



COMBINED DHS WRITTEN TESTIMONY

FOR A HEARING ON

“Asylum Abuse: Is it Overwhelming our Borders?”

**BEFORE
THE HOUSE COMMITTEE ON THE JUDICIARY**

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Introduction

Chairman Goodlatte, Ranking Member Conyers, and distinguished members of the Judiciary Committee: Thank you for the opportunity to testify at today's hearing. The joint testimony today will focus on how the following DHS agencies, U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Custom and Border Protection (CBP), support U.S. efforts related to border security while upholding our refugee protection obligations.

The United States has a long history of providing humanitarian protection to refugees and other vulnerable individuals and is a party to the 1967 Protocol relating to the Status of Refugees and the Convention against Torture (CAT). As parties to the 1967 Protocol and CAT, we are committed to abiding by our non-refoulement obligations – to refrain from returning eligible individuals to countries where they would more likely than not face torture or persecution. Our non-refoulement obligations under the Protocol and the CAT are implemented in the immigration context through various laws and regulations.

The Expedited Removal and Credible Fear Processes

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), individuals seeking admission to the United States at a port of entry or those apprehended attempting to enter the United States unlawfully were able to present their requests for asylum directly to an Immigration Judge within the Department of Justice's (DOJ's) Executive Office for Immigration Review (EOIR). IIRIRA, however, amended the Immigration and Nationality Act (INA) to allow for the expedited removal of individuals who lack required documentation or possess improper documentation at ports of entry. DHS also applies the

expedited removal process to individuals who are present without admission and encountered by an immigration officer within 100 air miles of the United States border and who were not physically present in the United States for the 14-day period immediately before their arrest as well as to aliens unlawfully arriving in the United States by sea.

The expedited removal provision was designed to deter individuals from entering the United States illegally and to streamline what had been a lengthy, resource-intensive process that required a hearing and order of deportation or exclusion from an Immigration Judge, a process that could take months or years to complete. Under the expedited removal process, when an immigration officer determines that an individual is inadmissible, the individual is ordered removed from the U.S. without a hearing before an Immigration Judge.

To ensure that the United States maintains compliance with its international treaty obligations relating to non-refoulement, however, individuals subject to expedited removal who indicate a fear of persecution or torture or who indicate an intent to apply for asylum are detained by ICE until they can present their claim to a specially trained USCIS asylum officer who conducts a detailed screening for potential asylum eligibility. These officers are a professional cadre within USCIS, dedicated full-time to the adjudication or screening of protection claims. They are extensively trained in national security issues, the security and law enforcement background check process, eligibility criteria, country conditions, interview techniques, making proper credibility determinations, and fraud detection.

The Role of CBP At U.S. Ports of Entry

When an alien arrives in the United States by air, land or sea, the alien must present himself or herself to a CBP officer for inspection at a U.S. port of entry. If the alien lacks

required documentation or possesses improper documentation, he or she may be placed in Expedited Removal (ER) and referred to secondary inspection for a sworn statement and to complete forms under 8 C.F.R. 235.3. If during this process the alien expresses a fear of return to his or her country, or an intention to apply for or request asylum from the United States, the alien will be referred to a USCIS asylum officer for a credible fear interview. The alien must be detained per section 235(b)(1)(B)(iii)(IV) of the INA and turned over to ICE Enforcement and Removal Operations (ERO) pending the credible fear interview. Every alien encountered at a U.S. port of entry undergoes a full inspection that includes national security, law enforcement, immigration, customs, and agricultural components.

The Role of CBP Between U.S. Ports of Entry

Border Patrol agents (BPA) receive training on the ER process and how to identify the applicable charges, recognize the conditions making an alien subject to ER, and proper protocols for the overall management of aliens through the ER process. The training includes recognizing the circumstances that require a referral to USCIS for a credible fear interview.

During ER processing, BPAs inquire whether the alien has any fear of persecution or torture, or a fear of return to his/her home country. If the alien expresses an intention to apply for asylum, or a fear of persecution or torture, or a fear of return to his/her home country, the alien is detained by ICE ERO and referred to a USCIS asylum officer for a credible fear interview.

Only asylum officers are authorized to make credible fear determinations. If during the booking process, the alien expresses a fear of return to his/her country, the local USCIS Asylum Office is contacted and provided with the relevant case forms to initiate the credible fear process. This

may occur before or after remanding custody to the local ICE facility depending on local agreements between ICE, USCIS and CBP. In all cases, the credible fear interview is conducted after the alien is remanded to ICE custody.

The Credible Fear Screening Process

Individuals in ER proceedings, including those who indicate a fear of persecution or who indicate an intent to apply for asylum, are subject to mandatory detention (with few exceptions). Credible fear interviews therefore are generally conducted by USCIS officers while the individual is in ICE detention. Credible fear determinations are made promptly. Since June 2013, the USCIS credible fear screening process has taken an average of 8 days to complete following ICE notification that an individual subject to expedited removal has indicated a fear of return. During Fiscal Year (FY) 2013, the average number of days between the date when an individual was detained in the ER process and the date the individual was referred to the USCIS Asylum Division for the scheduling of a credible fear interview was 19 days.

During the credible fear interview, individuals are questioned regarding their biographic information, their fear of persecution or torture, and whether there are any concerns that may make them ineligible for asylum. While regulations issued in December 2000 prohibit USCIS from taking mandatory bars into account during the credible fear screening, asylum officers must explore whether any mandatory bars are implicated during each credible fear interview. Mandatory bars to a grant of asylum include the persecutor bar, a conviction for a “particularly serious crime,” having committed a serious non-political crime outside of the United States, being a security risk to the United States, and terrorism grounds. Asylum officers document this information in the interview notes that are taken contemporaneously with the interview.

Wherever any derogatory information is uncovered that could implicate a mandatory bar, either through security checks or the alien's testimony, the information is flagged for ICE, and available for the ICE attorneys in the event they have a hearing before an Immigration Judge. USCIS coordinates with ICE and other law enforcement authorities, as appropriate, if there are reasonable grounds to believe that an individual may be barred for criminal activity, is a security risk, belongs to a terrorist organization or is a human rights violator. The Immigration Judge would make a determination on whether a mandatory bar applies during the removal proceedings.

Historically, only a small percentage of individuals placed in expedited removal proceedings have expressed a fear of return. However, the percentage has risen over time. From FY 2000 through FY 2009, the annual percentage of individuals subject to expedited removal who expressed a fear of return ranged from 4-6%. From FY 2010 through FY 2012, the annual percentage ranged from 7-9%. During FY 2013, approximately 15% of the individuals placed into expedited removal expressed a fear of return and were placed in the credible fear screening process. Despite this increase, expedited removal proceedings have been effective and have saved significant resources since their implementation in 1997 while also ensuring that the United States upholds its international treaty obligations regarding non-refoulement. Before the implementation of the expedited removal process, every individual subject to ER would have been entitled to a hearing before an Immigration Judge where they could apply for asylum.

Security Screening in the Credible Fear Process

In addition to the detailed credible fear interview, USCIS conducts security checks including biographic (TECS¹) and biometric (IDENT) checks during the credible fear process to assess identity and inform lines of questioning. TECS is owned and managed by CBP and is its principal law enforcement and national security system. TECS contains various types of information from a variety of Federal, state, local, and foreign sources, and the database contains records pertaining to known or suspected terrorists, wanted persons, and persons of interest for law enforcement and counterterrorism purposes. IDENT is a DHS system managed by the National Protection and Programs Directorate's (NPPD) Office of Biometric Identity Management (OBIM), and includes biometric information related to the travel history of foreign nationals and watchlist information. It also contains visa application information owned by the Department of State. This system is used to confirm identity, determine previous interactions with government officials and detect imposters. Asylum officers conduct a mandatory check of both TECS and IDENT during the credible fear process. Asylum officers also ensure that the Federal Bureau of Investigation (FBI) name check and fingerprint checks have been initiated.

As previously noted, most aliens are detained by ICE throughout the credible fear screening process. Based on the interview and all available evidence, the USCIS asylum officer determines whether or not the individual established a credible fear of persecution or torture. The USCIS asylum officer's determination as well as information on the individual's identity, including how he or she established it, results of the security checks, and any adverse information is recorded and placed in the alien's file upon completion of the credible fear process. This information is then provided to ICE.

¹ TECS—not an acronym—is the primary law enforcement and national security database which contains enforcement, inspection, and intelligence records.

The Credible Fear Standard

As defined by statute, in order to establish a credible fear of persecution or torture, the asylum officer must find that a “significant possibility” exists that the individual could establish eligibility for asylum or withholding of removal. The purpose of this screening standard is to dispose of claims where there is no significant possibility of success, while not foreclosing viable claims. This procedural safeguard allows the expedited removal process to act as an efficient mechanism in maintaining border security while ensuring compliance with the United States’ international treaty obligations regarding non-refoulement.

Several months ago, USCIS initiated a review of the training materials and guidance used by the Asylum Division to instruct asylum officers on the credible fear standard. This review has included the engagement of EOIR, ICE and CBP. After more than fifteen years since the establishment of the expedited removal/credible fear screening process, a review was necessary to make certain that our application of the credible fear standard properly reflects a significant possibility that claims for asylum or protection under the Convention Against Torture will succeed when made before an Immigration Judge. This review has recently been completed and asylum officers will soon receive training on the updated guidance.

Credible Fear Determinations

Like affirmative asylum decisions, 100 percent of credible fear determinations undergo supervisory review. Individuals who are ultimately found not to have a credible fear are subject to immediate removal by ICE, unless they request a limited review of the USCIS asylum

officer's determination by an Immigration Judge. The Immigration Judge can overrule the asylum officer's decision and find the individual does have a credible fear.

If the individual establishes a credible fear of persecution or torture, USCIS issues a Notice to Appear (NTA) and the individual is placed in removal proceedings before an Immigration Judge at which point he or she can seek asylum or other forms of relief or protection from removal. With the issuance of the NTA, USCIS' role in the ER process is completed. The Immigration Judge ultimately determines whether the individual is eligible for asylum or any other requested forms of relief or protection.

During the pendency of the removal proceedings, certain individuals are entitled to a custody hearing before the Immigration Judge. Aliens arriving at a Ports-of-Entry (POE), however, are only eligible for parole. Parole determinations are made by ICE and are not reviewed by an Immigration Judge. DHS has adopted parole standards to determine whether individuals should be paroled into the United States during the pendency of the removal proceedings. Aliens apprehended between the POEs who demonstrate a credible fear of persecution or torture are eligible for release. If detained, these aliens who are placed in removal proceedings are eligible for a bond hearing before an Immigration Judge.

During FY 2013, 65% of credible fear referrals involved nationals of El Salvador, Honduras, and Guatemala; just over 7% were Mexican nationals.

Developments in the ICE Parole Policy

Parole is an administrative measure, provided under section 212(d)(5) of the INA. ICE uses this parole authority to release inadmissible aliens who arrive at a port of entry and are found to have a credible fear of persecution or torture. Parole is not a lawful admission or a

determination of an alien's admissibility, and can be conditioned upon such terms as the posting of a bond or other guarantee.

On December 8, 2009, former ICE Director John Morton issued a revised directive on "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture" to ensure transparent and consistent parole determinations for arriving aliens seeking protection in the United States. Under this policy, aliens who arrive in the United States at a port of entry and who are found to have a credible fear of persecution or torture are considered for parole.

The policy added heightened quality assurance safeguards, such as a nationwide analysis of number of paroled aliens and their compliance rates. Further, while the prior policy allowed ICE officers to grant parole based on a determination of the public interest, it did not concretely define this concept. By contrast, the directive explains that ICE may parole aliens found to have a credible fear who (1) establish their identities and (2) pose neither a flight risk nor a danger to the community, if (3) no additional factors weigh against their release.

Protections in the ICE Credible Fear-Parole Process

By definition, aliens in the expedited removal process lack valid travel documents, so ICE must verify the alien's identity before release from custody. When considering parole for an arriving alien found to have credible fear, ICE Enforcement and Removal Operations officers review all relevant documentation and databases to determine if the alien can reasonably establish his or her identity. No alien is paroled without undergoing a comprehensive background check to identify any possible public safety or national security issues. Relevant information for this determination includes evidence of past criminal activity, both in the

United States and abroad; disciplinary infractions or incident reports; and any criminal or detention history showing that the alien has harmed or would harm others.

In addition, the alien must present sufficient evidence demonstrating that he or she will appear for the immigration hearing when required in order to be considered for parole. Some of the factors considered include family and community ties, employment history, record of appearance for prior court hearings, compliance with past reporting requirements, and ability to post bond. The alien must also provide an address where he or she will reside and must timely inform ICE and any other DHS agency (if required) of any change of address.

While ICE's procedures reflect the sound public policy position of favoring parole in positive credible fear cases where identity is established, and any flight risk and public safety concerns are alleviated, these procedures safeguard the ultimate discretion of the agency to deny parole. In particular, the 2009 policy specifically recognized that parole "remains an inherently discretionary decision" that can be affected, even in positive credible fear cases, by additional factors, like "overriding law enforcement interests." ICE takes its law enforcement responsibilities seriously, carefully considers each and every parole decision, and balances it with the need to protect border security.

Affirmatively Filed Asylum Applications

Individuals in the United States who are not subject to expedited removal may seek asylum in one of two ways: either by applying for asylum "affirmatively" with USCIS or "defensively" while in removal proceedings before an Immigration Judge. In general, any individual present in the United States and not in removal proceedings may file an affirmative asylum application with USCIS. Affirmative asylum procedures require an in-depth, in-person

interview of every principal asylum applicant. This interview is conducted by the same specially trained asylum officers who conduct credible fear screening interviews.

The asylum officer fully explores the applicant's persecution claim, considers country of origin information and other relevant evidence, assesses the applicant's credibility and completes required security and background checks. The asylum officer then determines whether the individual is eligible for asylum and drafts a decision. Supervisors review 100 percent of asylum officers' determinations prior to issuance of a final decision. If the asylum officer does not grant the asylum application, in most cases the applicant is placed in removal proceedings for a hearing before an Immigration Judge, including a decision on the asylum claim and any other claims for relief from removal. Information used to make a determination on the individual's claim, including the interview notes, biographic information, completed security checks and decisional documents, is placed into the individual's file and is available for use by ICE attorneys during removal proceedings.

Defensively Filed Asylum Applications

Individuals who have been placed in removal proceedings before an Immigration Judge receive a full hearing and have the right to request certain types of relief from removal, including, with few exceptions, asylum.

Background Checks in the Affirmative Asylum Process

Before individuals are granted asylum, they must all establish identity and pass all requisite national security and law enforcement background security checks. Each asylum applicant is subject to extensive biometric and biographic security checks. Both law

enforcement and intelligence community checks are required – including checks against the FBI, the Department of Defense, the Department of State, and other agency systems.

In conducting background screenings, asylum applicants are first checked against the USCIS Central Index System to determine if they have previously been issued an alien number. They are also screened against TECS, CBP's primary law enforcement and national security database which contains enforcement, inspection, and intelligence records. For applicants ages 14 through 79, an FBI search is conducted of the person's name(s) and date(s) of birth. A USCIS Application Support Center takes a complete set of fingerprints and biometrics (signature, photograph and index print) of asylum applicants between the ages of 12 years 9 months and 79 years. The FBI electronically searches the fingerprints within the Integrated Automated Fingerprint Identification System. The 10-prints are also electronically submitted to the IDENT database, where they are stored and matched to existing fingerprint records. This system is used to confirm identity and determine previous interactions with government officials. In addition, a biometric check against the DOD Automated Biometric Identification System (ABIS) is conducted for certain cases. The Asylum Division also screens all asylum information against the National Counterterrorism Center's terrorism holdings. Finally, the Asylum Division conducts biometric checks of certain applicants against Canadian, United Kingdom, Australian, and New Zealand holdings through an agreement under the Five Country Conference (FCC). We expect to move to 100% biometric checks through the FCC by the end of FY 2014.

Conclusion

The credible fear screening process and the established system that allows for individuals to seek asylum in the United States support efforts to effectively and efficiently meet our

international obligations to provide humanitarian protection to refugees and other vulnerable individuals while maintaining the integrity of the immigration system and national security. USCIS carries out these programs in a manner aimed to protect those who deserve it, while safeguarding the integrity of the programs from those who do not merit protection.

The expedited removal process is a critical tool for effective border management. The credible fear screening process that identifies individuals potentially in need of protection in the larger expedited removal framework affords those border efficiencies while ensuring U.S. compliance with its international treaty obligations relating to non-refoulement. Prior to IIRIRA, *all* individuals apprehended while unlawfully entering the United States were placed in deportation or exclusion proceedings before an Immigration Judge – such a framework today would overwhelm DHS’s and DOJ’s already stretched resources.

It is important to note that an asylum officer’s positive credible fear finding does not confer an immigration benefit or guarantee any lawful status in the United States. Rather, a finding of a credible fear results only in an individual’s opportunity to present his or her protection claim before an Immigration Judge in removal proceedings.

Thank you again for the opportunity to testify. We would be happy to answer your questions.

U.S. ASYLUM PROCESS FOR INDIVIDUALS ARRIVING AT PORTS-OF-ENTRY AND CERTAIN ILLEGAL ENTRANTS APPREHENDED WITHIN 100 AIR MILES OF U.S. INTERNATIONAL LAND BORDER

DEPARTMENT OF HOMELAND SECURITY

DEPARTMENT OF JUSTICE

