

7-1-2009

Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers

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Recommended Citation

Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B. U. Int'l. L. J. 61 (2009).

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AFFIRMATIVELY DENIED: THE DETRIMENTAL EFFECTS OF A REDUCED GRANT RATE FOR AFFIRMATIVE ASYLUM SEEKERS

Rachel D. Settlage*

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I. INTRODUCTION

Mr. O¹ arrived in the United States in 1997, fleeing persecution and genocide in his small central African country. Mr. O filed for asylum affirmatively before the United States Citizenship and Immigration Services (USCIS); however, because of severe emotional and physical problems, he was unable to apply until 2001. The USCIS asylum officer who heard Mr. O's case in 2004 declined to grant Mr. O asylum, instead referring Mr. O to an immigration judge in the Executive Office for Immigration Review (EOIR) on the grounds that he had failed to file for asylum within a year of arriving in the United States, even though he had, as the immigration judge would later note, an extraordinarily strong exception to the one-year filing deadline. In 2007, Mr. O received a final grant of asylum from the immigration judge. Despite being a bona fide refugee with an extraordinarily strong protection claim, Mr. O was forced to undergo a prolonged asylum process, which was exacerbated by the decision of the USCIS asylum officer not to grant asylum. As a result, seven years after filing for asylum affirmatively, and more than 10 years after arriving in the United States, Mr. O is still waiting to be reunited with his minor children, whom he was forced to leave behind when he fled Africa. Unfortunately, Mr. O's case is not unique. In the aftermath of the events of September 11, 2001 (9/11), a greater percentage of affirmative asylum seekers in the United States are facing a prolonged asylum process.

Under international law, the United States is obligated to provide protection to persons fleeing from persecution.² With these obligations in mind, the United States created a multi-tiered process whereby protection seekers in the United States can apply for asylum. In the aftermath of the events of 9/11, however, the number of asylum applications

¹ Mr. O is a former client of the author, and has given his permission for his story to be used in this article.

² See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [together hereinafter U.N. Refugee Convention]. See *infra* Part II.

received in the United States dropped significantly, as did the asylum grant rate at both USCIS asylum offices and EOIR immigration courts.³ Although the asylum grant rate in EOIR immigration courts rebounded to pre-9/11 levels by 2003, the asylum grant rate at USCIS has remained significantly lower than pre-9/11 rates.⁴

The ultimate effect of this post 9/11 change in grant rates is that a greater proportion of affirmative asylum seekers are unsuccessful in their claims at the first stage of the asylum process before USCIS asylum officers and, consequently, pay a much higher cost in time, resources, and mental well-being because they are referred to EOIR immigration courts where they must defend their claims a second time. Yet, of those individuals referred by USCIS asylum officers to EOIR immigration judges in 2007, 51 percent were ultimately granted asylum by an immigration judge.⁵ In other words, more than half of all affirmative asylum seekers referred to immigration judges have valid claims, but are nevertheless forced to undergo a prolonged asylum process and the harmful consequences of that prolonged process.

Part II of this article will look at the obstacles asylum-seekers confront in getting to the United States, as well as the process they face once they apply for asylum, with a focus on the first two stages of the affirmative asylum process in the United States. This section will also provide an analysis of asylum statistics at USCIS asylum offices and EOIR immigration courts over the past decade. Part III of this article will offer possible reasons for why the asylum grant rate at USCIS has dropped so significantly post-9/11. Finally, Part IV will analyze the devastating consequences that a prolonged asylum process can have on the lives of many asylum seekers with valid claims.

II. OBTAINING ASYLUM IN THE UNITED STATES

The United States is obligated under international law to provide relief to persons fleeing from persecution in the form of refugee status or asylum. The United States' obligations arise first and foremost under the 1951 United Nations Convention Relating to the Status of Refugees, and the 1967 United Nations Protocol Relating to Status of Refugees (together the "U.N. Refugee Convention"), which the United States rati-

³ See *infra* Table 2: USCIS Asylum Cases Filed or Reopened, Decided on the Merits, Granted, and Grant Rates; see *infra* Table 3: EOIR Asylum Applications Received, Decided on the Merits, Granted, and Grant Rates.

⁴ See *infra* Table 2: USCIS Asylum Cases Filed or Reopened, Decided on the Merits, Granted, and Grant Rates; see *infra* Table 3: EOIR Asylum Applications Received, Decided on the Merits, Granted, and Grant Rates.

⁵ See *infra* Table 4: EOIR Affirmative and Defensive Grant Rates.

fied in 1968.⁶ Other international agreements relevant to U.S. obligations to provide relief to persons fleeing persecution include the Universal Declaration of Human Rights,⁷ the International Covenant on Civil and Political Rights,⁸ and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁹ In addition, some U.S. courts have looked to customary international law as guidance in claims involving human rights.¹⁰

Under domestic law, U.S. obligations towards persons seeking protection are found primarily in the Refugee Act of 1980, which established the process for obtaining asylum, granted the Attorney General the authorization and discretion to grant asylum, and codified certain provisions from the U.N. Refugee Convention, including the definition of “refugee.”¹¹ Both refugees and asylees, in order to receive protection, must meet the U.S. statutory definition of a refugee, which is derived from the U.N. Refugee Convention:

[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion¹²

Refugees and asylum-seekers are, however, distinguished by where they apply for protection. Refugees apply for status while outside of the United States. Refugee status is granted after a determination is made by the United Nations High Commissioner for Refugees (UNHCR) to refer an individual for approval and the Department of Homeland Security (DHS) concurs that the protection seeker meets the definition of a refugee. The President of the United States and Congress, acting in consultation, decide how many refugees, and from which groups, to admit and

⁶ U.N. Refugee Convention, *supra* note 2. See also IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 341 (10th ed. 2006).

⁷ Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948).

⁸ International Covenant on Civil and Political Rights arts. 2, 9, *opened for signature* Dec. 16 1966, 999 U.N.T.S. 171.

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁰ See Kurzban, *supra* note 6, at 342.

¹¹ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101 (2006); Immigration and Nationality Act § 208, 8 U.S.C. § 1158; 8 C.F.R. § 208.14 (2008). See also Kurzban, *supra* note 6, at 343; Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT’L L. REV. 47, 53 (2004).

¹² 8 U.S.C. §1101(a)(42)(A).

resettle in the United States each year.¹³ Asylum seekers, on the other hand, must request protection while inside the United States or at its borders.¹⁴ It is only through the asylum process that adjudicators in United States, rather than UN or other personnel abroad, determine whether an applicant qualifies for asylum. Thus, once an asylum seeker has reached the United States, the United States Government is in a unique position vis-a-vis the asylum seeker. The U.S. Government must act, either to grant protection or to send the asylum seeker back to his or her country of origin.¹⁵ As a result, the burden is higher on the U.S. Government when faced with a protection seeker at or within its borders to ensure that protection seekers with valid claims are granted asylum in accordance with international treaty obligations.

However, U.S. immigration laws enacted in the last decade (particularly those enacted after 9/11), the asylum process, and even adjudicators themselves, have shown an ever-increasing bias against protection seekers, who are increasingly viewed as criminals or illegal immigrants.¹⁶ As a result, it is harder than ever for an asylum seeker, particularly an affirmative asylum seeker with a valid claim, to win an asylum application in the United States.

A. *Getting to the United States*

The first hurdle to obtaining asylum in any country is to successfully reach the shores of that country. However, it is increasingly difficult for those seeking asylum to reach a country where they can present an asy-

¹³ 8 U.S.C. § 1157. See Resettlement Section of UNHCR Washington, US Resettlement Overview, <http://www.usaforunhcr.org/usaforunhcr/uploadedfiles/OVERVW06.pdf> (last visited Oct. 11, 2006).

¹⁴ 8 U.S.C. § 1158 (a)(1).

¹⁵ See Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 448 (2006) ("To deny admission to refugees at our border, and force them to return to countries to face serious harm, violates the injunction to 'do no harm,' and thus implicates us in having caused their plight.").

¹⁶ See THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *THE STATE OF THE WORLD'S REFUGEES: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 2006* 61 (2006) [hereinafter UNHCR STATE OF THE WORLD'S REFUGEES] ("More and more, asylum seekers are portrayed not as refugees fleeing persecution and entitled to sanctuary, but rather as illegal migrants, potential terrorists and criminals—or at a minimum, as 'bogus.'"); see also Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT'L J. REFUGEE L. 509, 514, 519 (2006); Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19 INT'L J. REFUGEE L. 401, 418-19 (2007); Andy McSmith & Anne Penketh, *Millions of Refugees Are Hidden Victims of the West's War of Terror, Warns U.N.*, THE INDEPENDENT (U.K.), Apr. 19, 2006, at 4.

lum claim.¹⁷ Only a fraction of refugees have the means to reach the industrialized world and apply for asylum.¹⁸ A primary reason for this, no doubt, is the cost associated with the necessary travel to reach foreign borders. An asylum seeker must be able to afford these costs, or have the assistance of a person or organization able to afford these costs. However, in recent years there has also been an increased focus at the international level on policies of migration control and deterrence at the expense of refugees.¹⁹ In the past few years, many states have begun to implement border and immigration measures, including forced deportations, making it more difficult than ever for asylum seekers to apply for protection in foreign countries even when they can afford to do so.²⁰

If an asylum seeker wishes to reach the United States legally, he must have a valid passport from his home country and, in most cases, must obtain a U.S. visa. Applicants for nonimmigrant visas have always faced challenges in obtaining such a visa, particularly applicants from poorer parts of the world. According to a report issued by DHS and the U.S. Department of State, “(e)mbassies may appear to disproportionately refuse applicants from less developed regions of the world, or from poor sectors of the population, but it can be much more difficult for applicants who are unemployed or marginally employed to show that they intend to

¹⁷ See Feller, *supra* note 16, at 519; see also Mariano-Florentino Cuéllar, *The Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 HARV. L. & POL’Y REV. 401, 407 (2007). At the end of 2006, there were 9,877,707 refugees throughout the world and 743,937 people seeking asylum. See UNITED NATIONS HIGH COMM’R FOR REFUGEES, STATISTICAL YEARBOOK 2006 45 (2007), available at <http://www.unhcr.org/statistics/STATISTICS/478ce2e62.pdf>.

¹⁸ See Price, *supra* note 15, at 447 (noting that the poor, particularly women and children, are less likely to make it to an industrialized country); see also Nicholas Van Hear, “I Went as Far as My Money Would Take Me:” *Conflict, Forced Migration and Class* 12 (Ctr. on Migration, Pol’y & Soc’y, Working Paper No. 6, 2004) (discussing the part class plays on migration patterns).

¹⁹ See Feller, *supra* note 16, at 516 (“Where refugees are seen as little more than a sub-group of irregular migrants, the control of their movement is likely to take precedence over meeting their protection needs, with asylum laws often being but a part of more general immigration restriction legislation in many countries.”); see also Kelley, *supra* note 16, at 406-07; see generally UNHCR, THE STATE OF THE WORLD’S REFUGEES, *supra* note 16.

²⁰ See UNHCR, THE STATE OF THE WORLD’S REFUGEES, *supra* note 16, at 1; see also Kelley, *supra* note 16, at 406-07 (noting, for example, that in 2002 Tanzania and the Democratic Republic of the Congo forcibly deported thousands of protection seekers, and that in 2003, Malaysia and Panama likewise deported hundreds of asylum-seekers and refugees). See also Jodef Roy Benedict, *States Must Provide Protection*, NEW STRAIT TIMES (Malaysia), June 21, 2007 (noting that Europe has implemented stricter border controls and other measures to prevent asylum seekers from reaching European countries including interception operations in the Mediterranean.).

return to their country after visiting the United States.”²¹ Furthermore, while nonimmigrant visas may be authorized for specific purposes, these do not include seeking protection.²²

However, it has become increasingly difficult in the post-9/11 world to obtain a nonimmigrant visa to the United States. Statistics from the U.S. Department of State indicate that nonimmigrant visas are now issued far less frequently than just prior to the events of 9/11.²³ After 9/11 the United States implemented a variety of new restrictions on the issuance of visas. Since January 11, 2002, as part of the Visa Condor Program, all male, and some female, applicants between the ages of 16 and 45 from 26 (mostly Islamic) nations of security interest must undergo new security procedures in order to obtain a U.S. visa.²⁴ In July 2003, the Department of State mandated that consular officials conduct most visa interviews face-to-face with the applicant, a mandate that was codified in the Intelligence and Terrorist Prevention Act of 2004.²⁵ The Visa Waiver Program (VWP), under which nationals of certain countries are exempt from having to obtain visas to enter the United States for a visit or business, and are not required to undergo a consular interview or pre-inspection, was also restricted.²⁶ After September 11, 2001, the United States suspended the VWP for Argentina and Uruguay for security-related reasons.²⁷ In 2002, under the Enhanced Border Security and Visa Entry Reform Act of

²¹ HUMAN SMUGGLING AND TRAFFICKING CENTER, DEPARTMENT OF HOMELAND SECURITY OFFICE OF INTELLIGENCE AND ANALYSIS & DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, A PRIMER ON VISA AND VISAS FRAUD 7 (2008), <http://www.ilw.com/immigdaily/news/2008,0708-visafraud.pdf>.

²² See also Kelley, *supra* note 16, at 420.

²³ See *infra* Table 1: Nonimmigrant Visa Statistics by Region.

²⁴ Visas Condor security checks also required explicit approval from Washington for each applicant. See Wendy D. White & Lois Peterson, *Visas for Visiting Scientists and Students: Current Situation*, 46 *PHYSIOLOGIST* 47, 49 (2003). See also Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 *GEO. IMMIGR. L.J.* 383, 387-88 (2007).

²⁵ Kerwin & Stock, *supra* note 24, at 387 (citing Documentation of Nonimmigrants Under the Immigration and Nationality Act, 68 Fed. Reg. 40127 (July 7, 2003)(interim rule) and Intelligence Reform and Terrorist Prevention Act of 2004, Pub.L. No. 108-458, § 5301, 118 Stat. 3638).

²⁶ As of November 2008, 35 countries were approved to participate in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the UK. U.S. Department of State, Visa Waiver Program (VWP), http://travel.state.gov/visa/temp/without/without_1990.html (last visited Mar. 1, 2009).

²⁷ See Kerwin & Stock, *supra* note 24, at 387, 402-03.

2002, Congress mandated regular reviews of those countries still participating in the VWP.²⁸

Not surprisingly, some asylum seekers use fraudulent documents to travel.²⁹ However, sanctions are increasingly imposed on carriers that transport undocumented or improperly documented foreigners, which have led to increased screening by transport employees.³⁰ DHS has increased the number of its personnel overseas to help foreign airline personnel identify improperly documented aliens to prevent them from boarding planes to the United States.³¹ Pursuant to the 2004 Intelligence Reform and Terrorist Prevention Act, DHS expanded its pre-inspection program at foreign airports and placed additional U.S. Customs and Border Protection inspectors at foreign airports in order to prevent persons identified as national security threats from entering the United States.³² Thus, even for those who can afford the travel expenses, getting to the United States, especially from certain parts of the world, is becoming more difficult regardless of whether one travels with valid or fraudulent travel documents.

It has also gotten harder for those protection seekers who attempt to enter the United States without documentation or inspection. Persons who arrive at a U.S. border without proper documentation are subject to expedited removal.³³ In 2004, the U.S. Government expanded the expe-

²⁸ Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 307(a)(1)(2), 116 Stat. 543, 556.

²⁹ Lutheran Immigration and Refugee Service Fact Sheet: Refugee, Asylum Seeker, Immigrant: What Do These Terms Really Mean?, <http://www.lirs.org/InfoRes/PDFs/FactSheet—Terms.pdf> (last visited Mar. 25, 2009)(noting that “[p]eople who must flee their countries quickly or who for some other reason cannot access the refugee resettlement process become asylum seekers. . . . Usually they are forced to flee without proper documentation such as a passport and visa . . .”).

³⁰ Kelley, *supra* note 16, at 420-21.

³¹ U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS & RECOMMENDATIONS 16 (2005), available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf.

³² MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE (CRS), IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 18 (2008), <http://www.fas.org/sgp/crs/homsec/RL32564.pdf>. See also Kelley, *supra* note 16, at 421 (noting that there are pre-clearance consular sections in certain transportation hubs including, for example, in Aruba, Bermuda, Canada, Ireland, and soon, Mexico).

³³ If apprehended, a person to whom expedited removal applies is detained and removed to his or her country of origin as soon as possible, and is not permitted to see an immigration judge unless he or she is determined to have a credible fear of return to his or her own country. Any person who expresses a fear of return or an intention to apply for asylum is referred to a USCIS asylum officer for a “credible fear” interview. If found to have a credible fear, he or she is taken out of the expedited removal process, automatically detained, and placed in removal proceedings before an immigration judge. See Simona Agnolucci, Note, *Expedited Removal: Suggestions*

dited removal process for persons without documentation found at or near the U.S. border,³⁴ without sufficiently protecting the rights of such persons to apply for asylum.³⁵ In addition, U.S. Coast Guard and naval forces have intercepted and forcibly returned persons arriving by sea without documentation, with very little process for determining if asylum claims exist.³⁶

For those asylum seekers who are able to make it to the United States, their struggle has only just begun. Many asylum seekers have to contend with culture shock; an inability to speak the language; no friends, family, or other support; and an extremely complex and confusing legal process. Even those who do manage to navigate the U.S. asylum process face an uphill battle to convince an adjudicator that their asylum claim is legitimate.

for Reform in Light of the United States Commission on International Religious Freedom Report and the Real ID Act, 57 HASTINGS L.J. 619, 623-24 (2006).

³⁴ Specifically, expedited removal was expanded to land borders between ports of entry, and to anyone arrested within 100 miles of the Mexico or Arizona border within 14 days of their arrival in the United States. See Press Release, Department of Homeland Security, DHS Announces Expanded Border Control Plans (Aug. 10, 2004) (on file with author); see also *id.* at 623-24.

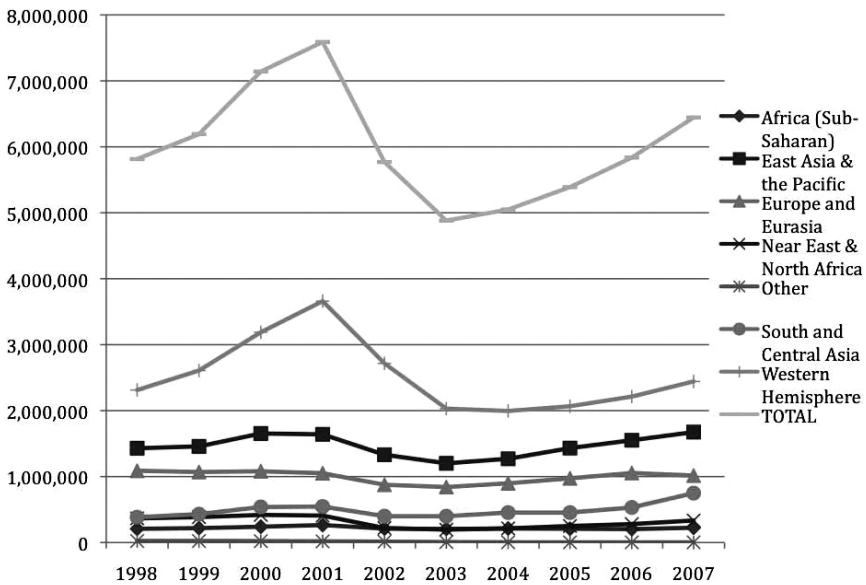
³⁵ In 2005, the United States Commission on International Religious Freedom (USCIRF), a bipartisan federal commission, released a study on expedited removal which showed that some immigration officials were improperly processing asylum seekers for deportation. Specifically, in 15 percent of the cases observed by USCIRF members, immigration officials failed to refer illegal immigrants to credible fear interviews, even when the immigrant expressed a fear of return. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS & RECOMMENDATIONS, *supra* note 31, at 20. See also Rachel L. Swarns, *Rights Group Criticize Speedy Deportations*, N.Y. TIMES, Feb. 20, 2006, at A9; Agnolucci, *supra* note 33, at 623-24.

³⁶ Harold Hongju Koh, *Reflections of Refoulment and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 3 (1994) (noting that Haitians arriving in American waters in the late 1980's and early 1990's were subject to interdiction and repatriation without having their asylum claims adjudicated). Kelley, *supra* note 16, at 423 (noting that in 2004, the Bush Administration had a blanket policy of forcibly returning any Haitians intercepted at sea).

TABLE 1: NONIMMIGRANT VISAS ISSUED BY REGION OF NATIONALITY³⁷

	Africa, Sub-Saharan	East Asia & Pacific	Europe & Eurasia	Near East & North Africa	Other ³⁸	South & Central Asia	Western Hemisphere	Total
1998	208,342	1,430,081	1,088,242	366,145	23,387	385,054	2,312,902	5,814,153
1999	218,529	1,457,532	1,069,867	385,493	23,003	430,091	2,607,963	6,192,478
2000	239,837	1,653,148	1,080,822	419,247	21,269	539,104	3,188,209	7,141,636
2001	265,511	1,640,446	1,050,641	408,758	17,622	545,836	3,659,964	7,588,778
2002	211,381	1,331,309	876,083	220,328	13,670	400,208	2,716,458	5,769,437
2003	206,191	1,201,053	841,700	195,583	7,689	398,917	2,030,499	4,881,632
2004	213,150	1,270,021	897,928	214,710	3,987	454,358	1,994,945	5,049,099
2005	209,059	1,431,912	973,278	250,899	3,101	454,268	2,066,420	5,388,937
2006	203,928	1,550,710	1,054,540	280,064	2,721	531,759	2,212,996	5,836,718
2007	224,163	1,674,714	1,015,815	334,753	3,005	749,294	2,442,512	6,444,256

FIGURE 1: NONIMMIGRANT VISAS ISSUED BY REGION OF NATIONALITY



³⁷ U.S. DEPARTMENT OF STATE, REPORT OF THE VISA OFFICE 2007, Table XVIII, available at <http://www.travel.state.gov/pdf/FY07AnnualReportTableXVIII.pdf>.

³⁸ Other includes “no nationality” and “United Nations Laissez-Passer” (UN personnel traveling on special documents). U.S. DEPARTMENT OF STATE, REPORT OF THE VISA OFFICE 2007, *supra* note 37, at Table XVIII.

B. *The Affirmative Asylum Process in the United States*

Once in the United States, an applicant can apply for asylum affirmatively through a USCIS asylum office in the DHS. If an applicant is not successful in her application, she is generally referred to an EOIR Immigration Judge in the Department of Justice and placed in removal proceedings, requiring that the applicant pursue her asylum claim defensively. If the immigration judge denies asylum, the applicant can appeal her case to the Board of Immigration Appeals (BIA), and from there to a Federal Circuit Court.³⁹ For an affirmative asylum seeker, the most important level of the process is before a USCIS asylum officer; if an applicant is successful at that stage, she can more quickly begin a new and safe life in the United States, begin healing if she suffered trauma, and reunite with her family.

USCIS and EOIR both regularly publish statistics on asylum applications, including application receipts, grants, and denials. However, each agency generates its statistics in a different manner, and each agency makes different data sets publicly available. Thus, it is almost impossible to compare the statistics of each agency.⁴⁰ Accordingly, this article will analyze the statistical data available for each agency separately and identify trends within each agency.

1. Applying for Asylum Affirmatively at USCIS

An applicant may apply for asylum affirmatively if he is not already in detention or in removal proceedings. An applicant who files for asylum affirmatively does so through one of the eight USCIS regional asylum

³⁹ An analysis of the asylum grant rates at the appeal levels (BIA and Federal Circuit Courts) is outside the scope of this article.

⁴⁰ It is impossible to make a direct comparison of grant rates between EOIR and USCIS. As documented in the DHS Statistical Yearbooks, USCIS generates its statistics by looking at asylum cases regardless of how many individuals are included in any particular case. See, e.g., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS 55-60, available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf> [hereinafter 2004 YEARBOOK OF IMMIGRATION STATISTICS]. EOIR, however, generates its statistics by looking at individual asylum seekers. When an applicant files for asylum, he or she is given an "A" number to identify his or her case. Any immediate family members who are in the United States are included in the principal's application as derivative asylum seekers, but all receive an individual "A" number. EOIR generates its statistics by looking at "A" numbers. Telephone interview by Tanya Powers with Elaine Thomas, Public Affairs, Executive Office for Immigration Review, DHS (July 25, 2008). See, e.g., OFFICE OF PLANNING, ANALYSIS, AND TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2007 STATISTICAL YEARBOOK (2008), available at <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf> [hereinafter FY 2007 STATISTICAL YEARBOOK].

offices.⁴¹ The applicant files an I-589 Application for Asylum and Withholding, along with any supporting documentation. After receipt of the application, the asylum office schedules an interview for the applicant with an asylum officer. The interview, which is considered non-adversarial,⁴² is conducted in the asylum office or by an asylum officer on a circuit ride in an appropriate USCIS local office. After the interview, the asylum officer grants asylum or, if the officer does not find that a valid claim exists or finds that the applicant is otherwise inadmissible, refers the applicant to an immigration court, where he is automatically placed in removal proceedings. Asylum officers may only deny asylum cases when the applicant holds another valid status (e.g., foreign student).⁴³

Not surprisingly, the absolute number of affirmative asylum applications filed in the United States dropped significantly after the events of 9/11. In 2007, only 32,213 asylum cases were filed or reopened with USCIS.⁴⁴ When compared with the 63,230 asylum application filed or reopened in 2001, this represents a decline of 49%.⁴⁵

The overall rate for grants of asylum by USCIS asylum officers also dropped significantly after 9/11, and still has not rebounded to pre-9/11 levels. In 2007, the overall USCIS asylum grant rate was 28%, which

⁴¹ There are regional asylum offices in Arlington, VA; Chicago, IL; Houston, TX; Los Angeles, CA; Miami, FL; Newark (Lyndhurst), NJ; New York (Rosedale), NY; and San Francisco, CA. See U.S. Citizenship & Immigration Services Office Locator, https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=ZSY (follow "Choose your state from the list" drop-down menu) (last visited July 11, 2008).

⁴² 8 C.F.R. § 208.9(b) (2007).

⁴³ In such cases, applicants cannot be placed in removal proceedings because they have a valid status. Prior to denying asylum in such cases, the asylum officer will issue a Notice of Intent to Deny, allowing the applicant the opportunity to provide more information. Affirmative asylum applicants who are denied asylum in such circumstances cannot appeal their case to the immigration judge. Only if they are later placed in removal proceedings after their valid status expires can they again raise their asylum claim defensively. See 8 C.F.R. § 208.14(c)(2) (2000). See also Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 741 n.11 (2002). The number of asylum applications denied by asylum officers under these circumstances typically represents a very small percentage of cases not granted. See, e.g., 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 40, at 55-60.

⁴⁴ See *infra* Table 2: USCIS Asylum Cases Filed or Reopened, Decided on the Merits, Granted, and Grant Rates.

⁴⁵ See *infra* Table 2: USCIS Asylum Cases Filed or Reopened, Decided on the Merits, Granted, and Grant Rates. In addition, every geographic region saw a significant drop in the number of applications filed or reopened in 2007 as compared to those filed or reopened pre-9/11. Only applications from individuals in the "Other" category, which includes stateless individuals and those whose nationality is unknown, have returned to pre-9/11 levels. See *infra* Appendix A: USCIS Asylum Cases Filed or Reopened by Region.

represents a 35% decrease from the 2001 USCIS asylum grant rate of 43%.⁴⁶

TABLE 2: USCIS ASYLUM CASES FILED OR REOPENED, DECIDED ON THE MERITS, GRANTED, AND GRANT RATES

Year	Asylum Cases Filed or Reopened During the Year	Asylum Cases Decided on the Merits ⁴⁷	Asylum Cases Granted	Grant Rate ⁴⁸
1998 ⁴⁹	55,428	42,738	9,949	23%
1999 ⁵⁰	42,207	34,544	13,241	38%
2000 ⁵¹	46,776	37,897	16,549	44%
2001 ⁵²	63,230	47,043	20,306	43%
2002 ⁵³	63,427	52,607	18,998	36%

⁴⁶ See *infra* Table 2: USCIS Asylum Cases Filed or Reopened, Decided on the Merits, Granted, and Grant Rates. Looking at grant rates regionally, the grant rate in 2007 for every geographic region in the world was also significantly less than the pre-9/11 rates. See *infra* Appendix B: USCIS Asylum Grant Rates by Region.

⁴⁷ Includes cases granted, denied, or referred to an Immigration Judge after an interview or because of a filing deadline issue.

⁴⁸ The asylum grant rate is calculated as the number of cases granted divided by the number of cases decided on the merits.

⁴⁹ IMMIGRATION & NATURALIZATION SERVICE, DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 102, 105 (2000), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf>

⁵⁰ IMMIGRATION & NATURALIZATION SERVICE, DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 100, 103 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/FY99Yearbook.pdf>.

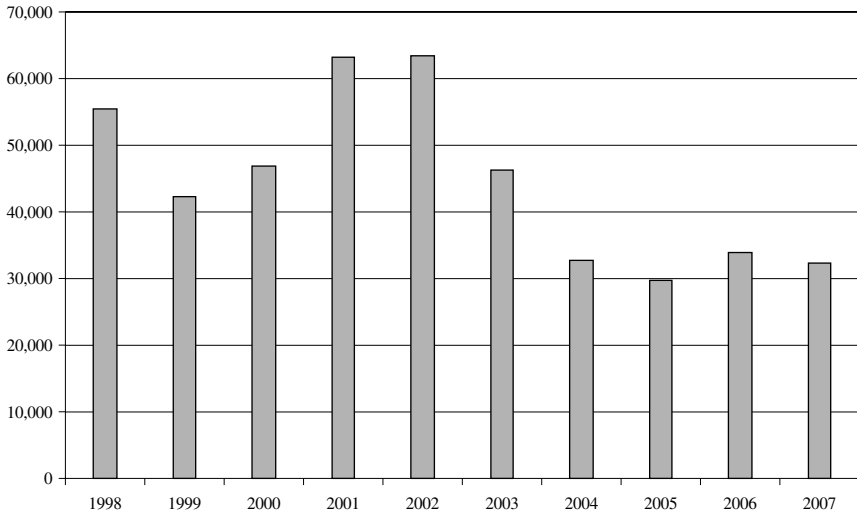
⁵¹ IMMIGRATION & NATURALIZATION SERVICE, DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 100, 103 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf>

⁵² IMMIGRATION & NATURALIZATION SERVICE, DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 102, 105 (2003), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf>

⁵³ OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 69, 72 (2003), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2002/Yearbook2002.pdf>.

2003 ⁵⁴	46,272	39,456	11,434	29%
2004 ⁵⁵	32,682	31,582	10,101	32%
2005 ⁵⁶	29,752	29,800	9,554	32%
2006 ⁵⁷	33,879	32,811	10,059	31%
2007 ⁵⁸	32,213	37,024	10,191	28%

FIGURE 2: USCIS—ASYLUM CASES FILED OR REOPENED



⁵⁴ OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 60, 63 (2004), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf>.

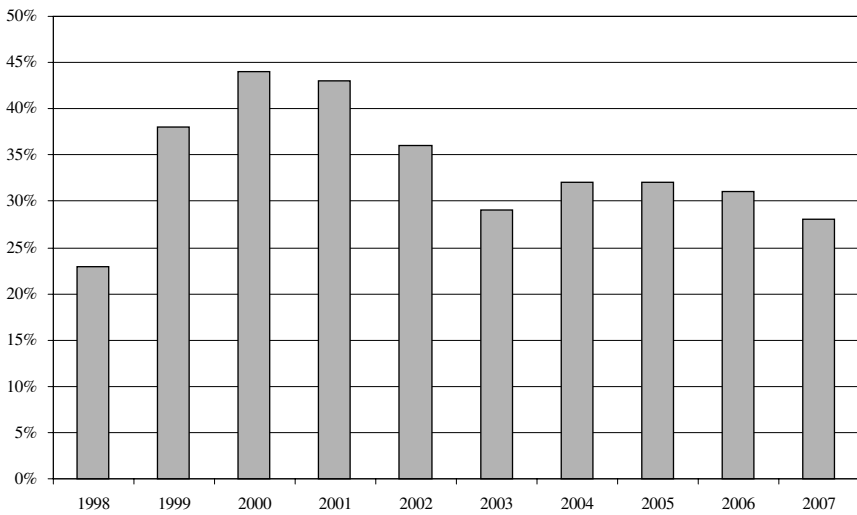
⁵⁵ 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 40, at 55, 58.

⁵⁶ E-mail from Sally Armstrong, Management & Program Analyst, U.S. Citizenship & Immigration Services, Office of Refugee, Asylum, and International Operations - Asylum Division to Rachel D. Settlege, Clinical Fellow, University of Baltimore School of Law (Sept. 22, 2008) (on file with author) [hereinafter Armstrong email] (2005-2007 statistics).

⁵⁷ *Id.*

⁵⁸ *Id.*

FIGURE 3: USCIS-ASYLUM GRANT RATES



2. Applying for Asylum Defensively Before an EOIR Immigration Court

If an asylum applicant is not granted asylum by a USCIS asylum officer, she is generally referred to an EOIR immigration court. Individuals in detention or who are already in removal proceedings start their asylum process defensively before an immigration court. An applicant's first appearance is at a Master Calendar Hearing to determine the nature of the relief sought and to set a date for a merits hearing. The merits hearing is an adversarial hearing in which the applicant presents her case, including any witnesses, and is subject to cross-examination by a DHS Immigration and Customs Enforcement (ICE) trial attorney. At the end of the merits hearing, the immigration judge will decide either to grant asylum or to deny asylum and enter an order for removal.

In 2007, EOIR immigration courts received 54,957 asylum cases from individuals applying either affirmatively or defensively.⁵⁹ When compared with the 62,038 asylum cases received from individuals in 2001, this represents a decline of eleven percent.⁶⁰

⁵⁹ See *infra* Table 3: EOIR Asylum Applications Received, Decided on the Merits, Granted, and Grant Rates.

⁶⁰ See *infra* Table 3: EOIR Asylum Applications Received, Decided on the Merits, Granted, and Grant Rates. Most geographic regions did not begin to see a significant decline in the number of asylum applications, affirmative or defensive, received by immigration courts until a couple of years after the events of 9/11. However, with the exception of the Western Hemisphere, the number of applications received in 2007 remains lower for every region when compared to pre-9/11 levels. See *infra* Appendix C: EOIR Asylum Applications Received by Region.

In contrast to USCIS grant rates, by 2003 the overall grant rate for asylum applications adjudicated by immigration judges had returned to the pre-9/11 rate, and by 2007 actually surpassed the pre-9/11 rate.⁶¹ Thus, applicants are more likely to be granted asylum before an immigration judge today than before 9/11, while the opposite is true for applicants applying affirmatively before USCIS asylum officers. In other words, it has become harder to win an asylum claim at the first stage of the asylum process, and as a result, some legitimate asylum seekers are forced to undergo a prolonged process. The detrimental effects resulting from this prolonged process will be discussed in more detail in Part IV.

TABLE 3: EOIR ASYLUM APPLICATIONS RECEIVED, DECIDED ON THE MERITS, GRANTED, AND GRANT RATES

Year	Total Asylum Applications Received ⁶²	Asylum Applications Decided on the Merits ⁶³	Individuals Granted Asylum	Grant Rate ⁶⁴
1998	72,080 ⁶⁵	27,534 ⁶⁶	7,252 ⁶⁷	26%
1999	54,916 ⁶⁸	26,590 ⁶⁹	8,355 ⁷⁰	31%
2000	51,967 ⁷¹	25,257 ⁷²	8,905 ⁷³	35%

⁶¹ See *infra* Table 3: EOIR Asylum Applications Received, Decided on the Merits, Granted, and Grant Rates.

⁶² Includes both affirmative & defensive asylum applications.

⁶³ Includes both affirmative & defensive asylum applications.

⁶⁴ The asylum grant rate is calculated as the number of cases granted divided by the number of cases decided on the merits (i.e. cases granted, conditionally granted, or denied).

⁶⁵ OFFICE OF PLANNING & ANALYSIS, U.S. DEP'T OF JUSTICE, FY 2002 STATISTICAL YEAR BOOK I1 (2003), available at <http://www.usdoj.gov/eoir/statspub/fy02syb.pdf> [hereinafter FY 2002 STATISTICAL YEAR BOOK].

⁶⁶ *Id.* at K1.

⁶⁷ Office of Planning and Analysis, U.S. Department of Justice, Asylum Statistics: Fiscal Year 1998, 1 (Jan. 2003), <http://www.usdoj.gov/eoir/efoia/FY98AsyStats.pdf> [hereinafter Asylum Statistics FY 1998].

⁶⁸ OFFICE OF PLANNING & ANALYSIS, U.S. DEP'T OF JUSTICE, FY 2003 STATISTICAL YEAR BOOK I1 (2004), available at <http://www.usdoj.gov/eoir/statspub/fy03syb.pdf> [hereinafter FY 2003 STATISTICAL YEAR BOOK].

⁶⁹ *Id.* at K1.

⁷⁰ Office of Planning and Analysis, U.S. Department of Justice, Immigration Courts: FY 1999 Asylum Statistics, 9 (April 20, 2004), <http://www.usdoj.gov/eoir/efoia/FY99AsyStats.pdf> [hereinafter Asylum Statistics FY 1999].

⁷¹ OFFICE OF PLANNING & ANALYSIS, U.S. DEP'T OF JUSTICE, FY 2004 STATISTICAL YEAR BOOK I1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf> [hereinafter FY 2004 STATISTICAL YEAR BOOK].

⁷² *Id.* at K2.

⁷³ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2000 Asylum Statistics, 9 (April 2005), <http://www.usdoj.gov/eoir/efoia/FY00AsyStats.pdf> [hereinafter Asylum Statistics FY 2000].

2001	62,038 ⁷⁴	25,037 ⁷⁵	7,956 ⁷⁶	32%
2002	74,712 ⁷⁷	29,367 ⁷⁸	8,660 ⁷⁹	29%
2003	67,268 ⁸⁰	35,790 ⁸¹	12,911 ⁸²	36%
2004	57,672 ⁸³	33,885 ⁸⁴	12,352 ⁸⁵	36%
2005	53,160 ⁸⁶	30,924 ⁸⁷	11,493 ⁸⁸	37%
2006	55,654 ⁸⁹	29,918 ⁹⁰	13,352 ⁹¹	45%
2007	54,957 ⁹²	27,657 ⁹³	12,807 ⁹⁴	46%

⁷⁴ OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEAR BOOK I1, (2006), *available at* <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf> [hereinafter FY 2005 STATISTICAL YEAR BOOK]

⁷⁵ *Id.* at K2.

⁷⁶ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2001 Asylum Statistics, 9 (April 2005), <http://www.usdoj.gov/eoir/efoia/FY01AsyStats.pdf> [hereinafter Asylum Statistics FY 2001].

⁷⁷ OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK I1 (2007), *available at* <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> [hereinafter FY 2006 STATISTICAL YEAR BOOK]

⁷⁸ *Id.* at K2.

⁷⁹ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2002 Asylum Statistics, 9 (April 2006), <http://www.usdoj.gov/eoir/efoia/FY02AsyStats.pdf> [hereinafter Asylum Statistics FY 2002].

⁸⁰ FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at I1.

⁸¹ *Id.* at K2.

⁸² Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2003 Asylum Statistics, 9 (April 2008), <http://www.usdoj.gov/eoir/efoia/FY03AsyStats.pdf> [hereinafter Asylum Statistics FY 2003].

⁸³ FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at I1.

⁸⁴ *Id.* at K2.

⁸⁵ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2004 Asylum Statistics, 9 (April 2008), <http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf> [hereinafter Asylum Statistics FY 2004].

⁸⁶ FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at I1.

⁸⁷ *Id.* at K2.

⁸⁸ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2005 Asylum Statistics, 9 (April 2008), <http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf> [hereinafter Asylum Statistics FY 2005].

⁸⁹ FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at I1.

⁹⁰ *Id.* at K2.

⁹¹ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2006 Asylum Statistics, 9 (April 2008), <http://www.usdoj.gov/eoir/efoia/FY06AsyStats.pdf> [hereinafter Asylum Statistics FY 2006].

⁹² FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at I1.

⁹³ *Id.* at K2.

⁹⁴ Office of Planning, Analysis, and Technology, U.S. Department of Justice, Immigration Courts: FY 2007 Asylum Statistics, 9 (April 2008), <http://www.usdoj.gov/eoir/efoia/FY07AsyStats.pdf> [hereinafter Asylum Statistics FY 2007].

FIGURE 4: EOIR ASYLUM APPLICATIONS RECEIVED

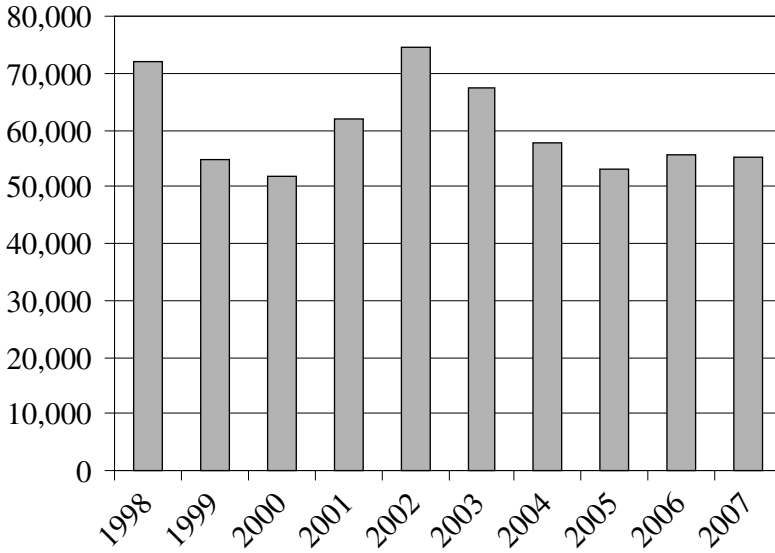
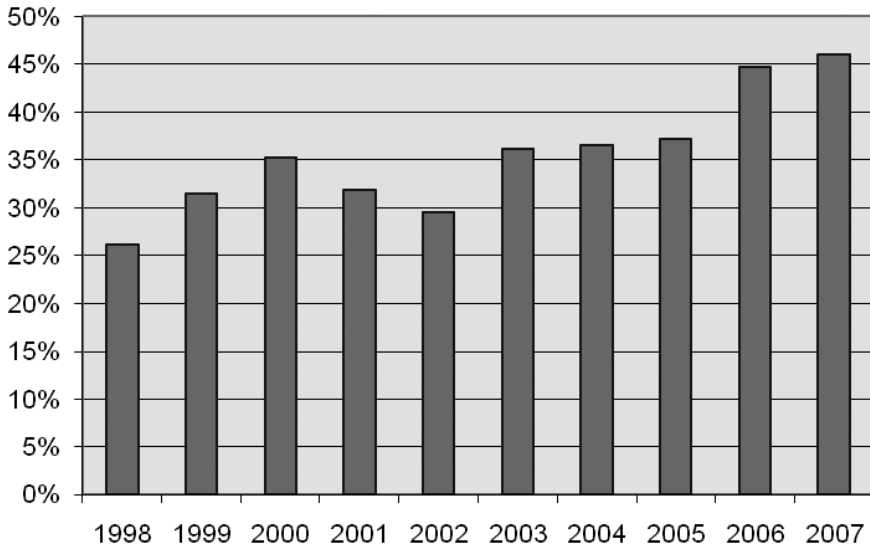


FIGURE 5: EOIR ASYLUM GRANT RATES



III. ANALYSIS OF REDUCED ASYLUM GRANT RATES AT USCIS ASYLUM OFFICES

Given the expanded restrictions on both nonimmigrant and immigrant entry into the United States, it is not surprising that the overall number of affirmative asylum applications received by USCIS dropped and has not returned to the pre-9/11 level. What is not so clear is why the grant rate for affirmative asylum applications before the USCIS also dropped so

significantly, but unlike the EOIR asylum grant rate, has not rebounded. The answer may lie in the fact that asylum law is becoming increasingly complex and restrictive at a time when asylum offices are overburdened and understaffed, and applicants more often than not are unrepresented by counsel.

A. *Asylum Officers*

The Asylum Officer Corps (AOC) was created in 1990 in order to develop professional asylum officers who were specially trained to handle asylum claims.⁹⁵ New asylum officers complete two five-week training courses, in addition to periodic local training.⁹⁶ All asylum decisions are reviewed by supervisory asylum officers, and each asylum office has at least one quality assurance or training officer to monitor the supervisory asylum officers.⁹⁷ Nevertheless, despite this training and these oversight mechanisms, there is inconsistency – at times significant inconsistency – in the grant rates between and within asylum offices.⁹⁸

While the training of asylum officers is thorough, asylum officers need only have a bachelor's degree to be eligible for the job, and, as a result, only some asylum officers have a law degree.⁹⁹ Without a law degree, it is

⁹⁵ 54 Fed. Reg. 30,676 (July 27, 1990) (codified at 8 C.F.R. § 208.1).

⁹⁶ See U.S. DEPARTMENT OF STATE, 2006 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, Appendix D: Department of Homeland Security International Religious Freedom Act (IRFA), available at <http://www.state.gov/g/drl/rls/irf/2006/71482.htm>. See also U.S. Citizenship and Immigration Services, Core Occupations, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=13b7f41e89a0e010VgnVCM1000000ecd190aRCRD&vgnnextchannel=64039c7755cb9010VgnVCM10000045f3d6a1RCRD> (under Asylum Officer (AO)) (last visited July 1, 2008) (“Part 1 of the Asylum Officer basic training course is 5½ -weeks long and includes instruction in the following subject areas: Immigration Law, U.S. Citizenship and Immigration Services Adjudication Process and Procedures, Naturalization Process and Procedures, Fraudulent Document Detection, EEO, Sexual Harassment, and Utilization of Immigration Data Base Systems. Part 2 of the Asylum Officer basic training course is a 5-week long Asylum-specific training. Topics include United States Asylum and Refugee Law, International Human Rights Law, Interviewing Techniques, Decision-Making and Decision-Writing Skills, Effective Country Conditions Research using Computer Data Bases and other Reference Materials, and Utilization of Immigration Asylum Data Base System. In order to successfully complete basic training all officers must obtain a score of 70% or better in each of the major areas of study, as well as satisfactorily complete all required Practical Exercises.”).

⁹⁷ Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 311 (2007) (noting as well that the Asylum Office headquarters also has various quality assurance and training staff).

⁹⁸ See *id.* at 313-25. “[T]he existing mechanisms have not created a just system in all regional offices for those whom America wants to protect.” *Id.* at 325.

⁹⁹ In 2004, only sixty percent of the asylum officer corps had a graduate degree or had completed some level of graduate coursework. Immigration Officer Academy,

unlikely that asylum officers have all of the skills they need to truly understand and apply the highly complex law that governs the granting of asylum. This situation is exacerbated by the fact that immigration law is rapidly changing and has undergone some significant and intricate modifications since 9/11.

In addition, asylum offices are understaffed and overburdened, leading to arduous work conditions for asylum officers. Asylum officers must conduct up to 18 asylum interviews in a two-week pay period in addition to researching the individual cases and country conditions following each interview, and writing detailed decisions.¹⁰⁰ After other work requirements such as local training and administrative duties, asylum officers have only a few hours to meet with each applicant and render a decision.¹⁰¹ The USCIS Ombudsman, in his 2007 Annual Report, further noted that “[a]sylum officers seem to have extremely limited access to any investigative support – locally and internationally – to help verify events, locations, and persons referenced in asylum applications. As applicant credibility is critical to asylum determinations, asylum officers should have timely access to investigative services to corroborate claims.”¹⁰²

Under these conditions, it is impossible for asylum officers to adequately research each case and render well-reasoned and considered opinions in all, or even most, cases. Even the Asylum Officer Basic Training Course Manual notes that “if the productivity rate for affirmative asylum applications is set too high, the quality of adjudications would likely suffer.”¹⁰³ At the same time, however, it fails to recognize that the

Asylum Officer Basic Training Course, Lesson: Corps Values and Goals, at 7 (Jan. 28, 2004), available at http://www.rmsscDenver.org/legal_aobtc2.html.

¹⁰⁰ In fact, asylum officers are rated in their performance evaluations on their ability to complete eighteen cases in the two-week pay period. *Id.* at 8, 10. From the inception of the asylum officer corps, asylum officers were expected to handle large caseloads; in 1992, it was estimated that asylum officers would have only three hours to devote to each case and that they would complete twelve cases per week. Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 275 (1992).

¹⁰¹ See Benjamin Johnson & Walter A. Ewing, *Asylum Essentials: The U.S. Asylum Program Needs More Resources, Not Restrictions*, Immigration Policy Ctr. (Feb. 2005), <http://www.immigrationpolicy.org/index.php?content=PR0502> (last visited Mar. 1, 2009). Asylum officers typically do not receive the asylum application until the morning of the interview. Immigration Equality, LGBT/HIV Asylum Manual, http://immigrationequality.org/manual_template.php?id=1049#D_26_7 (last visited June 10, 2007).

¹⁰² DEP’T OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN ANNUAL REPORT 2007, 95 (2007), available at http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

¹⁰³ Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Corps Values and Goals, *supra* note 99, at 11.

current productivity standard of eighteen cases in a two-week period is too high. It is not surprising that in an anonymous survey conducted by the American Federation of Government Employees, a number of asylum officers indicated that they have a low level of confidence in the accuracy of their decisions.¹⁰⁴ This may explain, in part, why asylum officers refer so many cases to immigration judges that are ultimately judged to be legitimate: they do not have the confidence to grant asylum in those cases in which there is a difficult or complex issue.

B. *Access to Lawyers*

One of the most important factors in determining the success of an asylum claim is whether or not an applicant is represented by counsel.¹⁰⁵ Studies have shown that asylum seekers represented by counsel are three times more likely to succeed.¹⁰⁶ However, while asylum seekers at all stages in the process may be represented by an attorney, they must provide one at no cost to the government.¹⁰⁷ The government does not provide counsel for asylum seekers, including for those detained.¹⁰⁸ Only one in three asylum applicants in affirmative proceedings before USCIS

¹⁰⁴ Johnson & Ewing, *supra* note 101 (citing an anonymous survey conducted in 2004 by the American Federation of Government Employees; “The survey elicited responses from 177 Asylum Officers (47 percent of the Asylum Corps) at seven of the eight asylum offices. Among the respondents, 93 percent routinely worked unpaid overtime even though that is prohibited by agency regulations. Among the reasons most commonly cited for doing so were that there is insufficient time to do quality work during a 40-hour week (100 percent of respondents), unpaid overtime is necessary to complete cases in compliance with timeliness standards (92 percent), and unpaid overtime is necessary to avoid creating a case backlog (91 percent)”).

¹⁰⁵ See Ramji-Nogales et al., *supra* note 97, at 340 (“[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.”).

¹⁰⁶ See *id.* (noting that represented asylum seekers were granted asylum 45.6 percent of the time, while those without representation were granted asylum only 16.3 percent of the time.); see also Transactional Records Access Clearinghouse (TRAC) Immigration Report, Immigration Judges, <http://trac.syr.edu/immigration/reports/160> (last visited Jan. 31, 2009) (finding during a study of asylum cases decided by immigration judges from 1994 to 2005 that asylum seekers without representation were denied asylum 93.4 percent of the time, while those with representation were denied only 64 percent of the time).

¹⁰⁷ Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (Supp. 1998).

¹⁰⁸ *Id.*

is represented by counsel.¹⁰⁹ In EOIR immigration courts, approximately two-thirds of asylum seekers are represented.¹¹⁰

The obstacles facing an asylum seeker filing an application pro se are enormous. An applicant must attempt to master a complex area of the law and navigate a convoluted application process.¹¹¹ The first step is to complete the application for asylum (I-589 Application for Asylum or Withholding), which is an incredibly dense and complicated 12-page document with 11 pages of instructions.¹¹² The USCIS Ombudsman, in his 2007 Annual Report, stated that “[c]omprehending these instructions requires at minimum a reading ability at a high level. . . . Even more alarming is that Form I-589 specifically serves a population for whom English may be the second language, as a lack of English language ability is commonplace among asylum seekers.”¹¹³ In addition to asking for extensive background information and the details of the persecution, the application requires that applicants indicate the basis for their persecution. This is a requirement that cannot be accurately addressed without at least some understanding of asylum and refugee law. In his 2007 report, the USCIS Ombudsman recommended that the I-589 be redrafted “so that it is less complicated and more understandable by the intended audience – persons who have been persecuted.”¹¹⁴

An application is more likely to be successful if supported by corroborating evidence, including personal documentation and country condition information.¹¹⁵ Obtaining personal documents, such as birth

¹⁰⁹ Schoenholtz & Jacobs, *supra* note 43, at 742. See also Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 7 (2008); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 58 (Winter 2008)

¹¹⁰ Schoenholtz & Jacobs, *supra* note 43, at 742 (noting that access to representation also varied depending on nationality and geographic location within the United States).

¹¹¹ See Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MPI INSIGHT, Apr. 2005, at 1, 2.

¹¹² Department of Homeland Security, U.S. Citizenship and Immigration Services, & U.S. Department of Justice, Executive Office for Immigration Review, I-589 Application for Asylum and Withholding, available at <http://www.uscis.gov/files/form/I-589.pdf>.

¹¹³ DEP'T OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN ANNUAL REPORT 2007, *supra* note 102, at 95.

¹¹⁴ *Id.*

¹¹⁵ A typical asylum application, as prepared by student attorneys at the University of Baltimore Immigrant Rights Clinic, will contain an I-589 Application for Asylum, an extremely detailed personal declaration, medical and psychological evaluations, numerous personal documents with translations, and hundreds of pages of country condition documentation with summaries. Each application can take several months to compile and hundreds of hours.

certificates, marriage certificates, party membership cards, medical records, requires that the applicant either have left his home country with those documents, or is able to contact individuals in his home country who can find the documents and send them to the United States. Records such as arrest warrants or official government documents documenting persecution may not exist, and even if they do, may be impossible to obtain without putting friends and family members at risk.¹¹⁶ Obtaining country condition information often requires access to a computer and the internet.

Compounding the difficulty for applicants to prepare pro se applications is that applicants for asylum come from many different backgrounds and cultures, with different customs and laws. Applicants often do not speak English,¹¹⁷ and some have very little education or even a basic level of literacy. Applicants may have no friends or family in the United States who can help them.¹¹⁸ It is unreasonable to assume that asylum applicants can successfully navigate the incredibly complex asylum system on their own, given some of these constraints.

Yet the importance of representation at the earliest stages of an asylum application cannot be underestimated. Even if a claim is valid, an incomplete affirmative application, or one that contains even innocent errors, can cause problems later during an asylum hearing before an immigration judge.¹¹⁹ Incomplete or inaccurate applications have been used by immigration judges to support findings of adverse credibility, ultimately leading to a denial of asylum.¹²⁰

Unfortunately, many asylum seekers cannot afford representation.¹²¹ Those asylum-seekers who arrive with no money or resources must devote their time to finding shelter, food, and basic social services. This is compounded by the fact that asylum seekers cannot obtain work authorization until 180 days after filing an application for asylum.¹²² While some

¹¹⁶ See *infra* Section II (C)(2)(b) (The Real ID Act – Credibility and Corroboration).

¹¹⁷ In 2007, a total of 265 different languages were spoken in court proceedings, and only 14 percent of proceedings were conducted in English. FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at F1.

¹¹⁸ Indeed, as a result, some asylum seekers fall prey to notaries and other unscrupulous parties that seek to exploit their vulnerabilities. See Katzmann, *supra* note 109, at 8.

¹¹⁹ *Id.* at 9.

¹²⁰ *Dong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005) (noting that the omission of information that goes to the heart of an asylum claim can support an adverse credibility finding.).

¹²¹ See Ramji-Nogales et al., *supra* note 97; see also FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at G1 (“Many individuals in removal proceedings are indigent and cannot afford a private attorney.”).

¹²² 8 C.F.R. § 208.7(a) (2008); Immigration and Nationality Act § 208(d)(2), 8 U.S.C. § 1158 (1998). See *infra* Part IV.A.

free or low cost legal services for asylum seekers exist, the need for such services is greater than the availability.¹²³

C. *Complex Asylum Law and Recent Legislative Obstacles To Affirmative Asylum*

Asylum law is increasingly complex. While some of the laws that raise bureaucratic obstacles to the granting of valid asylum claims were implemented prior to 9/11, in the wake of 9/11, the law became increasingly complicated and restrictive, leading to even greater uncertainty for asylum-seekers. As a result, asylum officers are now, more than ever, faced with cutting-edge issues or fine points of law. It stands to reason that asylum officers, who are not judges, or even lawyers in many cases, will choose to refer complicated questions of law to an immigration judge.

1. Legislative Obstacles to Affirmative Asylum Prior to September 11, 2001

In 1996, Congress implemented the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), which introduced a number of new restrictions on asylum seekers.¹²⁴ Two of these restrictions, in particular the one-year filing deadline and the firm resettlement bar, have prevented scores of affirmative asylum-seekers from having their cases adjudicated on the merits by asylum officers.

(a) *One-Year Bar*

The IIRIRA introduced a new filing deadline for asylum applications of one-year after an applicant's last arrival in the United States, unless the applicant can demonstrate that changed circumstances or extraordinary circumstances exist that are related to the failure to file within one year.¹²⁵ This change was codified ostensibly to reduce fraud in the asy-

¹²³ For a detailed overview of legal services available to asylum seekers, see Katzmann, *supra* note 109. See also Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGRATION BRIEFINGS No. 04-6, (June 2004) 1; Kerwin, *supra* note 111.

¹²⁴ Illegal Immigrant Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No.104-208, § 604(a), 110 Stat. 3009.

¹²⁵ 8 C.F.R. § 208.4(a)(2), (4), and (5). Changed circumstances “may include, but are not limited to: [c]hanges in conditions in the applicant’s country of nationality or . . . [c]hanges in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum” 8 C.F.R. § 208.4(a)(4)(i)(A)-(B). Extraordinary circumstances “shall refer to events or factors directly related to the failure to meet the 1-year deadline.” Those circumstances may include serious illness, mental or physical disability, legal disability such as being an unaccompanied minor, or the death or serious illness of the applicant’s immediate family. 8 C.F.R. § 208.4(a)(5).

lum system,¹²⁶ but in reality, it simply prevents many asylum seekers with valid persecution claims from having their claims adjudicated on the merits.

Preparing an application for asylum is an extremely complicated, time-consuming process, with serious consequences attached to any errors.¹²⁷ It is unreasonable to expect that every asylum seeker has the ability to navigate the process and prepare an application within one year of arrival. In fact, prior to the IIRIRA, many asylum seekers were not able to apply within the first year.¹²⁸ The one-year deadline makes no allowance for the applicant who does not know about the deadline, which is extremely problematic for those who have no familiarity with the U.S. legal system or the asylum process. Even those who do know that asylum is available and that there is a deadline may be unable to find affordable legal assistance and may find the difficulties in preparing an application on their own insurmountable.¹²⁹ The net effect of the one-year bar is to make asylum unattainable for the most vulnerable of all protection seekers: those who do not speak English, those who cannot read and write, or those who have no friends or family to help guide them through the U.S. asylum process.

The Asylum Officer Corps Basic Training Course Manual states that if an exception to the one-year filing deadline applies, then “the applicant is entitled to a full adjudication of the asylum application.”¹³⁰ Also, “[a]sylum offices must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists.”¹³¹ However, statistics published by USCIS from 2000 to 2004 on the number of affirmative asylum applications that were referred to an immigration judge on the basis of having been filed past the one-year deadline reveal a lack of such flexibility. Those cases averaged slightly more than 30 percent of all of the cases that asylum officers referred to an immigration judge,¹³² demonstrating that

¹²⁶ See Susan S. Blum, Note & Comment, *The Illegal Immigration Reform & Immigrant Responsibility Act's One-Year Filing Deadline on Applications for Asylum: The Narrow Interpretation and Application of Exceptions to the Filing Deadline*, 22 GA. ST. U. L. REV. 463, 471 (2005).

¹²⁷ See *supra* Section II.B.

¹²⁸ See Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 9 (2001).

¹²⁹ See *supra* Section II.B.

¹³⁰ Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: One-Year Filing Deadline at 8 (Sept. 14, 2006), <http://www.rmscdenver.org/documents/Oneyear14Sept06LP.pdf>.

¹³¹ *Id.*

¹³² See 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 40, at 55; 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 54, at 60; 2002 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 53, at 69; 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 52, 102; 2000 STATISTICAL

the one-year bar is a significant obstacle to the success of an affirmative application.

(b) *Firm Resettlement*

The definition of “firm resettlement” and its status as a mandatory bar to asylum was codified in 1996 by the IIRIRA.¹³³ A person is considered to be firmly resettled if “prior to arrival in the United States, he or she entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”¹³⁴ Like the one-year deadline, the firm resettlement bar in the United States has been described by some commentators as “a regulatory loophole by which the Immigration and Naturalization Service . . . attempts to remove refugees from otherwise valid persecution claims.”¹³⁵

To rebut a firm resettlement claim, an applicant must show that she was in the country solely as a necessity for her onward flight and only as long as necessary without establishing any ties; that she was not offered resettlement; or that her movements were so restricted by the authority of the country as to constitute non-resettlement.¹³⁶ Some courts use a “totality of circumstances” standard for determinations of firm resettlement,¹³⁷ while other courts require that the government demonstrate that an offer

YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 51, at 100.

¹³³ IIRIRA, *supra* note 124; 8 C.F.R. 208.13(c)(2)(i)(B) (2008); 8 C.F.R. 208.15 (2008). The 1951 Refugee Convention establishes the doctrine of firm resettlement by excluding from the definition of a “refugee” any person who “has acquired a new nationality, and enjoys the protection of the country of his new nationality.” U.N. Refugee Convention, *supra* note 2, at art. I (C)(3). However, when the United States codified the asylum process in 1980, firm resettlement was not a mandatory bar to a grant of asylum, and it was not until 1990 that new federal regulations were promulgated holding that firm resettlement was a mandatory ground for a denial of asylum. 55 Fed. Reg. 30,674, 30,678 (Jul. 27, 1990) (codified at 1 C.F.R. § 305.89). *See also* Sloane, *supra* note 11, at 53.

¹³⁴ 8 C.F.R. 208.15 (2008).

¹³⁵ *See* Sloane, *supra* note 11, at 47-48.

¹³⁶ “Factors that shall be considered include . . . the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.” 8 C.F.R. 208.15 (a)-(b) (2008).

¹³⁷ *See* Camposeco-Montejo v. Ashcroft, 384 F.3d 814, 818-21 (9th Cir. 2004).

of firm resettlement was made before the burden shifts to the asylum seeker to show that he or she was not firmly resettled.¹³⁸

The Asylum Officer Corps Basic Training Course manual follows the latter standard stating that “[t]he primary consideration in determining if an applicant was firmly resettled is whether an *offer* of *permanent* resident status, citizenship or some other type of permanent resettlement was made.”¹³⁹ The Asylum Officer Corps Basic Training Course manual does not adequately address the “totality of circumstances” standard, which leaves a gap in the legal training given to asylum officers and creates an uncertainty regarding the law that will be applied to an asylum seeker with a potential firm resettlement issue.

2. Legislative Obstacles to Affirmative Asylum after September 11, 2001

Irresponsible judges have made asylum laws vulnerable to fraud and abuse. We will end judge-imposed presumptions that benefit suspected terrorists in order to stop providing a safe haven to some of the worst people on Earth [sic]. The REAL ID Act will reduce the opportunity for immigration fraud so that we can protect honest asylum-seekers and stop rewarding terrorists and criminals who falsely claim persecution.

– Congressman F. James Sensenbrenner, Jr.’s official statement on the 2005 Real ID Act¹⁴⁰

One of the United States’ responses to the 9/11 attacks was to initiate a series of actions against non-citizens, including asylum seekers. In the months immediately following the attacks, the Government rounded up and detained over 1,200 non-citizens, mostly Arab or Muslim men;¹⁴¹ suspended all refugee resettlements for more than two months;¹⁴² and passed the USA PATRIOT Act on October 25, 2001, which was aimed at

¹³⁸ See *Diallo v. Ashcroft*, 381 F. 3d 687, 693 (7th Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d 477, 487-89 (3d Cir. 2001).

¹³⁹ Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Mandatory Bars to Asylum and Discretion at 26 (December 5, 2002), <http://www.rmssc.denver.org/aobtc/Bars5dec02lplinks.pdf> (citing *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001)).

¹⁴⁰ 151 CONG. REC. H545 (2005) (statement of Rep. Sensenbrenner).

¹⁴¹ See Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 *FORDHAM INT’L L.J.* 1361, 1367 (2005) (citing OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1* (2003), available at www.usdoj.gov/oig/special/0306/full.pdf).

¹⁴² *Id.* at 1368-69.

curbing terrorism, but had an impact on several immigration policies as well.¹⁴³

In 2002, the Bush Administration restructured the Federal Government and transferred all of the functions of the INS, previously part of the Department of Justice, to the newly created DHS.¹⁴⁴ In 2003, the Government initiated Operation Liberty Shield, whereby asylum seekers from thirty-four Arab or Muslim nations were automatically detained while their asylum cases were decided.¹⁴⁵ In 2004, DHS expanded expedited removal and in 2005, Congress passed the Real ID Act, which included provisions that directly targeted asylum seekers.¹⁴⁶

The war on terror has increased suspicion and distrust of asylum seekers. Some commentators have even suggested that terrorists would use the asylum process to gain admission into the United States.¹⁴⁷ However, there is no real evidence that terrorists have tried to use the asylum process.¹⁴⁸ Nor does it make sense that they would want to; applying for asylum is not only an extremely complicated and lengthy procedure, but it involves multiple security checks, including fingerprinting, other biometric verifications, and background checks.¹⁴⁹

Nevertheless, because the substantive grounds for asylum are well established,¹⁵⁰ in the aftermath of 9/11 legislators sought increased administrative and legislative means by which to permanently limit the number of asylum seekers granted protection in the United States, all in the name of increasing security. Since 9/11, new legislation has broad-

¹⁴³ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT ACT].

¹⁴⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 442(a)(3), 451(b), 116 Stat. 2135 (codified as 6 U.S.C. § 251(2), 252(a)(3), 271(b)).

¹⁴⁵ See Peter Schey, *U.S. Immigration Policies and the War on Terrorism*, L.A. LAW., Sept. 2006, at 12, 17. Operation Liberty Shield was terminated after little more than a month in the wake of intense opposition from community groups. See Acer, *supra* note 141, at 1379-82.

¹⁴⁶ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 [hereinafter REAL ID ACT].

¹⁴⁷ See, e.g., Price, *supra* note 15, at 414.

¹⁴⁸ See Editorial, *National ID Party*, WALL ST. J., Feb. 17, 2005, at A12 (“In the past decade, perhaps a half-dozen individuals with some kind of terrorists ties have applied for asylum. All were rejected.”).

¹⁴⁹ *Id.*; Patricia J. Freshwater, Note, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens?*, 19 GEO. IMMIGR. L.J. 585, 592-93 (2005).

¹⁵⁰ In fact, courts in the last decade have expanded the substantive grounds for asylum. For example, in the last few years, courts have increasingly recognized gender as a particular social group in certain circumstances, such as when an applicant fears being forced to undergo female genital mutilation. See *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996). See also Price, *supra* note 15, at 415.

ened the definition of “terrorist group” and “terrorist activities,” thereby increasing the number of people who are inadmissible, and changed some of the standards and requirements for establishing an asylum claim, thereby increasing the level of proof required of asylum seekers.

(a) *Material Support Bar*

In determining who is eligible for asylum, an adjudicator must take into account whether the asylum seeker is barred from admission on the grounds of having engaged in terrorist activity.¹⁵¹ The USA PATRIOT Act of 2001 and the Real ID Act of 2005 amended the INA by broadening the definition of “material support,” “terrorist,” and “terrorist organizations,” and thereby greatly expanded the class of people who are now inadmissible on this ground. This expanded definition has put legitimate refugees and asylum seekers at risk of being denied protection in the United States.

Under the law as amended by the USA PATRIOT Act and the Real ID Act, a person is inadmissible if he or she ever engaged in “terrorist activity”, which includes committing “an act that actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons. . . , explosives, or training. . . to a terrorist organization. . . or to any member of such an organization.”¹⁵² The USA PATRIOT Act expanded the definition of “terrorist organization” to include any group that used a “weapon” other than for personal monetary gain.¹⁵³ The Real ID Act further expanded the definition to include any group that has a subgroup that uses weapons.¹⁵⁴ As a result, a group may be deemed to be a terrorist organization even if it has not been designated as a Tier I or Tier II

¹⁵¹ Immigration and Nationality Act § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2006). The Immigration Act of 1990 was the first piece of legislation that explicitly excluded persons on security-related grounds if they were engaged in “terrorist activity.” Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; *See* Gregory F. Laufer, Note, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act’s “Material Support for Terrorism” Provision*, 20 GEO. IMMIG. L.J. 437, 438 (2006). In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (ADEPA), which created a process whereby the Department of State could designate certain organizations as foreign terrorist organizations, and automatically bar members of those organizations from asylum. ADEPA, Pub. L. No. 104-132, § 503, 110 Stat. 1214 (1996).

¹⁵² 8 U.S.C. § 1182(a)(3)(B)(iv).

¹⁵³ 8 U.S.C. § 1182 (a)(3)(B)(iii)(V)(b); *see* HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM 3 (2006), available at www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf [hereinafter ABANDONING THE PERSECUTED].

¹⁵⁴ 8 U.S.C. § 1182(a)(3)(B)(vi)(III); *see* ABANDONING THE PERSECUTED, *supra* note 153.

terrorist organization by the U.S. Department of State.¹⁵⁵ Organizations found to be terrorist organizations, but not designated as such by the Department of State, are generally referred to as Tier III terrorist organizations.¹⁵⁶

The only defense afforded an applicant accused of engaging in a “terrorist activity” is lack of knowledge if the applicant did not know, or should not have reasonably known, that the person he or she was providing support to was a member of a terrorist organization or planned to engage in terrorist activity.¹⁵⁷ There is no exception to the material support bar if the support provided was minimal.¹⁵⁸ There is no exception if the group to which material support is given is a group that the United States is sympathetic to, or if it is organized against an illegitimate repressive government.¹⁵⁹ Nor is there an exception if the “material support” was many years ago and the applicant clearly no longer presents a threat to the United States.¹⁶⁰ Spouses and children of those found to have given material support to terrorist organizations within the previous five

¹⁵⁵ In accordance with section 219 of the INA, the U.S. Department of State has a process for designating groups as terrorist organizations and maintains a list of these organizations known as FTOs (Foreign Terrorist Organizations). 8 U.S.C. § 1189 (a)(1). See U.S. Department of State, Foreign Terrorist Organizations (FTOs) (2005), www.state.gov/s/ct/rls/fs/37191.htm. Under the U.S. PATRIOT Act, the U.S. Department of State is also authorized to designate terrorist organization for immigration purposes and keeps a list of such countries known as the Terrorist Exclusion List; organizations so designated would fall under the definition of terrorist organizations” in Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(III). See U.S. Department of State, Terrorist Exclusion List, www.state.gov/s/ct/rls/fs/2004/32678.htm (last visited Mar. 3, 2009). See also ABANDONING THE PERSECUTED, *supra* note 153.

¹⁵⁶ See Catholic Legal Immigration Network, Inc., The Material Support Bar & Applying For Immigration Benefits, available at http://www.cliniclegal.org/sites/default/files/MaterialSupportFactSheet_April2008_final.pdf.

¹⁵⁷ 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

¹⁵⁸ 8 U.S.C. § 1182 (a)(3)(B)(iv)(VI); see *In re S- K-*, 23 I. & N. Dec. 936, 941-42, 945 (B.I.A. 2006) (“Congress has not expressly indicated its intent to provide an exception for contributions which are de minimis. Thus the DHS asserts that the term ‘material support’ is effectively a term of art and that all the listed types of assistance are covered, irrespective of any showing that they are independently ‘material.’”); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) (holding that very modest amounts of food and shelter did constitute “material support”).

¹⁵⁹ 8 U.S.C. § 1182(a)(3)(B)(iii); *In re S- K-*, 23 I. & N. Dec. at 941 (“[W]e find that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as ‘freedom fighters,’ and it did not intend to give us the discretion to create exceptions for members of organizations to which our government might be sympathetic. . . . Contrary to the respondent’s assertions, there is no exception in the Act to the bar to relief in cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime.”)

¹⁶⁰ 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

years are also barred from asylum, regardless of whether or not they were involved in the actions.¹⁶¹

Finally, under the Real ID Act as originally codified, there was no exception to the material support bar if the applicant acted out of duress or self-defense.¹⁶² Shortly after the enactment of the Real ID Act, judges in the EOIR immigration court, the BIA, and Federal Circuit Courts began to deny claims in which asylum applicants were forced to give support to terrorist organizations under duress.¹⁶³ However, adjudicators and others expressed grave concerns that, as a result of these provisions, those most in need of protection were at risk of having their asylum applications denied.¹⁶⁴

The law does provide that DHS can, in consultation with the Department of Justice and the Department of State, waive the inadmissibility of certain groups of refugees or asylum seekers under this bar, although there is no process by which such an exemption can be requested.¹⁶⁵ In response to widespread concern, DHS used its discretionary authority to slightly temper the material support provisions. In 2006 and 2007, the Department of State and DHS used this authority to waive inadmissibility for certain persons who supported the Chin National Front or the Karen National Union.¹⁶⁶

¹⁶¹ 8 U.S.C. § 1182 (a)(3)(B)(i)(IX). An exception is provided for spouses and children if they “did not know or should not reasonably have known of the activity, or if they “renounced the activity.” 8 U.S.C. § 1182(a)(3)(B)(ii).

¹⁶² 8 U.S.C. § 1182 (a)(3)(B)(iv)(VI); *see* ASYLUM CASE LAW SOURCEBOOK, CASE ABSTRACTS FOR U.S. COURT DECISIONS xxi (6th ed. 2006).

¹⁶³ *See, e.g., In re S- K-*, 23 I. & N. Dec. at 941; *Singh-Kaur*, 385 F.3d at 298 (3d Cir. 2004); *McAllister v. Attorney Gen.*, 444 F.3d 178, 184 (3d Cir. 2006).

¹⁶⁴ For example, in a concurring opinion in *McAllister*, Third Circuit Judge Barry wrote, “I refuse to believe that ‘Give me your tired, your poor, your huddled masses yearning to breathe free . . .’ is now an empty entreaty. But if it is, shame on us. . . . The problem here, though, is that Congress’s definition of ‘terrorist activity’ sweeps in not only the big guy, but also the little guy who poses no risk to anyone.” *McAllister*, 444 F.3d. at 191 (Barry, J., concurring). In a concurring opinion in *In re S- K-*, BIA Acting Vice Chairman Juan P. Osuna noted that “DHS conceded at oral argument that an individual who assisted the Northern Alliance in Afghanistan against the Taliban in the 1990’s would be considered to have provided ‘material assistance’ to a terrorist organization under this statute and thus would be barred from asylum.” *In re S- K-*, 23 I. & N. Dec. at 948 (Osuna, concurring).

¹⁶⁵ 8 U.S.C. § 1182(d)(3)(B). *See* ABANDONING THE PERSECUTED, *supra* note 153, at 5.

¹⁶⁶ In 2006, DOS applied the waiver to refugees from Burma who had supported the Chin National Front or Chin National Army. *See* Press Release, State Department Office of the Spokesman, The Department of State Decides Material Support Inapplicable to Chin Refugees from Burma (Oct. 19, 2006), *available at* <http://www.state.gov/r/pa/prs/ps/2006/74761.htm>. In 2007, DHS applied the waiver to persons who had supported the Karen National Union/Karen National Liberation Army, the Chin National Front/Chin National Army, the Chin National League for

In 2007, DHS exercised its discretionary authority to exempt from the material support bar certain individuals who provided material support under duress to two Columbian Tier II terrorist organizations: the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army of Colombia (ELN).¹⁶⁷ DHS also exercised its authority to hold that the persons who provided material support under duress to a Tier III organization may be eligible for a waiver to the bar if warranted by the totality of the circumstances.¹⁶⁸

In 2008, the Consolidated Appropriations Act significantly broadened the waiver authority of the Department of State and DHS over terrorism-related grounds for inadmissibility for any alien and amended the INA to permit immigration authorities to waive the “terrorist organization” definition of a non-designated group as long as it did not engage in terrorist activity against the United States or other democratic country, or engage in a pattern of terroristic activities against civilians. It also specifically designated ten groups as not being “terrorist organizations.”¹⁶⁹ On July 1, 2008, former President Bush signed into a law a provision that specifically exempted the ANC from treatment as a terrorist organization and provided DHS with the authority to determine that the material support bar not apply to persons with respect to activities undertaken in association with the ANC in opposition to the South African apartheid rule.¹⁷⁰ For all other groups, however, the decision regarding whether or not

Democracy, the Kayan New Land Party, the Arakan Liberation Party, the Tibetan Mustangs, the Cuban Alzados, the Karenni National Progressive Party. See Press Release, Statement from Michael Chertoff, Homeland Security Secretary on the Intention to Use Discretionary Authority for Material Support to Terrorism (Jan. 19, 2007), available at http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm.

¹⁶⁷ See Press Release, U.S. Citizenship and Immigration Services, USCIS Implements Authority to Exempt Certain Persons Who Provided Material Support Under Duress to the Revolutionary Armed Forces of Colombia (FARC) (Sept. 26, 2007), available at www.uscis.gov/files/pressrelease/MaterialSupportFS_26Sep07.pdf; Authorization Document from Paul S. Rosenzweig, Deputy Assistant Secretary, Department of Homeland Security, to Emilio Gonzalez, Director, U.S. Citizenship and Immigration Services (Dec. 18, 2007), available at http://www.uscis.gov/files/nativedocuments/ELN_Auth_18Dec07.pdf.

¹⁶⁸ Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958 (Mar. 6, 2007).

¹⁶⁹ Pub. L. No. 110-257, Div. J. § 691(a). The ten groups that are not considered “terrorist organizations” are the Karen National Union/Karen National Liberation Army, the Chin National Front/Chin National Army, the Chin National League for Democracy, the Kayan New Land Party, the Arakan Liberation Party, the Tibetan Mustangs, the Cuban Alzados, the Karenni National Progressive Party, appropriate groups affiliated with the Hmong, and appropriate groups affiliated with the Montagnards. Pub. L. No. 110-161, Div. J. § 691(b). See also Garcia & Wasem, *supra* note 23, at 7-8.

¹⁷⁰ Removing the African National Congress from Treatment as a Terrorist Organization, Pub. L. No. 110-257, 122 Stat. 2426 (2008). Prior to the enactment of

those groups qualify as a “non-designated” terrorist group, and whether that group then qualifies for a waiver, is thus generally left to the immigration adjudicator.

Following the enactment of the Real ID Act, and prior to the exercise of its waiver authority, DHS placed more than 500 asylum cases with material support issues on hold indefinitely.¹⁷¹ USCIS is currently reviewing some cases involving material support issues for which a waiver may be available, as well as some cases that were denied after December 26, 2007 on the basis of the material support bar.¹⁷² Nevertheless, some asylum applicants, often the most vulnerable, remain at risk because of the material support provisions, since not every applicant is covered by the current waiver authority. Those that may be eligible for a waiver must now wait for their cases to be reviewed by USCIS, thus prolonging their asylum application process.

(b) *Real ID Act – Credibility and Corroboration*

The Real ID Act also changed the credibility and corroboration standards applicable in asylum cases, and did so not to the benefit of an asylum seeker. Under the Real ID act, when determining credibility, an adjudicator can take into account the “totality of circumstances and all relevant factors,” which can include “demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements . . . with other evidence of record . . . and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim*, or any other relevant factor.”¹⁷³ This is a significant change; in the past, courts have held that inconsistencies in an applicant’s testimony or application must be material or go to the heart of the claim.¹⁷⁴ Now, any inconsistency, no matter how insignificant or tangential, may result in a finding of incredibility.

this law, if Nelson Mandela were to have applied for asylum during apartheid, he would have been barred had the material support provisions been in effect.

¹⁷¹ See Melanie Nezer, *The “Material Support” Problem: An Uncertain Future for Thousands of Refugees and Asylum Seekers*, BENDERS’S IMMIGR. BULL., at 2 (Dec. 15, 2005). See also Catholic Legal Immigration Network, Inc., *supra* note 156. See also ABANDONING THE PERSECUTED, *supra* note 153.

¹⁷² Catholic Legal Immigration Network, Inc., *supra* note 156.

¹⁷³ Immigration and Nationality Act, § 208(b)(1)(B)(iii), 8 U.S.C. § 1158 (b)(1)(B)(iii) (2006) (emphasis added).

¹⁷⁴ See *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003) (“Minor inconsistencies in the record that do not relate to the basis of an applicant’s alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant’s fear for his safety are insufficient to support an adverse credibility finding.”).

Even more disturbing is that the Real ID Act allows an immigration judge to deny asylum based on an applicant's demeanor. Allowing a judge to base a finding on credibility on an applicant's demeanor reflects a gross ignorance of the cultural norms of some applicants. Karen,¹⁷⁵ an asylee from Guinea, describes the difficulty in this way:

The hardest for me, was to learn to look the [asylum] officer in his eyes. The first thing is that when you are speaking to a person higher than you – their social position, age, or importance – you must keep your head and eyes down. The second thing is that a woman talking to a man does not look him in the eyes, unless he is very close, family. No one looks a stranger in the eye – to do so shows you have no respect and that you are better than him or her, it is like issuing a challenge. Also, in our culture, when you are with a stranger, you cannot talk about your life – that is giving away your private parts. With a stranger, there is no trust, and we are taught to ask “will he repeat what I say to another?” You also worry that the stranger will mock you if you tell them the private parts of your life.¹⁷⁶

Without assistance, asylum-seekers in Karen's position could find their claim denied because of their demeanor when appearing before an asylum officer or a judge.

The Real ID Act also allows an immigration judge to demand corroborating evidence and to deny a claim if such evidence is not provided.¹⁷⁷ The testimony of the applicant may be sufficient by itself, but “only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”¹⁷⁸ However, even under those circumstances the judge can require corroborating evidence, “unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”¹⁷⁹

This corroboration requirement can be an insurmountable obstacle for some asylum seekers. Some countries lack a developed infrastructure or a centralized bureaucracy, while others lack a functioning government at all. In rural areas in particular, identity documents are not often available, and even if they are, they are not regularly used in communities with high rates of illiteracy.¹⁸⁰ In addition, many people do not have the time

¹⁷⁵ Not her real name.

¹⁷⁶ Interview with “Karen,” in Tucson, Ariz. (Oct. 11, 2006) (notes on file with author).

¹⁷⁷ 8 U.S.C. § 1158 (b)(1)(B)(ii).

¹⁷⁸ 8 U.S.C. § 1158 (b)(1)(B)(ii).

¹⁷⁹ 8 U.S.C. § 1158 (b)(1)(B)(ii). See also *In re J-Y-C-*, 24 I. & N. Dec. 260, 263 (B.I.A. 2007); *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 209 (B.I.A. 2007); *Chukwu v. Attorney Gen.*, 484 F.3d 185, 188 (3d Cir. 2007).

¹⁸⁰ Karen, an educated professional, had the foresight to bring many documents with her when she fled her country. She notes, however, that many people in her

or the ability to collect what documents they do have when they flee the country or they may choose not to carry them due to fear that they will be identified while trying to leave. Furthermore, many repressive governments never generate any record of arrests, detentions, or even trials; in such countries secrecy is fundamental to maintaining a climate of fear and preserving impunity for its official actors. People fleeing from repressive governments, therefore, often do not have documentation of their abuse.

Nonetheless, the guidance provided by the Asylum Officer Corps Basic Training Course Manual regarding what type of corroborating evidence should be provided does not fully recognize these realities. The Asylum Officer Corps Basic Training Course Manual specifically cites to language from a BIA case, *Matter of S-M-J*¹⁸¹, stating that requested evidence “should provide documentary support for material facts which are central to [the] claim and easily subject to verification, such as evidence of his or her place of birth, media accounts of large demonstrations, evidence of publicly held office, or documentation of medical treatment.”¹⁸² In addition, “specific documentary corroboration of an applicant’s particular experiences is not required unless the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the [applicant], such as through friends, relatives, or co-workers.”¹⁸³ This guidance fails to take into account how difficult it can be for some asylum applicants to gather information, and if an applicant fails to convince an asylum officer of the impossibility of getting corroborating documents, he or she may not be granted asylum as a result.

Another disturbing development is that under the Real ID Act, asylum adjudicators are advised that a review of country condition information must include the U.S. Department of State Annual Country Reports on Human Rights Practices (DOS Human Rights Reports).¹⁸⁴ Asylum officers and immigration judges have always given a high level of deference to DOS Human Rights Reports, but now that deference is codi-

country do not read or write and as a result do not have papers, or, if they do, they do not know what they are for. Interview with “Karen,” *supra* note 176. Karen also noted this system for giving birth certificates has led to problems for school children. State schools require a birth certificate on file for all students, and thus, many impoverished children are unable to attend school.

¹⁸¹ When establishing the new corroboration standards, Congress indicated that the “provision is based upon the standard set forth in the BIA’s decision in *Matter of S-M-J*.” Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Eligibility Part IV: Burden of Proof 22 (Sept. 14, 2006), <http://www.rmcsdenver.org/aobtc/BurdenofProofStandardsofProofandEvidence.pdf>. (citing to H.R. Rep. No. 109-72, at 166 (2005) (Conf. Rep.)).

¹⁸² *Id.* (citing *In re S-M-J*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997)).

¹⁸³ *In re S-M-J*, 21 I. & N. Dec., at 726.

¹⁸⁴ Real ID Act, Pub. L. No. 109-13, 119 Stat. 231, 302-03 (2005) (amending 8 U.S.C. § 1158(b)(1)(B)(iii)).

fied.¹⁸⁵ However, several scholars have noted that the DOS Human Rights Reports cannot be considered an unbiased qualitative source of information, but rather that they have an inherent foreign policy bias.¹⁸⁶ Further, it is problematic to require that DOS Human Rights Reports be a primary source of evidence for an asylum applicant, because there is no meaningful opportunity for the applicant to cross-examine the anonymous authors or to question how the reports are drafted.¹⁸⁷ As a result, applicants whose persecution is of a type not described, or differently described, in the reports may face a much higher obstacle in corroborating their claims and proving their credibility.

The Department of State is also responsible for providing advisory opinions to asylum officers and immigration judges through written opinions, profiles on country conditions,¹⁸⁸ or cables from individual embassies. DOS has increasingly offered comments on the level of fraud in asylum cases from certain countries.¹⁸⁹ This is also problematic. First, while there may be high levels of fraud in documentation or otherwise

¹⁸⁵ See Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW J. L. & SOC. POL'Y 1, 4 (2007); see also *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (noting that there is "chronic overreliance on [State Department] reports" in immigration courts).

¹⁸⁶ See *id.* at 6; see generally Jordan Kevin Cameron, *Creating a Refuge Within the United States: Correcting the Problems of the Asylum Applicant's Hybrid Burden of Proof*, 2007 UTAH L. REV. 1171 (2007) .

¹⁸⁷ See *Niam*, 354 F.3d at 658 ("[T]he authors of these reports are anonymous and there is no opportunity for the asylum-seeker to cross-examine any of them.").

¹⁸⁸ Profiles on Asylum Claims and Country Conditions are prepared by Office of Country Reports and Asylum Affairs. Three of the very few publicly available and recently written profiles are from China in 2004, Albania in 2004, and El Salvador in 2003. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS (2004), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=5394> (which discusses fraud in population control-based asylum claims); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, ALBANIA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS (2004), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=3623>; U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, EL SALVADOR: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS (2003), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=1229>.

¹⁸⁹ For example, the US Embassy in Yaoundé, Cameroon sent the Department of State two cables, one in 2004 and one in 2007, both of which detail widespread fraud in Cameroonian asylum claims and documentary evidence, without more than briefly acknowledging the extremely poor human rights situation in the country that supports claims of asylum. Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers*, 26 PENN ST. INT'L L. REV. 383, 410 (2007) (citing to a cable from Niels Marquardt, U.S. Ambassador to Cameroon, November 2004, and a cable from Richard W. Nelson, Chargé d'Affaires at the U.S. Embassy in Cameroon, April 2007).

from a particular country, this does not mean that a particular applicant appearing before an adjudicator is participating in that fraud. Second, as with the DOS Human Rights Reports, there is no means for applicants to cross-examine or otherwise defend themselves from the generalities of these often anonymous opinions and profiles.¹⁹⁰ Yet, these opinions from the Department of State are taken very seriously by adjudicators, and have the potential of contributing to either increased demands for corroborating evidence, or to presumptions of fraud and adverse credibility determinations.¹⁹¹ As a result, in practice, applicants from countries having a high level of fraud have to meet a higher burden of proof to show that they, themselves, are credible.¹⁹²

(c) *The Real ID Act “One Central Reason” Requirement*

The Real ID Act further amended the INA by now requiring the applicant to establish that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least *one central reason* for persecuting the applicant.”¹⁹³ In the past, courts have followed a “mixed motive” standard, holding that persecution must simply relate to one of the five grounds, not that it was a *central* reason.¹⁹⁴ It is unclear if this mixed motive standard can survive under the new statutory language.

The guidance in the Asylum Officer Corps Basic Training Course Manual provides that the applicant must establish facts on which a reasonable person would fear that at least one central reason for the persecution was, or would be, the protected characteristic, which cannot be tangential or incidental to the persecutor’s motivation.¹⁹⁵ However, conflicts often have many underlying causes and can include ethnic or religious tensions,

¹⁹⁰ See *id.* at 402 (citing *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003), which held that a letter from a letter from the Director of the Office of Country Reports and Asylum Affairs regarding the results of an investigation in documentary fraud by a US embassy violated due process because the letter contained hearsay).

¹⁹¹ See *id.* at 384-85.

¹⁹² See *id.* at 423.

¹⁹³ Immigration and Nationality Act, § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2006).

¹⁹⁴ See *In re Kasinga*, 21 I. & N. 357, 365 (B.I.A. 1996) (The BIA held “to be a basis for a grant of asylum, persecution must relate to . . . one of the five categories described in section 101 (a)(42)(A) of the Act”). See *Rodriguez Morales v. Attorney Gen.*, 488 F.3d 884, 888 (11th Cir. 2007) (noting the inherent difficulties an applicant faces in providing direct evidence of the motives of their persecutor, and ruling that an applicant need only provide enough evidence “from which it is reasonable to conclude that the harm was motivated, at least in part, by an actual or imputed political opinion”).

¹⁹⁵ Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 71 (Jan. 23, 2007), available at <http://www.rmscdenvr.org/aobtc/NexusandtheFiveProtectedChar.pdf> (citing *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988); *In re S-P-*, 21 I.

political persecution, or simply a fight for control over natural resources. In many countries, ethnicity and political opinion overlap. In such cases, a person's ethnicity may be sufficient for finding that the government targeted that person on the basis of an imputed political opinion. In other cases, it may be impossible to determine if a person was targeted for persecution on one of the five grounds, or was simply caught up in an ethnic or political conflict, but not specifically targeted. This is simply one more area of asylum law that has become increasingly complex and difficult for adjudicators to navigate.

IV. ANALYSIS OF THE EFFECT OF A PROLONGED PROCESS FOR AFFIRMATIVE ASYLUM SEEKERS

One of our prime responsibilities in our endeavor to protect refugees is to adjudicate applications filed affirmatively with CIS The ultimate consequence of [a backlog in pending applications] is that genuine refugees do not receive timely protection and therefore cannot be promptly reunited with their immediate family members who may still be in danger.

– Asylum Officer Basic Training Course Manual¹⁹⁶

Mr. O¹⁹⁷, a native of a small country in central Africa, arrived in the United States in 1997 on a valid tourist visa. Mr. O was fleeing government genocide against his ethnic group and, prior to his escape, was repeatedly detained and severely tortured. Mr. O was forced to leave behind his wife and two young children, who went into hiding in a neighboring state. Shortly after arriving in the United States, Mr. O was hospitalized due to problems with his heart and pancreas. In 1999, Mr. O received the devastating news that his wife had died and his children were hiding in Cameroon with distant relatives. Distraught, Mr. O entered into a period of severe depression that rendered him incapable of participating in day-to-day activities. He was later diagnosed as suffering from severe depression and post-traumatic stress disorder. In 2000, doctors performed an emergency appendectomy on Mr. O. Mr. O requested and received one extension to his tourist visa based on his medical condition, but was denied a second extension.

After he recovered from the appendectomy, Mr. O immediately began seeking legal representation to pursue an asylum claim. He contacted several legal organizations and, in early 2001, his case was taken by the only organization in Arizona that provided free representation to non-

& N. Dec. 486 (B.I.A. 1996)); *Immigration & Naturalization Service v. Elias-Zacarias*, 502 U.S. 478, 479-82 (1992); H.R. REP. NO. 109-72 (2005) (Conf. Rep.).

¹⁹⁶ Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Corps Values and Goals, *supra* note 99, at 12.

¹⁹⁷ Mr. O is a former client of the author.

detained asylum seekers at that time. This local NGO filed an affirmative political asylum claim on behalf of Mr. O within two months.

Because he resided in Arizona, Mr. O had to wait until an asylum officer from the Los Angeles asylum office came to Phoenix to interview him. Mr. O was not scheduled for an asylum interview until late 2005, four years after filing his application. Mr. O did not receive a decision in his case for nine months, at which time the asylum officer referred him to an immigration judge because he had missed the one-year deadline despite his extraordinary circumstances. Mr. O's merits hearing was postponed twice by DHS, and his case was not heard by the immigration judge until September 2005, a full year after his case had been referred. The immigration judge granted asylum and noted that Mr. O had the strongest exception to the one-year bar that the judge had ever adjudicated. Unfortunately, DHS appealed the decision, and Mr. O had to wait almost two more years until the summer of 2007 before he received his final grant of asylum. During this time, Mr. O's children remained in hiding in Africa because, under the law, Mr. O could not apply to have them join him until he received his final grant of asylum. Mr. O is still waiting for USCIS to approve his application to bring his children to the United States.

Unfortunately, Mr. O's case is not unique. Once an application is affirmatively filed for asylum, the asylum seeker must wait for an interview, which, by law, is supposed to take place within 45 days.¹⁹⁸ Asylum applicants who reside far away from one of the eight local asylum offices are interviewed during "circuit rides," whereby asylum officers travel to USCIS District and Sub Offices for interviews.¹⁹⁹ A significant percentage of asylum applicants, more than 50 percent in some asylum offices, are interviewed via circuit rides.²⁰⁰ DHS has noted that applicants interviewed during circuit rides are more likely to not have their case adjudicated within the legislative timeline because of the infrequency in which circuit rides are scheduled.²⁰¹

¹⁹⁸ "[I]n the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed." Immigration and Nationality Act, 208(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii) (2006).

¹⁹⁹ Notice of Circuit Ride Location Changed for the Chicago and Houston Asylum Offices, 69 Fed. Reg. 17437 (Apr. 2004). See *supra* Part II.B.1.

²⁰⁰ In 2004, more than fifty percent of the applications received at the Houston Asylum Office and the Chicago Asylum Office were from individuals who had to be interviewed during Circuit Rides. Between five and twenty percent of the applications received at the five other asylum offices were from individuals that had to be interviewed during circuit rides. Notice of Circuit Ride Location Changed for the Chicago and Houston Asylum Offices, 69 Fed. Reg. at 17437.

²⁰¹ *Id.* (DHS also noted that interviews at circuit ride locations are less efficient and that asylum officers do not have access to the same decision-making tools available in the asylum office).

Once an interview has been conducted, the applicant must wait for a decision.²⁰² If referred to an immigration judge, the applicant then must then wait for a master calendar hearing and then wait for a merits hearing. Again, depending on the docket of a particular immigration court, a merits hearing might not be scheduled for many months. Once the hearing has taken place, if the immigration judge does not immediately decide the case, the applicant must await a written decision or return to court at a later date to hear the decision. While under law this process is supposed to take place within 180 days,²⁰³ in practice, for some asylum seekers the process may take years.

Since the USCIS asylum grant rate dropped after 9/11, a greater percentage of affirmative asylum applicants are being referred by USCIS asylum officers to an immigration judges and, as a result, see their cases prolonged. This is particularly troublesome given that in 2007, 51 percent of all affirmative asylum cases referred by the USCIS were cases in which an immigration judge ultimately granted asylum.²⁰⁴ In other words, slightly more than half of all affirmative asylum seekers referred to immigration judges have valid asylum claims, but have to expend significant additional time and resources before they are recognized as bona fide refugees and granted protection accordingly. In turn, this means that a greater proportion of legitimate asylum seekers must face the detrimental impact of a prolonged asylum process.

²⁰² The Asylum Officer Corps operates under the guidelines that 75% of all cases are completed, including being referred to an immigration judge if applicable, within sixty days of receipt. However, that means that up to 25% of cases may not be adjudicated within those guidelines, and consequently within the required 180 day adjudication guidelines. Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Corps Values and Goals, *supra* note 61, at 8, 10.

²⁰³ “[I]n the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.” 8 U.S.C. § 1158(d)(5)(A)(iii).

²⁰⁴ See *infra* Table 4: EOIR Affirmative and Defensive Grant Rates.

TABLE 4: EOIR AFFIRMATIVE AND DEFENSIVE GRANT RATES²⁰⁵

	Affirmative Grant Rate	Defensive Grant Rate
FY 01	44%	33%
FY 02	44%	28%
FY 03	44%	26%
FY 04	45%	26%
FY 05	44%	28%
FY 06	51%	34%
FY 07	51%	39%

A. *Inability to Work*

Mr. O was fortunate because he was able to work for most of the time that it took to adjudicate his asylum claim. When an asylum seeker files an asylum application, a clock begins to run that documents the days that have passed in the adjudication of the case. Asylum seekers may not apply for work authorization until 150 days have passed from the date the application was filed, and work authorization will only be granted if there is not a final determination on their case within 180 days.²⁰⁶ All asylum seekers are thus unable to work until their case has been adjudicated, or 180 days have passed, whichever occurs first.

However, some asylum applicants are unable to work at all during their asylum process. If a delay occurs in the course of adjudication and it is determined to be caused by the asylum seeker, then the clock is stopped.²⁰⁷ Thus, clocks are stopped if asylum applicants request that an asylum interview be rescheduled, or if they request a continuance in their master calendar or merits hearing for any reason, including the need for additional time to find a lawyer, or to obtain additional evidence. However, immigration practitioners report that some clocks are erroneously stopped, or even reset, through no fault of the applicant.²⁰⁸ Once stopped, it can be very difficult, if not impossible, to restart a clock.²⁰⁹

²⁰⁵ The grant rate is calculated as the number of cases granted divided by the number of cases decided on the merits (i.e. cases granted, conditionally granted, or denied). Statistics compiled from FY 2005 STATISTICAL YEAR BOOK, *supra* note 74, at K3 (FY 01-FY02); FY 2007 STATISTICAL YEAR BOOK, *supra* note 40, at K3 (FY 03-FY07).

²⁰⁶ 59 Fed. Reg. 62,284 (Dec. 5, 1994) (codified at 8 C.F.R. § 208.7(a) and 8 U.S.C. § 1158 (d)(2)).

²⁰⁷ 8 C.F.R. § 208.7(a)(2) (2008).

²⁰⁸ Discussion facilitated by Socheat Chea, Karen T. Grisez, Regina Germain and David Stoller at American Immigration Lawyers Association (AILA) Annual Conference, Breakfast With The Experts: Asylum Clock Issues (June 28, 2008).

²⁰⁹ *Id.*

Because of these regulations, all asylum seekers must either have the means to support themselves without working for up to 180 days while their case is processed, or be forced to rely on friends and family for support. For those asylum seekers whose clocks are stopped, they must wait sometimes indefinitely before they become eligible for work authorization. In the worst case situation, asylum seekers remain destitute and homeless while awaiting adjudication of their application.

B. *Compromised Safety of Family Members*

Many asylum seekers are forced to leave behind family members when they flee their country. Upon being granted asylum, an asylee may petition to bring his spouse and children over immediately as derivative asylees; however, the asylee must wait until he has received a final grant of asylum, and all appeals that DHS filed have been adjudicated.²¹⁰ The longer that an asylum case takes to adjudicate, the longer family members are separated. In Mr. O's case, it has been more than 10 years since he has seen his children.

Unfortunately, in many asylum cases, family members remaining in their home country are in danger themselves, either on independent grounds or because of their relationship to the asylum seeker. Furthermore, given the requirements that applicants need to meet to obtain a nonimmigrant visa, it is unlikely that family members will be able to join the asylum seeker in the United States if the consular office is aware that a family member has filed an asylum application.²¹¹

C. *Prolonged Trauma and Stress*

Uncertain immigration status in the country of a refugee can be very stressful for a survivor [of torture] and can add greatly to his or her feeling of instability and uncertainty. The survivor may fear being deported and returned to the country where the abuse occurred. Waiting for a decision on a request for asylum can be very stressful; being denied asylum can have [a] profound negative effect on a survivor.

– Asylum Officer Basic Training Course Manual²¹²

Many asylum seekers are the survivors of torture or other extreme trauma, and a prolonged asylum process can exacerbate this trauma. An estimated five to thirty percent of refugees have suffered torture, and

²¹⁰ See USCIS Form I-730 Refugee/Asylee Relative Petition, available at <http://www.uscis.gov/files/form/I-730.pdf>

²¹¹ See *supra* Part II.A.

²¹² Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Interviewing Part V – Interviewing Survivors at 13 (Dec. 5, 2002), available at <http://www.rmscdenver.org/aobtc/Intv5survivorsdec02lp.pdf>.

those most likely to have a history of torture include asylum seekers.²¹³ Post-traumatic stress disorder (PTSD) and depression are common outward manifestations of trauma or torture exhibited by asylum seekers. However, an asylum seeker also faces unique stressors related to her uncertain immigration status and fears of being ultimately returned to a country where she will face further abuse.²¹⁴

For an asylum seeker, the stress and instability of an uncertain future is often compounded by separation from family and friends, and the lack of a support system in the United States.²¹⁵ This is particularly true for asylum seekers who fear for the safety of family members who are left behind in their home countries. For those unable to work legally, unemployment and the resultant inability to support themselves or their family members is yet another stressor.²¹⁶ The longer the applicant must wait to be granted asylum and the safety and stability such a decision offers, the greater the amount of trauma and stress that applicant will suffer. Without a doubt, a denial of asylum at any stage of the process can be devastating to an asylum seeker, regardless of whether to not he ultimately succeeds in his claim.

V. CONCLUSION

It is clear that an affirmative asylum seeker with a legitimate claim whose asylum process is prolonged because she is referred to an immigration judge suffers a tremendous cost. However, it is not just the asylum

²¹³ Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155, 155 (2001) (citing Ron Baker, *Psychosocial Consequences for Tortured Refugees Seeking Asylum and Refugee Status in Europe*, in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 82 (Metin Basoglu ed., 1992) (“In the life of a refugee, the experience of trauma is persuasive – from unplanned departures, family separations, extreme violence and loss to perils associated with flight and potential exposure to atrocities beyond the capacity of understanding.”)).

²¹⁴ *Id.* at 161-62 (citing to Derrick Silove et al., *Trauma Exposure, Postmigration Stressors, and Symptoms of Anxiety, Depression, and Post-Migration Stress in Tamil Asylum Seekers: Comparison with Refugees and Immigrants*, 97 ACTA PSYCHIATRICA SCANDINAVICA 175 (1998) (“[W]ork comparing refugees and asylees . . . revealed higher postmigration stress in asylees related to their insecure residency status.”)).

²¹⁵ *See id.* at 161; *see also* Sana Loue, *Immigrant Access to Health Care and Public Health: An International Perspective*, 17 ANNALS HEALTH L. 213, 220 (2008).

²¹⁶ Piwowarczyk, *supra* note 174, at 161 (citing Michael Frese & Gisela Mohr, *Prolonged Unemployment and Depression in Older Workers: A Longitudinal Study of Intervening Variables*, 25 SOC. SCI. & MED. 173 (1987) (“Prolonged unemployment and repeated unemployment have been shown to lead to depression, reduced hope, and financial problems.”)). *See also* Loue, *supra* note 176, at 220 (citing Manuel Carballo & Aditi Nerukar, *Migration, Refugees, and Health Risks*, 7 EMERGING INFECTIOUS DISEASES 556 (2001)).

seeker that suffers a cost. When an asylum case is referred to an immigration judge for a *de novo* hearing, the U.S. Government faces additional operating and personnel costs, both within the Department of Justice, which adjudicates the case, and the DHS, which represents the government's interests in immigration court proceedings.

There is a societal cost involved with a prolonged asylum process as well. Asylum seekers who are unable to work for 180 days, or in some cases longer, are not contributing to the overall economic well-being of American society, either through their work or through taxes. There are also significant community health risks if communicable diseases go untreated because of an asylum seeker's lack of access to health care or insurance.²¹⁷ Untreated illnesses may ultimately lead to higher health-care costs later, or to decreased work productivity once status is obtained.²¹⁸

While these costs to the United States offer a practical motivation to address the affirmative asylum process, the affirmative asylum process must be repaired in order for the United States to truly meet its international obligations to protection seekers. While the creation of the asylum officer corps was a tremendous step towards creating an efficient affirmative asylum process, it is no longer functioning as it should. It is simply not acceptable that 51 percent of the cases that USCIS refers to immigration judges are ultimately found to be valid claims for protection.²¹⁹ In other words, the USCIS asylum officer corps has an error rate of over 50 percent in those cases that they refer to immigration judges. Asylum officers should be capable, in most cases, of granting asylum to deserving protection seekers when those asylum seekers appear before them.

It is true that immigration law, particularly asylum law, has undergone significant changes since 9/11, most particularly with the passage of the Real ID Act.²²⁰ These changes place a higher burden on the asylum seeker trying to prove that he is a bona fide refugee. These changes also make the decision-making process more complicated for adjudicators at all levels of the asylum process. However, the asylum officer corps, in particular, is operating under conditions that make it difficult, if not impossible, to adjudicate cases equitably.

First, the asylum officer corps does not have adequate personnel or resources, and thus asylum officers do not have enough time to devote to each individual case.²²¹ Given the changes in asylum and immigration law that have occurred since 9/11, and the lack of access to lawyers for many asylum seekers, it is more important than ever that asylum officers

²¹⁷ Loue, *supra* note 176, at 225 (citing Leighton Ku & Sheetal Matani, *Left Out: Immigrants' Access to Health Care and Insurance*, 20 HEALTH AFFAIRS 247 (2001)).

²¹⁸ *Id.*

²¹⁹ See *supra* Table 4: EOIR Affirmative and Defensive Grant Rates.

²²⁰ See *supra* Part III.C.2.

²²¹ See *supra* Part III.A.

have the time and the tools they need to thoroughly and competently adjudicate each claim. The asylum officer corps needs more officers, and more support and research staff, so that each asylum officer can dedicate adequate time to each asylum case.

Second, it is problematic that only some asylum officers hold a law degree.²²² It is true that asylum officers must undergo initial and continuing training in asylum law; however, they are also expected to make life and death legal decisions in a highly complicated area of the law. It is unreasonable to expect that asylum officers can do so, even with specialized training, without an educational background that is appropriate for their decision-making authority. The hiring requirements for asylum officers should be amended to require a law degree, as well as some experience in immigration law.

Affirmative asylum seekers with valid claims should be granted asylum at the first step in their asylum process, otherwise the cost to both the asylum seeker and the United States is too high. While the recommendations in this article offer only a partial solution to the problem, they are an important step towards reestablishing an effective and equitable asylum officer corps, a step which is necessary if the United States is to more satisfactorily meet its international obligations towards protection seekers.

²²² See *supra* Part III.A.

APPENDIX A:
USCIS ASYLUM CASES FILED OR REOPENED BY REGION

TABLE 1: USCIS ASYLUM CASES FILED OR REOPENED BY REGION²²³

	1998 ²²⁴	1999 ²²⁵	2000 ²²⁶	2001 ²²⁷	2002 ²²⁸	2003 ²²⁹	2004 ²³⁰	2005 ²³¹	2006 ²³²	2007 ²³³
Africa (Sub-Saharan)	8,645	9,191	9,988	10,915	10,791	9,303	7,064	5,260	4,564	4,787
East Asia & the Pacific	7,342	8,439	8,552	12,634	13,983	8,864	4,328	4,691	6,496	7,804
Europe & Eurasia	5,268	5,549	6,175	7,262	6,021	4,425	3,477	2,841	2,540	2,330
Near East & North Africa	2,502	1,927	2,248	2,510	2,606	1,569	876	899	1,163	1,256
Other ²³⁴	292	229	269	309	407	132	356	350	197	330
South & Central Asia	5,084	3,244	3,011	3,648	4,079	3,122	1,798	1,563	1,594	1,753
Western Hemisphere	26,324	13,633	16,553	25,952	25,630	18,332	14,539	14,148	17,325	13,953
TOTAL ²³⁵	55,428	42,207	46,776	63,230	63,427	46,272	32,682	29,752	33,879	32,213

²²³ For the purposes of this article, geographic regions were determined in accordance with the manner in which the U.S. Department of State defines geographic regions. See U.S. Department of State, Index: 2007 Country Report on Human Rights Practices, <http://www.state.gov/g/drl/rls/hrrpt/2007> (last visited Mar. 4, 2009).

²²⁴ 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICES, *supra* note 49, at 102.

²²⁵ 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 50, at 100.

²²⁶ 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 51, at 100.

²²⁷ 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 52, at 102.

²²⁸ 2002 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 53, at 69.

²²⁹ 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 54, at 60.

²³⁰ 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 55, at 55.

²³¹ Armstrong email, *supra* note 56.

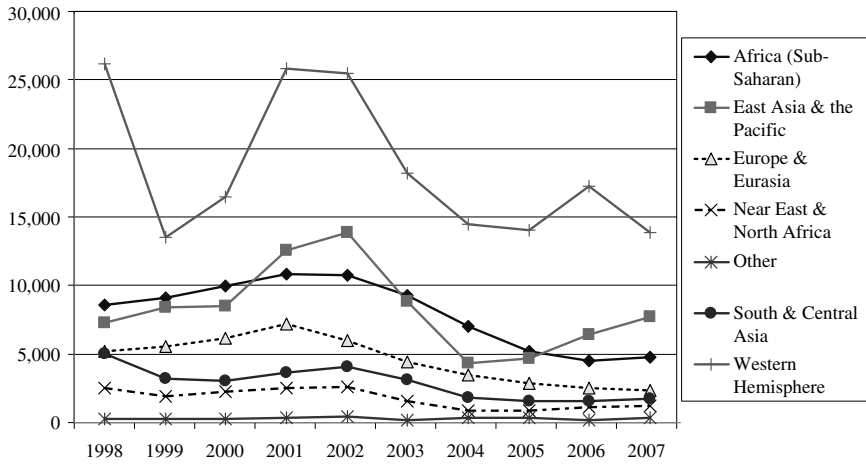
²³² *Id.*

²³³ *Id.*

²³⁴ Includes “no nationality,” “stateless,” and “unknown nationality.”

²³⁵ For some years, the sum totals of the regional totals differ slightly from the total number of applications received as reported in the DHS Statistical Yearbooks. It is unclear why these slight differences exist, but they are not significant statistically.

FIGURE 1: USCIS ASYLUM CASES FILED OR REOPENED BY REGION



APPENDIX B:
USCIS ASYLUM GRANT RATES BY REGION

TABLE 1: USCIS ASYLUM GRANT RATES BY REGION²³⁶

	1998 ²³⁷	1999 ²³⁸	2000 ²³⁹	2001 ²⁴⁰	2002 ²⁴¹	2003 ²⁴²	2004 ²⁴³	2005 ²⁴⁴	2006 ²⁴⁵	2007 ²⁴⁶
Africa (Sub-Saharan)	48%	61%	61%	56%	48%	39%	39%	35%	38%	42%
East Asia & the Pacific	18%	38%	48%	55%	46%	28%	26%	38%	35%	30%
Europe & Eurasia	35%	44%	46%	45%	34%	32%	29%	27%	30%	37%
Near East & North Africa	49%	59%	62%	65%	49%	41%	44%	41%	48%	56%
Other ²⁴⁷	14%	29%	26%	28%	25%	11%	11%	8%	14%	11%
South & Central Asia	19%	32%	49%	55%	47%	33%	36%	22%	39%	38%
Western Hemi-sphere	9%	14%	21%	24%	17%	22%	30%	31%	26%	17%

²³⁶ The asylum grant rate is calculated as the number of cases granted divided by the number of cases decided on the merits, i.e. cases granted, denied, or referred to an Immigration Judge after an interview or because of a filing deadline issue.

²³⁷ 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICES, *supra* note 49, at 102.

²³⁸ 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 50, at 100.

²³⁹ 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 51, at 100.

²⁴⁰ 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 52, at 102.

²⁴¹ 2002 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 53, at 69.

²⁴² 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 54, at 60.

²⁴³ 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 55, at 55.

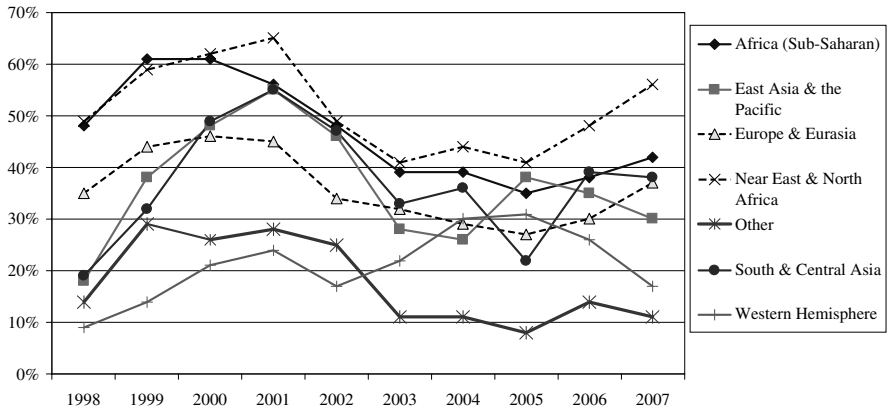
²⁴⁴ Armstrong email, *supra* note 56.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Includes “no nationality,” “stateless,” and “unknown nationality.”

FIGURE 1: USCIS ASYLUM GRANT RATES BY REGION



APPENDIX C:
EOIR ASYLUM APPLICATIONS RECEIVED BY REGION

TABLE 1: EOIR ASYLUM APPLICATIONS RECEIVED BY REGION

	1998 ²⁴⁸	1999 ²⁴⁹	2000 ²⁵⁰	2001 ²⁵¹	2002 ²⁵²	2003 ²⁵³	2004 ²⁵⁴	2005 ²⁵⁵	2006 ²⁵⁶	2007 ²⁵⁷
Africa (Sub-Saharan)	6,565	6,014	6,716	6,634	7,953	8,155	8,277	7,209	5,848	5,349
East Asia & the Pacific	6,955	9,939	11,646	12,593	14,927	15,785	10,968	10,479	11,269	9,879
Europe & Eurasia	6,592	4,995	6,484	7,361	8,326	7,200	6,245	5,293	4,580	3,652
Near East & North Africa	3,014	2,227	2,263	2,479	3,016	3,124	2,280	1,812	1,724	1,627
Other ²⁵⁸	73	47	77	79	158	190	176	179	126	205
South & Central Asia	6,927	5,537	3,541	3,533	4,256	4,378	3,949	3,927	2,923	2,435
Western Hemi-sphere	41,603	26,157	21,239	29,260	35,990	28,436	25,775	24,259	29,183	31,808
TOTAL ²⁵⁹	72,047	54,916	51,967	61,939	74,626	67,268	57,672	53,160	55,654	54,957

²⁴⁸ Asylum Statistics FY 1998, *supra* note 67, at 1-10.

²⁴⁹ Asylum Statistics FY 1999, *supra* note 70, at 1-9.

²⁵⁰ Asylum Statistics FY 2000, *supra* note 73, at 1-9.

²⁵¹ Asylum Statistics FY 2001, *supra* note 76, at 1-9.

²⁵² Asylum Statistics FY 2002, *supra* note 79, at 1-9.

²⁵³ Asylum Statistics FY 2002, *supra* note 82, at 1-9.

²⁵⁴ Asylum Statistics FY 2004, *supra* note 85, at 1-9.

²⁵⁵ Asylum Statistics FY 2005, *supra* note 88, at 1-9.

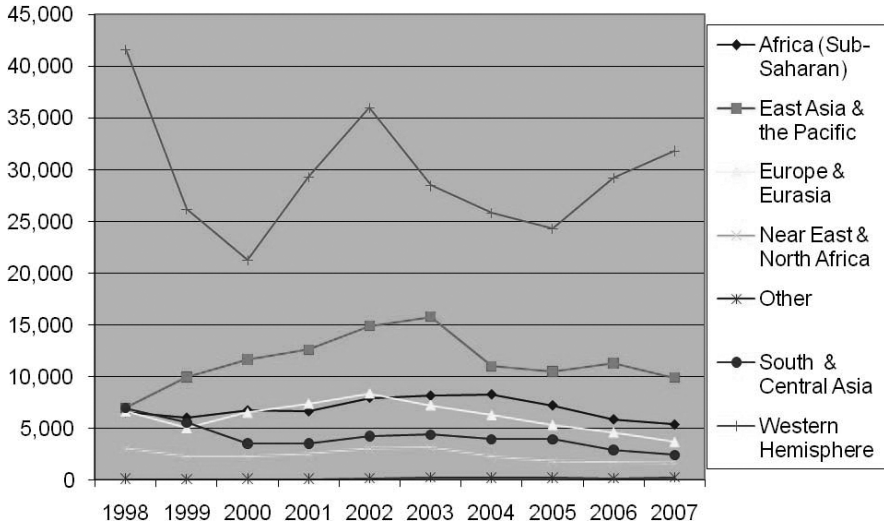
²⁵⁶ Asylum Statistics FY 2006, *supra* note 91, at 1-9.

²⁵⁷ Asylum Statistics FY 2002, *supra* note 94, at 1-9.

²⁵⁸ Includes “no nationality,” “stateless,” and “unknown nationality.”

²⁵⁹ For some years, the sum totals of the regional totals differ slightly from the overall total number of applications received as reported in the DOJ Statistical Yearbooks. It is unclear why these slight differences exist, but they are not significant statistically.

FIGURE 1: EOIR ASYLUM APPLICATIONS RECEIVED BY REGION



APPENDIX D:
EOIR ASYLUM GRANT RATES BY REGION

TABLE 1: EOIR ASYLUM GRANT RATES BY REGION²⁶⁰

	1998 ²⁶¹	1999 ²⁶²	2000 ²⁶³	2001 ²⁶⁴	2002 ²⁶⁵	2003 ²⁶⁶	2004 ²⁶⁷	2005 ²⁶⁸	2006 ²⁶⁹	2007 ²⁷⁰
Africa (Sub-Saharan)	42%	41%	42%	46%	42%	42%	47%	48%	58%	59%
East Asia & the Pacific	37%	41%	39%	16%	15%	37%	39%	27%	57%	66%
Europe & Eurasia	46%	49%	50%	50%	42%	46%	50%	51%	58%	60%
Near East & North Africa	44%	49%	50%	58%	52%	49%	45%	44%	57%	63%
Other ²⁷¹	57%	48%	49%	48%	35%	40%	54%	65%	76%	65%
South & Central Asia	35%	36%	48%	52%	48%	44%	45%	43%	54%	50%
Western Hemi-sphere	9%	12%	16%	19%	23%	24%	23%	22%	21%	21%

²⁶⁰ The asylum grant rate is calculated as the number of cases granted divided by the number of cases decided on the merits, i.e. cases granted, conditionally granted, or denied.

²⁶¹ Asylum Statistics FY 1998, *supra* note 67, at 1-10.

²⁶² Asylum Statistics FY 1999, *supra* note 70, at 1-9.

²⁶³ Asylum Statistics FY 2000, *supra* note 73, at 1-9.

²⁶⁴ Asylum Statistics FY 2001, *supra* note 76, at 1-9.

²⁶⁵ Asylum Statistics FY 2002, *supra* note 79, at 1-9.

²⁶⁶ Asylum Statistics FY 2003, *supra* note 82, at 1-9.

²⁶⁷ Asylum Statistics FY 2004, *supra* note 85, at 1-9.

²⁶⁸ Asylum Statistics FY 2005, *supra* note 88, at 1-9.

²⁶⁹ Asylum Statistics FY 2006, *supra* note 91, at 1-9.

²⁷⁰ Asylum Statistics FY 2007, *supra* note 94, at 1-9.

²⁷¹ Includes “no nationality,” “stateless,” and “unknown nationality.”

FIGURE 1: EOIR ASYLUM GRANT RATES BY REGION

