

July 8, 2009

The Honorable Janet Napolitano
Department of Homeland Security
U.S. Department of Homeland Security
Washington, D.C. 20528

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

Dear Secretary Napolitano,

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 toward advancing laws and policies that protect refugees seeking asylum protection in the United States. Our expertise is derived through providing legal representation to asylum-seekers, conducting extensive research into elements of the U.S. asylum system, engaging in policy development at a national and international level on issues related to refugee protection, and, in the case of UNHCR, conducting refugee status determinations and working with nations around the world on developing 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 feel will better ensure that asylum-seekers are afforded meaningful access to a fair and efficient asylum adjudication process.

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

1. Make appropriate staffing and structural adjustments to ensure the protection of refugees;
2. Minimize dangers inherent in the expedited removal process to ensure that refugees are not returned to persecution;
3. Prevent the unnecessary detention of asylum-seekers through enhancing due process protections, revising the parole criteria, exercising the discretion to detain an asylum-seeker by limiting such detention to cases where it is absolutely necessary, developing effective alternatives to detention, using appropriate facilities for those who, on an exceptional basis, must be detained, and codifying detention standards;

4. Ensure that the terrorism-related grounds of inadmissibility target *actual* terrorism by working with Congress and the Departments of Justice and State to revise, where appropriate, the definitions and interpretations of key terms and implementing a more effective process of adjudicating exemptions;
5. 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;
6. Ensure that claims by female asylum-seekers are properly recognized by issuing joint regulations with the Department of Justice (DOJ) 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;
7. Ensure that children's asylum claims are properly adjudicated, taking into account their special vulnerability, and that they are not returned to persecution;
8. Protect child asylum-seekers by transferring custody of all children who are not physically with their parents or reunified with their parents or a sponsor from DHS to ORR within 72 hours of their apprehension;
9. Allow asylees and refugees to be promptly reunified with vulnerable family members abroad by expediting the processing of I-730s; and
10. 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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U.S. Conference of Catholic Bishops

Michelle Brané
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cc: The Honorable Eric Holder, Attorney General
Cecilia Muñoz, White House Director of Intergovernmental Affairs

Protecting the Persecuted: Closing the Gaps in the U.S. Asylum System
Submitted to Janet Napolitano, Secretary of the Department of Homeland Security
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 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 ten recommendations for DHS. These reforms will help ensure that this country lives

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/>.

up to its commitment to protecting the persecuted, while also ensuring the protection of its citizens.⁴

1. Make appropriate staffing and structural adjustments to ensure the protection of refugees.

USCIRF found that it is exceedingly difficult to resolve inter-bureau issues relating to asylum within DHS and recommended the creation of an office headed by a high-level official to address and coordinate cross-cutting asylum issues. Instead, under the Bush administration, DHS appointed a senior refugee coordinator without conferring meaningful decision-making authority, housed that individual in the DHS policy office, and then gave him the additional responsibility for broader immigration matters. The creation of this position did not succeed in improving protection for refugees and asylum-seekers or coordination within DHS. With the change in administration, we recommend DHS leadership finally address this crucial need for inter-bureau coordination and decision-making authority through the following measures:

- Create a DHS Refugee Protection Office that reports directly to the DHS Secretary or Deputy Secretary and provide that office with the resources, staffing and authority to ensure the protection of asylum-seekers and refugees throughout DHS. This office should have both policy and operational oversight and should be headed by a political appointee who has extensive experience in refugee issues.
- Strengthen the DHS Deputy Secretary’s capacity and authority to increase coordination across bureaus on refugee and asylum matters to ensure that the Refugee Protection Office’s directives and guidance are followed by the various immigration-related agencies.

2. Minimize dangers inherent in the expedited removal process to ensure that refugees are not returned to persecution.

Migrants arriving at an airport or land port of entry without proper documents are subject to summary deportation without a hearing under the process of “expedited removal.” In order to ensure that refugees are not returned to countries where they face persecution, the law provides asylum-seekers with the opportunity to express a fear of return as a means to prevent their

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 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>.

deportation without a review of the merits of their claim. After expressing a fear of return, asylum-seekers in expedited removal are placed in mandatory detention and referred to a USCIS Asylum Officer for a “credible fear” interview. If a finding of credible fear is made, the asylum-seeker is taken out of expedited removal and referred for full asylum proceedings before an Immigration Judge.

The expedited removal process is of special concern for asylum-seekers, as the consequences of failing to implement can be dire for those facing persecution upon improper removal. USCIRF found serious problems in the implementation of this process, as many of the safeguards were either not being followed or they were inadequate to ensure that refugees were not being returned to persecution. Therefore, USCIRF provided a series of recommendations to DHS on how to enhance safeguards; however, rather than implementing the recommendations, DHS *expanded* the use of this flawed process without establishing additional safeguards or a means for assuring adherence to existing quality control measures. In order to mitigate the risks of expedited removal and protect refugees from being returned to persecution, we recommend that DHS:

- Direct Customs and Border Protection (CBP) to implement the reforms recommended by USCIRF and ensure that procedures designed to protect asylum-seekers from being returned to their persecutors are followed.
- Suspend the use of the expedited removal process in the interior of the United States until the recommendations made by USCIRF have been implemented and further study of the implementation of expedited removal by the Border Patrol is completed.
- Direct CBP to promulgate quality assurance measures to ensure that expedited removal interviews are conducted according to CBP policy. This will result in more reliable information for homeland security purposes and help ensure that asylum-seekers are not turned away in error. These measures must ensure that if any fear of return is expressed to an inspector or Border Patrol officer, the officer must refer the individual for a credible fear determination with an Asylum Officer and that any doubts as to whether or not a fear was expressed must be resolved through a documented consultation with the Asylum Office.
- Direct CBP to expand the use of recording systems, utilize undercover testers, and enhance officer training to improve quality assurance and ensure that the information on Forms I-867A and B accurately reflects what actually transpired during the interview or secondary inspection. Current reliance entirely on a paper review of the file rather than on an observation of what actually occurred in the interview room is inadequate to ensure the accuracy of the file and compliance with CBP procedures. The videotaping system in place at the Houston and Atlanta airports should be improved and expanded to all major ports of entry and, to the extent practicable, Border Patrol stations.
- Unless and until CBP includes transcripts or recordings of the sworn statement in the file, direct CBP to clarify in writing the limitations and purpose of the sworn statement taken by CBP officers and noted on Form I-867B. This form is frequently incomplete and unreliable and never provides a verbatim transcript of the interview. CPB should amend

its sworn statement form in the same way that USCIS amended its credible fear assessment form I-870, with a prominently displayed notation saying that the forms are not verbatim transcripts and are not intended to go into detail about any fear of persecution or torture. Without this notation, some immigration judges may continue to deny asylum claims as they have in the past based on negative inferences they draw from asylum-seekers “adding detail” to claims originally made in the sworn statement.

- Prohibit CBP from placing properly documented individuals in expedited removal—and mandatory detention—where the sole basis for doing so is the expression of a desire to apply for asylum, and require CBP to admit such individuals so as to permit them to apply for asylum affirmatively. The current system wastes detention resources and penalizes people for being forthcoming with CBP officials.
- Protect potential refugees interdicted at sea by the U.S. Coast Guard. The U.S. Coast Guard routinely interdicts boat migrants at sea and—depending on their nationality—subjects them to summary return to their country of origin unless a fear of return is expressed or provides them with cursory shipboard screening to assess whether they may have claims for refugee protection. The small fraction who are recognized as having potential protection claims are brought to Guantánamo, where, if found to be in need of protection, they often languish for months, if not years, as the United States seeks out third countries willing to take them. The adjudication process on Guantánamo is not subject to judicial review and access to legal counsel is highly problematic. DHS should direct the Coast Guard to bring interdicted migrants to the nearest port of entry and place them in Expedited Removal proceedings where they will at least have minimal due process protections and will allow those found to be refugees to remain in the United States where many of them have family or other ties.

3. **Prevent the unnecessary detention of asylum-seekers through enhancing due process protections, revising the parole criteria, exercising the discretion to detain an asylum-seeker by limiting such detention to cases where it is absolutely necessary, developing effective alternatives to detention, using appropriate facilities for those who exceptionally must be detained, and codifying detention standards.**

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.⁵ However, in the United States, detention is automatic for arriving asylum-seekers. Asylum-seekers are held in jails or jail-like facilities that are inappropriate. As USCIRF’s experts concluded, these conditions create a serious risk of psychological harm, particularly for torture-survivors, and parole practices vary widely, with very few asylum-seekers released in some parts of the country. Rather than codifying into regulations the existing parole criteria, as USCIRF recommended in 2005, in a November 2007 policy directive, DHS instead *added* hurdles to parole. Under this policy, asylum-seekers must affirmatively seek parole in writing and must

⁵ 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).

demonstrate it is in the “public interest” for them to be released, although this criterion is nowhere defined. There is no method of independent review of parole decisions, and there is no specified limit on the time individuals in proceedings may spend in detention. For those who arrive by sea, it is next to impossible to be released on parole, even if they are otherwise eligible. Further, this policy in its implementation discriminates against asylum-seekers based on nationality. Cubans are exempted from the policy yet Haitians are not.⁶

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 DHS:

- Work with DOJ 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.
- Issue regulations providing for the release of an asylum-seeker who can establish identity, has ties to the community, satisfies the credible fear standard, and does not pose a danger to the community. These regulations should require that all arriving asylum-seekers be assessed for parole eligibility after passing through the credible fear process and include a mechanism for an Immigration Judge to review every decision to deny an asylum-seeker parole.
- Reinstate the February 9, 2004 Release after Grant Memorandum favoring release for individuals granted asylum or withholding of removal protection whose decisions are on appeal.
- Increase the use of current release mechanisms including release on one’s own recognizance, on an order of supervision, on bond, or electronic monitoring by telephone check-in. The use of ankle bracelets or other restrictive forms of current supervised release/alternative to detention programs should only be used where necessary, and should not be used as alternatives to the release of asylum-seekers who meet parole criteria.
- Implement a program of nationwide community-based alternatives to detention in partnership with reputable and experienced not-for-profit organizations. Community-based programs should utilize full service programs which incorporate case managers, referrals to legal and social service providers and assistance with accessing information about court and case information. These elements were incorporated into a pilot program conducted by the Vera Institute between 1997-2000, which reported a 93% appearance

⁶ See United Nations High Commissioner for Refugees, UNHCR Comments on Notice Designating Aliens Subject to Expedited Removal Under INA § 235(b)(1)(A)(iii); INS No. 2243-02 (Dec. 13, 2002).

rate for the enrolled asylum-seekers and cost less than half of the amount to detain these same individuals.⁷

- When necessary to have physical custody of asylum-seekers, use the least restrictive means possible in conditions most conducive to the pursuit of their legal case for protection. Asylum-seekers should be held only in facilities that are not jails or jail-like in nature and are appropriate for civil detention at locations where they are near their counsel and family. At a minimum, asylum-seekers should not be transferred to or detained in remote or rural areas with few legal aid providers or pro bono resources, or without in-person access to an Asylum Office or an Immigration Judge.
- Promulgate and enforce regulations on detention standards to improve conditions of detention. Existing detention standards are insufficient and are routinely violated because those standards are not legally enforceable. As a result, conditions are often substandard and especially inhumane for asylum-seekers, many of whom have experienced severe trauma. Complaint procedures must be improved and all allegations of ill-treatment investigated and remedied. Improved conditions of immigration detention should include access to legal counsel and information, separation from criminal inmates, access to prompt, quality vital medical and mental health care, access to telephones and visitation, access to pastoral care and religious services, and accommodation for special needs such as the assignment of female staff for asylum-seekers who have suffered gender-based persecution.
- Immediately cease issuing new awards or contracts for Family Residential Facilities and end the use of family detention. A Request for Proposals to build new facilities was issued in summer 2008 with the expectation that the bid would be awarded and a contract entered in 2009. As an immediate first step, DHS should put a moratorium on the expansion of family detention, and consult with relevant NGOs and child welfare experts to discuss plans for any new facilities, with the goal of using alternatives to detention for families and eliminating family detention altogether.
- Institutionalize a preference for release for all family units and implement alternatives to detention appropriate for families not eligible for parole or release.
- Mandate strict compliance with limitations on detention established by the United States Supreme Court permitting only a period of time reasonably necessary to implement deportation—typically no more than 180 days—to minimize the occurrence of prolonged detention for those who cannot be removed.
- Work with the Department of Justice (DOJ) to expand the Legal Orientation Program (LOP) at all immigration detention facilities. This program promotes fundamental fairness and improves the efficiency of the courts. Although LOPs are not an adequate substitute for access to counsel, they are essential in the absence of individual

⁷ See Vera Institute of Justice: Appearance Assistance Program, <http://www.vera.org/content/testing-community-supervision-ins-evaluation-appearance-assistance-program>.

representation. DHS and DOJ should work together 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.

4. *Ensure that the terrorism-related grounds of inadmissibility target actual terrorism by working with Congress and the Departments of Homeland Security and Justice to revise, where appropriate, the definitions and interpretations of key terms and by 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 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 may be held in detention.

Working in cooperation with the Departments of Justice and State, where appropriate, we recommend DHS:

- 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. In the interim, delegate authority to grant exemptions to USCIS officers in the field.
- Support legislative elimination of section INA §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, implement an exemption under section INA §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.
- Adopt 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.
- Issue exemptions for individuals filing applications for immigration benefits who have already been granted protection in the United States. Because individuals already granted refugee or asylum status in the United States present a diminished security concern, USCIS adjudicators should be delegated the authority to proceed with adjudication of any case where the individual was previously granted relief or protection, the facts relevant to the alleged ground of inadmissibility were disclosed at that time, and the individual is otherwise admissible.
- Require ICE to track, monitor, and provide statistics on individuals who are eligible for discretionary exemptions under the law, and work with the Executive Office for Immigration Review to provide applicants in removal proceedings the opportunity to have their cases held or suspended until they can be considered for an exemption.

5. *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 U.S. 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.⁸ 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 2005.⁹ In many of these cases, the Asylum Officer found the applicant was credible, indicating fraud was not at issue.¹⁰ 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.¹¹

There are many reasons why a refugee might file a request for asylum protection more than a year after arriving in the U.S.¹² Many asylum-seekers do not speak English, have physical, mental or emotional health problems and struggle upon arrival to meet their basic needs. Moreover, potential applicants might not understand asylum law procedures or even know they are eligible for asylum. They also may 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 bar. In addition, it is contrary to international standards.¹³ We recommend DHS:

- 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 DOJ to issue policy guidance affirming that the exceptions to the deadline are to be broadly interpreted and that 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

⁸See, 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).

⁹ *Id.* at 698 (citing, inter alia, authors’ conversations with Andrew I. Schoenholtz, Deputy Director, Institute for the Study of International Migration, Summer 2006).

¹⁰ *Id.* at 699

¹¹ *Id.*

¹² See, e.g., Michele R. Pistone and Philip G. Schrag, “The New Asylum Rule: Improved but Still Unfair,” *Georgetown Immigration Law Journal* (2001).

¹³ UNHCR Global Consultations on International Protection, 2nd Meeting, Asylum Processes: Fair and Efficient Procedures, EC/GC/01/12 (31 May 2001) (“an asylum-seeker’s failure to submit a request within a certain time limit . . . should not in itself lead to an asylum request being excluded for consideration.”).

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.

6. **Ensure that claims by female asylum-seekers are properly recognized by issuing joint regulations with DOJ 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 that incorporated many important principles in recognizing the kinds of claims often raised by women asylum-seekers.¹⁴ 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 cases have been denied, while others have been left in legal limbo, and the decisions that have been issued by Immigration Judges 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 guarantee that any new proposed regulations carry forward the intent of the 2000 draft regulations, to ensure and enhance the protection of asylum-seekers.

¹⁴ 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.

We recommend DHS:

- Coordinate with DOJ 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 persecution¹⁵ and membership in a particular social group.¹⁶ 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, providing an ample notice and comment period to ensure full participation by experts and other key stakeholders in formulating the final regulations.

7. *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.

Children 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

¹⁵ *Gender-related Persecution within the context of Article 1A(2)*, HCR/GIP/02/01 (May 2002), <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

¹⁶ *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>.

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 open up to ORR caseworkers and access critical social services.

Furthermore, recent jurisprudence and the position taken by DHS on social group and nexus has 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, now giving DHS additional responsibility over 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, DHS should:

- Coordinate with DOJ 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 to USCIS as mandated by section 235 of the TVPRA.
- Cease the practice of using records provided by ORR against child asylum-seekers.

- Work with DOJ, HHS and the Department of State (all agencies which deal with unaccompanied children) in 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 the Office of the Chief Counsel 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.
- Encourage 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 an Unaccompanied Alien Child (UAC) which does not preclude initial jurisdiction by CIS over cases in which a UAC is reunified with a parent or legal guardian prior to filing an asylum application. To do otherwise puts children in a place of having to choose between family reunification or the benefits of the TVPRA.

8. *Protect child asylum-seekers by transferring custody of all children who are not physically with their parents or reunified with their parents or a sponsor, from DHS to ORR within 72 hours of their apprehension.*

In March 2003, the Homeland Security Act (HSA) transferred custody of unaccompanied children from the former Immigration and Naturalization Service (INS) to the Office of Refugee Resettlement (ORR). ORR, a division of the Department of Health and Human Services (HHS) created the Division of Unaccompanied Children’s Services (DUCS) to provide care and services to this population. The degree to which children’s immediate needs for shelter and some degree of security or safety are met can impact upon their ability to present a clear and consistent request for asylum. ORR has made great strides in terms of the treatment of unaccompanied children, as compared to when the INS detained children, although ORR continues to face many challenges.

A recent report released by the Women’s Refugee Commission found that Border Patrol and ICE continue to detain children in inappropriate facilities.¹⁷ While the HSA transferred custody of unaccompanied minors to ORR, the Women’s Refugee Commission found that this “transfer of custody” has been incomplete because DHS still serves as the gatekeeper in deciding which children meet the definition of “unaccompanied,” and, accordingly, which children will be transferred to ORR, and when. As a result, not all unaccompanied children are transferred to ORR custody, and many who are transferred are not transferred within 72 hours, as mandated by the *Flores* Settlement and recently enacted legislation. In some situations DHS inappropriately retains custody of some children who should be considered “unaccompanied.” Under this current

¹⁷ See Women’s Refugee Commission & Orrick Herrington & Stuciliffe LLP, “Halfway Home: Unaccompanied Children in Immigration Custody,” (Feb. 2009).

model, DHS exerts a significant and inappropriate influence over care and custody of unaccompanied children despite the fact that ORR is the legal custodian for this population.

Regarding these custodial challenges, DHS should:

- Work with HHS to clarify between ICE, Border Patrol and ORR the definition of unaccompanied alien child and age determination techniques so that no child, regardless of criminal history, remains in ICE or CBP custody for more than 72 hours unless in the physical company of a parent.
- Work with HHS to implement the provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) regarding age determinations.
- Release or place into alternatives to detention programs *as a family unit* children who are detained or apprehended with their parents.
- Direct Border Patrol and ICE to provide all information collected about children in their custody to DUCS so that DUCS can maintain a database of all children in federal custody.
- Direct Border Patrol to improve conditions for children at all stations and holding facilities, including the hiring of Juvenile Officers with childcare or child welfare backgrounds and expertise to supervise and assume care and responsibility of children until they can be transferred to ORR.
- Ensure that Border Patrol agents, Border Patrol juvenile officers and ICE officers are properly trained to interview children and to recognize potential victims of trafficking and children who fear return to their native country.
- Institute policies to ensure that children who are released are released into safe and appropriate settings.
- Utilize child-friendly, shelter-type facilities for holding children pending transfer to ORR or who have been transferred from ORR to ICE pending removal. Under no circumstances should these children be held in facilities intended for juvenile offenders or commingled with adults or youth offenders.

9. Allow asylees and refugees to be promptly reunified with vulnerable family members abroad by expediting the processing of I-730s.

Asylees and refugees who have already been granted legal status in the United States are given two years to file the Form I-730 Refugee/Asylee Relative Petition with USCIS if they wish for their spouse and unmarried children under the age of 21 to join them in the United States. It now takes the USCIS Nebraska Service Center, which is responsible for all I-730 adjudications, about 8 months to issue an approval notice for an I-730. After this approval, it often takes weeks or

months for the relative to travel to a United States consular post abroad where they can begin the procedure for immigrating to the United States. Security clearances can also add months to the process. In the meantime, these family members are often experiencing persecution, are in immediate danger of being persecuted, and/or are survivors of trauma. Relatives of asylees and refugees are among the most at-risk beneficiaries of all applications that USCIS is responsible for adjudicating, yet processing times for these petitions have gotten longer over time. DHS should:

- Prioritize I-730 adjudication by USCIS with a goal of processing them within three months of submission.
- Allow for children conceived or born after the time of filing to join the rest of the family.
- Generously apply the exception to the two year filing deadline for the I-730, which allows DHS to extend the filing period for “humanitarian reasons,” in recognition of the fact that refugees often lose contact with their spouse and/or children in the chaos of war, and it can take years for the relative in the U.S. to locate them or even to learn that they are still alive.

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

One of the asylum reforms enacted in 1995 barred asylum-seekers from 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 events¹⁸—and is prone to chronic error. It also unnecessarily lengthens the time

¹⁸ 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).

an asylum-seeker must wait in order to obtain employment authorization. To reduce administrative burdens and enable asylum-seekers to fairly pursue relief, DHS should:

- 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.