

Ten Days or Ten Years: How the “Last In, First Out” Policy Affects Asylum Interview Scheduling and Disproportionately Harms Immigrants

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Abstract:

As of 2022, nearly two million asylum-seekers are sitting in limbo, awaiting the scheduling of their asylum interviews. The wait has only been getting longer, due in part to the “last in, first out” policy (LIFO) implemented by the Trump Administration in 2018. In practice, LIFO has exacerbated the wait times for asylum-seekers by pushing waiting applicants with completed applications farther back in line and prioritizing new applicants who have less time to prepare their cases. This Note analyzes the causes for the sharp rise in pending asylum applications as well as LIFO’s harmful effects on immigrants stemming from its prioritization of affirmative asylum interviews during the first 21 days after asylum-seekers submit their applications. This Note argues that LIFO is the incorrect response to reduce the immigration backlog; instead, the government should assign some immigration officials to work in reverse order to give closure to waiting applicants, implement a five year “cutoff period” where applications are reprioritized after sitting for five years, hire more immigration officials to sift through the backlog, and guarantee the right to free or low-cost counsel to parties in immigration cases.

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I. INTRODUCTION

Congolese immigrant Alex Bukasa applied for asylum in 2015.¹ After waiting more than four years for an asylum interview to be scheduled, he was pushed to the back of the line by the “last in, first out” (LIFO) immigration policy, which gives priority to more recent asylum applications.² LIFO pushes waiting applicants to the end of the line, and Alex, who has already been waiting years for his interview, will likely wait many more while officials schedule new applicants within months or even weeks of submitting their applications.³

Like Alex, nearly two million immigrants are sitting in limbo, awaiting the scheduling of their asylum interviews and therefore waiting for their application’s final decision.⁴ These lines have only been getting longer, due in part to the COVID-19 pandemic shutting down courts across the country.⁵ Additionally, the United States government has implemented policies such as LIFO that have exacerbated the wait times of asylum-seekers.⁶

This Note will argue that LIFO immigration policy is harmful to immigrants because it prioritizes interviews for affirmative asylum applicants during the first 21 days after they submit their application. LIFO pushes waiting applicants with completed applications farther back in line and prioritizes new applicants who have less time to prepare their cases. This sped-up timeline does more harm than good, as the government has not been able to chip away at their backlog since adopting the policy.

This Note will begin by providing a background of the asylum process in the United States. The Background Part will define immigration terms, outline the asylum application process including the different forms of legal refugee status in the United States, describe the standards of proof needed to prevail on a case, and outline outright asylum bars. The Background Part will also explain LIFO, Special Immigrant Juvenile Status (SIJS), Unaccompanied Alien Children (UACs), and how each of these processes intersect.

Next, in the Analysis Part, this Note will examine the supposed merits and unintended consequences of LIFO. It will discuss the speed at which

¹ Leta Hollowell & Tania Karas, *Last In, First Out: Policy Change Moves Longtime US Asylum-Seekers to Back of the Line*, WORLD (Jan. 4, 2019, 4:30 PM), <https://theworld.org/stories/2019-01-04/last-first-out-policy-change-moves-longtime-us-asylum-seekers-back-line> [<https://perma.cc/HYY9-SN5W>].

² *Id.*

³ *Id.*

⁴ Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, TIME (Jan. 20, 2022, 11:31 AM), <https://time.com/6140280/immigration-court-backlog> [<https://perma.cc/2JF2-2VC6>].

⁵ *Id.*

⁶ Hollowell & Karas, *supra* note 1.

immigration officials process asylum applications (or lack thereof), why prioritization speed matters, and the impact on asylum seekers and their families deriving from waiting too long or not long enough for a scheduled asylum interview. This Note will next discuss how extremely quick turnaround times for asylum cases result in less time to acquire funds for an attorney and less time to prepare the case. Extremely long waits leave applicants in limbo, resulting in high anxiety. Additionally, the Analysis Part will discuss how LIFO has not cut into the immigration court backlog; in fact, the backlog has increased steadily since LIFO's original implementation and LIFO's revival by the Trump Administration.

Finally, this Note will propose alternatives to LIFO that not only prioritize the well-being of asylum-seekers, but also will better help the government reduce the backlog of pending cases. While an entire overhaul of the United States immigration system may be more effective, this Note will only discuss proposed policy changes for the current system. This Note proposes three alternatives to LIFO. First, in order to cut into the outstanding asylum applications, the government should consider designating some immigration officials to work forwards and some officials to work backwards through the backlog, ensuring that both ends will be visited within a reasonable amount of time. Second, another potential solution is to revisit outstanding asylum applications once they have been sitting for five years, re-prioritizing applications that may have dropped off the radar. Third, hiring more immigration judges and officials leads to more interviews and therefore a more efficient application process.

II. BACKGROUND

The United States has long since held the belief that they will not deport immigrants who will face persecution in their home country as a matter of human rights.⁷ As early as 1948, the United States began legislating refugee policy, permitting displaced persons to enter the country following the atrocities of World War II.⁸ Later, the Refugee Act of 1980 defined "refugee," which increased the ceiling of refugees permitted per year, and created provisions to protect emergency refugee seekers.⁹ While there are multiple

⁷ Paul H. Ode, Jr., *Section 243(b) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L.J. 291, 291 (1980); Jonathan Blazer & Katie Hoepfner, *Five Things to Know About the Right to Seek Asylum*, ACLU (Sept. 29, 2022), <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum> [https://perma.cc/QBB9-NF2X].

⁸ *History*, OFF. OF REFUGEE RESETTLEMENT (Nov. 12, 2021), <https://www.acf.hhs.gov/orr/about/history#:~:text=The%20U.S.%20Congress%20enacted%20the,an%20additional%20400%20displaced%20Europeans> [https://perma.cc/8DXK-8F5D].

⁹ *Refugee Act of 1980*, NAT'L ARCHIVES FOUND., <https://www.archivesfoundation.org/documents/refugee-act-1980> [https://perma.cc/2SUT-AEFG].

avenues to prevent deportation, this Note will primarily focus on asylum and how the “last in, first out” policy has altered the process, negatively impacting asylum seekers and their families.

A. What Is Asylum Generally

According to the United Nations High Commissioner for Refugees (UNHCR), the United States grants asylum to immigrants who fear persecution or harm from their home countries and who are applying from within the United States.¹⁰ To win an asylum case, applicants must (1) prove that they are a refugee and (2) show fear of persecution or harm, past or future, based on their race, religion, nationality, political opinion, or as a member of a particular social group.¹¹ Applicants must prove that their fear stems from persecution falling under any of these five enumerated categories.¹² While asylee and refugee are terms that are often used interchangeably, they are different avenues to achieve legal status. Asylum applications and refugee applications are assessed on the same grounds; however, immigrants may apply for refugee status only if they are applying from outside the United States while asylum applicants must apply from inside the United States.¹³

1. Well-Founded Fear of Persecution

The asylum-seeker bears the burden of proof to show they are a refugee under United States law. Under 8 U.S.C. § 1101(a)(42)(A), the definition of refugee is:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .¹⁴

To establish well-founded persecution, asylum-seekers and refugees must show that their fear is both “subjectively genuine and objectively

¹⁰ *What Is Asylum?*, UNHCR, <https://help.unhcr.org/usa/applying-for-asylum/what-is-asylum/#:~:text=Asylum%20is%20a%20form%20of,persecution%20can%20apply%20for%20asylum> [https://perma.cc/DR2B-TE4N].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 8 U.S.C. § 1101(42) (2023).

reasonable.”¹⁵ Subjectively, the applicant can illustrate persecution by credibly testifying as to their genuine fear.¹⁶ Objectively, the application can illustrate persecution one of two ways: (1) if the applicant can show they experienced past persecution, it is presumed that they have a future fear of persecution; or (2) the applicant can provide evidence that proves a reasonable person would also fear future persecution.¹⁷ Either an immigration official or judge, rather than a trier of fact, determines whether the alleged persecution is “well-founded.”¹⁸ Immigration judges and officials assess the credibility of asylum claims by weighing the facts, evidence, and testimony of the applicant.¹⁹ Immigration cases are not typically held in front of juries because immigration law is not considered criminal law, but rather administrative law.²⁰

Persecution is not considered to be well-founded if the applicant can safely relocate within their home country to avoid said persecution and it would be reasonable to do so.²¹ Immigration officials are directed to weigh factors such as size of the home country, reach of the persecutors, and the applicant’s demonstrated ability to relocate in order to determine the reasonability of relocation within the applicant’s home country.²² Immigration officials will deny the asylum application if they believe the applicant can safely relocate within their home country, whether or not the asylee is willing or financially able to, and it is the applicant’s burden to prove that it is unreasonable for them to relocate within their country.²³ Because a country’s government is considered both powerful and all-reaching, if the applicant’s persecutor is the government, it is presumed that they cannot relocate safely.²⁴

If the asylum-seeker cannot safely relocate, the applicant can establish persecution if they can prove they are a victim of their home country’s government or of a non-state actor who the government is “unwilling or

¹⁵ *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 8 U.S.C. § 1101(42) (2023); HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47077, U.S. IMMIGRATION COURTS AND THE PENDING CASE BACKLOG 1 (Apr. 25, 2022).

¹⁹ STRAUT-EPPSTEINER, *supra* note 18, at 9.

²⁰ *Public Funding for Immigration Legal Services*, NAT’L IMMIGR. F. (Apr. 12, 2021), <https://immigrationforum.org/article/public-funding-for-immigration-legal-services> [<https://perma.cc/2DR7-FDRQ>].

²¹ 8 C.F.R. § 1208.13(b)(3)(ii) (2022).

²² *Id.* §1208.13(b)(3), (b)(3)(i).

²³ *Id.*

²⁴ *Id.* § 1208.13(b)(3)(ii).

unable” to control.²⁵ The government category typically includes the police, the military, and government sponsored groups.²⁶ Examples of non-state actors include gangs and other guerilla groups.²⁷ Other persecutors who do not clearly fit in government or non-state actors, such as violent family members, are often considered a party the government is unwilling to control if the police were notified yet did not protect the complainant.²⁸ Persecution from non-state actors the government is unwilling or unable to control are placed at the same level as the government because it illustrates how the applicant will remain unprotected and in danger if returned to their home country.

2. Persecution Must Be Based on Race, Nationality, Religion, Political Opinion, or Membership of a Particular Social Group

Once the actor has been identified, the applicant must show their persecution falls into one of the five protected categories. While persecution based on race, religion, and nationality are clear boxes applicants can fit their stories into based on their personal identity, persecution based on political opinion or membership of a particular social group is less intuitive. According to the Bureau of Immigration Appeals in *Matter of Acosta*,

[W]e interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.²⁹

Particular social groups (PSGs) are characterized as groups made up of people with similar “background, habits, or social status.”³⁰ For example, immigration courts routinely consider membership within a specific family

²⁵ McMullen, 17 I. & N. Dec. 542, 544 (B.I.A. 1980).

²⁶ *Imposed by the Government or by a Group Which the Government Is Unable or Unwilling to Control*, IMMIGR. EQUAL. (Aug. 2020), <https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law> [https://perma.cc/WGK8-JAKK].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

³⁰ *Id.*

unit to be a definite PSG.³¹ A persecuted group does not automatically become a PSG simply because it is persecuted, but this can factor into the visibility of the group.³² Additionally, there is not a closed list of acceptable PSGs.³³ Instead, immigration judges and officials assess PSGs with a three-part test: if the group is (1) composed of individuals with common immutable characteristics; (2) defined with particularity; and (3) socially distinct within society.³⁴ Once the applicant establishes the PSG, the asylum-seeker must prove there is a nexus between the persecution and their identity within that PSG.³⁵

As previously mentioned, persecution based on political opinion is often more difficult to prove in a court of law than persecution based on personal identity categories such as race, nationality, or religion. To prove persecution based on political opinion, the asylum-seeker must provide evidence that the political affiliation exists.³⁶ Unlike membership in a particular social group—where multiple individuals must share a common characteristic—political opinion can be entirely personal and idiosyncratic, such as an opponent of the majority political group that holds the power in a country.³⁷ Political opinion can also be imputed, or attributed to a person, because of their connection to a specific idea or another person who holds this opinion. If the persecutor believes a person holds a political opinion, even if the person does not hold this belief, the political opinion is considered imputed and therefore a protected ground by the United States when considering asylum applications.³⁸

Imputed political opinion can be difficult to prove, but it is not an uncommon justification for seeking asylum. Currently, many college-educated individuals in Nicaragua are fleeing the country due to the current life-threatening political turmoil.³⁹ President Daniel Ortega and the

³¹ USCIS, NEXUS – PARTICULAR SOCIAL GROUP: TRAINING MODULE 22–24 (July 20, 2021), https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf [<https://perma.cc/488G-DHPA>].

³² UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) Of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 14, U.N. Doc HCR/GIP/02/02 (May 7, 2002).

³³ *Id.* ¶ 3.

³⁴ M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

³⁵ *Id.* at 243.

³⁶ *Id.* at 242.

³⁷ *Id.* at 236.

³⁸ *Id.* at 243.

³⁹ *U.S. Relations with Nicaragua*, U.S. DEP’T. OF STATE (Sept. 15, 2022), [https://www.state.gov/u-s-relations-with-nicaragua/#:~:text=Nicaragua%27s%20current%20leaders%20have%](https://www.state.gov/u-s-relations-with-nicaragua/#:~:text=Nicaragua%27s%20current%20leaders%20have%20)

Sandinista Party have hijacked the Nicaraguan government and marked college students who lead political protests as enemies of the state.⁴⁰ Anyone caught protesting in support of the students or affiliated with known state enemies is marked as a political opponent and targeted by the government.⁴¹ To find work, citizens need special government I.D. cards called “carnetes militantes” which pledge their support to President Ortega and the Sandinista Party.⁴² However, these cards are often denied to college-educated Nicaraguan citizens—even those with no ties to the political protests—simply because of the imputed political opinion associated with education.⁴³ Therefore, those with a higher education level are less likely to find work and more likely to be persecuted by the government as a political opponent. This is a current example illustrating imputed political opinion and how it encompasses even those who are not outspoken against a particular political regime.

3. Asylum Application

Asylum-seekers submit multiple documents to the immigration courts to apply for asylum. Firstly, they complete the I-589 form, also referred to as the bare-bones asylum application.⁴⁴ The I-589 is a fillable document that asks identification questions and allows space for applicants to explain which protected groups they are being persecuted under.⁴⁵ Once the applicant submits the I-589, a successful asylum-seeker will accompany their application with supporting documents and evidence to prove their credible fear. Applicants who were able to secure attorneys will typically file legal briefs, country condition reports, and other supplemental evidence such as birth certificates, declarations of applicant, affidavits from friends or family, passports, and other identifying information. While applicants are permitted

20systematically,wife%2C%20Vice%20President%20Rosario%20Murillo [https://perma.cc/N7UE-WCMN]; see Yubelka Mendoza and Maria Abi-Habib, *Nicaragua Seizes Universities, Inching Toward Dictatorship*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/world/americas/nicaragua-universities-ortega-dictatorship.html> [https://perma.cc/MR48-THU9].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Militantes Sandinistas Obligados a Firmar Ficha para Defener con su Vida a Ortega [Sandinista Militants Forced to Sign a File to Defend Ortega with Their Lives], NICAR. INVESTIGA (May 10, 2019, 8:19 PM), <https://nicaraguainvestiga.com/politica/5502-militantes-sandinistas-obligados-a-firmar-ficha-para-defender-con-su-vida-a-ortega> [https://perma.cc/D2GE-JL2V].

⁴³ *Id.*

⁴⁴ See generally DEP’T OF HOMELAND SEC. & DEP’T OF JUST., I-589: APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 5 OMB NO. 1615-0067 (Mar. 3, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> [https://perma.cc/C9L8-Y4CM].

⁴⁵ *Id.* at 3.

to submit these documents pro se, it is much more difficult to know what documents to submit, how to fill out the documentation, and when to submit them in a foreign language and country without legal representation.

While the only required form in an asylum application is the completed I-589, the case can be strengthened with supplemental evidence. Personal declarations outlining applicant's specific persecution, which are typically written and signed by applicant. Legal briefs arguing the grounds for persecution, the validity of the applicant's claimed PSGs, and how the law applies to the facts of applicant's case give the application a legal ground for the granting of asylum.⁴⁶ "The legal brief (also called a 'memorandum of law') typically highlights the legally strongest parts of the claim, overcomes any negative information (such as potential asylum bars), and presents the documents in an effective manner."⁴⁷

Country conditions reports (CCRs) illustrate factual reports of persecution the applicant would face if returned to the home country.⁴⁸ CCRs are important for illustrating objective reasons for persecution, beyond the personal experiences of the applicant.⁴⁹ CCRs give context of country conditions to immigration officers who may have no knowledge about the prevalence of certain issues in the applicant's home country, such as why the applicant does not trust the police or their government to protect them from persecution.⁵⁰

Additionally, documentation to establish proof of relationship—such as birth certificates, marriage certificates, divorce certificates—can be difficult to track down if left behind in the foreign country. With other documentation to illustrate persecution—such as doctor's notes, hospital records, police reports, filed complaints, affidavits—applicants face similar issues with retrieval. Additionally, it is common for electronic proof of persecution, such as threatening voicemails or extorting text messages, to become lost in the dangerous journey across the border.

Asylum applicants with immediate family members also seeking asylum may include "riders" or "derivatives" on their I-589 application. According

⁴⁶ Kristina Gasson, *What Will Happen at Your Individual Immigration Court Hearing in Asylum Case*, NOLO (Aug. 2019), <https://www.nolo.com/legal-encyclopedia/what-will-happen-at-your-individual-immigration-court-hearing-on-an-asylum-case.html> [https://perma.cc/88MJ-J8BB].

⁴⁷ *Id.*

⁴⁸ ISAAC BLOCH, FINDING COUNTRY CONDITIONS EVIDENCE FOR ASYLUM AND FEAR-OF-RETURN IMMIGRATION CASES 5 (June 2020), https://cgrs.uclawsf.edu/sites/default/files/CGRS-CA_Country%20Conditions%20Pro%20Se%20Manual_June%202020.pdf [https://perma.cc/9REY-6NJP].

⁴⁹ *Id.*

⁵⁰ *Id.*

to United States Citizenship and Immigration Services (USCIS), applicants are permitted to include their spouse and unmarried children under age 21 who are in the United States.⁵¹ The principal applicant, or the principal person filing the application, must prove the legal relationship with the derivatives, usually including birth certificates, marriage certificates, and other identification documents.⁵² These derivative applicants are tied to the success of the principal applicant; if the principal applicant's case is denied, the derivatives suffer the same fate.⁵³

After the application is filed, immigrants with pending asylum cases will receive a receipt notice from USCIS and a biometrics notice, scheduling a time for the government to log the applicant's fingerprints.⁵⁴ Applicants are permitted to apply for work authorization by submitting an Application for Employment Authorization, also known as an I-785 form, after their application has been pending for 150 days.⁵⁵ Immigrants who have a pending asylum application can work in the United States, even without permanent legal immigration status.

The next step in the asylum process is the interview with an immigration official. Asylum interviews are typically between one and four hours long.⁵⁶ In this interview, an immigration official asks the applicant questions about their application.⁵⁷ The applicant is forced to retell detailed stories of their past persecution and fear of future persecution while the asylum officer determines if the fear is credible and falls under one of the five protected grounds.⁵⁸ Any inconsistencies between the application and the interview will likely cause the official to flag the application and can negatively impact the final decision. The longer the applicant waits for a scheduled interview, the more likely the applicant will make mistakes recalling information from their

⁵¹ DEP'T OF HOMELAND SEC. & DEP'T OF JUST., *supra* note 44, at 1.

⁵² *Id.* at 6.

⁵³ *Derivative Refugee/Asylum Status for Your Children*, USCIS (July 9, 2020), <https://www.uscis.gov/forms/explore-my-options/derivative-refugeeasylum-status-for-your-children> [https://perma.cc/P3GL-PLGL].

⁵⁴ *USCIS Asylum Process*, ASYLUM SEEKER ADVOC. PROJECT (2022), <https://help.asylumadvocacy.org/faqs-uscis/#uscis-process> [https://perma.cc/J2E9-F8RZ].

⁵⁵ *USCIS Stopped Applying June 2020 Rules Pursuant to Court Order in Asylumworks v. Mayorkas*, USCIS (Sept. 21, 2022), <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/uscis-stopped-applying-june-2020-rules-pursuant-to-court-order-in-asylumworks-v-mayorkas#:~:text=You%20may%20file%20a%20Form,a%20total%20of%20180%20days> [https://perma.cc/7BNZ-TCGZ].

⁵⁶ *What Happens at the Asylum Interview?*, ASYLUM SEEKER ADVOC. PROJECT, <https://help.asylumadvocacy.org/faqs-uscis/#asylum-interview-summary> [https://perma.cc/A9P8-V2PK].

⁵⁷ *Id.*

⁵⁸ *Id.*

I-589. Additionally, applicants must bring an interpreter to their interview if they are not fluent in the English language; this interpreter must be fluent and over 18 years old, but does not need to be officially certified.⁵⁹ USCIS will not provide or pay for interpreters if the applicant fails to bring one or cannot afford one.⁶⁰ Applicants may also have their lawyer present, but again, are not promised the right to counsel.⁶¹

Once they have gained asylum status, the asylee is generally protected against deportation, absent a criminal conviction of a serious crime. Asylees have an established path to permanent residence as an LPR (lawful permanent resident), can leave and re-enter the United States, and can petition their families to the United States.⁶²

4. Affirmative Asylum

There are two primary forms of asylum applications: affirmative and defensive asylum. Immigrants who are applying for asylum “affirmatively” are either not in removal proceedings or are designated as unaccompanied minor children.⁶³ Affirmative asylum applications are sent to USCIS proactively where USCIS immigration officers conduct asylum interviews rather than immigration judges in immigration court.⁶⁴ An affirmative asylum application is submitted before an immigrant is actively in removal proceedings.⁶⁵ Typically, affirmative asylum applicants have had no contact with any immigration officials at the border, which explains why they are not facing removal proceedings.⁶⁶ There are currently 400,000 affirmative asylum cases backlogged with USCIS.⁶⁷ As of 2022, affirmative asylum cases make

⁵⁹ *If I Do Not Speak English, Do I Need to Bring an Interpreter to the Interview?*, ASYLUM SEEKER ADVOC. PROJECT, <https://help.asylumadvocacy.org/faqs-uscis/#asylum-interview-summary> [<https://perma.cc/A9P8-V2PKJ>].

⁶⁰ *Preparing for Your Affirmative Asylum Interview*, USCIS (Sept. 13, 2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/preparing-for-your-affirmative-asylum-interview> [<https://perma.cc/S6VP-RLLS>].

⁶¹ *What Happens at the Asylum Interview?*, *supra* note 56.

⁶² *The Difference Between Asylum and Withholding of Removal*, AM. IMMIGR. COUNCIL, Oct. 6, 2020, at 1, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf [<https://perma.cc/Q47D-EKDKJ>].

⁶³ *Asylum in the United States*, AM. IMMIGR. COUNCIL, Aug. 16, 2022, at 2, https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_0.pdf [<https://perma.cc/V4ZF-HRFA>].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*; E-mail from Erin Schutte Wadzinski, Practicing Immigration Attorney, Kivu Immigration Law, to author (Sept. 28, 2022) (on file with author).

⁶⁷ *Immigration Court Backlog Tool*, TRAC IMMIGR. (Sept. 2022), https://trac.syr.edu/phptools/immigration/court_backlog [<https://perma.cc/4PZB-EQMJJ>].

up only 18% of all asylum applications.⁶⁸ Affirmative applicants are denied approximately one-quarter of the time.⁶⁹

5. Defensive Asylum

A defensive asylum applicant is actively in removal proceedings and is filing an asylum application as a defense to prevent deportation.⁷⁰ These applications are sent to the Immigration Court where removal proceedings are pending.⁷¹ The Immigration Judge will give the applicant their final decision. Asylum-seekers are put into removal proceedings if they were apprehended and documented by immigration officials at the border.⁷² A defensive asylum application is submitted to defend their active removal order. The current immigration court backlog has reached nearly 2,000,000 cases.⁷³ Defensive asylum cases make up nearly 85% of the immigration backlog and are denied at a staggering 60% rate.⁷⁴ This data shows that defensive asylum applicants make up a majority of United States asylum applications and are denied at nearly double the rate of affirmative applicants.

B. Bars to an Asylum Application

There are three complete bars to asylum applications which render the asylum seeker completely ineligible. First, the one-year filing deadline is a hard bar, absent a circumstantial exception.⁷⁵ This strict one-year deadline requires asylum seekers to file their applications within one year of the day they are admitted into the United States.⁷⁶ Asylees who file outside of the one-year deadline must prove their excuse falls under one of the following

⁶⁸ *Speeding up the Asylum Process Leads to Mixed Results*, TRAC IMMIGR. (Nov. 29, 2022), <https://trac.syr.edu/reports/703/#:~:text=The%20much%20higher%20success%20rate,experienced%20by%20defensive%20asylum%20seekers> [<https://perma.cc/JSK8-N2LQ>].

⁶⁹ *Id.*

⁷⁰ *Asylum in the United States*, *supra* note 61.

⁷¹ *Id.*

⁷² *Obtaining Asylum in the United States*, USCIS (Sept. 13, 2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> [<https://perma.cc/PJ8D-VVY6>].

⁷³ Eric Katz, *The Biden Administration Begins Shifting Asylum Determinations to Federal Officers*, GOV'T EXEC. (June 1, 2022), <https://www.govexec.com/management/2022/06/biden-administration-begins-shifting-asylum-determinations-federal-officers/367636> [<https://perma.cc/2XA3-G8XY>].

⁷⁴ *Speeding up the Asylum Process Leads to Mixed Results*, *supra* note 68.

⁷⁵ *Asylum Bars*, USCIS (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-bars> [<https://perma.cc/H595-GCLH>]; 8 C.F.R. § 208.4 (2023); *The One-Year Filing Deadline*, IMMIGR. EQUAL., <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-the-one-year-filing-deadline> [<https://perma.cc/TFZ4-5Z8V>].

⁷⁶ *The One-Year Filing Deadline*, *supra* note 75.

exceptions: (1) changed circumstances or (2) extraordinary circumstances.⁷⁷ Under 8 C.F.R. § 208.4(4), examples of changed circumstances include but are not limited to: change to the country conditions in their home country, change to the United States' laws which alter applicant's asylum eligibility, or change in relationship with the primary applicant of a pending asylum application (i.e., divorce).⁷⁸ Similarly, extraordinary circumstances which permit a late filing include but are not limited to: severe illness, legal disability, ineffective assistance of counsel, a death or severe illness in the applicant's immediate family, or the applicant filed an application within the one-year deadline and was rejected for improper filing.⁷⁹

Second, an applicant who has a previously denied asylum case is precluded from applying again to prevent frivolous applications that slow down the immigration courts, unless again, they can show changed circumstances to justify their second application.⁸⁰ Third, if an applicant can be safely relocated to a third country or within their own country, they are barred from applying for asylum in the United States.⁸¹ For example, if an immigrant from country X travels through country Y to the United States and has dual citizenship in both countries, the United States would likely decline this application and resettle them safely in country Y.⁸²

There are additional bars that will cause immigration officials to deny an immigrant's application. The United States government will reject the asylum applications of individuals with connection to terrorism or "particularly serious crime[s]," as well as their spouse and children.⁸³ Individuals who have been "firmly resettled" in a third country prior to their arrival in the United States will also likely see their asylum applications denied.⁸⁴

C. The Last In, First Out Policy

On January 31, 2018, the Trump Administration enacted the "last in, first out" policy (LIFO) through a USCIS memorandum.⁸⁵ This memorandum

⁷⁷ *Id.*; 8 C.F.R. § 208.4 (2023).

⁷⁸ 8 C.F.R. § 208.4(4) (2023).

⁷⁹ 8 C.F.R. § 208.4(5) (2022).

⁸⁰ *Asylum Bars*, *supra* note 75.

⁸¹ 8 C.F.R. § 208.13(b)(3) (2022).

⁸² *Id.*

⁸³ *Asylum Bars*, *supra* note 75.

⁸⁴ *Id.*

⁸⁵ *USCIS to Take Action to Address Asylum Backlog*, USCIS (Feb. 2, 2018), <https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog> [https://perma.cc/L894-BGY5]; see also *Affirmative Asylum Interview Scheduling*, USCIS (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling> [https://perma.cc/T69C-8RLE].

created a priority list for affirmative asylum application interview scheduling, prioritizing rescheduled interviews, applications pending 21 days or less, and finally, pending applications starting with the newest and working backwards.⁸⁶ Through this memorandum, the LIFO policy prioritizes the newest applications over applications that have been sitting for years in an attempt to reduce the pending application backlog.

LIFO is not a new concept; it was originally introduced by the Clinton Administration in 1995 to “deter asylum-seekers who apply as a means to obtain work authorization.”⁸⁷ LIFO was an active step taken by the United States government to prevent fraudulent or frivolous asylum applications in an effort to quell application pileup. Clinton’s LIFO policy stood for nearly two decades until the Obama Administration adopted a “first in, first out” (FIFO) strategy in 2014 to hack at the mountain of backlogged applications.⁸⁸ Now that the pile has flipped once more, the consequences have been crippling, causing the newer applicants who filed between 2014 and 2017 to fall to the bottom once more.

D. Special Immigrant Juvenile Status (SIJS)

Special Immigrant Juvenile Status (SIJS) is a legal status granted to applicants who: (1) are under 21 years of age, (2) are living in the United States, (3) are unmarried, (4) and have a juvenile U.S. court order stating that the juvenile was abused, neglected, or abandoned by one or both legal parents.⁸⁹ SIJS cases are typically decided within 180 days after filing.⁹⁰ While SIJS offers an opportunity for legal status to juveniles who file before they turn 21 years old, these juveniles still need to obtain a juvenile court order showing abandonment, abuse, or neglect from one or both parents.

1. Challenges Facing SIJS Seekers

Because juvenile court is a state court issue and not a federal court issue, the age-out age for each state varies based on predicate order and

⁸⁶ *USCIS to Take Action to Address Asylum Backlog*, *supra* note 85; *Affirmative Asylum Interview Scheduling*, *supra* note 85.

⁸⁷ Alexandra Martinez, *Asylum-Seekers Have Been Waiting Years for an Interview Because of a Trump-Era Processing System*, PRISM (Mar. 31, 2022), <https://prismreports.org/2022/03/31/asylum-seekers-last-in-first-out> [<https://perma.cc/X35W-TMJV>].

⁸⁸ *DHS: Border, Interior*, RURAL MIGRATION NEWS (Apr. 10, 2018), <https://migration.ucdavis.edu/rmn/more.php?id=2145> [<https://perma.cc/PLJ8-QCGS>].

⁸⁹ *Special Immigrant Juveniles*, USCIS (Mar. 31, 2023), <https://www.uscis.gov/working-in-US/eb4/SIJ> [<https://perma.cc/7L28-HKB7>].

⁹⁰ *Id.*

guardianship laws.⁹¹ Minnesota recently passed S.F. 2736 which extended the guardianship age in juvenile court from 18 to 21, opening the door for older SIJS seekers to obtain this status.⁹² But a majority of the states still have barriers in place restricting SIJS for juveniles aged 18 to 21, even though this age group is protected under federal immigration law.⁹³ Nearly four in every five states require juveniles to obtain a “predicate order,” or a state court order proving dependency, prior to their 18th birthday.⁹⁴ These age limits create huge barriers for juveniles between 18 and 21 seeking SIJS status. Instead of securing a predicate order in juvenile court, many states force older SIJS seekers to be creative in proving one or both of their parents have abused, neglected, or abandoned them.

Juveniles seeking SIJS status who have only one parent on their birth certificate are similarly limited in their ability to prove a parent abused, neglected, or abandoned them. Juvenile courts typically require the parent to be listed on the birth certificate for their parental rights to be removed.⁹⁵ Because of this, establishing maternity or paternity rights becomes difficult if a parent is not listed on the birth certificate. Depending on the state court and judge, DNA testing may be ordered or affidavits may be supplemented to identify the father if he is not listed on the child’s birth certificate.⁹⁶

It is not unusual for some immigrant children to only have one parent on their birth certificate. As many women and children are fleeing domestic abuse and gang violence in their home countries, not naming an abusive or dangerous father on the birth certificate can protect the child. In El Salvador, paternity is established by being named on the birth certificate.⁹⁷ While this does not mean that this is the only way to establish paternity, abused or raped mothers sometimes give birth alone to limit the parental rights of the father.

⁹¹ *State-by-State Age-Out Database*, PROJECT LIFELINE: COLLABORATING FOR KIDS, <https://projectlifeline.us/resources/state-by-state-age-out-database> [https://perma.cc/UMW6-F2BN].

⁹² S.F. 2736, 92nd Leg., Reg. Sess. (Minn. 2022); WCCO Staff, *New Minnesota Law Establishes Juvenile Guardianship for At-Risk Youth*, CBS NEWS MINN. (June 13, 2022, 3:49 PM), <https://www.cbsnews.com/minnesota/news/minnesota-juvenile-guardianship-law> [https://perma.cc/4MLN-H2L6].

⁹³ *State-by-State Age-Out Database*, *supra* note 91.

⁹⁴ *Id.*

⁹⁵ IMMIGRANT LEGAL RES. CTR., FREQUENTLY ASKED QUESTIONS IN 1-PARENT SPECIAL IMMIGRANT JUVENILE STATUS CASES IN CALIFORNIA FAMILY COURTS 20 (Apr. 13, 2016), https://www.ilrc.org/sites/default/files/resources/faqs_familyctsijis_final_4.15.16.pdf [https://perma.cc/FW82-CNMN].

⁹⁶ *Id.*

⁹⁷ OFF. OF CHILD SUPPORT SERVS., A CASEWORKER’S GUIDE TO PROCESSING CASES WITH EL SALVADOR 14 (Feb. 17, 2009), https://www.acf.hhs.gov/sites/default/files/documents/ocse/a_caseworkers_guide_to_processing_cases_with_el_salvador.pdf [https://perma.cc/W29X-NK2E].

Without established paternity, the biological father legally owes no financial child support, however, this fact simply emphasizes that the biological mother often weighs their family safety over the potential monetary compensation.⁹⁸

Raped and abused mothers may feel that this is their only option to sever themselves from their child's biological father. El Salvador has an absolute ban on abortions, criminalizing all abortions with no exceptions for rape, incest, or medical emergency.⁹⁹ Young women are routinely arrested and sentenced to decades in prison for suffering miscarriages, charged with "aggravated homicide."¹⁰⁰ Women in countries with total abortion bans—such as El Salvador, Honduras, Guatemala, Madagascar, Haiti, Dominican Republic, Iraq, Egypt, Mauritania, Congo, Sierra Leone, Senegal, Suriname, Laos, Philippines—are left with little control over their reproductive health.¹⁰¹ Even more countries employ near-absolute abortion bans with few exceptions, leading to many women fleeing the country for safe abortions or to avoid criminal repercussions.¹⁰²

Especially in countries plagued with gang rape culture, rape of women is commonplace.¹⁰³ Machismo beliefs, patriarchal attitudes, and a struggle for dominance fuels gang culture and their view of women.¹⁰⁴ In some Central American countries, specifically the Northern Triangle (composed of El Salvador, Guatemala, and Honduras), two main gangs act as the de facto government: MS-13 and Barrio-18.¹⁰⁵ The gangs view women as their property, relegated to a status that is less than human.¹⁰⁶ "[Women] are routinely referred to as 'bichas' or 'hainas,' which, roughly translated, means

⁹⁸ *Id.*

⁹⁹ Alia Januwalla, *Human Rights Law and Abortion in El Salvador*, HEALTH & HUM. RTS. J. (Aug. 26, 2016), <https://www.hhrjournal.org/2016/08/human-rights-law-and-abortion-in-el-salvador> [<https://perma.cc/Y98G-PSEK>].

¹⁰⁰ Will Grant, *El Salvador's Abortion Ban: 'I Was Sent to Prison for Suffering a Miscarriage'*, BBC NEWS (June 28, 2022), <https://www.bbc.com/news/world-61798330> [<https://perma.cc/47N4-UER6>]; Eloise Barry, *The State of Abortion Rights Around the World*, TIME (June 24, 2022, 2:16 PM), <https://time.com/6173229/countries-abortion-illegal-restrictions> [<https://perma.cc/EGZ9-BMCH>].

¹⁰¹ See Barry, *supra* note 100.

¹⁰² *Id.*

¹⁰³ See Januwalla, *supra* note 99.

¹⁰⁴ *Id.*

¹⁰⁵ MS13, INSIGHT CRIME (Sept. 22, 2021), <https://insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile> [<https://perma.cc/RB6P-TLZM>].

¹⁰⁶ STEVEN DUDLEY ET AL., INSIGHT CRIME, MS13 IN THE AMERICAS: HOW THE WORLD'S MOST NOTORIOUS GANG DEFIES LOGIC, RESISTS DESTRUCTION 26 (Feb. 16, 2018), <https://insightcrime.org/wp-content/uploads/2018/02/MS13-in-the-Americas-InSight-Crime-English-3.pdf> [<https://perma.cc/S4GS-E3QS>].

animals.”¹⁰⁷ Rape is so infused with gang culture that “women who were accepted to the gang could choose to be literally gang raped as their initiation.”¹⁰⁸ As a method of physical control of territory, gangs collect “la renta” (rent) from people in their neighborhoods.¹⁰⁹ This rent is not always monetary; many gangs include sexual violence in the “price” or “rent” demanded of girls.¹¹⁰ Women and girls are also targets of gang sex trafficking.¹¹¹

Even if women and girls escape sexual violence in their home country, their journey to the United States is not safe. “According to a stunning Fusion investigation, 80 percent of women and girls crossing into the U.S. by way of Mexico are raped during their journey.”¹¹² This rape is sometimes perpetrated by their guides, government officials, fellow migrants, and sometimes even used as a form of payment for a bribe.¹¹³ “[W]hile many of these girls are fleeing their homes because of fears of being sexually assaulted, according to the UNHCR, they are still meeting that same fate on their journey to freedom.”¹¹⁴ The danger of rape along the journey is so common and well-known to travelers that many women and girls take contraceptives or get a birth control injection before they leave.¹¹⁵

All of these factors combine to create an environment that women have little to no control over, including a lack of control over their own physical and sexual health. Preventing the biological father of their child from putting his name on the birth certificate may be her only option for safety and control over herself and her child. Prospective SIJS applicants are limited by their ability to show that a parent abandoned them, and abandonment does not include a parent not being named on the birth certificate. Therefore, the environment fostered by gang culture can inhibit a child’s ability to apply for legal status even after they escape the country.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 39.

¹¹⁰ Joanne Lin et al., *Thousands of Girls and Women Are Fleeing Rape, Sexual Violence and Torture in Honduras, El Salvador and Guatemala*, CTR. FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/talking_points_and_stories [<https://perma.cc/8QHQ-7LZ3>].

¹¹¹ DUDLEY ET AL., *supra* note 106, at 45.

¹¹² Eleanor Goldberg, *80% of Central American Women, Girls Are Raped Crossing into the U.S.*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/central-america-migrants-rape_n_5806972 [<https://perma.cc/PB63-Y9P8>].

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*; Lin et al., *supra* note 110.

E. Unaccompanied Minors

Unaccompanied Minor, also called an Unaccompanied Alien Child (UAC), is a label assigned to immigrant children who entered the United States without authorization while they were under 18 and without an accompanying legal guardian.¹¹⁶ UACs are permitted to file affirmatively for asylum even if they are actively in removal proceedings, as long as they have no legal guardian able to provide care for them in the United States.¹¹⁷ UACs are also not bound to the one-year filing deadline of general asylum cases, nor the asylum bar of traveling through a “safe third country.”¹¹⁸

Who are UACs? Statistically speaking, UACs overwhelmingly travel to the United States from Central American countries, with Guatemalan and Honduran unaccompanied minors making up 79% of all UACs in 2021.¹¹⁹ Sixty-nine percent of UACs in 2021 were between the ages of 15 and 17.¹²⁰ Sixty-six percent of UACs in 2021 were male and 34% were female.¹²¹

When entering the country alone, minors are flagged as UACs after being stopped by the Department of Homeland Security (DHS) and transferred to the Office of Refugee Resettlement (ORR).¹²² The ORR designates the minor as a UAC, and then assign the minor to a state-licensed, ORR-funded care facility until they are able to find them a suitable sponsor in the United States.¹²³ ORR care facilities provide services including: “[c]lassroom education, [h]ealth care, [s]ocialization/recreation, [v]ocational training, [m]ental health services, [f]amily reunification, [a]ccess to legal services; and [c]ase management.”¹²⁴

¹¹⁶ See *Who Is an Unaccompanied Child?*, NAT’L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/unaccompanied-immigrant-children#:~:text=An%20unaccompanied%20child%20is%20defined,accompanying%20parent%20or%20legal%20guardian> [https://perma.cc/7JAG-SVEU].

¹¹⁷ *Minor Children Applying for Asylum by Themselves*, USCIS (Dec. 8, 2021), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves> [https://perma.cc/4JNK-MTU4].

¹¹⁸ ANDREW CRAYCROFT, IMMIGRANT LEGAL RES. CTR., UNACCOMPANIED CHILDREN AND THE ONE-YEAR FILING DEADLINE 1–2 (Feb. 2020), https://www.ilrc.org/sites/default/files/resources/uacs_and_the_one-year_filing_deadline-final_0.pdf [https://perma.cc/P99A-YADX].

¹¹⁹ *Fact Sheets and Data*, OFF. OF REFUGEE RESETTLEMENT (Oct. 13, 2023), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [https://perma.cc/UZ6E-JKTR].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *About the Program*, OFF. OF REFUGEE RESETTLEMENT (Sept. 2, 2022), <https://www.acf.hhs.gov/orr/programs/ucs/about> [https://perma.cc/XMA4-QWGC].

¹²³ *Id.*

¹²⁴ *Id.*

1. UAC Assigned Social Worker

Although UACs do not have a legal parent or guardian in the United States, once they are released from ORR care, they do live with a sponsor and are assigned a social worker by ORR. While sponsors are often family or friends of the UAC, ORR finds sponsors for UACs who have no connection to the child as well.¹²⁵ A UAC-assigned sponsor must be over 18 and able to provide for the child physically and mentally.¹²⁶ Sponsors must pass a background check and must not engage in activities that would pose a risk to the UAC, as well as “agree to ensure the child’s presence at all future immigration proceedings.”¹²⁷ Because UACs are children and may be fleeing dangerous situations and seeking safety from violence or trafficking, these sponsor assignments and placements are not publicly available.¹²⁸

The assigned social worker, affiliated with the United States Department of Health and Human Services, provides check-ins on the UAC and helps them avoid deportation. The social worker can accompany the minor to interviews and court dates, sometimes serving as an interpreter when necessary.¹²⁹ Social workers are critical because they provide knowledge and understanding of the system to a vulnerable population.

2. UACs and TVAP

Some UACs receive a year of grant-funded case management through the Trafficking Victim Assistance Program (TVAP), which is a grant program that funds comprehensive case management services.¹³⁰ TVAP provides comprehensive case management to individuals who are either victims of trafficking or are at “risk of experiencing a severe form of trafficking.”¹³¹ UACs in particular, face a very high risk of human trafficking. They are often

¹²⁵ *See id.*

¹²⁶ *See Unaccompanied Children Released to Sponsors by State*, OFF. OF REFUGEE RESETTLEMENT (Oct. 27, 2022), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state> [<https://perma.cc/WY2R-PUQY>].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Interview with Veronica Stafford, former Social Worker, in Iowa City, Iowa (Nov. 30, 2022); ROXANA TORRICO, NAT’L ASS’N OF SOC. WORKERS, MEETING THE NEEDS OF IMMIGRANT CHILDREN AND YOUTH IN CHILD WELFARE 2–3 (June 2010), <https://www.socialworkers.org/assets/secured/documents/practice/clinical/WKF-MISC-45510.ChildrenPU.pdf> [<https://perma.cc/Q5YL-3NCY>].

¹³⁰ *Trafficking Victim Assistance Program (TVAP) Fact Sheet*, OFF. ON TRAFFICKING IN PERSONS, <https://www.acf.hhs.gov/otip/fact-sheet/resource/tvap#:~:text=The%20Trafficking%20Victim%20Assistance%20Program,through%20a%20national%20network%20of> [<https://perma.cc/DZ44-VTY7>].

¹³¹ U.S. DEP’T OF HEALTH & HUM. SERVS., OTIP-FS-19-03, TRAFFICKING VICTIM ASSISTANCE PROGRAM, FY 2012–2018 DATA FACT SHEET 1 (Oct. 31, 2019).

travelling alone and with no parental protection or support and they often flee their home country hurriedly.¹³² The Congressional Research Service estimates that “75%-80% of unaccompanied children arriving at the U.S.-Mexico border have traveled with smugglers.”¹³³ Because so many UACs are trafficking victims, they are common recipients of TVAP assistance.

3. Challenges Faced by UACs

UACs face unique challenges in the United States legal system. Without a legal parent or guardian present, they are still expected to complete paperwork and filings in English.¹³⁴

Once a child is released from an ORR shelter to a sponsor or to foster care, it is the child’s responsibility – regardless of age or legal representation – to submit paperwork to inform the court that the child has moved and to file a formal motion to change venue if the new address is under the jurisdiction of a different court. Children who do not properly update their address could be ordered deported *in absentia* for failing to appear in court.¹³⁵

Many unaccompanied children are deported each year for missing court hearings and filing deadlines.¹³⁶ Because UACs are permitted to apply for asylum affirmatively, regardless of whether they had contact with immigration officials at the border, this demographic is one of the most affected by LIFO policy. Additionally, sponsors who have legal status or who have no priority for deportation may continue to distrust the government.¹³⁷ This continuous fear of deportation can lead to sponsors ignoring court dates or calls from the UACs assigned social worker in an attempt to protect their family unit.

Despite the assignment of sponsors and social workers to UACs, these strategies are not always foolproof at keeping UACs on track to gain legal status. First, it can be difficult for the social worker to locate a UAC if they change their address or phone number without updating the government by filing an Alien’s Change of Address form, or the AR-11, to continue receiving

¹³² *Fact Sheet: Unaccompanied Migrant Children (UACs)*, NAT’L IMMIGR. F. (Nov. 2, 2020), <https://immigrationforum.org/article/fact-sheet-unaccompanied-migrant-children-uacs> [<https://perma.cc/S6W8-V4QY>].

¹³³ *Id.*

¹³⁴ *Who Is an Unaccompanied Child?*, *supra* note 116.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Betsy Swan, *Legal Immigrants Fear Getting Arrested in Court by ICE*, DAILY BEAST (Apr. 10, 2017, 2:01 PM), <https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice> [<https://perma.cc/X4QJ-BXRT>]; TORRICO, *supra* note 129, at 1.

correspondence from USCIS.¹³⁸ It is not uncommon for asylum-seekers who do not have legal representation or an involved social worker to miss this step. Additionally, low-risk UACs are typically only on a social worker's docket for the first 90 days.¹³⁹ Typically, UACs file affirmative asylum applications. As of 2021, the average wait time for an affirmative asylum case is approximately four years.¹⁴⁰ Because social workers may only be involved for the first 90 of the 1489 days the average applicant waits for a decision, this allows for many UACs to fall between the cracks.¹⁴¹ Many UACs in this position miss court dates and therefore can be ordered removed by an Immigration Judge *in absentia*, also known as someone who received written notice of their court hearing and still failed to appear.¹⁴²

F. Intersection of Asylum, SIJS, UACs, and LIFO

If fiscally possible, it is ideal to apply for multiple forms of immigration relief. Oftentimes, immigrant children qualify for more than one avenue of immigration relief.¹⁴³ Children who traveled to the United States with one parent likely will apply for asylum as a derivative and SIJS. Children can also apply for asylum on their own, separate from a derivative application connected to their parent. Children who traveled to the United States alone will be designated as a UAC and can apply for affirmative asylum as well as SIJS or other visas such as the T or U visas.¹⁴⁴

Asylum cases are not typically decided quickly: more than “four out of

¹³⁸ *How to Change Your Address*, USCIS (Oct. 24, 2023), <https://www.uscis.gov/addresschange> [<https://perma.cc/D6Z3-E5S9>].

¹³⁹ Interview with Veronica Stafford, former Social Worker, in Iowa City, Iowa (Nov. 30, 2022).

¹⁴⁰ *A Mounting Asylum Backlog and Growing Wait Times*, TRAC IMMIGR. (Dec. 22, 2021), <https://trac.syr.edu/immigration/reports/672> [<https://perma.cc/TZ7C-EMPF>].

¹⁴¹ *See id.*

¹⁴² *FOIA Disclosures on in Absentia Removal Numbers Based on Legal Representation*, CLINIC LEGAL (Mar. 27, 2020), <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal> [<https://perma.cc/4YLF-AM9X>].

¹⁴³ ILRC Attorneys & Berkeley Anti-Trafficking Project (BATPro) Students, *Overview and Cost of Common Immigration Remedies for Youth*, IMMIGRANT LEGAL RES. CTR., June 2021, at 1, https://www.ilrc.org/sites/default/files/resources/6-21_batpro_fee_rule-final.pdf [<https://perma.cc/G52S-VL92>].

¹⁴⁴ T visas give sex or labor trafficking victims temporary status in the United States for up to four years and U visas are reserved for victims of crime in the United States who assist police in finding the perpetrator and suffer mentally or physically from the crime. *Victims of Human Trafficking: T Nonimmigrant Status*, USCIS (Oct. 21, 2023), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> [<https://perma.cc/Z48N-9N9N>]; *Victims of Criminal Activity: U Nonimmigrant Status*, USCIS (Mar. 20, 2023), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> [[https://perma.cc/VNS6-94\[X\]](https://perma.cc/VNS6-94[X])].

every ten Immigration Court cases in which asylum applications have been filed since October 2000 are still pending.”¹⁴⁵ The average asylum case will spend between four-and-a-half and six years pending before it hears a final decision.¹⁴⁶ Because it reshuffles docket prioritization, LIFO plays a significant role in who remains stuck in the backlog.

As a USCIS policy, LIFO only explicitly applies to affirmative asylum cases because they are governed by USCIS. However, recent defensive asylum cases controlled by the immigration courts have seen immediate turnaround as well. Practicing immigration attorney Erin Schutte Wadzinski has observed near immediate hearings scheduled for multiple of her defensive asylum applicants in the Fort Snelling Immigration Court.¹⁴⁷ There is evidence of the Trump, Obama, and Biden Administrations utilizing LIFO strategies in immigration court.¹⁴⁸ Evidence of immediate turnaround suggests that Immigrations Courts are influenced by USCIS policies as well, which expands the impact of LIFO beyond only affirmative asylum cases to defensive cases as well.

Under LIFO-era priorities, children who apply for both asylum and SIJS will potentially hear from their asylum case first. This presents challenges, especially if they applied for asylum derivatively on their parent’s principal application. If the parent loses their asylum case but the child’s SIJS case is still pending, the child is not considered a priority for deportation.¹⁴⁹ Instead, an immigration attorney can petition against removal due to the pending SIJS application.¹⁵⁰ While the child likely will not face deportation, the principal applicant is not so lucky. Facing impending removal, parents are forced to choose to bring their children back to their home country where they fear persecution, or to leave their child and find someone to raise their child in

¹⁴⁵ *A Mounting Asylum Backlog and Growing Wait Times*, *supra* note 140.

¹⁴⁶ *Id.*

¹⁴⁷ E-mail from Erin Schutte Wadzinski, Practicing Immigration Attorney, Kivu Immigration Law, to author (Sept. 28, 2022) (on file with author).

¹⁴⁸ Kate Morrissey, *Immigration Court Pushes New Asylum Seekers to Front of the Line, Challenging Them to Find Lawyers*, SAN DIEGO UNION-TRIB. (Feb. 27, 2022, 5:00 AM), <https://web.archive.org/web/20220228234646/https://www.sandiegouniontribune.com/news/immigration/story/2022-02-27/asylum-families-immigration-court-dedicated-docket> [<https://perma.cc/2ZMX-N3DW>].

¹⁴⁹ *Am I Protected from Deportation While My VAWA Self-Petition Is Pending?*, WOMENSLAW.ORG (Aug. 15, 2022), <https://www.womenslaw.org/laws/federal/immigration/vawa-abuse-victims/vawa-self-petitions/applying-vawa-self-petition/am-i#:~:text=Unfortunately%2C%20having%20a%20pending%20VAWA,on%20your%20pending%20self%20petition> [<https://perma.cc/UR3Z-9YJ5>].

¹⁵⁰ *Id.*

the United States.¹⁵¹ Deported parents plead to extended family members and close friends, often immigrants themselves, to take care of their children in order to protect them from persecution in their home country.¹⁵²

G. Why Does Priority Speed Matter

Some administrations, such as the Clinton and Trump Administrations, argue that speed in the asylum process is essential to preventing frivolous applications.¹⁵³ Supporters of LIFO claim that the policy is necessary to deter immigrants from applying for asylum without credible fear of returning to their home country simply to gain work authorization in the United States.¹⁵⁴ “Historically, the goal with the last-in, first-out concept is to process the newest cases first, so that people who are rejected from the asylum system are deported and can tell others that it’s not worth it to go because they will be turned back around so quickly.”¹⁵⁵

III. ANALYSIS

LIFO is a dangerous policy that harms asylum applicants regardless of whether it speeds or slows the application process. Interviews scheduled too quickly leave applicants unprepared, but interviews scheduled too slowly prevent the applicant from petitioning family members and partaking fully in society. In fact, LIFO is the incorrect response altogether. Instead, this Note suggests that the government assign some officials to work in reverse order to give closure to waiting applicants, implement a five year “cutoff period” where applications are reprioritized after sitting for five years, and hire more immigration officials to sift through the backlog. By utilizing reprioritization strategies, fewer applicants run the risk of slipping through the cracks of the system.

A. LIFO Prioritizes Some Applicants Too Quickly

LIFO supporters assume that applicants want to have their interviews as soon as possible. However, the sooner the applicant’s interview is scheduled, the less time they have to prepare.¹⁵⁶ LIFO prioritizes applications which

¹⁵¹ Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?*, PEW (Oct. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children> [https://perma.cc/LJ6D-P9WC].

¹⁵² *Id.*

¹⁵³ Martinez, *supra* note 87.

¹⁵⁴ *Id.*

¹⁵⁵ Morrissey, *supra* note 148.

¹⁵⁶ Catalina Villegas, *How Last In, First Out Immigration Policy Impacts Migrants Differently*, SPECTRUM NEWS (Apr. 12, 2019, 2:30 PM), <https://spectrumnews1.com/ca/la-west/news/2019/04/12/how-the-last-in--first-out-trump-immigration-policy-impacts-migrants-differently> [https://perma.cc/7X7S-YEKH].

have been pending 21 days or less over long-sitting cases.¹⁵⁷ Defensive asylum applicants actively facing Immigration Court are given a scheduling order, which allows them 60 days to submit all of their supporting evidence.¹⁵⁸ By scheduling interviews sooner, LIFO drastically reduces the amount of time applicants have to prepare their cases. As the scheduling orders are issued more quickly and court dates are moved up, applicants and their attorneys scramble to complete the I-589 application, prepare legal briefs, country conditions reports, and to gather supporting evidence such as birth certificates, marriage certificates, and other proof of persecution from their home countries.¹⁵⁹

The difficulty of compiling these documents, paired with the 60-day scheduling orders, makes immigrations cases essentially impossible to win without a lawyer. Less than one-third of all unauthorized immigrants self-identify as proficient in English,¹⁶⁰ and all court documents, application materials, and notices from the United States government are mailed in English only.¹⁶¹ Unlike criminal defendants, immigrants facing court dates are not appointed counsel if they are unable to afford an attorney.¹⁶² According to an American Immigration Council study, only 37% of all immigrants secured legal representation from 2007 to 2012.¹⁶³ Syracuse's TRAC Immigration dataset shows that only 52% of represented asylum applications are denied, but a whopping 82% of unrepresented asylum applications are denied.¹⁶⁴ Representation plays a huge role in whether an asylum applicant is granted refuge in the United States, and LIFO exacerbates

¹⁵⁷ See USCIS to Take Action to Address Asylum Backlog, *supra* note 85; *Affirmative Asylum Interview Scheduling*, *supra* note 85.

¹⁵⁸ Child's Immigr. L. Acad., *EOIR Revises Case Flow Processing in April 2021 PM*, A.B.A., <https://cilacademy.org/2021/06/07/eoir-revises-case-flow-processing-in-april-2021-pm> [https://perma.cc/88P3-P5XW].

¹⁵⁹ See Villegas, *supra* note 156.

¹⁶⁰ Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrants Are More Proficient in English, More Educated Than a Decade Ago*, PEW RSCH. CTR. (May 23, 2019), <https://www.pewresearch.org/fact-tank/2019/05/23/u-s-undocumented-immigrants-are-more-proficient-in-english-more-educated-than-a-decade-ago> [https://perma.cc/2R7R-XRVF].

¹⁶¹ LAURA ABEL, LANGUAGE ACCESS IN IMMIGRATION COURTS 9 (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf [https://perma.cc/7XV8-25KT].

¹⁶² *Access to Counsel*, NAT'L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/access-counsel> [https://perma.cc/9NLK-5JX4].

¹⁶³ INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 1, 5 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/N77J-34PW].

¹⁶⁴ *Asylum Decisions*, TRAC IMMIGR. (Sept., 2022), <https://trac.syr.edu/phptools/immigration/asylum> [https://perma.cc/C5FP-HD8Y].

this issue by speeding up the timeline and giving applicants even less time to find a lawyer.

B. Defensive Asylum's Version of LIFO Prioritizes Some Applicants Too Quickly

USCIS is not the only immigration agency who practices “last in, first out” strategies. Immigration courts have implemented their version of near-immediate prioritization of new applicants. In fact, the defensive asylum prioritization speed of the Trump Administration has been nicknamed the “rocket docket” because many families’ hearings were scheduled so quickly that they didn’t find out in time to show up and were ordered deported in their absence.¹⁶⁵ LIFO gives applicants even less time to prepare their cases and find legal representation,¹⁶⁶ and this process is nearly insurmountable without an immigration attorney.¹⁶⁷

The newest iteration of the rocket docket, the Biden Administration’s “Dedicated Docket,” prioritizes most recent asylum applications over pending applications.¹⁶⁸ Under the Dedicated Docket, “certain recently arrived families may be placed on the Dedicated Docket. Families may qualify if they are apprehended between ports of entry [along the Southwest border] on or after Friday, May 28, 2021, placed in removal proceedings, and enrolled in Alternatives to Detention (ATD).”¹⁶⁹ These cases are designated to ten cities, subject to Immigration Judge availability: “Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle.”¹⁷⁰ Once on the Designated Docket, immigration judges are supposed to decide filed asylum cases within 300 days.¹⁷¹ The Designated Docket, nicknamed the “new rocket docket” by critics, has been condemned for likewise prioritizing the speed of the decision over justice and due process.¹⁷² Implemented for the same reason as LIFO, to reduce the backlog, the Biden Administration designed the Designated Docket to chip away at

¹⁶⁵ Morrissey, *supra* note 148.

¹⁶⁶ *Id.*

¹⁶⁷ Villegas, *supra* note 156 (writing that lawyer Edward Pilot said, “I don’t know how people are able to accomplish this without proper legal representation.”).

¹⁶⁸ Morrissey, *supra* note 148.

¹⁶⁹ Press Release, Off. of Pub. Affs., DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021) (on file with the United States Department of Justice).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Dedicated Docket for Immigrant Families Arriving at the Southwest Border*, NAT’L IMMIGR. F. (Aug. 30, 2022), <https://immigrationforum.org/article/explainer-dedicated-docket-for-immigrant-families-arriving-at-the-southwest-border/#:~:text=The%20purpose%20of%20the%20new,entry%20at%20the%20Southwest%20Border.%E2%80%9D> [https://perma.cc/7Y3X-AWZY].

the pile of pending asylum applications by screening and stopping frivolous applications at the outset.¹⁷³ The Designated Docket creates identical issues as LIFO, reducing the amount of time immigrants have to find a lawyer and prepare their case prior to their hearing.¹⁷⁴

C. LIFO and Rocket Dockets Disproportionately Affect Immigrant Children

While policies such as LIFO and the “Rocket Docket” harm all asylum applicants, minors are affected disproportionately; they have no control over the actions of their guardian, whether they choose to retain counsel or file their application within the one-year deadline. Derivative applicants who are riders on their parent’s asylum case are bound to the principal application and therefore suffer from timing missteps or their parent representing themselves.¹⁷⁵ Derivative applicants have no say in these decisions yet can be punished by them. A late application submitted by a principal applicant hurts the derivative equally.

UACs, just like their adult-immigrant counterparts, have no right to court-appointed counsel.¹⁷⁶ The system is set up to place responsibility on young immigrant children, regardless of age, and force them to take control of their immigration cases.¹⁷⁷ Because of the vulnerability, immaturity, and lack of experience of UACs, whether the child has legal representation is one of the main factors of their case’s outcome.¹⁷⁸ In unaccompanied minor cases, only 15% of unrepresented UACs were permitted to stay in the country.¹⁷⁹ Contrastingly, 73% of represented UACs won their cases.¹⁸⁰ While this statistic shows the importance of an immigration attorney, it may also be skewed by attorneys only accepting cases they believe they can win. LIFO exacerbates this division by speeding up the amount of time UACs have to find representation and forcing children to build their case wholly on their own.

Some juveniles have pending asylum and SIJS cases and may be negatively impacted by varying wait times. As discussed in the background section, the asylum and SIJS applications are assessed at different speeds. Under LIFO, a derivative applicant has a chance of receiving a final decision

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Derivative Refugee/Asylum Status for Your Children*, *supra* note 53.

¹⁷⁶ *Dedicated Docket for Immigrant Families Arriving at the Southwest Border*, *supra* note 172.

¹⁷⁷ *Who Is an Unaccompanied Child?*, *supra* note 116.

¹⁷⁸ *Fact Sheet: Unaccompanied Migrant Children (UACs)*, *supra* note 132.

¹⁷⁹ *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/371> [<https://perma.cc/TT4Q-6X86>].

¹⁸⁰ *Id.*

from their parent's asylum case before their SIJS case is processed. If denied, the principal applicant will be ordered removed and will be deported,¹⁸¹ but the minor can file a motion to administratively close removal proceedings due to their pending SIJS case.¹⁸² Administratively closing removal proceedings pauses future court appearances and is used as a docket management tool to remove cases with low priority from the Immigration Judge's docket.¹⁸³ In short, the Immigration Judge is agreeing to pause removal proceeding conditioned on a pending case. If approved, minors with pending SIJS cases are not a priority for removal and therefore are permitted to stay in the United States even if their family is removed.

Akin to how juveniles with pending SIJS cases are not priorities for removal, all children born in the United States have citizenship and therefore are not removable. The Fourteenth Amendment guarantees birthright citizenship, providing that children born on United States soil have U.S. citizenship.¹⁸⁴ Children of undocumented immigrants born in the United States are citizens of the United States, regardless of whether their parents are documented. "Given how many women have arrived at the U.S.-Mexico border in the past two years, it's reasonable to estimate that there have been thousands who were pregnant, or became pregnant while they waited to cross into the U.S."¹⁸⁵ The children born in the United States to undocumented parents are not subject to orders of removal or deportation.

Because LIFO speeds up the asylum case, immigrants are more likely to find themselves in scenarios where the children are permitted to stay but the parents must go. LIFO also reduces the amount of time a family has to decide whether they will take their child with them to their home country or find a suitable guardian in the United States. "As many as half-a-million U.S.-citizen children experienced the deportation of at least one parent from 2011

¹⁸¹ *What Happens if They Deny My Asylum Request?*, WOMENSLAW.ORG (Dec. 17, 2020), <https://www.womenslaw.org/laws/federal/immigration/asylum/asylum-process/what-happens-if-they-deny-my-asylum-request> [https://perma.cc/8B3P-2VLL].

¹⁸² KIDS IN NEED OF DEFENSE, CHAPTER 4: SPECIAL IMMIGRANT JUVENILE STATUS 21 (Apr. 2015), [https://perma.cc/ERK9-YCKL].

¹⁸³ Memorandum from David L. Neal, Dir. of Exec. Off. for Immigr. Rev., Administrative Closure 1 (Nov. 22, 2021) (on file with the United States Department of Justice).

¹⁸⁴ Hana Callaghan, *Birthright Citizenship for Everyone Born on U.S. Soil Is the Law of the Land*, MARKKULA CTR. FOR APPLIED ETHICS (Dec. 14, 2018), <https://www.scu.edu/ethics/all-about-ethics/birthright-citizenship-for-everyone-born-on-us-soil-is-the-law-of-the-land/> [https://perma.cc/5S3P-WZ9N].

¹⁸⁵ Jasmine Aguilera, *Pregnant Asylum-Seekers Needed Help at the Border. Inside the Program That Provided Care—and Community*, TIME (Mar. 3, 2021, 6:24 PM), <https://time.com/5942119/pregnant-asylum-seekers-border-clinic> [https://perma.cc/49WG-D567].

through 2013.”¹⁸⁶

Children who experience the deportation of at least one parent suffer great trauma due to toxic stress.

Children experience toxic stress when they are suddenly separated from their parents, which negatively impacts brain development. They are also at greater risk of developing chronic mental health conditions that include depression and post-traumatic stress disorder (PTSD), as well as physical conditions such as cancer, stroke, diabetes, and heart disease.¹⁸⁷

Children who lose their parent(s) to deportation are more likely to experience suicidal thoughts and suffer from depression.¹⁸⁸ Not only are there mental, emotional, and physical risks associated with a parent’s deportation, but also there is a serious financial toll. “A study of immigration enforcement in six U.S. locations between 2006 and 2009 found that families lost 40 to 90 percent of their income, or an average of 70 percent, within six months of a parent’s immigration-related arrest, detention, or deportation.”¹⁸⁹ After losing a parent to deportation, the remaining family often struggles to pay rent and experience a high rate of foreclosures.¹⁹⁰

D. LIFO Pushes Some Applicants to the End of the Line

Alternatively, earlier applicants who are pushed to the end of the docket suffer due to the continued social restrictions accompanying their undocumented status, the mental toll of constant uncertainty, and the inability to petition their family member to the United States. Once applicants have had adequate time to build their case and prepare for their interview or court date, due process demands the rendering of a final decision.¹⁹¹ Instead, the current asylum backlog continues to grow; the backlog is eight times larger than it was ten years ago.¹⁹² The average asylum case waits

¹⁸⁶ *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [<https://perma.cc/JC57-XBGQ>].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRAC IMMIGR. (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675/#:~:text=The%20backlog%20now%20is%20eight,did%20a%20follow%20up%20study> [<https://perma.cc/XA24-J2J7>].

approximately five years for a final decision.¹⁹³ If some applications are being prioritized and decided immediately under LIFO, there are an equal number of applications waiting even longer to balance out the five-year average.

Once an applicant is sufficiently prepared for their interview, due process is undermined by years-long delays. Asylum-seekers with cases hung in limbo indefinitely are at high risk for negative mental health impacts. According to a 2011 study which focused on the different stressors suffered by asylum-seekers including uncertainty waiting for a final decision, asylum-seekers “are at substantially higher risk than the general population for a variety of specific psychiatric disorders.”¹⁹⁴ This risk relates to “their exposure to war, violence, torture, forced migration and exile and to the uncertainty of their status in the countries where they seek asylum — with up to 10 times the rate of post-traumatic stress disorder as well as elevated rates of depression, chronic pain and other somatic complaints.”¹⁹⁵

Additionally, asylum-seekers with applications pending are permitted to apply for work authorization yet remain unable to apply for lawful permanent residence until their asylum applications are approved.¹⁹⁶ Lawful permanent residents, also known as green-card holders, are permanently permitted to live and work in the United States.¹⁹⁷ Lawful permanent residents are able to own property, receive financial aid from public universities, join the United States armed forces, work without restrictions.¹⁹⁸ Arguably one of the biggest advantages of lawful permanent resident status is the ability to petition family members, including spouse and unmarried children, to immigrate to the United States.¹⁹⁹ Asylum applicants, who are actively fleeing persecution in their home countries, are sometimes forced to leave their spouse and/or children behind in these dangerous conditions while they await due process.²⁰⁰ Without the ability to petition family members, asylum applicants

¹⁹³ *Id.*

¹⁹⁴ Laurence J. Kirmayer et al., *Common Mental Health Problems in Immigrants and Refugees: General Approach in Primary Care*, CANADIAN MED. ASS'N J. 959, 960 (2011).

¹⁹⁵ *Id.*

¹⁹⁶ *The Difference Between Asylum and Withholding of Removal*, *supra* note 62.

¹⁹⁷ *Lawful Permanent Residents (LPR)*, DEPT. OF HOMELAND SEC. (Oct. 21, 2023), [https://www.dhs.gov/immigration-statistics/lawful-permanent-residents#:~:text=Lawful%20permanent%20residents%20\(LPRs\)%2C,permanently%20within%20the%20United%20States](https://www.dhs.gov/immigration-statistics/lawful-permanent-residents#:~:text=Lawful%20permanent%20residents%20(LPRs)%2C,permanently%20within%20the%20United%20States) [<https://perma.cc/H9TZ-QA3Z>].

¹⁹⁸ *Id.*

¹⁹⁹ *Family of Green Card Holders (Permanent Residents)*, USCIS (July 14, 2015), <https://www.uscis.gov/family/family-of-green-card-holders-permanent-residents#:~:text=As%20a%20Green%20Card%20holder,Unmarried%20children%20under%2021> [<https://perma.cc/5QZL-SZ4F>].

²⁰⁰ Erynn Elizabeth Reitmayer, *When Parents Get Deported Citizen Children Fight to Survive*, ARIZ.

must remain separated from their family until they obtain lawful permanent resident status or until their family member seeks status on their own.

Oftentimes, asylum-seekers are barred from seeking higher education while their case is pending. Isaac, a refugee from Egypt, was “unable to partake in educational opportunities while stuck in the asylum backlog for five years. He could not join any of the master’s programs in journalism that he had been accepted into because his lack of permanent status made him ineligible for student loans.”²⁰¹ As LIFO increases the wait times of those at the end of the line, students such as Isaac are unable to receive financial aid until their case is decided.

For one mother, being pushed to the back of the line indirectly resulted in serious harm to her daughter. “One applicant was a mother with a 14-year-old daughter in Ethiopia. [While she was awaiting her interview, h]er daughter was raped as punishment for her mother being a known dissident. . . . [H]ad her mother gotten an interview, she could have brought her daughter to the U.S. and prevented the attack.”²⁰² LIFO’s long wait times impacts asylum-seekers and torture survivors the most. “Many applicants are separated from family members who are still in their home countries.”²⁰³ According to “Andrea Barron, the advocacy program manager for Torture Abolition and Survivors Support Coalition, . . . applicants report that their children experience ongoing violence and are punished for their parents being known as dissidents.”²⁰⁴

Not all families stay together when migrating to another country. Two main factors dissuading family migration are rigid immigration policies and the high financial burden that accompanies uprooting an entire family and moving across borders.²⁰⁵

For many immigrants, especially those from Central America and Mexico, it is common for a mother and/or father to migrate to the United States and leave their children behind in the care of relatives or family friends. Then, after the parent(s) have achieved some degree of

STATE UNIV. NEWS 21 (Aug. 2010), <https://asu.news21.com/2010/08/children-of-deported-parents/index.html> [<https://perma.cc/452L-YVBF>].

²⁰¹ Cora Wright, *Barriers and Backlog: Asylum Office Delays Continue to Cause Harm*, HUM. RTS. FIRST (Oct. 3, 2022), <https://humanrightsfirst.org/library/barriers-and-backlog-asylum-office-delays-continue-to-cause-harm> [<https://perma.cc/RQ2Y-WK8U>].

²⁰² Martinez, *supra* note 87.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ SYLVIE DÉMURGER, IZA WORLD OF LAB., MIGRATION AND FAMILIES LEFT BEHIND 2 (Apr. 2015), <https://wol.iza.org/articles/migration-and-families-left-behind/long> [<https://perma.cc/SPX9-VEAV>].

stability in the United States, the children follow.²⁰⁶

While there are obvious risks to individuals facing persecution left behind in their home country, the immigrant faces struggles of their own. “Immigrants who are separated from partners and children experience worse psychological and emotional health, a finding that is salient for both immigrant women and men.”²⁰⁷ Especially if the immigrant believes the family that they leave behind is facing danger, they will likely feel anxiety and face a decline in their emotional and mental health.²⁰⁸

Even if children left in the home country do not face immediate danger or persecution, elongating the time of familial separation hurts the children emotionally and developmentally. In general, “left behind” children are emotionally impacted negatively by one or both of their parents leaving for another country.²⁰⁹ Left behind children are also more likely to have long-lasting negative educational impacts, turn to drugs or alcohol, and not seek help when needed.²¹⁰ Left behind children may also feel resentful toward their parents’ absence, often resulting in family-wide “emotional fallout.”²¹¹

To those pushed to the end of the line, LIFO exacerbates these emotional struggles. As asylum-seekers wait for their interview to be scheduled, they watch new applicants jump them in line. Like the Ethiopian mother whose daughter was raped in her home country, immigrants live with similar fear for their own families’ wellbeing.²¹² Years of separation quickly turn into decades of anxiety and distance felt by both the immigrant and the left behind child or spouse.

Additionally, staying longer in the United States makes it more difficult to leave. As asylum-seekers wait years and decades in the United States, they often learn the language, grow accustomed to the culture, build homes and families, and foster ties with the community.²¹³ According to a 2006 study

²⁰⁶ T.H. GINDLING & SARA POGGIO, UMBC, FAMILY SEPARATION AND THE EDUCATIONAL SUCCESS OF IMMIGRANT CHILDREN 1 (Mar., 2009) (citation omitted), <https://publicpolicy.umbc.edu/wp-content/uploads/sites/176/2014/04/Immigrationbrief.pdf> [<https://perma.cc/3ZBA-8LSN>].

²⁰⁷ Erika Arenas et al., *Gender, Family Separation, and Negative Emotional Well-Being Among Recent Mexican Migrants*, 83 J. MARRIAGE & FAM. 1401, 1403 (2021) (citation omitted).

²⁰⁸ *Id.*

²⁰⁹ Liza Yanovich, *Children Left Behind: The Impact of Labor Migration in Moldova and Ukraine*, MIGRATION POLY INST. (Jan. 23, 2015), <https://www.migrationpolicy.org/article/children-left-behind-impact-labor-migration-moldova-and-ukraine> [<https://perma.cc/6BJQ-VJQA>].

²¹⁰ *Id.*; GINDLING & POGGIO, *supra* note 206, at 4.

²¹¹ JOANNA DREBY, DIVIDED BY BORDERS: MEXICAN MIGRANTS AND THEIR CHILDREN 4 (2010).

²¹² Martinez, *supra* note 87.

²¹³ See Wright, *supra* note 201.

from the Urban Institute, more than five million children live in a household with at least one undocumented parent, and this number is growing.²¹⁴ Two-thirds of these children are U.S.-born citizens.²¹⁵ Seventy-seven percent of foreign-born parents in the United States have been in the U.S. for at least ten years.²¹⁶

Addressing asylum cases on a last in, first out basis allows many applications to fall through the cracks as their applications sit for years. Asylum-seekers spend years building lives and families in the United States yet remain uncertain about their future in the country. A waiting asylum-seeker, Nony, discusses the anxiety she feels about finally getting her final decision:

Finally getting an asylum office interview is both Nony's dream and a potential nightmare. She is desperate to move forward, to get permanent status, and to stop living in an awful limbo that has been devastating for her mental health. But she has heard horror stories about other people fleeing for their lives rejected at their asylum office interview after waiting years, paying their taxes, and beginning to carve out a new life in the United States. "There's so much pressure and anxiety building – it was already there from when I escaped my home country – but it keeps building. I was 31 when I came here. Soon, I'm going to be 40. I wish they would just tell me yes or no, instead of making me spend so many years in a country. I feel this is my country, my home. I've given it my loyalty; I've given it years of my life. It's not fair."²¹⁷

E. Why Is LIFO the Incorrect Response?

As the immigration backlog continues to grow, it is clear that LIFO is not supplying its promised outcomes. But temporary solutions that change every new presidential administration is not the answer either. Looking past whether the Trump LIFO or Obama FIFO policy is adopted, the constant priority shuffling is confusing for immigrants, immigration lawyers, and even immigration judges and officials.²¹⁸ Per former Immigration Judge Paul

²¹⁴ THE URB. INST., CHILDREN OF IMMIGRANTS: FACTS AND FIGURES 1 (May 2006), <https://www.issuelab.org/resources/187/187.pdf> [<https://perma.cc/5JLL-SHZ2>].

²¹⁵ *Id.* at 2.

²¹⁶ *Part of Us: A Data-Driven Look at Children of Immigrants*, URB. INST. (Mar. 14, 2019), <https://www.urban.org/features/part-us-data-driven-look-children-immigrants> [<https://perma.cc/TH5U-QPGY>].

²¹⁷ Wright, *supra* note 201.

²¹⁸ See Morrissey, *supra* note 148.

Schmidt, docket shuffling “just creates chaos. . . . That’s why you have these cases that are six, seven, eight years old that never get decided. They’re no priority. They just keep getting recycled to the end of the docket.”²¹⁹

According to TRAC Immigration, there were 129,505 asylum cases filed in immigration court in 1998.²²⁰ A mere 24 years later, the immigration court backlog is nearing 2,000,000 defensive asylum cases.²²¹ An additional 400,000 affirmative asylum cases are backlogged with USCIS.²²² Many of these immigrants have been sitting in limbo, able to get work authorization but denied an avenue for lawful permanent residence until their asylum application is decided.²²³ Without lawful permanent residence status, these asylum seekers are left without the power to petition family members. They also have been living in fear for years, constantly worried for the day when they will be dragged back into court.

Additionally, many denied affirmative asylum cases get recycled to the immigration court’s docket. If USCIS is unable to approve an affirmative asylum case, they often refer the immigrant’s application to the already overbacklogged immigration courts.²²⁴ This places affirmative applicants who were not initially in removal proceedings into immigration court facing removal. Under federal statute, USCIS is required to schedule asylum interviews no later than 45 days and render a final decision no later than 180 days after the application is submitted.²²⁵ Of the 400,000 pending applications, many have been pushed outside of this timeline. In the same memorandum that USCIS outlined their LIFO priority, they caution that “workload priorities” may inhibit their ability to schedule applications within this timeframe as a justification for missing the window.²²⁶

The inconsistency is astounding. In the asylum cases of two cousins, “[o]ne year to the day after arriving in the United States, and three months after applying for affirmative asylum, [Tom] will face an immigration official that could decide his fate in this country.”²²⁷ Contrastingly, “his cousin, who applied for asylum more than three years ago, is still awaiting his

²¹⁹ *Id.*

²²⁰ *Immigration Court Backlog Tool*, *supra* note 67.

²²¹ *Id.*

²²² Martinez, *supra* note 87.

²²³ *Id.*

²²⁴ *Types of Affirmative Asylum Decisions*, USCIS (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-affirmative-asylum-decisions> [<https://perma.cc/VVC5-B6N2>].

²²⁵ 8 U.S.C.A. § 1158 (2008).

²²⁶ *Affirmative Asylum Interview Scheduling*, *supra* note 85.

²²⁷ Villegas, *supra* note 156.

interview.”²²⁸ LIFO caused Tom to jump past his cousin in line, leaving the cousin in limbo, uncertain as to when the government will finally circle back to his case.²²⁹

Numbers show that LIFO is not even cutting into the backlog. “[W]hen the policy was implemented, the backlog for asylum cases stood at 311,000. A year later, the backlog had grown by almost 15,000 cases.”²³⁰ The purposes for implementing LIFO, to prevent frivolous applications and to address the backlog, are not being realized and therefore signals that LIFO is not necessary for the United States immigration system.

F. What Should the U.S. Government Do?

Because of the mountainous (and growing) immigration backlog, the United States Government is in a tough predicament. The Clinton Administration originally implemented LIFO out of desperation, panicked at the sheer number of incoming asylum applications and wanted to “get ahead” of frivolous applications.²³¹ Intending to deter immigrants from applying solely for work authorization without a well-founded fear of persecution, the administration cracked down immediately on new applications.²³² Similarly, the Trump Administration re-instated LIFO in an attempt to chip away at the immense backlog.²³³ LIFO is an active policy, yet the backlog continues to grow.²³⁴

If LIFO is not working as intended, then the benefits do not outweigh the detrimental effect on asylum-seekers. But what is the solution? The Obama Administration’s 2014 alternative, FIFO, was similarly unsuccessful.²³⁵ New asylum applicants who applied between 2014 and 2017 have waited years to be evaluated and likely make up a large portion of the applications moved to the end of the line due to LIFO.²³⁶

Instead of LIFO or FIFO, the Government should adopt a joint policy, where dedicated officials can work from the front of the list of applicants while others work from the back to reduce the amount of people who wait years for a decision. Second, the Government should install a five-year

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Martinez, *supra* note 87.

²³² *Id.*

²³³ *Id.*

²³⁴ Villegas, *supra* note 156.

²³⁵ Martinez, *supra* note 87.

²³⁶ *Id.*

“cutoff period” to reprioritize applications once they have been sitting five years to create more uniform wait times and reduce the number of applicants waiting ten or even twenty years for a decision. Third, likely the only way to address the growing backlog is to decide more cases each year, requiring more immigration judges and officials. And finally, even if the government continues to utilize LIFO, attorneys should be provided to immigrants facing court at free or reduced cost. These solutions, while not perfect, will work to reduce the negative impacts LIFO has on asylum applications and ensure a more consistent timeline across all applicants.

1. Designated Immigration Officials

The first proposed solution, mentioned in a September 9, 2021, Congressional letter to Homeland Security Secretary Alejandro Mayorkas and USCIS Director Ur Jaddou, suggests that some asylum officers should be designated to evaluate asylum cases back-to-front, as in assessing oldest cases first, while the others continue to work through the pile front-to-back, or newest cases first.²³⁷ This designation would guarantee that the longest pending cases are addressed and ensure timely decision making.²³⁸ Theoretically, the immigration officials would meet in the middle while chipping away at both ends of the backlog. The joint LIFO/FIFO approach addresses sitting cases while not ignoring new applicants, hopefully establishing a more consistent wait time.

2. Five-Year Cutoff Period

The second proposal, mentioned by representatives of Congress in their letter to USCIS Director Ur Jaddou and Secretary of Homeland Security Alejandro Mayorkas, is to create a five-year “cutoff period,” where applications are re-prioritized once they have been sitting for five years.²³⁹ Similarly, this solution intends to eliminate asylum applicants trapped in limbo for decades waiting for a scheduled interview. By re-prioritizing waiting applications, the five-year “cutoff period” would provide more uniformity in wait times across the board.²⁴⁰ This proposal would continue prioritizing the newest applications but would create a second level of priority to prevent neglecting applications for extensive periods of time.

If the United States government adopts either of these proposed solutions to ensure more consistent wait times among asylum applicants,

²³⁷ Letter from Members of Congress to Alejandro Mayorkas, Sec’y of U.S. Dep’t of Homeland Sec., and Ur Jaddou, Dir. of U.S. Citizenship & Immigr. Servs., USCIS 2 (Sept. 9, 2021), https://www.uscis.gov/sites/default/files/document/foia/Affirmative_asylum_application_backlog-Representative_Cicilline.pdf [<https://perma.cc/2B83-VWXF>].

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

asylees can be more confident in their timeline. Many of the issues described earlier, such as joint SIJS-asylum applicants hearing from one of their applications first, could be combated by a consistent immigration system. If lawyers and applicants know and understand which application they will hear from first and an approximate timeline, they are more able to properly prepare for these scenarios. Instead, asylees apply with no hint as to if they will wait ten days or ten years. The uncertainty of the current system is not healthy for asylum seekers nor sustainable policy.

3. Hire More Immigration Judges and Officials

While both proposed solutions would work toward equalizing the wait times of asylum applicants, neither seems to do anything about the hundreds of thousands of cases already backlogged. Likely, the only way to chip away at this backlog is to employ more asylum officers and therefore schedule more interviews each day. As the number of asylum-seekers rises, the United States government likely needs to hire more immigration officials and judges proportionate to the immigration rates. Instead of continuous docket shuffling which confuses immigrants, immigration lawyers, and immigration judges and officials, hiring more immigration authority maintains the docket while still addressing the backlog.

4. Guarantee the Right to Free or Low-Cost Counsel

Even if LIFO remains a United States immigration policy, there are other policy changes which can protect against the negative consequences exacerbated by LIFO. When examining LIFO's biggest consequences on asylum-seekers, the rate at which interviews are scheduled impacts the timeline within applicants must find and secure legal counsel. As discussed previously, unlike criminal defendants, immigrants have no right to court-appointed counsel if they are unable to afford an attorney.²⁴¹ While the Sixth Amendment provides a guarantee of representation to criminal cases, immigration cases are technically not criminal, but rather administrative.²⁴² If immigrants are provided with free or low-cost counsel, the success rates of asylum cases will likely increase. More lawyers appointed to asylum cases means fewer bare bones I-589 submissions; more cases will include legal briefs, country conditions reports, and other supplemental evidence. Therefore, if the United States government guarantees asylum-seekers' right to legal counsel, this proposed solution would likely combat one of the primary negative consequences of LIFO's speed.

Additionally, no child under 18 should ever find themselves in court without an adult representing them—especially a child that does not speak

²⁴¹ *Access to Counsel*, *supra* note 162.

²⁴² *Public Funding for Immigration Legal Services*, *supra* note 20.

the language and is attempting to convince an immigration judge to permit them to stay in the United States—universal legal representation for minors is a necessity to ensure fairness and integrity in the legal system. Advocates who fight for immigrants have continually claimed that “a person’s ability to make informed decisions — and their chances of being allowed to stay in the U.S. — are enhanced if an attorney represents them.”²⁴³

Many UACs who appear on their court dates show up alone and unrepresented.²⁴⁴ Federal Immigration Judge Jack Weil admits that he tries to teach unrepresented migrant toddlers about immigration law at their court hearing so they can better represent themselves. In a 2016 deposition, Judge Weil said, “I’ve taught immigration law literally to 3-year-olds and 4-year-olds. It takes a lot of time. It takes a lot of patience, . . . They get it. It’s not the most efficient, but it can be done.”²⁴⁵ Instead of providing migrant toddlers with legal representation, some immigration judges are taking matters into their own hands and “teaching” young children immigration law. Providing legal counsel free or at reduced cost to immigrants, especially immigrant children, is both more ethical and will ensure a more efficient process.

In response to Judge Weil’s words at the deposition, Georgetown anthropology professor Susan Terrio said, “[i]f a graduate of an American law school needs specialized training in order to provide competent legal representation, it strains credulity for an immigration judge to insist that he can train a young child in complicated legal concepts and procedures.”²⁴⁶ She continued by noting it is unethical, “particularly when that child is from a different culture, does not speak English, does not yet read in her native language, is apprehended and held in custody after an often dangerous and traumatizing journey to the U.S., and has no government-appointed attorney or child advocate.”²⁴⁷ Professor Terrio has conducted research of her own, finding that “[a]ll 31 of the immigration judges she interviewed supported providing legal representation for youths in immigration court” to promote efficiency and fairness.²⁴⁸

²⁴³ Molly Hennessy-Fiske, *This Judge Says Toddlers Can Defend Themselves in Immigration Court*, L.A. TIMES (Mar. 6, 2016, 3:00 AM), <https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html> [<https://perma.cc/Y5AW-DH88>].

²⁴⁴ See Ann Harrison, *Like a Good Neighbor: Extending the Anti-Trafficking Protections to Mexican Unaccompanied Children*, 19 J. GENDER, RACE, & JUST. 195 (2016), for a more comprehensive analysis of the additional disadvantages faced by UACs.

²⁴⁵ Hennessy-Fiske, *supra* note 243.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

IV. CONCLUSION

In short, LIFO is ineffective at reaching its intended purpose of reducing the backlog. More immigration officials will likely need to be hired to control and minimize the growing docket. Additionally, dedicating some of the officials to begin at the oldest cases and designating the others to begin at the newest and move backwards through asylum applications will ensure that applicants at the end of the line are not neglected. Re-prioritizing applications after they have been waiting for five years will also prevent lost or forgotten applications. And finally, providing legal counsel for minors and asylum-seekers who are unable to afford representation will reduce many of the negative consequences induced by the speed of LIFO, even if the government decides to continue utilizing LIFO.

LIFO prioritization hurts asylum-seekers, whether they are applying affirmatively or defensively. By speeding up some applications, these asylum-seekers are given less time to prepare their cases and find attorneys; therefore, they have a reduced chance of winning asylum. By moving other applicants to the end of the line, some asylum-seekers are overlooked and stuck in limbo, unable to own property, receive financial aid, or petition their family members to the United States. Whether an asylum-seeker is at the front or back of the LIFO line, the uncertainty causes severe anxiety and stress for the principal applicant and their dependents.

LIFO has been implemented on and off for the past 28 years, yet the asylum backlog has continued to grow. LIFO was implemented with the primary motivation of deterring asylum-seekers from applying frivolously and to quickly reduce the number of applicants who would appear in front of immigration officials. In contrast to its intended purpose, the backlog has continued to balloon under LIFO. For these reasons, LIFO is ineffective, disproportionately disadvantages immigrants, and must be replaced.