

March 10, 2017

The Honorable Lori Scialabba  
Acting Director  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
Washington, DC 20529

The Honorable John Lafferty  
Chief, Asylum Division  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
Washington, DC 20529

**Re: February 2017 Revised Lesson Plan: Credible Fear of Persecution and Torture**

Dear Ms. Scialabba and Mr. Lafferty:

Human Rights First has provided pro bono legal representation, in partnership with many of the nation's leading law firms, to refugees seeking asylum in the United States for over thirty-five years. I write to express Human Rights First's concern that certain revisions included in the February 2017 Revised Lesson Plan relating to credible fear of persecution and torture are inconsistent with U.S. immigration law and put people at risk of return to persecution and torture in violation of U.S. treaty commitments. The revisions appear for example to shift the standard from the credible fear screening standard set by Congress to higher level standards applicable in full asylum hearings. We urge that the Lesson Plan be revised to restore the legal standards corresponding to the credible fear screening process, rather than the standards applicable to full asylum hearings.

As you know, the United States is a party to the Refugee Protocol and to the Convention Against Torture. Under U.S. law an arriving asylum seeker who is determined to have a "credible fear" of persecution cannot be immediately deported under expedited removal and must instead be referred for consideration of his or her request for asylum. Similar protections are in place for those at risk of torture.

Credible fear screening interviews take place typically within days of an asylum seeker's arrival at an official port of entry or after he or she is taken into custody by the Border Patrol. In many cases, asylum seekers are still recuperating from long and at times traumatizing journeys. Some are victims of torture, rape or persecution and still suffer from the effects of their mistreatment. They are held in immigration detention facilities when these interviews are conducted. Most do

not speak English. In the vast majority of cases, asylum seekers are not represented by legal counsel at these interviews.

Most do not arrive carrying the levels of documentation and evidence now required to establish eligibility for asylum under U.S. law. The timing of these screening interviews, within days of arrival, does not allow for the periods of time necessary to track down and secure additional documentation and evidence, for example through the assistance of the asylum seeker's family members abroad. Many asylum seekers have no understanding that they will need extensive evidence to establish their eligibility for protection. Some do not have such documentation with them given the ways in which they had to flee their country. In some cases, asylum seekers do not carry documents confirming their political, religious, human rights or other similar activities, for fear those documents would put their lives at greater risk if they were stopped by their persecutors as they tried to leave their country. And even in cases where asylum seekers may have some identity or other documents with them, they often cannot present these materials to asylum officers at credible fear interviews as ICE typically retains identity and travel documents in its custody. Asylum seekers held in U.S. detention facilities typically have little or no access at this point to any documents in their baggage or suitcases which were taken from them when they were detained.

U.S. immigration law states that an asylum seeker has a "credible fear" where "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208 [of the INA]." In order to establish eligibility for asylum in a full immigration court proceeding, an asylum seeker must establish his or her identity and credibility by a preponderance of the evidence. However, to meet the initial credible fear screening standard, the asylum seeker must simply have a "significant possibility" of establishing those requirements. An asylum seeker is not expected to be able to proffer the evidence necessary to meet those full standards at the initial credible fear stage. The statute *does not* define "credible fear" as requiring that the asylum seeker has a significant possibility of establishing eligibility of asylum *and*, in addition, that the asylum seeker can establish his or her identity and the credibility of his or her account according to the same standard that would be applied to those determinations in a full asylum proceeding.

The new Lesson Plan however appears aimed at heightening the statutory credible fear standard including through adding:

- **An Improper Screening Standard with Respect to Credibility.** The Lesson Plan removes language making clear that the instruction to "take into account the credibility of the statements made" by the asylum seeker is part of the credible fear screening standard. Instead, the Lesson Plan appears to call for the full credibility assessment required to establish eligibility for asylum itself, along with the requirement to generally provide corroborating documentation. For example, language deleted from the February version of the Lesson Plan had stated that, in a credible fear interview, the applicant: "must establish that there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing" and that "[a]s long as there is a significant possibility that the applicant could establish in a full hearing that the claim is credible, unresolved questions regarding an applicant's credibility should not be the basis of a negative credible fear determination." Compare Lesson Plan Section VI.A (p. 18)

and Section V.B(1)(c) (p. 18-19) to Prior Lesson Plan Section VI.A (p. 17) and Section V.B(1)(d) (p.18). Now, by contrast, the Lesson Plan appears to import the corroboration requirements and standards for full asylum eligibility into the credible fear process, without clarifying that all a credible fear determinations requires is that there be a significant possibility that those standards could be met. INA Section 235's reference to "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" does not require the production of corroborating evidence by the applicant at this stage. Indeed, as outlined above, bona fide asylum seekers often do not have the kind of corroborating evidence needed in full asylum hearings physically with them at this initial arrival stage.

- **An Improper Screening Standard with Respect to Establishing Identity.** The new Lesson Plan also deletes language that stated that "[t]he applicant must be able to credibly establish his or her identity with a reasonable degree of certainty," consistently with the interview's function as a preliminary screening process, and instead adds new language that directs that "[t]he applicant must be able to credibly establish his or her identity by a preponderance of the evidence." The preponderance of the evidence standard however is the standard that must be met at a full hearing. Many asylum seekers may arrive with identity documents. Others have no choice but to flee without valid identity documents. Even those who do have such documentation may not be able to present that evidence due to their detention. At a credible fear screening interview, the applicant must only show that they have a significant possibility of demonstrating that they can establish their identity by a preponderance of the evidence.

To require asylum seekers to meet the full asylum hearing standards regarding the establishing of credibility and identity would turn the credible fear screening process into a full asylum adjudication, with hardly any of the procedural protections that are supposed to apply to full asylum adjudications. Not only would such an approach run contrary to U.S. law, but it would cause the United States to turn away refugees and individuals at risk of torture in ways that violate U.S. treaty commitments. Moreover, the Lesson Plan's periodic reminders of the many requirements and factors that must be taken into account for a valid assessment of an applicant's claims, while superficially protective of asylum seekers, in reality set up an entirely unreasonable burden both for USCIS staff and for asylum seekers. The multi-factor assessments, and detailed follow-up questioning and evidentiary questions such assessments would require, are unrealistic for an asylum officer to do this in the credible fear context. In imposing such requirements, the Lesson Plan appears to be setting up both asylum officers and refugees for failure.

To the extent that the purpose of these higher "enhanced" standards is to somehow label some asylum seekers as unable to fully establish their identities or credibility at this screening stage for some other purposes, negative inferences should not be drawn about the lack of documentary evidence at an initial arrival and screening stage.

The impact of these changes would fall most severely on the most vulnerable of asylum seekers – such as indigent asylum seekers who do not have the ability to secure legal counsel, uneducated refugees who lived in rural areas where they have had little access to government documentation, asylum seekers who escaped from repressive regimes after being subjected to government detention and torture, children who may never have had the opportunity to obtain identity

documents due to their age, and refugees with mental illness or cognitive disabilities that can pass undetected in these kinds of interviews.

Human Rights First understands that U.S. agencies are working hard to manage the increase in protection requests prompted by the refugee and displacement crisis stemming from the Northern Triangle Region of Central America. We firmly believe however that the United States can both effectively manage its borders and uphold its legal commitments under U.S. and international law.

We would be happy to meet with you and relevant staff at the Asylum Division and/or elsewhere in DHS to discuss these concerns. I can be contacted at (212) 845-5227 or AcerE@humanrightsfirst.org. Thank you for your attention and consideration to these matters.

Sincerely,



Eleanor Acer  
Senior Director, Refugee Protection

cc: DHS Office of Civil Rights and Civil Liberties