

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****February 13, 2006****RECOMMENDATION**

RESOLVED, that the American Bar Association supports the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. Such measures should include:

- (a) the elimination of unduly restrictive or inflexible limitations such as the one-year deadline for asylum seekers to initiate claims;
- (b) the establishment of policies and practices that ensure prompt identification of asylum seekers at the border, or in expedited removal proceedings, and that enable asylum officers to grant asylum administratively after the “credible fear” interview;
- (c) the creation of fair and consistently applied screening procedures for those intercepted or interdicted, in order to quickly identify refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge; and
- (d) the development of a refugee visa as well as improved visa and pre-clearance policies for refugees who cannot travel to the United States because of existing immigration policies.

REPORT

*This is the sixth report in the Commission's series of seven resolutions and reports that addresses "Asylum and Refugee Procedures," as explained at the beginning of the first report (107A).

Simple lack of access to the immigration system is one of today's major barriers for forced migrants attempting to flee their home countries to a place of refuge. Austere state immigration policies have made it increasingly difficult for refugees to seek asylum in developed states. The trend in both the United States and Europe is very clear: asylum applications are down significantly. Between 2001 and 2005, the number of asylum seekers asserting initial claims in the U.S. dropped by about one half. This resolution supports changes to a number of U.S. immigration practices that create major barriers to refugee access.

I. Arbitrary Time Limits to File an Asylum Claim

A major obstacle for asylum seekers who enter the U.S. is the requirement that applicants file their claims within one year of arrival in the country. The only exceptions are changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing. Department of Homeland Security (DHS) data show that this procedural requirement prevents a large number of asylum seekers from asserting substantive claims of persecution. Since the imposition of the one-year deadline in late 1998, U.S. asylum officers have initiated removal proceedings for asylum applicants in more than 35,000 cases—without any consideration of the merits of their claims—solely because of the applicants' inability to file or to prove that they filed within one year of arriving in the country. An unknown number of refugees, after learning that they have missed the one-year deadline, do not file asylum claims at all. Some refugees have wrongly concluded, without benefit of legal counsel, that they could not qualify for an exception to the deadline. Denying a substantive hearing to so many people with potential claims of persecution in their home countries is simply unacceptable.

While this problem pre-dates the September 11th attacks of 2001, the number of claims being rejected because of the one-year deadline has grown significantly since then. The rate of enforcing the deadline and rejecting excuses has almost doubled, from 11.5 percent in 2000–01 to 21 percent in 2003–05. In each of these cases, asylum officers do not consider the merits of the applicants' cases, instead referring them for removal proceedings solely because they did not file their applications soon enough or because they cannot provide the evidence deemed necessary to prove their date of entry or their eligibility for an exception to the deadline.

Genuine refugees often have good reasons for failing to file their claims immediately or soon after arrival. Many refugees are traumatized. Unless they are in countries that provide them with food and shelter, their first priority is survival—finding relatives, friends, or others who will help them. Language barriers, as well as ignorance of the law, also hinder prompt applications. Perhaps most importantly, asylum seekers experience great difficulty in finding legal representation. Getting an asylum application considered on its merits is extraordinarily difficult without help from a lawyer or another professional who specializes in asylum law. Two

out of three asylum seekers lack representation in the first instance. Studies have demonstrated that asylum seekers who are represented at their court hearings are between 1.4 and 17 times more likely to be granted asylum than those who proceed without representation.

As a result of the deadline, people with legitimate reasons for failing to apply within one year are placed in legal proceedings in which their only chance of avoiding removal to the country of persecution is to qualify for “withholding of removal,” which requires them to establish a far greater likelihood of risk than would have been required to win asylum in the first instance. Those who are unable to meet this very high standard are expelled from the U.S. simply because they did not meet an arbitrary deadline. Those who do qualify for withholding can remain in the U.S., but are denied the right to become permanent residents or citizens and to bring their spouses or minor children to join them here.

The U.S. asylum system is quite effective at adjudicating the claims it does handle on the merits. The grant rate for cases decided on the merits is significant at the Asylum Office (now about 40 percent) and in Immigration Court (now about 38 percent). Many of those denied asylum have fled the same countries as have those granted asylum. Decisions are made in a timely fashion. In fact, two decisions, one from the Asylum Office and one from the Immigration Court, are generally issued within 180 days of the initial filing. Work authorization is generally only provided to those granted asylum. The 1995 reforms have significantly minimized fraudulent claims.

If an asylum system is effective, the imposition of time limits is not needed to control abuse. The U.S. system, in particular, is not subject to significant abuse, and arbitrary mechanisms aimed at controlling abuse are not needed. In fact, there is no evidence that the imposition of arbitrary time limits decreases abusive claims. On the other hand, it is clear that such restrictions limit the access of bona fide claimants to a decision on the merits of their claims.

The one-year U.S. filing deadline for asylum applications is a significant impediment to fair adjudication. It has prevented tens of thousands of people from seeking asylum. Many of these are genuine refugees who face persecution or death when returned to their home countries. The problem of arbitrary refusal to consider asylum claims is becoming ever more serious. The U.S. should eliminate the time deadline or, at the very least, impose a much more generous one, such as five years rather than one.

II. Administrative Grant of Asylum

Since 1983, ABA policy has opposed the summary exclusion of asylum seekers. Congress enacted expedited removal legislation in 1996 that has led directly and frequently to such summary exclusion. The United States Commission on International Religious Freedom documented these abuses in a comprehensive study published in February 2005. The Commission and other experts have made recommendations on how to better ensure that inspectors of Customs and Border Protection (CBP) identify all individuals who, as DHS regulations state, have “an intention to apply for asylum, a fear of torture, or a fear of return to his or her own country.”

When CBP inspectors do identify such individuals, they are referred to a DHS Asylum Officer for a “credible fear” interview and they are “detained,” *i.e.*, incarcerated, in the meantime. The Asylum Officer determines whether that person has a credible fear of persecution. In order to be sure that the United States does not wrongly return a refugee to a country of persecution, Asylum Officers often examine these asylum seekers with the same care that they use in the regular asylum interviews, where individuals must demonstrate a well-founded fear of persecution in order to be eligible for asylum. Most of those referred to Asylum Officers meet the credible fear standard, leave the expedited removal process, and are placed in formal, adversarial removal proceedings before an Immigration Judge.

The Asylum Office at DHS is currently seeking authority to grant asylum immediately in those credible fear cases where it is clear that the individual has demonstrated a well-founded fear of persecution. Such cases would not need to proceed to Immigration Court. The U.S. Commission on International Religious Freedom recommended that Asylum Officers have this authority as a means of easing the burden on the detention system, the Immigration Court, and bona fide refugees. This is an efficient and meaningful way to ensure that the rights of refugees are respected in a timely fashion. Only when a refugee is granted asylum does he or she gain the right to reunite with family and to become, in time, a lawful permanent resident and United States citizen.

III. Direct Return and Unfair Screening of Interdicted Asylum Seekers

The United States has led the way among countries developing interdiction practices with the goal of preventing asylum seekers and other migrants from ever reaching their borders. Under the 1951 Refugee Convention and its 1967 Protocol, the U.S. is prohibited from returning refugees to countries where they will face persecution. Despite this legal obligation, U.S. interdiction practices are woefully deficient in ensuring that refugees are not returned to the hands of their persecutors. Under U.S. procedures, for example, migrants who are interdicted at sea are not brought to the U.S. for asylum processing, are not afforded access to lawyers, and are not even individually screened to make sure that they are not refugees who are in danger of persecution if returned.

The Coast Guard interdicts migrants routinely, including many who flee persecution and civil strife in their home countries. Although they come from many nations, perhaps the most mistreated asylum seekers in this regard have been Haitians. During the instability at the time of the ouster of President Aristide in March 2004, thousands of Haitians tried to escape the island. The Coast Guard interdicted and returned almost 2,000 Haitian asylum seekers between February and April 2004, after which only smaller numbers tried to leave Haiti.

Article 33 of the 1951 Refugee Convention states that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” The Reagan Administration read this language to mean that the U.S. must first determine whether a Haitian interdicted on the high seas was a

refugee before taking any action to return him, and recorded that understanding in an agreement with Baby Doc Duvalier's regime.

Notwithstanding President Reagan's straightforward reading of the Refugee Convention, the U.S. Supreme Court cleared the legal way for his successors to mistreat Haitians by holding that direct return without any screening, after interdiction on the high seas, did not violate the U.S. obligation not to return refugees to countries of persecution. No high court in any other nation has interpreted the Refugee Convention in this manner. The administrations of Presidents G.H.W. Bush, Clinton, and G.W. Bush have returned asylum seekers directly to Haiti. President G.W. Bush acknowledged that the United States was returning "refugees." Each of those Presidents has flouted the core principles of protection found in this international treaty by doing so.

In addition to returning asylum seekers to countries of persecution without screening, the U.S. employs different screening standards for different interdicted nationals. While Cuban migrants are read a statement in Spanish notifying them that they may come forward and speak with a U.S. representative if they have any concerns, the statement itself is viewed by groups like Human Rights First as deficient and as encouraging refugees to return to Cuba to pursue in-country refugee processing. Worse yet, Haitian and other migrants are not provided with any indication, written or oral, that they can express their fears about being returned. Each refugee must have the knowledge and strength to come forward on their own and to articulate a fear of persecution. Even if a Haitian asylum seeker might voice a fear of persecution, the U.S. government does not require that translators be present in every instance of interdiction at sea.

The United States is still not prepared to respond to a refugee emergency in a way that both respects the non-refoulement principle and addresses concerns about the impact on local communities of large numbers of arrivals. The best response to any mass exodus of Haitian asylum seekers, for example, is regional protection. That means placement for some in the United States and for others elsewhere in the region. While the challenges to developing such shared responsibility are significant, current American practices harm people who deserve protection. They also diminish the leadership role that the United States should play internationally in encouraging states around the world to protect refugees and to honor their treaty obligations. Given that most refugees seek asylum in developing states, this leadership role is critical to an effective international protection system.

The U.S. should develop fair policies and practices that successfully identify those interdicted asylum seekers who have a credible fear of return. It should apply those policies and practices to individuals of all nationalities. Those determined to have such a fear should then have an opportunity to "seek and enjoy asylum," as proclaimed in the Universal Declaration of Human Rights. No refugee should ever be returned directly to a country of persecution.

IV. Visa and Pre-Clearance Policies Restrict Air Travel to the United States for Asylum Seekers

Many refugees cannot travel to the U.S. at all because of American visa, pre-clearance, and pre-inspection requirements. Such measures apply to travelers generally and have separate

migration policy rationales, even though they have a significant effect on the ability of asylum seekers to reach developed states. States are not about to forego such practices in general if they continue to be seen as appropriate migration management tools. States need to find ways to identify refugees who cannot travel because of these measures and to provide them with appropriate protection.

This is perhaps the most difficult dilemma presented here. Interestingly, the United States is the only country that includes in its refugee definition those with a well-founded fear of persecution who still reside in their countries of origin. Other states should follow the American example in this regard. But the major problem here is not a legal one. Rather, it is the practical challenge of identifying refugees without compromising their ability to remain safe while they reside in a country of persecution. Persecuting governments can easily observe citizens who visit embassies in their home countries.

There are several options for in-country protection processes. Where it can be safely done, special “refugee” visas should be issued by embassies and consulates to persons who do not qualify for regular visas but who can demonstrate that they are or will be endangered if they do not leave their home countries. A second option is to establish UNHCR offices in countries of origin where would-be asylum seekers could request protection, with the understanding that they would be evacuated to countries willing and able to receive them. Finally, states could broaden the responsibilities of pre-inspection personnel and other immigration officials assigned to overseas locations so that they might assess the asylum claims of persons seeking to board aircraft and other carriers without proper documentation. States would have to be prepared to provide protection for those identified as refugees or to arrange for another state to do so. Given the challenges and inexperience with regard to in-country processes, these various approaches should all be tested in meaningful ways in order to develop good practices.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
February 2006

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Richard Peña, Chair

1. Summary of Recommendation(s).

This recommendation supports the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. The recommendation supports measures to ensure such access, including: eliminating unduly restrictive limitations that prevent asylum seekers from initiating claims; establishing practices that ensure the prompt identification of asylum seekers and that enable asylum officers to grant asylum administratively after the “credible fear” interview; creating fair screening procedures for refugees intercepted or interdicted in order to quickly identify refugees, asylum seekers, and torture victims; and developing a refugee visa and pre-clearance policies to assist refugees in coming to the United States.

2. Approval by Submitting Entity.

On October 7, 2005, the Commission approved this recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Relevant existing Association policies support the fair treatment and processing of asylum seekers and refugees in the United States. This recommendation is entirely consistent with these policies, and does not restate them. Rather, it expands upon them by specifying particular measures that the ABA should support to further ensure a fair asylum process. The relevant existing policies are:

- Improving Asylum Process: supports administrative improvements to asylum process and to the exercise of the right to counsel; supports legislation for temporary U.S. protection for persons who may not qualify for asylum but who would be endangered if forced to leave (2/90).
- Summary Exclusion: opposes summary exclusion legislation, and supports legislation to provide hearings for entry applicants and asylum applicants (02/83).
- Gender-Based Persecution: urges gender-based persecution be recognized as a ground for asylum under the Immigration and Nationality Act (01M110).
- Involuntary Transfer of Detained Immigrants and Asylum Seekers: opposes involuntary transfers of detained immigrants and asylum seekers to remote facilities if it would impede

access to counsel (01M106B).

This recommendation adds to existing policies by supporting the elimination of unduly restrictive limitations in refugee and asylum processes, such as the one-year deadline to initiate claims that has been imposed since 1998. The recommendation calls for policies and practices that ensure prompt identification of asylum seekers at the border or who are interdicted, as current practices have proven to be inadequate. The recommendation also supports innovative reforms: (1) enabling an asylum officer to grant asylum following a “credible fear” interview, with no second interview required; and (2) the creation of a refugee visa and improvements in visa policies for refugees who cannot travel to the U.S. because of existing immigration policies.

5. What urgency exists which requires action at this meeting of the House?

Simple lack of access is one of today’s major barriers for forced migrants attempting to flee to a place of refuge. Austere immigration policies have made it increasingly difficult for refugees to seek asylum in developed states. The trend in both the United States and Europe is very clear: asylum applications are down significantly. Since the implementation of the one-year filing deadline in late 1998, U.S. asylum officers have initiated removal proceedings for asylum applicants in more than 35,000 cases—without any consideration of the merits of their claims—solely because of the applicants’ inability to file or prove that they filed within one year of entry. Another serious barrier to access is the U.S. policy of preventing asylum seekers from reaching our borders, by interdicting migrants fleeing their home countries. The Coast Guard interdicted almost 2,000 Haitian asylum seekers between February and April 2004. This practice flouts the U.S. obligation of “nonrefoulement,” or non-return, of refugees. This high number of people whose substantive claims for asylum are never heard, as well as the sharp decline in the number of asylum applications, and the substantial barriers that have been erected to deter potential asylum seekers from filing their claims, illustrates the need for immediate action.

6. Status of Legislation. (If applicable.)

The Asylum Office at the Department of Homeland Security (DHS) is currently seeking authority to grant asylum administratively in cases where it is clear that the individual has demonstrated a well-founded fear of persecution.

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), passed by the House of Representatives in December 2005, includes several provisions that the recommendation and existing Association policy oppose (see the Association’s letter of December 13, 2005 to the House of Representatives). The bill mandates detention for a significant group of immigrants and asylum seekers, with very limited exceptions; eliminates judicial review in a variety of instances; increases burdens on asylum seekers and refugees; and seeks to invalidate Supreme Court precedents *Zadvydas v. Davis* and *Clark v. Martinez* which currently provide due process protection to immigrants and asylum seekers in detention.

On March 3, 2005 Senator Feinstein introduced a bill (S. 524) that would bar asylum seekers, torture victims, and others from asylum eligibility if they use false documents to enter the United States. Senator Feinstein has not agreed to create a refugee exception for her bill.

7. Cost to the Association. (Both direct and indirect costs.)

Existing Commission and Governmental Affairs staff will undertake the Association's promotion of this recommendation, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This recommendation is currently being circulated to Association entities and Affiliated Organizations including:

Criminal Justice

Family Law

Litigation

SCLAID

Domestic Violence

Administrative Law

Government and Public Sector lawyers

Individual Rights and Responsibilities

International Law

Young Lawyers Division

Labor and Employment

Judicial Division

Law and National Security

Commission on Law and Aging

Center for Children and the Law

CEELI

ABA Africa

LALIC

American Immigration Lawyers Association (AILA)

NLADA

San Diego Bar Association

Chicago Bar Association

Los Angeles County Bar Association

State Bar of Texas

The Association of the Bar of the City of New York

Beverly Hills Bar Association

New Jersey State Bar Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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