IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, *et al.* **Plaintiffs,** ***v.*** **KEVIN K. MCALEENAN,** in his official capacity as Acting Secretary of Homeland Security & Commissioner of United States Customs and Border Protection, *et al.* **Defendants.**	**Civil No. 19-cv-01872 KBJ**

CORRECTED BRIEF OF THE
NATIONAL CITIZENSHIP AND IMMIGRATION SERVICES COUNCIL 119
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' OPPOSITION
AND CROSS-MOTION FOR SUMMARY JUDGMENT

Michael Lacovara (Bar ID: NY0197)
Latham & Watkins, LLP
885 Third Avenue
New York, NY 10022
(212) 906-1377
Michael.Lacovara@lw.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Page(s)

RULES

REGULATIONS

STATEMENT OF INTEREST

The National Citizenship and Immigration Services Council 119 ("Council 119") is a labor organization that serves as the bargaining council for over 13,500 bargaining unit employees of the Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS"). These men and women serve our country in USCIS Refugee, Asylum and International Operations Directorate, including the Asylum Officer Corps and Refugee Officer Corps. Council 119 is comprised of 21 local unions that represent USCIS employees and ensures that their rights and interests are protected in the workplace.

Amicus curiae is the labor union that speaks on behalf of federal government employees who conduct initial asylum pre-screening interviews and, in so doing, determine which asylum-seekers will be summarily removed through expedited removal and which have a "credible fear" requiring immigration court proceedings. Its members have actual knowledge about the extent to which lesson plans—including the challenged April 2019 revised Lesson Plan on Credible Fear of Persecution and Torture Determinations ("Lesson Plan")—are policy documents that govern USCIS employees' daily work. *Amicus curiae* has a special interest in this case because its members' ability to perform their jobs is inextricably linked to the Lesson Plan on which they depend on as a foundational policy directive for conducting credible fear interviews.[1]

[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus,* its members, or its counsel made such a monetary contribution. *See* Local Civ. R. 7(o)(5); Fed. R. App. P. 29(a)(4)(E). This brief relies upon information that is publicly available and that is not confidential, law enforcement sensitive, or classified. The brief represents the views of Council 119 on behalf of the bargaining unit. It does not represent the views of USCIS employees in their official capacities.

I. INTRODUCTION

The USCIS employees who conduct credible fear interviews are among the first individuals to evaluate the claims of those who potentially can request refugee status. The implications of their front-line decisions are life-changing: if they find an individual does not have a credible fear of persecution on a protected ground, that individual may be summarily removed with no further process. If they are mistaken, that individual (and his or her children) could be harmed, tortured, or killed. With the stakes this high, it is imperative that USCIS employees receive the proper guidance to follow the law and to do so consistently rather than arbitrarily.

The Lesson Plan at issue is an authoritative document on which this process depends. New employees are trained with the document, current employees rely on it, and supervisors discipline employees who do not follow it. But, the recent revisions to the Lesson Plan—which were made in darkness, rather than through the customary transparent comment and review process involving subject matter experts from the USCIS Asylum Division, in addition to the Agency's Office of Chief Counsel—prevent USCIS employees from performing their duties and upholding their oath to follow the law. The revisions have created a confusing, conflicting, and unlawful Lesson Plan that functionally instructs USCIS employees to remove individuals even when they might have a credible fear. USCIS employees are proud of the hard work that they do as gatekeepers across this country's borders—but they did not sign up to apply the law (or some misinterpreted version of it) arbitrarily and send those with a right to a proper refugee-status determination to face persecution and potential death.

II. BACKGROUND

A. The Statutory Codification of Refugee Protections

Since well before Independence, the United States has been a singular refuge for the persecuted. It codified its commitment to the protection of refugees in the Refugee Act of 1980,

Pub. L. No. 96-212 § 101(a), 94 Stat. 102. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). That statute codified the United States' obligations under the Convention relating to the Status of Refugees of 1951 ("Refugee Convention") and the subsequent Refugee Protocol.[2] Refugee Convention and Refugee Protocol: The Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (1951), and the Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967), (respectively, the "Refugee Convention" and the "Refugee Protocol"). The Refugee Convention sets forth a rights regime, which requires the United States and other contracting states to provide a list of enumerated substantive rights to any individual who establishes that she is a "refugee." Refugee Convention, Arts. 2-34; *see also* 8 U.S.C. § 1101(a)(42)(A) (defining "refugee").

Through the Refugee Act, Congress enacted a system of protection for refugees. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212 § 101(a), 94 Stat. 102, 102 ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"). Congress reiterated that commitment after ratifying the Convention Against Torture and enacting the Foreign Affairs Report and Restructuring Act of 1998 ("FARRA"). *See* Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (It is "the policy of the United States not to expel . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."). Collectively, the statutes protect individuals from being sent back to the possibility of further persecution or torture. *Id*.

[2] The United States acceded to the Refugee Protocol in 1968 and bound itself to "comply with the substantive provisions of Articles 2 through 34 of the [Refugee] Convention . . . with respect to 'refugees' as defined in Article 1.2 of the Protocol." *INS v. Stevic*, 467 U.S. 407, 416 (1984); Refugee Protocol, Art. 1.1.

Section 1158(a) authorizes "any" individual to apply for asylum. *See* 8 U.S.C. § 1158(a). To apply for asylum, an individual is permitted to submit an application either (1) affirmatively to an asylum office of USCIS, *see* 8 C.F.R. § 208.9(a); 6 U.S.C. § 271, or (2) defensively in removal proceedings in Immigration Court, *see* 8 U.S.C. § 1229a(c)(4)(A). In addition, Congress created withholding of removal, which prevents removal of a refugee who is ineligible for asylum but establishes that she would be more likely than not persecuted if removed. *See* 8 U.S.C. § 1231(b)(3)(B). An individual (whether or not a refugee) may not be removed if she can establish that it is more likely than not she will be tortured as defined under the Convention Against Torture. *See* FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822; 8 C.F.R. § 1208.16(c)(4). Withholding of removal provides non-permanent relief from removal, and does not provide a path to lawful permanent resident status.

B. The Expedited Removal System Was Designed To Protect Refugees.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") marked an expansive change in the United States' immigration laws. In part, Congress intended to address concerns regarding perceived abuses of the asylum system. H. Jud. Comm. Rep. No. 104-469(I) at 139 - 158, 104th Cong., 2d Sess. (1996) (available at 1996 WL 168955) ("House Report"). To separate potentially meritorious claims from frivolous claims of repeat border crossers, IIRIRA established an expedited system of removal that allows immigration officers to remove certain individuals from the United States—those arriving at a port of entry who entered without inspection, valid documentation or through fraud—without further hearing or review. *See* 8 U.S.C. § 1225(b)(1)(A)(i), (iii).

At the same time, Congress was explicit that individuals with "credible asylum claims [would still] be allowed to pursue those claims." House Report at 107. The expedited removal system was not meant to turn away refugees: "[T]here should be no danger that an alien with a

genuine asylum claim will be returned to persecution." *Id*. at 158. To ensure a level of protection for those with legitimate asylum claims, and to uphold the United States' international obligations, Congress created the "credible fear" screening process as part of the expedited removal system. In a credible fear interview, an asylum officer determines whether the applicant "could establish eligibility for asylum" by "taking into account the credibility of the statements made by the alien" and considering "other facts as are known to the officer." 8 U.S.C. § 1225(b)(1)(B)(v). The credible fear process is designed to identify, and offer at least interim protection to, those individuals who "indicate[ ] either an intention to apply for asylum . . . or a fear of persecution." *Id.* at § 1225(a)(1)(A)(ii).

C. The Credible Fear Interview

USCIS asylum officers are at the heart of credible fear determinations. They conduct the screening interviews from which they determine whether an individual has a credible fear of persecution or torture. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(e)(2), (3). The credible fear determination is one focused on *potential* asylum eligibility, not actual legal entitlement to asylum. *See* 8 U.S.C. § 1225(b)(1)(B)(v). Accordingly, the standard to be applied in a credible fear interview is, logically and necessarily, less rigorous than that ultimately applied for an asylum determination.

Credible fear interviews are to be conducted in a non-adversarial manner. Lesson Plan Redline, Exhibit A to Plaintiffs' Cross-Motion for Summary Judgment ("Redline") at 15, ECF No. 36-3. Credible fear interviews should take place within days of an asylum seeker's arrival at either a port of entry or after being taken into custody. After frequently harrowing journeys to reach the United States, asylum seekers are held in immigration detention facilities prior to their scheduled interviews and during the duration of the determination period. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). While in detention facilities, an asylum seeker has little opportunity to

collect documents that may substantiate their fears and speaking with an attorney is difficult, if not impossible. *See id*. During the interview, asylum seekers have no right to be assigned counsel (having only a vaguely-defined ability to "consult with a person" of their choosing, so long as it does "not unreasonably delay" the process, which in many cases amounts to a practical denial of any meaningful ability to seek and receive the benefit of counsel). *See* 8 C.F.R. § 208.30(d)(4). Nor do asylum seekers have a right to call witnesses on their behalf. *See id*. § 208.9(b). Based on those circumstances, it is neither sensible nor consistent with Due Process for the credible fear screening process to do anything more than "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch." Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999).

Those who pass the credible fear screening by establishing a "potentially" meritorious claim are excused from expedited removal proceedings and may apply for asylum, withholding of removal, and Torture Convention protection in removal proceedings that are conducted by an Immigration Judge. *See* 8 C.F.R. § 208.30(f). Applicants found to lack a credible fear are summarily removed and barred from seeking admission to the United States for at least five years. *See* 8 U.S.C. § 1182(a)(9)(A)(i); 8 C.F.R. § 1003.42(f); 8 C.F.R. § 1208.30(g)(f)(iv)(A); *see also* Mem. of Law in Supp. of Plaintiffs' Cross-Motion for Summary Judgment ("Pls. Mot.") at 8-10, ECF No. 38.[3]

D. USCIS Employees Rely on Lesson Plans To Perform their Job Duties.

USCIS employees rely on a comprehensive compendium of lesson plans. The Lesson Plan, which supplanted the February 13, 2017 version, is the functional guide by which all credible fear

[3] Although a system for review and reconsideration of an adverse finding is technically available, it is a summary review (often conducted via videoconference and en masse) that largely defers to the findings of the USCIS officer.

screenings are conducted. In the current climate of increased scrutiny on immigration, the reach of the Lesson Plan's significance extends beyond the Asylum Officer Corps to any DHS employee even temporarily assigned to assist the Asylum Division in making credible fear determinations, which can include Refugee Officers, Immigration Services Officers and Border Patrol agents who receive the basic requisite level of training. For those individuals, who are inherently less familiar with the complex legal framework of the U.S. asylum system than are their asylum division counterparts, the Lesson Plan serves as a crucial—and in most cases only—source of instruction, explanation and guidance.

III. ARGUMENT

A. The Lesson Plan Is a Foundational Policy Guidance Document for the Asylum Division.

As a matter of practice and fact known to *amicus curiae,* the Government's stated position in this case is wrong: the Lesson Plan is not an "internal agency training material" intended merely "to summarize existing legal and policy authorities." Mem. of Law in Supp. of Defendants' Motion for Summary Judgment ("Def. Mot.") at 3, 10, ECF No. 31-1. In fact, the Lesson Plan provides the foundational policy guidance to those conducting credible fear interviews. *Amicus curiae* understands that the Asylum Division has always intended for the Lesson Plan to serve as an integral policy document. The Division relies on, and integrates, the Lesson Plan into initial training, continuing education, supervision, and quality assurance review.

First, a threshold matter: the Government's argument that the Lesson Plan is not reviewable under 8 U.S.C. § 1252(e)(3) because it is not a policy guidance document, *see* Def. Mot. at 21, is neither correct nor consistent with its other arguments. Section 1252(e)(3) does not artificially confine reviewable policy documents to those with a specific title or format. Instead, the Section discusses a broad range of functional writings, including "procedure[s]" and "guideline[s]." The

Government concedes that the Lesson Plan "provides guidance to officers on how to apply the law governing asylum, statutory withholding of removal, and CAT protection in the credible fear screening context[.]" Def. Mot. at 19. That concession places the Lesson Plan within the ambit of Section 1252(e)(3).

The Court already held that "guidelines issued by or under the authority of the Attorney General" according to Section 1252(e)(3) are reviewable policy documents. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 119 (D.D.C. 2018) (Sullivan, J.). As the Government acknowledges, the reference to "Attorney General" in Section 1252(e)(3) is "deemed to refer" to the Secretary of Homeland Security as well. *See* 6 U.S.C. § 557; Def. Mot. at 4 n.2. Here, the Government attempts to escape the ruling in *Grace v. Whittaker* claiming, without analysis, that the case is inapplicable. *See* Def. Mot. at 19. That assertion is belied by the fact that the Lesson Plan is the same functional form and substantive type of document at issue in *Grace*: the Lesson Plan was issued under an authority referred to by Section 1252(e)(3) and provides guidelines to asylum officers. *See* 8 U.S.C. § 1103(a)(2)-(3) (empowering the Secretary of Homeland Security to "issue such instructions" as necessary to "control, direct[], and supervis[e] . . . all employees").

Lesson plans are a cornerstone of initial training programs for asylum officer trainees. Prior to conducting a credible fear interview—or performing any of the other duties of an asylum officer—asylum officer trainees are required to complete two training programs: (1) a remote self-study review of lesson plans, including the Lesson Plan; and (2) in-person sessions to test and reinforce the trainee's knowledge of the materials introduced during the self-study period.

Even after completion of basic asylum training and certification as a permanent asylum officer, lesson plans remain central to an asylum officer's ongoing training and daily work. The bulk of asylum officers' continued education is presented through mandatory weekly trainings

derived from lesson plans. For this reason, the Refugee, Asylum and International Operations training instructs that lesson plans are "designed to be used as reference tools" in an officer's day-to-day work. *See RAIO Combined Training Course: Sources of Authority*, § 2.9.4, (2012).[4]

The Asylum Division instructs asylum officers to draw on lesson plans as the principal comprehensive instructions for the manner in which they are to make credible fear determinations. For credible fear cases, asylum officers refer to the Lesson Plan as a first point of reference and a last check of authority. According to a published memorandum from the Acting Director of the Asylum Division, Joseph E. Langlois, the Lesson Plan "remains the primary source for instruction on the legal standard." Ex. Q. to Pls. Mot. at 1, ECF No. 36-3, *available at* https://www.aila.org/infonet/ins-implements-new-credible-fear-process. *Amicus curiae* is not aware of any guidance that has supplanted this position.

Even at the supervisory level, lesson plans remain a foundational source of authority for supervisors to reference in offering policy guidance for adjudication. For example, in response to questions about a credible fear determination, supervisory asylum officers direct asylum officers to consult the Lesson Plan. *See* Sept. 3, 2019 Declaration of Paul Grussendorf ("Grussendorf Decl.") ¶¶ 11-12, ECF No. 36-3. Quality control reviews are conducted with frequent citations to and reliance on lesson plans. *Id.* ¶ 13; *see also* Ex. Q. to Pls. Mot. at 1, ECF No. 36-3.

B. The Lesson Plan Must Be Unambiguous and Lawful.

The Lesson Plan must be unambiguous and lawful. First, credible fear determinations are a core function of asylum officers' work. The INA instructs the Secretary of Homeland Security to "issue such instructions" necessary to "control, direct[], and supervis[e] all employees" and "files" of DHS and ensure that the immigration laws are being properly administered. 8 U.S.C.

[4] *Available at:* https://www.uscis.gov/sites/default/files/files/nativedocuments/Sources_of_Authority_RAIO_Lesson_Plan.pdf

§§ 1103(a)(1)-(3). Only an "asylum officer" may conduct asylum and Convention Against Torture credible fear screenings to make credible fear determinations. *Id.* § 1225(b)(1)(A)-(B). The INA requires an asylum officer to receive "professional training in country conditions, asylum law, and interview techniques" because it is the asylum officers' responsibility to apply the law as Congress directed. *See* § 1225(b)(1)(E)(i).

Asylum officers cannot adhere to domestic law and the United States' treaty obligations if their guiding lesson plans are ambiguous. Asylum officers lack the ability to expend additional time and resources navigating ambiguous or legally inconsistent lesson plans. Each asylum pre-screening officer conducts approximately twenty credible fear interviews each week and is responsible for issuing determinations on eligibility for each case. To complete this high volume of determinations in a thorough and efficient manner, asylum officers rely on the Lesson Plan to be unambiguous and lawful.

Second, the goal of the Lesson Plan is to ensure consistency of treatment across all credible fear determinations. Credible fear determinations—which can have life-or-death implications[5]—should not be based on whim or lack of clarity. A lesson plan that allows asylum officers to apply ambiguous, convoluted, or inapposite directions contravenes the law and Congress's intent. Congress directed that there should be "no danger" that an individual deserving of asylum protection be removed. House Report at 158. Contrary to that directive, a Lesson Plan susceptible to arbitrary or personal interpretation that contains guidance contrary to law would result in the inconsistent and improper removal of individuals entitled to a full asylum hearing.

[5] *See*, *e.g.*, Sarah Stillman, *When Deportation Is A Death Sentence*, NEW YORKER, (Jan. 15, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence (documenting accounts of people who faced death after they were improperly removed from the United States).

One (unsurprising) reason that asylum officers have informed Council 119 that they are finding it difficult to ensure consistency across the Division is that they were excluded from the entire process that led to the current Lesson Plan. In a stark departure from the Division's history of implementing amendments through a transparent review, comment and revision process led by subject-matter experts, the Lesson Plan was developed in secret. Unexplained, and untraceable policy revisions, have caused difficulty for asylum officers trying to perform their work. That difficulty only emphasizes the criticality of unambiguous and lawful guidance.

C. The Lesson Plan Impermissibly Raises the Burden of Proof for Credible Fear Determinations.

The Lesson Plan impermissibly purports to raise the burden of proof for credible fear determinations. In doing so, it contravenes federal statutes, treaty obligations, and defeats the expressed intent of Congress.

Remarkably, the 2019 "revisions" now purport to require an applicant to demonstrate she "***is*** a refugee." Redline at 15, 19 (emphasis added); *see id*. at 33 (deleting language that an applicant need only demonstrate "a significant ***possibility of establishing*** that he or she is a refugee") (emphasis added). This change works an explicit and improper derogation of Congressional action: at the credible fear stage, an applicant need only demonstrate she "could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). As a result, the Lesson Plan improperly imports the burden of proof applicable in the affirmative, 8 U.S.C. § 1158(b)(1)(B)(i), or defensive, 8 U.S.C. § 1231(b)(3)(C), asylum context, in which the claim of asylum ***is*** adjudicated on the merits to the threshold determination stage. *See also* Pls. Mot. at 31, 33-35. The imposition of this burden is unlawful, and will result in the expedited removal of people entitled to full due process on potentially meritorious asylum claims.

Likewise, the Lesson Plan misstates the credibility analysis asylum officers must perform during credible fear interviews. Under federal law, an asylum officer determines whether there is a "significant possibility" that the applicant "***could establish eligibility*** for asylum"; the officer does so by "taking into account the credibility of the statements made by the alien" and considering "other facts as are known to the officer." 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). The credible fear threshold is intended "to be a low screening standard for admission into the usual full asylum process[.]" 142 Cong. Rec. S11,491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch). It therefore should set a "low threshold of proof of potential entitlement to asylum." Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997). The recently revised Lesson Plan violates the law and cannot be reconciled with Congress' declared intentions because it "entitle[s asylum officers] to determine that the applicant must provide evidence that corroborates the applicant's testimony, even where the officer might otherwise find the testimony credible." Redline at 17; *see id*. at 15 (deleting language discussing difficulties of corroboration "in the credible fear context of expedited removal and detention").

No component of Section 1225 requires corroboration. 8 U.S.C. § 1225. In the affirmative and defensive asylum contexts, an asylum officer has authority to determine that "the applicant ***should*** provide evidence that corroborates otherwise credible testimony." 8 U.S.C. § 1158(b)(1)(B)(ii); *see* 8 U.S.C. § 1231(b)(3)(C) (emphasis added). Without any basis in law, the Lesson Plan now deems an asylum officer "***entitled*** to determine that the applicant ***must*** provide evidence that corroborates" otherwise credible testimony. *See* Redline at 17. This discretionary corroboration requirement impermissibly raises the burden of proof for credible fear determinations beyond even the level applied at the fulsome affirmative and defensive asylum proceeding stages. Nor would documentary corroboration make sense in this context, given that

individuals in credible fear interviews may have crossed the border with nothing more than the shirts on their backs and are then detained.

CONCLUSION

Council 119 respectfully submits that the Plaintiffs' cross-motion for summary judgment should be granted and the Government's motion for summary judgment should be denied.

Date: September 19, 2019

Respectfully submitted,

/s/ Michael Lacovara
Michael Lacovara (Bar ID: NY0197)
Latham & Watkins, LLP
885 Third Avenue
New York, NY 10022
(212) 906-1377
Michael.Lacovara@lw.com
Counsel for Amicus Curiae