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*Submitted via <http://www.regulations.gov>*

**Re: American Immigration Lawyers Association and American Immigration Council's  
Comment on Procedures for Credible Fear Screening and Consideration of Asylum,  
Withholding of Removal, and CAT Protection Claims by Asylum Officers  
DHS Docket No. USCIS-2021-0012**

Dear Chief Cutlip-Mason and Assistant Director Alder Reid:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) submit the following comments in response to the above-referenced Department of Justice (DOJ) and Department of Homeland Security (DHS) (collectively, “the Departments”) Interim final rule (“IFR”) with a request for comments, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (DHS Docket No. USCIS-2021-0012), 87 Fed. Reg. 60 (March 29, 2022).

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring

contributions of America’s immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

We welcome many of the changes made between the notice of proposed rulemaking and this IFR. Among them are: the return to the prior standard of review for initial fear screenings; allowing USCIS to reconsider negative fear determinations; rescinding the proposal that allowed U.S. Citizenship and Immigration Services (USCIS) asylum officers to issue removal orders; and improvements in how the Departments handle the treatment of dependent spouses and children.

However, AILA and the Council believe the advanced timeline proposed in the IFR will significantly hinder access to due process, and we have concerns about the impact the asylum office agency culture will have on the implementation of this IFR.

## **I. The Timeline Proposed in the IFR**

Under the IFR, respondents are faced with the following timeline:

- The Asylum Merits Interview must be scheduled 21-45 days after a positive credible fear determination, with a decision generally issued within 60 days of the positive credible fear determination.<sup>1</sup>
- Any additional evidence to amend, correct, or supplement the credible fear record must be submitted to the asylum officer “no later than 7 days prior to the scheduled asylum interview,” or 10 days prior if submitted by mail.<sup>2</sup>
- If the asylum officer denies asylum, DHS files the NTA with EOIR, and the master calendar hearing must be scheduled “30 days after the date the NTA is served [on the respondent], or, if a hearing cannot be held on that date, on the next available date no later than 35 days after the date of service.”<sup>3</sup>
- The IFR creates a new mechanism in the form of a status conference, which is then similarly scheduled 30 days after the master calendar hearing, or no later than 35 days.<sup>4</sup>
- The final merits hearing is then scheduled 60 days after the master calendar hearing or no later than 65 days after the master calendar hearing.<sup>5</sup>

While the IFR does provide the opportunity for respondents to obtain extensions or continuances to seek counsel, these continuances are strictly limited. Before the immigration court, respondents may receive no more than 30 days of continuances for “good cause shown.”<sup>6</sup> Judges may delay the hearings an additional 45 days, but only on a heightened showing that the

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<sup>1</sup> Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. Vol. 87, No. 60 (Mar. 29, 2022) (to be codified at 8 CFR Parts 208, 212, and 235; 8 CFR Parts 1003, 1208, 1235, and 1240) [hereafter “IFR”] at 18096.

<sup>2</sup> *Id.* at 18081.

<sup>3</sup> *Id.* at 18223.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 18224.

<sup>6</sup> *Id.* at 18189.

continuance is “necessary to ensure a fair proceeding and the need for the continuance or extension exists despite the respondent’s exercise of due diligence.”<sup>7</sup> Continuances that would extend the merits hearing longer than 135 days are categorically barred, absent a showing that not granting the continuance would be unlawful under the Constitution.<sup>8</sup>

Thus, if a person passes a credible fear interview on January 1, they will be required to attend an Asylum Merits interview by February, receive a decision by March, appear for a master calendar hearing by April, have a status conference by May, and litigate their final merits hearing by June. As explained below, this timeframe will interfere with both the due process right to a meaningful hearing and the right to counsel.

## **II. The accelerated timeline of the IFR significantly hinders access to counsel and the opportunity to be heard in a meaningful manner, violating the right to due process.**

The opportunity to be heard in a meaningful manner is a foundation of due process.<sup>9</sup> The key to a meaningful opportunity to be heard is sufficient time to prepare for a hearing, and the right to counsel.<sup>10</sup> Unfortunately, the accelerated timelines provided in the IFR are so rapid that they do not provide sufficient time for an individual to obtain counsel and prepare for their hearings, depriving asylum seekers of meaningful access to due process.

Courts have repeatedly held that it is a violation of due process to deny respondents sufficient time to obtain counsel.<sup>11</sup> In light of this requirement, EOIR has long provided in policy that immigration judges should grant “at least one continuance” to obtain counsel.<sup>12</sup> Unfortunately,

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<sup>7</sup> *Id.* at 18104.

<sup>8</sup> *Id.* at 18083.

<sup>9</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

<sup>10</sup> See, e.g., *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (“Congress has recognized [the right to counsel] among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings.”); see also 8 U.S.C. § 1362; 8 C.F.R. § 292.1(a)(1)-(6).

<sup>11</sup> See, e.g., *Hernandez Lara v. Barr*, 962 F.3d 45, 55 (1st Cir. 2020) (violation of right to counsel where immigration judge denied continuance 14 business days after the time respondent became aware her prior counsel on a bond hearing would not be representing her); *Rios-Berrios v. I.N.S.*, 776 F.2d 859 (9th Cir. 1985) (violation of right to counsel where immigration judge granted two continuances of 24 hours each and proceeded without counsel 10 days after the Order to Show Cause was issued); *Castaneda-Delgado v. Immig. and Naturalization Serv.*, 525 F.2d 1295, 1300 (7th Cir. 1975) (violation of right to counsel where immigration judge only granted a single continuance of two business days, even where initial hearing occurred 15 days after Order to Show Cause); *Jiang v. Houseman*, 904 F. Supp. 971 (D. Minn. 1995) (overturning removal order on collateral attack after finding that a denial of a continuance 23 days after the Order to Show Cause was a violation of the right to counsel).

<sup>12</sup> EOIR Operating Policies and Procedures Memorandum 17-01, *Continuances* (July 31, 2017) (“it remains general policy that at least one continuance should be granted” to obtain counsel); OPPM 13-01, *Continuances and Administrative Closure* (March 7, 2013) (“absent good cause shown, no more than two continuances should be granted ... for the purpose of obtaining legal representation”); but see *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

the average respondent will be highly unlikely to be able to retain counsel under the timeframes laid out in the IFR.

*A. The IFR does not adequately address concerns regarding meaningful access to counsel for asylum applicants.*

The importance of legal representation cannot be overstated. A person who can retain an attorney is far more likely to succeed in immigration court.<sup>13</sup> A 2015 study showed that for non-detained immigrants, people with lawyers were nearly five times more likely to obtain immigration relief than those without (63% of those with representation obtained relief versus 13% of those without representation obtained relief).<sup>14</sup> The IFR allows for these fast-track procedures to occur while someone is in immigration custody. Among detained immigrants, people with lawyers were twice as likely to obtain relief than those without lawyers (49% of those with representation are able to obtain relief whereas only 23% of those without representation are able to obtain relief).<sup>15</sup> Notably, non-detained immigrants are much more likely to have representation, with two-thirds of them having counsel compared to only 14 percent of detained immigrants.<sup>16</sup> Recently arrived asylum seekers—who often have added vulnerabilities, including trauma, language barriers, and a lack of familiarity with the U.S. legal system—are especially dependent on counsel to understand and navigate our evolving and highly complex U.S. asylum laws.

*B. The IFR does not give adequate time for asylum applicants to obtain counsel.*

Fast-tracked immigration proceedings, such as those proposed in the IFR,<sup>17</sup> exacerbate existing barriers to access to counsel. Data collected from immigration cases that are part of another recent initiative to fast-track immigration proceedings, known as the “Dedicated Docket,” makes clear that accessing counsel takes time.<sup>18</sup> In May 2021, the U.S. Department of Justice (DOJ) and the U.S. Department of Homeland Security (DHS) announced the Dedicated Docket initiative, which places certain families who crossed between ports of entry on or after May 28, 2021, into fast-tracked removal proceedings where an IJ generally is expected to issue a decision within 300 days of the master calendar hearing.<sup>19</sup> Seven (7) months into the Dedicated Docket initiative, only 15.5% of asylum seekers had counsel to represent them in their proceedings, compared to 91.1% of asylum seekers whose cases were decided over the same period, but who were not in

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<sup>13</sup> Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 48–59 (2015), <https://bit.ly/3stYw55> [hereinafter “Eagly, *Access to Counsel*”].

<sup>14</sup> American Immigration Council, *Access to Counsel in Immigration Court*, 2-3 (Sept. 2016), <https://bit.ly/399gEuk>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *see supra* Part I.

<sup>18</sup> TRAC Immigration, *Unrepresented Families Seeking Asylum on “Dedicated Docket” Ordered Deported by Immigration Courts*, (Jan. 13, 2022) [hereinafter TRAC report], <https://trac.syr.edu/immigration/reports/674/#f4>.

<sup>19</sup> U.S. Dep’t of Just., *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings* (May 28, 2021), <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

fast-tracked proceedings.<sup>20</sup> Of those who had been on the Dedicated Docket for seven months—*more than three (3) times as long* as the IFR’s timeline (60 days) for issuing an asylum decision—only 45% had an attorney to represent them in court.<sup>21</sup> A total of 1,557 asylum seekers on the Dedicated Docket have received deportation orders so far. Of these, only 75 – just 4.7 percent – had representation. By contrast, since the start of the Dedicated Docket program just 13 people—all represented—have been granted asylum or another form of lawful relief from deportation.<sup>22</sup> These statistics are particularly troubling given the Administration’s assurances that families placed on the Dedicated Docket would have time, despite the expedited schedule, to access representation.<sup>23</sup>

Similarly, the IFR emphasizes the *opportunity* for asylum seekers, even in the new streamlined proceedings, to seek continuances of their proceedings to find counsel.<sup>24</sup> But the IFR ignores evidence of the *amount of time* needed to be able to secure counsel. A 2016 study of the 2014 initiative to fast-track the cases of unaccompanied children and families with children in immigration proceedings found that “shorter continuances systematically prevent pro se respondents from finding counsel.”<sup>25</sup> Based on the empirical evidence available, the study recommended that “continuances of under *ninety days* for non-detained immigrants should be presumptively invalid,” and that the government bear the burden of justifying a shorter continuance.<sup>26</sup>

In contrast, the IFR proposes a general rule that continuances “shall not exceed 10 days,” and after three such continuances—*just thirty days* of additional time—the burden falls on the asylum seeker to justify additional continuances under a heightened standard.<sup>27</sup> *If* the asylum seeker can meet that burden and receives additional continuances, should those continuances result in the merits hearing occurring *two and half months* after the 60-day deadline in the IFR, the asylum seeker must meet an even higher standard by showing that “failure to grant the continuance or extension would be contrary to the statute or the Constitution.”<sup>28</sup> Although it is notable that the IFR recognizes that “a continuance to seek representation would be sufficient to qualify for the heightened continuance standards in these streamlined 240 proceedings if denial would violate a noncitizen’s right to representation or another statutory or constitutional right,” the IFR is silent on how a pro se asylum seeker who is seeking continuances for the purpose of finding counsel would know their statutory or constitutional rights under U.S. law, and be able to demonstrate how the failure to grant a continuance violated such a right.<sup>29</sup>

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<sup>20</sup> TRAC Report.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> U.S. Dep’t of Just., *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings* (May 28, 2021), <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigrati-on-hearings>.

<sup>24</sup> IFR at 18078, 18104.

<sup>25</sup> David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 Fordham L. Rev. 1823, 1842 (2016).

<sup>26</sup> *Id.* at 1842-43 (emphasis added).

<sup>27</sup> IFR at 18103-04.

<sup>28</sup> *Id.* at 18104.

<sup>29</sup> *Id.*

*C. The IFR creates obstacles for immigration attorneys to zealously represent their clients and imposes nearly insurmountable challenges to obtaining counsel.*

Preparing an asylum case within the timeframe provided in the IFR will be *significantly* more difficult for immigration attorneys than under the current schedule and, as a result, the expedited timeframe will discourage many from agreeing to take these cases. Zealous representation, which is the immigration attorney's ethical duty as a member of the bar, requires multiple meetings between the client and the attorney to screen the client, build rapport, gather evidence, and prepare for hearings. Attorneys then need to carry out their own investigation, research relevant caselaw, draft the applicant's declaration, interview witnesses and potentially draft supplemental affidavits, consult with and potentially retain expert witnesses, prepare documents, and draft a pre-trial brief on the relevant legal issues. Some of these steps may include requesting documents from foreign countries such as police reports and medical records, a process that can take months before translation. In 2019, AILA's national Asylum & Refugee Committee of leading asylum experts estimated that "representing an asylum seeker in immigration court conservatively takes between 40-80 hours of work, with an estimated 35 hours of face-to-face communication with the client."<sup>30</sup> This estimate does not include preparing an affirmative asylum case before USCIS.

When an average case takes a matter of years, this time-intensive process can be spread out across a long period of time and allows an experienced immigration attorney to take multiple asylum cases at the same time. Under the expedited timeframes mandated in the IFR, immigration attorneys would be forced to carry out the same work as before the IFR, but within a week for the asylum merits hearing in order to meet the evidentiary deadline for DHS and within only two months for cases before the immigration court. Thus, rather than being able to represent hundreds of asylum seekers over the course of multiple years, immigration attorneys would be forced to represent much smaller numbers for much shorter periods of time. By proposing the accelerated timeline present in the IFR, the Departments place immigration attorneys in the impossible position of either representing fewer clients when there is already a shortage of attorneys available in the rural areas where border courts are located,<sup>31</sup> or doing less than zealous advocacy in the time available to them. Both of these options in turn impact their client's access to due process.

Given the difficulties involved, AILA and the Council anticipate that many immigration attorneys will decline to take cases of asylum seekers being heard through the IFR's new process. This will further exacerbate the problem of far greater demand for asylum representation than supply and make it even less likely that asylum seekers in the IFR's new process will be able to obtain counsel.

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<sup>30</sup>AILA Asylum & Refugee Committee, *AILA Sends Letter to DHS Acting Secretary Detailing MPP's Barriers to Counsel*, American Immigration Lawyers Association (June 3, 2019), <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

<sup>31</sup>April Simpson, *Wanted: Lawyers for Rural America*, Pew Trusts (June 26, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/26/wanted-lawyers-for-rural-america>.

Additionally, the price of retaining an attorney will prevent many asylum seekers from being able to obtain a lawyer under these accelerated timeframes. Current law requires asylum seekers to wait several months before they are even eligible for employment authorization, hindering their ability to pay an attorney. Many immigration attorneys charge a standard fee for an asylum case of ten thousand dollars. The expedited nature of the hearings will require immigration attorneys to charge significantly more per client. Respondents who have spent their life savings simply to get to the border are unlikely to be able to obtain sufficient funds to retain private counsel within six months, especially if fees are higher due to the expedited nature of the hearings. In addition, nonprofits that rely on per-client grant-based funding will be disincentivized to take cases under the IFR, as they will be unable to carry a client load at the same size as under the current system and thus risk losing funding if they focus their attention on a smaller number of cases at a more expedited schedule.

Fast-tracking immigration proceedings increase the risk that immigrants will be left to fight their cases without legal representation, preventing them from having a meaningful opportunity to contest their removal. The new standards for obtaining continuances and the shortened presumptive length of the continuances go against the IFR's stated "purpose to develop more fair and efficient processes to adjudicate the claims of individuals encountered at or near the border and found to have a credible fear of persecution or torture."<sup>32</sup> Language regarding preserving opportunities to secure counsel to ensure fair and efficient proceedings is rendered meaningless where the practical realities show that few can secure representation on such an expedited timeline.

*D. The proposed timeline and the barriers to counsel do not meet the Departments' stated goal of operational efficiency and will be impossible for the agencies to implement.*

The goal of operational efficiency will be better met without these barriers to access to counsel and due process. When immigrants have legal representation, they "have a better understanding of the legal process and are typically more prepared to proceed in their legal cases. The most common reasons pro se individuals request continuances are to seek counsel or to prepare their case."<sup>33</sup> Additionally, the accelerated timeline in the IFR will result in adjudicative errors, which will yield many more appeals to the Board of Immigration Appeals and to the federal courts of appeals.

Additionally, the timeline in the IFR will be impossible for the Departments to reasonably meet. When commenting on the prior administration's own attempt at implementing an expedited timeline, the National Association of Immigration Judges observed that "the overwhelming numbers of applicants in 2020 make it impossible to meet the 180-day deadline while ensuring due process."<sup>34</sup> An additional barrier to the Departments meeting the timeline are the

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<sup>32</sup> IFR at 18103.

<sup>33</sup> Jorge Loweree and Gregory Chen, "The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal," American Immigration Council, Jan. 15, 2021, <https://www.americanimmigrationcouncil.org/research/biden-administration-and-congress-must-guarantee-legal-representation-people-facing-removal>.

<sup>34</sup> See National Association of Immigration Judges Comment to NPRM at 2 (Oct. 23, 2020), available at <https://www.regulations.gov/document/EOIR-2020-0005-1701>.

practicalities of running an immigration court: in the first half of May alone, there were 6 closures of immigration courts due to power outages, COVID-19 exposure, building maintenance issues, severe weather, and closure of the building.<sup>35</sup> These practicalities will not go away in the face of the expedited timeline within the IFR, where the Departments propose to not only adjudicate claims within 180 days, but do so while coordinating across two separate departments.

The IFR also fails to acknowledge that the date at which DHS serves an NTA on a respondent is often far apart from the date at which DHS files the NTA with EOIR “pursuant to 8 CFR part 1239.” Under the IFR, removal proceedings begin once DHS has filed the NTA and “schedule[d] a master calendar hearing to take place 30 days after the date the NTA is served, or, if a hearing cannot be held on that date, on the next available date no later than 35 days after the date of service.”<sup>36</sup>

DHS already struggles to issue NTAs in compliance with existing law.<sup>37</sup> This provision of the IFR makes it likely that DHS will often be forced to schedule people for their initial master calendar hearing long past the 30 days on which the NTA was served, thus making it impossible for DHS to comply with the regulation.

*E. Recommendations to ensure due process concerns are met in the final rule.*

**We urge the Departments to withdraw the proposed expedited timeframe.** While we understand the Departments’ timeline concerns, the expedited timeframe does not adequately ensure meaningful access to counsel and due process.

**The Departments should eliminate restrictions on continuances, including the heightened standard for obtaining them, in the interest of preserving access to due process.** At a minimum, DHS should eliminate the presumption of 10-day continuances, as well as the heightened standards for obtaining continuances if the merits hearing would occur more than 90 days after the master calendar hearing. The Departments should also acknowledge the delays on the part of the government such as delays in filing NTAs and scheduling hearings, which should not count towards these expedited timelines.

**EOIR should uncouple any regulatory timelines from the date of service of the NTA.** EOIR should modify the language of 8 C.F.R. § 1240.17(b) as follows (changes in bold):

(b) *Commencement of proceedings.* Removal proceedings conducted under this section shall commence when DHS files a Notice to Appear (NTA) pursuant to 8 CFR part 1239 and schedules the master calendar hearing to take place 30 days after the date the NTA is ~~served~~ **filed** or, if a hearing cannot be held on that date, on the next available date no later than 35 days after the date of ~~service~~ **filing**.

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<sup>35</sup> DOJ EOIR, Twitter, accessed May 20, 2022, [https://twitter.com/DOJ\\_EOIR](https://twitter.com/DOJ_EOIR).

<sup>36</sup> IFR at 18223.

<sup>37</sup> See *Niz Chavez v. Garland*, 141 S.Ct. 1474, 1484 (2021) (“The government admits that producing complaint notices has proved taxing over time.”); see also *Pereira v. Sessions*, 138 S.Ct. 2105, 2119 (2018).

### **III. AILA and the Council express grave concerns about the impact the current culture of asylum offices will have on the implementation of this IFR.**

This rule will result in an unprecedented shifting of responsibility from the immigration court to the asylum office. We acknowledge that asylum seekers have often experienced trauma and, in general, it is more appropriate to interview asylum seekers in a non-adversarial interview setting than to subject them to a full hearing with cross-examination in court. The Refugee Asylum and International Operations (RAIO) training materials include a full lesson plan on non-adversarial interview techniques<sup>38</sup> as well as training materials on working with specific vulnerable populations. However, over recent years, many AILA members report asylum interviews becoming longer—often lasting more than six hours—and becoming more adversarial. Asylum officers often appear intent on finding minor inconsistencies as a justification to refer cases rather than to grant them.

A recent report issued by the University of Maine School of Law and partners highlights the culture of denial in the Boston asylum office that has led to asylum grant rates that are less than half the national average.<sup>39</sup> In addition to analyzing data across asylum offices, the report sought to answer the more subjective question, “Why does the Boston Asylum Office approve such a small percentage of asylum cases?” The authors meticulously analyzed data, including information that was disclosed after federal litigation over Freedom of Information Act requests, and conducted over 100 interviews of immigration practitioners, asylum seekers, and former asylum officers who had worked in the Boston asylum office. The authors found supervising asylum officers played an enormous role in creating a negative culture in the office. Since every proposed decision is reviewed by a supervising officer, and the asylum officer’s own employee performance evaluation is conducted by the same supervising officer, the asylum officer has a significant incentive to draft decisions that conform to their supervisor’s liking. If the supervising officer is predisposed to deny most cases, the asylum officers will feel a strong inclination to fall in line, both to demonstrate to the supervisor that their understanding of asylum analysis is similar to that of the supervisor and because it is faster to have supervisors approve draft decisions than to have to rewrite them if the supervisor disagrees. Additionally, the report pointed out that officers are immersed in a culture of viewing most asylum applications as being fraudulent, with 14 out of 21 trainings conducted in the office focusing on fraud and/or credibility. For the IFR to serve its intended function, asylum officers must fairly evaluate each claim that comes before them and not be unduly influenced by the biases of supervisors.

Similarly, on April 27, 2022, the National Immigration Project of NLG, along with partner organizations, filed a complaint about the Houston asylum office’s adjudication of credible fear

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<sup>38</sup> See RAIO, *Interviewing – Introduction to the Non-Adversarial Interview*, (Dec. 20, 2019) [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Intro\\_to\\_the\\_NonAdversarial\\_Interview\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf).

<sup>39</sup> University of Maine School of Law, et al, *Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers* (Mar. 2022) <https://mainelaw.maine.edu/news/report-boston-asylum-office-violates-rights-of-asylum-seekers>.

interviews (CFIs) with the DHS Office of Civil Rights and Civil Liberties.<sup>40</sup> The complaint focused on asylum officers' conduct in conducting CFIs and demonstrated their lack of compliance with existing law and guidance that is relevant to merits interviews as well as screening interviews. Specifically, the report highlighted Houston asylum officers' use of adversarial questioning, even for asylum seekers from vulnerable populations, with an improper focus on credibility rather than the potential viability of a claim. Likewise, asylum officers misapplied the law, subjecting asylum seekers at the threshold CFI stage to legal standards higher than necessary for corroboration at the merits stage. In other cases, asylum officers failed to follow the law altogether. In one especially egregious example, an asylum officer denied a Venezuelan asylum seeker's political opinion claim, finding that, even though he had suffered past persecution, he could avoid future harm by not expressing his political opinion.<sup>41</sup>

Additionally, a recent report issued by Human Rights First highlights extreme differences in adjudications from asylum office to asylum office. In addition to the problems highlighted above with the Boston asylum office, the New York asylum office's grant rate in Fiscal Year 2021 was a mere 7 percent.<sup>42</sup> Perhaps more disturbing were their findings of specific nationalities being treated differently in different offices. For example, the Los Angeles asylum office granted asylum to Cameroonians at a rate 2.5 times below the national average. Overall, the affirmative grant rate across all asylum offices dropped from 44 percent in 2016 to 28 percent in 2020.<sup>43</sup> As the Departments seek to shift a significant portion of asylum adjudications to the asylum offices, we are concerned that the asylum offices will not give asylum seekers fair and consistent adjudications.

Given the concerns raised here about the asylum office culture, asylum seekers will likely need to avail themselves of the Immigration Courts to seek protection. The problems with the current agency culture underscore why the expedited timeframes discussed above are so troubling. The IFR establishes a streamlined review of asylum office decisions. Although asylum seekers referred by the asylum office will be put into INA § 240 proceedings, it is not clear, in practice, whether judges will routinely conduct de novo hearings, or simply rubber-stamp the decisions made by the asylum office. As currently written, the IFR will simply usher asylum seekers through a process that is highly skewed toward a removal order. It is therefore critical that RAIO devotes resources to investigating asylum offices that have unacceptably low grant rates and implements a plan to improve performance in those offices.

*A. Recommendations to address this cultural problem within the agency.*

**DHS should address these issues prior to implementing any of the significant changes included in this IFR.** Given the culture identified in some of the asylum offices, it will be critical for RAIO Headquarters to provide oversight and monitoring to ensure that there are

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<sup>40</sup> National Immigration Project of NLG, et al, *Systemic Deficiencies at the Houston Asylum Office in Assessments of Credible and Reasonable Fear Cause Harm and Irreversible Damage to Asylum Seekers*, (Apr. 27, 2022) [https://nipnlg.org/PDFs/2022\\_27April-CFI-complaint.pdf](https://nipnlg.org/PDFs/2022_27April-CFI-complaint.pdf).

<sup>41</sup> *Id.* at 6.

<sup>42</sup> Human Rights First, *USCIS Records Reveal Systemic Disparities in Asylum Decisions*, May 2022, <https://www.humanrightsfirst.org/sites/default/files/AsylumOfficeFOIASystemicDisparities.pdf>.

<sup>43</sup> *Id.*

minimal discrepancies in grant rates across asylum offices and to investigate asylum offices that deny cases at unacceptable rates. Asylum office directors should also ensure that officers' denial rates are not influenced by the supervisor to whom they are assigned. The asylum offices will need to shift their cultural bias away from looking for reasons to refer cases to the court in order to clear their caseload, to fairly adjudicating each case under the law.

**DHS should revise and implement new training and curriculum for asylum officers that is consistent with the Constitution, asylum law, and international law, and ensure fair and meaningful access to asylum.** The training should emphasize culturally appropriate questioning and the sensitivities of traumatized asylum seekers. The training and directives from RAIO should include principles of fairness and dignity for asylum applicants appearing before officers.

**DHS should increase transparency in adjudications.** The asylum office should make statistics publicly available that break down grant rates by asylum office, country of nationality, and whether the asylum seeker's case falls under this new rule or is on the traditional affirmative asylum track. Moreover, DHS should make training materials and adjudicative guidance on which asylum officers rely publicly available so that counsel can better understand the decision-making process at the asylum office level.

#### **IV. Conclusion**

AILA and the Council urge the administration to address the due process and fairness issues unnecessarily created by emphasizing speed over accurate and considered decision-making of protection claims by asylum seekers. The Departments should not only withdraw their proposed expedited timeframe but address the cultural concerns identified in the asylum offices prior to implementing any significant changes included in the IFR.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL