

November 13, 2014

VIA FEDEX AND E-MAIL



Megan H. Mack
Officer of Civil Rights & Civil Liberties
Department of Homeland Security
245 Murray Lane, SW
Building 410
Washington, D.C. 20528

John Roth
Inspector General
Department of Homeland Security
245 Murray Lane, SW
Building 410
Washington, D.C. 20528



Re: Inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process

Dear Ms. Mack and Mr. Roth:

The undersigned organizations write to raise concerns regarding the failure by U.S. Customs and Border Protection (CBP) to properly screen individuals who flee to the United States and are taken into custody at the border, resulting in their unjust expedited removal to countries where they face persecution. Federal law states that when an individual apprehended at the border or point of entry expresses a fear of persecution, CBP must refer the individual to U.S. Citizenship and Immigration Services (USCIS) for a credible fear interview, the first step in the asylum process for those in the expedited removal process.¹ The National Immigrant Justice Center (NIJC), in collaboration with American Gateways, American Immigration Lawyers Association (AILA), the Center for Gender & Refugee Studies (CGRS), Centro Legal de la Raza, Human Rights First, Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR), the Texas Civil Rights Project, the Immigration Clinic of the University of Texas Law School, and the Women's Refugee Commission submit this complaint on behalf of 9 noncitizens who were denied the opportunity to seek asylum because of flaws in CBP's screening process. (*See Exs. A-I, Individual Complaints.*)

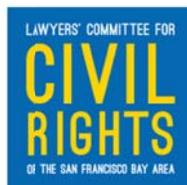
Concurrent with the filing of the attached individual complaints, AILA has separately filed a submission to the Office of Civil Rights and Civil Liberties (CRCL) with names and A-numbers for additional individuals who also were denied access to the asylum process. (*See Ex. J, AILA Chart of Individual Complainants.*) AILA filed a similar complaint in November 2013, and these additional cases supplement that complaint. (*See Ex. K, Letter to AILA from the CRCL acknowledging complaint filed on November 26, 2013.*) In addition, advocates from signatory organizations and other legal service providers have provided affidavits explaining their firsthand observations of common shortcomings in CBP's screening and referral procedures. (*See Exs. L-P, Legal Service Provider Affidavits.*) Based on the attached complainants' affidavits, the cases collected

¹See 8 U.S.C. § 1225(b)(1)(A)(ii).

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by AILA, and the observations of legal service providers, there is no doubt that a thorough investigation would reveal that CBP errors are systemic in nature and prevent meritorious asylum claims from being heard.

This letter (1) details the U.S. government's increased dependence on summary removal procedures and its harmful consequences for asylum seekers, (2) describes CBP's legal obligations to ensure that those who flee persecution have access to the asylum process, (3) describes the long-standing systemic failure by CBP to meet its legal obligations, (4) summarizes the experiences of the individual complainants while highlighting the serious errors made by CBP in their cases, and (5) offers recommendations that CBP should implement to ensure that individuals who come to the United States are afforded the right to seek asylum as the law requires and as Congress intended.

The experiences of complainants and the observations of legal service providers demonstrate three stages of consequences for asylum seekers. Some CBP officers fail to properly screen individuals for asylum at the border and points of entry and, as a result, issue expedited removal orders when they should instead refer individuals for credible fear interviews with the Asylum Office. In many cases, those individuals subject to erroneous expedited removal orders are then compelled to return to the United States following their deportations because they experience additional persecution abroad. And when they return, CBP officers' errors are exacerbated when the government reinstates the expedited removal orders and deems these returning refugees ineligible for asylum.

In light of the serious due process and civil rights violations that occur when CBP fails to adequately screen asylum seekers and instead deports legitimate asylum seekers to face further persecution in their home countries, the undersigned organizations strongly urge CRCL to investigate CBP's practices and provide guidance and oversight to improve the agency's screening, referral, and treatment of asylum seekers.

I. Increased dependence on summary removal procedures and its consequences

In enacting the expedited removal provision of U.S. immigration law, Congress made the already expansive power of immigration officers at the border even more substantial.² This provision authorizes officers to summarily order removal (deportation) for certain noncitizens without providing a hearing or review.³ A critical detail, however, is that expedited removal is prohibited when an individual expresses a fear of persecution or intent to apply for asylum. These individuals must instead be referred to the Asylum Office for credible fear interviews and, if credible fear of persecution is found, are to be afforded the opportunity to seek asylum before

² For a history on the creation and evolution of the CBP as an agency, see Garrett M. Graff, *The Green Monster: How the Border Patrol became America's most out-of-control law enforcement agency*, POLITICO MAGAZINE, November/December 2014, available at <http://politi.co/11cmvam>.

³ 8 U.S.C. § 1225(b)(1)(A)(i). By regulation, the agency affords itself authority to apply expedited removal to noncitizens who are encountered within 100 miles of the border and who entered the United States without inspection less than 14 days before they are encountered. See 69 FED. REG. 48,877-81 (Aug. 11, 2004).

the immigration court.⁴ Congress was clear in creating this scheme that it did not want its expedited removal system to result in the expulsion of *bona fide* refugees.⁵

Nonetheless, expedited removal orders have been a central tool in U.S. deportation strategies for nearly 18 years, particularly following expansion of the program in 2004.⁶ The number of expedited removal orders issued by the Department of Homeland Security (DHS) has more than doubled from 72,911 in 2005 to 193,092 in 2013.⁷ In 2013, expedited removals accounted for 44 percent (up 5 percent from FY 2012) of all removals.⁸ Almost all expedited removals—98 percent—were issued against nationals from Mexico, Guatemala, El Salvador, and Honduras.⁹

The CBP officers who issue these orders are neither lawyers nor judges, yet they hold extraordinary power in determining the fate of arriving asylum seekers.¹⁰ They screen individuals (who are generally detained and unrepresented) and make unilateral decisions without any type of hearing before a neutral party, in many cases within hours of the individual’s arrival after a journey that is typically arduous and often dangerous.¹¹ Further, these decisions are generally not subject to appellate review.¹² Despite the scope of this authority, CBP seems to prioritize the issuance of expedited removal orders over its other duty: ensuring that those who fear returning to their home countries are properly referred to the Asylum Office for further screening.

The impact that CBP’s errors have on particularly vulnerable populations is especially troubling. Based on the observations of undersigned organizations, a significant number of the individuals who are deported under expedited removal orders despite having valid claims to asylum are women or young adults with domestic violence claims or individuals with sexual-orientation-

⁴ 8 U.S.C. § 1225(b)(1)(A)(ii).

⁵ *See, e.g.*, H.R. Rep. No. 104-469, pt. 1, at *13 (1996) (“Throughout the process, the procedures protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims.”); *id.* at 107-08 (“[A]rriving aliens with credible asylum claims will be allowed to pursue those claims.”); *id.* at 158 (“If the alien meets this [credible fear] threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.”); *id.* (“Under this system, there should be *no danger* that an alien with a genuine asylum claim will be returned to persecution.”) (emphasis added).

⁶ 8 C.F.R. § 1240.16; Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208 (Sept. 30, 1996) (establishing expedited removals); *see also* American Immigration Council, *Removals Without Recourse: The Growth of Summary Deportations From the United States*, April 28, 2014, [hereinafter AIC Removals Without Recourse], available at <http://bit.ly/1wJO8Fk>.

⁷ *See* U.S. Dep’t of Homeland Sec. Office of Immigration Statistics, “Immigration Enforcement Actions: 2013,” *Annual Report Sept. 2014* at 5 (Table 7) [hereinafter “DHS 2013 Annual Report”], available at <http://1.usa.gov/1wMj45G>; *cf.* U.S. Dep’t of Homeland Sec. Office of Immigration Statistics, “Immigration Enforcement Actions: 2005,” *Annual Report November 2006* 5, Table 2 (Nov. 2006), available at <http://1.usa.gov/1n5Ww88>.

⁸ *See* DHS 2013 Annual Report, *supra*, note 7, at 1, 5 (Table 7).

⁹ *Id.* at 6.

¹⁰ Ian Gordon, *4 Reasons Why Border Agents Shouldn’t Get to Decide Whether Child Migrants Get to Stay in the U.S.*, MOTHER JONES, July 1, 2014, available at <http://bit.ly/1u2ThES>.

¹¹ *See* 8 U.S.C. § 1225(b)(1)(A)(i) (instructing that the officer “shall order the alien removed from the United States without further hearing or review” unless the individual expresses a fear of return).

¹² *Id.*; *see id.* § 1225(b)(1)(C) (no administrative review except for individuals claiming to have lawful permanent resident, refugee, or asylee status); *id.* § 1252(a)(2) (no judicial review).

based claims.¹³ CBP’s failure to properly screen these individuals can be fatal, sending individuals back into environments where they are targeted for extreme violence.¹⁴ For example, in Honduras, a country with a population smaller than New York City, an average of one woman is murdered a day.¹⁵ Another report documents that El Salvador has the world’s highest number of “femicides.”¹⁶ LGBT individuals face similar risks. In Guatemala and El Salvador, LGBT people live in an “environment of intolerance” where most of the population and the government believe homosexuality is morally repugnant.¹⁷ Mexico has the second highest LGBT murder rate in the Western Hemisphere.¹⁸ The Honduran government—particularly since the government change in 2009—has condoned social cleansing of LGBT people.¹⁹

When individuals who receive expedited removal orders are forced to return to the United States to seek safety—sometimes immediately, sometimes after enduring additional persecution abroad—they risk automatic removal anew and have limited opportunities for protection. In such instances, if apprehended, individuals are then subject to another summary removal procedure known as “reinstatement of removal.”²⁰ Like expedited removal orders, these orders are issued by immigration officers, are subject to similar limits on appellate review, and are

¹³ The ability to win asylum claims based on these factors is well established. *See, e.g., Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014) (regarding domestic violence claims); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (regarding LGBT claims).

¹⁴ *See* HUMAN RIGHTS WATCH, *You Don’t Have Rights Here: U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm*, October 2014 [hereinafter “HRW 2014 Report”] available at <http://bit.ly/1EmsHsq>. HRW interviewed deported Hondurans and documented that many are now living in fear and hiding. *See also* HUMAN RIGHTS FIRST, *How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy*, June 2014, 10-12 [hereinafter “HRF 2014 Blueprint for Change”] available at <http://bit.ly/1pScydh> (The Report notes that the expansion of expedited removal “puts the United States at risk of deporting asylum seekers ... without giving them a meaningful opportunity to apply for asylum.” The Report goes on to recommend numerous changes to the screening process that would address this concern.); Brad Wong, *Domestic Violence Survivor Killed By Ex-Boyfriend After Deportation To Mexico, Lawsuit Says*, HUFFINGTON POST: LATINO VOICES, June 19, 2013, available at <http://huff.to/1zfHFPO> (This article tells the story of a woman who was killed in Mexico by her abusive ex-partner after being deported from the United States.).

¹⁵ NOBEL WOMEN’S INITIATIVE, *From Survivors to Defenders: Women Confronting Violence in Mexico, Honduras & Guatemala*, 2012, available at <http://bit.ly/O9Y2Ll>.

¹⁶ *See* GENEVA DECLARATION SECRETARIAT, *The Global Burden of Armed Violence 2011: Lethal Encounters* 113, 2011, available at <http://bit.ly/1wf5t4X>; *see also* CENTER FOR GENDER & REFUGEE STUDIES, *Central America: Femicides and Gender-Based Violence*, 2013, available at <http://bit.ly/WE5AKv>.

¹⁷ *See* UNIV. OF CALIFORNIA, BERKELEY, INT’L HUMAN RIGHTS LAW CLINIC, *Sexual Diversity in El Salvador: A Report on the Human Rights Situation of the LGBT Community*, July 2012, available at <http://bit.ly/10Nwx0g>; PEW RESEARCH CENTER, *Global Views on Morality: Homosexuality*, Apr. 15, 2014, available at <http://pewrsr.ch/1yrAral>; INT’L GAY & LESBIAN HUMAN RIGHTS COMMITTEE, ET. AL, *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Guatemala: A Shadow Report*, March 2012, available at <http://bit.ly/1xEsE8Z>.

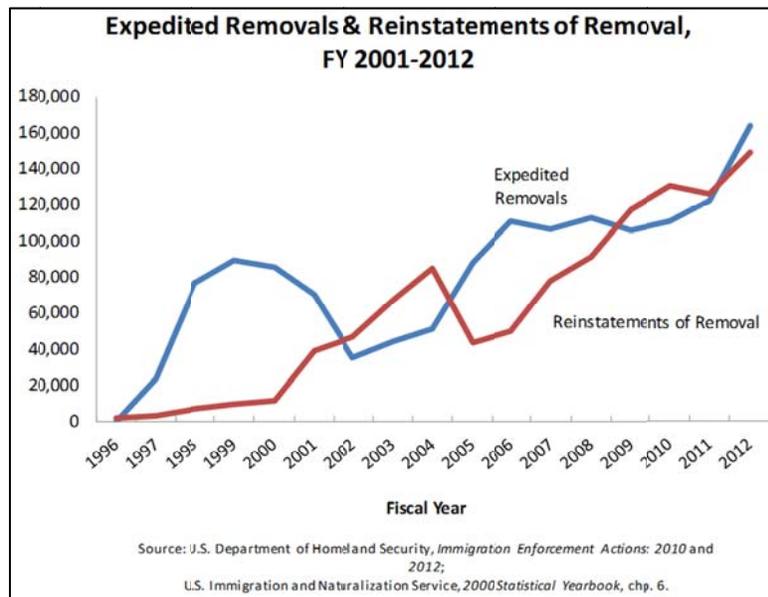
¹⁸ *See* Angeles Cruz Martínez, *Mexico, Second in L[atin] A[merica] in Homophobic Murders*, LA JORNADA, May 17, 2008, available at <http://bit.ly/10Nxrdd>; Patricia Monreal, *Mexico: Michoacan, Third in the Nation for Homophobic Crimes*, CAMBIO DE MICHOACAN, Sept. 4, 2011, available at <http://bit.ly/1EmtHwv>.

¹⁹ *See* Suyapa Portillo Villeda, *Outing’ Honduras: A Human Rights Catastrophe in the Making*, UPSIDE DOWN WORLD, Dec. 3, 2012, available at <http://bit.ly/1EmtYzw>.

²⁰ 8 U.S.C. § 1231(a)(5). While any prior removal order, regardless of the circumstances in which it was issued, can be used as the basis for reinstatement, this complaint specifically documents circumstances in which the prior removal order relied upon is an erroneously issued expedited removal order under 8 U.S.C. § 1225(b)(1)(A)(i).

generally issued against individuals who are detained and unrepresented.²¹ Reinstatement orders were the second-largest category of removal orders in 2013, accounting for 39 percent of all removal orders (170,247).²² That number nearly quadrupled between 2005 and 2013.²³

The increase in both expedited and reinstated removals is dramatic:²⁴



In total, more than more than 80 percent of all removals occur behind closed doors at the discretion of immigration officers—without judges or attorneys and through completely non-transparent processes. In light of the current violence in Central America forcing families and children to seek safety in the United States, pressures on CBP to quickly deport those arriving to this country have only increased, risking further escalation of mistakes and abuses.²⁵

A Note about Withholding of Removal

The series of events described above begins with an expedited removal order of an asylum seeker and often culminates in a reinstated removal order. For those who are able to express fear of persecution and have that fear acknowledged before the issuance of a reinstated removal order and a second deportation, the most significant consequence of that reinstated removal order is that, according to the government, it limits the applicant to withholding of removal as

²¹ 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8(a). Individuals subject to reinstatement of removal who express a fear of return must also be referred to the Asylum Office. *See* 8 C.F.R. § 1208.31(a).

²² *See* DHS 2013 Annual Report, *supra*, note 7.

²³ *Id.*

²⁴ *See* AIC Removals Without Recourse, *supra*, note 6.

²⁵ *See* Letter from Barack Obama to Harry Reid, Mitch McConnell, and Nancy Pelosi, *Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation's Southwest Border*, June 30, 2014, available at <http://1.usa.gov/1mg5i7R> (discussing the need to return unlawful migrants to their home countries “quickly”).

her only form of protection.²⁶ Individuals limited to withholding of removal must meet a higher burden of proof (which itself can result in the exclusion of *bona fide* refugees) and are:

1. **Unable to petition for spouse and children:** A grant of withholding of removal, unlike a grant of asylum, does not allow an applicant to sponsor a spouse or children for derivative status. Those like complainants PMA and NBS (discussed below) are thus forced to choose between reuniting with family and compromising their own safety.²⁷
2. **Excluded from permanent lawful status:** Withholding recipients cannot apply for lawful permanent residence or citizenship.²⁸ Instead, they are left in permanent limbo; they must apply annually for work authorization, and they can be deported if DHS determines that there has been a change in the conditions that supported their claim for protection. They also cannot travel outside of the United States or access benefits.
3. **Subject to prolonged detention:** Most of the complainants faced some time in immigration detention. Indeed, only PMA avoided prolonged detention—likely only because she was pregnant when she was taken into custody.²⁹

* * *

The undersigned organizations have witnessed firsthand the troubling cycle of summary removal that *bona fide* asylum seekers face when erroneous expedited removal orders turn into reinstated orders of removal. Because these summary procedures have the inherent potential of being employed against individuals fleeing persecution and with limited accountability, it is crucial that CRCL—perhaps the only entity able to do so—employ the oversight mechanisms available to it to ensure respect for the right to seek asylum. The practice of prioritizing expedient removals through summary removal orders cannot come at the expense of the right to seek asylum that is afforded by statute to “any alien” in this country who has suffered or is at risk of persecution.³⁰

II. CBP’s responsibilities to asylum seekers as gatekeeper to the United States

Given CBP’s obligations under U.S. law, agency guidance requires that before CBP officers issue expedited removal orders, they must:³¹

²⁶ 8 C.F.R. §§ 1208.31(e), (g)(2)(i). Withholding of removal is available by statute, *see* 8 U.S.C. § 1231(b)(3), and under the Convention Against Torture (CAT), *see* 8 C.F.R. § 1208.16. This complaint does not directly challenge the validity of the provisions precluding noncitizens in reinstated removal proceedings from applying for asylum, but complainants and the undersigned organizations take the view that this limitation is impermissible. That argument has been advanced by some of the undersigned organizations in multiple cases, and in at least one case, the agency agreed to cancel the expedited removal order and allow the individual a chance to seek asylum. *See Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. voluntarily dismissed Feb. 4, 2014). A summary of that case, as well as party and amicus briefs, is available at <http://bit.ly/1xsGXhK>.

²⁷ U.S. DEP’T OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections*, Jan. 15, 2009, available at <http://1.usa.gov/1nOG2q9>.

²⁸ *Id.*

²⁹ *See* HRW 2014 Report, *supra*, note 14 at 32-34 (discussing the adverse effects detention has on asylum seekers, both in terms of access to counsel and emotional well-being). While not the subject of this complaint, the undersigned share concerns raised in the HRW report around the mandatory detention of asylum seekers, including the expansion of detention facilities to hold women and children.

³⁰ *See* 8 U.S.C. § 1158(a) (noting that “any alien who is physically present in the United States...irrespective of such alien’s status” has the right to seek asylum subject to limitations not applicable here).

³¹ 8 C.F.R. § 235.3(b)(2)(i).

- Read to the noncitizen a notice explaining the expedited removal process and the opportunity to express concerns about persecution in the home country
- Interview the noncitizen and create a record of the facts of the case and statements made (using forms I-867A, I-867B, discussed below in more detail)
- Read the recorded information to the noncitizen
- Advise the noncitizen of the charges of inadmissibility and give the noncitizen an opportunity to respond to the charges

Agency guidance thus incorporates the duty for CBP officers to screen asylum seekers and begins with the notice provided on Form I-867A, reproduced below, which officers must read verbatim to all noncitizens subject to expedited removal:

I am an officer of the United States Department of Homeland Security. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except: as I will explain to you, you are not entitled to a hearing or review.

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me, so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

The highlighted language is intended to implement CBP officers' duty to raise the possibility of asylum to individuals that they apprehend, as CBP is the first and potentially *only* entity to encounter individuals fleeing persecution. The subsequent questions on Form I-867A record the person's name, age, nationality, willingness to participate in the interview, and ties to the United States.³²

CBP officers also must read verbatim the questions on Form I-867B.³³ Those questions are:

1. Why did you leave your home country or country of last residence?
2. Do you have any fear or concern about being returned to your home country or being removed from the United States?

³² See *id.*

³³ See KATE JASTRAM & TALA HARTSOUGH, UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM, *Study on Asylum Seekers in Expedited Removal*, (2005) [hereinafter "USCIRF 2005 Study"], available at <http://bit.ly/XxTG6k> (Vol. I) and <http://bit.ly/1pt6Tmr> (Vol. II). See page 44, for an explanation and analysis of these questions.

3. Would you be harmed if you are returned to your home country or country of last residence?
4. Do you have any questions or is there anything else you would like to add?

If, in the course of asking these questions, the CBP officer determines that a noncitizen has expressed a fear of persecution or torture, that person is to be referred to the Asylum Office for a credible fear interview. If the CBP officer determines that a noncitizen does not have a fear or—as in the case of the undersigned complainants—precludes or ignores an expression of fear, then the individual will be deported, *without any process or review*.

Of particular importance, nothing in the immigration statute, regulations, or agency field guidance instructs CBP officers to judge the strength of asylum seekers' stated fears or determine if individuals warrant asylum. In fact, CBP is instructed to do exactly the opposite:

Legal guidance to CBP on the credible fear referral process	
Statute	“If an immigration officer determines that an alien...who is arriving in the United States...indicates either an intention to apply for asylum... or a fear of persecution, the officer <u>shall refer the alien for an interview by an asylum officer.</u> ” ³⁴
Regulation	“If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer <u>shall not proceed</u> further with removal of the alien until the alien has been referred for an interview by an asylum officer.” ³⁵
CBP Inspector's Field Manual	“[I]f the alien indicates <u>in any fashion</u> that he or she has a fear of persecution, or that he or she has suffered or might [suffer] torture, you are <u>required to refer the alien to an asylum officer for a credible fear determination.</u> ... [T]he inspecting officer has a responsibility to ensure that anyone who indicates a fear of persecution is referred to an asylum officer for a credible fear determination. Inspectors should <u>consider verbal as well as non-verbal cues</u> given by the alien. The obligatory questions on the Form I-867B are designed to help in determining whether the alien has such fear. ... <u>Do not go into detail on the nature of the alien's fear of persecution or torture; leave that for the asylum officer.</u> If an alien asserts a fear or concern which is clearly unrelated to an intention to seek asylum or a fear of persecution, then the case should not be referred to an asylum officer. In determining whether to refer the alien, <u>inspectors should not make eligibility determinations or weigh the strength of the claims,</u> nor should they make credibility determinations. ... The inspector should <u>err on the side of caution</u> and apply the criteria generously, referring to the asylum officer any questionable cases. ... Do not make any evaluation as to the merits of such fear; that is the responsibility of the asylum officer.” ³⁶

³⁴ 8 U.S.C. § 1225(b)(1)(A)(ii).

³⁵ 8 CFR § 235.3(b)(4).

³⁶ CUSTOMS AND BORDER PROTECTION (CBP), *Inspector's Field Manual*, Feb. 10, 2006 at 114, available at <http://bit.ly/1zhH7c4>.

These texts offer important lessons on the proper treatment of potential asylum seekers:

1. **No “magic words” are required.** An individual can express a fear “in any fashion.”³⁷ There is no need to expressly state a desire to seek asylum, to mention the words persecution or torture, or to link a fear to a protected ground. In fact, non-verbal cues can be sufficient to illustrate a fear and merit referral to the asylum office.³⁸
2. **Individuals do not need to express fear in response to a question.** Even if the person expresses a fear after the formal interview is complete or before it begins, that should trigger the duty to refer the individual for a credible fear interview.³⁹
3. **CBP officers must refrain from attempting to parse individuals’ expressed fears with the “refugee” definition.** The purpose of the referral to the Asylum Office is at least twofold. Not only are asylum officers specifically trained how to ask survivors of persecution about their fear in a confidential setting, but they also are trained on the complexities of asylum law and are far better able to assess whether individuals have a substantial likelihood of meeting the refugee definition.
4. **When in doubt, CBP should refer to the asylum office.** CBP officers should err on the side of caution when determining whether or not fears are sufficiently “related” to potential asylum claims. This requirement is particularly important in cases involving noncitizens whose claim may be based on membership in particular social groups because the requirements for defining social groups are nuanced, rapidly evolving, and involve a complex legal and factual analysis.⁴⁰

In sum, expedited removal orders comport with the law only if CBP officers advise individuals of their right to seek protection and give them a fair opportunity to do so. Officers must take care in the process and err on the side of caution. The risks of mistakes are simply too high for the process to be handled otherwise. When the process fails—as it has in the case of each underlying complainant—the undersigned organizations argue that the removal order and any subsequent reinstatement of that order should be considered invalid.

³⁷ *Id.*

³⁸As the legal service providers who have submitted affidavits attest, and as federal courts have noted, there are many legitimate reasons why asylum seekers, particularly those with highly sensitive claims or accompanied by children, might be hesitant to disclose them to border officials in their initial interviews. *See* Exs. L-P; *see also e.g., Moab v. Gonzales*, 500 F.3d 656, 661 (7th Cir. 2007) (hesitancy to disclose sexual orientation); *Balogun v. Ashcroft*, 374 F.3d 492, 505 (7th Cir. 2004) (reluctance to disclose personal information); *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (hesitancy to disclose rape).

³⁹ 8 U.S.C. § 1225(b)(1)(A)(ii); 8 CFR § 235.3(b)(4).

⁴⁰ Although the Board of Immigration Appeals’ test for determining what constitutes a “particular social group” was first announced nearly 30 years ago in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), the Board has frequently revisited the test. *See, e.g., Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008); *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007). Faced with this case law, at least two courts declined to recognize the Board’s conclusion that a social group must be “visible” and defined with “particularity,” finding these requirements arbitrary. *See Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009). Following these decisions, the Board again clarified its understanding of the meaning of “particular social group.” *See Matter of M-E-V-G-*; 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014). The first court to address the Board’s clarified precedent granted the appeal, finding that the BIA had failed to adhere to its own test, noting that the determination regarding whether a “particular social group” is cognizable is a highly fact-specific query. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). CBP officers are ill-equipped to respond to this evolution.

III. Flaws in CBP's issuance of expedited removals and the impact on asylum seekers

As the attached complainants' affidavits and AILA case examples document, despite the clear requirements of the law and the grave stakes involved, CBP's processing of arriving asylum seekers is marred by careless errors, subversion of even minimal procedures, willful indifference, and, in some cases, outright intimidation or coercion. These failings have repeatedly been documented over many years.

In 2005, the U.S. Commission on International Religious Freedom (USCIRF) documented substantial noncompliance by CBP officers in screening noncitizens with potential asylum claims in the expedited removal process.⁴¹ These problems were observed at every point in the process. For example, CBP officers frequently failed to read any of the information provided on Form I-867A, and in half of the cases, officers failed to read the only paragraph dedicated to the asylum process:⁴²

<p>I am an officer of the United States Department of Homeland Security. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.</p>	
<p>You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.</p>	<p>CBP OFFICER DID NOT READ IN 19.5% OF CASES</p>
<p>This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.</p>	<p>CBP OFFICER DID NOT READ IN 38.6% OF CASES</p>
<p>Except as I will explain to you, you are not entitled to a hearing or review.</p>	
<p>U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.</p>	<p>CBP OFFICER DID NOT READ IN 50.5% OF CASES</p>

Even when noncitizens expressed fear, doing so did not guarantee referrals to the Asylum Office; in one-sixth of these cases, CBP made no referrals and instead ordered individuals removed or permitted them to withdraw the applications for entry.⁴³

The USCIRF study uncovered not just a failure to ask required questions but also a failure to properly record and verify answers. In about 10 percent of cases referred to the Asylum Office, there were “marked differences” between the official files prepared by CBP officers and what the USCIRF study’s experts observed.⁴⁴ In seven percent of cases, CBP officers failed to record “considerable detail” that noncitizens expressed about their fears, simply recording “yes” or

⁴¹USCIRF 2005 Study, *supra*, note 33.

⁴² *Id.* at 14, Table 2.1.

⁴³ *Id.* at 20, 23.

⁴⁴ *Id.* at 16.

“no” responses.⁴⁵ Finally, the study found that in about 16 percent of cases, CBP officers failed to ask noncitizens to confirm the accuracy of recorded statements, yet “every statement was signed by the aliens being interviewed.”⁴⁶ These recording problems have become sufficiently obvious that federal courts of appeals have expressed concern about the accuracy and validity of CBP screening interviews, particularly in cases where they are later used to impugn the credibility of asylum applicants—a tactic that continues to be employed into the present, as some of the legal service providers observe (*see infra* Part IV).⁴⁷

Such systemic shortcomings continue seemingly unabated, as witnessed and documented by complainants and the undersigned organizations nearly a decade after the USCIRF report.⁴⁸ There is no indication that any remedial actions by CBP have improved upon or resolved the problems that the USCIRF study identified. In fact, last month Human Rights Watch (HRW) issued a report documenting similar, ongoing, concerns with CBP’s screening process.⁴⁹ HRW noted that several of the deported Hondurans who were interviewed “provided accounts that, if true, should qualify them for asylum.”⁵⁰ Upon apprehension at the U.S.-Mexico border, some said they were not informed that asylum was a possibility, and those who tried to seek asylum often were outright discouraged.⁵¹ One young man stated that when he told a Border Patrol officer who dismissed his request for asylum that “he was violating my right to life,” the officer responded, “[y]ou don’t have rights here.”⁵² HRW also highlighted the troubling disparity between the percentages of Honduran nationals subjected to expedited removal (81 percent) with the “miniscule” percent of individuals who were referred to the Asylum Office for credible fear interviews (1.9 percent).⁵³ While the report focused largely on Honduras, HRW noted that

⁴⁵ *Id.*

⁴⁶ *Id.* at 18.

⁴⁷ *See e.g., Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004) (noting numerous barriers to reliability of border interviews); *Balasubramaniam v. INS*, 143 F.3d 157 (3d Cir. 1998) (addressing language barriers in border interviews).

⁴⁸ Other reports have also documented problems in the expedited removal system. The American Immigration Council (AIC) published a report in May that exposed problems in the expedited removal process similar to those experienced by complainants. They included efforts to dissuade people from seeking asylum through tactics such as berating and yelling, threats of lengthy detention and separation from family, failure to document the fears that were expressed, and insistence that individuals did not qualify for asylum. *See* SARA CAMPOS & JOAN FRIEDLAND, AMERICAN IMMIGRATION COUNCIL, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, May 2014, available at <http://bit.ly/1wMl9i2>. AIC also partnered with the American Civil Liberties Union, the Northwest Immigrant Rights Project and the National Immigration Project of the National Lawyers Guild on a project called Hold CBP Accountable, which highlights CBP officers’ coercion, misinformation, and other disregard for the already minimal procedures that are attendant to expedited removal and other summary deportations. *See* Hold CBP Accountable, <http://holdcbpaccountable.org> (last visited Nov. 11, 2014). Human Rights First’s June 2014 report also addresses this issue, along with many other problems with refugee and asylum screening at the border, while offering numerous practical recommendations. *See* HRF 2014 Blueprint for Change, *supra*, note 14.

⁴⁹ HRW 2014 Report, *supra*, note 14.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 27.

⁵² *Id.* at 9.

⁵³ *Id.* at 21.

this particular finding also applied to Mexico and other countries of Central America.⁵⁴ As HRW noted, the failure by CBP to properly screen asylum seekers violates both domestic and international law.⁵⁵

HRW's findings mirror the experiences of these complainants and the observations of legal service providers. The most common and significant errors in complainants' cases were:

1. **Failure to communicate rights:** CBP officers fail to affirmatively inform asylum seekers of their right to seek protection.
2. **Failure to ask about fear:** CBP officers fail to ask asylum seekers whether they are afraid of returning to their home countries.
3. **Failure to acknowledge fear:** CBP officers fail to acknowledge any expression of fear, including non-verbal cues, as a sign that a case should be referred to the Asylum Office.
4. **Use of intimidation:** CBP officers directly discourage asylum seekers from expressing their fears or applying for asylum by, for example, stating that they will be deported in the end anyway, using the prospect of prolonged detention to dissuade noncitizens from expressing fear, denying them the opportunity to discuss their cases in private, or stating that the expressed fears are not covered by asylum law.
5. **Use of coercion:** CBP officers utilize coercive tactics to undermine the process by, for example, yelling at noncitizens or forcing them to sign forms they do not understand.
6. **Failure to record an expression of fear in the written record and/or including inaccurate information:** When applicants express fears, CBP officials fail to capture those statements in the required documentation or include mistaken information.

IV. Experiences of Complainants and Legal Service Providers

Each complainant has experienced one or more of the failures identified in the previous section. As the legal service providers attest, their experiences are not outliers; to the contrary, they are emblematic of a serious and persistent problem in CBP's screening and referral.

Complainant 1: KBS (Ex. A.) – Currently Detained

KBS is a young man from Honduras who came to the United States fleeing domestic abuse from his father. From the time KBS was a toddler to just prior to his entry to the United States, his father beat him and verbally abused him. Sometimes his father choked him in his sleep. When his mother intervened, his father hit her too. As a result of this abuse, KBS suffered convulsions, frequent nosebleeds, and a great deal of physical pain. When KBS and his mother filed a complaint against his father for the abuse they suffered, the police never responded, and KBS's father beat him even more after he learned about the report.

⁵⁴ For Mexico, HRW documented 537,136 apprehensions, with a referral rate to the Asylum Office of less than 1 percent. There were 52,472 apprehensions of Guatemalans, and again less than 1 percent got a credible fear referral. *Id.* at 23.

⁵⁵ *Id.* at 36-40.

When KBS first entered the United States in early 2014, he told the CBP officer he was afraid to return to Honduras. The CBP officer did not acknowledge these statements, nor did he refer KBS to the Asylum Office for a credible fear interview. Instead, the CBP officer accused KBS of lying and told KBS that his case would not go to a judge. KBS then told the officer that he was afraid to go back to Honduras because his father beat him constantly. The CBP officer replied that he didn't care, that KBS did not have a right to fight for his case, and that he would be deported back to Honduras. KBS was deported without ever speaking to any asylum officer.

- ← Failure to acknowledge fear
- ← Intimidation
- ← Failure to acknowledge fear

KBS knew he would continue to suffer in Honduras, so he spent only three days in hiding before fleeing a second time. CBP officers again apprehended him at the border, and KBS again told them that he feared returning to Honduras because his father abused him. One CBP officer told him that his prior deportation prevented him from being allowed to apply for asylum. When KBS told the CBP officer that he had also been afraid of returning to Honduras the first time he was detained, the officer said he had bad luck to talk with an officer who did not believe his story. This officer did, however, refer KBS to the Asylum Office for a reasonable fear interview. The asylum officer found KBS's testimony about his experiences in Honduras and his attempts to communicate those experiences on his first entry credible. The asylum officer referred KBS to the court for withholding-only proceedings. KBS is currently detained awaiting a decision on his case.

Complainant 2: BBM (Ex. B.)

BBM is a young man from Honduras who was a vocal opponent of the gang violence that has plagued his country. Mara 18 regularly tried to recruit him, but he resisted because the gang had killed his friends and neighbors. BBM even joined a peaceful community group that was formed to speak out against gang violence in his community.

Over time the violence became too great for BBM, leading him to flee in 2013. After making it to the United States, the first time he learned about any of his rights as an asylum seeker was from another detained individual, not from any immigration official. The individual told him that because this was BBM's first time entering the United States, he could fight his case and should have a chance to stay and tell a judge about his fear. Equipped with this information, BBM sent three written requests to immigration officers telling them about his fear and asking for a chance to apply for asylum. Instead of responding to these requests by referring him to the Asylum Office, immigration officers responded that they were sending him back to Honduras and that he had no right to see a judge. While he was detained prior to this deportation, county-jail guards yelled at him when he tried to reiterate

- ← Failure to communicate rights
- ← Failure to acknowledge fear
- ← Intimidation

his fear of returning to Honduras.

BBM was deported back to Honduras without being given a chance to seek asylum. He was scared to go home, so he went to his grandmother's village. There, members of the MS-13 gang threatened him. Those threats forced BBM to return to his hometown where he was again attacked by Mara 18. Facing intensified threats, murders of additional friends and family, and no prospect of protection, BBM fled back to the United States in 2014. This time, BBM's statements of fear were acknowledged, and he was referred to the Asylum Office. He was given a reasonable fear interview and later granted withholding of removal. He is now protected, but without the rights and benefits of an asylee, despite having met an even higher burden of proof.

Complainant 3: PMA (Ex. C.)

PMA is a young woman from Honduras who tried to escape her country four times because she suffered from seemingly endless gender-based violence from partners, friends, and family.

When PMA first entered the United States in 2007, immigration officials apprehended and detained her for 22 days. During that time, no one informed her about the asylum process or explained to her that there might be legal mechanisms for her to remain in the United States. Moreover, officials never asked if she feared returning to Honduras. Because PMA had suffered extreme sexual violence at the hands of government officials in Honduras, she did not trust that she could tell the male official who questioned her about the abuse she suffered and she was never given a chance to speak to a female officer, in private.

← Failure to communicate rights
← Failure to ask about fear

After PMA was deported to Honduras, she suffered more abuse. Her ex-partner's family controlled her money, and his brother forced her to endure incredibly cruel and vicious gender-based harm—raping her, threatening her, impregnating her, and forcibly aborting her fetus with a bottle of pills, which caused excruciating suffering. Her ex-partner's brother also stalked her to the point that she feared being kidnapped.

The continuing abuse became so unbearable that PMA fled Honduras again in 2008. In Mexico, she was deported to Honduras. In 2009, she again set out for the United States but ran into the same problems with Mexican immigration. A few months later, she tried again and successfully entered the United States. Years later, PMA was taken into immigration custody from her home. PMA believes her former partner reported her to ICE. She said these officials "did not ask me even once if I was afraid to return to my home country." PMA's boyfriend helped her find a lawyer who advocated so that she could get a reasonable fear interview, and PMA is now in the process of applying for withholding.

But even if she wins, withholding will not allow her to petition to have her son—who remains abroad—reunite with her in the United States.

Complainant 4: JCM (Ex. D.)

JCM is a young man from Mexico whose family and classmates beat and abused him for being effeminate, so much so that he became suicidal as a child. He made six attempts to escape for a safer life in the United States; four times, U.S. immigration authorities apprehended him and, as a Mexican national, immediately returned him. JCM reports that during his first time at the U.S. border, in 1998, he was “never asked” if he feared returning to Mexico, and was automatically deported. One week later, he returned to the border and entered the United States without being apprehended, making his way to Chicago. ← Failure to ask about fear

He was forced to briefly return to Mexico in 2000, and was again apprehended at the border upon his return. Once again, immigration officials did not ask if he feared returning to Mexico; he was immediately deported the same day. A few days later, JCM tried entering the United States again and was not apprehended. He made a second brief trip back to Mexico in 2006, and CBP again apprehended him and again failed to ask him if he feared returning to Mexico. He was immediately deported the next day. ← Failure to ask about fear

JCM made his last attempt to enter the United States later that same week, this time without being apprehended. JCM was arrested in 2014 when stopped while driving without a license. He was transferred to immigration custody, where ICE gave him papers saying he would be deported again without seeing a judge. At that point, JCM filled out a grievance form with ICE stating that he was afraid to return to Mexico. As a result, officers referred him to a reasonable fear interview. At that interview, the Asylum Office found that JCM had a reasonable fear of persecution based on his sexual orientation, and because of events that endured in Mexico, which would have made him eligible for asylum at any of the prior points when he had been returned to Mexico. Because he had never been given a chance to express his fear and was instead removed, the government limited his options for protection to withholding of removal, which a judge recently granted.

Complainant 5: NBS (Ex. E.)

NBS is a young woman from Peru who fled gender-based violence. In Peru, an individual affiliated with drug cartels threatened to hurt her family if she refused him, and then raped her at gunpoint. He once pushed her out of a car and, on multiple occasions, tried to force her to use cocaine. NBS could not find the protection she needed in Peru, so fled to the United States in 2012.

During her initial entry at the border, NBS tried telling a CBP officer that she feared returning to Peru. But instead of listening to her fear or complying with the required process, the officer told her that entering the United States without documents was a crime and that she was being immediately deported. NBS was then detained in Georgia to await removal. After a month, and despite repeated attempts to tell the officers that she was afraid of returning to Peru, NBS was deported.

← Failure to
acknowledge fear
← Intimidation
← Failure to
acknowledge fear

Back in Peru, NBS's tormentor found her and the persecution grew worse: he tried to control her completely, stalked her, raped her, and, with increased frequency, threatened to kill her. NBS's persecutor also began to demand money. He warned NBS that if she reported him to the police, he would hire assassins to kill her family one by one before killing her.

By 2014 NBS had suffered all she could and fled to the United States for a second time. Immigration officials caught her at the border and detained her. Because of her prior removal, she is deemed ineligible to seek asylum, and she spent months in custody awaiting a reasonable fear interview. NBS was found to have a reasonable fear of persecution and has been released from immigration custody, and is awaiting adjudication of her claim for protection. But a grant of withholding of removal will not end her suffering. Her children remain in Peru, and even if she is granted protection, she will not be permitted to petition for them to join her in the United States.

Complainant 6: RAM (Ex. F.)

RAM is a gay man from El Salvador who was sexually abused as a child and who spent most of his life trying to hide his sexual orientation.

In March 2009, RAM decided to come to the United States, hoping that he could finally live his life as an openly gay man. He had been to the United States on two prior occasions (both on valid visas), and on those trips he realized that in the United States he would have an opportunity to be openly gay. But on RAM's March 2009 entry, he did not have a visa, and he was caught at the border. When he was detained, RAM expressed his desire to apply for asylum. But the officer told him that he did not qualify, and when RAM asked why, the officer told him he had no rights. RAM continued to press the issue, but was continually told that he did not qualify for asylum. RAM was not referred to the Asylum Office for a credible fear interview and never saw an asylum officer or an immigration judge during his time in detention. The officers never asked RAM why he might be interested in asylum, and so RAM never felt that he had an opportunity to safely explain that he is gay.

← Failure to
acknowledge fear
← Failure to ask about
fear

Approximately five days after being detained, RAM started feeling sick.

He asked to see a doctor, and after days of being ignored, he collapsed. He had lost a significant amount of weight, but the only information he was given, after asking a number of times, was that he had pneumonia. He asked for the results of the multiple medical tests, but no one would give him answers. After a week in the hospital, RAM was returned to the general population and deported just days later. ← Intimidation

Back in El Salvador, it took RAM a couple of months to recover from his experience, and he stayed with his aunt during that time. After he recovered, he tried to find work as a teacher (his previous profession), but was unable to do so and therefore began working at a bar with a quiet gay scene. Once he started working there, he was verbally attacked regularly. Just a month after starting, RAM and his boss were beaten and robbed; about a month later, they were kidnapped and raped.

Because of this trauma, RAM decided that it was not safe for him in El Salvador. He reentered the United States in December 2010 to escape the risk of further sexual and physical abuse. RAM was not caught on his second entry, and he now finds himself in a difficult position. He knows that his prior removal order makes him ineligible for asylum or other immigration benefits, including adjustment of status based on his relationship with a U.S. citizen. But he remains fearful of returning to El Salvador. RAM knows that, because of the prior erroneous expedited removal order, any action he takes with immigration could lead to his detention and deportation.

Complainant 7: JVC (Ex. G.) – Currently Detained

JVC is a young woman from Guatemala who fled to the United States to seek safety from her abusive ex-partner, who regularly extorted money from bus drivers and appeared complicit with local officials. When JVC learned of her ex-partner's illicit activities, he became increasingly violent—beating and kicking her, padlocking her to the stairs for days, and firing what JVC believed at the time to be a loaded gun at her head. JVC also overheard her ex-partner order someone to make her cousin, who worked for a local bus company, disappear. Though JVC filed a report with the National Civil Police, she was unable to find the protection she needed in Guatemala.

JVC first entered the United States in January 2014 and was apprehended by immigration authorities shortly thereafter. Though JVC expressed her fear of return to Guatemala to an immigration officer, she was told not to fight her case because she would be detained with criminals for nine months. JVC was issued an expedited removal order and deported to Guatemala. ← Failure to acknowledge fear
← Intimidation

JVC was in Guatemala for about 10 days before she left again for the United States. She entered the country around April 2014, and was again apprehended at the border. JVC was able to obtain legal representation and had a reasonable fear interview in June 2014. About two months later, JVC learned the Asylum Office had found she had a reasonable fear of persecution; however, because she has a prior removal order, she is only able to apply for withholding of removal.

Complainant 8: RSC (Ex. H.) – Currently Detained

RSC is a woman from Guatemala who sought protection in the United States due to repeated persecution on account of her status as an indigenous woman. RSC was harassed, abused, and raped on four occasions before fleeing her country for the first time. She was ordered removed twice from the United States and suffered additional persecution in Guatemala. Although RSC filed police reports on two occasions, they were not taken seriously and she was unable to obtain the protection she needed.

RSC first entered the United States around December 2013. After she was apprehended by immigration authorities, she expressed her fear to the border patrol agents but was told: “don’t talk. These are all lies. Stop speaking....All Guatemalans are telling the same lies.” Terrified, RSC was forced to sign a removal order without being given the opportunity to speak to an asylum officer about her fear. RSC spent only 10 days back in Guatemala—during which time she was drugged, raped, and impregnated—before returning to the United States around April 2014. Again, RSC was not given an opportunity to express her fear of return and was deported within days.

← Failure to acknowledge fear
← Coercion
← Failure to acknowledge fear

RSC remained convinced that she would not be safe in Guatemala, and entered the United States with her eight-year-old son in about July 2014, after both she and her son were threatened by armed men who entered their home. She presented herself to border officials and was finally able to express her fear of return and obtain an interview with an asylum officer. However, because RSC’s son was present during the interview, she was afraid to speak freely about the rapes in front of him and was given a negative determination. Through counsel, RSC was able to obtain another interview, but was not able to have her attorney participate telephonically. Scared, nervous, and intimidated by the asylum officer, RSC was again not able to fully express her fear of return and again received a negative determination. Ultimately, RSC’s attorney represented her at a hearing before an immigration judge who determined RSC does have a reasonable fear of persecution and vacated the asylum officer’s decision. Nonetheless, because RSC has prior removal orders—despite her repeated attempts to express her fear of return—she is in withholding-only proceedings and cannot apply for

the more permanent protection that asylum would allow. Ironically, RSC's eight-year-old son was referred for a credible fear interview, which he passed, making him eligible for asylum and consideration for release from DHS custody, while RSC is not. Even if RSC's son wins asylum, due to his status as a minor, he will be unable to petition for her.

Complainant 9: EYT (Ex. I.) – Currently Detained

EYT is a young man from Honduras. He fled after members of the Barrio 18 gang threatened to kill him for cooperating with police in the arrest of two gang members. Twice, he attempted to flee to the United States, and members of his family have also been killed.

EYT first entered the United States around May 2013. Upon entry, he was kidnapped at the border, beaten severely, and held for ransom. EYT's family in the United States paid the ransom in hopes of rescuing him, but the kidnappers took EYT to the desert, assaulted him, and left him for dead. A man found EYT in the desert and called immigration.

When CPB officers picked up EYT in the desert, EYT told them about the kidnapping and that he was afraid to return to Honduras. EYT does not recall them acknowledging this fear. Given his critical condition, EYT was taken to a hospital for leg surgery; the hospital performed four different surgeries. EYT was sleeping and recovering from surgery when CBP officers came into his room and woke him up. Although EYT was disoriented and semi-conscious, the CBP officers showed him some documents written in English. EYT could not understand what they were saying and in fact thought they were hospital forms. Against EYT's will, one of the officers grabbed his hand to sign the forms. EYT later learned that these documents contained the order for his expedited removal. CBP officers never explained the nature of their visit to EYT, never asked him about a fear of return, and never explained the documents. Further, they did not investigate, to EYT's knowledge, the circumstances of the crime committed against him at the border.

← Failure to
acknowledge fear

← Coercion

← Failure to ask about
fear

EYT was later transferred to immigration detention and in August 2013, he was deported to Honduras. Upon return to Honduras, EYT's uncle met him at the airport to warn him that his life was in danger. EYT turned around immediately and traveled back to the United States seeking safety. In May 2014, EYT re-entered the United States and was again taken into immigration custody. He is currently detained and applying for protection based on his fear of return to Honduras.

Observations of Legal Service Providers

The experiences of these individuals are not isolated incidents. AILA's members regularly hear similar accounts from their clients, and the organization has recently collected 14 case examples that illustrate problems with the CBP screening and referral process. These cases supplement 19 other cases that AILA submitted to CRCL in November 2013. *See* Exs. J-K. In addition, five legal service providers have provided affidavits summarizing their collective breadth of experience with the issue. *See* Exs. L-P. Their knowledge spans over a decade and covers diverse geographic regions:

- Denise L. Gilman, Immigration Clinic, University of Texas School of Law (Texas)
- Robin Goldfaden, Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) (California)
- Benjamin Harville, Florence Immigrant and Refugee Rights Project (FIRRP) (Arizona)
- Stephanie Taylor, American Gateways (Texas)
- Eleni Wolfe Roubatis, Centro Legal de la Raza (California)

While the problems in the screening and referral process occur largely at the U.S.-Mexico border, these providers report they have encountered the same issues nationwide in their everyday work with asylum seekers. Highlights of their observations, detailed in the attached affidavits, include:

Failure to screen for fear or acknowledge fear

All the legal service providers have encountered individuals who received expedited orders of removal as a result of CBP's failure to screen for or acknowledge a fear of return. Wolfe Roubatis reports that "[m]any individuals with prior orders were not able to express a fear during their initial interviews with [CBP] because they were told...they had no option but to accept a removal order." According to Taylor, "it is not surprising that the complainants would have endeavored to express a fear of persecution before they were improperly subject to an expedited removal order" and that what should have been understood as a claim for asylum was instead ignored. Gilman observes, "In some cases, CBP agents improperly advise detainees about their claims, for example, indicating that fear of domestic violence or gangs will not qualify an individual for asylum and discouraging expression of fear."

Use of intimidation and coercion

Legal service providers also say that some asylum seekers are too afraid of CBP officers to raise their claims. Taylor reports that "[m]any recent arrivals report being afraid or intimidated by Border agents such that they do not feel safe disclosing their reasons for fleeing their home countries." Gilman adds that confusion and despair at being apprehended, detention conditions, and confidentiality or privacy concerns also make asylum seekers fearful of raising claims. She notes that some recent arrivals have reported being too afraid to raise a fear following "harsh and threatening" questioning by CBP officers who, in some cases, have even been physically abusive.

Wolfe Roubatis notes that individuals have been afraid to express their fear because “officers stood near them with guns while reading through interview questions.”⁵⁶

Failure to record an expression of fear and/or including inaccurate information

If individuals do raise a fear of return, CBP officers sometimes simply do not record it. Wolfe Roubatis notes, “Many individuals report...that they did express a fear but that the CBP officer told them that the fear they expressed was not a valid one and marked ‘no fear’ on the form despite one having been expressed.”

Another troubling trend that legal service providers encounter relates to discrepancies between what CBP officers record in the required forms and what individuals recount as having stated. One common discrepancy noted by Wolfe Roubatis, Goldfaden, and Taylor relates to the responses to the questions on Form I-867B. In response to the question about why an individual came to the United States, they say, CBP officers record that the individual came to “work and live” in a particular place; when asked about this response, the asylum seekers routinely deny having given that answer. Wolfe Roubatis observes “there is no variety in the way that the response is phrased.” In some instances, it appears that the forms completed by CBP during border interviews contain information that relates to another individual. “I frequently come away with the distinct impression that answers to the question on these forms have been auto-filled, with the same response carried over from form to form,” explains Harville. Gilman describes the rushed circumstances in which CBP officers prepare documentation, what appears to be “cut and paste” of information by CBP officers onto forms, and incorrect designations of gender or point of entry.

These errors create further anguish for individuals who are already anxious about their immigration status, given the persecution they have endured or fear. Often, these border statements are used against asylum-seekers in later removal proceedings in attempts to impeach their credibility. According to Harville, “[a]nother problem seen frequently is that the shoddy documentation of initial interviews by CBP and other flaws in border officers’ handling of the process later prompt government attorneys or immigration judges to question the credibility of those who eventually are able to get a hearing before an immigration judge.” Wolfe Roubatis says, “I have seen firsthand for years the surprise, frustration and terror that asylum seekers feel when I tell them what their documentation from their initial interview contains.”

Because of the prevalence of CBP errors, the service providers who have supplied affidavits say they no longer regard CBP officers’ records to be reliable accounts of border interviews, reliable bases for expedited removal orders, or grounds upon which to dismiss a potential asylum seeker as not credible. In fact, in light of the repeated discrepancies, Goldfaden explains that LCCR engaged in an internal audit of 34 cases to more closely study the problem. In over 60 percent of the examined cases, CBP officers had recorded no fear of return but the Asylum Office later made positive credible fear findings. According to Goldfaden, “even if the overall national rate of discrepancy between what CBP records and the actual level of fear is only a small fraction of

⁵⁶ HRW also observes that Border Patrol officers are visibly armed when they apprehend individuals at the border, and in subsequent individual interviews, “their holsters are empty but visible.” See HRW 2014 Report, *supra* note 14, at 8.

the rate that LCCR found in its internal audit, the situation is deeply troubling. It would mean that the United States is sending a substantial number of bona fide refugees back to... persecution and possibly torture or even death.”

Given the frequency with which service providers encounter these issues, it is important to emphasize that the cases included in this complaint represent a fraction of the population that has fallen prey to screening errors by CBP. It is impossible to know the exact number of individuals unjustly subject to expedited removal because those individuals would be deported before having a chance to consult with legal service providers.⁵⁷ But given the accounts of the individuals whose cases are included this complaint, the accounts of legal services providers, and the recent findings by HRW, there is strong reason to believe that the failure by CBP to properly screen asylum seekers is systemic and widespread.

IV. Recommendations to restore fairness to the CBP asylum screening process

CBP is the gatekeeper to the U.S. asylum process for those who flee persecution and come into custody near the border, but its actions keep the gate closed to a significant number of *bona fide* refugees. CBP officers seem to perceive their job as one of deporting noncitizens as quickly as possible, neglecting that another key function of their work is to identify those who do have potential protection claims and refer them to the Asylum Office. This dereliction of duty has resulted in the return of many asylum seekers, like the included complainants, to unimaginable pain and suffering. This harm is compounded when individuals make a second attempt to reach safety and are shut out of asylum by other rules limiting individuals with prior removal orders to the more limited protection of withholding of removal.

To remedy a range of problems that have been documented, CRCL should instruct CBP to make the following modifications to its administration of the expedited removal process.

1. **Training:** CBP officers need better training to ensure their understanding and compliance with existing law and procedure—including directives in the agency’s own manual—with respect to the treatment of asylum seekers who are apprehended at the border or a point of entry.⁵⁸

In addition to training in policy and procedures, CBP officers should receive sensitivity training to improve their understanding of why some asylum seekers may be hesitant to disclose fear during initial interviews shortly after crossing the border. CBP officers must be aware that, particularly in cases involving gender or sexual-orientation-based violence or when individuals previously were abused by state actors, applicants may be extremely hesitant to disclose the sensitive information that could give rise to a valid asylum claim.

2. **Supervision and monitoring:** CBP officers must be strictly required to comply with the proper asylum screening procedures during the expedited removal process. CBP must monitor and audit individual officers’ compliance on a periodic basis. CBP officers must

⁵⁷ HRW 2014 Report, *supra*, note 14, at 30-31.

⁵⁸ See 8 U.S.C. § 1225(b)(1)(A)(ii); 8 CFR 235.3(b)(4); CBP Inspector’s Field Manual, *supra*, note 36, at 113-14.

be penalized for intimidating or coercing asylum seekers in ways that could dissuade *bona fide* applicants. Failure to comply with the proper standards must result in concrete disciplinary measures. CBP should also keep and make public its own data on compliance, supervision, and auditing.

3. **Deference to the Asylum Office:** CBP must reinforce to its officers that they are not to evaluate individuals' asylum claims. CBP officers must adhere to their statutory duty of actively acknowledging *any* indication that asylum seekers may have fears of returning to their home countries and refer these individuals to the Asylum Office for credible fear interviews. CBP officers are not sufficiently trained in the nuances of the law governing the "refugee" definition, nor should they be tasked with engaging in such complex legal analysis. This limitation is particularly important in cases involving potential claims based on membership in a particular social group, a rapidly evolving area of law.

Given the complexity of asylum law, and to ensure there is no confusion among CBP officers as to their responsibility to refer those with fear to the Asylum Office, the following sentence should be removed from CBP Field Guidance: "If an alien asserts a fear or concern which is clearly unrelated to an intention to seek asylum or a fear of persecution, then the case should not be referred to an asylum officer."⁵⁹

CONCLUSION

In creating the expedited removal system, Congress vested remarkable authority in immigration officers, but it did so in tandem with the requirement that potential asylees be afforded a meaningful chance to express fear and seek protection. There can be no doubt that CBP officers have great power when it comes to executing expedited removal orders. They must take more seriously their corresponding responsibility to ensure that individuals who seek protection under U.S. refugee laws have an opportunity to be heard. When that safety net is removed, and particularly when it is removed as an act of conscious disregard, the integrity of the system is destroyed. Moreover, the due process and civil rights violations inherent in this failed process are compounded when a faulty summary removal order is simply "reinstated" against a *bona fide* refugee, precluding the individual from the full protection of our laws.

When individuals fleeing persecution and violence see the United States as a beacon of hope and security, the U.S. government should embrace the opportunity to implement the laws and procedures that make this country admirable to people around the world.

The complainants and legal service providers await CRCL's response and look forward to working with CRCL to provide guidance to ensure that CBP vigorously upholds its duty to protect those who flee persecution.

⁵⁹ CBP Inspector's Field Manual, *supra*, note 36, at 114.

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