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## **Statement of the American Immigration Lawyers Association**

### **Submitted to the Subcommittee on Immigration and Border Security of the Committee on the Judiciary of the U.S. House of Representatives**

#### **Hearing on “Asylum Fraud: Abusing America’s Compassion?”**

**February 11, 2014**

The American Immigration Lawyers Association (AILA) submits this statement to the Subcommittee on Immigration and Border Security. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 13,000 attorney and law professor members.

The United States has one of the most comprehensive and effective systems to screen and review applicants for asylum status. Recently, however, critics of the asylum system have asserted that too many people are coming to the United States to take advantage of our asylum seeking process. Some have proposed increasing the use of mandatory detention for asylum seekers or further restricting eligibility or adding barriers for asylum. These steps will not necessarily improve national security, and will come at the cost of exacerbating current problems with the asylum process that keep many who have survived trauma and persecution waiting for years until their cases are heard.

AILA is concerned that assertions about fraud are unfounded and questions whether additional measures to address fraud are necessary. Effective anti-fraud measures already exist in the adjudications process, and arbitrary or harsh rules often prevent bona fide asylum seekers from seeking, much less obtaining the protection they need. Asylum seekers currently undergo numerous screenings and face procedural hurdles such as the one-year filing deadline that denies protection regardless of the actual merits of their asylum claim. They face a backlog waiting for their cases to be adjudicated by asylum officers and immigration courts, and many are left to maneuver the complex legal process without legal counsel.

The current asylum system needs to be reformed, but reforms should be done in a manner that safeguards the integrity of the asylum system without compromising protections for refugees the United States has committed to protect. AILA recommends the following improvements:

- Eliminate the arbitrary one-year filing deadline
- Increase funding for immigration courts to reduce wait times to process asylum cases
- Increase access to legal counsel for asylum seekers

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## Process of Applying for Asylum

Welcoming and protecting those fleeing persecution is a deeply rooted American value that has defined our country since its founding and is firmly established in our laws. In 1968, the U.S. acceded to the 1967 U.N. Protocol Relating to the Status of Refugees, which extends the obligation of *non-refoulement*, or the duty not to return a refugee to a country where their life or freedom would be threatened on the basis of certain grounds – an obligation that was first enshrined in the 1951 Convention Relating to the Status of Refugees. Additionally, the U.S. is bound under the U.N. Convention Against Torture not to return an individual to a country where the person would likely face torture. In 1980, the U.S. enacted the Refugee Act to bring its laws into compliance with international law and has continued to be a leader in the area of asylum and refugee protections internationally.

The current asylum process provides three paths for receiving asylum: affirmatively through an asylum officer with the U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS); defensively in removal proceedings before an immigration judge; or derivatively as the spouse or child of an asylee. Individuals in removal proceedings cannot apply for asylum to USCIS; rather, they must present their asylum claim to an immigration judge with the Executive Office for Immigration Review (EOIR) in the Department of Justice (DOJ). Individuals who arrive at a port of entry or in between the ports without proper immigration documents have an additional hurdle and must first meet a “credible fear” standard before they can apply for asylum.<sup>1</sup>

The burden of proof is on asylum seekers to show that they meet the legal definition of a refugee. Fear of harm or torture alone is not enough to be granted asylum. Individuals must show that they are outside of their country of nationality and are unable or unwilling to return to and avail themselves of protection from their country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Asylum seekers provide in detail information about their past activities, associations, country conditions, experiences of persecution, and fear of future persecution. Furthermore, even if the applicants meet the legal definition, they are barred from receiving asylum if they pose a danger to the community or national security, have engaged in the persecution of others, have engaged in terrorist activity, have been convicted of a particularly serious crime, or firmly resettled in another country prior to arriving in the United States.

Additional hurdles are present throughout the process. In 1996, with the passage of the Illegal Immigration and Immigrant Responsibility Act, Congress created a one-year filing deadline for asylum seekers. Asylum seekers are denied an opportunity to have their application evaluated if

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<sup>1</sup> AILA expressed concerns in the credible fear process for asylum seekers subject to expedited removal in our statement to the House Judiciary Committee for the December 12, 2013 hearing on the asylum process at the border. See AILA Statement to HJC on the hearing “Asylum Abuse: Is it Overwhelming Our Borders?” December 12, 2013. Accessible at <http://www.aila.org/content/default.aspx?docid=46731>



they fail to file their claim within one year of arrival, except in limited circumstances, regardless of the merits of their asylum claim. If an asylum officer denies the claim, and the individual does not have valid immigration status, the individual is referred to immigration court for formal proceedings. If the individual raises the asylum claim, then it is litigated in immigration court with an immigration judge and government trial attorney.

With the passage of the REAL ID Act of 2005, asylum officers and immigration judges now consider the following factors among others in the assessment of an applicant's credibility – demeanor, responsiveness, consistency between oral and written statements, any inaccuracy in statement – factors that may be impacted by an individual's cultural misunderstandings, trauma from flight and past persecution, and language barriers. Individuals not found to be credible by asylum officers have an adverse credibility finding that creates an additional barrier to protection even if their case is heard in the immigration courts.

All asylum seekers are subject to numerous screenings and background checks. During the application stage, USCIS conducts fingerprinting and background security checks. Before individuals are granted asylum, their names and fingerprints are checked through immigration, law enforcement, and intelligence databases housed in DHS, FBI, Department of Defense, Department of State, CIA and other agencies.<sup>2</sup> They are interviewed by the USCIS asylum officer to determine their credibility and eligibility for asylum. Decisions made by the asylum officer are reviewed by supervisory asylum officers under USCIS.

Many legitimate asylum seekers, as well as asylees seeking adjustment to lawful permanent status or petitioning for their family members, have not been able to access these protections and benefits due to allegations that they provided “material support” to terrorist organizations. Extremely broad definitions of what constitutes “material support” long placed thousands of refugees and asylum seekers in a state of uncertainty, unable to adjust their status or to bring family members to the United States, for activities such as providing medical treatment under coercion or paying to escape persecution.<sup>3</sup> Terrorism-related bars should target those who present actual threats and not sweep in innocent individuals deserving of protection. On February 5, 2014, DHS announced new exemptions for individuals who provided “limited” or “insignificant” material support but have passed all relevant background checks.<sup>4</sup> It is yet to be seen how these exemptions are going to be applied to cases and provide needed protections for bona fide asylum seekers.

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<sup>2</sup> Testimony of USCIS Deputy Director Lori Scialabba, ICE Deputy Director Daniel Ragsdale, and CBP Office of Border Patrol Chief Michael Fisher, before House committee on the Judiciary Hearing, “Asylum Abuse: Is it Overwhelming our Border?” December 12, 2013.

<sup>3</sup> Human Rights First, *Denial and Delay: The impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*. November 2009.

<sup>4</sup> 79 FR 6913 (2/5/14); 79 FR 6914 (2/5/14)



## Improving the Asylum Process

AILA recommends the following reforms to ensure asylum seekers have a meaningful opportunity to seek protection from persecution.

- **Eliminate the arbitrary one-year filing deadline.** Individuals are barred from asylum if they did not apply within one year of their last arrival into the United States and if they do not fall under limited exceptions. The arbitrary one-year cutoff denies protection to asylum seekers who, due to language barriers, effects of trauma, and lack of community among many reasons, are unable to meet the deadline, keeping many deserving asylum seekers from being granted protection. Although there are exceptions, the exceptions are often not fully analyzed or considered by USCIS asylum officers, resulting in referrals to the immigration courts and the unnecessary expenditure of government resources by pushing the claims of legitimate asylum seekers into the overburdened immigration court docket. Congress should eliminate the one-year filing deadline and efficiently allocate limited time and resources to assessing the actual merits of asylum applications.
- **Increase funding for immigration courts.** The immigration court system and funding for the courts have not kept up with the dramatic increases in immigration enforcement over the past two decades. As of December 2013, the immigration courts had a backlog of 357,167 cases that far exceeds its capacity.<sup>5</sup> There are only about 250 immigration judges handling this enormous caseload, and immigration judges handle far higher caseloads than other administrative law judges, sometimes twice the number of cases per year. There are even fewer attorney advisors to assist immigration judges in handling such an immense case load. As a result, asylum seekers frequently wait years after their initial arrival before their asylum hearing is conducted. For asylum seekers, the backlog results in long wait times during which they face an uncertain future. For those in detention, the backlog of cases can result in longer detention times and compound the damaging trauma experienced by victims of persecution. Congress should fund the immigration courts at a level commensurate with its funding for enforcement to properly address court backlogs and provide adequate staffing and resources for the immigration courts. In addition, USCIS should hire sufficient additional Asylum Officers and train them to meet the burgeoning need that is placing stress on the entire asylum system.
- **Increase access to legal counsel.** The lack of legal counsel for respondents in immigration courts contributes to the backlog, and to the prolonged state of uncertainty for many asylum seekers. Six out of ten respondents, including asylum-seekers, children, and mentally-ill respondents, appear before immigration courts without legal counsel. Asylum seekers, dealing with the aftermath of surviving persecution or living in fear of return, are left to navigate our laws and to present their claims with no legal

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<sup>5</sup> Transactional Records Access Clearinghouse. Immigration Court Backlog Tool. Accessed February 10, 2014 at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/)



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representation, while representation by an attorney is the “single most important factor” affecting the result in an asylum case.<sup>6</sup> Adequate consideration and resources should be given to facilitate the representation of asylum-seekers in their cases before immigration courts.

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<sup>6</sup> Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340-41 (2007).