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Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States

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Executive Summary

Women with their children, girls and boys, single adults, and entire families have been fleeing El Salvador, Guatemala, and Honduras to escape an epidemic of violence that has taken hold of their countries in the past several years. The governments of these countries have not been able to control the high rates of murder, rape, domestic violence, gender-based violence, and targeted and organized gang attacks. In a 2015 report, the UN refugee agency UNHCR found not only a five-fold increase in the number of asylum seekers coming from those countries to the United States, but also a thirteen-fold increase in the number of asylum requests to Mexico, Panama, and other countries in the region.¹

Proving asylum in the United States is a difficult and complex legal process. Yet U.S. asylum officers are concluding that nearly 90 percent of asylum seekers from El Salvador, Guatemala, and Honduras (also known as the Northern Triangle) have credible claims, a very high figure that far exceeds the rate for nationals from other parts of the world.² This statistic is borne out in the experiences of AILA member attorneys who have represented about 20,000 people through AILA's partnership in the Artesia Pro Bono Project and the CARA Family Detention Project.³

Instead of recognizing that people fleeing Central America are overwhelmingly asylum seekers who deserve humanitarian protection, the Obama administration has adopted an aggressive enforcement strategy that prioritizes sending a message of deterrence. The tactics include increased apprehensions and detentions, the use of rapid deportation strategies that undermine due process, and recently, raids targeting families and unaccompanied children. The administration has begun refugee protection programs in the Northern Triangle, but these efforts are overshadowed by tactics that severely undermine access to asylum and a meaningful opportunity to seek protection for those coming to the U.S. border.

The U.S. government should not resort to harsh enforcement and deterrence tactics to manage migration flows in an orderly and efficient manner. Adjudicating claims can be done efficiently but also in a way that guarantees due process to those who may qualify for asylum or other legal protection. Already two federal courts have found that the government's use of detention against Central American families violates U.S. legal obligations.⁴ Mothers and children deported back to those countries live in constant fear, have faced further persecution, and have even been killed.⁵ Securing the safety and welfare of our nation can be achieved without imperiling the lives of those fleeing danger.

The administration should implement solutions that restore due process and protect people fleeing violence. A solution begins with giving people the chance to make their claim to a judge rather than subjecting them to fast-track procedures that bypass the courts and undermine due process. In fact, for years judges decided most immigration removal cases. Now, border agents arrest and quickly deport people without giving them a chance to see an asylum officer, let alone a judge. After people are apprehended in the border region, they receive almost no meaningful information about what the law requires them to do or how they should pursue a claim for legal protection. If they are not immediately deported, they face re-traumatizing detention that restricts access to counsel, separates them from loved ones, and rushes adjudication of their claims. If they are not detained, their legal case is calendared on a high priority immigration court "rocket docket" that gives them limited opportunity to seek counsel and prepare their case.

The government does not guarantee representation for asylum seekers, children, or anyone facing removal. Recent statistics show about one-half of children and 70 percent of families lack representation in immigration court.⁶ Having a lawyer makes an enormous difference for those facing removal: Families represented by legal counsel are 10 times more likely to be granted asylum or protection from deportation than those who are unrepresented.⁷

Even with a lawyer, an asylum seeker's case will be reviewed by a deeply flawed asylum system that does not deliver reliable or fair results. Immigration judges render inconsistent interpretations of asylum law and grant asylum at dramatically disparate rates—while nationally, judges grant asylum in 43 percent of all cases, in Atlanta and El Paso, judges grant asylum only two percent and four percent of the time, respectively.⁸ Moreover, thousands of asylum seekers are categorically barred from applying for asylum because of unfair procedural requirements, like the one-year filing deadline for seeking asylum or the reinstatement bar to seeking asylum.

The administration's enforcement and deterrence strategies have undermined due process so severely that Central American families and children who are ultimately able to win asylum do so only by overcoming tremendous obstacles created by the very government that is supposed to protect them. With the lives of thousands at stake, the government must implement reforms to restore due process and to ensure that no family, child, or victim of persecution is ever returned to life-threatening danger.

Summary of Recommendations:

- The Department of Homeland Security (DHS) should improve conditions and processing at U.S. border stations to ensure migrants are screened in a careful and humane fashion while also ensuring that asylum seekers and those needing protection understand their legal obligations and their right to seek legal protection.
- DHS should suspend the use of “fast-track” removal methods, such as expedited removal and reinstatement of removal, and return to using immigration courts to adjudicate immigration removal cases.
- DHS should end family detention and invest instead in cost-effective, community-based case management alternatives to detention that are more humane and will reduce government detention costs while increasing compliance with immigration law.
- Congress should guarantee legal counsel to every individual facing removal who cannot afford counsel. As an interim step, the relevant government agencies should take steps to ensure counsel is appointed for all children, families, and other vulnerable individuals, and in cases where the appointment of counsel is necessary to ensure fair adjudication.
- Congress and the Department of Justice (DOJ) should ensure the immigration court system has the funding and capacity to adjudicate cases effectively and protect due process and the integrity of the court's decisions.
- Congress and the DOJ should reform the asylum system to ensure efficient and consistent adjudication of asylum claims and remove unfair procedural rules that block meritorious asylum claims from even being heard.
- In addition to these U.S.-based reforms, AILA supports efforts to address the underlying conditions contributing to the extreme violence in the Northern Triangle. AILA also urges country governments to expedite implementation of refugee screening, processing, and resettlement efforts to ensure protection for asylum seekers and other vulnerable individuals.



San Salvador

EL SALVADOR

1. Border processing should be humane and protect asylum seekers, children, and families.

U.S. Customs and Border Protection (CBP) is the largest and most substantially funded law enforcement agency in the country.⁹ However, it has not taken adequate steps to protect vulnerable individuals who seek protection at U.S. borders. An asylum seeker's first encounter with the U.S. immigration system can be deeply traumatizing, especially due to the terrible conditions in U.S. Border Patrol holding stations that detainees call "*hieleras*," or "iceboxes." Not only are the facility conditions unacceptable, but the screening procedures used by CBP officers at the border also often fail to identify those in need of protection, or record inaccurate information about a person's case, resulting in the deportation of vulnerable individuals who would qualify for asylum or other legal protection.

CBP should improve conditions at holding stations and provide legal orientation at those stations. DHS should improve screening procedures to identify those who qualify for humanitarian protection and replace CBP officers with professionals trained in victim assistance, trauma, counseling, child welfare, gender-related violence, and international humanitarian and immigration law to screen individuals. A common criticism of the current system is that people will not appear at court after they are released from border stations. The strategies recommended above have been shown to improve court appearance rates, because people gain a better understanding of the U.S. immigration system, their obligation to attend court, and their opportunity to seek asylum or other legal protection.

Conditions in border holding facilities are inhumane.

CBP continues to hold children, families, and single adults in inhumane conditions. Empirical evidence from the CARA Project tells a grave story about CBP providing unsuitable food, unhygienic conditions, and substandard medical care.

Mayra *

Mayra fled to the United States after the Maras attempted to kidnap one of her daughters and threatened to kill her if she told anyone of the incident. When she got to the United States, she thought they were finally safe. But inside "*la hielera*," Border Patrol threatened to separate Mayra from her daughter—who was only six years old—saying they did not believe she was really her mother."¹⁰

The Border Icebox

"*Hieleras*" – the Border "Icebox": The border station detention facilities are kept at very low temperatures earning them the name "*hieleras*." Some families reported being so cold that their "bones began to ache," that they "lost feeling in hands and feet," or that their hands and feet became "numb." One mother described the cold as "unbearable" and recalled that while she herself was shaking with cold, children were crying from cold and hunger."¹¹

* Pseudonyms are used in all case examples to protect confidentiality.

CARA Project staff member Alex Mensing interviewed 228 women between October and December 2015 about the conditions of their confinement and their treatment while at border holding stations, and collected 40 sworn declarations from these women:

Some mothers reported that the area around the toilet was the warmest place in the cell. As a result, a number of mothers and children squeezed themselves into the floor area surrounding the toilets. One mother, who resorted to trying to sleep under the toilet with her three-year-old son, reported that the “smell was horrible” and that other families used the toilets as she and her son lay next to it. A fifteen-year-old *Flores* class member reported that she observed a mother and her one-year-old son in the bathroom trying to stay warm and it made her cry.

While some mothers and children received “aluminum” sheets to sleep under, others did not. Many mothers who received the sheets reported that they did not provide sufficient warmth. Other mothers were deterred from requesting the sheets after seeing how angrily officials reacted when other detained mothers asked for them. One mother reported that CBP officials made the families throw away the thin pieces of aluminum foil each day and then withheld “new ones as punishment if we asked too many times for help.” Other mothers reported that officers ordered the families to clean the cells. When the families did not comply to the officers’ satisfaction, the officers reportedly punished them by taking away the remaining Mylar sheets or ordering them to throw their sheets in the trash.¹² [internal citations omitted]

Abusive and biased screening by CBP results in wrongful deportation of asylum seekers, children, and families.

“When they took me out to talk to me, they told me that my daughter was not mine, that I was lying, that they would take her away from me because I had robbed her. ... They said all from El Salvador are liars, and we all have the same story.”¹³—Mayra

Individuals apprehended at or near the border may be rapidly removed under various summary procedures that bypass immigration courts, provide no access to legal counsel, and allow a border official to deport a person immediately. Before executing a deportation, a CBP officer is supposed to ask if the person has a fear of returning to his or her home country. If the officer concludes the person has a fear, the officer is required to refer that person to an asylum officer for another screening interview. Only upon passing the asylum officer screening does the person get the opportunity to present a claim before a judge. In this regard, CBP officers are the gatekeeper to the asylum system, and any failure by CBP to screen individuals properly can result in wrongful denial of asylum and deportation.

As vital as these screening procedures are, empirical evidence shows that CBP officers not only fail to ask the required questions and frequently deport people who have a fear, but also engage in abusive, biased behavior. Mothers report degrading treatment by CBP officers, who tell them that they are lying about their fears of return, that they do not have rights, and that they will be deported no matter what they say. This kind of abusive treatment is common practice and places into question whether CBP officers can conduct interviews about asylum and humanitarian protection in an objective and fair way that is sensitive to the severe trauma that Central American victims of violence, who are overwhelmingly women, have suffered.

In fact, CBP officers do not carefully screen migrants, and often summarily deport asylum seekers. For example, in a case represented by an AILA member at the family detention center in Artesia, New Mexico, Border Patrol officers not once but twice ignored the expressions of fear by a Guatemalan asylum seeking mother, who suffered repeated rapes and sexual abuse by family members. The officers even called the woman a liar. Those grave errors led to two wrongful deportations. The woman returned again to the United States, and only upon that third time was she able to get a hearing before an Immigration Judge who granted her a form of relief similar to asylum. (See Juliza's case below). AILA has documented similar cases of improper screenings by CBP that have resulted in asylum seekers being denied a fair opportunity to seek legal protection and then being wrongfully deported.¹⁴

One mother “with a sick child” was reportedly told to sign for her deportation because she was “just a fucking migrant.” The officer then threatened that if she didn’t sign she would be held longer in the *hielera* without food, and that her son’s illness was going to get worse.”¹⁵

CBP officers also inaccurately record responses on the forms they use to collect this information. CBP records its initial screening interviews on the Record of Sworn Statement in first-person, question-and-answer format, giving it the appearance that it is a verbatim transcription of the interrogation. Yet AILA attorneys have uncovered serious errors on these documents. In an amicus brief filed in 2015, AILA attorneys presented examples of statements signed and sworn to by CBP but that could not have been made by toddlers. One such form, signed by the officer as a truthful record of what was said during an interview with a 3-year-old child, claims that the child told the officer that he came to the United States “to look for work.”¹⁶ Improper screening and inaccurate recording of information place vulnerable individuals at immediate risk of deportation back to the very dangers from which they fled.

There is also a severe legal consequence to these wrongful deportations: In most cases, the deportees will be barred from re-entry for at least five years due to the removal order. Moreover, if the person does come back to the United States, she will be barred from seeking asylum (see Section 6). In Juliza's case, she was allowed to apply only for “withholding of removal,” which has a higher standard of proof than asylum. As a result of the improper CBP screening, Juliza was denied the opportunity to seek asylum at multiple stages of the legal process. Upon her initial entry, she was not able to seek asylum due to CBP screening errors; later, she was barred from seeking asylum due to having a prior expedited removal order. Finally, she was held to a higher legal standard for withholding of removal—all because of government misconduct.

Juliza

Juliza is an indigenous Guatemalan woman who suffered persecution throughout her whole life due to her indigenous ethnicity. Beginning at the age of 13, Juliza was raped by her father's family members, who referred to her as a “dirty Indian” while they assaulted her. When she finally gained the courage to go to the police, she was sexually propositioned by the officers. After a family member continued to threaten her with death and more sexual violence, Juliza fled to the United States.

When she told the Border Patrol officer that she feared returning, he said she was lying and deported her without a credible fear interview. Within a month of being back in her country of origin, Juliza was drugged, raped, and thrown into a river by the Ladino family member who had been threatening her. Juliza fled to the United States again. She told the CBP officer again that she was scared, but was deported, again without ever having a credible fear interview with an asylum officer or a hearing before a judge. When she was back in Guatemala caring for her eight-year-old son, gang members attempted to

kidnap him. Juliza fled again, this time taking her son on the perilous journey with her. On January 5, 2015, Juliza was granted a form of humanitarian relief related to asylum (“withholding of removal”) by an immigration judge.¹⁷

As a result of the systemic flaws in CBP’s interview practices, children, families, and individual adults who would qualify for asylum or other legal protection are being forcibly returned to life-threatening conditions in violation of U.S. law. In 2014, AILA and other organizations filed a complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL) charging that CBP systematically failed to properly process and interview asylum seekers in their custody. The complaint cited numerous examples in which CBP never asked about fear of return or ignored statements of fear. CRCL has opened an investigation in response to the complaint.¹⁸

Instead of being done by CBP officers, the screenings should be performed by professionals with training in victim assistance, trauma, counseling, child welfare, gender-related violence, and international humanitarian and immigration law. Not only do CBP officers lack the necessary training, but they also conduct interviews while dressed in their uniform with a side-arm in the holster. Children and traumatized individuals are more likely to divulge facts about violence, persecution, and torture that they experienced if the interviewer is dressed as a civilian and is unarmed. Initial screenings by CBP officers are not conducted in confidential spaces—most interviews take place in an open room with several children and adults present, and often take place via video rather than in person. Interviews that address asylum and other sensitive topics should always be conducted in person and in a confidential space. Mothers should have the option of excluding their children from the interview and having them placed in a safe, child-friendly setting.

Central American and Mexican children should receive the same level of protection.

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) establishes an unfair legal double standard for the screening and protection of unaccompanied children that is based on the child’s country of origin: Mexican (and Canadian) children are subjected to a cursory screening by a CBP officer for trafficking, persecution, and other risk factors.¹⁹ If the CBP officer does not identify such concerns, the officer may immediately deport the child. By contrast, unaccompanied children from Central America (and other countries that do not share a border with the United States) cannot be summarily deported and are required to have their case heard by an immigration judge.

In 2014, Congress considered lowering the standard of protection for Central American unaccompanied children to that applied to Mexican unaccompanied children. Had it been enacted, this proposal would have placed thousands of child asylum seekers and victims of trafficking or other violence at grave risk of return to life-threatening dangers due to gross deficiencies in the protection given to Mexican unaccompanied children. A confidential 2014 United Nations High Commissioner for Refugees (UNHCR) report was highly critical of how CBP conducted the screenings of Mexican children. UNHCR uncovered a systemic bias that desensitized CBP officers to any protection needs of Mexican children, and concluded that “[c]hildren with needs that Congress intended to protect are likely rejected at the border.”²⁰ According to UNHCR, CBP personnel were inadequately trained and did not understand the definitions of the questions they were asking. UNHCR recommended that CBP should not conduct the screenings of children.

These systemic flaws and biases in CBP’s screening of Mexican children were also described in a 2011 report by the Appleseed Foundation, which found that in most cases “no meaningful screening is being conducted” by CBP as required by the TVPRA.²¹ The report concluded:

[M]inors are not being informed of their rights, have little or no comprehension regarding their options, and are encouraged to believe that they have no real choice other than to return to Mexico, regardless of their circumstances. On the whole, then, unaccompanied Mexican children still are being returned to whatever conditions led them to migrate north, even if those conditions include an abusive home environment, or exploitation by traffickers, gangs, and drug cartels.

Legal orientation presentations should be provided to all individuals at border stations.

Years of quantitative studies have shown that asylum seekers comply with the law and appear at court proceedings at high rates, even under minimal supervision.²² Asylum seekers want to avoid living in limbo in irregular status, and are inclined to trust the asylum adjudication process, even if they might lose. Upon arrival at the border, however, few know anything about asylum or immigration law or their obligations under the law. After initial screening, CBP officers provide limited guidance to help families or single adults understand the paperwork they are given that requires them to appear for an appointment with U.S. Immigration and Customs Enforcement (ICE) or at immigration court.

As the first point of contact, CBP border stations offer a key opportunity to educate asylum seekers and migrants about the U.S. immigration system as well as asylum and other legal protections. Currently, CBP does not provide any legal orientation at these stations. The national Legal Orientation Program (LOP) run by the immigration court system has been shown to improve efficiency and court appearance rates and to save costs for the courts and enforcement agencies.²³ Currently, LOP is offered only in some longer-term ICE detention facilities.

LOP should be provided to every noncitizen processed at a border station. LOP should include information about the legal responsibilities of individuals and how to access court hearing information through the court telephone hotline. CBP could further improve processing by permitting counsel and other providers inside the stations to provide consultations and evaluations for legal and social service needs.

Recommendations:

- DHS should improve CBP border holding stations to ensure safe, sanitary, and humane conditions.
- DHS should replace CBP officers with professionals trained in victim assistance, trauma, counseling, child welfare, gender-related violence, and international humanitarian and immigration law to screen individuals apprehended at the border about asylum and other risk factors.
- DHS should improve quality control mechanisms to ensure proper screening and recording of interviews.
- Congress should raise the level of protection and care provided for Mexican unaccompanied children to the same level as that provided to Central American unaccompanied children to ensure no child is placed at risk of harm.
- DHS and DOJ should provide legal orientation presentations for every individual processed at border patrol stations to ensure they understand their legal rights and obligations.

2. Fast-track removals undermine due process and should be suspended.

Every individual facing deportation, and especially asylum seekers and vulnerable individuals, should have the opportunity to present their case before an immigration judge. Currently, however, DHS deports the vast majority of noncitizens without ever bringing them before the immigration court. In 2013, the latest year for which data is available, 83 percent of all removals bypassed court altogether through the application of fast-track methods like “expedited removal” and “reinstatement of removal” that give enforcement agents unilateral authority to deport.²⁴

Less than 1 out of 5 people facing removal get a hearing before an immigration judge.

In theory, initial screenings by CBP officers are intended to ensure that asylum seekers and other vulnerable individuals are not wrongfully deported to life-threatening dangers. As explained in Section 1, CBP officers function as the gatekeepers for legal protections, but officers frequently ignore expressions of fear and fail to provide information about the legal rights and responsibilities of those apprehended. The government does not guarantee legal counsel or even grant access to counsel during these interviews. Given how quickly the process unfolds and the remote locations of border stations, few individuals subject to fast-track procedures receive any legal counsel.

The CARA Project in Dilley, Texas, has been able to provide counsel to many women who are subject to expedited removal. With the assistance of independent mental health professionals, the CARA Project has documented several cases in which mothers subject to expedited removal had been unable to share their stories with an asylum officer or an immigration judge in the first instance due to the severity of the past trauma.²⁵ In several of these cases, mothers and their children were deported back to danger despite strong claims for protection. Fast-track removals present even greater obstacles for indigenous language speakers who are trying to understand and navigate the legal process.

Fidelia

Fidelia and her eight-year-old son fled Guatemala after members of a powerful transnational criminal organization repeatedly harassed Fidelia and threatened to rape her. Throughout her expedited removal proceedings, Fidelia had trouble communicating what had happened to her, and her husband described her as “so traumatized that she cannot communicate.” In working with Fidelia, her attorneys discovered that she was illiterate and had a hard time understanding questions posed to her in Spanish. Eventually, it became clear that Fidelia’s primary language was Mam—an indigenous Guatemalan dialect—rather than Spanish. But cognitive impairment, anxiety, and trauma also became readily apparent. Because of these severe limitations, Fidelia was unable to communicate her experiences during her credible fear interview (conducted in Spanish) and she received a negative decision, which was quickly affirmed by an immigration judge. Later, after she obtained pro bono counsel through the CARA Project, she obtained a second credible fear interview and was found to have a credible fear of persecution.²⁶

Expedited removal and reinstatement of removal not only undermine due process, they also require the substantial commitment of asylum officer time and resources at the border. If an individual expresses fear to a CBP officer, the officer is supposed to refer that person to an asylum officer who will conduct an interview to determine if the individual has a credible fear of persecution or a reasonable fear of persecution. With CBP using fast-track removal procedures at such high rates, U.S. Citizenship and Immigration Services (USCIS) has been forced to reallocate asylum officers to conduct more credible fear and reasonable fear determinations—using precious personnel time that could be spent reviewing asylum applications. Currently, there are more than 140,000 asylum applications pending before USCIS's asylum divisions, and the processing of these applications is being severely delayed by the use of fast-track removal procedures.²⁷

CBP has the discretion to place individuals it apprehends at the border in immigration court removal proceedings rather than apply fast-track removal procedures. Review by an immigration court will provide more thorough and consistent adjudication of asylum and other claims for legal protection.

Beatriz

Beatriz fled Guatemala to find safety for herself and her two children, ages two and eight, in the United States. She suffered an abusive childhood and severe domestic violence from her child's father, including repeated rapes and one incident where she was burned with a hot iron. After being apprehended by CBP, Beatriz and her children were held at the Dilley detention center.

During her credible fear interview Beatriz was unable to disclose the abuse because of the trauma she had endured and the deep shame she felt whenever she recalled these experiences. Only later after an independent psychological evaluation was conducted by a trained mental health professional was it established that Beatriz suffers from symptoms of depression and “extremely severe” symptoms of PTSD. If Beatriz had been given mental health services and had the benefit of legal counsel prior to her credible fear interview, it is far more likely that she would have been able to explain her history of abuse and persecution during the credible fear interview. Instead, she and her children were deported.²⁸

Recommendations:

- DHS should suspend the use of “fast-track” removal methods, such as expedited removal and reinstatement of removal, and return to using immigration courts to adjudicate immigration removal cases.
- The DHS Office of Inspector General (OIG) should conduct an independent study of expedited removal and reinstatement of removal to evaluate how they impact due process and individuals seeking asylum or other legal protection.

3. End the detention of families.

In 2009, DHS closed down the T. Don Hutto family detention facility in Texas after litigation forced it to acknowledge the facility's poor conditions and unsuitability for families. After that facility's closure, DHS used detention for families only rarely and maintained less than 100 beds for family detention purposes. But in 2014, in response to the growing number of Central American families coming to the U.S. border, the administration quickly established new family detention facilities in New Mexico and Texas. DHS now maintains more than 3,000 detention beds for families, and the numbers of very young children and nursing infants being held in family detention centers increased in 2016.²⁹

Detention has grave consequences for the health of families. AILA and its CARA Project partner organizations have documented that many detained families suffer from post-traumatic stress disorder (PTSD), anxiety, depression, or other emotional or cognitive disorders that go undiagnosed and untreated in detention, and continue to be detained despite the fact that detention is exacerbating their symptoms.³⁰ The detention facilities are ill-equipped to provide the necessary medical and mental health care to treat these problems, and while detained, families cannot access necessary services.³¹ Furthermore, detention re-traumatizes survivors of violence.³² Studies show that the negative health and mental health consequences of detention are particularly acute for children and asylum seekers.³³ Experts confirm that detention poses risks to children's health that can be immediate and long lasting.³⁴

Detention harms not only the health and welfare of families but also their ability to seek asylum and gain meaningful review of their claims for legal protection. Once CBP decides to apply expedited removal or reinstatement of removal to a family, it places the family in detention, which sharply curtails access to counsel and makes it extremely difficult to gather evidence and present a legal claim. While in detention, the women and children are unable to contact family members or other potential witnesses who witnessed violence in their countries of origin.

*USCIS found 9 out of 10 Central American families
had a credible fear of persecution.*

Despite these challenges, asylum officers are finding that about 90 percent of Central American families have a credible fear of persecution. Especially with this data showing that this population is establishing high rates of credible fear, DHS should be taking steps to facilitate access to the courts and legal system rather than imposing obstacles to due process.

Two federal district courts have already ruled against the administration's family detention practices and have ordered DHS to change course. One court invalidated the government's "detain to deter" rationale to justify the detention of thousands of families, holding that a restriction on one person's liberty cannot be justified simply to send a message to another.³⁵ A second federal court held that the government's family detention practices violated the rights of children as set forth in the longstanding settlement agreement reached in the nationwide *Flores* class action lawsuit. The court ordered the government to release children and mothers consistent with that agreement.³⁶ In May 2016, attorneys for the children filed yet another motion to enforce the agreement, highlighting the ways in which the government is still failing to comply with both the *Flores* agreement and the court's most recent orders.³⁷

The government should end the practice of detaining families. Central American asylum seekers have a high credible fear rate and a strong interest in appearing for court to have their cases adjudicated. DHS claims detention is necessary to ensure people show up for court. But in practice, CBP makes absolutely no assessment of whether a family is a flight risk before deciding to detain them and makes decisions to detain families randomly, in complete disregard of the principle that an individualized determination of risk must be made before depriving someone of liberty.

In those cases in which some additional supervision is necessary, DHS should develop community-based alternatives to detention that provide information about legal obligations and facilitate appearances at court hearings. These alternatives have high compliance rates and would reduce detention costs. President Obama's fiscal year 2016 budget request estimates the cost of these alternatives at just over \$5 per day per individual. That figure can be compared to the price tag of more than \$160 per day to detain one person and a total annual DHS detention budget of \$2 billion.³⁸ As discussed elsewhere in this report, if the government guaranteed legal counsel for families, it would further improve court appearance rates and simultaneously ensure due process.

Recommendations:

- DHS should end family detention and invest instead in cost-effective, community-based case management alternatives to detention that are more humane and will reduce government detention costs while increasing compliance with immigration law.



4. Every individual facing removal should be guaranteed legal counsel.

No one should be compelled to navigate the extremely complex immigration removal and deportation process without the assistance of legal counsel. Yet vulnerable individuals, including asylum seekers, children, and those who speak little or no English, typically face immigration proceedings without any legal representation. In fact, about one-half of children and 70 percent of families are unrepresented in removal proceedings.³⁹ In the 20 states in which courts have issued the most removal orders, only one in 10 families have had legal representation.⁴⁰ Unlike in the criminal justice system, the government does not guarantee legal representation to immigrants facing removal, even though the consequences are severe and may be life threatening.

Legal counsel greatly improves an individual's chances of being able to succeed on asylum or other claims. Data on unaccompanied children shows that children with attorneys are six times more likely to be granted asylum or other protection from deportation, based on an analysis of 51,807 cases closed by the immigration court through April 2016. Almost 90 percent of unrepresented children were ordered to leave the country.⁴¹

Only 3 out of every 10 families are represented by legal counsel in removal proceedings.

Families with counsel are 10 times more likely to be granted protection from deportation.

The effect of having legal representation is even more pronounced for families. Families with counsel are 10 times more likely to be granted protection from deportation than families without counsel, based on an analysis of 28,797 cases that had been closed by the immigration court through April 2016. Nearly every family that went unrepresented—more than 96 percent of all such cases—was ordered to leave the country.⁴²

Having counsel not only gives individuals a fair shot, it also correlates highly with compliance with court appearances. A decade of immigration court data shows that children with counsel appeared for their hearings more than 95 percent of the time.⁴³

Children with legal counsel appeared for their hearings more than 95 percent of the time.

Legal representation also increases the efficiency of the court process. Immigration judges expend valuable time in court informing pro se respondents of their rights, ensuring that they have properly completed required applications, and otherwise helping them through the removal process. These steps prolong case adjudication but are required to ensure due process. With legal representation present, cases move faster and are less likely to require continuances to enable respondents to prepare their cases.⁴⁴

Individuals facing expedited removal and reinstatement of removal rarely have access to counsel. Expedited removal orders are usually executed in CBP custody, where lawyers are not permitted. Individuals in expedited removal who express a fear of return are usually rapidly scheduled for a credible fear interview with an asylum officer that takes place in detention, far from urban areas with available pro bono counsel.

Legal representation makes a critical difference in any asylum seeker's ability to meet the threshold burden of establishing a credible fear. In July 2014, immediately after the Artesia family detention center opened and families had no legal counsel at all, the positive credible fear determination rate was just 40 percent.⁴⁵ Hundreds of families were deported during those weeks. Once AILA's pro bono effort started providing free legal assistance in August, the credible fear passage rate at Artesia jumped to 79.7 percent. The credible fear rate at Artesia remained at these high levels until the facility's closure in December 2014. The credible fear passage rate continued to increase and is now 90 percent.

Of the 121 Central American and Mexican family members arrested in the January 2016 raids, less than 50 percent had an attorney with them at their removal hearing. Once arrested, families and unaccompanied children detained in "Operation Border Guardian" and other raids have slim, if any, chance of seeing an attorney before they are rapidly deported. For example, the CARA Project was only able to identify and screen 35 out of the 121 family members arrested in January. Even at such a late stage, legal representation in those cases made a difference, and attorneys uncovered flaws in court notice, due process violations, and meritorious asylum claims that had never been heard. The CARA Project sought stays of removal in 12 cases, and the Board of Immigration Appeals (BIA) granted stays in all of those cases.

Our nation cannot risk sending children, families, and single adults back to violence and life-threatening dangers. The U.S. government should ensure that every individual facing removal proceedings is represented by an attorney, and should pay for counsel in those cases in which an individual cannot afford one. AILA recommends that Congress pass the Fair Day in Court for Kids Act, which would guarantee counsel for children, families, other vulnerable individuals, and in other cases in which a judge determines the interest of justice requires the appointment of counsel.

Recommendations:

- Congress should guarantee legal counsel to every individual facing removal who cannot afford counsel. As an interim step, the relevant government agencies should take steps to ensure counsel is appointed for all children, families and other vulnerable individuals, and in cases in which the appointment of counsel is necessary to ensure fair adjudication.
- Until the government guarantees counsel, it should ensure that adequate opportunity is given to unrepresented individuals to obtain counsel before entering orders of removal or executing deportation. The government should not move forward with cases against children, families or other vulnerable individuals who are unrepresented or in cases in which the appointment of counsel is necessary to ensure fair adjudication. In such cases, immigration judges should grant continuances sua sponte until counsel can be obtained.

5. Implement reforms to the immigration court system to ensure due process.

Less than 20 percent of the people ordered removed ever step foot in a courtroom due to CBP's overwhelming use of expedited removal and reinstatement of removal. The erosion of this basic right to a fair day in court has greatly undermined fairness in the immigration adjudication system, perhaps more than any other development. To make the system fair, CBP needs to suspend the use of expedited removal and reinstatement of removal, as discussed in Section 2 of this report. Just as important, the immigration court must be funded adequately to reduce the overall number of cases backlogged in the system and enable the court to efficiently and fairly adjudicate the higher number of cases that will come before it.

A number of immigration court procedures are making it more difficult for unaccompanied children and families to receive due process and a fair hearing, including the use of priority dockets for unaccompanied child and family cases; inadequate or improper notice of court dates; and the lack of adequate interpreters at master calendar, bond, and merits hearings—especially for indigenous language speakers. All of these problems are compounded by the fact that the government does not guarantee legal representation to individuals facing removal. Recognizing the greater vulnerability of children and families and their lack of awareness of immigration court procedures, immigration judges should take extra steps to ensure these individuals receive a full and fair hearing of their case.

Underfunding has eroded the integrity of the immigration courts.

In order to make the processing of Central Americans more efficient without compromising fairness in the legal system, it is essential that long-term investments be made in the funding of the immigration courts and in the hiring of judges. For more than a decade, congressional appropriations for the immigration court system have not kept pace with increases in funding for the enforcement agencies (ICE and CBP). The Executive Office for Immigration Review (EOIR), which administers the immigration courts, is funded at about \$420 million annually; by comparison, ICE and CBP are now funded at \$19.5 billion annually.⁴⁶ This imbalance in funding levels has resulted in far more rapid growth in the number of enforcement cases being placed into proceedings compared to the number of judges who adjudicate cases.⁴⁷ In 2000, there were about 125,000 cases pending, a number that grew to 490,000 as of April 2016.⁴⁸ During this same period, the number of immigration judges increased from 206 to a total of 256.⁴⁹ In other words, with only a modest increase of 24 percent, immigration judges are now responsible for adjudicating nearly four times the number of cases.

With so many cases in the total backlog, judges and court personnel carry tremendous workloads. One study found that immigration judges issued on average 1,014 decisions in the year 2008.⁵⁰ By comparison, law judges for veterans' benefits cases decided an average of 729 cases, and judges reviewing social security benefits decisions decided about 544 cases per year.⁵¹ The exceedingly high caseloads carried by immigration judges place pressure on them to resolve cases quickly rather than dedicate the necessary time for a careful and comprehensive review.

The backlog unfortunately creates the problematic incentive for ICE and CBP to continue using expedited removal and other fast-track procedures to execute removals more quickly, even though such procedures

undermine due process.⁵² Rather than increasing the use of these summary procedures, attention should be focused on improving the capacity of courts to adjudicate claims fairly and efficiently. Julie Myers Wood, who directed ICE from 2006 to 2008, acknowledged that expedited removal could erode access to asylum: “Any extension of expedited removal would have to be managed closely to ensure that the existing credible fear process for asylum seekers continues to be strictly followed and appropriate training is provided for DHS officers.”⁵³ With the vast majority of removals now being executed using these fast-track methods, the courts are being bypassed, and access to due process and asylum are being undermined.

In addition, lengthy court delays—now typically exceeding four years—harm asylum seekers and others whose cases may be weakened over time by the loss of evidence and witnesses.⁵⁴ Until the immigration court decides their asylum cases, most asylum seekers experience great difficulty moving past the trauma they experienced and feeling secure in their new lives. Moreover, asylum seekers are frequently held in detention while they await their court cases. Detention has grave effects on asylum seekers, and has been shown to compound their past trauma and continuing health or mental health problems. Finally, delays make it harder to recruit pro bono counsel who may not be able to retain a case for several years.

Congress should fully fund EOIR to ensure there are adequate judge teams. For the fiscal year 2016, Congress appropriated funds to hire up to 374 judges.⁵⁵ It is estimated that 524 judges are needed to significantly reduce the backlog and enable the courts to adjudicate cases in a timely manner.⁵⁶ Congress should also ensure that funding for enforcement is kept in balance with funding for the immigration court.

Rocket dockets place excessive pressure on Central Americans and compromise due process.

Because of the large backlog of cases before the immigration court, the Obama administration established priority dockets to hear the cases of unaccompanied children and families from Central America on an expedited time frame. The priority dockets, also referred to as “rocket dockets,” were intended to make removal decisions and deportations more efficient and to deter future arrivals at the border, but in fact, they place pressure on children and families to move forward before they are ready. Instead of accelerating these cases, both EOIR and DHS should recognize that families and children are exceptionally vulnerable and implement steps to slow down the process to ensure they can obtain legal counsel and have a meaningful opportunity to present any meritorious claims for relief.

Under the prioritization plan begun in 2014, children were scheduled for their first immigration court hearing within 10 to 21 days of the government’s filing of the Notice to Appear (NTA).⁵⁷ In 2016, EOIR revised the time frame to require the first hearing within 30 to 90 days. For families, the prioritization plan has required the first hearing within 10 to 28 days of the filing of the NTA. These expedited dockets and their compressed timelines impede vulnerable, poor, and traumatized young children and families’ abilities to secure counsel and gather the evidence necessary to prove their cases. Children and families typically need several weeks or months to obtain legal representation, especially in smaller cities or communities where the legal services and pro bono legal community have fewer resources. Many are unable to find counsel after months of diligent efforts. The acceleration in case hearings caused by the priority dockets also overwhelm nonprofit legal service agencies and pro bono counsel that represent these vulnerable individuals.

Typically, immigration judges are willing to grant a continuance to give more time for children, mothers, or indigent respondents to find counsel. But judges eventually push children or mothers to move their

cases forward. In many cases, judges have entered removal orders against unrepresented individuals before they have had the opportunity to obtain counsel.

Families and children should be given ample opportunity to seek counsel and prepare their claims for relief, and they should not be rushed through the process. Instead of prioritizing the cases of unaccompanied children and families, EOIR should return to the practice of prioritizing cases based on the date the Notice to Appear is filed with the court.

Notice of court hearings is inadequate.

The EOIR docket prioritization plan has put tremendous strain on the courts, counsel, pro bono resources, and the families and children themselves. AILA lawyers and other practitioners observed an increase in the number of children who received defective notice of their removal proceedings or who received no notice at all, and in February 2015, AILA and several other organizations sent a letter to EOIR and ICE documenting these cases.⁵⁸ Some children and their sponsors received hearing notices only a few days before scheduled hearing dates or after the scheduled hearing dates have passed. In some jurisdictions, the immigration court is more than a thousand miles away from where the child and sponsor live, making it more difficult to appear for a court hearing with late notice.

Failing to receive timely notice or any notice at all of one's immigration court date has devastating consequences. A judge may order removal in the absence of the respondent without giving an opportunity to assert meritorious claims for relief.

M

Unaccompanied child “M” never presented his asylum claim due to inadequate notice.

In February 2016, ICE agents arrived at M's home. M was told he missed his court hearing and had been ordered removed in absentia by the judge. But M never received the court notice of his hearing or the subsequent order of removal for missing his court date. M was waiting for his court notice, but it never came. M's lawyer consulted with ICE, and his lawyer saw that there was an error on the record of M's address: “Avenue” was left off the address on file.

M wanted the opportunity to seek asylum or other protection in court. In 2014, he was kidnapped in Mexico by a gulf cartel and was held against his will for eight days by men wearing dark clothing and bullet proof vests and brandishing guns. While kidnapped, he witnessed a beheading. M's grandmother, who lives in Maryland, received a call from the cartel demanding a ransom payment for M.⁵⁹

Yesenia

ICE and the immigration court failed to correct her address with a missing street name.

The first time Yesenia learned that the immigration court had issued an in absentia removal order—or that a court hearing had even taken place—was when ICE arrested her at her home in South Carolina with her four-year-old son Michaelo in May 2016. Yesenia fled Guatemala after suffering extensive abuse at the hands of her husband, Michaelo's father. At one point, her husband threw a machete at his infant son's foot,

permanently injuring his foot. In 2014, Yesenia came to the United States seeking protection, and was released from CBP custody to live with her sister in South Carolina. From then on, she maintained the same address and checked in regularly with an ICE office in Charlotte.

But ICE provided an obviously inaccurate address to the immigration court, completely omitting a street name and simply listing the address as number 10, “Drive.” Although Yesenia regularly reported to her ICE check-ins, ICE did not take any of these opportunities to review their own files to identify the error or investigate why she had not appeared in court. The court apparently failed to take note of the lack of a street name in the address. Instead of taking steps to rectify the errors in notice, ICE came to her home and told her that if she did not open the door, they would take away her son and her sister. The CARA Project has filed a motion to rescind her in absentia order of removal based on lack of notice. As of June 1, 2016, she received an automatic stay of her removal from the court, but ICE continues to detain her and her son.⁶⁰

The failures in notice are likely exacerbated by the large numbers of cases that have been placed on the priority docket for children and families. For example, legal and social service providers have observed an increase in database and human errors on the part of government actors, such as incorrect entry of addresses and addresses on file with EOIR that do not match the addresses provided by the child’s sponsors. These malfunctions not only result in initial notice failures, but also stymie those children and custodians who make diligent efforts to obtain crucial information regarding their cases. The EOIR hotline, which sponsors rely on in order to obtain case status updates, often contains incorrect information or is not updated in a timely fashion. Furthermore, ICE has made errors in recording addresses and does not advise individuals during check-in appointments about their court obligations. ICE and EOIR should take steps to remedy these problems and substantially improve procedures to provide notice of court hearings.

Indigenous language speakers face greater obstacles in immigration court.

Central Americans who speak indigenous languages and speak only limited Spanish frequently do not understand what is happening through the removal process. Speakers of indigenous languages are among Central America’s most vulnerable, impoverished, and illiterate citizens.⁶¹ Indigenous women in particular have less access to education and are less likely to work outside the home than their male counterparts. As a consequence, indigenous women are less likely than indigenous men to have Spanish language skills.⁶²

AILA members report that indigenous language interpretation is insufficient in many immigration court hearings.⁶³ In some courts, indigenous language interpretation is wholly absent at master calendar hearings, leaving these noncitizens unable to understand what the judge may be saying about the nature and consequences of the proceedings or what they are expected to do next. Although a judge may not make a substantive legal ruling at a master calendar hearing, typically the judge will explain the factual allegations and provide information about the individual’s legal responsibilities and the legal process. The individual is required make statements that will impact her legal case, such as whether she admits allegations made by the government or intends to apply for relief. If the individual does not understand what the judge has said, she will be severely disadvantaged throughout the process.

Kira

Kira's case required three asylum hearings due to interpretation difficulties. Kira is a 23-year-old indigenous Guatemalan Mayan mother who was detained with her four-year-old son. Kira and her son fled Guatemala after Kira's husband, a deacon at a local church, was targeted by gangs for preaching a religious message of non-violence, and after the gang targeted Kira, beating her face bloody on multiple occasions, and threatened her son. Her asylum hearing was conducted not only by videoconference but also via three-way telephonic interpretation—Kira's Mam dialect was translated into Spanish, which was then translated into English. Kira and her counsel identified several critical incorrect translations. They could not finish her testimony during the first hearing because it took so long. At the second hearing, counsel questioned the translation on the record, and Kira repeatedly had to tell the court that she did not understand the questions. The judge agreed with counsel that the issue was so substantial that the hearing should start from scratch. At Kira's third and final hearing, even though the judge tried to find an interpreter from Kira's own town, the errors in translation in her primary language continued to be so severe that she found it easier to continue solely in Spanish. Even with these difficulties, the judge recognized the severity of her persecution and granted her asylum claim. Without legal representation, it is hard to imagine how a mother like Kira could have navigated the asylum system.⁶⁴

Hearings for detained families are regularly conducted via videoconference rather than in person, compounding communication difficulties. To ensure that individuals with limited English or Spanish proficiency can meaningfully access the immigration court process, competent interpretation should be required at master calendar, bond, and merits hearings.

Recommendations:

- Congress should appropriate funds for EOIR to hire enough judges and staff to reach 524 immigration judge teams by 2018, the projected number needed to manage the immigration caseload. Future appropriations for the immigration court should keep pace with funding for ICE and CBP.
- EOIR should end the use of priority rocket dockets for unaccompanied children and families. EOIR should return to prioritizing cases based on the date the Notice to Appear is filed with the court and also expand the dedicated, juvenile dockets to other jurisdictions.
- EOIR and ICE should implement reliable procedures to ensure that children and families receive timely and accurate notice of court hearings. In these cases, immigration judges should refrain from issuing in absentia orders of removal unless there is clear indication that notice was received. Government counsel and judges should support motions to reopen in cases in which there was inadequate notice or in which the individual states a bona fide, non-frivolous claim for relief that was not previously presented.
- EOIR and ICE should develop additional protocols at master calendar hearings to educate children, families, and other vulnerable individuals about their legal rights and obligations as well as basic information about court dates, deadlines, and how to use the court's telephone information line.
- EOIR should provide qualified interpreters during all master calendar, bond, and merits hearings.

6. Reform the asylum system to ensure asylum claims are decided fairly and consistently.

As the preceding sections illustrate, from the time an asylum seeker crosses the border, she faces many obstacles before she even gets a hearing before an immigration judge. Once her case comes before the court, qualifying for asylum is still extremely difficult and is nearly impossible for someone who does not have legal counsel. Asylum grant rates vary dramatically depending on the immigration judge, and in some regions, judges grant asylum in only two percent of the cases. Furthermore, immigration judges have been slow to recognize asylum status in situations common to Central American cases—in particular, gender-based violence and gang-related cases. These claims are at a distinct disadvantage no matter how compelling the facts are in the case. Finally, unfair procedural rules, such as the reinstatement bar to seeking asylum and the one-year filing deadline, exclude many bona fide asylum seekers from ever making a claim.

Immigration judges in some regions almost never grant asylum.

A critical factor that influences whether someone wins or loses her asylum claim is which immigration judge hears the case. In 2015, the national average asylum grant rate was 48 percent. But immigration judges in several jurisdictions almost never grant asylum. The vast disparity in judges' asylum decisions means that a person appearing before certain judges may have little or no chance of being granted asylum no matter how strong her case is. The disparity points to a fundamental unfairness in the asylum system and should lead one to question whether a family who was denied asylum by a judge in Atlanta and El Paso, where rates are two percent and four percent, received a fair and objective review of their case.

2015 Immigration Court Asylum Grant Rates⁶⁵

National Average Asylum Grant Rate	48%
Jurisdictions with Extremely Low Grant Rates	
Atlanta, GA	2%
Stewart Detention Facility, GA	5%
Charlotte, NC	13%
Dallas, TX	9%
El Paso, TX	14%
El Paso SPC, TX	4%
Houston SPC, TX	7%
Houston, TX	9%

Immigration courts have been slow to recognize asylum claims prevalent in the Northern Triangle.

To establish an asylum claim, an individual must show either past persecution or a well-founded fear of future persecution on account of that person's race, religion, nationality, membership in a particular social group, or political opinion.⁶⁶ Congress created this definition, but left it to the courts to interpret what constitutes "persecution on account of a protected ground." Over time, courts' interpretations of this term have gradually developed, but they are still largely defined by perceptions of war, torture, and genocide from the World War era. In the meantime, however, terrorism, civil wars, and organized transnational gang activity have become more prevalent threats to international and domestic security. As these forms of violence rapidly evolve in the world, courts' interpretations of what constitutes asylum and persecution have not kept pace, and as a result, whole categories of victims find it very difficult to obtain asylum. With thousands of Central Americans fleeing from domestic violence, gender-based persecution, and gang-related persecution, clearer guidance needs to be given to judges and asylum officers to ensure these claims are adjudicated in a fair and consistent manner.

In 2014, the BIA issued a binding precedent decision in *Matter of A-R-C-G* recognizing that domestic violence may serve as the ground for asylum if the other legal requirements for asylum are established. In that case, the asylum seeker was a mother of three who suffered what the Board deemed "repugnant abuse" at the hands of her husband, including beatings, rapes, an assault that broke her nose, and an attack with paint thinner that left her with burn scars. The Board found that "married women in Guatemala who are unable to leave their relationship" can constitute and be members of a particular social group.

After the Board decided *A-R-C-G*, courts have struggled to decide whether a woman who faced severe abuse from her long-time domestic partner and tried repeatedly to escape from him should qualify for asylum even if she was not legally married to her abuser. In practice, immigration judges may be cautious about interpreting a precedent like *A-R-C-G* handed down from the Board beyond the narrowest holding of the case. But until courts achieve greater consistency in recognizing such claims, entire groups of women who survived horrific violence, torture, or persecution will be excluded from protection and returned to life-threatening circumstances. For this reason the Attorney General or the Board should issue guidance or precedent clarifying how domestic violence and gender-based persecution claims should be interpreted.

Organized and targeted gang persecution is intensifying in the Northern Triangle of Central America, and as with domestic violence and gender-based persecution claims, courts have been cautious to adopt interpretations that gang-related persecution may serve as the ground for an asylum claim.⁶⁷ Organized gangs have usurped power from state law enforcement agencies and control entire towns or regions in the Northern Triangle. Gangs are commonly viewed as street thugs engaging in criminal activity, but gangs controlling the Northern Triangle are very different and operate as sophisticated institutions that will target and persecute victims as individuals or groups. Until this perception of gangs as mere street criminals is dispelled, an immigration judge may be predisposed to view gang-related persecution as a generalized criminal act rather than as persecution that can support a claim for asylum.

Immigration judges and federal circuit courts have recognized gang-related persecution as a ground for an asylum claim. For example, the Sixth and Seventh Circuits have held that former gang membership is an immutable characteristic sufficient to define a particular social group for asylum purposes.⁶⁸ The rulings in this area remain inconsistent, however, and greater clarity in the jurisprudence is needed.⁶⁹

Northern Triangle asylum seekers remain at a distinct disadvantage in seeking protection from persecution because of the gaps and inconsistencies in the interpretation of gang-related and gender-based asylum claims. To resolve these inconsistencies and ensure protection for people fleeing from these forms of violence, AILA urges the Attorney General to issue a clarifying opinion that broadly recognizes gender-based and gang-based persecution claims as qualifying grounds for asylum.

The reinstatement rule unjustly bars asylum seekers from applying for asylum.

Current regulation bars anyone who has been previously removed from applying for asylum in the future.⁷⁰ The bar is intended to deter people who were removed from returning to the United States and fraudulently seeking asylum. The rule, however, is premised on the assumption that asylum seekers are properly identified and offered a meaningful opportunity to seek protection before deportation. In fact, as discussed in Section 1, many legitimate asylum seekers are never given the opportunity to seek asylum before CBP deports them. Not only are they wrongly ordered removed and deported, but under the reinstatement rule, they are barred from filing for asylum. The reinstatement bar to asylum also applies to people who were deported years ago who later suffered persecution that would otherwise qualify them for asylum, but who are barred because they were previously deported.

If an individual who was previously removed returns seeking asylum, she can only apply for “withholding of removal,” which has a higher burden of proof than asylum. As a result, the reinstatement rule has blocked thousands of individuals who were deported from getting any kind of legal protection. The rule is inconsistent with U.S. asylum law and with international legal standards forbidding the return of persecuted individuals to danger.

Catalina

Wrongfully denied asylum and then barred under the reinstatement rule

When Catalina came to the United States fleeing severe domestic abuse, including a kidnapping and gang rape orchestrated by her partner, she did everything in her power to tell officials that she was afraid to return to El Salvador. But no one listened. She even showed border officials the medical documentation of her treatment after the rape, but the officer said the document “doesn’t mean anything here.” Though promised the opportunity to see an asylum officer, Catalina was detained for more than two weeks and never given an interview. She even attempted to submit a written request to ICE, but the official handling detainee mail told her that “Salvadorans don’t have that right to turn in that paper.” On the day she was deported, as she was taken out of her cell, she tried to explain that she still had not seen an asylum officer. But the immigration official told her it was too late, and that her deportation was already final. Then Catalina was deported.

Catalina was so frightened that she headed back north as soon as she could, staying in El Salvador for only one day. After again reaching the United States, Catalina was finally given a fear interview with an asylum officer and received a favorable determination. When she appeared before the immigration judge, she was told she was barred from applying for asylum because of the earlier removal. Under the reinstatement rule, Catalina was only eligible for withholding of removal, and fortunately, her case was strong enough to meet the higher legal standard for withholding of removal.⁷¹

Withholding of removal also offers fewer benefits when compared to asylum. Unlike asylum, someone granted withholding of removal is not permitted to travel internationally. If Catalina had received asylum, the protection would have extended to her two younger children in El Salvador. But withholding of removal leaves vulnerable family members without protection, and Catalina will be indefinitely separated from her children.

The one-year asylum filing deadline unfairly bars asylum seekers from protection.

The current U.S. asylum statute requires that an asylum seeker submit her application within one year of arrival in the United States, unless she qualifies for one of two narrow exceptions. Though it was intended to prevent asylum fraud, the one-year filing deadline functionally bars thousands of bona fide asylum seekers from ever receiving asylum protection. According to a 2010 study, one in five asylum applicants is denied asylum because they missed this deadline.⁷² Many Central American and other asylum seekers represented by AILA attorneys have been barred from seeking asylum pursuant to this rule.

Mirza

Mirza is a Honduran woman who was in a verbally, physically, and sexually abusive domestic relationship. In 2011, Mirza fled to the United States and immediately requested asylum, both verbally and in writing. She believed she had “applied” for asylum by making these requests, and by completing a credible-fear interview in which the asylum officer determined there was a “significant possibility” that she could establish eligibility for asylum. At no time did anyone notify Mirza that she needed to fill out and file a particular form within a year of her arrival. Instead, she was told only that she could continue her pursuit of asylum at a hearing before an immigration judge—leading her to believe that there was nothing more for her to do until the hearing. To make matters worse, she didn’t receive that hearing until October 2012—after a year had already passed. And even then, at that first hearing, she still was never told by anyone, including the judge, that she needed to file a particular form. As a result, Mirza did not file an asylum application until well after the one-year deadline.⁷³

The one-year asylum filing deadline results in patently unfair denials of protection to asylum seekers and should be repealed.⁷⁴

Recommendations:

- The Attorney General should issue a clarifying opinion that broadly recognizes gender-based and gang-based asylum persecution claims as grounds for asylum.
- DHS should amend federal regulations and remove the reinstatement bar to asylum.
- Congress should repeal the one-year asylum filing deadline.

Conclusion

There is a reason Central American girls, boys, families and single adults are coming to the United States, despite the incredible risks and dangers they face on the difficult journey north: They are hoping to find shelter and protection from the extremely high incidence of rapes, beatings, gang attacks, and other grave or life-threatening violence that has taken over the Northern Triangle. But as this report has shown, once these asylum seekers and other vulnerable individuals arrive at our borders, they are thwarted at multiple stages of the process from seeking legal protection. CBP officers are abusive and biased, and deport people without carefully screening them. Families are placed in inhumane detention. The vast majority of all people removed never have the chance to appear before a judge or to receive assistance from a lawyer making it nearly impossible to win asylum or other relief. Unjust procedural rules further bar people from seeking protection. Not only has AILA documented specific instances where the federal government has deported people who qualify for asylum, some of which are recounted in this report, but there is strong evidence that due process is being undermined so systematically as to violate the United States' fundamental legal obligations to protect asylum seekers and others needing humanitarian protection.

Congress and federal government agencies have tools at their immediate disposal that can ameliorate the harms committed by the Administration's current approach. Certain problems, such as the chronic underfunding of the courts and lack of funding for legal counsel, may require legislative action. But many of the problems were initiated through decisions by federal agencies--such as the decision to bypass courts altogether through the increased use of expedited removal and reinstatement of removal or the increased detention of families—those policy choices can be addressed by the executive branch. Whether it is Congress or the President that takes the first step, AILA urges immediate action that restores the guarantee of due process to individuals facing removal in America's immigration system. Our nation cannot risk sending any more people back to danger.



Endnotes

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- 9 Department of Homeland Security, *Congressional Budget Justification FY 2017—Volume I*, available at https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%201_1.pdf. U.S. Customs and Border Protection (CBP) FY 2016 enacted budget was \$13.3 billion.
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- 12 *Id.* at ¶12(7) and at ¶12(4).
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