

November 30, 2023

The Honorable Ur M. Jaddou
Director, U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

The Honorable Kristen Clarke
Assistant Attorney General for Civil Rights
U.S. Department of Justice

Submitted via email

Re: USCIS Denial of Language Access to Affirmative Asylum Applicants

Dear Director Jaddou and Assistant Attorney General Clarke:

We write to raise our concerns regarding U.S. Citizenship and Immigration Service (USCIS)'s recent change to its language access policies and practices, which now require individuals to bring their own interpreters to their affirmative asylum interviews. In doing so, USCIS has arbitrarily abandoned its practice of the last three years of providing government-paid interpreters at asylum interviews to all individuals with limited English proficiency (LEP), instead reverting to prior practices that discriminate against such individuals and deprive them of the ability to meaningfully participate in these life-or-death proceedings. As a result of this change, asylum seekers with LEP will be forced to use family, friends, and other informal interpreters for their asylum interviews.¹ This reversion to pre-pandemic rules proceeds even as USCIS continues its routine practice of providing professional contract interpreters to monitor the quality of interpreters provided by the asylum seekers. Those who cannot procure or pay for their own qualified interpreter may be placed directly into removal proceedings, an adversarial process, without an opportunity to present their cases first to the asylum office.

USCIS's decision, which was announced without any opportunity for input by our organizations and other advocates for asylum seekers, presents numerous grave concerns and ethical considerations. It is also illegal. It conflicts with Executive Orders 13166 and 13985, is arbitrary and capricious in violation of the Administrative Procedure Act (APA), and raises serious equal protection and due process problems.

Legal Background

Executive Orders 13166 and 13985 require that the Department of Homeland Security (DHS) and its components, including USCIS, provide individuals with LEP meaningful access to

¹ Although this letter focuses on language access for affirmative asylum seekers, it is important to note that USCIS's general approach and current Language Access Plan also contravene Executive Orders 13166 and 13985, *see* 65 Fed. Reg. 50121 (Aug. 16, 2000) and 86 Fed. Reg. 7009 (Jan. 25, 2021); Attorney General Merrick Garland's 2022 memo, modernized as U.S. Dep't of Justice, *Department of Justice Language Access Plan* (last updated Nov. 15, 2023); HHS's recently proposed Section 1557 rule in 87 Fed. Reg. 47,824 (proposed Aug. 4, 2022); and many other federal agencies' positions on what constitutes meaningful language access according to decades of well-established language rights standards.

their activities, programs, and operations. As both Executive Orders recognize, programs and activities that are provided in English must be accessible to persons with LEP. Otherwise, they constitute discrimination on the basis of national origin, in the same way that Title VI of the Civil Rights Act of 1964 requires recipients of federal funds to provide individuals with LEP with meaningful access to their programs and activities and treats the failure to do so as national origin discrimination.² While Title VI does not apply to DHS or its components, its principles and standards for determining what constitutes meaningful language access in the context of activities and programs provided by recipients of federal funds apply equally to activities and programs provided by federal actors, such as USCIS and other DHS components. Thus, USCIS, one of the key agencies that provides services and benefits to non-English speaking immigrants, is obligated to protect language rights.

In November 2022, Attorney General Merrick B. Garland issued the “Memorandum to Improve Access to Services for People with Limited Proficiency in English.”³ The Memo reaffirmed the principles in Executive Order 13166 and directed agencies to update their language access policies and plans.⁴ In announcing the memo, Attorney General Garland proclaimed that “[a]ll people in this country, regardless of the language they speak, deserve meaningful access to programs and activities that are conducted or supported by federal agencies.”⁵ He also emphasized that “[t]he Justice Department is committed to working with our federal partners to address linguistic barriers in governmental services that deny individuals a full opportunity to participate in economic, social, and civic life.”⁶

More recently, in August 2023, the Department of Justice (DOJ) issued its updated Language Access Plan (LAP), reaffirming DOJ’s commitment to advancing equity for all and the importance of high quality, accurate, and equitable linguistic access to government programs and activities.⁷ The DOJ LAP, in its policy statement, reiterates the principle “that it is the Department’s responsibility, and *not that of an individual* seeking services, to take reasonable steps to ensure meaningful access to all Department programs and activities[.]”⁸ Importantly, the DOJ LAP also provides that, absent exigent circumstances, certain individuals should not be relied on

² See, e.g., *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003) (holding that a food stamp program’s failure to provide bilingual translation of materials could constitute intentional discrimination on the basis of national origin under Title VI); *Lau v. Nichols*, 414 U.S. 563, 568 (1974), *abrogated on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001) (establishing the denial of services to non-English speaking groups as national origin discrimination under Title VI).

³ Memorandum from the Attorney General Merrick B. Garland for Heads of Federal Agencies, Heads of Civil Rights Offices, and General Counsels on Strengthening the Federal Government’s Commitment to Language Access (Nov. 21, 2022),

https://www.justice.gov/d9/pages/attachments/2022/11/21/attorney_general_memorandum_-_strengthening_the_federal_governments_commitment_to_language_access_0.pdf.

⁴ *Id.* at 1.

⁵ Press Release, Office of Public Affairs, U.S. Dep’t of Just., Attorney General Merrick B. Garland Issues Memorandum to Improve Access to Services for People with Limited Proficiency in English (Nov. 21, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-garland-issues-memorandum-improve-access-services-people-limited>.

⁶ *Id.*

⁷ U.S. Dep’t of Just., Language Access Plan (Aug. 15, 2023), <https://www.justice.gov/d9/2023-08/DOJ-Language-Access-Plan-August-2023.pdf>.

⁸ *Id.* at 1 (emphasis added).

for language assistance services, including family members, neighbors and friends.⁹

Failure to provide meaningful language access also implicates equal protection and due process protections found in the U.S. Constitution. USCIS oversees the process by which asylum seekers who are fleeing persecution or torture in their home countries can affirmatively seek protection in the United States. By engaging in this process, these individuals place themselves at risk of deportation to their home countries if their applications for protection are denied. When the government withholds critical language services during this process, asylum seekers whose primary languages are not English face a greater burden—and greater risks—than English-speaking asylum seekers who are navigating the same process. This includes monetary burdens, because they must hire a qualified interpreter; the possibility of delay if they cannot locate a qualified interpreter or if their interpreter is unavailable at the last minute, which could have an adverse impact on the ability to secure a work permit; and a higher risk of being placed in removal proceedings and being ordered removed, simply because of their inability to speak English. No compelling interest, or even a legitimate government purpose, justifies the government’s refusal to provide meaningful language access, particularly in such high-stakes proceedings.¹⁰

USCIS’s Interpreter Requirement for Affirmative Asylum Applicants

Despite these well-established language rights principles, between 1994 and 2020, the federal government required by regulation, pursuant to 8 C.F.R. § 208.9(g)(1), that affirmative asylum applicants with LEP “provide, at no expense to the USCIS, a competent interpreter fluent in both English and the applicant’s native language or any other language in which the applicant is fluent.”¹¹

During the COVID-19 pandemic, this regulation was temporarily amended to provide that asylum applicants who could not proceed with the interview in English need not provide their own interpreters at the asylum interview, and could use the DHS-provided telephonic interpreters instead.¹² This amendment was extended four times until USCIS announced on September 11, 2023, that it would end the rule starting two days later.¹³ In ending the rule, USCIS never indicated whether it “analyze[d] the practice of USCIS providing contract interpreters at affirmative asylum interviews to determine whether there may be a future need for USCIS to provide contract

⁹ *Id.* at 8.

¹⁰ See, e.g., *B.C. v. Att’y Gen.*, 12 F.4th 306, 316 (3d Cir. 2021) (“Failing to provide an interpreter when needed makes meaningless a noncitizen’s right to due process.”); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) (“It is long-settled that a competent translation is fundamental to a full and fair hearing. If [a noncitizen] does not speak English, deportation proceedings must be translated into a language the [noncitizen] understands.”); *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (“The presence of a competent interpreter is important to the fundamental fairness of a hearing, if the [noncitizen] cannot speak English fluently.”).

¹¹ Notably, this regulation falls under the authority of both the DOJ (via the Attorney General) and DHS (via the Secretary). See 8 U.S.C. § 1158(d)(5)(B). USCIS also has extended this requirement to other adjudications, which is reflected in their language access plan and policy memorandum.

¹² Asylum Interview Interpreter Requirement Modification Due to COVID-19, 85 Fed. Reg. 59,655 (Sept. 23, 2020).

¹³ Press Release, U.S. Citizenship & Immigration Services, Affirmative Asylum Applicants Must Provide Interpreters Starting Sept. 13 (Sept. 11, 2023),

<https://www.uscis.gov/newsroom/alerts/affirmative-asylum-applicants-must-provide-interpreters-starting-sept-13>.

interpreters" as it stated that it would.¹⁴

USCIS provided no opportunity for stakeholders to comment on the change and on the necessity for permanently suspending the regulation. Yet, in response to DHS's call for comments on the DHS Language Access Plan and DHS Indigenous Languages Plan, multiple organizations urged the agency to use its discretionary authority to permanently amend the regulations and ensure that interpreters are provided by the government in all USCIS adjudications.¹⁵ Notably, in establishing and extending the temporary rule, DOJ and DHS themselves acknowledged that costs would not be an issue, and concluded that it would actually be more efficient to use government-provided interpreters because *they were already participating in the interviews*:

USCIS has an existing contract to provide telephonic interpretation and monitoring in interviews for all of its case types. USCIS has provided contract monitors for many years at interviews where the applicant brings an interpreter. In other words, almost all interviews that utilize a USCIS provided interpreter under this temporary final rule would have required instead a contracted monitor during asylum interviews conducted pre-pandemic. Additionally, the cost of monitoring and interpretation are identical under the current contract and monitors are no longer needed for interviews conducted through a USCIS-provided contract interpreter. Therefore, the continued extension of the temporary final rule is projected to be cost neutral or negligible for the government because USCIS is already paying for these services even without this rule.¹⁶

In a stark reversal and without any explanation, USCIS has reverted to its pre-2020 practices—putting the burden on asylum seekers with LEP to procure their own interpreter despite the presence of a government-paid interpreter during the same interview. This decision defies logic, has enormous adverse consequences for non-English speaking asylum seekers, and is unlawful.

First, as noted above, requiring asylum seekers with LEP to provide their own interpreters provides no cost-saving to the government because it is already paying for telephonic interpreters for each interview. Moreover, imposing the burden on asylum applicants is less efficient, as the agency itself recognized, because it leads to more continuances and a greater backlog.

¹⁴ Asylum Interview Interpreter Requirement Modification Due to COVID-19, 88 Fed. Reg. 16,372, 16,376 (Mar. 17, 2023).

¹⁵ See, e.g., Letter from Advocates for Language Access in Detention & National Language Access Advocates Network to Dep't of Homeland Sec., Comments on DHS Language Access Plan & DHS Indigenous Languages Plan (May 17, 2023), https://drive.google.com/file/d/1_suSO-NpA3RVBSJhqj1PjROM_J_ahdhT/view. More generally, USCIS should provide language services at all adjudication proceedings and interviews, as well as at all points of contact, including INFOPASS and contact center and customer service lines. Additionally, federal regulations have required translating vital information, both paper and electronic, for more than forty years, but USCIS does not have any consistent or effective practice of providing translated or multilingual notices and information. The lack of translation or multilingual content makes it nearly impossible for individuals with LEP to submit applications on their own or respond to notices and other requests for evidence and other information, without the assistance of attorneys or other service providers.

¹⁶ 88 Fed. Reg. at 16,377; see also 85 Fed. Reg. at 59,658.

Second, faced with the threat of being placed into removal proceedings for failure to bring an interpreter, many individuals with LEP may feel compelled to proceed without an interpreter or settle for any interpreter they can find and afford, even if they are nonprofessional and untrained. This feeds the expansion of a network of brokers and notarios who charge exorbitant fees, exploit vulnerable individuals, and provide sub-par services.¹⁷ Advocates across the country are already consistently reporting that their clients are turning to these unscrupulous actors.

Third, as nonprofits and legal aid organizations have stepped in to try to fill the gap, their resources are strained and diverted from meeting other compelling needs of the communities they serve.

Finally, the change is both arbitrary and capricious, in violation of the APA, and has serious due process and equal protection implications. Non-English speaking asylum seekers who cannot afford to hire trained interpreters will be denied a meaningful opportunity to access the affirmative asylum process based on factors—national origin and wealth—that have no bearing on the underlying merits of their asylum claims. Given the very real risk that they will be sent straight to removal proceedings if they cannot procure an interpreter, many will feel forced to proceed in English; others will rely on subpar so-called interpreters. The inevitable result is miscommunication, adverse credibility findings, and even allegations of fraud and misrepresentation—all to the detriment of their asylum applications. In sum, the policy reversal is inefficient, unfair, and discriminatory.

DHS and DOJ should use their authority to amend 8 C.F.R. § 208.9(g)(1) to indicate that interpreters shall be provided in all USCIS adjudicatory interviews where the applicant cannot provide one,¹⁸ and the USCIS LAP must be updated accordingly to ensure that language services be provided at all points of public contact with USCIS.

Conclusion

Achieving equity in accessing government programs and services is one of those problems whose solution is complicated by the fact that, despite the enormity of the problem, it is largely unseen and systemically excludes those most impacted. The lack of language access leads individuals to be so completely shut out that their travails in navigating the asylum system largely occur in the shadows. The cause of their suffering is also the cause of its invisibility.

¹⁷ These brokers and notarios insert themselves between immigrants with LEP and USCIS. To file applications on the applicant's behalf, they collect the applicant's sensitive personal information and charge applicants at every stage of the application process. Immigrants who attempt to muddle through the process with limited English skills or with the help of a friend or family member are at heightened risk of misunderstanding key requirements and leaving incomplete applications, being wrongfully denied or, even worse, being held responsible for false statements that were the result of a language barrier. We have assisted a number of clients, who have had their applications denied due to miscommunication and credibility issues stemming from USCIS's failure to provide language services. By not providing meaningful access to individuals with LEP, USCIS is fostering an environment where individuals are at risk of exploitation, to the detriment of their asylum applications.

¹⁸ Of course, USCIS should give all individuals the option of bringing their own interpreter if they prefer, as was the policy under the temporary rule. Individuals may have concerns with the quality of government contract interpreters and the use of telephonic interpretation compared to in-person interpretation, as well as preference for working with interpreters vetted for the client's comfort level and individualized circumstances (including, as is often the case, trauma and other conditions that may impact their communication).

Current language access initiatives by the federal government represent important steps forward toward providing more equitable access to critical government programs, services, benefits, and activities. That is why we are particularly disappointed and surprised by USCIS's decision to revert to its old policy of requiring non-English speaking asylum seekers to provide their own interpreters for asylum interviews. Our client communities—who already start from a position of vulnerability as relatively new arrivals to the country who often faced unimaginable harm and risked their lives to seek shelter and asylum—face the daily risk of exploitation; delays associated with requesting interpreters; and the burden, confusion and chaos from navigating new policies and rules that did not include them or actively excluded them from the process. At a very minimum, USCIS should not be making their situations worse by reverting to a policy that serves no legitimate purpose, while adding to the burdens LEP asylum seekers face in accessing the asylum process.

We look forward to discussing this important issue with you and options USCIS can take to avoid taking this step backward. Please do not hesitate to reach out to either My Khanh Ngo (mngo@aclu.org) or Laura Murchie (lmurchie@advancingjustice-atlanta.org). Thank you.

Sincerely,

Advancing Justice - Asian Law Caucus
Advocates for Basic Legal Equality (ABLE)
Afghans For A Better Tomorrow
African Advocacy Network
African Communities Together (ACT)
Ahri Center
Aldea - The People's Justice Center
American Civil Liberties Union
American Friends Service Committee (AFSC)
American Gateways
Americans for Immigrant Justice
Aoki Center for Critical Race and Nation Studies
Asian Americans Advancing Justice – Atlanta
Asian Resources, Inc.
Asylum Seeker Advocacy Project (ASAP)
BanchaLenguas Language Justice Collective
Black Alliance for Just Immigration (BAJI)
Boston College Law School Civil Rights Clinic
CAIR-WA
Carolina Refugee Resettlement Agency
Center for Empowering Refugees and Immigrants (CERI)
Center for Gender & Refugee Studies
Central West Justice Center
Centro Legal de la Raza
Chacón Center for Immigrant Justice at MD Carey Law School
Children's Law Center of California

Chinese for Affirmative Action
Church World Service
Coalition for Humane Immigrant Rights (CHIRLA)
Communities United for Status & Protection (CUSP)
Conklin Immigration Law, LLC
Cornell Asylum and Convention Against Torture Appellate Clinic
Esperanza Immigrant Rights Project
Federal Litigation and Appeals Clinic, Drexel University Thomas R. Kline School of Law
Florence Immigrant and Refugee Rights Project
Haitian Bridge Alliance
HIAS Pennsylvania
Human Rights First
Immigrant Defenders Law Center
Immigrant Legal Advocacy Project
Immigration Center for Women and Children
Immigration Equality
Immigration Justice Clinic, Cardozo School of Law
Immigration Law & Justice Michigan
Immigration Law & Justice Network
International Institute of New England
International Refugee Assistance Project (IRAP)
International Rescue Committee
Just Detention International
Just Neighbors
Justice Action Center
Justice at Work Pennsylvania
Justice For Our Neighbors North Central Texas
Justice in Motion
KRC in Action
La Raza Community Resource Center (SF)
Las Americas Immigrant Advocacy Center
Law Office of Peggy J. Bristol
Law Office of Sabrina Damast, Inc.
Legal Aid at Work
Long Island Language Advocates Coalition
Los Angeles Center for Law and Justice
Louisiana Advocates for Immigrants in Detention
Lutheran Social Services of the National Capital Area (LSSNCA)
Martinez & Nguyen Law, LLP
Massachusetts Immigrant and Refugee Advocacy Coalition
MetroWest Legal Services
National Immigrant Justice Center
National Immigration Project (NIPNLG)
Nationalities Service Center
New England Justice for Our Neighbors
New Mexico Immigrant Law Center

New Orleans Workers' Center for Racial Justice
New York Immigration Coalition
New York Law School Asylum Clinic
Northeastern University School of Law Immigrant Justice Clinic
Northwest Immigrant Rights Project
Oasis Legal Services
OLA of Eastern Long Island
Pacific Asian Counseling Services
Paloonykey
Pangea Legal Services
Pars Equality Center
Pennsylvania Immigration Resource Center
Project ANAR
Public Counsel
Public Justice Center
Public Law Center
REACT DC, Inc.
Rocky Mountain Immigrant Advocacy Network
Safe Passage Project
San Joaquin College of Law New American Legal Clinic
Sonoma Immigrant Services
Texas Immigration Law Council
Thai Community Development Center
The Immigration Law Clinic, James E. Rogers College of Law, University of Arizona
The Platform of Hope
The Young Center for Immigrant Children's Rights
VECINA
Volunteers of Legal Service

CC:

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