IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*, Plaintiffs, v. ALEJANDRO N. MAYORKAS, *et al.* Defendants.	No. 22-cv-10808-ADB

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR COMPLETION OF DEFICIENT ADMINISTRATIVE RECORD, AND FOR RECORD SUPPLEMENTATION THROUGH LIMITED DISCOVERY

Dated: August 10, 2023

Susan M. Finegan (BBO #559156)
John F. Quill (BBO #632216)
Andrew H. DeVoogd (BBO #670203)
Andrew N. Nathanson (BBO #548684)
Kenneth P. Monroe (BBO #696381)
Michael P. Molstad (BBO #707524)
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
617.542.6000
SMFinegan@mintz.com

Adriana Lafaille (BBO #680210)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108
617.482.3170
ALafaille@aclum.org

Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

In November 2021, after a two-month pause on the adjudication of Afghan humanitarian parole applications, U.S. Citizenship and Immigration Services adopted a policy providing that the applications "generally will be denied" absent certain circumstances, and that the applications of Afghans still in Afghanistan could not be approved. *See* ECF No. 92-7. The impact was swift: the grant rates for Afghan applications dropped from 95% to zero. Plaintiffs challenge the November 2021 policy under the Administrative Procedure Act, and have moved for completion of the administrative record, and discovery. ECF No. 90 (July 19, 2023) ("Motion").

I. Defendants have revealed that they did not attempt compile a record of the documents USCIS considered in formulating the November 2021 policy.

An order requiring Defendants to complete the administrative record is warranted because Defendants' Opposition, ECF No. 94 (Aug. 2, 2023), makes clear that they have not even attempted to provide a complete administrative record of the materials considered by the USCIS in adopting the November 2021 policy. In their Motion, Plaintiffs argued that the record contains a dearth of documents, only about 30 in all, that USCIS may have considered in adopting the policy. ECF No. 91 at 11–12. Defendants do not contest these facts. Instead, they state that since they dispute Plaintiffs' characterization of the November 2021 policy, but had to "meet the Court's order" to produce a record, they simply assembled a "general record" about changes in policy and the processing of humanitarian parole. ECF No. 94 at 18.

That "general record" does not comply with the Court's order to produce a "complete, certified administrative record." ECF No. 69 at 38. "An agency may not unilaterally determine what constitutes the Administrative Record." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). An administrative record must consist of "all documents and materials directly or indirectly considered by the agency" in taking the agency action under review. *Id.* But Defendants do not claim to have compiled such a record for the November 2021 policy, or any of the

subsequent policies they say are relevant to this case. *See* ECF No. 94 at 11.[1]

The agency's certification of its record correspondingly omits standard language in which an agency certifies the production of the documents "considered by" the agency.[2] Indeed, Defendants used exactly that language in certifying the 23 individual administrative records produced in this case. *See, e.g.*, ECF No. 79-1 at 1 (stating record contains "the non-privileged documents considered by USCIS"). By contrast, with regard to the record relevant to its policy, USCIS claims to provide only documents that "detail" parole processing and "relate" to the changes in policy. ECF No. 79-24 at 2. Thus, the significant gaps in the record identified by Plaintiffs' Motion are compounded by USCIS's admission that it has not produced a true administrative record. An order requiring completion of the record is warranted.

II. Potentially deliberative material cannot categorically be withheld from the record.

Plaintiffs challenge the government's exclusion of materials from the administrative record on the grounds of deliberative process privilege. Specifically, Plaintiffs seek a privilege log of the material that has been withheld from the administrative record, and ask the Court to compel Defendants to unredact USCIS adjudicators' explanations of the decisions in Plaintiffs' cases.

A. Withheld deliberative material cannot be evaluated without a log.

Defendants contend that their decision to exclude an unspecified number of documents from the administrative record on the basis of privilege is immune from review. *See* ECF No. 94

[1] Defendants appear to argue that being asked to produce a complete administrative record of the November 2021 policy change renders this case a "programmatic challenge" akin to that in *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). ECF No. 94 at 14. It is difficult to see any similarity between this challenge to the November 2021 policy and the claim in that case.

[2] *See, e.g.*, *Casa Libre Freedom House v. Mayorkas*, No. 2:22-cv-01510, ECF No. 94 (C.D. Cal. June 9, 2023) ("the attached documents . . . constitute a true and complete copy of all nonprivileged documents and materials considered by the agency in promulgating the rule"); *L.F.O.P. v. Mayorkas*, No. 4:21-cv-11556, ECF No. 76 (D. Mass. May 12, 2022) ("Defendants compiled all documents directly and indirectly considered in coming to a final decision[.]").

at 20. But Defendants acknowledge that, with regard to the small sample of 15 email attachments initially withheld on privilege grounds, two were erroneously withheld and were not produced until Plaintiffs inquired about the documents. *Id.* at 7; ECF No. 92-1 at 4-5. They also acknowledge that, even when documents are properly designated as privileged, the privilege may be "overcome" if "competing interests weigh in favor of disclosure." ECF No. 94 at 12. This Court cannot assess those interests without a log.

Although there is a split in authority concerning whether Defendants should be required to log documents omitted from the administrative record on grounds of privilege, the view more consistent with the qualified nature of the privilege favors requiring a log.[3] That information is particularly important here given the paucity of the record produced.

B. The explanations accompanying adjudicating officer's decisions in Plaintiffs' cases are not privileged and would aid this Court's review.

The explanations given by adjudicating officers for their decisions in individual Plaintiffs' cases are not privileged, and even if they were, the interest in disclosure outweighs that privilege.

1. Defendants cannot render the "decision" of an "adjudicating officer" predecisional and deliberative by labeling it a "recommendation."

Adjudicating officers' explanations for the decisions they made in Plaintiffs' cases are not predecisional or deliberative, and cannot be withheld under the deliberative process privilege. As Plaintiffs previously demonstrated, USCIS's Humanitarian Affairs Branch Manual describes "adjudicating officers" as the officials who make a "decision" in a humanitarian parole case. ECF

[3] *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, No. 2:20-cv-00396-LEW, 2022 WL 2953075, at *2-4 (D. Me. July 26, 2022). Indeed, two cases cited by Defendants reinforce that Courts need information in order to assess claims of privilege against the needs of litigation. *See Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 176 (1975) (deposition taken to determine whether reports were predecisional and deliberative); *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1455-58 (1st Cir. 1992) (upholding exclusion of materials from record after *in camera* review); ECF No. 94 at 12, 15, 20.

No. 92-3 at 47-48 (USCIS-93–94). Plaintiffs seek their unredacted Parole Adjudication Worksheets ("PAWs"), in which adjudication officers are required to "document" and "provide[] a justification" for their decision. *Id.* at 47 (USCIS-93).

Defendants do not dispute that a PAW contains the justifications for the decision that an adjudicating officer makes. But they contend that the PAW is predecisional and deliberative because the decision must later be approved by a supervisor. Defendants avoid using the Manual's own terms, referring to *adjudicating officers* as "first-line officer[s]" or "lower-level staff," to the *decisions* of these officers as "recommendations," and to the *notice* sent to the applicant as the only relevant "decision." ECF No. 94 at 12, 14-15 (quotations omitted).[4] But Defendants' logic misses a step. It is true that an adjudicating officer's decision is not "final" until after supervisory concurrence. But that fact alone does not transform the officer's reasoning into a mere "recommendation." And even if the officer's decision were characterized as a "recommendation" of sorts, the Court would still have to determine whether, after supervisory sign-off, the officer's reasoning was the agency's final reasoning.

The inquiry is fact-specific. In *Renegotiation Board*, a Regional Board provided a recommendation to a Board, which received additional evidence and deliberated before making a final decision. *Regional Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 175–76 (1975). The Regional Board had "no legal authority to decide" the matter, which "only the

[4] Defendants say Plaintiffs "misrepresent" the sequence of events in the Manual. ECF No. 94 at 12, 15. Not so. Plaintiffs focus on how adjudication happens, whereas Defendants focus on the sending of the notice, which occurs after supervisory concurrence. (Defendants call this the moment when the notice is "issued," and thus state that "supervisory review occurs *before* decisions are issued," and that supervisors "issue" decisions, ECF No. 94 at 13–14, which is incorrect. Adjudicating officers "issue" decision notices prior to supervisory review; supervisors sign them before they are sent. ECF No. 92-3 at 48–49, 54 (USCIS-94–95, USCIS-100).)

Board could decide." *Id.* at 185. Because "the evidence utterly fail[ed] to support the conclusion that the reasoning in the [Regional Board's] reports is adopted by the Board as its reasoning," the deliberative process privilege applied to the Regional Board's reports. *Id.* at 184–85.[5]

By contrast, the evidence here shows that, after supervisory sign-off, the adjudicating officer's reasoning is left in place as USCIS's final reasoning. Adjudicating officers are empowered by USCIS to make the parole "decision" and exercise their own discretion on the agency's behalf. ECF No. 92-3 at 47 (USCIS-93). Once an adjudicating officer has "reached a decision," the officer must "document his or her decision" and "provide[] a justification" for it in the PAW. *Id.* at 47–48 (USCIS-93–94). The officer must also "issue" a denial or other decision notice and update internal systems to "reflect the decision made." *Id.* at 48–50 (USCIS-94–96).

Supervisors then provide quality control, ensuring that adjudicators' decisions are consistent with agency standards. Supervisory review is *not* "a re-adjudication of the officer's decision." *Id.* Even when an adjudicator has failed to meet agency adjudication standards—*i.e.*, when "the officer's decision is legally insufficient or is inconsistent with agency policy or guidance"—the supervisor does not issue their own decision. *Id.* at 53–54 (USCIS 99–100). Instead, the supervisor will "return . . . the case to the officer" for a new decision. *Id.* at 54 (USCIS-100).[6] This edifies the fact that officers *are* the decision-makers. When instead an adjudicating officer's decision "is an appropriate exercise of the *officer*'s discretion," the supervisor merely

[5] The Court's analysis of the report in *Renegotiation Board* benefitted from discovery. *Id. at* 181 (noting deposition was "almost the only evidence" regarding nature of relevant documents).

[6] Even when "the supervisor determines the officer's decision is legally sufficient, but the supervisor determines the case should be decided differently due to policy considerations, consistency with other decision, or for other reasons," the supervisor is not authorized simply to make their own decision. ECF No. 92-3 at 54 (USCIS-100); *cf.* ECF No. 94 at 15. Instead, the Supervisor "may discuss the case with the officer." *Id.* "[W]here there is disagreement," the Supervisor "is encouraged to discuss it with his or her branch chief." *Id.*

notes their concurrence in USCIS's internal system, signs the decision notice issued by the officer, and triggers the sending of that notice to the petitioner. *Id.* at 53–54 (USCIS-99–100) (emphasis added). This finalizes the officer's decision and reasoning as the agency's decision and reasoning.[7]

In short, this design guards the authority of the adjudicating officer to exercise judgment on behalf of the agency. The officer's decision is at no point a "recommendation" to a separate, decision-making officer. But even if one viewed the supervisor as the ultimate decision-maker, or saw the supervisor and adjudicating officer as a team, a supervisor's sign off ratifies the *officer*'s decision. Once that decision is final, the PAW cannot be deliberative because there is no way that "if released," it could "inaccurately reflect or prematurely disclose the views of the agency." *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 559 (1st Cir. 1992). The PAW is not privileged and should be produced in full.[8]

2. Defendants' claim that the November 2021 policy change *helped* Afghan applicants only bolsters the interest in disclosure of the PAW.

Plaintiffs previously showed that strong interests in understanding USCIS's decisions regarding Afghan humanitarian parole are sufficient to overcome the government's diffuse interests in the privilege. ECF No. 91 at 13–14; *see also Desert Survivors v. US Dep't of the Interior*, 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017). Now, Defendants' brief has only strengthened Plaintiffs' argument that, even if the PAWs were privileged, they should still be disclosed.

In particular, Defendants' new contention that USCIS's November 2021 policy change

[7] The court in *Abtew v. DHS* reached a contrary conclusion in the context of asylum assessments. 808 F.3d 895, 899 (D.C. Cir. 2015). It concluded that the "official writing the Assessment" "merely [made] a recommendation to a supervisor," who "made the final decision." *Id.* Unlike this case, the court there appears not to have had before it any evidence about how decision-making authority is allocated between officers and supervisors in the asylum context. *Id.* at 899 & n.1.

[8] Plaintiffs also challenged the redaction of material indicating the *supervisors'* decision and reasoning (if any). *See* ECF No. 91 at 7; ECF No. 92-5 at 2. Defendants do not defend these redactions, and appear to misconstrue Plaintiffs' arguments. ECF No. 94 at 14.

helped Afghan applicants, rather than harmed them, bolsters the need for disclosure of the PAWs. Until now, Defendants argued that USCIS did not change its policies for Afghan humanitarian parole applicants in November 2021, contrary to the allegations in the Complaint. *See, e.g.*, Aug. 2, 2022 Tr. at 6:14–15 ("there has been no policy change"), 11:21–22. In their latest submission, Defendants now acknowledge the November 2021 policy and say it contained an unprecedented change in language. ECF No. 94 at 10–11 (admitting that agency's new policy "had no precedent in any pre-existing generally-applicable guidance document."). But Defendants characterize these changes as extending "special solicitude" to Afghans by providing them with more favorable adjudication standards. ECF No. 94 at 10–11. Particularly in light of this new contention, the PAWs may provide a necessary and unique window into how USCIS policy actually operated.

On the other side of the ledger, Defendants make only a generalized claim that the administrative record is already adequate and that it has an "interest" in maintaining "the candid nature of the deliberations" in the PAW. ECF No. 94 at 17. First, the PAW does not contain "deliberations." And beyond pointing to its general "interest" in "open communication," Defendants make no actual contention that disclosure of the PAWs in this case would have *any* chilling effect on agency staff. That is insufficient to overcome the strong reasons for disclosure.[9]

III. Limited discovery is essential to ensuring that the Court has a full record for review.

Plaintiffs' motion sought two forms of limited discovery, relating to how Defendants produced the administrative record, and to Plaintiffs' delay claims.[10]

[9] Defendants also deploy 8 U.S.C. § 1252(a)(2)(B)(ii), ECF No. 94 at 12-13, but this Court already held that the provision does not strip its jurisdiction over Plaintiffs' challenge to "changes in policy," and ordered the production of records for that review. ECF No. 69 at 15–16, 38.

[10] Plaintiffs' motion may at times have been imprecise in referencing record "supplementation." *See* ECF No. 91 at 6, 21. Plaintiffs' request for discovery relating to the record aims to learn information that will aid in *completing* the record. And Plaintiffs' delay claims would not ordinarily be decided on a traditional administrative record. *See* ECF No. 45 at 19. But even under

A. The government claims that it did not know how to compile the administrative record—and its recognition that it did not produce such a record—justify discovery into the that records' production.

Plaintiffs have provided "clear evidence" to rebut the presumption that Defendants properly designated and produced the administrative record. *Yuetter*, 994 F.2d at 740. Because "a showing [has been] made that the record may not be complete, limited discovery is available to resolve that question."[11] While Plaintiffs need not show "bad faith," *Housatonic River Initiative*, 2023 WL 4730222, at *20, the facts below would support such a showing.

This is, undoubtedly, a unique APA case. Rather than acknowledge that Plaintiffs challenged a policy change that occurred in November 2021 and produce the administrative record of it, Defendants denied the change in policy existed. *See, e.g.*, Aug. 2, 2022 Tr. at 6:14–15. But it did. And just recently, the November 2021 policy memorandum at the heart of that change was finally produced as part of the administrative record. ECF No. 92-7. As Defendants now admit, policy toward Afghan HP applicants *did* change in November 2021. ECF No. 94 at 10 (casting changes as helpful to Afghans); *see also* ECF No. 63-1 at 3 (Nov. 18, 2021 email acknowledging "new qualifications" had caused approval to be withdrawn). But even the existence of a clear agency action—clear from the fact of the November 5, 2021 policy memorandum—did not ensure orderly production of the administrative record.

Instead, when asked to produce a record, Defendants have continually claimed not to know

---

the rubric of supplementation, the requested discovery is warranted (1) to "facilitate [the Court's] comprehension of the record or the agency's decision, particularly . . . when the agency has failed to explain administrative action as to frustrate effective judicial review," and (2) "to determine whether the agency considered all relevant factors in making its decision." *Housatonic River Initiative v. EPA, New England Region*, No. 22-1398, 2023 WL 4730222, at *20 (1st Cir. July 25, 2023) (quotations omitted).

[11] Other courts have ordered discovery to ensure the completeness of the record. *See, e.g.*, *Sierra Club v. Fed. Highway Admin.*, No. 17-cv-01661, 2018 WL 1695402, at *9 (D. Colo. Apr. 6, 2018); *Colorado Env't Coal. v. Off. of Legacy Mgmt.*, No. 08-cv-01624, 2010 WL 231641, at *4 (D. Colo. Jan. 14, 2010); *Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).

what policy Plaintiffs were challenging. *See* July 7, 2022 Tr. at 8:8–11 (noting "questions" about administrative record given "amorphous nature of the claim"); ECF No. 55 at 22 ("Defendants are tasked with compiling a record tied to no specific decision"). Now, taking issue with how Plaintiffs characterize the November 2021 policy in their Complaint (filed, of course, prior to the policy's production), Defendants did not produce the materials that were considered by the agency in adopting the new policy. *See supra* Section I. They signaled a record of "alleged policies" could not be produced, and produced a sampling of related documents instead. ECF No. 94 at 18; *see id.* (referring to "non-existing policies," and "policies that exist only in speculation.").

At the August 8, 2022 hearing in this case, this Court recognized that discovery was the logical solution to Defendants' denial that a fall 2021 change in policy had occurred. Aug. 2, 2022 Tr. at 6 ("Don't we need discovery to see if there's been a policy change?"). One year later, faced with a continued refusal to acknowledge the implications of that change for this case and a failure to produce an adequate record, discovery is now appropriate.

B. Because delay claims are not moot, discovery is warranted.

This Court has already acknowledged that Plaintiffs' delay claims are "fact-bound." ECF No. 69 at 35. But Defendants contend that discovery into delay claims is unnecessary because the claims are moot and the record is adequate.

Defendants have not met the "heavy burden" to demonstrate mootness. *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 8 (1st Cir. 2021); *Johansen v. Liberty Mut. Grp., Inc.*, No. 1:15-cv-12920-ADB, 2016 WL 7173753 (D. Mass. Dec. 8, 2016). Nor can they. Three of the four Plaintiff families still have their humanitarian parole cases pending before USCIS. With regard to the Doe and Boe families, requests for reconsideration of their denials have been pending for one year or longer.

ECF No. 91 at 18 n.13.[12] For its part, the Moe family received "Notices of Continued Parole Processing." *Id.* Defendants do not explain why that fact—"continued" processing—indicates that a determination of their cases is final.[13] Indeed, Defendants' brief suggests that USCIS still has a further role in their humanitarian parole applications once the Moes "complete processing in a country with a U.S. consular presence." ECF no. 94 at 24. Without further evidence, the government cannot meet its burden to demonstrate mootness as to the Moe family's delay claims.

Finally, Defendants suggest that the existing record is sufficient to adjudicate Plaintiffs' delay claims. But Defendants did not purport to provide a record relevant to the delay claims—despite this Court's order to produce "administrative record[s] . . . relevant to" Plaintiffs' claims concerning "the pace of adjudications of Afghan humanitarian parole applications." *See* ECF Nos. 69 at 38; 79-24 (noting USCIS record "relate[s] to the decision-making process to temporarily pause parole processing in order to review parole policy and procedures and the resulting updated guidance that was issued in late 2021 and 2022"). And the record includes documents only up to May 2022—fifteen months ago. The record provides some information about initial staffing efforts, but does not address ongoing delays.[14] Discovery is therefore appropriate.

---

[12] The May 2022 Complaint did not mention the delayed processing of Plaintiffs' reconsideration motions, which had not yet been filed (for the Boes), or had been pending for under three months (with regard to the Does). The present delays are encompassed by the Complaint's allegations—including that "USCIS has unreasonably delayed and/or unlawfully withheld the adjudication of urgent applications filed by or on behalf of the Plaintiffs who have pending applications," ECF No. 1 at ¶ 196—Plaintiffs will respectfully seek leave to supplement the complaint with allegations specific to the reconsideration process if needed. *See* Fed. R. Civ. Pro. 15(d).

[13] Plaintiffs' understand the "Notice of Continued Parole Processing" to be a positive development in the Moes' case, but its meaning is not fully clear. Plaintiffs' understand that this notice of "continued" processing results from USCIS's policy, since November 2021, of not providing Conditional Approvals to Afghans in Afghanistan.

[14] *See Neema v. Renaud*, No. 5:21-cv-9, 2021 WL 6803282, at *2 (D. Vt. Mar. 4, 2021) (granting motion for discovery from USICS on delay claims); *Edakunni v. Mayorkas*, No. 2:21-cv-00393-TL, 2022 WL 16949330, at *1–5 (W.D. Wash. Nov. 15, 2022) (same and explaining that

IV. Even the incomplete administrative record supports Plaintiffs' allegations.

The government spends much of its brief about discovery picking at the merits of Plaintiffs' challenge to the November 2021 change in policy.[15] Defendants appear to contend in circular fashion that discovery is not warranted because Plaintiffs' arbitrary-and-capricious challenge will fail (according to Defendants) on the existing record. Beyond its circular logic, this argument misses the mark: the available record, so far, amply supports Plaintiffs' claim.

This is not the place for a full exposition of the merits, but a summary may be useful:

First, the challenged agency action occurred, and there is a reviewable, final agency action before this Court. The record reveals that in November 2021, USCIS issued new policy with regard to Afghan humanitarian parole applicants. ECF No. 92-7. With regard to Afghans still in Afghanistan, the policy contains both language that relates to the standards for issuing denials (which the parties characterize differently), and language relating to the possible outcomes of an adjudication (which the parties also characterize differently). With regard to the latter, the policy allows officers to either deny parole or issue a "Parole Notice (Suspension of Processing)," the latter of which results in the administrative closure of the case. *Id.* at 4, 9; *see* ECF No. 1 ¶ 55.

The consequences of the challenged policy were disastrous for Afghans. After the change in policy, USCIS's approval rate of Afghan humanitarian parole applications plummeted from 95% to zero. *Compare* DeVoogd Dec. Ex. A (noting 72 approvals and 4 denials in the first eight months of 2021); Ex. B at 6 (noting 80 conditional approvals in August 2021) *with* Ex. C (reporting the same 80 conditional approvals from July 2021 to February 2022).

"supplementation is necessary to allow the Court to examine whether there has been unreasonable agency delay under the [TRAC] factor test."); *cf. Hu v. Reno*, No. 3-99-cv-1136-BD, 2000 WL 425174, at *4 (N.D. Tex. Apr. 18, 2000) (ordering trial on delay claims).

[15] Defendants' brief is also replete with characterizations of about Plaintiffs' intentions in this suit, to which Plaintiffs do not believe a response is warranted.

Second, because the November 2021 policy is a final agency action, it is subject to review to determine whether it is "not in accordance with law" or "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A). With regard to the latter, an agency changing policy must "display awareness that it *is* changing position," and "provide a reasoned explanation for its action." ECF No. 69 at 23 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The agency's decision must reflect that the agency "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Third, the November 2021 policy fails these APA requirements. It is arbitrary and capricious, among other things, because the agency failed to acknowledge a change in policy. It also failed to provide a reasoned explanation for the policy change; did not consider reliance interests of applicants, who were not even informed of new standards to govern their applications; and failed to consider alternatives to addressing the absence of a consulate in Kabul, including the possibility of continuing to issue Conditional Approvals in such circumstances as it had done in early September 2021. *See* ECF No. 1 at ¶¶ 177-81; *see also DHS v. Regents of the Univ. of Calif.*, 140 S.Ct. 1891, 1915 (2020). The policy is also contrary to law because it violates the command in 8 U.S.C. § 1182(d)(5)(A) and USCIS's Manual to make parole decisions on a case-by-case basis. ECF No. 1 at ¶¶ 186-87.

In short, the available record materials confirm the solid grounding of Plaintiffs' claims. They provide no basis to pretermit a thoughtful inquiry into the November 2021 policy change based on the complete administrative record that this case deserves.

V. Conclusion

For the foregoing reasons, the Court should grant Plaintiffs' motion; order Defendants to produce a complete administrative record; require a privilege log of possibly privileged materials

withheld from the challenged record, and the unredacted PAWs; and permit limited discovery (interrogatories and a designee deposition) relevant to the production of the administrative record and Plaintiffs' delay claims.

Dated: August 10, 2023

Respectfully submitted,

PLAINTIFFS

By their attorneys,

/s/ *Susan M. Finegan*
Susan M. Finegan (BBO #559156)
John F. Quill (BBO #632216)
Andrew H. DeVoogd (BBO #670203)
Andrew N. Nathanson (BBO #548684)
Kenneth P. Monroe (BBO #696381)
Michael P. Molstad (BBO #707524)
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
617.542.6000
SMFinegan@mintz.com

Adriana Lafaille (BBO #680210)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108
617.482.3170
ALafaille@aclum.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*, Plaintiffs, v. ALEJANDRO N. MAYORKAS, *et al.* Defendants.	No. 22-cv-10808-ADB

DECLARATION OF ANDREW H. DEVOOGD

I, Andrew DeVoogd, declare as follows:

1. I am an attorney licensed to practice law in the Commonwealth of Massachusetts. I am a member of the law firm Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. and I have entered an appearance as counsel for Plaintiffs in the matter captioned above. *See* Dkt. 14.

2. I offer this Declaration in support of Reply Memorandum in Support of Plaintiffs' Motion to Compel Completion of Administrative Record, and for Record Supplementation Through Limited Discovery (the "Reply"). I have personal knowledge of the facts set forth herein and, if called to testify regarding the same, I could competently do so.

3. My team and I extensively reviewed the production of Defendants purporting to be the administrative record. Based on that extensive review, I understand the Reply to accurately describe the contents of that production, and the materials known and believed to be missing from that production.

4. Attached hereto as Exhibit A is a true and correct copy of the administrative record document bates-stamped USCIS-00000730.

5. Attached hereto at Exhibit B is a true and accurate copy of the administrative record document bates-stamped USCIS-00000017.

6. Attached hereto as Exhibit C is a true and correct copy of the administrative record document bates-stamped USCIS-00000620.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of August, 2023, in Boston, Massachusetts.

/s/ *Andrew DeVoogd*
Andrew DeVoogd

Exhibit A

- **Over the last five years, how many parole applications have we received and adjudicated by year?**
  - Please see attached charts. Currently we have over 1,050 applications pending. Normally, we try to keep at having no more than 450 or so pending (an average of three months of receipts under steady-state), as our target processing time is to complete 90% of our cases within 90 days. We are not meeting our target.

- **How many staff are dedicated to adjudicating these applications?**
  - Until recently IRAD was authorized for 6 adjudication officers for parole applications. We have 3 on board and all three are serving as acting supervisory adjudication officers for refugee officers and others assigned to assist with the parole workload.
  - The Humanitarian Affairs Branch current staffing level is as follows:

Staffing IRAD Humanitarian Affairs Branch		
Position	**Authorized**	**On Board**
Section Chief	1	1
Supervisor	3	1
Adjudication Officers	**13**	**3**
Staff Assistant	1	1
Immigration Services Assistants	4	0
Total	22	6

  - Until a few months ago, HAB had 6 authorized adjudication officers. Recently, OCFO approved an additional 7. IRAD is in the process of hiring. In the meantime, IRAD has assigned 13 refugee officers and a supervisory refugee officer to assist, and has 2 officer detailees from outside RAIO to support
  - IRAD is assessing our parole adjudication staffing needs taking into account our backlog of pending cases, the anticipated 4,000 FRTF parole cases, and Afghan parole cases, among others.

- **How many Afghan related parole applications have come in thus far, by week?**
  - OIDP has not yet been able to beak it down by week, but since July 1, the Lockbox has received over 1,350 requests for parole from Afghan nationals, of which 1,003 were accepted. Please see chart below for more details for Lockbox receipts.

Form I-131 Humanitarian Parole Requests 7/1/2021 to 9/1/2021	ACCEPTED				Rejected			
	With Fee Paid	**With Fee Waived**	**Fee Accepted Elsewhere**	**Total Accepted**	**Rejected FW Related**	**Rejected Not FW Related**	**Total Rejected**	**Total Processed**
Non-Afghans	413	26	98	**537**	79	27	**106**	**643**
Afghans HP	907	96		**1003**	165	188	**353**	**1,356**
All HP	**1**			**1**				**1,462**

- **How many of those that already came in are for people inside Afghanistan?**
  - We are unable to accurately assess that without looking at each case, but the vast majority have been for individuals inside Afghanistan.

- **Is it accurate for me to say that we have been expeditiously adjudicating those inside Afghanistan?**
  - Yes, USCIS prioritized the requests for parole for individuals inside Afghanistan during the evacuation. Staff worked overtime and weekends to approve those cases that were approvable and sent the approved lists daily to State. We also requested expedited NCTC checks and completed all the normal vetting before approval.

- **Of the applications already adjudicated, what is the approval rate?**
  - This year, we approved 100% of the Afghan cases requested by State (31 cases adjudicated) and 95% of the Afghan Forms I-131 (72 approved and 4 denied). These stats require explanation and may be misleading because we were focusing on just **getting the approvals** out in hopes of the beneficiaries getting on an evacuation flight. As such, these rates should not be used to anticipate what would be approved in the future, particularly as the volume increases and many people see parole as a ticket out of Afghanistan or to the U.S. (including those who may have been living in third countries for years or are not even Afghan nationals but seek to exploit the situation). Please see historic stats attached.

- **What is the denial rate?**
  - See note above and attached stats.

- **What are some of the reasons for denial?** Can we discuss?

- **Why do you believe that under current HP standards that a good number would be denied?**
  - We anticipate that a significant number of applications will be general pleas for help to get out of Afghanistan based on fear of harm. Please see attached policy guidance on the analytic framework for protection-related cases, beginning on page 59. Below is an excerpt, but good to read in context. Will discuss with you.

    Generally, for you to find that there are urgent humanitarian reasons for parole in cases involving claims of targeted harm cases, you must find that the beneficiary is at imminent risk of serious harm. The claim may be based on specific threats targeting the beneficiary individually or, in some cases, the claim may be based on the beneficiary's membership in an at-risk group that has been specifically targeted for harm. In those cases, the evidence must show not only that members of the group are at risk of imminent harm, but that the individual or group targeting the at-risk group knows, or likely imminently will know, that the beneficiary is a member of that group. Imminent serious harm, in the context of parole cases, means an immediate and present threat of harm that could lead to serious injury (psychological or physical) or death.

    . . .

    In order to exercise discretion favorably in claims where the asserted urgent humanitarian reasons is solely a claim of targeted harm, there must be credible, third-party evidence of the threat. See discussion of evidence below. If there is no credible, third-party evidence of threat, but there are other compelling, positive factors associated with the case such that you believe that discretion should be exercised favorably in a particular case, please discuss with your supervisor.

Exhibit B

Policy Branch
International and Refugee Affairs Division
Refugee, Asylum and International Operations
U.S. Citizenship and Immigration Services

Parole Requests for Afghan Nationals
Interim Policies and Procedures

Date: December 17, 2021[1]

Background:

On August 29, 2021, the Department of Homeland Security (DHS) became the lead agency implementing the ongoing U.S. Government efforts to support vulnerable Afghan nationals, including many who were evacuated with U.S. Government and private partner assistance from Afghanistan following the withdrawal of the U.S. military from Afghanistan. These coordinated efforts are known as Operation Allies Welcome (OAW) and include comprehensive screening and vetting and additional medical screening and vaccination of Afghan nationals paroled into the United States.

USCIS has developed vetting and medical-related requirements to apply Operation Allies Welcome policies to the adjudication of parole requests for Afghan nationals received through Form I-131 or U.S. government referrals that are under International and Refugee Affairs Division's (IRAD) jurisdiction.[2] This guidance outlines these policies and procedures, as well as eligibility considerations that are specific to parole of Afghan nationals, taking into account the evolving situation in Afghanistan, U.S. policy interests, and other protection mechanisms in place for vulnerable Afghan nationals.

Eligibility:

Adjudicators must follow the HAB Procedures Manual and the Parole Training Module when adjudicating parole requests for Afghan nationals. Although parole requests may be similar in nature, each application must be evaluated on its own merits taking into account all the factors unique to the specific parole request and considering the totality of the circumstances. Given the conditions specific to Afghanistan and the implementation of OAW, adjudicators must follow the additional guidance specific to parole requests for Afghan nationals outlined below.

---

[1] OCC/RALD clearance received December 9, 2021

[2] Many Afghan nationals were transported to the United States by the USG and were paroled at the ports of entry by CBP. Afghan nationals who remain overseas are eligible to apply for parole with USCIS by filing the Form I-131, Application for Travel Document. USCIS also receives requests for parole through executive agency referrals. Parole requests filed on behalf of overseas beneficiaries are adjudicated by IRAD's Humanitarian Affairs Branch (HAB) and, if approved, the individual must visit a U.S. embassy or consulate to complete parole processing (including biometric security checks) and receive travel documents.

The interagency[3] is prioritizing relocation to the United States of the following categories of Afghan nationals who have been able to leave Afghanistan:

- Immediate relatives of a U.S. Citizen (spouse, unmarried children under 21, and parents);
- Immediate relatives of a U.S. Lawful Permanent Resident (spouse and unmarried children under 21);
- Locally Employed Staff (LES)[4] of U.S. Embassy Kabul and their immediate family (spouse and unmarried children under 21);
- Special Immigrant Visa (SIV) applicants who have received Chief of Mission (COM) approval and immediate relatives (spouse and unmarried children under 21) included on their case;
- Immediate relatives of Afghan nationals previously relocated to the United States through OAW (spouse, unmarried children under 21, and, in the case of unaccompanied minors relocated as part of OAW, their primary caregiver, including but not limited to a parent or legal guardian, and the spouse and dependent children under 21 of the primary caregiver); and
- Individuals referred to the U.S. Refugee Admissions Program (USRAP) through a P1 embassy referral or P2 group designation referral ***and*** **in imminent risk of *refoulement* or serious, targeted harm** in the country outside Afghanistan where they are located.

Membership in one of these groups outlined above should be considered a strong positive factor when assessing urgent humanitarian reasons, significant public benefit, and the exercise of discretion.

Special Immigrant Visas (SIV): Special immigrant applicants who have received COM approval have provided the Department of State with evidence to show they have provided faithful and valuable service to the U.S. Government and have experienced an ongoing serious threat. COM approval is a strong positive factor when assessing significant public benefit and urgent humanitarian reasons. SIV applicants who have not received COM approval must provide third party, credible evidence of their work for the U.S. government (see below section on Evidence), as well as evidence of imminent, targeted severe harm or a particular vulnerability (such as a serious medical condition or a single female without support) to show why they are unable to wait to complete SIV or refugee processing. Adjudication officers can find evidence of COM approval by looking in CCD. Evidence of an approved I-360 petition in CLAIMS3 would also be a strong indicator that the individual has received COM approval.

Protection Claims and P1/P2 Refugee Referrals: Parole is not intended to replace refugee processing and, wherever possible, it is USG policy to process protection needs through the U.S. Refugee Admissions Program (USRAP). However, in some circumstances, the protection needs are so urgent that processing via the USRAP, which can take six months or more for an expedited case, is not a realistic option to accord needed protection. While each case is unique and parole determinations are made based on the totality of the circumstances, USCIS generally approves requests based on protection needs only if there is credible, third-party evidence naming the beneficiary that shows the beneficiary is targeted and at imminent risk of severe harm. The interagency has prioritized relocation efforts for those Afghan nationals who have been referred as P1 or P2 refugee referrals if they are in imminent risk of serious, targeted harm in the country outside of Afghanistan where they are located and processing

[3] Department and Agency Deputies, in coordination with the National Security Council, established these priority groups

[4] Locally Employed Staff are foreign nationals and other locally resident citizens who are legally eligible to work in the country and are employed by the U.S. embassy or consulate.

through the USRAP is not an option. The Department of State is developing procedures so that a State Department Refugee Coordinator, working closely with the United Nations High Commissioner for Refugees, can identify Afghan refugee applicants who are at such risk or have specific vulnerabilities such that expedited refugee processing will not meet the protection needs. In those situations, the Department of State will present a government referral to IRAD for consideration of parole.

While receiving these cases through the government referral process is the preferred approach, that does not preclude individuals from submitting requests for parole using Form I-131 based solely on protection needs. However, the evidentiary burden for those who are not P1/P2 referred applicants for whom PRM and/or UNHCR has confirmed are at imminent risk, will remain high.

Beneficiaries still in Afghanistan

Since the U.S. Embassy in Afghanistan has suspended operations, including all normal consular services, a beneficiary will be required to leave Afghanistan in order to complete processing of their parole request. If an adjudicator finds that a beneficiary residing in Afghanistan is appears initially to be eligible for parole, the adjudicator may issue a Parole Notice (Suspension of Processing) stating that USCIS cannot complete processing of the parole request unless and until the beneficiary informs USCIS that they are able to report to a U.S. embassy or consulate. It may be difficult to assess eligibility based purely on protection needs while an individual is still in Afghanistan, as the adjudicator will not know when or how the beneficiary will leave Afghanistan, where the beneficiary will be once outside of Afghanistan, or the protection that may be available to the beneficiary in that location. Therefore, for Afghan nationals in Afghanistan, parole requests based on protection needs, without other factors, such as the beneficiary's falling into one of the categories of Afghan nationals prioritized by the interagency, family reunification, or urgent medical needs, generally will be denied. Such parole beneficiaries should be given denial notices informing them that 1) their parole applications cannot be approved at this time and that, should they get to a third country, they should contact the United Nations High Commissioner for Refugees (UNHCR) for protection and consideration of refugee resettlement in the United States through the U.S. Refugee Admissions Program; and 2) should they be at imminent risk of severe harm in that third country or forced return to Afghanistan, they should contact USCIS with information on whether they have contacted UNHCR for protection assistance and include any third-party credible evidence of their risk in that third country. USCIS will consider reopening the denied parole application (for no fee) within a year from the denial and may reconsider their request if sufficient additional new evidence is provided.

Beneficiaries outside of Afghanistan

Generally, beneficiaries in need of protection should be directed to contact UNHCR. UNHCR has more direct access to information about the beneficiary and conditions in the host country and can consult with the State Department Refugee Coordinator to assess urgency and the most appropriate protection path, including referral for parole, expedited refugee processing for resettlement in the United States, or resettlement in a third country. Parole is not intended to replace normal refugee processing channels and therefore discretion generally will be exercised to deny a request for parole based on a protection need in lieu of channeling vulnerable individuals through the normal protection channels. However, some vulnerable beneficiaries may be eligible for parole based on the specific circumstances of the beneficiary. When assessing parole eligibility, the adjudicator must review the Form I-131 application carefully for any other factors in addition to the protection request, such as family unity, specific vulnerability that may put the beneficiary at risk of imminent harm in the third country, the possibility of imminent refoulement to Afghanistan, and/or whether the beneficiary has access to UNHCR, depending on the location. The adjudicator should assess the totality of the circumstances to determine whether

there are urgent humanitarian factors or significant public benefit reasons for parole and whether discretion should be exercised favorably. A combination of factors in addition to protection needs – such as factors related to family unity or other close U.S. ties and specific vulnerability – should be considered favorably.

Beneficiaries of Form I-130 or Form I-730 Petitions:

While parole generally is not used to circumvent normal immigration processing channels, family reunification is a positive factor when assessing parole eligibility, particularly when combined with other factors related to vulnerability and when normal immigration processing channels are insufficient to address the need for parole. There often are significant public benefit reasons to promote family unity, particularly with respect to vulnerable family members (for example, when the separated vulnerable family member is outside the United States, or the beneficiary is needed to assist a vulnerable family member inside the United States). Family unity is also a positive factor in the exercise of discretion.

Approved Form I-130 and Form I-730 Petitions

A vulnerable Afghan national who is the beneficiary of an approved Form I-130 petition may be eligible for parole if there are no negative discretionary factors that outweigh the positive factors of risk and family reunification. Vulnerability may be based on age, status (e.g., single female, LBGTQI+ status, religious minority status), medical condition, association with the United States, etc. Adjudicators should review PCQS (CLAIMS 3 and ELIS2) and the A-file to confirm the status of any prior petitions filed for the beneficiary. Generally, parole is not to be used to circumvent normal visa processing.

If the beneficiary has an approved Form I-130 petition and a visa is immediately available (e.g., immediate relatives of U.S. Citizens) or the beneficiary's preference category is current[5], the processing of the parole request should be suspended (marked closed in the case management system) and the beneficiary referred to immigrant visa processing through the Consular Section unless there are circumstances that indicate the visa process would be significantly delayed beyond the time the beneficiary could safely remain in the third country. IRAD HQ is in regular discussions with the Department of State Consular Affairs (DOS/CA) and will provide updated information about visa processing capacity at posts in the region. Adjudicators may also contact IRAD Policy for information when there are questions in this regard. If the beneficiary is in a particularly vulnerable situation, IRAD Policy can consult with DOS/CA to determine the most expeditious processing based on the specific post.

Similarly, if the Form I-131 beneficiary is also the beneficiary of an approved Form I-730 petition, the beneficiary should be directed to contact the U.S. Embassy or Consulate, or USCIS international office, where the beneficiary is located to transfer the Form I-730 petition for the travel eligibility determination and issuance of a travel document. If the travel document is issued, the beneficiary will be able to enter the United States as an asylee or refugee. Normally, the Department of State process for issuing a boarding foil for a Form I-730 beneficiary is very similar to the process for issuing a boarding foil for a parole beneficiary. IRAD HQ is in regular discussions with the Department of State Consular Affairs (DOS/CA) and will provide updated information about Form I-730 travel eligibility processing capacity at posts in the region. Adjudicators may also contact IRAD Policy for information when there

[5] See the Department of State Visa Bulletin for preference categories and visa availability.

are questions in this regard. If the beneficiary is in a particularly vulnerable situation, IRAD Policy can consult with DOS/CA to determine the most expeditious processing based on the specific post.

Pending Form I-130 and Form I-730 Petitions

When a petition is pending, adjudicators should review the evidence provided to determine whether the beneficiary is at risk of harm if they were to wait for adjudication of the underlying petition and immigrant visa processing or travel document processing (Form I-730), whether sufficient evidence has been provided to support the claimed relationship and risk of harm, and to consider positive and negative discretionary factors. Any harm to the petitioner based on delayed family unification should also be considered. Adjudicators may also reach out to IRAD Policy where there are pending family-based petitions, and IRAD Policy can flag the petition for expedited adjudication with the office that has jurisdiction.

No Form I-130 and Form I-730 Petition Filed

When no family-based petition has been filed, but the Form I-131 beneficiary could also be eligible as a beneficiary of a Form I-130 or I-730 Petition based on relationship to a USC, LPR, asylee, or refugee, adjudicators should review the evidence provided to determine whether the beneficiary is at risk of harm if they were to wait for the petition and adjudication process (even if expedited), whether sufficient evidence has been provided to support the claimed relationship and risk of harm, and consider positive and negative discretionary factors have been considered. Any harm to the petitioner based on delayed reunification should also be considered.

The Department of State also has authority to accept Form I-130 petitions filed for immediate relatives at consular posts abroad for expeditious processing in urgent circumstances. Adjudicators may reach out to IRAD Policy to explore whether IRAD HQ could assist in working with partners within USCIS and DOS/CA to expedite the adjudication process if a Form I-130 or I-730 petition were to be filed.

Minors:

Adjudicators should refer to the HAB Procedures Manual and the Parole Training Module for additional guidance on adjudicating parole cases for minor children. The Adjudication Programs Coordination Office has also developed the RAIO Afghan Children and Adoption-Related Considerations Primer with information specific to the Afghan population.

Separated Family Members:

During the evacuation of Afghan nationals prior to August 31, 2021, some family members were separated from each other, with certain family members paroled into the United States pursuant to Operation Allies Welcome, some remaining in Afghanistan, and others getting to third countries via other means. There are significant public benefit reasons related to family unity to reunite immediate family members with family members paroled into the United States pursuant to Operation Allies Welcome, which can help improve resettlement outcomes. Reflecting the significant public benefit of this type of family reunification, Congress has authorized resettlement assistance after September 30, 2022, for the spouse and children of Afghan nationals paroled into the United States between July 31,

2021, and September 30, 2022, if their parole has not been terminated, as well as the parent or legal guardian of an unaccompanied Afghan minor paroled into the United States during that period. [6]

There also may be urgent humanitarian reasons to use parole to unite Afghan family members separated during the evacuation efforts, depending on the circumstances of each case. Generally, parole may be appropriate to unite separated immediate family members, including spouses and unmarried children, with an individual who was paroled into the United States as part of Operation Allies Welcome. It may also be appropriate for more extended family members, such as parents, adult children, or siblings, depending on the circumstance of each case and taking into account any vulnerabilities and dependencies among the family members.

Beneficiaries who are in the United States:

Some Afghan nationals who have pending parole requests with USCIS were able to enter the United States through other means, including U.S. government evacuation flights or an immigrant visa. If the adjudicator determines that the beneficiary of an initial Form I-131 filed while the beneficiary was outside the United States is in the United States at the time of adjudication after having been admitted or paroled, the parole request should be denied with an explanation that the reason for parole no longer exists since the beneficiary is currently present in the United States.

Conditional Approvals prior to August 31, 2021:

USCIS conditionally approved approximately 80 requests for parole for Afghan nationals in August 2021. Some of these beneficiaries were able to board evacuation flights, but many were not. USCIS will generally honor the prior conditional approval for these cases if the beneficiaries are able to continue processing their parole requests outside of Afghanistan within one year of approval and comply with all vetting and medical requirements, unless new derogatory information is found. If the petitioner or beneficiary contacts USCIS to continue processing the parole request, the adjudicator must reopen the case in CAMINO, review the file for any data fields required for vetting and update these in CAMINO, and submit a new OAW vetting request. If the beneficiary is eligible for parole after all security checks are complete, HAB should issue a new Afghanistan Conditional Approval Notice and Afghanistan Authorization Memo, which include the new medical requirements.

Evidence:

In order to determine whether the beneficiary is eligible for parole, the adjudicating officer should review and evaluate all of the evidence in the record. The adjudicator should refer to the HAB Procedures Manual and the Parole Training Module for guidance on assessing relevance and credibility of the evidence provided. Adjudicators should also refer to 8 CFR § 103.2(b)(2) for regulations regarding the submission of secondary evidence when primary evidence is unavailable.

Afghan Documents: Identity and relationship documentation may be lacking in some Afghan parole requests given the circumstances of flight, for those outside of Afghanistan, and due to limitations on the availability of identity documents. For example, according to the September 22, 2021 Afghan

[6] See H.R. 5305, Section 2502 https://www.govtrack.us/congress/bills/117/hr5305/text/enr#link=C_V_2502_a&nearest=H68BB5F7B78D94E92A179EDBCC860C09F

Document Guide produced by the HSI Forensics Lab, citing a UNICEF report, birth certificates are not commonly used in Afghanistan and those that are issued often do not have the child's name. Adjudicators must become familiar with the Afghan Document Guide, which provides detailed information and exemplars of Afghan government documents prior to the recent take-over by the Taliban. Adjudicators are also encouraged to review the Department of State Reciprocity and Civil-Documents Guide section on Afghanistan. It notes that the main form of identity document used in Afghanistan is the *tazkera* and provides the following comments:

> *Afghans usually apply for a tazkera when a child reaches school age, but it can also be obtained and/or modified throughout adulthood. The document traces its holder's roots through the father; mother's names are not usually listed on tazkeras. Tazkeras are hand-written, and there have been multiple variants of the document since 1976. U.S. Embassy Kabul requires all Afghan citizens who are applying for immigrant, special immigrant, or other such visas to submit a tazkera, as proof of identity and birth. Some Afghan citizens may also possess birth certificates issued by clinics or hospitals in Afghanistan, but these documents are not accepted for U.S. visa processing. U.S. Embassy Kabul requires that all tazkeras be accompanied by a certified English translation. The tazkera must first be authenticated by the Ministry of Interior before an English translation may be certified by the Ministry of Foreign Affairs.*

More information will be provided regarding passports and identity documents issued by the Taliban government once it is available.

Passports: In general, a parole beneficiary must have a passport to travel. However, when the beneficiary is unable to obtain a passport prior to travel to the United States, the adjudicator must notify the Consular Section that the beneficiary does not have a passport in the authorization memo sent to Post. The Consular Section may issue the boarding foil on the Form DS-232.

Verifying Work with the U.S. Government: Copies of letters and certificates from U.S. government agencies or officials can be easily replicated and generally should not be considered strong evidence without credible third-party verification. The Department of Defense (DOD) may be able to verify employment with DOD contractors in certain circumstances. DOD can also verify whether they have referred an individual for P1 or P2 refugee processing, including both individuals who worked for DOD and some who worked for the former Afghan government or military.

IRAD HQ is working to obtain access to the list of P1 and P2 referrals of Afghan nationals to the USRAP. In the near-term, adjudicators can refer cases to IRAD Policy for verification of DOD records if the beneficiary is otherwise eligible for parole (e.g., there is an imminent risk of severe targeted harm, particular vulnerability, or other factors that preclude refugee resettlement or visa processing) and third-party evidence of the beneficiary's claimed work with the U.S. Government is the only outstanding issue. Adjudicators should also send requests for verification of employment by other U.S. Government employers to IRAD Policy, and IRAD Policy will work to establish a mechanism for verifying these requests.

Sponsorship and Resettlement Benefits:

The continuing resolution for Fiscal Year 2022 passed by Congress on September 30, 2021, provides certain Afghan nationals who were paroled into the United States between July 31, 2021, and

September 30, 2022, access to resettlement assistance, entitlement programs, and other benefits normally provided to refugees, and provides similar assistance to certain other Afghan nationals paroled after September 30, 2022.[7] While sponsorship documents are still required for parole requests to ensure beneficiaries have appropriate reception and support while paroled, adjudicators should take into account the benefits provided to certain Afghan parole beneficiaries through the continuing resolution when determining whether the beneficiary will have sufficient support during the authorized parole period in the United States. Sponsorship documents may also provide additional evidence to show U.S. ties, which may be a positive factor when assessing eligibility for parole.

The Department of State has developed a fact sheet on obtaining resettlement benefits, which the Consular Section will provide to the Afghan parole beneficiary at the time of travel foil issuance. After a beneficiary is paroled into the United States, the parolee will need to approach a designated resettlement agency to identify themselves as eligible for these benefits and be accepted into the program within 90 days of arrival in the U.S. Although Afghan parolees are entitled to resettlement benefits, it may take several weeks or a month to schedule an appointment with a resettlement agency and begin receiving these benefits after arrival. It is important that Afghan parolees have the support of a sponsor during this period.

Vetting:

(U/FOUO) In addition to standard security checks,[8] ***Afghan beneficiaries*** of parole are required to undergo vetting consistent with the vetting in place for OAW evacuees. Additionally, the National Counterterrorism Center (NCTC) will continue to conduct biographic vetting for ***petitioners and sponsors*** of Afghan parole beneficiaries.

Law Enforcement Privilege

[7] See H.R. 5305, Section 2502 https://www.govtrack.us/congress/bills/117/hr5305/text/enr#link=C_V_2502_a&nearest=H68BB5F7B78D94E92A179EDBCC860C09F

[8] See the HAB Procedures Manual, Section VII. Background and Security Checks (July 9, 2019) and the Background and Security Check Vetting Guidance for Form I-131 (HAB) Parole Adjudication (October 20, 2020)

[9] A copy of this spreadsheet has been shared with HAB to assist adjudicators and support staff in entering all essential data into the case management system for vetting.

Law Enforcement Privilege

Suspension of Processing Certain Cases:

Parole beneficiaries must report to a U.S. embassy or consulate to complete processing of their parole request, including identity verification, biometrics collection, and receipt of vaccination records. Adjudicators should issue a Parole Notice (Suspension of Processing) if an Afghan beneficiary appears initially to be eligible for parole, but the beneficiary is residing in Afghanistan or another country without U.S. consular services. The Parole Notice (Suspension of Processing) states that USCIS cannot complete processing of the parole request unless and until the beneficiary informs USCIS that they are able to report to a U.S. embassy or consulate.

Adjudicators may also issue the Parole Notice (Suspension of Processing) in cases where the beneficiary appears initially to be eligible for parole but has an approved Form I-730, I-360 (Petition for Amerasian, Widow(er), or Special Immigrant), or I-130 and an immigrant visa is available. The Parole Notice (Suspension of Processing) states that the beneficiary should pursue immigrant visa processing but may notify USCIS once outside of Afghanistan if immigrant visa processing is not a viable option.

The Parole Notice (Suspension of Processing) should only be issued for cases that appear initially to be eligible for parole **and all biographic vetting, including OAW NCTC vetting, is complete.** Adjudicators are not required to review pre-existing A-files prior to issuing a Parole Notice (Suspension of Processing) unless the A-file is required to determine initial eligibility. Once the Parole Notice (Suspension of Processing) has been issued, the adjudicator should administratively close the case in CAMINO or ELIS,

[10] IRAD FDNS will issue specific guidance to RIO FDNS on how to review these "red" responses and annotate FDNS-DS.

purely for case tracking and workload management purposes. The parole application will remain open for at least a year.

If the petitioner or beneficiary notifies IRAD that the beneficiary is able to report to a U.S. embassy or consulate to continue processing of their case, the adjudicator should verify that the beneficiary is still eligible for parole and that all required USCIS-initiated[11] security checks are valid. For cases where the beneficiary has an approved immigrant petition and the visa is available, the adjudicator must assess whether a reasonable explanation has been provided for why the beneficiary cannot pursue immigrant visa processing, confirm all required USCIS-initiated security checks are valid, and verify that the beneficiary is still eligible for parole. If the adjudicator determines that the beneficiary is still eligible for parole, the adjudicator must re-open the parole request in CAMINO or ELIS and issue a Conditional Approval Notice. An Authorization Memo must also be sent to Post.

Medical Requirements:

For beneficiaries who are in a location where they can complete Consular processing, adjudicators will generate a Conditional Approval Notice: Referral to Consular Processing if the beneficiary is initially found eligible for parole and all USCIS-initiated vetting has been completed. The Conditional Approval Notice: Referral to Consular Processing notifies the petitioner and beneficiary of the additional steps required to complete processing of their case, including completion of the Form DS-160 and required medical screening and vaccinations through the panel physician. For urgent cases, USCIS or a government referring agency may request documentation of vaccinations through the panel physician before the adjudicator has made an initial decision on eligibility and may consider requiring medical screening for tuberculosis be completed within 60 days of arrival in the United States as a condition of parole. Adjudicators will also generate an authorization memo to Post notifying them of the conditional approval and medical requirements.

In line with current OAW requirements, Afghan parole beneficiaries will be required to complete the following medical screening and vaccinations[12] through a panel physician, unless an exception applies:

- Age-appropriate vaccinations, as determined by the panel physician based on Technical Instructions issued by the Centers for Disease Control and Prevention (CDC), with expanded age requirements for measles, mumps, rubella (MMR) and polio vaccines:
    i. MMR vaccine starting age ≥ 6 months
    ii. Polio vaccine starting age ≥ 6 weeks and no upper age limit
- 21-day post-MMR vaccine waiting period prior to travel

[11] DOS/CA conducts additional biometric and biographic checks prior to issuance of a boarding foil.
[12] https://www.cdc.gov/immigrantrefugeehealth/panel-physicians/vaccinations.htm CDC has additional vaccination age requirements for Afghan nationals: MMR is required for all Afghan nationals 6 months old until those born in or after 1957. Polio vaccination is required for all Afghan nationals 6 weeks or older.

- Completed COVID-19 vaccine series. If COVID vaccine provided is a 2-dose series, both doses must be administered but no waiting period is required after the series is completed. [13]
- Tuberculosis (TB) screening and treatment based on Technical Instructions issued by the Centers for Disease Control and Prevention. The beneficiary is required to take appropriate isolation and treatment measures if the tuberculosis test is positive.

The panel physician will generally complete a Form DS-2054, Report of Medical Examination by Panel Physician, for each beneficiary, which includes the Vaccination Documentation Worksheet to record all vaccinations completed and whether any vaccinations are not medically appropriate and the Tuberculosis Worksheet. Waivers to vaccinations that are not medically appropriate are recorded by the panel physician in the right column of the Vaccination Documentation Worksheet. The beneficiary must submit the medical record completed by the panel physician to the Consular Officer during their interview.

Exceptions:

In general, Afghan parole beneficiaries who have not completed the required medical screening and vaccinations (or provided documentation from the panel physician that the vaccinations are not medically appropriate) will not be issued a boarding foil to travel to the United States. However, there may be exceptional circumstances when a beneficiary is unable to complete the required medical screening and vaccinations, either due to the urgent need to travel or because panel physician services and vaccines are severely limited in the beneficiary's country of processing. Whenever possible, the first dose of all vaccinations should be completed prior to travel. If there is sufficient evidence in the record to support the parole beneficiary's need for urgent travel to the United States (i.e., within 90 days of approval of the parole request), USCIS may consider approving parole with the condition that the parolee must complete any additional COVID-19 vaccination doses and TB screening within 60 days of arrival in the United States. If the beneficiary needs to urgently travel to the United States within 30 days of the parole conditional approval, USCIS may waive the 21-day post-MMR vaccination waiting period.

Adjudicators, with the approval of their supervisor, may use their discretion to approve parole into the United States conditioned on the parolee obtaining the required vaccinations and/or TB screening within 60 days of arrival. Adjudicators will issue the beneficiary the Notice Regarding Conditions of Parole via email, if available, copying the petitioner and representative of record, and will also provide the Consular Section with a copy of the Notice Regarding Conditions of Parole to deliver to the beneficiary at the time of foil issuance. This notice outlines the medical requirements that must be completed within 60 days of arrival in the United States. The adjudicator must mark that parole was authorized with conditions and note the conditions to parole in the case management system.

---

[13] The COVID vaccination requirement can be fulfilled with: 1) any of the COVID-19 vaccines with FDA approval or emergency use authorization: Janssen (J&J), Pfizer, or Moderna or 2) any of the COVID-19 vaccines listed for emergency use by the World Health Organization (WHO). See also: Guidance for persons vaccinated outside US, Technical Instructions for Panel Physician Exam: COVID 19, What to do when COVID vaccine is not routinely available

Compliance with Conditions of Parole:

If conditions are placed on parole, the parolee must verify that they have met the conditions of their parole by certifying their vaccination and TB screening status on the USCIS website within 60 days of arrival in the United States.[14] IRAD is working with the ELIS team to develop a case flag in ELIS that will notify adjudicators when a parole beneficiary has not reported compliance with the medical requirement conditions within 120 days of an approval of parole with conditions. When ELIS flags a case for non-compliance, an adjudicator must review CIS to determine whether the parole beneficiary entered the United States and the date of entry. If there were conditions placed on parole, it has been 75 days since the parolee entered the United States, and the beneficiary has not attested to completing the TB screening and required vaccinations, USCIS will send a warning letter to the beneficiary's last recorded address in AR-11. If the beneficiary fails to complete the vaccination and TB attestation within 120 days of arrival in the United States, USCIS will notify ICE to determine appropriate enforcement actions to promote compliance with the medical requirements. ICE will review each individual referral on a case-by-case basis. ICE or USCIS may amend the parole requirement to impose regular check-ins and technical monitoring or issue a Notice to Appear (NTA) as a means of revoking parole. USCIS may consider a new grant of parole, on a case-by-case basis, upon completion of medical requirements.

Afghanistan Resources:

For additional country conditions information for Afghanistan, please visit the RAIO Research Unit's Afghanistan Resource Guide. For information concerning terrorism-related inadmissibility grounds (TRIG) and TRIG-related concerns in Afghanistan, which may be helpful when determining whether discretion should be exercised to authorize parole, please see the RAIO TRIG Afghanistan Country Guide.

Afghanistan Parole Notices:

- **Conditional Approval Notice, Referral to Consular Processing:** HAB issues this notice to the Form I-131 petitioner, beneficiary, and representative of record when HAB determines that the beneficiary is eligible for parole and all USCIS-initiated security checks have been completed. The notice requires the beneficiary to complete the DS-160 to initiate Consular processing and to begin completing required vaccinations. For government requests for parole, HAB issues this notice to the referring agency.
- **Parole Notice (Suspension of Processing)**: HAB issues this notice to the Form I-131 petitioner, beneficiary, and representative of record after an initial assessment that the beneficiary may be eligible for parole, but the beneficiary is in a location where there is no U.S. embassy or consulate (e.g., Afghanistan or Iran) or where the beneficiary is also the beneficiary of an approved I-130 or I-730 and HAB determined that parole processing should be halted in favor of immigrant visa processing. For government requests for parole, HAB issues this notice to the referring agency. This notice serves several purposes: 1) notification that the beneficiary must report to a U.S. embassy or consulate to continue processing the parole request; 2) where applicable, notification that the beneficiary should pursue immigrant visa processing and to notify HAB if this is not feasible.
- **Parole Authorization Memo:** HAB issues this memo to the Consular Section, copying the Consular Affairs parole points of contact, when a parole request has been conditionally

[14] Afghan Parolee Vaccination Status | USCIS

approved. This memo serves to notify the Consular Section that USCIS has conditionally approved the parole request and any additional requirements for processing the parole request. If the parole beneficiary may be eligible for resettlement benefits, HAB should include a copy of the resettlement benefits fact sheet when the authorization memo is sent to post.

- **Notice Regarding Conditions for Parole:** HAB issues this notice to the Consular Section with the Authorization Memo so that the Consular Section can provide the notice to the beneficiary at the time of foil issuance. HAB may also issue the notice to the parole beneficiary via email, if email address is available, copying the petitioner and representative of record.
- **Parole Denial Notice:** HAB issues this notice to the Form I-131 petitioner, beneficiary, and representative of record when the request for parole is denied. For government requests for parole, HAB issues the denial notice to the referring agency.

Exhibit C

U.S. Citizenship and Immigration Services

Meeting with Secretary Mayorkas on Afghan Parole
February XX, 2022

BOTTOM LINE UP FRONT:

- DHS has received several letters from Members of Congress expressing concerns over USCIS' denial rate for Afghan nationals applying for parole and the current standard of evidence required for parole requests based on protection needs.
  - See January 20, 2022 letter signed by 15 Senators and December 20, 2021 letter signed by 56 Senators and Members of Congress.
- USCIS adjudicates parole requests for urgent humanitarian and significant public benefit reasons for Afghan nationals on a case-by-case basis using an analytic framework that applies to all nationalities, taking into account the totality of the circumstances of each case. Additionally, to complete the parole process, the beneficiary must travel to a U.S. embassy or consulate for biometrics collection, interviewing, and identity verification.
- Congress has signaled its intent that parole is not to be used in lieu of refugee processing, providing that an alien who is a refugee may not be paroled into the United States unless the Secretary determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee.[1]
- Moreover, there is no infrastructure to interview and verify protection-related parole requests. Given this, USCIS historically has required a high level of evidence to approve a parole request based on refugee-like protection needs.
- Both USCIS and the Department of State (State) are working to increase refugee and immigrant visa processing for Afghan nationals at risk to enter the United States with a permanent lawful status rather than through parole (temporary and not a lawful immigration status).
- The preferred approach to address increasing protection needs of Afghan nationals is to:
  - Press State to consider increasing access to the USRAP, perhaps through UNHCR and NGO referrals or Priority 2 groups,
  - Continued diplomacy to expand locations where the U.S. government can process Afghan refugee applicants for resettlement; and
  - Work with UNHCR and foreign governments to provide immediate protection needs, local integration, and resettlement opportunities in multiple countries (e.g., Canada or Australia).

DISCUSSION POINTS:

Issue 1: Concerns Raised by Congress on Denial Rate of Afghan Parole Adjudications

- <u>High denial rate for Afghan nationals applying for parole with USCIS – Statistical Comparison and Overview</u>
  - Between July 1, 2021, and January 31, 2022, USCIS received over 42,000 Form I-131 parole requests filed on behalf of Afghan nationals, and USCIS continues to receive over

[1] See Immigration and Nationality Act section 212(d)(5)(B).

100 new requests a day. In a normal year, USCIS receives under 2,000 parole requests from all nationalities.

- At least 75% of Afghan parole requests are for Afghan nationals still in Afghanistan. For those in Afghanistan, USCIS will issue denials for those found ineligible, but will close/suspend requests for those who likely would be found eligible if they could complete processing outside Afghanistan at a U.S. consulate or embassy (e.g., biometric collection and vetting, interview, and identity verification).
  - Those whose cases are closed/suspended are notified to contact USCIS to continue parole processing if they are able to get to a third country.
  - Those whose cases are denied are informed they can request reopening of their case without fee within a year if they have new or additional evidence.
- Of the Afghan parole requests adjudicated since July 1, 2021, USCIS has denied about 990 (88%), conditionally approved 80 (7%), and closed/suspended 52 (5%) (*for a potential approval rate of 12%*).
- While the USCIS approval rate for parole varies year over year, over the past six years, USCIS approved approximately 36% of all initial requests for parole. However, the approval rate based on purely protection needs (refugee-like cases) has been approximately 13% [compared to approval of approximately 47% of requests based on medical needs and 37% of requests based on family unity.]
- Most Afghan nationals are submitting parole requests based on protection needs due to risk of harm from the Taliban, without the requisite evidence or other compelling factors generally required for approval. USCIS has seen a large number of skeletal filings submitted on behalf of Afghan nationals or parole requests with only an attestation from the petitioner indicating the beneficiary will be killed by the Taliban. Without a detailed interview, it is difficult for USCIS to validate the credibility of these claims.
- USCIS has also noted a trend in parole requests submitted on behalf of Afghan nationals for very large family groups, including in-laws, aunts and uncles, and nieces and nephews, without any evidence of particular vulnerabilities that would support the need for parole. These requests for parole for extended family members have also led to an increase in denials for requests based on family unity.

- Types of claims more likely to be approved: Thus far, the most common reasons for approving a parole request for Afghan and non-Afghan nationals is a close family relationship to someone in the United States with evidence of a vulnerability, including a minor child, disability/infirmity, serious medical condition, or risk of isolation when immediate family or a caregiver travels.
- Evidentiary standard for protection cases
  - Members of Congress have raised concerns that USCIS is requiring an impossible burden of proof for Afghan nationals at risk.
  - Generally, for USCIS to exercise discretion favorably in claims based on fear of harm, there must be credible, third-party evidence that the beneficiary is at imminent risk of serious harm.
  - Credible evidence that the beneficiary is at risk of imminent serious harm may consist of reports or other documentation from a credible third-party source specifically naming the beneficiary, the serious harm the beneficiary faces, and the imminence of the harm. Credible third-party sources may include but are not limited to a U.S. Government agency, a reputable human rights organization or a media source. In some cases, credible evidence may consist

of a USCIS grant of a protection-based immigration benefit such as asylum, refugee or special immigrant status to an immediate family member or same-sex partner of the parole beneficiary, which supports the basis of the parole request.

- In the absence of credible, third-party evidence of threat, adjudicators may also consider whether there are other compelling, positive factors associated with the case that would lead to a positive exercise of discretion (for example, a beneficiary with a particular disability in a country of flight with no local support and a close family member in the U.S.). In other words, the lack of credible, third-party evidence does not preclude an approval when there are other compelling factors and the totality of the circumstances demonstrate that discretion should be exercised favorably.

- Special consideration for Afghan cases
  - On November 5, 2021, USCIS announced on our public website additional strong positive factors that USCIS would consider when reviewing parole requests filed on behalf of Afghan nationals, which include the Deputies' criteria for prioritized relocation of Afghan nationals.
- Afghans in Afghanistan
  - Members of Congress have asked what efforts DHS is making to ensure at-risk Afghan nationals are identified and prioritized for evacuation.
  - Members of Congress and stakeholders frequently reference the Secretary's announcement in late-August that it is appropriate to exercise discretion for CBP officers to parole certain Afghan nationals into the United States pursuant to Operation Allies Refuge when raising concerns regarding USCIS' parole policy framework and current denial rates. They seem to conflate the two, which presents messaging challenges.
  - USCIS is unable to assist parole beneficiaries to leave Afghanistan and the filing of a parole application with USCIS does not facilitate departure. State is coordinating evacuation of some Afghan nationals at risk, but this is limited to those who meet the Deputies' criteria or are approved for an exception.
- Request for a Special Parole Program
  - Members of Congress and stakeholders have requested that DHS create a parole program for categories of Afghan nationals at risk, such as women judges.
  - Generally, parole programs have been put in place where other options, such as refugee processing, are not viable. Basing a parole program on risk categories would be challenging, as there is no infrastructure for detailed interviews to assess the veracity of the claims. However, USCIS is exploring options for an Afghan parole program that could potentially include family reunification and individuals who meet the Deputies' criteria for Afghan priority relocation.
  - Even if DHS were to establish a parole program, it likely would only benefit those who are able to leave Afghanistan on their own, which is a significant limiting factor.

Issue 2: Increased Refugee Processing for Afghan Nationals

- Last year, State announced a new Priority 2 designation for Afghan nationals who have worked with the U.S. government, on U.S. government-funded programs or projects, or for U.S.-based non-governmental organizations and media organizations. Referral to the new Priority 2 designation must be made by a U.S. government agency or the senior-most U.S. citizen employee of the NGO or media organization to deter fraud. State also established a

process to enable U.S. government agencies to refer known Afghans at risk to the USRAP as Priority 1 referrals.

- State has received over 30,000 such referrals since August and is still reviewing and cleaning up the data. Most referred individuals are still in Afghanistan, and they cannot be processed until they leave Afghanistan.
- USCIS will pilot expedited refugee processing within 30 days for Afghan nationals evacuated from Afghanistan to Camp Al Sayliyah (CAS) in Qatar, including 300 individuals in March. The goal is to increase refugee processing at CAS to 1000 individuals/month.
  - Social media vetting currently required as a matter of policy for nationals of Security Advisory Opinion (SAO) countries such as Afghanistan is limiting USCIS's capacity to process more than 300 refugee applicants a month a CAS. USCIS is analyzing the process for all refugee applicants who require social media checks and will be making recommendations in the very near future.
- USCIS is ready to deploy refugee officers or coordinate VTEL interviews and adjudicate Afghan refugee cases as soon as they are referred to us by State.

Limitations:

- Without faster and greater throughput of vetting results from USRAP vetting agencies, the USRAP will be unable to achieve significantly higher refugee admission numbers for Afghan nationals.
  - Critical to the success of this initiative will be ensuring that one of the vetting Agencies (classified), which still uses a fairly manual process, will be able to significantly increase throughput.
  - DHS should press vetting agencies to confirm their readiness to increase capacity.
- The limited categories and referral requirements present a "protection gap," leaving many Afghan nationals with no mechanism to access the USRAP. They see a parole request as their only hope to come to the United States.
  - One way to address this, which State is exploring, would be to create a more robust process for NGOs to refer refugees to the USRAP. State is also exploring the creation of a P-4 private sponsorship program that could expand categories of individuals who can get access to the USRAP.
- Host country concerns of a pull factor may limit our ability to conduct refugee processing in certain locations, including in Turkey and Pakistan, which host large numbers of Afghan refugees. State is engaging in quiet diplomacy on that front.

Attachment: Summaries of Afghan Parole Cases

Staff Responsible for Briefing Memo: Joanna Ruppel, Chief, International and Refugee Affairs Division, PLAINTIFF PII REDACTION