PARTICULARLY ABUSED: CLOSING THE BACKDOOR ON CERTIFIABLY DENIABLE PARTICULAR SOCIAL GROUP ASYLUM CLAIMS

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INTRODUCTION

Immigrants have come to the United States (U.S.) for generations in search of a better life. There is no denying the pull effect[1] that the U.S. has with a booming economy, a stable government, and the safety it offers to many refugees.[2] But what happens when the flock of people entering the U.S. becomes too much for the immigration courts to handle?[3] The system becomes overcrowded, abused, and broken.[4] No one can blame those who flood the borders—for many, it is not an easy choice[5]—and while the U.S. immigration policy is arguably the most generous, it is not limitless.[6] This note examines the current application of asylum law and the detrimental effect it has had on the immigration court system. More specifically, asylum claims

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1. *Push or Pull Factors: What Drives Central American Migrants to the U.S.?*, NAT'L IMMIGR. F. (July 23, 2019) [hereinafter *Push or Pull Factors*], https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/ (explaining that the pull effect or "'pull' factors are circumstances in the destination country [the U.S.] that make it a more attractive place to live than [a migrant's] home countr[y]").

2. *Id.*

3. *Immigration Court Backlog Surpasses One Million Cases*, TRAC, SYRACUSE UNIV. (Nov. 6, 2018) [hereinafter *Immigration Court Backlog*], https://trac.syr.edu/immigration/reports/536/ (providing that as of fiscal year 2018, the U.S. Immigration Court had a backlog of 1,098,468 cases).

4. *See id.*

5. *See generally* SONIA NAZARIO, ENRIQUE'S JOURNEY (Random House Trade Paperbacks 2006) (narrating the story of one boy's strenuous journey from Honduras to the United States).

6. *See* Phillip Connor & Gustavo López, *5 Facts About the U.S. Rank in Worldwide Migration*, PEW RSCH. CTR. (May 18, 2016), https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/ ("[T]he U.S. has more immigrants than any other country in the world. As of 2015, the United Nations estimates that 46.6 million people living in the United States were not born there."); *Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline (July 28, 2020).

made on account of the protected ground, membership in a Particular Social Group (PSG) and the meritless claims which will inevitably be denied.

Part I of this note traces the historical aspects of asylum law and the previous solutions put in place to address the influx of immigrants. Part II discusses the recent surge in asylum applications and their detrimental effect on the immigration courts' caseload. Part III explores the various ways an immigrant can apply for asylum, while Part IV analyzes the various elements an alien must establish to warrant relief and further examines the frequently asserted ground—membership in a particular social group—as well as the narrow scope immigration courts have recognized as cognizable. After addressing asylum law jurisprudence, the recent surge in applications, and the necessary elements of the law, Part V urges protecting the rule of law by continuing to follow binding immigration authority, set forth by the immigration courts. Lastly, Part VI of this note argues for the adoption of a heightened standard for what constitutes credible fear and applying this standard at the border. Further, Part VI urges immigration courts to adopt sanctions for attorneys who exploit the law, ultimately concluding that these solutions are necessary to prevent further court backlog and are essential to protect the immigrant under the spirit of the law.

I. HISTORY

U.S. asylum law can be traced back as early as 1793 when French refugees settled in northern Pennsylvania in an attempt to escape the violence of the French Revolution.[7] Asylum law gained global traction after World War II, with over fifty million people displaced,[8] the United Nations declared that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[9] This international crisis led to the founding of the Office of the

7. *See* DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE xli (7th ed. 2015) [hereinafter AILA'S ASYLUM PRACTICAL GUIDE]; *see generally* ELSIE MURRAY, AZILUM: FRENCH REFUGEE COLONY OF 1793 (2d ed. 1950) (encapsulating the French refugees in 1793 as the first time U.S. law recognized asylum law).

8. Adrian Edwards, *Global Forced Displacement Hits Record High*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (June 20, 2016), https://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html; *Global Forced Displacement Tops 50 Million for First Time Since World War II*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (June 20, 2014), https://www.unhcr.org/en-us/news/press/2014/6/53999cf46/global-forced-displacement-tops-50-million-first-time-since-world-war-ii.html; James L. Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 3 MICH. J. INT'L L. 3 (1982).

9. G.A. Res. 217 (III) A, at Art. 14(1), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

United Nations High Commissioner for Refugees (UNHCR) in 1950.[10] The international definition of "refugee" derives from two treaties: the 1951 United Nations Convention and the 1967 United Nations Protocol.[11] The modern legal foundation of U.S. immigration law began with the Immigration and Nationality Act (INA) of 1952.[12] However, it was not until 1980, when Congress passed the Refugee Act,[13] that the U.S. would satisfy its "international obligations."[14]

Prior to the 1980s, there were relatively few asylum applications.[15] However, by the late decade, a large wave of Central American migrants began the journey to the U.S. seeking asylum.[16] This uptick in applications led to stricter asylum laws, including the appointment of asylum officers,[17] and the enactment of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).[18] IIRAIRA permitted expedited removal of any alien[19] that failed to make a "credible fear of persecution" claim.[20] After the terrorist attacks on September 11, 2001, the U.S. began to close off its borders to aliens seeking admission, decreasing the number of credible fear interviews afforded to asylum seekers by over fifty percent by 2003.[21]

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10. KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 353 (2d ed. 2015); Edwards, *supra* note 8; G.A. Res. 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950); Carlin, *supra* note 8, at 7.

11. *See* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267.

12. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 414-477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537).

13. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

14. *See* AILA'S ASYLUM PRACTICAL GUIDE, *supra* note 7, at xliv.

15. *See* Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era.

16. *Id.*

17. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Walter A. Ewing & Benjamin Johnson, *Asylum Essentials: The U.S. Asylum Program Needs More Resources, Not Restrictions*, IMMIGR. POL'Y CTR. 1–5 (Feb. 2005), https://www.americanimmigrationcouncil.org/sites/default/files/research/Asylum%20Essentials%202-05.pdf (creating a specially trained corps of officers to review asylum applications).

18. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1225 (b)(1)(B)(ii)).

19. The term alien, immigrant, and undocumented immigrant are used interchangeably to refer to an individual who does not have permission to reside in the U.S. in the absence of being legally granted relief.

20. 8 U.S.C. § 1225 (b)(1)(B)(ii).

21. Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 326 (2005) (stating that more than 13,000 aliens were afforded credible fear interviews in 2001, less than 10,000 aliens were afforded credible fear interviews in 2002, and less than 6,000 aliens were afforded credible fear interviews in 2003).

The Real ID Act was implemented in 2005, "increasing the evidentiary burden on asylum-seekers" and implementing changes "regarding credibility determinations and corroboration in asylum claims."[22] With 70.8 million displaced persons in the world today,[23] asylum applications continue to increase,[24] the immigration courts' backlog continues to grow,[25] and the law continues to change.

II. THE NEVER-ENDING BACKLOG

In recent years, asylum applications have skyrocketed, overwhelming the immigration courts, the Executive Office for Immigration Review (EOIR), and U.S. Citizenship and Immigration Services (USCIS).[26] As of September 2018, immigration courts in the U.S. had a total backlog of 1,098,468 pending cases.[27] Immigration courts, however, are not the only ones struggling to keep up with the overflow of asylum seekers. All agencies under the U.S. Department of Homeland Security (DHS) and federal courts are also affected.[28] A 2018 Congressional Research Service Report estimated that USCIS had a backlog of about 320,000 affirmative asylum applications and EOIR had a backlog of about 325,000 defensive asylum applications.[29] While many, including Attorney General (A.G.) Jeff Sessions, have deemed this pending case backlog as "not acceptable,"[30] the number of asylum applications filed each year continues to increase and many fear there is no end in sight.

The number of asylum applications filed each year continues to multiply.

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22. AILA'S ASYLUM PRACTICAL GUIDE, *supra* note 7, at xliv–xlv.

23. UNITED NATIONS HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018, at 4 (2019), https://www.unhcr.org/5d08d7ee7.pdf.

24. NADWA MOSSAAD & RYAN BAUGH, OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2016, at 7 & n.21 (2018) [hereinafter ANNUAL FLOW REPORT: 2016], https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016.pdf (providing that the Department of Homeland Security estimated "115,399 affirmative asylum [principal] applications were filed with USCIS in 2016, . . . more than [a] 100 percent increase since 2014," along with an additional 52,468 applications for dependents).

25. *Immigration Court Backlog*, *supra* note 3.

26. *See id.;* ANNUAL FLOW REPORT: 2016, *supra* note 24.

27. *Immigration Court Backlog*, *supra* note 3.

28. *See Judicial Business 2018*, U.S. COURTS (2018), https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018 (providing that immigration offenses in 2018 "constituted the largest percentage of prosecutions in . . . district courts").

29. ANDORRA BRUNO, CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 25 (2019), https://fas.org/sgp/crs/homesec/R45539.pdf.

30. Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks to the Executive Office for Immigration Review Legal Training Program (Jun. 11, 2018) (transcript available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal).

Asylum Applications	**2015**	**2016**	**2017**
Affirmative	83,032	115,433	139,801
Derivatives[31]	------	52,468	69,894
Defensive	65,747	72,605	119,303
Total	**148,779**[32]	**240,506**[33]	**328,998**[34]

According to the Department of Homeland Security Office of Immigration Statistics[35], the number of asylum applications have increased by almost 150% since 2014,[36] and 2017 demonstrated the "eighth consecutive annual increase and the highest [number of applications filed] since 1995."[37] This uptick in applications is due to an almost 800% increase in affirmative asylum seekers from Central American countries such as El Salvador, Guatemala, and Honduras.[38] "More than three quarters (78 percent) of the applications pending at the end of 2017 were filed within the last two years. . . ."[39] Affirmative applications are not the only claims contributing to the pending case backlog. Defensive applications filed with EOIR have consecutively increased at an alarming rate since 2009.[40] "According to EOIR, as of June

31. Derivative applications arise when an individual, within the past two years, entered into the U.S. as a refugee or was granted asylum. The individual may petition for certain family members to obtain derivative refugee or asylee status. Qualifying family members include a spouse or an unmarried child under the age of 21.

32. NADWA MOSSAAD, OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2017, at 7–8 (2019) [hereinafter ANNUAL FLOW REPORT: 2017], https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

33. *Id.*; ANNUAL FLOW REPORT: 2016, *supra* note 24, at 7 n.21.

34. *See* ANNUAL FLOW REPORT: 2017, *supra* note 32, at 7–8, 7 n.18.

35. *Id.* This note will address a solution to the increasing number of defensive asylum applications, through heightening the credible fear standard as seen in section VI. Closing the Loophole, A. Heightening the Standard–Credible Fear Interviews.

36. ANNUAL FLOW REPORT: 2017, *supra* note 32, at 7.

37. *Id.*; *see also* UNITED NATIONS HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2017, at 40 (2018), https://www.unhcr.org/5b27be547.pdf ("[In 2017,] [t]he United States of America was the largest recipient of new asylum applications [in the world]. . . .").

38. ANNUAL FLOW REPORT: 2017, *supra* note 32, at 7.

39. *Id.* at 8.

40. *Adjudication Statistics: Defensive Asylum Applications*, EXEC. OFF. FOR IMMIG. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/page/file/1106356/download (last updated Jan. 23, 2020) (comparing 12,176 defensive asylum applications filed in 2009 to 149,779 defensive asylum applications filed in 2019, and noting that since 2008, 2018 was the only year that defensive applications did not increase).

18, 2018, it had [an estimated] 720,000 pending cases, and some 325,000 of those 'about 45%' included asylum applications."[41] There is no doubt the alarming increase in asylum applications is contributing to the overwhelming backlog of the courts. The question that presents itself now are how to address the current backlog, prevent further backlog, and protect the immigrant under the spirit and color of the law.

III. APPLYING FOR ASYLUM

Aliens can seek asylum either in the affirmative or in the defensive. To affirmatively apply for asylum the alien must be physically present in the U.S.[42] The alien must then file an *I-589, Application for Asylum and for Withholding of Removal*[43] with USCIS within one year of arrival.[44] The alien will then be fingerprinted and receive a background check.[45] Next, a credible fear interview will be scheduled with an asylum officer, and that officer will make a determination[46] on whether the alien is eligible to apply for asylum,[47] meets the definition of a refugee,[48] or is barred from being granted asylum.[49] The asylum officer will either grant the alien asylum,[50] refer the case to an immigration court,[51] give notice of intent to deny,[52] or give a final denial decision.[53]

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41. *See* BRUNO, *supra* note 29, at 25.

42. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (Sept. 22, 2020).

43. *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-589 (Sept. 30, 2020).

44. *The Affirmative Asylum Process*, *supra* note 42.

45. *Id.*

46. *Id.* ("A supervisory asylum officer reviews the asylum officer's decision to ensure it is consistent with the law.").

47. Asylum eligibility will be discussed at length in the next section.

48. 8 U.S.C. § 1101(a)(42) (defining refugee).

49. 8 U.S.C. § 1158(b)(2) (noting bars to asylum claims).

50. *Types of Asylum Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions (Jan. 26, 2021).

51. *Id.* (stating that an Immigration Judge will independently review the individual's case and make a final determination).

52. *Id.* (explaining that once the asylum officer has determined the individual does not meet the requirements of asylum, the individual will have sixteen days to submit additional evidence to show why asylum should be granted).

53. *Id.* If a final decision by an asylum officer is rendered, and an alien fails to respond to the NOID (Notice of Intent to Deny) within sixteen days, or evidence submitted by the alien does not overcome the officer's reasons for denial, the claim is denied. *Id.* Once a claim is denied, a final decision cannot be

If an alien is seeking asylum in the defensive, it means she[54] is currently in removal proceedings[55] before an immigration court with the EOIR.[56] An alien may be placed in removal proceedings because she violated her immigration status; is illegally present in the U.S.; or attempted to enter the U.S. without proper documentation and an asylum officer[57] apprehended her at a port of entry. If apprehended at a port of entry, an asylum officer may place the alien in expedited removal proceedings,[58] if it is found that she does not have a "credible fear of persecution."[59] The immigration judge will then conduct a hearing and either order the alien removed from the U.S. or grant the alien asylum.[60]

No wonder asylum applications contribute to the substantial backlog of the courts. The American Immigration Council suggests that after an alien files her asylum application,[61] it takes almost one thousand days until a merits hearing is held and a final decision is made.[62]

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appealed; however, an individual may request to have their case reopened by showing a change in circumstances that would affect their asylum eligibility. *Id.*; *see also* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964–66 (2020) (discussing the immigrant removal and asylum application process).

54. While an alien, immigrant, or undocumented individual can be anyone, for consistency purposes this note will address the alien by the pronoun she or her.

55. If an alien is in removal proceedings, she can seek other forms of relief such as Withholding of Removal and the Convention Against Torture (CAT). *See* 8 C.F.R. § 208.16 (2020). However, for purposes of this note, those will not be discussed.

56. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (Sept. 22, 2020).

57. *Id.*

58. Expedited removal will be discussed in section VI. Closing the Loophole, A. Heightening the Standard – Credible Fear Interviews.

59. 8 C.F.R. § 208.30(e)(4) (2020) (explaining that when determining credible fear, an asylum officer should "consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge").

60. *See id.* § 208.30(f) (explaining the "[p]rocedures for a positive credible fear finding"); *Types of Asylum Decisions*, *supra* note 50.

61. An alien has up to a year upon arrival to file an application. That means that in addition to the waiting period it takes to adjudicate her asylum case, the alien may have already been present in the U.S. for an additional 365 days prior to filing. *See* AMERICAN IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 2 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf.

62. *Id.* at 5–6; *Immigration Court Processing Time by Outcome*, TRAC, SYRACUSE UNIV., https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last visited Feb. 1, 2020) (showing that, as of February 2020, two immigration courts, California and New Jersey, had average wait times of 1,024 days and 1,289 days respectively until a final merits hearing was held).

IV. ELIGIBILITY FOR ASYLUM

Once the alien files for asylum, she has the burden[63] to show eligibility by proving that she fits the definition of a refugee. A refugee is defined as:

> [A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to and is unable or unwilling to avail . . . 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.[64]

The Board of Immigration Appeals (BIA) in *Matter of Acosta* determined that an alien seeking asylum must establish four elements to meet the definition of a refugee.[65]

First, "the alien must have a 'fear' of 'persecution.'"[66] Fear must be the alien's primary motive when applying for asylum.[67] To establish persecution,[68] "harm or suffering had to be inflicted upon an individual in order to punish h[er] for possessing a belief or characteristic a persecutor sought to overcome."[69] Further, under the color of the law, that harm or suffering had to have been inflicted by the country's government or by someone the "government was unable or unwilling to control."[70]

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63. Pula, 19 I. & N. Dec. 467, 474 (B.I.A. 1987) ("[The alien] has the burden of establishing that the favorable exercise of discretion is warranted.").

64. 8 U.S.C. § 1101(a)(42)(A).

65. Acosta, 19 I. & N. Dec. 211, 219 (B.I.A. 1985); *see also* JOHNSON ET AL., *supra* note 10, at 355.

66. *Acosta*, 19 I. & N. Dec. at 219.

67. *Id.* at 221–22. Fear is defined as "a genuine apprehension or awareness of danger in another country. No other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, satisfies the definition. . . ." *Id.*

68. *Id.* at 222 (providing that persecution can "mean either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive"). Persecution is not defined in the INA, instead, the definition has developed through case law. *See* Kovac v. Immigr. & Naturalization Serv., 407 F.2d 102, 107 (9th Cir. 1969) (defining persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive"); Maccaud, 14 I. & N. Dec. 429, 434 (B.I.A. 1973) (citing to the definition of persecution provided by the Ninth Circuit in *Kovac*); Diaz, 10 I. & N. Dec. 199, 200 n.1 (B.I.A. 1963) (adopting a definition of persecution from Webster's dictionary which states "the infliction of sufferings, harm or death on those who differ (as in origin, religion or social outlook) in a way regarded as offensive or meriting extirpation").

69. *Acosta*, 19 I. & N. Dec. at 222–23 (noting that Congress explicitly rejected the inclusion of "displaced persons" in the definition of a refugee, and thus, "those who flee harm generated by military or civil disturbances" will not qualify for asylum).

70. *Id.* at 222.

Second, the fear must be "well-founded."[71] Fear is "well-founded" if there is "a reasonable possibility of suffering such persecution" if the alien is forced to return to her country.[72] An alien can also establish a finding of "well-founded fear of future persecution" upon showing evidence of past persecution.[73]

Third, the persecution the alien fears must be on account of a protected ground.[74] Protected grounds include: "race, religion, nationality, membership in a particular social group, or political opinion."[75] The alien must establish a "nexus" between the feared harm and one of the five protected grounds.[76]

Fourth, the alien must be "unable or unwilling to return to h[er] country of nationality."[77] The alien must show that she cannot return to *any* part of her country because "the threat of persecution exists for h[er] country-wide."[78] Thus, international protection should be afforded to the alien because her country is no longer safe.[79]

A. Membership in a Particular Social Group

While membership in a PSG is arguably the hardest ground to establish and be granted asylum relief, it is often the most sought-after.[80] In recent years, immigration courts and federal courts are overwhelmed by PSG claims made by aliens who express a fear of gang violence or domestic violence.[81] It is now common practice to seek asylum on account of a PSG when an alien fears returning home because her country suffers from elevated levels of violent crime or economic hardship.[82] However, the immigration law community is misguided in its belief that membership in a PSG constitutes a

71. *Id.* at 224.

72. 8 C.F.R. § 208.13(b)(2)(i)(B) (2019).

73. H-, 21 I. & N. Dec. 337, 337, 346 (B.I.A. 1996).

74. *Acosta*, 19 I. & N. Dec. at 232. For purposes of this note, the only protected ground that will be discussed is a Particular Social Group (PSG).

75. 8 U.S.C. § 1101(a)(42)(A).

76. JOHNSON ET AL., *supra* note 10, at 357 (stating that to establish a nexus, a necessary element, the alien must show that the oppressor is motivated to persecute the alien on account of a protected ground).

77. *Acosta*, 19 I. & N. Dec. at 235; 8 U.S.C. § 1101(a)(42)(A).

78. *Acosta*, 19 I. & N. Dec. at 235.

79. JOHNSON ET AL., *supra* note 10, at 355.

80. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE 2–4 (2018) ("Immigration authorities have described [PSG] as 'perhaps the most complex and difficult to understand' ground for asylum.").

81. *Id.* at 3.

82. *See id.* at 3–4; A-B-, 27 I. & N. Dec. 316, 318 (U.S. Att'y Gen. 2018).

broad category.[83] Even though all asylum claims are determined on a case-by-case basis,[84] the United Nations and *Matter of C-A-* have made it clear that PSG claims were not created to "be a 'catch all' applicable to all persons fearing persecution."[85]

Although the INA does not define what a PSG is, the BIA precedent has ascertained a complex and demanding standard that aliens are required to establish.[86] The BIA first set forth the definition of a PSG in *Matter of Acosta.*[87] In *Matter of Acosta*, the BIA "interpret[ed] the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."[88] A common, immutable characteristic must be one "that the members of the group either cannot change, or should not be required to change because it is *fundamental* to their individual identities or consciences."[89] This interpretation logically follows the other four protected grounds by restricting the definition of a refugee as an individual who is unable "to avoid persecution."[90]

In an attempt to restrict PSG claims from being used as a catch-all ground for seeking asylum, the BIA established two additional elements the alien must prove: "particularity" and "social visibility."[91] In 2006 and 2008, the BIA held

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83. *See generally* C-A-, 23 I. & N. Dec. 951, 961 (B.I.A. 2006) (determining that noncriminal drug informants working against the cartel did not constitute a PSG); A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 72 (B.I.A. 2007) (recognizing that a proposed group may be too broadly defined to be considered a PSG); W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014) ("The group must also be discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse, or subjective."); M-E-V-G-, 26 I. & N. Dec. 227, 241, 244 (B.I.A. 2014) (discussing "the analysis of broadly defined social groups" and "concerns [that] are based on an overbroad reading of the particular social group ground of persecution").

84. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

85. *C-A-*, 23 I. & N. Dec. at 960 (quoting UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION 2 (2002) [hereinafter GUIDELINES ON INTERNATIONAL PROTECTION], https://www.unhcr.org/3d58de2da.pdf).

86. Regarding the BIA's complex and demanding standards, the Supreme Court has acknowledged that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

87. *Acosta*, 19 I. & N. Dec. at 233; *see also* JOHNSON ET AL., *supra* note 10, at 359.

88. *Acosta*, 19 I. & N. Dec. at 233.

89. *Id.* (emphasis added) ("The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience. . . ."). Immutable characteristics can also include sexual orientation, Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990), gender and mutilation, Kasinga, 21 I. & N. Dec. 357, 358, 377 (B.I.A. 1996), and nuclear families, Gebremichael v. Immigr. & Naturalization Serv., 10 F.3d 28, 36 (1st Cir. 1993).

90. *Acosta*, 19 I. & N. Dec. at 234.

91. C-A-, 23 I. & N. Dec. 951, 955–59 (B.I.A. 2006); S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

in *Matter of C-A-* and *Matter of S-E-G-* respectively that an alien must clearly articulate a *particular group* (particularity)[92] and show social visibility which "must be considered in the context of the country of concern and the persecution feared."[93] Further, the BIA described the particularity test as "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[94]

Ultimately, the court clarified in *Matter of M-E-V-G-* that an alien asserting a claim on the protected ground of a PSG "must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[95]

B. Recognized Cognizable Groups

It is well-known that PSG jurisprudence is constantly changing and evolving. While many accept BIA precedent outlined in *Matter of M-E-V-G-*[96] and *Matter of W-G-R-*[97] requiring particularity and social visibility, some advocates argue in favor of returning to the *Acosta* standard.[98] Nevertheless, particularity and social visibility[99] must be established when creating a PSG and have been reflected in precedent when determining valid and invalid PSG claims.[100]

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92. *C-A-*, 23 I. & N. Dec. at 957.

93. A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

94. *S-E-G-*, 24 I. & N. Dec. at 584.

95. M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

96. *See id.* at 231–34.

97. W-G-R-, 26 I. & N. Dec. 208, 211, 214, 221 (B.I.A. 2014) (affirming the requirement of particularity for the reasons explained in *M-E-V-G-* and holding there was a lack of particularity because the "group as defined . . . [was] too diffuse, . . . [as it] could include persons of any age, sex, or background").

98. *See generally* Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the* Acosta *Definition of "a Particular Social Group,"* 30 GEO. IMMIGR. L.J. 287 (2016); Lauren Cherney, *Returning to Acosta: How* In re A-B- *Exemplifies the Need to Abolish the "Socially Distinct" and "Particularity Requirements for a Particular Social Group*, 38 MINN. J.L. & INEQUALITY 169 (2020).

99. *W-G-R-*, 26 I. & N. Dec. at 216 (renaming "social visibility" to "social distinction" to clarify that the element does not mean literal or "ocular" visibility).

100. *See* C-A-, 23 I. & N. Dec. 951, 962 (B.I.A. 2006); A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73–76 (B.I.A. 2007); *W-G-R-*, 26 I. & N. Dec. at 218–20; *M-E-V-G-*, 26 I. & N. Dec. at 231–34.

It is clear from both BIA precedent and the United Nations that PSG claims shall be narrow.[101] Further, "as a matter of legal logic, the social group cannot be read so broadly that it renders the other Convention grounds [race, religion, national origin, and political opinion] superfluous."[102] Congressional intent is simple, the protected ground, PSG, is conceivably the hardest ground for an alien to establish relief under.[103] The law cannot continue to allow individuals to undercut congressional intent by filing baseless asylum applications on account of a PSG. In fact, the court warned in *Matter of R-A-* that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."[104] If the requirements are this demanding, why do PSG claims continue to be the most asserted ground?[105] Conceivably, it is because the alien has no other grounds for relief.[106] This theory was affirmed in *Matter of M-E-V-G-* when the BIA expanded *Matter of Acosta* in an attempt to limit PSG claims made by asylum seekers, stating:

> At the time we issued *Matter of Acosta*, . . . relatively few particular social group claims had been presented to the Board. . . . Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various

101. *See M-E-V-G-*, 26 I. & N. Dec. at 237–38; GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 85, at 2. (illustrating that PSG claims are narrow because the purpose of the protected ground was to provide a safety net to individuals who might not fall into another category, not to provide blanket protection to all who wish to remain in the U.S.).

102. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group,' in* REFUGEE PROTECTION IN INTERNATIONAL LAW 263, 285 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003), https://www.unhcr.org/419cbe1f4.html.

103. *See* SMITH, *supra* note 80, at 1–6.

104. R-A-, 22 I. & N. Dec. 906, 919 (B.I.A. 1999).

105. *See* SMITH, *supra* note 80, at 1–6.

106. *See generally M-E-V-G-*, 26 I. & N. Dec. at 235, 251 (explaining that refugee protection is not afforded to "those fleeing from natural or economic disaster, civil strife, or war," although "Congress may choose to provide relief to those suffering from difficult situations not covered by asylum"); Sosa Ventura, 25 I. & N. Dec. 391, 394 (B.I.A. 2010) (discussing the legislative history of temporary protective status and stating that it was "premised upon the recognition that individuals fleeing life-threatening natural disasters, such as drought or famine, or 'the existence of a generalized state of violence within a country' did not establish a basis for claiming persecution").

> possible social groups, *some of which appeared to be created exclusively for asylum purposes.*[107]

Asylum protection was never meant to extend to "all individuals who are victims of persecution."[108] Instead, asylum protection was only intended to offer relief to refugees facing persecution *on account of* a protected ground.[109] Asylum protection is limited in itself. It does not afford protection to "those fleeing from natural or economic disaster, civil strife, or war."[110] While it is unfortunate that a vast number of people suffer from internal country conflicts every day, the use of the protected ground, PSG, cannot and should not be manipulated to allow asylum grants for these purposes.[111]

Furthermore, the protection is intended for individuals who have a well-founded fear of persecution under the color of the law. Many PSG claims rely on a loose connection between the persecutor and a government actor, or claim fear due to a lack of protection from the government.[112] Thus, these claims ultimately lack the necessary nexus element.[113] This, in turn, has led to the abuse and exploitation of the protected ground, vastly contributing to the overflow of the court system.

The spirit of the law and the BIA make it clear, "general conditions of strife, such as crime and other societal afflictions" are not valid reasons to grant asylum.[114] Instead, the law provides alternative forms of relief for these unfortunate circumstances.[115] While many PSG claims are grievous, under the

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107. *M-E-V-G-*, 26 I. & N. Dec. at 231 (emphasis added).

108. *Id.* at 234.

109. *Id.* at 234–35 (providing that protected ground refers to "persecution on account of 'race, religion, nationality, membership in a particular social group, or political opinion'").

110. *Id.* at 235; *see also* Sosa Ventura, 25 I. & N. Dec. 391, 394 (B.I.A. 2010).

111. *See M-E-V-G-*, 26 I. & N. Dec. at 234–36.

112. *See generally* A-B-, 27 I. & N. Dec. 316 (U.S. Att'y Gen. 2018) (discussing cases involving PSG claims based upon lack of protection from a persecutor unaffiliated with the government and rejecting such a claim from the applicant); *id.* at 320 (stating violence inflicted by non-governmental actors is unlikely to satisfy the necessary statutory grounds for asylum); Beltrand-Alas v. Holder, 689 F.3d 90, 94 (1st Cir. 2012) (noting that since the government cannot protect anyone from gangs, the social group is not cognizable).

113. *Id.* at 321.

114. *M-E-V-G-*, 26 I. & N. Dec. at 235; *see also Sosa Ventura*, 25 I. & N. Dec. at 394 (stating that natural disasters and states of violence do not warrant a grant of asylum); Konan v. Att'y Gen. of the U.S., 432 F.3d 497, 506 (3d Cir. 2005) (asserting that "general conditions of civil unrest or chronic violence and lawlessness do not support asylum"); Abdille v. Ashcroft, 242 F.3d 477, 494 (3d Cir. 2001) ("[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum.").

115. *M-E-V-G-*, 26 I. & N. Dec. at 235 (citing *Sosa Ventura*, 25 I. & N. Dec. at 395–96 for the proposition that "Congress created the alternative relief of Temporary Protected Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not

color of the law and at the forefront, they do not meet the statutory requirements necessary to be granted relief and will inevitably be denied. While this may seem unfair on its face, it is the practical effect and harsh reality of the asylum law standard.[116] Because many PSG "well-founded fear" claims are based on a country's general crime or economic shortfalls, these claims lack the essential elements to qualify for asylum.[117] Thus, even though each asylum claim is afforded the opportunity to be heard and determined under a case-by-case basis,[118] the case outcome, denial, is known prior to the alien's individual merits hearing. This is an affront to the rule of law. The court cannot continue to go through the motions. By allowing the filing of meritless PSG claims to continue, the court backlog will only continue to increase. Instead, the court must immediately address these claims at an earlier time in proceedings.

V. PROTECTING THE RULE OF LAW[119]

In *Matter of A-B-*, Attorney General (A.G.) Jeff Sessions confirmed that Congress did not intend "'membership in a particular social group' to be 'some omnibus catch-all' for solving every 'heart-rending situation.'"[120] Ultimately, the case overturned *Matter of A-R-C-G-*[121] which recognized domestic violence claims as valid PSG's "without performing the rigorous analysis required by . . . precedents."[122] The undocumented immigrant in *Matter of A-B-* articulated her PSG to be "'women who [were] unable to leave their domestic relationships where they ha[d] children in common' with their partners."[123] The persecution she suffered was on account of domestic violence actions committed by her partner, a private actor.[124] A.G. Sessions ultimately held that the petitioner failed to show a nexus between the harm

entitled to asylum"). While it is acknowledged that many immigration attorneys seek Asylum, TPS, and CAT, this note only discusses the effects that the vast number of PSG asylum claims have on the overwhelmed system.

116. Taking into account matters of discretion, credibility, the burden of proof, and elemental factors that are needed to satisfy an asylum claim, the likely outcome is that most cases will be denied.

117. *See generally A-B-*, 27 I. & N. Dec. at 320–23 (explaining that asylum claims will likely fail when based upon criminal conduct, gang violence, economic hardships, and personal altercations).

118. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

119. This note will only briefly address *Matter of A-B-* and *Grace v. Whitaker*.

120. *A-B-*, 27 I. & N. Dec. at 346 (quoting Velasquez v. Sessions, 866 F.3d 188, 198 (4th Cir. 2017)).

121. A-R-C-G-, 26 I. & N. Dec. 388, 392 (B.I.A. 2014).

122. *A-B-*, 27 I. & N. Dec. at 319 (citing *A-R-C-G-*, 26 I. & N. Dec. at 389–95).

123. *Id.* at 321 (citation omitted).

124. *Id.*

suffered and her asserted PSG[125] because her partner's violence arose on account of their personal relationship, and that her membership in the articulated PSG was not "one central reason" for the abuse.[126] Another predominant reason for denial was that the petitioner failed to connect the private harm to government acquiescence.[127] When an applicant seeks to "establish persecution based on violent conduct of a private actor[, she] must show more than the government's difficulty controlling private behavior."[128] Instead, she "must show that the government condoned the private actions or demonstrated an inability to protect the victims."[129] Sessions stated that "generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." This further clarified that it is not impossible for an alien to establish asylum on such a basis, rather it is just unlikely they can.[130] Ultimately, the case stressed the importance of properly applying the legal framework when addressing the validity of a PSG.[131]

In response to A.G. Session's remarks in *Matter of A-B-*, DHS released a policy memorandum for its asylum officers to consider when making a finding of credible fear.[132] The guidelines laid out current case precedent, including *Matter of A-B-*, that must be considered when an officer makes a determination involving membership in a PSG.[133] The U.S. District Court for the District of

125. *Id.* at 343.

126. *Id.*; *see also* Zoarab v. Mukasey, 524 F.3d 777, 781 (6th Cir. 2008) ("Courts have routinely rejected asylum applications grounded in personal disputes. . . .").

127. *A-B-*, 27 I. & N. Dec. at 344.

128. *Id.* at 316.

129. *Id.*

130. *Id.* at 320. Domestic violence is not an isolated crime, it occurs in every country in the world. Even victims in the U.S. struggle to get the justice they deserve. Over ten million people in the U.S. suffer from domestic violence every year. While domestic violence is a serious problem, it is *often* motivated because of a personal relationship, *see National Statistics Domestic Violence Fact Sheet*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/statistics (last visited Mar. 25, 2020), rather than a central reason on account of a protected ground. Thus, in a majority of cases, under the color of the law, asylum cannot be afforded to the alien.

131. *See A-B-*, 27 I. & N. Dec. at 331.

132. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEPT. OF HOMELAND SEC., POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* 1 (2018), https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF.

133. *Id.* at 9–10. This note does not convey that all five basic inquires listed in USCIS memorandum are reasonable under a credible fear determination. It is acknowledged that some of the inquiries should be determined by a judge due to complexity. Instead, this note supports a general implementation of consistency during the credible fear process by requiring the alien to show a nexus.

Columbia, in *Grace v. Whitaker*,[134] subsequently struck down the new credible fear policy.[135] The court held that the policy was "arbitrary and capricious and contrary to law."[136] The federal court ruling restricts asylum officers from using a heightened standard in the credible fear process.[137] However, *Grace v. Whitaker* does not apply to decisions made by immigration courts, where *Matter of A-B-* remains binding authority.[138] Rather, the decision only enjoined credible fear determinations at the border.[139] Thus, while the rationale in *Matter of A-B-* will not be applied in making a credible fear determination by an asylum officer, it will ultimately be applied by an immigration judge in the alien's individual asylum hearing.[140] In turn, the federal court's denial of a heightened fear standard at the border only delays the inevitable, the applicability of binding immigration law.[141]

VI. CLOSING THE LOOPHOLE

This note has addressed the history of asylum, the immigration court backlog, and the legal elements a refugee must establish to be granted asylum on account of a PSG. This note will now propose two solutions that will effectively decrease the courts' caseload and prevent further backlog while protecting the immigrant under the spirit and color of the law. The first solution proposes heightening the standard of what constitutes credible fear by requiring a showing of nexus at the border. The second solution proposes providing an informational fact sheet to immigrants and implementing Rule 11 of the Federal Rules of Civil Procedure to deter and address attorney abuse.

134. Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

135. *Id.* at 105.

136. *Id.* at 140.

137. *Id.* at 146.

138. *See id.* at 105.

139. *Id.*; K-S-, 20 I. & N. Dec. 715, 718 (B.I.A. 1993) (showing that the BIA is not bound to follow published decisions of U.S. District Court cases even in cases arising within the same district).

140. *Id.* at 145–46.

141. The Federal Court's denial of a heightened credible fear standard substantially contributes to the overall backlog of immigration courts. The decision in *Grace v. Whitaker* serves only to delay the inevitable, removal, due to lack of 'well-founded fear' in accordance with the law. A heightened credible fear standard would allow meritless cases to be adjudicated in a faster and more efficient manner. The author acknowledges the finality of a negative credible fear finding by an asylum officer under *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963, 1979 (2020).

A. Heightening the Standard–Credible Fear Interviews[142]

If, at the forefront, most judges, Assistant Chief Counsels,[143] and defense attorneys know an asylum merits hearing will result in an order of removal,[144] how does the alien even pass the credible fear screening process? To address this question, the credible fear process must first be reviewed.

As mentioned in Section III, *Applying for Asylum*, a credible fear interview is afforded to all arriving aliens[145] who seek asylum.[146] The purpose of the interview is to determine if the alien has a "*significant* possibility" of establishing asylum eligibility.[147] Even if an asylum officer makes a negative credible fear determination, a supervisor, and an immigration judge can still review that determination.[148] If the judge still finds no credible fear exists, the alien is subject to expedited removal proceedings and ordered removed.[149]

Expedited removal proceedings, established by Congress in 1996, were created to relieve and remedy asylum abuse.[150] This process had the ultimate effect of alleviating some of the immigration courts' asylum case backlog by immediately removing aliens who failed to meet the low credible fear

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142. This note will not address the recent development of 84 FR 63994 "Safe Third Country Agreements."

143. The attorney that represents DHS in immigration proceedings.

144. *See Asylum Decisions and Denials Jump in 2018*, TRAC, SYRACUSE UNIV. (Nov. 29, 2018), https://trac.syr.edu/immigration/reports/539/ (stating that 65% of asylum hearings resulted in a denial in 2018, marking "the sixth year in a row that that denial rates have risen").

145. For purposes of this note, "arriving alien" refers to an individual who was apprehended by ICE when attempting to come into the U.S. or presented herself at a port of entry without proper documentation.

146. 8 U.S.C. § 1225(b)(1)(B); *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening (July 15, 2015); *see also Overview of Asylum Processe*s, UNITED NATIONS HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/58a212354.pdf (last visited Mar. 25, 2020).

147. 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added) (emphasis added) ("[T]he 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."); RUTH ELLEN WASEM, CONG. RSCH. SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 4–5 (2011), https://fas.org/sgp/crs/homesec/R41753.pdf (stating that the current burden of proof to make a positive credible fear assertion is much "easier to meet . . . than the well-founded fear of persecution standard required to obtain asylum").

148. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *Credible Fear Screening*, *supra* note 146; *Overview of Asylum Processe*s, *supra* note 146.

149. *Credible Fear Screening*, *supra* note 146. Under IIRAIRA, courts cannot "review 'the determination' that an alien lacks a credible fear of persecution." Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1965–66 (2020); *see* 8 U.S.C. § 1252(a)(2)(A)(iii).

150. WASEM, *supra* note 147, at 4 ("Asylum claims with the INS dropped in the years following the passage of IIRIRA.").

threshold.[151] If implementation of stern guidelines reduced case backlog once, it is logical to conclude that implementing stern guidelines for what constitutes "credible fear" will bring about the same effect: a solution to the never-ending backlog.[152]

Despite the drop in apprehensions and detentions made at the border and ports of entry, it is undisputed that the number of asylum seekers, particularly defensive asylum seekers, continues to rise.[153] This is largely due to the sky-rocketing increase of "credible-fear claims made by those apprehended. . . . [T]he number of credible-fear claims completed has increased 17 times between fiscal years 2009 to 2018 from 5,523 to 99,035 [claims]."[154] In 2017 and 2018, seventy-six percent of credible fear interviews conducted obtained a positive finding by the asylum officer.[155] This means that, in 2018, 74,677 aliens were issued a Notice To Appear (NTA),[156] likely paroled into the U.S.,[157] added to the court docket, and given the opportunity to their individual cases at their individual merits hearing before an immigration judge.[158] Thus, in 2018, almost 75,000 aliens were added to an already overwhelmed court docket. However, many of these positive credible fear findings—which further burdened the system—were likely

151. *Id.* Note that while this assertion is accurate, outside factors such as improvement in country conditions and other changes in immigration policies are not accounted for.

152. This is not to be inferred as an end-all solution. It is merely one solution in the mists of a sea of problems immigration law faces with the never-ending backlog. The author is not suggesting it is the only solution, nor is the author suggesting that it will eliminate the backlog, the author is merely suggesting that over time, it will reduce the backlog and decrease the number of asylum applications filed each year as it did in 1996.

153. *Asylum in the United States: How the Case Backlog Grew to Hundreds of Thousands*, USA FACTS (May 5, 2019, 5:00 PM), https://usafacts.org/reports/asylum-border-immigration-court-backlog.

154. *Id.*; *see also* BRUNO, *supra* note 29, at 28, 37 ("[T]he number of individuals being screened for and found to have a credible fear has grown.").

155. *See Adjudication Statistics: Credible Fear Review and Reasonable Fear Review Decisions*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST. [hereinafter Fear Review], https://www.justice.gov/eoir/page/file/1104856/download (July 14, 2020). In 2016, 92,990 credible fear interviews were conducted, 73,081 of them were positive, which is a seventy-nine percent approval rate. BRUNO, *supra* note 29, at 38. In 2017, 79,710 credible fear interviews were conducted, 60,566 of them were positive, which is a seventy-six percent approval rate. *Id.* In 2018, 97,728 credible fear interviews were conducted, 74,677 of them were positive, which is a seventy-six percent approval rate. *Id.*

156. Notice to Appear instructs an alien that she must appear before an immigration judge on a specific date or she will be ordered removed *in absentia*. *Id.*

157. *Overview of Asylum Processes*, *supra* note 146 (stating that parole is determined within seven days upon a positive finding of credible fear).

158. *Id.*

unwarranted.[159] The high number of positive credible fear findings made by asylum officers have a stark contrast to the comparatively few immigration judges that grant asylum.[160] EOIR and DOJ statistics show that in 2017 only 13.94% and in 2018 only 16.43% of asylum applicants with cases originating with a positive credible fear claim were granted asylum.[161] Further, in 2018, 39.26% of those positive credible fear applicants did not even file an asylum application.[162] Instead, as A.G. Sessions suggests, many aliens who are paroled into the U.S. under a positive credible fear determination "simply disappear and never show up at their immigration hearings."[163] Since 2009, there has been over a 700% increase of *in absentia*[164] orders entered with "cases that began with a credible fear claim."[165] This means that more and more aliens who are paroled into the U.S. based upon credible fear findings never show up to court. Those aliens, unless otherwise picked up by law enforcement and deported, remain in the U.S. without ever truly seeking legal asylum.[166] This stark contrast in numbers demonstrates that a credible finding of fear has virtually no relation to a viable asylum claim.[167] Instead, the numbers suggest that a positive credible fear finding is the golden ticket for disappearing into the U.S.[168]

One solution to reducing the pending immigration court backlog is to provide asylum officers with stricter guidelines as to what constitutes

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159. *See infra* note 160; *see generally Adjudication Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST. [hereinafter *Adjudication Statistics*], https://www.justice.gov/eoir/page/file/1062976/download (July 14, 2020) (comparing the number of positive findings of credible fear to the number of asylum grants originating with a positive finding of credible fear).

160. *Compare* BRUNO, *supra* note 29, at 38 (stating that in 2017, asylum officers found a positive credible fear in seventy-six percent of cases), *with Adjudication Statistics*, *supra* note 159 (stating that in 2017, immigration judges granted asylum for only 13.94% of cases that originated with a positive credible fear finding).

161. *Adjudication Statistics*, *supra* note 159.

162. *Id.*

163. Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), *available at* www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

164. An *in absentia* order is an order of removal entered when an alien fails to show up for court.

165. Sessions, *supra* note 163.

166. *Id.*

167. *See generally Adjudication Statistics*, *supra* note 159 (comparing the high percentage of positive credible fear findings to the low percentage of asylum grant rates originating with positive credible fear claims).

168. *See generally id.*; Sessions, *supra* note 163 ("The system is being gamed. The credible fear process was intended to be a lifeline for persons facing serious persecution. But it has become an easy ticket to illegal entry into the United States.").

"credible fear."[169] While *Grace v. Whitaker* restricted DHS from implementing *certain* heightened inquiries during the credible fear interview, the results at the border cannot be denied.[170] In the few months that *Matter of A-B-* and the DHS policy memo was effectuated, negative credible fear determinations rose drastically.[171]

There is no doubt that a heightened standard will reduce court backlog. While adhering to the decision laid out in *Grace v. Whitaker*,[172] the heightened standard should not result in categorically barring types of claims.[173] Instead, asylum officers, when determining cases involving PSG, should focus on the nexus requirement. The judge in *Grace v. Whitaker* held that the government's standard of determining a nexus requirement in a credible fear interview was reasonable.[174] Thus, asylum officers, under the color of the law in accordance with federal courts and the BIA, can apply a "heightened standard" during credible fear interviews by requiring the undocumented immigrant to show a nexus.[175] Under the INA, nexus requires a refugee to establish that she was persecuted "on account of" a protected ground such as PSG.[176] The protected ground the alien asserts must be "one central reason" for the persecution.[177] For example, violence based on preexisting personal disputes or criminal entities targeting individuals with money or property does not meet the nexus requirement.[178] Under the color of the law, even if an asylum officer found credible fear in claims that lacked a nexus and the alien was afforded the opportunity to seek relief in full proceedings, the immigration judge would still find that the alien was not eligible for asylum because the alien's case

169. The author is not suggesting the alien must meet the standard of proof necessary to establish an asylum grant, rather have asylum officers focus on determining if the undocumented immigrant can make a prima facie showing of nexus at the forefront.

170. Grace v. Whitaker, 344 F. Supp. 3d 96, 137–38 (D.D.C. 2018) (emphasis added).

171. Tal Kopan, *Impact of Sessions' Asylum Move Already Felt at Border*, CNN (July 14, 2018, 8:09 AM), https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html ("[I]mmigration advocates say they have already seen the results for weeks now, as they describe clients being denied credible fear in unprecedented numbers.").

172. *Whitaker*, 344 F. Supp. 3d at 131 ("[T]he government did not violate the APA or INA with regards to its interpretation of the nexus requirement.").

173. *Id.* at 126.

174. *Id.* at 131.

175. *See id.*

176. *Id.* at 130; *see* 8 U.S.C. § 1158(b)(1)(B)(i).

177. *Whitaker*, 344 F. Supp. 3d at 130 (acknowledging that "one central reason" in a credible fear policy does not deviate from a "mixed-motive" analysis); 8 U.S.C. § 1158(b)(1)(B)(i).

178. *Whitaker*, 344 F. Supp. 3d at 130–31; A-B-, 27 I. & N. Dec. 316, 338–39 (U.S. Att'y Gen. 2018).

lacked a nexus.[179] Thus, the results are the same, the alien is ordered removed, the only difference is the time frame.

Statistical data shows what the correlation between the vast abuse positive credible fear determinations have in relation to the influx of illegal aliens into the U.S.[180] Requiring a nexus showing at the forefront will ultimately help deplete the immigration court backlog through expedited removal of undocumented immigrants with certifiably deniable claims.[181] Thus, this heightened credible fear standard would lower the number of positive credible fear findings, resulting in a higher number of expedited removals.

Groups like the American Civil Liberties Union (ACLU) do not support a heightened credible fear standard.[182] They claim that Congress intended credible fear screenings to be a low threshold, arguing a heightened standard could potentially screen out valid claims and result in categorically barring large groups of people.[183] That is why it is imperative for asylum officers to focus on the nexus requirement.[184]

Further, it is important to note the current safeguards that exist in the credible fear decision process.[185] Once an asylum officer makes a determination, that decision is reviewed by a supervisory officer to ensure legal consistency.[186] Further, upon request of the alien, the decision is

179. *See Whitaker*, 344 F. Supp. 3d at 131.

180. *See Adjudication Statistics*, *supra* note 159; *see also* Sessions, *supra* note 163 ("The increase [of claims] ha[ve] been especially pronounced and abused at the border. From 2009 to 2016, the credible fear claims at the border went from approximately 3,000 cases to more than 69,000. . . . Not surprisingly, many of those who are released into the United States after their credible fear determination from DHS simply disappear and never show up at their immigration hearings.").

181. *See* 8 U.S.C. § 1225(b)(1)(B)(iii); *Credible Fear Screening*, *supra* note 146; *Overview of Asylum Processes*, *supra* note 146; *see also* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963, 1979 (2020) (holding that a negative finding of credible fear is a final decision under IIRAIRA that is not reviewable by the federal courts, and explaining that "detaining all asylum seekers until [a] full-blown removal process is completed would place an unacceptable burden on our immigration system and . . . releasing them would present an undue risk that they would fail to appear for removal proceedings").

182. *See* Complaint for Declaratory and Injunctive Relief at 4, Grace v. Sessions, No. 1:18-cv-01853 (D.D.C. Aug. 7, 2018).

183. *Id.* at 4, 25.

184. Focusing on the nexus requirement will not categorically bar claims because courts have recognized that multiple motivations for persecution can exist and nexus will be found so long as one central reason for the persecution is on account of a protected ground. *See Whitaker*, 344 F. Supp. 3d at 126, 130–31.

185. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (providing that once it has been determined that an individual does not have a credible fear of persecution, an immigration judge may review the determination; *Credible Fear Screening*, *supra* note 146 (noting option of requesting review from an immigration judge).

186. 8 U.S.C. § 1225(b)(1)(B)(iii); 8 C.F.R. § 1003.42(e) (2020).

afforded review by an immigration judge prior to removal.[187] Thus, even though heightened credible fear standards will screen out more claims, there are three safeguards in place to protect asylum seekers with valid claims from being subject to expedited removal.[188]

The real reason advocates are against stricter credible fear interviews is time. With a heightened credible fear standard, more aliens will be subject to expedited removal and will be removed within days of arriving, instead of years.[189] Due to the overwhelmed court system, asylum cases can be pending for years on end which allows the alien to stay in the U.S., obtain a worker's permit, a driver's license, and further establish roots.[190] For most attorneys, the only relief they can offer the alien is the ability to stay in the U.S. for the amount of time it will take to adjudicate their case.[191] This delay, delay, delay, tactic[192] frequently used by attorneys, coupled with high positive credible fear findings, "create[s] even more incentives for illegal aliens to come here and claim a fear of return."[193]

"The system is being abused to the detriment of the rule of law, sound public policy, . . . and of just claims."[194] Something must be done to address this credible fear abuse and the ever-increasing case backlog. Heightening the

187. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

188. *Fear Review*, *supra* note 155. These safeguards are proven to work. In 2017, Immigration Judges vacated DHS's negative credible fear findings and found a credible fear in 1,648 cases. *Id.* Further, there were 1,368 credible fear cases in 2018 and 3,196 cases in 2019. *Id.* Thus, the safeguards implemented are more than just "formalities." The safeguards have been exercised accordingly in favor of protecting the alien who may have a valid claim.

189. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, 35411 (July 23, 2019), https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal ("In . . . 2018, the average time in DHS custody for aliens placed in expedited removal was 11.4 days.").

190. *See Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/ refugees-and-asylum/asylum (last updated Aug. 25, 2020) (stating that an alien may apply for a worker's permit 365 days after filing); Miriam Jordan, *Immigrants Use Asylum Applications to Delay Possible Deportation*, WALL ST. J. (Dec. 17, 2016), https://www.wsj.com/articles/immigrants-use-asylum-applications-to-delay-possible-deportation-1481976003 ("The asylum claims also enable applicants to obtain work permits and driver's licenses while their cases crawl through the adjudication process."). USCIS will issue a permit thirty days after receiving the application, which is a total wait time of 395 days. Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374, 62377, 62385 (proposed Nov. 14, 2019) (to be codified at 8 C.F.R. 208 and 8 C.F.R. 274).

191. *See generally* Jordan, *supra* note 190 (discussing the controversial tactic of using asylum as a way to delay deportation).

192. Will be discussed in length in section VI. Attorney Abuse – (B) The Adverse Effect.

193. Sessions, *supra* note 163.

194. *Id.* This argument is not to assert blame upon those who travel to the U.S. in seek of a better life. Many immigrants have suffered unimaginable hardship to get here. However, the law must change to prevent the continuation of abuse at the forefront.

standard to satisfy "credible fear" has the potential to decrease the incoming caseload, decrease the amount of legally inadequate asylum claims, and serve as a reverse push factor[195] to deter more aliens from making the dangerous journey to the U.S.[196]

B. Attorney Abuse–the Adverse Effect

The crux of the American legal system is to provide justice for an individual's redress of injury *without delay.*[197] Courts were invented to provide a just way to seek relief.[198] But what happens when relief is no longer the motive and delaying a case becomes the primary purpose to file?[199] The system no longer serves its purpose and in turn becomes overwhelmed, abused, and broken.

This is what is occurring in the immigration law community today. "[T]he U.S. cannot provide a jury trial every time an immigrant is caught illegally entering the country[,] nor was [that] ever intended. But also, over the years, smart attorneys have exploited loopholes in the law . . . to substantially undermine the intent of Congress."[200] With growing denial rates, increased burdens, and stricter standards, asylum claims should be dwindling. Instead, attorneys continue to file applications at an increasing rate.[201] Immigration attorneys are no longer filing asylum applications to seek relief; rather, the primary motive in filing is to delay the inevitable: removal.[202] The use of the asylum system to create a delay rather than to seek actual relief should be seen as unethical and cannot continue to go unpunished. The spirit of the law demands that attorneys who abuse the system for the sole purpose of keeping

195. *See Push or Pull Factors*, *supra* note 1 (defining "push" factors).

196. Asylum officers screening out legally inadequate asylum claims without judicial review will effectively decrease the immigration courts backlog. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1966 (2020) ("[N]otwithstanding any other habeas corpus provision[,] . . . no court shall have jurisdiction to review any other individual determination or claim arising from or relating to the implementation or operation of an order of expedited removal. . . . In particular, courts may not review the determination that an applicant lacks a credible fear of persecution.").

197. *See Constitutional Access to Justice Provisions*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/topics/judicial-officers/judicial-administration/state-links (last visited Mar. 15, 2020).

198. *See generally id.*

199. Jordan, *supra* note 190.

200. Sessions, *supra* note 163.

201. *Id.*

202. *See id.*

their clients in the country longer, to obtain additional legal fees, or fail to disclose to the alien realistic outcomes should be reprimanded.

Before addressing how, we must address why. Why are attorneys—who know an alien's asylum claim lacks merit[203]—nevertheless, filing an I-589 application with the court?

Simply put, "[i]t's a bad asylum claim, but it is not frivolous and can get you benefits."[204] The benefits of applying for asylum are numerous.[205] Those who apply for asylum may remain in the country legally until the case has been adjudicated.[206] Further, one year after filing, the alien may be granted a work permit.[207] Additionally, even if an alien is denied asylum protection from USCIS and subsequently gets put in removal proceedings, she will still be given a chance to prove she qualifies for asylum defensively in front of a judge.[208] The process is long, tedious, and often takes years.

Attorneys' use of the delay tactic is both controversial and "widespread."[209] The effects of the delay tactic have become detrimental to the system, the alien, and the spirit of the law. The unethical tactic is considered "an abuse of the law."[210] "'The backlog . . . created by these lawyers [is] literally flooding the asylum office with cases that lack merit,' said Charles Kuck, an Atlanta attorney."[211] There is no doubt this delay tactic is vastly contributing to the overwhelming caseload of the courts.[212] When the goal of the attorney is to delay rather than to advocate for relief, the backlog will only continue to grow unless something is done to stop this blatant abuse of the law.

Not only does the delay tactic undermine and overwhelm the system, it also has a negative impact on aliens with legitimate asylum claims. "[J]ustice

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203. Merit, for purposes of this note, is meant to convey the validity and likelihood of an asylum grant, or rather, in this case, the lack thereof.

204. Jordan, *supra* note 190.

205. *See* Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374, 62377, 62385 (proposed Nov. 14, 2019) (to be codified at 8 C.F.R. 208 and 8 C.F.R. 274).

206. *Id.* at 62385. The author notes that prior to August 2020, the alien could get a work permit 150 days after filing. *Id.* at 62377.

207. *Id.*

208. *See id.* at 62377.

209. Jordan, *supra* note 190.

210. *Id.*

211. *Id.*

212. *See generally id.* (discussing the use of asylum applications as a deportation delay tactic which exacerbates the judicial backlog).

delayed is [J]ustice denied."[213] By flooding the court system with legally inadequate cases, justice is being denied to those with legitimate claims. Aliens, with genuine cases, are overshadowed with these meritless ones.[214] Further, those "with legitimate asylum claims [are forced to] wait even longer for a decision, to the detriment of loved ones still in their country who depend on the principal applicant's case to be approved to legally immigrate to the U.S."[215] Asylum law was created to afford protection to qualifying refugees fleeing persecution; under the spirit of the law, this delay tactic should be regarded as unethical, as it harms those the law aspires to protect and it should not go unpunished.

Further, this unethical delay tactic hurts the undocumented immigrant it purports to help. Many aliens are unaware of the consequences and/or results[216] of filing an asylum application. Many lawyers, to their client's detriment, fail to disclose the likely outcome: denial of the asylum claim.[217] Instead, the attorney promises the alien work authorization, a driver's license, and other benefits to applying while leaving out the very likely result: deportation.[218] Many aliens are "unaware they [can] be deported after paying thousands of dollars to attorneys who promised them work permits obtained through an asylum application."[219] Representation is not cheap, especially for those who have next to nothing. The average rate to have an attorney simply file an asylum application with the court or USCIS is anywhere from $1,000 to $3,000.[220] That cost may not include the additional hourly rate to have the attorney represent you in court proceedings.[221] Lack of transparency on the realistic outcome of the alien's asylum claim, coupled with expensive attorneys' fees, results in aliens being ordered removed upon order from the U.S. and forced to return to their country with next to nothing in their pockets.

The current practice of filing meritless claims is not only unethical but insults the legal system that every attorney has sworn to uphold and protect.

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213. *Justice*, LAW.COM, https://dictionary.law.com/Default.aspx?selected=1086 (last visited Mar. 15, 2020).

214. *See* Jordan, *supra* note 190.

215. *Id.*

216. *Id.*

217. *Id.* (explaining that once an affirmative asylum application is denied, the immigrant will be subject to removal proceedings).

218. *See id.*; *see generally* Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (proposed Nov. 14, 2019) (to be codified at 8 C.F.R. 208 and 8 C.F.R. 274).

219. Jordan, *supra* note 190.

220. Jen K., *How Much Does an Immigration Lawyer Cost?*, THERVO, https://thervo.com/costs/immigration-lawyer-cost (last visited Mar. 15, 2020).

221. *See id.*

While adhering to the color of the law, with the objective of protecting the undocumented immigrant, EOIR should require all immigration attorneys to give potential asylum clients an informational fact sheet. Further, if the court discovers that the attorney has filed an asylum application for a frivolous or improper purpose, the attorney should be subject to court sanctions as provided by Rule 11 of the Federal Rules of Civil Procedure. The proposed solutions will allow the undocumented immigrant to make an informed decision when seeking representation and will effectively reprimand attorneys who abuse the system by filing meritless claims.

1. Protecting the Immigrant Using Informed Decisions

The spirit of the law is to protect the vulnerable, the immigrant, from being used and abused. Immigrants are arguably one of the most vulnerable populations in America.[222] Thus, attorneys working with immigrants should be held to a higher professional responsibility standard. While attorney representation statistically improves an undocumented immigrant's chances of being granted asylum,[223] the data may not outweigh the financial detriment an undocumented immigrant may incur in retaining counsel. Absent retaining a pro-bono attorney, representation is not cheap and is especially strenuous to immigrants who lack the financial resources to obtain one.[224] Many undocumented individuals hire and pay an attorney with the hope they will obtain asylum.[225] However, that hope is likely to be unwarranted when the court orders their removal and they must leave the U.S. with next to nothing in their pockets.[226] Many undocumented immigrants do not understand the extremely low chances of being granted asylum, regardless of representation.[227] By requiring every attorney to provide potential clients with

222. *See* Solange Margery Bertoglia, *Immigrants: A Vulnerable Population*, AM. PSYCH. ASS'N, https://psycnet.apa.org/record/2011-00620-010 (last visited Mar. 20, 2020).

223. *See generally Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and More*, TRAC, SYRACUSE UNIV. [hereinafter *Asylum Decisions*], https://trac.syr.edu/phptools/immigration/asylum/ (Aug. 2020) (providing statistical data on asylum grant rates comparing respondents represented by counsel to pro-se respondents).

224. *See* Jen K., *supra* note 220.

225. *See Asylum Decisions*, *supra* note 223.

226. *See generally id*. (showing that, statistically speaking, even with representation, asylum is unlikely to be granted); Jordan, *supra* note 190.

227. *See generally Asylum Decisions*, *supra* note 223 (providing statistical data on asylum grant rates which suggests that even with representation the chances of being granted asylum are still low – in 2017 aliens represented had a 46.47% chance, in 2018 a 38.59% chance, in 2019 a 32.35% chance, and in 2020 a 29.55% chance of being granted asylum).

a form that lays out asylum success and denial rates for the applicable jurisdiction, the immigrant will be in a better position to make an informed financial decision. The form should be in the immigrant's preferred language and include both national and jurisdictional data.

[SPACE INTENTIONALLY LEFT BLANK]

This form should include data such as:

Asylum Representation Fact Sheet

Before agreeing to representation, the law requires all potential clients to review this applicable fact sheet which discusses statistical data regarding Asylum decisions. This form allows you to make an informed decision with regards to choosing representation. The Data below includes National Asylum Decision Rates regarding representation, Asylum Decision Rates by Nationality, and Asylum Decision Rates based on Jurisdiction. Prior to signing a retainer agreement, every client, who seeks representation with regards to asylum, must review this sheet and acknowledge at the bottom that he/she understands that representation does not guarantee Asylum being granted.

National Asylum Decision Rates:

Year: 2020	Cases	Denied	Granted	Other Relief Granted
Represented	27,098	69%	29.7%	1.27%
Not Represented	6,096	84.6%	12.8%	2.59%

Year: 2019	Cases	Denied	Granted	Other Relief Granted
Represented	57,050	66.5%	32.3%	1.23%
Not Represented	10,470	84.2%	14%	1.79%

Immigration Court Asylum Denial Rates by Nationality and Representation Status, FY 2012 – FY 2017

	Number of Asylum Decisions			Percent Denied Asylum		
Nationality	**All**	**Not Represented**	**Represented**	**All**	**Not Represented**	**Represented**
China	31,176	1,328	29,848	20.3%	78.7%	17.1%
El Salvador	15,667	4,210	11,457	79.2%	95.9%	73.1%
Mexico	14,688	5,550	9,138	88.0%	97.1%	82.5%
Honduras	11,020	3,407	7,613	78.1%	94.5%	70.7%
Guatemala	10,983	2,575	8,408	74.7%	95.1%	68.4%

Asylum Decision Rates in Immigration Courts Years 2014 - 2019

Immigration Court	Cases	Denied	Granted
Miami	11,001	85.65%	14.35%
Miami - Krome	2,305	91.4%	8.6%

Disclaimer: *Every asylum claim is adjudicated on a case-by-case basis, these numbers may not accurately reflect your chances of being granted asylum. These numbers are provided for informational purposes only. They should not be construed to persuade or dissuade you from seeking representation. Ultimately, it is up to you to decide if representation is in your best interest.*

I _____ have read and understand the statistical data above.
(print name)

Signed: _____ Date: _____

(This form has been created for illustrative purposes only.) [228]

228. This form has been created, for note purposes only, as an example of what every attorney should be required to hand out to all potential clients. All statistical data provided in the form is accurate in accordance with TRAC data. *Asylum Decisions, supra* note 223; *Immigration Court Asylum Denial Rates*

Asylum law is rooted in protecting those who seek it;[229] mandatory implementation of an informational fact sheet will provide immigrants with a necessary tool to make an informed decision regarding representation. Requiring a form like the one illustrated above, under the spirit of the law, will offer further protection to vulnerable immigrants. The legislature should not allow attorneys to profit off the backs of undocumented individuals, whose finances are next to nothing, without properly disclosing statistical data that would allow the alien to make an informed decision.

2. Implementing Rule 11 Sanctions

Under the color of the law, attorneys who abuse the system to delay a case, make a greater profit, or file a frivolous claim should be subject to sanctions by the court. EOIR has the authority to discipline practitioners that "engag[e] in conduct that is prejudicial to the administration of justice,"[230] "fail[] to disclose adverse legal authority,"[231] or engage in "frivolous behavior."[232] Under the current process, an immigration judge must file a written complaint with the EOIR.[233] After EOIR receives the complaint, a disciplinary council may decide whether or not to initiate disciplinary proceedings.[234] The current review process discourages immigration judges from seeking disciplinary action against unethical attorneys.[235] To address the widespread abuse, immigration judges should be allowed to directly issue sanctions on these attorneys in accordance with Rule 11[236] of the Federal Rules of Civil Procedure.[237] Implementation of Rule 11 sanctions in immigration court

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by Nationality and Representation Status, FY 2012 – FY 2017, TRAC, SYRACUSE UNIV. (Nov. 20, 2017), https://trac.syr.edu/immigration/reports/491/include/table2.html; *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019*, TRAC, SYRACUSE UNIV., https://trac.syr.edu/immigration/reports/judge2019/denialrates.html (last visited Mar. 15, 2020).

229. *See* Universal Declaration of Human Rights, *supra* note 9, at Art. 14(1).

230. U.S. DEP'T. OF JUST., IMMIGRATION COURT PRACTICE MANUAL 149 (2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

231. *Id.* at 150.

232. *Id.* at 149 (referring to "frivolous behavior, as defined in 8 C.F.R. § 1003.102(j)").

233. *Id.* at 151.

234. *Id.* at 153; 8 C.F.R. §§ 1003.104(b)–(d), 1292.19(b) (2020).

235. Immigration judges are already overwhelmed with the number of cases they must address every day. Requiring the immigration judge to file a written complaint with EOIR and wait for a disciplinary council to make a decision is time the judge likely does not have.

236. FED. R. CIV. P. 11(c).

237. The Rule provides, in relevant part:

proceedings would allow the judge to sanction any attorney who files a frivolous application.[238] This will encourage defense attorneys to advocate under the spirit of the law and will encourage attorneys to turn in complete and adequate documents to the court in a timely manner. Further, it will subject attorneys that use the filing process as a delay tactic to immediate disciplinary action.[239] But, most importantly, it will protect the undocumented immigrant from unscrupulous attorney practices. Like Rule 11, the BIA should give the immigration judge some discretion when deciding if the sanctions imposed are reasonable.[240] By ensuring the asylum application is presented for the proper purpose, implementation of Rule 11 in immigration proceedings will decrease

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(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b)(1)-(4).

238. The Rule provides, in relevant part:

(c) Sanctions. (1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee. (2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion. (3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b). (4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation. (5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction: (A) against a represented party for violating Rule 11(b)(2); or (B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. (6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

FED. R. CIV. P. 11(c).

239. *See id.*

240. FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

the immigration courts' pending case backlog and the number of meritless asylum applications filed.

CONCLUSION

Asylum protection was not created to be an easy path to U.S. Citizenship, nor was it intended to be a means for undocumented individuals to stay in the country for long periods of time. Rather, its purpose was to offer safety to those fleeing persecution on account of a protected ground. The current practice of adjudicating PSG claims that blatantly fail to meet the necessary elements of asylum law at the forefront must change. These PSG claims have the practical effect of backing up the courts, undercutting the viability of aliens with real claims, and ultimately financially stripping the alien of any money earned in the U.S. The legislature must close this loophole by implementing a higher credible fear standard at the border and taking action to combat attorney abuse. While it is impossible to change the pull effect the U.S. has on many immigrants, the spirit of the law demands recognition of the detrimental and overwhelming effect meritless PSG claims have on immigration courts. Congress must close the backdoor on certifiably deniable PSG asylum claims, while protecting the immigrant, in order to correct the overcrowded, abused, and broken system before it is too late.