USCIS v. EOIR: Jurisdiction over Asylum Applications for Individuals Who Were in Expedited Removal Proceedings or Issued Notices to Appear

Practice Advisory[1]
December 20, 2017

The general rules governing where asylum seekers should file their applications appear straightforward; the Executive Office for Immigration Review (EOIR) has jurisdiction over asylum applications of individuals in removal proceedings (defensive filings), while U.S. Citizenship and Immigration Services (USCIS) has jurisdiction over applications filed by individuals not in removal proceedings (affirmative filings). *See* 8 C.F.R. § 208.2. Unfortunately, USCIS' application of these rules can be convoluted, particularly in cases involving expedited removal proceedings. Because the Department of Homeland Security (DHS) does not always promptly place noncitizens into proceedings before EOIR after they enter the United States, some asylum seekers have difficulty determining which agency has jurisdiction over their applications and, in some cases, report that they are unable to successfully submit their applications to *any* agency. As a result, they may be unable to successfully file for asylum within one year of their arrival in the United States as required by statute. *See* 8 U.S.C. § 1158(a)(2)(B).

In 2017, USCIS released documents addressing jurisdiction over asylum applications in response to discovery requests in *Mendez-Rojas v. Duke*, No. 2:16-cv-01024-RSM (W.D. Wash.).[2] The agency released a March 11, 2016 memo written by John Lafferty, Chief of

---

[1] Copyright (c) 2017 American Immigration Council (the Council), Dobrin & Han, PC, and the Northwest Immigrant Rights Project (NWIRP). Click here for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The author of this practice advisory is Kristin Macleod-Ball. We are grateful for the assistance of Lindsay Harris for reviewing and providing feedback.

[2] *Mendez-Rojas* is an ongoing nationwide class action challenging the failure of DHS to provide notice of the one-year deadline and the failure of both DHS and the Department of Justice to provide a uniform mechanism through which noncitizens can apply for asylum within one year of arrival in the United States. It was filed in June 2016 by the Council, Dobrin & Han, PC, NWIRP, and the National Immigration Project of the National Lawyers Guild (NIPNLG).

Plaintiffs in *Mendez-Rojas* are seeking a uniform mechanism through which all asylum seekers—including those who have been issued NTAs, in some cases after positive credible fear determinations, that have not been filed with an immigration court—can file their applications within the one-year deadline. USCIS' current position, as outlined in the Lafferty memo and jurisdiction chart, does not provide for such a mechanism. For more information about the case, click here.

the USCIS Asylum Division, entitled "Processing Affirmative Applications (Form I-589) Filed by Applicants in Expedited Removal and Processing Credible Fear Cases of Non-Detained Individuals" (Lafferty Memo), and an attached Asylum Jurisdiction Reference Chart (Jurisdiction Chart). The Lafferty Memo and Jurisdiction Chart, attached to this advisory, outline the agency's own interpretation of the jurisdictional rules governing asylum applications from individuals who have received Form I-860 Notice and Order of Expedited Removal (expedited removal orders), have had credible fear interviews and/or have been issued Notices to Appear (NTAs).

This practice advisory describes USCIS' position as set forth in the Lafferty Memo and Jurisdiction Chart and offers practical suggestions for filing asylum applications that USCIS is likely to reject for lack of jurisdiction. However, this practice advisory does not endorse USCIS' positions regarding jurisdiction over asylum applications.

1. **Do the regulations establish which agency has jurisdiction over an asylum application?**

Yes. Generally, USCIS has jurisdiction over an asylum application unless an NTA or other charging document has been served on the applicant and filed with an immigration court, in which case EOIR has jurisdiction until proceedings are terminated. 8 C.F.R. § 208.2;[3] *see also* USCIS Affirmative Asylum Procedures Manual (2016) at 68 ("The USCIS Asylum Division has jurisdiction to adjudicate the asylum application filed by an alien physically present in the U.S., unless and until a charging document has been served on the applicant *and filed* with EOIR, placing the applicant under the jurisdiction of Immigration Court.") (emphasis added); *id.* at 69 ("Jurisdiction remains with EOIR until proceedings have been terminated or the applicant departs from the U.S.").[4]

Additionally, noncitizens who are subject to expedited removal orders are referred to credible fear interviews before USCIS, rather than permitted to file affirmative asylum

---

[3] Subsections (a) and (b) of 8 C.F.R. § 208.2 (Jurisdiction) provide, in relevant part:

> (a)Refugee, Asylum, and International Operations (RAIO) Except as provided in paragraph (b) or (c) of this section, RAIO shall have initial jurisdiction over an asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry. . . .
>
> (b)Jurisdiction of Immigration Court in general. Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court. . . .

[4] Special rules apply to asylum applications submitted by unaccompanied children, *see, e.g.*, 8 U.S.C. § 1158(b)(3)(C), and the categories of noncitizens described in 8 C.F.R. § 208.2(c), including stowaways, crewmembers, and individuals subject to the Visa Waiver Program. This practice advisory does not address those exceptions.

applications. *See, e.g.*, 8 U.S.C. § 1225(b).[5] However, expedited removal orders may be vacated, including by a determination that the individual has a credible fear of persecution or torture. *See, e.g.*, 8 C.F.R. §§ 1003.42(f), 1208.30(g)(2)(iv)(B); *see also* 8 C.F.R. § 208.3(f). Where there is no outstanding expedited removal order, USCIS has jurisdiction over an asylum application unless the applicant's NTA is filed with an immigration court. *See* 8 C.F.R. § 208.2.

Under the plain language of the regulations, EOIR only obtains jurisdiction over an asylum application when a charging document has been issued and filed with the immigration court. 8 C.F.R. §§ 208.2(b), 1208.2(b). Until that happens, USCIS has jurisdiction. 8 C.F.R. §§ 208.2(a), 1208.2(a). For this reason, Plaintiffs in *Mendez-Rojas* and other practitioners have argued that USCIS should have jurisdiction over asylum applications filed by individuals issued NTAs which have not been filed with any immigration court, including noncitizens issued NTAs after positive credible fear determinations. Similarly, USCIS should have jurisdiction over an application submitted by an individual who *was* in proceedings before an immigration court but had those proceedings terminated.

The positions laid out in the Lafferty Memo and Jurisdiction Chart are not always consistent with these regulations. This practice advisory does not endorse USCIS' positions, but encourages practitioners to be aware of them to better advocate for clients seeking to apply for asylum. Practitioners should document all communications with the agency, including all efforts to submit their clients' asylum applications and/or obtain credible fear interviews, in case they need to argue that their clients are entitled to an exception to the one-year deadline. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(5).[6]

2. How will USCIS treat applications submitted by individuals who were issued expedited removal orders but never had credible fear interviews?

USCIS will reject these applications, regardless of whether an NTA has been issued to the applicant. *See* Jurisdiction Chart at Line 1 and 2; Lafferty Memo at 1-2 ("Individuals are in expedited removal proceedings if they have received a Notice and Order of Expedited Removal (Form I-860) that remains outstanding. If the individual is in expedited removal, USCIS does not have jurisdiction over an I-589 filed by that individual, even if the individual is paroled out of immigration detention."). Because these individuals have not had credible fear interviews, the expedited removal orders likely were not vacated prior to the commencement of proceedings before an immigration judge.

---

[5] For more information about the expedited removal process, please see the Council, ACLU and NIPNLG practice advisory on Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements.

[6] For more information about complying with the one-year deadline, please see our practice advisory on Preserving the One-Year Filing Deadline for Asylum Cases Stuck in the Immigration Court Backlog. *See also* Lindsay Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 Wis. L. Rev. 1185 (2017).

Sometimes, U.S. Customs and Border Patrol (CBP) or U.S. Immigration and Customs Enforcement (ICE) begins expedited removal proceedings but does not ultimately issue an individual an expedited removal order. They also may affirmatively vacate an expedited removal order. In either situation, USCIS should have jurisdiction over that individual's asylum application unless an NTA is filed with an immigration court. Consequently, practitioners may file affirmatively with USCIS, including evidence that their client does not have an outstanding expedited removal order and that no NTA has been filed with an immigration court.[7] Be aware, however, that USCIS may reject the application for purported lack of jurisdiction. *See* Questions 3 and 5 (regarding situations in which an NTA is served on an applicant but not filed with an immigration court). Even if USCIS were to reject the application, the practitioner would have a record of the client's attempt to file the application within one year of arrival, which could later support a claim that exceptional circumstances prevented the client from filing on time. *See supra* n.6.

Individuals who have been issued expedited removal orders and released from detention but have not yet had credible fear interviews should request an interview with USCIS. USCIS should conduct credible fear interviews, as long as the agency has copies of the required DHS forms (Forms I-860 and I-867A&B). Absent the required documentation, USCIS will require the individual to request a credible fear referral from ICE. *See* Lafferty Memo at 3.[8]

3. How will USCIS treat applications submitted by individuals who were issued expedited removal orders (with or without positive credible fear determinations), but never had NTAs filed in immigration court?

USCIS will reject these applications. *See* Jurisdiction Chart at Lines 2 and 7. Regardless of any argument that USCIS should accept an application from an individual whose NTA has not yet been filed with an immigration court, *see* 8 C.F.R. § 208.2; *infra* at Question 5, the agency is still unlikely to accept the application because it will treat the individual as "in expedited removal." Jurisdiction Chart at Line 7; *see also* USCIS Affirmative Asylum Procedures Manual at 74 ("[T]he asylum office does not have jurisdiction to adjudicate the applicant's affirmative I-589 application if the applicant has a positive credible fear finding and was issued an NTA, but the NTA was not filed with the immigration court . . . .").

Individuals who received credible fear determinations should ask USCIS to immediately file the NTA with an immigration court. *See* Jurisdiction Chart at 7; 8 C.F.R. § 208.30(f). Individuals who have not had a credible fear interview may want to contact the relevant ICE office to determine whether ICE intends to file the NTA and, if so, to encourage immediate action. *See* USCIS Asylum Division Quarterly Stakeholder Meeting (Aug. 2017), AILA Doc. No. 17062902 at 2 ("[I]f ICE or CBP issued the NTA, we recommend

---

[7] If no such evidence is available, practitioners may want to include a cover letting explaining that their client has no outstanding expedited removal order and a request that USCIS obtain confirmation of the vacated expedited removal order from CBP or ICE.

[8] For information on responding to a negative credible fear determination, see Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements at 3-4.

you contact ICE to request that ICE file the NTA with the immigration court. If an Asylum Office issued the NTA after conducting a credible fear screening, please contact the Asylum Office to request that it file the NTA with the immigration court.").[9] If ICE does not intend to file the NTA, noncitizens may request that that the agency vacates any outstanding expedited removal order to allow them to pursue asylum applications before USCIS. If ICE is unwilling to do so, such applicants may want to request a credible fear interview from USCIS. *See supra* Question 2. USCIS is likely to require confirmation that ICE does not intend to file the NTA before scheduling an interview. *See* Jurisdiction Chart at Line 2.

4. How will USCIS treat applications submitted by individuals who were initially issued expedited removal orders and subsequently were placed in immigration court proceedings, but whose immigration court proceedings were terminated?

USCIS will first determine the reason that immigration proceedings were terminated and will only accept applications submitted by individuals whose proceedings were terminated for substantive or non-technical reasons. *See* Jurisdiction Chart at Lines 4-7. While the full scope of what may constitute "technical" reasons is unclear, USCIS will reject applications submitted by individuals whose proceedings were terminated based on technically flawed NTAs. *Id*.

Individuals whose removal proceedings were terminated for non-technical reasons should submit evidence of the reason for termination to USCIS with their asylum applications. Individuals whose proceedings were terminated based on flawed NTAs issued by USCIS should request that USCIS file a new NTA. Otherwise, individuals may want to contact the relevant ICE office to determine whether ICE intends to file a new NTA and, if so, to encourage immediate action. If ICE does not intend to file a new NTA, applicants may request that that the agency vacates any outstanding expedited removal order to allow them to pursue asylum applications before USCIS. If ICE declines to do so, these individuals may wish to request a credible fear interview from USCIS. *See supra* Question 2. USCIS is likely to require confirmation that ICE does not intend to file a new NTA before scheduling an interview. *See* Jurisdiction Chart at Lines 2, 4, and 5.

5. How will USCIS treat applications submitted by individuals who were never subject to an expedited removal order and were issued NTAs which have not yet been filed in immigration court?

USCIS will reject the applications, unless ICE informs USCIS that it will not file the NTA with an immigration court. *See* Jurisdiction Chart at Line 3. If ICE informs USCIS that it will file the NTA, USCIS will reject the application. *Id*. If ICE fails to provide USCIS

[9] Practitioners should be aware that there may be an additional wait after DHS provides an individual's NTA to an immigration court before EOIR will accept jurisdiction over an asylum application from that individual, due to delays in entering NTAs into EOIR's database. Although EOIR should have jurisdiction from the time it receives the NTA, EOIR staff—as a practical matter—may not realize that the NTA has been submitted until the case is entered into the database.

with information about whether the NTA will be filed, USCIS is unlikely to act on the application. *Cf. id.* (directing USCIS to process an asylum application only "[i]f ICE does not file the NTA").

Practitioners may submit applications to USCIS including an argument as to why the agency has jurisdiction over their clients' applications pursuant to 8 C.F.R. § 208.2. However, USCIS is likely to require confirmation that ICE does not intend to file the NTA before determining whether to accept the application. *See* Jurisdiction Chart at Line 3. Practitioners may also want to contact the relevant ICE office to determine whether ICE intends to file the NTA and, if so, to encourage immediate action. *See* USCIS Asylum Division Quarterly Stakeholder Meeting (Aug. 2017), AILA Doc. No. 17062902 at 2 ("[I]f ICE or CBP issued the NTA, we recommend you contact ICE to request that ICE file the NTA with the immigration court."). If ICE does not intend to file the NTA, they may request that that the agency provides USCIS with documentation of that decision to allow them to pursue affirmative asylum applications.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Refugee, Asylum and International
Operations Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

MAR 1 1 2016

HQRAIO 120/9

Memorandum

TO: Asylum Office Directors and Deputy Directors
Supervisory Asylum Officers
Training Officers
Asylum Officers

FROM: John Lafferty
Chief, Asylum Division

SUBJECT: Processing Affirmative Applications (Form I-589) Filed by Applicants in Expedited Removal and Processing Credible Fear Cases of Non-Detained Individuals

I. Purpose

The purpose of this memorandum is to issue procedures for processing affirmative asylum applications (Form I-589) filed by individuals who are in expedited removal. It is also to issue procedures for processing credible fear cases of individuals who are in expedited removal and who are not in immigration detention (non-detained).

The Asylum Division has identified at least 600 I-589s in our pending caseload that may have been filed by individuals in the expedited removal process. See the attached IIDS report. Each asylum office must conduct additional system checks to confirm that the individuals are in the expedited removal process.

After an asylum office confirms an I-589 has been filed by an individual in expedited removal, the office must close the applicable I-589 in RAPS by April 15, 2016.

Once these cases are closed in RAPS, the asylum office must process these individuals through the non-detained expedited removal/credible fear process indicated below.

II. Background

Individuals are in expedited removal proceedings if they have received a Notice and Order of Expedited Removal (Form I-860) that remains outstanding. If the individual is in expedited removal,

EXHIBIT 8
WIT: Mura
DATE: 8-27-17
Kinkade RDR CRR CSR

USCIS does not have jurisdiction over an I-589 filed by that individual, even if the individual is paroled out of immigration detention. The attached reference chart indicates when the Asylum Division has jurisdiction to adjudicate an I-589 filed by a non-detained individual for whom a Notice to Appear (Form I-862) or an I-860 has been issued.

III. Procedures

Identifying I-589s

Asylum offices should use the IIDS report to identify I-589s that may have been filed by individuals in expedited removal and may be closed after verifying that they are in expedited removal. This report was created by removing all special group codes and then bouncing A-numbers on the RAPS 5-Part Backlog Detail Report that have a "Y," "C," or blank entry in the EARM column against ICE records in EARM. The report also contains information from RAPS and APSS.

At issuance of this memo, the IIDS report contains approximately 2,000 A-numbers that have an EARM encounter and a pending I-589. At least 600 pending I-589s appear to have been filed by individuals in expedited removal. Headquarters will provide an updated IIIDs report to the asylum offices on a regular basis. Beginning with the attached IIDS report, and then regularly, asylum offices must review the report, cross-check each A-number individually using EARM, EOIR, and US-VISIT to confirm that the individual is in expedited removal, and after confirmation close the applicable I-589 in RAPS.

The other pending I-589s on the report may have been filed by individuals who have NTAs or who are subject to a reinstatement of the prior order. See AAPM section III.L., *Jurisdiction*, and section III.S., *Reinstatement of the Prior Order*, for procedures to handle those I-589s.

Case Processing

Once asylum offices confirm an I-589 has been filed by an individual in expedited removal, asylum office personnel:

- Close the I-589 in RAPS using the Admin Close Update (CLOS) command with "No/IJ Jurisdiction" (C4) as the close reason and indicate on the CLOS screen that the asylum office will not issue an NTA/referral.
- Issue a *Notice of Lack of Jurisdiction (Expedited Removal)* letter (AAPM Appendix 94) to the individual.
- Write a memorandum to file that explains why the affirmative asylum case was closed and that the individual may be processed for credible fear (see attached *Sample Memo to File – No Jurisdiction*).
- Notify U.S. Immigration and Customs Enforcement (ICE) that the asylum office has all the required forms for the individual and will treat the case as a credible fear referral, or, if the asylum office does not have all the required forms for the individual, instruct the individual to contact ICE to make a proper credible fear referral.

- Schedule the individual for a credible fear interview as the office would normally schedule non-detained cases using Form G-56, *Notice of Credible Fear Interview*. If the individual was already scheduled for an affirmative asylum interview or appears for an affirmative asylum interview, the credible fear interview may be conducted at that time.
- Enter the credible fear case in APSS following the procedures described in Section IV below.
- Conduct the credible fear interview, make a credible fear determination, and serve the credible fear decision following the procedures in new CFPM section IV.N., *Non-Detained Aliens*.

An asylum office may treat the case as a credible fear referral if the asylum office has Form I-860 and Form I-867 Parts A&B for the individual prior to conducting the interview. If the non-detained individual did not receive a Form M-444 and the attached list of free legal service providers from U.S. Customs and Border Protection (CBP) or ICE, then asylum offices may still process the individual for credible fear after providing and explaining the M-444 and providing the attached list of free legal service providers at the time of the credible fear interview. The asylum office should notify ICE that it has the required forms and will be processing the non-detained individual for credible fear. This supersedes past draft guidance that required an explicit referral from CBP or ICE documenting an individual's expression of fear even when USCIS had the required DHS documents, including the M-444. Pursuant to this new guidance, asylum offices may treat the filing of an I-589 as the individual's expression of fear. The guidance in CFPM section III.D.1.b., *Orientation,* has been revised to clarify that it does not apply to non-detained individuals. Orientation guidance for non-detained individuals is included in the new CFPM section IV.N., *Non-Detained Aliens.*

IV. APSS Data Entry

Asylum office personnel should enter the non-detained credible fear case on the Preliminary Record (PREC) screen when the asylum office has the Form I-860 and the Form I-867 Parts A&B for the individual. The detention facility should be entered as *NONDET. Asylum office personnel should complete as much information as possible on the PREC screen but not enter a clock-in date. The clock-in date is the date the asylum office interviews the individual and should be entered when the individual appears for the non-detained credible fear interview.

V. Conclusion

The new and updated procedures and notices are located in the following sections of the Credible Fear Procedures Manual (CFPM) and the Affirmative Asylum Procedures Manual (AAPM):

- New AAPM appendix 94, *Notice of Lack of Jurisdiction (Expedited Removal)*
- Revised CFPM appendix, *Form G-56, Interview Notice*
- Revised CFPM section III.D.1.b., *Orientation*
- New CFPM section IV.N., *Non-Detained Aliens*
- New CFPM appendix, *Notice of Failure to Appear (Credible Fear Interview)*
- New CFPM appendix, *Notice of Failure to Appear (Credible Fear Decision)*
- New CFPM appendix, *Credible Fear Decision Pick-Up Notice*

- New AAPM section III.L.6., *Applicants in Expedited Removal*
- New AAPM section III.N.4., *Applicant Receives Parole and Form I-860*

AAPM section III.B.3, *Credible Fear-Screened Affirmative Asylum Applicants*, contains procedures on how to process affirmative asylum applications from individuals previously screened through the credible fear program. Those procedures remain unchanged.

These procedures are effective immediately and are incorporated into the AAPM and the CFPM on the ECN and the APSS User's Guide. If you have any questions regarding the guidance in the attached procedures, please contact the HQASM Operations Branch.

cc: ICE

Attachments (12) (excluding IIDS Report)

Asylum Jurisdiction Reference Chart

Scenario	Asylum Jurisdiction over I-589?	Asylum Jurisdiction over Credible Fear?
Individual issued I-860 and files an I-589 with USCIS.	**No.** Individual is in expedited removal.	**Yes.** No explicit referral from CBP or ICE is required for non-detained cases if the asylum office has all the required forms. Notify ICE that the asylum office is treating the case as a credible fear referral, then process the case accordingly. If the asylum office does not have the required forms then instruct the individual to contact ICE to make a proper credible fear referral.
Individual issued I-860 and NTA. No evidence ICE filed the NTA with the immigration court. Files I-589 with USCIS.	**No.** Individual is in expedited removal.	**Maybe.** Contact ICE to determine whether ICE will file the NTA with the immigration court. If ICE does not file the NTA and the asylum office is treating the case as a credible fear referral, then process the case accordingly. If the asylum office does not have the required forms, instruct the individual to contact ICE to make a proper credible fear referral.
Individual issued NTA and files I-589 with USCIS.	**Maybe.** Contact ICE to determine whether ICE will file the NTA with the immigration court. If ICE does not file the NTA with the immigration court then process I-589.	**No.** Individual is not in expedited removal.
Individual issued I-860 and NTA. IJ terminated proceedings for technical flaws in the NTA. Files I-589 with USCIS.	**No.** Individual is in expedited removal.	**Maybe.** Contact ICE to determine whether ICE will refile the NTA with the immigration court. If ICE does not refile the NTA and the asylum office has all the required forms, notify ICE that the asylum office is treating the case as a credible fear referral, then process the case accordingly.
Individual issued I-860 and NTA. IJ terminated proceedings for substantive or nontechnical reasons. Files I-589 with USCIS.	**Yes.**	**No.** Expedited removal order was terminated by the filing of the NTA with the immigration court.
Individual issued I-860 and NTA. IJ terminated proceedings for unknown reasons. Files I-589 with USCIS.	**Maybe.** Contact ICE.	**Maybe.** Contact ICE.
Asylum office issues an NTA to the individual after positive credible fear determination but the NTA was not filed with EOIR or was terminated by the IJ due to a technical fault. Files I-589 with USCIS.	**No.** Individual is in expedited removal.	**Yes.** Reissue the NTA and file the NTA with the immigration court.
Asylum office issues negative credible fear determination. Individual is not removed and later files I-589 with USCIS.	**No.**	**Yes.** Asylum office may treat the I-589 as a request for IJ review of the negative credible fear determination, or may exercise discretion to reconsider the negative determination.
Individual issued NTA and is in EOIR proceedings. Files I-589 with USCIS.	**No.**	**No.**