

Director

U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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Re: USCIS Response to Recommendation Concerning Service of Asylum Decisions

The purpose of this memorandum is to acknowledge receipt of your office's recommendation that USCIS change its procedure for serving asylum decisions and to explain the agency's position on this issue. While USCIS appreciates your office's concern that requiring certain asylum applicants to return to an Asylum Office for decision pick-up may inconvenience some applicants, significant legal and customer service concerns argue strongly against adopting your recommendation. The current decision pick-up process complies with statutory and regulatory requirements and advances USCIS's goals of ensuring the security and integrity of the immigration system and promoting customer service and efficiency. Issuances of asylum decisions by mail will not satisfy these concerns.

In-person service of an asylum decision complies with statutory and regulatory requirements.

Eliminating the decision pick-up process for affirmative asylum applicants whose asylum applications are being referred to the immigration court renders USCIS vulnerable to the assertion that it operates contrary to existing statute. Section 239 of the Immigration and Nationality Act (INA) provides that written notice of initiation of removal proceedings via Form I-862, Notice to Appear (NTA), "shall be given in person to the alien." INA § 239(a)(1) (emphasis added). INA §239 further provides that NTA service should take place by mail only if personal service is "not practicable." Of the asylum applicants required to return to the Asylum Office for in-person service of decisions, 96 percent appeared for the decision pick-up appointment in fiscal year 2005. With such a high rate of compliance, we are not persuaded that personal service of an asylum decision could be considered "not practicable." Because the current system of personal decision issuance is practicable, the statute appears to compel the current process.

It is indisputable that obtaining proof of personal service places DHS in a stronger litigation position if service of an NTA is contested in removal proceedings. Requiring asylum seekers who are not maintaining valid status to return to the Asylum Office for in-person service of an asylum decision ensures that the NTA, if the case is being referred to the immigration court, is actually served on the applicant. Proof of personal service of an NTA provides greater support for an *in absentia* removal order if an applicant fails to appear for

his or her removal hearing. Your recommendation maintains that the return receipt or regular mail process is an acceptable alternative method for issuing decisions. However, aliens have successfully challenged *in absentia* removal orders for lack of proof of proper service based on the service of NTAs by regular mail. For example, in Joshi v. Ashcroft the Court of Appeals for the Seventh Circuit held that what it characterized as “weak evidence” – the intended recipient’s affidavit of nonreceipt of an NTA – nonetheless raised a question of fact regarding whether the petitioner had received the notice. The court held that the affidavit, along with any other corroborating evidence (even if inconclusive), must be adequately considered in rendering a decision on proper service. 389 F.3d 732 (7th Cir. 2004). Other circuits similarly have found that service of an NTA by regular mail raises a weaker presumption of delivery than service of NTAs by certified mail, requiring less strong evidence to rebut the presumption. See Ghounem v. Ashcroft, 378 F.3d 740 (8th Cir. 2004) (finding that an alien’s sworn affidavit stating that he had not received the notice of hearing was sufficient to rebut the weaker presumption of delivery raised by the current statute that allows for notice by regular mail); Salta v. INS, 314 F.3d 1076 (9th Cir. 2002) (finding a sworn affidavit of nonreceipt sufficient to rebut the presumption of delivery of notice by mail where the petitioner initiated the proceeding to obtain the benefit, appeared at an earlier hearing, and had no motive to avoid the hearing). When an NTA is served by certified mail, evidence that the alien did not receive the NTA is sufficient to challenge an *in absentia* removal order (even if the alien’s own failure to inform USCIS of a change in address as required under INA § 265 causes the delivery failure of the NTA). Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001). Considering the success of past challenges to service of NTAs by mail, we can anticipate that a move toward service of asylum decisions by mail will result in increased litigation and, therefore, increased demands on DHS and Immigration Court resources in responding to challenges. The weaker standing in court of NTAs served by mail, coupled with the statutory requirement that NTAs be served in person except where not practicable, supports the USCIS position that in-person issuance of asylum decisions must be maintained.

The legal arguments for maintaining in-person asylum decision issuance are not limited to those relating to service of NTAs. Section 309 of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. No. 107-173, 116 Stat. 543 (2002)) requires the Asylum Division to issue immediately employment authorization documents to applicants who are granted asylum. The Asylum Division presently uses the decision pick-up process to ensure compliance with this statutory mandate in the majority of cases. Currently, photographs and fingerprints used in producing these documents are taken at the Asylum Office during the decision pick-up process. Issuing all asylum decisions by mail would significantly hinder the Asylum Division’s ability to comply with the specific statutory requirement that the immediately-issued evidence of employment authorization contain, at minimum, the applicant’s fingerprint and photograph. In addition to these concerns, such a process would hinder the efficiency of document issuance. All asylees would still be required to appear at a USCIS office to provide the fingerprint and photographs. It is more efficient for USCIS to serve the decision and obtain the biometric data at the same time than to mail out approval letters that require the applicant to return to the office to capture biometric data. While USCIS transitions to a fully automated process for the creation of secure employment authorization documents, the asylum decision pick-up process provides the best opportunity for compliance with this important statutory mandate.

The regulations governing asylum adjudication and process require that the applicant appear in person to receive and to acknowledge receipt of the decision of the Asylum Officer and any other accompanying material at a time and place designated by the Asylum Officer. 8 C.F.R. 209(d). Although regulations can be revised, the regulatory requirement for in-person decision issuance was carefully debated and considered at the time of promulgation. In the *Supplementary Information* portion of the final rule on asylum reform, the Department of Justice responded to commenters who had recommended eliminating the decision pick-up process. See 59 FR 62299 (December 5, 1994). The Department , emphasizing that decision pick-up ensures that applicants receive their decisions and that reliance solely on mailing decisions risks non-delivery or

delayed service, stated, "It may be somewhat inconvenient to make a return trip to the Asylum Office; however, under this system, the applicant will receive his or her decision promptly If the applicant has provided an invalid address or has moved without notifying the INS, delivery most often will not be accomplished. In addition, postal delays and difficulties in processing return receipt cards detract from the INS's ability to confirm timely delivery." The Department also explained that the pick-up process ensures that applicants referred to the immigration court receive proper notice of their proceedings, noting "If the decision is to refer the claim, the applicant will receive a charging document that will state the date and time of required appearance in immigration court, and will be able to plan for that proceeding. Both the asylum adjudications and removal proceedings systems will benefit if there are fewer disputes regarding the service of decisions and charging documents." Id.

In-person service of an asylum decision helps ensure the security and integrity of the immigration system.

You assert in your recommendation that the proposed change would enhance national security because applicants will be more inclined to be truthful and accurate about their address in anticipation of a positive asylum decision. We do not agree with your assessment of the national security implications of the proposed change. On the contrary, we firmly believe that a move away from in-person service of asylum decisions will adversely impact our efforts to ensure the security and integrity of the immigration system.

INA § 208(d)(5)(A) requires that the Asylum Division check an applicant's identity against all relevant DHS databases prior to any grant of asylum. In complying with this provision, the Asylum Division has determined that applicants must be enrolled in the Automated Biometrics Identification System (IDENT). Through enrollment in IDENT, the Asylum Office can determine whether an applicant previously applied for asylum, is subject to any outstanding wants or warrants, is an alien absconder (i.e., failed to comply with a removal order by immigration judge), or is the subject of a national security-related lookout. At the decision pick-up appointment, Asylum Offices may use IDENT to verify that the individual appearing for in-person service of the decision is the same individual who appeared for the asylum interview. This verification provides assurances that an applicant granted asylum personally receives the documentation of the grant and provides strong evidence that an applicant referred to an immigration judge personally received the notice of the immigration hearing. In addition, if an applicant cannot be enrolled in IDENT at the time of his or her asylum interview due to system failure or time constraints, the applicant is enrolled at the time of decision pick-up, allowing the Asylum Offices an additional opportunity to check that the applicant is not a danger to public safety or national security.

Additionally, in-person service of an asylum decision enables Asylum Offices, in cooperation with U.S. Immigration and Customs Enforcement and other law enforcement agencies, to conduct appropriate follow-up action with regard to applicants who, based on the results of one or more security checks, are determined to be a threat to public safety or national security, and, where appropriate, provides an opportunity for law enforcement personnel to detain an unsuspecting individual deemed to be a danger to public safety. This opportunity may not have been available at the asylum interview. Given the statutory requirement that asylum interviews be conducted within 45 days of application filing, all adverse information on the applicant may not be available to the Asylum Office by the time of interview, and dangerous individuals may not be identified at that time. For example, the Asylum Office might not have received the full report detailing the basis of an adverse national security or law enforcement security checks. In addition, after an interview the asylum office may discover adverse information regarding an applicant through a name search on an alias used by the applicant or research regarding an associate of the applicant. The two-week period between the interview and the decision pick-up appointment provides USCIS with the time to gather and consider

additional information about the applicant and to coordinate with law enforcement agencies for follow-up action to be taken at the time of decision pick-up.

We do not agree that issuance of decisions by mail will encourage applicants to be more truthful about their addresses. In its efforts to combat asylum fraud, the Asylum Division has learned that some applicants present as their own address that of the individual who prepared the asylum application. Nearly every case in which a preparer has been prosecuted for fraud in the asylum process has involved the use of a bogus residence address at which the applicant did not reside and which the preparer controlled. In these cases, the applicant did not provide his or her correct address at the time of the asylum interview despite questioning by the Asylum Officer. Moreover, the application preparer may be a human trafficker, alien smuggler, or other individual engaged in immigration fraud who might use decision issuance by mail as leverage in taking advantage of an applicant by holding on to documentation that the applicant has been granted asylum. In addition, the preparer may hold an NTA mailed to a bogus address leading to the entry of an *in absentia* order of removal issued against the applicant due to the applicant's failure to appear for a hearing of which he or she was unaware. See Andia v. Ashcroft, 359 F.3d. 1181 (9th Cir. 2004) (remanding to the BIA on timeliness grounds aliens' motion to reopen a removal hearing after learning of an *in absentia* order of removal entered when the aliens did not receive notice of hearing because an immigration consultant misrepresented their address in preparing their asylum application).

In-person service of an asylum decision promotes efficiency and customer service.

Although some applicants may experience inconvenience or even frustration with the current decision pick-up process, most applicants receive their decisions in a timely manner and experience additional customer service benefits that would not be received through decision mail-outs. While your recommendation is correct to point out that returning to the Asylum Office a second time may represent a financial burden for some applicants, this burden must be weighed against the benefits of immediate issuance of evidence of employment authorization and the opportunity to ask questions of and obtain important information from qualified USCIS personnel. For those applicants without legal representation, USCIS provides an important service in explaining the decision to the applicant. This is especially true for applicants referred to an immigration judge who hear directly from USCIS the importance of appearing for the removal hearing and the consequences for failure to appear.

In-person service of an asylum decision ensures that applicants actually receive their decisions and that decisions are served in a timely manner. Applicants required to return to an Asylum Office for decision pick-up know from the time of their asylum interviews the exact date and time when they will receive their decisions. We believe that the predictability and transparency of the timing in our decision-making process is a benefit that far outweighs the inconvenience of returning for a second appointment. Having a specific date on which he or she will be provided a decision decreases the applicant's anxiety as to when or if he or she will receive an answer to his or her request for protection. More importantly, Asylum Officers notify applicants that the decision will be complete in advance of the pick-up date, personally committing themselves to seeing that the applicant's request for asylum is closely, carefully, and expediently decided. Awareness of and sensitivity to the inconvenience and frustration that may result should an Asylum Officer not complete the case adjudication by the time of the decision pick-up, or fail to notify the applicant in advance that the decision would not be ready on time, motivates Asylum Officers to make timely decisions and not put aside harder decisions to languish in a backlog of cases.

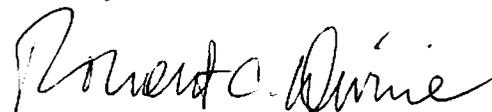
The customer service advantages of the decision pick-up process extend beyond the assurance that the applicants actually receive the decision documents. Applicants who appear for decision pick-up have the

opportunity to ask questions of Asylum Office personnel. This ensures that qualified individuals immediately resolve an applicant's concerns and accurately answer an applicant's questions. It is more efficient for USCIS to address an applicant's concerns with him or her in person than it is to require the applicant to submit a formal inquiry to the Asylum Office, Service Center, the National Customer Service Center (NCSC), or his or her representative to answer asylum-related questions and/or understand documents issued by the Asylum Office. Asylum Office personnel serving a decision in person provide valuable information directly to the applicant concerning the asylum process, as well any potential rights or benefits to which the applicant may be entitled. Asylum Office personnel also have the opportunity to impress upon the applicant the importance of appearing for a hearing before an immigration judge, if the case is being referred to the immigration court, or submitting an I-730 or application for a refugee travel document (I-131), if the applicant has been granted asylum and wishes to be joined by his or her immediate family in the U.S. or must travel abroad.

In your recommendation, you contend that applicants appearing for decision pick-up must wait a considerable amount of time to receive their decisions and that sometimes the decision is not ready. While long waits may occasionally occur, we do not believe that this is a significant problem. In fact, the recommendation itself points out that typical decision issuance lasts no longer than five to ten minutes. Moreover, procedural safeguards are in place to prevent failure to have an asylum decision ready at the time of the pick-up appointment. For example, the Asylum Division's procedural guidance provides that an office can cancel a pickup appointment only in extraordinary circumstances and with the approval of a Supervisory Asylum Officer. Furthermore, the Asylum Office must notify the applicant of the appointment cancellation in advance whenever possible. Therefore, if there are reasons that a decision will not be ready by the date of the scheduled pick-up appointment, the applicant will be notified and thus avoid an unnecessary trip to the Asylum Office. The Asylum Division's procedural guidance also allows applicants to request another pick-up date if they cannot appear at the Asylum Office for the originally scheduled pick-up appointment.

In conclusion, although we appreciate your office's concern for improving customer service for asylum seekers, we cannot accept your recommendation to eliminate the current decision pick-up process. This practice is required by statute and has been thoroughly addressed in the process of regulatory formulation. It also reduces litigation over sufficiency of service of decisions. The current decision pick-up process promotes the security and integrity of the immigration process, including the ability of Asylum Offices to conduct required security checks and take necessary follow-up action. Finally, in-person service ensures that decisions are completed in a timely manner and provides several additional customer service benefits, including immediate issuance of employment authorization to applicants who are granted asylum.

Sincerely,



Robert Divine
Acting Deputy Director, USCIS

cc: Michael Jackson, Deputy Secretary