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HIGH- STAKES ASYLUM

*How Long an Asylum Case Takes
and How We Can Do Better*

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Introduction

There should be a process, but there does need to be some space to be able to do this process. When you are in the thick of applying for asylum, you're going to commit errors, you're going to make mistakes, and it's my understanding that these are the things that get you sent home. The work of an attorney is so important because you [as the applicant] have to turn over your soul, the best of you in this interview. The hardest part is the time, and the details required to demonstrate to the U.S. you are worthy of being allowed to remain hereⁱ

Lara
Boston, MA

Recently received her green card based on an asylum grant.



For people fleeing violence and persecution, nothing is more important than finding safety. For more than 40 years, U.S. asylum law has guaranteed asylum seekers the right to access legal protections enabling them to stay in the United States and avoid being returned to danger. But since the Refugee Act was signed into law in 1980, the laws on asylum eligibility have grown into a maze of convoluted requirements and pitfalls, like the children's game "Chutes and Ladders," with potentially deadly consequences.

Because of the complexity and requirements of asylum law, it takes time to prepare an asylum application. In my 25 years of practice, I have prepared and filed hundreds of asylum applications. Based on my experience, it takes *time* to get an accurate account of someone's life when there's violence and trauma involved. It takes *time* to find evidence of torture and persecution. When you read this report, I encourage you to try to imagine navigating the complex legal steps in the asylum process. Then, imagine doing it without an attorney, a nearly impossible task as extensive research and data has shown.¹

This report comes at a critical moment when increased migration to the U.S. southern border and intense political pressure are pushing lawmakers to process asylum seekers faster. Faster can be accomplished, but it must also be fairer. If the system is fair, people meriting protection will receive it and those not eligible can and must depart. Toward that end, this report includes several recommendations that improve asylum processing so that it is both fair and more efficient. It is our hope that this report will contribute to policy reforms that are grounded in the realities of asylum law and the system that implements it.

Jeremy McKinney
President, American Immigration Lawyers Association (AILA)

ⁱ Quotes by Lara throughout the report are from an interview conducted primarily in Spanish and then translated into English.

Executive summary and recommendations

The heightened levels of migration worldwide are drawing intense political and media attention to the United States' southern border, including radical calls for blocking access to asylum seekers that would undo longstanding American humanitarian principles. More balanced, smarter approaches are available. In fact, since taking office, the Biden Administration has implemented several such policies, including the scale-up of resources to screen asylum seekers at the border and the expansion of existing legal pathways for people to obtain protection.

Unfortunately, the President is also accelerating and truncating the asylum system in an attempt to speed up the process with policies like the 2022 asylum processing rule and the dedicated dockets program.ⁱⁱ AILA has forcefully opposed these recent policies because they are restricting or blocking asylum access and, as a result, deeply compromising the integrity and fairness of the U.S. system.ⁱⁱⁱ

This report on the asylum process draws principally upon the expertise of AILA's membership of more than 16,000 immigration attorneys and law professors nationwide who provided more than 300 detailed responses to a survey about the critical steps and time required to prepare an asylum case.^{iv} The report's principal conclusion is that the *minimum* time required for an attorney to properly prepare an asylum case is 50 to 75 hours. While this estimate accounts for some complications, an asylum case can take much longer. For example, the attorney may need to find evidence of torture in a country that is still wracked by political violence or devote extensive interview time to obtain sensitive information from the asylum applicant while they are still suffering from trauma. See Appendix I.

The government can greatly increase the efficiency of the asylum process by increasing agency resources and capacity and by eliminating existing delays within the system. Some of those steps are being taken, but further action is urgently needed. AILA recommends the Biden Administration use a systemwide, all-of-government approach to implement a [range of solutions](#) that will improve asylum processing and the management of migration at the U.S. southern border.

America needs an asylum system that is in line with the nation's commitments to protect asylum seekers and ensure a fair legal process while also meeting the urgent demand for greater efficiency and capacity. The country's immigration system must be able to quickly identify who has a legitimate claim for humanitarian protection and who does not. Those not eligible should be required to depart. But imposing strict, arbitrary timelines for asylum that do not allow for adequate preparation will result in eligible asylum seekers being denied protection and sent back to face persecution or death.

ⁱⁱ The asylum processing rule is formally known as "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers." New enrollment is currently paused as the Biden administration focuses on the transition away from Title 42. For recent updates, see *Featured Issue: Asylum and Credible Fear Interim Final Rule*, AILA, <https://www.aila.org/advo-media/issues/featured-issue-asylum-and-credible-fear#:~:text=The%20interim%20final%20rule%20%E2%80%9CProcedures,for%20individuals%20in%20expedited%20removal>. See *infra* at *Biden administration fast-tracked programs limit the opportunity to access counsel* for more information on the asylum processing rule and the dedicated docket program.

ⁱⁱⁱ E.g., AILA and the Council Submit Comments on Credible Fear Screening and Asylum Processing IFR, May 26, 2022, <https://www.aila.org/infonet/comments-on-credible-fear-screening>; AILA Joins Legal Service & Mental Health Providers in Letter to Administration Expressing Grave Concerns over the "Dedicated Docket", Oct. 5, 2022, <https://www.aila.org/advo-media/aila-correspondence/2022/letter-to-administration-expressing-grave-concerns>; AILA and the Council Submit Comments on Circumvention of Lawful Pathways Proposed Rule, Mar. 26, 2023, <https://www.aila.org/infonet/comments-on-circumvention-of-lawful-pathways>.

^{iv} See Appendix II.

Ultimately, systemwide changes can only be accomplished through congressional action to appropriate the funding required to meet these systemic demands. After three decades of inaction, Congress must pass immigration laws that ensure America’s immigration system is ready for the future.

Key findings

- The basic steps of preparing an asylum application takes an estimated minimum of 50 to 75 hours. This work cannot be done in one continuous period; instead, it is carried out over the course of several months. Cases with significant complexity can take far more time than this estimate.
- Most asylum cases are **not** straightforward. Complicating factors that add time to an asylum case may include detention, past trauma experienced by the applicant, language barriers, and procuring evidence from foreign countries or expert witnesses such as medical testimony.
- It is extremely difficult for an asylum seeker represented by counsel to sufficiently develop their asylum application within the mandatory deadlines established in the May 2022 asylum processing rule or the expedited family court “dedicated dockets.”

AILA recommendations

Ensure asylum timelines do not undermine fairness

- **When setting asylum processing deadlines, allow adequate time for an asylum seeker to obtain counsel and for the attorney to prepare for the case.** Timelines should not rush trauma survivors who may need more time to recount their experience. Reasonable continuances should be allowed to obtain an attorney or for attorney preparation.
- **Waive or exempt asylum seekers from deadlines if the reason the deadline was not met is outside of their control.**
- **Do not hold asylum seekers to the same evidentiary standards when they are subject to expedited adjudication timelines,** such as the shortened deadlines of the 2022 asylum processing rule.

Reduce government delays and inefficiency

- **Establish uniform policies, centralized systems, and appropriate information sharing between immigration agencies.** Agencies should centralize and digitize address changes across all agencies and simplify access to a noncitizen’s immigration record. These steps will enhance communication and data sharing, which will in turn reduce backlogs, avoid delays, and increase efficiency and fairness.
- **Reduce the immigration court backlog.** Executive Office for Immigration Review (EOIR) should continue expanding initiatives to remove cases from the docket or facilitate the resolution of cases through pretrial conferencing. Immigration judges should administratively close or terminate appropriate cases, such as those eligible for a benefit with U.S. Citizenship and Immigration Service (USCIS).²
- **Do not expend finite prosecutorial resources on cases that can be resolved more expeditiously.** Immigration and Customs Enforcement’s (ICE) Office of the Principal Legal Advisor (OPLA) attorneys should engage in pretrial negotiations and exercise prosecutorial discretion to avoid unnecessary litigation.

Legal access and representation improve fairness and government efficiency

- **Ensure asylum seekers and other migrants being processed rapidly at the U.S. southern border have access to legal information, advice, and full counsel during credible fear interviews (CFIs), Customs and Border Protection (CBP) inspections, and immigration court proceedings.**
- **Congress should Fund the Department of Justice (DOJ) to provide legal representation for all immigrants.** Everyone needs access to an attorney to provide legal advice and information prior to any hearings, including the CFI. Congress should appropriate DOJ funding to provide full legal representation to those in removal proceedings who cannot afford it.
- **Ensure access to counsel in all detention facilities.** Detention facilities must be held accountable to policies that ensure attorneys have reliable confidential contact visits with clients, as well as access to free and confidential phone calls and video conferences. The government must monitor access to counsel at ICE facilities and impose penalties for violations of standards.

Reduce immigration detention

- **Reduce immigration detention.** Detention delays asylum cases because it creates barriers to obtaining counsel and makes case preparation far more difficult. The Department of Homeland Security (DHS) should reduce its use of immigration detention.

Improve the asylum process

- **The Biden administration should publish the long-awaited regulation on particular social group (PSG) asylum cases.** On February 20, 2021, President Biden issued an executive order to promulgate this regulation by November 17, 2021,³ but it has not been published. A regulation would aid in consistency of application of asylum law and would reduce USCIS referrals to immigration court.
- **Increase transparency in adjudications by making DHS's asylum officer training materials publicly available.**
- **Establish an interagency task force to develop a trauma-informed adjudication system.** Experts in development, mental health, welfare, and trauma science should all be involved in this process. A trauma-informed adjudication process will help ensure accurate adjudications in the first instance, which in turn will decrease appeals.
- **Fund additional asylum officers.** Congress should appropriate funds to increase the capacity of USCIS to adjudicate asylum applications.

Anatomy of an asylum case

Importance of legal representation in an asylum case

Applying for asylum is not like applying for other legal documents, such as a driver's license or even a marriage-based green card. There are life-or-death stakes for the asylum seeker, and there are many parts of the process where an error can result in a denial. As retired immigration judge Dana Leigh Marks once summarized in an interview, "...[W]e're doing death penalty cases in a traffic court setting. We are already working at light speed, and yet the stakes for the people who are before the courts can be a risk to their very life, particularly if they are fearing persecution or other harm if forced to return to their home countries."⁴

Compounding these high stakes, eligibility for asylum is very narrow. The asylum seeker must not only be fleeing danger, but they must also be fleeing persecution. Generalized persecution is insufficient; it must be directed at the person and "on account of" a specific set of reasons. Furthermore, asylum law can vary by where you live within the United States. For example, California in the 9th Circuit has different asylum laws than Georgia, which sits in the 11th Circuit. The outcome of an asylum case could turn on location and an understanding of these nuances.

Legal representation is an important part of ensuring the United States government receives an accurate and complete asylum application. Without this, our country risks turning away meritorious asylum claims in violation of our international and domestic laws. The importance of legal representation is demonstrated by the data. In a November 2022 report, Transactional Records Access Clearinghouse (TRAC) Immigration found that "[s]uccess rates were ... more than two and a half times higher—49 percent—in represented cases, than in the small number of

The different paths of an asylum case

Affirmative asylum is when the asylum seeker applies for asylum with U.S. Citizenship and Immigration Services (USCIS), part of the Department of Homeland Security (DHS). If the application is denied, the asylum seeker's case is "referred" to the immigration court within the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice (DOJ). It then becomes a defensive asylum case.

Defensive asylum is when the asylum seeker is in removal proceedings and is seeking asylum before an EOIR immigration judge to remain in the United States. This involves an application with supporting documents and several hearings, including a final merits hearing. This system is adversarial, and the "prosecutor" is an attorney from the Office of the Principal Legal Advisor (OPLA), a division of U.S. Immigration and Customs Enforcement (ICE), which is also a part of DHS. If the asylum seeker is denied, there are options for appeal. AILA's survey does not explore the time it takes to pursue the appellate process.

Expedited removal is a process that allows for the rapid deportation of an individual taken into custody within 14 days of entering the United States without inspection by an immigration officer who encounters the individual within 100 miles of the U.S. border. If someone is seeking asylum in this process, they are interviewed by an asylum officer (an employee of USCIS) to see if they have a "credible fear" or "reasonable fear" of persecution. Both credible and reasonable fear interviews are meant to be a low bar in advance of the actual asylum standard to avoid returning bona fide asylees and violating international and domestic law.

unrepresented cases that had managed to file without an attorney at their side. Only 18 percent won asylum when unrepresented.”⁵ The TRAC report notes that one of the reasons legal representation is so key to an asylum grant is very practical, as “without an attorney to help in filing the paperwork, few are able to put together a formal asylum application — a step that is required to even obtain a hearing on their asylum claims.”⁶ The reason for this should become clear given the multitude of factors that go into an asylum application, which are described below.

When asked if she could have navigated the asylum process without an attorney, Lara said, “I didn’t have the tools, I didn’t have the knowledge. There’s a difference between feeling like you have a partner, that you are not alone ... on my own, I would have committed errors, I would have made mistakes.” Lara received an asylum grant based in part on being a transgender woman from Colombia — but she was unlikely to have been successful without her attorney.

Setting a baseline: how much time does an asylum case take?

The core of an asylum case is a factual account of what can be the most traumatic moment of a person’s life. Each case involves a unique set of facts and legal considerations that have to fit a narrow definition to win protection. As a result, a “straightforward” asylum case does not exist. As asylum attorneys said in their survey responses:

- “[E]ach case is different. ALL of them take at least twice as long as we estimate at the outset.” Sean Lewis, Tennessee
- “I currently have an affirmative case, nearly ready to file, and we have spent about 60 hours total. My defensive case, which we picked up from a previous attorney who had initially filed affirmatively, has taken over 300 hours of prep, including for the merits. [There is] WILD variation.” Vanessa Frank, California

Despite the unpredictability of asylum case preparation, AILA estimates a range of 50 to 75 hours for an asylum application *when prepared by an attorney experienced in asylum law*. This estimate is consistent with past estimates by individuals and the AILA Asylum and Refugee Committee.⁷ There are complications that would add to this estimate. See Appendix I for a chart of complicating factors.

Notably, most complications occur at the beginning of the asylum application — before the asylum interview or the merits hearing, demonstrating just how crucial it is to have sufficient time to prepare an asylum case. Detention, trauma, supporting evidence requests, working with experts, and language barriers stand out among the most time-consuming complications for an asylum case. See Appendix I.

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Preparing an asylum case

The initial asylum application involves preparation of the Form I-589, Application for Asylum and for Withholding of Removal, a 12-page form that requires an explanation of the asylum seeker’s account as well as significant biographic information. Proper completion of this form requires several additional steps. Among the most critical elements are developing trust with a survivor who may have experienced trauma and is unable to recount their experience at initial meetings and finding and

developing corroborating evidence, which may require researching conditions in the person’s home country and searching for police, hospital, and other records of abuse, violence, and documentation about the person’s life.

Intake and the Form I-589

Preparing the Form I-589 is not as simple as filling out a form. Most attorneys begin with an intake questionnaire that their clients fill out, which mirrors much of the biographic information required on the Form I-589. Attorneys then use the questionnaire responses to populate the I-589. The form requires five years of addresses, dates, and other information that may not be easily available such as the addresses of all employers and schools attended. Failure to provide complete and accurate information can be the basis for denying an application. Due to educational levels and cultural differences, gathering this information can be particularly difficult and it is not unusual to receive an intake form that is only half complete. Attorneys and support staff spend several hours working with an asylum seeker to fill in these initial gaps to ensure a complete application.

Declaration

A “detailed client declaration to explain the harm suffered and feared” is included in every asylum application and is often the central part of the application.⁸ A declaration takes multiple meetings and hours of working with a client, reviewing the initial intake information, and filling in any gaps. A client with significant trauma could require many more meetings.^v Once there is a complete draft declaration, it is reviewed to ensure there are no outstanding questions.

Supporting evidence

The federal government places significant weight on the consistency of the information and the corroborating evidence presented by the asylum seeker, as required by the 2005 Real ID Act. This legislation increased the emphasis on corroborating evidence and on consistency in testimony and evidence, permitting adjudicators “to make determinations based on minor inconsistencies and inaccuracies, regardless of whether the mistake” is material to the asylum claim. This can be particularly difficult to prove and requires an attorney to navigate a client’s normal memory loss caused by time and trauma to demonstrate a consistent account. Under existing law, the importance of corroborating evidence in an asylum case cannot be overstated, and gathering this evidence is time-consuming. Corroboration of any kind is typically out of reach for the pro se asylum seeker.

“Credibility is always litigated, it’s always something DHS is going to attack. It’s difficult, it’s so discretionary.”
—Gregory Fay, AILA Asylum & Refugee Committee

^v See *infra* section *Asylum timelines need to accommodate trauma that asylum seekers have experienced*.

One attorney stated that he takes a systematic approach to supporting evidence and, for every sentence in the declaration, he asks: “can I prove this?” Then, he starts building the supporting evidence with an aim to document every line of the declaration. This can be as basic as proving the name of the applicant with the birth certificate or passport, but it gets more complex. The attorney starts by seeking specific documentation that supports the asylum claim, asking if there is a police report, if there was a court hearing, if medical records exist, and whether there were there any neighbors who may have been witnesses. This process can take months. When Lara hired her attorney, they only had five months left before the one-year filing deadline, and it took about two months to gather all the documents required for her case.

Some aspects of obtaining supporting evidence can be particularly time-consuming

- Requesting supporting evidence such as police or medical records from a foreign country is not only time-consuming but also costly and can require hiring an attorney in the foreign country. AILA’s survey estimates that this **adds 18 hours of time** for an affirmative asylum case, not including translation time.
- Both USCIS and EOIR will only accept foreign-language documents with an English translation, and it is incumbent on the asylum seeker or their attorney to have any relevant supporting documents translated. Attorneys surveyed estimate that when supporting evidence needs to be translated, this can add an **additional 9 hours** of time.
- Developing initial country conditions. Attorneys surveyed estimate it takes an **additional 14 hours** to research and develop completely new country conditions evidence.^{vi}

Often, the asylum process itself complicates mental health issues. While pursuing her asylum application, Lara developed anxiety and panic attacks in part due to the uncertainty involved. She sought mental health treatment and medicine for anxiety, and her attorney was able to secure an earlier interview to help mitigate this impact.

- Attorneys also work with experts to provide testimony to support an asylum seeker’s case. For example, they may use country-condition experts to describe ongoing conflict in a country, mental health professionals to explain trauma, or a doctor to document physical scars or other symptoms.⁹ Attorneys surveyed estimate that working with mental health professionals **adds 24 hours** to preparation.

Finally, all this supporting evidence is dynamic—particularly country conditions—and may change by the time the asylum seeker has a hearing. In defensive cases, where it may be five or more years before the merits hearing, attorneys will need to review any and all evidence to supplement and revise as necessary.

^{vi} Many attorneys serve multiple clients from the same country, which saves time as it allows for a library of country conditions research to build up, with foreign translations already completed.

Meetings between the attorney and asylum seeker

Asylum attorneys meet with their clients numerous times throughout the development of the asylum application. Forty-three percent of survey respondents say they generally meet with clients 10 or more times over the course of the case, ranging from phone calls to video conferencing to in-person meetings. In addition to meeting to go over the declaration, attorneys will generally meet with the asylum seeker to go over their account one or more times and help prepare them for the interview or hearing. The attorney “will engage in rigorous interviewing to explore the details of the asylum claim” to ensure each detail is accurate and consistent.¹⁰ Survey respondents estimated that the time to prepare the asylum seeker for a merits hearing ranges from 5 to 15 hours, although it could take longer.

Language barriers can add time to this preparation and every other step of the asylum process. While many immigration attorneys speak a second (or more) language, it is not uncommon to not speak your client’s native language. If an interpreter is required to navigate communication with the client, the attorneys surveyed estimated that this adds about 11 hours of time to an asylum case.

Legal research

The way asylum law is interpreted varies depending on the federal circuit governing the case and the immigration judge. More than the basics described above, there are a range of factors that may render the person ineligible for asylum. These include the person being firmly resettled in another country, having convictions for certain types of crimes, or having participated in terrorist activity.¹¹ This makes it essential for an attorney to do legal research to ensure eligibility for asylum. AILA’s survey found that this adds an additional 11 hours to preparation. Further, due to existing court and other institutional processing delays, it is not uncommon for asylum law to change from the time a client hires an attorney to the time their case is before an adjudicator. The attorney will need to do additional legal research to account for changes in the law.

Asylum timelines and the preparation of an asylum application

Fast-tracked timelines, such as those imposed by the 2022 asylum regulation, hinder access to counsel. Fast-tracked timelines also have a significant impact on the ability of an attorney to manage their existing caseload. The low representation rates in existing fast-tracked programs demonstrate the impact these programs have on access to counsel.

The Biden Administration’s fast-tracked programs limit the opportunity to access counsel

The Biden Administration’s Dedicated Dockets initiative and the interim asylum processing rule — both designed to expedite immigration proceedings — severely restrict access to counsel and undermine the integrity of court proceedings. The Dedicated Docket initiative, announced in May 2021, places certain families who crossed between ports of entry into fast-tracked removal proceedings where an immigration judge is expected to issue a decision within 300 days of the master calendar hearing.¹² According to a January 2022 TRAC report, seven months into the Dedicated Docket initiative, only 15.5% of asylum seekers on the Dedicated Docket had counsel to represent them in their proceedings.¹³ A total of 1,557 asylum seekers on the Dedicated Docket have received removal orders. Of these,

only 75—just 4.7%—had representation. A separate study by the Immigrants’ Rights Policy Clinic at UCLA Law, found 70.1% of those on the Dedicated Docket in Los Angeles do not have attorneys.¹⁴ By contrast, since the start of the Dedicated Docket program, just 13 people—all represented—have been granted asylum or another form of lawful relief from removal.¹⁵

Similarly, the new interim asylum processing rule¹⁶ created significantly expedited timelines for every step of the asylum process. Under this rule, the transcript from the CFI serves as the asylum application, and the asylum merits interview (AMI) must be scheduled 21–45 days after a positive credible fear determination, with a decision generally issued within 60 days of the positive credible fear determination.¹⁷ Any additional evidence to amend, correct, or supplement the credible fear record must be submitted to the asylum officer “no later than 7 days prior to the scheduled asylum interview,” or 10 days prior if submitted by mail.¹⁸ Assuming that an asylum seeker does not need time to find an attorney to take their case, this could leave **only 11 days** between the credible fear determination and the AMI for the attorney to prepare an asylum case in advance of the interview. If the asylum seeker needs time to obtain an attorney, that will shorten this time even further. Given the significant time involved in navigating trauma and preparing a complete declaration, let alone developing supporting evidence, this timeline is insufficient to allow for both the hiring of an attorney and that a complete asylum claim is made.

After less than a year of implementation, data shows the asylum processing rule has negatively impacted the ability of an asylum seeker to access counsel. Only 7.6% of asylum seekers processed under this rule have attorney representation for their AMI.¹⁹ That number is even lower for attorney representation at the CFI, with only 1% of credible fear cases having attorney representation.²⁰

The low representation rate is partly attributable to the rule’s severe restriction on continuances, which asylum seekers commonly need to find legal representation.²¹ USCIS has stated that the need to find an attorney or have time for attorney preparation is not a sufficient reason to grant a continuance in advance of the AMI.²² Before the immigration court, respondents may receive no more than 30 days of continuances for “good cause shown.”²³ Continuances that would extend the merits hearing longer than 135 days are categorically barred absent a showing that not granting the continuance would be unlawful under the Constitution.²⁴

Asylum timelines need to accommodate trauma that asylum seekers have experienced

Most asylum seekers have experienced violence or abuse that has lasting effects on their mental health. Coping with continuing trauma is inherent to their lives and adds significant time and complexity to preparing their asylum cases. In particular, trauma survivors frequently require additional time before they can share their experiences. To build trust with trauma survivors, attorneys meet multiple times with their client to develop a relationship before asking them to recount their experience. AILA members reported that if a client is suffering from *significant* trauma this adds an average of 22 hours to the time it takes to develop their case. An asylum seeker with significant trauma typically needs a medical evaluation, which can add an estimated 18-24 hours of preparation time. Allowing for this time is crucial as trauma that is improperly navigated can result in missing pieces of an account with life-or-death consequences.

“[the hardest part of the case] is working through the trauma. . . . We’re asking them to recount the most traumatic moment of their life with critical detail that can be torn apart on the stand at any point like it’s just a fact in a fiction novel and not somebody’s reality. It can be really challenging to get people to open up to you in the first place, and trauma can cause memory issues and lack of details. It can be really hard to get a statement together that makes sense to someone on the outside.”

—Briana Miller, North Carolina

Trauma causes memory loss, which makes presenting an asylum case particularly difficult.²⁵ Physicians for Human Rights Asylum surveyed asylum seekers from 90 different countries and found memory gaps of the traumatic event as well as difficulty establishing the timeline of the experience.²⁶ As law professor Carol Suzuki stated in her article on techniques for counseling asylum applicants with post-traumatic stress disorder (PTSD), “There is an inescapable and cruel paradox evident when one considers the ramifications of PTSD on an asylum claim — those who suffer from PTSD because of their traumatic experiences, and who are deserving of asylum in the United States, may be denied asylum as a direct result of the symptoms of their affliction.”²⁷

Frequently, adjudicators do not find an asylum seeker’s testimony credible because they were unable to disclose trauma early in the asylum process. The failure to disclose those painful experiences early on is then used against the asylum seeker when they describe the trauma later in the process. For example, CFIs are usually brief interactions early in removal proceedings that occur between a government official and an asylum seeker, often without counsel. These relatively short interactions with USCIS and CBP officers are not sufficient to navigate trauma, yet CBP officers “record personal details in intake forms during short, preliminary interviews which may later be held against asylum seekers if there are any inconsistencies.”²⁸ For this reason, AILA urges DHS to reconsider the extremely truncated procedures set by the May 2023 policy of processing CFIs within 24 hours in CBP custody and the asylum processing rule, which relies heavily on this brief exchange at the initial CFI.²⁹ Speaking of childhood sexual trauma, AILA Asylum and Refugee Committee member Gregory Fay observed, “I find that doesn’t usually come up until the third or fourth time I meet somebody ... it’s not something most people are prepared to talk about up front. If it’s something they didn’t mention in their CFI, then you have a credibility issue.”

Research into asylum adjudicators’ adverse credibility determinations found high inconsistency levels even among genuine asylum claims. This led the researchers to conclude that “adhering to current credibility determination guidelines will likely result in an unacceptably high false-positive rate (i.e., the categorization of genuine claims as noncredible) among asylum seekers.”³⁰

Not adequately accounting for the time required to accommodate the impact of trauma during the initial screening stages means bona fide asylum seekers could be unfairly denied asylum protection. Congress recognized that the initial CFI interview happens very quickly in the process and as a result set a lower screening standard (referred to as a “significant possibility” of persecution) than what is used at the final asylum adjudication stage.³¹ Not accounting for the time it takes to navigate trauma narrows this net, and holding information in this brief exchange against asylum seekers later in the process narrows it even further.

The difficulty of obtaining an accurate account from trauma victims can be minimized if the asylum process incorporates trauma-informed techniques developed by medical and mental health experts. Trauma-informed methods are designed to reduce the adversarial nature of interviews and other stages of the adjudication process. As Samantha Holland of Washington state observed in her survey response:

[M]y clients are almost always treated more harshly by the [immigration judge] and OPLA in contrast to their treatment by USCIS officers, and I therefore need more time to prepare my clients for this emotional challenge and the challenge of presenting a credible case when their audience is inclined to disbelieve them. That challenge is multiplied exponentially for traumatized clients – which is most if not all of my clients who are seeking asylum.

Recommendations for effectively navigating PTSD and trauma in the attorney-client relationship include avoiding long interviews due to their emotional toll leading to lower efficiency, using careful interviewing techniques, generally avoiding retraumatizing the asylum seeker, and working to lower their anxiety.³² These techniques require time to navigate and cannot be accomplished in one visit. The more time an attorney has to work with an asylum applicant in advance of the interview, the more efficient and accurate the information with which the asylum adjudicator must work, which in turn saves government time.

Recommendation

- **Establish an interagency task force to develop a trauma-informed adjudication system.** Experts in development, mental health, welfare, and trauma science should all be involved in this process. Understanding trauma within the adjudication process will help ensure accurate adjudications in the first instance, which in turn will decrease appeals.

Excessively short asylum timelines make it impossible for asylum seekers to obtain competent legal counsel

The extremely short timelines set in the 2022 asylum processing rule negatively impact an attorney’s ability to take a case given their existing caseloads. Ethical rules require that an attorney accept a case only if they are able to provide zealous representation of the client.³³ Many attorneys reported that the expedited timelines of the 2022 rule and the dedicated dockets are preventing them from taking on asylum cases because they cannot complete the case within the time constraints.

- “Asylum cases are really time intensive. The dedicated docket cases are especially difficult. We try to do only 1 at a time due to time constraints with everything compacted into only 1 month or 45 days.” Lynn Neugebauer, New York

Half of all survey respondents currently manage 70 or more active cases at one time.

- “I can’t envision taking on [asylum processing rule] cases because of the time constraints given our already existing case load.” Audrey Robert Ramirez, Massachusetts
- “There’s no way I’m taking a case that is due in less than 2 months ... There’s just no way I could give a new case 30-40 hours of my time in the 2 months after I take it.” Survey respondent, Florida

The mandated timeframes in the asylum processing rule require that the attorney condense all the case preparation into 11 days or less. It is not feasible for an attorney to devote 50 to 75 hours to one case exclusively within that time while maintaining existing caseloads that have their own deadlines. With half of all surveyed asylum attorneys reporting a caseload of 70 or more active cases, the impact of an existing caseload cannot be overstated. If an attorney does choose to take on one of these cases, the mandated timelines necessitate that aspects of the case remain undeveloped, which could lead to denials of meritorious cases due to lack of evidence that would otherwise be available.

Fast-tracked timelines are incompatible with ensuring access to legal counsel and thus incompatible with due process

Federal immigration law guarantees the right to counsel before an immigration judge for any removal proceedings.³⁴ Programs with expedited timelines that do not account for the time it takes to prepare an asylum application, navigate trauma, and manage existing caseloads are fundamentally at odds with access to counsel. Courts have repeatedly held that it is a violation of due process to deny respondents sufficient time to obtain counsel.³⁵ In light of this requirement, EOIR has long provided in policy that immigration judges should grant “at least one continuance” to obtain counsel.³⁶ One continuance is often insufficient as it can require several weeks or months to obtain counsel.

Recommendations

The Biden Administration should implement procedures that facilitate access to counsel, including:

- **When setting asylum processing deadlines, allow adequate time for an asylum seeker to obtain counsel and for the attorney to prepare for their case.** Timelines should not rush trauma survivors who may need more time to recount their experience. Reasonable continuances should be allowed to obtain an attorney or for attorney preparation.
- **Waive or exempt asylum seekers from deadlines if the reason why the deadline was not met is outside of their control.**
- **Do not hold asylum seekers to the same evidentiary standards when they are subject to expedited adjudication timelines,** such as the shortened deadlines of the 2022 the asylum processing rule.
- **Ensure asylum seekers and other migrants being processed rapidly at the U.S. southern border have access to legal information, advice, and full counsel during credible fear interviews, CBP inspections, and immigration court proceedings.**

AILA recommendations for improving the efficiency of the existing asylum process

The United States currently faces an unprecedented asylum backlog. For an asylum seeker whose cases is before USCIS, wait times have grown to more than six years.³⁷ Before the immigration court, current data estimates that “the average backlog wait times from when the case was filed in the Immigration Court to when [the] asylum hearing will be scheduled and [the] claims heard is currently 1,572 days, or 4.3 years.”³⁸ This extended timeframe further undermines the integrity of the system. Legally, these asylum delays can deny asylum seekers the benefits that come with immigration status, such as petitioning to bring family members to the United States.³⁹ Delays in processing asylum claims leave asylum seekers in legal limbo while their case is adjudicated, and this state of limbo has significant mental health implications for the asylum seeker, as victims of trauma who fled in fear for their lives and will not know true stability and safety until they are granted asylum.⁴⁰

The solution is **not** to speed up the process, introduce barriers to asylum to limit those who are eligible, or focus USCIS asylum resources on the southern border to the detriment of other asylum applications. There are practical ways to introduce efficiency and reduce processing times within the existing asylum process, all of which require different branches of DHS to communicate with each other and for DHS agencies and EOIR to work together.

Reducing the use of detention will save time in the asylum process

Detention adds significant time, barriers, inefficiencies, and trauma to the asylum process. AILA attorneys report that detention also adds time to the legal representation, estimating that it adds as much as **24 hours of additional time**. Even a simple step such as getting a signature from a client can take several hours and cost extra when someone is detained.

“Being detained adds SO MUCH time because [the] client is hard to contact, visits (almost always) must be in person, and detention centers are often far from population centers.”—Asylum attorney, survey response

Any number of scenarios in detention can completely prevent an asylum seeker from meeting with an attorney. In a recent report, the American Civil Liberties Union found that “[o]ver a third of [ICE] facilities do not allow for ‘contact’ visits or have any in-person visits between attorneys and detained.”⁴¹ When attorneys are allowed contact visits, they are often denied or delayed, with “attorneys at nearly half (20 out of 42) of facilities ... [stating that] [i]n-person client visits were denied or delayed because of failures by facility employees to accurately keep track of detained clients, inadequate staffing, or arbitrary and shifting attorney dress codes.”⁴²

Compounding these difficulties, when attorneys *can* meet with detained clients, detention centers are often in remote locations, hours away from where immigration attorneys work. Currently, ICE relies on Texas and Louisiana facilities to detain most people.⁴³ The South Texas ICE Processing Center, capable of holding 1,904 individuals and where ICE has held the largest number of people in FY2023,

is over a two-hour drive roundtrip from the nearest large city.⁴⁴ Efforts to access clients remotely are often rebuffed, as shown in recent litigation where the government argued that the attorney’s desire to have remote access to their clients and the ability to fax and email legal documents when in-person visitation exists is simply asking “too much” and beyond “what the national standards or due process require.”⁴⁵

If a client is detained, communication between the asylum seeker and the federal government is often limited to mail. Detained migrants must submit mail through the intermediary of ICE.⁴⁶ The American Civil Liberties Union (ACLU) found that “11 [ICE] facilities’ delayed deliveries of legal mail had caused them to continuously request extensions for deadlines from the court, to miss key filing deadlines, or that they had observed pro se detained immigrants missing deadlines because of difficulties with the mail system.”⁴⁷ Compounding this is the U.S. Postal Service (USPS), which reports an average mail delivery time of 2.7 days.⁴⁸

The government’s lack of efficiency throughout this process undermines the goal of a faster process and in turn undermines the due process that should be afforded to the asylum seeker. This is very clear in the recent example of the asylum processing rule, where delays caused by communicating by mail make some mandated time frames impossible to meet in practice. For example, the only option to submit a Request for Reconsideration (RFR) to USCIS for an adverse credible fear finding under the new asylum processing rule is through USPS mail, yet it comes with a 7-day deadline, which begins on the date of the immigration judge’s concurrence with the denial.⁴⁹ The San Antonio-based nonprofit Migrant Center for Human Rights, which works with asylum seekers in the asylum processing rule pilot program, tracked the length of time it took for the copy of an asylum seekers CFI transcript to arrive at the Migrant Center’s office. The median time for a transcript to arrive at the Migrant Center’s office was 13 days, and some took 30 days or more to arrive, greatly exceeding the 7-day deadline and preventing the filing of an RFR.⁵⁰

Representing a client in detention compounds the complications and delays caused by trauma or other aspects of developing an asylum application. Detention alone, particularly potentially indefinite detention, is traumatic, with “physical effects [that] can include: severe and chronic anxiety and dread; chronic levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well as on the central nervous system; depression and suicide; PTSD,” among others.⁵¹ The detention center itself is not conducive to conducting trauma-informed interviews, and attorneys will often prepare these cases in public rooms surrounded by other detainees and with hostile guards patrolling. This worsens the difficulty faced by the attorney and asylum seeker when communicating about traumatic events and can cause trauma in of itself.

“I spend a lot of time trying to deal with the mental health issues that detention causes, which impedes my ability to prepare cases more quickly and requires long drives to and from and waits at detention centers. Clients who arrive healthy often quickly deteriorate, and I am regularly trying to get my client into a mindset that allows me to address their claim.”—Natalie Cadwalader-Schultheis, Arizona

Recommendations

- **Ensure access to counsel in all detention facilities.** Detention facilities must be held accountable to policies that ensure attorneys have reliable confidential contact visits with clients, as well as access to free and confidential phone calls and video conferences. The government must monitor access to counsel at ICE facilities and impose penalties for violations of standards.
- **Reduce immigration detention.** Detention delays asylum cases because it creates barriers to obtaining counsel and makes case preparation far more difficult. DHS should reduce its use of immigration detention.
- **Establish uniform policies, centralized systems, and appropriate information sharing between immigration agencies.** Agencies should centralize and digitize address changes across all agencies and simplify access to a noncitizen's immigration record. These steps will enhance communication and data sharing, which will in turn reduce backlogs, avoid delays, and increase efficiency and fairness.

Standardizing how asylum law is applied will decrease unnecessary referrals to immigration court

Another way for the government to reduce the length of asylum cases is to reduce unnecessary USCIS referrals, which will in turn reduce the case load of the immigration courts. Recent data from TRAC Immigration demonstrates that “[o]ver three-quarters (76%) of cases USCIS asylum officers had rejected were granted asylum on rehearing by Immigration Judges.”⁵² Every one of these cases met the legal standard and could have been a grant in the first instance. Reducing unnecessary referrals will alleviate the burden on the immigration courts and ensure efficiency throughout the immigration system.

When asked about this statistic in an interview, a former asylum officer who left during the Trump Administration^{vii} attributed this to the narrow interpretation of asylum law that USCIS lays out for its asylum officers. The former officer observed, “I often knew that the headquarters interpretation conflicted with [circuit] law. Headquarters has a very narrow interpretation of nexus and recognizes fewer PSGs. There were definitely cases that I had to deny that I thought would probably be granted by an immigration judge.” Jennifer Bibby-Gerth, another former asylum officer, who left during the Obama Administration, did not remember there being a formal policy in place but stated “I’m sure we were not told to not read Fourth Circuit cases. I didn’t have a particularly good understanding of what Circuit I was in and what case law was when I was sat.”

Asylum attorneys also report a significant number of automatically referred asylum applications because of one-year filing deadline issues, despite potential exceptions to the one-year filing bar.

Recommendations

- **Establish uniform policies, centralized systems, and appropriate information sharing between immigration agencies.** Agencies should centralize and digitize address changes across all agencies and simplify access to a noncitizen's immigration record. These steps will enhance communication and data sharing, which will in turn reduce backlogs, avoid delays, and increase efficiency and fairness.

^{vii} This former asylum officer requested to remain anonymous.

- **Publish the long-awaited regulation on particular social group (PSG) asylum cases.** On February 20, 2021, President Biden issued an executive order to promulgate this regulation by November 17, 2021.⁵³ The regulation has not been published. A regulation would aid in consistency of application of asylum law and would reduce USCIS referrals to the immigration court.
- **Increase transparency in adjudications by** making DHS’s asylum officer training materials publicly available.
- **Fund additional asylum officers.** Congress should appropriate funds to increase the capacity of USCIS to adjudicate asylum applications.

Reduce the immigration court backlog

The immigration courts are overwhelmed with a case backlog that exceeds two million cases. According to recent data, even if no more cases are added to the immigration court backlog, it would take more than six and a half years for the backlog to be cleared.⁵⁴ To address the backlog, EOIR has introduced initiatives to increase pretrial conferencing between parties and to remove cases from the docket that may not require court adjudication. AILA urges EOIR and DOJ to further expand these initiatives.

Immigration courts regularly make last-minute scheduling changes that prolong case time. Thirty-nine percent of respondents cited court-caused delays as adding significant time to case preparation. Many respondents cited last-minute rescheduling on the part of the immigration court. In March 2022, members of Congress wrote Attorney General Merrick Garland expressing concern that such rescheduling “can result in great hardship to respondents and witnesses who have spent months preparing for court, took time off work to attend the hearing, and may have traveled great distances in the early morning hours to arrive at court on time.”⁵⁵

Finally, AILA attorneys report delays caused by ICE OPLA’s unwillingness to engage in pretrial negotiations and insistence on litigating aspects of a case that are not in dispute. The Administration’s new rollout of prehearing conferences by EOIR could help address this communication gap and ensure a more efficient immigration court process, but only if OPLA assigns attorneys to cases in a timely manner.⁵⁶

Recommendations

- **Reduce the immigration court backlog.** EOIR should continue expanding initiatives to remove cases from the docket or facilitate the resolution of cases through pretrial conferencing. Immigration judges should administratively close or terminate appropriate cases, such as those eligible for a benefit with USCIS.⁵⁷
- **Do not expend finite prosecutorial resources on cases that can be resolved more expeditiously. ICE OPLA attorneys should engage** in pretrial negotiation procedures and exercise prosecutorial discretion to avoid unnecessary litigation.
- **Fund DOJ to provide legal representation for all immigrants.** Everyone needs access to an attorney to provide legal advice and information prior to any hearings, including the CFI. Congress should appropriate DOJ funding to provide full legal representation to those in removal proceedings who cannot afford it.

Conclusion

The United States has a legal and moral obligation to prevent bona fide asylum seekers from being returned to persecution. Legal representation greatly increases the likelihood that an asylum seeker will receive a fair hearing. To ensure a fair asylum system, asylum seekers must have adequate time to secure counsel and for their attorney to properly prepare their case. Ensuring access to counsel will also improve the efficiency of the asylum system. AILA recommends that the federal government improve efficiency within the existing asylum system using methods that save time throughout the asylum process without undermining the accuracy and fairness of the asylum system.

Appendix I: Complicating Factors

Key: When the complication occurs
Before the asylum interview or the merits hearing
Throughout the asylum case
Before the merits hearing, after the application is submitted (defensive)
After the interview with USCIS or the merits hearing (affirmative)

Average estimated time in hours each complication adds to preparing an asylum case <i>When there is a distinction within the survey results between an affirmative and defensive case, it is noted below.</i>	
Complication	Hours
Client is detained and requires a bond hearing (defensive).	15
Client is detained throughout the process (defensive).	24
Legal research around issues with the notice to appear (NTA) that impact service (defensive).	7
Client speaks a language that will require an interpreter each time they interact with their attorney.	18 (affirmative) 22 (defensive)

<p style="text-align: center;">Average estimated time in hours each complication adds to preparing an asylum case <i>When there is a distinction within the survey results between an affirmative and defensive case, it is noted below.</i></p>	
Complication	Hours
Attorney will need to be heavily involved in the collection or creation of corroborating evidence.	13 (affirmative) 14 (defensive)
Supporting evidence will need to be translated (both affirmative and defensive).	9
Supporting evidence will need to be requested from a foreign country.	18 (affirmative) 15 (defensive)
Supporting evidence includes letters or statements from specialists such as psychologists or country-condition experts.	24 (affirmative) 18 (defensive)
Attorney/law office has not represented a client from the same country or with a similar claim in the recent past, and thus country-condition documentation will need to be developed from scratch (both affirmative and defensive).	14
Legal research or evidence development around possible ineligibility issues is required (both affirmative and defensive).	11
Client is suffering from significant trauma and requires more time or multiple appointments to develop a relationship with the attorney to effectively tell their story.	29 (affirmative) 25 (defensive)
Government-created delays such as erroneous client addresses, delays in mailing or in the postal service, difficulty accessing the case file, etc., must be addressed (defensive).	7
There is at least one witness or specialist who will testify in the case (defensive).	8
Immigration court reschedules the individual hearing without consulting the attorney (defensive).	12
USCIS requires more than one interview (affirmative).	12
USCIS does not issue a timely decision and requires multiple inquiries to the asylum office (affirmative).	5

Appendix II: Methodology

About the attorneys who filled out this survey

AILA shared the survey nationally with AILA members and through asylum advocacy listservs and received responses from 304 immigration attorneys who practice asylum law in the United States. These attorneys are split between private (54%) and nonprofit (45%) practice. They have a busy practice, with 50% of them carrying a case load of more than 70 active legal cases. Few of them practice exclusively asylum law, although 60% of them say that it constitutes more than half of their practice. The experience of these asylum attorneys varies, with the majority reporting at least five years of experience practicing asylum law.

About the data

Each survey response is an individual, subjective estimate. As many asylum attorneys do only affirmative or only defensive asylum cases, the survey needed to allow participants to opt out of questions that did not apply to them, so not every question was answered by every survey participant.

To narrow the dataset and manage the length of the survey, the survey excluded certain parts of the asylum process. The survey focused only on affirmative asylum cases before USCIS and defensive asylum cases before the immigration court. The expedited removal process and the appeals process beyond the immigration court were excluded. To create a workable dataset and look at factors that add time and complexity to an asylum case, AILA asked attorneys to create a “baseline” number, described as a “straightforward” asylum case. Because 68–79% of the survey responses said, “I never see a case that takes as little as my ‘baseline’ number,” or that they always had at least 20 hours of time added, AILA added 20 hours of time to their baseline numbers to get the estimate in this report. Any percentages in this report are rounded to the nearest whole number and represent the percentage of attorneys who answered the question. The questions asked in the survey are available on the AILA website.^{viii}

Interviews were conducted with two practicing immigration attorneys, one who works for a nonprofit and one who runs their own firm, as well as with an immigration paralegal who works at the same firm. Two additional interviews occurred with former asylum officers.

Author and acknowledgements

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Lara, and AILA Asylum and Refugee Committee members Vickie Nielson, Kathryn Weber, Gregory Fay, Katie Meyer, and Dree Collopy.

Thank you also to those interviewed who requested to remain anonymous.

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