations that are immaterial to the heart of an applicant's claim. Yet, without other ways to monitor the validity of claims, these misrepresentations also offer opportunities for malafide applicants to submit credible fear and asylum applications and gain permanent

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<sup>5</sup> “Press Release, House Judiciary Committee Asks GAO to Investigate Cost of Asylum Fraud to Taxpayers,” February 11, 2014, [http://goodlatte.house.gov/press\\_releases/496](http://goodlatte.house.gov/press_releases/496).

residence in the United States. Fraud is certainly nearly always present in cases in which criminals or terrorists file applications. A 2002 Government Accounting Office (GAO) study on benefit fraud found that fraud was pervasive and routinely used in furtherance of criminal activities or those who threatened the national security of the United States.<sup>6</sup>

Unfortunately, there is a dearth of information on whether credible fear applicants have criminal records or commit crimes once they have been granted asylum. Among all persons charged with criminal immigration offenses, 92 percent entered the country illegally.<sup>7</sup> Yet, these statistical associations do not pinpoint the experiences of the tens of thousands of individuals who seek asylum. Connections between crime, terrorism and fraudulently filed asylum claims are typically uncovered looking back on the cases that have proven noteworthy because of the harm caused by the individual asylum recipient.<sup>8</sup> For instance, scholars long have observed the link between “international terrorism” and “illicit drugs, money laundering, illegal arms, trafficking, and illegal movement.”<sup>9</sup> The degree of harm that may result even from these relatively infrequent cases, however, support an urgent need to review and reform the existing asylum and credible fear process.

## **1. Key Considerations and Assumptions**

The credible fear process is a screening process to ensure that meritorious applicants are not returned to countries in which they would be at risk of being persecuted or tortured. The applicants must show “a significant possibility” that they will be found credible in “a full hearing before an immigration judge that he or she has been

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<sup>6</sup> United States General Accounting Office, *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems* (GAO-02-66) (Washington, DC: U.S. Government Accountability Office, 2002), <http://www.gao.gov/assets/240/233515.pdf>.

<sup>7</sup> Mark Motivans, *Immigration Offenders in the Federal Justice System, 2010* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2013), <http://www.bjs.gov/content/pub/pdf/iofjs10.pdf>.

<sup>8</sup> Thomas H. Kean and Lee Hamilton, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York, NY: W.W. Norton & Company, 2004), 72.

<sup>9</sup> Steven Hutchinson and Pat O’Malley, “A Crime–Terror Nexus? Thinking on Some of the Links between Terrorism and Criminality,” *Studies in Conflict & Terrorism* 30, no. 12 (2007): 1095–107, doi: 10.1080/10576100701670870.

persecuted or has a well-founded fear of persecution or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country.”<sup>10</sup> Accordingly, applicants do not need to present corroborating evidence because asylum officers rely on the oral testimony of the applicants. When the applicants connect their fear and harm to one of the five enumerated grounds (race, religion, nationality, membership in a particular social group, or political opinion) and the motivation of the persecutor, the asylum officer will refer the case to an immigration judge. Upon establishing credible fear, the applicants may be released on bond. The applicant, or usually a family member already resident in the United States, will pay the bond money for release from detention. The applicant must then return for a hearing in immigration court during which he or she has an opportunity to present the asylum claim in more detail.

Applicants’ testimonial narrative during this process is crucial because it provides the evidentiary basis for applicants to prove they have a fear of persecution. An unintended effect of the expedited removal process, however, is that as applicants are detained together in groups, their stories of fear of harm begin to share similarities. For instance, applicants from China have claims of forced abortions, religious persecution, or political opinions, whereas applicants from Mexico, South, Central, and Latin America often present claims based on general violence, belonging to a particular social group, and political opinion. The expedited removal process itself creates an environment that fosters the exchange of information among applicants and provides them with similar narratives.

The clustering of shared narrative themes, however, may point to patterns of fraudulent claims. Recent applicants from Mexico and Central American countries, for example, are certainly driven to come to the United States because of instability and violence in their home countries. Their problems arise from a combination of weak local governments, high poverty rates, violent drug cartels battling each other for regional

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<sup>10</sup> “Lesson Plan Overview—Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course—Credible Fear,” 1–47, February 28, 2014, <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>.

dominance, and self-defense forces that aggressively seize control of towns.<sup>11</sup> Crime, general violence, or unrest, however, are not grounds for protection under U.S. asylum laws because the fear is generally unconnected to one of the five grounds upon which asylum may be used as a mechanism to protect the individual.

Applicants' narratives also change in patterned ways during the application process. Close to 90 percent of recent credible fear applicants referred to crime as the basis for their claim. Yet, during their first immigration court hearing, they expressed a fear of returning to their countries for political reasons.<sup>12</sup> A change in the narrative in predictable ways may indicate that the applicants' stories may not be truthful and are changed to meet the asylum criteria once they are informed about and coached on what to say before an immigration judge.

## **2. Arguments**

Statistics show that most individuals in expedited removal proceedings who claim fear of return will be found to have established credible fear. Illegal entrants with successful credible fear determinations are referred to immigration court where they may apply for asylum. While a successful credible fear interview should not mean that a grant of asylum is automatic, statistics show that most asylum applications are approved at the immigration court stage.<sup>13</sup> After one year of having had their asylum application approved, applicants may apply for lawful permanent residence (LPR), or more commonly known as "the green card." The credible fear process, therefore, is an easily exploitable pathway to permanent residency in the United States.

As discussed more fully in subsequent sections, the majority of credible fear applicants misrepresents or exaggerates their claim of persecution to remain in the United

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<sup>11</sup> Alex Gore, "Thousands of Armed Vigilantes Takeover Mexican Town, Arrest Police and Shoot at Tourists after 'Commander' Is Killed and Dumped in the Street," *Mail Online*, March 28, 2013, <http://www.dailymail.co.uk/news/article-2300381/Vigilantes-seize-town-Mexico-shoot-tourists-commander-killed.html>.

<sup>12</sup> Jim Forsyth, "The Vast Majority of Central American Immigrant Children Are Appearing for Immigration Hearings," *News Radio 1200 WOAI*, October 20, 2014, <http://www.woai.com/articles/woai-local-news-sponsored-by-five-119078/the-vast-majority-of-central-american-12881005/>.

<sup>13</sup> "Relief Granted by Immigration Judges As of December 2014," December 2014, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_relief.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_relief.php).

States for economic reasons, personal reasons, such as joining family members, who already reside in the United States, or simply to avoid being detected as criminals or terrorists. With a steady increase in the size of the flow across the southwest border, the credible fear process has been well publicized in the media. As the public became aware of the credible fear process, public support for humanitarian relief, such as credible fear and asylum, has waned. A change in the credible fear process and the asylum process would re-establish public confidence in the system and should reduce the exploitation of the process by applicants who have no legal basis to seek asylum.

### **3. Limits of the Research**

Applicants' credible fear claims are evaluated using several criteria. One of the most important is whether the applicant has a fear of torture if returned to the country of origin. The focus of this thesis, however, is limited to the credible fear process in expedited removal proceedings as it relates to applicants' claims for asylum. The discussion also focuses only on the adult population in the credible fear and asylum context, despite the large number of undocumented minors involved in the migratory flow. U.S. policy is not to place unaccompanied minors into the expedited removal process except when the minors had been previously removed from the United States, or if they have been convicted of or involved in criminal activity.<sup>14</sup> The Asylum Division has initial jurisdiction over asylum claims filed by unaccompanied minor children who are apprehended by CBP, which has the effect that these cases effectively bypass the immigration court.

## **B. RESEARCH QUESTION**

Although the detained immigration population undergoes biographical and biometric screening, which entails analyzing photos, fingerprints, and signatures against a host of automated system tools, the credible fear and asylum processes provide insufficient safeguards in determining whether individuals merit asylum status. When fraud indicators are not confirmed by biographical and biometric screening, the

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<sup>14</sup> Paul Virtue, *Unaccompanied Minors Subject to Expedited Removal*, Memorandum to Management Team (Washington, DC: INS Office of Programs, 1997).

mechanism to detect fraud relies on the expertise of the interviewing officer. However, without the luxury of time, coupled with overcrowded detention facilities and large number of applicants, the tendency is to decide that the applicants need protection. The process is flawed and fosters misrepresentation. It attracts criminals and opportunists, and may even encourage individuals with ties to terrorism to cross the southwest border illegally. The high number of people who avail themselves of the credible fear process erodes the confidence of the public in the asylum system, undermines the humanitarian aspects of the process, and creates loopholes in the nation's national security objectives. This thesis seeks to answer the following questions, (1) what are the weaknesses in the asylum and credible fear processes that need to be addressed to mitigate fraud and abuse in the system, and (2) what solutions and recommendations would minimize these gaps.

### **C. METHODOLOGY AND SUMMARY OF INTENT**

This thesis examines the credible fear process within the asylum context. It is the product of 16 months of research that began in September 2013 and ended in February 2014, and includes a review and analysis of legislation; statutory, regulatory rules, and legal decisions, immigration policies, and available literature on the credible fear process. Empirical data and statistics that pertain to asylum seekers, illegal entrants, and national security matters, and information gleaned from Department of Homeland Security (hereafter referred to simply as DHS), individual agencies (USCIS, ICE, and CBP), the Executive Office of Immigration Review (hereafter referred to simply as EOIR), reports from the Pew Research Study, the Transactional Records Access Clearing House (TRAC) Immigration Project University of Syracuse, the Homeland Security Digital Library (HSDL), U.S. congressional testimonies, U.S. Congressional Research Service (CRS) reports, media articles and reports, legal journals and review articles support this thesis.

The primary intent of this thesis is to provide solutions and recommendations to overcome inherent flaws in the asylum and credible fear process and thereby strengthen the nation's immigration system. An improved process will restore public trust in the system.

## **D. LITERATURE REVIEW**

While the United States is not party to the 1951 Convention relating to the Status of Refugees, it ratified the 1967 Protocol relating to the Status of Refugees on November 1, 1968 and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on October 21, 1994.<sup>15</sup> For its asylum and refugee laws, the United States draws heavily from the United Nations treaties, and statutory, regulatory, and case law, as it relates to asylum and refugee law. Throughout much of its history, U.S. immigration law has adapted to broad shifts in the composition and patterns of global migration flows. It has also reflected contentious political battles involving both domestic and international interests. The legal frameworks for asylum and credible fear processes have and remain part of this tumultuous history.<sup>16</sup>

### **1. Origins and Implications of the Credible Fear Process**

On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), Public Law 104–208, 110 Stat. 3009.<sup>17</sup> IIRIRA amended the Immigration and Nationality Act (INA) and had a wide-reaching impact on how the United States handles immigration.<sup>18</sup> IIRIRA changed the treatment of illegal aliens at the border, the process of removal from the United States, and the adjudication of asylum cases.

IIRIRA created new grounds of exclusion aimed to alleviate a backlog of asylum cases. Prior to the passage of IIRIRA, aliens who expressed a fear of persecution at the time of admission at a U.S. port of entry, or at the time of apprehension upon entry

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<sup>15</sup> “State Parties to the 1951 Convention Relating to the Status of Refugees and/or the 1967 Protocol as of September 2012,” accessed January 21, 2014, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/open docpdf.pdf?reldoc=y&docid=50518a402>; “Chapter V, Refugees and Stateless Persons, Protocol Relating to the Status of Refugees, Participant and Accession/Succession List. January 31, 1967,” accessed January 21, 2014, [https://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=V-5&chapter=5&lang=en); “Chapter IV, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. December 10, 1984,” accessed January 21, 2014, [https://treaties.un.org/Pages/ShowMTDSDetails.aspx?src=UNTSO&mtdsg\\_no=IV-9&chapter=4&%3Blang=en](https://treaties.un.org/Pages/ShowMTDSDetails.aspx?src=UNTSO&mtdsg_no=IV-9&chapter=4&%3Blang=en).

<sup>16</sup> INA, sections 235(b)(1)(A) & (B).

<sup>17</sup> Illegal Immigration Reform and Immigration Responsibility Act of 1996, 8 U.S.C. section 1101, Pub. Law No. 104-208, 110 Stat. 309 (1996), codified at 8 U.S.C. section 1101. INA section 235(b)(1)(A) and 8 C.F.R. section 235.3.

<sup>18</sup> IIRIRA, P.L. 104-208, 1996.

into the United States without proper authorization, were scheduled with an immigration judge within the Department of Justice (DOJ) to directly present their claim of asylum. IIRIRA changed this process and created the expedited removal process that became effective on April 1, 1997. With the enactment of IIRIRA, the Attorney General gained the authority to remove expeditiously an individual who engaged in misrepresentation or fraud, lacked proper documentation, or who was otherwise found inadmissible at the time of entry. IIRIRA created credible fear provisions.<sup>19</sup> When individuals express a fear of returning to their countries of origin, their cases are referred to asylum officers for a screening interview to determine whether the individuals possess a credible fear of persecution.

Prior to April 1, 1997, aliens held in custody pursuant to an order of deportation could request judicial review of the deportation order through habeas corpus proceedings under INA section 106, which would effectively stall their deportation. Aliens may challenge detention as unlawful in habeas corpus proceedings, which are independent from the deportation hearings, when there are “good reasons to believe” that they are unlikely to be removed. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that it was unlikely that Mr. Zadvydas would be removed because no other country would accept Mr. Zadvydas as he was born in Germany in a displaced persons’ camp to his Lithuanian parents.<sup>20</sup> IIRIRA repealed section 106 and added Section 242(g) of the INA to IIRIRA. Section 242(g) was later amended by the Real ID Act. Section 242(g) shifts credible fear claims away from the courts and gave exclusive jurisdiction to the Attorney General to exercise deportation authority previously reserved for immigration judges.<sup>21</sup>

## **2. Arguments Surrounding the Credible Fear Process**

In the six months after the passage of IIRIRA, and the creation of the credible fear process, the legal community organized to oppose the law, noting an 80 percent

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<sup>19</sup> IIRIRA, P.L. 104-208, 1996.

<sup>20</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>21</sup> INA section 242(g).

approval rate, abusive behavior by former Immigration and Naturalization Service (INS) inspectors, and deficiencies in the processing of cases.<sup>22</sup> Although the INS ceased to exist on March 1, 2003, and the reorganization of its functions are now distributed between USCIS, CBP, and ICE, concerns over the program continue.<sup>23</sup> Recently, many applicants go straight to the ports of entry (POE) to request credible fear interviews without attempting to enter the United States illegally, essentially “turning themselves in” to U.S. immigration authorities.

The pre-9/11 legal immigration community widely opposed IIRAIRA, the expedited removal procedure, and the credible fear process because many believe they would effectively close the door to a generous immigration system.<sup>24</sup> Despite these qualms, however, USCIS continues to provide information to the public about the credible fear process and other immigration benefits to would-be applicants on its official website, maintains a question and answer page that describes the credible fear process, and explains in detail how to apply for credible fear.<sup>25</sup> Detainees also have access to information that explains the expedited removal process.<sup>26</sup>

After 9/11, the literature focused on the possibility of terrorists crossing into the United States illegally from Mexico. For instance, in February 2005, Alan Eisner, a former *Reuter's* journalist and pro-Israeli advocate, reported for the *UT San Diego* that thousands were illegally crossing the border every day and among them could be drug

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<sup>22</sup> Charles Wheeler, Mary McClenahan, and Catholic Legal Immigration Network, Inc, “Credible Fear Report,” AILA, October 29, 1997, <http://www.aila.org/content/default.aspx?bc=13120>; Melvyn L. Cantor, Tracy M. Flynn, and Eleanor Acer, “Brief *Amicus Curiae* of the Lawyers Committee for Human Rights,” Human Rights First, August 1999, [https://www.humanrightsfirst.org/wp-content/uploads/pdf/pb\\_spec\\_03.pdf](https://www.humanrightsfirst.org/wp-content/uploads/pdf/pb_spec_03.pdf).

<sup>23</sup> “Creation of the Department of Homeland Security,” accessed January 27, 2014, <http://www.dhs.gov/creation-department-homeland-security>.

<sup>24</sup> Wade Graham, “Masters of the Game. How the U.S. Protects the Traffic in Cheap Mexican Labor,” *Harper's Magazine Foundation, Harper's Magazine* 293, no. 1754 (1996), <http://www.justice.gov/oig/special/9807/mastgm1.htm>.

<sup>25</sup> “Questions & Answers: Credible Fear Screening,” September 21, 2003, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening>.

<sup>26</sup> *Ibid.*

gangs and smuggled.<sup>27</sup> Likewise, in November 2005, Jon Dougherty, a *World Net Daily* contributor, reported that U.S. immigration authorities had apprehended illegal aliens from countries with known terrorists links or from areas in which terrorists operated.<sup>28</sup> Paul Williams, a former FBI consultant and journalist, for instance, argued that drug trafficking gangs were possibly involved in helping Al Qaeda explore plans to smuggle nuclear weapons across the U.S.-Mexico border.<sup>29</sup>

More recent arguments show that the current system was not created to withstand the large number of illegal migrants requesting credible fear interviews and much less designed to identify frivolous. Additionally, many applicants do not intend to defraud the asylum system, but their reasons for seeking protection have no necessary nexus to one of the five grounds under which a genuine fear must occur. Damien Cave of the *New York Times* describes a recent example of the complexities. In “A Civil Servant in Mexico Tests U.S. on Asylum,” Cave describes a case in which a Mexican official gave a letter to a woman so that she could go to the United States and apply for asylum. Her letter describes that gangs are shooting at her house and that she fears being shot or killed.<sup>30</sup> However, what the author of the article, the Mexican official who wrote the letter, and the woman who applied for asylum are seemingly unaware of is that asylum applicants do not need a note or a letter from their persecutors. Moreover, the woman may find herself caught up in the U.S. legal system because her fear is based not on one of the five grounds (religion, race, nationality, political opinion, or social group). Her case is representative of many applicants who claim fear for their safety but who do not meet the criteria under U.S. law for receiving protection through the asylum system.

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<sup>27</sup> Alan Elsner, “Non-Mexican Illegal Aliens a U.S. Security Headache,” *U-T San Diego*, February 4, 2005, <http://legacy.utsandiego.com/news/mexico/tijuana/20050204-0912-security-border.html>.

<sup>28</sup> Jon Dougherty, “Lawmaker: Terror War Spilling across Border,” *WND*, November 16, 2005, <http://www.wnd.com/2005/11/33406/>.

<sup>29</sup> Paul L. Williams, *The Al Qaeda Connection: International Terrorism, Organized Crime, and the Coming Apocalypse* (Amherst, NY: Prometheus Books, 2005).

<sup>30</sup> Damien Cave, “A Civil Servant in Mexico Tests U.S. on Asylum,” *The New York Times*, December 28, 2013, [http://www.nytimes.com/2013/12/29/world/americas/path-to-asylum-for-mexicans-bearing-letter.html?\\_r=1&](http://www.nytimes.com/2013/12/29/world/americas/path-to-asylum-for-mexicans-bearing-letter.html?_r=1&).

The credible fear process has been and continues to be contentious. Although the system is flawed, it needs to continue to offer protection to those who must flee the persecution that pervades many countries. However, to remain viable, the system needs new avenues to detect fraud and discourage applicants from filing frivolous claims.

#### **E. OVERVIEW OF UPCOMING CHAPTERS**

The first chapter provides the reader with a brief introduction into the topic of the thesis. It further aims to address the goal of the thesis and the significance of the research. It briefly sets out the methodology of the research and structure of the thesis. The reader is introduced to the credible fear process and the literature surrounding the asylum and credible fear process. The second chapter provides the reader with a comprehensive background on asylum and credible fear. In this chapter, the reader learns the definitions and the intricacies of the process, including evidence and data in support of why a change in policy is needed. The third chapter is an in-depth discussion of the current situation in the asylum and credible fear process. It also provides findings on fraud and on the criminals and terrorists that attempt to exploit the credible fear and the asylum process. The last chapter provides recommendations.

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## II. DISCUSSION OF CREDIBLE FEAR PROCESS

This first section of this chapter provides a deeper background discussion of the credible fear process. From the outset, it is important to clarify the term “credible fear,” which is a term of art. This section describes the purpose and structure of a credible fear interview, including what generally occurs during the interview and the types of questions an individual may be asked to ascertain fear. It also covers the five grounds that provide protection under U.S. asylum law and how the asylum officer determines credibility, including what constitutes material as compared to innocuous misrepresentation. Additionally, certain common terms used in this process, for example “general violence” and “*de novo* hearing,” are reviewed. The chapter ends with a discussion of the demographic profile of asylum seekers and a brief description of the government agencies involved in the credible fear process.

### A. CREDIBLE FEAR OF PERSECUTION

U.S. refugee and asylum laws are complex. The question of whether an applicant fears remaining or returning to their home country or last place of residence is firmly embraced in U.S. refugee and asylum laws. A proper adjudication of a credible fear claim must draw on human rights treaties, statutes, regulations, case laws, interpretation of policy memorandums, and an understanding of the political and social conditions of the various countries that migrants behind.<sup>31</sup>

As already defined above, the term “alien” means an individual who is not a citizen or national of the United States. The United Nations identifies migrants as persons who voluntarily or involuntarily move to another country to improve their material or social prospects (i.e., economic migrants or temporary migrant workers).<sup>32</sup> Migrants are treated very differently under U.S. law depending on a variety of circumstances. A significant difference between a refugee and an asylum seeker, for instance, is that a

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<sup>31</sup> “Asylum Division Training Programs,” March 5, 2012, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs>.

<sup>32</sup> “Key Migration Terms,” 2011, <https://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html>.

refugee is outside of the United States when they seek protection while an asylum seeker has already crossed the border into the United States.<sup>33</sup> Migrants who may not be admissible to the United States are placed in expedited removal proceedings.<sup>34</sup>

Section 235(b)(1)(A) of the INA provides that if the aliens indicate an intention to apply for asylum or expresses fear of persecution or return to their countries, the aliens shall be scheduled for an interview with an asylum officer to establish a credible fear of persecution or torture.<sup>35</sup> Accordingly, the credible fear process is a way for the asylum officer to gather information from the aliens about their fear and determine whether the aliens might be eligible for asylum.

## **B. A SCREENING INTERVIEW**

INA section 235(b)(1)(B)(v) defines credible fear to mean that “there is 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 the INA].”<sup>36</sup> The statute, therefore, requires the aliens to testify truthfully about the events that lead them to leave their countries and that the events demonstrate that they were persecuted or may be persecuted if returned to their home countries. If the applicant’s testimony meets this threshold criterion, he or she is eligible to apply for asylum. However, rather than filing the asylum claim with the asylum officer, the applicants will be scheduled for a hearing with an immigration judge because they are in expedited removal proceedings.<sup>37</sup> The individual hearing on the merits of the case is preceded by one or more master calendar hearings.

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<sup>33</sup> “Refugees & Asylum,” September 1, 2011, <http://www.uscis.gov/humanitarian/refugees-asylum>.

<sup>34</sup> Alison Siskin and Ruth Ellen Wasem, *Immigration Policy on Expedited Removal of Aliens* (CRS Order Code RL33109) (Washington, DC: Congressional Information Service, 2005), <http://fpc.state.gov/documents/organization/54512.pdf>.

<sup>35</sup> Illegal Immigration Reform and Immigration Responsibility Act of 1996, 8 U.S.C. section 1101, Pub. Law No. 104-208, 110 Stat. 309 (1996), codified at 8 U.S.C. section 1101. INA section 235(b)(1)(A) and 8 C.F.R. section 235.3.

<sup>36</sup> “8 U.S. Code § 1225—Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing,” accessed January 25, 2015, <http://www.law.cornell.edu/uscode/text/8/1225>. See also INA § 235(b)(1)(B)(ii), 8 U.S.C § 125(b)(1)(B)(ii).

<sup>37</sup> “Immigration Court Practice Manual,” 1–258, June 2013, [http://www.justice.gov/eoir/vll/OCIJPracManual/Practice\\_Manual\\_review.pdf](http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf).

Section 239(b)(1) of the INA provides that master calendar hearings must be scheduled within 10 days after the notice to appear (NTA) is served on the alien.<sup>38</sup> A master calendar hearing is an initial court hearing to calendar submission dates for the asylum application and supporting documents, and to schedule the individual merits hearing. On occasion, applicants are not represented during the initial master calendar hearing and may not immediately find suitable legal representation for subsequent master calendar hearings. Therefore, immigration judges may reschedule additional master calendar hearings for the applicants to return with legal representation, which may be 30 or more days later. The applicants are, therefore, not immediately scheduled for their asylum hearings because they are given time to find and select an attorney to represent them at their master calendar hearing. The individual asylum hearing may be scheduled much later and, therefore, applicants have time to gather evidence and otherwise prepare for their individual hearings.<sup>39</sup>

Since the court docket is severely backlogged, merits or individual hearings, during which the asylum case is fully presented, are scheduled far into the future. No regulatory requirement exists for a merits or individual hearing to be scheduled within a prescribed time. The scheduling of a merits or individual hearing depends entirely on the immigration judge's calendar, attorney's availability, and other such reasons, including timing needed to gather evidence, witnesses, or similar conditions. Therefore, the merits or individual hearing may be scheduled years later, which as explained in the following sections, may give the applicants additional time to polish their story. To not have the aliens linger in detention for many years, the aliens or someone on their behalf may post a monetary bond to release the aliens with the goal to ensure that they will return.<sup>40</sup>

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<sup>38</sup> “8 U.S. Code § 1229—Initiation of Removal Proceedings,” accessed January 25, 2015, <http://www.law.cornell.edu/uscode/text/8/1229>.

<sup>39</sup> “Immigration Court Practice Manual, Chapter 4, Hearings before Immigration Judges,” June 2013, [http://www.justice.gov/eoir/vll/OCIJPracManual/Practice\\_Manual\\_review.pdf#page=67](http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=67).

<sup>40</sup> “8 C.F.R. 212.5—Parole of Aliens into the United States,” accessed January 25, 2015, <http://www.law.cornell.edu/cfr/text/8/212.5>; 23 I&n Dec. 731 (Bia 2005), and Interim Decision #3510. *In Re X-K-, Respondent*.

### **C. THE CREDIBLE FEAR INTERVIEW**

The credible fear interview is recorded on “Form I-870, Record of Determination/Credible Fear Worksheet.”<sup>41</sup> Prior to the interview, the asylum officer must ensure that the applicants have an understanding of the credible fear process. The applicants should have been oriented on the credible fear process during the 48 hours prior to the credible fear interview, which is evidenced by their signature and date on “Form M-444, Information about Credible Fear Interview.” Applicants, however, may waive the 48-hour waiting period and request to be interviewed as soon as possible.<sup>42</sup>

### **D. WHAT HAPPENS DURING A SCREENING INTERVIEW?**

Whenever feasible, and at the discretion of an asylum office director, credible fear interviews are conducted in person, by telephone, or over live video conferencing equipment. The U.S. government will provide telephonic interpreters for applicants who do not speak English. These government-paid interpreters will translate verbatim what is being asked and answered during the interview.<sup>43</sup>

The applicants may begin asking a series of questions, including how long they will be detained and when they can see family. Asylum officers, however, must first swear in the telephonic interpreters before swearing in the applicants to ensure that the oath the applicants take is clearly understood by the applicants. Only after explaining the purpose of the interview and ensuring throughout the interview that the applicants have a complete understanding of the process, may the asylum officer begin asking questions.

Although it is not a requirement, credible fear applicants may be represented by an attorney, at no cost to the U.S. government during the interview.<sup>44</sup> The credible fear

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<sup>41</sup> Cantor, Flynn, and Acer, “Brief *Amicus Curiae* of the Lawyers Committee for Human Rights.”

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> César C. García Hernández, “No Right to Attorney for Credible Fear Interview, Says Immigration Judge,” *crImmigration*, November 25, 2014, <http://crimmigration.com/2014/11/25/no-right-to-attorney-for-credible-fear-interview-says-immigration-judge/>.

interview is not adversarial; however, the applicants are sworn in to testify truthfully.<sup>45</sup> No witnesses are cross-examined, and applicants may submit. Occasionally, applicants will have witnesses, who may testify at the discretion of the asylum officer.<sup>46</sup>

The asylum officer must type or handwrite notes of the interview and ask the applicants a series of questions, including names, aliases, date(s) of birth, country of origin, marital status, and similar.<sup>47</sup> After the initial questions, the asylum officer seeks to learn about the applicants' claims to fear and harm, including why the applicants left their countries and who they feared.<sup>48</sup> The asylum officer will probe applicants' reasons for fear, focusing on details about any particular event that caused the applicants to leave his or her country. The asylum officer will also ask questions to ascertain whether the applicants have persecuted anyone or are somehow barred from asylum. Before the end of the interview, the asylum officer must read back the testimony of the applicants. At the end of the interview, applicants are informed that a determination on the credible fear application will be served at a later date.

The supervisory asylum officer may review all cases; although certain high profile determinations are referred for review to the Headquarters Asylum Office. Positive or negative decisions are handed to the applicants in person.<sup>49</sup> On occasion, when applicants are interviewed over the phone or over video conferencing equipment, detention center staff will usually facilitate the process and help the asylum office staff with handing the decision to the applicants.

Pursuant to INA section 235(b)(1)(B)(iii)(III), negative determinations contested by the applicants must "be concluded as expeditiously as possible," which is understood to mean within 24 hours but no later than seven days after the date of the negative

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<sup>45</sup> "8 C.F.R. 208.30—Credible Fear Determinations Involving Stowaways and Applicants for Admission Found Inadmissible Pursuant to Section 212(a)(6)(C) or 212(a)(7) of the Act," accessed January 25, 2015, <http://www.law.cornell.edu/cfr/text/8/208.30>.

<sup>46</sup> Cantor, Flynn, and Acer, "Brief *Amicus Curiae* of the Lawyers Committee for Human Rights."

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*



the applicants by at least one of these central reasons.<sup>55</sup> Although an exact motive is not required, the persecutors must be influenced by the protected characteristic in targeting the applicants. Race, religion, nationality, and political opinion have a long history and are relatively easy as a basis for persecution. Membership in a particular social group, however, is somewhat amorphous and its meaning continues to evolve with new cases and experiences. For instance, the Board of Immigration Appeals (BIA) recognized domestic violence as a protected ground on August 26, 2014.<sup>56</sup> A claim that rests on fear of persecution on account of membership in a particular social group requires an asylum officer to apply analytical tests that have been defined by case law in evaluating the applicants' claim for asylum. These carefully carved out interpretations of what constitutes a membership in a particular social group do not include civil strife, fear of gangs, or gang violence, forced gang membership, economic reasons, or similar harm unless the harm is severe and "above and beyond" economic deprivation.<sup>57</sup> However, harm not associated with the five protected grounds does not preclude a finding of fear of harm on account of a protected ground on which the persecutors' motives are mixed, such as the persecutors are motivated to harm for economic reasons and political reasons.<sup>58</sup>

## **F. CREDIBILITY ISSUES**

Credible, persuasive testimony that refers to specific facts is sufficient for applicants to meet the threshold of establishing that they have a well-founded fear of returning to their countries of origin. To meet the legal standard of a well-founded fear,

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<sup>55</sup> See INA sections 101(a)(42) and 208(b)(1)(B)(i).

<sup>56</sup> *Matter of A-R-C-G-* et al., 26 I&N Dec. 388 (BIA 2014).

<sup>57</sup> "Refugee, Asylum, and International Operations Directorate Officer Training. Asylum Division Officer Training Course—Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution," March 25, 2009, [http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees & Asylum/Asylum/AOBTC Lesson Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf](http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf).

<sup>58</sup> *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994).

the applicants must demonstrate that they have both a subjective and an objective fear.<sup>59</sup> Subjective fear means that the applicants have an awareness of the danger. It recognizes that fear is evidence of risk perceived at an individualistic level, and requires the evaluation of the applicants' testimony in light of the political and social conditions in their countries of origin. When subjective fear is not established, the request for protection must be denied. Subjective fear is negated, for instance, when the applicants' account of fear is not credible or when the applicants return to their countries of origin after having made a claim of fear of persecution. When applicants establish subjective fear, the asylum officer examines the applicants' fear against an objective standard and whether future persecution is likely to occur. The objective standard was explained by the Supreme Court in its 1987 landmark decision *INS v. Cardoza-Fonseca* (1987).<sup>60</sup> The Supreme Court in *Cardoza-Fonseca* also emphasized a low threshold level of 10 percent for applicants to establish a well-founded fear. The applicants meet the standard if a reasonable person in similar circumstances would fear persecution, and if a reasonable person would fear harm upon returning to the countries of origin.<sup>61</sup> Further, in *Matter of Mogharrabi*, the BIA found that the applicants, to establish objective fear, must provide credible, direct, and specific evidence.<sup>62</sup>

In practice, when the asylum officer discovers an adverse credibility factor during the interview, the officer must inform the applicants of the inconsistency and provide the applicants with an opportunity to explain the inconsistency.<sup>63</sup> Minor inconsistencies do not negatively impact a credibility finding by the asylum officer. An officer may find the applicants not credible when the inconsistency is material to the claim; for example, the

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<sup>59</sup> "Refugee, Asylum, and International Operations Directorate Officer Training. Asylum Division Officer Training Course—Asylum Eligibility Part II: Well-Founded Fear," 1–34, March 13, 2009, [http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees & Asylum/Asylum/AOBTC Lesson Plans/Well-Founded-Fear-31aug10.pdf](http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Well-Founded-Fear-31aug10.pdf).

<sup>60</sup> "Refugee, Asylum, and International Operations Directorate Officer Training. Asylum Division Officer Training Course—Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence," September 14, 2006, 1–34, [http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees & Asylum/Asylum/AOBTC Lesson Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf](http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf).

<sup>61</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

<sup>62</sup> *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

<sup>63</sup> United States General Accounting Office, *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems*.

identity of the persecutor or other key points in the claim cannot be remembered during the interview or in follow-up interviews. Vague testimony or one that lacks the details that the applicants should generally be able to provide will support an adverse credibility finding.<sup>64</sup>

Revisions to the Asylum Office’s lesson plan on credible fear require asylum officers to review applicants’ statements to CBP. If the initial statements made to the CBP officer contradict the statements to the asylum officer, the asylum officer must inform the applicants and assess their credibility. Additionally, the REAL ID Act of 2005 modified asylum law provisions pertaining to credibility.<sup>65</sup> Under the REAL ID Act, the interviewing officer considers *the totality of the circumstances* when assessing the credibility of applicants.<sup>66</sup> The officer will consider the applicants’ demeanor, responsiveness to questions, and whether they are detailed in their answers to questions.<sup>67</sup> In applying the REAL ID Act, the officer no longer has to consider whether an inconsistency goes to the heart of the claim. Trivial inconsistencies or inconsequential ones for which the applicants offer plausible explanations do not support an adverse credibility finding. However, substantial inconsistencies or omissions result in negative determinations.

#### **G. AFFIRMATIVE ASYLUM AND *DE NOVO* HEARING**

When the asylum officer does not find asylum applicants eligible for asylum, and these individuals have legal status in the United States (e.g., as a visitor or student), the applicants will receive a notice of intent to deny which explains the asylum officer’s reasons for the action.<sup>68</sup> The applicants have 16 days to respond and rebut the notice of intent to deny. They must explain the reasons why they should receive asylum or submit

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<sup>64</sup> United States General Accounting Office, *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems*.

<sup>65</sup> REAL ID Act of 2005, section 101(a)(3), Div. B of Pub. L. No. 109-13, 119 Stat. 231, 303 (effective May 11, 2005) (codified at section 208(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)).

<sup>66</sup> *Ibid.*

<sup>67</sup> REAL ID Act, section 101(a)(3)(B)(iii).

<sup>68</sup> “8 C.F.R. 1003.42—Review of Credible Fear Determination.”

evidence previously unavailable.<sup>69</sup> Based on the rebuttal, the asylum office will make a final decision to approve or deny the asylum application.

However, when asylum applicants are not in valid status, for example, because the applicants' nonimmigrant status has expired, they were never in a lawful status, or otherwise lost their lawful status, and the asylum officer denied the asylum application, then the case is forwarded or referred to the immigration court that has jurisdiction to hear the case. The asylum applicants will have an opportunity to present their case anew before an immigration judge. In a *de novo* hearing, the applicants may present new evidence, bring in witnesses, and depending on the circumstances, potentially add new reasons for asylum.<sup>70</sup> A *de novo* hearing treats the case as if it had not been previously heard or adjudicated. It is essentially a second chance to get the asylum story right.

## **H. DEFENSIVE ASYLUM AND *DE NOVO* HEARING**

Immigration judges also conduct *de novo hearings* for credible fear applicants who contest negative credible fear determinations.<sup>71</sup> These credible fear *de novo hearings* are not asylum hearings. Although immigration judges make independent findings during these *de novo hearings*, the record will contain a summary of the credible fear interview conducted by the asylum officer, including any evidence or facts the officer relied upon, as well as the officer's notes and assessment.<sup>72</sup>

## **I. TERMINATION OF ASYLUM**

INA section 208(c)(2) governs the termination of asylum status under certain circumstances. A grant of asylum may be terminated upon discovery that an applicant obtained a grant of asylum through fraud.<sup>73</sup> When fraud in asylum is suspected, the

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<sup>69</sup> "8 C.F.R. 1003.42—Review of Credible Fear Determination."

<sup>70</sup> "Official Asylum in the United States," March 11, 2011, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

<sup>71</sup> 8 C.F.R. section 1003.42.

<sup>72</sup> Michael J. Creppy, *Interim Operating Policy and Procedure. Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews* (Washington, DC: U.S. Department of Justice), accessed November 8, 2014, <http://www.justice.gov/eoir/efoia/ocij/oppm97/97-3.pdf>.

<sup>73</sup> "Affirmative Asylum Procedures Manual (AAPM)," November 2013, [http://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum\\_Procedures\\_Manual\\_2013.pdf](http://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf).

asylum officer must first establish that the applicant knew that the statement or document was fraudulent.<sup>74</sup> The asylum officer may also terminate an individual's asylum status if her or she returned to the country in which persecution was experienced, or no longer has a well-founded fear of persecution and/or the country's conditions have changed.<sup>75</sup> Termination of asylum status makes individuals subject to removal proceedings.

Although the asylum officer may terminate asylum status for individuals who avail themselves of the protection of the countries of feared persecution (e.g., by returning to those countries or obtaining permanent resident status in those countries), the asylum officer has no jurisdiction to terminate asylum grants by immigration judges.<sup>76</sup>

## **J. AGENCIES INVOLVED**

Numerous agencies are involved in the credible fear and asylum process, both from DHS and DOJ. Although other agencies exist, the following is a discussion and overview of the most visible agencies and their responsibilities.

### **1. United States Customs and Border Protection**

With more than 60,000 employees, CBP is DHS's principal law enforcement arm. Its top priority is to guard the border and provide border security, which is to prevent illegal entries and foil terrorists and their weapons from entering the United States.<sup>77</sup> CBP guards 328 ports of entries and 15 pre-clearance locations, and secures over 5,000 miles of a border the United States shares with Canada and nearly 2,000 miles of land border the United States shares with Mexico. CBP also patrols approximately 95,000 miles of U.S. coastline and a network of rivers along the borders. In 2013, Congress authorized a CBP budget of \$12,953,010,000.<sup>78</sup>

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<sup>74</sup> *Ntangsi v. Gonzales*, 475 F.3d 1007 (8th Cir. 2007).

<sup>75</sup> INA Section 208(c)(2)(A)–(E); see also 8 C.F.R. section 208.24(a).

<sup>76</sup> 8 C.F.R. section 1208.24(f).

<sup>77</sup> “Official website of the Department of Homeland Security,” accessed September 11, 2014, <http://www.cbp.gov/>.

<sup>78</sup> “Fiscal Year 2013—Summary of Performance and Financial Information,” June 2014, <http://www.cbp.gov/sites/default/files/documents/FY2013%20Summary%20of%20Performance%20and%20Financial%20Information%20-%20FINAL%20%28panels%29%20%20%20.pdf>.

When CBP officers apprehend someone, they must create a record of the facts, which are documented on Forms I-867A&B, “Record of Sworn Statement in Proceedings Section 235(b)(1) of the Act.” The CBP officer will read a series of questions to the aliens and record the responses on Form I-867A&B. The aliens are required to initial each page and sign the form. At the same time, the aliens are informed of the charges and ordered removed. The removal order prohibits the aliens from reentering the United States for a period of five years. Additionally, they are not entitled to a hearing or appeal in the expedited removal process. Historically, Mexican nationals entering the United States are returned within 24 hours. Individuals from countries other than Mexico may linger in ICE detention as was discussed previously, or are released unless they fall into the civil immigration enforcement priorities categories.<sup>79</sup>

CBP also creates Form I-213, “Record of Deportable/Inadmissible Alien,” in anticipation of removing the individuals from the United States. Form I-213 records the apprehended persons’ immigration history, such as apprehensions and removals, including any criminal records.

## **2. United States Immigration and Customs Enforcement**

ICE became DHS’s chief investigative agency for the country after it merged the investigative roles of the former U.S. Customs Service, the Federal Protective Service, and the INS. ICE has powers to investigate and apprehend aliens, detain suspected illegal entrants, and audit and search businesses that employ illegal aliens. The agency accomplishes its goals through two branches, Homeland Security Investigations (HSI), ICE’s investigative arm, and Enforcement and Removal Operations (ERO), ICE’s operation that manages the country’s immigration detention system.<sup>80</sup>

ICE’s Detention Management Division reports that as of November 2011, ICE has 33,330 beds available as compared to 7,500 beds in 1995, and houses men, women,

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<sup>79</sup> Jeh C. Johnson, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” Department of Homeland Security, November 20, 2014, [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>80</sup> “Overview,” accessed September 11, 2014, <https://www.ice.gov/about/overview/>.

and families in its detention system.<sup>81</sup> On October 6, 2009, ICE released a comprehensive study of its detention system conducted by the Office of Detention Policy and Planning within ICE. The report found that during FY2008, ICE had “378,582 aliens from 221 countries in custody or supervised,” and detained 31,075 aliens spread over a network of more than 350 facilities throughout the United States, all of which was at a cost of \$31,000,000.<sup>82</sup> Detention facilities are generally operated by county authorities or private contractors and not by ICE employees, who are assigned to the various facilities. In recent months, ICE opened temporary detention facilities or converted jails to house new illegal arrivals to avoid having to release them into the United States where they may disappear into the immigrant communities.

Roughly 66 percent of detainees were subject to mandatory detention because of criminal histories and confined in correctional facilities designed for pre-trial felons. Of the 51,000 detainees released from detention into the community in 2008, 12,000 were under an order of recognizance, 29,000 bonded out, 10,000 agreed to be supervised, and 650 were paroled. ICE is responsible for ensuring that detainees are safe and secure, that the detention facilities provide sufficient physical space and are free of infectious diseases, and that if health issues arise, they are identified and handled. Detention officers (DO) meet with detainees at least once a week in person to discuss the removal process. According to the report, the average detention time is 30 days; however, most detainees are released within one day to four months. At any time, the detainees may request to be interviewed by an asylum officer.<sup>83</sup>

Pursuant to 8 C.F.R. section 236.1, individuals in detention may either themselves or through another person or company post a bond to be released. The purpose of the bond is to increase the likelihood that individuals present themselves in any future immigration proceedings. If the aliens fail to appear at a future hearing, the money is

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<sup>81</sup> “Detention Management—Fact Sheet,” November 10, 2011, <https://www.ice.gov/news/library/factsheets/detention-mgmt.htm>.

<sup>82</sup> Dora Schriro, *Immigration Detention Overview and Recommendations* (Washington, DC: Immigration and Customs Enforcement, U.S. Department of Homeland Security, 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

<sup>83</sup> *Ibid.*

forfeited.<sup>84</sup> Further, ICE may release individuals from detention under orders of supervision or monitor aliens with a GPS-enabled ankle bracelet.<sup>85</sup>

Additionally, ICE's Policy Directive (PD) provides that when arriving aliens indicate an intention to apply for asylum or a fear of persecution, an officer shall refer the aliens for an interview conducted by an asylum officer.<sup>86</sup> Aliens who have established a credible fear of persecution may be paroled on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided that the aliens are neither a security risk nor a flight risk pursuant to 8 C.F.R. sections 212.5(b); 235.3(c).<sup>87</sup>

Five categories of aliens may qualify under the case-by-case standard, provided they are not a security risk or a risk of absconding: (1) aliens who have serious medical conditions, (2) pregnant women, (3) certain juveniles, (4) aliens who are witnesses in federal judicial, administrative, or legislative proceedings, and (5) aliens' continued detention is not in the public interest.<sup>88</sup> The officers are reminded that the directive serves as a guide, as parole is inherently discretionary. ICE also determines whether the aliens pose a danger to the community or are a risk to U.S. national security. Denied parole requests are in writing and state the reason(s) for the denial. When paroles are granted, the aliens are provided with a Form I-94 annotated with "Paroled under 8 C.F.R. section 212.5(b). Employment Authorization Would Not to Be Provided on This Basis."<sup>89</sup>

Secretary Jeh Charles Johnson's November 20, 2014 policy memorandum to ICE, CBP, and USCIS provides guidance for the apprehension, detention, and removal of

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<sup>84</sup> See "8 C.F.R. 236.1—Apprehension, Custody, and Detention," accessed February 10, 2015, <http://www.law.cornell.edu/cfr/text/8/236.1>.

<sup>85</sup> Alicia A. Caldwell, "DHS Is Using GPS-Enabled Ankle Bracelets to Track Immigrant Families Crossing the Border," *The Huffington Post*, December 24, 2014, [http://www.huffingtonpost.com/2014/12/24/dhs-is-using-gps-enabled-a\\_n\\_6379132.html](http://www.huffingtonpost.com/2014/12/24/dhs-is-using-gps-enabled-a_n_6379132.html).

<sup>86</sup> "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture. Directive No. 11002.1," December 8, 2009, [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

undocumented aliens in this country.<sup>90</sup> The Secretary's memo is effective as of January 5, 2015, and gives, unless they qualify for asylum, the highest priority to aliens who should be removed who are a threat to national security, security to U.S. borders, and public safety. This category includes aggravated felons. Aliens fall in the other two enforcement priorities if they have been convicted of three or more misdemeanors other than traffic violations, or are immigration violators and should not be removed if they qualify for asylum.<sup>91</sup> In considering the mandatory detention and priority of the removal of aliens housed in detention, the ICE field office director, CBP sector chief, or CBP director of field operation, should exercise discretion on a case-by-case basis and whether the aliens are an enforcement priority.<sup>92</sup>

### **3. United States Citizenship and Immigration Services**

USCIS is DHS's agency that manages immigration benefits of foreigners coming to the United States. USCIS has 223 offices around the world and 19,000 employees. A component of USCIS, the Refugee, Asylum and International Operations (RAIO) Directorate has three divisions: the Refugee Affairs Division, the Asylum Division, and the International Operations Division. Collectively, the divisions in RAIO fulfill the U.S.' obligations under the 1967 Protocol of the United Nations by providing humanitarian services to those in need and protecting refugees and asylum applicants from serious harm.

The Asylum Division has offices in Long Island, New York, Newark, New Jersey, Arlington, Virginia, Miami, Florida, Houston, Texas, Chicago, Illinois, Los Angeles, California, and San Francisco, California. Adjudication of credible fear cases and affirmative asylum cases is within the purview of the Asylum Division. Joseph Langlois is RAIO's current associate director and was previously chief of the Asylum

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<sup>90</sup> United States General Accounting Office, *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems*.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

Division within RAIIO.<sup>93</sup> The Asylum Division is responsible for conducting individual credible fear interviews, usually in-person or over video-conferencing equipment, with detainees who expressed a fear to return to their countries. The interview will determine whether the individual applicants have a credible fear and are otherwise admissible to the United States. As previously mentioned, the credible fear interview is a screening interview and once credible fear is found, the individuals may proceed to the next step and file an application for asylum with the immigration court.

#### **4. Executive Office of Immigration Review**

EOIR is an agency under DOJ and is charged with adjudicating immigration cases. For purposes of this thesis, the terms “immigration court” and “immigration judge,” either the singular or plural form, will include the term “EOIR.” EOIR has 60 immigration courts and employs 248 immigration judges to conduct judicial hearings in matters of deportation and removal. A handful of those immigration judges reside over asylum claims that arose from favorable credible fear determination. Accordingly, approximately 408,037 cases are awaiting adjudication by the 248 immigration judges, or an average of 1,645 cases per judge.<sup>94</sup>

With a backlog of approximately 408,037 cases in the immigration courts system, a case may linger for many years before applicants will receive a final decision on their asylum claim.<sup>95</sup> From October 1, 2013 to August 1, 2014, TRAC Immigration reports that cases take an average processing time of 506 days to go through the immigration court system, which includes time for scheduling the initial hearing, to the merits hearing, all the way to the decision.<sup>96</sup> However, the average wait time for individuals to be seen

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<sup>93</sup> “Joseph E. Langlois, Associate Director, Refugee, Asylum and International Operations,” July 30, 2014, <http://www.uscis.gov/about-us/leadership/joseph-e-langlois-associate-director-refugee-asylum-and-international-operations>.

<sup>94</sup> *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994).

<sup>95</sup> “Backlog of Pending Cases in Immigration Courts as of August 2014,” accessed November 3, 2014, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php).

<sup>96</sup> “Immigration Court Processing Time by Outcome. Fiscal Year 2014, Valid through August 2014,” accessed November 3, 2014, [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php).

by an immigration judge for the first time is approximately 567 days.<sup>97</sup> In other words, more than a 1,000 days or nearly three years, have passed between the day of referral by the asylum office to the day of the decision by an immigration judge. The prolonged waiting periods may be a nuisance to some who desire finality in their lives, whereas they are a benefit to others because it allows them to rehearse their story and gather new evidence. Moreover, individuals will be permitted to remain in the United States. Understandably, the individuals will make the United States their home as others in this country, including working, living, marrying, having children, and similar, with the potential of being told at an immigration court hearing that the asylum claim is denied and the individuals are then removed.

#### **K. CREDIBLE FEAR APPLICANTS DEMOGRAPHICS**

By the third quarter in FY2014, the Asylum Division reports that it received 35,333 applications and found 73 percent of them, or 26,723, to have demonstrated credible fear. The front runners for nationalities in cases in which fear was found were El Salvador with 9,688 cases, followed by Honduras with 4,259, Guatemala with 2,991; Ecuador with 2,918, Mexico with 2,052, China with 1,172, India with 698, Nicaragua with 448, Nepal with 281, Bangladesh with 419, Peru with 292, Somalia with 238, the Dominican Republic with 234, and Albania with 232. Other nationalities were represented at times with fewer than a hundred cases, including Syria with 63 approved credible fear cases, and Iraq with 27 approved credible fear cases. Detainees who filed credible fear applications in which no basis was found were determined not eligible for credible fear referral to the immigration court or requested to return to their home countries. In addition, 1,793 cases were dissolved and 18 cases were withdrawn by applicants, which equates to less than 5 percent of the applications filed during that period of time.<sup>98</sup> Therefore, on average, applicants who request a credible fear interview

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<sup>97</sup> “Average Time Pending Cases Have Been Waiting in Immigration Courts As of August 2014,” accessed November 3, 2014, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog\\_avgdays.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php).

<sup>98</sup> “Credible Fear Nationality Report, All Cases: Summary from October 1, 2013 to June 30, 2014,” accessed March 11, 2015, <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf>.

with an asylum officer have an 80 percent chance of getting approved, such as by being referred to immigration court.

During FY2103, CBP apprehended 68,645 females and 345,752 males, or a total of 414,397 individuals at the southwest border; of those, 148,988 were nationals from countries other than Mexico.<sup>99</sup> Although these numbers appear large, the United States saw a surge in applications during FY1999. During that fiscal year, approximately 1,537,000 people were apprehended at the southwest border and 1,579,010 apprehensions occurred nationwide.<sup>100</sup> At that time, the credible fear program already existed but was largely unknown and underused by the illegal population.

Table 1, Apprehensions by CBP from FY1992 to FY2013, shows that more economic migrants were apprehended after the enactment of IIRIRA. Table 1 also shows a decline in the number of apprehensions since FY2008.

Table 1. Apprehensions by CBP from FY1992 to FY2013<sup>101</sup>

Fiscal Year	Total Illegal Alien Apprehensions		Illegal Alien Apprehensions from Mexico		Illegal Alien Apprehensions from Countries Other Than Mexico	
	Southwest Border	Rest of Nation	Southwest Border	Rest of Nation	Southwest Border	Rest of Nation
FY2013	414,397	420,789	265,409	267,734	148,988	153,055
FY2012	356,873	364,768	262,341	265,755	94,532	99,013
FY2011	327,577	340,252	280,580	280,580	46,997	54,08
FY2010	447,731	463,382	396,819	396,819	50,912	59,017
FY2009	540,865	556,041	495,582	495,582	45,283	52,655
FY2008	705,005	723,825	653,035	653,035	51,970	62,059

<sup>99</sup> “Sector Profile—Fiscal Year 2013 (Oct. 1st through Sept. 30th),” 2013, [http://www.cbp.gov/sites/default/files/documents/U.S. Border Patrol Fiscal Year 2013 Profile.pdf](http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf).

<sup>100</sup> “Total Illegal Alien Apprehensions by Month—FY1999 through FY2013,” 2013, [http://www.cbp.gov/sites/default/files/documents/BP Total Monthly Apps by Sector and Area 2C FY1999-FY2013.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%202C%20FY1999-FY2013.pdf).

<sup>101</sup> “Total Illegal Alien Apprehensions by Fiscal Year (Oct. 1st through Sept. 30th), FY2009 to FY2013,” 2014, <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Apprehension%20Statistics%20by%20sector%20and%20border%20area.pdf>.

Fiscal Year	Total Illegal Alien Apprehensions		Illegal Alien Apprehensions from Mexico		Illegal Alien Apprehensions from Countries Other Than Mexico	
	Southwest Border	Rest of Nation	Southwest Border	Rest of Nation	Southwest Border	Rest of Nation
FY2007	858,638	876,704	800,634	800,634	48,004	68,016
FY2006	1,071,972	1,089,092	973,819	973,819	98,153	108,026
FY2005	1,171,396	1,189,075	1,016,409	1,016,409	154,987	165,170
FY2004	1,139,282	1,160,395	1,073,468	1,073,468	65,814	75,389
FY2003	905,065	931,557	865,850	865,850	39,215	49,545
FY2002	929,809	955,301	901,761	901,671	28,048	37,317
FY2001	1,235,718	1,266,214	1,205,390	1,224,047	30,328	42,167
FY2000	1,643,679	1,676,438	1,615,081	1,636,883	28,598	39,555
FY1999	1,537,000	1,570,010	No data	No data	No data	No data
FY1998	1,516,680	1,555,776	No data	No data	No data	No data
FY1997	1,368,707	1,412,953	No data	No data	No data	No data
FY1996	1,507,020	1,549,876	No data	No data	No data	No data
FY1995	1,271,380	1,324,202	No data	No data	No data	No data
FY1994	979,101	1,031,668	No data	No data	No data	No data
FY1993	1,212,886	1,263,490	No data	No data	No data	No data
FY1992	1,145,574	1,199,560	No data	No data	No data	No data

## 1. Mexico

Of the 641,633 individuals attempting to enter the United States illegally during the FY2011, 76 percent were Mexican nationals.<sup>102</sup> Historically, few Mexican nationals have successfully established eligibility for asylum; however, this factoid may be changing with the recent rise of credible fear and asylum applicants from Mexico who are citing crime, and drug violence as a reason for fleeing, and with the possibility of

<sup>102</sup> John Simanski and Lesley M. Saap, *Annual Report. Immigration Enforcement Actions: 2011* (Washington, DC: Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, 2012), [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement\\_ar\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf).

expanding the membership in a particular social group to include individuals who fear harm based on crime and violence.<sup>103</sup>

Although Mexican nationals continue to make up only about 7 percent of all the credible fear cases, from FY2009 to FY2011, the number of Mexican nationals who applied under the credible fear program has increased fourfold.<sup>104</sup> Moreover, over the same period of time, applicants' chances of referral to immigration court increased from 58 percent to 85 percent.<sup>105</sup>

Therefore, the data shows that Mexican nationals are increasingly applying for credible fear and asylum in the United States. Moreover, while the United States is a destination country, most of the illegal population travels through Mexico, using smugglers and their routes. This situation was recognized by President Obama who reaffirmed his cooperation with his Mexican counterpart, President Peña Nieto, in addressing the surge of migrating Central Americans through Mexico.<sup>106</sup>

## **2. El Salvador**

El Salvador has a population of more than 6.1 million people with approximately 20 percent of its population living abroad.<sup>107</sup> According to the 2010 census, 1,648,968 Salvadorans live in the United States, with the largest communities living in California, Texas, New York, Virginia, and Maryland.<sup>108</sup> In the last decade, CBP apprehended 256,108 Salvadorans attempting to enter the United States illegally.<sup>109</sup>

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<sup>103</sup> Sandra Dibble, "Rising Numbers of Mexicans Seek Asylum," *U-T San Diego*, March 12, 2014, <http://www.utsandiego.com/news/2014/mar/12/mexican-asylum-seekers/>.

<sup>104</sup> *Asylum Abuse: Is It Overwhelming Our Borders? Hearing Before the Committee on the Judiciary House of Representatives*, 113th Cong., 1st sess., Serial No. 113-56 (2013), <https://www.hsdl.org/?view&did=748900>.

<sup>105</sup> U.S. Immigration and Customs Enforcement, *Report to Congress—Detained Asylum Seekers for FY 2009 and 2010* (Washington, DC: Department of Homeland Security, 2012), <http://www.ice.gov/doclib/foia/reports/detained-asylum-seekers2009-2010.pdf>.

<sup>106</sup> "Credible Fear Workload Summary Report—FY2009–FY2014."

<sup>107</sup> "The World Factbook: El Salvador," Central Intelligence Agency, last updated June 22, 2014, <https://www.cia.gov/library/publications/the-world-factbook/geos/es.html>.

<sup>108</sup> Sharon R. Ennis, Merarys Ríos-Vargas, and Nora G. Albert, *The Hispanic Population: 2010* (Washington, DC: U.S. Dept. of Commerce, Economics and Statistics Administration, U.S. Census Bureau, 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

<sup>109</sup> Dickson, "How the U.S. Sold Out Indian Asylum Seekers on the Border."

Estimates in 2008 set the number of Salvadorans living in the United States illegally at 570,000, which makes it the second largest unauthorized immigrant group right after the illegal population from Mexico.<sup>110</sup> In 2011, DHS revised its earlier figures and stated that the numbers of Salvadorans living illegally in the United States is approximately 660,000.<sup>111</sup> This number represents an increase of approximately 16 percent in only three years.

Along with Salvadorans trying to escape violence and poverty in El Salvador, criminal elements arrive in the United States. The gangs Mara Salvatrucha, or MS-13, and Eighteen Street (M18), originated among Salvadorans living in the Los Angeles area during the 1980s. With illegal criminal aliens being deported back to El Salvador, the gangs have spread their violence throughout Central America.<sup>112</sup> Concern exists that gang members are using the credible fear process to come to the United States.<sup>113</sup> The Department of State (hereinafter simply referred to as DOS) issues travel warnings for U.S. citizens traveling to El Salvador that state that families of gang members are being threatened, killed, or disappear.<sup>114</sup>

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<sup>110</sup> Michael Hoefler, Nancy Rytina, and Bryan Baker, "Population Estimates. Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008," Department of Homeland Security, Office of Immigration Statistics. Policy Directorate, February 2009, [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf).

<sup>111</sup> Michael Hoefler, Nancy Rytina, and Bryan Baker, "Population Estimates. Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011," Department of Homeland Security. Office of Immigration Statistics. Policy Directorate, March 2012, [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

<sup>112</sup> Adam Elkus, "Gangs, Terrorists, and Trade," *Foreign Policy in Focus*, April 12, 2007, [http://fpif.org/gangs\\_terrorists\\_and\\_trade/](http://fpif.org/gangs_terrorists_and_trade/).

<sup>113</sup> Bob Goodlatte and J. Randy Forbes, "House Committee on the Judiciary to The Honorable Eric H. Holder, Jr., Attorney General," United States House of Representatives, Judiciary Committee, February 21, 2014, [http://judiciary.house.gov/\\_cache/files/c40ba915-d436-4cef-8361-865e9a1b0a2f/attorneygeneral\\_gangletter.pdf](http://judiciary.house.gov/_cache/files/c40ba915-d436-4cef-8361-865e9a1b0a2f/attorneygeneral_gangletter.pdf).

<sup>114</sup> "El Salvador Travel Warning," January 9, 2015, <http://travel.state.gov/content/passports/english/alertswarnings/el-salvador-travel-warning.html>.

### **3. Honduras**

DHS reports that from 2002 to 2011, 296,551 nationals from Honduras were apprehended.<sup>115</sup> In 2008, approximately 300,000 Hondurans represented nearly 26 percent of the entire unauthorized immigrant population.<sup>116</sup>

DOS published travel warnings on January 9, 2015 that Honduras has had the highest murder rate in the world since 2010, that violence and crime rates have been critically high throughout the country, and that the government is unable to protect its citizens.<sup>117</sup>

In June 2014, Honduras began a three-prong campaign to stop illegal migration to the United States. The campaign delivers CBP ads in Spanish warning of the dangers of traveling through Mexico and that travelers will not be awarded with immigration benefits. Additionally, the Honduran government will repatriate Honduran nationals who were removed from the United States and apprehend those who illegally cross the border into Guatemala from Honduras.<sup>118</sup>

### **4. Guatemala**

In 2008, 430,000 Guatemalan nationals were living illegally in the United States, who account for 27 percent of the illegal population for the entire United States.<sup>119</sup> The recent surge of illegal entrants from Central American countries increased the credible fear claims. According to the 2014 Ombudsman's report to Congress, Guatemalan nationals were the third highest group to apply for credible fear during the FY2013.<sup>120</sup>

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<sup>115</sup> "Policy Papers, The Math of Immigration Detention Comments."

<sup>116</sup> "El Salvador Travel Warning."

<sup>117</sup> "Honduras Travel Warning," January 9, 2015, <http://travel.state.gov/content/passports/english/alertswarnings/honduras-travel-warning.html>.

<sup>118</sup> Dibble, "Rising Numbers of Mexicans Seek Asylum."

<sup>119</sup> Zakaria, "U.S. Agency Says Average Cost of Immigrant Detention \$119 per Day."

<sup>120</sup> Citizenship and Immigration Services, Ombudsman, *Annual Report 2014* (Washington, DC: Department of Homeland Security, 2014), <http://www.dhs.gov/sites/default/files/publications/cisomb-annual-report-2014.pdf>.

## 5. China

From 2002 to 2011, ICE found 76,975 nationals of the People's Republic of China inadmissible to the United States, with 22,446 attempting to enter the United States illegally.<sup>121</sup> Over a period of nine years, from FY2002 to FY2011, the Asylum Division approved the asylum applications of 26,261 Chinese nationals. Those individuals accounted for about 20 percent of all the approved asylum applicants in the United States, whereas an immigration judge defensively approved the asylum applications of 37,155 Chinese nationals.<sup>122</sup> These figures are in contrast with the number of asylum applications approved for Chinese nationals during the FY2013, the year China became the country with the highest number of affirmative asylum applications.<sup>123</sup> In FY2013, 4,072 Chinese nationals or 27 percent of all applicants had their asylum applications approved. Thus, with 4,532 applications or 46 percent, China was also the leading country for filing defensive asylum applications.<sup>124</sup>

## 6. India

During FY2008, approximately 160,000 Indian nationals illegally lived in the United States and made up roughly less than 10 percent of the unauthorized immigrant population in the country.<sup>125</sup> Often, economic migrants from India are paying as much as \$35,000 to be smuggled across the border into the United States, whereas some Indian nationals report smugglers demand \$50,000.<sup>126</sup>

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<sup>121</sup> "Policy Papers, The Math of Immigration Detention Comments."

<sup>122</sup> Ibid.

<sup>123</sup> Daniel C. Martin and James E. Yankay, *Refugees and Asylees: 2013* (Washington, DC: Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, 2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf).

<sup>124</sup> Ibid.

<sup>125</sup> "El Salvador Travel Warning."

<sup>126</sup> Daniel González, "Immigrants from India Surge across Arizona Border," Azcentral.com, September 8, 2013, <http://www.azcentral.com/news/politics/articles/20130907immigration-arizona-border-indian.html>; Caitlin Dickson, "How the U.S. Sold Out Indian Asylum Seekers on the Border," *The Daily Beast*, August 11, 2014, <http://www.thedailybeast.com/articles/2014/08/11/how-the-u-s-sold-out-indian-asylum-seekers-on-the-border.html>.

The United States fully complies with international treaties on issues relating to alien smuggling and trafficking, and is actively working with national and international groups to eliminate smuggling and the trafficking of humans. Still, the people, who are being smuggled to the United States, are paying anywhere from a few thousand dollars upward to \$60,000 to be smuggled into the United States.<sup>127</sup>

**L. EVIDENCE/DATA FROM USCIS’ ASYLUM DIVISION**

Over the past five years, the Asylum Division saw a dramatic shift in the number of credible fear applicants. As Figure 1 illustrates, the trend began in FY2009 with 5,522 credible fear referrals from ICE to USCIS, and has been steadily increasing to the present. The Asylum Division reports that it received no fewer than 7,848 credible fear applications during FY2010 and 33,283 credible fear applications during FY2013.<sup>128</sup>

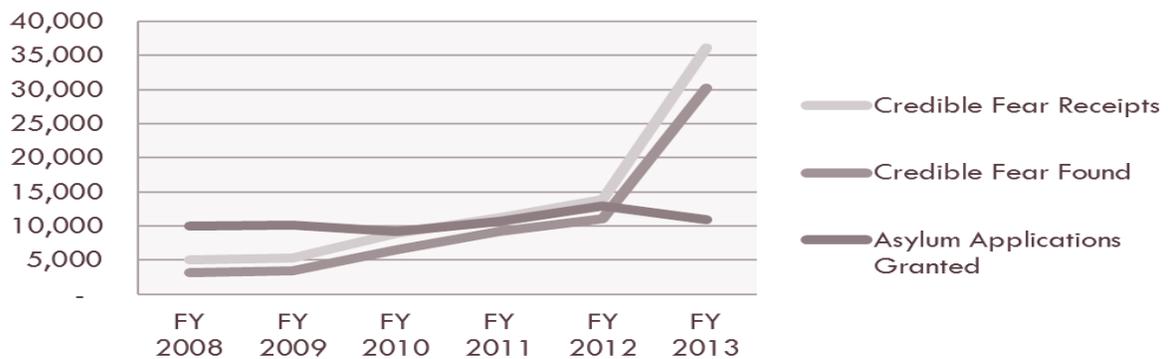


Figure 1. Credible fear and asylum FY2008–FY2013<sup>129</sup>

<sup>127</sup> “Human Trafficking Ring Dismantled,” January 27, 2015, <http://www.fbi.gov/news/stories/2015/january/human-trafficking-ring-dismantled/human-trafficking-ring-dismantled>.

<sup>128</sup> “Credible Fear Workload Summary Report—FY2009–FY2014,” January 22, 2014, [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf).

<sup>129</sup> Refugee, Asylum & International Operations Directorate, *Annual Performance Plan for Fiscal Year 2013* (Washington, DC: U.S. Citizenship and Immigration Services, 2013), 18.

Table 2 illustrates that historically only a small percentage of individuals subject to expedited removal proceedings requested credible fear interviews. However, the same table also shows that the number of individuals interviewed increased from 2006 to 2011 by more than 200 percent.

Table 2. Individuals subject to expedited removal referred for a credible fear interview, 2006–2011

<b>Year</b>	<b>Subject to Expedited Removal<sup>1</sup></b>	<b>Referred for a Credible Fear Interview<sup>2</sup></b>	<b>Percentage</b>
2006	116,001	5,338	5%
2007	111,448	5,252	5%
2008	117,711	4,995	4%
2009	111,394	5,369	5%
2010	120,075	8,959	7%
2011	Not provided	11,217	Not provided

<sup>1</sup> Numbers of individuals subject to expedited removal are calculated from the numbers of individuals removed through expedited removal and individuals referred to a credible fear interview. Note that the numbers of individuals who withdrew their applications for admission in lieu of expedited removal were unavailable for FY2006–FY2011. The total numbers of individuals subject to expedited removal are preliminary figures.

<sup>2</sup> Statistics from the Asylum Headquarters Asylum Pre-Screening System (APSS) database.

Table 2 must also be read in conjunction with Table 3 to understand that the increase in credible fear applications results in an increase in finding credible fear eligibility. Table 3 confirms the concerns of the legal community, and also shows that of the cases filed, credible fear was established on average in 82 percent of the cases.

Table 3. Credible fear claimants who meet the credible fear standard<sup>130</sup>

Credible Fear Cases	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
<b>Referrals from CBP or ICE</b>	<b>5,338</b>	<b>5,252</b>	<b>4,995</b>	<b>5,369</b>	<b>8,959</b>	<b>11,217</b>
Completed	5,241	5,286	4,828	5,222	8,777	11,529
Credible fear found	3,320	3,182	3,097	3,411	6,293	9,423
Credible fear not found	584	1,062	816	1,004	1,404	1,054
Closed	1,337	1,042	915	807	1,080	1,052
Of cases decided on the merits, % where credible fear was found	85.04%	74.98%	79.15%	77.26%	81.76%	89.94%
Of all referred cases, % where credible fear was found	63.35%	60.20%	64.15%	65.32%	71.70%	81.73%

As the chances of an approval of the credible fear application are greatly enhanced, more and more individuals in expedited removal proceedings are willing to await their credible fear interview to move on to the next step in this process. Additionally, the chances of obtaining approval for their credible fear interviews works as an incentive for individuals who have no fear of returning to their countries and file frivolous claims of fear, as applicants who have been determined to have no fear, or those who misrepresented themselves or their claim, are not penalized for having submitted a credible fear application despite statutory and regulatory provisions to the contrary. The individuals are simply returned to their countries of origin unless the individuals contest the denied credible fear application to be seen by an immigration judge on this matter. The question becomes what is the reason for the 80 percent approval rating of credible fear cases?

<sup>130</sup> "Asylum Pre-Screening System Reports," April 17, 2014, <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/AdditionalStatisticRequestedApril2014AsylumStakeholderEngagement.pdf>.

From March 2013 to June 2013, the Asylum Division accepted 15,579 new affirmative asylum applications and had 26,386 applications pending at the end of June 2013. Of the 8,878 cases adjudicated, the Asylum Division approved 4,155 applications. During the same four-month time frame, the Asylum Division revoked 12 asylum grants.<sup>131</sup> The Asylum Division did not provide reasons for the revocations or information about when the individuals were granted asylum prior to the revocation. What is clear, however, is that less than .3 percent of cases approved are ultimately revoked despite the high fraud rate.

#### **M. EVIDENCE/DATA FROM CBP AND ICE**

When CBP determines that non-citizens at the border are not clearly admissible, and unless the non-citizens have requested asylum, the officer may temporarily detain them for further inquiry, and under INA section 235(b)(1)(A), has the authority to summarily remove these individuals.<sup>132</sup> On October 1, 2014, CBP published a breakdown of its enforcement actions by state along the U.S. southwest border for FY1960 to FY2014. As noted in Table 4, apprehensions in Texas accounted for more than half of CBP's total apprehensions during FY2013 and nearly 70 percent of CBP's total apprehensions in FY2014.<sup>133</sup> Apprehensions during FY2013 at the southwest border accounted for nearly 98.5 percent of the nationwide total of 420,789 apprehensions in FY2013. In other words, only 6,392 individuals were apprehended at the northern border or coastal border sectors.<sup>134</sup> The numbers of people apprehended by CBP during FY2013 and FY2014, as shown in Table 4, demonstrates that apprehensions at the southwest border are significantly larger than throughout the rest of the nation.

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<sup>131</sup> "Asylum Office Workload March 2013," (AILA InfoNet Doc No. 13081316) August 18, 2013, [http://www.cayerdysonlaw.com/newsandlinks/images/081413 Asylum Statistics.pdf](http://www.cayerdysonlaw.com/newsandlinks/images/081413%20Asylum%20Statistics.pdf).

<sup>132</sup> "Fiscal Year 2013—Summary of Performance and Financial Information."

<sup>133</sup> "Media Releases, CBP Fiscal Year 2013 in Review," January 17, 2014, <http://www.cbp.gov/newsroom/national-media-release/2014-01-17-000000/cbp-fiscal-year-2013-review>.

<sup>134</sup> "Southwest Border Sectors, Total Illegal Alien Apprehensions by Fiscal Year (1960–2014)," October 1, 2014, [http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2014_0.pdf).

Table 4. Apprehensions by CBP by state<sup>135</sup>

<b>Apprehensions</b>	<b>Arizona</b>	<b>Texas</b>	<b>New Mexico</b>	<b>California</b>	<b>Total</b>
<b>FY2013</b>	125,942	235,567	7,983	44,905	414,397
<b>FY2014</b>	93,817	337,036	4,096	44,422	479,371

Table 5 documents the number of apprehensions by ICE, both HSI and ERO, and CBP from FY2009 to FY2013. Moreover, Table 5 shows CBP and ICE agencies apprehended 25 percent fewer illegal border crossers in FY2013 than they did in FY2009; yet, the number of individuals who took advantage of the credible fear process in detention increased sevenfold during that same period of time as previously discussed. The numbers, therefore, only support a finding that the southwest border faced a crisis not previously experienced by the nation. The data captured in Table 5 does not include FY2014 apprehension by ICE, as they have not yet been published at the time of this writing.

Table 5. Aliens apprehended by agency from FY2009 to FY2013 (includes administrative arrests)<sup>136</sup>

<b>Apprehensions</b>	<b>FY2009</b>	<b>FY2010</b>	<b>FY2011</b>	<b>FY2012</b>	<b>FY2013</b>
<b>By CBP</b>	556,032	463,382	340,252	364,788	420,789
<b>By HSI (ICE)</b>	21,251	18,290	16,261	15,937	11,996
<b>By ERO (ICE)</b>	311,920	314,915	322,093	290,602	229,698
<b>ICE Total</b>	333,171	333,205	338,354	306,539	241,694
<b>Combined Total</b>	889,203	796,587	678,606	671,327	662,483

<sup>135</sup> “Southwest Border Sectors, Total Illegal Alien Apprehensions by Fiscal Year (1960–2014).”

<sup>136</sup> “Yearbook of Immigration Statistics 2013, Enforcement Actions,” October 1, 2014, <http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions>.

The information in Table 6 captures ICE removals for FY2009 to FY2014 and includes the removals of convicted criminals and non-criminal immigration violators.<sup>137</sup>

Table 6. ICE total removals FY2009 to FY2014<sup>138</sup>

	<b>FY2009</b>	<b>FY2010</b>	<b>FY2011</b>	<b>FY2012</b>	<b>FY2013</b>	<b>FY2014</b>
<b>Convicted Criminals</b>	136,343	195,772	216,698	191,412	216,810	177,960
<b>Non-Criminal Immigration Violators</b>	253,491	197,090	180,208	174,880	151,834	137,983
<b>Total</b>	389,834	392,862	296,906	366,292	368,644	315,943

The data in Table 6, therefore, indicates that more individuals were removed during FY2014 than in FY2009. Yet, fewer non-criminals were removed than criminals. Moreover, the above data are contrasted with the data shown in Table 5. Table 5 shows that in FY2009, ICE apprehended a total of 333,171 individuals, as compared to conducting 241,694 apprehensions in FY2014, which represents a decrease in the number of individuals apprehended by ICE of nearly 28 percent. Yet, ICE only removed 389,834 immigration violators in FY2009, and removed 315,943 violators in FY2014, which indicates a decrease of approximately 20 percent in the number of individuals removed from the United States by ICE.

Table 7 describes the average length of stay in ICE detention. During FY2012, detainees were staying in detention an average of 26.5 days or nearly 10 days less, or approximately 72 percent fewer days than during FY2007, which shows foreign nationals were detained an average of 37.2 days in detention during FY2007. Detention stays for convicted criminals dropped from an average of 47.5 days in FY2007 to 32.5 days in FY2012, which indicates a 71.25 percent decrease in the number of days. Length of stays also became shorter for the non-criminal population, which dropped about 63 percent.

<sup>137</sup> “ICE Total Removals through August 25th, 2012,” accessed February 3, 2015, <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf>.

<sup>138</sup> “FY 2014 ICE Immigration Removals,” October 1, 2014, <http://www.ice.gov/removal-statistics>.

Table 7. Average length of stay in days as of August 25, 2012<sup>139</sup>

	FY2007	FY2008	FY2009	FY2010	FY2011	FY2012
<b>Convicted Criminals</b>	47.5	44.0	41.0	36.6	34.7	32.5
<b>Non-Criminal Immigration Violators</b>	32.0	24.3	25.8	25.9	22.7	20.1
<b>Total</b>	37.2	30.4	31.3	31.5	29.2	26.5

Whether the reduced length of stay in detention correlates with the decline in the number of removals of immigration violators, or the increase in asylum and credible fear cases, is not readily clear from the data. However, a September 11, 2014 article by Dara Lind on deportations questioned the reliability of the number of deportations by ICE. She referred to an AP report that the number of individuals deported by ICE between October 1, 2013 and July 28, 2014 was 258,608 or 862 per day.<sup>140</sup> Ms. Lind is disputing a September 11, 2014 report, entitled “U.S. Sharply Cutting Deportations,” by the *Associated Press* by Alicia Caldwell, who wrote that ICE deported 20 percent fewer illegals during this budget year than the previous year, when it removed 320,167 individuals.<sup>141</sup> Ms. Caldwell emphasized that ICE deported 344,624 people from October 1, 2011 to end of July 2012, whereas ICE reports, on its website that it removed 366,292 individuals during FY2012, which ended September 30, 2012. While ICE’s numbers and the ones used by Ms. Caldwell may not necessarily contradict each other, the data show that the numbers of individuals removed have decreased while the numbers of immigration violators have not waned.

Notwithstanding the high numbers of apprehension and removal, detention has a human component, as Arjun Sethi, writer for the *Christian Science Monitor*, noted on June 5, 2012 that “it’s not fair” to hold asylum seekers at the border in expedited removal proceedings indefinitely. At the time, detention cost U.S. taxpayers about \$100 per day

<sup>139</sup> “FY 2014 ICE Immigration Removals.”

<sup>140</sup> Dara Lind, “Report: Deportations Way Down during Obama’s Second Term,” *Vox*, September 11, 2014, <http://www.vox.com/2014/9/11/6136757/deportations-2014-obama-decrease-amnesty-immigrants>.

<sup>141</sup> Alicia A. Caldwell, “U.S. Sharply Cutting Deportations,” *Associated Press*, September 11, 2014, <http://bigstory.ap.org/article/apnewsbreak-us-sharply-cutting-deportations>.

per detainee.<sup>142</sup> Since 2012, the cost of housing a detainee rose to approximately \$159 per day during FY2014.<sup>143</sup> Actual expenses, however, may be much higher.

Table 8 shows the average daily detention population as of August 25, 2012 leveled at about 34,069.<sup>144</sup>

Table 8. Average daily population as of August 25, 2012<sup>145</sup>

	FY2007	FY2008	FY2009	FY2010	FY2011	FY2012
<b>Total</b>	30,295	31,771	32,098	30,885	30,330	34,069

In his report on detaining credible fear applicants, which was based on data gleaned from a 2004 Census Bureau study, Steven Camarota, the Director of the Center for Immigration Studies, remarked that the costs associated with illegal immigration run into the billions.<sup>146</sup> Camarota found that a single individual in expedited removal proceedings costs U.S. taxpayers \$100 per day per alien.<sup>147</sup> The daily costs for detaining illegal border crossers jumped to about \$163 in 2013.<sup>148</sup> Contrary to these figures, DHS estimated the average detention cost to be about \$119 per day.<sup>149</sup> Therefore, according to the data in FY2012, the United States expends anywhere between \$4 million to \$5.5 million dollars per day on detaining immigration violators.

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<sup>142</sup> Arjun Sethi, “Don’t Penalize Asylum-seekers at U.S. Ports,” *The Christian Science Monitor*, June 5, 2012, <http://www.csmonitor.com/Commentary/Opinion/2012/0605/Don-t-penalize-asylum-seekers-at-US-ports>.

<sup>143</sup> “Policy Papers, The Math of Immigration Detention Comments,” August 22, 2013, <http://immigrationforum.org/blog/themathofimmigrationdetention/>.

<sup>144</sup> “El Salvador Travel Warning.”

<sup>145</sup> *Ibid.*

<sup>146</sup> Steven A. Camarota, “The High Cost of Cheap Labor,” Center for Immigration Studies, August 2004, <http://cis.org/High-Cost-of-Cheap-Labor>.

<sup>147</sup> *Ibid.*

<sup>148</sup> Jody Brannon, “Daily Costs of Detaining Immigrants Led to Releases,” *National Journal*, March 1, 2013, <http://www.nationaljournal.com/thenextamerica/immigration/daily-costs-of-detaining-immigrants-led-to-releases-20130301>.

<sup>149</sup> Tabassum Zakaria, “U.S. Agency Says Average Cost of Immigrant Detention \$119 per Day,” *Reuters*, February 28, 2013, <http://www.reuters.com/article/2013/03/01/us-usa-fiscal-immigration-idUSBRE92001120130301>.

To alleviate the agency of costs associated with the apprehension, detention, and processing of illegal border crossers, ICE announced a new policy of automatically considering releasing individuals, who have established a credible fear, from detention pursuant to parole.<sup>150</sup> Additionally, despite having been issued notices to appear, which clearly provide the reason(s) for the hearing, and the location, dates and times of the hearing, many credible fear applicants are not reporting to their mandatory immigration court hearings. To keep track of released aliens, ICE began using ankle bracelets in December 2014 to monitor individuals it released on bond.<sup>151</sup> However, no reliable statistics of the success of this program are currently available.

## **N. EVIDENCE/DATA FROM EOIR**

The Office of Immigration Statistics within DHS reports that for FY2002 to FY2012, 143,104 individuals were granted their affirmative asylum application by the Asylum Division, whereas 117,847 individuals were granted their defensive asylum applications by the immigration courts.<sup>152</sup>

Table 9 shows all the types of cases that the immigration courts received between FY2009 and FY2013.

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<sup>150</sup> “Revised Parole Policy for Arriving Aliens with Credible Fear Claims,” December 16, 2009, <https://www.ice.gov/factsheets/credible-fear>.

<sup>151</sup> Douglas Ernst, “ICE Tracking Illegal Immigrants with GPS-enabled Ankle Bracelets,” *Washington Times*, December 24, 2014, <http://www.washingtontimes.com/news/2014/dec/24/illegal-immigrants-tracked-gps-enabled-ankle-brace/>.

<sup>152</sup> “Yearbook of Immigration Statistics: 2011,” September 2012, [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf).

Table 9. Immigration court cases received by case type<sup>153</sup>

Type of Case	FY2009	FY2010	FY2011	FY2012	FY2013
Deportation	68	77	76	5	1
Exclusion	9	13	4	1	0
Removal	254,460	246,214	237,478	211,193	187,677
Credible Fear Review	861	1,144	885	739	1,768
Reasonable Fear Review	229	387	441	815	1,162
Claimed Status	41	47	26	37	31
Asylum Only	404	383	407	355	394
Rescission	46	48	49	25	46
Continued Detention Review	1	1	5	2	0
NACARA (Nicaraguan Adjustment and Central American Relief Act)	19	4	1	0	2
Withholding Only	240	497	886	1,090	2,269
<b>Total</b>	<b>256,378</b>	<b>248,815</b>	<b>240,258</b>	<b>214,262</b>	<b>193,350</b>

The statistics in Table 9 show rescissions or terminations of defensively filed asylum cases in immigration court. Given that fraud in asylum filings constitute on average 70 percent, the number of cases terminated in immigration court is low, and on average, only 11 percent of the asylum cases received. Despite the high level of fraud, as previously indicated, the immigration courts rescind only a handful of credible fear and asylum cases, even if fraud was later discovered in the application or some other reason that made the individuals no longer eligible for asylum status. This denial results because immigration judges generally only have an opportunity to terminate individuals' asylum status when they are placed in proceedings because of having committed a crime. Once in proceedings, the applicants may still be eligible for certain other immigration benefits unless the government or ICE attorney can demonstrate that the original asylum application was frivolous not because the applicants no longer fear returning to their countries of origin.

<sup>153</sup> "FY2013 Statistics Yearbook," April 2014, <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.

## O. ADDITIONAL CONSIDERATIONS

In June 2014, President Obama requested a multi-agency response to the crises at the border.<sup>154</sup> The President directed the DHS Secretary to call upon the Federal Emergency Management Agency (FEMA), in coordination with the military, DOS, and other agencies for a unified approach to alleviate the humanitarian crises.<sup>155</sup> The Secretary designated FEMA to manage the government-wide response with 140 interagency personnel to provide relief in the form of housing, language services, food, and other basic necessities to the illegal border arrivals.<sup>156</sup>

As the Asylum Division experienced a sevenfold increase in credible fear claims, and moved staff and resources away from the asylum program, the President's plan entailed hiring additional asylum officers to conduct credible fear interviews and temporarily assign immigration judges to conduct hearings over video conferencing equipment.<sup>157</sup> Additionally, the President announced a Central American Regional Security Initiative (CARSI) at a cost of \$165.1 million dollars to stem illegal immigration from El Salvador, Honduras, and Guatemala. When Congress denied the President's request for a \$3.7 billion emergency immigration fund to handle the high number of illegal arrivals, DHS moved funds to support the agency's efforts.<sup>158</sup> On January 9, 2015,

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<sup>154</sup> "The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border," August 1, 2014, <http://www.whitehouse.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american->.

<sup>155</sup> Avaneesh Pandey, "Homeland Security Chief Backs Obama's Bid to Secure \$3.7B Emergency Immigration Fund," *International Business Times*, July 10, 2014, <http://www.ibtimes.com/homeland-security-chief-backs-obamas-bid-secure-37b-emergency-immigration-fund-1624158>.

<sup>156</sup> "Read White House Fact Sheet on Emergency Supplemental Request," July 8, 2014, <http://thehill.com/homenews/administration/211564-read-white-house-fact-sheet-on-emergency-supplemental-request>.

<sup>157</sup> Craig Fugate, R. Gil Kerlikowske, and Thomas S. Winkowski, *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions and the Southern Border before the U.S. Senate Committee on Homeland Security and Governmental Affairs*, July 9, 2014, [http://www.fema.gov/media-library-data/1408034747762-1bc7ee6115164a64e9f46f91aedca2ee/7-9-14%20Testimony%20-%20UAC%20-%20HSGAC\\_508.pdf](http://www.fema.gov/media-library-data/1408034747762-1bc7ee6115164a64e9f46f91aedca2ee/7-9-14%20Testimony%20-%20UAC%20-%20HSGAC_508.pdf).

<sup>158</sup> Pete Kasperowicz, "Congress Denies Obama's Latest Request for Border Funds, for Now," *The Blaze*, September 10, 2014, <http://www.theblaze.com/blog/2014/09/10/congress-denies-obamas-latest-request-for-border-funds-for-now/>.

the Congressional Appropriations Committee voted to increase DHS's budget by \$400 million to \$39.7 billion in discretionary funding.<sup>159</sup>

The concerns about managing the flow of undocumented arrivals are not merely limited to an increased budget. On June 11, 2014, immigrant advocacy groups filed 116 complaints against DHS, and alleged that 80 percent of the unaccompanied minors were neglected, did not receive food or water, and were being emotionally, verbally, and physically abused, including subjected to rape and beatings while in custody.<sup>160</sup> When DHS launched a federal investigation into the first batch of allegations of systemic abuse that included 57 surprise visits to 41 border patrol facilities, no misconduct was found. The Inspector General John Roth declined to prosecute due to a lack of criminal activities.<sup>161</sup>

Aside from the concern for abuse of the foreign population in detention, some advocates call for the release of individuals from detention while they are waiting for their asylum court hearing because of the high costs associated with housing these individuals. Detaining the hundreds of thousands of individuals could cost the country billions of dollars.<sup>162</sup>

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<sup>159</sup> *H. R. 240—Making Appropriations for the Department of Homeland Security for Fiscal Year Ending September 30, 2015, and for Other Purposes, in the House of Representatives, January 9, 2015*, 114th Cong., 1st sess., (2015), <https://www.congress.gov/114/bills/hr240/BILLS-114hr240ih.pdf>.

<sup>160</sup> "Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection," June 11, 2014, [http://www.immigrantjustice.org/sites/immigrantjustice.org/files/FINAL DHS Complaint re CBP Abuse of UICs 2014 06 11.pdf](http://www.immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs%202014%2006%2011.pdf).

<sup>161</sup> Alicia A. Caldwell, "U.S.: No Wrongdoing in Handling Child Immigrants," *U.S. News*, September 2, 2014, <http://www.usnews.com/news/politics/articles/2014/09/02/us-no-wrongdoing-in-handling-child-immigrants>.

<sup>162</sup> Sethi, "Don't Penalize Asylum-seekers at U.S. Ports."

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### III. GAPS IN THE CREDIBLE FEAR AND ASYLUM PROCESS

#### A. CHANGE IS NEEDED IN THE CREDIBLE FEAR AND ASYLUM PROCESS

The UNHCR reported on March 27, 2012 that the United States, with an estimated 74,000 claims, ranks as the country with the highest number of asylum applications in 2011 among the 44 countries covered by the report.<sup>163</sup> The Office of Immigration Statistics Annual Flow Report published by DHS showed that nearly half of all of the defensive asylum applicants (those that are in proceedings) are from China, Ethiopia, Eritrea, Nepal, and Egypt with the majority of applicants being younger than 24 years of age.<sup>164</sup> The Pew Hispanic Center, a project of the Pew Research Center, analyzed a Census Bureau data study from 2011, and estimated that approximately “11 million unauthorized” were in the United States.<sup>165</sup>

During the spring, and particularly during the summer of 2013, the number of people arriving at the southwestern border between the United States and Mexico who requested credible fear interviews dramatically increased, with Texas reporting nearly a quarter million apprehensions.<sup>166</sup> “Credible fear” applications at the border have increased sevenfold, from just under 5,000 to more than 36,000, driven largely by an influx of economic migrants coming from El Salvador, Honduras, and Guatemala.”<sup>167</sup> While ultimately most applicants will not be granted asylum, the credible fear process buys time as approximately 80 percent of credible fear applicants are referred to an

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<sup>163</sup> “Asylum Claims in Industrialized Countries up Sharply in 2011,” March 27, 2012, <http://www.unhcr.org/4f7063116.html>.

<sup>164</sup> Daniel C. Martin and James E. Yankay, *Refugees and Asylees: 2011* (Washington, DC: Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, 2012), <https://www.hsdl.org/?view&did=708751>.

<sup>165</sup> “A Nation of Immigrants,” January 29, 2013, <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants>.

<sup>166</sup> “Texas Draws More Illegal Immigrants, but Overall Numbers Fall,” September 30, 2013, <http://www.homelandsecuritynewswire.com/dr20130930-texas-draws-more-illegal-immigrants-but-overall-numbers-fall>.

<sup>167</sup> Cindy Chang and Kate Linthicum, “U.S. Seeing a Surge in Central American Asylum Seekers,” *Los Angeles Times*, December 15, 2013, <http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215>.

immigration judge. Since the system is backlogged, this process allows credible fear applicants to live in the United States for years before actually being seen by an immigration judge.

On May 22, 2013, the Judiciary Committee and the Committee on Oversight Government Reform held a hearing on S.744 and the Immigration Reform and Control Act of 1986, during which current and former ICE officials and private security contracting firms testified about detention facilities, fraud by applicants in the expedited removal process [credible fear process], and border security issues.<sup>168</sup> Subsequent hearings revealed that during FY2013, credible fear applications grew by 434 percent.<sup>169</sup> At the time of the hearing, approximately 28,679 credible fear applicants had appeared since the beginning of FY2013, which constitutes approximately two-thirds of all applications interviewed by asylum officers. The committee also learned that no agency is keeping track of individuals who return to their countries after they receive asylum approval on the basis that they are afraid to return these countries.<sup>170</sup>

Members of the Congressional Committee on Border Security Oversight visited the U.S.-Mexico border near Yuma and Nogales, Arizona, and the detention centers in Eloy, Arizona. Mr. Jason Chaffetz, who chaired the hearing, noted that the increase in the number of credible fear applicants is a serious flaw in the U.S. legal system, as it exposes weaknesses in this nation's immigration systems and is the newest emerging threat. He was dismayed by the situation of the immigration court in Phoenix, Arizona, staffed with only three immigration judges who had calendared a court date in 2020 for a credible fear applicant because of the overwhelming number of credible fear claims.<sup>171</sup>

On July 18, 2014, a press release from Judiciary Committee Chairman Bob Goodlatte revealed, "the vast majority of Central Americans arriving at our border come

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<sup>168</sup> "Subject: S. 744 and the Immigration Reform and Control Act of 1986: Lessons Learned or Mistakes Repeated?" May 22, 2013, <http://judiciary.house.gov/index.cfm/hearings?ID=379AC087-EB9A-1CEE-AB8F-8213C8D5EDD2>.

<sup>169</sup> "Border Security Oversight, Part II: Examining Asylum Requests," July 17, 2013, <http://oversight.house.gov/hearing/border-security-oversight-part-iii-examining-asylum-requests/>.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

to meet up with another family member who is already in the United States illegally.”<sup>172</sup> Chairman Goodlatte’s statement alludes to the primary reason for applicants leaving their countries, which may not be because they are fleeing harm but rather to be with family members living in the United States, some of whom may be undocumented aliens. In contrast, the American Immigration Council countered on September 14, 2014 that politicians are using the credible fear process for political gains, by alleging “people are abusing the system.” Attorneys Sara Campos and Joan Friedland quote RAIO Associate Director Joseph Langlois’ conclusion that two-thirds of credible fear claims were filed by individuals fleeing “increased drug trafficking, violence and overall rising crime” in El Salvador, Honduras, and Guatemala.<sup>173</sup>

However, as already previously stated, general violence and crime are not grounds for asylum, and individuals who claim fear solely on the basis of crime may be removed from the United States. To avoid deportation, many applicants who initially stated that they fled criminal gangs and violence at time of the credible fear interview change their story when they apply for asylum to meet a ground for protection (e.g., fear of persecution because of political opinion), and hope they will be assessed a favorable outcome.

Examples of news items that contribute to the public’s loss of trust in the U.S. asylum system are concerns that the immigration authorities are releasing criminal aliens or absconders from custody.<sup>174</sup> ICE is charged with detaining apprehended illegal aliens housed in facilities run by county authorities or private contractors.<sup>175</sup> However, during the spring of 2013, ICE released 2,228 illegal aliens from detention because it had no

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<sup>172</sup> “Judiciary Obtains Data Showing Majority of Central Americans’ Asylum Claims Immediately Approved,” July 18, 2014, <http://judiciary.house.gov/index.cfm/2014/7/judiciary-obtains-data-showing-majority-of-central-americans-asylum-claims-immediately-approved>.

<sup>173</sup> Sara Campos and Joan Friedland, “Mexican and Central American Asylum and Credible Fear Claims: Background and Context,” Immigration Policy Center, May 21, 2014, <http://www.immigrationpolicy.org/special-reports/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context>.

<sup>174</sup> Miriam Jordan, “U.S. Public Support for Path to Legal Status for Illegal Immigrants Slips,” *The Wall Street Journal*, July 16, 2014, <http://www.wsj.com/articles/u-s-public-support-for-path-to-legal-status-for-illegal-immigrants-slips-1405534524>.

<sup>175</sup> “Fact Sheet: 2009 Immigration Detention Reforms,” February 20, 2009, <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>.

room in its detention centers.<sup>176</sup> Additionally, in November 2013, the Judiciary Committee indicated that it obtained an internal CBP document that many people claiming a “credible fear” of persecution have a direct or indirect association with drug trafficking and other illegal activity, such as human smuggling.<sup>177</sup> Laura Wides-Munoz of the *Associated Press* reported a typical example when she wrote on August 11, 2014 that the illegal mother of a teenager in Honduras had sent money for her to be smuggled to the United States to be reunited with her.<sup>178</sup>

What is disconcerting are reports of illegal aliens who are terrorists with gang member associations in Mexico and other South and Central American countries, and who are infiltrating the Spanish-speaking Muslim communities in those countries. Reports from federal agency officials and several authors have come to the forefront and reported that “terrorist groups seek target-rich environments for financial support, safe haven, and recruitment,” and that “six million Muslims inhabit Latin American cities, which are ideal centers for recruiting and hiding terrorists.”<sup>179</sup> On July 22, 2010, the subcommittee on Border, Maritime, and Global Counterterrorism of the Committee on Homeland Security, House of Representatives, 111th Congress, found that smuggling pipelines could potentially be exploited by terrorist and other extremist organizations seeking entry into the United States.<sup>180</sup> Despite these concerns, DHS, as reported by *FOX*

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<sup>176</sup> Sarah Childress, “Why ICE Released Those 2,000 Immigrant Detainees,” *PBS, Frontline*, March 19, 2013, <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/why-ice-released-those-2000-immigrant-detainees/>.

<sup>177</sup> “House Judiciary Committee to Hold Hearing on Asylum Abuse,” November 22, 2013, <http://judiciary.house.gov/index.cfm/2013/11/house-judiciary-committee-to-hold-hearing-on-asylum-abuse>.

<sup>178</sup> Laura Wides-Munoz, “Honduran Teens, Mom Navigate Life after U.S. Reunion,” *Associated Press*, August 11, 2014, [http://hosted.ap.org/dynamic/stories/U/US\\_IMMIGRATION\\_ONE\\_FAMILY\\_S\\_REUNION?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/U/US_IMMIGRATION_ONE_FAMILY_S_REUNION?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT).

<sup>179</sup> Rex A. Hudson, *Terrorist and Organized Crime Groups in the Tri-Border Area (TBA) of South America: A Repo* (Washington, DC: Federal Research Division, Library of Congress, 2003, revised 2010), [http://www.loc.gov/r/frd/pdf-files/TerrOrgCrime\\_TBA.pdf](http://www.loc.gov/r/frd/pdf-files/TerrOrgCrime_TBA.pdf).

<sup>180</sup> *Enhancing DHS’ Efforts to Disrupt Alien Smuggling Across Our Border, Hearing before the Subcommittee on Border, Maritime and Global Terrorism of the Committee on Homeland Security, House of Representatives*, 111th Cong., 2nd sess., (2010), <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg64702/pdf/CHRG-111hrg64702.pdf>.

*News*, found no evidence that Mexican gangs were aligning themselves with terrorists to be smuggled across the southwest border.<sup>181</sup>

## **B. GAPS OF FRAUD IN THE CREDIBLE FEAR AND ASYLUM PROCESS**

A noted authority in the field of refugee and migration law, Professor James C. Hathaway defines refugees as involuntary migrants and includes, “victims of fundamental social disfranchisement” in this definition.<sup>182</sup> “Victims of fundamental social disfranchisement” are not classified as refugees under the 1967 Convention. Individuals, who fear harm or suffered harm, must connect the harm to one of the refugee definitions (race, religion, nationality, membership in a particular social group, or political opinion). Professor Hathaway criticizes the Convention definition as inadequate because it does not capture harm of individuals who suffer “fundamental social disfranchisement” because of economic discrimination or lack of access to education or health care.<sup>183</sup> To extend sanctuary to migrants who seek economic security under the Convention, however, goes beyond the definition of membership in a particular social group. Concern about financial status or lack of opportunity may create fear and anxiety in people; nonetheless, economic status is not an immutable characteristic, and in fact, is changeable. Still, it is worth repeating that the United Nation charter protects only those who suffered or fear serious human rights violations in their home countries; therefore, economic migrants are not included in the refugee category unless the economic harm, depending on the circumstances, affects the person’s livelihood.<sup>184</sup> Extending the definition of membership in a particular social group to include economic migrants or those who are victims of disfranchisement may have unintended consequences. Aside from the possibility that social disfranchisement may dilute the proof of harm applicants are required to show, it would open up additional avenues for individuals with little to no

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<sup>181</sup> “Feds Probe Al Qaeda Link to Latino Gang,” January 14, 2005, <http://www.foxnews.com/story/2005/01/14/feds-probe-al-qaeda-link-to-latino-gang/>.

<sup>182</sup> James C. Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date’?” *Journal of Refugee Studies* 20, no. 3 (2007): 349–69, doi:10.1093/jrs/fem019.

<sup>183</sup> *Ibid.*, 222, 352.

<sup>184</sup> “Handbook and Guidelines on Procedures and Criteria For Determining Refugee Status,” Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Reissued, Geneva, reissued December 2011, 16–17, 2011, <http://www.refworld.org/pdfid/4f33c8d92.pdf>.

harm to misrepresent or exaggerate their claims of harm. Therefore, the Asylum Division or the immigration courts may incur an accompanying difficulty when determining what circumstances reach the level of economic harm that would require protection.

Moreover, Professor Hathaway recognizes that “refugees are entitled to protection against *refoulement*,” which precludes signatories to the United Nation charter from removing refugees to the countries of fear. However, he also proposes to withdraw refugee status when the risk of harm ends.<sup>185</sup> The prohibition against *refoulement*, such as to not return individuals to countries in which their life or freedom would be threatened on account of one of the five protected grounds, is an important consideration under the 1967 Protocol.<sup>186</sup> Approved asylum status, however, should be terminated when the individuals present a danger to the security of the country, or return to the countries of claimed fear or again avail themselves of the protection of the home countries. Re-availment includes, depending under the circumstances, voluntarily applying for or obtaining a national passport.<sup>187</sup> Such action would, under Professor Hathaway’s definition, arguably show that the risk of harm the individuals feared ended. Accordingly, the UNHCR suggests that contracting countries should reinvestigate the claim for asylum, and ask the people to explain, “that there has been no basic change in the conditions that originally” made them seek protection.<sup>188</sup>

As already described under the Credibility discussion in Chapter II.F., applicants only need to meet a 10 percent threshold to establish that they have a well-founded fear, which will require an asylum officer to find the applicants established credible fear, if in expedited removal proceedings, or an asylum application was approved during the affirmative process. Due to the low threshold level of proof required, fraud is rampant in the credible fear process.

The congressional committee on Border Security Oversight held several hearings during late 2013, and January and February 2014, and recently announced that more than

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<sup>185</sup> Jordan, “U.S. Public Support for Path to Legal Status for Illegal Immigrants Slips.”

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

70 percent of the credible fear applications are fraudulent.<sup>189</sup> During the February 11, 2014 hearing on asylum fraud, Professor Jan C. Ting emphasized, “illegal immigrants ... have a strong incentive to lie in making an asylum claim in order to obtain permanent legal status to work legally and qualify for becoming a U.S. citizen.”<sup>190</sup> During the hearing, Professor Ting provided several examples of individuals who obtained their asylum status in the United States by telling fraudulent stories. He also cited a *New Yorker* article from August 1, 2011 called “The Asylum Seeker,” which describes “how illegal immigrants educate themselves on how to construct stories that make them sound like victims of persecution” when, in fact, they had never been harmed or embellish their fear.<sup>191</sup> At 70 percent, the success rate of a false claim being approved is better than winning the lottery, and as Professor Ting pointed out, it is difficult to expose fraudulent claims and secure convictions. Illegal immigrants have found the credible fear route attractive and the number of credible fear applications has “increased sevenfold from less than 5,000 [in 2008] to more than 36,000 in FY2013.”<sup>192</sup>

Similar to the examples given by Professor Ting, earlier in 2014, illegal immigrants were found with a “cheat sheet” in the Spanish language near the Mexican border close to McAllen, Texas.<sup>193</sup> The cheat sheet lists routine questions asked by immigration officials of illegal aliens and typical answers to these questions. In the asylum context, as previously explained, similar narratives are not necessarily indicative of fraudulent claims. Moreover, some scholars may interpret the cheat sheet as an item of evidence that the individuals were informed of their rights and the type of questions they may be asked by an asylum officer. Further, as already stated earlier, USCIS maintains a

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<sup>189</sup> “United States Border Patrol, Sector Profile—Fiscal Year 2014 (Oct. 1st through Sept. 30th).”

<sup>190</sup> *Testimony of Jan C. Ting, To the Subcommittee on Immigration and Border Security, Committee on the Judiciary, United States House of Representatives Hearing on “Asylum Fraud: Abusing America’s Compassion?”* February 11, 2014, [http://judiciary.house.gov/\\_cache/files/ce51425e-3e89-4007-a98d-7153ac6f2b4c/jan-c-ting-asylum-fraud-testimony-final.pdf](http://judiciary.house.gov/_cache/files/ce51425e-3e89-4007-a98d-7153ac6f2b4c/jan-c-ting-asylum-fraud-testimony-final.pdf).

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> Michael Zennie, “The ‘Cheat Sheet’ Found Near Mexico Border Shows That Shows Illegal Immigrants How to Stay in the United States if Detained by Authorities,” *Mail Online*, June 27, 2014, <http://www.dailymail.co.uk/news/article-2671292/The-cheat-sheet-near-Mexico-border-shows-illegal-immigrants-guarantee-asylum-hearing-usually-release-detained-U-S-authorities.html>.

website that explains the credible fear screening process and how individuals may qualify for protection under this program. Still, it is believed that the cheat sheet was used to coach illegals to fabricate claims that they fled violence and feared returning to their home countries.<sup>194</sup> As is explained more fully in subsequent sections, irrespective of the divergent views on the cheat sheet, such evidence supports a need for a change in the credible fear and asylum process, including additional reviews even after an approval of asylum status.

Mr. Sekutu Mehta, the author of “The Asylum Seeker,” which appeared in the August 1, 2011, issue of the *New Yorker*, and who was quoted by Professor Ting during the February 11, 2014 hearing on Asylum Fraud, was immediately criticized for his article. Although fraud is found in 70 percent of credible fear claims, Anna Theofilopoulou’s decries Metha in her article, “Most Asylum Seekers Are Not Cheaters.”<sup>195</sup> Similar outcries perpetuate that fraud is a myth in the asylum process.

A September 26, 2014, article, entitled “U.S.: Most New Immigrant Families Fail to Report,” by Alicia A. Caldwell with the *Associated Press* details that “70 percent of immigrant families... did not follow the government’s instruction to meet with federal immigration agents within 15 days. Instead, they have vanished into the interior of the U.S.”<sup>196</sup> Ms. Caldwell writes that the “70 percent figure suggests that roughly 41,000 [individuals] failed to appear at federal immigration offices,” and that only 14 of the 860 people ordered removed were actually deported.<sup>197</sup> While House Judiciary Committee Bob Goodlatte criticized the Administration for the 70 percent no-show rate by illegals, no recommendation of how to mitigate these failures-to-report was forthcoming from lawmakers.

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<sup>194</sup> Zennie, “The ‘Cheat Sheet’ Found Near Mexico Border Shows That Shows Illegal Immigrants How to Stay in the United States if Detained by Authorities.”

<sup>195</sup> Anna Theofilopoulou, “Most Asylum Seekers Are Not Cheaters,” *Foreign Policy in Focus*, August 15, 2011, [http://fpif.org/most\\_asylum\\_seekers\\_are\\_not\\_cheaters/](http://fpif.org/most_asylum_seekers_are_not_cheaters/).

<sup>196</sup> Alicia A. Caldwell, “U.S.: Most New Immigrant Families Fail to Report,” *Washington Times*, September 26, 2014, <http://www.washingtontimes.com/news/2014/sep/26/us-most-new-immigrant-families-fail-to-report/?page=all>.

<sup>197</sup> *Ibid.*

### **C. TERRORISTS ABUSE GAPS IN THE CREDIBLE FEAR AND ASYLUM PROCESS**

Although reports contest that terrorists would abuse the credible fear process, terrorists and individuals with ties to terrorism have used the credible fear process and the asylum process to enter the United States with the goal to do harm. Therefore, a sense of irony emerges that those individuals would abuse this humanitarian immigration benefit by alleging that they were the ones harmed.

On the other hand, some scholars argue that terrorists forgo crossing the southwestern border, which they perceive as too risky, and instead, recruit from sympathizers within the United States to avoid detection.<sup>198</sup> Although homegrown terrorist recruitment occurs, the evidence points also to foreign-born terrorists using the U.S. asylum system to enter the United States.

#### **1. Lack of Available Research**

Kathleen Smarick and Gary D. LaFree of the National Consortium for the Study of Terrorism and Responses to Terrorism at the University of Maryland conducted research on individuals in the United States who have been identified, indicted, charged, or prosecuted with federal terrorism-related activities. The research covered the period from 1980 to 2004, and showed involvement by those individuals in groups, such as the Abu Nidal Organization, Al-Qaida, Hamas, Hezbollah, and other groups listed on the U.S. DOS' designated foreign terrorist organizations list.<sup>199</sup> As the Smarick-LaFree research focused on the years from 1980 to 2004, information has been sorely lacking on this topic since then. No similar studies have been performed that would cover the past decade.

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<sup>198</sup> Frank S. Perri, Terrance G. Lichtenwald, and Paula M. MacKenzie, "Evil Twins: The Crime-Terror Nexus," *The Forensic Examiner*, 16–29, Winter 2009, <http://www.all-about-psychology.com/support-files/crime-terror-nexus.pdf>.

<sup>199</sup> Kathleen Smarick and Gary D. LaFree, *Border Crossings and Terrorist Attacks in the United States: Lessons for Protecting against Dangerous Entrants, Final Report to the Office of University Programs* (College Park MD: National Consortium for the Study of Terrorism and Responses to Terrorism, 2012), [http://www.start.umd.edu/sites/default/files/files/publications/START\\_BorderCrossingsTerroristAttacks.pdf](http://www.start.umd.edu/sites/default/files/files/publications/START_BorderCrossingsTerroristAttacks.pdf).

In their Final Report to the Office of University Programs, Science and Technology Directorate, U.S. Department of Homeland Security, the authors identified 264 individuals charged with terrorism from 1980 to 2004 who entered the United States 221 times. The report highlighted that these individuals relied on the political asylum mechanism to enter and remain in the United States, who used “fake or fraudulently obtained documents to enter the country.”<sup>200</sup>

## 2. Yousef, Sheikh, Abdel-Rahmen, Tizegha, Siraj, and Abdi Cases

Despite the lack of a more recent study on this topic, some cases are noteworthy. Ramzi Yousef’s case, for instance, claimed fear when he arrived in New York, which led him to be released from detention to commit the first World Trade Center bombing. Yousef was given two life sentences for the 1993 World Trade Center bombing, a plot to assassinate Pope John Paul II, and plans to bomb Philippine passenger airlines and crash one of the aircrafts into CIA headquarters.<sup>201</sup> Yousef, a Kuwaiti citizen born to Pakistani-Palestinian parents, entered the United States on September 1, 1991, with an Iraqi passport and a false name. He was held for 72 hours during which time he requested political asylum, stating that he would be killed if he returned to Iraq.<sup>202</sup> Due to a lack of bed space in the detention center, Yousef was released and referred to a November 9, 1992 immigration court hearing.<sup>203</sup> Once released, Yousef went on to mastermind the 1993 World Trade Center attack.<sup>204</sup> Equally worrisome is the September 3, 2014, capture of four terrorists from Turkey, who were smuggled across the border into Texas after

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<sup>200</sup> Smarick and LaFree, *Border Crossings and Terrorist Attacks in the United States: Lessons for Protecting against Dangerous Entrants, Final Report to the Office of University Programs*, 23.

<sup>201</sup> John J. Lumpkin, “Project Bojinka,” GlobalSecurity.org, accessed October 22, 2014, [http://www.globalsecurity.org/security/profiles/project\\_bojinka.htm](http://www.globalsecurity.org/security/profiles/project_bojinka.htm).

<sup>202</sup> Samuel M. Katz, *Relentless Pursuit. The DDS and the Manhunt for the Al-Qaeda Terrorists* (New York: Foge Book, 2002), 65–66.

<sup>203</sup> Ibid.

<sup>204</sup> *Review of Department of Justice Immigration Detention Policies, Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives*, 107th Cong., 1st sess., (2001), 12–22, [http://commdocs.house.gov/committees/judiciary/hju76810.000/hju76810\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju76810.000/hju76810_of.htm).

each paid \$8,000 to an unknown smuggler.<sup>205</sup> The men stated they wanted to apply for asylum. Although these men were linked to a terrorist group that took responsibility for a suicide bomb attack on the U.S. Embassy in Ankara, Turkey, a judge ordered two of the men released.<sup>206</sup>

Other cases demonstrate the link between the credible fear process, asylum, and terrorists abusing the asylum process. For instance, Sheikh Abdel-Rahman, better known as the “blind Sheikh,” initially entered the United States on a tourist visa and lied to obtain permanent residency privileges. Then, after his green card was revoked, he requested political asylum.<sup>207</sup> The Sheikh was given a life sentence for his involvement in the World Trade Center 1993 bombings.<sup>208</sup>

Abdel Hakim Tizegha, another Al-Qaeda conspirator, also filed a claim for political asylum after he slipped across the Quebec-Vermont border in 1997.<sup>209</sup> Ahmed Ressay, the Al-Qaeda-trained Millennium bomber, used a fraudulent passport and hid his true identity from customs officials.<sup>210</sup> Although he was arrested, he was released after stating he was seeking political asylum. Ressay was later again arrested for skipping his immigration court hearing.<sup>211</sup> Shahawar Matin Siraj applied for asylum after his arrest in connection with plans to bomb a New York subway station.<sup>212</sup> Likewise, Nuradin M. Abdi illegally entered the United States and filed a frivolous asylum application to remain in the United States. Abdi was sentenced in 2007 to 10 years in prison for

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<sup>205</sup> Stephen Dinan, “4 Turkish Terrorists Caught in Texas after Being Smuggled across Border,” *Washington Times*, November 12, 2014, <http://www.washingtontimes.com/news/2014/nov/12/terrorists-smuggled-across-us-southern-border-befo/>.

<sup>206</sup> Joel Himelfarb, “Jeh Johnson: Judge Made Us Release Turkish Terror Suspects,” *Newsmax*, December 2, 2014, <http://www.newsmax.com/Newsfront/Jeh-Johnson-Marxist-terror-judge/2014/12/02/id/610626/>.

<sup>207</sup> Douglas Jehl, “The Twin Towers: Rahman Errors Admitted,” *The New York Times*, March 7, 1993, <http://www.nytimes.com/1993/03/07/nyregion/the-twin-towers-rahman-errors-admitted.html>.

<sup>208</sup> Kean and Hamilton, *The 9/11 Commission Report*, 256.

<sup>209</sup> *Ibid.*, 178.

<sup>210</sup> *Ibid.*, 177.

<sup>211</sup> *Ibid.*, 178.

<sup>212</sup> *House Report 108-724—9/11 Recommendations Implementation Act (Parts 1–6)*, 108th Cong., 2nd sess., (2003–2004), <https://www.congress.gov/congressional-report/108th-congress/house-report/724/3>.

conspiracy to provide material support to Al-Qaeda for plans to bomb a shopping mall in Ohio.<sup>213</sup>

Other than the Siraj and Abdi cases, all these individuals share in common that they were known to the 9/11 Commission and abused the asylum process.<sup>214</sup> Additionally, Janice L. Kephart, Former Staff Counsel for the 9/11 Commission, stated in a joint commission hearing on March 14, 2005 before the Subcommittee on Immigration, Border Security and Citizenship, and the Subcommittee on Terrorism, Technology and Homeland Security, that asylum is “most rampantly abused by terrorists” and that “members of... terror groups have all used claims of political asylum to stay longer in the United States.”<sup>215</sup> Although these cases and experts’ statements about the asylum-terrorist connection pre-date the 9/11 events, asylum fraud by terrorists continues to this date as the following case discussions show.

### **3. The Fahti’s Case**

The Fahti case demonstrates the ease of creating an asylum story and weaving it with facts gleaned from human rights reports, published by DOS. El Mehdi Semlali Fahti, a Moroccan man, entered the United States with a student visa on January 8, 2008. Although his student status terminated on February 20, 2009, he did not leave the United States.<sup>216</sup> On December 19, 2010, he was arrested in Fairfax, Virginia for trespassing, and because he was no longer in valid student status, was referred to ICE’s ERO, which determined his removability and placed him in immigration custody.<sup>217</sup>

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<sup>213</sup> “Ohio Man Sentenced to Ten Years Imprisonment for Conspiracy to Provide Material Support to Terrorists,” November 27, 2007, [http://www.justice.gov/archive/opa/pr/2007/November/07\\_nsd\\_944.html](http://www.justice.gov/archive/opa/pr/2007/November/07_nsd_944.html).

<sup>214</sup> Thomas R. Eldridge et al., “9/11 and Terrorist Travel,” 98–99, August 21, 2004, [http://permanent.access.gpo.gov/lps53197/911\\_TerrTrav\\_Monograph.pdf](http://permanent.access.gpo.gov/lps53197/911_TerrTrav_Monograph.pdf).

<sup>215</sup> *Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on Terrorist Travel, Joint Hearing before the Subcommittee on Immigration, Border Security and Citizenship and the Subcommittee on Terrorism, Technology and Homeland Security of the Committee on the Judiciary*, 109th Cong., 1st sess., (2005), 25–26, <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg22470/pdf/CHRG-109shrg22470.pdf>.

<sup>216</sup> “United States of America v. El Mehdi Semlali Fahti, Case No. 3:14-CR-00163-JCH, Filed on July 24, 2014,” accessed November 3, 2014, [http://www.investigativeproject.org/documents/case\\_docs/2524.pdf](http://www.investigativeproject.org/documents/case_docs/2524.pdf).

<sup>217</sup> “United States District Court, District of Connecticut, Special Agent Anabela Sharp, Affidavit,” April 4, 2014, [http://www.investigativeproject.org/documents/case\\_docs/2336.pdf](http://www.investigativeproject.org/documents/case_docs/2336.pdf).

During his stay in detention, Fahti learned from another detainee how to apply for asylum. Fahti later admitted that, while he was in detention, he read country condition reports on human rights for Morocco published by DOS and used certain facts in those reports to create his case around those issues. He fabricated a story that the Moroccan government persecuted him because of his political opinion and would continue to do so if he were to be returned to Morocco. He claimed to have been a member of an anti-government student union and that the Moroccan government suspected him of seeking to overthrow the monarchy. Later, he added fraudulent statements that he had been arrested and beaten by the Moroccan authorities.<sup>218</sup> After filing an application for asylum with the immigration court and scheduling his next hearing, on June 27, 2011, Fahti was released from custody. While he was waiting to be scheduled for a merits hearing, he traveled to California and was arrested for theft on December 6, 2012.<sup>219</sup> Fahti's merits hearing was held on August 16, 2013, three years after he was found to have credible fear and was released from ICE detention. During his hearing, he provided detailed statements about his asylum claim, which at times, contradicted his written statements and the statements made in the asylum application. Nonetheless, he was granted withholding of removal, and subsequently, released from custody.<sup>220</sup> After his release, a federal criminal investigation discovered that Fahti planned to bomb a federal building and an institution in Connecticut. Pursuant to a plea agreement, Fahti plead guilty to having abused the asylum process and was sentenced to two years in prison.<sup>221</sup>

Lessons learned from the Fahti case are as follows.

- Fathi learned about the asylum process from other detainees while he was in immigration custody.
- Fathi researched human rights and country condition reports to fabricate his narrative and prepare his asylum application.
- Fahti's frivolous asylum application was only discovered after an investigation by federal law enforcement.

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<sup>218</sup> "United States District Court, District of Connecticut, Special Agent Anabela Sharp, Affidavit."

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

- Fathi was released from ICE detention because he had established he had a credible fear of return to Morocco.
- Fathi was not removed from the United States despite his arrests and was granted withholding of removal; a right that allows him to remain in the United States.
- Fathi was released from ICE detention and had three years to prepare for his asylum hearing.
- Fathi plotted terrorist activities during the three years he was not in detention.

It is presumed that Fathi underwent a thorough background search, which includes biographic and biometric searches, at the time he applied for his student visa, at the time he was arrested after his student status terminated, at the time he applied for his credible fear interview, at the time he was re-arrested for trespassing, and at the time he applied for his asylum application. The Fathi case demonstrates the ease with which individuals may apply for asylum even though the claims of fear are fabricated. Moreover, it demonstrates that despite criminal records, the asylum applicants may be permitted to remain in the United States and not be removed. More importantly, the case shows that the meritless claim of fear was only discovered through Fathi's own testimony. The inconsistencies in his initial application became apparent during the merits hearing. Therefore, the Fathi case validates the recommendation to uncover fraud through several interviews and not to rely merely on the credible fear and asylum interviews.

#### **4. The Dhakane Case**

The Dhakane case shows that terrorists are learning about smuggling opportunities into the United States across the southwest border and to file frivolous credible fear and asylum applications. Ahmed Muhammed Dhakane, a Somali national, presented himself on March 28, 2008 to U.S. Border Patrol at the Brownsville POE in the southern district of Texas. Dhakane stated that he feared persecution in Somalia.<sup>222</sup> After a brief stay in the Pearsall detention facility, on October 28, 2008, he applied for asylum that was initiated through the credible fear process. After his asylum application was

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<sup>222</sup> "United States of America, Plaintiff, v. Ahmed Muhammed Dhakane, Defendant. U.S. District Court, Western District of Texas. Criminal No. 10-CR-194 (XR), Attorney's Brief," April 21, 2011, [http://www2.mysanantonio.com/PDFs/20110422defense\\_memorandum.pdf](http://www2.mysanantonio.com/PDFs/20110422defense_memorandum.pdf).

approved, he admitted to material falsehoods in his asylum application. He told federal agents about his association with a U.S.-designated terrorist organization and that he had illegally smuggled Somali nationals with terrorist ties into the United States.<sup>223</sup> Dhakane was sentenced to 10 years imprisonment on April 28, 2011 because he had given false information on his asylum application, and he had run “a large-scale smuggling enterprise” in Brazil prior to his entry to the United States, which included instructions to several violent Jihadists from Somalia of how to make false asylum claims.<sup>224</sup>

The Dhakane case is important for several reasons. It demonstrates that Dhakane was in detention for 6 months, and during that time, subjected to thorough background investigations. Despite these background searches that aim to discover any reason that Dhakane should be barred, and include checks on criminal history or involvement with terrorists, he was approved in his credible fear interview and his asylum application was also approved. Only after his asylum application was approved, did Dhakane admit to his involvement with terrorism. Similarly to the Fathi case, the lesson learned from the Dhakane case is that background searches insufficiently protect the public and the United States from potential terrorists.

The Fathi and Dhakane cases also illustrate that terrorism charges in credible fear and asylum cases may either not be filed, dropped, or plead down because they are difficult to sustain. The reason is not quite clear, and this author suspects that procedural and substantive reasons inherent in the legal process in combination with policy considerations are, at least, partially contributing to not pursuing terrorism charges. Another important point to draw from the Dhakane case is that it is not an isolated case. The lesson learned from these cases is that the abuse of the credible fear process by terrorists is not merely an idea. It is plausible with real implications.

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<sup>223</sup> “United States of America, Plaintiff, v. Ahmed Muhammed Dhakane, Defendant. U.S. District Court, Western District of Texas. Government’s Sentencing Memorandum. Criminal No. 10-CR-194 (XR),” December 1, 2010, [http://www.investigativeproject.org/documents/case\\_docs/1505.pdf](http://www.investigativeproject.org/documents/case_docs/1505.pdf).

<sup>224</sup> *Ibid.*

## 5. The Boston Marathon Bombers

Another unfortunate terror plot that shook the United States occurred on April 15, 2013 when Tamerlan Tsarnaev, and his young brother, Dzhokhar Tsarnaev, killed three and injured 264 people during the Boston Marathon.<sup>225</sup> The Boston case illustrates that individuals who have approved asylum status return to their countries of fear yet federal officials rarely terminate or rescind approved asylum status on this basis. The *Boston Globe* reports that “1,582 asylum grants [or] less than 1 percent of roughly 300,000” asylum approvals during 1994 were revoked.<sup>226</sup> Although the statistics quoted by *The Boston Globe* was compiled from data collected during the pre-9/11 era, the federal government, as previously discussed, continues to revoke few approved asylum applications even when the applicants return to the countries of fear.

In the Boston Marathon bombing case, the two brothers received their asylum status in 2003, after the creation of DHS, through their father, Anzor Tsarnaev, when they were still minors.<sup>227</sup> Due to confidentiality and practical reasons, children and spouses of asylum applicants are not screened on claims of persecution made by the primary applicant.<sup>228</sup> According to the INA, within one year of arrival, the Tsarnaevs were permitted to apply for lawful permanent resident status.<sup>229</sup> At that stage, the Tsarnaev brothers most certainly were too young to undergo biometric and background checks; however, they were screened on later occasions when they applied for other immigration benefits, including their naturalization application.<sup>230</sup>

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<sup>225</sup> Deborah Kotz, “Number Injured in Marathon Bombing Revised Downward to 264,” *The Boston Globe*, April 24, 2013, <http://www.bostonglobe.com/lifestyle/health-wellness/2013/04/23/number-injured-marathon-bombing-revised-downward/NRpaz5mmvGquP7KMA6XsIK/story.html>.

<sup>226</sup> Maria Scacetti, “In Wake of Marathon Attack, Questions about Safe Harbor for Ibragim Todashev,” *The Boston Globe*, July 5, 2013, <http://www.bostonglobe.com/metro/2013/07/04/wake-marathon-attack-questions-about-safe-harbor-for-ibragim-todashev/iTe3zMwBZxh46u915N2SWL/story.html>.

<sup>227</sup> “Unclassified Summary of Information Handling and Sharing Prior to April 15, 2013, Boston Marathon Bombings,” April 10, 2014, <http://cdn1.bostonmagazine.com/wp-content/uploads/2014/04/s1404.pdf>.

<sup>228</sup> “8 C.F.R. 1003.42—Review of Credible Fear Determination.”

<sup>229</sup> *Ibid.*

<sup>230</sup> Philip Bump, “How the Boston Bombing Suspect Became a U.S. Citizen,” *The Wire*, April 19, 2013, <http://www.thewire.com/national/2013/04/how-boston-bombing-suspects-became-us-citizens/64397/>.

The Tsarnaev are ethnical Chechens who lived in Dagestan, a Russian province near Chechnya, and although Anzor Tsarnaev claimed persecution in Chechnya, the evidence is murky if they have actually ever lived in Chechnya and rather shows that he and his family had lived in Kazakhstan before moving to Dagestan.<sup>231</sup> Further, Anzor Tsarnaev returned to live in Dagestan, which certainly negates his fear of returning to live in that country, and his sons traveled to Russia, Dagestan, and Chechnya to join jihadist groups.<sup>232</sup> Ironically, Dzhokhar Tsarnaev became a naturalized citizen on September 11, 2013, the 12th anniversary of 9/11.<sup>233</sup>

One year after receiving asylum approval, the Tsarnaevs applied for permanent resident status and later for naturalization to become U.S. citizens.<sup>234</sup> Although the Tsarnaevs' background checks revealed "no derogatory information," and that processes were followed and benefits were granted, "in accordance with the ... INA and agency and policy procedures," the evidence points to the fact that Anzor should not have had his asylum, and subsequent immigration benefit applications, approved because of suspect travel to the country of fear.<sup>235</sup> Aside from the problematic travel pattern, this case also raises the questions of why asylum status is so quickly approved for individuals on whom scant information is available, and why those approved asylum applicants should be eligible to apply for lawful permanent resident status after only one year.

## **6. Terrorists Planning to Enter the United States?**

In February 2014, Miriam Jordan with the *Wall Street Journal* noted that Syrians, unable to secure a U.S. tourist visa, are traveling to Mexico to forego traditional channels

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<sup>231</sup> Eric Schmitt, Michael S. Schmidt, and Ellen Barry, "Bombing Inquiry Turns to Motive and Russian Trip," *The New York Times*, April 20, 2013, [http://www.nytimes.com/2013/04/21/us/boston-marathon-bombings.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/04/21/us/boston-marathon-bombings.html?pagewanted=all&_r=1&).

<sup>232</sup> *Ibid.*

<sup>233</sup> Christina Ng, "Boston Bomb Suspect Became a U.S. Citizen on 9/11 Last Year," *ABC News*, April 13, 2013, <http://abcnews.go.com/US/boston-marathon-bombing-suspected-tsarnaev-brothers/story?id=19000426>.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

and enter the United States to apply for asylum.<sup>236</sup> The obvious reason for this phenomenon, as the article pointed out, is that asylum is a fast track to obtaining LPR status.<sup>237</sup> Figure 2 shows the number of Syrians and Iraqis who claimed credible fear to qualify for asylum in the United States during FY2010. The *Wall Street Journal* used figures obtained from DHS, and although Figure 2 shows 94 percent of Syrians were approved, USCIS also published its own figures and declares that only 78 percent of the Syrian applicants had their credible fear applications approved.<sup>238</sup> The variance in the percentage and numbers of applicants should be contributed to the fact that the *Wall Street Journal* article appeared a few months after USCIS published its numbers, which may have increased by the time of the *Wall Street Journal* publication.

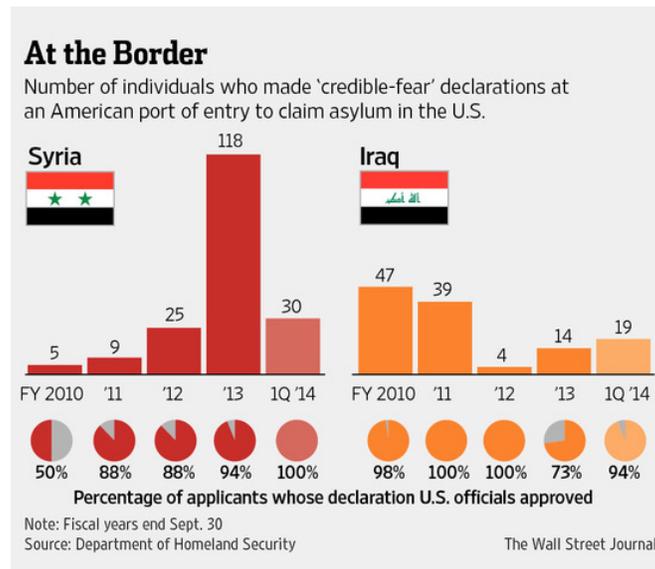


Figure 2. Credible fear applications from Syria and Iraq<sup>239</sup>

<sup>236</sup> Miriam Jordan, "Syrians Seek U.S. Asylum via Mexico," *Wall Street Journal*, February 20, 2014, <http://online.wsj.com/news/articles/SB10001424052702304703804579381240476852108>.

<sup>237</sup> Ibid.

<sup>238</sup> "Asylum Applications Filed By Nationals of Syria. Fiscal Year 1993 to Fiscal Year 2014 (covering October 1, 2013 to March 31, 2014)," accessed February 13, 2015, [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/AdditionalStatisticRequestedApril2014AsylumStakeholderEngagement.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/AdditionalStatisticRequestedApril2014AsylumStakeholderEngagement.pdf).

<sup>239</sup> "Asylum Applications Filed By Nationals of Syria. Fiscal Year 1993 to Fiscal Year 2014 (covering October 1, 2013 to March 31, 2014)."

*The Economist* reported on June 14, 2014 that the Islamic State of Iraq and Greater Syria (ISIS or ISIL) has an estimated 11,000 Jihadist fighters in Syria and Iraq, and that after ISIS took over Mosul, Iraq, half a million people fled the area.<sup>240</sup> As of August 2014, the civil war contributed to more than three million Syrian displaced people.<sup>241</sup> On November 25, 2014, just before Thanksgiving, the United Nations revised this number and announced that 12.2 million Syrians are in need of humanitarian aid.<sup>242</sup> As Jihadists in terror groups, such as Al Qaeda, Al-Nusra Front, and ISIS, have made Syria their home, the likelihood of terrorists trying to use the credible fear route through Mexico into the United States becomes more likely. Adding to the discourse, Texas Governor Rick Perry suggested during an interview that terror groups, such as ISIS, may already be in the United States.<sup>243</sup>

On August 29, 2014, Andrew C. McCarthy from *National Review Online* writes that federal law enforcement is on alert because social media chatter indicates that ISIS is at the Mexican border planning an attack on U.S. soil.<sup>244</sup> On the same day, a Texas law enforcement bulletin stated that ISIS is “expressing an increased interest in the notion that they could clandestinely infiltrate the southwest border of [the] U.S., for terror attacks.”<sup>245</sup>

During a September 10, 2014 hearing on cyber security and terrorism, Under Secretary for Intelligence and Analysis, Francis X. Taylor confirmed to the U.S. Senate

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<sup>240</sup> “The Islamic State of Iraq and Greater Syria: Two Arab Countries Fall Apart,” June 14, 2014, <http://www.economist.com/news/middle-east-and-africa/21604230-extreme-islamist-group-seeks-create-caliphate-and-spread-jihad-across>.

<sup>241</sup> “UN Says Syria Refugees Pass Three Million,” August 14, 2014, <http://www.aljazeera.com/news/middleeast/2014/08/un-says-syria-refugees-top-three-million-mark-201482952430880804.html>.

<sup>242</sup> “Syria: Humanitarian Efforts Falling Short, UN Relief Chief Warns, Calling for End to Violence,” November 25, 2014, <http://www.un.org/apps/news/story.asp?NewsID=49448#.VH49UkiiwZw>.

<sup>243</sup> Joel Gehrke, “Rick Perry Warns ISIS May Already Be in the United States,” *National Review Online*, August 21, 2014, <http://m.nationalreview.com/corner/385975/rick-perry-warns-isis-may-already-be-united-states-joel-gehrke>.

<sup>244</sup> Andrew C. McCarthy, “Judicial Watch: Feds’ Bulletin Describes Threat of Imminent Terrorist Attack on Southern Border,” *National Review Online*, August 29, 2014, <http://www.nationalreview.com/corner/386694/judicial-watch-feds-bulletin-describes-threat-imminent-terrorist-attack-southern>.

<sup>245</sup> Jana Winter, “Online Posts Show ISIS Eyeing Mexican Border, Says Law Enforcement Bulletin,” *Fox News*, August 29, 2014, <http://www.foxnews.com/us/2014/08/29/online-posts-show-isis-eyeing-mexican-border-says-law-enforcement-bulletin/>.

Committee on Homeland Security and Governmental Affairs that ISIS has been encouraging followers through Twitter and other social media messages to infiltrate into the United States through the southwest border.<sup>246</sup> DHS Secretary Jeh C. Johnson testified on September 17, 2014 at a hearing before the House Committee on Homeland Security that no evidence exists of ISIL attempting to infiltrate the United States through the southwest border and dismissed these announcements.<sup>247</sup>

It is worth repeating that not every person who enters the United States illegally is seeking to harm the United States. Nonetheless, it is equally true that every individual who illegally crosses into the United States and asks for protection disrupts the integrity of the credible fear and asylum process. Therefore, the federal government should have additional safeguards in place when individuals are applying for protection from persecution.

#### **D. CRIMINALS ABUSE GAPS IN THE CREDIBLE FEAR AND ASYLUM PROCESS**

The discourse of abuse of the credible fear process by criminals also stirs up discussions. In particular, public outcry and concern has occurred over the number of criminal aliens released from detention prior to obtaining an asylum hearing. Although INA section 235(b)(1)(A) provides that credible fear applicants “shall be detained for further consideration of the application for asylum” after an asylum officer determined that aliens have a credible fear of persecution, *CNN* reported on February 28, 2013 that ICE released several hundred illegal immigrants from detention due to budget cuts

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<sup>246</sup> *Hearing on Cybersecurity, Terrorism, and Beyond: Addressing Evolving Threats to the Homeland U.S. Senate Committee on Homeland Security and Homeland Affairs*, September 10, 2014, <http://www.hsgac.senate.gov/hearings/cybersecurity-terrorism-and-beyond-addressing-evolving-threats-to-the-homeland>.

<sup>247</sup> *Testimony of The Honorable Jeh Johnson, Department of Homeland Security, Secretary of State,* “*Hearing: Worldwide Threats to the Homeland*,” September 17, 2014, <http://homeland.house.gov/hearing/hearing-worldwide-threats-homeland>.

restraints.<sup>248</sup> The released detainees were described as “non-criminals” or “low-risk offenders,” who would be required to wear ankle bracelets and be monitored.<sup>249</sup>

Despite congressional intent to detain credible fear applicants until adjudication of the asylum application, 8 C.F.R. section 208.30(f) authorizes the consideration of parole after a positive credible fear finding (e.g., release from detention), for these applicants.<sup>250</sup> Then, in February 2013, former ICE Director John Morton took the interpretation of who should be released from detention a step further when he stated, “not all immigrants, even if they have committed crimes, are subject to mandatory detention... [and that] it’s not so different from how individuals are charged with crimes can be released on bail.”<sup>251</sup> During a House Judiciary Committee hearing on March 19, 2014, Rep. Bob Goodlatte (R-Va.) suggested for the former ICE director to request additional appropriations to avoid having to release illegal detainees. The ICE director, however, countered that he was “trying to live within the appropriations that Congress gives us.”<sup>252</sup> The director’s explanation, however, seems circular. The director would not have to release detainees if the appropriations that Congress already gave to ICE were sufficiently high.

Rightly so, the public is cognizant that more credible fear applicants are released from ICE detention than are detained. The use of administrative detention as a deterrence for individuals to discourage them from illegally entering the United States is not effective because detainees are asking to be released and are routinely released from detention. The following table, reproduced as Figure 3 illustrates ICE’s report to Congress on the number of asylum applicants in detention as compared to the number of detainees released from detention for the years 2006 to 2012. Year 2011, however, was

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<sup>248</sup> Mariano Castillo and Nick Valencia, “Immigration Detainee Release under Fire,” *CNN*, February 28, 2013, <http://www.cnn.com/2013/02/27/politics/immigration-detainees/index.html>.

<sup>249</sup> Greg Slabodkin, “Budget Cuts from Impending Sequestration Tied to ICE Detainee Release,” *FierceHomelandSecurity*, February 28, 2013, <http://www.fiercephomelandsecurity.com/story/budget-cuts-impending-sequestration-tied-ice-detainee-release/2013-02-28>.

<sup>250</sup> 8 C.F.R. section 208.30(f). See also section 212.5, and section 212(d)(5) of the INA for parole of aliens.

<sup>251</sup> Zach Rausnitz, “Immigrant Detention Issues Remain Contentious as Reform Proposal Nears,” *FierceHomelandSecurity*, March 25, 2013, <http://www.fiercephomelandsecurity.com/story/immigrant-detention-issues-remain-contentious-reform-proposal-nears/2013-03-25>.

<sup>252</sup> Rausnitz, “Immigrant Detention Issues Remain Contentious as Reform Proposal Nears.”

not reported. According to the table, 85 percent of asylum applicants were released from detention in 2006 as compared to 15 percent detained during that same year. In contrast stand the 2012 numbers, which show that only 64.4 percent of asylum applicants were released as compared to 35.6 percent, who remained detained. For the period from 2006 to 2012, the non-detained population grew by nearly 28 percent, whereas the detained population grew by more than 76 percent.

Year	Total Asylum Seekers	Number Detained	Percent of Total	Number Not Detained	Percent of Total
2006	37,677	5,761	15.0%	31,916	85.0%
2007	36,926	9,971	27.0%	26,955	73.0%
2008	43,511	8,480	19.5%	35,031	80.5%
2009	47,307	10,742	22.7%	36,565	77.3%
2010	61,858	15,769	25.5%	46,089	75.0%
2012	68,795	24,505	35.6%	44,290	64.4%

**Source:** All data were derived from ICE HRIFA reports to Congress. Detained, vs. non-detained asylum applicant data for the years 2006 through 2008 had to be aggregated to arrive at the totals shown in the table. That was not necessary for the years 2009, 2010, or 2012 because of a change in ICE's reporting format.

Figure 3. ICE HRIFA report to Congress<sup>253</sup>

To address concerns of the public, one of the objectives announced by ICE in its Strategic Plan FY2010–2014 was to phase out the “catch and release” policy and under the “secure communities” program to remove aliens who pose “a risk to national security or public safety, including terrorists, gang members and convicted criminals.”<sup>254</sup> Since November 20, 2014, DHS discontinued the secure communities program.<sup>255</sup> On the same day, Secretary Jeh C. Johnson issued a memo entitled “Policies for the Apprehension,

<sup>253</sup> Dan Cadman, “Asylum in the United States How a Finely Tuned System of Checks and Balances Has Been Effectively Dismantled,” Center for Immigration Studies, March 2014, <http://cis.org/sites/cis.org/files/cadman-asylum.pdf>.

<sup>254</sup> “ICE Strategic Plan FY2010–2014,” June 2010, <https://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf>; see also “Secure Communities,” accessed January 17, 2015, <http://www.ice.gov/secure-communities>.

<sup>255</sup> Jeh C. Johnson, “Secure Communities,” November 20, 2014, [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

Detention and Removal of Undocumented Immigrants,” which outlines DHS’ enforcement priorities.<sup>256</sup> ICE continues the authority to detain, and according to interpretation by ICE, has the discretion to release individuals for whom detention is not mandatory. Mandatory detention is reserved for suspected terrorists, violent criminals, or individuals removable on certain other criminal grounds. Even when individuals are not subject to mandatory detention, ICE has prosecutorial discretion to continue to detain individuals perceived as risk of flight. In its discretion, ICE may release a detainee upon payment of a bond of no less than \$1,500, or release the individuals on conditional parole, when the inadmissible alien is found to have a credible fear of persecution or torture, or for urgent humanitarian reasons, or where detention of the aliens is not in the public interest.<sup>257</sup> The Secretary of Homeland Security, however, must approve all such releases. In August 2014, however, it was confirmed that the ICE director, in fact, had released illegal immigrants with known criminal records.<sup>258</sup>

On August 12, 2014, the Inspector General (IG) issued a report on the release of immigrant detainees by ICE and found fault with ICE’s inadequate planning of its needs and lack of communication with homeland security leadership. However, the IG also found that budgetary restrictions were partially to blame and recognized that an increase in apprehensions of illegals contributed to the release of more than 2,000 detainees, some of whom were individuals with known criminal records.<sup>259</sup>

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<sup>256</sup> United States General Accounting Office, *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems*.

<sup>257</sup> INA sections 212(d)(5)(A) and 101(a)(13)(B). *See also*, 8 C.F.R. section 212.5(b).

<sup>258</sup> Ramsey Cox, “Coburn: Obama Is Releasing Illegal Immigrants with Criminal Histories,” The Hill, August 12, 2014, <http://thehill.com/blogs/floor-action/senate/214967-coburn-obama-is-releasing-undocumented-criminals>.

<sup>259</sup> Office of Inspector General. *OIG-11-116 ICE’s Release of Immigration Detainees (Revised)* (Washington, DC: U.S. Department of Homeland Security, 2014), 8–11, [http://www.oig.dhs.gov/assets/Mgmt/2014/OIG\\_14-116\\_Aug14.pdf](http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf).

## E. CONCLUSION

As delineated in the previous discussion, the asylum and credible fear program is subject to abuse by individuals who illegally enter the United States to improve their socio-economic status or to meet family members already in the United States. The program is also easily exploitable by criminals and terrorists. The various agencies are attempting to handle the large number of illegal entrants coming to the United States, by either working with the particular countries of origin to return them or channeling them through the credible fear, and ultimately, the asylum process once the individual expressed fear of return. The data also shows that fraudulently filed applications continue to be filed in large numbers and approved by both the Asylum Division and the immigration courts. Moreover, the program remains susceptible to criminals and terrorists benefiting from shortcomings in the program despite background checks and biometric screenings, which are completed before interviews and the issuance of the asylum benefit. An ISIS recruiter, for example, wrote an on-line article over the 2015 Valentine's Day weekend, that Italy's checkpoints, "even [if] partially exploited and developed strategically, pandemonium could be wrought in the southern European states."<sup>260</sup> ISIS, thus, recognizes that Europe's immigration policies could be exploited. Moreover, the UNHCR noted that during 2014, Italy experienced a 64 percent spike in illegal immigration from Libya and Turkey, and that 70,000 more people illegally crossed the Mediterranean into southern Europe since 2011.<sup>261</sup> On February 15, 2015, Italy's Defense Minister Roberta Pinotti raised similar concerns that "the risk is imminent" because ISIS fighters are planning to enter Europe illegally from Libya into Italy

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<sup>260</sup> Ruth Sherlock and Colin Freeman, "ISIS Planning to Use Libya As 'Gateway' to Wage War across Europe: Militant's Document," *The National Post*, February 17, 2015, <http://www.nationalpost.com/m/wp/blog.html?b=news.nationalpost.com%2F2015%2F02%2F17%2Fisis-planning-to-use-libya-as-gateway-to-wage-war-across-europe-document>.

<sup>261</sup> "ISIS Plans to Invade Europe through Libya—Report," February 18, 2015, <http://rt.com/news/233335-isis-islamic-libya-europe/>.

disguised as Syrian refugees.<sup>262</sup> Therefore, the idea that terrorists could slip through the southwestern border unnoticed, and if apprehended, apply under the credible fear process for asylum status, is no longer far-fetched. At least one U.S. intelligence source commented that jihadists could hide amongst groups of Syrian refugees as “a means of bypassing tighter restriction that control traveling by aircraft.”<sup>263</sup> Accordingly, some areas should be addressed, which would enhance the integrity of the credible fear and asylum process and restore public confidence in the program.

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<sup>262</sup> Philip Ross, “ISIS Threat to Italy: Islamic State in Libya Sparks Fears in Europe, But Experts Caution Restraint,” *International Business Times*, February 18, 2015, <http://www.ibtimes.com/isis-threat-italy-islamic-state-libya-sparks-fears-europe-experts-caution-restraint-1820736>.

<sup>263</sup> Tom Porter, “Isis Militants Travel to Europe Disguised as Syrian Refugees,” *International Business Times RSS*, January 30, 2015, <http://www.ibtimes.co.uk/isis-militants-travel-europe-disguised-syrian-refugees-1485874>.

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## IV. FINDING A SOLUTION THROUGH POLICY CHANGES

The author's research reveals that the current literature does not address all the issues of a successful credible fear and asylum program. The recommendations made by the federal government and others are helpful; however, they do not address all the weaknesses in securing the program, despite technological advancements in conducting front-end background checks, from infiltration by terrorists, or criminals, or in subsiding frivolously filed applications. Therefore, a change is needed in the current system that would address the high level of fraud within the credible fear and asylum processes. The system should have the capabilities of not merely detecting fraud before and during the asylum interview, but also after the approval of a request for protection.

Recommendations for policy reform include the following.

(1) The creation of an Asylum Review Board (ARB)

- Create an ARB that would track foreign travel of approved asylees. The ARB would also periodically review the approved asylum status to ensure the individuals continue to meet the refugee definition and have the authority to terminate approved asylum claims regardless of jurisdiction, e.g., cases approved at either the Asylum Division or the EOIR.

(2) A change in the credible fear process referral procedure

- The Asylum Division should retain jurisdiction over asylum claims by credible fear applicants rather than referring these cases to immigration court. Moreover, referrals of denied affirmative asylum applicants to immigration court should no longer be entitled to *de novo* hearings to free up the immigration courts and reduce the EOIR backlog.

(3) The provision for conditional asylum grants

- Eliminate the one-year period that would permit approved asylees to apply for permanent resident status (the "green card") and create additional layers of security. Instead, a two-year conditional asylum approval period should be established.

The following discussion provides a brief overview and examination into the strengths, potential challenges, and limits of each recommendation.

## **A. CREATION OF AN INDEPENDENT ASYLUM REVIEW BOARD**

The first recommendation for reform to the credible fear and asylum process is the formation of an independent ARB. The ARB should be a separate entity independent of the Asylum Division because one of its purposes is to manage approved asylum grants as compared to adjudicating applications filed by asylum seekers, which is within the purview of the Asylum Division. The ARB should be staffed with immigration services officers who are specifically trained in immigration and nationality law and also receive training in asylum and refugee law alongside asylum and refugee officers. This training would ensure ARB officers have a complete understanding of the intricacies of asylum and refugee law and individuals' claim of fear of persecution. Additionally, ARB officers should work closely with the Fraud Detection and National Security (FDNS) directorate in eradicating immigration fraud and other threats committed by individuals with approved asylum status.

At this time, the Asylum Division conducts security and systems checks at the front-end of the credible fear and asylum application process. The Asylum Division screens for national security risks, egregious public safety concerns, fraud, or criminal history upon receipt of an application. Once adjudicated, an asylum claim is rarely revisited and the individuals can move onto the next stage in their immigration process.

As previously mentioned, the 1967 Protocol permits countries to inquire into individuals' behaviors after being granted asylum. Nonetheless, at this time, no process is in place for USCIS to conduct such inquiries until the filing of another application, such as the filing of an adjustment of status application for lawful permanent residency by the approved asylum applicant. Additionally, as was pointed out by congressional members and the Asylum Division, travel to return to the countries of fear is not tracked by any agency. Yet, it is a common occurrence after asylum status approval. Additional time is needed to review applicants' travel pattern after an asylum grant. Reviews of travel patterns detect fraudulent applicants and would aid in uncovering criminal and terrorist schemes. The ARB would be the entity with the authorization to track and review travel patterns of individuals with approved asylum status.

As part of its authority, the ARB will ensure that applicants with asylum status, who return to their countries of fear, be it for vacation, family visits, or for other innocuous reason, have their asylum applications re-evaluated and, if warranted, have their asylum privileges terminated. Further, the ARB will periodically review cases of individuals granted asylum to determine if the applicants continue to meet eligibility criteria as permitted under the 1967 Protocol.

Currently, the Asylum Division and the EOIR each have the authority to terminate asylum status granted under a host of circumstances delineated under INA section 208(c)(2).<sup>264</sup> Although each has the authority to terminate an approved asylum grant, few cases are acted upon. Additionally, only the EOIR has the authority to terminate approved asylum cases that originated in immigration court.<sup>265</sup> Recently, the BIA stated that the EOIR has no jurisdiction to review terminations by the Asylum Division.<sup>266</sup> Consensus appears to be growing, however, that a termination of asylum privilege is appropriate when asylees are returning to the countries of origin unless the return is for a good cause.<sup>267</sup>

The ARB should have the authority to terminate asylum status regardless of where the case originated. It should have the authority to issue NTAs, which initiate removal proceedings against the individuals whose asylum were terminated.

A shift of having the ARB be responsible for terminating asylum cases that should not have been approved restores integrity to the asylum process. Moreover, it deters individuals from filing frivolous asylum applications. Costs may be associated with the training and salaries of ARB officers, etc.; however, the benefit of having such a review board in place would enhance the credible fear process and the asylum program. Additionally, the ARB's authority would address the concern of the Border Security Oversight Committee that an agency (e.g., USCIS through the ARB), is keeping track of

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<sup>264</sup> INA section 208(c)(2). *See also* 8 C.F.R. section 1208.24(f).

<sup>265</sup> *Nijjar v. Holder*, No. 07-74054 (9th circuit August 1, 2012).

<sup>266</sup> 25 I&N Dec. 893 (BIA 2012), and Interim Decision #3765. *Matter of A-S-J-, Respondent*.

<sup>267</sup> Andorra Bruno et al., *Immigration Legislation and Issues for the 113th Congress* (CRS Report No. R43320) (Washington, DC: Congressional Research Service, 2013), <https://www.hsdl.org/?view&did=747382>.

approved asylum applicants who return to their countries after they claimed fear of returning.

The Asylum Division is not self-funded. It relies on other USCIS divisions for its budget, whereas, other divisions are self-reliant and are receiving monies by charging fees for applications. Similarly, the ARB could have a self-sustaining budget and charge fees.

Resistance to establishing an ARB is likely from nongovernmental organizations with a stake in immigration matters, immigration lawyers associations, charitable organizations, and other public and private immigration organizations. Applicants, they might argue, have rights attached to termination proceedings in court and they would be disadvantaged in an ARB hearing. However, in this proposal, ARB officers would receive training in asylum and humanitarian laws and procedures, and individuals may be represented during any ARB interview or proceedings, just as they would be in proceedings for other immigration benefits.

**B. ELIMINATION OF REFERRALS OF SUCCESSFUL CREDIBLE FEAR APPLICANTS TO EOIR AND ELIMINATION OF *DE NOVO* HEARINGS FOR UNSUCCESSFUL AFFIRMATIVE ASYLUM APPLICANTS**

The second recommendation in support of reforming the credible fear process is the elimination of referrals of successful fear applicants by the Asylum Division to the EOIR. Under current procedures, once credible fear applicants establish a significant possibility that they would succeed with an asylum claim, they are referred to immigration court to apply for asylum. Successfully referred applicants have the opportunity to prepare for a full asylum hearing, which includes time to find legal representation, bring witnesses, and submit additional evidence in support of their asylum application. However, there should be no referrals to immigration court. Rather than referring cases to the EOIR, the Asylum Division should retain jurisdiction over applicants' cases and adjudicate asylum applications filed by individuals who successfully established a credible fear.

This process already partially exists. Unlike asylum applications filed by adult applicants, the Asylum Division has jurisdiction over claims filed by unaccompanied minors who illegally entered the United States. When minors are in removal proceedings and raise a claim of fear, immigration judges administratively close the removal proceedings and refer those cases back to the Asylum Division for adjudication. It is, therefore, plausible for the Asylum Division to similarly absorb the adjudication of asylum applications filed by adults after a positive credible fear determination. Moreover, shifting the burden of adjudicating asylum claims from the immigration courts to the Asylum Division would reduce the immigration court backlog by thousands of cases. The Asylum Division is presently prioritizing asylum interviews and is unable to provide exact hearing dates.<sup>268</sup> However, waiting periods between the credible fear referral and the asylum interview would be considerably shorter than at the EOIR level.<sup>269</sup> In January 2015, TRAC Immigration reports the average wait period from referral to asylum hearing in immigration court is 594 days; whereas, average processing time (e.g., from filing the asylum application until the merits hearing), is 473 days.<sup>270</sup> A change in the referral process would reduce the backlog at the EOIR.

Moreover, as successful credible fear applicants are being released from detention, there are individuals who fail to appear for their asylum hearing in immigration court. Under the proposed procedure, applicants who fail to appear for their asylum interview with the Asylum Division should be referred to immigration court without an opportunity to apply for asylum at the court level unless rescheduling at the Asylum Division is warranted under the circumstances.

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<sup>268</sup> “How Long Does the Process Take?” February 4, 2015, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/faq/how-long-does-process-take>.

<sup>269</sup> “Asylum Office Workload (October, November, December 2014),” January 1, 2015, <http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf>.

<sup>270</sup> “Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts,” January 2014, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/); “Immigration Court Processing Time by Outcome,” January 2015, [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php).

A second component of the suggested changes to the referral process is the elimination of *de novo* hearings for affirmative asylum applicants who were found ineligible for a grant of asylum.

As described previously, when applicants for affirmative asylum are unsuccessful, they are referred to immigration court. At that time, the immigration court has jurisdiction over the aliens' asylum application and reviews the application as if an asylum interview with the Asylum Division had not taken place. Referrals should not provide the alien with "a second bite at the apple." The purpose of a *de novo* hearing is for the immigration court to hear facts and evidence independent of the Asylum Division. However, as these hearings are scheduled years after the referral, they essentially permit the unsuccessful asylum applicants to correct their story. At this point, no other immigration application or petition would permit aliens to have a second chance, and the asylum applications should not be an exception. Unsuccessful asylum applicants should not have a second chance to rehearse their story to get it right. Rather, the immigration court should only review the Asylum Division's decision to determine if gross errors occurred, such as in fact or in law, as is the case with other appealed applications and petitions. If the immigration court finds gross error, the case should be returned to the Asylum Division, as is the case with other applications and petitions remanded by the appeals offices.

### **3. Provide for Conditional Asylum Status**

The third recommendation is to provide approved applicants with conditional rather than permanent asylum status. At present, once asylum is granted, applicants may reside in the United States permanently even after the conditions in their countries of origin that were the grounds for asylum have changed. As previously stated, once individuals' asylum applications are approved, they may petition to bring their families, (e.g., spouse and minor children), to the United States as derivative asylees. Furthermore, after one year beyond the asylum approval, applicants and their family members may apply for lawful permanent resident status (i.e., the "green card"). This one-year period is an arbitrary period of time that should be lengthened to allow USCIS, through the ARB, to conduct further background checks.

The United States should consider a conditional asylum program that would allow persecuted individuals to feel safe in the United States and provide for their return once the threat is no longer viable. The concept of conditional status is not new. Prior to the enactment of the Real ID Act, section 101(g)(2), applicants from China who claimed persecution under China's coerced population control policy were granted conditional asylum under a cap of a 1,000-person limit for this category.<sup>271</sup> The concept of a conditional grant for certain asylum applicants was eliminated because it was dependent on the issuance of visas based on numerical limits. Other examples of conditional grants are available. For instance, USCIS grants conditional lawful permanent resident status (the "green card") to aliens who marry United States citizens to ensure that the marriage is not based on fraud. Another example is conditional residency given to investors to ensure their investment complies with statutory and regulatory requirements, including the success of the enterprise venture and demonstration that the investor hires a certain number of U.S. workers. Conditional residencies for marriage-based and investor applicants run for two years. Prior to the expiration of the two years, the alien must present evidence that the marriage or the business continues to be viable.

Similarly, the grant of asylum should be conditional. No numerical limits should be placed under the conditional asylum scheme (e.g., eligible applicants should be granted asylum once the condition is removed). However, the period before approved asylum applicants become eligible to file applications for lawful permanent residency should be extended to a minimum of two years to allow additional background checks of the applicants and their family members. Removal of the conditionality for approved asylees should also depend on a number of factors, including fraud and travel patterns, such as returning to the countries of fear during the period of the conditional asylum approval, criminal conduct, or other undesirable behavior.

Extending the conditional time period creates several safeguards and restores integrity to the asylum system. The applicants, once asylum is conditionally granted,

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<sup>271</sup> Ruth Ellen Wasem, *U.S. Immigration Policy on Asylum Seekers* (CSR Order Code RL32621) (Washington, DC: Congressional Research Service, 2005), 21, <http://www.fas.org/sgp/crs/misc/RL32621.pdf>; "Text of the REAL ID Act of 2005," accessed February 16, 2015, <https://www.govtrack.us/congress/bills/109/hr418/text>.

must demonstrate that the condition should be removed by showing that the threat of harm that the individuals fear continues. Additionally, the time period would provide the ARB with an opportunity to vet the applicants and any family members appropriately, by reviewing backgrounds for unsavory acts, including crimes or involvement in national security matters, and inviting the applicants for brief, routine interviews to ensure that they continue to meet the definition of a refugee.

During the period of conditional approval, individuals may apply for employment authorization and travel authorization to travel overseas. If evidence is available that the individuals or family members returned to the countries of fear, the ARB will be able to question the asylees on the reasons of returning to their countries, and as appropriate, initiate termination of asylum status procedure. Once the condition is removed, the applicants receive a final asylum approval and should be eligible to apply for lawful permanent residence within the prescribed period of one year.

Conditional approval of asylum in the United States would also discourage approved asylees from returning to their countries of fear where they claimed to have faced fear of persecution, or to avail themselves of the benefits of their countries (including applying for a passport) while they also held a grant of asylum in the United States. These and other conditional requirements would substantially reduce the incentives to risk making a fraudulent claim to asylum.

## V. CONCLUSIONS

At the outset of this thesis, the plight of hundreds of thousands of displaced economic migrants and its implications for a dramatic increase in the number of credible fear filings and asylum applications was highlighted as a critical policy challenge for U.S. security. While some individuals have a genuine well-founded fear that meets the refugee definition under the 1967 Protocol, others also face valid fears that do not match the identified criteria. Additionally, some applicants are neither genuine asylum seekers nor fearful of returning to their home countries. Most of these individuals are merely seeking to make the United States their home, join family members who are already in the United States, or make a better life for themselves. By applying fraudulently, however, these individuals chip away at the integrity of the credible fear and the asylum program for those in need of protection. A broken application process also creates opportunities for criminals and terrorists to escape detection and apprehension.

Due to the high level of fraud and abuse in the credible fear and asylum program, the thesis sought to answer the following critical questions: What weaknesses should be addressed to mitigate fraud and abuse in the system, and what solutions and recommendations should be formulated to minimize these gaps?

Evidence was presented to demonstrate that the large number of credible fear and asylum applications has overwhelmed the system both at the Asylum Division and the EOIR. For several years before the influx of credible fear and asylum applicants began in mid-2012, the EOIR already experienced severe backlogs. Yet, the Asylum Division was unscathed for many years prior to the recent increase in applications. To reduce the increased workload, the Asylum Division hired additional staff to adjudicate cases. However, hiring additional staff has not fully addressed the symptoms.

The primary reason to create an ARB is to provide a solution to correct deficiencies in the asylum and credible fear process. By serving as a mechanism to monitor approved asylum applicants, the ARB would help protect the United States from terrorism plots and attacks, deter fraudulent applications, and improve public safety, and

thereby, restore integrity to the system. The proposed Asylum Review Board would have the authority to address a range of vulnerabilities by managing approved asylum claims, terminating approved asylum claims if necessary, and in accordance with statutory and regulatory laws initiate removal proceedings.

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