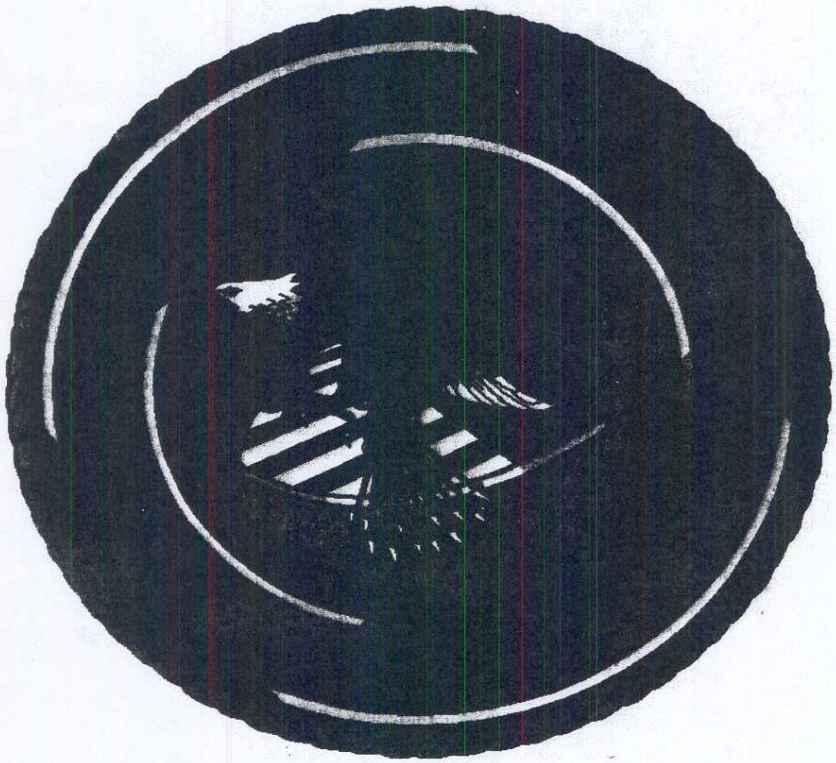
U.S. Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge

Measures to Improve the Immigration Courts and the Board of Immigration Appeals



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Measures to Improve the Immigration Courts and the Board of Immigration Appeals

Directive # 8. ***Analysis and Recommendations Regarding Disparities in Asylum Grant Rates***

"A recent study has highlighted apparent disparities among immigration judges in asylum grant rates. The Director of EOIR, in consultation with the Acting Chief Immigration Judge, will review this study and provide an analysis and, if appropriate, recommendations to the Deputy Attorney General with respect to this issue."

I. OVERVIEW

On July 31, 2006, the Transactional Resource Access Clearinghouse (TRAC) Immigration Project released a report entitled, "Judges Show Disparities in Denying Asylum" (hereinafter "TRAC report").[1] The TRAC report concluded that there was a great disparity in the rate in which immigration judges deny asylum. However, a close analysis of the report reveals that its conclusions are based on an oversimplification of how the asylum process works and a misunderstanding of the pertinent data. Therefore, the TRAC report does not present a full and accurate picture of the asylum denial rates in the immigration courts.

II. BACKGROUND

A. The TRAC Report

The TRAC report used information provided by EOIR, and other sources that are unnamed, to evaluate the differences in asylum denial rates by immigration judges. Specifically, the report considered the rates at which immigration judges denied claims of asylum by represented aliens from fiscal years 2000 to 2005. It concluded that the "typical" denial rate among immigration judges was 65% during the period in question, but that there were eight judges who denied asylum to nine out of ten applicants, and two judges who granted asylum to nine out of ten applicants. The authors also highlighted the fact that, according to their own calculations, there was one judge who denied 96.7% of asylum claims and another judge who denied only 9.8% of asylum claims.

Acknowledging that asylum seekers in different cities might be in fundamentally different circumstances because they emigrated from different countries, the report then compared the denial rates for "similarly situated" asylum seekers in a single city. Specifically, it examined the number of asylum cases filed by Chinese nationals who were denied asylum by immigration

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[1] The TRAC Immigration Project is a multi-year effort to obtain very detailed information from the government, check it for accuracy, and then disseminate it to the public . The project is supported by the JEHT Foundation, the Ford Foundation, and Syracuse University. *See* trac.syr.edu/immigration/about.html.

judges in New York City. The report underscored the disparity between the judges with the highest (94.5%) and lowest (6.9%) denial rates and noted that the denial rates of the other immigration judges in New York City covered a broad range.

B. The ANSIR System

Analyzing system data to draw supportable conclusions regarding asylum denial rates is a difficult undertaking. One of the primary hindrances is the quality of the data. For the period covered by the TRAC report, statistics pertaining to asylum completions were captured for EOIR by the Automated Nationwide System for Immigration Review (ANSIR). This system is twenty years old and has a limited capacity to code dispositions.[2]

In many cases the ANSIR code for an asylum case is listed as "O" for "other," a code which does not specifically describe the outcome of a case. When a code is general in nature like this, the coding requires some interpretation. For example, a code such as "other" in an asylum case generally means that the asylum application was never reached (as opposed to being denied), and it is critical to keep in mind that a judge's failure to grant an application is *not* the equivalent of the judge's denial of it. As discussed more fully below, any analysis of EOIR data that is based on a binary "grant or deny" assumption will produce skewed results.

Furthermore, because ANSIR's coding is so limited, it cannot capture the different grounds for which an asylum application might be denied. For example, ANSIR does not parse out which asylum claims are denied for untimeliness or because of the applicant's failure to appear for the asylum hearing, nor does it capture ineligibility for asylum due to a criminal conviction. In other words, the denial of an asylum application may be grounded on statutory or regulatory ineligibility for asylum, or even the applicant's own failure to prosecute the application, without the judge ever reaching the substance of the asylum claim. Thus a mere tabulation of "denials" provides limited insight into a judge's propensity for granting or denying asylum applications.

III. FACTORS WHICH AFFECT DENIAL RATES

The asylum process is complex and there are a number of variables that must be considered before reaching any conclusions regarding denial rates between judges in various courts throughout the country, and even between judges sitting in the same court.

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[2] The Executive Office for Immigration Review is replacing the ANSIR system with a new case tracking system. The Case Assess System for EOIR (CASE) has been deployed to the Board of Immigration Appeals and will replace ANSIR in all immigration courts during FY 2007. CASE will modernize data management for the agency and enable it to use advances in technology to make the agency more efficient.

A. The Initiation of Asylum Claims

The majority of asylum claims are initiated before an asylum officer at the Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service).[3] These are referred to as "affirmative" asylum claims. Additionally, an alien can file an original claim in the context of removal proceedings before an immigration judge. These are known as "defensive" asylum claims. Approximately 70% of the asylum claims completed by immigration judges from FY 2000 to 20005 originated at a DHS asylum office. The fact that a claim already has been rejected (the technical term is "referred") by an asylum officer is important and must be considered when evaluating the rates of denials as a whole in the immigration courts. EOIR seldom sees "easy grants" because a DHS asylum officer presumably will have granted asylum in those cases in the first instance.

B. The Individualized Nature of Asylum Claims

Asylum claims vary greatly from application to application as each case involves its own particular fact pattern and evidence. Further, the immigration court system is premised on the fact that each judge must make an individualized determination in every instance. These factors make it highly problematic to reach a general conclusion when comparing the denial rates for various courts and judges across the country.

C. The Effect of Country of Origin on Asylum Adjudications

During the period covered by the report, asylum claims were filed by applicants from approximately 215 countries. The largest number of asylum applications were from China, followed by Mexico, Haiti, El Salvador, and Colombia. *See* Appendix I (pie chart listing the top 25 countries from which asylum claims were filed in FY 2000 to 2005). Certain nationalities tend to be geographically clustered within the United States, which affects the type of cases which predominate a court's caseload. *See* Appendix J (listing major nationalities in cases heard by immigration courts with more than 100 asylum case completions). For example, the immigration court in New York City is dominated by Chinese asylum claims, while the immigration court in Miami generally hears asylum claims from Haitians and Colombians. *Id.* The country of origin is very important when evaluating denial rates because each country is governed by different considerations that are reflected in a court's overall rate of grants or denials. Some countries, for example, will have emerged from serious political, social, or other upheaval at the time the applicant's case is heard. Consequently, the number of asylum grants for aliens from that country will be on the decline due to changed country conditions. At the same time, other countries might reflect higher grant rates than others for reasons relating to abysmal country conditions or new developments in the law. Chinese asylum cases are

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[3] This can occur when an alien expresses a fear of returning to his or her native country during an interview (e.g., when seeking admission to the United States at a port of entry) or by an alien who is already present in the United States (e.g., affirmatively applying for asylum after entry).

illustrative of this point because they often involve claims based on coerced population control and thus are governed by a special provision in the law expanding the definition of "persecution." *See* Section 101(a)(42)(A) of the Act.[4] A high percentage of these cases are granted. EOIR data reveal that the New York City immigration court issued conditional asylum grants in 10,327 out of 12,901 Chinese asylum claims during FY 2000 to 2005.

By nationality, Mexican nationals comprise the second largest population of asylum-seekers in the United States. *See* Appendix I. During FY 2000 through 2005, a large number of Mexican nationals filed asylum applications with DHS – not in order to apply for asylum, but as a tactic to apply for another form of relief referred to as cancellation of removal. In this situation, many asylum applications are ultimately withdrawn once the alien files an application for cancellation of removal, which brings into question the appropriateness of classifying the matter as an asylum case at all. In the first half of this decade, the California courts were greatly affected by this trend, as illustrated by the fact that the Los Angeles court had more than 32,000 asylum cases withdrawn during this period. *See* Appendix A. In comparison, the New York City Court, which is similarly-sized, only had approximately 3,500 withdrawals – roughly 10% of the number filed in Los Angeles – during the same period. *Id.* Comparing the circumstances of Chinese and Mexican asylum-seekers illustrates the difficulties in comparing the denial rates for various courts across the country.[5]

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[4] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 added the following language to the definition of refugee:

> . . . .a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistence to a coerced population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear of persecution that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

The amendments limited the number of cases which could be granted on this basis to 1,000 per Fiscal Year; this resulted in a conditional grant system to permit an alien to receive some form of relief until a number was available.

[5] Further, a withdrawn asylum application might be recognized as a "denial" in a broad statistical grouping, but the reason for the denial has nothing to do with the immigration judge's individualized consideration of the merits of the claim. *See infra* at III, A, 6.

D. Detained or Incarcerated Aliens

Another variable affecting the grant rate of asylum claims is that a certain percentage of asylum cases involve detained or incarcerated aliens. From FY 2000 to 2005, 23,254 asylum cases were heard where the respondent was detained at the completion of the case. *See* Appendix C. The immigration judges also heard asylum claims from aliens incarcerated in 58 correctional institutions nationwide (municipal, state and federal) through the Institutional Hearing Program (IHP). There were 3,163 asylum cases completed through the IHP from FY 2000 to 2005. *See* Appendix D.

Many detained aliens, and all incarcerated aliens, have committed crimes. Many will seek asylum believing that it may be an avenue (legitimate or not) to remain in the United States. Specifically, for FY 2000 through 2005 there were 9,354 asylum claims by aliens for whom a criminal charge of removability under section 237(a)(2) of Immigration and Nationality Act was lodged.[6] *See* Appendix B. Of these, the vast majority, 8,372 cases, involved an aggravated felony removal charge. A conviction for an aggravated felony automatically bars an alien from asylum, and other criminal acts might trigger a bar or indicate that a favorable exercise of discretion is not warranted. Such factors must be considered when evaluating the denial rates of individual immigration judges because they are based on matters unrelated to the merits of the underlying case and are unlikely to be reflected in broad-based statistical surveys.

E. Asylum Cases Where Other Relief is Granted

When evaluating "denial" rates of asylum, it also should be considered that while asylum might be denied, another form of relief might be granted. Data reveal that from FY 2000 to FY 2005, there were 4,920 applicants who were denied asylum but granted another form of relief. *See* Appendix E (listing immigration courts and cases coded in ANSIR as an asylum denial and other relief granted). One example of this arises when a criminal alien is barred from asylum or denied on the basis of discretion. These aliens might be granted withholding of removal or protection under the Convention Against Torture. This still would be considered an asylum "denial," but in fact the alien was able to obtain protective relief from removal. Other possible grants of relief would include applications for adjustment of status or cancellation of removal. Accordingly, before drawing a negative inference from a given judge's denial rate, an analysis of that judge's rulings should take into account whether other forms of relief, especially related forms of relief, were granted.

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[6] ANSIR reports that there were in total 111,950 denials of asylum for the period of FY 2000-2005. *See* Appendix M.

F. Asylum Cases Completed In Absentia, and Other "Denials" Not on the Merits of the Asylum Claim

In the disposition of asylum applications there are not two outcomes (either grant on the merits or deny on the merits) but multiple possible outcomes. Many denials are not related to the substance of the asylum claim.

For example, an asylum application is treated as abandoned when an alien fails to appear for his or her hearing, and yet the application could be designated as "denied" in the database. From FY 2000 through 2005, there were 6,146 cases completed and coded as a denial in the ANSIR system where the respondent was ordered removed after a hearing held in absentia. *See* Appendix F (listing cases completed by individual court as an asylum denial where the respondent was ordered removed after a hearing held in absentia).

Another example is where an alien elects to withdraw an asylum application upon recognition that he or she is not eligible for asylum, or because he or she did not intend to prevail on the application in the first place (e.g., the asylum application is filed as a litigation tactic to reach another form of relief). From FY 2000 through 2005, there were 67,137 asylum applications withdrawn nationally. *See* Appendix A. As discussed earlier, common fact patterns accounting for this trend include the large number of Mexican nationals who filed affirmative asylum applications with DHS during this period in order to be put into proceedings to pursue cancellation of removal, a form of relief that is not related to asylum but leads to lawful permanent residence in the United States.[7] Another example is the large number of non-meritorious asylum applications filed by aliens in the 1990s for the purpose of receiving work authorization, a large number of which were subsequently withdrawn or abandoned.[8] These scenarios may be tabulated as a "denial" in a broad statistical grouping, but the reason for the denial has nothing to do with the immigration judge's individualized consideration of the merits of the claim.

As a final point, it should be noted that these other dispositions – including cases where other forms of relief were granted, where the alien failed to appear, or where a criminal charge was involved – amount to 18% of 111,950 cases where asylum was denied in FY 2000 to 2005. In

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[7] The TRAC report in many instances does not completely explain the bases for the statistics cited within. For example, the report claims that from FY 2000 to 2005, there were 2,957 Mexican asylum cases decided. Our data reflect that there were 49,020 Mexican asylum cases decided during this period.

[8] Because INS asylum proceedings took years to complete, aliens would file non-meritorious applications for asylum, thus acquiring legal permission to work in the United States based upon a pending application for relief. This abuse of the asylum system led to asylum reform enacted in 1997 which required that an asylum case be pending greater than 180 days before an alien could be granted work authorization.

short, in approximately a fifth of the cases where asylum was "denied" the immigration judge never reached the merits of the claim. *See* Appendix M. These aspects of the asylum adjudication process were not considered in the TRAC report.

IV. FURTHER ANALYSIS OF CASE COMPLETION DATA

Attached are a series of charts which depict the denial rates for immigration judges for the period FY 2000 through 2005. *See* Appendix K. These charts are based upon a larger statistical analysis than that used in the TRAC report. *See* Appendix L.[9] This statistical analysis gives detailed information regarding the number of cases which were administratively closed or where other relief was granted, venue was changed, or the respondent was detained for the entire proceeding. In addition, this analysis provides information regarding the number of IHP cases with asylum claims, the number of asylum cases where a criminal charge was filed, and the number of cases where the alien was represented by an attorney.

The denial rates depicted in the graphs in Appendix K reflect the total range of reasons why a case could be coded as "denied." (For example, the case was abandoned, denied, conditionally granted, withdrawn, administratively closed, terminated, had venue changed, or another type of relief was granted other than asylum.) The graphs are intended to compare immigration judges within a court to determine the rate of variance in denying asylum. In general, immigration judges handle the same sorts of cases within their court, but there are possible variations among judges within a court as some may handle more detained or IHP cases than their peers.

Significantly, while there are some notable variances, denial rates often are quite consistent among immigration judges when compared to their peers in the same immigration court. The difference in denial rates often amounts to less than 10 percentage points among judges in the same immigration court and only in rare instances are the denial rates separated by more than 15 percentage points. When comparing denial rates within a single court, it must be considered that one of the immigration judges might have been assigned to the court's detained or IHP caseload, and as noted earlier, this is likely to affect the number of denials.

The greatest variances in denial rates generally occur in the immigration courts located in large cities. The TRAC report specifically details the variance in asylum denial rates for Chinese asylum seekers in New York City. The denial rate among the judges in these cases varied from a low of 8% to a high of 68%. Most New York judges, however, fell within a denial range of 20% to 40%. In the Miami immigration court, 19 of 24 judges (80%) denied asylum more than 40% of the time. Immigration Judges in Los Angeles generally denied asylum in 10% to 20% of the

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[9] This analysis depicts judges at courts in which they were assigned during FY 2000 and 2005 or had a temporary detail of significant length. Judges may be listed in more than one court as they transferred or were detailed to another court. There also may be only limited statistics available for the judges who were appointed to the bench during this period.

cases. Therefore, while there are some notable variances in denial rates, they are attributable to a relatively small number of judges, and most judges appear to grant and deny asylum claims at comparable rates.[10]

V. APPELLATE REVIEW OF IMMIGRATION JUDGE DECISIONS

Both the alien and the Department of Homeland Security may appeal a decision of an immigration judge to the Board of Immigration Appeals. Having nation-wide jurisdiction over appeals from immigration judge decisions, the Board has a vantage point which permits it not only to correct erroneous decisions, but also to promote a uniformity of result in discretionary and legal determinations. During the period of the TRAC report, the Board completed 159,011 appeals of immigration judge decisions. The appeal was sustained in 5,726 cases, indicating that only a small percentage of immigration judge decisions are reversed.

If unsuccessful at the Board, an alien may appeal to the federal courts of appeal, whereas DHS cannot appeal an asylum grant past the administrative level. The following statistics were provided by the Office of Immigration Litigation on the outcome of immigration cases in general and those involving an asylum claim in particular. The statistics reveal that immigration judge decisions are upheld in most instances when they are appealed to the circuit courts.[11]

From the Civil Division's CASES database (excluding the Second Circuit):

Fiscal Year	Decisions	Win Rate	PFR Win	Asylum PFR Win
2001	3,878	.864	.920	.869
2002	3,554 (– .084)	.898	.907	.854
2003	4,588 (+ .291)	.916	.934	.892
2004	7,239 (+ .578)	.930	.938	.895
2005	7,403 (+ .023)	.919	.921	.889
2006 (½)	2,757 (– .255)	.927	.928	.908

PFR = petition for review

[10] We note that the TRAC report singled out eight judges deemed to be on the extreme end of the spectrum in denying claims (those who denied asylum to nine out of the ten applicants who came before them). *See* TRAC Report, p.1. However, this number represents less than 4% of the 208 judges who were considered in the report. Further, this number did not take into account whether the judges in question handled a large number of detained or criminal alien cases, or whether other variables existed to explain the low percentage of grants.

[11] Statistics are not available for the Court of Appeals for the Second Circuit because these cases are handled by the United States Attorney's Office and this office does not keep a database specific to immigration cases.

VI. CONCLUSION

As shown above, the asylum process is administratively complex and denials of asylum claims often are based on factors unrelated to the underlying merits of the case. Moreover, the quality of the data available for analysis in these types of cases is often less than exemplary. And lastly, each case, by its very nature, is unique. Accordingly, it is very difficult, if not impossible, for anyone to provide a definitive, well-supported comparison of the denial rates of the more than 200 judges in the immigration court system. Therefore, the TRAC report is of decidedly limited accuracy and value. Nonetheless, some of the largest disparities in the denial of asylum claims among a handful of immigration judges merit close attention. EOIR is committed to addressing this issue through an enhanced training, mentoring, and supervisory program that will not improperly impinge upon the adjudicatory role of the immigration judges, but that will ensure that all immigration decisions are based on the law and the facts in each specific case.

Appendix

Asylum Cases Filed and Application Withdrawn by Respondent	A
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