Asylum Reform:

5 Years Later

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Introduction

The United States has a long tradition of offering safe haven to persons fleeing oppression, persecution, and torture. This heritage is based on an inherent belief in human rights and the right of individuals to be free from persecution based upon their beliefs and other fundamental characteristics, such as race or nationality. Asylum is a precious and important protection, rooted in international law, and provided in U.S. federal law to qualified refugees who are in or arriving to the United States. A refugee is defined as a person who is unable or unwilling to return to his or her country of nationality or, if stateless, country of last habitual residence, because of persecution or a well-founded fear of persecution on account of one or more of five protected characteristics – race, religion, nationality, membership in a particular social group, or political opinion.

In developing the asylum program, the Immigration and Naturalization Service struggled to balance the need for a fair system that provides protection to genuine refugees against the need to prevent abuse of the asylum program. In 1991, the first professional asylum corps was formed as part of a final rule to implement the 1980 Refugee Act. While the final rule created a fair process in which professional asylum officers were trained to elicit refugees' claims in a non-adversarial setting, the program quickly became subject to abuse. A lack of resources, combined with a lengthy process and easy availability of employment authorization to almost all asylum applicants, made the program vulnerable to fraudulent applications and many genuine refugees' applications languished in an ever-increasing backlog. Sweeping administrative changes in 1995, known as "asylum reform," successfully transformed a barely functional but fair process into one that has become a model of efficiency. As a result of asylum reform, genuine asylum-seekers are quickly identified and granted protection, and incentives for abuse have been minimized. Individuals who are not found eligible for asylum are promptly placed into removal proceedings where they may renew their asylum application before an Immigration Judge.

The History of The Asylum Program in the United States

• Early Refugee and Asylum Law in the International Sphere

Following the events of World War II, there was a flurry of activity in the international arena to look for standards to provide for the protection of those at risk of persecution.

The United Nations was established in 1945 and a Universal Declaration of Human Rights was adopted in 1948 (Article 14.1 concerned the "right to seek and enjoy in other countries asylum from persecution"). In December 1950, the Office of the United Nations High Commissioner for Refugees (UNHCR) was created, and the United Nations Convention relating to the Status of Refugees was signed in 1951.

Article 33 of the 1951 Convention relating to the Status of Refugees prohibits a State party from expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of a protected characteristic in the refugee definition ("non-refoulement"). The Convention defines refugee as follows:

> *As a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

In 1967, an important Protocol to the Convention incorporated the provisions of the 1951 Convention, but amended the definition of refugee deleting the reference to the events occurring before 1 January 1951; that is, the events relating to WWII, making the definition more universal.

• Beginnings of an Asylum System in the United States

In 1968, the United States acceded to the 1967 UN Protocol relating to the Status of Refugees, committing our country to follow certain elements of international law in the treatment of refugees, including use of the international definition of refugee.

It wasn't until 1980, however, that Congress enacted legislation to bring U.S. law into compliance with obligations under international law. Prior to implementation of the 1980 Refugee Act, refugees under U.S. law were defined in political and geographical terms; unless there was a special act of Congress, refugees had to come from either communist countries or countries in the Middle East. The Congressional intent of the 1980 Refugee Act was to establish a politically and geographically neutral

adjudication standard for both asylum status and refugee status, a standard to be applied equally to all applicants regardless of country of origin.

Following the principle of non-refoulement, the Act amended the Immigration and Nationality Act (INA) to make mandatory the withholding of deportation to a country where an individual's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

The Act also amended the INA to give the Attorney General discretionary authority to grant asylum to individuals in the United States, or arriving to the United States, who qualify as refugees as defined by statute "irrespective of status" and manner of entry.

The statutory definition of refugee was derived from the Refugee Convention definition, but expanded the definition of "refugee" to include someone who has been persecuted in the past, as well as someone who has a well-founded fear of future persecution. This legal foundation establishes a politically and geographically neutral standard for asylum status.

During the first ten years after passage of the 1980 Refugee Act, attempts by several Attorneys General to promulgate final administrative regulations did not succeed. Proposed regulations were discussed, and some even published for comment, but none became final. During that time, operating under the authority of interim regulations, asylum claims were among the many kinds of applications and requests adjudicated by examiners and adjudications officers in INS District Offices.

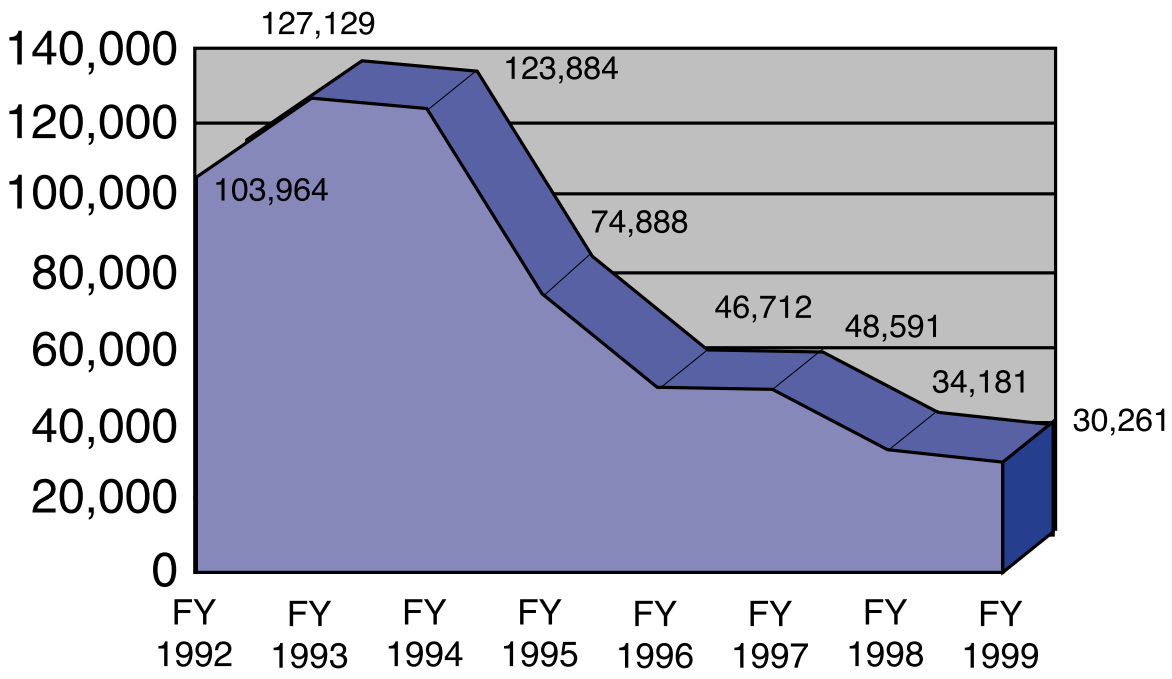
• The Early Days of the Asylum Corps – Confronted by Challenge

On July 27, 1990, the Department of Justice issued a final asylum rule fully implementing the 1980 Refugee Act. This rule mandated the establishment of a new INS Asylum Officer Corps that would be specially trained to make the asylum determinations on applications filed voluntarily by individuals not in immigration proceedings. The regulations required that Asylum Officers receive training in international human rights law, conditions in countries of origin, and relevant national and international refugee law. The officers would work out of seven geographically dispersed offices reporting directly to the Office of Refugees, Asylum, and Parole within INS headquarters in Washington, DC. Additionally, the INS Resource Information Center (RIC), an in-house library and documentation center, was created by the 1990 regulations and opened in late 1991. The RIC collects and disseminates to Asylum Officers and other INS officers information on the human rights situation in countries of origin.

An essential feature of the 1990 reforms was the retention of a two-tiered review process. This system gave most asylum applicants two chances to have their asylum claims heard and adjudicated -- once by an INS asylum officer and, if unsuccessful, again by an Immigration Judge.

Under the 1990 regulations, most asylum applicants would be interviewed in a "non-adversarial" setting by a specially trained INS Asylum Officer. The Asylum Officer would make a determination on the case and, if not approving the case, would draft and send an official Notice of Intent to Deny (NOID), giving the

Number of New Filings



The reduction in new receipts demonstrates that the restriction on the availability of employment authorization and the prompt completion of removal proceedings for those not granted asylum, removed the incentive to file false asylum claims.

The above numbers of new filings does not include re-opened cases or applications filed as a result of the ABC settlement.

Data for FY 1993-1997 are from the INS Statistical Yearbook
Data for FY 1998 are final pending inclusion in the INS Statistical Yearbook
Data for FY 1999 are preliminary

applicant 30 days to rebut the proposed decision. After reviewing a rebuttal, if any, the Asylum Officer would draft and issue the final denial. Applicants denied by an Asylum Officer and who were not in valid status could then present their asylum cases for a second, de novo, hearing before an Immigration Judge, after being placed in deportation or exclusion proceedings.

The hearings before an Immigration Judge were conducted in an adversarial courtroom setting. It could take several years for an asylum applicant to go through the complete process.

In April 1991, the original 82 Asylum Officers began work out of the seven specialized offices. Unfortunately, incoming new asylum applications overwhelmed the Asylum Corps before they could even begin their work. New receipts of applications in FY 1992 reached 104,000, far exceeding the antici-

pated 70,000. On top of this workload of new cases, responsibility for hearing what eventually became an additional 240,000 Central American asylum claims was mandated by a 1991 class action settlement agreement (American Baptist Churches v. Thornburgh – see below). And finally, asylum officers were responsible for granting employment authorization to asylum applicants, which, while a secondary duty, consumed a significant portion of asylum officers' valuable time.

Then, shortly after the startup of the new Asylum Program, a significant percentage of the Asylum Corps was diverted to the U.S. Naval Station at Guantanamo Bay, Cuba, to adjudicate the protection claims of Haitian migrants. Before long, the new asylum program was hopelessly backlogged.

A Call for Reform

It is important to note that, although the system designed in 1990 was flawed, it was basically a fair system. Many in the advocacy community were pleased that asylum applicants received a fair hearing in a non-adversarial setting in front of a well-prepared officer, irrespective of country of nationality.

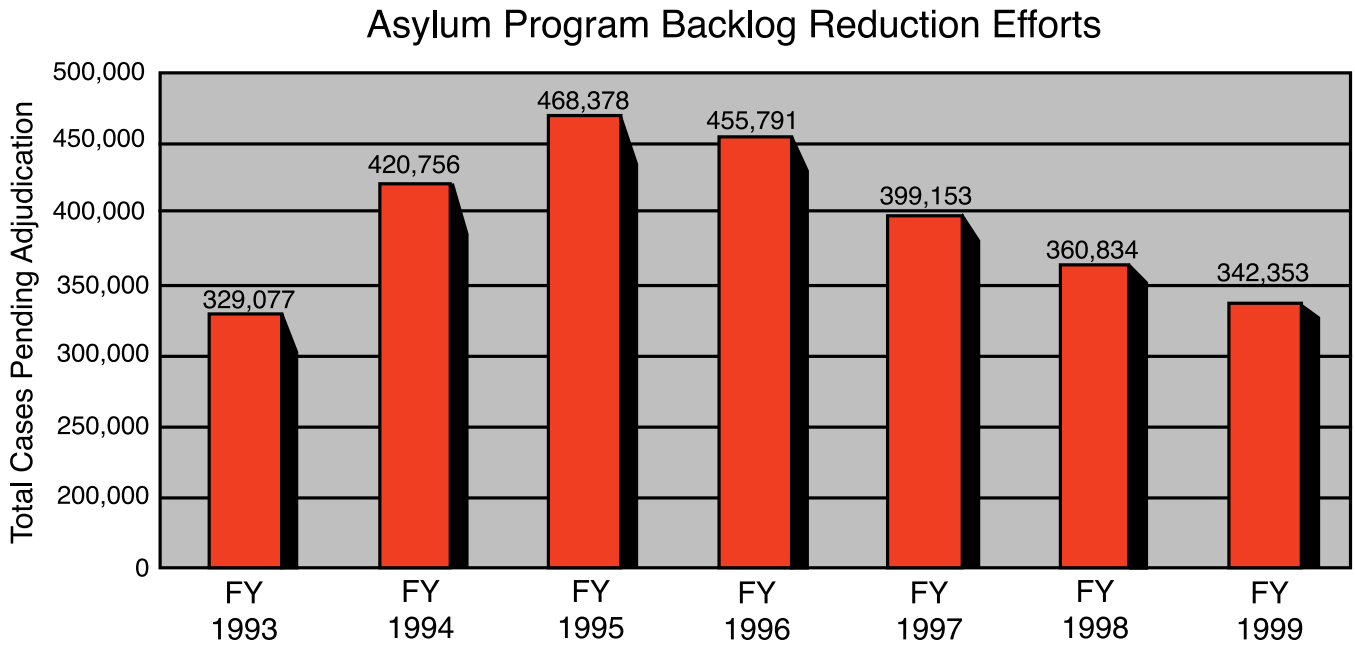
Even with the addition of another 68 Asylum Officers in March 1992, bringing the total number of Asylum Officers to 150, almost two-thirds of all new asylum applications went straight into the asylum backlog. Under existing policies, once a case got into the backlog, it would stay there. As word spread of the availability of a work permit by filing an asylum application and getting placed in a backlog for many years, more and more asylum requests were received than ever before.

In 1991, the new Asylum Program had received 56,000 new filings, but had completed only 16,550. The next fiscal year, the number of asylum applications filed rose to almost 104,000 while the number completed barely reached 22,000. By 1995, more than 425,000 applications would be in the asylum backlog. Many of those in the backlog had no real claim to asylum, but still enjoyed the benefit of a work permit. Others with real claims for asylum also were in the backlog. But without the grant of asylum, they remained in legal limbo, unable to begin a new life or legally bring their families out of harm's way at home.

• 1993: Need for Reform Acknowledged

Then, in early 1993, prominent stories of immigrant smuggling and terrorist attacks by foreign nationals brought the need for immigration reform, especially in the area of asylum policy, to the forefront of the minds of many. In late July 1993, President Clinton directed the Department of Justice to develop within three months an administrative, but not legislative, plan to reform asylum.

Working groups were established consisting of government representatives and members of the non-governmental organization (NGO) community. Through dialogue and compromise, a plan emerged that retained the fair adjudication instituted by the 1990 reforms while adopting procedures that could keep up



with demand and deter abuse. The new program would have to approve quickly those who needed asylum, while keeping those who did not qualify from benefiting just by filing an asylum application.

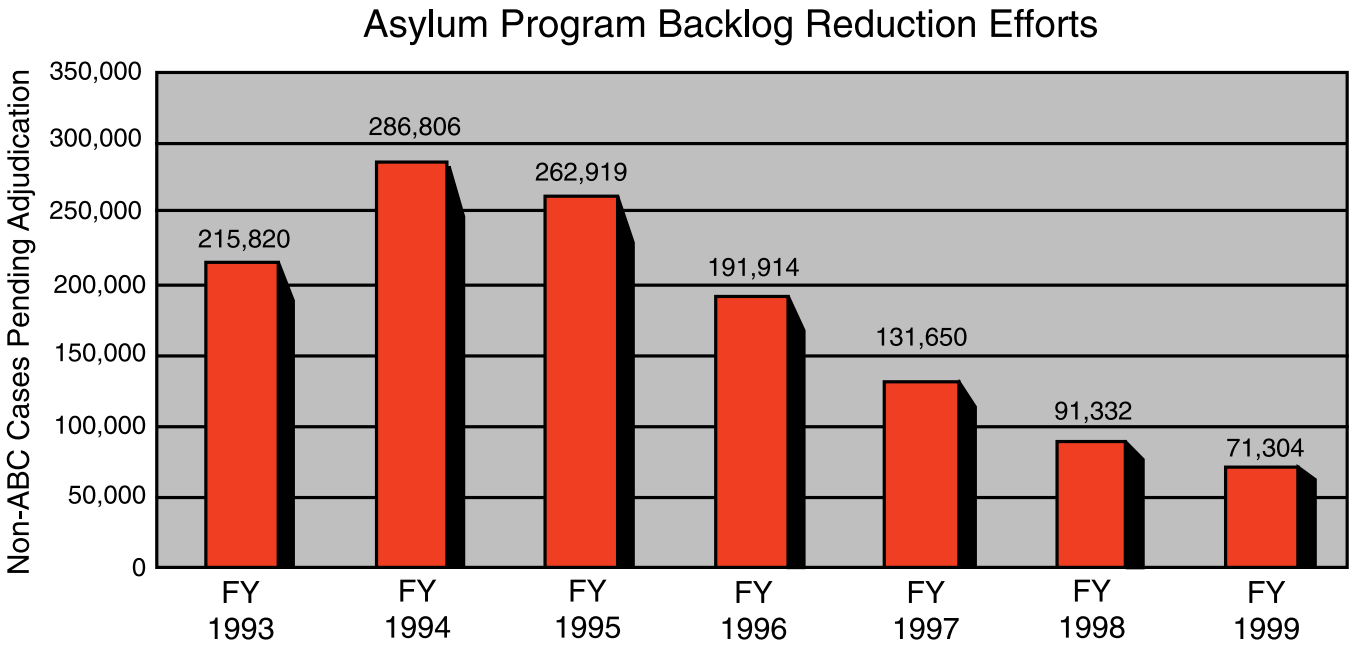
A comprehensive package of reforms was developed and announced in October 1993. The proposed regulations revising the July 1990 final asylum rule, which were published for public comment in March 1994, were revised in response to public comments and promulgated in final form on December 5, 1994. They became effective on January 4, 1995.

• January 1995: Implementation of Asylum Reform Begins

The 1995 asylum reforms were a comprehensive package integrated into a program that brought change at many levels. This package kept the best of the previous system, reformed procedures that had not been working, and provided additional new funding. Most notably, the reform program retained the "non-adversarial" interview by INS Asylum Officers, and an opportunity for Immigration Judge adjudication in non-approved cases.

First, under this combined and streamlined process, applicants who applied on or after January 4, 1995, are not automatically eligible for a work permit. Work permits are granted only if applicants are approved for asylum or if the government takes longer than 180 days to reach a final decision, whichever comes first.

Second, under reform, the review process was streamlined. If the asylum officer does not approve the claim, and the applicant is in the United States illegally, the asylum officer refers the case directly to an Immigration Judge. Asylum offices are able to issue documents placing individuals in proceedings



before the Immigration Court based on the information provided in the asylum application, and Asylum Offices schedule hearings in Immigration Court directly through access to the Immigration Court's computer system. Furthermore, all applicants are required to pick up decisions in person, insuring that, if they are placed in removal proceedings, they are served with the charging documents, informing them of the date and place of hearing. Only applicants who are in the United States legally may be denied asylum by an asylum officer, and only after the applicant is first given a Notice of Intent to Deny explaining the adverse determination and an opportunity to rebut the decision.

Third, the 1994 Violent Crime Control and Law Enforcement Act provided for sufficient additional resources to be made available to the reformed asylum process to double the U.S. Asylum Corps from 150 to over 300 Asylum Officers and permit an increase in the number of Immigration Judges from 112 to 179.

Under asylum reform, the Asylum Program is committed to processing asylum applications in a timely manner; therefore, the majority of decisions made by Asylum Officers are completed within 60 days of receipt of the application at the INS Service Center.

• Five Years Later: A Story of Success

At the beginning of reform, the new asylum program faced a continuing onslaught of applications being filed at the rate of more than 127,000 per year (excluding applications filed under the ABC settlement agreement), coupled with a backlog of almost 425,000 cases. However, with the reform procedures in place, the Asylum Corps was prepared to tackle this once insurmountable task.

As a result of these reforms,

- the number of non-meritorious filings has significantly decreased,
- productivity within the streamlined asylum system has increased nearly fourfold, and
- the great majority of applicants are receiving decisions from the Asylum Program within 60 days of filing for asylum, and from Immigration Judges within 180 days of filing.

Since Fiscal Year (FY) 1993, asylum applications made to the INS have decreased by 75 percent, from 127,000 to approximately 32,000 in FY 1999. The reduction in new receipts demonstrates that the restriction on the availability of employment authorization and the prompt completion of removal proceedings for those not granted asylum removed the incentive to file false claims. Furthermore, the increase in approval rates by INS Asylum Officers from approximately 15% in FY 1993, to 22% in FY 1996, and to 38% in FY 1999, indicates that genuine asylum-seekers are being identified, rather than languishing in the backlog.

Since the implementation of asylum reform, the Asylum Corps has remained current with new receipts, while also completing 270,000 cases from the pre-reform backlog. All but 36,000 of the current backlog are cases belonging to applicants who are covered by special legislation that may allow them to apply for other forms of relief. (This includes applicants covered by the Nicaraguan Adjustment and Central American Relief Act (NACARA) and the Haitian Refugee and Immigrant Fairness Act (HRIFA). Adjudication of these asylum requests has been suspended to give the applicants the opportunity to first apply for relief under the special legislation.)

By the end of 1999, legitimate claimants were being granted asylum within six months of filing, often sooner, while those found ineligible were decided quickly and, if not in valid status, were placed in removal proceedings. As a result of the success of the 1995 reform, the INS Asylum Program has regained the confidence of the government and public – finally achieving the balance between compassion and control that had previously been so elusive. In recognition of the success of asylum reform, Congress incorporated key aspects of the reform regulations into the Immigration and Nationality Act in 1996. In addition, the success of the asylum program was a key factor in the Attorney General's decision to authorize asylum officers to adjudicate claims for suspension of deportation and special rule cancellation of removal under section 203 of NACARA.

Training

Specialized training of the Asylum Corps has been the linchpin of the program since its inception in 1991. Training consists of a five-week Asylum Officer Basic Training Course (AOBTC) and regular in-service training.

Since the beginning of the program, twelve classes of asylum officers have attended AOBTC. Over 400 officers have been trained during the intensive program that focuses on international human rights law, US immigration law, decision writing, interviewing techniques, and country conditions research. Since 1999, asylum

officers have also been required to complete the five-week Immigration Officer Basic Training Course as a supplement to AOBTC.

Asylum Officers receive in-service training on a regular basis. Each of the asylum offices has at least one Quality Assurance Training Officer on staff. These officers are specially trained to design and provide training to asylum officers on the application of case law and country conditions information. These locally-designed training sessions have the flexibility to address needs of particular offices, such as newly evolving events in a particular country, or cultural information regarding a particular ethnic group more frequently applying for asylum.

In recent years, asylum officers have received training on new legislation and guidelines as necessary. During FY 1999, 90% of all asylum officers were trained on the implementation of section 203 of NACARA and the new roles of asylum officers in adjudicating requests for suspension of deportation and special rule cancellation of removal under this new law. Also during 1999, all asylum officers received specialized training in the obligations of the INS under the International Religious Freedom Act. This training will soon be incorporated into the standard curriculum of AOBTC.

In addition, after the December 1998 issuance of guidelines for adjudicating asylum and refugee claims from children, each asylum office held special training to update all officers on the application of these guidelines. The Asylum Program conducted similar training for officers after the issuance of the May 1995 guidelines on the adjudication of claims from women.

The Quality Assurance and Training Unit of the Asylum Division has also reached out to other countries in their training efforts. In August 1999, the Office of International Affairs hosted a six-member delegation from the Immigration Division of the South African government who are charged with implementing newly-passed legislation on asylum and refugee issues. The Training Unit conducted sessions on interviewing skills for this group.

Forthcoming efforts by the Training Unit will make the Asylum Officer Basic Training Course Materials available to all over the Internet on the INS website.

Resource Information Center

The Resource Information Center (RIC) was established in 1991 to provide the Asylum Corps with human rights information on countries generating claims for asylum. The RIC assists Asylum Officers domestically and Immigration Officers determining refugee status overseas, by collecting and disseminating credible and objective information on human rights and country conditions.

The core function of the RIC is the production of original research for dissemination to the field. Through query responses and country/topic reports, RIC addresses the unique needs of officers that can not be met by other publicly available materials. During the past year, RIC produced information packets on Colombia, the Kosovo crisis, the impact of Hurricane Mitch on Central America, and papers on the Shining Path in Peru, and the re-emergence of social cleansing death squads in El Salvador. Draft reports on Cuba, Guatemala, China, Indonesia, and the Eritrean-Ethiopian war

were also completed. The RIC also responded to many field requests for information in the form of short query responses answering specific concerns raised by Asylum Officers and other branches of INS. Query responses and RIC papers are included in REFWORLD, a human rights information CD produced by the UN High Commissioner for Refugees. In addition, RIC produces a biweekly News Summary for Asylum Adjudicators – a compilation of news articles that address country and topical information of relevance to the asylum program. The RIC has also designed training programs on country conditions research and the situation in El Salvador, Sierra Leone, Liberia, Kosovo, and many more.

As part of the RIC's effort to share information with agencies of other governments and to increase internal resources, the center continued active participation as the US representative to the Inter-Governmental Consultations' Expert Group on Country of Origin Information. This connection serves to develop continued support and promotion of a closed, inter-governmental website featuring both content and information from all 16 participating IGC states and an interactive discussion group.

In 1999, RIC staff was also involved in the creation of a proposed Virtual Secretariat for the Regional Conference on Migration (RCM), an inter-governmental group comprised of 11 Western Hemisphere countries. The INS RIC Director will serve as the coordinator of the Virtual Secretariat in 2000 when the chair of the RCM rotates to the United States.

New Roles for Asylum Officers

With the success of asylum reform, the Asylum Corps has been called upon to take on new challenges and responsibilities, including credible fear determinations in the expedited removal process, reasonable fear screenings in certain administrative removal cases, adjudication of suspension of deportation or special rule cancellation of removal under section 203 of NACARA, and various international assignments.

• Expedited Removal – Credible Fear Screening

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added new removal procedures to the INA through the expedited removal process, adding a new role for asylum officers.

Under IIRIRA and its current implementing regulations, arriving stowaways and certain arriving aliens at ports of entry who are inadmissible to the United States because they have presented fraudulent documents, lack proper documents, or have made other material misrepresentations to gain admission, are immediately removable from the United States by the INS unless they indicate an intention to apply for asylum or articulate a fear of return. It is the responsibility of asylum officers to interview any individual who voices an intention to apply for asylum or a fear of return. The asylum officer then makes the determination as to whether an alien will be allowed to present a case for asylum or withholding of removal in front of an Immigration Judge. The standard for credible fear of persecution or torture determinations was developed to ensure com-

pliance with international agreements to which the United States is a party, that when requested, no alien be returned to a country where he or she is more likely that not to be persecuted or tortured. During 1999, the Asylum Pre-Screening Officer (APSO) responsibilities were expanded to include screening for credible fear of torture, fulfilling US obligations under the United Nations Convention against Torture.

Although the number of cases referred to asylum officers for credible fear determinations increased dramatically between 1998 and 1999, asylum officers have met the challenge of the increase and adjudicated approximately 85 percent of cases referred in two weeks or less from the date of referral.

• Administrative Removal -- Reasonable Fear Screening

Regulations published in February 1999 delegate authority to asylum officers to conduct reasonable fear screenings of certain aliens who are subject to INS reinstatement of a final order of deportation, exclusion, or removal or who are subject to INS removal under section 238(b) of the INA, based on an aggravated felony conviction. The INA precludes such aliens from applying for immigration benefits, but at the same time the United States must comply with treaty obligations not to return an alien to a country where he or she would be persecuted or tortured. Therefore, if such an alien seeks to apply for withholding of removal based on fear of persecution or torture, an asylum officer will conduct an interview to determine whether the alien has a reasonable fear of persecution or torture. If a reasonable fear is found, the alien is referred to an immigration judge to apply for withholding or deferral of removal to the country where persecution or torture is feared. Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly frivolous claims.

• Nicaraguan Adjustment and Central American Relief Act (NACARA)

In 1998, the Attorney General took the unprecedented step of delegating to the Asylum Corps her authority to adjudicate applications for suspension of deportation and special rule cancellation of removal for certain Salvadorans, Guatemalans, nationals of former Soviet Bloc countries, and their qualified relatives under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). Traditionally, only immigration judges have had this authority. This decision stems from the fact that a majority of the estimated 300,000 individuals eligible to apply for relief under section 203 of NACARA currently have asylum applications pending under the terms of the American Baptist Churches v. Thornburgh settlement agreement.

Permitting eligible applicants to apply for relief simultaneously with their asylum claims streamlined the process and offered an efficient method for resolving many of these claims at an earlier stage; this, in turn, reduces both the time and expense incurred by the government and the applicant. The Attorney General's

decision to delegate authority to asylum officers to adjudicate requests for suspension or cancellation demonstrates the Department of Justice's confidence in the INS Asylum Program.

• International Assignments

Over the last two fiscal years, as the United States has committed to admit a greater number of refugees interviewed overseas, the number of asylum officers participating in refugee processing has also increased. Asylum officers participate in specialized training to prepare them for the 30 to 60 day assignments to locations throughout Africa, Europe, and the Middle East. In any given year, asylum officers may participate in up to 90 overseas processing details. For example, during the summer of 1994, a number of asylum officers quickly responded to the urgent need to send INS officers to Macedonia to process ethnic Albanians who had fled from Kosovo. In addition, asylum officers contributed to the staffing of INS operations at Fort Dix, New Jersey where refugees quickly evacuated from camps in Macedonia completed the post-refugee determination processing.

Special Guidelines

• Claims By Children

In December 1998, INS issued guidelines for adjudicating asylum and refugee claims from children. Realizing that many children around the world have been victims of abuses such as cruel child labor practices, trafficking in children, rape, forced prostitution, and forced participation in armed conflicts, the asylum program determined that all asylum officers must be prepared to handle asylum claims made by children. The United States became only the second country in the world to adopt special procedures for considering the unique needs of its youngest asylum seekers. The guidelines include coaching on ways to set children at ease during interviews, how to better elicit testimony, and how to analyze the legal aspect of the child's claims to asylum. Soon after their release, each asylum office held a special training session on the children's guidelines.

• Gender-based Claims

In May 1995, the Office of International Affairs issued guidelines for the adjudication of asylum claims of women based wholly or in part on their gender. These guidelines were developed in reaction to international initiatives at that time to increase awareness on the unique claims presented by women. These guidelines not only addressed some of the adjustments that asylum officers must make during the interview to best elicit testimony from women, taking into consideration cultural differences between American government officers and most asylum applicants, but also the legal aspects of such cases. The guidelines provided a tool for asylum officers to analyze whether a claim of past persecution or well-founded fear of future persecution expressed by a woman in which her gender has a bearing could qualify her for asylum status. The guide-

lines discuss issues such as particular types of harm more likely to befall women, treatment on account of political or religious beliefs concerning gender, and whether the persecution endured was on account of the applicant's gender or membership in a particular social group constituted by women. Soon after the issuance of these guidelines, all asylum officers received specialized training in their application, and a module on the guidelines has been integrated into the Asylum Officer Basic Training Course. Furthermore, the Quality Assurance Unit within Headquarters asylum reviewed most gender-related decisions in the period following the release of these guidelines in order to insure uniformity in their implementation.

The Changing Shape of Asylum Policy

The INS Asylum program will continue to seek new ways to enhance the asylum process to benefit those in greatest need. With the introduction of specialized training for the 300-member Asylum Corps, applicants are assured that their claims are heard by competent, qualified officers who have a wealth of knowledge at their disposal.

Over time, asylum policy will continue to evolve as case law develops and the definition of persecution is further refined. At each turn, the INS is committed to ensuring that the process remains competent and fair while maintaining efficiency. As long as the future of nations remains volatile and unpredictable in various parts of the world, the United States will continue to uphold its tradition of offering safe haven to those in need of protection from persecution.