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U.S. Immigration Policy on Asylum Seekers

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U.S. Immigration Policy on Asylum Seekers

Summary

The United States has long held to the principle that it will not return a foreign national to a country where his life or freedom would be threatened. This principle is embodied in several provisions of the Immigration and Nationality Act (INA), most notably in provisions defining refugees and asylees. Aliens seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.

Aliens present in the United States may apply for asylum with the United States Citizenship and Immigration Services Bureau (USCIS) in the Department of Homeland Security (DHS) after arrival into the country, or they may seek asylum before the Department of Justice's Executive Office for Immigration Review (EOIR) during removal proceedings. Aliens arriving at a U.S. port who lack proper immigration documents or who engage in fraud or misrepresentation are placed in expedited removal; however, if they express a fear of persecution, they receive a "credible fear" review with an USCIS asylum officer and — if found credible — are referred to an EOIR immigration judge for a hearing.

In FY2004, there were 27,551 claims for asylum filed with USCIS, and 55,067 asylum cases filed with EOIR. Generally, over two-thirds of all asylum cases that EOIR received were cases referred to the immigration judges by the asylum officers. The USCIS asylum officers approved 10,101cases in FY2004, a 32% approval. Of asylum cases EOIR decided in FY2004, the approval rate was 34%. At the end of FY2004, there were 182,015 cases pending for asylees to adjust to legal permanent resident (LPR) status.

Although there are many who would revise U.S. asylum law, those advocating change have divergent perspectives. Some express concern that potential terrorists could use asylum as an avenue for entry into the United States, especially aliens from trouble spots in the Mideast, northern Africa and south Asia. Others argue that — given the religious, ethnic, and political violence in various countries around the world — it is becoming more difficult to differentiate the *persecuted* from the *persecutors*. Some assert that asylum has become an alternative pathway for immigration rather than humanitarian protection provided in extraordinary cases. Others maintain that current law does not offer adequate protections for people fleeing human rights violations or gender-based abuses that occur around the world. At the crux is the extent an asylum policy forged during the Cold War can adapt to a changing world and the war on terrorism.

Major asylum provisions that were dropped from the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) were included in the REAL ID Act of 2005 (P.L. 109-13, Division B). This law also eliminated the annual cap of 10,000 on asylee adjustments. The House-passed Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) has provisions that may affect asylum seekers. This report will be updated as warranted.

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U.S. Immigration Policy on Asylum Seekers

Introduction

Background

The United States has long held to the principle that it will not return a foreign national to a country where his life or freedom would be threatened. This principle is embodied in several provisions of the Immigration and Nationality Act (INA), most notably in provisions defining refugees and asylees.[1] Aliens seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.[2]

Aliens present in the United States may apply for asylum with the United States Citizenship and Immigration Services Bureau (USCIS) in the Department of Homeland Security after arrival into the country, or may seek asylum before a Department of Justice's Executive Office for Immigration Review (EOIR) immigration judge during removal proceedings. Aliens arriving at a U.S. port who lack proper immigration documents or who engage in fraud or misrepresentation are placed in expedited removal; however, if they express a fear of persecution, they receive a "credible fear" hearing with an USCIS asylum officer and — if found credible — are referred to an EOIR immigration judge for a hearing.[3]

The INA makes clear that the Attorney General can exercise discretion in the granting of asylum. Aliens who participated in the persecution of other people are excluded from receiving asylum. The law states other conditions for mandatory denials of asylum claims, including when: the alien has been convicted of a serious crime and is a danger to the community; the alien has been firmly resettled in another country; or there are reasonable grounds for regarding the alien as a danger to

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[1] Refugees are aliens displaced abroad and their cases are considered overseas. For a full discussion of U.S. refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[2] INA §208; 8 U.S.C. §1158.

[3] Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture. For a full legal analysis of the this convention, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

national security.[4] The INA, moreover, has specific grounds for exclusion of all aliens that include criminal and terrorist grounds.[5]

Current Concerns

The core concern is the extent an asylum policy forged during the Cold War can adapt to a changing world. Most people who have traditionally received refugee or asylum status were fleeing communist or socialist countries. From 1946 through 2000, the United States gave legal permanent resident (LPR) status to 3.5 million refugees, asylees, and other humanitarian entrants. Over half (53%) of all of these refugees and asylees were from three countries: Vietnam (19%), Cuba (18%), and the former Soviet Union (16%). As one might expect, the collapse of the Soviet Union has altered the makeup of recent humanitarian admissions. During FY2001-FY2002, nationals from four countries comprised more than half (55%) of all the 234,590 refugees, asylees and humanitarian entrants who became LPRs: Bosnia-Herzegovina (20%), Cuba (20%), Ukraine (8%), and the former Yugoslavia (7%).[6]

Although there are many who would revise U.S. asylum law and policy, those advocating change have divergent perspectives. Some express concern that potential terrorists could use asylum as an avenue for entry into the United States, especially aliens from trouble spots in the Mideast, northern Africa and south Asia. Others argue that — given the religious, ethnic, and political violence in various countries around the world — it is becoming more difficult to differentiate the *persecuted* from the *persecutors*. Some assert that asylum has become an alternative pathway for immigration rather than humanitarian protection provided in extraordinary cases. Others maintain that current law does not offer adequate protections for people fleeing human rights violations or gender-based abuses that occur around the world.

This report is organized into four substantive sections. The first section summarizes the legislative history of U.S. asylum policy, highlighting the key provisions of the major immigration laws that established this policy. The second section presents an overview of current policy, discussing the concepts of "credible fear" and "well-founded fear," explaining affirmative and defensive avenues to seek asylum, and describing key procedures such as background checks and expedited removal. The third section analyzes asylum data, exploring trends over time as well as source countries and regions of the world. The final section synthesizes the issues of current debate, offering a range of alternative views.

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[4] INA §208(b)(2); 8 U.S.C. §1158.

[5] CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia; and CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

[6] CRS analysis of data from Table 23, Department of Homeland Security, Office of Immigration Statistics, *2002 Yearbook of Immigration Statistics*, Sept. 2003. For more on Cuban migration in particular, see CRS Report RS20468, *Cuban Migration Policy and Issues*, by Ruth Ellen Wasem.

Legislative History

Refugee Act of 1980

In 1968, the United States became party to the 1967 United Nations Protocol Relating to the Status of Refugees (hereafter, U.N. Refugee Protocol).[7] The U.N. Refugee Protocol does not require that a signatory accept refugees, but it does ensure that signatory nations afford certain rights and protections to aliens who meet the definition of refugee. At the time the United States signed the U.N. Refugee Protocol, Congress and the Administration assumed that there was no need to amend the INA and that the withholding of deportation provisions — then §243(h) of INA — would be adequate. In 1974, the INS issued its first asylum regulations as part of 8 C.F.R. §108. Prior to the passage of the Refugee Act of 1980, there was no direct mechanism in the INA for aliens granted asylum to become legal permanent residents (LPRs).

The Refugee Act of 1980 codified the U.N. Refugee Protocol's definition of a refugee in the INA, included provisions for asylum (§208 of INA), and instructed the Attorney General to establish uniform procedures for the treatment of asylum claims of aliens within the United States. Under the INA, a refugee is defined as an alien "displaced abroad 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."[8] The law defined asylees as aliens in the United States or at a port of entry who meet the definition of a refugee. For the first time, the Refugee Act added statutory provisions to INA that enabled those granted refugee and asylee status to become LPRs after certain general requirements were met.[9]

The 1980 law specified that up to 5,000 of the refugee admissions numbers, which are set annually by Presidential Determination in consultation with Congress, could be used by the Attorney General to give LPR status to aliens who had received asylum (and their spouses and children), and who have been physically present in the United States for one year after receiving asylum, continue to meet the definition of a refugee, are not firmly resettled in another country, and are otherwise admissible as immigrants. At that time, it appears that Congress and the Administration assumed that the 5,000 ceiling would be more than adequate.[10]

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[7] 19 U.S.T. 6223.

[8] §101(a)(42) of INA; 8 U.S.C. §1101.

[9] For a full discussion of U.S. refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[10] Later that same year, the Mariel boatlift brought approximately 125,000 Cubans and 30,000 Haitians to U.S. shores, and most of these asylum seekers ultimately became LPRs through special laws enacted for Cubans and Haitians.

Immigration Act of 1990

By 1986, the number of aliens receiving asylum annually was growing, and a backlog in obtaining LPR status developed due to the 5,000 ceiling. Compounding the frustration with the backlog was the worry of many of those asylees from Eastern Europe that — as a result of the improved political and human rights conditions in their native countries — they no longer would qualify as refugees under the law. Meanwhile, the number of aliens filing asylum claims surpassed 100,000 in 1989.

The Immigration Act of 1990 sought, among other major immigration reforms, to address the backlogs in asylee adjustments to LPR status. Foremost, it doubled the annual limit from 5,000 to 10,000 LPR adjustments. It also allowed those asylees who had filed for LPR adjustments before June 1, 1990, to do so outside of the numerical limits, effectively clearing out the existing backlog. The Immigration Act of 1990 further granted LPR status to those asylees who had qualified for LPR status as of November 29, 1990, but were unable to obtain it because of the prior numerical limits and improved country conditions. The crumbling of communism in Eastern Europe and the Arias Peace talks in Central America gave optimism to many that the number of asylum seekers would lessen in the future.[11]

1996 Revisions to Asylum Policy

Prior to 1996, aliens arriving at a port of entry to the United States without proper immigration documents were eligible for a hearing before an immigration judge to determine whether the aliens were admissible. Aliens lacking proper documents could request asylum in the United States at that time. If the alien received an unfavorable decision from the immigration judge, he or she also could seek administrative and judicial review of the case.

Critics of this policy argued that illegal aliens were arriving without proper documents, filing frivolous asylum claims, and obtaining work authorizations while their asylum cases stalled in lengthy backlogs. In the late 1980s and early 1990s, the mass exodus of thousands of asylum seekers from Central America, Cuba, and Haiti prompted further concerns that the then-current policy was unwieldy and prone to abuses because it provided for multiple levels of hearings, reviews, and appeals. The 1993 bombing of the World Trade Center heightened fears that international terrorists might enter the United States with false documents, file bogus asylum claims, and disappear into the population.

Supporters of the then-current system asserted that the regulatory reforms begun by the first Bush Administration and expanded by the Clinton Administration had already corrected the bureaucratic problems that had plagued the asylum process. They emphasized that the United States was a signatory to the UN Refugee Protocol and that INA codified the internationally-held legal principle of *nonrefoulement* (i.e., that an alien would not be forced to return to a country where his life or freedom

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[11] In Feb. 1987, the Presidents of El Salvador, Honduras, and Guatemala signed a 10-point peace plan for Central America that was first offered by Costa Rican President Oscar Arias. Nicaragua joined the peace process later that same year.

would be threatened). They also pointed out that aliens considered to be terrorists were already excluded by law from entering the United States. Proponents argued that aliens fleeing the most dangerous situations were likely to escape with fraudulent documents to hide their identity, and maintained therefore that even aliens lacking proper documents should be entitled to a full hearing and judicial review to determine if they might be admissible.

The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208) made substantial changes to the asylum process: establishing expedited removal proceedings; codifying many regulatory changes; adding time limits on filing claims; and limiting judicial review in certain circumstances, but it did not alter the numerical limits on asylee adjustments.

Expedited Removal. Among the significant modifications of the INA made by the IIRIRA are the provisions that created the expedited removal policy.[12] The goal of these provisions was to target the perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at the port of entry. As a result, if an immigration officer determines that an alien arriving without proper documentation does not intend to apply for asylum or does not fear persecution, the immigration officer can deny admission and order the alien summarily removed from the United States. The amendments to INA made by IIRIRA provide very limited circumstances for administrative and judicial review of those aliens who are summarily excluded (including those who are deemed not to have a "credible fear" as discussed below).[13]

Mandatory Detention. Foreign nationals arriving without proper documents who express to the immigration officer a fear of being returned home must be kept in detention while their "credible fear" cases are pending.[14] If an asylum officer determines that an alien does not have a "credible fear" of persecution, the alien is removed. If the asylum seeker meets the "credible fear" threshold, they may be released on their own recognizance while an immigration judge considers the case.

Deadlines. Another important change IIRIRA made to the asylum process is the requirement that all applicants must file their asylum applications within one year of their arrival to the U.[15]S. Aliens may be exempted from this time requirement if they can show that changed conditions materially affect their eligibility for asylum, or they can present extraordinary circumstances concerning the delay in their application filing.[16]

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[12] The IIRIRA provisions amended §235 of INA.

[13] For a full discussion, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[14] For background and analysis on detention policy under the Immigration and Nationality Act, see CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

[15] INA §208(a)(2)(B).

[16] See 8 C.F.R. §208.4(a)(4) and (5).

Safe Third Country. IIRIRA amended INA to bar asylum to those aliens who can be returned to a "safe-third country." This provision was aimed at aliens who travel through countries that are signatories to the U.N. Refugee Protocol (or otherwise provide relief from deportation for refugees) to request asylum in the United States. In order to return a potential applicant to a safe-third country, the United States must have an existing agreement with that country.[17]

Other Limitations. An additional restriction on the filing of asylum applications includes a bar against those who have been denied asylum in the past, unless changed circumstances materially affect their eligibility.[18] The reforms also established serious consequences for aliens who file frivolous asylum applications. For example, the Attorney General now has the authority to permanently bar an alien from receiving any benefits under the INA if he determines that they have knowingly filed a frivolous asylum application.[19]

Employment Authorization. IIRIRA codified many regulatory revisions of the asylum process that the former Bush and Clinton Administrations made. Most notably, aliens are statutorily prohibited from immediately receiving work authorization at the same time as the filing of their asylum application. Now the asylum applicant is required to wait 150 days after the USCIS receives his/her complete asylum application before applying for work authorization.[20] The USCIS then has 30 days to grant or deny the request.

Coercive Family Planning. IIRIRA also added a provision that enabled refugees or asylees to request asylum on the basis of persecution resulting from resistance to coercive population control policies, but the number of aliens eligible to receive asylum under this provision was limited to 1,000 each year.[21]

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[17] INA §208(a)(2)(A) and (C). The first and only agreement was signed with Canada in 2002.

[18] INA §208(a)(2)(A) and (C).

[19] INA §208(d)(6).

[20] 8 C.F.R. §208.7.

[21] This coercive family planning provision was added by §601. It states:

> 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.

Overview of Current Policy

Standards for Asylum

Because "fear" is a subjective state-of-mind, assessing the merits of an asylum case rests in large part on the credibility of the claim and the likelihood that persecution would occur if the alien is returned home. Two concepts — "credible fear" and "well-founded fear" — are fundamental to establishing the standards for asylum. The matter of "mixed motives" for persecuting the alien is also an important concept.

Credible Fear. The INA states that "the term *credible fear of persecution* means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under §208."[22] Integral to expedited removal, the credible fear concept also functions as a pre-screening standard that is broader — and the burden of proof easier to meet — than the well-founded fear of persecution standard required to obtain asylum.

Well-Founded Fear. The standards for "well-founded fear" have evolved over the years and been guided significantly by judicial decisions, included a notable U.S. Supreme Court case.[23] The regulations specify that an asylum seeker has a well-founded fear of persecution if:

> (A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;
> (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and
> (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.[24]

The regulations also state that an asylum seeker "does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country...."[25]

In evaluating whether the asylum seeker has sustained the burden of proving that he or she has a well-founded fear of persecution, the regulations state that the asylum officer or immigration judge shall not require the alien to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

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[22] INA §235(b)(1)(B)(v); 8 U.S.C. §1225.

[23] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782, Mar. 9, 1987).

[24] 8 C.F.R. §208.13(b)(2).

[25] Ibid.

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.[26]

Mixed Motives. The intent of the persecutor is also subjective and may stem from multiple motives. The courts have ruled that the persecution may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.[27] A 1997 BIA decision concluded "an applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future, [but must] produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground."[28] Generally, the asylum seeker must demonstrate in mixed motive cases that — even though his/her persecutors were motivated for a non-cognizable reason (e.g., the police's desire to obtain information regarding terrorist activities in the Sikh cases) — the persecutors were also motivated by the asylum seeker's race, religion, nationality, social group, or political opinion.[29]

Process of Requesting Asylum

An applicant for asylum begins the process either already in the United States or at a port of entry seeking admission. This process differs from a potential refugee who begins a separate process wholly outside of the United States.[30] Depending on whether or not the applicant is currently in removal proceedings, two avenues exist to seek asylum: "affirmative applications" and "defensive applications." The affirmative and defensive applications follow different procedural paths, but draw on the same legal standards. In both processes, the burden of proof is on the asylum seeker to establish that he or she meets the refugee definition specified in the INA.

Affirmative Applications. An asylum seeker who is in the United States and not involved in any removal proceedings files an I-589, the asylum application form, with the USCIS-Regional Service Center. The USCIS schedules a non-adversarial interview with a member of the Asylum Officer Corps. There are eight asylum offices located throughout the country. The asylum officers either grant asylum to successful applicants or refer to the immigration judges those applicants who fail to meet the definition. The asylum officers make their determinations regarding the affirmative applications based upon the application form, the information received

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[26] 8 C.F.R. §208.13(b)(2).

[27] *Harpinder Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).

[28] Matter of T-M-B-, 21 I. & N. Dec. 775, 777 (B.I.A. 1997).

[29] *Harpinder Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).

[30] For a full discussion of U.S. refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

during the interview, and other potential information related to the specific case (e.g., information about country conditions). If the asylum officer approves the application and the alien passes the identification and background checks, then the alien is granted asylum status.

The asylum officer does not technically deny asylum claims; rather, the asylum applications of aliens who are not granted asylum by the asylum officer are referred to EOIR immigration judges for formal proceedings. In some respects, these applicants/aliens are allowed a "second bite at the apple." Asylum applicants in the affirmative process are not subject to the mandatory detention requirements while their applications are being adjudicated, though there is broader authority under the INA to detain aliens for other grounds.[31]

Defensive Applications. Defensive applications for asylum are raised when an alien is in removal proceedings and asserts claim for asylum as a defense to his/her removal. EOIR's immigration judges and the Board of Immigration Appeals (BIA), entities in DOJ separate from the USCIS, have exclusive control over such claims and are under the authority of the Attorney General. Generally, the alien raises the issue of asylum during the beginning of the removal process. The matter is then litigated in immigration court, using formal procedures such as the presentation of evidence and direct and cross examination. If the alien fails to raise the issue at the beginning of the process, the claim for asylum may be raised only after a successful motion to reopen is filed with the court. The immigration judge's ultimate decision regarding both the applicant/alien's removal and asylum application is appealable to the BIA. Applicant/aliens seeking asylum via the defensive application method may be detained until an immigration judge rules on their application. The applicant/alien is not detained due to their asylum claim, but rather, because of their unlawful status in the United States.

Expedited Removal. An immigration officer must summarily exclude an alien arriving without proper documentation, unless the alien expresses a fear of persecution. When expedited removal initially went into effect in April 1997, the INS applied the provisions only to "arriving aliens," although the law provides the option of applying it to aliens illegally present in the United States for less than two years. According to DHS immigration policy and procedures, Customs and Border Protection (CBP) inspectors, as well as other DHS immigration officers, are required to ask each individual who may be subject to expedited removal the following series of "protection questions" to identify anyone who is afraid of return:

- Why did you leave your home country or country of last residence?
- Do you have any fear or concern about being returned to your home country or being removed from the United States?
- Would you be harmed if you were returned to your home country or country of last residence?
- Do you have any questions or is there anything else you would like to add?

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[31] CRS Report RL31606, *Detention of Noncitizens in the United States*, by Alison M. Siskin and Margaret Mikyung Lee.

If the alien expresses a fear of return, the alien is supposed to be detained by the Immigration and Customs Enforcement (ICE) Bureau and interviewed by an USCIS asylum officer. The asylum officer then makes the "credible fear" determination of the alien's claim. Those found to have a "credible fear" are referred to an EOIR immigration judge, which places the asylum seeker on the defensive path to asylum.[32] EOIR reports that it completed 91% of the 50,017 expedited removal asylum cases in 180 days or less in FY2003.[33]

Aliens Arriving by Sea. On November 13, 2002, the former INS published a notice clarifying that certain aliens arriving by sea who are not admitted or paroled are to be placed in expedited removal proceedings and detained (subject to humanitarian parole).[34] This notice concluded that illegal mass migration by sea threatened national security because it diverts the Coast Guard and other resources from their homeland security duties. The Attorney General expanded on this rationale in his April 17, 2003, ruling that instructs EOIR immigration judges to consider "national security interests implicated by the encouragement of further unlawful mass migrations ..." in making bond determinations regarding release from detention of unauthorized migrants who arrive in "the United States by sea seeking to evade inspection."[35] The case involved a Haitian who had come ashore in Biscayne Bay, Florida, on October 29, 2002, and had been released on bond by an immigration judge. The BIA had upheld his release, but the Attorney General vacated the BIA decision.[36]

Background Checks. All aliens seeking asylum are subject to multiple background checks in the terrorist, immigration, and law enforcement databases, notably the Interagency Border Inspection System (IBIS).[37] Those who enter the country legally on nonimmigrant visas are screened by the consular officers at the Department of State when they apply for a visa, and all foreign nationals are

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[32] For more information, see *Obtaining Asylum in the United States: Two Paths to Asylum*, at the USCIS website [http://uscis.gov/graphics/services/asylum/paths.htm#seekers].

[33] For further background and analysis, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[34] *Federal Register*, vol. 67, no. 219, Nov. 13, 2002, pp. 68923-68926.

[35] 23 I&N Dec. 572 (A.G. 2003).

[36] CRS Congressional Distribution Memorandum, *Policy Implications of Department of Justice Ruling on Bond Determinations for Unauthorized Aliens in Detention*, by Alison Siskin, May 1, 2003.

[37] IBIS is a broad system that interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Department's Enforcement and Communications System (TECS II), the former INS's National Automated Immigration Lookout System (NAILS) and Non-immigrant Information System (NIIS) and the Department of State's Consular Consolidated Database (CCD), Consular Lookout And Support System (CLASS) and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

inspected by CBP officers at ports of entry.[38] Those who enter the country illegally are screened by the U.S. Border Patrol or the ICE agents when they are apprehended.[39] When aliens formally request asylum, they are sent to the nearest USCIS authorized fingerprint site. They have all 10 fingers scanned and are subject to a full background check by the Federal Bureau of Investigation (FBI).[40]

Safe Third Country Agreement with Canada. On August 30, 2002, Canada and the United States signed the final draft text for the "safe third country" agreement regarding asylum claims made at land border ports of entry. The agreement states that any person being removed from Canada in transit through the United States, who makes an asylum claim in the United States, will be returned to Canada to have the claim re-examined by Canada. Further, any person being removed from the United States in transit through Canada, who makes an asylum claim in Canada, and whose asylum claim has been rejected by the United States, will be returned to the country from which the person is being removed. If the person has not had a refugee status or asylum claim determined by the United States, he or she will be returned to the United States to have the claim examined by the United States. Responsibility for determining the asylum claim will rest with the receiving country.[41] On March 8, 2004, DHS published the proposed rule to implement the safe third country agreement with Canada, but has not yet issued the final rule.[42]

Victims of Torture. Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter, Torture Convention). Article 3 of the Torture Convention prohibits the return of any person to a country where there are "substantial grounds" for believing that he or she would be in danger of being tortured. The alien must meet the three elements necessary to establish torture: (1) the torture must involve the infliction of severe pain or suffering, either physical or mental; (2) the torture must be intentionally inflicted; and (3) the torture must be committed by or at the acquiescence of a public official or person acting in

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[38] For more information and analysis of alien screening and background checks, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion of Aliens*, by Michael John Garcia and Ruth Ellen Wasem; CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem; CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, coordinated by Ruth Ellen Wasem with Jennifer Lake, James Monk, Lisa Seghetti, and Stephen Viña; CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse; and CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa M. Seghetti and Stephen Viña.

[39] CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nuñez-Neto.

[40] For more information, see U.S. Citizenship and Immigration Services, *Affirmative Asylum Procedures Manual*, Feb. 2003, pp. 93-144; available at [http://uscis.gov/graphics/lawsregs/handbook/AffrmAsyManFNL.pdf].

[41] A copy of this agreement is available on the DHS website at [http://uscis.gov/graphics/lawsregs/DraftAgree090402.pdf].

[42] 69 *Federal Register*, pp. 10620-10627, Mar. 8, 2004.

an official capacity. Generally, an applicant for non-removal under Article 3 has the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country. If credible, the applicant's testimony may be sufficient to sustain this burden without additional corroboration.[43] In assessing whether it is "more likely than not" that an applicant would be tortured if removed to the proposed country, all evidence relevant to the possibility of future torture is required to be considered. However, if a diplomatic assurance (deemed sufficiently reliable by the Attorney General or Secretary of State) that the alien will not be tortured is obtained from the government of the country to which the alien would be repatriated, the alien's claim for protection will not be considered further, and the alien may be removed.[44]

Statistical Trends

Asylum Requests and Approvals

Asylum Officers. As **Figure 1** illustrates, the number of affirmative asylum claims has varied greatly over the past 30 years, shaped by the prevalence of repression, civil unrest and violence around the world, as well as by changes in asylum policy. There was a drop in affirmative asylum claims being filed in the late 1990s followed by an upturn in FY2001 and FY2002. In FY2004, the affirmative claims dropped back to 27,551 — a level below the previous low point of 38,013 in FY1999. This decline in affirmative asylum claims has enabled USCIS to work through some of the backlog of pending cases. By the close of FY2005, there were 98,499 affirmative asylum cases pending at USCIS, down from a recent high of 393,699 at the close of FY1997.[45]

The number of affirmative asylum claims being approved also has fluctuated in recent years. Approvals by the INS asylum corps first surpassed 10,000 in FY1995 when 12,454 cases were approved. In FY2000, INS approved 16,693 asylum cases, and 31,202 cases were approved in FY2002. The number of cases USCIS asylum officers approved dropped to 10,101 cases in FY2004. The percentage of affirmative cases approved dropped from 44% of cases in FY2000 to 32% in FY2004. The approval rate has ranged historically from a high of 55% in FY1980 to a low 15% in FY1990.[46]

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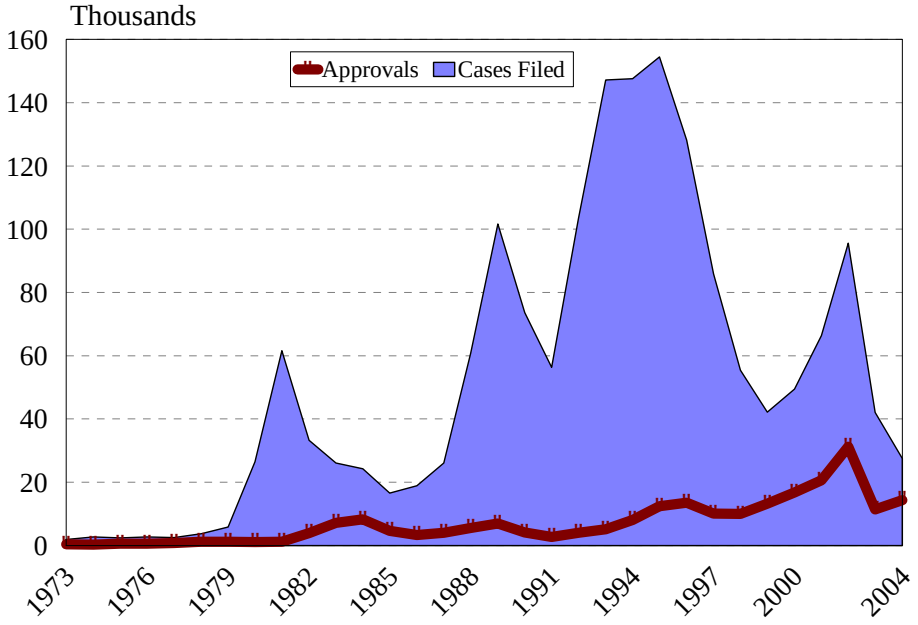
[43] 8 C.F.R. §208.16(c)(2).

[44] 8 C.F.R. §208.18(c) and §1208(c). For a full legal analysis of the Torture Convention, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy concerning the Removal of Aliens*, by Michael John Garcia.

[45] CRS analysis of data from U.S. Department of Homeland Security, Office of Immigration Statistics, *FY2004 Yearbook of Immigration Statistics*, Sept. 2005.

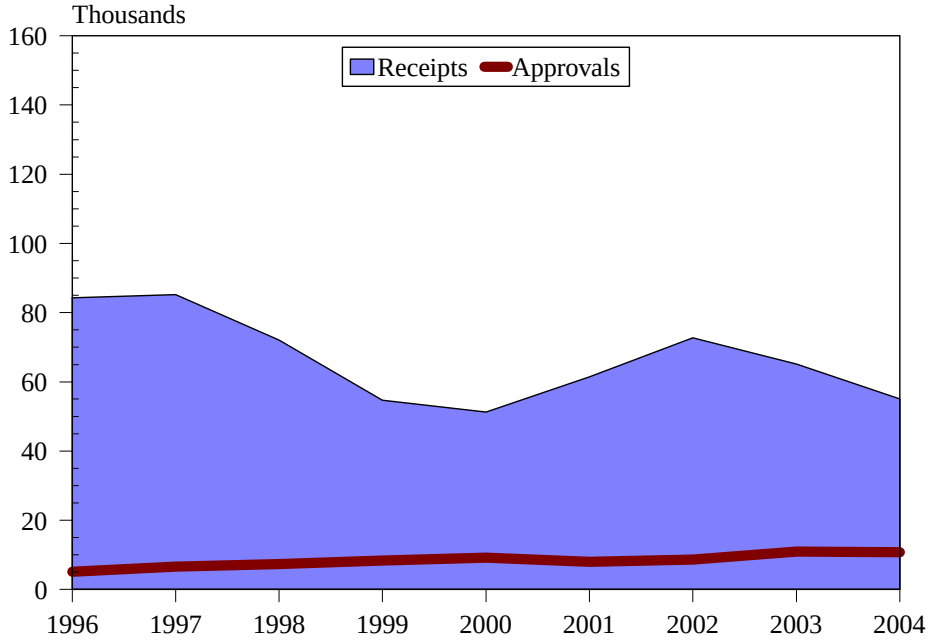
[46] Ibid.

Figure 1. Asylum Cases Filed with and Approved by Asylum Officers, FY1973-FY2004



Source: CRS presentation of USCIS Office of International Affairs data.

Figure 2. Asylum Cases Filed with and Approved by Immigration Judges, FY1996-FY2004



Source: CRS presentation of DOJ Executive Office for Immigration Review Office of Planning and Analysis data.

Immigration Judges. Recent trends in asylum statistics from EOIR exhibit a similar pattern of an overall decline in cases received in the late 1990s followed by a reversal of the trend in FY2001 and FY2002, as **Figure 2** illustrates. The number of cases dropped from 74,127 in FY2002 to 55,067 in FY2004, making the number of cases filed comparable to the low point of 54,916 in FY2000. Generally, over two-thirds of all asylum cases that EOIR receives are affirmative cases referred to the immigration judges by the asylum officers.[47]

The number of EOIR asylum approvals has risen gradually, as **Figure 2** depicts. (The Y axis is scaled to be comparable to **Figure 1**, and as a result the change over time is less apparent). Asylum cases granted by EOIR judges rose from 5,131 in FY1996 to 9,170 in FY2000. EOIR reached a high of 13,365 approvals in FY2003 and granted 10,796 cases in FY2004. The percentage of EOIR asylum cases approved (of the cases decided) in the past five years ranged from 32% in FY1991 to 40% in FY2001, and now has leveled at 34% in FY2004.[48]

Source Countries

In FY2004, just over half (55%) of all affirmative asylum claims filed with USCIS were from the top 10 source countries. This percent is down from FY2003, when the top 10 source countries of aliens who made affirmative asylum claims comprised 62% of the 42,114 asylum cases. As **Table 1** indicates, the percentage of cases approved among the top 10 countries ranges from a high of 60% for asylum seekers from Ethiopia to a low of 10% for asylum seekers from Haiti.[49]

Haiti became the top source country in FY2004 with numbers comparable to FY2003 when it ranked fourth (i.e., 3,543 and 3.276, respectively). The People's Republic of China dropped from 4,750 in FY2003 to 2,839 in FY2004. Asylum seekers from the top five source countries in FY2003 — People's Republic of China, Colombia, Mexico, Haiti, and Indonesia — made up 45.7% of all claims filed that year. It is important to acknowledge that Mexico went from being a source country of 3,846 asylum claimants in FY2003, to a number so small that disclosure standards were not met in FY2004.[50]

In addition to the top source countries overall, there were five source countries that had (1) more than 50% of their cases approved, and (2) more than 100 cases approved by USCIS in FY2004. These countries were Burma (Myanmar), Ethiopia,

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[47] CRS analysis of data from U.S. Department of Justice, Executive Office for Immigration Review, *FY2004 Statistical Yearbook*, Apr. 2005.

[48] Ibid. The approval rate for EOIR is calculated by dividing the number of cases approved with the sum of the number of cases approved and the number of cases denied.

[49] Ibid.

[50] CRS analysis of data from U.S. Department of Homeland Security, Office of Immigration Statistics, *FY2003 Yearbook of Immigration Statistics*, Sept. 2004.

Eritrea, Iran, and Pakistan. In FY2003, there were six countries meeting these criteria: Ethiopia, Eritrea, Liberia, Burma (Myanmar), Togo, and Iraq.[51]

Table 1. Top 10 Source Countries of USCIS Asylum Seekers

Source Country	New Cases Filed	Cases Approved	Percent Approved
Haiti	3,543	1,412	35
People's Republic of China	2,839	737	25
Colombia	2,452	1,544	45
Venezuela	1,418	610	45
Cameroon	1,189	556	42
Ethiopia	968	651	60
Brazil	774	23	33
Guatemala	703	154	10
Guinea	660	133	21
Russia	657	198	30
All nationalities	**27,551**	**10,101**	**32**

Source: DHS Office of Immigration Statistics, *FY2004 Yearbook of Immigration Statistics*, Sept. 2005.

The EOIR country data on asylum cases are similar to USCIS's affirmative asylum case data. In FY2004, the top 10 source countries of aliens who made defensive asylum claims comprised 62% of the 55,067 asylum cases filed with EOIR. Likewise, the top 10 source countries of aliens who made defensive asylum claims comprised 62% of the 65,153 asylum cases filed with EOIR in FY2003.

Table 2. Top 10 Source Countries of EOIR Asylum Seekers

Source Country	Cases Received	Cases Granted	Cases Denied	Percentage Approved (cases decided)
People's Republic of China	6,191	1,240	3,052	29.0
Colombia	5,127	1,470	3,064	32.0
Haiti	4,942	533	2,371	18.0
Guatemala	3,396	176	864	17.0
Mexico	3,319	68	591	10.0
El Salvador	2,519	42	608	6.0
Indonesia	2,428	421	1,226	26.0
Venezuela	1,615	57	248	19.0
India	1,338	57	248	19.0
Albania	1,226	724	627	54.0
All nationalities	**55,067**	**10,796**	**20,838**	**34.0**

Source: DOJ Executive Office for Immigration Review, *FY2003 Statistical Yearbook*, Mar. 2005.

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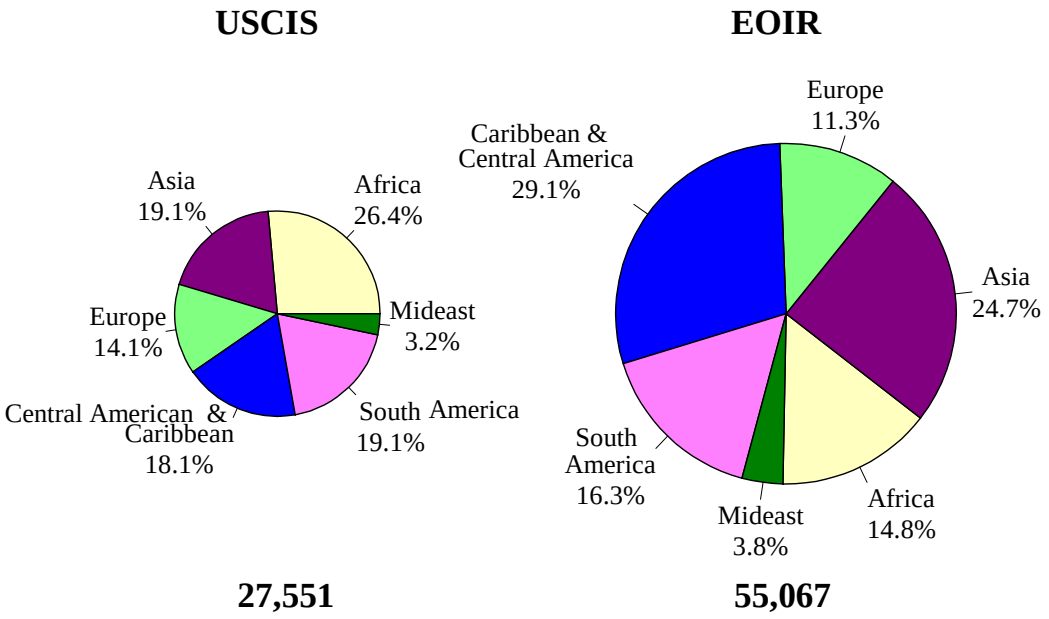
[51] CRS analysis of data from U.S. Department of Justice, Executive Office for Immigration Review, *FY2004 Statistical Yearbook*, Apr. 2005.

In FY2004, asylum claimants from the top five source countries — People's Republic of China, Colombia, Haiti, Guatemala, and Mexico — made up 43% of all defensive claims filed with EOIR. Asylum claimants from the top five source countries — People's Republic of China, Mexico, Colombia, Haiti, and Indonesia — made up 49% of all claims filed with EOIR in FY2003.[52]

The percentage of asylum cases approved (of those decided) by EOIR, however, exhibits a somewhat different pattern, as **Table 2** presents. Although EOIR generally has a higher approval rate than USCIS asylum officers (37% compared to 29% in FY2003), the percentage are fairly close in FY2004 — 34% to 32% respectively. The percentage of EOIR cases approved among the top 10 countries ranges from a high of 54% for asylum seekers from Albania to a low of 6% for asylum seekers from El Salvador. In FY2003, there were six source countries that had (1) more than 50% of their cases approved and (2) more than 100 cases approved by EOIR. These six source countries were Bangladesh, Burma (Myanmar), Egypt, Iran, Liberia, and Russia. In FY2004, there were 10 source countries that met this criteria: Albania, Russia, Egypt, Ethiopia, Guinea, Mauritania, Iran, Yugoslavia, Burma (Myanmar), and the Congo.[53]

Figure 3. Asylum Claimants by Regions of the World, FY2004



Source: CRS analysis of FY2004 data from the DHS Office of Immigration Statistics and the DOJ Executive Office for Immigration Review.
Note: EOIR data include asylum cases referred by USCIS.

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[52] CRS analysis of data from U.S. Department of Justice, Executive Office for Immigration Review, *FY2003 Statistical Yearbook*, Apr. 2004, and *FY2004 Statistical Yearbook*, Apr. 2005.

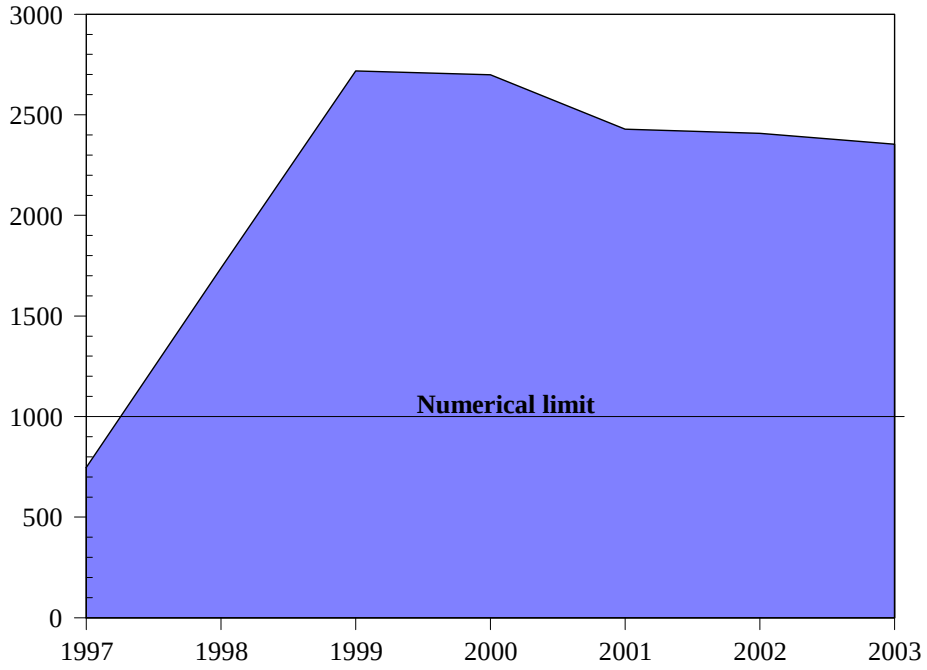
[53] Ibid.

Asylum seekers come from all over the world, as **Figure 3** illustrates, and the regional distribution of the USCIS claims differs from that of the EOIR claims, as do the sheer numbers. In FY2004, the top source regions for USCIS asylum claimants were Africa (26.4%) followed by Asia (19.1%) and South America (19.1%). In terms of EOIR asylum claims, the top source regions were Central America and the Caribbean first at 29.1%, Asia second at 24.7% and South America third at 16.3%. African asylum claimants comprised 14.8% of EOIR claims.

Coercive Population Control Cases

Since 1998, the second year the provision was available, the number of aliens eligible to receive asylum based on persecution resulting from coercive population control policies has exceeded the numerical limits of 1,000 annually, as **Figure 4** illustrates. As a result, USCIS and EOIR issue *conditional asylum* status to asylum seekers who demonstrate a well-founded fear that if returned home, they will be persecuted based on coercive population control policies.

Figure 4. Conditional Asylum Grants on the Basis of Coercive Population Control



Source: CRS presentation of data from the USCIS Office of Refugees, Asylum, and International Operations.

In FY2003, USCIS and EOIR granted conditional asylum status to 2,353 aliens based on resistance to coercive population control policies. USCIS issued 194 conditional grants of asylum, and EOIR issued 2,159 conditional grants of asylum. The country of origin for all conditional coercive population control grantees as of FY2003 has been the People's Republic of China. USCIS issued all 1,000 final grants of asylum for FY2003. At the end of FY2003, there were at least 7,665

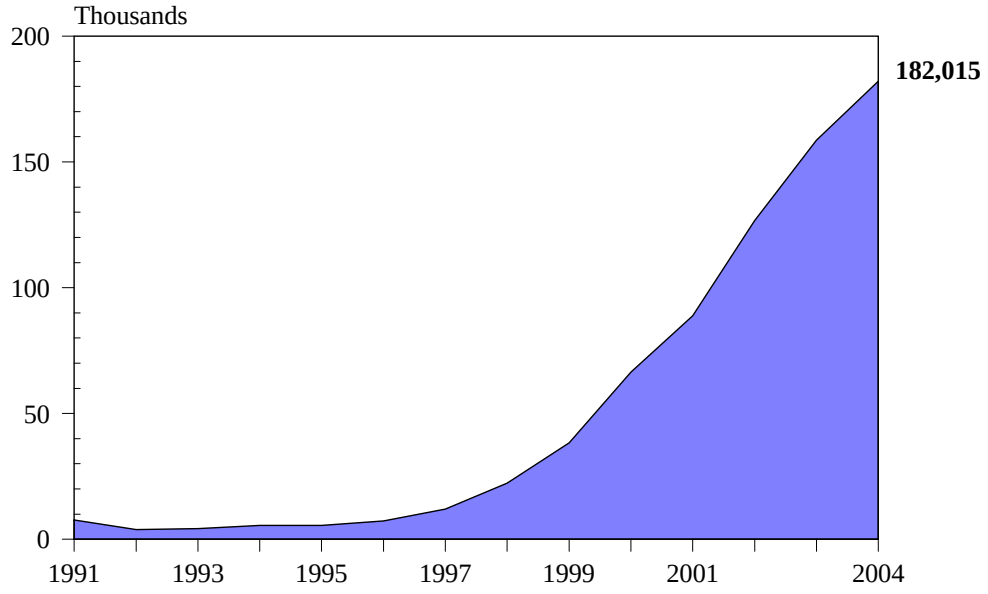
principal conditional grantees on the waiting list for final approval authorization numbers, comprising 6,401 EOIR cases and 1,264 USCIS cases.[54]

LPR Adjustment Cases Pending

As evident in **Figures 1 and 2** above, the number of people granted asylum each year exceeds the number who were permitted to adjust to LPR status — 10,000 annually. Both the USCIS and EOIR data represent asylum cases, not individuals. One case may include several people since asylum applicants may list their immediate family members on the petition. When assessing the potential number of LPR adjustments and the pressure on the 10,000 limit, the spouses and minor children of the asylees also must be factored in, even though they are not enumerated in the asylum caseload data depicted in the figures, because they count toward the cap when adjusting as LPRs.

At the end of FY2004, there were 182,015 cases pending for asylees to adjust to LPR status. As **Figure 5** illustrates, the growth of the backlog accelerated in the late 1990s. Prior to the enactment of the REAL ID Act (discussed below), which changed the law on numerical limits, a person who received asylum at the end of FY2004 would have had to wait about 18 years to become an LPR.

Figure 5. Pending Cases of Asylee Adjustments to LPR Status, FY1991-FY2004



Source: CRS analysis of data from the DHS Office of Immigration Statistics.

[54] Unpublished data provided by the USCIS Office of Refugees, Asylum, and International Operations.

Some maintained that the 10,000 annual limit on asylee adjustments to LPR status was an arbitrary provision and unfair, particularly because refugees coming from abroad do not have statutory limits on adjustment of status after a year of conditional residence. They argued that it served no policy function and only created unnecessary bureaucratic delays, reaching a 18-year wait for asylees to obtain the LPR "green card" by the end of FY2004. Some also criticized the 1,000 cap on asylees who flee coercive population control policies, arguing that it too was arbitrary and unfair, singling out one group of asylees for differential treatment.

Supporters of numerical limits expressed a concern that unlimited asylum adjustments would have a "magnet effect" that would encourage unauthorized migration, and they maintained that the numerical limits dampen this flow of migrants. They pointed out that those who obtain asylum are permitted to stay in the United States and thus have the necessary humanitarian relief from forced return.

Current Issues of Debate

Terrorist Infiltration and Screening[55]

Some have long been concerned that terrorists would seek asylum in the United States, hoping to remain hidden among the hundreds of thousands of pending asylum cases. Critics point to asylum seekers from countries of "special concern" (i.e., Saudi Arabia, Syria, Iran, North Korea, China, Pakistan, Egypt, Lebanon, Jordan, Afghanistan, Yemen and Somalia) as potential national security risks. Some argue further that — since asylum is a discretionary form of immigration relief — national security risks should outweigh humanitarian concerns, and thus asylum relief should be restricted and judicial review of asylum cases more limited.

Others point out that asylum seekers are subject to multiple national security screenings and that — if an asylum seeker is a suspected or known terrorist — the law already bars alien terrorists. They argue that the extent to which security risks exist, the risks result more from the limited intelligence data on terrorism, rather than an expansive asylum policy. Some assert further that asylees from countries of "special concern" may be beneficial to U.S. national security because they may have useful information that assists in the war on terrorism, much like assistance provided by communist defectors during the Cold War. Opponents of limiting the judicial review of asylum cases contend that it would erode two traditional values of U.S. polity — the right to due process and freedom from repression and persecution.

Coordination with Customs and Border Protection and Immigration and Customs Enforcement

Although USCIS and EOIR are clearly the lead agencies in asylum policy, the first contacts many asylum seekers have with the U.S. government are with Customs

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[55] For broader analysis, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

and Border Protection (CBP) inspectors, U.S. Border Patrol officers, and Immigration and Customs Enforcement (ICE) agents, whom some maintain are not adequately trained in asylum policy and other humanitarian forms of immigration relief. They maintain that these CBP officers and ICE agents are front line law enforcement who are so geared up to protect against terrorists that the they may not be flexible enough to recognize bona fide asylum seekers. They also question whether there is sufficient communication among the key immigration agencies: CBP, EOIR, ICE and USCIS.

Others point out that the CBP inspectors, U.S. Border Patrol officers, and ICE agents follow the policy and procedural guidelines to ensure that aliens who express a fear of returning home are given the opportunity to have their fears considered by an asylum officer and/or an immigration judge. They maintain the training is more than adequate and that ample protections are afforded to those who express fears of persecution.

Expanding Expedited Removal[56]

Proponents of expanding expedited removal refer to the provisions giving aliens who express a fear of persecution or an intention to seek asylum the opportunity for a credible fear determination. They usually cite statistics indicating that more than 90% of aliens who express a fear are deemed to be credible (pass their credible fear hearing) and are able to bring their cases to an immigration judge. They also note that the U.S. Commission on International Religious Freedom (USCIRF) study found that DHS has mandatory procedures in place to ensure that asylum seekers are protected under expedited removal.[57] Testifying on the issue of expedited removal, C. Stewart Verdery, Jr., formerly Assistant Secretary for Border and Transportation Security Policy and Planning in DHS, concluded, "I am heartened to see that internal and external reviews of the asylum process largely have concluded that DHS has handled this subset of cases appropriately."[58]

Critics of expedited removal maintain that a low-level immigration officer's authority to order removal is virtually unchecked. The officer's decision to place the person in expedited rather than regular removal proceedings, they argue, can result in the person losing substantive rights. Indeed, they assert that there have been reports of abuse of the procedure since it was first implemented at the ports of entry and many individuals with valid claims have been erroneously removed.[59] Critics

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[56] For a complete analysis, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

[57] U.S. Commission on International Religious Freedom, Study on Asylum Seekers in Expedited Removal, Feb. 2005.

[58] U.S. Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology and Homeland Security and Subcommittee on Immigration, Border Security and Citizenship, hearing on "The Southern Border in Crisis: Resources and Strategies to Improve National Security," Jun. 7, 2005.

[59] For examples of this view, see American Immigration Law Foundation, DHS Announces

(continued...)

refer to one investigation that found cases where aliens had requested the opportunity to apply for asylum but were refused and "pushed back" at primary inspection.[60]

Mandatory Detention

Opponents to the mandatory detention of asylum seekers in expedited removal usually cite the U.N. High Commissioner on Refugees, who maintains that detention of asylum seekers is "inherently undesirable."[61] Detention is psychologically damaging, some further argue, to an already fragile population that includes aliens who are escaping from imprisonment and torture in their countries. Asylum seekers are often detained with criminal aliens, a practice that many consider inappropriate and unwarranted. Some contend that Congress should provide for alternatives to detention (e.g., electronic monitoring) for asylum seekers in expedited removal. Others argue that the mandatory detention of asylum seekers provision should be deleted, maintaining that there is adequate authority in the INA to detain any alien who poses a criminal or national security risk.

Proponents for current law warn that releasing asylum seekers in expedited removal undermines the purpose of expedited removal and creates an avenue for bogus asylum seekers to enter the United States. They argue that mandatory detention of asylum seekers is an essential tool in maintaining immigration control and homeland security. Any loosening of these policies, they allege, would divert the CBP and ICE officers from their homeland security duties to track down wayward asylum seekers. Supporters of current law also contend that it sends a clear signal of deterrence to aliens who consider using asylum claims as a mechanism to enter illegally.[62]

Cuban and Haitian Policies

U.S. policy toward asylum seekers from Cuba and Haiti are often discussed in tandem because there are several key points of comparison. Both nations have a history of repressive governments with documented human rights violations. Both countries have a history of sending asylum seekers to the United States by boats. Finally, although U.S. immigration law is generally applied neutrally without regard

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[59] (...continued)
Unprecedented Expansion of Expedited Removal to the Interior, by Mary Kenney, Aug. 13, 2004; and Center for Human Rights and International Justice, University of California, Hastings College of Law, Report on the First Three Years of Implementation of Expedited Removal, May 2000.

[60] CBP has stated that it is "very concerned and dismayed that this is happening contrary to policy, and is taking steps to address this." U.S. Commission on International Religious Freedom, Study on Asylum Seekers in Expedited Removal, Feb. 2005.

[61] Office of the of the United Nations High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 1999.

[62] For further analysis of detention policy, see CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

to country of origin, there are special laws and agreements pertaining to Cubans and Haitians. Despite these points of similarity, the treatment of Cubans fleeing to the United States differs from that of Haitians.[63]

Many observe that Cuban migrants receive more generous treatment under U.S. law than Haitians or foreign nationals from any other country.[64] As a consequence of special migration agreements with Cuba, a "wet foot/dry foot" practice toward Cuban migrants has evolved. Put simply, Cubans who do not reach the shore (i.e., dry land), are interdicted and returned to Cuba unless they cite fears of persecution. Those Cubans who successfully reach the shore are inspected for entry by DHS and generally permitted to stay and adjust under the Cuban Adjustment Act (CAA) the following year. Despite what some consider generous treatment of Cubans, there are others who charge that the forced return of Cubans interdicted at sea violates the spirit, if not the letter, of U.S. asylum and refugee law.

Critics maintain that the Haitians are being singled out for more restrictive treatment than any other group of asylum seekers.[65] Haitians interdicted at sea are repatriated, as are Cubans; however, critics charge that Haitians who reach the United States are more likely to be detained and less likely to be paroled after the credible fear determination.[66] The Administration maintains that paroling Haitians (as is typically done for aliens who meet the credible fear threshold) may encourage other Haitians to embark on the risky sea travel and potentially trigger a mass migration from Haiti to the United States. The Administration further argues that all migrants who arrive by sea pose a risk to national security and warns that terrorists may pose as Haitian asylum seekers.

Gender-Based Persecution

Some advocate amending the INA's definition of refugee and asylee to expressly mention gender-based persecution, as was done for resistance to coercive population control policies. Proponents argue that those aliens fleeing such acts as female genital mutilation (FMG), rape by military or police forces, "honor killings," or domestic violence are not adequately protected by the INA because the alien must demonstrate that the abuse was based on race, religion, nationality, membership in a particular social group, or political opinion. They contend that the judicial

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[63] For fuller discussions and analyses of these issues, see CRS Report RS20468, *Cuban Migration Policy and Issues*, by Ruth Ellen Wasem; and CRS Report RS21349, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem.

[64] This policy is embodied in the Cuban Adjustment Act (CAA) of 1966 (P.L. 89-73), as amended, which provides that certain Cubans who have been physically present in the United States for at least one year may adjust to permanent residence status at the discretion of the Attorney General.

[65] U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration, *Hearing on the Detention and Treatment of Haitian Asylum Seekers*, Oct. 1, 2002. (Hereafter cited as Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*.) Available at [http://www.access.gpo.gov/congress/senate/pdf/107hrg/88613.pdf].

[66] Letter from Daniel J. Bryant, Assistant Attorney General, to Sens. Edward Kennedy and Sam Brownback, dated Sept. 25, 2002.

decisions thus far have been contradictory and often cite Attorney General John Ashcroft's announcement that he is reconsidering the decision of his predecessor Attorney General Janet Reno to vacate the BIA ruling denying asylum to a Guatemalan woman who sought asylum based on repeated domestic violence by her husband.[67] They assert that amending the INA to add gender as a basis would strengthen the policy, clarify the ambiguities resulting from varied judicial decisions, and speed up the lengthy asylum adjudication process.

Others maintain that current law affords sufficient protections for aliens fleeing gender-based violence and persecution. They cite the legal guidance for Asylum Officers issued in 1995 that stated: "severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution."[68] Supporters of current law point out that the BIA held *In Matter of Kasinga*, that a subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution and set the precedent for asylum on the basis of FMG in1996.[69] They assert that adding gender as basis for asylum would impose western cultural norms as well as create a migration magnet for women living in male-dominated cultures and countries.

Legislation

108th Congress

Among over three dozen bills that include provisions on asylum introduced in the 108th Congress, H.R. 4011, S. 710, and House-passed S. 2845 (substituting language from H.R. 10) received action. The asylum-related provisions of these three bills are summarized below.

House-Passed S. 2845. The Speaker of the House of Representatives Dennis Hastert introduced H.R. 10, to provide for reform of the intelligence community, terrorism prevention and prosecution, border security, and international cooperation and coordination. The House-passed H.R. 10 as amended on October 16, 2004, as the substitute language for S. 2845, National Intelligence Reform Act of 2004, which the Senate had passed October 6, 2004. Among its provisions, House-passed S. 2845 would have expanded authority for expedited removal and revise asylum law. More specifically, House-passed S. 2845 would have expanded the class of aliens subject to expedited removal without further hearing or review, by increasing the prior continuous U.S. physical presence required for exemption from such removal from two years to five years. It also would have restricted the ability of those aliens in expedited removal who are seeking asylum to be given an interview

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[67] Matter of R-A-, Int. Dec. 3403 (BIA 1999, A.G. 2001).

[68] U.S. Department of Justice memorandum to all INS Asylum Officers, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, from Phyllis Coven, Office of International Affairs, May 26, 1995.

[69] To read this case, see [http://www.usdoj.gov/eoir/library/intdec/id_pdf/3278.pdf]. See also CRS Report RS21923, *Female Genital Mutilation (FGM): Background Information and Issues for Congress*, by Tiajii Salaam, Erin Williams, and Ruth Ellen Wasem.

with an asylum officer to those aliens who have been physically present in the United States for less than a year.

House-passed S. 2845 would have established expressed standards of proof for asylum seekers, including that the applicant's race, religion, nationality, social group, or political opinion was or will be the *central motive* for his or her persecution. In addition, H.R. 10 would have codified that the burden of proof is on the asylum seeker to establish that he or she meets the refugee definition specified in the INA. As would have been required by § 3007 of House-passed S. 2845: the testimony of the asylum seeker may be sufficient to sustain such burden without corroboration, but only if it is credible, is persuasive, and refers to specific facts that demonstrate that the applicant is a refugee. Where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of the claim, §3007 would have required that such evidence be provided unless a reasonable explanation is given as to why such information is not provided. House-passed S. 2845 would have limited judicial review by barring a court from reversing the decision of the asylum adjudicator about the availability of corroborating evidence, unless it finds that a reasonable adjudicator is compelled to conclude that such evidence is unavailable.

H.R. 4011. The North Korean Human Rights Act of 2004 (P.L. 108-333, H.R. 4011) also included a provision pertaining to asylum. It requires that a national of the Democratic People's Republic of Korea (i.e., North Korea) not be considered a national of the Republic of Korea for purposes of eligibility for refugee or asylum status.

S. 710. The Senate Judiciary Committee reported S. 710, Anti-Atrocity Alien Deportation Act, which included a provision that would bar any alien who commits of acts of torture or extrajudicial killings from obtaining asylum. Language similar to S. 710 was added to House-passed S. 2845 and was included in the National Intelligence Reform Act of 2004 (P.L. 108-458).

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The Real ID Act. Many (but not necessarily all) of the immigration provisions that the conferees dropped from the National Intelligence Reform Act of 2004 (P.L. 108-458) were included in H.R. 418 introduced by House Committee on the Judiciary Chairman James Sensenbrenner.[70] Some of the asylum provisions in H.R. 418 are comparable to provisions in the 108th Congress's H.R. 10 as introduced or H.R. 10 as passed by the House. The key asylum provisions in H.R. 418 are found in §101 and have several key features.

- It would establish expressed standards of proof for asylum seekers, including that the applicant's race, religion, nationality, social group, or political opinion was or will be the *central motive* for his or her persecution.

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[70] For a legal analysis of H.R. 418, see CRS Report RL32754, *Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005,* by Michael Garcia, Margaret Mikyung Lee, and Todd Tatelman.

- It would codify that the burden of proof is on the asylum seeker to establish that he or she meets the refugee definition specified in the INA and would require that, where the trier of fact determines that the asylum seeker should provide evidence which corroborates otherwise credible testimony, such evidence must be provided (unless the applicant does not have the evidence or cannot obtain the evidence without leaving the United States);
- It require an alien applying for withholding of removal to be subject to the same credibility determinations and burdens as an alien applying for asylum.
- It would provide that no court shall reverse a determination (as made by a trier of fact with respect to the availability of corroborating evidence) in either asylum or withholding of removal cases, unless the court finds that a reasonable trier of fact would be compelled to conclude that such corroborating evidence is unavailable.

H.R. 418 would also repeal §5403 of the Intelligence Reform and Terrorism Prevention Act of 2004, which requires the Comptroller General of the United States to evaluate the extent to which weaknesses in the United States asylum system and withholding of removal system have been or could be exploited by aliens "connected to, charged in connection with, or tied to terrorist activity."

Among other things, the Manager's Amendment to H.R. 418 added a provision to the bill that would eliminate the annual cap of 10,000 on asylee adjustments to LPR status. H.R. 418 as amended passed the House of Representatives on February 10, 2005, by a vote of 261 to 161.

The Real ID Act also passed the House on March 12, 2005 as part of the FY2005 supplemental appropriations for military operations in Iraq and Afghanistan, reconstruction in Afghanistan and other foreign aid (H.R. 1268). The conferees for H.R. 1268 modified the asylum provisions, the most significant revisions from the original language being:

- established expressed standards of proof for asylum seekers, including that the applicant's race, religion, nationality, social group, or political opinion was or will be ***one of the central motives*** for his or her persecution;
- required that the asylum seeker provide evidence which corroborates otherwise credible testimony, such evidence must be provided, **unless the applicant cannot reasonably obtain the evidence**; and
- eliminated the 10,000 numerical limit on asylee adjustments and the 1,000 cap on asylum based on persecution resulting from coercive population control policies.[71]

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[71] U.S. House of Representatives, *Conference Report on H.R. 1268*, H.Rept. 109-72, May 3, 2005.

Because H.R. 1268 was an emergency supplemental appropriation, it was considered "must pass" legislation. It passed the House on May 5, 2005 and the Senate on May 10, 2005. The President signed H.R. 1268 as P.L. 109-13 on May 11, 2005.

Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. As passed by the House, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) has several provisions on which advocates for asylum seekers express concern. Foremost, §407 of H.R. 4437 would mandate that expedited removal be applied to all aliens (except those from Canada and Mexico) encountered within 100 miles of an international land border who have not been in the United States more than 14 days. In addition, Title II of H.R. 4437 would upgrade the consequences of illegal presence from a civil offense to a criminal offense. Since many asylum seekers arrive without proper documents or are in the United States illegally when they claim asylum, some argue the bill would subject them to mandatory detention and generally bar them forever from obtaining asylum, and subject them to arrest by state and local law enforcement who encounter them.[72] Others maintain that H.R. 4437 retains the protections in current law for aliens who express a fear of persecution or an intention to seek asylum the opportunity for a credible fear determination.

In addition to these bills, the Legislative Information System (LIS) lists 22 other asylum-related immigration bills that have been introduced, but have not seen action thus far in the 109th Congress.

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[72] United States Conference of Catholic Bishops, Office of Government Liaison, *Weekly Update on Immigration and Refugee Legislative Matters 109th Congress*, Dec. 26, 2005.