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Protecting Migrant Rights Across Borders

June 12, 2024

Mr. Daniel Delgado
Director for Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
Washington, DC 20528

Submitted via http://www.regulations.gov

Re: Justice in Motion's Comment on the Department of Homeland Security's Notice of Proposed Rulemaking, the *Application of Certain Mandatory Bars in Fear Screenings*, DHS Docket No. USCIS-2024-0005

Dear Director Delgado,

Justice in Motion submits the following comment in response and opposition to the Department of Homeland Security's ("DHS") Notice of Proposed Rulemaking, Application of Certain Mandatory Bars in Fear Screenings ("Proposed Rule"), published on May 13, 2024.[1] In spite of the DHS's assurance that the Proposed Rule does not significantly alter Credible Fear Interview ("CFI") or Reasonable Fear Interview ("RFI") procedures, the application of mandatory bars at this preliminary stage of an asylum seeker's legal process is expressly sought to deny a greater number of migrants rightful access to proceedings under Section 240 of the Immigration and Nationality Act ("INA").[2] CFIs represent the first entry point for most asylum seekers at a port of entry. As such, most have had no contact with, let alone counsel, from legal representatives to help them navigate or even understand the process, and their rights. The adjudication of the mandatory asylum bars requires complex legal analysis based on decades of case law that demands a clear and deep understanding of both domestic and international legal standards and practices. Allowing for their summary application to the most vulnerable and isolated migrants represents a departure from our nation's core values and obligations and will only lead to further human rights violations and increasing inefficiency in an already broken immigration system.

For these and the reasons set forth below, we respectfully request that the Department publish a notice in the Federal Register withdrawing the Proposed Rule.

I. Justice in Motion's Interest in the Proposed Rule

[1] 89 Fed. Reg, 41347 (May 13, 2024) [hereinafter "Proposed Rule"].
[2] Proposed Rule at 41,356.

Founded in 2005, Justice in Motion (previously Global Workers Justice Alliance) promotes the concept of portable justice: the right of migrants to access to justice regardless of their location. For this purpose, Justice in Motion has developed a Defender Network made up of human rights organizations and individual advocates in countries within the Mesoamerican region, including México, Guatemala, Honduras, El Salvador, and Nicaragua.

Justice in Motion's purpose is to help strengthen and protect migrant rights, facilitate access to transnational justice, and make migrants and their issues visible and worthy of protection. Our work supports legal advocates in the United States who work directly with migrants and their families by building and supporting partnerships with civil and human rights defenders in the migrants' countries of origin to ensure equal access to justice no matter who they are, where they are, or where they come from. We hold firm to our duty to uphold the dignity of every and all migrants and to fiercely work towards ending policies and closing loopholes that allow for the violation of their rights.

II. A Thirty-Day Comment Period is Not Sufficient to Adequately Respond to a Proposed Rule with Such Irreversible and Life-Threatening Implications

The Administrative Procedures Act ("APA") requires that the federal government provide the public a meaningful period to comment on any proposed regulation or regulatory change.[3] Furthermore, President Biden himself has recognized that in most cases this should translate to "a comment period of not less than 60 days."[4] Limiting the current comment period to 30 days contradicts this administration's own principles and undermines the public's right to fully engage with important issues of public policy. Given the serious and irreversible consequences that the Proposed Rule will have on thousands of vulnerable protection-seekers, the shortened period for review and comment stands out as particularly egregious.

III. The Proposed Rule is a Violation of Due Process and Requires Complicated Analysis of Legal and Evidentiary Standards Which Are Far Too Complex to Fairly Adjudicate at the Credible Fear Stage of an Asylum Process

The Department, in its 2022 Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers ("Asylum Processing Interim Final Rule"), itself concluded that the application of mandatory bars is "a decision most appropriately made in the context of a full merits hearing . . . before an asylum officer or an [Immigration Judge]" and that "due process and fairness considerations counsel against applying mandatory bars during" fear screenings.[5]

The Proposed Rule would reverse this position and allow asylum officers the power to deny access to a full asylum adjudication, increasing the risk of erroneous application and wrongful return of refugees to life-threatening situations in their home countries or across the border in

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[3] 5 U.S.C. § 533(c).
[4] *Improving Regulation and Regulatory Review*, Exec. Order of Jan. 18, 2011, § 2(b), 76 Fed. Reg. 3,821, 3,821-22 (Jan. 21, 2011).
[5] *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18,078, 18,134 (Mar. 29, 2022) [hereinafter "Asylum Processing Interim Final Rule"].

Mexico.[6] Statistics show that the Asylum Office often refers meritorious affirmative asylum claims to the Immigration Courts at an alarming rate, with glaring disparities between the regional offices.[7] For example, in Fiscal Year 2023, the Immigration Courts granted asylum to 76% of affirmative asylum cases referred by the Asylum Office.[8]

The mandatory bars to asylum are fact-intensive and require complex legal analysis. For example, the persecutor bar disqualifies anyone who has ever been involved in the persecution of others.[9] While it may seem straightforward on its face, courts have wrestled with whether and how any exceptions should apply.[10]

The same is true for the other applicable bars; the particularly serious crime bar;[11] the serious nonpolitical crime bar;[12] the security bar,[13] and the terrorism bar.[14]Additionally, any meaningful analysis and application of any of the five bars requires factual and evidentiary burdens that a recently arrived migrant, without an attorney, will be hard pressed to meet or even address. These cases, when fully adjudicated by an asylum office or an Immigration Judge can take years to be heard. Allowing for an asylum officer to make these determinations based on a border interview, without more, elevates asylum officers to final adjudicators on matters that even the most seasoned immigration experts struggle with.

This, of course, increases the likelihood that the bars will be erroneously applied. During a CFI the burden is heavily on the asylum seeker to convince or prove, by a preponderance of the evidence, that none of these bars should apply; bars whose existence and legal nuances they are almost certainly unaware of. Meanwhile, under the proposed rule an officer conducting a CFI need only determine that it "appears" that one of the bars applies.[15]

Again, DHS must consider the disparity that this produces, especially at ports of entry where access to counsel is often unlikely, if not altogether impossible. Most CFIs occur while the asylum seeker is detained, often disoriented and held under stressful conditions by Customs and Border Protection ("CBP") or Immigration and Customs Enforcement ("ICE"). The environment

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[6] *Id.* at 18,084; Human Rights First, Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban 7-9 (May 7, 2024), www.humanrightsfirst.org/library/trapped-preyed-upon-and-punished.
[7] Cora Wright, *Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs*, Human Rights First (Apr. 19, 2022), https://humanrightsfirst.org/library/erroneous-asylum-office-referrals-delay-refugee-protection-add-tobacklogs; Human Rights First, Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies 33-34 (Aug. 3, 2022), https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf.
[8] Asylum Decisions, TRAC Immigration (last visited June 10, 2024) (based on data from the following: "2023" from the first column "Fiscal Year of Decision"; "Affirmative" from second column "Affirmative/Defensive Application"; "Asylum Granted" from third column "Decision"), https://trac.syr.edu/phptools/immigration/asylum/.
[9] 8 U.S.C. §1158(b)(2)(A)(i).
[10] Hillel R. Smith, Cong. Research Serv., LSB10816, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two) 1-2 (Sept. 7, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10816.
[11] 8 U.S.C. §1158(b)(2)(A)(ii).
[12] 8 U.S.C. §1158(b)(2)(A)(iii).
[13] 8 U.S.C. §1158(b)(2)(A)(iv).
[14] 8 U.S.C. §1158(b)(2)(A)(v).
[15] Proposed Rule at 41,360 (proposed 8 C.F.R. § 208.30(e)(5)(ii)(A)-(B)).

is a hostile one, with no one around to advocate for or explain the migrant's rights to due process, a standard that is impossible to meet under the duress of incarceration and the fear of being removed, sometimes permanently from the only safe place where they can seek refuge.[16]

Further complicating a migrant's right to seek asylum is the practice of expedited removal. For migrants detained at the border, within 100 miles of the border or any port of entry, or for those intercepted by ICE or CBP within fourteen days of having entered the country, the U.S. government can already circumvent their right to a full review of their claims by subjecting them to a truncated review process, after which they can be removed and prohibited from reentering the United States for five years. The consequences of an unsuccessful CFI, therefore, are serious, irreversible and potentially life-threatening.

IV. Conclusion

The right to seek asylum is a human right, enshrined in both international and domestic law. The expedited removal process is already an assault on due process, denying thousands of immigrants the right to fully and meaningfully participate in the defense of their legal rights. The Proposed Rule will further erode the rights of asylum seekers by allowing a determination on mandatory bars to be made at the CFI stage, the very first stage of the process, when a migrant is least likely to have legal assistance or to access any necessary evidence in support of their claim.

Justice in Motion strongly urges DHS to withdraw the Proposed Rule. Doing so will not only protect our core humanitarian values, but it will also save lives.

[16] "I'm a Prisoner Here": Biden Administration Policies Lock Up Asylum Seekers 24-25 (Apr. 2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/ImaPrisonerHere.pdf.