

1946  2006

60 Years of Service 60 Years of Excellence

June 15, 2006

Dr. Emilio Gonzalez
Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave. NW
Washington, DC 20529

Re: Letter from NGOs responding to Ombudsman's proposal to limit adjudication of
affirmative asylum applications

By fax and mail

Dear Dr. Gonzalez:

On June 2, 2006, we forwarded to you a letter from 31 Non-Governmental Organizations that are closely involved in the asylum process, expressing our deep concerns about the proposal put forth by the Ombudsman regarding the asylum process. Since then, an additional 27 organizations asked to join the letter. Therefore, enclosed is a new copy of the letter, with 58 organizations signed on. The text of the letter has not otherwise changed.

Once again, these groups are united in urging you to reject the proposal in its entirety.

Thank you for your consideration.

Sincerely,



Crystal Williams
Deputy Director, Programs

cc:

Michael P. Jackson, Deputy Secretary
Stewart A. Baker, Assistant Secretary for Policy
Prakash Khatri, CIS Ombudsman
Joseph Langlois, Director of Asylum

June 15, 2006

Dr. Emilio Gonzalez
Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, D.C. 20529

Re: Response to Ombudsman's Proposal to Limit Adjudication of Affirmative Asylum Applications to Those Filed by Applicants in Valid Non-Immigrant Status

Dear Dr. Gonzalez:

We, the undersigned organizations¹, express our grave concerns about the above-referenced Ombudsman's Proposal. We are troubled that the Proposal, with its narrow focus on efficiency considerations, fails to recognize the unique nature of asylum adjudications or the well-considered and time-tested advantages of the affirmative asylum process. We are also deeply concerned about the impact of the Ombudsman's recommendations on unrepresented asylum seekers who comprise a significant portion of the Asylum Office's case load.

At the outset, we caution that the Ombudsman's Proposal fails to consider the history of the Asylum Corps, the rationale underlying its creation in 1990 and the thoughtful modifications made during the Asylum Reform process in 1994.² The Ombudsman's Proposal evaluates the asylum process exclusively in terms of processing time and cost. This misguided emphasis ignores both the fundamental nature of asylum as a form of humanitarian protection and the unique vulnerabilities of asylum seekers.

Such a one-dimensional approach fails to acknowledge the widely-recognized and proven advantages of a non-adversarial process for the adjudication of asylum claims. The current affirmative asylum process works well to identify many genuine refugees – a vulnerable and traumatized population – and to quickly confer upon them the benefit of asylum without forcing them to endure the additional stress and trauma of a lengthy, complicated and frightening court proceeding. The system outlined in the Ombudsman's Proposal would certainly sacrifice these unquestionable benefits without resulting in any meaningful time or cost savings.

Seriously flawed assumptions form the basis of the Ombudsman's Proposal.

¹ Many of these organizations met with the Ombudsman on May 31, 2006. This letter reflects some of the concerns expressed in that meeting.

² The Proposal describes its "Purpose" as follows: to recommend "a change to processing asylum applications dependent upon the immigration status (or lack thereof) of the applicant" with the sole justification that the recommended process, "appears to be more cost-efficient" than the current process.

The Proposal mischaracterizes the nature of the referral system and reasons for the current referral rate

The Ombudsman's Proposal makes the unsupported assertion that the current referral rate of 70% "appears to indicate an inherently flawed system . . . prone to abuse and/or fraud." What the referral rate actually reflects is the fact that, historically, the mandate of the Asylum Office has been to grant readily approvable claims. Contrary to the Ombudsman's assertion, a referral is not a denial of asylum. Rather, it is a determination that there are unresolved factual or legal issues in the case. These could include issues related to the one-year filing deadline;³ the failure of some *pro se* applicants, particularly those who have been victims of torture or trauma, to provide enough detail relevant to meeting the five statutory grounds for asylum; an applicant's inability to obtain adequate corroboration either prior to filing the I-589 or within the relatively short period between filing and the Asylum Office interview; or the existence of a purely legal issue, such as whether the person falls within a particular social group.

Many of these deficiencies are later remedied before the Immigration Court, particularly if the applicant is able to obtain counsel. In fact, grant rates for affirmative cases referred to the courts have historically been higher than for defensive cases.⁴ According to EOIR, 44% of affirmative asylum cases referred to the Immigration Courts and decided on the merits in FY2005 were ultimately granted.⁵ When viewed in this context, it is clear that the 70% referral rate does not indicate that the affirmative process is flawed or more subject to fraud or abuse than the defensive process.⁶

The Proposal mischaracterizes asylum adjudication as an enforcement activity

The Proposal errs in characterizing the asylum process for out-of-status individuals as an enforcement activity. The grant of asylum is inherently a benefit, one provided for under international law and undertaken by the United States pursuant to treaty obligations and statute. The Asylum Office currently initiates enforcement activity by issuance of an NTA after it encounters an out-of-status person not entitled to this benefit. It is erroneous to say that USCIS is in effect granting relief from removal. The fact that a person may technically be removable at the time of an asylum application does not change the inherent nature of asylum from a benefit to an enforcement activity. Indeed, USCIS service centers and local offices constantly adjudicate cases for out-of-status beneficiaries. Like the Asylum Office, those offices initiate enforcement

³ We continue to object to the one-year filing deadline and to the burden of proof currently imposed on applicants to prove their compliance with that deadline, even in the current affirmative asylum process.

⁴ U.S. Department of Justice, Executive Office for Immigration Review, FY 2005 Statistical Yearbook (February 2006) at K3, available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

⁵ *Id.*

⁶ It is likely that if a list of free legal services organizations were provided to applicants prior to either the time of filing the Form I-589 or the interview, the number of referrals for the reasons discussed above would decrease.

activity by issuance of an NTA after they determine that the out-of-status person is not entitled to a benefit.

The Proposal's assumptions regarding the time and cost savings likely to result from a reduction in USCIS' caseload fail to account for increased costs and delays likely to result from shifting the workload to the Immigration Court system

While this recommendation might save time and money for the Asylum Office, it would increase the load for other areas of government. The Proposal fails to account for the costs associated with shifting the burden of asylum adjudications away from a specialized, well-trained and highly efficient professional Asylum Officer Corps onto an already over-burdened court system. The Ombudsman's Proposal ignores the particularized in-depth training in the law, country conditions, international migration trends, and the effects of torture and trauma that the Asylum Corps has received. This special training would be essentially wasted if Asylum Officers were switched to other USCIS adjudications. Indeed, Asylum Officers would need to be retrained for those other adjudications, assuming they were even interested in moving to such cases.

Even more importantly, this assumption about cost savings within USCIS ignores the increased costs to DHS and to DOJ of shifting almost all affirmative asylum adjudications to the Immigration Court. While an accurate cost estimate does not currently exist, it is obvious that an adversarial, in-court adjudication requiring an Immigration Judge, a court interpreter, on-the-record proceedings, transcribers, court personnel, and DHS/ICE trial attorneys and support staff cannot possibly cost less than a non-adversarial interview conducted by one highly trained officer.

The supposed cost savings of eliminating the "duplication" of an Immigration Judge hearing after an Asylum Office interview on referral cases is nearly if not completely offset by the increased costs discussed above of conducting a full court hearing on cases currently resolved by a simple interview. Also, the benefit to the court's efficiency of the Asylum Office having reviewed and focused the issues for the referred cases is lost. Thus, the changes recommended in the Ombudsman's Proposal likely will wind up costing the government more than it saves.

The projected time savings that might result from the recommended changes in the Ombudsman's Proposal are also overstated. While going to Immigration Court in the first instance might save the sixty days currently consumed by the affirmative asylum process, placing all those cases into the court system would slow those cases down by more than sixty days. The time between a master calendar and individual hearing, even assuming no continuances are necessary at the master calendar stage, is close to one year in almost every jurisdiction. Those cases that could readily be approved at the Asylum Office would unnecessarily clog the Court system and further push back individual hearing dates. This is true not only for asylum cases, but for those "pure" enforcement cases in which DHS has an interest in getting a final removal order as quickly as possible.

One of the justifications provided in the Proposal for reducing the workload of asylum officers is to enable USCIS to reallocate asylum resources to eliminate current backlogs. In fact, the backlog in affirmative asylum applications already has been very significantly reduced. New

filings are virtually all processed within the statutory sixty-day deadline unless referral to Asylum Headquarters for further review is necessary. The other backlog within the Asylum Office's jurisdiction is in NACARA cases, but a backlog reduction effort there is also underway.

In addition to our fundamental objection that the Ombudsman's Proposal urges an ill-advised shift away from a non-adversarial system for determining eligibility for asylum as a benefit to an adversarial, enforcement-minded process, the Proposal contains other objectionable and unjustifiable provisions.

Imposing a Filing Fee on Asylum-Seekers

The imposition of a fee for the opportunity to seek protection is inconsistent with the obligations of the United States to provide such protection to refugees pursuant to its international treaty commitments. Many asylum-seekers, including non-detained affirmative asylum seekers, have limited financial resources and would be unable to cover the cost of filing. By definition, most of them have been in the U.S. for less than one year and do not have employment authorization. Imposing the payment of a filing fee would likely have a chilling effect on the filing of meritorious claims by those unaware of the availability of a fee waiver or unable to properly complete the necessary application .

Once again, the Ombudsman's Proposal betrays a lack of awareness regarding past efforts to revise the asylum process. In 1994, the USCIS' predecessor agency – the INS – considered imposing a filing fee on asylum applicants. The proposal was ultimately rejected based on the conclusion that the additional expense involved in adjudicating the large numbers of fee waivers would offset any potential income from filing fees.

Shifting Jurisdiction for Credible Fear Interviews to ICE

The Ombudsman's Proposal recommends that jurisdiction over credible fear interviews be shifted from USCIS asylum adjudicators to ICE enforcement officers. This aspect of the Proposal also reveals a fundamental misunderstanding of the asylum process. Credible fear interviews, by definition, are conducted between two and seven days after an asylum applicant's arrival in the United States. Applicants are in detention, usually fearful, confused and often already traumatized by their past experiences. Language interpretation, if needed, is over the telephone. The applicant frequently has had no access to an attorney. Placing the threshold determination of eligibility to apply for asylum in the hands of an officer from the enforcement side of the agency under these circumstances is a recipe for disaster -- specifically, the immediate return of *bona fide* refugees to their home countries because they could not fully explain their fear of return in a single session to an officer whose mindset is that of interrogation and removal.

Anecdotal evidence indicates that airport and land border inspectors already discourage some asylum applicants and erroneously prevent many from ever getting a credible fear interview. It is reasonable to expect that these problems would only be magnified by having ICE officers conduct credible fear interviews. The end result would be that even fewer *bona fide* refugees would have the opportunity to seek asylum from an Immigration Judge. Separation of the adjudication and enforcement functions was one reason that Congress decided to split the old

INS into separate components for adjudications and enforcement. This is why USCIS today exists separately from ICE and CBP. Asylum protection is the last place in which the agency should seek to defy that intent and re-merge the functions.

Finally, we object to the structure of the Proposal's presentation. The Proposal is over 92 pages long and proposes numerous changes to the regulations governing the asylum process. Nonetheless, the Proposal clearly identifies only two primary changes: 1) denying out-of-status asylum-seekers access to the affirmative asylum process; and 2) imposing an unprecedented fee on vulnerable and often destitute asylum-seekers. These changes are the only changes clearly addressed in both the Ombudsman's three-page cover memo and the first 14 pages of the Proposal.

We object to this attempt to propose so many significant and wide-reaching changes to the asylum process without openly addressing or providing justification for these changes. A document that proposes such myriad changes should identify, discuss, and justify each and every statutory and regulatory change recommended. The Ombudsman's Proposal fails to do so.

The undersigned organizations strongly urge you to reject the Ombudsman's Proposal's recommendations and to retain the current affirmative asylum process. It would be foolhardy to tamper with one of the most smoothly functioning units in all of USCIS, and to do so at the risk of the lives and safety of asylum seekers.

Sincerely,

American Immigration Lawyers Association
918 F Street, NW
Washington, DC 20004-1400

Advocates for Survivors of Torture and Trauma (ASTT)
431 East Belvedere Avenue
Baltimore, MD 21212

Advocates International
8001 Braddock Road Suite 300
Springfield, VA 22151-2110

American Friends Service Committee Immigrant Rights Program
89 Market Street, 6th Floor
Newark, NJ 07102

Amnesty International USA
600 Pennsylvania Avenue, SE, 5th floor
Washington, DC 20003

Arab Community Center for Economics & Social Services (ACCESS)
6451 Schaefer Road
Dearborn, MI 48126

Asian American Justice Center (AAJC)
1140 Connecticut Avenue, NW, Suite 1200
Washington, DC 20036

Ayuda Inc.
1707 Kalorama Road, N.W.
Washington, DC 20009

Bellevue Program for Survivors of Torture
462 First Avenue
Bellevue Hospital Center, C&D 7th Floor, Room 710
New York City, NY 10016

The Bernardo Kohler Center, Inc.
P.O.Box 41991
Austin, Texas 78704

Capital Area Immigrants' Rights Coalition (CAIR)
1612 K Street, NW
Suite 204
Washington, DC 20006

Catholic Charities Immigration Legal Services
901 SE Oak Street, Suite # 105
Portland, OR 97214

Catholic Charities
680 West Peachtree St. NW
Atlanta, GA 30308

Center for Gender & Refugee Studies
University of California, Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057

Center for Immigration Law and Practice
4900 Connecticut Ave, NW
Washington DC 20008

The Center for Justice & Accountability
870 Market Street, Suite 688
San Francisco, CA 94102

Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003

Church World Services/Immigration and Refugee Program
110 Maryland Avenue, NE, Suite 108
Washington, DC 20002

Cornell Law School Asylum/CAT Appeals Clinic
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853-4901

Florida Immigrant Advocacy Center
3000 Biscayne Blvd., Suite 400
Miami, FL 33137

Harvard Immigration & Refugee Clinical Program
197 Friend Street
Boston, MA 02114

Heartland Alliance for Human Needs & Human Rights
208 S. LaSalle Street, Suite 1818
Chicago, IL 60604

Hispanic Apostolate/ Immigration Legal Services
Catholic Charities
430 S. Broadway
Baltimore, MD 21231

Human Rights Advocates International (HRAI)
350 Fifth Avenue - Suite 5720
New York, NY 10118

Human Rights First
333 Seventh Avenue
13th Floor
New York, NY 10001

Human Rights Watch
1630 Connecticut Avenue, N.W., Suite 500
Washington, DC 20009

Immigration Clinic
Jerome N. Frank Legal Services Organization Yale Law School
Box 209090
New Haven, CT 06512

Immigrant Legal Resource Center
1663 Mission Street, Suite 602
San Francisco, CA 94103

Immigrant Law Ctr./Oficina Legal
450 N. Syndicate St., Ste. 175
St. Paul, MN 55104

International Institute of Boston
Asylum Representation Project
One Milk Street
Boston, MA 02109

International Institute of the East Bay
449 15th Street, Suite 201
Oakland, CA 94612

International Rescue Committee
1730 M Street, NW, Suite 807
Washington, D.C. 20036

Jubilee Campaign USA
9689-C Main Street
Fairfax, VA 22031

Justice for Our Neighbors
United Methodist Committee on Relief
8900 Georgia Avenue, Room 208
Silver Spring, MD 20910

Kurdish Human Rights Watch, Inc.
10560 Main Street, Suite 207
Fairfax, VA 22030

Legal Momentum
1522 K Street, N.W.
Suite 550
Washington, DC 20005

Lutheran Immigration and Refugee Service
700 Light Street
Baltimore, MD 21230

Minnesota Advocates for Human Rights
650 Third Avenue S., Suite 550
Minneapolis, MN 55402

National Immigrant Justice Center
(formerly Midwest Immigrant & Human Rights Center)
208 S. LaSalle Street, Suite 1818
Chicago, IL 60604

National Immigration Forum
50 F Street NW, Suite 300
Washington, DC 20001

National Network to End Violence Against Immigrant Women

The New York Immigration Coalition
137-139 W. 25th Street, 12th Floor
New York, NY 10001-7277

Northwest Immigrant Rights Project
615 2nd Ave., Suite 400
Seattle, WA 98104

Physicians for Human Rights
2 Arrow Street, Suite 301
Cambridge, MA 02138

Political Asylum Project of Austin (PAPA)
314 East Highland Mall Boulevard
Suite 501 Austin, Texas 78752

PRIME - Ecumenical Commitment to Refugees
129 Owen Avenue
Lansdowne, PA 19050

Progreso Hispano
4100 Mohawk Lane
Alexandria, VA. 22309

Refugee Resettlement and Immigration Services of Atlanta
4151 Memorial Drive, 205D
Decatur, GA 30032

Rocky Mountain Survivors Center
1547 Gaylord Street
Suite 100
Denver, CO 80206

Tahirih Justice Center
6066 Leesburg Pike, Suite 220
Falls Church, VA 22041

University of Maryland School of Law
Small Firm Practice: Immigration Clinic
500 W. Baltimore Street
Baltimore, MD 21201

U.S. Committee for Refugees and Immigrants
1717 Massachusetts Avenue, NW, 2nd Floor
Washington, DC 20036-2003

Vermont Refugee Assistance and the Vermont Immigration Project
73 Main Street, Box 19
Montpelier, VT 05602

Washington Lawyers' Committee for Civil Rights and Urban Affairs
11 Dupont Circle, NW, Suite 400
Washington, DC 20036

Women's Commission for Refugee Women and Children
122 East 42nd Street, 12th Floor
New York, NY 10168-1289

World Organization for Human Rights USA
1725 K Street NW, Suite 610
Washington, DC 20006

World Relief
7 East Baltimore Street
Baltimore, MD 21202

cc: Michael P. Jackson, Deputy Secretary, DHS
Stewart A. Baker, Assistant Secretary for Policy, DHS
Prakash Khatri, CIS Ombudsman
Joseph Langlois, Director of Asylum Division, USCIS