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**Asylum Advocacy in the Age of ‘The Donald’:  
Once More unto the Breach, Dear Friends**

**Edna Yang**

**Paul Zoltan**

**Author Contact Information:**

Edna Yang  
American Gateways  
Austin, TX

[ednay@americangateways.org](mailto:ednay@americangateways.org)  
512.478.0546

Paul Zoltan  
Law Office of Paul S. Zoltan  
Dallas, TX

214.320.3400

# ASYLUM ADVOCACY IN THE AGE OF ‘THE DONALD’: ONCE MORE UNTO THE BREACH, DEAR FRIENDS

By: Edna Yang and Paul Zoltan

## Introduction

Think of this article as a tool box: a disjointed compendium of lessons learned the hard way, assembled for those who already know their way around *Immigration Court Practice Manual* and who don’t need to be told that “causal nexus” isn’t the latest sequel to *The Matrix*. The authors’ fondest hope is that something in this congeries helps a jailed refugee nearly as much as smuggling them a file.

## Blocking expedited removal & reinstatement

As explained below, the Immigration and Nationality Act (INA) and its implementing regulations forbid the Department of Homeland Security (DHS) from removing any alien who expresses a fear of returning to their country.<sup>1</sup> However, reports recently published by the ACLU<sup>2</sup> and by Human Rights Watch<sup>3</sup> confirm what asylum practitioners have suspected for years: Customs and Border Protection (CBP) systematically ignores immigrants’ cries of fear and illegally subjects them expedited removal and reinstatement of removal.

As those reports forcefully argue, it simply cannot be true – as CBP claims – that over 95% of the Hondurans, Guatemalans, and Salvadorans that the agency caught in 2012 expressly<sup>4</sup> disavowed any fear of returning to their country. Typical are the facts recited in complaint one of the authors recently filed online with CBP<sup>5</sup>:

*In the Record of Deportable/Inadmissible Alien (Form I-213) that CBP Officer [redacted] prepared March 10, 2015 to commence the expedited removal of [my client], he falsely states that “the subject does not claim fear of persecution” and “[t]he subject declined an interview before an asylum officer and requested to be returned to El Salvador.” [My client] is an intelligent and articulate young man who remembers well telling [the] Officer [ ] - whom he remembers by the name on the officer's badge - that he was afraid of the Mara 18 gang. Over the past four years, Mara 18 has killed four of [my client's] immediate family. As corroboration, he has all four death certificates and two police reports. [The] Officer [ ] cannot be correct in his assertion that, on*

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<sup>1</sup> Lutheran Immigration and Refugee Service has posted a useful chart showing how the expedited- and reinstated- removal “safety valve” is *supposed* to work: <http://tinyurl.com/ja6dhvd>.

<sup>2</sup> “You Don’t Have Rights Here,” HRW (2014) (<http://tinyurl.com/qy5guwj>)

<sup>3</sup> “American Exile: Rapid Deportations that bypass the Courtroom,” ACLU (December 2014) (<http://tinyurl.com/zu5lwkf>)

<sup>4</sup> “[T]he examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern.” CFR § 235.3(b)(4). NB: discrepancies between this often fabricated “record” and subsequent statements to the asylum officer (AO) may undermine the alien’s credibility. Asylum Division Officer Training Course: Credible Fear (ADOTC-CF), VI.C.5 (Feb. 28, 2014) (<http://tinyurl.com/p9f6xhp>).

<sup>5</sup> <https://help.cbp.gov/app/forms/complaint>

*March 10, 2015, this resourceful and well-spoken young man expressed no fear of returning, declined the opportunity to seek asylum, and “requested to be returned to El Salvador.”*

Typical also is the outcome of that complaint: three months after it was filed, CBP closed the matter – as it does with 97% the complaints it receives – without action or a substantive reply.<sup>6</sup> Next stop: the press.

Apart from filing more complaints, what’s to be done? When a lawyer gets a call from someone in detention or, more commonly, a panicked member of their family, the first thing to be done is to ascertain if the detainee was (a) recently picked up at or near the border or (b) previously removed (or deported or excluded). If so, it is likely that your prospective client’s expedited or reinstated removal is imminent.

These are very frustrating cases: desperate calls from moms and spouses worried sick about their loved ones, Enforcement and Removal Officers (EROs) and Immigration and Customs Enforcement (ICE) attorneys who won’t answer their phones or return your calls, and who pass the buck when they do. Yet as an attorney you *can* make a difference – indeed, you’re about the only one who can. A well-aimed email, fax, letter, or phone call can rescue someone from expedited removal: 8 C.F.R. § 235.3(b)(4) says, “If an alien subject to the expedited removal provisions . . . expresses a fear of . . . return to his or her country, the inspecting officer *shall* not proceed further with removal.” (Emphasis added.) With respect to reinstatement, 8 CFR § 208.31(a) and (b) similarly say, “any alien . . . who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal . . . *shall* be referred to an asylum officer for a reasonable fear determination.”<sup>7</sup> (Emphasis added.) And the regulations contain *no time limit*: an unenforced expedited removal order may even be vacated years after ICE has designated the noncitizen a “fugitive.”

With many deportees murdered within days of their return to Central America (<http://tinyurl.com/pf7s8sq>), it’s no exaggeration to say that we can save life by picking up the phone. Here’s how to go about it:

- 1) Confirm where your client is detained through ICE’s detainee locator: <https://locator.ice.gov/odls/homePage.do>.
- 2) Instruct the client’s family how to transfer funds into client’s account (in the case of Pearsall, and maybe others, by calling 866/345-1884 with the alien number handy). These funds can then be used to call you, the attorney.

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<sup>6</sup> “Record of Abuse: Lawlessness and Impunity in Border Patrol’s Interior Enforcement Operations,” ACLU (October 2015), p. 10; link: <http://tinyurl.com/z6gedmk>

<sup>7</sup> Though beyond the scope of this article, it is possible to vacate a reinstatement order not only through a “reasonable fear” interview, but by *appealing* that order directly to the circuit court of appeals. A 2013 practice advisory on reinstatement of removal published by the American Immigration Counsel and National Immigration Project of the NLG covers this topic in depth: <http://tinyurl.com/jsz6l89>.

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