

Credible Fear: A Screening Mechanism in Expedited Removal

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, creating an expedited removal process in which immigration officers are able to order the deportation of certain individuals charged with inadmissibility under the Immigration and Nationality Act.

One of the components of this expedited removal process, the credible fear screening process, ensures that the United States did not summarily deport bona fide asylum seekers, and that they had an opportunity to apply for asylum and have their eligibility assessed by an immigration court.

The Trump Administration, however, has begun mislabeling the screening process as a “loophole” that is being used by asylum seekers to come into the United States. This damaging rhetoric is being used to legitimize changes to U.S. immigration laws that would block families, individuals, and children who have fled persecution from applying for asylum in the United States.¹

This fact sheet outlines the credible fear process, as well as the effective security and anti-fraud measures that are already in place.

What is the Credible Fear Process?

Since expedited removal cannot, by law, be applied to certain individuals—including U.S. citizens, legal permanent residents, refugees, or asylum seekers—the credible fear process was created to prevent

those who may be eligible for asylum from being wrongfully removed.

When a person subjected to expedited removal (a summary removal process) indicates an intention to apply for asylum or a fear of persecution and/or torture, the immigration officer must refer him or her for a “credible fear interview” by a trained asylum officer within U.S. Citizenship and Immigration Services (USCIS).²

The asylum officer determines whether a “significant possibility” exists—“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 person will be able to demonstrate eligibility for asylum.³

The credible fear interview is not meant to require the same standard as a full asylum hearing. Asylum seekers are generally held in U.S. immigration detention facilities during this screening process, and screenings are conducted days after long and traumatizing journeys to the United States.

If the individual receives a positive result from the credible fear interview, he or she will be referred to regular removal proceedings—a process under section 240 of the Immigration and Nationality Act—and can then present an asylum claim before an immigration judge.

If an asylum seeker is determined to not meet the credible fear screening standard, he or she can be deported under expedited removal without being allowed to apply for asylum and present their case before an immigration judge.

¹ Donald Trump, “2018 State of the Union Address” (Washington, DC, January 30, 2018).

² Immigration and Nationality Act § 235(b)(1)(A)(ii).

³ Immigration and Nationality Act § 235(b)(1)(B)(v).

How Many People Are Screened for and Pass Credible Fear?

Over the past several years, the number of individuals subjected to expedited removal processing has increased. So, too have the numbers referred for the protection component of expedited removal.

During FY 2012, USCIS adjudicated 13,880 credible fear requests. The number jumped to 78,564 credible fear requests in FY 2017.⁴ This increase comes at a time when global displacement has reached record highs as wars, conflict, and persecution have caused more people to flee their homes. The targeted violence of transnational criminal organizations in Central America's Northern Triangle—Guatemala, El Salvador, and Honduras—has led to a significant increase in protection requests in the United States, as well as in other countries in the region. For example, Costa Rica saw a 222 percent increase in asylum applicants between 2014 and 2016, and Mexico saw a 156 percent increase from 2015 to 2016 alone.⁵

In February 2017, USCIS released a Revised Lesson Plan relating to credible fear and reasonable fear screenings. This plan appears to be aimed at raising the screening standard set by Congress.⁶

The number of positive credible fear decisions fell sharply after the lesson plan was issued—from 78

percent in February 2017 down to a low of 68 percent in June 2017. The pass rates until September 2017, the latest date for which we have data, remained lower than their respective 2016 rates.

Over the years, the U.S. Commission on International Religious Freedom, Human Rights First, and other organizations have documented many flaws in the implementation of the protection safeguards in expedited removal by Customs and Border Patrol (CBP).

In some cases, border patrol officers have failed to refer asylum seekers for credible fear assessments. In other cases, asylum officers have failed to find that asylum seekers who satisfied the criteria actually did so.⁷

What Type of Security Vetting is Performed During the Credible Fear Process?

Asylum seekers who enter the asylum process after presenting themselves to CBP at a port-of-entry or after coming into contact with Border Patrol initially undergo vetting by CBP. This process includes national security, terrorism, and intelligence checks

⁴ USCIS, Asylum Division Quarterly Stakeholder Meeting, Credible Fear and Reasonable Fear Statistics and Nationality Report, FY 2017, available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf.

⁵ UNHCR, North of Central America Situation, Operation Update, January-March 2017, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Operational%20Update%20on%20NCA%20Situation%20-%20January-March%202017%20-%20Copy.pdf>.

⁶ See Human Rights First, DHS Secretary Nielsen Uses "Alternative Facts" to Attack Children, Asylum Seekers (January 2018).

⁷ See Brief of Refugee and Human Rights Organizations and Scholars as Amici Curiae in Support of Petitioners, *Castro v. DHS*, No. 16-1339 (3d Cir. Aug. 29, 2016), *cert. denied* (U.S. Apr. 17, 2017) (No. 16-812). United States Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016). United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* (2005).

via TECS—an information-sharing platform and database owned by CBP.⁸

TECS contains enforcement, inspection, and intelligence records from federal, state, local, and foreign sources, as well as records pertaining to known or suspected terrorists, wanted persons, and persons of interest for law enforcement and counterterrorism purposes. The data in TECS is collected both directly from the person in question, as well as by referencing other systems.

For example, TECS maintains a copy of the FBI's Terrorist Screening Database, and TECS users have access to Nlets (formerly the National Law Enforcement Telecommunications System), which links every federal, state, local law enforcement, justice, and public safety agency for the purpose of sharing information on criminal histories as well as Interpol information.

Once an asylum seeker is referred for a credible fear interview, USCIS asylum officers conduct a mandatory check of both TECS and the Department of Homeland Security (DHS) IDENT database. IDENT (the Automated Biometric Identification System) is managed by the Office of Biometric Identity Management (OBIM), which is part of the National Protection and Programs Directorate of DHS.

The person's 10 fingerprints are electronically submitted to the IDENT database, where they are stored and matched to existing fingerprint records.

This is used to confirm identity, determine previous interactions with government officials, and detect imposters.⁹ OBIM also checks each person's biometric information against a watch-list of known terrorists, criminals, and immigration violators, and verifies the information against its entire database of fingerprints to determine if the person has used an alias or is using fraudulent identification.

USCIS asylum officers also ensure that FBI name check and fingerprint checks have been initiated.¹⁰ The FBI electronically searches fingerprints within the Integrated Automated Fingerprint Identification System—the largest criminal fingerprint database in the world—which includes some 73,000 known and suspected terrorists processed by the U.S. and international law enforcement agencies.¹¹

All this information is made available to U.S. Immigration and Customs Enforcement (ICE), which detains the vast majority of asylum seekers who enter through the credible fear process.¹² ICE personnel also check the applicant's biographical data against an ICE database called the Alien Removal Module (EARM), which contains records of immigrants in detention, exclusion, and removal processes.

ICE considers any derogatory information from this vetting in release assessments. Asylum seekers are not paroled before undergoing a "comprehensive background check to identify any possibly public safety or national security issues."

⁸ See, U.S. Department of Homeland Security, Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing, Dec. 22, 2010.

⁹ U.S. Department of Homeland Security (DHS), Combined Testimony of DHS before the House Judiciary Homeland Security Committee for a hearing on "Asylum Abuse: Is it Overwhelming Our Borders" (December 12, 2013).

¹⁰ U.S. Department of Homeland Security (DHS), Combined Testimony of DHS before the House Judiciary Homeland Security Committee for a hearing on "Asylum Abuse: Is it Overwhelming Our Borders" (December 12, 2013).

¹¹ See U.S. Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis/.

¹² See e.g., U.S. Department of Homeland Security, Detained Asylum Seekers: Fiscal Year 2014 Report to Congress, September 9, 2015, indicating that 35,598 of 42,187 (or 84 percent) of credible fear applicants were detained in ICE custody. Families are often held in U.S. immigration detention for several weeks, and sometimes much longer. Adult asylum seekers are often held in detention facilities and jails for many months. See Human Rights First, Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers, June 2016; Human Rights First, Family Detention: Still Damaging, Still Happening, October 2015.

The background check will review “evidence of past criminal activity, both in the United States and abroad; disciplinary infractions or incident reports; and any criminal or detention history showing that the alien has harmed or would harm others.”¹³

Once an asylum seeker is in immigration court—after having been found to have a credible fear of persecution or torture—the immigration judge must determine whether the person meets the standard for asylum. However, the judge may not grant relief from removal unless DHS reports that all required identity, background, and security checks have been completed.¹⁴

Can People Who Pose Security Threats Be Granted Asylum?

Various categories of people are barred from asylum, including those who pose a threat to the security of the United States.

U.S. immigration laws prohibit granting asylum to:

- People who engaged in, assisted in, or incited the persecution of others.
- People who have been convicted of a particularly serious crime in the United States.
- People who have committed a serious non-political crime abroad.
- People who have engaged in terrorist activity.
- People who are representatives of foreign terrorist organizations.

¹³ U.S. Department of Homeland Security (DHS), Combined Testimony of DHS before the House Judiciary Homeland Security Committee for a hearing on “Asylum Abuse: Is it Overwhelming Our Borders” (December 12, 2013).

¹⁴ U.S. Department of Homeland Security, Fact Sheet: USCIS and ICE Procedures Implementing EOIR Regulations on Background and Security Checks on Individuals Seeking Relief or Protection from Removal in Immigration Court or Before the BIA, August 22, 2011 (citing to 8 C.F.R. Parts 1003 and 1208).

¹⁵ Many refugees, including victims of armed groups, will ultimately be eligible for exemptions from these admissibility

- People who otherwise pose a threat to the security of the United States.

Unfortunately, these U.S. immigration provisions often ensnare refugees with no connection to terrorism because they are so broadly written.¹⁵ These “inadmissibility” provisions define any rebellion against an established government as “terrorist activity,” and characterize any group of two or more people that engages in, or has a sub-group that engages in, the use of armed force as a terrorist organization for immigration law purposes. Thus, these provisions apply to groups not designated or listed by the State Department as terrorist organizations, in addition to those listed.

Moreover, “material support” to a “terrorist organization,” which is understood to include any provision of goods or services, regardless of amount, regardless of whether it bears any relation to violent activity, and regardless of whether it was given voluntarily, is considered “terrorist activity” in its own right.

The inadmissibility provisions are so broad that they would encompass George Washington or participants in the Warsaw Ghetto uprising.¹⁶

They have been applied to:

- Iraqis who fought with U.S. forces to overthrow Saddam Hussein.
- A Liberian man robbed of \$4 and his lunch by armed militants.

provisions. In fact, Congress created a waiver process to address the unintended consequences of these broadly written bars to asylum. While an asylum officer during a credible fear interview may identify an asylum seeker as potentially inadmissible due to these terrorism-related inadmissibility provisions, that does not mean that the individual presents a risk to the United States given the sweeping nature of these provisions

¹⁶ See Human Rights First, Denial and Delay: The Impact of Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States, November 2009.

- ☑ Victims of religious and ethnic persecution in Myanmar.
- ☑ A woman who sold flowers to a man affiliated with a terrorist organization.
- ☑ Supporters of a range of groups that the United States supports around the world.
- ☑ Women enslaved by armed groups that had kidnapped them.
- ☑ A Central American father of young children who mentioned to the asylum officer that in the 1980's a large group of members of a rebel movement that he opposed had invaded his home and forced him under threat of death to move some boxes for them.¹⁷

During the credible fear interview, asylum officers must consider whether any of the mandatory bars to asylum are implicated. To the extent any derogatory information is discovered that could implicate a mandatory bar—either through the various security checks or from the asylum seeker's testimony—that information is identified for ICE and will be available to ICE attorneys should the case go before an immigration judge.¹⁸

What Anti-Fraud Safeguards Does the Government Have in Place?

U.S. immigration authorities have a range of tools to combat fraud.

DHS has an office of Fraud Detection and National Security (FDNS) that works to identify fraudulent asylum claims by training asylum officers and providing technical support. Asylum officers may refer applications to FDNS and/or ICE for criminal investigation and prosecution.

The FDNS officers conduct in-depth vetting on cases with national security concerns. This

includes liaising with local Joint Terrorism Task Forces. FDNS officers are in every USCIS center, district, field, and asylum office. These officers engage in fraud assessments, compliance reviews, and conduct targeted site visits.

With respect to cases pending before the immigration courts, asylum seekers must submit a copy of their application to DHS so that the various vetting processes outlined above can be conducted.

ICE attorneys monitor the background check and report the results to the immigration court, and are permitted to conduct any identity, background, and security checks deemed necessary to ensure the applicant is not a threat to national security. ICE also has specialized investigative staff charged with identifying fraud and national security risks and can refer cases for criminal prosecution. No immigration benefit may be granted until ICE informs the court that all background and security checks have been completed.

Finally, at each stage of the credible fear and asylum-seeking process, immigration adjudicators assess the credibility of the asylum seeker. Once an asylum seeker has passed his or her credible fear interview, he or she must submit a detailed application to the immigration court, along with available documentation and supporting information.

Immigration judges consider the following factors in assessing an applicant's credibility:

- ☑ demeanor;
- ☑ candor;
- ☑ responsiveness;
- ☑ inherent plausibility of the claim;

¹⁷ Ibid.

¹⁸ U.S. Department of Homeland Security (DHS), Combined Testimony of DHS before the House Judiciary Homeland Security

Committee for a hearing on "Asylum Abuse: Is it Overwhelming Our Borders" (December 12, 2013).

- ☑ the consistency between oral and written statements;
- ☑ the internal consistency of such statements, the consistency of such statements with evidence of record, and;
- ☑ any inaccuracy or falsehood in such statements.¹⁹

Are Asylum Seekers Expected to Provide Documentary Evidence?

Asylum seekers often submit extensive documentation in support of their cases, including materials such as proof of identity, confirmations of political party, religious affiliations or family ties, medical records or death certificates, affidavits from people who confirm their history of persecution, and testimonies from medical professionals confirming evidence of torture or trauma.

Asylum seekers are only excused from providing documentation when it is unreasonable to expect them to be able to obtain it. Moreover, testimony of the asylum seeker would be sufficient without additional evidence only in cases where the judge has determined that “the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”²⁰

Finally, DHS-ICE trial attorneys conduct a cross examination of the asylum seeker, which is often directed at exposing any potential weaknesses in the person’s credibility.

Trained asylum officers and immigration judges must decline to grant asylum in cases where they conclude the applicant’s testimony is not credible.

¹⁹ INA § 208(b)(1)(B)(iii).

²⁰ INA § 208(b)(1)(B)(iii).