

UNITED STATES DISTRICT COURT
For the
EASTERN DISTRICT OF NEW YORK

YUELIANG ZHANG, HUANHONG GU,
JINHENG ZHANG,

No. 19-CV-5370

Plaintiff,

v.

KENNETH K. CUCCINELLI, Director,
U.S. Citizenship and Immigration Services,
KEVIN MCALEENAN, Secretary,
U.S. Department of Homeland Security,
THOMAS CIOPPA, District Director, New
York Field Office, U.S. Citizenship and
Immigration Services,¹

DECLARATION OF ANDREW
DAVIDSON IN SUPPORT OF MOTION
TO DISMISS COMPLAINT

Defendants.

¹ Acting Secretary Chad F. Wolf is automatically substituted for his predecessor, Acting Secretary Kevin K. McAleenan, and Acting Director Mark Koumans is automatically substituted for his predecessor, Acting Director Kenneth T. Cuccinelli, pursuant to Fed. R. Civ. P. 25(d).

DECLARATION OF ANDREW DAVIDSON

- 1
- 2 1. I am the Chief of the Asylum Division within U.S. Citizenship and Immigration
3 Services (USCIS), U.S. Department of Homeland Security (DHS). I make this
4 declaration based on my personal knowledge and my review of official documents
5 and records maintained by USCIS.
- 6 2. The Asylum Division is a component of USCIS that:
- 7 (a) Adjudicates applications for asylum pursuant to 8 U.S.C. § 1158 (including
8 applications by unaccompanied alien children (UACs) for which the Asylum
9 Division has original jurisdiction pursuant to 8 U.S.C. § 1158(b)(3)(C));
- 10 (b) Conducts screening determinations regarding whether particular individuals
11 have a reasonable fear of persecution or torture pursuant to the regulations at
12 8 C.F.R. § 208.31;
- 13 (c) Conducts screening determinations regarding whether particular individuals
14 have a credible fear of persecution or torture upon return to their countries of
15 origin pursuant to 8 U.S.C. § 1225(b)(2)(B) and the regulations at 8 C.F.R. §
16 208.30; and
- 17 (d) Adjudicates applications for relief under section 203 of the Nicaraguan
18 Adjustment and Central American Relief Act (NACARA), enacted as title 2
19 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (as amended by
20 Technical Corrections to the Nicaraguan Adjustment and Central American
21 Relief Act, Pub. L. No. 105-139, 111 Stat. 2644 (1997)).
- 22 3. The Asylum Division oversees eight Asylum Offices located in Bethpage, NY;
23 Lyndhurst, NJ; Arlington, VA; Miami, FL; Chicago, IL; Houston, TX; Tustin, CA;
24 and San Francisco, CA, and two subsidiary or ancillary offices in Boston, MA, and
25 New Orleans, LA.
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1 4. The Asylum Division is composed of a cadre of specially trained adjudicators
2 known as Asylum Officers. By statute and regulation, Asylum Officers must
3 receive training on international human rights law, non-adversarial interview
4 techniques, and country conditions information. *See* 8 U.S.C. § 1225(b)(1)(E); 8
5 C.F.R. § 208.1(b).

6
7 **I. BACKGROUND**

8 **A. Asylum Application Process**

9 5. Any alien in the United States (other than aliens present in the Commonwealth of
10 the Northern Mariana Islands) who meets the definition of a refugee, warrants a
11 positive exercise of discretion, and is not otherwise statutorily barred, is eligible for
12 asylum. *See* 8 U.S.C. § 1158(b). Pursuant to statute, such an alien must file an
13 application for asylum within one year of his or her arrival in the United States
14 unless extraordinary circumstances or changed country conditions exist. *See* 8
15 U.S.C. § 1158(a)(2)(C) and (D).

16 6. Asylum applications filed with USCIS are referred to as “affirmative” asylum
17 applications. Asylum applications filed in removal proceedings before the
18 Department of Justice’s Executive Office for Immigration Review (EOIR) are
19 referred to as “defensive” asylum applications.

20 7. The Immigration and Nationality Act (INA) provides that the agency must establish
21 procedures for the consideration of asylum applications that include an interview
22 within 45 days from the date of the application, absent exceptional circumstances.
23 8 U.S.C. § 1158(d)(5)(A)(ii).

24 8. Applicants may request that USCIS expedite the adjudication of an application or
25 petition for an immigration benefit if it meets one or more of the following criteria:
26 (1) severe financial loss; (2) urgent humanitarian reasons; and/or (3) compelling
27 U.S. government interests. All requests for expedited adjudication must be
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1 accompanied by supporting documentation, and are decided on a case-by-case basis
2 by the office having jurisdiction over the application or petition. General
3 instructions on how to request expedited adjudication can be found on USCIS'
4 public facing website at <https://www.uscis.gov/forms/how-make-expedite-request>
5 (last updated May 10, 2019).

6 9. If, after an interview, the Asylum Officer decides to grant asylum to the applicant,
7 the Asylum Office issues the approval to the applicant. If the decision is not to grant
8 asylum and the alien has no lawful immigration status, the Asylum Office issues a
9 Notice to Appear (NTA), which places the alien in removal proceedings and refers
10 the case to the EOIR for de novo review of the asylum claim by an immigration
11 judge (IJ). If the decision is not to grant asylum and the alien is in lawful status, the
12 Asylum Division can deny the application and may issue a Notice of Intent to Deny
13 prior to denial, if appropriate.

14 10. An asylum applicant may file an application for employment authorization (Form
15 I-765) 150 days after filing the asylum application, not including any delays
16 requested or caused by the applicant, provided neither an Asylum Officer nor an
17 Immigration Judge (IJ) has denied the asylum application. 8 C.F.R. § 208.7(a). In
18 general, as long as neither the Asylum Division nor an IJ denies the asylum
19 application, the alien may qualify for employment authorization 180 days from the
20 date of the application. *Id.*

21
22 **B. Current Situation - Backlog**

23 11. As of the end of the 2019 fiscal year (FY) on September 30, 2019, the backlog of
24 affirmative asylum cases awaiting adjudication by USCIS totaled 340,810. In
25 contrast, the backlog at the end of FY 2012 was 15,526.

26 12. Initially, the increase in the affirmative asylum backlog was largely due to a sharp
27 rise in the Asylum Division's credible and reasonable fear caseload between 2014
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1 and 2017. The increase in that caseload required the diversion of a majority of the
2 Asylum Division's available Asylum Officers to conduct those screening
3 determinations, and thus impacted the number of affirmative asylum adjudications
4 conducted by Asylum Officers.

5 13. Starting approximately in 2013, tens of thousands of undocumented migrants began
6 crossing the U.S./Mexican border annually at a significantly increased rate. Upon
7 apprehension, U.S. Customs and Border Protection (CBP) would generally place
8 these aliens in expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i).
9 However, an alien subject to expedited removal who expresses a fear of return to
10 his or her country must be referred for a credible fear or reasonable fear interview,
11 whichever is applicable, by an Asylum Officer. *See* 8 C.F.R. §§ 208.31,
12 235.3(b)(4). This process is meant to identify persons who might be eligible for
13 either asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. §
14 1231(b)(3), or withholding of removal under the Convention Against Torture under
15 8 C.F.R. § 208.16(c).

16 14. Although there is no statutory or regulatory requirement for completion of the
17 credible fear process within a specified time period, the statute states that an alien
18 subject to the credible fear process "shall be detained" pending a final determination
19 of the claim. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Regulations require reasonable fear
20 interviews be completed within 10 days of referral, absent exceptional
21 circumstances. 8 C.F.R. § 208.31(b). Consequently, DHS makes the rapid
22 completion of credible and reasonable fear cases a high priority and assigns a
23 substantial portion of its asylum officers to the expeditious completion of these
24 cases. With the diversion of resources to the border and fewer affirmative asylum
25 applications being adjudicated, there was a corresponding increase in the
26 affirmative asylum backlog.

Fiscal Year	Credible Fear Received	Reasonable Fear Received	Affirmative Asylum Applications			
			Filed		Completed	Backlog
			Total	UAC	Total	Total
2012	13,880	5,070	41,900	410	38,372	15,526
2013	36,035	7,735	44,453	718	29,918	32,560
2014	51,001	9,084	56,898	2,797	30,620	61,525
2015	48,052	8,015	83,197	14,218	40,062	108,749
2016	94,048	9,632	114,965	14,711	31,435	194,986
2017	78,564	10,273	141,695	18,060	50,995	289,835
2018	99,035	11,101	106,147	16,155	82,001	319,202
2019	105,301	13,177	95,959	12,009	78,580	340,810

15. Between 2013 and 2017, asylum application receipts increased and the overall caseload of the Asylum Division increased by approximately 160%.

C. The Scheduling System and Employment Authorization

16. Asylum seekers are generally not eligible for public benefits and are expected to support themselves during the asylum adjudication process. Should they choose to work, asylum applicants must secure an employment authorization document. 8 U.S.C. § 1324a. An asylum applicant is eligible to file an application for employment authorization (Form I-765) 150 days after filing the asylum application, provided the application has not been denied by either an Asylum Officer or an immigration judge. 8 C.F.R. § 208.7(a)(1). The Government must grant or deny the alien's employment authorization application 30 days from the date of filing of the application for employment authorization, but may not issue employment authorization prior to 180 days from the date of the asylum application if no decision on the application has been made, except where the alien has caused the delay in the adjudication. 8 C.F.R. § 208.7(a)(1).

1 17. Prior to 1995, regulations provided for the issuance of employment authorization
2 documents to those who filed “non-frivolous” asylum applications. 8 C.F.R. §
3 274.12(c)(8) (1994). Regulations further provided for the issuance of employment
4 authorization if the Government failed to adjudicate the asylum application within
5 90 days. *Id.* In the early 1990s, nearly two-thirds of applications were not decided
6 in 90 days, with the result being that the former Immigration and Naturalization
7 Service began mailing employment authorization to applicants upon receipt of the
8 asylum application, because those applicants certainly would not have a timely
9 adjudication. This employment authorization would then be valid for years before
10 the application was fully adjudicated. As the asylum caseload and corresponding
11 processing times grew, so did the filing of fraudulent, otherwise non-meritorious,
12 or frivolous claims in order to secure employment authorization and, by 1994, the
13 number of asylum applications grew to well over 400,000.

14 18. To address this issue, the former INS instituted a series of regulatory reforms,
15 which, among other things, extended the waiting period for employment
16 authorization to 180 days in order to detach asylum applications from employment
17 authorization. 8 C.F.R. § 208.7(a)(3).

18 19. The agency also implemented a scheduling system known as “Last-In-First-Out”
19 (LIFO). Under this system, the Asylum Division scheduled recently filed cases for
20 interview ahead of older cases. By giving priority to the newest cases, applicants
21 were on notice that filing asylum applications solely to obtain work authorization
22 carried a risk that their cases would be heard quickly and that their efforts to solely
23 obtain work authorization would be fruitless. In other words, by scheduling new
24 cases sooner rather than later, LIFO reduced the incentive engendered by the
25 backlog to file fraudulent or otherwise non-meritorious asylum claims just to obtain
26 work authorization.

27 20. Over time, these reforms and the LIFO system had success in reducing the backlog.
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1 At its height at the end of FY 1995, the backlog was over 464,100 cases. But by
2 the beginning of FY 2013 just over 4,200 cases were pending adjudication longer
3 than six months. (Note that the chart at paragraph 12 indicates that 15,526 cases
4 were pending at the end of FY 2012. That number, however, includes cases pending
5 less than six months).

6 21. However, the rise in credible and reasonable fear cases starting in approximately
7 2013 played a role in undermining the effectiveness of asylum reforms and the LIFO
8 scheduling system. Because of the urgent need to address the crush of credible and
9 reasonable fear cases – which were not subject to LIFO – in many Asylum Offices,
10 very few Asylum Officers were available to adjudicate affirmative asylum
11 applications. This situation led to an increase in the backlog and longer processing
12 times for older cases.

13 22. The surge at the border also included a dramatic increase in the number of UACs
14 who applied for asylum with USCIS from 410 in 2012 to 18,060 in 2017. Unlike
15 adults apprehended attempting to enter the United States without authorization,
16 UACs are not subject to expedited removal. Rather, the statute requires UACs be
17 placed into removal proceedings before an immigration judge under 8 U.S.C. §
18 1229a. However, if a UAC seeks asylum, USCIS has original jurisdiction to
19 consider the asylum claim. 8 U.S.C. 1158(b)(3)(C). In response to this surge of
20 UACs and at the request of the Administration, the Asylum Division also began
21 prioritizing the processing of UAC cases, which further diverted Asylum Officers
22 from the adjudication of other affirmative asylum applications.

23 23. Under these circumstances, where most of the Asylum Division's officers were
24 assigned to address the surge of credible and reasonable fear cases and UAC cases
25 from the border, the effectiveness of the LIFO scheduling system in discouraging
26 frivolous, fraudulent or otherwise non-meritorious filings was undermined, while
27 very few affirmative cases could be adjudicated in any event. Consequently, in
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1 December 2014, the agency decided to temporarily adopt a “first-in-first-out”
2 (FIFO) scheduling system under which the Asylum Division prioritized cases for
3 interviews in the order in which they were filed with the agency.

4 24. However, the institution of FIFO has had negative consequences. In FY 2013,
5 USCIS received 41,024 applications for initial asylum work authorizations. By FY
6 2017, that number increased more than six times to 261,447. Similar to the Asylum
7 Division’s prior experience with backlogs of frivolous, fraudulent or otherwise non-
8 meritorious asylum applications filed solely to obtain work authorization, the
9 current backlog has led to the same problem.

10 25. In order to stem the growth of the agency’s asylum application backlog and identify
11 frivolous, fraudulent or otherwise non-meritorious asylum claims earlier, on
12 January 31, 2018, USCIS announced that it would return to the LIFO scheduling
13 system.

14 26. As the press release noted,² USCIS faced a crisis-level backlog of 311,000 pending
15 asylum cases as of January 21, 2018, making the asylum system increasingly
16 vulnerable to fraud and abuse. The backlog had grown by more than 1,750 percent
17 during the five years prior to the re-implementation of LIFO, and the number of
18 new asylum applications had more than tripled. To address this problem, USCIS
19 follows these priorities when scheduling affirmative asylum interviews:

- 20 (a) Applications that were scheduled for an interview, but the interview had to
21 be rescheduled at the applicant’s request or the needs of USCIS;
- 22 (b) Applications pending 21 days or less since filing; and
- 23 (c) All other pending applications, starting with newer filings and working back
24 toward older filings.

25 27. Based on the Asylum Division’s experience, reinstating the LIFO scheduling
26 system is a critical element in slowing the growth of the pending application
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28 ² <https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>.

1 caseload and efficiently processing all pending asylum applications by eliminating
2 the incentive to file frivolous, fraudulent or otherwise non-meritorious asylum
3 applications solely to obtain employment authorization. Comparing October 2018
4 through January 2019 to October 2017 through January 2018, there has been a 33%
5 decrease in the average monthly receipts of new affirmative asylum filings
6 following the reinstatement of LIFO scheduling.

7
8 **D. Additional Efforts to Reduce the Backlog**

9 28. Along with frivolous, fraudulent or otherwise non-meritorious asylum filings to
10 obtain work authorization, the agency has noticed an increasing number of late-filed
11 so-called “cancellation cases.” With certain limited exceptions, an applicant who
12 applies for asylum with USCIS must file within one year of the date of last arrival
13 in the U.S. *See* 8 U.S.C. § 1158(a)(2)(B). Pursuant to the INA, an alien who is in
14 removal proceedings may be eligible for cancellation of removal and receive lawful
15 permanent resident status if they meet certain criteria, including residence in the
16 United States for ten years prior to the issuance of the Notice to Appear. *See* 8
17 U.S.C. § 1229b(b). This form of relief is only available to aliens placed in removal
18 proceedings under 8 U.S.C. § 1229a before the U.S. Department of Justice,
19 Executive Office for Immigration Review; there is no mechanism to affirmatively
20 apply for cancellation of removal as a benefit. Consequently, individuals with and
21 without the assistance of counsel are filing late meritless asylum applications with
22 the knowledge that if the Asylum Office declines to grant the application, the
23 Asylum Office will file an NTA placing the alien in removal proceedings where
24 they may apply for cancellation of removal. The Asylum Division estimates that
25 approximately 20% of pending cases have been filed by applicants who have been
26 living in the U.S. for at least ten years. The agency has also noticed an increase in
27 filings by aliens who have been in the United States for just under ten years,
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1 seemingly with the belief that by the time their case is referred to the Immigration
2 Court, they will have obtained ten years of residency. In order to more efficiently
3 process such cases, the Asylum Division began a pilot program in 2018 to offer
4 applicants with untimely filed cases the opportunity to waive the asylum interview
5 and be referred on the threshold issue of the one year filing deadline. The Asylum
6 Division continues to offer applicants the opportunity to waive the asylum interview
7 and be referred based on the one year filing deadline.

8 29. Further, the agency has increased the number of authorized Asylum Officer
9 positions from 273 in 2013 to 771 in 2019, and is in the midst of an aggressive
10 hiring surge that will result in approximately 200 new asylum officers. The Asylum
11 Division is also developing a training strategy in preparation for this surge to ensure
12 that these newly hired officers will be ready to adjudicate before the end of the
13 year. Each new hire is expected to complete nearly 300 hours of training in total.

14 30. From February 2019, and through the end of FY 2019, USCIS assigned an average
15 of 30 to 50 former refugee and asylum officers from the Refugee Affairs Division
16 and the Field Operations, Service Center Operations, and Fraud Detection and
17 National Security Directorates to conduct credible and reasonable fear interviews.
18 For the first quarter of FY 2020, as many as 100 individuals are assigned to asylum
19 details.

20 31. With these additional resources, the Asylum Division has been able to assign more
21 Asylum Officers to adjudicate affirmative asylum applications. In FY 2018, the
22 Asylum Division was able to adjudicate 82,001 cases compared to 30,620 cases in
23 FY 2014.

24 32. In addition to increasing and supplementing the asylum corps, the Asylum Division
25 is utilizing new technology to streamline adjudication. For example, in FY 2019,
26 the Asylum Division began using an assessment generator (AG) within its case
27 management system that pulls information from data that has already been entered
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1 in the system and automatically populates portions of the officer assessment,
2 allowing officers to close out cases more efficiently and consistently.

3 33. Another technology improvement that is in development is an automated case
4 scheduler that combines officer availability with interview schedules to ensure work
5 is assigned quickly and efficiently to field staff, as opposed to the current process
6 which requires that offices manually assess their interview capacity and align that
7 with the case management system's automated scheduler.

8 34. The Asylum Division also opened a centralized screening and vetting center in
9 Atlanta, Georgia, in FY 2018. Once fully operational, this center will conduct all
10 security check and screening activities to ensure that affirmative cases are
11 "interview ready" when they are assigned to asylum officers. Currently, security
12 checks are conducted by asylum officers as they are assigned cases, and can take up
13 to an hour or more to complete depending on the issues presented in the individual
14 case, as well as the number of people associated with a case. The screening center
15 will relieve officers of this burden and allow them to focus on expeditious
16 completion of adjudications. The center is expected to be fully operational in FY
17 2021.

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19 **E. Plaintiff's Case**

20 35. Plaintiff Yueliang Zhang (Plaintiff Zhang) applied for asylum on February 26, 2016.
21 He included his spouse, Huanhong Gu, and his son, Jinheng Zhang, as dependents
22 on his asylum application.

23 36. As noted in paragraph 26 above, USCIS announced the change in its scheduling
24 system on January 31, 2018. Plaintiff Zhang's application falls into the third
25 category (subsection C) of the announcement, i.e., cases that had not been
26 rescheduled or pending less than 21 days. As a result, Plaintiff Zhang will need to
27 await adjudication of his case until agency resources permit.

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1 37. As of the date of filing of his Complaint, Plaintiff Zhang has not submitted to the
2 New York Asylum Office a request to expedite adjudication of his asylum
3 application for humanitarian reasons with supporting documents.

4 38. While Plaintiff Zhang awaits the adjudication of his asylum application under the
5 current scheduling system, USCIS records indicate that Plaintiff Zhang and his
6 dependents have been granted an Employment Authorization Document (EAD) as
7 defined by 8 C.F.R. §§ 274a.12 and 274a.13 under the classification of pending
8 asylum.

9 39. Specifically, on or about September 20, 2016, USCIS granted Plaintiff Zhang an
10 EAD effective until September 19, 2017; on or about January 8, 2018, USCIS
11 granted Plaintiff Zhang a second EAD, effective until January 7, 2020, at which
12 time Plaintiff can apply to renew the EAD.

13 40. On or about September 10, 2016, USCIS granted Huanhong Gu an EAD effective
14 until September 9, 2017; on or about January 8, 2018, USCIS granted her a second
15 EAD, effective until January 7, 2020, at which time she can apply to renew the
16 EAD.

17 41. On or about September 27, 2016, USCIS granted Jinheng Zhang an EAD effective
18 until September 26, 2017; on or about February 11, 2017, USCIS granted him a
19 second EAD, effective until February 10, 2019, at which time he was eligible to
20 apply to renew the EAD, but he has not done so as of the date of filing of this
21 Complaint.

22
23 **II. CONCLUSION**

24 42. The Asylum Division's processing of affirmative asylum applications is governed
25 by the Division's resources and many constantly changing factors outside of its
26 control, including the number of credible and reasonable fear cases, UAC cases,
27 frivolous, fraudulent or otherwise non-meritorious asylum claims filed solely to
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1 obtain work authorization, and meritless filings to obtain an NTA to permit an
2 individual to apply for cancellation of removal in immigration court. With decades
3 of experience in addressing backlog growth, the Asylum Division has undertaken a
4 multipronged effort to reduce the current backlog. A very important aspect of that
5 effort, and one that has been successfully employed in the past, is the LIFO
6 scheduling system. The agency's experience has shown that this type of scheduling
7 system discourages frivolous, fraudulent or otherwise non-meritorious asylum
8 filings and reduces the overall growth in filings, thereby allowing the gradual
9 reduction in the overall backlog and more efficient processing of all asylum
10 applications.

11 43. The Asylum Division believes that these combined efforts will result in an overall
12 decrease in the caseload and in the wait time for asylum interviews. Based on the
13 Asylum Division's experience in reducing the prior backlog in the 2000s, its current
14 resources and output of cases, and barring another surge at the border requiring the
15 near total diversion of resources, the Asylum Division is aiming to virtually
16 eliminate the backlog of cases pending more than six months by 2024.

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20 Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury that the foregoing is true
21 and correct.

22
23 Executed on: _____

24 Andrew Davidson
25 Chief of the Asylum Division,
26 U.S. Citizenship and Immigration Services
27 U.S. Department of Homeland Security
28