ASYLUM ADVOCACY IN THE AGE OF 'THE DONALD': ONCE MORE UNTO THE BREACH, DEAR FRIENDS

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Introduction

Think of this article as a tool box: a disjointed compendium of lessons learned the hard way, assembled for those who already know their way around *Immigration Court Practice Manual* and who don't need to be told that "causal nexus" isn't the latest sequel to *The Matrix*. The authors' fondest hope is that something in this congeries helps a jailed refugee nearly as much as smuggling them a file.

Blocking expedited removal & reinstatement

As explained below, the Immigration and Nationality Act (INA) and its implementing regulations forbid the Department of Homeland Security (DHS) from removing any alien who expresses a fear of returning to their country.[1] However, reports recently published by the ACLU[2] and by Human Rights Watch[3] confirm what asylum practitioners have suspected for years: Customs and Border Protection (CBP) systematically ignores immigrants' cries of fear and illegally subjects them expedited removal and reinstatement of removal.

As those reports forcefully argue, it simply cannot be true – as CBP claims – that over 95% of the Hondurans, Guatemalans, and Salvadorans that the agency caught in 2012 expressly[4] disavowed any fear of returning to their country. Typical are the facts recited in complaint one of the authors recently filed online with CBP[5]:

> *In the Record of Deportable/Inadmissible Alien (Form I-213) that CBP Officer [redacted] prepared March 10, 2015 to commence the expedited removal of [my client], he falsely states that "the subject does not claim fear of persecution" and "[t]he subject declined an interview before an asylum officer and requested to be returned to El Salvador." [My client] is an intelligent and articulate young man who remembers well telling [the] Officer [] - whom he remembers by the name on the officer's badge - that he was afraid of the Mara 18 gang. Over the past four years, Mara 18 has killed four of [my client's] immediate family. As corroboration, he has all four death certificates and two police reports. [The] Officer [] cannot be correct in his assertion that, on*

[1] Lutheran Immigration and Refugee Service has posted a useful chart showing how the expedited- and reinstated-removal "safety valve" is *supposed* to work: http://tinyurl.com/ja6dhvd.
[2] "You Don't Have Rights Here," HRW (2014)(http://tinyurl.com/qy5guwj)
[3] "American Exile: Rapid Deportations that bypass the Courtroom," ACLU (December 2014)(http://tinyurl.com/zu5lwkf)
[4] "[T]he examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern." CFR § 235.3(b)(4). NB: discrepancies between this often fabricated "record" and subsequent statements to the asylum officer (AO) may undermine the alien's credibility. Asylum Division Officer Training Course: Credible Fear (ADOTC-CF), VI.C.5 (Feb. 28, 2014) (http://tinyurl.com/p9f6xhp).
[5] https://help.cbp.gov/app/forms/complaint

March 10, 2015, this resourceful and well-spoken young man expressed no fear of returning, declined the opportunity to seek asylum, and "requested to be returned to El Salvador."

Typical also is the outcome of that complaint: three months after it was filed, CBP closed the matter – as it does with 97% the complaints it receives – without action or a substantive reply.[6] Next stop: the press.

Apart from filing more complaints, what's to be done? When a lawyer gets a call from someone in detention or, more commonly, a panicked member of their family, the first thing to be done is to ascertain if the detainee was (a) recently picked up at or near the border or (b) previously removed (or deported or excluded). If so, it is likely that your prospective client's expedited or reinstated removal is imminent.

These are very frustrating cases: desperate calls from moms and spouses worried sick about their loved ones, Enforcement and Removal Officers (EROs) and Immigration and Customs Enforcement (ICE) attorneys who won't answer their phones or return your calls, and who pass the buck when they do. Yet as an attorney you *can* make a difference – indeed, you're about the only one who can. A well-aimed email, fax, letter, or phone call can rescue someone from expedited removal: 8 C.F.R. § 235.3(b)(4) says, "If an alien subject to the expedited removal provisions . . . expresses a fear of . . . return to his or her country, the inspecting officer *shall* not proceed further with removal." (Emphasis added.) With respect to reinstatement, 8 CFR § 208.31(a) and (b) similarly say, "any alien . . . who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal . . . *shall* be referred to an asylum officer for a reasonable fear determination."[7] (Emphasis added.) And the regulations contain *no time limit*: an unenforced expedited removal order may even be vacated years after ICE has designated the noncitizen a "fugitive."

With many deportees murdered within days of their return to Central America (http://tinyurl.com/pf7s8sq), it's no exaggeration to say that we can save life by picking up the phone. Here's how to go about it:

1) Confirm where your client is detained through ICE's detainee locator: https://locator.ice.gov/odls/homePage.do.

2) Instruct the client's family how to transfer funds into client's account (in the case of Pearsall, and maybe others, by calling 866/345-1884 with the alien number handy). These funds can then be used to call you, the attorney.

[6] "Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations," ACLU (October 2015), p. 10; link: http://tinyurl.com/z6gedmk

[7] Though beyond the scope of this article, it is possible to vacate a reinstatement order not only through a "reasonable fear" interview, but by *appealing* that order directly to the circuit court of appeals. A 2013 practice advisory on reinstatement of removal published by the American Immigration Counsel and National Immigration Project of the NLG covers this topic in depth: http://tinyurl.com/jsz6l89.

3) Attaching a G-28 (that need not be signed by the detainee[8]), contact the ICE Office of Chief Counsel with responsibility for the detention center to determine if the detainee is scheduled for a credible fear interview.

4) Since any such communication will likely be ignored, schedule follow-up inquiries at daily intervals. Make yourself the 'squeaky wheel' until you get confirmation that your client will get to see an asylum officer (AO).

5) Prepare the client for his or her credible fear interview.

Making the most of a credible- or reasonable-fear interview

Once DHS has confirmed your client will see an AO for a credible fear interview (CFI) or a reasonable fear interview (RFI), it's time to prepare her for that interview. Such preparation is even more important than for a hearing or affirmative asylum interview because, although the AO *should* patch you in by phone, (1) you'll likely get no advance notice of the interview, and may not be available when the call comes out of the blue; and – as detailed below – (2) the AO may severely limit your participation. On top of this, the stakes in a CFI or RFI are extremely high: the IJ who'd review a *negative* decision would likely forbid any advocacy whatever (again, see below).

For these reasons, the attorney must thoroughly prepare each client *beforehand*, teaching them to recite their story in a way that satisfies the requirements for the relief sought: if asylum, with emphasis upon the "causal nexus" between persecution and a protected ground; if CAT, with emphasis upon the severity of the feared harm, and on the government's involvement or complicity.

Credible fear interviews:

In a CFI, the alien bears the burden of proof to establish a credible fear of persecution or torture. There is, however, "a shared aspect of that burden": "asylum officers have an affirmative duty to elicit all information relevant to the legal determination"; moreover, "the applicant's testimony may be sufficient . . . if it is 'credible, [] persuasive, and refers to specific facts.'" ADOTC-CF, IV.A.

If the AO determines there's a "significant possibility" – as defined at 8 CFR §§ 235(b)(1)(B)(v) and 208.30(e)(3) – that she or he can establish eligibility for asylum or withholding of removal (either under INA § 241(b)(3) or the Convention Against Torture (CAT), 8 CFR § 1208.16(c)), DHS must initiate removal proceedings under INA § 240. "Significant possibility" is a "low threshold": "many aliens who have passed the credible fear standard will not ultimately be granted asylum." ADOTC-CF, IV.B. For asylum and withholding under INA (though not CAT relief) a "credible fear" finding requires also a "significant possibility" that (1) "the persecutor was [or will be] motivated to harm him or her on account of his or her race, religion, nationality,

[8] DHS announced this policy in an email posted online by the American Immigration Counsel: http://tinyurl.com/zzzkkhu.

membership in a particular social group, or political opinion"; and (2) the persecutor is "either an agent of the government or an entity the government is unable or unwilling to control." ADOTC-CF, VII.B. Because withholding of removal under CAT requires a showing the alien is "more likely than not" to be tortured, "a significant possibility of establishing eligibility for withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum." ADOTC-CF, VIII.

Mandatory bars do not affect the credible fear determination. 8 CFR § 208.30(e)(5).
8 CFR § 208.30(d)(4) permits the alien to "consult with a person or persons . . . prior to the interview," though such consultation "may not unreasonably delay the process." It allows this person to "be present at the interview," and gives the AO "discretion . . . to [allow] a statement at the end of the interview."

Once credible fear is established, a Notice to Appear should be filed with the immigration court, initiating removal proceedings under INA § 240. These are "normal" proceedings, in which the alien can apply for release from DHS custody. Matter of X-K, 23 I&N Dec. 731 (BIA 2005).
If the AO determines that the alien does not have a credible fear of persecution, the officer "shall" order the alien removed without further hearing or review. INA § 235(b)(1)(B)(iii)(I). If the alien requests review by an immigration judge (IJ), the AO forwards his or her interview notes, summary of the evidence, and legal analysis to the IJ. INA § 235(b)(1)(B)(iii)(II). The IJ must promptly review that determination – "if possible," within 24 hours, but never more than seven days of the AO's decision. INA § 235(b)(1)(B)(iii)(III). That review is de novo. 8 C.F.R. § 1003.42(d). The IJ may appear by videoconference, and "may receive into evidence any oral or written statement which is material and relevant to any issue in the review. 8 C.F.R. § 1003.42(c). Throughout the review process, the alien must remain detained. INA § 235(b)(1)(B)(iii)(IV).

There is no appeal from an IJ's concurrence with the AO's negative credible fear determination. 8 C.F.R. § 1003.42(f). However, DHS itself "may reconsider a negative credible fear finding . . . after providing notice of its reconsideration to the immigration judge." 8 CFR § 1208.30(g)(2)(A).

Neither the INA nor the regulations address an alien's right to representation during the credible fear review process. However, many IJs construe 8 C.F.R. § 208.30(d)(4) – "The alien may consult with a person or persons of the alien's choosing prior to the review" (emphasis added) – to mean that aliens lack this right during that review. The regulations obviously do not compel this reading.

<u>Reasonable fear interviews</u>:

As mentioned above, an RFI gets scheduled when an alien subject to reinstatement of a prior order of removal (or deportation or exclusion) under INA § 241(a)(5) says they're afraid of going back to their country. 8 CFR §§ 208.31(a), (b).

According to the regulations, an RFI opens the courtroom only for purposes of applying for withholding of removal,[9] and then only if "the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal." 8 CFR § 208.31(c). Per DHS, "The 'reasonable possibility' standard is the same [as] . . . 'well-founded fear.'" Asylum Division Officer Training Course: Reasonable Fear (ADOTC-RF), IV (Aug. 6, 2008) (http://tinyurl.com/p9f6xhp).

The AO may consider prior credibility findings (e.g. those of an IJ), but the AO isn't "strictly bound" thereby. ADOTC-RF, V.D. The AO must "create a summary of the material facts as stated by the applicant" that the AO then "review[s] . . . with the alien and provide[s] the alien with an opportunity to correct errors therein." 8 CFR § 208.31(c).

As with credible fear determinations, the AO can't consider mandatory bars (e.g. INA § 241(b)(3)(B)) "[f]or purposes of the screening determination." 8 CFR § 208.31(c). The AO should likewise disregard "whether the applicant could relocate to another part of his or her country." ADOTC-RF, X.D.

"The alien may be represented by counsel or an accredited representative at the interview . . . and may present evidence." 8 CFR § 208.31(c). That representative "may present a statement at the end of the interview," though the AO may limit its length. Id. Per DHS, "The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview." ADOTC-RF, XII.E.

If the alien requests it, an IJ must review an AO's negative decision regarding reasonable fear. 8 C.F.R. § 208.31(g). Absent "exceptional circumstances," this must happen "within 10 days of the filing of the [referral notice] with the immigration court." *Id*.

If the IJ finds that "the alien has a reasonable fear of persecution or torture, the alien may submit Form I-589" in order to apply for withholding only. 8 C.F.R. § 208.31(g)(2). If the IJ concurs with the AO, there's no appeal. 8 C.F.R. § 208.31(g)(1).

The regulations don't say whether an alien may be represented in the reasonable fear review.

Getting your client released

The increase in family detention because of the surge of Central American families (primarily women and children) fleeing violence and persecution in their home country spurred the creation of Family "Residential" Centers. These are essentially detention centers for women and children.

[9] *Pace* 8 C.F.R. § 1208.31(e), the question whether asylum is available in so-called withholding-only proceedings remains unresolved. The Supreme Court indicated that asylum remains available to individuals subject to reinstatement. *See Fernandez-Vargas v. Holder*, 548 U.S. 30, 35 n.4 (2006); *see also Herrera-Molina v. Holder*, 597 F.3d 128, 139 n.8 (2d Cir. 2010) (noting Supreme Court's acknowledgement of the availability of asylum in dicta); and Brief for Amici AILA and Lawyers' Committee for Civil Rights of the San Francisco Bay Area, *Maldonado-Lopez v. Holder*, No. 12-72800 (9th Cir. ____), posted here: http://tinyurl.com/zp9pa4z.

The detention of children by DHS has been a contentious issue since the mid-80s. In 1985, a class action lawsuit was filed against the INS challenging the way the agency processed, apprehended, detained, and released children in its custody. Since 1997, the *Flores v. Reno*[10] Settlement Agreement (FSA) has governed the treatment of unaccompanied children (UCs) and adults with children (AWCs) apprehended by DHS. Many of the agreement's terms have been codified at 8 CFR §§236.3. The agreement defines a juvenile as a person under the age of 18 who is not emancipated by a state court or convicted and incarcerated due to a conviction for a criminal offense as an adult. It requires that juveniles be held in the least restrictive setting appropriate to their age and special needs to ensure their protection and well-being. It also requires that juveniles be released from custody without unnecessary delay.

The Flores agreement and INS policy also mandate that "juveniles will not be detained with an unrelated adult for more than 24 hours." The FSA also applies to **all** children apprehended by DHS (or those transferred to ORR custody), including those apprehended and detained with an adult family member.[11] It seems clear that the FSA should apply the current influx of children who are now being detained by DHS at the family detention centers, but the government has blatantly chosen to ignore its obligations.

Because of this violation of the FSA, on February 2, 2015, a mother and her children who were being detained by DHS at a family detention center (Plaintiffs) filed a motion to enforce the Agreement.[12] On July 24, 2015, a federal district court ruled in *Flores v. Johnson* that the federal government's policy of incarcerating children with their mothers in family detention centers violates the FSA. After further briefing, the district court issued a decision on August 21, 2015, requiring that the Government end its material breaches of the Flores Settlement Agreement by October 23, 2015. On September 18, 2015, the Government filed a Notice of Appeal of both district court orders. The case is ongoing at the 9^{tth} Circuit.

The government is arguing to overturn decades of recognized precedent DHS policy and regulations regarding the detention of children. They argue that the District Court erred in holding that the FSA applies to accompanied non-citizen minors and their adult non-citizen parents. Alternatively, the government is arguing that the District Court incorrectly denied the government's motion to amend the Flores agreement. On February 23, 2106, Immigration rights organizations filed an amicus brief in support of the plaintiffs-appellees and in support of affirmation of the district court judgment in the *Flores* settlement agreement lawsuit, arguing against the government's position that *Flores* does not apply to children in family detention facilities. [13]

Lengthy detention of families can and should continue to be challenged using the FSA. There are only 2 narrow exceptions to release under the FSA –

1) Where the detention of a particular child is required to secure his or her timely appearance before DHS/HHS or immigration court; **OR**

[10] Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)
[11] Juvenile Protocol Manual 2006 section 2.3.2
[12] *Flores v. Johnson,* No. 85-cv-4544 (C.D. Cal.), ECF Nos. 100, 101.
[13] These are posted online: *AILA Doc No. 16022411*

2) Where the continued detention is required to ensure the child's safety or the safety of others.

If the detention of a minor does not fall under one of these narrow exceptions then the juvenile should be released from custody without any unnecessary delay.

In order to currently "comply" with the District Court ruling in the *Flores* case as it pertains to the family detention centers, the government has implemented an Alternative to Detention (ATD) program in which children and their mothers are being release. The adults must agree to the restrictive terms of the ATD monitoring. If they do not, then they are held without bond, until bond hearing before and Immigration Judge can be scheduled. Most mothers agree to the ATD, despite its restriction, because they are coerced into the program – they do not want to remain detained for longer periods of time. Refusing the ATD, will inevitably result in longer detention for the families.

ATD is currently the most common form of release at the family centers in Karnes and Dilley and provides for release of the family unit with the mother on an ankle monitor. Below is a general overview of the ATD release requirements:

Alternative to Detention (ATD):

- Requirements:
    - A positive decision at your credible fear or reasonable fear interview
    - A valid ID from your country of origin
    - A telephone number of a contact for release so ICE can coordinate departure
    - The release contact will have to provide travel ticket(s) to an ICE oficial

- Post Release requirements:
    - In addition to attending all hearings with the immigration judge, the individual will have check in appointments with an ICE agent in the area where she will be going to live
    - Must to report to the local ICE office in the city where the individual is going to live within 10 days of release. ICE will give the individual the date and address so that the individual will know when and where to report.
    - ICE will determine whether the ankle monitor will be removed or how much longer it will remain on the individual on a case by case basis

Currently CFIs and RFIs are being completed for individuals at the family detention centers within 10 days. Once there is a positive CFI or RFI, the family is reviewed for release via the ATD program. If a family does not want ATD because they do not want to be on an ankle monitor, then they can choose to request a bond from the ICE and then a review of that bond determination before the IJ. Or if they individual has been charged as an arriving alien and is not

eligible for a bond, they can request release under parole from ICE. The vast majority of the families at Karnes and Dilley have chosen to enter the ATD program for release.[14]

Because there are too few asylum officers, and because of the requirement to complete CFIs and RFIs within 10 days at the family detention centers, adults held elsewhere must wait much longer: as of March 1, 2016, it was 30 days for CFIs and 60 days for RFIs at Hutto and at STDC in Pearsall, Texas. At the adult detention centers, the most common forms for release remain through parole and a request for a bond reduction before the Immigration Judge after ICE has made an initial bond determination.

Parole Requests before ICE:

- Requirements:
    - Must obtain a positive decision at your credible fear interview
    - Must present a valid ID from your country of origin
    - Make sure to highlight any important discretionary factors for release, such as the Parental Interests Directive
    - No eligible for custody review before the IJ because charged as an arriving alien.

In December 2009, DHS issued a Policy Directive, "Parole of arriving aliens found to have a credible fear of persecution or torture," that clearly says, "when an arriving alien found to have a credible fear establishes . . . his or her identity and that he or she present neither a flight risk nor danger to the community, DRO should . . . parole . . . the alien on the basis that his or her continued detention is not in the public interest."[15] Though ICE has itself made the directive available online, the authors have observed that the detention officers read these words to mean little more than "Mary had a little lamb": in many jurisdictions, ICE continues to detain noncitizens post-CFI even after receiving ample and unassailable proof of the alien's identity and an immediate family member's fixed address.

Bond requests before an IJ:

- Requirements
    - Must have community ties and demonstrate a place where you can be released (to a USC/LPR)
    - Cannot be a danger to the community
    - Cannot have been charged with certain crimes
    - Must have a valid ID from your country of origin
    - Cannot have been paroled from a port of entry

When trying to obtain the release of an individual from detention, keep in mind also the Parental Interests Directive, which can also be used to prevent the detention of certain parents. In 2013, ICE issued a Parental Interests Directive to provide federal guidelines regarding immigration

[14] We have seen no requests for a bond determination at Karnes and very few (less than 1%) at Dilley. The families/individuals who have requested bond are represented by attorneys and have done so as a part of a legal strategy for their cases.
[15] http://tinyurl.com/jsv6cxd

enforcement against parents and legal guardians. The Directive emphasizes that ICE should respect an immigrant parent's rights and responsibilities, and seeks to ensure that "immigration enforcement activities do not unnecessarily disrupt" parental rights.[16]

The Directive applies to all parents and guardians involved with ICE, with particular attention to:

- Primary caretakers of minor children of any immigration status;
- Parents or legal guardians who have a direct interest in a family court proceeding involving a minor or child welfare proceedings. This includes both dependency and private custody cases; and
- Parents, both custodial and non-custodial, and legal guardians of U.S. citizen or lawful permanent resident (LPR) minor children.

It is important to screen potential clients who are recent arrivals to the US to see if the Parental Interests Directive applies to them, as some recent entrants may have previously been in the US and have children that they have left with family or friends.[17]

The Directive contains important provisions relevant to child welfare agencies and child welfare attorneys, including ICE Decision-Making. While ICE offices have discretion in how to handle cases, the Directive provides guidance to try to minimize the negative impact of immigration actions on families. This includes guidance that ICE should:

- Consider whether it should prosecute parents for immigration violations
- Consider refraining from detaining parents initially.
- Attempt to place parents in detention as close as practical to their child or their child's court case

Navigating the priority docket

On February 3, 2016, the Executive Office for Immigration Review (EOIR) issued a Memorandum, "Revised Docketing Practices Relating to Certain EOIR Priority Cases,"[18] which amended the standards set forth in the March 24, 2015, Memorandum "Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of New Priorities."[19] The Memorandum sets out the following Priorities:

- **Unaccompanied Children (UCs) –Priority:**

[16] Parental Interests Directive can be found at: https://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf

[17] It should be noted that DRO at the CCA Laredo Detention Center have stated that the Parental Interests Directive does not apply to any recent entrant to the US. DRO at the STDC and Hutto facilities have not stated this. There is nothing in the Directive itself that states that it cannot or does not apply to recent entrants to the US.

[18] https://www.justice.gov/eoir/file/819736/download

[19] https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf

Beginning on February 8, 2016, UC cases will be scheduled for an initial master calendar hearing (MCH) no earlier than 30 days and no more than 90 days from the Immigration Court's receipt of the Notice to Appear (NTA). If the 90th day falls on a Saturday, Sunday, or legal holiday, the MCH will be scheduled no later than the last business day before the Saturday, Sunday, or legal holiday.

- **Adults with Children Released on Alternatives to Detention (AWC/ATD) – No longer a priority if no longer enrolled in the ATD program:**
  Beginning on March 1, 2016, AWC/ATD cases in which the AWC/ATD priority code designation has been removed from CASE because the individual is no longer in the ATD program will no longer be a docketing priority, even if DHS previously marked the NTA with the AWC/ATD designation. There may be pending cases involving adults with children in which only one family member's case continues to be identified with the AWC/ ATD priority code designation in the CASE system. In those cases, Judges should consolidate the cases of these family members, where appropriate, and schedule them according to existing docketing standards for A WC/ATD cases. If the case remains on the AWC/ATD priority docket, then the initial MCH must be scheduled within 28 days of the Immigration Court's receipt of the NTA.

- **Adults with Children/Detained (AWC/D) – Priority**
  A WC/D cases in which the Respondents are released from custody continue to be a priority. If a case must be referred to Citizenship and Immigration Services (CIS) for adjudication of potential substantive relief (e.g., pending I-360, asylum, special immigrant juvenile status), the case should be administratively closed pursuant to *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012).

One-year deadline issues

Pursuant to INA § 1208(a)(2)(B) and 8 C.F.R. § 1208.4, an individual is only eligible for asylum if she files her application within one year of her arrival in the United States or if she establishes that she meets one of two limited exceptions to the one-year filing deadline. The applicant must prove by "clear and convincing evidence" that the asylum application was filed within one year of the date of his or her last arrival in the US either affirmatively with USCIS or, if the applicant is in removal proceedings, with the Immigration Court/EOIR. In defensive filings, asylum applications must be filed in "open court" at a master calendar hearing.[20] An applicant must also alert DHS to the need to fingerprint her by sending the first three pages of the Form I-589, her attorney's Form EOIR-28 Notice of Entry of Appearance (if any), and a copy of DHS's "pre-filing instructions"[21] to the USCIS Nebraska Service Center (NSC).

With the current state of the EOIR dockets, this filing deadline can be problematic for:

- Individuals who may had been issued an NTA, that has not yet been filed with the Immigration Court, or

[20] EOIR Practice Manual, Chapter 3.1
[21] Posted at http://tinyurl.com/hajmoe3

- Individuals who have been issued an NTA and have an initial MCH scheduled outside of the one year filing deadline.

If an individual has been served an NTA that has not yet been filed with the Immigration Court, the asylum application should be filed affirmatively with the appropriate USCIS Service Center (for routing to the Houston Asylum Office).

If an individual has been served with an NTA and it has been filed with the Immigration Court but the MCH is scheduled beyond the one year filing deadline, the "lodging" procedure (see below) may constitute additional evidence of good faith efforts to meet the filing requirements. But lodging alone isn't enough. The Chief Immigration Judge (OCIJ) has said that "the lodged date is not the filing date and a lodged asylum application is not considered filed,"[22] and you can expect your client's IJ to toe this fuzzy line (the OCIJ also says judges "consider the legal effect of lodging an asylum application when considering whether an exception to the one-year bar applies").[23]

Another option is to file a Motion to Advance the Master Calendar Hearing Date.[24] Such a motion may constitute further evidence of good faith efforts to meet the one year filing deadline and will preserve a record for appeal should an Immigration Judge find there are no extraordinary circumstances. A Motion to Advance must completely articulate the reasons for advancing the hearing date, the negative consequences of not doing so, and the relief or remedy sought. The motion should explicitly state that its purpose is to enable the Respondent to meet the one year filing deadline for his asylum application.[25] Motions to Advance should also be accompanied by the Respondent's written pleadings, a copy of the asylum application, as well as any additional copies for family members included in the application, and any supporting documentation.

Getting your client work authorization

Asylum applicants and the *ABT* Settlement Agreement

Work authorization eludes many asylum applicants because:

1) An asylum applicant must wait at least 150 days after filing their application before they may file Form I-765,
2) 180 days must elapse before CIS may *issue* that authorization,
3) Any delays "requested or caused by the alien" don't count toward the 150 or 180 days,[26] and
4) The immigration courts have devised fiendishly clever ways to jimmy the EAD "clock" so that almost any delay is "requested or caused" by the alien.[27]

[22] OPPM 13-03 (http://tinyurl.com/gq54zua)
[23] *Id.* at 6.
[24] For a template, email EdnaY@AmericanGateways.org
[25] EOIR Practice Manual, Chapter 5.10(b)
[26] 8 C.F.R. § 1208.7(a)(2)

In 2013 the American Immigration Council, Northwest Immigrants Rights Project, Gibbs Houston Pauw, and the Massachusetts Law Reform Institute won a lawsuit that limited the courts' ability to thus impoverish asylum seekers. Per CIS' press release:

> *As part of a settlement of the class action lawsuit, ABT, et al., v. U.S. Citizenship and Immigration Services, et al., 11-cv-02108 (W.D. Wash.), U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) have agreed to change certain procedures that will affect the eligibility of some asylum applicants for employment authorization documents (EAD).*

Under *ABT*, an asylum applicant may "lodge" a completed I-589 at the immigration court filing window. This application is stamped and returned to the applicant (either in person or using a self-addressed, stamped envelope enclosed with the I-589). Once 150 days have elapsed from the date the application is lodged, the applicant may file an application for work authorization under 8 C.F.R. § 274a.12(c)(8).

This lodging process is peculiar in many respects:

- No copy of the application or cover letter is retained by the court.[28]
- The application is not "filed" for purposes of satisfying the one-year deadline.[29]
- The courts' database for keeping track of days elapsed since filing is not engaged (so don't be alarmed when you call 800/898-7180 and "zero days" have elapsed on the EAD clock).[30]
- If the application is lodged at least 75 days before the master calendar when the application is *filed*, the judge should remove the case from the expedited asylum docket.[31]

Withholding-only applicants and EADs

Joseph Heller's spirit lives on in the Catch-22 faced by so-called withholding-only applicants – that is, those who've filed an I-589 under either the Convention Against Torture (CAT) or INA § 241(b)(3).

8 C.F.R. § 274a.12(c)(8) clearly provides that withholding-only applicants may be authorized to work: among "[a]liens who must apply for employment authorization," it lists, "An alien who has filed a complete application for . . . withholding of deportation or removal."

Just as clearly, the INA and the regulations impose *no waiting period* upon withholding-only applicants who need employment authorization. This is why EOIR, which keeps the asylum

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[27] Operating Policies and Procedures Memorandum (OPPM) 13-02 (http://tinyurl.com/jv6f5ej); OPPM 05-07 (http://tinyurl.com/hqghzb4)
[28] OPPM 13-03
[29] *Id.*; see above, One-year deadline issues
[30] "The 180 day asylum EAD clock notice," CIS (http://tinyurl.com/zgsqqrx)
[31] The Chief Immigration Judge instructs judges: "If a case is referred [from the asylum office] to EOIR with 75 days or more elapsed on the asylum clock, the case is not treated as an 'expedited asylum case.'" Logic dictates that a I-589 that has been lodged 75 days prior to a next master calendar setting should be treated in the same way. OPPM 13-02, *supra* note 14, at 5.

"clock" in the cases pending before it,[32] won't start the clock: the Chief Immigration Judge explains simply, "[i]n cases where the Form I-589 has been filed for other than asylum relief, the 180-day clock does not apply"[33]

Here's the catch: anytime CIS receives an I-765 in which "(c)(8)" appears in the "eligibility category" field – regardless of what relief the noncitizen is applying for – they *will* check the EAD clock and, just as certainly, deny work authorization when they see that 150 days haven't elapsed!

The only solution known to the authors is to haul CIS before the federal district court. Here's how:

1) File Form I-765 and await its denial;
2) Appeal that "arbitrary, capricious," abusive, and otherwise not-in-accordance-with-the-law denial to federal district court under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A);[34]
3) Discuss CIS' regulatory violation with the agency's bemused counsel; and
4) Move to dismiss the appeal as moot once work authorization is issued under 8 C.F.R. § 274a.12(c)(8).

Recent developments in "particular social group"

Anyone persecuted by a criminal organization, be it a gang or a cartel, has a hard row to hoe in immigration court. Since a grant of asylum (or withholding of removal under INA § 241(b)(3)) requires a causal nexus between the persecution and one of five "protected grounds"[35] – and since criminal enterprises seldom care about their victims' race, religion, nationality, or political opinion – applicants find themselves having to argue that they've been persecuted (or will be) on account of their membership in a "particular social group" (PSG).

Ignoring guidance from the United Nations High Commissioner for Refugees[36] (as well as humanity and common sense), Board of Immigration Appeals has built an obstacle course for any proposed PSG:

- Groups that are too big or "amorphous" fail the Board's made-up "particularity" requirement for PSGs;[37] but

- Narrowly defined PSGs fail the "social distinctness" (formerly "visibility") requirement because, unlike the other four protected grounds, the existence of a PSG must be recognized by a society *as a whole*.[38]

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[32] *Sekhon v. Meissner*, 2000 U.S. Dist. LEXIS 16512 (N.D. Cal. June 19, 2000)
[33] OPPM 00-01 (http://tinyurl.com/zk3van4)
[34] For a template, email pzoltan@zoltanlaw.com
[35] INA § 101(a)(42)(A)
[36] "Guidance Note on Refugee Claims Relating to Victims of Organized Gangs," UNHCR (March 2010): http://www.refworld.org/pdfid/4bb21fa02.pdf
[37] It was on this basis that the Board rejected as a PSG "former gang members." *Matter of W-G-R-*, 26 I&N Dec. 208, 221 (BIA 2014).

Though "family" has been called the "quintessential social group,"[39] the Fifth Circuit consistently holds that family lacks the "particularity" the Board requires of a PSG.[40] Other circuits have been kinder, and advocates may make some headway distinguishing a client's facts from dreadful Fifth Circuit precedent:

- *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011): Every circuit to have considered the question has held that family ties can provide a basis for asylum.

- *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009): Membership in the same family is widely recognized by the caselaw.

- *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993): There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.

- *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014): A nuclear family can constitute a particular social group based on common, identifiable, and immutable characteristics.

- *Crespin-Valladares v. Holder*, 632 F.3d 117, 125-126 (4th Cir. 2011): A particular social group based on a family that was targeted by gangs is immutable because of family bonds—especially because of the limited size of the family—and socially distinct because the family relationship was easily recognizable.

- *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015): The Fourth Circuit did not credit the Board's finding that the applicant "was not threatened because of her relationship to her son (i.e. family), but was instead threatened because she would not consent to her son engaging in criminal activity." The court found that this holding was "an excessively narrow reading" of the "on account of" requirement and that the analysis "dr[ew] a meaningless distinction" between several reasons the applicant was targeted, which included her maternal relationship to her son. The court concluded that the applicant's "relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join" the gang. Therefore, the court ruled that her familial relationship to her son was at least one central reason for her persecution and that she had successfully established a nexus to a protected ground

The dismal prospects for family-based claims in this circuit may well improve, and soon. In March 2016 the Board solicited amicus briefs[41] to resolve the circuit split on this precise issue:

> *Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family, has he or she*

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[38] 24 I&N Dec. 579 (BIA 2008)
[39] "[T]he family remains the quintessential particular social group." *Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015).
[40] *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012); *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015).
[41] http://tinyurl.com/h9cojj9

satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another protected ground?

It can be hoped that the Board will answer this question "Yes," and issue a precedent decision clearly endorsing "family" as a particular social group. If it does, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (*Brand X*) will require the Fifth Circuit to reexamine its PSG jurisprudence in light of that decision.

Conclusion

The families, children, and adults who come to this nation seeking refuge too often find themselves jailed, silenced, deprived of their fundamental rights, and summarily expelled – some of them to their death. In a system that is rigged against asylum seekers, the arguments raised in this article should serve as tools: implements that, if properly wielded, may help a frightened newcomer pry open the door to a free and dignified life in this country.