NEW YORK
CITY BAR

COMMITTEE ON IMMIGRATION AND NATIONALITY LAW

CLAUDIA SLOVINSKY
CHAIR
396 BROADWAY, SUITE 601
NEW YORK, NY 10013-3518
Phone: (212) 925-0101
Fax: (212) 219-9412
cslovinsky@slovinsky.com

CHRISTINA B. LABRIE
SECRETARY
67 WALL STREET, SUITE 1801
NEW YORK, NY 10005
Phone: (212) 425-0555
Fax: (212) 425-3282
christina@cyrusmehta.com

May 12, 2006

Dr. Emilio T. Gonzalez
Director
US Citizenship and Immigration Services
US Department of Homeland Security
Washington, DC 20528

RE: Recommendation from the CIS Ombudsman to the Director, USCIS on Changes to Affirmation Asylum Application Procedures

Dear Dr. Gonzalez:

We write to comment on the CIS Ombudsman's recommendation, dated March 20, 2006, regarding proposed changes to the affirmative asylum application process within USCIS. Our committee is comprised of highly experienced immigration attorneys, many of whom have extensive experience in asylum and refugee law.

We strongly feel that the Ombudsman's proposed changes would have a negative impact on asylum seekers, the asylum adjudication process and the over-burdened immigration court system. The proposed changes are based on scant or no research or statistical support and fail to adequately analyze the consequences of such changes.

Many of the perceived problems presented in the Ombudsman's recommendation have already been addressed by immigration reform. In 1995, in an effort to reduce fraudulent and frivolous filings, Congress made extensive changes to the affirmative asylum procedure. These changes are generally acknowledged to have achieved their goals. In addition, the Asylum Offices made a concerted effort to clear backlogged cases and decrease processing times. The number of affirmative asylum applications dropped from a high of 147,430 in 1995 to 32,682 in 2004. The number of asylum applications received in 2004 was the lowest since 1987. The USCIS and the Asylum Offices currently process asylum applications very quickly; the time between receipt and interview is usually no more than several weeks.

The Ombudsman's recommendation contains conclusory statements that are not supported by facts. We would like to bring your attention to the follow specific points in the recommendation:

- The claim of "an inherently flawed system": This statement is based entirely on an unsupported assumption that the 70% referral rate of cases from the Asylum Offices reflects indiscriminate filings, fraud and tactical delay by asylum applicants. Cases are referred to Immigration Court for reasons other than a lack of credibility in the claim (e.g. for consideration of a claim to withholding of removal, lack of sufficient supporting documentation, failure of a credible narrative to meet the requirements for asylum). In fact, in our experience, many of the asylum cases referred to Immigration Court are ultimately granted. In addition, contrary to the Ombudsman's assertion, there is no tactical reason for those seeking to delay removal to file an affirmative asylum application as doing so brings the applicant to the attention of immigration authorities.

- The "enforcement activity" conducted by USCIS: The Ombudsman states that by adjudicating asylum applications, USCIS is "technically conducting an enforcement activity that is really within the purview of ICE and the Immigration Court…" USCIS officers adjudicate a variety of applications from people not in lawful status (adjustment applications, VAWA petitions, etc.). This is efficient because USCIS officers adjudicate such applications, applying expertise in particular areas of the law, without unnecessary referral to the overburdened immigration courts. This is even more the case with asylum applications because Asylum Officers receive specialized training, develop expertise in this specific and complex area of law and have access to specialized materials and resources.

- Quicker and more equitable adjudication: It is incorrect to claim that under the proposed changes asylum applications would be adjudicated more quickly for "those applicants truly deserving of asylum." Out-of-status applicants would be denied the current efficient processing at the Asylum Office and instead would be referred to Immigration Court, where it often takes months or years for a merits hearing to take place. Applicants in lawful status may possibly have processing times reduced by a few weeks, but this benefit is insignificant in light of the impact on other applicants.

- Additional source of revenue for USCIS: The recommendation would simply shift the financial burden of the asylum program from other sources to the asylum-seekers themselves and would not, in fact, create "an additional source of revenue." The proposed imposition of filing fees on asylum applications would also introduce a fee-waiver process. The case-by-case analysis of fee waiver applications would undoubtedly consume much of the income generate by the fees.

In addition, the Ombudsman proposes specific changes to the regulations, not mentioned in the memorandum, that are unnecessary, punitive and serve no legitimate purpose:

- Elimination of training of asylum officers (8 C.F.R. §208.1(b)): Discontinuing the training of asylum officers would jeopardize the quality of adjudications. Further, the Immigration and Nationality Act mandates that credible fear interviews be conducted by trained asylum officers. This proposal would require an amendment to the Act.

- Elimination of lawful status as a possible "extraordinary circumstance" (208.4(a)(5)(iv)): The Ombudsman does not provide any reason to remove this section from the non-inclusive list of "extraordinary circumstances" for the failure to file an asylum application within one year of arrival. Nor does he suggest that the provision is being misused or misinterpreted. The one year deadline, as it now stands, is an arbitrary and unfair obstacle for many worthy asylum applicants. Implementation of this recommendation would make the bar even more arbitrary and unfair.

- Elimination of applicant or attorney statement at asylum interview (8 C.F.R. §208.9(d)): This change would limit the applicant's opportunity to present his or her asylum claim and would eviscerate the role of counsel in asylum interviews.

The Ombudsman's recommendation would increase the burden on the immigration courts. Immigration judges currently face staggering caseloads, as was acknowledged by almost all of the witnesses in the recent Senate hearings on immigration related judicial reform. The Circuit Courts of Appeals have recently admonished immigration judges for failing to provide due process in adjudicating asylum applications. Now is not the time to shift more of the burden of the asylum adjudication process to the immigration courts.

The proposed changes are also contrary to the spirit of the UN Convention Relating to the Status of Refugees because most asylum applicants would be denied the opportunity to present their claims for asylum in a non-adversarial context before a specially-trained Asylum Officer. Instead, the claims would only be considered in the context of a government-initiated adversarial removal proceeding.

In short, we see no reason to implement any of the changes proposed by the Ombudsman. While not perfect, the affirmative asylum adjudication process has a well-earned reputation for efficiency and cost-effectiveness. The proposed changes would not only not ameliorate any problems or improve the

current affirmative asylum process, but would in many instances prejudice the rights of asylum seekers.

Thank you for your consideration.

Sincerely,

Claudia Slovinsky
Chair, Committee on Immigration and Nationality Law
New York City Bar Association

cc: Michael Jackson, Deputy Secretary, USCIS
Prakash Khatri, USCIS Ombudsman
Michael Chertoff, Secretary, Department of Homeland Security