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CUNY School of Law Dilley Delegation FOIA Request

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CUNY SCHOOL OF LAW DILLEY DELEGATION FOIA REQUEST

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RE: FOIA REQUEST

Dear Ms. Eggleston,

This is a request under the Freedom of Information Act. We ask to be provided with all guidance and policy on providing notice for credible fear interviews for defensive asylum applicants in federal detention.

I. INTRODUCTION

Fear is at the heart of an application for asylum.¹ Some asylum seekers fear abusive spouses, others fear ruthless gangs or interfaith violence.² Whatever the reason, that fear creates a moral imperative for the United States to give shelter, and it creates a defense enshrined in federal law.³ Credible fear interviews (“CFI”) represent the first threshold towards asylum.⁴

Advocates on the ground report that immigrants in detention receive little to no notice for these interviews, which is a potential violation of the

¹ See John Washington, *The Long, Winding, and Painful Story of Asylum*, THE NATION (Apr. 20, 2020), <https://perma.cc/BH38-4BLJ>.

² DORIS MEISSNER ET AL., MIGRATION POLICY INST., THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD 18 (2018), <https://perma.cc/22GK-X982>.

³ 8 U.S.C. § 1225(b)(1)(B)(v) (2009).

⁴ 8 U.S.C. § 1225(b)(1)(B)(ii).

Fifth Amendment.⁵ Without proper notice, asylum applicants cannot prepare to discuss what are often the most traumatizing moments of their lives. Therefore, we would like to know what federal policies exist for providing notice regarding CFIs, and what, if any, guidance exists for implementing that notice.

II. POLICIES AND GUIDANCE REGARDING NOTICE FOR CFIS ARE SUBJECT TO FOIA

The Freedom of Information Act (“FOIA”) is designed to hold the government accountable and to ensure transparency of government activities to all members of the public.⁶ FOIA plainly includes agency policies, including those described in this request.⁷ It additionally includes staff guidance documents that affect a member of the public, such as the guidance pertaining to credible fear interviews requested here.⁸

III. U.S. CITIZENSHIP & IMMIGRATION SERVICES IS THE PROPER PARTY TO ADDRESS THIS FOIA REQUEST

Applications for asylum in the United States are generally handled by two federal agencies: the U.S. Citizenship & Immigration Services (“USCIS”), which is a division of the U.S. Department of Homeland Security (“DHS”); and the Executive Office for Immigration Review (“EOIR”), which is a division of the U.S. Department of Justice (“DOJ”).⁹ Affirmative asylum applications, which are filed by immigrants who are physically present in the U.S. and not in removal proceedings, are handled by USCIS.¹⁰

⁵ U.S. CONST. amend. V; *Farhoud v. Immigration & Naturalization Serv.*, 122 F.3d 794, 796 (9th Cir. 1997) (“The Due Process Clause protects [noncitizens] in deportation proceedings and includes the right to a full and fair hearing as well as notice of that hearing.”) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)).

⁶ See *FOIA Legislative History*, NAT’L SEC. ARCHIVE, <https://perma.cc/F4FM-VCSP> (last visited May 8, 2020).

⁷ 5 U.S.C. § 552(a)(2)(B) (2016) (“Each agency, in accordance with published rules, shall make available for public inspection in an electronic format . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register”).

⁸ 5 U.S.C. § 552(a)(2)(C) (2016).

⁹ *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://perma.cc/JE9N-QPJ9> (last updated Oct. 19, 2015).

¹⁰ CONG. RESEARCH SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 3 (2019), <https://perma.cc/RYJ7-L9JK>; *Overview of Asylum Processes*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/6A94-7J2V> (last visited Apr. 16, 2020).

Defensive asylum applications, by contrast, are handled by both USCIS and EOIR.¹¹ Defensive asylum applies when an applicant has already entered the U.S. and is seeking asylum as a defense against removal.¹² The EOIR handles asylum applications when an applicant is in standard removal proceedings and requests asylum as a defense.¹³ If the applicant is in expedited removal proceedings, however, special provisions of the Immigration and Nationality Act (“INA”) are triggered that bring their application under USCIS’s jurisdiction.¹⁴ An applicant is in expedited removal proceedings if they arrived at a port of entry or were apprehended within 100 miles of border and within fourteen days of arrival, or arrived by sea within the last two years and had either no documents or fake documents.¹⁵

Expedited removal does not apply to asylum seekers who have a “credible fear” of persecution in their home country.¹⁶ At the discretion of the apprehending immigration officer—either from U.S. Customs and Border Protection (“CBP”) or Immigration and Customs Enforcement (“ICE”), which are both divisions of DHS—the applicant may either be detained and referred to a USCIS asylum officer for a credible fear interview, or released and issued a Notice to Appear (“NTA”) before an immigration judge to argue the merits of their case under standard removal proceedings.¹⁷

IV. THE PROCESS OF ASSERTING CREDIBLE FEAR

Immigrants in expedited removal proceedings who express fear of returning to their country and are referred for a CFI will appear before a USCIS asylum officer for their interview.¹⁸ It could take two weeks for immigrants in expedited removal proceedings to receive an interview, during which they are detained.¹⁹

The asylum officer makes one of two determinations: a positive or negative credible fear determination. If receiving a positive credible fear

¹¹ CONG. RESEARCH SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 5-7 (2019), <https://perma.cc/RYJ7-L9JK>.

¹² *Id.* at 5.

¹³ *Id.* at 7.

¹⁴ *Id.* at 15-16; HILLEL R. SMITH, CONG. RESEARCH SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 13-18 (2019), <https://perma.cc/HZJ3-U37L>.

¹⁵ ASYLUM SEEKER ADVOCACY PROJECT, VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND 9 (2018), <https://perma.cc/5AS9-8UMK>; *Overview of Asylum Processes*, *supra* note 10.

¹⁶ CONG. RESEARCH SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 6 (2019), <https://perma.cc/RYJ7-L9JK>.

¹⁷ ASYLUM SEEKER ADVOCACY PROJECT, *supra* note 15, at 11-12.

¹⁸ *Id.*

¹⁹ *Id.*; *Overview of Asylum Processes*, *supra* note 10.

determination, the immigrant has a credible fear of persecution in their home country and may be referred to an immigration judge for an asylum hearing.²⁰ If receiving a negative fear determination, the immigrant is inadmissible and thus removable by ICE without further inspection, hearing, or review unless the immigrant seeks review from an immigration judge of the negative determination. A negative credible fear determination is the worst outcome for an asylum seeker, as they are then vulnerable to deportation.²¹

Accounting for the credibility of the immigrant's statements and other relevant facts in support of their claim, credible fear of persecution means that there is a significant possibility that the immigrant could establish eligibility for asylum.²²

If the asylum officer determines that there is no credible fear of persecution, the officer must create a written record summarizing the interview and the reasoning for declining to find credibility.²³ Alternatively, if the immigrant has a credible fear of persecution, then the immigrant is held in an immigration detention facility until the immigration judge presides over a full hearing to consider the claim to either grant or deny asylum.²⁴

V. WHY NOTICE MATTERS FOR A CREDIBLE FEAR INTERVIEW

Notice in any proceeding, including a CFI, is a fundamental requirement of due process.²⁵ The Due Process Clause of the Fifth Amendment specifically protects immigrants in deportation proceedings, including the right to a fair hearing as well as notice of that hearing.²⁶ Notice must be reasonably calculated to convey sufficient information to an interested party that gives them an opportunity to present objections.²⁷ Furthermore, notice should provide interested parties with a reasonable time to make their appearance, as well as a reasonable time to adequately prepare.²⁸ The means by which notice is given cannot be a mere gesture, but must be one "desirous of actually informing" an affected party.²⁹

²⁰ 8 U.S.C. § 1225(b)(1)(A)(i) (2009).

²¹ 8 C.F.R. § 1003.42(f) (2020).

²² 8 U.S.C. § 1225(b)(1)(B)(v).

²³ 8 U.S.C. § 1225(b)(1)(B)(iii)(II).

²⁴ 8 U.S.C. § 1225(b)(1)(B)(ii).

²⁵ See U.S. CONST. amends. V, XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

²⁶ *Farhoud*, 122 F.3d at 796.

²⁷ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

²⁸ *Id.* at 314; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978).

²⁹ *Mullane*, 339 U.S. at 315.

Absence of notice is a violation of the Fourteenth Amendment to the U.S. Constitution.³⁰ For deportation proceedings in particular, the Supreme Court has previously held that the possibility that a petitioner can be expelled or deported is no excuse to deprive them of their right to notice of the nature of those charges.³¹ Immigrants who are asylum applicants are required to first establish a credible fear of persecution before they are even granted the opportunity to be heard.³² This happens during the credible fear interview, and if the asylum officer finds there is no credible fear of persecution, the officer can order removal without further hearing or review.³³ Notice is therefore crucial, so that an asylum applicant can adequately prepare for this life-changing interview.

VI. CONCLUSION

For the reasons above, we request that responsive records be provided in .pdf format via email, if possible, or on CD, if necessary. In order to help determine our fee requestor status, we are law students at the City University of New York School of Law, and we are seeking these documents for research purposes and, for the avoidance of any doubt, not for any commercial use. We are willing to pay fees for this request up to a maximum of \$25.00. If you estimate that the fees will exceed this limit, please contact us in advance.

³⁰ *Id.* at 320.

³¹ *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953).

³² 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2009).

³³ *Id.*