Submitted via Federal eRulemaking Portal

July 15, 2020

Lauren Alder Reid, Assistant Director,
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: Public Comment Opposing Proposed Rules by DHS/USCIS and DOJ/EOIR on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review. RIN 1125-AA94/EOIR, Docket No. 18-0002.

Dear Ms. Alder Reid:

The thirteen (13) national torture treatment programs below respectfully submit this comment to oppose the notice of proposed rulemaking by the Department of Justice (DOJ) and Department of Homeland Security (DHS) on Rules on Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, EOIR Docket No. 18-0002, issued on June 15, 2020.

The proposed rule will be extremely detrimental to survivors of torture, who comprise a shocking percentage of the U.S. refugee and asylum seeking populations. It is yet another step by the administration to punish asylum seekers for pursuing refuge in the United States. Torture survivors' ability to obtain legal relief fairly and efficiently is key to their mental health and wellbeing. This rule will make it more difficult for survivors to obtain asylum, hindering their healing and further exposing them to re-traumatization. Most disturbingly, this rule will lead to the return to danger of many who would merit humanitarian relief in violation of domestic and international law.

For the reasons detailed in the comments that follow, the DOJ and DHS should immediately withdraw their current proposal and dedicate their efforts to advancing policies that safeguard individuals fleeing persecution, including torture.

Thank you for the opportunity to submit comments on this proposed rule. Please do not hesitate to contact us with any questions or for further information.

Andrea Carcamo /s/
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DETAILED COMMENTS in opposition to proposed rules and procedures for asylum and withholding of removal; credible fear and reasonable fear review. RIN 1125-AA94/EOIR, Docket No. 18-0002.

The thirteen undersigned torture treatment programs welcome the opportunity to comment on the proposed rules—issued by the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) and Executive Office of Immigration Review (EOIR) of the Department of Justice (DOJ)—on procedures for asylum and withholding of removal; credible fear and reasonable fear review**,** EOIR Docket No. 18-0002 ("the Proposed Rule," or "the Rule").

The signatory organizations seek to advance the knowledge, technical capacities and resources devoted to the care of torture survivors living in the United States and act collectively to prevent torture worldwide.

As experts in the provision of mental health and other rehabilitation services to survivors of torture and other trauma, we are intimately familiar with the profound effects that this proposed rule will have on our clients, including making the U.S. asylum process overwhelming, and will lead to the return of persecuted and tortured individuals to danger.

I. Background

On June 15, 2020 USCIS (DHS) and EOIR (DOJ) ("the agencies") published jointly the notice of Proposed Rulemaking that is the subject of this comment. These regulatory changes seek to rewrite the laws adopted by Congress giving rise to the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act through the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The Proposed Rule makes drastic changes to asylum and other humanitarian protection procedures designed by Congress to ensure that the United States can efficiently and effectively recognize individuals who are refugees and deserve our protection. The proposed changes severely limit the number of individuals who will qualify for asylum by narrowing many of the elements within the refugee definition. These changes will re-format asylum laws shaped by decades of work and analysis by judges and other experts in the subject matter, many of whom are deeply familiar with the experiences these individuals have faced and often meet in person in court with asylum seekers who will meet death, violence or torture if removed.

II. This rule is part of a larger scheme by the administration to end asylum

Through the establishment of policies, agreements, and dubious unilateral changes to well-settled asylum law, it is clear that the Trump administration seeks to prevent individuals—especially, but not only, those arriving at our southern border—from accessing the U.S. asylum process at

all, much less actually obtaining asylum. These actions form the backdrop to the proposed rule and include the following:

Blanket Ban for asylum seekers at the borders: On March 19, 2020 the Centers for Disease Control and Prevention (CDC) issued an order allowing the closure of the U.S. borders using COVID-19 as a public health justification. DHS is currently summarily removing those seeking protection at the border and between ports of entry without implementing a procedure to determine whether they might qualify for humanitarian protection.

Changing asylum immigration law: The attorney general certified to himself several immigration court cases and decided them in a way that upends longstanding law. In overruling Matter of A-B- and Matter of L-E-A-, the attorney general made it significantly more difficult for individuals from Central America to win their asylum cases, since they largely rely on these two cases.

Zero Tolerance leading to Family Separation: The administration adopted a policy of pursuing criminal charges against every individual who crossed the border outside of a port of entry, then forcibly separated children from the parents who were subjected to criminal proceedings. Family separation was a cruel practice that traumatized both children and parents. It will have long lasting consequences for asylum seekers and for the United States.[1]

Asylum Ban 1.0: In November 2018, the president issued a proclamation banning individuals who enter the United States between ports of entry from asylum.[2]

Migrant Protection Protocols: Established in January 2019, this policy forces asylum seekers to wait in dangerous Mexican border cities during the pendency of their cases. Besides placing asylum seekers in danger, it undermines their ability to obtain assistance of counsel, greatly diminishing their ability to win their case.[3]

Asylum Ban 2.0: In July 2019, the administration disqualified from asylum any individual who transited through a third country before arriving at the United States southern border. This disqualifies all but Mexican asylum seekers arriving at our southern border from asylum.[4]

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[1] Center for Victims of Torture. Asylum Fact 4. *Available at* https://www.cvt.org/AsylumFact4 (last accessed on 12/30/2019).

[2] https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection.

[3] Human Rights First. Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process. *Available at* https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf (last accessed on 12/30/2019).

[4] https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications

Agreements with other countries: The Trump administration has forced some countries that are not safe into entering into "safe third country" agreements—from which people are fleeing violence and persecution that these countries' governments cannot, or will not, effectively address—including El Salvador, Guatemala, and Honduras.

Work Authorization Restrictions: The administration proposed to establish a fee for work authorizations, and a separate rule that has been finalized doubles the time an asylum seeker must wait before qualifying for a work permit (from 150 days to 365 days) and imposes additional restrictions on eligibility. Yet another final rule eliminates entirely the time limit previously imposed on USCIS to adjudicate work authorization applications, which implicitly authorizes the agency to delay any such adjudication indefinitely.

III. Allowing only a 30-day comment period does not provide adequate time for comprehensive comments.

The Agencies have provided a wholly insufficient 30-day timeframe to respond to what amounts to a complete overhaul of the U.S. asylum system. Under the Administrative Procedures Act, the agencies have a duty: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[5] The Rule is over 160 pages long with more than 60 of those pages being the proposed regulations themselves—including dense, technical language and sweeping new restrictions that have the power to send the most vulnerable back to their countries where they may face persecution, torture, or death. Any one of the sections of these regulations, standing alone, would merit 60 days for the public to fully absorb the magnitude of the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes to the asylum rules, issued in a single, massive document.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, impactful, and dense, but the challenges to respond to the Rule are magnified by the ongoing COVID-19 pandemic. As individuals working on these issues struggle with child-care while working at home, sick relatives, and the stress of the pandemic itself, it is especially unfair to only give 30 days to provide comment on a Rule that will have devastating consequences for thousands of individuals.

For this procedural reason alone, we urge the administration to rescind the Proposed Rule. If it wishes to reissue the Rule, it should grant the public at least 60 days to have adequate time to provide comprehensive comments. Because of the prejudicial 30-day public comment period, the

[5] *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-cv-2117, ECF No. 72, 24-25 (D.D.C. June 30, 2020) (internal citations omitted).

below comments cannot address every problematic provision. But silence is not consent: the fact that we do not discuss a particular change does not mean we agree with it.

IV. The rule has a discriminatory effect

Under INA section 101(a)(42)(A), a refugee is: "any person who. . .is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

The Rule changes the meaning of several of the elements within the definition of refugee, and those changes appear both to be done with discriminatory intent and would have a discriminatory effect.

The Rule narrows what constitutes political opinion, persecution, and membership in a particular social group by creating new definitions that significantly decrease the number of instances where a person would meet a particular element of the definition of refugee required to obtain asylum. The Rule then provides examples of instances when certain actions or scenarios would generally be insufficient to demonstrate each revised element. Some of these are: the attempted recruitment of the applicant by criminal, terrorist or persecutory groups under particular social group; a political opinion that is defined by generalized disapproval of gangs absent expressive behavior; and non-severe economic harm or property damage in the context of persecution.

These proposed revisions appear targeted specifically at Central American asylum seekers, as the changes would disproportionately exclude legitimate claims common to asylum-seeking Central Americans. Many escape their countries to avoid recruitment efforts by gangs, and whose rejections to join most likely lead to their deaths. Under the new rule, this scenario would "generally be insufficient" to meet the particular social group element. Many women escape violence they experience at home and by society just because they are women without the protection of their governments. The Rule explicitly states that gender is not an act of persecution that would merit protection. Finally, many others flee because they cannot thrive due to a war tax the gang charges to family businesses or families to the point they can no longer provide for basic needs. Under the new Rule, this persecution might now be placed in the category of "non-severe economic harm or property damage" making it significantly more difficult for these individuals to obtain asylum.

V. The rule violates domestic and international law

The rule abrogates the United States' obligations under the 1951 Convention Relating to the Status of Refugees (the Refugee Convention). The United States, while not a party to the 1951

Refugee Convention itself, did ratify the 1967 Protocol. In ratifying the 1967 Protocol, the United States bound itself to the obligations of the 1951 Refugee Convention as well.[6]

The Refugee Convention states that "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."[7] As previously mentioned, this rule significantly limits the pool of individuals who will qualify for asylum based on, in large part, the administration's desire to keep individuals with certain nationalities and ethnicities from being able to receive humanitarian protection from the United States. As more individuals who would otherwise qualify for relief will be returned to their home countries—likely the one they fled—they face significant risk of persecution upon return, an issue about which the U.N. High Commissioner for Refugees recently expressed serious concern.

VI. By changing the definition of torture, the rule narrows the pool of individuals who would qualify for protection under CAT

The United States signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1988 and it was codified into U.S. law in 1998.[8] Article 3 of the Convention states that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Protection known as withholding or deferral of removal under the Convention Against Torture (CAT) provides critical protections for individuals who face torture in their country of origin and would be otherwise barred from asylum protections. The Proposed Rule modifies the standard for protection under CAT to limit the accountability of governments as to the torturous conduct inflicted either at the hand of government actors directly or by private individuals acting with the government's acquiescence.

In particular, the Proposed Rule requires asylum seekers pursuing protection under CAT to prove that the perpetrator was not acting as a "rogue official" when torturing them, a burden that is wholly unreasonable—and in many, if not most, cases impossible—for torture survivors to satisfy. Additionally, the Rule provides that only a government actor who is acting "under color of law" can acquiesce in torturous conduct by private actors. The definition of "acquiescence" currently requires a finding of actual knowledge or willful blindness; the Proposed Rule

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[6] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, Article 1, available at: https://www.refworld.org/docid/3ae6b3ae4.html.

[7] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 33.1, available at: https://www.refworld.org/docid/3be01b964.html

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1988 U.S.T. 202, 1465 U.N.T.S. 85 (enacted into U.S. Law on October 21, 1998 by Fiscal Year 1999 Omnibus Consolidated and emergency Supplemental Appropriations Act, Pub. L. No. 104-277, Div. G, Sub. B, Title XXI S2242 of the foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-822 (1998)

redefines "willful blindness" to require that the official be "aware of a high probability of activity constituting torture and deliberately avoided learning the truth." A reckless or negligent disregard for the truth is not enough; "the official or other person in question must have been charged with preventing the activity as part of his or her duties."[1] The effect of these changes will be to deny relief under CAT to survivors who are clearly victims of CAT violations.

The Rule narrows the pool of individuals who would qualify for protection under CAT, which will lead to the *refoulement* of individuals who will likely face torture as currently defined. The Committee against Torture, which monitors implementation of CAT, has interpreted the *non-refoulement* obligation to be "similarly absolute" as the prohibition on torture itself; in other words, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification" for any exception to the obligation. In making these changes to the definition of torture, the administration is taking an action that will almost surely lead to violations of CAT.

VII. The proposed rule will have profound health consequences for asylum-seeking torture and trauma survivors, will effectively bar many of them from qualifying asylum, and will subject them to heightened risk of being re-victimized.

The overwhelming majority of asylum seekers arrive to the United States having suffered traumatic experiences, whether in the country from which they fled or on the often-perilous journey in search of safe haven, with no more than the possessions they can carry. According to the Department of Health and Human Services, research "suggests that 44% of refugees, asylees, and asylum seekers living in the U.S. have experienced torture." A high percentage of survivors of torture in the U.S.—refugees and asylum seekers from around the world—have been separated from their families, sometimes by force and other times by necessity when clients must flee without warning to escape imminent danger.

In addition to the dangerous impacts of the rule described above, it would also result in many asylum seekers—and torture survivors among them—qualifying only for lesser forms of relief. For example, asylum seekers who stop at another country will only qualify for protection under withholding of removal or under CAT. This means they will not be able to include family members in their application leading to continuous family separation and will live in constant limbo as these types of relief don not lead to citizenship.

Clinicians and their colleagues from torture treatment programs across the United States engage with this population every day. They know from first-hand experience how important the ability to bring family is for effective rehabilitation, as well as the immense contributions their clients continue to make to our society.

The following clinicians offer their views directly on the proposed rule:

Anne Eichmeyer, MSW, LICSW, Psychotherapist, at the Center for Victims of Torture

> I work with a female client who was raped and tortured (detained and physically beaten) by a military superior, reported his actions and was met with retaliation from other military officials. She fled her country for safety, securing a visa to the United States where she had a family member. On her way to the US, she passed through another country where she had to receive medical treatment- this necessitated her to stay for over 14 days in this second country. She arrived in the US and applied for asylum within the one-year deadline. She has waited close to four years for her interview. In the meantime, she is working as an essential health care worker during the COVID19 pandemic and has directly worked in nursing homes with outbreaks, continually putting her own life at risk.

Emily Manaen, MSW, LICSW, Psychotherapist at the Center for Victims of Torture

> This asylum rule will have detrimental effects on asylum seekers. As a psychotherapist at the Center for Victims of Torture, in St. Paul, MN, I have provided psychological treatment to many asylum seekers, for whom the current system of asylum is already a difficult and painful process. The Trump administrations' proposed rule will cause incredible harm to many who have already suffered human rights abuses in their own countries. For example, I provide psychotherapy treatment to an individual who was tortured in his home country by unidentified police officers. Following an opposition protest, he was followed and beaten by a group of men he later recognized as police officers. As a result of his torture, he was rendered unconscious and suffered a traumatic brain injury. He fled his country on foot, leaving behind his children and loved ones, in order to find safety. He experienced peril and further violence on his journey, through multiple countries, to the US border. Once in the US, he applied for asylum within the one-year deadline and has been in the immigration process for multiple years now. The uncertainty and length of the asylum process causes immense psychological distress for this person. The new asylum rules will only add to his psychological distress. He is but one example of many for whom this asylum rule will cause harm.

Conclusion

The administration must abstain from implementing the proposed rule, which will denigrate the asylum system, asylum seekers generally, and survivors of torture specifically.

Sincerely,

Bellevue Program for Survivors of Torture
Bilingual International Assistant Services
Center for Survivors of Torture
Center for Victims of Torture
De Novo Center for Justice and Healing
HealthRight International Human Rights Clinic
International Rescue Committee, Denver
Libertas Center for Human Rights
Mount Sinai Human Rights Program
Partnerships for Trauma Recovery
Program for Torture Victims
Torture Abolition and Survivors Support Coalition International (TASSC)
Utah Health & Human Rights