



## **Migrant Center for Human Rights Protecting the Persecuted**

August 10, 2020

*Submitted via [www.regulations.gov](http://www.regulations.gov)*  
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Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

### **RE: RIN 1615–AC57 [Docket No: USCIS 2020–0013 / A.G. Order No. 4747–2020], Public Comment Opposing the Proposed Rule on Security Bars and Processing**

The Migrant Center for Human Rights (“Migrant Center”) writes in response to the DHS and the DOJ Proposed Rule on the [Security Bars and Processing](#), published in the Federal Register at 85 F.R. 41201 on July 9, 2020.

The Migrant Center for Human Rights (“Migrant Center”) is a 501(c)(3) non-profit organization that provides legal services to immigrants detained at the South Texas Detention Complex, in Pearsall Texas. This facility is the third largest in the country and holds up to 1,900 immigrants on a given day. The Migrant Center works almost exclusively with asylum seekers and has served approximately 600 asylum seekers in the last three years. Our team’s legal expertise includes more than eight years of immigration removal defense litigation experience, much of this working on asylum cases. As a non-profit organization, we also have an expertise in working with *pro se* respondents and therefore are particularly aware of the unique challenges they face in trying to navigate our legal process.

The Proposed Rule will affect thousands of people fleeing persecution and looking for a safe place in the United States. To date in FY 2020 CBP reports 151,000 arrivals at the southern border (34,000 arriving aliens, and 117,000 entries without inspection). Because the Proposed Rule will affect vulnerable individuals whose return to their country of origin will result in persecution,



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torture, and death, and who do not have another place to go, the stakes couldn't be higher. The Proposed Rule would, for the first time in modern American history, permit the mass *per se refoulement* of asylum seekers simply for traveling through a country with an infectious disease – even if they are healthy – without permitting them to seek any form of protection before an Immigration Judge.

We oppose the Proposed Rule as it will subject vulnerable asylum seekers to impermissibly vague, overbroad, and unlawful standards with virtually no due process protections, while simultaneously doing nothing to protect the American people. We oppose the Proposed Rule because it would deny most asylum seekers meaningful access to counsel, their right to respond to the charges against them and present evidence on their behalf, and any access to judicial review.

We furthermore oppose the Proposed Rule because it illegally usurps the power of Congress to set law by rewriting the definition of the security bar to include infectious diseases, contravenes the U.S.'s non-*refoulement* obligations under domestic and international law to refrain from returning refugees to places where their lives or freedom are in danger, and rolls back four decades of established legal precedent, resulting in the disappearance of refugee protections that have long been accepted as a key part of who we are as a nation.

The consequences of the Proposed Rule are literally life and death for refugees the U.S. has a responsibility to protect. Accordingly, we urge you to withdraw the Proposed Rule in its entirety and instead dedicate your efforts – and our taxpayer dollars – to advancing policies that respect individuals' legal right to seek asylum. We thank you for carefully reviewing this Comment. We are including links to relevant materials and ask that you incorporate these references into the administrative record.

### **I. Does Not Achieve Its Stated Objective of Protecting Americans**

The Proposed Rule begins by stating that: “The Departments seek to mitigate the risk of a deadly communicable disease being brought to the United States, or being further spread within the country.” By statute, asylum seekers who are determined to be “danger to the security of the United States” are barred from asylum and withholding of removal under the INA and the United



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Nations Convention Against Torture. This term has typically been used to prevent the entry of individuals who have engaged in terrorist activities or are otherwise criminally dangerous. The Proposed Rule would add to the definition by prohibiting anyone who has traveled through a country where there is an infectious disease, even if they are perfectly healthy and therefore no danger to the security of the United States.

Under the Proposed Rule DHS is not required to administer tests to determine whether the individual in question does in fact present a risk. If DHS does administer a test and the results are negative, there is absolutely no justification for finding that the individual is a security risk and bar them from protection. In this way the Proposed Rule is impermissibly overbroad in its application as explained below.

The Proposed Rule provides no reason for why DHS cannot administer tests (this is an issue under the Administrative Procedures Act which requires that the agency explain its rationale for why a rule is necessary or desirable so that the public has meaningful notice and ability to comment). There is absolutely no reason that the U.S. cannot administer tests to arriving asylum seekers to determine if they have a communicable disease and, if the person tests positive, place them in quarantine until they are no longer contagious. The government states that “CBP is not equipped to provide medical support to treat infectious or highly contagious illnesses or diseases” but there is no reason that it cannot become so or, at a minimum, test individuals to determine who is healthy and can have their case processed. The United States is a developed wealthy country that can certainly take on the work of providing health screenings. In fact, health screenings are already a required part of DHS intake and processing. COVID testing is easily administered with a cheek swab and would not even be a significant financial burden.

For those who do test positive DHS is currently “keeping affected detainees in single-cell rooms or cohorts” and we see no reason why DHS cannot continue to do so. While we agree that this can “impact the availability of detention beds” if we assume that DHS is social distancing in the dorms/pods (which it should be doing anyways at present as COVID-19 can be brought into the facilities by government staff and contractors) it is unclear how this would put strain on detention capacity considering that intake levels are way down and detention facilities less than



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half full already. Any other juggling of dorm assignment is a normal issue DHS addresses on a daily basis as the agency handles immigrants of different genders and security levels. Even if detention capacity is strained, this is not a reason to deny asylum seekers protection. It is irrelevant whether DHS wants to “operate its facilities at normal capacity”. The goal of immigration detention should not be to fill beds for the sake of it but only where the individual is a flight risk or danger to the community. The Migrant Center regularly sees individuals locked up in detention for no legitimate reason, including that they don’t have the money to pay to get out, their country won’t take them back, etc. There are many immigrants who could be released to free up bed space if necessary.

The Proposed Rule recognizes that there is a risk to the contagious disease spreading in detention but then fails to acknowledge that asylum seekers would still be held in detention facilities for weeks or months under the Proposed Rule waiting for their USCIS interview, putting fellow detained immigrants, detention staff, and the community at large in danger of contracting the virus if the individual is positive. Testing and proper quarantine procedures are therefore necessary regardless of this Proposed Rule. This Proposed Rule consequently accomplishes nothing except violating the fundamental rights of asylum seekers and undermining our country’s asylum system.

In the Migrant Center’s experience, there is typically about a month wait-time for a USCIS interview. Even where the interview process has been expedited, for example by giving priority to detained families, in our experience that this has only resulted in further delays of on average an additional two weeks for others such as single adults. Speeding up the interviews any quicker than a couple of weeks risks denying access to counsel, which will be increasingly important under the Proposed Rule as explained below. Even with the month wait time at STDC, we often see asylum seekers who do not find out about our free legal consultation, preparation, and representation services until after they have gone through their interview.

The Proposed Rule also expresses concern that sick immigrants will take up bed space in local hospitals. While we agree that this is a concern, there is nothing in our law that allows for access to health care to be denied due to immigration status. In fact, nationality discrimination is



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prohibited by our Constitution. And of course it is fundamentally against American values to deny potentially life-saving care to someone in need.

Importantly, the Proposed Rule has the opposite effect of helping sick Americans by barring asylum-seeking nurses, doctors, health aides, cleaners and all other essential personnel who have “come into contact with” COVID-19 even if they test negative themselves, including those already in the U.S. who may stop doing this important work out of fear that it will negatively impact their chance of staying in safety in the U.S. Nearly 30% of doctors and 40% of health aides in the United States are foreign born, and immigrants disproportionately work in the service or food industries that keep us all fed during this crisis. They also form large segments of nursing home and daycare staff, personal care attendants, delivery drivers, grocery store and other food supply chain employees, and poultry plant workers. By denying admission to the U.S. to many of these immigrants, the Proposed Rules denies Americans access to important health professionals and the services we all need to get through this pandemic.

As it stands, the Proposed Rule bars from asylum anyone who has travel through a country with a communicable disease even if they test negative. Many other countries have shown that COVID-19 can be managed through sensible quarantine policies, testing, and contact tracing without sacrificing fundamental protections and rights. There is no reason the United States cannot do the same and every reason for our country to do so. There is no evidence that the Proposed Rule will help the government achieve its stated objective, to “better respond to the COVID–19 crisis”, as required by the Administrative Procedures Act, and it should consequently be withdrawn.

### **II. Restricts Access to Counsel and Denies Due Process**

The Proposed Rule would be applied at the Credible Fear / Reasonable Fear interview. Thus, while USCIS will normally indicate on their Note Sheet if they believe that a security bar may apply to the asylum seeker before transferring the case to an Immigration Judge, they will now be deciding whether the bar applies, a legal determination typically reserved for the Immigration Judge. Decisions that are typically made by Immigration Judges and require significant pre-hearing preparation, should not be transferred to the USCIS Asylum Office in



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an expedited process (Asylum Officers do make these evaluations in affirmative cases but this is only after the asylum seeker and attorney have had months, and more often years, to prepare evidence and legal argument). In order for asylum seekers to have meaningful review of their claims they must have the ability to seek and obtain legal counsel before this interview – attorneys often need several weeks of advance notice in order to be able to take and prepare a case for an interview under the current, less-complex process – as well as the time needed to obtain the necessary documentary evidence. That the Proposed Rule is intended to result in “expeditious removal” is very concerning.

The Migrant Center has worked with and represented many asylum seekers who due to a variety of reasons including trauma, gender, language, and education level have not known how to correctly present their case to a USCIS Asylum Officer without legal guidance. Attorneys play a critical role in this process, helping elicit important details of an asylum seeker’s fear, explaining how to ask for clarification and handle interpretation problems, and identifying legal theories. This assistance will be more important than ever due to the new requirements that the Proposed Rule seeks to implement.

The standard for these screening interviews is supposed to be a “low threshold” to ensure that the United States does not wrongly deport a person to a life-threatening situation. Under the Proposed Rule, asylum seekers would be subjected to the expanded national security bar with little time for preparation and most often fail their USCIS interviews without the ability to legally challenge the government’s determination that the country has an infectious disease that is prevalent.

While we assume that USCIS Asylum Officers would take a closer look at the facts under the Proposed Rule than they currently do knowing that their decision is final, it is worth noting that the Migrant Center has found that every time a bar is marked it, with the exception of the firm resettlement bar, the bar does not apply and the Immigration Judge agrees. In several cases, for example, the Asylum Office has marked someone as potentially barred for a particularly serious crime or serious non-political crime when they’ve attended a political protest at which other protesters threw rocks at the police or buildings. It is concerning that the Proposed Rule anticipates



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that the USCIS review time will be “minimal” which indicates that review will be cursory and not appropriately detailed. We believe that it would be quicker and easier – not to mention more legal and humane – to simply test asylum seekers (the Proposed Rule mentions wait times for results but these can be as little as 15 minutes if done properly).

### **III. Encourages Illegal Presence**

The Proposed Rule would bar from asylum anyone who has contracted a contagious disease in the U.S. – including health care and essential workers, discouraging them from doing this important work – and so incentivizes those in the U.S. who were planning on filing an asylum application to not do so or, if they’ve already filed, to not show up for their interview or court hearing (although this Proposed Rule is not intended to apply retroactively it may still create fear in the immigrant community). It is in no one’s best interest to have undocumented refugees living in the shadows of our community.

### **IV. Is Punitive**

The Proposed Rule would bar from asylum anyone who contracts a contagious disease inside a detention center regardless of the fact that they have no control over this happening. Detention centers often force immigrants into close quarters, do not give them the proper safety and sanitation tools, and do not have adequate health care screening and services to prevent infection. Not only do other immigrants spread COVID-19 but there are documented cases of DHS personnel and private contractors bringing the disease into the facility. To then turn around and say that those with pending cases are barred from protection as they are now a “danger to the security of the United States” is punitive, especially considering that DHS often has the discretion to have released them from this dangerous environment before they became infected.



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#### **V. Is Overbroad, Vague, and Subject to Administrative Abuse**

This Proposed Rule makes a blanket statement that all asylum seekers are security risks *per se* due to their travel history without administering tests or making individualized decisions. This is a fundamental denial of due process.

Not only does the Proposed Rule apply to everyone who has travel through a country with a communicable disease even if they test negative, but the Proposed Rule sweeps broadly to include *any* “communicable disease of public health significance” that has triggered “an ongoing declaration of a public health emergency” or is “prevalent or epidemic.” This “communicable disease” language sweeps broadly and could include TB, mumps, measles, gonorrhea, syphilis, etc. Furthermore, it is unclear what is meant by “prevalent or epidemic” and who makes this determination. Will this be when the president suspends entry from a certain country in a national proclamation? Will this be if the Department of State issues a Level 3 Travel Health Notice or a Level 4 Do Not Travel Advisory? Will this be if that country declares a national public health emergency or if their health ministry reports a certain number of confirmed cases and/or deaths over a certain period of time with a certain percentage of the population testing with a certain ratio of positive to negative results?

The only guidance Proposed Rule gives is that the bar will apply when an asylum seeker is “coming from a country, or a political subdivision or region of that country [where]:

- (i) The disease has triggered an ongoing declaration of a public health emergency under Federal law, including under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3; or
- (ii) The Secretary and the Attorney General have, in consultation with the Secretary of Health and Human Services, jointly: Determined that because the disease is a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services (42 CFR 34.2(b))) that is prevalent or epidemic ... [and] would cause a danger to the public health in the United States; and... are still within the number of days equivalent to the longest known incubation



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and contagion period for the disease or exhibit symptoms indicating they are afflicted with the disease”

The Centers for Disease Control and Prevention (“CDC”) has stated that: “A pandemic is a global outbreak of disease. Pandemics happen when a new virus emerges to infect people and can spread between people sustainably. Because there is little to no pre-existing immunity against the new virus, it spreads worldwide.” This does little to make the Proposed Rule more precise.

#### **VI. Is Inconsistent with the Law and Congressional Intent**

While Congress gave the Attorney General and the DHS Secretary the authority to “establish additional limitations and conditions... under which an alien shall be ineligible for asylum” those limitations must be “consistent with [section 208 of the INA].” IIRIRA, sec. 604(a) (codified at INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C)). Barring asylum seekers *per se* from protection for no valid reason, as explained above, is not consistent with our laws.

Additionally, in *Matter of A-H-*, the Attorney General also ruled that the required determination that “there are *reasonable grounds* for regarding the alien as a danger to the United States”— “implied the use of a ‘reasonable person’ standard” that was “substantially less stringent than preponderance of the evidence,” and instead akin to “probable cause.” 23 I&N Dec. at 788–89 (emphasis added). The only reasonable grounds for viewing an asylum seeker as a danger to the U.S. is if they have tested positive for COVID-19, and not even then as they can quarantine until they recover. By simply looking at the numbers, in most locations the COVID-19 prevalence rate is low enough that it would not be reasonable to regard the asylum seeker as a danger without more (1.5% for the U.S., one of the countries worst affected at present: there are 5,023,649 positive cases according to the CDC out of 329,877,505 people according to the Census Bureau). It is not accurate to say that a reasonable person, looking at this data, would consider “it is enough that the [mere] presence of disease in the countries through which the alien has traveled to reach the United States makes it reasonable to believe that the entry of aliens from that country presents a serious danger of introduction of the disease into the United States.”



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Furthermore, the INA defines “national security” [in the context of the designation process for foreign terrorist organizations] to mean “the national defense, foreign relations, or economic interests of the United States.” Section 219(c)(2) of the Act, 8 U.S.C. 1189(c)(2) (2000). “National security” has not been defined to include public health concerns before and, while this does not seem impossible to do, in our democratic checks and balances system it should be Congress that does so – where all political actors can have their voices heard and ideas can be debated thoroughly – not the Executive branch of government which has been granted limited authority to craft only “consistent” rules that do not deviate as substantially as the Proposed Rule does here.

### **VII. Results in the Inhuman Violation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The Proposed Rule allows USCIS Asylum Officers, instead of Immigration Judges, to determine if it is “more likely than not” that the asylum seeker would be tortured in their home country by their government or with the consent or acquiescence of their government if they affirmative claim fear of torture (it is unclear what type or amount of information would be considered raising this issue). Currently cases are passed to the Immigration Judge if the asylum seeker shows that there is a significant possibility that they will be able to prove their case. It would not be an issue for the USCIS Asylum Office to make this final determination if it provided the asylum seeker with an in-person interview and the adequate time to prepare. But that is not what the Proposed Rule does. The Migrant Center has worked on hundreds of asylum cases, many where these legal determinations are complex and require legal counsel and time to adequately explain the case in order to ensure a fair hearing and increase the chances of the adjudicator reaching the correct decision.

Even where the asylum seeker shows that their government is more likely than not to torture them, the Proposed Rule would allow DHS to send that asylum seeker to a third country under deferral of removal without review by an Immigration Judge under the current process unless they somehow affirmatively prove during the USCIS interview that they would be



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persecuted or tortured in that third country, without any requirement that they be informed of the identity of the country in advance. Without notice there is no way that an asylum seeker can meet this burden, even assuming they have the time and the ability to gather the necessary evidence in this condensed time frame and from inside DHS custody, and obtain the legal counsel that can help them connect the facts of their case to the legal standards at issue.

### **VIII. Conclusion**

The proposed regulatory changes will ultimately result in the erroneous denial of protection to *bona fide* refugees and result in their forced deportation – “*refoulement*” – in violation of our federal asylum statute (Refugee Act as codified in the Immigration and Nationality Act), the clear intent of Congress to provide a meaningful and fair path to protection for those fleeing persecution, four decades of supporting legal precedent, our international human rights obligations under both treaties (including the Protocol Relating to the Status of Refugees and the Convention Against Torture) and *jus cogens* norms, and the U.S. Constitution. We therefore call on you to immediately withdraw the Proposed Rule in its entirety.

Sincerely,

*//s// Sara Ramey*

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