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UNITED STATES DEPARTMENT OF JUSTICE  
BOARD OF IMMIGRATION APPEALS

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**MATTER OF M- R- R-**

**Axxx-xxx-584**

**CHILD**

**Axxx-xxx-xxx**

**CHILD**

**Axxx-xxx-xxx**

*Respondents*

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In Removal Proceedings  
Appeal of a Decision of an Immigration Judge

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**BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

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**AMERICAN IMMIGRATION**

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Last summer, at a United States Border Patrol station along the U.S.-Mexico border, a parade of Border Patrol agents interviewed Y-F-.<sup>1</sup> Addressing Y-F- directly in Spanish, a government agent told Y-F- that "I am an officer of the United States Department of Homeland Security." He informed Y-F- that "I want to take your sworn statement" and warned Y-F- that "[t]his may be your only opportunity to present information to me and the Department of Homeland Security to make a decision." Under oath, the agent interrogated Y-F-. "Do you understand what I've said to you? Yes. Do you have any questions? No." On and on the interrogation went. Near the end of the interrogation, the agent asked Y-F- "Why did you leave your home country or country of last residence?" Y-F- responded, "To look for work." The interrogation was memorialized in a writing – on the official government Forms I-867A/B Record of Sworn Statement (and the continuation sheet, Form I-831) to

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<sup>1</sup> See AILA-AIC Artesia Pro Bono Project Case No. 20140086 (on file with authors). The AILA-AIC Artesia Pro Bono Project maintained a meticulous database of client data and government practices. See Stephen Manning, *Ending Artesia* at Chap. II (Jan. 25, 2015) available at <https://innovationlawlab.org/the-artesia-report> (explaining that the report “is based on a review of data collected from June 2014 through December 2014 by volunteers with the project. The scope of the data is unique in its granularity and its breadth.”).

be exact. The testimony was written in a first-person, question-and-answer format which gives it the appearance that it is a verbatim transcription of the interrogation. The writings were sworn to by the government agent who administered the oath and they were even witnessed and counter-signed by yet another agent who attested to having witnessed the entire interrogation. On its face, it all seemed so official, so precise, and so full of due process and normal procedure. *See, e.g., Espinoza v. INS*, 45 F.3d 308, 310 (CA9 1995) (describing immigration record rule of reliability).

It was the experience of the AILA-AIC Artesia Pro Bono Project that documents like the one in Y-F's case would be used by the Department of Homeland Security's lawyers as impeachment evidence.<sup>2</sup> The assumptions behind their use as impeachment evidence were that different statements made at different times would indicate that

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<sup>2</sup> The AILA-AIC Artesia Pro Bono Project, like the CARA Family Detention Pro Bono Project, operates a sophisticated client management system that captures each government interaction, numerous demographic datapoints as well as critical case-related information. *See* Decl. of Allegra M. McLeod (filed as Exhibit 5, Memorandum for a Preliminary Injunction in *R.I.L.R. v. Johnson*, 15-CV-00011-JEB) (01/08/2015) (available at: [https://www.aclu.org/sites/default/files/field\\_document/2015.01.08\\_009\\_amended\\_pi\\_motion\\_with\\_exhibits.pdf](https://www.aclu.org/sites/default/files/field_document/2015.01.08_009_amended_pi_motion_with_exhibits.pdf)).

something is amiss and that because this is a government record created by sworn officers in their normal course of duty, it is inherently reliable. *See Espinoza*, 45 F.3d at 310. Because, why not? Isn't that the essence of impeachment evidence that where statements contradict, one cannot be true?

Here's why not: Y-F-'s interview, so painstakingly transcribed, sworn, signed and counter-signed, almost certainly never happened in the format in which it was memorialized. The impossibility of the interview, in spite of the DHS officers' affirmations of veracity and the rule of government regularity is plain on the face of the writings themselves: Y-F- was three years old at the time he was interrogated.

A lot happened in the summer of 2014 along the U.S.-Mexico border. Approximately 1200 children and women, like the Respondents here, were arrested, interrogated, and detained in several temporary facilities until they arrived at the detention center in Artesia, New Mexico. *See* Stephen W Manning, *Ending Artesia* at Chaps. IV & XI. In this case, like others defended by the AILA-AIC Artesia Pro Bono Project, the Department of Homeland Security introduced statements made at border interviews and during credible fear interviews and

reasonable fear interviews mostly for impeachment purposes. See *Ending Artesia* at Chap. IX (describing substantial deviations from typical bond hearings common in the Artesia docket). The Secretary of Homeland Security along with numerous officials in his chain of command – all officials with command control over the officers conducting interrogations like that in Y-F-’s case, publicly pronounced over and over again that the children and women seeking asylum that summer did not, in fact, qualify.<sup>3</sup> Over and over, these same officials

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<sup>3</sup> See, e.g., Vice President Joseph Biden, *Remarks to the Press and Question and Answer at the Residence of the U.S. Ambassador, Guatemala City, Guatemala* (June 20, 2014) available at <http://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>; *Hearing on the Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters*, Before the S. Comm. on Appropriations (July 10, 2014) (statement of Jeh Johnson, Sec’y of Homeland Sec. of the United States), available at <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>; Juan Carlos Llorca, *DHS Secretary Visits Artesia, N.M. Facility; Warns Immigrants ‘We Will Send You Back,’* EL PASO TIMES, July 11, 2014, available at [http://www.elpasotimes.com/latestnews/ci\\_26128803/dhs-secretary-visit-artesia-nm-migrant-detention-center](http://www.elpasotimes.com/latestnews/ci_26128803/dhs-secretary-visit-artesia-nm-migrant-detention-center); Interview with Secretary of Homeland Security Jeh Johnson, NBC News, Meet the Press, July 6, 2014 (video); Press Release, Department of Justice, *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing Into the U.S.* (July 9, 2014), available at <http://www.justice.gov/opa/pr/2014/July/14-dag-711.html>; *Background*

repeated that speedy removals were expected and intended.

And it was not just the U.S. Border Patrol caught up in the frenzy of fast removals. The USCIS Asylum Division designed a credible fear and reasonable fear process that was designed to inhibit accurate interviewing and memorialization. Interviews were scheduled without notice and children were required to be present among other systemic defects.<sup>4</sup> *See infra* at § 2 (describing asylum fear screening defects in

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*Briefing from the Senior U.S. Department of State Official on Secretary Kerry's Trip to Panama* (July 1, 2014), available at <http://m.state.gov/md228646.htm>; *Officials: NM Detention Center Will Be Focused On Deporting Illegal Immigrants Within 15 Days*, CBS DC, (June 27, 2014 6:48 AM), available at <http://washington.cbslocal.com/2014/06/27/officials-nm-detention-center-will-be-focused-on-deporting-illegal-immigrants-within-15-days/>; *Hearing on Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border*, Before H. Comm. on Homeland Sec. (June 24, 2014) (statement of Jeh Johnson, Sec'y of Homeland Sec. of the United States); *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Border*, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs (July 9, 2014), available at <http://www.hsgac.senate.gov/hearings/challenges-at-the-border-examining-the-causes-consequences-and-responses-to-the-rise-in-apprehensions-at-the-southern-border> (statements of Thomas S. Winkowski, Principal Deputy Assistant Sec'y of U.S. Immigration and Customs Enforcement).

<sup>4</sup> *See, e.g.*, Transcript of Remarks by Deputy Secretary of Homeland Security Alejandro Mayorkas on the Central American Migrant Crisis,

detail). These defects in the design of the fear screening process distorted the accuracy of the interviews.

The cumulative effect of evidence in the public record when matched with the case-specific evidence here and viewed in light of the experience of the AILA-AIC Artesia Pro Bono Project indicates that the presumption of government record reliability took a grievous blow in the summer of 2014. When the head of an agency speaks so plainly and so frequently with disdain about the Central American children and women applying for asylum and when the government practices on the ground organize around that sentiment with the goal of deporting rapidly, the presumption of fairness that judges give to border records produced in the course of duty by CBP, particularly the I-867A/B, and the asylum records created in the course of duty by the USCIS Asylum Division, particularly the I-870 Record of Determination/Credible Fear Worksheet and the I-899 Record of Determination/Reasonable Fear Worksheet, merits reexamination. *See Matter of S-S-*, 21 I&N Dec. at NDN, National Press Club, Sept. 16, 2014, *available at* <http://ndn.org/blog/2014/09/transcript-deputy-secretary-homeland-security-mayorkas-ndn-event> (acknowledging the asylum division's screening process was defective).

123-24 (requiring a reliable process for taking statements used as impeachment).

Amicus, the American Immigration Lawyers Association, submits this brief to provide context to the BIA in understanding how things actually play out on the ground. We describe the irregularities in the border screening process, the coercive nature of the detention center, and the systemic defects in the implementation of the credible and reasonable fear interviews. The *design* of the process used by DHS infects every adjudication.

As illustrated here, the Government's systemic failures form the fulcrum around which DHS seeks reversal. While we take no position on the merits of the Respondent's claim, AILA explains that the presumption that has historically applied — that the Department of Homeland Security regularly discharges its duties in a lawful manner — cannot apply here because of the system-bias against all the women and children detained in Artesia and the other family detention centers. The government records created as part of the family detention program in the summer of 2014 are designed to deport as many children

and women as possible in a short period of time. While all of those documents carry an air of reliability, few of them were created in conditions that deserve such a presumption.

Instead, the BIA should adopt a uniform rule that when an I-867A/B, an I-870, or an I-899 are introduced for impeachment purposes, DHS bears the burden of producing the maker and demonstrating in fact the document's reliability. *See Matter of S-S-*, 21 I&N Dec. 121, 123-24 (BIA 1995). The BIA and the immigration judge "need[ ] to know what transpired in the proceedings before the asylum officer before [they] can evaluate questions with respect to credibility arising from the interview." *Id.* at 124. If DHS fails to produce the maker or fails to meet its burden, the BIA should adopt a rule that precludes an Immigration Judge from making an adverse credibility finding based on any purported inconsistency. What happened at the border and in Artesia in 2014 was unfair and, regrettably, cannot be undone; this rule, though, provides a measured response to address the system-bias and ensure fair adjudications in the immigration courts.

### **Interest of Amicus**

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

## **Argument**

### **1. System-bias in the border screenings.**

The written memorializations of border screenings conducted by U.S. Customs and Border Protection and recorded on Forms I-867A/B are not inherently reliable because they often contain fake responses, do

not accurately reflect testimony presented, and were almost always created under coercive conditions.

The presumption that the I-867A/B are inherently reliable indicators of what was said by a respondent during a border screening stems from the idea that the forms are completed by sworn public officers in the course of carrying out their duty to the public. These forms “are presumed inherently reliable if authenticated, and are presumed to contain information from the respondent unless the respondent presents evidence to the contrary.” *Espizona*, 45 F.3d at 309. “This rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports.” *Id.* at 310.

The public record as reflected in the experience of the AILA-AIC Artesia Pro Bono Project demonstrates that both prongs of the presumption are false. The CBP has a duty both to fairly identify inadmissible noncitizens who express fear and to accurately record their interactions on the government forms I-867A/B. The public record

shows that the government was motivated by a bias against the Central American children and women seeking asylum.

The CBP has a history of faking responses to the I-867A/B and the AILA-AIC Artesia Pro Bono Project's experience confirms this is so. Since the expedited removal program was first promulgated, the border screenings have been marked by systemic errors that, over nearly twenty years, have gone absolutely unchecked and unacknowledged by DHS (and the former INS). There is no public record that would suggest that any attention was given to reforming or improving the CBP processes used by the CBP officers to bring them into line with their duty. Indeed, the public record speaks otherwise about CBP's practices in general and CBP's practices in particular during the summer of 2014.

By statute, the government has a duty to identify inadmissible noncitizens in the expedited removal program who express a fear of harm. INA § 235(b). By regulation, this duty belongs largely to CBP (and in some instances rests with ICE). *See* 8 C.F.R. § 235.3(b). The duty has two components: creating an accurate record of proceedings

and, when the record of proceedings reveals an indication of fear, referring the noncitizen for a credible fear interview.<sup>5</sup>

The duty to create an *accurate* record of proceedings is microscopically described in the regulations so that there ought to be no room for manipulation of the system. See David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int'l L. 673, 681 (2000).<sup>6</sup> The examining immigration officers are supposed to elicit relevant information, record it, and if they hear an indication of fear, a “beep” sounds and the credible fear screening starts. *Id.* The regulations provide that “[i]n every case in which the expedited removal provisions will be applied...the examining immigration officer shall

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<sup>5</sup> The reasonable fear process is substantially similar. See 8 C.F.R. § 208.31. Only if the distinction matters in this brief do we refer to the reasonable fear process separately. Importantly, AILA has taken the position that the entire reasonable fear process violates the plain language of the asylum statute and that it is plainly illegal. See, e.g., Brief of Amicus Curiae American Immigration Lawyers Association, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, and National Immigrant Justice Center, filed in *Perez-Guzman v. Holder*, 13-70579 (CA9 Apr. 2, 2014) available at: <http://www.aila.org/infonet/amicus-brief-perez-guzman-v-holder>

<sup>6</sup> Mr. Martin, a former general counsel for the then-INS, and part of the team that helped shape the expedited removal process, 40 Va. J. Int'l L. at 678, provided a series of recommendations for improving the expedited removal process including transparency and monitoring of the inspection process. *Id.* at 695-701.

create a record of the facts of the case and statements made by the alien.” See 8 C.F.R. § 235.3(b)(2)(i). The regulations prescribe that “[t]his shall be accomplished by means of a sworn statement using form I-867A/B, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act.” *Id.*

The interaction of the examining immigration officer with the noncitizen is painstakingly described in the regulation. *Id.* The examining officer “shall read (or have read) to the alien all information contained on Form I-867A.” *Id.* The examining immigration officer “shall record the alien’s responses to the questions contained on Form I-867B[,]” and the examining immigration officer is required to read back to the noncitizen the whole statement and then obtain a signature and, on each page, an initial. *Id.* The regulations describe a professional, regular, unbiased duty – the kind envisioned by the inherent reliability presumption.

The agency policy manual captures this professionalized view of the examining immigration officer’s public duty. When performing the duty described in 8 C.F.R. § 235.3, the examining immigration officer

“must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her.” *See* U.S. Customs and Border Protection Inspector’s Field Manual, Chap. 17.15(b). The duty, as described in the agency policy, goes on to emphasize that it “is important that a complete, accurate record of removal be created[.]” *Id.* The examining immigration officer has a duty to “[b]e sure to obtain responses from the alien regarding the mandatory closing questions contained on the form [I-867B].” *Id.* And finally, the agency manual reminds the examining immigration officer to “have the alien read the [sworn] statement, or have it read to him or her in a language the alien understands” before signing and initialing. *Id.* That’s the duty as publicly described. And that’s how it is supposed to work.

Clearly, this written description of the duty of the government in the preparation of the forms I-867A/B gives great support to the inherent reliability presumption that immigration judges, the BIA, and the judicial courts afford to such forms. The publicly expressed duty gives the impression that the I-867A/B, in both form and substance, is a

transcription of what happened at a border holding center where no one else normally appearing in immigration court is regularly present to observe. The public assumes that its sworn officers follow the law – that is the heart and soul of the presumption of inherent reliability. In the rare case where that is not so, the presumption is just a presumption, after all, and it can be rebutted.

The burden, though, is placed on the respondent to rebut the reliability which is a difficult task and intentionally so. What if it were the case, though, that in some or many instances, the duty was not followed and the reports contained inaccuracies? The confidence that judges have in the presumption would certainly be tested. What if it were the case that in most of the instances, the duty was disregarded and, in fact, the I-867A/B's contained blatantly false information? The presumption would have to automatically fail.

The reality on the ground is that the CBP adheres to its sworn duty so irregularly that the premise of inherent reliability is fatally undermined. The public record has consistently documented the deficiencies of CBP's adherence to its duty to provide accurate and fair

reports on the forms I-867A/B and has documented falsification of reports. See U.S. Gen. Accounting Office, *Opportunities Exist to Improve the Expedited Removal Process* (Sept. 2000); U.S. Comm. on International Religious Freedom, *Study on Asylum Seekers In Expedited Removal: Evaluation of Credible Fear Referral in Expedited Removal At Ports of Entry in the United States* (Feb. 2005) (USCIRF Report); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L. J. 167 (2006); American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context* (May 2014) (AIC Report). The persistence of the irregularities over a large span of time cannot be ignored by the BIA by continuing to adhere to a presumption of reliability.

In 2005, the United States Commission on International Religious Freedom released its findings of its independent review of CBP's practices in expedited removal. The USCIRF Report used direct observation of CBP's practices. Its findings are notable. The USCIRF Report explains plainly that CBP officers faked responses to the I-867B.

See USCIRF Report at 15, 13-19. “However, despite the observation of a number of cases in which the I-867B fear questions were not asked, official documents prepared during these interviews (A-files) indicated that questions were asked and answered in most of the cases in which our research team did not observe any such questioning[.]” *Id.* at 15. With regard to the I-867B fear question “Why did you leave your home country or country of last residence?” the USCIRF researchers concluded that in nearly 87% of the cases, “the A-file incorrectly indicated that the question had been asked and answered.” *Id.*

The USCIRF researchers determined that “[m]ore than a quarter of all aliens referred for a Credible Fear interview were not asked to confirm their statements, despite the potential use of these statements in subsequent asylum proceedings.” *Id.* at 18. Importantly, the researchers explained that in “only 28.2 percent of cases, aliens were observed to read their statements or had their statements read to them before signing the confirmation.” *Id.* at 18-19.

Obviously, faking answers and forcing signatures are not part of the duty to which the examining immigration officers swear. In spite of

the blatant evidence that such practices were occurring in a “large proportion” of cases, USCIRF Report at 30, the public response from CBP after publication of the USCIRF Report was silence. There is no mention in the public record that CBP took any corrective action to realign its actual, largely unobserved practices, with the duty so entrusted. Indeed, “[m]any of those same flaws still plague the expedited removal system.” *See* AIC Report at 10. These flaws included completing interviews “without confidentiality,” “without properly interpreting interviews or translating documents back to applicants,” using “identical boilerplate statements in officers’ reports” and “fail[ing] to record asylum seekers’ statements[.]” *Id.* at 10.

In the case of Y-F-, the examining immigration officer swore that he asked a three-year old child why he left his home country and he swore that a three-year old responded “to look for work”. The implausibility of that interaction is obvious. The fact that other officers signed on further discredits the regularity of the border screening officer’s adherence to his or her duty.

Nearly twenty years into the credible and reasonable fear screening process, there has not been a single publicly reported initiative wherein CBP has sought to overcome these deficiencies. As the case of Y-F- suggests, the presumption that the CBP screening officers are actually fulfilling their duty is not well-founded.

The presumption that the CBP officers are performing their duty with an impartial motive is belied by the public record. As explained above, the head of the agency pre-judged the cases of these claimants. The border screenings were conducted at inhospitable government-controlled holding centers that were not designed to ensure reliability during the interviews or in the memorialization of the interviews. The inhospitable conditions inject skepticism that data collected therein is an accurate reflection of what was actually said during an interview.<sup>7</sup>

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<sup>7</sup> In a disturbing recent echo, volunteers with the CARA Family Detention Pro Bono Project at the Dilley detention center report that clients of the project reported experiencing intimidation and humiliation by CBP officers such as being gathered en masse and told by CBP officers that “you are bad mothers”. *Cf.* USCIRF Report at 23 (describing CBP officer telling a Central American asylum applicant that she would be “in trouble” and that “she would not see her family for a long time if she made a fear claim.”).

The public record of CBP's practices in 2014 speaks of a disregard for the noncitizens in their custody that create coercive conditions ill-designed for accurate screening. First, the use of frigid temperature controls in holding areas was widely reported. See Molly Redden, *Why Are Immigration Detention Facilities So Cold?*, Mother Jones (Jul. 16, 2014); Rachael Bale, *Detained border crossers may find themselves sent to 'the freezers'*, Ctr. for Investigative Reporting (Nov. 18, 2013); Nat'l Immigrant Justice Center, et al, *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (June 11, 2014) but see Office of Inspector General, Memorandum to Jeh Johnson on the Oversight of Unaccompanied Alien Children (Aug. 28, 2014).<sup>8</sup>

A consortium of organizations has collected numerous reports of border holding centers that indicate conditions are ill-suited to the

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<sup>8</sup> The OIG response is available at: [https://www.oig.dhs.gov/assets/pr/2014/Sig\\_Mem\\_Over\\_Unac\\_Alien\\_Child090214.pdf](https://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf). While the Office of Inspector General failed to sustain many of the complaints, it acknowledged the temperature problems. It provided different plausible explanations, in lieu of an intentional manipulation of temperature controls, to explain the existence of cold conditions. There can be no serious dispute that the interrogation of children and women in icy-cold holding-centers is not a best practice in interrogation design and does not correlate to an intention to elicit accurate historical information.

professional duty outlined in the statute, regulations, and policy manual. The ACLU of San Diego and Imperial Counties, the American Immigration Council, the National Immigration Project of the National Lawyers Guild and the Northwest Immigrant Rights Project have assembled representative samples of CBP disregard of its duty that include use of fake statements, use of icy conditions, use of degrading conditions, use of intimidation, and other unprofessional conduct. *See Resources and Reports at <http://HoldCBPAccountable.org> (last visited May 24, 2015).*

## **2. System-Bias in Credible Fear Interviews**

Shortly after DHS opened the Artesia detention center in Artesia, New Mexico, D-R- was interviewed by the USCIS Asylum Office.<sup>9</sup> The Asylum Office found that she had no credible fear, and the immigration judge affirmed. D-R- was subsequently gathered one night with other women and herded to an airplane to constitute another “wave” of removal.

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<sup>9</sup> *See* AILA-AIC Artesia Pro Bono Project Case No. 20140099 (on file with authors).

The record, though, created by the Asylum Office as it was required to do, *see* 8 C.F.R. §§ 208.30(d)(6), (e)(1), was defective by design. Dangling around her neck was her son. In Artesia, the conditions of detention and the conditions of the credible fear interviews were such that for several weeks, all the women were interviewed in the presence of their young children. D-R- was no exception. This made sense in a way because the women and children were supposed to be removed as quickly as possible. In D-R-'s case that could have proved fatal.

D-R- explained that “[d]uring my credible fear interview, my son was with me. I was afraid and ashamed to speak of [the violence that I experienced].” Importantly, she did not want her son to know that his father tried to kill her and force her to abort him. *See also*, Manning, *Ending Artesia* at Chap. X (explaining the AILA-AIC project’s emphasis on filing motions to reconsider negative fear findings). No one reading her I-870 later would have known about this because the I-870 would never have reflected the systemic bias.

The conditions of the interviews were designed to prevent women from openly discussing their past experiences and the experiences of

their children. The interviews did not at first routinely elicit information related to domestic violence. None of the interviews purported to be exhaustive in nature. Accordingly, the record of the interviews, Form I-870, cannot on their own form a basis for impeachment when testimony later develops that contains additional information.

The Asylum Office's credible fear screenings were not designed to achieve accuracy or completeness because of the presence of children. Like the case at hand, this system bias was present in all the credible fear interviews in Artesia. *See, e.g.,* Dara Lind, *9 ways detaining immigrant families is turning into a 's\*\*\*show'*, Vox (Aug. 6, 2014) (quoting AILA-AIC Pro Bono Project volunteer, Laura Lichter); Women's Refugee Commission & Luthern Immigration and Refugee Services, *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention* at (Oct. 2014) (LIRS Report). For example, the asylum office found no credible fear in the case of a lesbian woman from El Salvador in part because the presence of her child during the interview distorted the questioning. *Id.* (describing the

asylum office's denial of a lesbian Salvadoran woman's credible fear claim).<sup>10</sup> Researchers from LIRS and the Women's Refugee Commission reported that "the Artesia facility lacked any childcare and had no school for children for months after opening[.]" See LIRS Report at 12. They found that "mothers had no options for childcare if they wished to sleep, needed a break, and, critically, when sharing their traumatic histories in making their cases for protection in the United States." *Id.* at 9; see *id.* ("several children detained at Artesia were the result of rape – something the mothers refused to disclose in front of these children, but which was crucial to their case histories.").<sup>11</sup>

For several weeks, asylum officers were not routinely seeking information about domestic violence during the credible fear interviews.

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<sup>10</sup> This client, almost removed because of the systematic failures in the expedited removal process, was later granted asylum. See Manning, *Ending Artesia* at Chap. XIV (describing the case of "Rosslyn").

<sup>11</sup> See also Detention Watch Network, *Expose & Close: Artesia Family Residential Center, New Mexico* (2014) at 6-7 (explaining that "[m]any women did not disclose rape or other critical details to asylum officers or immigration judges because they were unaware that the proceedings were confidential"); also *id.* ("Women have also been forced to participate in credible fear interviews and immigration hearings with their children due to requirements by ICE and the Executive Office for Immigration Review[.]"). The report is available at: [http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose\\_close\\_-\\_artesia\\_family\\_residential\\_center\\_nm\\_2014.pdf](http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_close_-_artesia_family_residential_center_nm_2014.pdf).

The records of the AILA-AIC Pro Bono Project indicate that through mid-August 2014, the asylum office did not ask about family or intimate relation harm. See AILA-AIC Pro Bono Project's Big Table Report for Aug. 6, 2014 (describing liaison activity with asylum office relating to encouraging officers to engage in questioning about family violence) (on file with authors). This was so even though the DHS had long taken the position that a woman who was unable to leave a domestic relationship or was viewed as property by virtue of that relationship could set forth a cognizable claim for asylum. See Brief of U.S. Dep't Homeland Security, *Matter of L-R-* at 14-15, available at [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf).

Notably, every I-870 issued by the USCIS Asylum Office and logged into the AILA-AIC Pro Bono Project's database included a disclaimer stating that it was not an exhaustive account of all possible bases for fear. Section III of every I-870 contained the following language in all capital letters: THE FOLLOWING NOTES ARE NOT A VERBATIM TRANSCRIPT OF THIS INTERVIEW. THESE NOTES ARE

RECORDED TO ASSIST THE INDIVIDUAL OFFICER IN MAKING A CREDIBLE FEAR DETERMINATION AND THE SUPERVISORY ASYLUM OFFICER IN REVIEWING THE DETERMINATION. THERE MAY BE AREAS OF THE INDIVIDUAL'S CLAIM THAT WERE NOT EXPLORED OR DOCUMENTED FOR PURPOSES OF THIS THRESHOLD SCREENING. Indeed, this disclaimer appears to be commonly placed on the form I-870. The experience of the AILA-AIC Pro Bono Project is that it should be taken at its word and considered by judges in the adjudication process because, in spite of the appearance of a verbatim transcript, the I-870 is no such thing.

Though the federal courts have not expressed a granular understanding of what is involved in an “airport interview” versus a “credible fear interview,” they have consistently expressed skepticism about using the government-created records of credible fear determinations as a basis for an adverse credibility finding. For example, the Tenth Circuit has explained that adjudicators must “be sensitive to the pressure bearing on persons seeking to escape persecution and make allowances for omissions of detail in their early

accounts of what befell them.” *Ismail v. Mukasey*, 516 F.3d 1198, /PIN (CA10. 2008). In *Zhang v. Holder*, 585 F.3d 715, 724 (CA2 2009), the Second Circuit held that credible fear interviews are “more similar to airport interviews than asylum interviews and therefore warrant close examination.” The Second Circuit stated that adjudicators should consider the fact that respondents had been detained, did not have the benefit of counsel, and were “likely to be more unprepared, more vulnerable and more wary of government officials.” *Id.*

These systematic failures in the design of the credible fear interviews make it absurd for any judge to make a negative credibility finding based on discrepancies between the I-870 and later testimony. The I-870 does not have the inherently reliability, in the absence of the maker’s testimony, to form the basis for an adverse credibility finding. The Third Circuit has found that credible fear interviews in a detained setting present troubling reliability concerns. *See Fiadjoe v. AG*, 411 F.3d 135 at 159 (CA3 2005) (“The Asylum Officer's interview of Ms. Fiadjoe was not conducted at the airport shortly after her arrival; it was conducted on March 30, 2002, approximately nineteen days later, at the

York County Prison. Yet conditions similar to, and in many ways worse than, those at an airport interview prevailed.”)<sup>12</sup> The Seventh Circuit has also instructed the BIA to consider the circumstances surrounding the credible fear interview. *See Balogun v. Ashcroft*, 374 F.3d 492 at 504-505 (CA7 2004) (“Reliability concerns not only the accuracy and validity of the documents on which airport interviews are recorded, but also the applicant's frame of mind and ability to answer the interviewer's questions.”).

The circumstances of the instant case demonstrate the practical consequences of this flawed credible fear process. The Department of Homeland Security has appealed to the BIA the Immigration Judge’s grant of asylum and has asked the BIA to review alleged inconsistencies and omissions between testimony given by the Respondent to an asylum officer in a credible fear interview and the testimony given by

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<sup>12</sup> Although the courts of appeals refer to “airport interviews,” it is not clear if the asylum office has ever regularly conducted credible fear or reasonable fear interviews at an actual United States airport. The rules would seemingly preclude such an interview because no fear interview should take place until at least 48 hours have elapsed from the time of CBP’s referral. It might be that the courts of appeals, like others, have confused the I-867A/B CBP interview with the asylum office’s I-870 record of credible fear.

the Respondent in her hearing before the Immigration Judge. The Respondent explained to the Immigration Judge that she was not free to divulge the details of her claim in full during the credible fear interview because of the presence of her children in the interview. The Immigration Judge rejected the allegation of any inconsistency and accepted this explanation for the Respondent's failure to raise certain issues at her credible fear interview.

On appeal, the DHS seeks to establish that the Respondent was not credible because she did not raise the subject of threats against her children in a credible fear interview where her children were present. See Gov't Brief at 10. The DHS brief discounts her explanation that she did not want her children to know of the threats against them:

Given that during her initial Asylum Officer interview the respondent disclosed, in the presence of her children, that their father was killed, and she was afraid that they would be harmed because of their father's death, it makes no sense why she would not also be willing to disclose the threats that were the basis of her fear.

Gov't Brief at 12-13.

At the time of these interviews, the children were four years old.

The Board should not sanction the DHS' creation of a credible fear process which is designed to inhibit the revelation of information and the DHS' challenge of a mother's very reasonable explanation, accepted by the judge, that the circumstances of the interview, specifically, the presence of her young children, inhibited the full disclosure of information.

The Respondent's case is perfectly emblematic of the fatal flaws described throughout this brief.

## Conclusion

Twenty years ago, in the BIA laid down a very simple rule: when the credibility of an applicant for asylum or withholding is placed in issue because of alleged statements made earlier, the record of the interview must contain a meaningful, clear, and reliable summary of the statements made by the respondent. *Matter of S-S-*, 21 I&N Dec. at 124. The I-867A/B, I-870, and I-899 are not reliable and should not be relied on as a matter of course. Instead, the DHS must bear a burden to demonstrate their reliability each time one of these documents is used for impeachment purposes.

Respectfully submitted on June 2, 2015,

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ANDRES BENACH

STEPHEN W MANNING

## CERTIFICATE OF SERVICE

I, Andres Benach, certify that I caused to be served by first class mail a copy of this brief on the parties below on June 2, 2015.

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