UNIVERSITY OF SAN FRANCISCO

CHANGE THE WORLD FROM HERE

School of Law
Faculty
2130 Fulton Street
San Francisco, CA 94117-1080
Tel 415.422.6842
Fax 415.422.6433
usfca.edu/law

MEMORANDUM

TO: John Lafferty
Chief, Asylum Division
USCIS

CC: Alejandro Mayorkas
Deputy Secretary
Department of Homeland Security

FROM: Bill Ong Hing
Professor of Law, University of San Francisco

RE: Lesson Plan, *Credible Fear of Persecution and Torture Determinations*

April 21, 2014

Chief Lafferty,

I. Introduction

On February 28, 2014, you released a revised version of the "ADOTC Lesson Plan, *Credible Fear of Persecution and Torture Determinations"* to USCIS Asylum Office Directors and Asylum Officers throughout the country. I have reviewed the 47-page Lesson Plan and am deeply troubled by its tenor, format, and content. In my opinion, the Lesson Plan undermines the asylum process set forth in the Immigration and Nationality Act by sending an erroneous message to Asylum Offices about the standard to be applied in assessing credible fear claims. As I detail below, a fair reading of the Lesson Plan leaves one with the clearly improper message that Asylum Officers must apply a standard that far surpasses what is intended by the statutory framework and U.S. asylum law.

Additionally, as a matter of public policy, the application of the credible fear standard in a harsh manner that does not give the benefit of the doubt to imperfect yet reasonable claims will be something that our nation will regret in the not-too-distant future. In part III of this memo, I will briefly recount tragic mistakes our country has made in the past when it comes to certain classes of asylum seekers. In retrospect, our actions in those situations were not simply embarrassing; they were shameful because lives were unnecessarily lost as a result of bad judgment and political expediency.

By way of introduction, I have been an immigration lawyer since 1974 and a fulltime law professor since 1979. I have been a regular faculty member of the law faculties at the University of San Francisco, University of California, Davis, and Stanford University over the course of my career. My primary area of scholarship and research has been U.S. immigration law. I am the author of dozens of articles and several books on immigration law. I was appointed to the Citizens Advisory Panel of the Immigration and Naturalization Service by Attorney General Janet Reno during the Clinton Administration. I have handled many asylum cases and, most notably, I was co-counsel in the U.S. Supreme Court case, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), that established the burden of proof to satisfy the "well-founded fear" standard for asylum. You might also find it significant that I teach the Evidence course at USF on a regular basis. As such, I am quite familiar with the federal rules of evidence related to credibility, relevance (including probative value), and burdens of proof.

II. Problems with the Lesson Plan

The new credible fear standards are misleadingly and inappropriate. They instruct asylum officers to impose a burden on applicants that surpasses the well-founded fear standard established by the Supreme Court in *INS v. Cardoza-Fonseca*. In fact the actual standard should be more deferential than the well-founded fear standard.

As the Lesson Plan correctly points out, the function of credible fear screening is "to quickly identify *potentially* meritorious claims to protection and to resolve *frivolous* ones with dispatch. . . . If an alien passes this *threshold-screening* standard, [the] claim for protection . . . will be further examined by an immigration judge. . ." (emphasis added) (Lesson Plan at 11).[1] This is consistent with the statutory structure. Under INA § 235(b), if "the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer." Then if the asylum "officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum." Thus, the credible fear process clearly is a screening process for potentially meritorious asylum claims versus frivolous ones. Structurally and explicitly, the alien certainly does not need to establish the asylum claim at this point; a *potentially* meritorious claim at this juncture is all that is necessary.

Thus, the standard and burden for credible fear—a threshold screening stage—must be lower than establishing an actual meritorious claim for asylum. At this credible fear review, the asylum officer can only screen out *frivolous* claims.

[1] Citing Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999).

Since the standard for credible fear is structurally less rigorous than the standard for asylum, in order to adequately appreciate and grasp the correct credible fear standard, one must know what the standard is for asylum. In order to qualify for asylum, the applicant must meet the definition of refugee set forth in INA § 101(a)(42), by establishing "a well-founded fear of persecution." In *INS v. Cardoza-Fonseca,* the Supreme Court explained the well-founded fear standard: "So long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility" in order to qualify for asylum. In fact, "10% chance of [persecution may be sufficient to establish] "well-founded fear. . . [I]t is enough that persecution is a reasonable possibility." Clearly, the applicant is not required to prove that it is more likely than not he or she will be persecuted.[2] The applicant is not required to establish by a preponderance of the evidence that he or she will not be persecuted. In fact, the Supreme Court's holding in *Cardoza-Fonseca* requires a very low standard of proof for asylum. This makes sense, given the humanitarian purpose of asylum and what is at stake if an incorrect decision denying asylum is made. In essence, the benefit of the doubt is given to the applicant. An "applicant for asylum has established a well-founded fear if he shows that a *reasonable person* in his circumstances would fear persecution." *See Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987).

Thus, since we know that the asylum standard is low, requiring only a "10% chance" or a "reasonable possibility" of persecution, we know intuitively that the credible fear screening hurdle must be even lower. Instructions suggesting anything more are therefore incorrect and misguided. Therein lies the problem with the Lesson Plan, whose tenor, format, and content suggests too high a burden for credible fear.

Here are some examples of specific problems with the Lesson Plan:

- Throughout the text, the Lesson Plan (e.g., at 12) points out that credible fear of persecution means that there is a "significant possibility" that the alien can establish eligibility for asylum. However, this is done without regular acknowledgement and reminder that establishing eligibility for asylum, i.e., well-founded fear, is a relatively low threshold when compared to other burdens of proof such as preponderance of the evidence or beyond a reasonable doubt. Without that reminder or acknowledgement, the reader is left with the words "significant possibility" which connote a high burden. In fact, it is a burden that requires less than a 10% likelihood of persecution.

[2] Prior to *Cardoza-Fonseca,* the Supreme Court held that the "preponderance" or "more likely than not" standard of persecution did apply to the "clear probability" standard for withholding of deportation. *INS v. Stevic,* 467 U.S. 407 (1984). *Cardoza-Fonseca* provided the Supreme Court the opportunity to explain for the first time that the well-founded fear standard for asylum was intended to be more generous than the withholding standard; the two provisions were located in two different parts of the Immigration and Nationality Act.

- The Lesson Plan (at page 12) contains this guidance:

> The applicant bears the burden of proof to establish a credible fear of persecution or torture. This means that the applicant *must produce sufficiently convincing evidence that establishes the facts of the case*, and that those facts must *meet the relevant legal standard.* (emphasis added)

The italicized language suggests an incorrect standard. The language suggests that each and every fact must be established by convincing evidence. That language suggests the inapplicable preponderance standard. That high standard is not even required for asylum, so it certainly cannot be the proper standard for credible fear which should be much lower.

- Citing INA § 208(b)(1)(B)(ii), the Lesson Plan (at page 13) says that the applicant's testimony is sufficient only if "credible, is persuasive, and refers to specific facts." This part of the Lesson Plan goes on:

> Therefore, the terms 'persuasive' and 'specific facts' must have independent meaning above and beyond the first term 'credible.' An applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. 'Specific facts' are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the asylum officer must distinguish between fact and opinion testimony and determine how much weight to assign to each of the two forms of testimony.

This statement and citation to INA § 208(b)(1)(B)(ii) comes under the specific part of the Lesson Plan labelled: "V. BURDEN OF PROOF AND STANDARD OF PROOF FOR CREDIBLE FEAR DETERMINATIONS." This is a serious error. In fact, INA § 208(b)(1)(B)(ii) falls in the section of the Immigration and Nationality Act that pertains to the burden of proof for asylum, not credible fear. Thus, the lesson plan incorrectly instructs that the same burden of proof for asylum applies to credible fear. The clear incorrect lesson to the reader is that the credible fear applicant must meet an eligibility requirement that in fact does not apply.

- In this same section, the Lesson Plan (page 13) goes on: "After developing a sufficient record by eliciting all relevant testimony, an asylum officer must analyze whether the applicant's testimony is sufficiently credible, persuasive, and specific to be accorded sufficient evidentiary weight to meet the significant possibility standard." Again, the first problem with this statement is that it refers

to a standard that applies to asylum. Secondly, the well-founded fear standard is not referenced, therefore no context is provided for the reader to understand that the "significant possibility" standard must be less than well-founded fear that can be satisfied with a one in ten reasonable possibility of persecution.

- In the subsection: "B. Credible Fear Standard of Proof: Significant Possibility" (Lesson Plan at 14), the reader is told: "The party who bears the burden of proof must persuade the adjudicator of the existence of certain factual elements according to a specified "standard of proof," or degree of certainty. The relevant standard of proof specifies how convincing or probative the applicant's evidence must be." But again, no reference is made to the correct well-founded fear standard so that the reader will know that the standard of proof for credible fear relative to the well-founded fear standard is lower.

  Arguably an attempt to clarify is made at the bottom of page 14 of the Lesson Plan with this statement: "While a mere possibility of success is insufficient to meet the credible fear standard, the 'significant possibility' standard does not require the applicant to demonstrate that the chances of success are more likely than not." However, the last part of this statement is misleading, because it relates to the asylum standard of well-founded fear which is in fact greater than the credible fear standard. (This is repeated again on page 15.) The first part of the statement is also misleading that a "mere possibility" is insufficient. In fact, since a reasonable possibility of persecution is sufficient for asylum under *Cardoza-Fonseca* and *Mogharrabi,* a mere possibility of success might in fact be sufficient for a credible fear finding. After all, a mere possibility of persecution may in fact be reasonable enough to qualify even for asylum. Saying that the standard of proof is "best understood" (page 15) as "not requiring the applicant to show that he or she is more likely than not going to succeed" is wrong. In fact, the standard of proof is best understood as not requiring even as much as a one in ten chance of success.

  Buried in the subsection "C. Important Considerations in Interpreting and Applying the Standard" is this important statement: "When there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination. The questions at issue can be addressed in a full hearing before an immigration judge." (Lesson Plan at 16) This is a fair admonition to the reader that should be highlighted more prominently. This bullet could be easily overlooked and, up to this point in the Lesson Plan, the message to the reader is that the burden on the applicant is much more strenuous.

  This subsection also contains this statement: ". . . the asylum officer shall consider whether the applicant's case presents *novel or unique* issues that merit

consideration in a full hearing before an immigration judge." (emphasis added) This statement also is misleading. One could interpret this statement as requiring that the applicant present "novel or unique' issues in order to meet the credible fear standard. The statement should be followed by a reminder that novel or unique issues need not be presented by the applicant to meet the credible fear standard.

- In a subsection "Identifying Credibility Concerns," the Lesson Plan (at 18-19) thoughtfully provides:

> While demeanor, candor, and responsiveness may be taken into account in the asylum context, they may be of limited reliability in the credible fear context because of cross-cultural factors, effects of trauma, and the nature of non-adversarial interviews. The nature of expedited removal and the credible fear interview process—including detention, relatively brief and often telephonic interviews, etc.—further limits the reliability of and ability to evaluate these three factors in the credible fear context. Therefore, demeanor, candor, and responsiveness will normally not be significant factors in credible fear determinations.

The sentiment of this language is good and needs to be emphasized throughout the document. Further expansion of this sentiment is necessary, such as by further explaining why these factors may have been affected by the circumstances and explaining the common effects of post traumatic press disorder (PTSD).

Specificity and explanation would be helpful here. So while important factors are listed in "Assessing Credibility in Credible Fear," (page 19) such as trauma, passage of time, cultural factors, interpretation problems, and cross-cultural communication, examples of these factors would be very helpful to the reader. After years of teaching, I have learned that without solid examples, complicated factors such as these are left to possible inconsistent or incorrect interpretation.

Similarly, while the Lesson Plan (page 20) points out that "trivial or minor inconsistencies will not be sufficient to" bar a finding of credible fear, the document goes on to say that "such inconsistencies may provide support for a negative credibility finding if, taking into account an explanation offered by the applicant, there is not a significant possibility that the applicant would establish in a full hearing that the claim is credible." This is language is extremely problematic. The reader is left with the incorrect impression that a negative credible fear finding is appropriate because inconsistencies can make a "significant possibility" of success at the asylum hearing unlikely. This is not the job of the asylum officer at this point because satisfying the burden of proof to

establish asylum is not the issue here. Less is required at this point. Furthermore, if the reader hones in solely on this discussion of inconsistencies without a reminder that a person suffering from PTSD commonly expresses seemingly inconsistent statements in spite of actually having a well-founded fear of persecution, then the entire humanitarian purpose of asylum is defeated. Moreover, nowhere in the Lesson Plan is there recognition that more often than not, a person who has been persecuted or who fears persecution must be interviewed many, many times to extract all the relevant details.[3] This is all the more reason to remind the reader that the credible fear stage is a screening function not involving anything close to requiring the proof needed to make the case for asylum.

This subsection on credibility (that goes on to page 21) is problematic for a practical reason as well. Given the circumstances of the screening function for credible fear determinations, to expect this kind of nuanced credibility determination at this point is asking too much of asylum officers. The BIA itself has had serious conflict over how to make accurate credibility findings, *see, e.g., Matter of A—S—*, 21 I.&N. Dec. 1106 (BIA 1998) (*i.e.*, the debate between the majority versus the stinging dissents by then Board chair, Paul Schmidt, and member Lory Rosenberg). Misunderstandings related to PTSD, poor interpretation, and general nervousness at this point are quite possible. Negative credibility determinations are best left to an immigration judge after the credible fear stage, just as they are in general affirmative asylum application cases where asylum officers refer cases to the immigration court rather than render denials.

- Section "VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION" of the Lesson Plan (pages 22 to 34) (and the subsequent discussion of bars to asylum that begins at page 41) attempts to provide an overview of asylum law. By doing so, however, the reader is again given the lesson without proper context. While the overview is a serious attempt, the reader is left with the wrong impression that at the credible fear stage, the applicant is judged against these standards for asylum. The reader is not reminded that the credible fear determination is less rigorous—something that should be done constantly to be true to the statutory framework.

  For example, the *Matter of Mogharrabi* test of the BIA for well-founded fear is set forth (beginning at page 28). However, the Lesson Plan does not explain why the test was established, namely, because the BIA had to come up with a test after the Supreme Court in *Cardoza-Fonseca* overruled the BIA's interpretation of

[3] *See e.g.*, Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder,* 4 HASTINGS RACE & POVERTY L. J. 235 (2007).

well-founded fear in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). In fact, a critical rule that was announced by the BIA in *Mogharrabi* is left out of the lesson plan, *viz.*, an "applicant for asylum has established a well-founded fear if he shows that a *reasonable person* in his circumstances would fear persecution." (emphasis added) Once again, the Lesson Plan fails to explain that a credible fear determination requires even less than a one in ten chance of establishing fear of persecution.

- Nothing in the summary (beginning at page 44) corrects this wrong impression. Instead, the summary reinforces a standard of proof that is equated to the asylum standard and, in some places, arguably implies an even higher standard because the *Cardoza-Fonseca* definition of well-founded fear is omitted.

- Significantly, the discussion of asylum law does not include important variations in the law from federal circuit to federal circuit. For example, the Ninth Circuit's approach to credibility findings is different from that of BIA and other circuits. *See, e.g., Ren v. Holder,* 648 F.3d 1079 (9th Cir. 2011); *Shrestha v. Holder,* 590 F.3d 1034 (9th Cir.2010). Different circuits vary in their approaches to when relatives comprise membership in a particular social group. *Compare, Demiraj v. Holder*, 631 F.3d 194 (5th Cir. 2011), *with, Torres v. Mukasey,* 551 F.3d 616 (7th Cir. 2008), and *Crespin-Valladares v. Holder,* 632 F.3d 117 (4th Cir. 2011). The issue of former gang membership and particular social group also can vary. *See Ramos v. Holder,* 589 F. 3d 426 (7th Cir. 2009), and Joseph E. Langlois, Chief of Asylum Division of USCIS, *Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit,* Mar. 2, 2010, http://www.uscis.gov/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf. These important variations represent a monumental oversight in the Lesson Plan. There are two solutions to this problem: either rewrite the section in a lengthy, nuanced manner or, because of the complexities of asylum law, acknowledge the complexities and do not attempt to cover the field here and defer these tough decisions to the immigration judge. The latter option makes the most sense at the credible fear stage.

III. Public Policy Reasons for a Generous Credible Fear Standard

The immigration system allows for those who express a fear of return at our borders to receive a credible fear interview, rather than being summarily deported. This is essential to protecting those who may face danger abroad, but who have little understanding of our legal system and few resources with which to prove their case. And it is essential to maintaining the United States as a safe haven for those who have been persecuted or who fear persecution at home. Without this more generous screening standard, the nation risks returning immigrants to grave dangers, including situations involving political

violence, police corruption, gang violence, and torture. Recent news reports that the new Lesson Plan announced on February 28 was issued in response to a surge in applications and too many positive credible fear findings is worrisome. That sentiment smacks of political expediency, a concept that has no place in the context of humanitarian asylum law. The increase in negative credible fear findings are reminiscent of three tragic procedural eras in the asylum history related to Central America refugees, Haitian refugees, and Jewish refugees from Europe during World War II.

Treatment of Central American Refugees

The Ninth Circuit opinion in *Orantes-Hernandez v. Smith,* 919 F.2d 549 (9th Cir. 1990), reveals that immigration officials engaged in a strategy that foreclosed the opportunity to apply for asylum for Salvadorans during the 1980s.

Generally, after aliens were apprehended, either border patrol agents or INS officers processed them. INS processing of detained aliens consisted of an interrogation combined with the completion of various forms, including form I-213, "Record of Deportable Alien," and the presentation of form I-274 "Request for Voluntary Departure." Although the arrested Salvadorans were eligible to apply for political asylum and to request a deportation hearing prior to their departure from the United States, the vast majority of Salvadorans apprehended signed voluntary departure agreements that commenced a summary removal process. Once a person signed for voluntary departure in the course of INS processing, he or she was subject to removal from the United States as soon as transportation could be arranged. A person given administrative voluntary departure in this manner never had a deportation hearing, the only forum before which the detained person could seek political asylum and mandatory withholding of deportation.

The *Smith* court found that the widespread acceptance of voluntary departure was due in large part to the coercive effects of the practices and procedures employed by INS and the unfamiliarity of most Salvadorans with their rights under United States immigration laws. INS agents directed, intimidated, or coerced Salvadorans in custody who had no expressed desire to return to El Salvador, to sign form I-274 for voluntary departure. INS agents used a variety of techniques to procure voluntary departure, ranging from subtle persuasion to outright threats and misrepresentations. Many Salvadorans were intimidated or coerced to accept voluntary departure even when they had unequivocally expressed a fear of returning to El Salvador. Even when an individual refused to sign form I-214, "Waiver of Rights," INS officers felt that they could present the person with the voluntary departure form.

The court also found that INS processing officers engaged in a pattern and practice of misrepresenting the meaning of political asylum and of giving improper and incomplete legal advice, which denied arrested Salvadorans meaningful understanding of the options

presented and discouraged them from exercising available rights. INS officers and agents routinely advised Salvadorans of the negative aspects of choosing a deportation hearing without informing them of the positive options that were available. Without informing them that voluntary departure could be requested at a deportation hearing, INS officers advised detainees that if they did not sign for voluntary departure they could be formally deported from the United States, and that such a deportation would preclude their legal re-entry without the pardon of the Attorney General.

INS officers and agents routinely told Salvadoran detainees that if they applied for asylum they would remain in detention for a long time, without mentioning the possibility of release on bond. Similarly, without advising that an immigration judge could lower the bond amount and that there were bond agencies that could provide assistance, INS agents regularly told detainees that if they did not sign for voluntary departure they would remain detained until bond was posted. Some agents told individuals the monetary bond amount they could expect or the bond amount given to other Salvadorans, without telling them that the bond amount ultimately depended upon the circumstances of the individual.

INS officers commonly told detainees that if they applied for asylum, the application would be denied, or that Salvadorans did not get asylum. INS officers and agents represented that Salvadorans ultimately would be deported regardless of the asylum application. INS officers and agents misrepresented the eligibility for asylum by saying that it was only given to guerillas or to soldiers. INS processing agents or officers further discouraged Salvadorans from applying for asylum by telling them that the information on the application would be sent to El Salvador, and stating that asylum applicants would never be able to return to El Salvador. INS processing officers also used the threat of transfer to remote locations as a means of discouraging detained Salvadorans from exercising their rights to a hearing and to pursuing asylum claims.

Furthermore, INS agents often did not allow Salvadorans to consult with counsel prior to signing the voluntary departure forms, although they acknowledged that aliens had this right. Even those Salvadorans fortunate enough to secure legal representation were often unable to avoid voluntary departure, as INS' practice was to refuse to recognize the authority of counsel until a formal notice of representation (Form G-28) was filed. Due to the rapid processing of Salvadoran detainees, it was often physically impossible for counsel to locate their clients and file Form G-28 before the client was removed from the country.

In conclusion, the *Smith* court noted:

> The record before this Court establishes that INS engages in a pattern and practice of pressuring or intimidating Salvadorans who remain detained after the issuance

> of an OSC to request voluntary departure or voluntary deportation to El Salvador. There is substantial evidence of INS detention officers urging, cajoling, and using friendly persuasion to pressure Salvadorans to recant their requests for a hearing and to return voluntarily to El Salvador. That this conduct is officially condoned, even in the face of complaints, demonstrates that it is a *de facto* policy. The existence of a policy of making daily announcements about the availability of voluntary departure, coupled with the acknowledgement that the policy is designed to free-up scarce detention space, supports the conclusion that INS detention officers make a practice of pressuring detained Salvadorans to return to El Salvador. This conduct is not the result of isolated transgressions by a few overzealous officers, but, in fact, is a widespread and pervasive practice akin to a policy. . . .
> This pattern of misconduct flows directly from the attitudes and misconceptions of INS officers and their superiors as to the merits of Salvadoran asylum claims and the motives of class members who flee El Salvador and enter this country.

Thus, the court entered the following order:

> 1. [INS and border patrol agents] shall not employ threats, misrepresentation, subterfuge or other forms of coercion, or in any other way attempt to persuade or dissuade class members when informing them of the availability of voluntary departure pursuant to 8 U.S.C. § 1252(b). The prohibited acts include, but are not limited to:
>
> (a) Misrepresenting the meaning of political asylum and giving improper and incomplete legal advice to detained class members;
>
> (b) Telling class members that if they apply for asylum they will remain in detention for a long period of time, without mentioning the possibility of release on bond or indicating that bond can be lowered by an immigration judge and that there are bond agencies which can provide assistance;
>
> (c) Telling Salvadoran detainees the amount of bond given to other class members, without indicating that the bond amount ultimately depends upon the circumstances of the individual class member;
>
> (d) Telling class members that their asylum applications will be denied, that Salvadorans do not get asylum, or that asylum is only available to guerillas or soldiers;
>
> (e) Representing to class members that the information on the asylum application will be sent to El Salvador;

(f) Representing to class members that asylum applicants will never be able to return to El Salvador;

(g) Indicating that Salvadoran detainees will be transferred to remote locations if they do not elect voluntary departure;

(h) Advising Salvadorans of the negative aspects of choosing a deportation hearing without informing them of the positive options that are available;

(i) Refusing to allow class members to contact an attorney; and

(j) Making daily announcements at detention facilities of the availability of voluntary departure.

The bias that INS officials and asylum corps officers exhibited toward both Guatemalan and Salvadoran asylum applicants was further exposed in *American Baptist Churches v. Thornburgh,* 760 F.Supp. 796 (N.D. Cal. 1991). As the *New York Times* reported on the case:

> Such applications have long presented the Government with an embarrassing choice. The United States supports the Governments of El **Salvador** and Guatemala, and at the same time it is asked by asylum applicants to find that they have a "well-founded fear of persecution" if they are returned home. Every approval of an application for political asylum thus amounts to an admission that the United States is aiding governments that violate the civil rights of their own citizens.
>
> Since 1980 the Government has denied 97 percent of applications for political asylum by El Salvadorans and 99 percent of those by Guatemalans. During the same time, applications for political asylum by Eastern Europeans, **Nicaraguans** and residents of other countries have a high percentage of approval. For example, 76 percent of applications by residents of the Soviet Union were approved, as were 64 percent of those by residents of China.[4]

A settlement was reached requiring the INS to readjudicate the asylum claims of certain Salvadorans and Guatemalans who were present in the United States as of 1990, and who had sought immigration benefits. The case, known as the "*ABC* litigation" began in 1985 as a nationwide class action on behalf of Salvadorans and Guatemalans. The plaintiffs alleged that the INS and the Executive Office of Immigration Review were biased in their

[4] Katherine Bishop, *U.S. Adopts New Policy for Hearings On Political Asylum for Some Aliens,* N.Y. Times, Dec. 20, 1990, at B18.

asylum adjudication process for those two nationalities. Under the settlement, these Central Americans were eligible for new asylum interviews.

Unfair Treatment of Haitian Asylum Applicants

In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982), the Fifth Circuit chastised the federal government for unfair processes that were imposed on Haitian asylum applicants. In response to the repressive Duvalier regime that caused political and economic havoc in Haiti in the 1970s, many Haitians fled to the United States seeking refuge. Large numbers sought asylum once they reached the shores of Florida. A backlog developed, so INS officials implemented an accelerated program to deal with the situation. The program of accelerated processing to which the Haitians were subjected by the INS-termed the "Haitian Program"- embodied the government's response to the tremendous backlog of Haitian deportation cases that had accumulated in the INS Miami district office by the summer of 1978. By June of that year between six and seven thousand unprocessed Haitian deportation cases were pending in the Miami office. These staggering numbers were not the result of a massive influx of Haitians to south Florida over a short period. Although significant numbers of Haitians had entered the United States from Haiti and the Bahamas in the spring of 1978, the backlog was primarily attributable to a slow trickle of Haitians over a ten-year period and to the confessed inaction of the INS in dealing with these aliens.

Many officials provided input in the planning process of the Haitian project. Assigned by the Deputy Commissioner of the INS with the task of assessing the Haitian situation in Miami, INS Regional Commissioner Armand J. Salturelli submitted the recommendation, among others, that processing could be expedited by ceasing the practice of suspending deportation hearings upon the making of an asylum claim. Salturelli acknowledged that this would contravene internal operations procedures, but suggested that those procedures should be cancelled or "at least be suspended insofar as Haitians are concerned." One July 1978 report from the Intelligence Division of INS to the Associate Director of Enforcement advised in absolute terms that the Haitians were "economic" and not political refugees and, in belated recognition of the obvious, warned the Enforcement Division that favorable treatment of these Haitians would encourage further immigration. Associate Director of Enforcement, Charles Sava, later visited Miami to find space for holding an increased number of deportation hearings and to discuss with Miami personnel the processing of Haitians. Out of those discussions arose recommended deterrence measures, which Sava outlined in a letter to Deputy Commissioner Noto. These included detention of arriving Haitians likely to abscond, blanket denials of work permits for Haitians, swift expulsion of Haitians from the United States, and enforcement actions against smugglers.

Planning of the Haitian program culminated in a memorandum sent on August 20, 1978 by Deputy Commissioner Noto to INS Commissioner Leonel J. Castillo. The memo explained the basic mechanics of the accelerated processing already being implemented in the Miami district office. Among the specifics set forth were the assignment of additional immigration judges to Miami, the instructions to immigration judges to effect a three-fold increase in productivity, and orders for the blanket issuance of show cause orders in all pending Haitian deportation cases.

In accordance with the goal of high productivity demanded of the Miami office, Acting District Director Gullage issued a memorandum to all personnel in the office, stating "processing of these cases cannot be delayed in any manner or in any way. All supervisory personnel are hereby ordered to take whatever action they deem necessary to keep these cases moving through the system." The Haitian cases were processed at an unprecedented rate. Prior to the Haitian program only between one and ten deportation hearings were conducted each day. During the program, immigration judges held fifty-five hearings per day, or approximately eighteen per judge. At the program's peak the schedule of deportation hearings increased to as many as eighty per day.

At the show cause or deportation hearing, the immigration judges refused to suspend the hearing when an asylum claim was advanced, requiring the Haitians instead to respond to the pleadings in the show cause order and proceed to a finding of deportability. The order entered by the judge allowed the Haitian ten days for filing an asylum claim with the district director, then ten days to request withholding of deportation from the immigration judge if the asylum deadline was not met. Failure to seek withholding in a timely manner effected automatic entry of a deportation order.

Deportation hearings were not the only matter handled during the Haitian program. Asylum interviews also were scheduled at the rate of forty per day. Immigration officers who formerly had worked at the airport were enlisted as hearing officers for these interviews. Prior to the program such interviews had lasted an hour and a half; during the program the officer devoted approximately one-half hour to each Haitian. In light of the time-consuming process of communication through interpreters, the court concluded that only fifteen minutes of substantive dialogue took place. Consistent with the result-oriented program designed to achieve numerical goals in processing, the Travel Control section in the Miami office recorded the daily totals of asylum applications processed. The tally sheet contained space only for the total number of denials; there was no column for recording grants of asylum.

Hearings on requests for withholding deportation also were being conducted simultaneously with asylum and deportation hearings, at several different locations. It was not unusual for an attorney representing Haitians to have three hearings at the same hour in different buildings; this kind of scheduling conflict was a daily occurrence for

attorneys throughout the Haitian program. The INS was fully aware that only approximately twelve attorneys were available to represent the thousands of Haitians being processed, and that scheduling made it impossible for counsel to attend the hearings. It anticipated the scheduling conflicts that in fact occurred. Nevertheless the INS decided that resolving the conflicts was "too cumbersome for us to handle" and adopted the attitude that everything would simply work out.

Under these circumstances, the court concluded that the INS had knowingly made it impossible for Haitians and their attorneys to prepare and file asylum applications in a timely manner. The court found that adequate preparation of an asylum application required between ten and forty hours of an attorney's time. The court further estimated that if each of the attorneys available to represent the Haitians "did nothing during a 40 hour week except prepare [asylum applications], they would have been able to devote only about 2 hours to each client." The results of the accelerated program adopted by INS are revealing. None of the over 4,000 Haitians processed during this program were granted asylum.

In the end, the federal court of appeals struck down the accelerated program as a violation of procedural due process. The government was forced to submit a procedurally fair plan for the orderly reprocessing of the asylum applications of the Haitian applicants who had not been deported.

Turning Away Jewish Refugees during World War II

In the 1930s, the United States turned away thousands of Jews fleeing Nazi persecution (e.g., *SS St. Louis*), in large part because of powerful restrictionist views against certain ethnic, religious, and racial groups. Congress and U.S. consular officers consistently resisted Jewish efforts to emigrate and impeded any significant emergency relaxation of limitations on quotas.

The plight of European Jews fleeing Nazi Germany aboard the ship *SS St. Louis* in 1939 is a horrific example of how restrictionist views were manifested toward refugees at the time. In a diabolical propaganda ploy in the spring of 1939, the Nazis had allowed this ship carrying destitute European Jewish refugees to leave Hamburg bound for Cuba, but had arranged for corrupt Cuban officials to deny them entry even after they had been granted visas. It was the objective of Nazi propaganda minister Joseph Goebbels to prove that no country wanted the Jews. The St. Louis was not allowed to discharge its passengers and was ordered out of Havana harbor. As it sailed north, it neared United States territorial waters. The U.S. Coast Guard warned it away. President Franklin D. Roosevelt had said that the United States could not accept any more European refugees because of immigration quotas, as untold thousands had already fled Nazi terror in Central Europe and many had come to the depression-racked United States.

Nearly two months after leaving Hamburg, and due to the efforts of U.S. Jewish refugee assistance groups, the ship was allowed to land in Holland. Four nations agreed to accept the refugees—Great Britain, Holland, Belgium and France. Two months later, the Nazis invaded Poland and the Second World War began. Over 600 of the 937 passengers on the St. Louis were killed by the Nazis before the war was over. When the United States refused the *St. Louis* permission to land, many Americans were embarrassed; when the country found out after the war what happened to the refugees, they were ashamed.

IV. Closing

Recognizing credible fear is not a grant of asylum. It merely recognizes that the person has shown a significant possibility that that the applicant can meet the less-than-preponderance standard for asylum before an immigration judge. As such, the credible fear standard is quite low. A credible fear finding simply gives the person a chance for a fair hearing in an immigration court. Credible fear requires less than a one in ten chance that persecution is likely—something that the new Lesson Plan fails to teach.

Those who come to our borders seeking asylum deserve fair treatment. This administration should not be associated with the tragic asylum eras of the past. Politics should not get in the way. I urge you to reconsider the entire content of the Lesson Plan so that asylum seekers are treated fairly at this screening stage. If they meet the correct, contextualized credible fear standard, they should be allowed to make a case for asylum in front of an immigration judge where all the nuances of asylum law can be fairly evaluated. Given the likely manifestations of PTSD, complications in assessing credibility, possible challenges with translation, and other logistical challenges, the screening function of credible fear determinations is most correctly viewed as one of deference to the applicant. I urge you to protect the integrity of the asylum system by suspending the new Lesson Plan and installing one that more accurately reflects the statutory framework as well as the purpose and minimal legal requirements that attach to credible fear determinations.

Sincerely,

Bill Ong Hing

Bill Ong Hing
Professor of Law, University of San Francisco
Professor of Law *Emeritus,* University of California, Davis