



Migrant Center for Human Rights

Protecting the Persecuted

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RE: RIN 1615-AC67 / 1125-AB20; CIS No. 2692-21; DHS Docket No. USCIS-2021-0012 [A.G. Order No. 5116-2021]; 86 FR 46906

Public Comment on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

The Migrant Center for Human Rights (“Migrant Center”) writes in response to the Executive Office for Immigration Review’s (“EOIR”) and United States Citizenship and Immigration Services’ (“USCIS”) [Notice of Proposed Rulemaking](#) on *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, published in the Federal Register on August 20, 2021, which re-envision the asylum screening process for those in expedited removal.¹ While we welcome this effort, and there are commendable sections to the proposal, ultimately the Proposed Rule does not remedy many of the inefficiencies and injustices in the current system and is likely to create more.

The Migrant Center is a 501(c)(3) non-profit organization that provides *pro bono* and *low bono* legal services to immigrants, primarily to those in detention and going through removal proceedings before both USCIS and EOIR. Our team’s legal expertise includes more than nine years of immigration litigation experience assisting several thousand individuals and representing dozens in removal proceedings. Additionally, as a non-profit organization, we have extensive

¹ The former Immigration and Naturalization Service (“INS”) initially implemented expedited removal only against noncitizens arriving at ports of entry. In 2002, DHS expanded the application of expedited removal to noncitizens who (1) entered the United States by sea, either by boat or other means, (2) were not admitted or paroled into the United States, and (3) have not been continuously present in the United States for at least 2 years. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 FR 68924 (Nov. 13, 2002). In 2004, DHS published an immediately effective notice in the *Federal Register* to expand the application of expedited removal to noncitizens encountered within 100 miles of the border and to noncitizens who entered the United States without inspection fewer than 14 days before they were encountered. Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004). In 2019, DHS expanded the process to the full extent authorized by statute to reach noncitizens who entered the country without inspection less than 2 years before being apprehended and who were encountered anywhere in the United States. Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019). President Biden has directed DHS to consider whether to modify, revoke, or rescind that 2019 expansion. E.O. 14010, *Ensuring a Timely and Fair Expedited Removal Process*, 86 FR 8267, 8270–71 (Feb. 2, 2021).



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expertise in working with low income *pro se* immigrants and therefore are particularly aware of the unique challenges they face in trying to navigate our legal system without counsel.

On behalf of the immigrants we work with, as well as in our capacity as a nonprofit that will see our business significantly affected, we write to urge you to more deeply consider several provisions of the Proposed Rule that we have good reason to believe will negatively affect the due process rights of people in our community, thereby undermining our American values of justice and the rule of law.

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 12866, sec. (1)(b)(6) states that “[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs”. Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Sections of the Proposed Rule not discussed below should not be taken as agreement with those sections. Furthermore, we request that the content of any hyperlinks included here be considered (all information referenced without hyperlinks, or otherwise cited without reference, is taken directly from the Proposed Rule).

Application of the Proposed Rule is Unequal

When an individual is placed in expedited removal and claims fear of return to their home country they are scheduled for a Credible Fear Interview (“CFI”)² or, if they are in reinstatement of removal due to entering without inspection after having received a removal order, a Reasonable Fear Interview (“RFI”).³ See INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); 8 CFR 235.3(b)(4), 1235.3(b)(4)(i).

² A credible fear is defined by statute as a “significant possibility” that the noncitizen could establish eligibility for asylum. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v).

³ The generic term “protection claims” is used here to refer to all three forms of protection addressed in this proposed rule (asylum, statutory withholding of removal, and protection from removal under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994).



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This means that in those expedited removal cases where ICE issues an NTA (or USCIS does because the agency can't find an interpreter for the CFI / RFI) the asylum seeker will not be able to have a non-adversarial interview before an Asylum Officer or two chances by then having a review before an Immigration Judge, just the one EOIR hearing. This is unfair. There is no reason that the Proposed Rule could not allow ICE to send these cases first to USCIS. If the Administration has determined that this USCIS interview process is the most efficient and fair then it should be accessible for people ICE determines can skip the CFI / RFI, such as pregnant women and families.⁴ For the same reason, assuming the Administration has determined that this is the best process, it is unclear why the Proposed Rule does not allow judges to send asylum cases to USCIS, including for those who are not in expedited removal.

The Proposed Rule also does not remedy the unequal treatment of affirmative and defensive cases. Instead it goes only half-way by saying that *some* people in expedited removal – those referred internally for USCIS protection interviews after passing the CFI / RFI – will get a *partial* review with an Immigration Judge instead of the full case review those in the affirmative protection process have if they are denied by USCIS.

The Proposed rule also differentiates between “normal” cases and those of stowaways and those of asylum seekers arriving in the Commonwealth of the Northern Mariana Islands. It is unclear why these groups are treated differently.

The Administration also proposes to roll out the program with preferential treatment for non-detained families. There is no justification for why this group is giving priority over detained individuals and single adult women and men. It is the Migrant Center's position that discriminating based on whether or not someone has children is unjustifiable under our Constitution. We cannot comment on whether detained or non-detained cases should be priorities as the Proposed Rule gives no discussion of why the Administration thinks non-detained cases are better deserving of access to this non-adversarial USCIS interview process. We see no justification for such a position.

The Proposed Rule also states that “individuals [will be] granted or denied asylum faster than if they were to go through the current process with EOIR.” While it is unclear that this is accurate as the current wait time for a CFI / RFI is an average of 955.3 days (median 919 days) from FY 2016-2020,⁵ if we assume that the additional hiring will create a sufficiently-sized dedicated team for these cases – although there is no commitment in the Proposed Rule that these new hires will only hear this docket – and result in these cases being processed quicker, it will create more inequities.

⁴ While in theory a CFI / RFI can be scheduled outside detention, in practice, when CBP releases someone at the border they are issued an NTA.

⁵ For detained cases it is an average of 25.6 days and a median of 15 days. But as the Proposed Rule anticipates asylum seekers going through their second USCIS interview outside detention, the non-detained processing times are more relevant.



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It is fundamentally unfair that those who have been waiting in line longer will be passed over so that newer arrivals get access to justice sooner.⁶

Although, “upon review of an asylum officer’s negative credible fear determination, an IJ finds that an individual does have a credible fear of persecution or torture, the individual also could be referred back to an asylum officer for proceedings on the individual’s protection claims,” §§ 1003.42, 1208.30(g), the Immigration Judge is not give the authority to refer cases for a USCIS protection interview because the Administration claims that “[m]oving these cases to a new process at this stage would risk further delaying adjudication of their protection claims and create an immediate backlog of tens of thousands of cases for USCIS as it prepares to implement this proposed process.” This blanket policy is not the most logical. Because EOIR “cases are in various stages of the removal process” some of these cases will be just at the beginning and be looking at multiple years of waiting for adjudication whereas the process with USCIS could be quicker.⁷ The government could, for example, provide judges with the date of the next available USCIS protection interview and if this is sooner then their next merits hearing date, the judge could have the authority to transfer the case. This would equalize adjudication times and would prevent USCIS from being overwhelmed with more cases then the agency can handle (while this would mean that new arrivals cases would go slower, decreasing the time for those already here so that all are treated equally is the fair approach).

We strongly believe that *all* asylum claims should be afforded equal access to “a better and more efficient [system] that will adjudicate protection claims fairly and expeditiously.”

Eliminating the Ability to Request Reconsideration with USCIS is Highly Problematic

Ostensibly the Administration aims to avoid perceived duplicative review of negative CFI / RFI results by eliminating the USCIS reconsideration process. However, while this is an admirable goal, not only are these processes – reconsideration and IJ review – not sufficiently identical, but

⁶ Off and on over the years the government has created separate hearing dockets for new arrivals to bypass the long wait times. However, just because this has been done before, does not mean that it is lawful or advisable. The justification for giving new cases priority over those with pending cases has been that it will deter people from coming to the U.S. as they will not be allowed to stay here awaiting adjudication for years. Not only has a connection between these policies and arrivals been at all supported by the evidence, not only is it illogical that someone fleeing persecution will not try for the chance of safety regardless of the time. In which their case will be processed, but it is unjustifiable to punish a group of people by prolonging resolution of their case in an effort to prevent the possible future action of someone else.

⁷ An initial hearing on an asylum application should generally occur within 45 days after the filing of the application and an initial administrative decision should generally be made within 180 days). INA 208(d)(5), 8 U.S.C. 1158(d)(5). However, wait times are much longer in practice due to the court’s backlog of 1.3 million cases.



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there is a due process argument, and an administrative efficiency argument, for keeping the reconsideration process in place.⁸

First, it is important to understand how these two reviews are not identical. When USCIS informs an asylum seeker of a negative CFI / RFI result the asylum has two options: request reconsideration with USCIS (which may or may not lead to a follow-up interview depending on the nature of the problem identified) and request view before an Immigration Judge. When USCIS issues a negative CFI / RFI result ICE is sent the results⁹ and these are then served on the asylum seeker and EOIR (if the asylum seeker has requested review of the results). EOIR is then required by statute to program a hearing within seven business days. At any point in time after receiving the results the asylum seeker can request reconsideration with USCIS.

While USCIS and Immigration Judges are applying the same law, due to the quick nature of the court hearings, it is often difficult to obtain a legal consultation, much less legal representation, and prepare and submit legal arguments and evidence for these hearings. Despite the expertise of Immigration Judges, it has been proven time and again that asylum seekers with legal representation can be up to five times more likely to obtain a positive result than those who appear before EOIR *pro se*. This means that in reality, the EOIR review does not always fully protect an individual's rights and ability to obtain a correct case outcome and avoid refoulement to a country where their life is in serious danger.

On the other hand, because USCIS can reconsider a case at any point in time, asylum seekers often have the time with USCIS, and consequently a better chance, to fully explain what problems occurred at their initial interview – whether those be factual misunderstandings, such as important

⁸ The Proposed Rule states that 5 hours is too long to conduct the review necessary to save someone's life. We disagree. "The total time to review a reconsideration request varies widely, but if an office recommends a follow-up interview, then the complete review process could take more than 5 hours per request. The Departments believe that these resources could be far better spent, including in training and supervisory efforts, to ensure the high quality of USCIS initial screening determinations." If USCIS does not have the staff to conduct trainings and supervise efficiently then the agency should hire more people, not eliminate a vitally important due process guarantee.

The Proposed Rule also states, problematically, that: "In recent years, USCIS has received growing numbers of meritless reconsideration requests, which have strained agency resources and resulted in significant delays to the expedited removal process." First, there is no comparison to the increase in case numbers meaning that there is no indication of whether this growth is a higher percentage of cases or in fact a lower percentage, ie relative decrease in requests. Second, there is no explanation of what is considered a "meritless" request: just because a request is denied does not mean it was meritless. It is highly probably that many good cases have been denied, as we've seen this happen in our work at the Migrant Center, in the last years due to, among other things, the Trump-era erroneous decisions that have now been vacated in *Matter of A-B-*, *Matter of L-E-A-*, etc. Third, even if some cases are truly meritless, this does not mean the process should be closed off to everyone. If this were how we ran our legal system, then there would be no courts in the U.S. either.

⁹ Most of these interviews are conducted in detention facilities. The service process may function differently in other settings.



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additions to the record or interpretation errors, or erroneous application of the law. *Pro se* respondents have almost zero chance of explaining legal errors including examples we've seen in the last month of USCIS not evaluating their cases at all under *Matter of L-E-A-10* and *Matter of H-L-S-A-11* despite testimony identifying these as possible grounds for protection.

Pro se respondents also struggle with identifying factual errors as many of them cannot read the English interview results to determine if there's been an interpretation error (USCIS does not provide a translation of either the notes, case summary, or decision so asylum seekers in almost all cases tell us that they have no idea why their case was denied). Another common problem is that asylum seekers often feel rushed by USCIS Asylum Officers, who say things like "only answer yes or no" and "only answer my question" resulting in asylum seekers not feeling like they can elaborate, provide important background information, and otherwise add important testimony, often thinking that what the officer has asked is enough (because they don't know what is legally relevant). Unfortunately, one interview is often not enough to elicit all the important details of a case – we see time and again that it takes several meetings to build up trust with our clients, as well as to think of all the angles and questions that should be asked. All of these procedural problems make sense because the CFI / RFI is only meant to be an initial, threshold screening interview with a low standard for approval. But, as a result of these issues, it is crucial that meaningful access to a review process is maintained.

Even assuming that an asylum seeker calls our office the same day they receive their CFI / RFI interview results, it will take them a day to make a photocopy, a second day to get that copy in the mail, and 2-4 business days for it to be received by our office. This means that it can take a week or longer to receive the information necessary for us to figure out what could have gone wrong and schedule a consultation. About half the time, this does not happen before the court hearing. Immigration Judges will sometimes grant a continuance to have time to consult with an attorney but not always. Even if a consultation is able to take place before the hearing, it is often difficult to prepare a case in time. Our office has declined representation in several cases in the last month simply because we felt that we could not ethically and competently prepare and represent someone in less than 24 or 48 hours (a common timeframe).

Eliminating USCIS' ability to review requests for reconsideration is also problematic because there are new circumstances that could arise after an Immigration Judge review that would materially change someone's claim – such as a *coup d'etat* – and, because the Proposed Rule eliminates the mechanism through which a new interview could be requested, these *bona fide* asylum seekers would be refouled without even having a chance to have their cases heard.¹²

¹⁰ Available at: <https://www.justice.gov/eoir/page/file/1404791/download>.

¹¹ Available at: <https://www.justice.gov/eoir/page/file/1361386/download>.

¹² Ostensibly an asylum seeker could try to request an *initial* interview based on these new facts but it is unclear whether USCIS would grant an *initial* interview when there is already an interview on file. Even if USCIS exercised



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Additionally, there is a benefit to the agency to receiving requests for reconsideration because it serves as a “checks and balances” for USCIS to ensure that Asylum Officers are appropriately conducting interviews and it can help be a “canary in the coal mine” for when additional training on a particular topic, or other agency action, may be needed. Beyond the benefit to the agency and the asylum seeker, it is in the public interest to take any and all measures to guarantee that our country is upholding our protection laws and not refouling those who should be allowed safe haven in the United States.

The Proposed Rule expresses concern about duplicative requests for reconsideration but makes no mention of how often this occurs so it is unclear that this is valid concern. While it is true that occasionally – again we don’t have any numbers on this – the fact of having more than one request submitted for the same individual this does not automatically mean that the request is duplicative.¹³ In a recent case, for example, two different attorneys submitted a request, one based on a misinterpretation of the law and another based on interpretation issues. A more reasonable regulation could require that any additional request state new grounds for the request.

There are several things the Administration could do to improve the system that are not addressed in the Proposed Rule. First, it would be helpful to clarify the role of an attorney. While it is fairly clear that attorneys and *pro se* asylum seekers can submit legal arguments and evidence in writing if time permits, it is not clear that attorneys can ask questions not asked by the adjudicator (USCIS or EOIR) or add additional information not directly asked. This means that in some cases we’ve seen, not all the relevant information gets presented to the adjudicator. Additionally, USCIS denials of requests for reconsideration use template language and give zero explanation of why the request was denied. This means that there is no way to ensure that the issues presented were considered, much less properly considered. Without transparency there can be no accountability, which undermines our ability to guarantee good government, not to mention due process.

discretion to do so in some cases, without a regulation requiring this it is foreseeable that serious violations of our asylum law will occur.

¹³ The Proposed Rule states, without providing any data: “In many cases, reconsideration requests that previously were considered are resubmitted numerous times without additional information.” To make such a major regulatory change, the Administration must give numbers so that the public can meaningfully comment.

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Allowing USCIS to Grant Asylum in Expedited Removal Cases Makes Sense if Certain Procedures are Guaranteed

The Migrant Center, and others,¹⁴ has long called for USCIS to exercise the authority to grant protection to asylum seekers regardless of the timing and manner of their entry into the U.S.¹⁵ Not only is the expedited removal process – that currently requires a CFI / RFI and referral to an Immigration Judge – unnecessarily duplicative and therefore an inexcusable waste of taxpayers’ dollars, but it prolongs adjudication, further burdens an already crowded court docket, forces asylum seekers into an adversarial and less trauma-centered environment, and is fundamentally unfair in how cases are processed vis-à-vis affirmative cases which have both a better format and which give an applicant two bites at the apple instead of one.¹⁶

Unfortunately, the Proposed Rule does not remedy this unequal treatment, does not appear to eliminate duplicative hearings or speed up the process, forces asylum seekers to choose between a USCIS interview and a court hearing (although the Proposed Rule is actually even worse in that it doesn’t give people a choice), and eliminates rights to access to the courts.

First, it is unclear how the proposed change will affect the backlog. It appears to simply shift the backlog from EOIR (approximately 610,000 pending asylum applications, with 220,000 of those

¹⁴ In its congressionally mandated 2005 report on the expedited removal process, the U.S. Commission on International Religious Freedom (“USCIRF”) recommended that asylum officers be allowed to grant asylum to ease “the burden on the detention system, the immigration courts, and bona fide asylum seekers in Expedited Removal.” USCIRF, *Report on Asylum Seekers in Expedited Removal, Volume I: Findings & Recommendations* 66 (Feb. 2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf. The USCIRF repeated this recommendation when it conducted a follow-up study and issued an updated report in 2016, stating as follows: Asylum officers have the legal background and training to adjudicate asylum claims, and do so for affirmative asylum cases. USCIRF, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 54 (Aug. 2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>. Experts from the Migration Policy Institute (“MPI”) reached a similar conclusion in a 2018 report on the state of the U.S. asylum system. MPI concluded as follows: It would also enable meritorious cases to be resolved more quickly, reducing the overall asylum system backlogs and using limited asylum officer and IJ resources more efficiently. Doris Meissner, Faye Hipsman, & T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward* 3, Migration Policy Institute (Sept. 2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf>. The DHS Homeland Security Advisory Council’s (“HSAC”) bipartisan CBP Families and Children Care Panel also included this recommendation in its final report to the Secretary. HSAC, *CBP Families and Children Care Panel Final Report* 24 (Nov. 14, 2019), https://www.dhs.gov/sites/default/files/publications/fccp_final_report_1.pdf.

¹⁵ See e.g., August 2018 Newsletter: https://www.canva.com/design/DAC_I8JrqXQ/view#5 (proposing USCIS be given the authority to grant protection at the CFI/RFI stage); <https://thehill.com/opinion/immigration/417358-presidential-proclamations-cannot-take-away-the-right-to-seek-asylum> (discussing Trump interim final rule attempting to deny access to asylum to those who enter without inspection); and <https://thehill.com/opinion/immigration/390743-people-fleeing-persecution-have-the-right-to-seek-asylum> (calling illegal prosecutions against asylum seekers illegal),

¹⁶ Affirmative denials are entitled to de novo review before an Immigration Judge, thereby effectively giving affirmative applicants a “second” chance to win their case before getting to court.



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originating from CFI / RFI¹⁷) to USCIS (presently over 400,000 pending affirmative asylum applications) and, while EOIR's case load will decrease, the proposed change will actually add to the overall adjudication in cases where USCIS denies as these cases will then have two reviews instead of one. While it is true that the salary of an Immigration Judge is higher than the salary of an Asylum Officer,¹⁸ it is unclear that this difference will offset the difference of conducting additional USCIS interviews. USCIS anticipates it will need to hire and train 794 to 4,647 new asylum officers to implement the rule, at a cost of \$179,820 to \$952,379 million, for the approximated case increase of 75,000 to 300,000 cases annually. There is also no DHS trial attorney salary to cover.

Despite the Administration stating that the purpose of this change is to "there is no indication of how this change will speed up the process."¹⁹ EOIR case completion times (asylum and non-asylum) in detention are 43 days and outside of detention 3.75 years. While there is no data on how long it would be for USCIS interviews inside detention, outside detention there are over 400,000 asylum seekers waiting for merits interviews (the Proposed Rule does not state what the average and median of days are for a merits interview, only that CFI processing FY 2021 for positive cases is a median of 15 days in detention and 919 days outside of detention, making it unclear what the actual wait time will be, vis-à-vis any additional hiring). There is no reason to think that the interviews would be quicker inside detention than the EOIR process and serious concern that if they are quicker, this will not afford the asylum seeker sufficient time to obtain counsel, gather evidence, and prepare their case.

That the Proposed Rule says nothing about the timeline for gathering evidence, much less how documents can be submitted, is incredibly problematic. Especially for those in detention who may not have the funds to make expensive international calls to request evidence, it often takes time to obtain documents from abroad and get them translated into English. Due to the time involved in reviewing evidence, correcting errors such as missing signatures etc, translations, and compiling and shipping times, we request that respondents get us their evidence 30 days before the Immigration Judge's filing deadline. This means that in the best case scenario, respondents need about 6 weeks to get their evidence together, and more in circumstances such as COVID that make travel and access to government records' offices difficult. The ability to present an asylum case to

¹⁷ EOIR, *Executive Office for Immigration Review Adjudication Statistics: Pending I-862 Proceedings Originating With a Credible Fear Claim and All Pending I-862s* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1112996/download>.

¹⁸ EOIR data indicate the average salary of Immigration Judges at \$155,089 and the base salary for a GS-12 ranges from \$66,829, at step 1, up to \$86,881, at step 10 (GS-15 step 3 is \$117,824 and step 4 is \$121,506). Office of Personnel Mgmt., *Salary Table 2021-GS Incorporating the 1% General Schedule Increase Effective January 2021*, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/GS.pdf> (last visited May 17, 2021).

¹⁹ The Proposed Rule states that USCIS would grant asylum in about 15% of cases, based on the FY 2016-2020 numbers of grants originating in CFI, and, while this will reduce EOIR caseloads, the added adjudication of 85% of additional USCIS interviews that will end up with EOIR anyways does not seem to counterbalance this cost savings.



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USCIS is meaningful only if the asylum seeker has sufficient opportunity to gather evidence and prepare their case.

Normally, Immigration Judges conduct several Master Calendar hearings before the merits hearing, to explain the legal process and requirements, take pleadings, and take care of preliminary matters so that the parties are ready to proceed at the merits hearing. Especially for pro se respondents, having access to the adjudicator in their case to ask questions and explain problems, such as if they are going to need more time to get their evidence, can be vitally important.

For those in detention, ostensibly at a minimum everyone who is in reinstatement of removal,²⁰ it is unclear how these interviews will take place. Most USCIS interviews are currently conducted over the phone. Protection claims need to be heard in person in order to evaluate the credibility of the asylum seeker and to help the asylum seeker feel to discuss their persecution and torture.²¹ This means that there will likely be an extra cost in new construction at the detention facilities, not to mention the cost of paying for Asylum Officers to travel to remote locations. These spaces also *must* be accessible to counsel. It is of vital importance that asylum seekers can have their counsel physically sitting next to them. These processes can be terrifying, considering what's at stake, and it is not only important to help minimize trauma to have counsel present but it also has a real due process impact in allowing asylum seekers to relax some, thereby improving their ability to focus on questions and answer clearly.

During this interview, counsel “will also have the opportunity to ask follow-up questions”. This is in contrast to what happens in Immigration Court, where proceedings commence with the asylum seeker’s counsel conducting direct examination. While we do not intend to comment on the efficiency of USCIS affirmative protection interviews as that is not an area wherein we have much knowledge, giving counsel the ability to ask questions first is very beneficial as it helps the asylum seeker relax due to their familiarity working with counsel, and it often allows for quicker adjudications as counsel should be more informed of the particulars of the case and therefore be able to direct the questioning to the most important facts quickly.

The Proposed Rule does not foresee the need, or establish a process, for continuances. Continuances are common occurrences in Immigration Court for a variety of reasons, including difficulties in obtaining counsel or gathering evidence. The Proposed Rule only states that an Asylum Officer “may grant the applicant a brief extension of time during which the applicant may submit additional evidence”. This does not include the flexibility to grant continuances for other

²⁰ It is ICE policy to not release people in reinstatement of removal. *See EOIR Adjudications Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1062976/download> (last visited Aug. 4, 2021).

²¹ While we acknowledge that EOIR occasionally uses VTC for merits hearings, we do not feel that a video image is a sufficient replacement for the asylum seeker who may be nervous about people listening in off screen and not otherwise feel as comfortable opening up about painful memories and fears to a person on a TV screen.



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important matters, fails to define what a “brief” extension is, does not indicate if this includes an extension of the interview date or just the filing deadline, and ties the granting of time to brevity instead of the time needed to meet due process. These ambiguities should be remedied.

Worryingly, under the Proposed Rule, the Asylum Officer “may” consider evidence submitted within the 14-day period prior to the interview date “[a]s a matter of discretion” and not as a matter of due process. Instead, the statutory language should require that the late admissibility of evidence be considered under a legal standard similar to that in Immigration Court: the reason for missing the deadline is weighed along with the relevancy of the evidence. As the Proposed Rule stands, it does not afford the same due process protections as Immigration Court proceedings and therefore is not a viable substitute.

Unlike our proposal,²² which would allow for grants of protection at the CFI / RFI, the current proposal still requires a follow-up interview / hearing. While this will be necessary in many cases, the Administration has not explained how an interview is quicker or cheaper than a hearing, especially when denials will then lead to an extra layer of review. It is highly likely that the protection interview will be conducted by a different officer than the CFI / RFI so they will not already be familiar with the record any more than an Immigration Judge. If ICE transfers or releases the asylum seeker the case will also likely be transferred to a different Asylum Office and end up back at the end of the queue again.

The Proposed Rule states that: “If the alien does not request a review by an immigration judge, the decision and order of removal will be final.” This review must be requested within 30 days of the decision. However, where an asylum seeker wants to return to their country as soon as possible, there is no provision in the Proposed Rule that would allow them to waive the right to a review before those 30 days have elapsed. This is likely simply an oversight in how the language is written but is an important clarification to make because some asylum seekers have family in dire need to their support and spending an extra month in detention could cause unnecessary harm (not to mention unnecessary cost to the government). In theory an asylum seeker could write USCIS a letter and in theory there would be a place to send this letter – which currently doesn’t exist for people in detention who do not have access to e-mail – and in theory USCIS would have the power to grant this request but none of this is specified in the Proposed Rule and it should not be left to theory.

Judicial Review of USCIS Decisions Should Be Preserved in its Entirety

The Proposed Rule takes away the right to a full hearing before an Immigration Judge when USCIS denies protection, thereby establishing different procedures for those who have protection

²² August 2018 Newsletter: https://www.canva.com/design/DAC_I8JrqXQ/view#5.



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interviews with USCIS that originate from a positive CFI / RFI and those that originate with an affirmative asylum application. “The Departments believe that an approach requiring a full evidentiary hearing before an IJ after an asylum officer’s denial would lead to inefficiencies without adding additional value or procedural protections.”

One of the reasons that the current system allows for referral to EOIR when USCIS denies is that Asylum Officers do not need to be attorneys and, regardless of trainings, are not as well versed in legal principals and judges. The Proposed Rule will require that Asylum Officers conducting these interviews be hired at the GS-13 level or above (versus the GS-9-12 level currently required).

While the Immigration Judge would be provided with a transcript of the interview to review, there is no indication, much less a guarantee, that the asylum seeker will have access to the audio recording. Without having access to the recording, there is no way to evaluate the case for interpretation errors, much less provide the court evidence of any error. The Migrant Center has seen over and over again that recordings made of court hearings are incredibly important for this reason, and in some cases have led to the reversal of negative decisions.

Although “the Departments expect that the IJ generally would be able to complete the *de novo* review solely on the basis of the record before the asylum officer” we are concerned about the ability to present new, previously unavailable evidence, including evidence that may not have been presented because the asylum seeker was unaware that it was important. The Proposed Rule only allows for additional testimony and documentation if it “is *necessary* to ensure a sufficient factual record upon which to base a reasoned decision” (emphasis added) and not whether it is relevant, which is the normal standard in immigration court. Furthermore, the proposed regulatory language requires that USCIS provide the court with a “written notice of decision” but does not require that this notice include anything beyond a “granted” / “denied”, much less a reasoned decision explaining how the decision was reached.

Additionally, when an asylum seeker asks for a judge to review their case, the judge will review both the denial and the grant even if DHS does not challenge the grant. What this means is that an individual granted withholding of removal who seeks to challenge the denial of asylum that would allow him or her to have their family legally in the U.S. would run the risk of the judge *sua sponte* taking away their ability to stay and work in the U.S.²³ This basically forces asylum seekers to make the impossible choice between risking their own newfound assurance of safety and facing

²³ In contrast to the more generous benefits available through asylum, statutory withholding and CAT protection do not: (1) prohibit the Government from removing the noncitizen to a third country where the noncitizen would not face the requisite likelihood of persecution or torture (even in the absence of an agreement with that third country); (2) create a path to lawful permanent resident status; or (3) afford the same ancillary benefits, such as derivative protection for family members. Read more about the differences here: <https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal?emci=a83e943b-600a-eb11-96f5-00155d03affc&emdi=ea000000-0000-0000-0000-000000000001&ceid=>



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permanent separation from their children and spouse. It consequently dissuades these “appeals” and cuts off access to judicial review.²⁴

Treating the Interview Results as the Asylum Application Will Lead to a Host of Problems

While we commend the Administration’s desire to eliminate the pernicious and unreasonable effects of the one-year filing deadline,²⁵ treating the credible fear interview results as a “complete asylum application” can be expected to open the proverbial can of worms.²⁶

The first problem is that the CFI / RFI is not by any means complete in the vast majority of the hundreds of cases we’ve seen over the years.²⁷ In fact, USCIS’s Form I-870 — which asylum officers use to take notes during CFIs / RFIs — expressly indicates that “[t]here may be areas of the individual’s claim that were not explored or documented for purposes of this threshold screening”.²⁸ As these are threshold screening interviews, it only makes sense that USCIS would not take the time to fully delve into all the relevant details. So either USCIS will need to expand

²⁴ It would make more sense if judges were only given the authority to review grants where the DHS prosecutor determines that it makes sense, upon their review of the record, to prosecute and review the grant. This is how our adversarial process is intended to work. Judges are not intended to make prosecutorial decisions, much less on matters already decided. It is also worth noting that by requiring judges to review grants, the Proposed Rule duplicates litigation unnecessarily.

²⁵ The Proposed Rule states that “the written record of a positive credible fear finding issued in accordance with § 208.30(f) or 8 CFR 1003.42 or 1208.30 satisfies the application filing requirements in paragraph (a)(1) of this section and § 208.4(b) for purposes of consideration by USCIS pursuant to the jurisdiction provided at § 208.2(a)(1)(ii). We have called on Congress to eliminate this deadline and encourage the Administration to continue efforts for this to happen. See e.g., April 2019 Newsletter: <https://mailchi.mp/64803d817974/how-uscis-processing-delays-harm-immigrant-families-382023>.

²⁶ Section 235(b)(1)(B)(ii) of the INA, 8 U.S.C. 1225(b)(1)(B)(ii), provides that if a noncitizen in expedited removal proceedings is determined to have a credible fear of persecution by an asylum officer, the noncitizen is entitled to “further consideration of the application for asylum.” This proposed rule addresses how that further consideration will occur.

²⁷ The discussion states that the “Departments propose that this application for asylum would not be subject to the completeness requirement of 8 CFR 208.3(c) and 208.9(a)” but this does not appear to be clearly reflected in the actual proposed statutory changes.

²⁸ [I]t is entirely unreasonable... to demand that, during the credible fear interview, the noncitizen establish “facts” that “satisfy every element” of her future asylum claim as a prerequisite to getting a favorable credible fear determination... Imposing such a requirement is tantamount to making asylum applicants prove that they *are* a refugee during their credible fear interviews, even though Congress has made abundantly clear that a noncitizen need only carry *that* burden *after* she has shown a credible fear of persecution and has been placed in full removal proceedings. See 8 U.S.C. § 1158(b)(1)(B)(ii).



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these interviews substantially,²⁹ which we expect to be the case,³⁰ or they will not be complete.³¹ This is both true with regards to the substantive claim questions, as well as to multiple other questions on the I-589 such as military and human rights affiliations, returns to home country, and criminal information. So either the Proposed Rule needs to provide justification for eliminating these questions (and then be consistent and do so on the I-589 as well) or explain the cost of increasing the questioning at the CFI / RFI. While the Proposed Rule claims that “The record created would contain the necessary biographical information and sufficient information related to the noncitizen’s fear claim to be considered an application” “they are not [currently] required to give a detailed and specific account of the bases for their claims, as applicants for asylum must in their asylum application”. *Zhang v. Holder*, 585 F.3d at 724 (2nd Cir. 2009). This suggests that the interview process will need to become more detailed and time-consuming.

The second problem is that the CFI / RFI notes are just that, notes. Although written in question and answer format, it is not a transcript. They are neither the exact questions, nor the exact answers given. In fact, in many situations we’ve seen, there can be quite a disparity between the language used in writing up the notes and the actual language used during the interview. As any legal scholar knows, a seemingly slight difference in word can completely change the meaning of a sentence, such as how “may” and “shall” in statutory construction often result in opposite results.

The Proposed Rule states that the “asylum applicant may subsequently amend, correct, or supplement the information collected during the expedited removal process”³² However, the actual statutory language states that amendments can only be made if the asylum applicant is given permission: “as a matter of discretion, the asylum officer or immigration judge with jurisdiction may permit an asylum applicant to amend or supplement the application filed under § 208.3(a)(1).”

²⁹ The average annual number of CFIs for FY 2016 - 2020 is 59,280 positive credible fear determinations and 12,083 negative credible fear determinations, for a total of 71,363 individuals with credible fear determinations.

³⁰ The I-589 “is incomplete if it does not include a response to each of the required questions contained in the form” and USCIS regularly rejects forms for lack of completeness. See litigation on the “blank space policy”.

³¹ “[T]he credible-fear interview is not meant to be a detailed account of the events supporting an applicant’s asylum claim”. *Ferreira v. Lynch*, 831 F.3d 803, 809 (7th Cir. 2016). These “often rushed” assessments can occur under “tense conditions” that can affect their reliability in fundamental ways. *Lin Ming Feng v. Sessions*, 721 F. App’x 53, 55 (2d Cir. 2018). As a practical matter, a noncitizen “appearing at a credible fear interview has ordinarily been detained since his or her arrival in the United States and is therefore likely to be more unprepared, more vulnerable, and more wary of government officials than an asylum applicant who appears for an interview before immigration authorities well after arrival.” *Zhang v. Holder*, 585 F.3d 715, 724 (2d Cir. 2009).

³² While it seems reasonable that USCIS be provided notice of any change “no later than 7 calendar days prior to the scheduled asylum hearing, or for documents submitted by mail, postmarked no later than 10 days prior to the scheduled asylum hearing” as a practical matter there are often errors that come to counsel’s attention a day or two before trial. As ensuring accuracy in the application is of paramount importance we propose that a sentence is added that gives USCIS the discretion to accept amendments up to and including the time of the interview if a reasonable explanation for the delay is provided.



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Yet, even if they are not allowed to make amendments, the asylum applicant is required to sign the application affirming that it is true and complete under penalty of perjury.³³ This cannot stand.

Perhaps the craziest part of treating a CFI / RFI as an asylum application is that the asylum seeker has no chance to review it before it is “filed” (the date of service on the asylum seeker is the date of filing). In fact, if the asylum seeker does not have access to a translator, they will never have a chance to review the application to ensure that it is accurate, making the possibility of future amendments – not a guaranteed right in the Proposed Rule – irrelevant. This will particularly prejudice indigent, *pro se* asylum seekers. Even where the asylum seeker can access a translator, this will be an additional cost to the asylum seeker or, where the cost is not passed off to the asylum seeker, the attorney representing the individual or the non-profit organization. In the case of non-profit organizations who depend on donations and grants, this will likely mean that they can hire less staff and take on less cases (this will also tie up the few volunteer translators with a significant amount of additional work, taking them away from other projects).³⁴ Consequently, we are looking at this proposal decreasing representation numbers and thereby, access to counsel. Unless the government is going to provide translations in a language the asylum seeker understands fluently, this proposal will likely result in CFI / RFI mistakes causing many confused records and miscarriages of justice.³⁵³⁶

Requiring an asylum seeker to sign a document in English under penalty of perjury that they have not been able to review in a language they understand, or be deported to persecution / torture, is very likely unconstitutional.

³³ The Proposed Rule has contradictory language relating to the signature requirement. It states that a signature is not required on the CFI / RFI “asylum application” but that the application “must be properly filed in accordance with 8 CFR part 103” which requires a signature and that the asylum applicant “shall be subject to the conditions and consequences... following the applicant’s signature at the asylum hearing before the USCIS asylum officer.” We take this to mean that no signature is required for the asylum application to be treated as filed but that it must be signed later. We encourage the Administration to clarify the language on this point.

³⁴ We acknowledge that this new cost will be offset, at least in part, by the costs saved in preparing the I-589. According to the Proposed Rule: “Maximum potential cost-savings to applicants of Form I-589 of \$364.86 per person.” The Administration bases this number on the lost income to the asylum seeker / opportunity cost (who most likely is not eligible to work) instead of the cost of an attorney (12 hours to complete x the average immigration attorney cost is \$101.07 / hour). The average wage for lawyers is provided by the Department of Labor. See U.S. Dep’t of Labor BLS, May 2021 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/2020/may/oes_nat.htm#00-0000 (last visited May 13, 2021). Calculation: Average hourly wage for lawyers \$69.70 x benefits burden of 1.45 = \$101.07 (rounded).

³⁵ Alternatively, instead of prepping CFI / RFI notes, the Proposed Rule could treat the actual transcript as the asylum application. The problem with this is that to prepare a transcript – instead of notes – this will significantly slow down the process and cost more money.

³⁶ While we realize that I-589s are currently filled out in English – although we believe that not providing translations of the forms and answers is similarly a language access issue – an I-589 will be filled out to the best of the person’s ability – as small as that may be – while a CFI / RFI are the Asylum Officer’s notes and not, often, the exact words of the asylum seeker. Stated another way, even a poorly filled out I-589 will be more reliable / faithful to the testimony of the asylum seeker, than a third-party’s notes.



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Illogically Undermines Family Unity

Without explanation, the Proposed Rule states that “only a spouse or dependent included on the credible fear determination or who presently has an asylum application pending with USCIS after a positive credible fear determination can be included on the subsequent asylum application”. These means that after-acquired³⁷ and unlisted spouses who are not in expedited removal, who are in reinstatement of removal³⁸, who failed a CFI, and/or who pass a CFI but have their case referred to EOIR³⁹, cannot obtain protection simultaneously to their spouses. These are not only unfair discrimination between categories of people but all of these spouses would currently be included in cases before EOIR as long as the Immigration Judge was informed before reaching a decision on the merits. As a result, the Proposed Rule undermines family unity without providing any justification for doing so.

The Proposed Rule is furthermore based on several faulty assumptions. First, the Administration assumes that asylum seekers will provide their spouse’s information during the CFI. The Migrant Center has found many cases where the CFI notes do not accurately reflect the asylum seeker’s marital status due to the asylum seeker not being familiar with the law. Unless the Proposed Rule explicitly requires the necessary inquiries, much more than is currently done, then errors will continue to be made. The problem principally lies in that U.S. immigration law recognizes as valid a marriage that is valid under the law of the country where the marriage took place. This means Asylum Officers must be familiar with the law in over 200 countries and ask the necessary questions to determine whether the asylum seeker has a legally valid traditional marriage or common law marriage. Take the state of Texas: if you view each other as spouses and hold each other out as spouses and have lived together for *one* day, then you are legally married. A large reason that we see so many errors on the CFIs is because asylum seekers are not familiar with the laws of their countries and so give both false-positives and false-negatives to this question (this is particularly problematic for *pro se* respondents, the vast majority of those going through CFI).

The Administration acknowledges that the Proposed Rule will result in some spouses and after-acquired children (such as stepchildren or adopted children) not being able to obtain legal status at the time of USCIS’ asylum grant. The Proposed Rules says this problem is solved by the fact

³⁷ An after-acquired spouse is someone who becomes a spouse after the asylum seeker’s CFI but before their USCIS asylum hearing. As always, the asylum seeker would need to prove that there was a lawful marriage, not a fraudulent one conducted solely for purposes of obtaining immigration status. It is fairly common, for cultural reasons, that partners live together for many years and have children together but do not bother to formalize their relationship as, for practical reasons, that is unnecessary in their country (it can also be prohibitively expensive for some people).

³⁸ Currently, a derivative asylum application is the only viable way for a spouse in reinstatement of removal to avoid deportation and obtain legal permanent residency as a grant of withholding or deferral of removal could see the person deported to a third country.

³⁹ This is particularly problematic, and goes contrary to the stated aim of the Proposed Rule, as it will keep cases on EOIR’s docket unnecessarily as these individuals will need to independently litigate their cases, creating an unnecessary burden on the system and cost to the U.S. taxpayer.



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that the spouse or child can apply by filing a form I-730 Asylee Relative Petition which, according to USCIS' processing times chart⁴⁰, takes 15 – 27.5 months to adjudicate. In other words, instead of immediately getting asylum, these spouses and children will need to go through an application process that could take several weeks or months depending on if they have counsel readily available and then wait close to 2 ½ years! During this time they will not be able to work lawfully and in many states will not be able to take a driver's safety test to learn the rules of the road where they live, potentially putting the lives of everyone in the community at risk. Enrolling in school will be more difficult, thereby making it slower for them to integrate into society and gain skills to contribute to economy.

And this legal limbo is just the beginning of the problems with this proposal. The I-730 process is for people *outside* the U.S. so either USCIS will deny these petitions outright, or will need to reformat the process. Then USCIS will have an increased adjudicatory burden – to what degree the Proposed Rule does not estimate – and this will slow down the I-730 process for everyone else (unless USCIS hires more staff, which the Proposed Rule gives no indication of doing). Not only does this prolong family reunification for those in the I-730 process – who may find it necessary to travel to the U.S. through other means and therefore require CBP / ICE / USCIS devoting more resources to the matter⁴¹ – but it can put spouses and children at risk, many who live in dangerous countries. The additional adjudicatory burden on USCIS will continue for years, as the asylum seeker will have to decide after one year if they should risk not adjusting status for another year or two (adjusting status is viewed as a sign that the person continues to be afraid to return to their country of origin) or if, upon becoming a legal permanent resident, they will need to ask that USCIS convert the I-730 to an I-130 and I-485 with an I-601 waiver (if even possible) meaning more forms to adjudicate and more expense to the asylum seeker and the U.S. government. Then, potentially, instead of USCIS adjudicating the whole family's adjustment applications in one go, USCIS will adjudicate first the asylum seeker's application and, several years later, the family's applications. The same problem will repeat when they are eligible for citizenship.

Without providing a reason why, the administration states that the “Departments believe that it is procedurally impractical to attempt to include a spouse or child on the application when the spouse or child has not previously been placed into expedited removal and subsequently referred to USCIS after a positive credible fear determination.” It is *impractical* to do otherwise. It creates duplicative work and increases the adjudicatory burden, the economic cost to all parties, the emotional cost of prolonged insecurity, and the danger to spouses and children.

As proposed in this rule, the noncitizen would be allowed to supplement or request modifications or corrections to this application up until 7 days prior to the scheduled asylum hearing before a

⁴⁰ <https://egov.uscis.gov/processing-times/>, accessed September 11, 2021.

⁴¹ They could file for humanitarian parole and wait in that queue, present at a Port of Entry or cross without inspection, etc.



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USCIS asylum officer, or for documents submitted by mail, postmarked no later than 10 days before the scheduled asylum hearing. *Id.* § 208.3(a)(2).

Relatedly, the Proposed Rule makes the vague statement that: “The asylum officer in his or her discretion may also include other accompanying family members who arrived in the United States concurrently with a principal alien in that alien’s positive fear evaluation and determination for purposes of family unity.” § 208.19. It does not state what family members this includes (siblings, cousins, etc.), whether this means the family members would just be listed on the form with the hopes that ICE would release them all from detention (for example, where a mother gets a positive, her separated husband would be released too), or whether the family members would automatically also get a positive determination in their case and thus would be considered to have filed an asylum application (which seems problematic if the person has not been informed, much less consented to this, and there are serious consequences for frivolously filing an application). The regulatory language must be clearer.

Parole “Expansion” Only Partially Addresses Reality

The Proposed Rule also would broaden the circumstances in which individuals making a fear claim during the expedited removal process could be considered for [parole](#) on a case-by-case basis prior to a positive credible fear determination being made.⁴² For such individuals, parole could be granted as an exercise of discretion not only where required to meet a medical emergency or for a legitimate law enforcement objective, 8 CFR 235.3(b)(2)(iii), (b)(4)(ii), but also where detention is “unavailable or impracticable”.

While this proposal will possibly lead to an increase in releases and a potential decrease in detention costs – and an increase in “human dignity” – as more people are released, it could also lead to the perverse result of increasing calls for detention beds if the only reason people are getting released is because their detention is “unavailable or impracticable”.

Additionally, while this addition is all well and good, detention should not be the default option. Our constitutionally protected liberty interest dictates that freedom should be the default option, only restricted when it is demonstrated that the individual is a danger to the community or a flight risk that cannot be mitigated by the setting of a bond or other condition(s).

⁴² And the U.S. Supreme Court recently acknowledged in *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018), that DHS may exercise its authority to temporarily parole persons subject to expedited removal, while also acknowledging that the relevant statutory language in section 235(b)(1) and (b)(2) of the INA, 8 U.S.C. 1225(b)(1), (b)(2), “unequivocally mandate that aliens falling within their scope ‘shall’ be detained,” *id.* at 844.



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Giving DHS the ability to grant parole instead of bond in more cases is preferable⁴³ for two important reasons: 1) it will help asylum seekers save money to hire legal counsel and thereby increase the probability that their case will be well prepared – leading to increased adjudication efficiencies / government savings and increased chances of receiving protection, and 2) it will allow indigent asylum seekers who cannot afford to pay a bond freedom from unlawful restraint and the benefits that come with it psychologically and to case preparation. For this reason we urge the Administration to go further in expanding the grounds upon which parole can be granted.

Without stating a clear reason for doing so, the Proposed Rule establishes that individuals paroled under 212(d)(5) who would normally automatically qualify to apply for work authorization under (c)(11) cannot do so. Not only does this take away the right to be self-sufficient from arriving aliens who currently are paroled *with* the ability to apply for work authorization, but there is no reasonable justification for this prohibition. It is not in the public interest to have hundreds of asylum seekers living in the community without the ability to support themselves and contribute to our economy. Not only will this put further strain on non-profit organizations and other social support systems, but it will not give asylum seekers an important method for restarting their lives and recover from the trauma that happened in their home countries and the journey.

Unreasonable Limitations to the Removal Order Vacatur Possibility

If an asylum applicant shows *prima facie* eligibility for a different form of relief from removal, a motion can be filed with the Immigration Judge to vacate the asylum officer's removal order. § 1003.48. The first problem is that the Immigration Judge, after determining that the individual is *prima facie* eligible, can still deny the motion "in the exercise of his or her discretion". This means that even where USCIS would otherwise grant a green card to a spouse, for example, the Immigration Judge could stop the case dead in its tracks if he or she feels like it. It is not clear how that discretion should be exercised, much less that there would be a right to appeal for an abuse of discretion. So we can see forced separation of families and other deportations when individuals are eligible for U-visas and other forms of relief.

Second, "[a]n applicant may file only one such a motion" regardless of whether there is a change in the law or circumstances. For example, if the applicant has already filed a motion, and then the

⁴³ The Administration states that "DHS would begin to consider for parole on a case-by-case basis all noncitizens who have been referred to USCIS for a credible fear screening under the slightly expanded set of factors" but there is no requirement in the Proposed Rule that DHS consider parole, much less parole instead of bond. This means that the actual process in practice will vary by Administration, Field Office, and officer, as is so often the case in detention decisions. For example, just last month two of our Guatemalan clients in the exact same legal situation left detention in separate ways: one was granted parole and now has the ability to seek employment authorization and the other had to pay a \$2500 bond and has no current pathway to legal employment. This unequal treatment under the law is incredibly problematic (not to mention a constitutional violation). It is an unfortunate oversight that the current Proposed Rule does not address this issue.



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government designates a country as too dangerous for return under TPS, they will not be able get their removal order vacated. Similarly, if no motion has been filed “before the immigration judge issues a decision” on their “appeal” and there is a change in the law or circumstances, such as a U.S. child coming of age to petition for their parent, there is no mechanism to vacate the removal order.

The Proposed Rule also states that it will not allow the individual to apply for voluntary departure instead of a removal order.⁴⁴ There is no explanation for this decision. If neither USCIS nor EOIR can grant voluntary departure, individuals could be prevented from family unity and business opportunities in the future. Taking away this possibility must be justified.

Conclusion

Despite the Administration’s stated goal of “consider[ing] the asylum claims of individuals encountered at or near the border more promptly while ensuring fundamental fairness” the Proposed Rule includes many problematic sections, as discussed above, that undermine these goals and should consequently be significantly revised.

Sincerely,

//s// Sara Ramey

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⁴⁴ This appears in the discussion and is not clearly specified in the actual statutory language. Clarity should be provided.