

July 8, 2009

The Honorable Eric H. Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: Protecting the Persecuted: Closing the Gaps in the U.S. Asylum System

Dear Attorney General Holder:

The undersigned organizations include key national non-governmental organizations and the Office of the United Nations High Commissioner for Refugees (UNHCR). Together, as experts on the U.S. asylum system, we are working to advance laws and policies that protect refugees seeking asylum protection in the United States. Our expertise is derived from providing legal representation to asylum-seekers, conducting extensive research into elements of the U.S. asylum system, engaging in policy development at the national and international levels on issues related to refugee protection, and, in the case of UNHCR, conducting refugee status determinations and working with nations around the world to develop effective asylum systems.

Collectively we believe that it would benefit refugees, asylum-seekers and your Department to engage in a comprehensive review of the U.S. asylum system with a view toward evaluating what is working well and where there may be gaps. We invite your Department to join us, as well as other relevant experts such as within academia, the private bar and think tanks, in such a review. Based on our initial examination of the asylum system, we recommend a number of measures which we believe will better ensure that asylum-seekers are afforded meaningful access to a fair and efficient asylum adjudication process.

Accordingly, the following nine recommendations detail immediate steps that DOJ can take to address some of the most pressing problems facing asylum-seekers in the United States:

1. Provide the Executive Office for Immigration Review (EOIR) with appropriate staffing and resources;
2. Support the Department of Homeland Security (DHS) in preventing the unnecessary detention of asylum seekers by issuing joint regulations that allow an Immigration Judge to conduct custody determination hearings for arriving asylum seekers and take steps toward expanding the Legal Orientation Program (LOP) nationwide;
3. Improve the quality of decision-making and review by the Immigration Courts and BIA;
4. Expand access to legal counsel and information for asylum-seekers;

5. Ensure that the terrorism-related grounds of inadmissibility target *actual* terrorism by working with Congress and the Departments of Homeland Security and State to revise, where appropriate, the definitions and interpretations of key terms and implementing a more effective process of adjudicating exemptions;
6. Support legislation eliminating the arbitrary barrier to asylum imposed by the one-year filing deadline and in the interim support broad interpretations/application of the exceptions to the deadline;
7. Ensure that claims by female asylum-seekers are properly recognized by issuing joint regulations with DHS that take into account their unique circumstances and clarify that the existence of a particular social group is established based on group members sharing a fundamental or immutable characteristic without any additional requirement;
8. Ensure that children's asylum claims are properly adjudicated, taking into account their special vulnerability, and that they are not returned to persecution; and
9. Improve the administrative efficiency and fundamental fairness of the work authorization process.

We have included a memo explaining in greater detail each of the recommendations listed above. We look forward to working with you and your staff and would like to respectfully request a meeting with you at your earliest convenience to discuss these recommendations further. Annie Sovcik, Advocacy Counsel at Human Rights First is our focal point and can be reached at sovcika@humanrightsfirst.org; 202-370-3318. Thank you for your attention to our views.

Sincerely,

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cc: The Honorable Janet Napolitano, Secretary of the Department of Homeland Security
Cecilia Muñoz, White House Director of Intergovernmental Affairs

Protecting the Persecuted: Closing the Gaps in the U.S. Asylum System
Submitted to Eric H. Holder, Attorney General
July 8, 2009

Introduction

The United States has a long history of providing safe haven to refugees fleeing political, religious and other persecution in their homelands. This commitment was affirmed when the United States signed the 1967 Protocol to the 1951 Convention relating to the Status of Refugees and includes the obligation to ensure that those who face harm in their country of origin are not returned back to persecution. Congress passed the Refugee Act of 1980 to enshrine these protections in domestic law.

In recent years, however, changes in laws and policies have undermined the United States' tradition of protection. In 2005, the bipartisan United States Commission on International Religious Freedom issued its comprehensive "Report on Asylum Seekers in Expedited Removal" (USCIRF Report).¹ This report documented the treatment of asylum-seekers in the United States and found that the U.S. asylum system was woefully inadequate in a number of areas critical to ensuring refugee protection. Among its conclusions, the USCIRF Report found that vital safeguards for preventing the summary deportation of refugees without a hearing—"expedited removal"—were not followed, that asylum-seekers were detained in inappropriate prison-like facilities, and that decisions whether to grant asylum—or instead deport someone back to the country of feared persecution—varied widely, depending on which individual Immigration Judge heard the case. Subsequent expert reports—both governmental² and independent³—have confirmed these findings and elaborated on related issues. Importantly, these studies provide constructive recommendations for addressing some of the serious problems with expedited removal and the asylum system.

In an effort to build an asylum system of quality, consistency, coherence, and accountability in line with this country's long-standing tradition of protecting victims of persecution, this memo presents nine recommendations for DOJ. These reforms will help ensure that this country lives up to its commitment to protecting the persecuted, while also ensuring the protection of its citizens.⁴

¹ U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, February 8, 2005, http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1.

² The U.S. Government Accountability Office (GAO) made similar findings in one of two of its recent reports on the asylum system. "U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across the Immigration Courts and Judges" (Sept. 2008) available at <http://www.gao.gov/new.items/d08940.pdf>. The other GAO report found, among other problems, a lack of consistent, enforced quality assurance of the asylum adjudication process, which further contributed to disparities in decision-making and other concerns about the adequacy, justness and fairness of the system. "U.S. Asylum System: Agencies Have Taken Actions to Help Ensure Quality in the Asylum Adjudication Process, but Challenges Remain" (Sept. 2008) available at <http://www.gao.gov/new.items/d08935.pdf>.

³ See the study by Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," 60 *Stanford L. Rev.* 295 (2007), available at <http://lawreview.stanford.edu/content/vol60/issue2/RefugeeRoulette.pdf>, as well as the 2008 Transactional Records Access Clearinghouse (TRAC) statistical analysis of EOIR decision-making, available at <http://trac.syr.edu/immigration/reports/>.

⁴ The asylum system has numerous safeguards built in to ensure that those who have engaged in crimes or violent acts or present a security risk are not granted asylum. Examples of these measures include checking the identities of

1. Obtain adequate funding for the Executive Office for Immigration Review (EOIR) so that the immigration courts are able to maintain appropriate staffing and training.

EOIR requires more resources in order for its Immigration Judges (IJs) and staff to effectively handle increasing immigration caseloads and to have adequate time to properly assess asylum claims, which typically are both factually and legally complex cases. In FY 2007, immigration courts completed 266,140 removal proceedings, over 1,000 per judge, and terminated 272,879 total matters, about 1,240 per judge.⁵ During that year, 55,573 proceedings were asylum adjudications. In comparison, U.S. District Court Judges average 483 matters completed per year.⁶ Law clerks, who provide valuable assistance in adjudicating complex immigration matters, are spread thin throughout the Immigration Courts. EOIR currently employs about 50 law clerks, meaning that the over 200 judges must share clerks.⁷ Nationally, the ratio of law clerks to IJs means most judges have one-sixth of a law clerk.⁸ Moreover, some smaller courts have no clerks assigned to them. By contrast, each federal district court judge has at least one individually assigned law clerk. These resource constraints undermine the quality of the Immigration Court system.

Part of the proposed increase in resources should go toward ensuring that all judges and staff should receive on-going, mandatory training. In addition to training on developments in the law and in judicial conduct, in particular fair and impartial decision-making, training must also incorporate fundamentals of asylum adjudication including U.S. treaty obligations and legal standards for refugee determination under international and U.S. law, cross-cultural communication, the psycho-social impact of trauma and distress and other factors related to credibility determinations, and up-to-date information on conditions in refugee-producing countries. We recommend that DOJ:

- Consistently include in its budget requests to Congress funding for EOIR to hire more IJs and law clerks to reduce the overwhelming caseload of the immigration bench and ensure that such funding takes into consideration orientation, evaluation, and continued training for IJs and staff.

asylum applicants against numerous databases such as the Central Index System (CIS), Deportable Alien Control System (DACS), National Automated Immigration Lookout System (NAILS), Interagency Border Inspection System (IBIS), Automated Biometric Identification System (IDENT), and FBI Query. Asylum applicants are screened at ports of entry by immigration officers with some training in asylum procedures. The INA bars from asylum individuals who have engaged in acts of terrorism or committed certain crimes. The USA Patriot Act of 2001 expanded the definition of “terrorist activity” under which asylum can be denied to an applicant. *See* INS Internal Guide, Asylum Identity Checks Quick Reference Guide (February 1998), Office of International Affairs Asylum Division, Affirmative Asylum Procedures Manual (February 2003), and Benjamin Johnson and Walter A. Ewing, Ph.D., “Asylum Essentials: The U.S. Asylum Program Needs More Resources, Not Restrictions,” (February 2005), available at <http://www.immigrationpolicy.org/index.php?content=pr0502>.

⁵ Executive Office for Immigration Review, 2007 Statistical Yearbook, at B-7, C-4, I-2, available at <http://www.usdoj.gov/eoir/statpub/fy07syb.pdf>.

⁶ Russ Wheeler, Immigration and the Courts, Brookings Governance Studies Judicial Issues Forum, Feb. 20, 2009.

⁷ TRAC Immigration Report, “Improving the Immigration Courts: Effort to Hire More Judges Falls Short,” July 28, 2008, available at <http://trac.syr.edu/immigration/reports/189/>.

⁸ Jennifer Ludden, “Immigration Crackdown Overwhelms Judges,” National Public Radio, All Things Considered, Feb. 9, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=100420476>.

- Coordinate with DHS to bring parity to the Departments’ budget requests so that, as a general rule, the number of judges and support staff at EOIR increase relative to the increase in cases in immigration court proceedings.

2. **Support the Department of Homeland Security (DHS) in preventing the unnecessary detention of asylum seekers by issuing joint regulations that allow an Immigration Judge to conduct a custody determination hearings for arriving asylum seekers and take steps toward expanding the Legal Orientation Program (LOP) nationwide.**

International standards make clear that asylum-seekers should not be detained, except when absolutely necessary, and that any detention should be in the least restrictive setting possible.⁹ However, in the United States, detention is automatic for arriving asylum-seekers. Unlike other detained immigrant populations, arriving asylum-seekers do not have the opportunity to go before an Immigration Judge for a custody/bond determination hearing. Thus, there is no method of independent review of DHS’s decisions to not release an asylum seeker on parole. Likewise, there is no specified limit on the time asylum seekers in proceedings may spend in detention. Consequently, many languish in detention for months or years as their cases are adjudicated.

The U.S. system for detaining asylum-seekers lacks adequate safeguards to protect them from unnecessary and prolonged detention; it is not consistent with international human rights standards. To provide asylum-seekers in detention with basic due process protections and to improve the conditions of detention where its limited use is determined to be absolutely necessary after an individualized assessment, we recommend that DOJ:

- Work with DHS to amend current regulations to allow asylum-seekers who request protection at our borders or ports of entry access to the Immigration Courts for custody hearings. Such regulations should make clear that any bond requirements must be appropriate to the circumstances and means of the asylum-seeker.
- Expand the Legal Orientation Program (LOP) at all immigration detention facilities. This program promotes fundamental fairness and improves the efficiency of the court. Although LOPs are not an adequate substitute for access to counsel, they are essential in the absence of individual representation. DOJ should work with DHS to ensure that LOPs are provided in every detention facility where asylum-seekers may be held and seek the necessary funding from Congress to expand and fully implement this program as well as other pro bono representation programs.

⁹ Executive Committee Conclusion No. 44 ¶ (b) (XXXVII) (1986); United Nations High Commissioner for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999).

3. Improve the quality of decision-making and review by the Immigration Courts and Board of Immigration Appeals.

The quality of decision-making by the Immigration Courts and the Board of Immigration Appeals (BIA) has been widely criticized by federal court judges and other experts in recent years, and has led to a proliferation of the immigration caseload in the circuit courts as flawed decisions at the administrative level are increasingly appealed. Rather than increase resources to reduce growing backlogs and speed up appeals, the Bush Administration's DOJ made "streamlining" changes by increasing the use of summary and single-member decisions. The Bush administration also reduced the number of BIA members from 23 to 11.

These changes have undermined the quality of decision-making at the BIA and led to a steep drop in its approval of asylum appeals. Several studies have also documented the wide variations in immigration court asylum denial rates. Corrective reforms announced by DOJ in August 2006 did not go far enough – and have still not been fully implemented. The BIA has also denied asylum claims based on misinterpretations of long-standing precedent and international standards, inappropriately narrowing the eligibility for asylum of many with a genuine need for protection. To guarantee meaningful hearings and appellate review, we recommend that DOJ:

- Ensure the Board has a sufficient number of Members, at least twenty-one at a minimum, to fully and appropriately review and decide all the appeals before it in a timely manner.
- Restore the requirements that appeals to the BIA must be decided by three-member panels and that the legal basis for decisions must be stated and address the arguments made by the parties. Or, at a minimum, institute these requirements for cases involving asylum, withholding of removal and the Convention Against Torture.
- Require that precedent decisions be issued by the full Board.
- Ensure full funding for staffing and resource needs, including, additional immigration judges and legal staff and BIA staff attorneys and law clerks; quality, mandatory initial training and on-going professional development for Immigration Judges and Board members and their legal staffs; up-to-date equipment and research and resource materials; funding to study and address reliance on video hearings.
- Establish quality adjudication standards and accountability by promulgating through rulemaking a mandatory code of professional conduct for Immigration Judges and BIA members as well as mandatory performance evaluations and peer evaluations; mandating hiring criteria for judges and Board members; establishing effective mechanisms for receiving and responding to complaints against judges and for disciplining judges who act unprofessionally or consistently misapply the law; and allowing judges more flexibility in meeting "case completion deadlines."

4. Expand access to legal counsel and information for asylum-seekers.

Access to legal counsel and information helps to ensure that bona fide refugees are able to establish their claims to asylum in Immigration Court. Pronounced disparities in asylum grants, which often involve life-or-death decisions, exist between those with counsel and those unable to access legal information and understand the legal process. The complexity of asylum law and the adjudication process, combined with the inherent difficulties asylum-seekers face in presenting their stories in support of their claims, leads many asylum-seekers to be ill-equipped to enter into Immigration Court effectively without the assistance of legal counsel. Counsel also helps guarantee that the government's broad powers to bar refugees from asylum protection are not used improperly or arbitrarily. USCIRF found that asylum-seekers without counsel had a much lower chance of being granted asylum (2%) than those with an attorney (25%).¹⁰

Legal counsel plays an important role in facilitating and streamlining immigration adjudications, enhances the effective use of court resources, and improves immigration officers' ability to quickly distill and address the core legal issues. Nevertheless, the INA provides that a non-citizen in removal proceedings has "the privilege of being represented" by counsel, but "at no expense to the Government."¹¹ As a result, in 2007, approximately 58 percent of non-citizens in removal proceedings were not represented by counsel.¹² The disparity is even more extreme for immigrants in detention. According to immigration court statistics reported by the Vera Institute of Justice, 84% of detained immigrant respondents are not represented by a lawyer.¹³ We recommend that DOJ:

- Support legislation that authorizes immigration judges to appoint counsel for indigent asylum-seekers and other particularly vulnerable populations.
- Seek funding to enhance and support resources to increase the availability of counsel through the development of government-funded programs that would connect asylum-seekers with legal representation.
- Expand legal orientation programs (LOPs) at all immigration detention facilities. (*See recommendation 2 above related to detention of asylum-seekers*).

5. Ensure that the terrorism-related grounds of inadmissibility target actual terrorism by working with Congress and the Departments of Homeland Security and State to revise, where appropriate, the definitions and interpretations of key terms and implementing a more effective process of adjudicating exemptions.

The security related grounds of inadmissibility contained in INA §212(a)(3) were enacted to protect the national security interests of the United States and prevent individuals who have

¹⁰ See *supra* at note 1.

¹¹ INA § 292, 8 U.S.C. § 1362.

¹² Department of Justice, Executive Office for Immigration Review, FY 2007 Statistical Yearbook (Apr. 2008), p. G1.

¹³ See "Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program, Report Summary," available at http://www.vera.org/publication_pdf/477_877.pdf

engaged in acts of terrorism, genocide, torture or other crimes against humanity from being granted admission to the United States. In recent years, due to the unduly broad definition of “terrorist activity” in INA §212(a)(3)(B) and the expansive interpretations adopted by DOJ and DHS under the prior administration, victims of oppression seeking protection have been unjustly labeled supporters of “terrorist organizations” or participants in “terrorist activity.” As a result, thousands of refugees who have never engaged in acts of serious wrongdoing and do not pose a threat to the United States or its allies have had requests for protection or other status delayed and sometimes denied.

The Bush administration recognized this as a serious problem but took a piecemeal approach to addressing it, pursuing an inefficient and time-consuming exemption process that has failed to address the breadth of the problem. For example, there has been no progress in adjudicating cases involving voluntary activities and associations related to Tier III groups, including groups that fought against Saddam Hussein in Iraq and Afghans who fought the Soviets in the 1980’s. The Bush administration required a centralized review of each Tier III group before an individual who engaged in voluntary activities on behalf of such a group could be exempted from these bars. No Tier III group has been cleared since last year.

Also troubling is that while USCIS has been carefully monitoring these cases, ICE has not provided any statistics regarding individuals in removal proceedings who are eligible under the law to be considered for an exemption. This gives rise to the concern that individuals are being removed without any consideration of whether an exemption is possible or warranted, raising significant concerns about U.S. compliance with its treaty obligations under the Refugee Convention. This failure is due in part to the unduly burdensome procedures set out for adjudicating exemptions in removal cases. These procedures require an asylum-seeker to wait until there is a final order of removal before USCIS can consider whether to issue an exemption, unnecessarily penalizing genuine asylum-seekers and forcing them to choose between pursuing an administrative appeal and obtaining prompt consideration of an exemption. This process can take months or years and, in many cases, the asylum-seeker is held in detention. Working in cooperation with DHS and the Department of State (DOS), where appropriate, we recommend that DOJ:

- Support legislation to amend the definition of “terrorist activity” to ensure that it is consistent with common understanding of the meaning of “terrorism” and does not adversely impact asylum-seekers and refugees who have not engaged in terrorism.
- Support legislative elimination of INA section 212(a)(3)(B)(i)(IX), which makes spouses and children inadmissible and ineligible for refugee protection and other status based solely on the inadmissibility of their spouses or parents. As an interim measure, support implementation by DHS and DOS of an exemption under INA section 212(d)(3)(B) for persons deemed to be inadmissible based on the activities or associations of their parents, husbands, or wives.
- Reconsider legal interpretations of the existing statute adopted under the prior administration, including the application of the terrorism bars to persons who acted under duress and/or as children, the extent of the application of the material support bar to *de*

minimis contributions and to activities unrelated to terrorism, such as the provision of medical care.

- Support DHS and DOS in issuing new policy guidance treating Tier III cases involving voluntary support or other activity the same as Tier III duress cases. Cases of individuals who provided voluntary support to a Tier III group or engaged in other activity related to a Tier III group should be considered on a case-by-case basis.
- Institute a mechanism at EOIR to track, monitor, and provide statistics on individuals who are eligible for discretionary exemptions under the law, and provide the applicant the opportunity to have their cases held or suspended until they can be considered for an exemption.

6. Support legislation eliminating the arbitrary barrier to asylum imposed by the one-year filing deadline and in the interim support broad interpretations/application of the exceptions to the deadline.

The one-year filing deadline creates an arbitrary barrier to bona fide asylum claims. Asylum Officers and Immigration Judges have increasingly applied the one-year asylum filing deadline in ways that are inconsistent with Congress' intent and many refugees have been denied asylum or granted lesser forms of protection as a result. Before passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") of 1996, a person could apply for asylum at any time after arriving in the United States. The proponents of the one-year filing deadline favored it as a means to prevent fraud by applicants raising asylum claims only to delay or avoid deportation, and stressed that it was not intended to impede legitimate asylum-seekers.¹⁴ The exceptions to the filing deadline were meant to be applied flexibly, with specific inquiry into applicants' reasons for untimely filing. Nevertheless, the Center for Gender and Refugee Studies, which maintains a database of examples of asylum claims that were denied based on failure to meet the one-year bar, reported that Asylum Officers denied and referred for deportation proceedings at least 35,429 claims on account of the one-year bar between 1999 and 2005.¹⁵ In many of these cases, the Asylum Officer found the applicant was credible, indicating fraud was not at issue.¹⁶ In other cases, Immigration Judges found the applicants credible but could only award alternative, less comprehensive forms of relief because those applicants were made ineligible for asylum solely because of the filing deadline.¹⁷

There are many reasons why a refugee might file a request for asylum protection more than a year after arriving in the United States.¹⁸ Many asylum-seekers do not speak English, have physical, mental or emotional health problems and struggle upon arrival to meet their basic

¹⁴See, e.g., Karen Musalo and Marcelle Rice, "Center for Gender and Refugee Studies: The Implementation of the One-Year Bar to Asylum," 31 *Hastings Int'l & Comp. L. Rev.* 693, 695 (Summer 2008) (citations omitted).

¹⁵ *Id.* at 698 (citing, inter alia, authors' conversations with Andrew I. Schoenholtz, Deputy Director, Institute for the Study of International Migration, Summer 2006).

¹⁶ *Id.* at 699

¹⁷ *Id.*

¹⁸ See, e.g., Michele R. Pistone and Philip G. Schrag, "The New Asylum Rule: Improved but Still Unfair," *Georgetown Immigration Law Journal* (2001).

needs. Moreover, potential applicants might not understand asylum law procedures or even know that they are eligible for asylum. They also might face delays in obtaining counsel and in gathering documentation necessary to corroborate their claim. Denying these individuals relief contravenes the original legislative intent behind the one-year deadline. We recommend that DOJ:

- Support legislation to rescind the one-year filing deadline in INA §208(b)(2)(B).
- Until the filing deadline is rescinded through legislation, coordinate with DHS to issue policy guidance affirming that the exceptions to the deadline are to be broadly interpreted and that the decision-making must first focus on the actual merits of the claim for protection before considering whether the filing deadline is an issue.
- Similarly, until such legislation is passed, ensure that all refugees are treated alike with respect to work authorization. Currently, asylum-seekers are entitled to work authorization, subject to certain conditions, after their application has been pending for 180 days. An asylum-seeker with a one-year filing deadline issue may be deemed by an Asylum Officer or Immigration Judge to be eligible only for “withholding of removal,” a lesser form of protection that does not have a filing deadline but also does not convey any right to work authorization until an application has actually been granted and not while it is pending, no matter how long it is pending and no matter the cause of the delay. This distinction should be eliminated. Asylum Officers and Immigration Judges should be instructed to start and continue the “clock” that tracks the days an asylum claim has been pending for work authorization purposes in all cases in which asylum is sought, whether or not the claim may ultimately be deemed one for withholding due to the filing deadline.

7. **Ensure that claims by female asylum-seekers are properly recognized by issuing joint regulations with DHS that take into account their unique circumstances and clarify that the existence of a particular social group is established based on group members sharing a fundamental or immutable characteristic without any additional requirement.**

Over the years, the U.S. government has recognized and affirmed that gender-based harms, such as rape, forced marriage, honor killings, domestic violence, and female genital cutting, can meet the definition of persecution for asylum eligibility and that such claims could be based on the “particular social group” ground of the refugee definition, as well as any other statutory ground. As with every asylum claim, these claims must satisfy all the requirements for asylum eligibility including, in cases where the persecutor is a non-state actor, that there is a failure of state protection. In 2000, building on the DOJ’s 1995 *Considerations for Asylum Officers Adjudicating Asylum Claims for Women*, and the BIA’s 1996 landmark decision in *Matter of Kasinga*, draft regulations were issued recognized the kinds of claims often raised by women asylum-seekers.¹⁹ Unfortunately, these regulations were never finalized and, despite a clear and pressing need for such guidance, a framework for analyzing gender-based persecution claims under U.S. law has yet to be firmly and consistently established. As a result, many women’s

¹⁹ Significantly, these draft regulations also contained a number of provisions that would have benefited many asylum-seekers, regardless of their gender or the nature of their claims.

cases have been denied, while others have been left in legal limbo, and the decisions that have been issued by immigration courts and the BIA have been inconsistent and incoherent. The need for clear guidance is illustrated by the highly-publicized case, *Matter of R-A-*, involving an asylum-seeker who had suffered more than a decade of brutal domestic violence and a grave failure of state protection. *Matter of R-A-* has been pending for more than 10 years despite briefing from DHS in 2004 arguing in favor of granting asylum. The failure to timely resolve this case has become emblematic of the dysfunction and paralysis that pervades this field.

Although the regulations proposed in 2000 still serve as a benchmark in addressing some of the critical issues related to asylum protection, they also contain provisions that were seen by many to pose additional and unwarranted obstacles to asylum-seekers. In light of these concerns and given the long passage of time since the draft regulations were issued, a thorough review and reassessment of them should be undertaken before new proposed regulations are promulgated. The participation of relevant non-governmental and inter-governmental experts in this review process would help ensure that any new proposed regulations carry forward the intent of the 2000 draft regulations, to ensure and enhance the protection of asylum-seekers.

We recommend that DOJ:

- Work with DHS in conducting a full review and reassessment of the proposed asylum regulations issued in 2000 to ensure that gender-based persecution is recognized as a basis for asylum eligibility whether it is based on membership in a particular social group, defined in whole or in part by gender, or on any other statutory ground. This review should include analysis and, where relevant, incorporation of current developments in international law, in particular the UNHCR Guidelines on International Protection issued in 2002 addressing gender-related persecution²⁰ and membership in a particular social group.²¹ Experts in the asylum and refugee legal and advocacy community should be consulted in this process.
- Ensure that the new proposed regulations resolve crucial issues, including, among others, clarification that:
 - i. The existence of a “particular social group” may be demonstrated by establishing the criteria set forth by the BIA in *Matter of Acosta* 19 I & N Dec. 211 (1985), without any additional requirement; and
 - ii. Proof that persecution is “on account of” one of the five statutory grounds for asylum can be established by either direct or circumstantial evidence.
- Issue the new proposed joint asylum regulations addressing these and other pertinent issues for public notice and comment as soon as the re-drafting is completed with ample

²⁰ *Gender-related Persecution within the context of Article 1A(2)*, HCR/GIP/02/01 (May 2002), <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>

²¹ *Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02 (May 2002), <http://www.unhcr.org/cgi-bin/teXis/vtx/refworld/rwmain?page=search&docid=3d36f23f4>

notice and comment period to ensure full participation by experts and other key stakeholders in formulating the final regulations.

8. Ensure that children's asylum claims are properly adjudicated, taking into account their special vulnerability, and that they are not returned to persecution

Child asylum-seekers face significant obstacles in their claims for protection. The majority of children's asylum claims have been heard in adversarial immigration court proceedings, where child asylum-seekers are subject to the same evidentiary standards as adults and most children do not benefit from the assistance of counsel or an independent adult charged with protecting their best interests. Many children are highly traumatized and have trouble recalling details critical to their claim, let alone understanding or articulating legal concepts like motive and persecution. In addition, it is particularly challenging for child asylum-seekers to obtain corroborating evidence.

Unaccompanied Alien Children (UACs) in the custody of the Office of Refugee Resettlement (ORR) are further disadvantaged by ORR's policy of sharing records with DHS. Some DHS trial attorneys use these records to undermine children's credibility and the substance of their asylum claims. However, such records are unreliable for a number of reasons, including that they are not sworn statements, are not checked for accuracy, frequently contain numerous errors, and contain the subjective opinions of ORR caseworkers. Intake interview notes are especially problematic because intakes occur upon a child's arrival at an ORR facility, when the child is often confused, exhausted, scared, and unsure who to trust. In cases of child abuse, some DHS trial attorneys argue that ORR phone logs documenting the child's contact with relatives undermine the child's credibility or fear of persecution. This argument fails to recognize the complicated relationship that exists between a child and her abusive parent or caretaker. Furthermore, the sharing of records impacts a child's ability to confide in ORR caseworkers and access critical social services.

Furthermore, recent BIA decisions and the position taken by DHS on social group and nexus have made it exceedingly difficult for child applicants, who are frequently persecuted by non-state actors, to establish asylum eligibility. Decisions, such as *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008) do not account for the fact that non-state actors who harm children, or states that fail to protect them, are frequently motivated by children's vulnerability and status in society. All of these hurdles substantially increase the risk of returning refugee children to persecution.

A recent positive development was the enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) which transferred initial jurisdiction over unaccompanied children's asylum claims from the adversarial Immigration Courts to the USCIS Asylum Office. Responsibility has thus been transferred from EOIR to DHS in ensuring that proper considerations are in place regarding children's vulnerability, special circumstances and position in society and their inability to understand the legal requirements of asylum. The TVPRA also requires a variety of other measures to ensure that those unaccompanied children in need of protection are identified and protected.

In light of developments under the TVPRA, we recommend that DOJ:

- Work with DHS in issuing new joint proposed regulations, as discussed in Point 6, above. As noted in Point 6, in order to comply with international and domestic obligations not to return child refugees to persecution, the regulations should: 1) ensure that the existence of a “particular social group” is evaluated under the criteria set forth by the BIA in *Matter of Acosta* 19 I & N Dec. 211 (1985), without any additional requirement, and 2) affirm that nexus can be established in cases involving non-state actors when there is a showing that the persecutor was motivated by a protected ground, or that the state's failure to protect was so motivated. As noted in Point 6, relevant UNHCR Guidelines should be consulted for guidance.
- Ensure that the responsibility for initial adjudication of all asylum applications involving unaccompanied children is conferred from EOIR to USCIS as mandated by section 235 of the TVPRA.
- Work with DHS, HHS and the Department of State (all agencies which deal with unaccompanied children) on an interagency basis with interested community stakeholders in determining a plan to implement sections 212 and 235 of the TVPRA. Interested stakeholders could include asylum and children’s advocacy organizations, members of Congress and inter-governmental agencies such as UNHCR.
- Instruct EOIR to adopt the DOJ’s *Guidelines for Children’s Asylum Claims* as a legal directive until such time as the regulations mandated under section 235 of the TVPRA are issued.
- Consistent with the spirit of the TVPRA, adopt an interpretation of the definition of UAC which does not preclude initial jurisdiction by USCIS over cases in which a UAC is reunified with a parent or legal guardian prior to filing an asylum application. To do otherwise forces children to choose between family reunification or the benefits of the TVPRA.

9. Improve the administrative efficiency and fundamental fairness of the work authorization process.

One of the asylum reforms enacted in 1995 barred asylum-seekers from receiving work authorization for 180 days, without providing them any access to public assistance. Asylum-seekers who work during this period are not allowed to ever receive lawful permanent residency—even if they are granted asylum. Regulations established complicated requirements for calculating and tolling the 180-day period and barred asylum-seekers from ever acquiring work authorization in certain circumstances. The result of these rules has often been that individuals who actually qualify for protection as refugees are forced to break the law to work in order to survive.

Current regulations toll the 180-day clock for *any* applicant-caused delay (8 C.F.R. § 208.7(a)(2)), even for reasonable requests related to the full and fair preparation of the case (such as requests to reschedule or continue a hearing to enable all evidence to be presented). Work authorization is also withheld from an asylum-seeker who misses a scheduled interview or hearing, except in exceptional circumstances (8 C.F.R. § 208(a)(4)). This multi-variable stopping and starting of the clock imposes a tremendous administrative burden on adjudicators—Asylum Officers and Immigration Judges must cumulatively track and code over 40 different types of clock-impacting events²²—and is prone to chronic error. It also unnecessarily lengthens the time an asylum-seeker must wait in order to obtain employment authorization. To reduce administrative burdens and enable asylum-seekers to fairly pursue relief, we recommend that DOJ:

- Change regulations to toll the clock for one reason only: an adjudicator’s written finding of an asylum-seeker’s clear and egregious failure to move the case forward. Reasonable and necessary choices made by a litigant in the course of a removal hearing should never be deemed such a failure. If an adjudicator tolls the clock, it should be restarted as soon as an asylum-seeker recommences proceedings, such as through an appearance at a rescheduled hearing, a submission of a motion or evidence or other similar actions.

Conclusion

We respectfully request a meeting with you and your senior staff at your earliest convenience to discuss these issues. In the meantime, please let us know if you have any questions about the issues raised in this memo.

²² See Affirmative Asylum Procedures Manual (Nov. 2007)(reviewing 15 codes Asylum Officers must use to indicate whether the clock runs or tolls) available at <http://www.uscis.gov/files/nativedocuments/AffirmAsyManFNL.pdf>; see also the Office of the Chief Immigration Judge’s Operating Policies and Procedures Memorandum (OPPM) 05-07: “Definitions and Use of Adjournment, Call-up and Case Identification Codes” (Jun. 16, 2005), at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm> (reviewing the 55 separate codes Immigration Judges must use to designate types of adjournments, 27 of which toll the clock until the next hearing).