

Immigration: U.S. Asylum Policy

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Summary

Asylum is a complex area of immigration law and policy. While much of the recent debate surrounding asylum has focused on efforts by the Trump Administration to address asylum seekers arriving at the U.S. southern border, U.S. asylum policies have long been a subject of discussion.

The Immigration and Nationality Act (INA) of 1952, as originally enacted, did not contain any language on asylum. Asylum provisions were added and then revised by a series of subsequent laws. Currently, the INA provides for the granting of asylum to an alien who applies for such relief in accordance with applicable requirements and is determined to be a refugee. The INA defines a refugee, in general, as a person who is outside his or her country of nationality and is unable or unwilling to return to 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.

Under current law and regulations, aliens who are in the United States or who arrive in the United States, regardless of immigration status, may apply for asylum (with exceptions). An asylum application is affirmative if an alien who is physically present in the United States (and is not in removal proceedings) submits an application to the Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS). An asylum application is defensive when the applicant is in standard removal proceedings with the Department of Justice's (DOJ's) Executive Office for Immigration Review (EOIR) and requests asylum as a defense against removal. An asylum applicant may receive employment authorization 180 days after the application filing date.

Special asylum provisions apply to aliens who are subject to a streamlined removal process known as expedited removal. To be considered for asylum, these aliens must first be determined by a USCIS asylum officer to have a credible fear of persecution. Under the INA, 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." Individuals determined to have a credible fear may apply for asylum during standard removal proceedings.

Asylum may be granted by USCIS or EOIR. There are no numerical limitations on asylum grants. If an alien is granted asylum, his or her spouse and children may also be granted asylum, as dependents. A grant of asylum does not expire, but it may be terminated under certain circumstances. After one year of physical presence in the United States as asylees, an alien and his or her spouse and children may be granted lawful permanent resident status, subject to certain requirements.

The Trump Administration has taken a variety of steps that would limit eligibility for asylum. As of the date of this report, legal challenges to these actions are ongoing. For its part, the 115th Congress considered asylum-related legislation, which generally would have tightened the asylum system. Several bills contained provisions that, among other things, would have amended INA provisions on termination of asylum, credible fear of persecution, frivolous asylum applications, and the definition of a refugee.

Key policy considerations about asylum include the asylum application backlog, the grounds for granting asylum, the credible fear of persecution threshold, frivolous asylum applications, employment authorization, variation in immigration judges' asylum decisions, and safe third country agreements.

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Introduction

Illegal aliens have exploited asylum loopholes at an alarming rate. Over the last five years, DHS has seen a 2000 percent increase in aliens claiming credible fear (the first step to asylum), as many know it will give them an opportunity to stay in our country, even if they do not actually have a valid claim to asylum.

—Department of Homeland Security (DHS) press release, December 20, 2018¹

The increased number of Central Americans petitioning for asylum in the United States is not because more people are “exploiting” the system via “loopholes,” but because many have credible claims.... There is no recorded evidence by any U.S. federal agency showing that the increased number of people petitioning for asylum in the United States is due to more people lying about the dangers they face back in their country of origin.

—Washington Office on Latin America (WOLA) commentary, March 14, 2018²

These statements and the conflicting views about asylum seekers underlying them suggest why the asylum debate has become so heated. Policymakers have faced a perennial challenge to devise a fair and efficient system that approves legitimate asylum claims while deterring and denying illegitimate ones. Changes in U.S. asylum policy and processes over the years can be seen broadly as attempts to strike the appropriate balance between these two goals. Periods marked by increasing levels of asylum-seeking pose particular challenges and may elicit a variety of policy responses. Faced with an influx of Central Americans seeking asylum at the southern U.S. border, the Trump Administration has put forth policies to tighten the asylum system (see, for example, the “2018 Interim Final Rule” and “DHS Migrant Protection Protocols” sections of this report); these policies typically have been met with court challenges. This report explores the landscape of U.S. asylum policy through an analysis of current asylum processes, available data, legislative and regulatory history, recent legislative and presidential proposals, and selected policy questions.

What is Asylum?

In common usage, the word *asylum* often refers to protection or safety. In the immigration context, however, it has a narrower meaning. The Immigration and Nationality Act (INA) of 1952, as amended,³ provides for the granting of *asylum* to an alien⁴ who applies for such relief in accordance with applicable requirements and is determined to be a *refugee*.⁵ The INA defines a refugee, in general, as a person who is outside his or her country of nationality and is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution

¹ U.S. Department of Homeland Security, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration,” press release, December 20, 2018, <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> (hereinafter cited as DHS, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration”). Note that DHS has told CRS that the “2000 percent” reference in the quote is incorrect; telephone conversation with USCIS Office of Legislative and Intergovernmental Affairs, January 24, 2019.

² Maureen Meyer and Elyssa Pachico, *6 Facts About Alleged “Loopholes” in the U.S. Immigration Process*, Washington Office on Latin America, March 14, 2018, <https://www.wola.org/analysis/6-facts-alleged-loopholes-u-s-immigration-process/>. WOLA is a human rights advocacy organization.

³ The INA is Act of June 27, 1952, ch. 477, codified, as amended, at 8 U.S.C. §§1101 et seq.

⁴ Under INA §101(a)(3) (8 U.S.C. §1101(a)(3)), an alien is a person who is not a U.S. citizen or a U.S. national.

⁵ INA §208 (8 U.S.C. §1158).

based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. Asylum can be granted by the Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS) or the Department of Justice's (DOJ's) Executive Office for Immigration Review (EOIR), depending on the type of application filed (see "Asylum Application Process").

The INA distinguishes between applicants for refugee status and applicants for asylum by their physical location. Refugee applicants are outside the United States, while applicants for asylum are physically present in the United States or at a land border or port of entry.⁶ After one year as a refugee or asylee (a person granted asylum), an individual can apply to become a U.S. lawful permanent resident (LPR).⁷

Overview of Current Asylum Provisions

With some exceptions, aliens who are in the United States or who arrive in the United States, regardless of immigration status, may apply for asylum. This summary describes the asylum process for an adult applicant.

As discussed in the next section of the report, asylum may be granted by a USCIS asylum officer or an EOIR immigration judge.⁸ There are no numerical limitations on asylum grants. In order to receive asylum, an alien must establish that he or she meets the INA definition of a refugee, among other requirements. Certain aliens, such as those who are determined to pose a danger to U.S. security, are ineligible for asylum. An asylum applicant who is not otherwise eligible to work in the United States may apply for employment authorization 150 days after filing a completed asylum application and may receive such authorization 180 days after the application filing date.

An alien who has been granted asylum is authorized to work in the United States and may receive approval to travel abroad. A grant of asylum does not expire, but it may be terminated under certain circumstances, such as if an asylee is determined to no longer meet the INA definition of a refugee. After one year of physical presence in the United States as an asylee, an alien may be granted LPR status, subject to certain requirements. There are no numerical limitations on the adjustment of status of asylees to LPR status.

Special asylum provisions apply to certain aliens without proper documentation who are determined to be subject to a streamlined removal process known as expedited removal. To be considered for asylum, these aliens must first be determined by a USCIS asylum officer to have a credible fear of persecution. Those determined to have a credible fear may apply for asylum during standard removal proceedings. (See "Inspection of Arriving Aliens.")

Asylum Application Process

Applications for asylum are either defensive or affirmative. A different set of procedures applies to each type of application.

⁶ This report does not address refugee status. For information on the U.S. refugee admissions program, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*.

⁷ INA §209 (8 U.S.C. §1159). LPRs can live and work permanently in the United States. They can become U.S. citizens through the naturalization process.

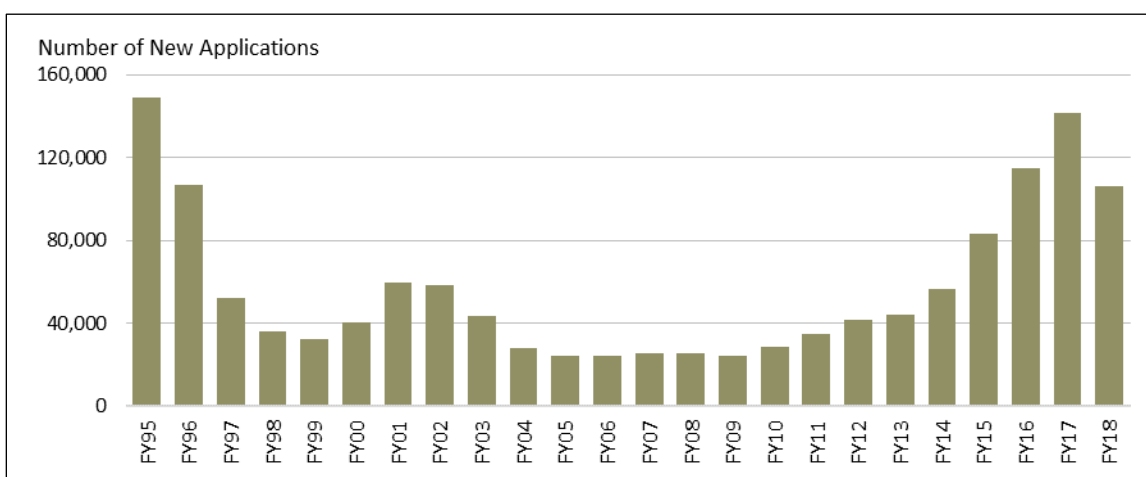
⁸ The Board of Immigration Appeals (BIA), a component of EOIR, has jurisdiction to hear appeals of certain decisions made by immigration judges and DHS.

Affirmative Asylum

An asylum application is affirmative if an alien who is physically present in the United States (and not in removal proceedings) submits an application for asylum to DHS's USCIS. An alien may file an affirmative asylum application regardless of his or her immigration status, subject to applicable restrictions. There is no fee to apply for asylum.⁹

Figure 1 shows the number of new affirmative asylum applications filed with USCIS since FY1995, the year filings reached their historical high point. The years included in this figure and in the subsequent figures and tables differ due to the availability of data from the relevant agencies. The data displayed in **Figure 1** are for applications, not individuals; an application may include a principal applicant and dependents. **Figure 1** reflects the impact of various factors. For example, reforms in the mid-1990s, which made the asylum system more restrictive, contributed to the decline in applications in the earlier years shown. A contributing factor to the application increases in the later years depicted in **Figure 1** was the influx of unaccompanied alien children from Central America seeking asylum.¹⁰ (See **Appendix A** for underlying data and data on the top 10 nationalities filing affirmative asylum applications.)

Figure 1. New Affirmative Asylum Applications Filed, FY1995-FY2018



Source: CRS presentation of data provided by the Department of Homeland Security, U.S. Citizenship and Immigration Services, on July 19, 2018 (FY1995-FY2017); Department of Homeland Security, U.S. Citizenship and Immigration Services, "Affirmative Asylum Statistics" (monthly October 2017 through September 2018), "Asylum Applications Filed" (Received) (FY2018).

Notes: Data represent applications, not individuals. Data are limited to new filings; they do not include applications that were reopened during the relevant fiscal year.

The INA prohibits the granting of asylum until the identity of the asylum applicant has been checked against appropriate records and databases to determine if he or she is inadmissible or deportable, or ineligible for asylum.¹¹ As part of the affirmative asylum process, applicants are scheduled for

⁹ The adjudication of asylum applications is funded by fees charged on other applications for immigration benefits. INA §286(m) (8 U.S.C. §1356(m)) provides: "That fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants."

¹⁰ The asylum process for unaccompanied alien children is not covered in this report. For further information about this population, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*.

¹¹ INA §208(d)(5)(A)(i) (8 U.S.C. §1158(d)(5)(A)(i)).

fingerprinting appointments. The fingerprints are used to confirm the applicant's identity and perform background and security checks.

Asylum applicants are interviewed by USCIS asylum officers. In scheduling asylum interviews, the USCIS Asylum Division is currently giving priority to applications that have been pending for 21 days or less. According to USCIS, "Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain employment authorization."¹²

Under DHS regulations, the asylum interview is to be conducted in "a nonadversarial manner." The applicant may bring counsel or a representative to the interview, present witnesses, and submit other evidence. After the interview, the applicant or the applicant's representative can make a statement.¹³

USCIS Decisions on Affirmative Asylum Applications

An asylum officer's decision on an application is reviewed by a supervisory asylum officer, who may refer the case for further review.¹⁴ If an asylum officer ultimately determines that an applicant is eligible for asylum, the applicant receives a letter and form documenting the grant of asylum.¹⁵

If the asylum officer determines that an applicant is not eligible for asylum and the applicant has immigrant status, nonimmigrant status, or temporary protected status (TPS),¹⁶ the asylum officer denies the application.¹⁷ If the asylum officer determines that an applicant is not eligible for asylum and the applicant appears to be inadmissible or deportable under the INA, however, DHS regulations direct the officer to refer the case to an immigration judge for adjudication in removal proceedings.¹⁸ In those proceedings, the immigration judge evaluates the asylum claim independently as a *defensive* application for asylum.

Figure 2 presents data on affirmative asylum applications considered by USCIS since FY2009. It shows four separate outcome categories. Closures are cases administratively closed for reasons such as abandonment or lack of jurisdiction. A closure in one fiscal year in **Figure 2** could have been refiled or reopened in a subsequent year. **Figure 2** shows that a majority of cases were referred to an immigration judge each year. These referrals included both applicants who were interviewed by USCIS and applicants who were not (e.g., they did not appear for the interview). (See **Table B-1** for underlying data and additional detail.¹⁹)

¹² U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "Affirmative Asylum Interview Scheduling," January 26, 2018, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling>.

¹³ 8 C.F.R. §208.9.

¹⁴ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "The Affirmative Asylum Process," <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>.

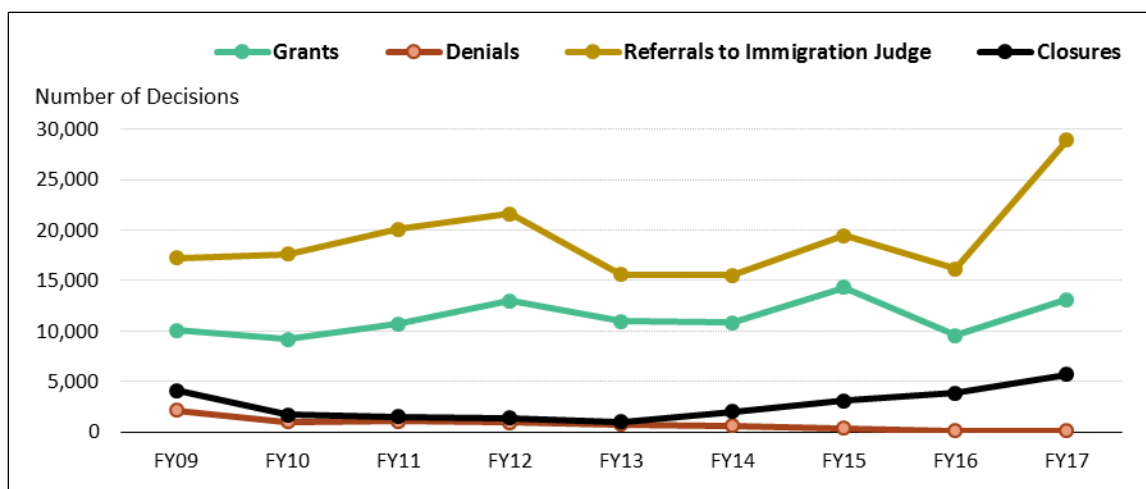
¹⁵ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "Types of Asylum Decisions," <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions>.

¹⁶ For information about TPS, see CRS Report RS20844, *Temporary Protected Status: Overview and Current Issues*.

¹⁷ 8 C.F.R. §208.14(c).

¹⁸ 8 C.F.R. §208.14(c)(1).

¹⁹ Data on individuals granted asylum affirmatively by country of nationality for FY2014 through FY2016 are available in Table 17 of U.S. Department of Homeland Security, *2016 Yearbook of Immigration Statistics*, <https://www.dhs.gov/immigration-statistics/yearbook/2016/table17>. Earlier yearbooks contain comparable data for earlier years.

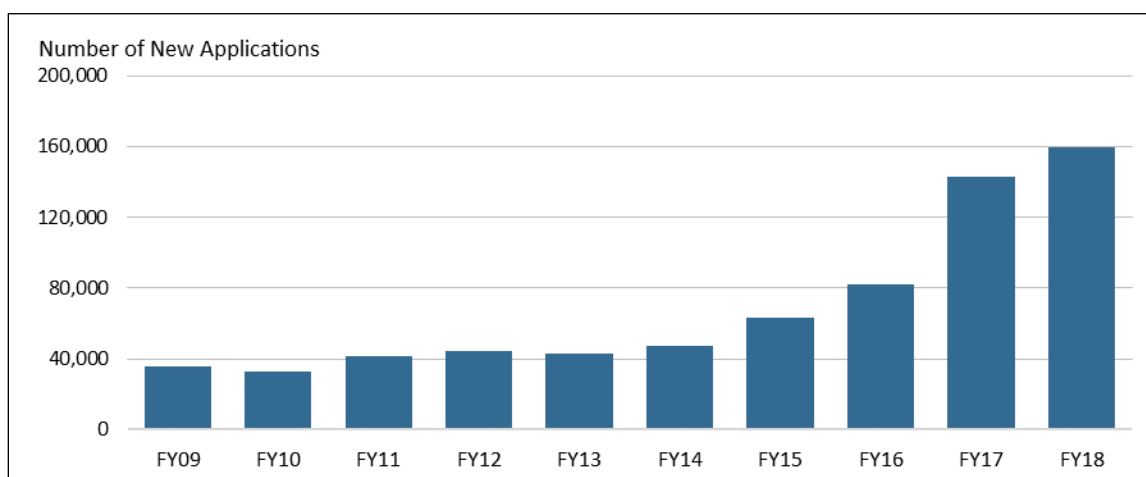
Figure 2. USCIS Decisions on Affirmative Asylum Applications, FY2009-FY2017

Source: CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on July 30, 2018.

Notes: Data represent applications, not individuals. *Closures* are cases administratively closed for reasons such as abandonment or lack of jurisdiction.

Defensive Asylum

An asylum application is defensive when the applicant is in standard removal proceedings in immigration court²⁰ and requests asylum as a defense against removal. **Figure 3** provides data on defensive asylum applications filed since FY2009. The data include both cases that originated as defensive cases as well as cases that were first filed as affirmative applications with USCIS, as described in the preceding section. (See **Table C-1** for underlying data and additional detail.)

Figure 3. Defensive Asylum Applications Filed, FY2009 -FY2018

Source: CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, "Total Asylum Applications," generated October 24, 2018.

Notes: Data represent individuals. Data are for applications filed in removal, deportation, exclusion, and asylum-only proceedings.

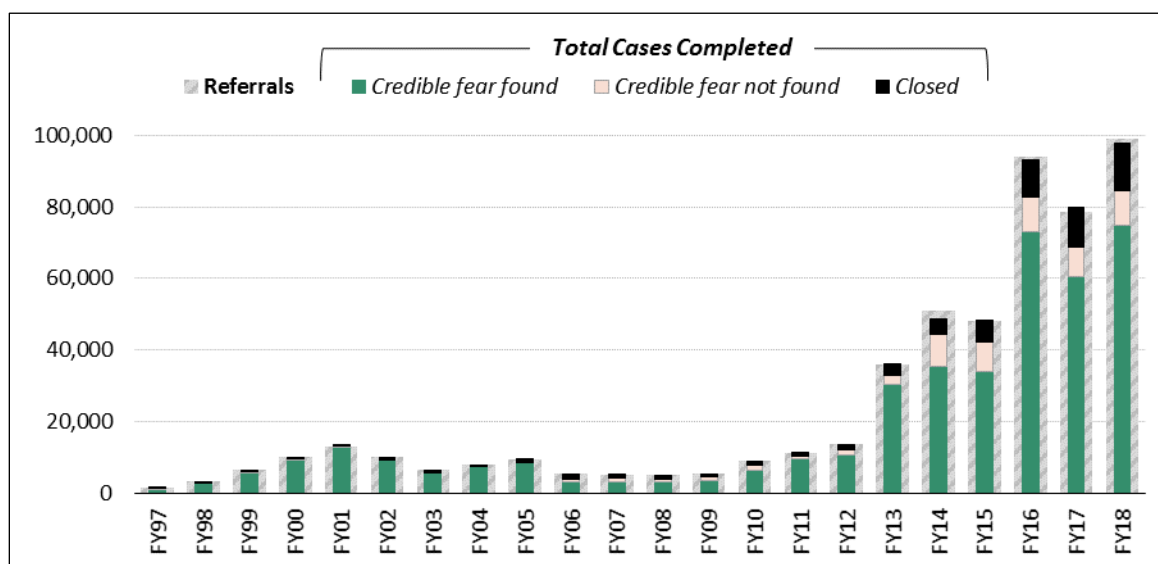
²⁰ The standard removal process is described in INA §240 (8 U.S.C. §1229a) and is distinct from the expedited removal process.

There are different ways that an alien can be placed in standard removal proceedings. An alien who is living in the United States can be charged by DHS with violating immigration law. In such a case, DHS initiates removal proceedings when it serves the alien with a Notice to Appear before an immigration judge.

Another way to be placed in standard removal proceedings relates to the statutory expedited removal and credible fear screening provisions discussed more fully below (see “Inspection of Arriving Aliens”). Under the INA, an individual who is determined by DHS to be inadmissible to the United States because he or she lacks proper documentation or has committed fraud or willful misrepresentation of facts to obtain documentation or another immigration benefit (and thus is subject to expedited removal) and expresses the intent to apply for asylum or a fear of persecution is to be interviewed by an asylum officer to determine if he or she has a credible fear of persecution. 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.”²¹ If the alien is found to have a credible fear, the asylum officer is to refer the case to an immigration judge for a full hearing on the asylum request during removal proceedings.

Figure 4 provides data on USCIS credible fear findings since FY1997. For each year, it shows the number of credible fear cases referred to and completed by USCIS and the outcomes of the completed cases. Closed cases are cases in which a credible fear determination was not made. (See **Table B-2** and **Table B-3** for underlying data and additional detail.)

Figure 4. Credible Fear Referrals and Findings, FY1997-FY2018



Source: CRS presentation of data provided by the Department of Homeland Security, U.S. Citizenship and Immigration Services, on April 27, 2018 (FY1997-FY2017); Department of Homeland Security, U.S. Citizenship and Immigration Services, “Credible Fear and Reasonable Fear Statistics and Nationality Report,” “Credible Fear Workload Report Summary, FY 2018 Total Caseload” (FY2018).

Notes: Data represent individuals. Credible fear referrals to USCIS come from DHS’s U.S. Customs and Border Protection or DHS’s Immigration and Customs Enforcement.

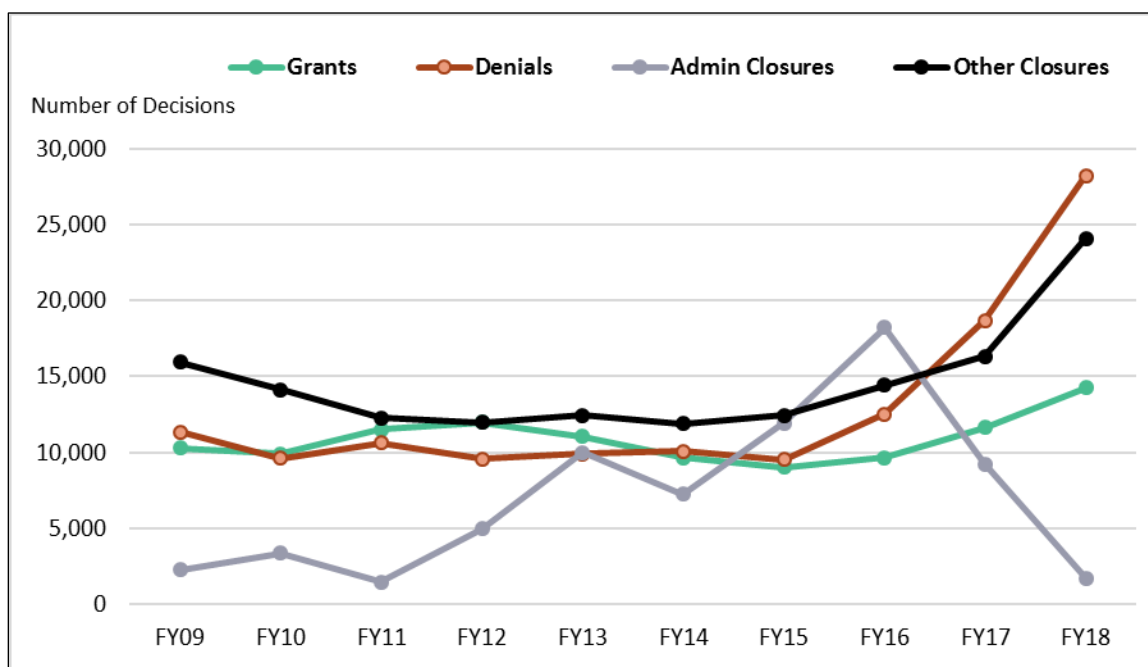
²¹ INA §235(b)(1)(B)(v) (8 U.S.C. §1225(b)(1)(B)(v)).

EOIR Decisions on Defensive Asylum Applications

During a removal proceeding, an attorney from DHS's Immigration and Customs Enforcement (ICE) presents the government's case for removing the alien, the alien or their representative may present evidence on the alien's behalf and cross examine witnesses, and an immigration judge from EOIR determines whether the alien should be removed. An immigration judge's removal decision is generally subject to administrative and judicial review.²²

Figure 5 presents data on EOIR decisions in defensive asylum cases since FY2009. (See **Appendix D** for underlying data and data for defensive cases that began with a credible fear claim.²³) **Figure 5** shows a sharp drop in administrative closures since FY2016. Administrative closing "allows the removal of cases from the immigration judge's calendar in certain circumstances" but "does not result in a final order" in the case;²⁴ cases that are administratively closed can be reopened. Administrative closure has been used, for example, when an alien has a pending application for relief from another agency. In May 2018, Attorney General Jeff Sessions ruled that immigration judges and the BIA do not have general authority to administratively close cases.²⁵

Figure 5. Immigration Judge Decisions in Defensive Asylum Cases, FY2009-FY2018



Source: CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, "Asylum Decision Rates," generated October 2018.

Notes: Data represent individuals. Data include both initial case completions (in removal, deportation, exclusion, and asylum only proceedings) and subsequent case completions (e.g., in proceedings that begin when an immigration judge

²² See CRS Report R43892, *Alien Removals and Returns: Overview and Trends*.

²³ Data on EOIR decisions in defensive asylum cases, by nationality, for FY2018 are available in U.S. Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, "Asylum Decision Rates by Nationality" table, generated October 24, 2018, <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

²⁴ *Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204 (BIA 1990).

²⁵ *Matter of CASTRO-TUM*, 27 I&N Dec. 271 (A.G. 2018).

grants a motion to reopen, reconsider, or recalendar). *Administrative Closures* are case closures that do not result in a final order. *Other Closures* include closures in cases that are abandoned, not adjudicated, or withdrawn.

Evolution of U.S. Asylum Policy

The INA, as originally enacted, did not contain refugee or asylum provisions. Language on the *conditional entry* of refugees was added by the INA Amendments of 1965.²⁶ The 1965 act authorized the conditional entry of aliens, who were to include those who demonstrated to DOJ's Immigration and Naturalization Service (INS)²⁷ that

(i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made.²⁸

In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). The Protocol incorporated the 1951 United Nations Convention Relating to the Status of Refugees (Convention), which the United States had not previously been a party to, and expanded the Convention's definition of a refugee.²⁹ The Convention had defined a refugee in terms of events occurring before January 1951. The Protocol eliminated that date restriction. It also provided that the refugee definition would apply without geographic limitation, while allowing for some exceptions.³⁰ With the changes made by the Protocol, a refugee came to be defined as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

The Protocol retained other elements of the Convention, including the latter's prohibition on *refoulement* (or forcible return), a fundamental asylum concept. Specifically, the Convention prohibited states from expelling or returning a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."³¹

In the 1970s, INS issued regulations that established procedures for applying for asylum in the United States and for adjudicating asylum applications. For example, a 1974 rule provided that an asylum applicant could include his or her spouse and unmarried minor children on the application and that INS could deny or approve an asylum application as a matter of discretion.³²

²⁶ P.L. 89-236, §3.

²⁷ INS, an agency of the Department of Justice with primary responsibility for administering and enforcing immigration laws, was abolished in 2003 in accordance with the Homeland Security Act of 2002 (P.L. 107-296). Most INS functions were transferred to the new Department of Homeland Security.

²⁸ P.L. 89-236, §3.

²⁹ The texts of the 1951 Convention and 1967 Protocol are available at U.N. High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

³⁰ U.N. Protocol Relating to the Status of Refugees, Article 1.

³¹ 1951 Convention on the Status of Refugees, Article 33. Under the Convention, however, this nonrefoulement provision is inapplicable to a refugee who poses a danger to the security or the community of the country in which he or she is living.

³² U.S. Department of Justice, Immigration and Naturalization, "Asylum," 39 *Federal Register* 41832, December 3, 1974.

Refugee Act of 1980

Despite the U.S. accession to the 1967 U.N. Protocol, the INA did not include a conforming definition of a refugee or a mandatory nonrefoulement provision until the enactment of the Refugee Act of 1980.³³ As noted, the 1965 conditional entry provisions incorporated a refugee definition that was limited by type of government and geography. A 1999 INS report explained a goal of the Refugee Act as being “to establish a politically and geographically neutral adjudication for both asylum status and refugee status, a standard to be applied equally to all applicants regardless of country of origin.”³⁴

The definition of a refugee, as added to the INA by the 1980 act, reads, in main part:

(A) any person who is outside any country of such person’s nationality ... and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁵

(This first part of the definition of a refugee has not changed since enactment of the Refugee Act.)

Asylum Process

As explained by INS Acting Commissioner Doris Meissner at a 1981 Senate hearing, the primary focus of the Refugee Act of 1980 was the refugee process. According to Meissner’s written testimony, “The asylum process was looked upon as a separate and considerably less significant subject.”³⁶ In keeping with this secondary status, the asylum provisions added by the 1980 act to the INA (as INA §208) comprised three short paragraphs. The first directed the Attorney General to establish asylum application procedures for aliens physically present in the United States or arriving at a land border or port of entry, regardless of immigration status, and gave the Attorney General discretionary authority to grant asylum to aliens who met the newly added INA definition of a refugee. The second paragraph allowed for the termination of asylum status if the Attorney General determined that the alien no longer met the INA definition of a refugee due to “a change in circumstances” in the alien’s home country. The third paragraph provided for the granting of asylum status to the spouse and children³⁷ of an alien granted asylum.³⁸

Adjustment of Status

Separate language in the Refugee Act added a new Section 209 to the INA on refugee and asylee adjustment of status. Adjustment of status is the process of acquiring LPR status in the United States. The asylee provisions granted the Attorney General discretionary authority to adjust the status of an alien who had been physically present in the United States for one year after being granted asylum and met other requirements, subject to an annual numerical limit of 5,000.³⁹

³³ P.L. 96-212.

³⁴ U.S. Department of Justice, Immigration and Naturalization Service Asylum Program, *History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication*, September 1999.

³⁵ INA §101(a)(42)(A), as added by §201(a) of the Refugee Act.

³⁶ Testimony of Doris Meissner, INS Acting Commissioner, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration and Refugee Policy, *How Do We Determine Who is Entitled to Asylum in the United States and Who Is Not?* hearing, 97th Cong., 1st sess., October 14, 1981 (Washington: GPO, 1982), p. 6

³⁷ The word *child*, as defined in the INA and as used in this report, refers to an unmarried person under age 21. See INA §101(b)(1) for the current definition of *child* applicable under the INA asylum provisions.

³⁸ P.L. 96-212, §201(b), adding new INA §208.

³⁹ P.L. 96-212, §201(b), adding new INA §209.

Withholding of Deportation

The Refugee Act amended an INA provision on withholding of deportation, making it consistent with the nonrefoulement language in the Convention. The INA provision in effect prior to the enactment of the Refugee Act “authorized” the Attorney General to withhold the deportation of an alien in the United States (other than an alien involved in Nazi-related activity) to “any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion.” The Refugee Act revised this language to prohibit the Attorney General from deporting or returning any alien to a country where the Attorney General determines the alien’s life or freedom would be threatened because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion. It also added exclusions beyond the one for participation in Nazi-related activity.⁴⁰ Specifically, the new provision made an alien ineligible for withholding if the alien had participated in the persecution of another person based on race, religion, nationality, membership in a particular social group, or political opinion; the alien had been convicted of a “particularly serious crime” and thus was a danger to the United States; there existed “serious reasons for considering that the alien had committed a serious nonpolitical crime outside the United States,” or there existed “reasonable grounds” for considering the alien a danger to national security. (For subsequent changes to this provision, see “Withholding of Removal.”)

1980 Interim Regulations

INS published interim regulations in June 1980 to implement the Refugee Act’s provisions on refugee and asylum procedures.⁴¹ The asylum regulations included the following:

- INS district directors had jurisdiction over all requests for asylum except for those made by aliens in exclusion or deportation proceedings.⁴²
- An alien whose application for asylum was denied by the district director could renew the asylum request in exclusion or deportation proceedings.
- The applicant had the burden of proof to establish eligibility for asylum.
- The asylum applicant would be examined in person by an immigration officer or an immigration judge.⁴³
- The district director (or the immigration judge) would request an advisory opinion on the asylum application from the Department of State’s (DOS’s) Bureau of Human Rights and Humanitarian Affairs (BHRHA).
- The district director could grant work authorization to an asylum applicant who filed a “non-frivolous” application.
- The district director’s decision on an asylum application was discretionary.
- The district director would deny an asylum application for various reasons, including that the alien had been firmly resettled in another country; the alien had participated in the persecution of another person based on race, religion, nationality, membership in a particular social group, or political opinion; the alien had been convicted of a “particularly serious crime” and thus was a danger to the United States; there existed

⁴⁰ Section 201(e) of the Refugee Act, amending INA §243(h). This provision, as subsequently revised, now comprises INA §241(b)(3) (8 U.S.C. §1231(b)(3)).

⁴¹ U.S. Department of Justice, Immigration and Naturalization, “Aliens and Nationality; Refugee and Asylum Procedures,” 45 *Federal Register* 37392, June 2, 1980.

⁴² Immigration judges had jurisdiction over asylum requests by aliens in exclusion or deportation proceedings. For an explanation of exclusion and deportation, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*.

⁴³ At the time, the immigration judges were part of INS.

“serious reasons for considering that the alien had committed a serious non-political crime outside the United States;” or there existed “reasonable grounds” for considering the alien a danger to national security.

- An initial grant of asylum was for one year and could be extended in one-year increments.
- Asylum status could be terminated for various reasons, including changed conditions in the asylee’s home country.

1990 Final Rule

There was much discussion and debate about asylum in the 1980s, as related legislation and regulations were proposed, court cases were litigated, and the number of applications increased. In addition, in a 1983 internal DOJ reorganization, EOIR was established as a separate DOJ agency to administer the U.S. immigration court system. It combined the Board of Immigration Appeals (BIA)⁴⁴ with the INS immigration judge function. With the creation of EOIR, the immigration courts became independent of INS.

It was not until July 1990 that INS published a final rule to revise the 1980 interim regulations on asylum procedures.⁴⁵ According to the supplementary information to the 1990 rule, the asylum policy established by the rule reflected two core principles: “A fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process; and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims.”⁴⁶

The 1990 final rule created the position of asylum officer within INS to adjudicate asylum applications. As described in the supplementary information to a predecessor 1988 proposed rule, asylum officers were intended to be “a specially trained corps” that would develop expertise over time, with the expected result of greater uniformity in asylum adjudications.⁴⁷ Under the 1990 rule, asylum applications filed with the district director were to be forwarded to the asylum officer with jurisdiction in the district.

Under the 1990 rule, comments on asylum applications by DOS—a standard part of the adjudication process under the 1980 interim regulations—became optional.⁴⁸ (In an earlier, related development, DOS announced that as of November 1987 it would no longer be able to provide an advisory opinion on every asylum application due to budget constraints and would focus on those cases where it thought it could provide input not available from other sources.⁴⁹)

⁴⁴ The BIA, “the highest administrative body for interpreting and applying immigration laws,” has jurisdiction to hear appeals of certain decisions made by immigration judges and DHS. “Most BIA decisions are subject to judicial review in the federal courts.” See U.S. Department of Justice, Executive Office for Immigration Review, <https://www.justice.gov/eoir/board-of-immigration-appeals>.

⁴⁵ U.S. Department of Justice, Immigration and Naturalization Service, “Aliens and Nationality; Asylum and Withholding of Deportation Procedures,” final rule, 55 *Federal Register* 30674, July 27, 1990 (hereinafter cited as 1990 final rule).

⁴⁶ *Ibid.* p. 30675.

⁴⁷ U.S. Department of Justice, Immigration and Naturalization Service, “Aliens and Nationality; Asylum and Withholding of Deportation Procedures,” revised proposed rule, 53 *Federal Register* 11300, 11301, April 6, 1988.

⁴⁸ A February 1984 *Washington Post* article described INS as being “determined to recapture control of the asylum process” from the State Department. The article cited the 1980 regulatory provisions on DOS review of asylum cases as one source of State Department control. Caryle Murphy, “Eager INS Official Seeks to Cut Backlog of Asylum Requests,” *Washington Post*, February 27, 1984, p. A9.

⁴⁹ This change was reported in U.S. Department of Justice, Immigration and Naturalization Service, “Asylum Adjudications Procedure Change,” 53 *Federal Register* 2893, February 2, 1988. Under current regulations (8 C.F.R. §208.11), USCIS may request, at its discretion, and DOS may provide, at its discretion, comments about asylum cases.

The 1990 rule distinguished between asylum claims based on actual past persecution and on a well-founded fear of future persecution. To establish a well-founded fear of future persecution, the rule required, in part, that an applicant establish that he or she fears persecution in his or her country based on one of the five protected grounds and that “there is a reasonable possibility of actually suffering such persecution” upon return. The rule further detailed the “burden of proof” requirements for asylum applicants. It provided that the applicant’s own testimony alone may be sufficient to prove that he or she meets the definition of a refugee. It also stated that an applicant could show a well-founded fear of persecution on one of the protected grounds without proving that he or she would be persecuted individually, if the applicant could establish “that there is a pattern or practice” of persecution of similarly situated individuals in his or her home country and that he or she is part of such a group.⁵⁰

The 1990 rule provided that a grant of asylum to a principal applicant would be for an indefinite period. It also provided that the grant of asylum to a principal applicant’s spouse and children would be indefinite, unless the principal’s asylum status was revoked.

Under the 1990 rule, an application for asylum was also to be considered an application for withholding of deportation; in cases of asylum denials, the asylum officer was required to decide whether the applicant was entitled to withholding of deportation. A 1987 proposed rule would have made asylum officers’ decisions on asylum and withholding of deportation applications binding on immigration judges.⁵¹ That change was not retained in the 1990 final rule, however, which preserved immigration judges’ role in adjudicating asylum and withholding of deportation claims in exclusion or deportation proceedings. Regarding eligibility for withholding of deportation, the 1990 rule stated, in part, “The applicant’s life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵²

The 1990 rule directed the asylum officer to grant an undetained asylum applicant employment authorization for up to one year if the officer determined that the application was not frivolous; frivolous was defined as “manifestly unfounded or abusive.”⁵³ The employment authorization could be renewed in increments of up to one year. The asylum officer had to provide an applicant with a written decision on an asylum or withholding of deportation application, and had to provide an explanation in the case of a denial. The 1990 rule also granted specified officials in INS and DOJ the authority to review the decisions of asylum officers but did not grant applicants any right to appeal to these officials.

Acts of 1990 and 1994

The Immigration Act of 1990⁵⁴ and the Violent Crime Control and Law Enforcement Act of 1994⁵⁵ made several changes to the asylum-related provisions in the INA. The 1990 act amended INA §209 to increase the annual numerical limitation on asylee adjustment of status from 5,000 to 10,000.⁵⁶ It also added new language to INA §208, making an alien who had been convicted of a crime categorized as an *aggravated felony* under the INA ineligible for asylum.⁵⁷ The 1994 act further amended INA §208 to state that an

⁵⁰ 1990 final rule, p. 30683 (see §208.13).

⁵¹ U.S. Department of Justice, Immigration and Naturalization Service, “Aliens and Nationality; Asylum and Withholding of Deportation Procedures,” proposed rule, 52 *Federal Register* 32552, 32553, August 28, 1987.

⁵² 1990 final rule, pp. 30684 (see §208.16(b)(1)).

⁵³ Ibid. pp. 30681-30682 (see §208.7(a)).

⁵⁴ P.L. 101-649.

⁵⁵ P.L. 103-322.

⁵⁶ P.L. 101-649, §104(a).

⁵⁷ P.L. 101-649, §515(a). See INA §208(b)(2)(B)(i) for the current asylum provision on aggravated felony convictions, and INA §101(a)(43) for the current definition of *aggravated felony*.

asylum applicant was not entitled to employment authorization except as provided at the discretion of the Attorney General by regulation.⁵⁸

1994 Final Rule

In March 1994, INS published a proposed rule to streamline its asylum procedures that included a number of controversial provisions. The agency characterized the problem the proposal sought to address as follows: “The existing system for adjudicating asylum claims cannot keep pace with incoming applications and does not permit the expeditious removal from the United States of those persons who[se] claims fail.”⁵⁹

The 1994 final rule, published in December 1994, made fundamental changes to the asylum adjudication process.⁶⁰ Under the rule, INS asylum officers were no longer to deny asylum applications filed by aliens who appeared to be excludable or deportable,⁶¹ or to consider applications for withholding of deportation from such applicants, with limited exceptions. Instead, officers were to either grant such applicants asylum or immediately refer their claims to immigration judges, where the claims would be considered as part of exclusion or deportation proceedings. Asylum officers were to continue to issue approvals and denials in cases of asylum applications filed by aliens with a legal immigration status.

The 1994 rule also made changes to the employment authorization process for asylum applicants that were intended to “discourage applicants from filing meritless claims solely as a means to obtain employment authorization.”⁶² Under the rule, an alien had to wait 150 days after his or her complete asylum application had been received to apply for employment authorization.⁶³ INS then had 30 days to adjudicate that employment authorization application. (These 150-day and 30-day time frames remain in regulation.⁶⁴) According to the supplementary information accompanying the rule, the goal was to make a decision on an asylum application before the end of 150 days: “The Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR) would strive to complete the adjudication of asylum applications, through the decision of an immigration judge, within this 150-day period.”⁶⁵

Some of the provisions in the proposed rule were not adopted in the final rule. These included proposals to make asylum interviews discretionary and to charge fees for asylum applications and initial applications for employment authorization.⁶⁶

⁵⁸ P.L. 103-322, §130005(b).

⁵⁹ U.S. Department of Justice, Immigration and Naturalization Service, “Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization,” proposed rule, 59 *Federal Register* 14779, 14780, March 30, 1994 (hereinafter cited as 1994 proposed rule).

⁶⁰ U.S. Department of Justice, Immigration and Naturalization Service, “Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization,” final rule, 59 *Federal Register* 62284, December 5, 1994 (hereinafter cited as 1994 final rule).

⁶¹ For an explanation of exclusion and deportation, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*.

⁶² 1994 final rule, p. 62290.

⁶³ As explained in the supplementary information to the 1994 proposed rule, “The Department [DOJ] selected 150 days as the period beyond which it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated.” 1994 proposed rule, p. 14780.

⁶⁴ See 8 C.F.R. §208.7(a)(1).

⁶⁵ 1994 final rule, p. 62284.

⁶⁶ At the time, there was a fee for a renewal application for employment authorization. This fee remained (and still remains) in place.

Illegal Immigration Reform and Immigrant Responsibility Act and Implementing Regulations

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996⁶⁷ significantly amended the INA's asylum provisions and made a number of other changes to the INA relevant to asylum policy. Many of the IIRIRA changes remain in effect.

One set of changes, which had broad implications for the immigration system generally, concerned the INA grounds of exclusion. Applicable to aliens outside the United States, these provisions enumerated classes of aliens who were ineligible for visas and were to be excluded from admission. IIRIRA amended these provisions and replaced the concept of an excludable alien with that of an inadmissible alien—the latter being a person who, whether outside or inside the United States, has not been lawfully admitted to the country. In general, with the enactment of IIRIRA, an alien became ineligible for a visa or admission if he or she was described in the reconfigured grounds of inadmissibility.⁶⁸

Asylum Provisions

IIRIRA added restrictions to the general policy set forth in the 1980 Refugee Act and incorporated into the INA that an alien who is present in the United States or who arrives in the United States, regardless of immigration status, can apply for asylum. In general, under the IIRIRA amendments, which remain in effect, an alien is not eligible to apply for asylum unless the alien can show that he or she filed the application within one year of arriving in the United States. An alien is also generally ineligible to apply if he or she has previously had an asylum application denied. There is an exception to both restrictions if an alien can show “changed circumstances which materially affect the applicant’s eligibility for asylum,” and an additional exception to the time limit requirement if the alien can show “extraordinary circumstances” related to the filing delay.⁶⁹ IIRIRA also made an alien ineligible to apply for asylum if the Attorney General determined that the alien could be removed, pursuant to a bilateral or multilateral agreement, to a safe third country where the alien would be considered for asylum or equivalent temporary protection (see “Safe Third Country Agreements”).⁷⁰

IIRIRA amended the INA to authorize, but not require, the Attorney General to impose fees on asylum applications and related applications for employment authorization.⁷¹ Among other new asylum provisions it added to the INA were a requirement to check the identity of applicants against “all appropriate records or databases maintained by the Attorney General and by the Secretary of State” and a permanent bar to receiving any immigration benefits for aliens who knowingly file frivolous asylum applications after being notified of the consequences for doing so.⁷² IIRIRA also put asylum processing-related time frames in statute, including a requirement that “in the absence of exceptional circumstances,” administrative adjudication of an asylum application be completed within 180 days after the filing date.⁷³ All these provisions are still in statute.

IIRIRA modified and codified some existing and prior asylum regulations. It amended an existing INA provision on employment authorization by adding language prohibiting an asylum applicant who is not

⁶⁷ IIRIRA is Division C of P.L. 104-208.

⁶⁸ See INA §212(a).

⁶⁹ P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(a)(2)(B)-(D) (8 U.S.C. §§1158(a)(2)(B)-(D)). Relevant regulations can be found at 8 C.F.R. §208.4.

⁷⁰ P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(a)(2)(A) (8 U.S.C. §§1158(a)(2)(A)).

⁷¹ P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(d)(3) (8 U.S.C. §§1158(d)(3)).

⁷² P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(d)(5)(a)(i), (d)(6) (8 U.S.C. §§1158(d)(5)(A)(i), (d)(6)).

⁷³ P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §208(d)(5)(A)(iii) (8 U.S.C. §§1158(d)(5)(A)(iii)).

otherwise eligible for employment authorization from being granted such authorization earlier than 180 days after filing the asylum application. It further amended the INA asylum provisions to add grounds for denying asylum. Similar to the mandatory denial language in the 1980 interim regulations, these grounds included an applicant's conviction for a "particularly serious crime," "serious reasons for believing the alien has committed a serious nonpolitical crime outside the United States," "reasonable grounds" for considering the alien a danger to national security, and the applicant's firm resettlement in another country prior to arrival in the United States.⁷⁴ IIRIRA also added, as a new asylum denial ground, being inadmissible to the United States on certain terrorist-related grounds.⁷⁵ In addition, IIRIRA provided that the Attorney General could establish additional ineligibilities for asylum by regulation that were consistent with the INA asylum provisions.⁷⁶ These IIRIRA amendments remain a part of the INA, although the provision on terrorist-related grounds of inadmissibility has been revised.⁷⁷

IIRIRA amended the INA language on termination of asylum to state that the granting of asylum "does not convey a right to remain permanently in the United States." It also added new termination grounds to the existing ground of no longer meeting the INA definition of a refugee. IIRIRA provided that asylum could be terminated if the Attorney General determined that the asylee met one of the grounds for denying asylum noted in the preceding paragraph. Among IIRIRA's other new grounds for terminating asylum was a determination by the Attorney General, analogous to the "safe third country" determination described above, that the alien could be removed, pursuant to a bilateral or multilateral agreement, to a safe third country where the alien would be eligible for asylum or equivalent temporary protection.⁷⁸ The IIRIRA asylum termination provisions remain part of the INA.⁷⁹

Definition of a Refugee

IIRIRA amended the INA definition of a refugee to cover individuals subject to "coercive population control." It provided that for purposes of meeting the definition of a refugee, an individual who had been forced to have an abortion or undergo sterilization or had been persecuted for resistance to a coercive population control program would be considered to have been persecuted on the basis of political opinion. Similarly, an individual with a well-founded fear that he or she would be forced to undergo a procedure or would be persecuted for resistance to a coercive population control program would be considered to have a well-founded fear of persecution on the basis of political opinion.⁸⁰ This language remains part of the INA definition of a refugee.

Inspection of Arriving Aliens

IIRIRA amended the INA provisions on the inspection of aliens by immigration officers to establish a new immigration enforcement mechanism known as expedited removal. In general, under expedited removal an alien who is determined by an immigration officer to be inadmissible to the United States because the alien lacks proper documentation or has committed fraud or willful misrepresentation of facts to obtain documentation or another immigration benefit may be removed from the United States without

⁷⁴ All of these grounds except the last one concerning firm resettlement were the same ineligibility grounds established by the Refugee Act of 1980 for withholding of deportation (see "Withholding of Deportation").

⁷⁵ P.L. 104-208, Div. C, §604(a), amending INA §208. P.L. 104-208, Div. C, §604(a) further specified with respect to these denial grounds that an alien who had been convicted of an aggravated felony would be considered to have been convicted of a particularly serious crime.

⁷⁶ P.L. 104-208, Div. C, §604(a), amending INA §208. See INA §§208(b)(2)(C) (8 U.S.C. §§1158(b)(2)(C)).

⁷⁷ See INA §§208(d)(2), (b)(2)(A)(ii)-(vi) (8 U.S.C. §§1158(d)(2), (b)(2)(A)(ii)-(vi)).

⁷⁸ P.L. 104-208, Div. C, §604(a), amending INA §208 (8 U.S.C. §1158).

⁷⁹ See INA §§208(c)(2) (8 U.S.C. §§1158(c)(2)).

⁸⁰ P.L. 104-208, Div. C, §601(a), amending INA §101(a)(42) (8 U.S.C. §1101(a)(42)).

any further hearings or review, unless the alien indicates either an intention to apply for asylum or a fear of persecution.⁸¹

Under the INA, as amended by IIRIRA, this expedited removal procedure was to be applied to all *arriving aliens*, a term that includes aliens arriving at a U.S. port of entry.⁸² (An exception for Cuban citizens arriving at U.S. ports of entry by aircraft is no longer in effect.⁸³) It also could be applied to any (or all) aliens in the United States, as designated by the Attorney General at his or her discretion, if an alien has not been admitted or paroled into the United States and “has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.”⁸⁴ Using this statutory authority, the application of expedited removal has been expanded to classes of aliens beyond arriving aliens (see “Implementing Regulations”).

Under the IIRIRA amendments, an alien who is subject to expedited removal and expresses the intent to apply for asylum or a fear of persecution is to be interviewed by an asylum officer to determine if the alien has a credible fear of persecution.⁸⁵ (Special procedures apply to aliens arriving in the United States at a U.S.-Canada land port of entry in accordance with a U.S.-Canada agreement; see “Safe Third Country Agreements.”) Under the INA, 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.”⁸⁶ If an alien is found to have a credible fear, the asylum officer is to refer the case to an immigration judge for full consideration of the asylum request during standard removal proceedings. If an alien is found not to have a credible fear, the alien may request that an immigration judge review the negative finding. To ultimately receive asylum, however, an alien must meet the higher standard of showing past persecution or a well-founded fear of future persecution.

Withholding of Removal

As part of a larger set of changes to the INA replacing the concept of deportation with removal, IIRIRA added a withholding of removal provision (INA §241(b)(3)) to replace the existing INA withholding of deportation provision.⁸⁷ The new withholding of removal provision stated, and continues to state, in main part, that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”⁸⁸ The IIRIRA provision retained language on ineligibility for withholding that had been enacted in 1980. It also included language

⁸¹ P.L. 104-208, Div. C, §302(a), amending INA §235 (8 U.S.C. §1225). For additional discussion, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*.

⁸² INA §235(b)(1)(A)(i) (8 U.S.C. §1225(b)(1)(A)(i)). Under 8 C.F.R. §1.2, “*Arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.”

⁸³ U.S. Department of Homeland Security, Office of the Secretary, “Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air,” 82 *Federal Register* 4769, January 17, 2017.

⁸⁴ INA §§235(b)(1)(A)(iii) (8 U.S.C. §1225(b)(1)(A)(iii)).

⁸⁵ INA §235(b)(1)(B)(i), (ii) (8 U.S.C. §1225(b)(1)(B)(i), (ii)).

⁸⁶ INA §235(b)(1)(B)(v) (8 U.S.C. §1225(b)(1)(B)(v)).

⁸⁷ P.L. 104-208, Div. C, §305(a)(3) added a new INA §241 on detention and removal of aliens, which included §241(b)(3) (8 U.S.C. §1231(b)(3)) on withholding of removal. INA §241(b)(3) was further amended by the REAL ID Act of 2005 (P.L. 109-13, Div. B, §101(c)) to add language requiring determinations about burden of proof and credibility.

⁸⁸ INA §241(b)(3)(A) (8 U.S.C. §1231(b)(3)(A)).

on treatment of aggravated felonies for purposes of ineligibility for withholding of removal.⁸⁹ The IIRIRA amendments on ineligibility for withholding of removal remain in current law.⁹⁰

Some of the same ineligibility grounds apply to applicants for withholding of removal and applicants for asylum. As noted, however, asylum is also subject to a second set of restrictions, under which certain individuals are ineligible to *apply for* this form of relief. These restrictions include the requirement to apply for asylum within one year after arrival in the United States. Withholding of removal is not subject to an analogous set of restrictions. Another difference between withholding of removal and asylum concerns adjustment to LPR status. The INA provides for the adjustment of status of aliens granted asylum but not those granted withholding of removal (for further comparison of withholding of removal and asylum, see “Implementing Regulations,” below).

Implementing Regulations

In March 1997, DOJ issued an interim rule, effective April 1, 1997, to amend existing regulations to implement the IIRIRA provisions on asylum, withholding of removal, expedited removal, and other immigration procedures.⁹¹ In December 2000, DOJ published a final rule on asylum procedures, which addressed jurisdiction, asylum application procedures, and withholding of removal, among other issues.⁹²

The December 2000 rule included language on eligibility for asylum and eligibility for withholding of removal under INA §241(b)(3). Regarding eligibility for asylum based on a well-founded fear of future persecution, the 2000 regulations stated, in part, “An applicant has a well-founded fear of persecution if: (A) The applicant has a fear of persecution in his or her country of nationality ... 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.”⁹³ This language was similar to that in the 1990 rule. Unlike the earlier rule, however, the 2000 regulations also provided that an applicant would not be considered to have a well-founded fear of persecution if he or she could relocate within his or her home country “if under all the circumstances it would be reasonable to expect the applicant to do so.”⁹⁴

Regarding eligibility for withholding of removal under INA §241(b)(3) based on a future threat to one’s life or freedom, the 2000 regulations, like the earlier 1990 regulations on withholding of deportation, stated that an applicant could demonstrate a future threat “if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country.”⁹⁵ As with the regulations on asylum eligibility, the 2000 regulations on eligibility for withholding of removal provided that an applicant could not demonstrate a threat to life or freedom upon a finding that the applicant could avoid the threat by relocating within his or her home country if it were reasonable to expect him or her to do so.

⁸⁹ The Immigration Act of 1990 (P.L. 101-649, §515) had previously amended the withholding provision to add language on aggravated felonies. IIRIRA revised this language.

⁹⁰ See INA §241(b)(3)(B) (8 U.S.C. §1231(b)(3)(B)).

⁹¹ U.S. Department of Justice, Immigration and Naturalization Service, and Executive Office for Immigration Review, “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures,” 62 *Federal Register* 10312, March 6, 1997 (hereinafter cited as “1997 interim rule”).

⁹² U.S. Department of Justice, Immigration and Naturalization Service, “Asylum Procedures,” 65 *Federal Register* 76121, December 6, 2000.

⁹³ *Ibid.* pp. 76133-76134 (see §208.13(b)(2)(i)).

⁹⁴ *Ibid.* (see §208.13(b)(2)(ii)).

⁹⁵ *Ibid.* p. 76135 (see §208.16(b)(2)).

The December 2000 regulations on eligibility for asylum and withholding of removal under INA §241(b)(3) remain in effect. Comparing the above-cited standards for providing these two forms of relief in cases involving claims of future persecution, the threshold for granting withholding of removal (*more likely than not*) is higher than that for granting asylum (*reasonable possibility*).

Regarding expedited removal, DOJ stated in the supplementary information to the March 1997 interim rule that for the time being, it would only apply the expedited removal provisions to arriving aliens (i.e., aliens arriving at ports of entry and certain others). At the same time, it reserved “the right to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the [INS] Commissioner’s discretion, such action is operationally warranted.”⁹⁶

Beginning in 2002, DOJ and then DHS, which assumed primary responsibility for immigration under the Homeland Security Act,⁹⁷ acted to apply the expedited removal procedures to additional classes of aliens. In November 2002, DOJ extended expedited removal to aliens arriving by sea who are not admitted or paroled and who have not been continuously present in the United States for the prior two years.⁹⁸ In August 2004, DHS authorized the placing in expedited removal proceedings of aliens who are present in the United States without having been admitted or paroled, and are found inadmissible due to lack of proper documentation or to commission of fraud or willful misrepresentation to obtain documentation or another immigration benefit, in certain circumstances. These circumstances were that the aliens “are encountered by an immigration officer within 100 air miles of the U.S. international land border” and “have not established to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.”⁹⁹

Convention Against Torture Protection and Implementing Regulations

Separate from asylum and withholding of removal under the INA, protection from removal is available to aliens in the United States who are more likely than not to be tortured in the country of removal, in accordance with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰⁰ (Convention Against Torture, or CAT), which entered into force for the United States in November 1994. Under Article 3 of the CAT, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Under current DHS and DOJ regulations, torture is defined, in part, as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁰¹ In February

⁹⁶ 1997 interim rule, p. 10314.

⁹⁷ The Homeland Security Act of 2002 (P.L. 107-296) abolished INS and transferred most of its functions to DHS as of March 1, 2003.

⁹⁸ U.S. Department of Justice, Immigration and Naturalization Service, “Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act,” 67 *Federal Register* 68924, November 13, 2002.

⁹⁹ U.S. Department of Homeland Security, Bureau of Customs and Border Protection, “Designating Aliens For Expedited Removal,” 69 *Federal Register* 48877, August 11, 2004. Despite this notice, expedited removal was not expanded to all eligible southwest border patrol sections until September 2005, and was not expanded to the northern and coastal borders until January 2006. See CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*.

¹⁰⁰ The text is available at United Nations, The Office of the United Nations High Commissioner for Human Rights, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/professionalinterest/pages/CAT.aspx>. Reports on U.S. implementation of the CAT are available at U.S. Department of State, U.S. Treaty Reports, <https://www.state.gov/j/drl/reports/treaties/>.

¹⁰¹ 8 C.F.R. §208.18(a)(1), §1208.18(a)(1).

1999, DOJ published an interim rule establishing procedures to implement U.S. obligations under Article 3 of the CAT in the removal process.¹⁰² These regulations have since been revised.

DHS regulations set forth procedures for handling cases in which an alien subject to expedited removal expresses a fear of torture. In a process analogous to that for aliens subject to expedited removal who express a fear of persecution, DHS regulations provide that such an alien is to be interviewed by an asylum officer to determine if he or she has a credible fear of torture.¹⁰³ To establish a credible fear of torture, an alien must show that “there is a significant possibility that he or she is eligible for” protection under the CAT.¹⁰⁴ Eligibility for CAT protection, unlike for asylum, does not require the showing of a nexus between the torture claim and a protected ground (such as race). If the asylum officer makes an affirmative credible fear finding, the officer is to refer the case to an immigration judge for full consideration of the CAT application during standard removal proceedings. If the officer makes a negative finding, the alien may request a review of that determination by an immigration judge.¹⁰⁵ If during removal proceedings the immigration judge determines that “the alien is more likely than not to be tortured in the country of removal,” the alien is entitled to CAT protection.¹⁰⁶ That protection is to be granted in the form of either withholding of removal or deferral of removal depending on the circumstances of the case.¹⁰⁷

The February 1999 CAT rule also established another screening process—for *reasonable fear* of persecution or torture. Modeled on but separate from the credible fear of persecution or torture screening processes, reasonable fear screening applies to certain aliens who are not eligible for asylum (these are aliens ordered removed under INA §238(b) for the commission of certain criminal offenses or aliens whose deportation, exclusion, or removal is reinstated under INA §241(a)(5)). Under current DHS and DOJ regulations, if an alien in this category expresses a fear of returning to the country of removal, USCIS is to make a reasonable fear determination, subject to review by an immigration judge.¹⁰⁸ To establish a reasonable fear of persecution, an alien must establish “a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion”; this is the same standard used to establish eligibility for asylum. To establish a reasonable fear of torture, an alien must establish “a reasonable possibility that he or she would be tortured in the country of removal.”¹⁰⁹

If the alien receives a positive reasonable fear finding, the case is referred to an immigration judge to determine whether the alien is eligible for withholding of removal under INA §241(b)(3) or withholding of removal or deferral of removal under the CAT.¹¹⁰ DHS and DOJ regulations further state, however, that

¹⁰² U.S. Department of Justice, Immigration and Naturalization Service, “Regulations Concerning the Convention Against Torture,” 64 *Federal Register* 8478, February 19, 1999 (hereinafter cited as “1999 CAT rule”). The supplementary information to the rule explains the statutory mandate behind the regulations and provides other background information.

¹⁰³ 8 C.F.R. §235.3(b)(4), §208.30.

¹⁰⁴ 8 C.F.R. §208.30(e)(3).

¹⁰⁵ 8 C.F.R. §§208.30(f), (g).

¹⁰⁶ 8 C.F.R. §208.16(c)(4), §1208.16(c)(4).

¹⁰⁷ See 8 C.F.R. §208.16, §208.17, §1208.16, §1208.17.

¹⁰⁸ 8 C.F.R. §208.31, §1208.31.

¹⁰⁹ 8 C.F.R. §208.3(c), §1208.31(c). Regarding the standard for establishing reasonable fear (which enables an alien to pursue a claim for withholding or deferral of removal), the supplementary information to the 1999 CAT rule explains: “Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.” 1999 CAT rule, p. 8485.

¹¹⁰ 8 C.F.R. §208.31, §1208.31.

the granting of such withholding of removal or deferral of removal would not prevent the United States from removing the alien to a third country.¹¹¹

Post-1996 Statutory Provisions

While the IIRIRA amendments to the INA asylum provisions remain largely in place, subsequent laws have made further changes to the INA provisions. For example, the Real ID Act of 2005¹¹² amended the INA language on the conditions for granting asylum to add “burden of proof” provisions, which had previously been in regulations. These burden of proof provisions remain in law. They require an asylum applicant to show that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant” to meet the definition of a refugee.¹¹³ The provisions further set forth standards for making determinations about an applicant’s credibility and about the need for corroborating evidence to sustain an applicant’s burden of proof.¹¹⁴ In addition, among its other asylum-related provisions, the Real ID Act eliminated the annual caps on asylee adjustment of status.¹¹⁵ The 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) added language to the INA asylum provisions that addressed asylum applications by unaccompanied alien children in the United States. This new language made certain statutory restrictions on applying for asylum inapplicable to these children and provided that a USCIS asylum officer would have initial jurisdiction over any asylum application filed by an unaccompanied child, even if the child was in removal proceedings.¹¹⁶

2018 Interim Final Rule

On November 9, 2018, DHS and DOJ jointly issued an interim final rule to govern “asylum claims in the context of aliens who are subject to, but contravene, a suspension or limitation on entry into the United States through the southern border with Mexico that is imposed by a presidential proclamation or other presidential order.”¹¹⁷ That same day, President Donald Trump issued a proclamation to suspend immediately the entry into the United States of aliens who cross the Southwest border between ports of entry (see “Presidential Action”). According to the supplementary information accompanying the interim rule, the rule would serve to “channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner.”¹¹⁸

The interim rule, which is not in effect due to legal challenges, would bar an alien who enters the United States in contravention of the proclamation from eligibility for asylum. Under the rule, an asylum officer would make a negative credible fear of persecution determination in the case of such an alien. As explained in the supplementary information to the rule, however, aliens who enter the United States at the Southwest border without inspection would continue to be eligible for consideration for forms of protection from removal other than asylum—namely, withholding of removal under INA §241(b)(3) and

¹¹¹ 8 C.F.R. §208.16, §1208.16.

¹¹² The Real ID Act is Division B of P.L. 109-13.

¹¹³ P.L. 109-13, Div. B, §101(a)(3), amending INA §208(b)(1).

¹¹⁴ P.L. 109-13, Div. B, §101(a)(3), amending INA §208(b)(1).

¹¹⁵ P.L. 109-13, Div. B, §101(g), amending INA §209(b).

¹¹⁶ P.L. 110-457, §235(d)(7). The asylum process for unaccompanied alien children is not covered in this report. For related information, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*.

¹¹⁷ U.S. Department of Homeland Security and U.S. Department of Justice, Executive Office for Immigration Review, “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” 83 *Federal Register* 55934, November 9, 2018.

¹¹⁸ *Ibid.* p. 55935.

protections under the CAT. The interim final rule addresses eligibility for asylum and screening procedures for aliens who enter the United States in contravention of the proclamation. Regarding claims for withholding of removal under the INA or withholding or deferral of removal under the CAT, the rule establishes that such claims would be assessed under the reasonable fear standard (see “Convention Against Torture Protection and Implementing Regulations”). The supplementary information includes the following summary of the two-stage screening protocol the rule would institute:

Aliens determined to be ineligible for asylum by virtue of contravening a proclamation, however, would still be screened, but in a manner that reflects that their only viable claims would be for statutory withholding or CAT protection.... After determining the alien’s ineligibility for asylum under the credible-fear standard, the asylum officer would apply the long-established reasonable-fear standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted.¹¹⁹

This rule is being challenged in federal court. On December 19, 2018, a federal district court judge in California granted a nationwide preliminary injunction against it.¹²⁰

DHS Migrant Protection Protocols

On December 20, 2018, DHS announced the Migrant Protection Protocols (MPP), under which “individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.”¹²¹ The U.S. government notified the Mexican government about the MPP that same day. The MPP is separate and distinct from a safe third country agreement (see “Safe Third Country Agreements”).

The DHS press release announcing the Migrant Protection Protocols characterized them as “historic measures” to address the “illegal immigration crisis.” In the words of the press release:

Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. ‘Catch and release’ will be replaced with ‘catch and return.’ In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.¹²²

According to DHS, the U.S. government will invoke INA §235(b)(2)(C),¹²³ which permits the return of certain aliens arriving in the United States on land from a foreign contiguous territory to that foreign territory pending standard removal proceedings. An alien potentially subject to this return provision under the INA is an applicant for admission who “is not clearly and beyond a doubt entitled to be admitted” and

¹¹⁹ Ibid. p. 55943.

¹²⁰ For further information about related legal developments, see CRS Legal Sidebar LSB10222, *District Court Temporarily Blocks Implementation of Asylum Restrictions on Unlawful Entrants at the Southern Border*; Nicholas Iovino, “Ninth Circuit Refuses to Reinstate Trump’s Asylum Limits Pending Appeal,” December 7, 2018, <https://www.courthousenews.com/ninth-circuit-refuses-to-reinstate-trumps-asylum-limits-pending-appeal/>; Maria Sacchetti and Isaac Stanley-Becker, “In blow to Trump’s immigration agenda, federal judge blocks asylum ban for migrants who enter illegally from Mexico,” Washington Post, November 20, 2018, https://www.washingtonpost.com/nation/2018/11/20/blow-trumps-immigration-agenda-federal-judge-blocks-asylum-ban-migrants-who-enter-illegally-mexico/?utm_term=.7e5117d13dfd; Adam Liptak, “Justices Refuse To Let Trump Limit Asylum,” New York Times, December 22, 2018, p. A1.

¹²¹ DHS, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration.” For a legal analysis, see CRS Legal Sidebar LSB10251, “*Migrant Protection Protocols*”: *Legal Issues Related to DHS’s Plan to Require Arriving Asylum Seekers to Wait in Mexico*.

¹²² DHS, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration.”

¹²³ Ibid.

thus is “detained for a [standard removal] proceeding.”¹²⁴ INA §235(b)(2)(C) is explicitly inapplicable to aliens who are determined to be subject to expedited removal.¹²⁵

On January 28, 2019, USCIS and DHS’s Customs and Border Protection (CBP) issued memoranda on MPP implementation.¹²⁶ The CBP memorandum announced that the agency would begin implementing the MPP that day. According to the memorandum, “MPP implementation will begin at the San Ysidro port of entry [in California], and it is anticipated that it will be expanded in the near future.” Also on January 28, 2019, CBP issued “MPP Guiding Principles,” which included the following: “To implement the MPP, aliens arriving from Mexico who are amenable to the process ... and who in an exercise of discretion the officer determines should be subject to the MPP process, will be issued [a] Notice to Appear (NTA) and placed into Section 240 removal proceedings. They will then be transferred to await proceedings in Mexico.” Among the aliens identified as “*not* amenable to MPP” in the CBP guiding principles document are unaccompanied alien children, citizens or nationals of Mexico, aliens processed for expedited removal, and aliens who are more likely than not to face persecution or torture in Mexico.¹²⁷ The MPP is in effect as of the date of this report, but it remains unclear how DHS is making decisions about which aliens to process under the protocols. The MPP is being challenged in federal court.¹²⁸

Recent Legislative and Presidential Action

Legislation in the 115th Congress

Asylum-related legislation was considered in the 115th Congress. Two immigration bills that were the subjects of unsuccessful House floor votes in June 2018—the Securing America’s Future Act of 2018 (H.R. 4760) and the Border Security and Immigration Reform Act of 2018 (H.R. 6136)—contained similar provisions on asylum. A third asylum-related House bill (the Asylum Reform and Border Protection Act of 2017 (H.R. 391)) that included some of the same provisions as the above measures was ordered to be reported by the House Judiciary Committee. In addition, the House and the Senate acted on several other measures containing more limited language on asylum.

H.R. 4760 and H.R. 6136

H.R. 4760 and H.R. 6136, as considered on the House floor, included various provisions related to asylum. Both bills would have amended the INA “safe third country” asylum provision, under which an alien is ineligible to apply for asylum if it is determined that he or she can be removed to a safe country “pursuant to a bilateral or multilateral agreement” (see “Safe Third Country Agreements”). H.R. 4760 and H.R. 6136 would have eliminated the “pursuant to a bilateral or multilateral agreement” language.

¹²⁴ INA §235(b)(2)(A).

¹²⁵ For additional information, see U.S. Department of Homeland Security, “Migrant Protection Protocols,” press release, January 24, 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹²⁶ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, policy memorandum, January 28, 2019, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>; U.S. Department of Homeland Security, U.S. Customs and Border Protection, Memorandum to Todd C. Owen, Executive Assistant Commissioner, Field Operations, and Carla L. Provost, Chief, U.S. Border Patrol, from Kevin K. McAleenan, Commissioner, *Implementation of the Migrant Protection Protocols*, January 28, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/Implementation%20of%20the%20Migrant%20Protection%20Protocols.pdf>.

¹²⁷ U.S. Department of Homeland Security, U.S. Customs and Border Protection, *MPP Guiding Principles*, January 28, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

¹²⁸ American Civil Liberties Union, “Trump Administration Is Illegally Forcing Asylum Seekers Out of the United States,” <https://www.aclu.org/blog/immigrants-rights/trump-administration-illegally-forcing-asylum-seekers-out-united-states>.

Both bills would have added a new provision to the INA stating that an alien's asylum status would be terminated if the alien returned to his or her home country (from which the alien sought refuge in the United States) absent changed country conditions. Both bills would have given DHS discretionary authority to waive this provision in individual cases. H.R. 4760 also included an exception to this provision for certain Cubans.

Both bills would have amended the INA provisions on frivolous asylum applications (see "Frivolous or Fraudulent Asylum Claims"). Current INA provisions make an alien permanently ineligible for immigration benefits if he or she knowingly files a frivolous asylum application after receiving notice of the consequences for doing so. The bills would have changed the notification process. They would have required that a written notice appear on the asylum application advising the applicant of the consequences of filing a frivolous application. The bills would also have added language to the INA explaining that an application is frivolous if "it is so insufficient in substance that it is clear that the applicant knowingly filed the application solely or in part to delay removal from the United States, to seek employment authorization as an applicant for asylum" or "any of the material elements are knowingly fabricated."

H.R. 4760 and H.R. 6136 also would have changed the INA definition of credible fear of persecution, which an alien in expedited removal has to show to be able to pursue an asylum claim. The bills would have added a new requirement to the definition—that "it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien's claim are true." The bills would also have required audio or audio/visual recording of expedited removal and credible fear interviews.

H.R. 391

H.R. 391, as ordered to be reported by the House Judiciary Committee, would have amended the INA provisions on safe third country removals, termination of asylum upon return to the home country, frivolous asylum applications, and credible fear similarly to H.R. 4760 and H.R. 6136. In addition, this bill would have made a number of other changes to the asylum-related language in the INA.¹²⁹ Among its asylum-related provisions, H.R. 391 would have clarified the INA definition of a refugee (which asylum applicants also have to satisfy), specifically the "membership in a particular social group" ground. It would have defined *particular social group*, which is not currently defined in statute, to mean a group that is "defined with particularity," is "socially distinct," and has members who share "a common immutable characteristic."

H.R. 391 would have explicitly provided that the "membership in a particular social group" ground would cover individuals who fail or refuse "to comply with any law or regulation that prevents the exercise of the individual right of that person to direct the upbringing and education of a child of that person (including any law or regulation preventing homeschooling)." At the same time, the bill sought to prohibit the application of this ground to asylum cases involving criminal gang membership or activity.

H.R. 391 also included language related to the INA asylum provisions that enumerate certain determinations about an alien that preclude the granting of asylum. One of these determinations is that the alien was "firmly resettled in another country" before coming to the United States and requesting asylum. H.R. 391 would have considered the "firmly resettled" criterion to be satisfied "by evidence that the alien can live in such country (in any legal status) without fear of persecution."

Other Bills

Other bills that saw action in the 115th Congress included more limited language on asylum. For example, the Criminal Alien Gang Member Removal Act (H.R. 3697), as passed by the House, would have added a

¹²⁹ Some of the provisions discussed here appear in the committee substitute amendment to H.R. 391 but do not appear in the bill, as introduced. The text of the substitute amendment is available in the CQ markup report, <http://www.cq.com/doc/committees-20170726375056?4&search=P45CzBnV>.

new item to the INA list of determinations that preclude the granting of asylum. It would have made an alien ineligible for asylum if he or she was inadmissible or deportable based on new INA criminal gang membership or criminal gang-related activity grounds that the bill would have established. Under H.R. 3697, such an alien would also have been exempt from the INA restriction on removing an alien to a country where his or her life or freedom would be threatened based on race, religion, nationality, membership in a particular social group, or political opinion.

Asylum-related provisions similar to those in H.R. 3697 were included in two other measures—the Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act (H.R. 2431), as ordered to be reported by the House Judiciary Committee, and the SECURE and SUCCEED Act (S.Amdt. 1959 to H.R. 2579), which failed on a Senate floor vote in February 2018. In addition, these two measures would have made further changes to the INA’s asylum-related provisions. They would have made aliens ineligible for asylum if they were inadmissible on a broader array of terrorist-related grounds and would have exempted aliens who were inadmissible on this larger set of terrorist grounds from the general INA restriction on removing an alien to a country where his or her life or freedom would be threatened.

H.R. 2431 and S.Amdt. 1959 would also have amended the INA provisions on asylee adjustment of status to LPR status. Current INA provisions generally require that applicants for adjustment be admissible to the United States as immigrants, but they grant the Secretary of Homeland Security or the Attorney General broad authority to waive applicable inadmissibility provisions for humanitarian purposes. While there were significant differences among the asylee adjustment of status amendments in S.Amdt. 1959 and H.R. 2431, both measures would have limited existing DHS/DOJ inadmissibility waiver authority and added new deportability-related requirements to the INA asylee adjustment of status provisions.

Presidential Action

Citing constitutional and statutory authority, President Trump issued a presidential proclamation on November 9, 2018, to immediately suspend the entry into the United States of aliens who cross the Southwest border between ports of entry.¹³⁰ The proclamation indicates that its entry suspension provisions will expire 90 days after its issuance date or on the date that the United States and Mexico reach a bilateral safe country agreement, whichever is earlier. Also on November 9, 2018, DHS and DOJ jointly issued an interim final rule to bar an alien who enters the United States in contravention of the proclamation from eligibility for asylum. The proclamation and the rule are being challenged in federal court (see “2018 Interim Final Rule”).¹³¹ On February 7, 2019, President Trump renewed the proclamation with the issuance of a new proclamation with the same name.¹³²

Selected Policy Issues

Asylum is a complex area of immigration law and policy. Much of the recent debate surrounding it has focused on efforts by the Trump Administration to tighten the asylum system. Several key policy considerations about asylum are highlighted below. Some, such as the grounds for granting asylum, have

¹³⁰ Proclamation 9822 of November 9, 2018, *Addressing Mass Migration Through the Southern Border of the United States*, 83 *Federal Register* 57661, November 15, 2018.

¹³¹ For further information, see CRS Insight IN10993, *Presidential Proclamation on Unlawful Border Crossers and Asylum*.

¹³² Proclamation 9842 of February 7, 2019, *Addressing Mass Migration Through the Southern Border of the United States*, 84 *Federal Register* 3665, February 12, 2019.

been long-standing issues for policymakers, while others, such as safe third country agreements, have been garnering attention more recently.

Asylum Backlog

There has been much discussion about an increasing backlog of asylum applications. The term *asylum backlog* may suggest that there is a single queue of pending asylum cases. In fact, as discussed above, USCIS and EOIR separately adjudicate affirmative asylum cases and defensive asylum cases, respectively.¹³³ (*Backlog* as used in this report is synonymous with *pending caseload*.)

The numbers of pending USCIS affirmative asylum applications and EOIR defensive asylum cases have varied over the years, impacted by factors including international developments, changes to U.S. immigration laws, and agency resources. In the case of affirmative applications, there have been significant fluctuations in the size of the backlog over the history of the asylum program. Since FY2009, however, backlogs of both USCIS affirmative asylum applications and EOIR cases have increased annually. At the end of FY2009, there were about 6,000 pending affirmative asylum applications at USCIS¹³⁴; that number stood at about 320,000 at the end of FY2018.¹³⁵

During this same period, the number of pending cases before EOIR increased from about 224,000 at the end of FY2009 to about 786,000 at the end of FY2018.¹³⁶ Not all the EOIR cases necessarily involve an asylum claim, however. According to EOIR, as of June 18, 2018, it had about 720,000 pending cases, and some 325,000 of those (about 45%) included asylum applications.¹³⁷

A variety of arguments are made for prioritizing the reduction of the asylum backlog. These include the need to preserve the integrity of the asylum process and to provide protection in a timely manner to legitimate asylum seekers. More controversial arguments for addressing the backlog center on the perceived need to eliminate an incentive for unauthorized aliens without valid asylum claims to enter the United States and file frivolous applications (see “Frivolous or Fraudulent Asylum Claims”).

Regarding the affirmative asylum backlog, USCIS described its January 2018 decision to interview more recent asylum applications before older filings as “an attempt to stem the growth of the agency’s asylum backlog.”¹³⁸ There is debate about whether this is an effective and judicious strategy. While some point to signs that this processing change is reducing the backlog,¹³⁹ others argue that it is a wrongheaded approach and that USCIS should instead be dedicating more resources to adjudicating asylum cases.

¹³³ As noted, however, if an alien’s affirmative asylum application is denied by USCIS and the alien is placed in removal proceedings, he or she can be considered for defensive asylum by an EOIR immigration judge during those removal proceedings.

¹³⁴ Data provided by U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, to CRS by email, August 23, 2018.

¹³⁵ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Asylum Applications Pending, September 2018, <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PEDAffirmativeAsylumStatisticsSept2018.pdf>. For a discussion of various factors contributing to the affirmative asylum backlog, see Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward*, Migration Policy Institute, September 2018.

¹³⁶ U.S. Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, “Pending Cases” table, generated October 24, 2018, <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

¹³⁷ Data provided by U.S. Department of Justice, Executive Office for Immigration Review, to CRS by email, June 28, 2018.

¹³⁸ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Affirmative Asylum Interview Scheduling,” January 26, 2018, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling>.

¹³⁹ See, for example, Stephen Dinan, “U.S. Clears More Asylum Cases Than It Receives in May,” *Washington Times*, June 14, 2018.

Those in the latter group argue that individuals with older, valid asylum claims will face even longer waits for relief under the last in-first out system.¹⁴⁰

DHS efforts to reduce the asylum backlog are also impacting other humanitarian admissions programs. According to the report *Proposed Refugee Admissions for Fiscal Year 2019*, “DHS in FY 2017 and FY 2018 shifted a significant proportion of its refugee officers to processing affirmative asylum applications and conducting credible fear and reasonable fear screenings. This reduced the number of refugee interviews that could be conducted abroad in those years.”¹⁴¹ The report also indicates that the Administration plans to “continue to shift some refugee officers to assist the Asylum Division” in FY2019 to address the asylum backlog.¹⁴²

Regarding the backlog of immigration court cases, the director of EOIR testified at an April 2018 Senate hearing that the agency was addressing challenges that had contributed to the backlog. In his prepared testimony, he cited the challenges of “declining case completions, protracted hiring times for new immigration judges, and the continued use of paper files.”¹⁴³

In June 2018 remarks at EOIR, Attorney General Sessions characterized the large and growing backlog of immigration court cases as unacceptable and outlined steps being taken to reduce it.¹⁴⁴ In his prepared remarks, he asked each EOIR judge to complete at least 700 cases annually, which he described as “about the average.” He said, “Setting this expectation is a rational management policy to ensure consistency, accountability, and efficiency in our immigration court system.” He also explained that additional immigration judges were being hired and that DOJ was working with DHS to “deploy judges electronically and by video-conference.”

Some question whether the approach being taken by DOJ to reduce the EOIR backlog—particularly the annual case completion goal—is advisable and will succeed. For example, Ashley Tabaddor, president of the National Association of Immigration Judges, has expressed concern about the ability of immigration judges to adjudicate asylum cases within the time frame dictated by that yearly goal.¹⁴⁵

Grounds for Asylum

The INA definition of a refugee identifies five persecution grounds as the bases for receiving refugee status or asylum: race, religion, nationality, membership in a particular social group, and political opinion. It provides no definitions of these terms. As noted, however, it does state that an individual who has been forced to have an abortion or undergo sterilization or has been persecuted for resistance to a coercive population control program is to be considered to have been persecuted on the basis of political opinion. Legislation considered in the 115th Congress would have further amended the INA refugee definition to

¹⁴⁰ See, for example, Laura D. Francis, “Asylum Process Aimed at Fake Work Permits May Not Help Backlog,” Bloomberg Law, March 16, 2018, <https://www.bna.com/asylum-process-aimed-n57982089962/>.

¹⁴¹ U.S. Department of State, U.S. Department of Homeland Security, and U.S. Department of Health and Human Services, *Proposed Refugee Admissions for Fiscal Year 2019: Report to the Congress*, p. 5, <https://www.state.gov/documents/organization/286401.pdf>.

¹⁴² *Ibid.* p. 6.

¹⁴³ Testimony of James McHenry, Director of the Executive Office for Immigration Review, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Border Security and Immigration, *Strengthening and Reforming the America’s Immigration Court System*, hearing, 115th Cong., 2nd sess., April 18, 2018, p. 2, <https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Testimony.pdf>.

¹⁴⁴ U.S. Department of Justice, Office of Public Affairs, “Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program,” June 11, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>.

¹⁴⁵ Dean DeChiaro, “Trump’s Strategy to Shrink Immigration Court Backlog May Not Work,” April 16, 2018, <https://www.rollcall.com/news/policy/trump-strategy-immigration-court-backlog-may-not-work>.

provide that an individual who has been persecuted for failure to comply with or resistance to any law or regulation that prevents homeschooling is to be considered to have been persecuted on the basis of membership in a particular social group (see “H.R. 391”).

In June 2018, Attorney General Sessions issued a decision regarding the adjudication of asylum claims based on the “membership in a particular social group” ground.¹⁴⁶ In the past, asylum had been granted to certain victims of domestic violence based on a finding of persecution or a well-founded fear of persecution on account of “membership in a particular social group.” Attorney General Sessions vacated a Board of Immigration Appeals’ 2016 decision in one of these cases and remanded the case to the immigration judge for further proceedings, arguing that the appropriate legal standards had not been applied. He reached the following conclusion about asylum cases involving private criminal activity (footnotes excluded):

Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.¹⁴⁷

The decision further noted that because claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors generally will not qualify for asylum, they would also generally not meet the threshold for a finding of a credible fear of persecution (see “Inspection of Arriving Aliens”).¹⁴⁸

In July 2018, USCIS issued a policy memorandum to provide guidance to its asylum officers in light of the Attorney General’s decision. Highlighting required findings about the home government in cases involving private violence, the memorandum stated:

Few gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm may merit a grant of asylum or refugee status—or pass the “significant possibility” test in credible fear screenings ...—because an applicant must prove, or establish a significant possibility that, his or her government is unable or unwilling to protect him or her.... Again, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution.¹⁴⁹

Following issuance of the Attorney General’s decision, immigration advocates expressed worry that the decision and the related USCIS policy memorandum could have wide-sweeping consequences, particularly for asylum seekers from Central America. In a letter to the *New York Times*, a counsel with the Tahirih Justice Center, which advocates for immigrant women and girls fleeing gender-based violence, wrote, “As a result of that ruling, and the subsequent policy guidance, immigration officers may now feel emboldened to deny asylum to women fleeing domestic violence, even under the most life-threatening circumstances.”¹⁵⁰

¹⁴⁶ *Matter of A-B-, Respondent*, 27 I&N Dec. 316 (A.G. 2018).

¹⁴⁷ *Ibid.* p. 320.

¹⁴⁸ For additional discussion, see CRS Legal Sidebar LSB10150, *An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*.

¹⁴⁹ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, policy memorandum, July 11, 2018, p. 10.

¹⁵⁰ Irena Sullivan, “Denying Asylum,” letter to the editor, *New York Times*, July 30, 2018, p. A18. Also see Tal Kopan, “Impact of Sessions’ asylum move already felt at border,” July 14, 2018, <https://www.cnn.com/2018/07/14/politics/sessions-asylum->

On December 19, 2018, a federal district court judge in Washington, DC, ruled on a case challenging the policies regarding credible fear of persecution determinations set forth in former Attorney General Sessions' decision and the USCIS policy memorandum. The judge permanently enjoined the U.S. government from continuing some of the new policies.¹⁵¹

Some who are concerned about the potential impact of the former Attorney General's decision on women seeking asylum have discussed the possibility of amending the underlying INA definition of a refugee to explicitly address gender-based asylum claims. Among the legislative options that have been put forward are to add "gender" to the list of persecution grounds or "to define the phrase 'particular social group' by amending the law to include a non-exclusive list of (currently) common gender-based asylum claims, including domestic violence."¹⁵²

Credible Fear of Persecution Threshold

Separate from the 2018 decision by former Attorney General Sessions and the related USCIS policy memorandum discussed in the preceding section, the credible fear of persecution threshold has been a focus of attention recently as the number of individuals being screened for and found to have a credible fear has grown. Individuals who are found to have a credible fear may remain in the United States while their court case proceeds.

As noted, the INA asylum provisions define credible fear of persecution to mean "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." House bills considered in the 115th Congress would have added a new requirement to this definition—that "it is more probable than not that the statements made by, and on behalf of, the alien in support of the alien's claim are true."

USCIS Director Francis Cissna has endorsed a tightening of the credible fear of persecution standard. In prepared testimony for a May 2018 House hearing on border security, he stated, "The simple reality is that those who wish to gain access to or remain in the United States know they can likely effect that access and then delay their removal by simply saying the 'magic words' of 'fear' or 'asylum.' The standard for credible fear screenings at the border has been set so low that nearly everyone meets it."¹⁵³

Others disagree that the credible fear standard should be raised. In a 2018 policy brief, the American Immigration Lawyers Association (AILA) argues that "the lower threshold for credible fear determinations is necessary precisely because asylum seekers arriving at the border are typically detained, traumatized, and have limited access to counsel and documentation to support their claims."¹⁵⁴

[impact-border/index.html](#).

¹⁵¹ *Grace v. Whitaker*, ___ F. Supp. 3d. ___, 2018 WL 6628081 (D.D.C. 2018). Also see Dan Berman, Tammy Kupperman, Geneva Sands, and Laura Jarrett, "Trump admin can't limit asylum protections for domestic and gang violence victims, judge rules," December 19, 2018, <https://www.cnn.com/2018/12/19/politics/immigration-asylum-rules/index.html>.

¹⁵² Douglas Ligor and Lisa Jaycox, "Restoring asylum protections for victims of domestic violence," June 25, 2018, <https://thehill.com/blogs/congress-blog/homeland-security/393893-restoring-asylum-protections-for-victims-of-domestic>.

¹⁵³ Testimony of L. Francis Cissna, Director of U.S. Citizenship and Immigration Services, at U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Stopping the Daily Border Caravan: Time to Build a Policy Wall*, hearing, 115th Cong., 2nd sess., May 22, 2018, p. 3 (hereinafter cited as Cissna 2018 Hearing Testimony), <https://docs.house.gov/meetings/HM/HM11/20180522/108323/HHRG-115-HM11-Wstate-CissnaL-20180522.pdf>.

¹⁵⁴ *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum*, AILA Doc. No. 18060102, June 1, 2018, p. 5.

Frivolous or Fraudulent Asylum Claims

There have been concerns about frivolous asylum applications since the establishment of the U.S. asylum program. As noted, the 1980 interim regulations made reference to “non-frivolous” applications, and IIRIRA amended the INA to permanently bar an individual who knowingly files a frivolous asylum application from receiving immigration benefits. Under current regulations, an asylum application is considered “frivolous” for purposes of the INA benefit bar “if any of its material elements is deliberately fabricated.” These regulations also provide that for purposes of the bar, “a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.”¹⁵⁵

The issue of frivolous asylum claims was highlighted by Attorney General Sessions in 2017 remarks, in which he described the asylum system as being “subject to rampant abuse and fraud.” He further said, “And as this system becomes overloaded with fake claims, it cannot deal effectively with just claims.”¹⁵⁶ Similarly, in his May 2018 House testimony, USCIS Director Cissna stated, “The integrity of our entire immigration system is at risk because frivolous asylum applications impede our ability to help people who really need it.”¹⁵⁷

Several House bills considered in the 115th Congress sought to tighten language in the INA on frivolous asylum claims. In his May 2018 testimony, USCIS Director Cissna called for legislation to address the problem of frivolous claims that would, among other provisions, “impos[e] and enforce[e] penalties for the filing of frivolous asylum applications.”¹⁵⁸

A key point of contention in the current debate about frivolous or fraudulent asylum claims is the scope of the problem. According to a researcher at the immigration-restrictionist Center for Immigration Studies, “Most asylum claims nowadays, whether in Europe or the United States, are not genuine. Migrants are more and more using the asylum ticket to gain entry into a country and stay.”¹⁵⁹

Other experts, such as Law Professor Lindsay M. Harris, reach different conclusions about the prevalence of fraud in recent asylum applications: “One of the humanitarian crises producing refugees happens to be south of our border, in Central America, and this accounts for the exponential increase in asylum claims and individuals seeking protection in the U.S. through the credible fear system, rather than a sudden increase in fraudulent claims.”¹⁶⁰

Employment Authorization

Under current law, an asylum seeker who is not otherwise eligible for employment authorization cannot be granted such authorization until 180 days after filing an application for asylum. In general, under DHS regulations, an asylum applicant cannot submit an application for employment authorization and an employment authorization document (EAD) until 150 days after a complete asylum application has been

¹⁵⁵ 8 C.F.R. §208.20.

¹⁵⁶ U.S. Department of Justice, Office of Public Affairs, “Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review,” October 12, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

¹⁵⁷ Cissna 2018 Hearing Testimony, p. 4.

¹⁵⁸ *Ibid.* p. 4.

¹⁵⁹ Nayla Rush, *This World Refugee Day, Let’s Address Fraudulent Asylum Claims That Are Detrimental to Legitimate Asylum Seekers*, Center for Immigration Studies, June 20, 2018, <https://cis.org/Rush/World-Refugee-Day-Lets-Address-Fraudulent-Asylum-Claims-Are-Detrimental-Legitimate-Asylum>.

¹⁶⁰ Lindsay M. Harris, “Sessions fundamentally misses the mark on the asylum system,” *The Hill*, October 17, 2017, <http://thehill.com/opinion/immigration/355734-sessions-fundamentally-misses-the-mark-on-the-asylum-system>.

received. There is no fee for an asylum applicant's initial application for employment authorization. Renewal applications are subject to standard fees.

Although there seems to be general agreement that asylum seekers should be eligible for employment authorization at some point, aspects of this policy have long been debated. For example, for more than 20 years, some have argued that the availability of employment authorization creates an incentive for individuals to apply for asylum solely to be able to work legally in the United States. In his prepared testimony for the May 2018 House hearing on border issues, USCIS Director Cissna stated, "While the number of mala fide claims is difficult to estimate, experience from the 1990s indicates that a significant amount of the growth in receipts since FY 2014 may be linked to individuals pursuing work authorization and not necessarily asylum status."¹⁶¹

Others dismiss the idea that asylum seekers act in response to particular U.S. policies, arguing that they are motivated by desperate circumstances. Commenting on Central American asylum seekers, a spokesperson for the U.N. High Commissioner for Refugees said, "People are leaving because they are suffering from high levels of violence from gangs and other organized criminal groups.... This flow of families from Central America will not stop because if the root causes are still there these people will keep coming to the U.S. or to other countries."¹⁶²

The complex system set up to track when an asylum seeker has reached the 180-day point for employment authorization purposes—known as the *asylum EAD clock*—has also been controversial. There are various events that stop the asylum EAD clock. USCIS and EOIR characterize these as "delays requested or caused by an applicant while his or her asylum application is pending with USCIS and/or EOIR" (e.g., the applicant's "failure to appear at an interview or fingerprint appointment" or "the applicant or his or her attorney asks for additional time to prepare the case").¹⁶³ Over the years, immigration advocacy groups have been critical of clock-related USCIS and EOIR policies and actions.¹⁶⁴

Variation in Immigration Judges' Asylum Decisions

In November 2017, the Transactional Records Access Clearinghouse (TRAC) published the report *Asylum Outcome Continues to Depend on the Judge Assigned*, which examined asylum decisions of judges on the same immigration court. It was based on combined data from FY2012 through FY2017 for judges who decided at least 100 asylum cases during this six-year period. Among its findings, the report identified the Newark and San Francisco Immigration Courts as having the greatest judge-to-judge differences in asylum cases decided during that time. For the San Francisco court, for example, it stated that "the odds of denial varied from only 9.4 percent all the way up to 97.1 percent depending upon the judge." The TRAC analysis assumes that "when individual judges [on the same court] handle a sufficient number of asylum requests, random case assignment will result in each judge being assigned a roughly equivalent mix of 'worthy' cases." It, thus, posits, "any large differences in the denial rates of individual judges are

¹⁶¹ Cissna 2018 Hearing Testimony, p. 2.

¹⁶² Quoted in Ioan Grillo, "'There Is No Way We Can Turn Back.' Why Thousands of Refugees Will Keep Coming to America Despite Trump's Crackdown," June 21, 2018, <http://time.com/5318718/central-american-refugees-crisis/>.

¹⁶³ See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, and U.S. Department of Justice, Executive Office for Immigration Review, *The 180-day Asylum EAD Clock Notice*, updated May 9, 2017, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf.

¹⁶⁴ See, for example, American Immigration Council, Legal Action Center, "Employment Authorization and Asylum: Strategies to Avoid Stopping the Asylum EAD Clock," practice advisory, February 5, 2014, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/employment_authorization_and_asylum_fin_2-5-14_0.pdf.

unlikely to be the result of differences in the nature of the incoming cases. Instead, they are likely to reflect the personal perspective that each judge brings to the bench.”¹⁶⁵

TRAC first reported on differences in asylum decisions by immigration judges nationwide based on an analysis of asylum cases decided by judges from FY1994 through early FY2005. Published in July 2006, this TRAC report found a “great disparity in the rate at which individual immigration judges declined the applications.”¹⁶⁶ Seemingly taking issue with the TRAC analysis but not mentioning it by name, a November 2007 EOIR fact sheet, “Asylum Variations in Immigration Court,” stated:

Asylum adjudication does not lend itself well to statistical analysis. Each asylum application is adjudicated on a case-by-case basis, and each has many variables that need to be considered by an adjudicator. It is therefore important that any statistical analysis acknowledge these variables and not draw comparisons between substantially different cases.¹⁶⁷

The U.S. Government Accountability Office (GAO) examined variations in the outcomes of asylum cases in reports issued in 2008 and 2016. The 2008 report, which was based on an analysis of asylum case data from FY1994 through April 2007, found that “within immigration courts, there were pronounced differences in grant rates across immigration judges.”¹⁶⁸ While acknowledging the limits of its analysis,¹⁶⁹ GAO concluded that “the size of the disparities in asylum grant rates creates a perception of unfairness in the asylum adjudication process within the immigration court system.”¹⁷⁰

GAO analyzed EOIR data for FY1995 through FY2014 for its 2016 follow-up report. Although it was unable to control for “the underlying facts and merits of individual asylum applications,” GAO maintained that the available data allowed it to compare asylum outcomes across immigration courts and immigration judges.¹⁷¹ It estimated that for the May 2007-FY2014 period since its 2008 report, “the affirmative and defensive asylum grant rates would vary by 47 and 57 percentage points, respectively, for the same representative applicant whose case was heard by different immigration judges.”¹⁷²

Safe Third Country Agreements

Under the INA, an alien is ineligible to apply for asylum in the United States if he or she can be removed, pursuant to a bilateral or multilateral agreement, to a third country where the “alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”¹⁷³

¹⁶⁵ The report is available at <http://trac.syr.edu/immigration/reports/490/>. It contains data on asylum decisions by individual immigration judges and courts.

¹⁶⁶ The report is available at <http://trac.syr.edu/immigration/reports/160/>.

¹⁶⁷ U.S. Department of Justice, Executive Office for Immigration Review, “Asylum Variations in Immigration Court,” fact sheet, November 5, 2007, <https://www.justice.gov/sites/default/files/eoir/legacy/2008/09/09/AsylumVariationsNov07.pdf>.

¹⁶⁸ U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, GAO-08-940, September 2008, p. 32.

¹⁶⁹ Ibid. p. 60. In the body of the report, GAO noted, “Because data were not available on the facts, evidence, and testimony presented in each asylum case, nor on immigration judges’ rationale for deciding whether to grant or deny a case, we could not measure the effect of case merits on case outcomes.”

¹⁷⁰ Ibid.

¹⁷¹ U.S. Government Accountability Office, *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges*, GAO-17-72, November 2016, p. 5.

¹⁷² Ibid. “Highlights” page.

¹⁷³ INA §208(a)(2)(A) (8 U.S.C. §1158(a)(2)(A)).

The United States and Canada signed a safe third country agreement in 2002, which went into effect in 2004. Under the agreement, asylum seekers must request protection in the first of the two countries they arrive in, unless they qualify for an exception.¹⁷⁴ Under DHS regulations, a USCIS asylum officer must determine whether an alien arriving in the United States at a U.S.-Canada land border port of entry seeking asylum is subject to removal to Canada in accordance with the U.S.-Canada safe third country agreement.¹⁷⁵

The Trump Administration has had preliminary discussions with Mexico about a possible safe third country agreement. According to an unidentified senior DHS official, “We believe the flows [of Central Americans into the United States] would drop dramatically and fairly immediately” if a U.S.-Mexico safe country agreement went in effect.¹⁷⁶

Human Rights First, an advocacy organization, opposes such an agreement. The group found that Mexico was not a safe third country in 2017 and indicated in a July 2018 press release that that was still the case: “Since [last year], the dangers facing refugees and migrants in Mexico have escalated. Recent reports confirm that Mexican authorities continue to improperly return asylum seekers to their countries of persecution and that the deficiencies in the Mexican asylum system have grown.”¹⁷⁷

Taking a different approach, House bills considered in the 115th Congress would have amended the INA safe third country asylum provision to eliminate the “pursuant to a bilateral or multilateral agreement” language, presumably to provide for removals to a third country without a bilateral agreement.

Conclusion

The asylum provisions in the INA are unusual in providing a standard mechanism for eligible unauthorized aliens in the United States to apply for a legal immigration status. This aspect of asylum also serves to make this form of relief particularly controversial, especially at times when large numbers of asylum seekers are arriving in the United States. The high volume of asylum cases has elicited policy responses from the Trump Administration, as described in this report. In October 2018 remarks at an immigration conference, USCIS Director Cissna offered context for DHS’s and DOJ’s asylum-related actions from the Administration’s perspective when he referenced “challenges associated with surges at the U. S. southern border, where migrants know that they can exploit a broken system to enter the U.S., avoid removal, and remain in the country.”¹⁷⁸ While the Administration maintains that its policies adhere to the INA and are necessary to preserve the integrity of the immigration system, others argue that it is tightening the asylum process in contravention of the law. It remains to be seen whether the Administration will continue to try to reshape U.S. asylum policy and whether Congress will take action, as it has at times in the past, to make legislative changes to the asylum system.

¹⁷⁴ See U.S. Department of State, U.S.-Canada Agreement Covering Third-Country Asylum Claims at the Border (December 5, 2002), <https://www.state.gov/s/1/38616.htm>; U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, U.S.-Canada Safe Third Country Agreement, <https://www.uscis.gov/unassigned/us-canada-safe-third-country-agreement>.

¹⁷⁵ 8 C.F.R. §208.30(e)(6).

¹⁷⁶ Quoted in Joshua Partlow and Nick Miroff, “U.S. and Mexico discussing a deal that could slash migration at the border,” July 10, 2018, https://www.washingtonpost.com/world/the_americas/us-and-mexico-discussing-a-deal-that-could-slash-migration-at-the-border/2018/07/10/34e68f72-7ef2-11e8-a63f-7b5d2aba7ac5_story.html?utm_term=.662dfe7894c0.

¹⁷⁷ Human Rights First, “Trump Admin Renews ‘Safe Third Country’ Talks with Mexico,” press release, July 10, 2018, <https://www.humanrightsfirst.org/press-release/trump-admin-renews-safe-third-country-talks-mexico>.

¹⁷⁸ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Director’s Remarks, 15th Annual Immigration Law and Policy Conference Organized by the Migration Policy Institute and Georgetown Law, October 1, 2018, https://www.uscis.gov/sites/default/files/files/nativedocuments/Directors_Remarks_at_the_15th_Annual_Immigration_Law_and_Policy_Conference.pdf.

Appendix A. Affirmative Asylum Applications

Table A-1 provides the underlying data for **Figure 1** on new affirmative asylum applications filed annually with USCIS since FY1995.

Table A-1. New Affirmative Asylum Applications Filed, FY1995-FY2018

Fiscal Year	Number of Applications
1995	149,065
1996	107,130
1997	52,217
1998	35,903
1999	32,711
2000	40,697
2001	59,432
2002	58,404
2003	43,339
2004	27,907
2005	24,247
2006	24,284
2007	25,674
2008	25,505
2009	24,550
2010	28,443
2011	35,066
2012	41,880
2013	44,446
2014	56,912
2015	83,251
2016	114,927
2017	141,638
2018	106,147

Source: CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on July 19, 2018 (FY1995-FY2017); Department of Homeland Security, U.S. Citizenship and Immigration Services, “Affirmative Asylum Statistics,” “Asylum Applications Filed” (Received) (monthly October 2017 through September 2018) (FY2018).

Notes: Data represent applications, not individuals. Data are limited to new filings; they do not include applications that were reopened during the relevant fiscal year.

Table A-2 expands on the data in **Table A-1** to show the top 10 nationalities filing new affirmative asylum applications annually since FY2007. For each of the top 10 nationalities for each year, **Table A-2** provides a rank and a percentage of all applications that were filed by applicants of that nationality. The table also includes annual data on the total number of applications filed by all applicants (the latter totals match the data in **Table A-1**).

As shown in **Table A-2**, the top four nationalities filing new affirmative asylum applications in FY2007 (China, Haiti, Mexico, and Guatemala) remained in the top 10 throughout the period, with China holding the top spot in all years except FY2017 and FY2018. Between FY2009 and FY2012, Chinese nationals filed one-third of all new affirmative asylum applications each year. In FY2017 and FY2018, however, China's rank fell to 2nd and 4th, respectively. In each of those two years, Venezuelans filed more new affirmative asylum applications than nationals of any other country, accounting for one-fifth of all applications filed in FY2017 and more than a quarter of the total in FY2018. Since FY2015, nationals of Venezuela and four other Latin American countries (Guatemala, El Salvador, Mexico, and Honduras) have accounted for five of the top six nationalities filing new affirmative asylum applications each year.

Table A-2. Top 10 Nationalities Filing New Affirmative Asylum Applications, FY2007-FY2018

Nation	FY2007		FY2008		FY2009		FY2010		FY2011		FY2012		FY2013		FY2014		FY2015		FY2016		FY2017		FY2018	
	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%	Rank	%
China	1	24%	1	30%	1	36%	1	37%	1	37%	1	34%	1	27%	1	21%	1	17%	1	14%	2	12%	4	8%
Haiti	2	8%	3	5%	3	4%	3	3%	6	2%	8	2%	8	3%	10	3%	10	2%	9	3%	8	3%	8	3%
Mexico	3	8%	2	8%	2	6%	2	8%	2	12%	2	15%	2	13%	2	13%	2	11%	3	13%	5	9%	5	6%
Guatemala	4	4%	6	3%	7	2%	6	3%	3	3%	4	3%	4	4%	3	6%	3	10%	4	9%	3	9%	2	10%
Colombia	5	4%	8	2%	10	2%														10	2%	10	2%	
Ethiopia	6	4%	4	4%	4	4%	4	3%	7	2%	6	2%	7	3%										
Indonesia	7	3%	5	3%																				
Venezuela	8	3%	9	2%			10	2%	10	2%					5	4%	5	7%	2	13%	1	20%	1	27%
Russia	9	2%	10	2%	6	3%	7	2%	8	2%	10	2%								9	2%			
Guinea	10	2%																						
Nepal			7	2%	5	4%	5	3%	4	3%	5	3%	5	3%										
India					8	2%	9	2%														9	3%	
El Salvador					9	2%	8	2%	9	2%	9	2%	10	3%	4	4%	4	8%	5	8%	4	9%	3	9%
Egypt									5	2%	3	4%	3	6%	7	3%								
Ecuador											7	2%	9	3%	6	4%	7	4%	7	3%				
Syria													6	3%	8	3%								
Honduras															9	3%	6	6%	6	5%	6	5%	6	6%
India																	8	3%	8	3%	7	3%		
Ukraine																	9	2%	10	2%				
Nigeria																							7	3%
Number of Applications																								
All Nations	25,674		25,505		24,550		28,443		35,066		41,880		44,446		56,912		83,251		114,927		141,638		106,147	

Source: CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on July 19, 2018 (FY2007-FY2017); Department of Homeland Security, U.S. Citizenship and Immigration Services, “Affirmative Asylum Statistics,” “Leading Nationalities for Asylum Applications Filed with USCIS” (monthly October 2017 through September 2018) (FY2018).

Notes: Data represent applications, not individuals. Data are limited to new filings; they do not include applications that were reopened during the relevant fiscal year. Percentages are of all new filings for relevant fiscal year. Blank spaces indicate nationality was not in top 10 for relevant fiscal year.

Appendix B. USCIS Asylum Decisions and Credible Fear Findings

Table B-1 provides the underlying data for **Figure 2** on USCIS decisions on affirmative asylum applications issued annually from FY2009 through FY2017. It also includes an additional small outcome category (Cases Dismissed). These are cases where the applicant did not appear for fingerprinting/biometrics collection. For the cases referred to an immigration judge (which involve applicants without lawful status), **Table B-1** distinguishes among three mutually exclusive subcategories: cases that were interviewed by USCIS; cases that were interviewed by USCIS where the applicant did not meet the filing deadline; and cases that were not interviewed by USCIS. (The Referrals “Total” column in **Table B-1** matches the Referrals data displayed in **Figure 2**.)

Table B-1. USCIS Decisions on Affirmative Asylum Applications, FY2009-FY2017

Fiscal Year	Cases Granted	Cases Denied	Referrals to Immigration Judge			Total	Cases Closed	Cases Dismissed
			Cases Interviewed	Cases Interviewed/ Filing Deadline	Cases Not Interviewed			
2009	10,071	2,148	9,824	5,705	1,732	17,261	4,108	124
2010	9,174	958	9,084	6,700	1,858	17,642	1,677	28
2011	10,700	1,064	8,902	8,403	2,803	20,108	1,529	4
2012	12,991	922	8,920	9,028	3,710	21,658	1,348	4
2013	10,981	766	6,859	5,449	3,292	15,600	1,000	1
2014	10,811	582	7,499	4,535	3,503	15,537	2,008	3
2015	14,344	365	12,912	4,194	2,369	19,475	3,107	11
2016	9,538	131	9,436	4,328	2,422	16,186	3,830	7
2017	13,105	116	15,103	10,521	3,304	28,928	5,675	4

Source: CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on July 30, 2018.

Notes: Data represent applications, not individuals. *Cases Interviewed* are cases USCIS found ineligible for asylum status where the applicant was not in lawful status. *Cases Interviewed/Filing Deadline* are cases USCIS found ineligible for asylum status where the applicant was not in lawful status and did not meet the one-year filing deadline or qualify for an exception. *Cases Not Interviewed* are cases where the applicant was not in lawful status and failed to appear for an interview or withdrew the application. *Cases Closed* are cases administratively closed for reasons such as abandonment or lack of jurisdiction. *Cases Dismissed* are cases where the applicant did not appear for fingerprinting/biometrics collection.

In addition to deciding affirmative asylum cases, USCIS is tasked with assessing the credible fear of persecution claims made by individuals in expedited removal. **Table B-2** and **Table B-3** provide the underlying credible fear-related data for **Figure 4**. **Table B-2** contains data on referrals of credible fear claims to USCIS and USCIS completions of these cases.

Table B-2. Credible Fear Cases: Referrals & Completions, FY1997-FY2018

Fiscal Year	Referrals to USCIS	Completions
1997	1,438	1,206
1998	3,427	3,304
1999	6,690	6,463
2000	10,315	9,971
2001	13,140	13,689
2002	10,042	9,961
2003	6,447	6,357
2004	7,917	7,754
2005	9,465	9,581
2006	5,338	5,241
2007	5,252	5,286
2008	4,995	4,828
2009	5,369	5,222
2010	8,959	8,777
2011	11,217	11,529
2012	13,880	13,579
2013	36,035	36,174
2014	51,001	48,637
2015	48,052	48,415
2016	94,048	92,990
2017	78,564	79,710
2018	99,035	97,728

Source: CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on April 27, 2018 (FY1997-FY2017); Department of Homeland Security, U.S. Citizenship and Immigration Services, “Credible Fear and Reasonable Fear Statistics and Nationality Report,” “Credible Fear Workload Report Summary, FY 2018 Total Caseload” (FY2018).

Notes: Data represent individuals. Credible fear referrals come from the Department of Homeland Security’s U.S. Customs and Border Protection or the Department of Homeland Security’s Immigration and Customs Enforcement.

Table B-3 provides breakdowns of the **Table B-2** “Completions” data by case outcome. It also provides the percentage of the completed cases in which credible fear was found.

Table B-3. Outcomes of Completed Credible Fear Cases, FY1997-FY2018

Fiscal Year	Positive Credible Fear Findings	Negative Credible Fear Findings	Closures	Total Completions	% Total Completions with Positive Credible Fear Findings
1997	922	256	28	1,206	76%
1998	2,747	125	432	3,304	83%
1999	5,762	144	557	6,463	89%
2000	9,285	150	536	9,971	93%
2001	12,932	119	638	13,689	94%
2002	9,179	84	698	9,961	92%
2003	5,715	45	597	6,357	90%
2004	7,282	32	440	7,754	94%
2005	8,469	144	968	9,581	88%
2006	3,320	584	1,337	5,241	63%
2007	3,182	1,062	1,042	5,286	60%
2008	3,097	816	915	4,828	64%
2009	3,411	1,004	807	5,222	65%
2010	6,293	1,404	1,080	8,777	72%
2011	9,423	1,054	1,052	11,529	82%
2012	10,838	1,187	1,554	13,579	80%
2013	30,393	2,587	3,194	36,174	84%
2014	35,456	8,977	4,204	48,637	73%
2015	33,988	8,097	6,330	48,415	70%
2016	73,081	9,697	10,212	92,990	79%
2017	60,566	8,245	10,899	79,710	76%
2018	74,677	9,659	13,392	97,728	76%

Source: CRS presentation of data provided by Department of Homeland Security, U.S. Citizenship and Immigration Services, on April 27, 2018 (FY1997-FY2017); Department of Homeland Security, U.S. Citizenship and Immigration Services, “Credible Fear and Reasonable Fear Statistics and Nationality Report,” “Credible Fear Workload Report Summary, FY 2018 Total Caseload” (FY2018).

Notes: Data represent individuals. *Closures* are administratively closed cases; they include cases in which a credible fear determination is not made for reasons such as the individual withdraws the claim or is no longer in expedited removal.

Appendix C. Defensive Asylum Applications

The “Total Applications” column in **Table C-1** provides the underlying data for **Figure 3** on defensive asylum applications filed annually since FY2008. In addition, **Table C-1** provides data on the two components of that total: (1) asylum applications originally filed as affirmative applications with USCIS (column 2), and (2) asylum applications originally filed as defensive applications with EOIR (column 3) (see “Defensive Asylum”). As shown in **Table C-1**, the growth in the total number of defensive asylum applications filed in recent years prior to FY2018 has been driven mainly by an increase in asylum applications first filed in immigration court.

Table C-1. Defensive Asylum Applications Filed, FY2009-FY2018

Fiscal Year	Applications First Filed With USCIS	Applications First Filed With EOIR	Total Applications
2009	23,571	12,119	35,690
2010	20,133	12,728	32,861
2011	23,441	17,973	41,414
2012	24,594	19,903	44,497
2013	19,926	23,412	43,338
2014	16,262	31,104	47,366
2015	17,296	46,070	63,366
2016	12,722	69,156	81,878
2017	22,161	120,984	143,145
2018	48,854	110,736	159,590

Source: CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, generated October 24, 2018.

Notes: Data are for applications filed in removal, deportation, exclusion, and asylum-only proceedings only.

Appendix D. EOIR Asylum Decisions

EOIR immigration judges decide defensive asylum cases. An asylum application is defensive when the applicant is in standard removal proceedings in immigration court (see “Defensive Asylum”). **Table D-1** provides the underlying data for **Figure 5** on defensive asylum cases decided annually since FY2009.

Table D-1. EOIR Decisions in Asylum Cases, FY2009-FY2018

Fiscal Year	Cases Granted		Cases Denied		Cases Closed (Administrative)		Cases Closed (Other)		Total Decisions
	Number	%	Number	%	Number	%	Number	%	
2009	10,277	26%	11,333	28%	2,260	6%	15,951	40%	39,821
2010	9,890	27%	9,615	26%	3,368	9%	14,131	38%	37,004
2011	11,524	32%	10,611	30%	1,463	4%	12,257	34%	35,855
2012	11,957	31%	9,588	25%	4,977	13%	11,963	31%	38,485
2013	11,044	25%	9,897	23%	10,003	23%	12,457	29%	43,401
2014	9,653	25%	10,069	26%	7,244	19%	11,896	31%	38,862
2015	9,004	21%	9,527	22%	11,954	28%	12,436	29%	42,921
2016	9,638	18%	12,525	23%	18,227	33%	14,444	26%	54,834
2017	11,620	21%	18,699	33%	9,224	17%	16,340	29%	55,883
2018	14,271	21%	28,229	41%	1,703	2%	24,092	35%	68,295

Source: CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, generated October, 2018.

Notes: Data represent individuals. Data include both initial case completions (in removal, deportation, exclusion, and asylum only proceedings) and subsequent case completions (e.g., in proceedings that begin when an immigration judge grants a motion to reopen, reconsider, or recalendar). *Cases Closed (Administrative)* are cases that are closed without a final order. *Cases Closed (Other)* includes cases that are abandoned, not adjudicated, or withdrawn. Percentages for each fiscal year may not total due to rounding.

Table D-2 provides data on a subset of EOIR asylum decisions involving credible fear claims. It is limited to decisions in defensive asylum cases that originated with an individual receiving a positive credible fear of persecution finding from USCIS.

Table D-2. Immigration Judge Decisions in Asylum Cases with Initial Credible Fear Findings, FY2009-FY2018

Fiscal Year	Cases Granted		Cases Denied		Cases Closed (Administrative)		Cases Closed (Other)		Total Decisions
	Number	%	Number	%	Number	%	Number	%	
2009	921	53%	585	34%	4	0%	233	13%	1,743
2010	929	56%	490	29%	47	3%	198	12%	1,664
2011	1,367	54%	785	31%	43	2%	314	13%	2,509
2012	1,508	50%	953	31%	108	4%	461	15%	3,030
2013	1,399	39%	1,481	41%	140	4%	581	16%	3,601
2014	1,684	28%	2,722	46%	308	5%	1,231	21%	5,945
2015	1,958	25%	2,810	36%	1,811	23%	1,327	17%	7,906
2016	2,491	22%	3,805	34%	3,336	29%	1,697	15%	11,329
2017	4,009	25%	7,410	47%	1,698	11%	2,655	17%	15,772
2018	5,653	27%	10,199	49%	273	1%	4,870	23%	20,995

Source: CRS presentation of data from Department of Justice, Executive Office for Immigration Review, Workload and Adjudication Statistics, generated October 30, 2018.

Notes: Data represent individuals. Data include both initial case completions (in removal, deportation, exclusion, and asylum only proceedings) and subsequent case completions (e.g., in proceedings that begin when an immigration judge grants a motion to reopen, reconsider, or recalendar). *Cases Closed (Administrative)* are cases that are closed without a final order. *Cases Closed (Other)* includes cases that are abandoned, not adjudicated, or withdrawn. Percentages for each fiscal year may not total due to rounding.

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