

November 9, 2015

The Honorable Jeh Johnson
Secretary
Department of Homeland Security

The Honorable Loretta E. Lynch
Attorney General of the United States
Department of Justice

RE: Access to Asylum for Foreign Nationals with Prior Removal Orders

Dear Attorney General Lynch and Secretary Johnson:

We write as a group of 64 civil rights, immigrant rights, victims' services, labor, faith, and human rights organizations to alert you to our deep concern about rules which limit access to asylum for anyone subjected to a prior removal order. Well-documented deficiencies, particularly in the expedited removal process, result in protection claims overlooked or ignored, all too often deporting asylum seekers back to countries where their lives are at risk. Subsequently limiting their access to protection when those same refugees seek safe haven again in the United States compounds that error, and calls out for a fix.

The Universal Declaration of Human Rights provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."¹ The expedited removal provisions of the Immigration and Nationality Act (INA) allow CBP officers to order the immediate removal of certain individuals without a hearing before an immigration judge.² In enacting these provisions, Congress established procedures intended to safeguard against returning *bona fide* refugees to situations of persecution and to ensure US compliance with its legal obligations under the UN Convention and Protocol Relating to the Status of Refugees.³ Pursuant to federal regulations⁴ carrying out Congress's mandate, enforcement officials must screen for potential asylum-seekers during the expedited removal process.⁵ To complete this screening, enforcement officials must read specific information about asylum to the individual in a language he or she can understand and ask them if they intend to apply for asylum or fear harm upon return to

¹ [Universal Declaration of Human Rights](#), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

² 8 U.S.C. § 1225(b)(1)(A).

³ See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; U.S. acceded 1968). The United States committed to the central guarantees of the 1951 Refugee Convention by its accession to the Refugee Convention's 1967 Protocol. Among these is the right of "non-refoulement," prohibiting states from returning a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, <http://www.unhcr.org/3b66c2aa10.html>; U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268, entered into force October 4, 1967. The United States acceded to the 1967 Protocol in 1968. The US, as a party to the Convention against Torture, is also obligated not to return someone to a country "where there are substantial grounds for believing that [they] would be in danger of being subjected to torture." Convention against Torture, art. 3(1).

⁴ 8 C.F.R. 253.3(b)(2)(i) and (b)(4).

⁵ See *id.*; see also 8 C.F.R. §§ 235.3(b)(2)(i), 1235.3(b)(2)(i).

their country. If the individual indicates an intention to apply for asylum or a fear of harm, the statute forbids CBP from proceeding with removal and CBP must instead refer the individual to an Asylum Officer who is specially trained to interview asylum-seekers.⁶

Despite this clear legal framework, widespread, systemic failures by CBP officers to follow the required screening procedures persist. The bipartisan U.S. Commission on International Religious Freedom has documented the historic failures of U.S. border officers to implement safeguards designed to protect asylum seekers from mistaken expedited removal, including failing to read the protection language and not referring individuals to credible fear interviews after they had indicated a fear of return.⁷ A 2014 report by Human Rights Watch entitled "You Don't Have Rights Here," documents these flaws via analysis of CBP data on CFI referrals obtained via a Freedom of Information Act (FOIA) request and interviews with migrants who had been deported or were being deported through the expedited removal or reinstatement of removal process. An analysis of CBP data obtained via a FOIA request showed a worryingly low number of CBP referrals for credible fear interviews, particularly given the violent country conditions from which many of them had fled. Between October 2010 and September 2012, of all Hondurans apprehended by CBP and placed in expedited removal and reinstatement of removal proceedings, only a miniscule minority—less than two percent—were flagged for credible fear assessments by CBP.⁸ Honduras suffers from rampant impunity for human rights abuses. The murder rate, which has risen consistently over the last decade, was the highest in the world in 2013.⁹ For young adult males between the ages of 20 and 34, the murder rate in Honduras exceeds 300 per 100,000.¹⁰ The data also show low rates of credible fear referrals by CBP for nationals of Mexico, El Salvador, and Guatemala. Only 0.1 percent of Mexicans, 0.8 percent of Guatemalans, and 5.5 percent of Salvadorans in expedited or reinstatement of removal were referred to a credible or reasonable fear interview by CBP.

This extremely low rate of referrals resonates with the accounts of would-be asylum seekers who were deported from the US through expedited procedures. In interviews with Human Rights Watch these would-be asylum seekers said their interactions with CBP were brief and focused on explaining additional consequences of deportation, such as bars to return for set periods of time, rather than inquiring about whether they feared return. Many reported that they were never asked if they feared returning to their countries, were not informed of the availability of protection or that they were not referred to an asylum officer for a credible fear interview after they told a Border Patrol agent they were afraid to return to their country.¹¹ "The officers don't pay attention to you. If you say you are afraid they say they 'can't do anything,'" Marlon J. told Human

⁶ 8 C.F.R. §§ 235.3(b)(2)(i), 235.3(b)(4), 1235.3(b)(2)(i), 1235.3(b)(4).

⁷ U.S. Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal, February 8, 2015.

⁸ Calculated from CBP data on apprehensions provided to Human Rights Watch via a Freedom of Information Act request.

⁹ United Nations Office on Drugs and Crime (UNODC), "Global Study on Homicide 2013: Trends, Contexts, Data," April 2014, <http://www.unodc.org/gsh/> (accessed October 9, 2014).

¹⁰ *Id.*

¹¹ Human Rights Watch interviews, San Pedro Sula, Honduras, September 6, 7, 8, and 9, 2014.

Rights Watch. “All they said to me was that if I came back they would give me six months in prison.”¹²

Some would-be asylum seekers also reported that Border Patrol officers harassed, threatened, and attempted to dissuade them from seeking protection. Mateo S. who was deported in September 2014 told Human Rights Watch that when he informed a Border Patrol officer of the threats to his life in Honduras, “He told me there was nothing I could do and I didn’t have a case so there was no reason to dispute the deportation.... I told him he was violating my right to life and he said, ‘You don’t have rights here.’” “I asked for asylum,” said Jacobo E., who fled after being shot and seeing his mother killed for her failure to pay fees to gang members to run her small clothing business. “The officer told me don’t apply, 90 percent of the people who do don’t get it.”¹³

Some deportees and detainees with whom we have spoken report that they resisted signing forms offered by Border Patrol because of their fear of deportation, or were coerced into signing something they did not understand. “‘Fingerprint, fingerprint,’ they just kept saying, I didn’t know what I was signing,” said Jacobo E. who was in hiding in Honduras after being deported.¹⁴

As part of expedited removal procedures CBP officers must take a “complete sworn statement” from foreign nationals “concerning all pertinent facts” to their deportation.¹⁵ These statements may be introduced in court as government records created by sworn officers in their normal course of duty and used as impeachment evidence for migrants who are applying for asylum.¹⁶ However, migrants frequently tell us that the documents prepared in their cases do not reflect what they told Border Patrol officers.¹⁷

Illustratively, several sworn statements have come to light in which very young children purportedly told Border Patrol agents that they had come to the United States to work in specific locations.¹⁸ A U.S. Court of Appeals has also questioned the reliability of CBP interviews, noting that such interviews should be “carefully scrutinized for reliability before being utilized by the fact-finder.”¹⁹

As you know, one of the goals of US immigration law is to recognize and protect genuine refugees. When asylum seekers are deported back to a situation of persecution, they often have no choice but to return to seek protection again. Upon return, however, they risk prosecution for illegal reentry, and they are barred from accessing asylum. Under current policy and regulation, asylum seekers previously removed may only apply for

¹² Human Rights Watch interview with Marlon J. (pseudonym), San Pedro Sula, Honduras, September 6, 2014. (“*Los oficiales ya a uno no le prestan atención. Si uno dice que tiene miedo dicen que no pueden hacer nada, ‘I’m sorry,’ lo siento.*”)

¹³ Human Rights Watch interview with Roberto L. (pseudonym), San Pedro Sula, Honduras, September 9, 2014.

¹⁴ Human Rights Watch interview with Jacobo E. (pseudonym), San Pedro Sula, Honduras, September 7, 2014.

¹⁵ CBP Inspectors Field Manual, February 10, 2006, Section 17.15, available at <http://www.aila.org/File/Related/11120959F.pdf>.

¹⁶ <http://d35brb9zkkbdsd.cloudfront.net/wp-content/uploads/2015/06/AILA-Amicus-Border-Statement-Artesia-Public.pdf>

¹⁷ See NIJC et al., Inadequate U.S. Customs and Border Protection (CBP) Screening Practices Block Individuals Fleeing Persecution from Access to the Asylum Process, (Nov. 13, 2014), available at <http://bit.ly/1xfFsog>, and at 10 (“despite the clear requirements of the law and the grave stakes involved, CBP’s processing of arriving asylum seekers is marred by careless errors, subversion of even minimal procedures, willful indifference, and in some cases, outright intimidation or coercion.”).

¹⁸ Elise Foley, Infants and Toddlers Are Coming to the US to Work, According to the Border Patrol, Huffington Post, June 16, 2015, available at http://www.huffingtonpost.com/2015/06/16/border-patrol-babies_n_7594618.html.

¹⁹ *Qing Hua Lin v. Holder*, 736 F.3d 343, 355 (4th Cir. 2013).

withholding of removal.²⁰ This distinction places individuals at a distinct disadvantage, as withholding of removal requires a higher burden of proof, does not permit an individual to petition for or sponsor one's spouse and children, and prevents the individual from applying for lawful permanent residence or citizenship. Those granted withholding are left in permanent limbo; they must apply annually for work authorization, they can be deported if the Department of Homeland Security (DHS) determines that there has been a change in the conditions that supported their claim for protection, and they cannot travel outside of the United States.

In the interest of fairness, we urge you to address this problem in two ways:

Undertake rulemaking to allow all asylum-seekers, including individuals with prior removal orders, to apply for asylum, in addition to withholding removal. We are aware that a Petition for Rulemaking has been filed with DHS and is currently pending.²¹ We urge you to grant that Petition and to allow noncitizens to seek asylum even if they have returned after having been previously issued a removal order. Such a rule would not interfere with any legitimate enforcement need; noncitizens claiming protection would still need to pass a pre-screening interview. But it would mitigate the grave harm done by current policy and regulation.

Exercise prosecutorial discretion to cancel or decline to enter reinstatement orders against individuals expressing fear of return, and who were issued prior expedited removal orders without having received a credible fear interview. It is undisputed that DHS has prosecutorial discretion to decide when to invoke the provisions of 8 USC §1231(a)(5). We see no reason why DHS could not choose as a policy matter to exercise its discretion in this matter, ideally by public memorandum. A policy of declining to reinstate expedited removal orders for individuals claiming a fear of return would avoid the grave injustice of depriving these individuals of the right to seek asylum on their second attempt for the sole reason that they were wrongfully deprived of that opportunity on their first try. Such a policy would by no means excuse DHS from the obligation of ensuring better protections for refugees; after all, an individual wrongfully removed to the country from which they fled may not be able to flee again to safety.²²

Finally, we would note that this issue has arisen in litigation in various cases, including *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 487 (5th Cir. 2015) (petition for rehearing pending), *Perez-Guzman v. Lynch*, No. 13-70579(9th Cir.) (argument forthcoming). We recognize that litigation frequently requires government counsel to defend agency action

²⁰ 8 C.F.R. §§ 1208.31(e), (g)(2)(i). Withholding of removal is available by statute, see 8 U.S.C. § 1231(b)(3), and under the Convention Against Torture (CAT), see 8 C.F.R. § 1208.16.

²¹ Petition for Rulemaking to Promulgate Regulations Vindicating the Statutory Right to Seek Asylum Notwithstanding Reinstatement of Removal Orders, Aug. 7, 2015, available at <http://bit.ly/1KPe5sw>.

²² As we've explained, many noncitizens are deprived of the opportunity to seek asylum due to neglect, oversight, error, or mistake by immigration agents. We acknowledge that some noncitizens fail to express fear or to request a credible fear interview because of their own confusion, because of language limitations, or because of misadvice from friends or acquaintances. We do not suggest that the Department adopt a policy which turns on who bears the "blame" for the prior removal order. That would strike us as inefficient and likely to lead to unjust results. Rather, we suggest that whenever a noncitizen expresses fear of return after a prior removal order, that the case proceed in a way that allows the noncitizen to seek asylum. If an immigration judge ultimately finds any blame in the noncitizen's prior conduct, that can always be considered in the ultimate decision of whether to grant asylum in the exercise of discretion.

before full consideration by the relevant agencies. We would encourage you to promptly examine or reexamine your position on these matters now, before the courts act, while you may adopt a uniform, nationwide rule which protects asylum-seekers and advances our nation's longstanding welcome to those fleeing oppression.

Sincerely,

The Advocates for Human Rights
Alliance for Citizenship
American Friends Service Committee (AFSC)
American Gateways
American Immigration Council
American Immigration Lawyers Association
Amnesty International USA
Asian American Legal Defense and Education Fund (AALDEF)
Asian Americans Advancing Justice-AAJC
ASISTA Immigration Assistance
Border Action Network
Capital Area Immigrants' Rights (CAIR) Coalition
CARECEN DC
Catholic Legal Immigration Network, Inc. (CLINIC)
Catholic Migration Services
Center for Gender & Refugee Studies
Christian Church (Disciples of Christ) Refugee & Immigration Ministries
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Community Legal Services in East Palo Alto
Council on American-Islamic Relations
Detention Watch Network
Families For Freedom
First Focus
Fordham Law School's Feerick Center for Social Justice
Friends of Broward Detainees
Georgia Detention Watch
Grassroots Leadership
Human Rights First
Human Rights Initiative of North Texas
Human Rights Watch
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Justice Corps
Immigrant Law Center of Minnesota
Justice For Our Neighbors-Nebraska
Justice Strategies
Kids In Need of Defense
Latin America Working Group
Lutheran Immigration and Refugee Service
Massachusetts Immigrant and Refugee Advocacy Coalition

National Center for Lesbian Rights
National Immigrant Justice Center
National Immigration Law Center
National Korean American Service and Education Consortium
Needham (MA) Area Immigration Justice Task Force
Northwest Immigrant Rights Project
Office of Immigration Issues, Presbyterian Church (USA) National Office
OneAmerica
Pangea Legal Services
Public Counsel
Puentes: Advocacy, Counseling & Education
Reformed Church of Highland Park, NJ
Refugee and Immigrant Center for Education and Legal Services (RAICES)
Sisters of Mercy South Central Community
Sisters of Mercy West Midwest Community
Southeast Asia Resource Action Center (SEARAC)
Tahirih Justice Center
U.S. Committee for Refugees and Immigrants
UC Davis Immigration Law Clinic
University of Houston Law Center Immigration Clinic
UnLocal, Inc.
Villanova Farmworker Legal Aid Clinic
We Belong Together
Women's Refugee Commission
Young Center for Immigrant Children's Rights at the University of Chicago