Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***History of the Affirmative Asylum Program***
Rev. Date	May 9, 2013
Lesson Description	This lesson provides an historical overview of the refugee definition and asylum process in the United States, leading up to the creation of the Asylum Program. Information is provided on each major piece of legislation or regulation that contributed to the development of the Asylum Program.
Terminal Performance Objective	An Asylum Officer will be familiar with the history, mission, values, and goals of the U.S. Asylum Program within the context of DHS, USCIS, and RAIO, and utilize awareness of the U.S. Asylum Program's history to underscore the importance of conducting high quality adjudications in a timely manner.
Enabling Performance Objectives	1. Identify the key historical points in the development of the Asylum Program. (OK1)(OK2)(AIL1) 2. Explain the shortcomings of the 1990 Final Rule and the remedies provided in the 1995 Final Rule. (OK1)(OK2)(OK3)
Instructional Methods	Lecture, class discussion, visual aids.
Student Materials/ References	Participant Workbook; David A. Martin. "Making Asylum Policy: The 1994 Reforms," *Washington Law Review* (Vol. 70, No. 3, July 1995), pp. 725-755.
Method of Evaluation	Written test
Background Reading	1. Beck, Susan. "Cast Away," *The American Lawyer* (October 1992), pp. 54-59. 2. Beyer, Gregg A. "Affirmative Asylum Adjudication in the United States," *Georgetown Immigration Law Journal* (Vol. 6, No. 2, June 1992), pp. 253-284. 3. Beyer, Gregg A. "Establishing the United States Asylum Officer Corps: A First Report," *International Journal of Refugee Law* (Vol. 4, No. 4, July, 1992), 39 pp. 4. Beyer, Gregg A. "Reforming Affirmative Asylum Processing in

the United States: Challenges and Opportunity" *The American University Journal of International Law and Policy* (Vol. 9, No. 4, November 1994), pp. 43-78.

5. Conover, Ted. "The United States of Asylum," *New York Times Magazine* (September 20, 1993), pp. 56.

6. Langlois, Joseph E. Director, Asylum Division, US Citizenship and Immigration Services. *The Effect of the "Real ID" Act on the Processing of Coercive Population Control (CPC) Cases*, Memorandum for all Asylum Office Personnel (Washington, DC: 16 June 2005), 3pp.

7. Langlois, Joseph E., Acting Director, Asylum Division, Office of International Affairs. *Final Rule amending the asylum regulations in 8 C.F.R. 208*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 6 December 2000), 8 pp., plus attachment.

8. Martin, David A. "Making Asylum Policy: The 1994 Reforms," *Washington Law Review* (Vol. 70, No. 3, July 1995), pp. 725-755.

New Critical Tasks

1. Knowledge of the Asylum Division History (OK1)
2. Knowledge of Asylum Division mission, values and goals. (OK2)
3. Knowledge of U.S. case law that impacts Asylum Division policies and procedures (AIL1)
4. Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS (OK3)

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I. INTRODUCTION

Those who cannot remember the past are condemned to repeat it.

George Santayana, 1863–1953, *The Life of Reason*, Volume 1, 1905

The purpose of this lesson is to provide the context out of which the U.S. asylum program arose. After a brief discussion of the development of refugee protection on the international level, the lesson describes the critical events in the creation of a U.S. statutory and regulatory scheme for the protection of refugees. Through the lens of the past, this lesson strives to convey some of the challenges that will always confront the management and officers of the U.S. asylum program.

See generally, RAIO module *International Human Rights Law* and UNHCR module Overview of UNHCR and Concepts of International Protection for more information on the development of international refugee law.

II. DEVELOPMENT OF REFUGEE PROTECTION UNDER INTERNATIONAL LAW

In the 20th century, individuals fleeing their countries of nationality and seeking protection elsewhere became the subject of international legal protection. The Universal Declaration on Human Rights, adopted by the United Nations General Assembly in 1948, includes the right of individuals to seek and to enjoy in other countries asylum from persecution.

Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 Geo. Immigr. L.J. 253, 255-256 (1992).

Universal Declaration of Human Rights. Art. 14, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948

Because the Universal Declaration is not a treaty, the right to seek asylum was not immediately binding on UN member states. Yet within a few years of the Universal Declaration's proclamation, the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention) was crafted establishing the concept of protection of asylum seekers as an obligation of states.

Many scholars have asserted that many, if not all, of the rights enumerated in the Universal Declaration have become customary international law.

The 1951 Convention was innovative for two important reasons. First, it established a universal definition of a refugee, as opposed to a definition based on the nationality of the individual seeking protection.

1951 Convention Relating to the Status of Refugees, Art. 1, 189 U.N.T.S. 137, July 28, 1951.

In the post-World War I period, the League of Nations created programs to protect specific national or ethnic groups that would have been at risk were they to return to their countries of citizenship. Such groups included Russians, Assyrians, Turks, Greeks, Armenians, and German Jews. UNHCR. *State of the World's*

Refugees: The Challenge of International Protection (New York: 1993), pp. 11-12.

Second, the 1951 Convention prohibits contracting parties from expelling or returning an individual to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

1951 Convention, Art. 33.

Despite these innovations, the Convention's universal definition of a refugee was initially limited in scope. The definition applied only to those individuals in refugee-like situations "as a result of events occurring before 1 January 1951." In addition, the 1951 Convention allowed signatories to limit that definition further to "events occurring *in Europe* before 1 January 1951."

1951 Convention, Art. 1(A)(2)

1951 Convention, Art. 1(B), emphasis added

In 1967 a Protocol to the 1951 Convention was established. In addition to binding its signatories to apply the substantive provisions (Articles 2-34) of the 1951 Convention, the Protocol amended the definition of a refugee. First, the Protocol removed the date restriction, allowing the refugee definition to be used to address refugee situations that developed in the post-war period. Further, the 1967 Protocol required signatories to apply the definition without geographic limitation, unless the signature country had made an appropriate declaration and had renewed the declaration upon signature of the Protocol. Thus taken together, the 1951 Convention and its 1967 Protocol establish a truly universal definition of a refugee to be applied by party states. More importantly, for the first time, the protection of refugees who would be persecuted if returned to their countries of nationality was no longer optional, but became an international legal obligation.

1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, January 31, 1967.

1967 Protocol, Art. I.

III. 1952-1980: DEVELOPMENT OF REFUGEE PROTECTION IN US LAW, A PERIOD OF CONFLICTING DEFINITIONS

World War II and the holocaust shamed the world into formalizing a basic international legal framework for protecting refugees. "Disregard and contempt for human rights…[and] barbarous acts which outraged the conscience of mankind," cause the United Nations to include the right to seek and enjoy asylum from persecution in the 1948 Universal Declaration of Human Rights, The 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol further elaborated this right and the corresponding obligations for both applicants and States Party. The United States signed the 1967 Protocol in 1968, thus committing itself to the international regime of refugee protection.

Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. J. INT'L L. & POL'Y 43, 55 (1994).

Despite the international recognition of the need for refugee protection in the 1951 Convention, the US did not adopt a definition of a refugee until several years later. The United States did not accede to the 1951 Convention, and in 1952 the Immigration and Nationality Act (INA) was passed without any express provisions for the resettlement of refugees or admission of arriving asylum-seekers.

David A. Martin, *The Refugee Act of 1980: Its Past and Future*, *in* TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 109 (1992).
The 1952 Act did allow for a discretionary form of withholding of deportation for aliens who, in the opinion of the Attorney General, "would be subjected to physical persecution." *See* INA § 243(h) (1952); 66 Stat. 214, which was amended in 1965 to allow withholding of deportation for those who would be "persecuted on account of race, religion, or political opinion." INA § 243(h) (1965), 79 Stat. 918.

Beginning in 1956 the U.S. government adopted an ad hoc approach to refugee protection, with the Attorney General using his parole authority under the INA to allow refugees to enter the U.S. But because the INA did not provide a means for parolees to adjust their status to that of legal permanent residents (LPRs), Congress had to pass a series of special legislative acts, such as the Hungarian Refugee Act of 1958, the Cuban Refugee Act of 1966, and the Indochinese Refugee Act of 1977, to allow specific populations paroled into the U.S. in response to refugee situations to adjust their status.

Martin, *The Refugee Act of 1980*, at 92-95.

The first attempt by the U.S. to regularize the identification of refugees came with the passage of the September 1957 "Refugee-Escapee Act." That statute defined the term "refugee-escapee" in geographical and political terms, as persons fleeing communist or communist-dominated countries, or the Middle East. In 1965, Congress further regularized U.S. refugee protection programs by amending the INA to incorporate the "refugee-escapee" definition and provide for the resettlement of refugees as a category of immigrants – "conditional entrants." Three years after incorporating this politically oriented definition into the INA, the United States acceded to the 1967 Protocol and therefore accepted the obligation to apply the substantive provisions of the 1951 Convention and the universal definition of a refugee as amended by the Protocol.

Though the United States had acceded to the 1967 Protocol, and its refugee definition unencumbered by political or geographic

Section 15(c)(1) of the Act of Sept. 11, 1957, 71 Stat. 643; Joyce Vialet, CRS, CRS Report for Congress: "A Brief History of U.S. Immigration Policy," 1991.

INA § 203(a)(7) (1965); Section 3 of the Act of October 3, 1965, 79 Stat. 911, 913

1967 Protocol, 19 U.S.T. 6223, (entered into force for the United States on Nov. 1, 1968).

Refugee Act of 1980, PL 96-

constraints, the definition of a refugee in U.S. immigration law was not amended until 1980. At the time of accession to the 1967 Protocol there was an assumption that U.S. practices already conformed to the requirements of the 1951 Convention and its 1967 Protocol. In the eyes of the Administration, accession to the 1967 Protocol was less about changing our practices with respect to refugees, and more about signaling the global leadership of the U.S. in the area of refugee protection.

212, 94 Stat. 102.

David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1259 (1990); s*ee INS v. Stevic*, 467 US 407, 428 n.22 (1982) (arguing that the geographical limitations in INA § 203(a)(7) on those eligible for refugee resettlement as conditional entrants served as limits on admission, which was not required by the 1951 Convention, and thus was consistent with the Convention definition of a refugee).

But because the 1967 Protocol is not a self-executing treaty, implementing legislation was required to make the treaty operative. During the gap between accession to the 1967 Protocol and the passage of the Refugee Act of 1980, U.S. officials continued to look to the INA for authority to address the admission of refugees. As a result of this failure to promptly enact implementing legislation, the United States continued, until 1980, to apply its politically and geographically limited definition to refugee determinations despite accepting the universal definition of a refugee of the 1967 Protocol.

See INS v. Stevic, 467 US 407, 428 n.22 (1982) (noting that Article 34 of the 1951 Convention encouraged nations to facilitate the admission and naturalization of refugees, but did not require such a program to begin upon ratification).

Analysts of immigration policy have suggested that there were advantages to retaining the ideologically based definition. The adjudication of the former refugee definition was easier to adjudicate, requiring only a determination that the applicant was a citizen of communist or Middle Eastern country. The definition required little examination into the individual circumstances of the alien seeking protection, which would be required to determine whether there existed an objective possibility that the individual would be persecuted in the future (the universal definition standard). In addition, political support from Congress and the public was more easily generated for a program closely aligned with the country's primary foreign policy objective at that time – fighting Communism. The non-ideological definition of a refugee embodied in the 1951 Convention, and its implication that foreign policy concerns would not be a factor in asylum decisions, requires the U.S. to recognize as refugees those aliens who have been persecuted by government regimes that U.S. foreign policy supported. Acceptance of an approach that seemed to run counter to other U.S. policies was hard to win.

See Beyer, *Reforming Affirmative Asylum Processing in the United State: Challenges and Opportunities*, at 58-60.

IV. REFUGEE ACT OF 1980: US ACCEPTS UNIVERSAL DEFINITION

The Refugee Act of 1980 was passed with the primary purpose of bringing U.S. refugee law into conformance with the obligations it assumed when it signed the Protocol on November 1, 1968. The statutory definition of refugee was derived from the 1951 Convention definition: "…any person who is outside any country of such person's nationality…, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country 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." In fact, the U.S. definition of a refugee codified in the INA is broader than the Convention definition in that under United States law an individual can meet the refugee definition based on past persecution on account of one of the protected characteristics, even if he or she does not have a well-founded fear of future persecution.

See INS v. Cardoza-Fonseca, 480 US 421, 436 (1987).

Refugee Act of 1980. PL 96-212, 94 Stat. 102 (1980); INA § 101(a)(42).

Even more important to the fulfillment of U.S. obligations under the 1967 Protocol, the Refugee Act made *mandatory* the withholding of deportation to a country where an individual's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, consistent with Article 33 of the 1951 Convention (*non-refoulement*).

Refugee Act of 1980. PL 96-212, 94 Stat. 102. Prior to 1980 the INA *allowed* the Attorney General to withhold deportation in some situations, but did not require it. In INS v. Stevic, the Supreme Court asserted that the Attorney General could accommodate the requirements of Article 33 by always exercising his discretion to withhold deportation where the alien would be persecuted on account of a protected ground if returned. 467 US 407, 428, n.22 (1984).

The Refugee Act of 1980 also mandated that the Attorney General establish procedures to exercise discretion to grant asylum to refugees physically present in the United States, but provided little guidance as to the mechanisms to be created or standards to be applied. Under interim regulations published in June 1980, Immigration and Naturalization Service (INS) District Directors were given the authority to adjudicate asylum requests of those aliens not in exclusion or deportation proceedings. The decision to vest in INS District Directors the authority to grant asylum to aliens not in deportation or exclusion proceedings (affirmative applications) was consistent with the practice at that time to give District Directors authority over most immigration adjudications.

Beyer, *Affirmative Asylum Adjudication in the United States*, at 262; T. David Parish, *Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 925 (1992).

8 CFR § 208.1 (1980), 45 FR 37392

Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L.

455, 459 (1992).

V. 1980-1990: DEBATE OVER A FINAL ASYLUM RULE

A. Intervening Events

At the time that the interim rules were published, many believed that a final rule would follow shortly. However, intervening immigration events and the ensuing debate over the proper role of asylum in U.S. immigration policy hampered consensus-building among interested parties.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 459.

The landscape of immigration policy changed in the early 1980s when large influxes of Haitian and Cuban migrants arrived on U.S. shores exposing the new reality of the United States as a country of first asylum. Almost immediately, the situation demonstrated that not only did the U.S. not anticipate so many individuals reaching its shores to request asylum, but also did not appear ready to deal with the situation. Both the administration and Congress were legitimately concerned that the U.S. had lost control over its borders. Even a UN Deputy High Commissioner for Refugees urged that the U.S. regain its control over its borders, on the rationale that the general public does not support generous refugee programs if it believes that the programs have lost control. In addition, the situation demonstrated the administrative difficulty of determining more than that someone is from a country where life is "demonstrably unfree," but that the individual in question will be targeted if returned.

See Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 459.

Beyer, *Affirmative Asylum Adjudication in the United States*, at 265.

Martin, *The Refugee Act of 1980: Its Past and Future*, at 114. Others cite the experience of the Cuban-Haitian migration situations as demonstrative of the instinct of US officials to view immigration policy through the lens of foreign policy and the challenges that it faced in applying a neutral definition of a refugee. Advocates pointed out differences in the way that the situations of these two groups were being addressed by INS, especially in detention policies and policies regarding adjustment of status to that of a permanent resident. See US Committee for Refugees (USCR), *Despite a Generous Spirit: Denying Asylum in the United States*, at 14-18 (1986).

B. Failure to Achieve Ideals

The debates that ensued after the arrival of the Haitians and Cubans in the early 1980s illuminated a perceived conflict between two ideals: 1) offering protection to those who have been persecuted or fear persecution, regardless of foreign policy implications, and 2) successful control over the entry of aliens. However, within the first few years after the Refugee Act was passed, it became apparent that the limited asylum system established by the Refugee Act failed to reach either of the two ideals. Both government officials and outside organizations identified specific problems that frustrated the government's ability to achieve the ideals of the asylum system.

See Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, at 1270.

First, the prospect of obtaining permanent residence in the U.S. was attractive to many who had fled their countries of nationality, especially because an alien did not have to be *legally* present in the United States, or have a sponsoring relative with legal status, as required with most other means of immigration, in order to apply for asylum. In large part because of the Cuban-Haitian migration situation, within six months of the passage of the Refugee Act, more than 100,000 claims for asylum had been filed. By October 1982 there were more than 140,000 asylum cases before INS. Applying for asylum was made even more appealing by the regulations allowing asylum applicants to receive work authorization in the discretion of the district director, absent a finding that the asylum claim is frivolous. These factors resulted in a growing backlog, but, despite this, very few officers were assigned to interview and adjudicate these cases.

Martin, *The Refugee Act of 1980: Its Past and Future*, at 112.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 459.

Arthur Helton, *INS is the One that's Abusing Political Asylum*, HOUSTON CHRONICLE, February 22, 1989, at 3 (claiming that in 1989 only 30 officers nationwide were involved in adjudicating asylum claims at that time).

Martin, *The Refugee Act of 1980: Its Past and Future*, at 110.

Second, there was concern that adjudicators did not have requisite expertise in asylum law or access to relevant resources to fairly adjudicate the claims before them. In part, INS Examiners assigned to adjudicate asylum cases were viewed as "low level functionaries" with little or no instruction in asylum matters. Because the Examiners adjudicating asylum requests reported to INS District Directors, many believed that an enforcement mentality pervaded the administration of the asylum system. Compounding the concern about the training and management of the INS Examiners was the recognition of the complexity of the adjudication. Bona fide asylum applicants are likely to have left their countries of nationality without identity or other forms of documentation, and typical claims for asylum involve facts that are not easily verifiable, such as low-level membership in a political party or instances of past harm by

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 458.

Helton, *INS is the One that's Abusing Political Asylum.*

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 466.

Martin, *The Refugee Act of 1980: Its Past and Future*, at 115.

authorities. Credibility determinations are critical and a degree of prognostication is required.

Finally, the lack of real consequences for those who apply for asylum but are not eligible reduced the effectiveness of the entire system. Not only was there the possibility of receiving work authorization, but there was also little likelihood that a denial of asylum would result in the initiation of deportation proceedings and removal from the country. That reality both undermined any disincentive that an alien would have against filing a mala fide application for asylum and eroded public support for a generous asylum system.

Martin, *The Refugee Act of 1980: Its Past and Future*, at 115-116.

C. Identification of Goals

Through the examination of these failures, government officials and those in the advocacy committee identified two goals paramount to creating an effective asylum system: to produce high quality adjudications and to lessen systemic incentives for filing spurious claims in order to obtain work authorization or remain longer in the United States. Alternatives debated during the ten-year period between the promulgation of the interim rule in 1980 and the final rule in 1990 were measured against their ability to achieve these two goals.

See Beyer, *Affirmative Asylum Adjudication in the United States*, at 258.

D. Alternatives to the Status Quo

Four questions dominated the deliberations regarding the best design to achieve the goals of a prompt and fair adjudication and a system that did not create incentives for filing spurious claims:

1) Who should conduct the primary adjudication?

2) What role should Immigration Judges play in the process?

3) What organizational entity should control the administration of the affirmative asylum process?

4) How, and from what source, should country conditions be considered in the adjudication?

A final rule promulgated in 1990 answered each of these four questions, but an understanding as to why the questions were answered as they were requires a discussion of the debates surrounding the asylum program.

1. Who should conduct the primary adjudication?

Many refugee advocates, and some government officials, involved in the process of developing a new asylum system did not want to leave the primary adjudication of affirmative asylum claims to INS district adjudicators. Those familiar with refugee protection issues believed that the complex nature of the refugee definition, coupled with the reality that few refugees have access to corroborating documentary evidence, called for a more involved interview and in-depth legal analysis than most adjudications handled by the district offices. In addition, some outside the INS perceived district directors, and transitively those supervised by them, to be enforcement-oriented and less likely to look compassionately on the claims of those seeking refuge. Finally, many recognized that other adjudicative responsibilities in district offices would pull resources away from the adjudication of asylum claims.

See Martin, *The Refugee Act of 1980: Its Past and Future*, at 101.

See Beyer, *Affirmative Asylum Adjudication in the United States*, at 274; 1988 Revised Proposed Final Rule, 53 FR 11300, 11301.

Prior to the proposal and passage of the Refugee Act of 1980, the Select Commission on Immigration and Refugee Policy (1979-1981) was formed to study the laws and policies regarding refugees and make recommendations to the President and Congress. The president of the University of Notre Dame, Rev. Theodore Hesburgh, CSC, served as Chairman. In a Final Report submitted on March 1, 1981 (and echoed in a supplemental Staff Report issued in April 1981), the Select Commission recommended that a new position be created, "asylum admissions officer," to be filled by individuals trained in making eligibility determinations and with access to area experts familiar with conditions in the countries of origin. In response to the Select Commission's report, President Reagan created a Task Force on Immigration and Refugee Policy, which, after three months of work, reached a similar conclusion that applications for asylum be adjudicated by a new, dedicated corps of asylum officers within the INS. Anticipating a legislative response to these recommendations, the Department of Justice chose not to address asylum procedures when a final rule on refugee admission procedures was issued in September 1981. Indeed, in October 1981, the President put forward a legislative package to Congress that would have created the position of asylum officer within INS.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 460.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 460-461.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 461.

1981 Final Rule, 46 FR 45116; Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 461.

Omnibus Immigration Control Act, S. 1765, H.R. 4832; Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 461.

Other legislative proposals focused on administrative judges as the appropriate individuals to adjudicate asylum requests.

Immigration Reform and

The Immigration Reform and Control Act (IRCA) of 1983 contained provisions that would have created a system in which specially trained judges would hear asylum cases. In June 1989, the Administrative Conference of the United States recommended that a new Asylum Board be created within EOIR, with asylum hearings being conducted by asylum adjudicators recruited from attorneys with "adjudicative skills … familiar with international relations and refugee affairs." It was recommended that the adjudicators under the Asylum Board receive "salary, benefits, and guarantees of adjudicative independence equivalent to those of immigration judges."

Control Act, S. 529, H.R. 1510; Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 462.

Administrative Conference of the United States. *Recommendation 89-4 Asylum Adjudication Procedures*, June 16, 1989. The Administrative Conference of the United States, an independent agency and advisory committee created in 1968 and terminated in 1995, studied U.S. administrative processes with an eye to recommending improvements to Congress and executive agencies.

INS management supported the creation of a new corps of officers dedicated to asylum. In response to internal recommendations regarding the asylum program, INS Commissioner Alan C. Nelson declared that asylum processing issues would be an INS priority for fiscal year 1983 and that training would be organized for "specialized training for asylum officers" in that time period. Little progress was made on this proposal, until August 28, 1987 when a proposed final rule was issued which would have created the position of asylum officer under the management of the Assistant Commissioner for Refugee, Asylum, and Parole.

Alan C. Nelson, INS Commissioner, Memorandum *Asylum Study – Attached*, March 29, 1983, quoted in Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 462.

1987 Proposed Rule, 52 FR 32552, 32553. However, no change to the administration of the asylum program was implemented until after the publication of the 1990 Final Rule.

2. What role should the Immigration Judges play in the process?

As various organizations and committees recommended a specialty position for the adjudication of asylum cases, some indicated that the decisions of these new officers should be able to be appealed to a higher adjudicative body.

See Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 461. (The President's Task Force recommended hearings before INS asylum officers whose decisions could be appealed to the Attorney General).

Other plans called for administrative judges to take on the primary role of the adjudication of asylum cases, as was one of the proposed measures to be included in IRCA, as discussed above.

See discussion on IRCA in Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 462.

The 1987 proposed final rule adopted what proved to be the most controversial approach to the role of immigration judges. The 1987 rule proposed that INS asylum officers be the primary adjudicator of asylum and withholding of deportation claims and that their decisions be binding on immigration judges should the alien be placed into exclusion or deportation proceedings. Even defensive applications filed before an immigration judge (or for the first time on appeal to the BIA) would have to be referred to an asylum officer for a hearing before exclusion or deportation proceedings (or the appeal) could continue. In his testimony before a Subcommittee of the Senate Committee on the Judiciary in 1981, David Martin provided twin rationales for a similar proposal. First, a non-adversarial interview is the best setting for eliciting information from an applicant unfamiliar with the United States courtroom, especially where the primary evidence in the case is the applicant's testimony. Second, a limited review confined to the record would more expeditiously resolve cases.

52 FR at 32554.

52 FR at 32554.

David A. Martin, *Asylum Adjudication*, Hearings Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 1981.

Backlash over this proposal from the refugee advocacy community prompted a reversal of position. Advocates did not trust that this new corps of asylum officers would be sufficiently independent of the enforcement mentality or foreign policy concerns. Furthermore, the removal of the possibility of a *de novo* hearing by an immigration judge represented the loss of a last safety net that advocates believed would provide some protection to individuals facing return to a country where they may be persecuted. In response to the controversy, the proposed final rule issued on April 6, 1988 provided for a *de novo* hearing by an immigration judge where an applicant has been denied asylum by the asylum officer and been placed in exclusion or deportation proceedings. However, the supplemental information to the proposed rule suggested that DOJ could later revive the idea of removing the authority of immigration judges to adjudicate asylum requests in exclusion or deportation proceedings, as the decisions of the asylum corps achieved greater quality and consistency.

See Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 464-465.

53 FR 11300.

53 FR at 11301; See Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 465.

3. What organizational entity should control the administration of the affirmative asylum process?

The 1987 proposed final rule placed the authority over the management of the program in the INS Assistant Commissioner for Refugees, Asylum, and Parole (CORAP). This organizational assignment was retained by the 1988

52 FR at 32554.

53 FR at11303.

proposed final rule. The 1988 rule recognized that INS district directors were required to devote significant amounts of time to non-asylum matters. Even where individual districts had established a corps of examiners devoted to asylum cases, those examiners rarely received specialized training and little opportunity to strive for uniformity in decision-making with examiners in other districts.

53 FR at11301.

However, there were some, especially within INS, who were doubtful that the administration of the program would be best placed in the Central Office. After the publication of the 1988 proposed final rule, INS Commissioner Nelson recommended to Attorney General Thornburgh that INS District Directors supervise asylum officers. The INS at that time felt that because the role of Immigration Judges had been reinstated with the proposed rule of 1988, there was less of a need to keep the management of asylum adjudications separate from the more enforcement-oriented districts.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 465.

INS Pushes Major Changes to Proposed Asylum Rule, INTERPRETER RELEASES, Vol. 66, No. 1, Jan. 2, 1989, at 3.

In addition to the debate over Central Office or local district supervision, some raised concerns over the role of the Asylum Policy and Review Unit (APRU) within the Department of Justice. APRU was set up in 1987 as a component within the DOJ's Office of Legal Policy and was tasked with the review of certain asylum decisions (including final denials) forwarded by District Directors. APRU also provided both general analyses of asylum issues as well as case specific comments to the Deputy Attorney General. Some saw the creation of APRU as a reflection of DOJ's lack of confidence in the ability of INS to handle sensitive cases; others saw it as a way for DOJ to achieve a higher grant rate for applicants fleeing the communist governments of Eastern European countries (see section on foreign policy implications, below).

Martin, *Reforming Asylum Adjudications: On Navigating the Coast of Bohemia*, at 1313-1314.

Under the 1987 proposed final rule, APRU was to be involved in several steps of the asylum adjudication. APRU was given joint (with CORAP) responsibility for the compilation and dissemination of country conditions information; was to be provided copies of all applications for asylum and decisions on applications; and had the authority to review affirmative decisions or decisions as to termination prior to becoming effective. The INS objected to the review of asylum denials by APRU, claiming that the process was duplicative and expensive. Outside observers not only viewed APRU's review role as duplicative, but

52 FR at 32554.

52 FR at 32558.

52 FR at 32557, 32560.

INS Pushes Major Changes to Proposed Asylum Rule, INTERPRETER RELEASES, Vol.

also believed that to some extent it undercut the authority of the Board of Immigration Appeals in attempts to reverse the Board's finding after a deportation order was administratively final.

66, No. 1, Jan. 2, 1989, at 3.

Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, at 1338.

4. How, and from what source, should country conditions be considered in the adjudication?

Through the codification of a definition of a refugee based on the Convention definition, Congress demonstrated its intent that refugee standards be applied neutrally, without an ideological basis for the decision. However, early applications of the definition were not immune from foreign policy concerns. Under the 1980 interim asylum regulations, the district director requested an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State (DOS). This opinion could provide the basis of the adjudicator's decision, in whole or in part.

Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, at 1262.

8 CFR § 208.7 (1980).

See 8 CFR § 20.8(d) (1980).

Though DOS advisory opinions were not binding on the adjudicating officer, a General Accounting Office study found that in 1984 the INS agreed with the State Department opinion in 96 percent of cases. Outside observers supported their claim that decisions on individual cases were heavily influenced by foreign policy concerns by citing approval rates for asylum seekers in the 1980s. Statistics covering the years 1983-1986 indicate that the highest approval rates were for applicants from countries considered to be unfriendly to the United States (Iran – 60.4%; Romania – 51.0%; Czechoslovakia – 45.4%) and that the lowest approval rates were for applicants from countries with anti-communist or friendly governments (El Salvador – 2.6%; Haiti – 1.8%; and Guatemala – 0.9%).

Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, at 1303.

USCR. *Despite a Generous Spirit: Denying Asylum in the United States*, at. 8. The USCR report also notes that the foreign policy paradigm did not always apply; there was a lower approval rate (14.0%) of Nicaraguans seeking asylum from the Sandinista government over the same period.

A politically influenced asylum system was not without support within the government. Edwin Meese, the Attorney General from 1985 to 1988, saw the validity of arguments made by representatives of Nicaraguan and Polish asylum-seekers that it was peculiar that the US government would deny asylum to people fleeing countries that the US opposed in foreign policy. To address this concern, the administration had considered issuing rules that would create a presumption that those individuals fleeing "totalitarian regimes" had a well-founded fear of persecution.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 463-464.

USCR, *Despite a Generous Spirit: Denying Asylum in the United States*, at 8, 10.

With the proposed final rule issued in 1987, DOJ and INS

52 FR at 32553.

recognized that consideration of country conditions from diverse sources would increase the accuracy and consistency of asylum decisions. Therefore, the proposed rule required CORAP to compile and disseminate information concerning the persecution of persons in other countries. In addition, regulations allowed asylum officers to rely on the country conditions information from sources beyond the Department of State that had been compiled and disseminated by CORAP and APRU. BHRHA was no longer required to provide opinions on each case, but retained the option to comment. However, despite these moves toward a more politically neutral decision, the 1987 proposed rule required that asylum officers consider the DOS Country Reports on Human Rights Practices to be the principal source of country conditions information.

52 FR at 32554.

52 FR at 32556.

52 FR at 32554.

The concern regarding the influence of foreign policy over asylum decisions was personified in the plaintiffs in the class action lawsuit *American Baptist Churches v. Thornburgh* (initially, *American Baptist Churches in the U.S.A. v. Meese*). In 1985 over 80 religious and refugee service organizations and two individual undocumented aliens brought suit in federal district court against the INS, the Executive Office for Immigration Review (EOIR) and the United States Department of State.

The religious and refugee service organizations were later dismissed from the lawsuit. *American Baptist Churches in the USA v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989).

The plaintiffs challenged the actions by the U.S. government on several grounds, including that the government applied immigration laws in a discriminatory manner in violation of their Constitutional right to equal protection of the law. In support of the discriminatory treatment claim, the plaintiffs cited statistics similar to those quoted above that reflected a lower asylum approval rate of asylum requests filed by Salvadorans and Guatemalans. Though an additional claim that international law conferred the right to temporary refuge was dismissed, the court allowed the individual plaintiffs to pursue the claims based on discriminatory denial of asylum and withholding of deportation and unlawful denial of extended voluntary departure and certified a nationwide class of Guatemalan and Salvadoran plaintiffs – the "*ABC* class."

See *American Baptist Churches in the USA v. Meese*, 712 F.Supp. 756, 765 (N.D. Cal. 1989).

American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989) (removing religious and refugee service organizations from the suit for lack of standing and dismissing claim to right to temporary refuge); Order (N.D. Cal. Sept. 12, 1989).

Settlement negotiations, which began in 1990, culminated in a court-approved settlement on January 31, 1991. The stipulated settlement agreement (Settlement Agreement) represents an agreement by both parties regarding the proper procedures for adjudicating the asylum claims of the

Specifically, the Settlement Agreement provides that eligible class members are entitled to *de novo* adjudication of asylum requests pursuant to the 1990

class members and is binding on both parties. Reflecting concerns of the plaintiff class, the preamble of the Settlement Agreement states that the following are not relevant to the determination of whether an individual is eligible for asylum:

asylum regulations, irrespective of any decisions rendered on previously filed asylum applications. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

1) foreign policy and border enforcement considerations;

2) the fact that an individual is from a country whose government the United States supports or with which it has favorable relations; and

760 F. Supp. 796, 799 (N.D. Cal. 1991).

3) whether or not the United States government agrees with the political or ideological beliefs of the individual.

Additionally, the preamble provides that the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities.

VI. THE 1990 FINAL RULE: QUALITY AT A COST

A. Basic Elements

A final rule on the asylum system was published on July 27, 1990 and became effective on October 1, 1990. The final rule provided an answer to each of the four questions that had been debated over the course of the previous ten years.

1990 Final Rule. 55 FR 30674-88.

1. A corps of professional asylum officers, trained in international relations and international law, was created solely to adjudicate affirmative asylum claims.

   8 CFR § 208.1(b) (1990).

   Under the new system, asylum officers interviewed applicants for asylum and wrote individualized analyses of the eligibility of the applicant for asylum given the application of the law to the facts at hand. To better ensure quality decisions, as a matter of policy it was decided that all applicants whose claims were not recommended for approval were issued Notices of Intent to Deny (NOIDs), which laid out the legal grounds for a denial, and provided an opportunity to rebut the proposed decision prior to the final adjudication.

   Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 469.

2. The final rule retained the process whereby those applicants not eligible for asylum who were not in legal immigration status were allowed to renew their applications for asylum when in deportation proceedings before an Immigration

   8 CFR § 208.18(c) (1990).

Judge.

Applicants denied by the Immigration Judge could appeal the decision to the Board of Immigration Appeals and then to federal appellate courts.

3. The new Asylum Corps would operate under the direction of an INS Assistant Commissioner for Refugees, Asylum, and Parole based out of the Central Office. — 8 CFR § 100.2(d)(3)(1990).

The Assistant Commissioner was responsible for "general supervision and direction in the conduct of the asylum program, including evaluation of the performance of the employees." The administration believed that placing authority for the direction of the asylum program in a headquarters office independent of the district offices would separate the program from the enforcement functions, and perceived enforcement mentality, of the rest of INS. The final rule retained a role for DOJ APRU, such as participation in training, passing on country conditions information material to asylum claims, and review of asylum decisions. On June 11, 1992 the functions of APRU were assumed by the Quality Assurance Branch of the INS Asylum Division and the Resource Information Center (RIC) and soon after APRU was abolished. — 8 CFR § 208.1(b) (1990).

55 FR at 30676.

8 CFR § 208.1, 208.17, 208.18 (1990).

In 1993 the functions of CORAP were separated into three branches (Asylum, Refugees, and Parole) within the INS Office of International Affairs (IAO) and later regulations placed the authority for the administration of the affirmative asylum program with the director of IAO. 59 FR 60065, 60068.

4. Country conditions information would be compiled from multiple sources.

The final rule required CORAP "to compile and disseminate to Asylum Officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, as well as other information relevant to asylum determinations." The regulation mandated the creation of a documentation center, an element not included in either of the proposed rules, to provide officers with information on human rights conditions as had been the practice in asylum systems of other countries. — 8 CFR § 208.1(c) (1990).

8 CFR § 208.1(c) (1990); 55 FR at 30676.

Seven asylum offices opened in April 1991, and an eighth, New York, opened in December 1994. The offices are currently

Asylum applicants who lived far from one of the asylum

located in Los Angeles (Anaheim), San Francisco, Newark (Lyndhurst), Houston, Miami, Chicago, Arlington, and Rosedale, New York. The program began with eighty-two asylum officers and had a total of 150 by March 1992.

offices would be interviewed at a nearer INS district office by an asylum officer on circuit ride.

Though the final rule answered the four questions debated in the previous years, it remained to be seen whether the new system, and its 82 dedicated asylum officers, was adequate to meet the two goals set before it: to produce high quality adjudications and to lessen systemic incentives for filing spurious claims in order to obtain work authorization or remain longer in the United States.

B. Achievements of the 1990 Final Rule: Improved Quality

In the years of debate prior to the promulgation of the 1990 final rule, refugee advocates and policy analysts questioned the ability of the INS and its adjudicators to produce quality asylum decisions. The administration responded by creating a new profession whose training and dedication would help achieve the desired quality. Many observers found that the newly-founded asylum corps conducted more thorough and informed interviews than those of the past, and demonstrated a thorough understanding of the relevant legal standards.

Lawyers Committee for Human Rights, *Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Refugee Convention: A Report* (1991).

1. Personnel

Part of the unique character of the new asylum corps could be found in the experience of its staff. Great efforts were made to hire individuals from diverse backgrounds; overseas experience, foreign language abilities, and cross-cultural skills were viewed as assets. 45 percent of new officers were hired from outside the ranks of INS, while 55 percent had some INS or other government experience. New members of the corps had previous experience in overseas refugee processing, domestic refugee resettlement, human rights report, the law, and international relations.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 468 & 471, n. 101.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 471.

2. Training

Focusing on improving the quality and consistency of asylum adjudications, plans for the asylum corps included comprehensive training for the new officers in international relations and international law. To develop this new training program, INS top management encouraged interested NGOs to join INS and asylum program officials in the task. Together, the working group developed the INS

8 CFR § 208.1(b) (1990). 1990 Final Rule, 55 FR at 30680.

Basic Law Manual, which served as the agency's interpretation of asylum law and provided the basis of much of the new officers' training.

The Asylum Program no longer uses the Basic Law Manual. Asylum Program guidance on adjudications is reflected in the Refugee, Asylum and International Operations (RAIO) Training Modules, the Asylum Division Officer Training Course materials, Asylum Division Procedural Manuals, and other materials. For historical reference, *see* Joseph E. Langlois, Asylum Division, Office of International Affairs. *Use of the Basic Law Manual*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 27 August 1999), 1 p.

In late February 1991, a four-week training program for the new asylum officers and supervisors began. The training program included discussions of the political and legal challenges that prompted the creation of the asylum corps; study of asylum law and policies; role-playing exercises to practice interviewing techniques and cross-cultural sensitivity; and assignments in asylum case analysis and decision-writing.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 471-472.

3. Resource Information Center (RIC)

The RIC began operations simultaneously with the new asylum corps on April 2, 1991. The mission of the RIC was to collate and disseminate information on conditions in countries of origin required by asylum officers to accurately assess applicants' eligibility for asylum. In the process of designing the RIC, INS officials worked closely with the Canadian government and its Immigration and Refugee Board Documentation Center and borrowed from its resources it developing the RIC's library of holdings. The RIC collected documentation from many non-governmental sources, such as Amnesty International, Human Rights Watch, and the Lawyers Committee for Human Rights, as well as began plans for producing its own pieces to summarize and analyze the reports of other organizations. This function is now performed by the RAIO Research Unit.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 472-474.

C. Failing of the 1990 Final Rule: Backlogs are the Cost of Quality

While the ability of the asylum corps to adjudicate cases fairly was regarded as a significant improvement over that of the previous INS Examiners, its ability to provide timely adjudications was not yet proven. The issue remained whether the new asylum system could achieve the goal of a fair adjudication that does not create an incentive for filing spurious claims.

See Sarah Ignatius, National Asylum Study Project, *An Assessment of the Asylum Process of the Immigration and Naturalization Service* (Harvard Law School, 1993), at 1; Beyer, *Affirmative Asylum Adjudication in the United States*, at 276 (citing assessment by Arthur Helton).

The task of establishing a new corps of professional, specially-trained adjudicators posed a logistical challenge for the INS. New officers had to be selected, cleared and trained; office locations had to be identified, leased and reconstructed; a management staff, including local office directors, had to be established; and adjudication procedures developed. Until the program was ready to become operational under the 1990 regulations, an interim corps of officers was pulled together from the ranks of district adjudicators, known as the Designated Asylum Officer Corps (DAOC). Owing to practical concerns, the INS district directors retained supervisory authority over the DAOC, supplemented by CORAP quality assurance visits, until the asylum program was ready to open its doors on April 2, 1991.

Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, at 467.

And when the asylum offices opened those doors, they were greeted by a backlog of approximately 140,000 cases that had developed before the work even began. Staffing projections developed in July 1991 anticipated that the new corps would be able to complete 80,000 cases annually, based on a three-hour average adjudication (including interview, research, and written analysis). In early 1992 the annual caseload was estimated at 180,000 per year, taking into consideration the slower adjudication in 1992, backlogs developing in the early days of the program, and the 150,000 cases expected to be filed as a resulted of the ABC Settlement Agreement. Initial hopes were that the 150 officers adjudicating cases by mid-1992 would be able to keep current with new receipts. In fact, by 1992 there was a recognition that the changes to the program would need to be made in order to allow the asylum corps to keep current with receipts and issue decisions within a short period of time (INS Commissioner Gene McNary indicated a goal of 90-days from date of filing as an adequate adjudication period).

See James Rowley, *New Immigration Unit Starts One Step Behind*, THE WASHINGTON TIMES, March 27, 1991.

Beyer, *Affirmative Asylum Adjudication in the United States*, at 275-276.

See Beyer, *Affirmative Asylum Adjudication in the United States*, at 279-281.

In 1991, the new Asylum Program had received 56,000 new filings, but had completed only 16,550 cases. The next fiscal

Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges*

year, the number of asylum applications filed rose to almost 104,000 while the number completed barely reached 22,000. In early fiscal year 1994, only one in three new asylum cases were being scheduled for interview. Each month, more than 10,000 cases were going directly into a backlog. The situation was exacerbated by the diversion of asylum resources to Guantanamo Bay, Cuba to screen Haitian asylum-seekers. By 1995, more than 425,000 applications would be in the asylum backlog. Many of those in the backlog had no real claim to asylum, but still enjoyed the benefit of a work permit. Others with real claims for asylum also were in the backlog. But without the grant of asylum, they remained in legal limbo, unable to begin a new life or legally bring their families out of harm's way at home. But as this backlog grew, the system became more vulnerable to fraud and abuse by those seeking work authorization without a real possibility of being scheduled for an interview.

and Opportunities, at 51.

By the Spring of 1993 Senator Edward Kennedy, Chairman of the Senate Subcommittee on Immigration and Refugee Policy declared during a hearing on asylum policy, "The asylum system has broken down, and it's up to Congress and the Administration to fix it." The DOJ Justice Management Division concluded in a September 1993 report that the asylum program had been underfunded and understaffed from its inception, requiring the program to play "catch-up from the very beginning."

Quoted in Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, at 53.

Justice Management Division, U.S. Department of Justice, *Management of the INS Affirmative Asylum System*, September 1993, cited in Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, at 49, n. 44.

Compounding the concern within administrative and congressional circles over the lack of timely asylum adjudications, public support for the asylum program was strained by publicized stories of immigrant smuggling and terrorist attacks by foreign nationals. The grounding of the Golden Venture at Rockaway Beach, New York with its load of Chinese nationals seeking refuge reignited public concern that floods of asylum seekers threatened U.S. control over its borders. In addition, the involvement of aliens with pending asylum applications in both the 1993 World Trade Center bombing and the attack on CIA employees in Langley, VA demonstrated how the failure to adjudicate asylum applications in a timely manner could impact national security. In late July 1993, President Clinton directed the Department of Justice to develop within three months an administrative, but not legislative, plan to reform asylum.

VII. 1995 ASYLUM REFORMS: QUALITY AND TIMELINESS

The 1995 asylum reforms, published after having been revised in response to public comments on December 5, 1994, became effective on January 4, 1995. The comprehensive package of reforms was the product of collaboration between government representatives and members of the non-governmental organization (NGO) community. Through dialogue and compromise, a plan emerged that retained the quality adjudication instituted by the 1990 reforms while adopting procedures that could keep up with demand and deter abuse. The new program would have to approve quickly those who needed asylum, while keeping those who did not qualify from benefiting just by filing an asylum application.

1994 Final Rule, 59 FR 62284.

The 1995 asylum reforms brought change at many levels. This package kept the best of the previous system, reformed procedures that had not been successful, and provided additional new funding. Most notably, the reform program retained the non-adversarial interview by INS asylum officers and an opportunity for a *de novo* hearing before an Immigration Judge in cases not approved by an asylum officer.

A. Decoupled Asylum Request from Automatic Employment Authorization

First, in the combined and streamlined process created by the reforms, applicants who applied on or after January 4, 1995, are not automatically eligible for a work permit. Prior to reforms, asylum applicants could apply for work authorization at the same time they applied for asylum. So long as the asylum request was not "frivolous," employment authorization was granted. Under the reforms, work permits are granted only if applicants are approved for asylum or if the government takes longer than 180 days to reach a final decision, whichever comes first.

1990 Final Rule. 55 FR 30674-88.

8 CFR § 208.7 (1990)

8 CFR § 208.7 (1990)

Note: The applicant can apply for work authorization 150 days after USCIS receives a complete application. USCIS then has 30 days to either grant or deny the request.

In order to achieve the goal of final adjudication, not including any administrative appeal to the BIA, INS negotiated with the Executive Office for Immigration Review, the body with authority over the Immigration Courts, and agreed that the asylum program would strive to adjudicate affirmative asylum cases within 60 days of filing. A case referred to the Immigration Court within the first 60 days of filing would be placed on a fast track for hearings before an Immigration Judge to provide the best opportunity for completing the adjudication

See also section VII.B., "Created the Referral Process," below.

Pub. L. 104-208, 110 Stat. 3009.

before the 180-day mark. The success of this aspect of the reforms was reflected in the amendments to the INA passed by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). By statute, in the absence of exceptional circumstances, the asylum program is required to conduct an affirmative asylum interview within 45 days of filing, and the Immigration Court is required to complete its adjudication within 180 days of filing.

INA § 208(d)(5)(A). The changes to asylum processing enacted with IIRIRA apply only to those applications filed on or after April 1, 1997.

B. Created the Referral Process

Second, the 1995 reforms streamlined the review process for cases not granted by the asylum corps. Prior to the reforms, asylum officers issued final decisions on all applications for asylum and withholding of deportation. An applicant who was found ineligible was denied, and the applicant had the right to file an asylum application *de novo* with the Office of the Immigration Judge, if exclusion or deportation proceedings were initiated.

8 CFR §§ 208.14(a); 208.18(b)(1990)

Pursuant to the 1995 revised regulations, and current regulations, requests filed by applicants who are deportable or removable and who are found ineligible for asylum must be referred directly to EOIR for adjudication in immigration proceedings. Asylum offices are able to issue documents placing individuals in proceedings before the Immigration Court based on the information provided in the asylum application, and asylum offices schedule hearings in Immigration Court directly through access to the Immigration Court's computer system.

8 CFR § 208.14(c)

The immigration judge adjudicates the same asylum application that was filed with the Asylum Office. As a matter or discretion, the immigration judge may allow the applicant to supplement or amend the application.

C. Removed the Right to Rebut in Most Cases

Prior to the reforms, asylum applicants who were found ineligible for asylum were sent written explanations of the decision and provided an opportunity to rebut the preliminary decision before a final decision was made. Under the reform regulations only applicants who are in the United States legally may be denied asylum by an asylum officer, and only after the applicant is first given a Notice of Intent to Deny (NOID) explaining the adverse determination and an opportunity to rebut the decision.

Note that the reform and current regulations do not apply to eligible class members of the *ABC* Settlement Agreement, who receive a NOID if found ineligible for asylum. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796(N.D. Cal. 1991).

D. Decisions No Longer Mailed in Most Cases

Prior to the reforms, asylum decisions and any documents initiating deportation or exclusion proceedings were mailed to the applicant's last known address. This process made it more difficult for trial attorneys to prove that an alien who did not appear for a deportation or exclusion hearing before an Immigration Judge had been properly served with charging documents.

Since the reforms, all applicants are required to pick up decisions in person, insuring that, if they are placed in removal proceedings, they are served with the charging documents, informing them of the date and place of hearing. An exception is made for asylum applicants who are interviewed at a circuit ride location.

8 CFR § 208.9(d)

E. Removed Authority to Adjudicate Requests for Withholding of Deportation in Most Cases

Prior to the reforms, asylum officers adjudicated requests for withholding of deportation (now withholding of removal) with each asylum request. Currently asylum officers adjudicate only requests for asylum despite the fact that the application for asylum is at the same time an application for withholding of removal. Applicants may present to an immigration judge a request for withholding of removal based on the original I-589 if referred by the asylum office.

8 CFR § 208.16(1990).

8 CFR § 208.16(a).

8 CFR § 208.3(b).

Further equipping the asylum program to deal with its increasing backlogs, the 1994 Violent Crime Control and Law Enforcement Act provided for sufficient additional resources to be made available to the reformed asylum process to double the U.S. Asylum Corps from 150 to over 300 Asylum Officers and permit an increase in the number of Immigration Judges from 112 to 179.

Through asylum reform and additional resources provided by Congress, the Asylum Program committed itself to processing asylum applications in a timely manner; therefore, the majority of decisions made by Asylum Officers were completed within 60 days of receipt of the application at the INS Service Center.

VIII. 1995-PRESENT: SUCCESS IN MAINTAINING QUALITY AND TIMELINESS

At the beginning of the reforms, the new asylum program faced a continuing onslaught of applications being filed at the rate of more than 127,000 per year (excluding applications filed under the ABC settlement agreement), coupled with a backlog of almost 425,000

cases. However, with the reform procedures in place, the Asylum Corps was prepared to tackle this once insurmountable task.

As a result of these reforms, the number of non-meritorious filings has significantly decreased, productivity within the streamlined asylum system has increased nearly fourfold, and the great majority of applicants are receiving decisions from the Asylum Program within 60 days of filing for asylum, and from Immigration Judges within 180 days of filing.

Since Fiscal Year (FY) 1993, asylum applications made to the Asylum Program have decreased by 75 percent, from 127,000 to approximately 41,883 in FY 2012. The reduction in new receipts demonstrates that the restriction on the availability of employment authorization and the prompt completion of removal proceedings for those not granted asylum removed the incentive to file false claims. Furthermore, the increase in approval rates by INS Asylum Officers from approximately 22% in FY 1993 and FY 1996 to 41% in FY 2012 indicates that genuine asylum-seekers are being identified, rather than languishing in the backlog.

Affirmative Asylum receipts generally fell from 1995 to 2005. In 2005 receipts hit a record low of 24,260. Since 2005, receipts have been slowly climbing to the 2012 level of 41,883. In the years of 2010 through 2012, the backlog slowly began to grow again on account of increased receipts. This increase in Affirmative Asylum receipts, combined with large increases in both the Credible Fear and Reasonable Fear programs, has increased the workload of the Asylum Division, significantly in the recent years.

By the end of 1999, claims were being granted asylum within six months of filing, often sooner, while those found ineligible were decided quickly and, if not in valid status, were placed in removal proceedings. Since FY 2000 the asylum program has consistently adjudicated more than 75% of its cases interviewed at one of the eight asylum offices within 60 days of filing. As a result of the success of the 1995 reforms, the asylum program regained the confidence of the government and public, finally achieving the balance between the two goals of an effective asylum program – quality adjudications and without creating incentives for filing spurious claims – that had previously been so elusive.

IX. OTHER DEVELOPMENTS IN THE HISTORY OF THE US ASYLUM PROGRAM

The status of the asylum program has not remained static since the promulgation of the regulations that ushered in asylum reform in 1995. Subsequent legislation and regulations have confronted the

asylum program with new challenges and opportunities. As evident from the discussion below, many of those changes came with the enactment of IIRIRA in 1996.

A. Expansion of the Refugee Definition

IIRIRA expanded the refugee definition to include resistance to a coercive population control program as a political opinion. The definition of a refugee now specifically includes language stating that:

INA § 101(a)(42).

> *For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.*

This amendment was viewed as superceding previous administrative opinions finding that forced abortions and sterilizations did not constitute persecution on account of a protected characteristic.

See *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996).

B. Credible Fear Screening Interviews

IIRIRA also created the process called expedited removal, which authorized INS to remove from the United States without a hearing those aliens who arrive at ports of entry and illegally attempt to gain admission without entry documents or with improper documents, unless the alien expresses an intention to apply for asylum or a fear of return. Aliens who express a fear of return are referred to an asylum pre-screening officer (APSO), who conducts an interview to determine whether the alien has a credible fear of persecution or torture. The credible fear standard is a low threshold test designed to identify all persons who could qualify for asylum and refer those aliens to the Immigration Court for a full hearing on the claim to asylum or other protection from return.

INA § 235(b)(1)(A)(i).

See Asylum lesson, *Credible Fear*

C. Reasonable Fear Determinations

Under the INA, DHS has the authority to issue or reinstate final orders of removal, without hearing, to certain aliens who have

INA §§ 238(b), 241(a)(5); 8 CFR § 241.8.

been convicted of an aggravated felony after admission or who illegally reentered the United States after having been removed, or after having left the United States voluntarily while under an order of exclusion, deportation, or removal. In order to ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person's life or freedom would be threatened on account of a protected characteristic, interim regulations require asylum officers to conduct reasonable fear determinations in certain situations where final orders have been issued or reinstated.

8 CFR § 208.31.

The reasonable fear standard operates as a screening mechanism, much in the same way as the credible fear standard, but requires aliens in the reasonable fear process to meet a higher standard than do aliens in the credible fear process. Those aliens who demonstrate a reasonable fear of persecution or torture are referred to an Immigration Judge for a hearing on the claim to protection under Article 33 of the 1951 Convention or Article 3 of the Convention Against Torture.

Article 3 of the Convention against Torture prohibits the return of any individual to a country where there are substantial grounds for believing that the person would be in danger of being subject to torture. For more information, *see*, Asylum lesson, *Reasonable Fear of Persecution and Torture Determinations*.

D. NACARA

On November 19, 1997 President Clinton signed the Nicaraguan Adjustment and Central American Relief Act (NACARA). Section 203 of NACARA allowed certain nationals of Guatemala, El Salvador and former Soviet bloc countries who entered the U.S. and applied for asylum by certain dates, or registered for benefits under the *ABC* settlement agreement, to apply for suspension of deportation or special rule cancellation of removal under standards similar to those in place prior to the enactment of IIRIRA. The Attorney General gave asylum officers the authority to grant relief under section 203 of NACARA in certain cases, in large part based on a judgment as to the efficient management of resources. Most NACARA section 203 beneficiaries had asylum applications pending with the Asylum Program, including most of the approximately 240,000 registered *ABC* class members. Allowing these individuals and their qualified family members to apply for relief under section 203 while their asylum applications are pending with the Asylum Program provides an efficient method for resolving most of the claims at an earlier stage in the administrative process. Granting this authority to asylum officers was also viewed as an acknowledgment of the ability of the asylum program to produce quality adjudications in a timely manner, the key success of asylum reform.

See Asylum lesson, *Suspension of Deportation and Special Rule Cancellation of Removal under NACARA*

IIRIRA restricted the availability of cancellation of removal by heightening the eligibility requirements and limiting the number of aliens who could be granted cancellation.

E. The Homeland Security Act of 2002

On March 1, 2003, U.S. Citizenship and Immigration Services (USCIS) assumed responsibility for the immigration service functions of the federal government. The Homeland Security Act of 2002 (Pub. L. No. 107–296, 116 Stat. 2135) dismantled the Immigration and Naturalization Service (INS) and separated the agency into three components within the Department of Homeland Security (DHS).

The Homeland Security Act created USCIS to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications. The law also formed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security.

As a part of this restructuring the Asylum Program became one division in the Refugee, Asylum and International Operations Directorate (RAIO). Asylum remains the largest division in RAIO, even after the creation of the Refugee corps in 2006. Under RAIO, the Asylum Division continues to evolve. In 2012, RAIO piloted a combined training course for all three RAIO divisions—the Asylum Division, the Refugee Affairs Division, and the International Operations Division. Building upon what was previously taught in Asylum Officer Basic Training Course and Refugee Officer Basic Training Course, Officer training now consists of the RAIO combined basic training course in conjunction with the division specific courses. New asylum officers now attend both the RAIO Combined Training Course and the Asylum Division Officer Training Course. Like the original AOBTC, these courses are designed to ensure that all officers in RAIO receive specialized training in asylum and refugee law as well as country conditions research, cross cultural communication and other issues important to asylum adjudications.

Another recent change to the Asylum Program has been the implementation of post adjudication, quality reviews. These reviews are conducted by all three divisions and the results are reported to RAIO management. The purpose of these reviews is to ensure consistency between the divisions in our adjudications of refugee and asylum claims and to identify training needs in the field offices.

X. CONCLUSION

Taken together, the final rule of 1990 creating the asylum corps and

the 1995 reforms produced an asylum system that addressed the goals identified in the wake of the challenges to the system identified the 1980s – to produce high quality adjudications and to lessen systemic incentives for filing spurious claims in order to obtain work authorization or remain longer in the United States. But even after the successes of the reforms and the awarding of increased responsibilities as described above, the examination of the program's performance does not end. One of the lessons learned from the period of 1980 to 1990 was that even a well-intentioned program will fail where it cannot stand up under scrutiny from Congress, NGOs, or the general public.