October 23, 2020

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review

RE: RIN 1125–AA93; EOIR Docket No. 19–0010; A.G. Order No. 4843–2020,
Public Comment Opposing Proposed Rules on Procedures for Asylum and Withholding of Removal

Dear Assistant Director Reid:

HIAS respectfully submits this comment in response to the Department of Justice, Executive Office for Immigration Review (EOIR) proposed rule (Proposed Rule), *Procedures for Asylum and Withholding of Removal*.[1] Issued on September 23, 2020, the Proposed Rule would further eviscerate procedural protections for asylum seekers in removal proceedings, making it more difficult for bona fide asylum seekers to find safety in the United States. The Proposed Rule would require immigration judges to adjudicate most asylum applications within 180 days of the applications' filing, making it more difficult for asylum seekers to find counsel or fully prepare their cases. Likewise, the Proposed Rule would create a 15-day filing deadline for asylum applications for those in asylum-only proceedings, again making it very difficult to obtain counsel or to fully develop their asylum claims. The rule would further require judges to reject asylum applications for minor errors in completing the form, or for failing to pay the asylum fee,[2] potentially forcing asylum seekers to waive their ability to seek asylum. Finally, the Proposed Rule would fundamentally alter the role of the immigration judge by allowing judges to submit their own evidence in asylum proceedings.

[1] https://www.federalregister.gov/documents/2020/09/23/2020-21027/procedures-for-asylum-and-withholding-of-removal

[2] While there is not currently a filing fee for defensive asylum applications, EOIR proposed a fee for asylum applications through a proposed rulemaking February 28, 2020. *See* 85 Fed. Reg. 11866. Throughout this comment we raise the substantial concern that the agency's decision to engage in staggered rulemaking has made it impossible for us to adequately comment on the potential effects of this rule. While we are commenting on the Proposed Rule against the backdrop of current asylum rules and procedures, several pending rulemakings, could radically alter procedures for considering asylum applications and procedures for all litigants before the Executive Office for Immigration Review. Without knowing which proposed rules will ultimately be published, and how they might be altered in their final form, we are forced to comment blindly here without being able to consider the full aggregate effect of all of the proposed rules.

We wish to note that EOIR did not provide sufficient time for the comment period in response to this Proposed Rule. Typically, agencies should allow for public comment periods of at least 60 days. There is no reasonable justification for the public not being given 60 days to provide comments at this time. This is especially important since, if implemented, the Proposed Rule will affect every asylum seeker before, during, and after their merits hearings.

Moreover, the extensive changes being proposed through rapid-fire, staggered rulemaking make it impossible for the public to fully understand the interplay among the proposed rules. With this process, the public is denied any meaningful opportunity to adequately comment on the effect of this Proposed Rule. This comment specifically discusses two examples where the full effects of this Proposed Rule are unknown, *See* 85 Fed. Reg. 11866 (Feb. 28, 2020) and 85 Fed. Reg. 36264 (June 15, 2020), but these are not the only examples. Specifically, the NPRM issued on June 15, 2020, titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" 85 Fed. Reg. 36264 (June 15, 2020), proposed the most sweeping changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Similarly, on August 26, 2020, EOIR issued an NPRM which would substantially alter the procedural rights of asylum seekers and others in removal proceedings, titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491 (Aug. 26, 2020), which would dramatically alter procedures and rights before EOIR. Without knowing how the agencies may alter that proposed rules based on the 88,933 comments they received to the June 15 NPRM,[3] or the 1,287 comments they received to the August 26 NPRM,[4] or even whether the rules will contain anything more than technical changes, it is impossible to adequately comment on the current Proposed Rule.

Despite the inadequate 30-day deadline in which to submit a comment, we nevertheless submit this comment in objection to the proposed rule because the proposed regulations would greatly reduce the rights of asylum seekers[5] appearing before EOIR and would result in the wrongful

[3] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, https://www.regulations.gov/document?D=EOIR-2020-0003-0001.

[4] *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, https://www.federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure

[5] To the extent that this comment addresses issues that affect applicants for asylum, withholding of removal and protection under the Convention Against Torture, it will use the term "asylum seekers" to mean applicants for all of these forms of protection.

removal of bona fide asylum seekers to the countries from which they fled, where they would likely face further persecution or even death.

HIAS objects to restrictive changes to the U.S. asylum system, such as those proposed in this Proposed Rule, because we are the American Jewish community's refugee organization. We were founded in 1881, making us the oldest refugee serving organization in the United States. For much of our history, we assisted Jewish refugees. However, as the nature of refugee flows and crises changed, so did our work. We now work with refugees, asylum seekers and other forcibly displaced people, of all faiths from around the world. We partner with the U.S. federal government, as well as a network of 17 local organizations, and vast networks of community supporters, in welcoming resettled refugees to the United States.

HIAS also seeks to secure various forms of humanitarian relief for the clients we serve in the New York and Washington, DC metro areas. Our clients include asylum seekers, as well as abused and neglected children, and survivors of human trafficking and other violent crimes. Many of our clients are children and women who were forced to flee gang violence, as well as LGBTQ individuals whose governments refused to protect them. In addition, HIAS serves asylum seekers on both sides of the U.S./Mexico border. Through our robust pro bono program, and with the assistance of our four offices in Mexico, we provide legal support services to asylum seekers stuck in Mexico due to the Migration Protection Protocols (MPP), and refer cases to our legal fellows on the U.S. side of the border in California and Texas, as well as pro bono attorneys across the country.

For the reasons details below, the Departments should immediately withdraw the Proposed Rule. Instead, EOIR should dedicate its efforts to reducing barriers for people seeking asylum.

Please do not hesitate to contact HIAS with any questions or for further information.

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Policy Counsel, HIAS

8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6—The Proposed Rule Would Prioritize Speed over Fairness in Asylum Adjudications

Sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 within the Proposed Rule would require immigration judges to complete asylum cases within 180 days after the asylum application is filed, unless the respondent can demonstrate exceptional circumstances. Although these changes are derived from language in the INA, *see* INA §208(d)(5)(ii), it has never been implemented through regulations since Congress added that language to the asylum statute more than two decades ago. In 1996 when Congress passed the Illegal Immigration Reform and Immigration Responsibility Act imposing the 180-day completion deadline, there were 231,649 cases pending before EOIR.[6] Since that time, the immigration court backlog has ballooned by more than one million cases, and currently stands at 1,246,164 cases.[7] What may have been a sensible timeframe for Congress to enact in 1996 is unreasonable today given the extraordinarily large number of pending cases and backlog in immigration court. It defies logic and compassion to implement the 180 day filing requirement now, at a time when the immigration courts are overburdened and unable to adjudicate cases that lack filing deadlines, and when asylum seekers face increasing difficulties in finding pro or low bono counsel.

The Proposed Rule does not explain whether EOIR's intent would be to apply the 180-day rule to all pending cases or whether it would apply the rule prospectively only; either option would raise serious due process concerns. Consider first if EOIR applies this rule to all pending cases. Many cases in the current asylum backlog have been pending for years, and practitioners have constructed their caseload based upon hearing dates that may be years into the future. HIAS attorneys estimate that it takes between forty and sixty hours to prepare a single asylum case, meaning that an attorney could realistically represent a maximum of three asylum seekers per month of work if they solely concentrated on representing asylum seekers. Yet our attorneys handle other cases as well, and attorneys have caseloads in the double digits; one HIAS attorney has 41 pending cases with 18 being affirmative or defensive asylum cases. If, following publication of this rule, EOIR imposed a deadline on immigration judges to adjudicate these cases within 180 days of the rule's publication, practitioners, including HIAS attorneys, would

[6] U.S. DOJ, EOIR, Statistical Yearbook 2000, at 6, https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf.

[7] TRAC, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

be forced to choose between withdrawing from cases or providing inadequate representation. If practitioners were forced to withdraw from their cases, considering this rule's mandate to complete any asylum case within 180 days, asylum seekers would be hard pressed to obtain effective counsel willing and able to represent them.

Courts similarly will be overwhelmed if this rule is applied to all pending cases. While EOIR has expanded the number of immigration judges to 520 adjudicators,[8] this number still pales in comparison with the previously mentioned 1.2 million case backlog. If this rule is applied to all pending cases, immigration judges would be simply unable to comply. Any attempts by immigration judges to adjudicate their portion of the backlog within the 180-day timeframe would result in low-quality, rushed decisions that would disembowel any pretense of justice for asylum seekers. These rushed decisions would also be unlikely to survive scrutiny either by the Board of Immigration Appeals or the relevant circuit court, so at the same time this rule impedes the possibility of asylum seekers obtaining effective counsel, it creates a pressing need for just that. Finally, if this rule forces immigration judges to craft decisions that are unable to survive appellate scrutiny, the rule may then increase the number of cases returned to immigration judges on remand. By imposing this timeframe, this rule may increase immigration judges' workload and further add to the backlog.

On the other hand, if EOIR applies the rule prospectively, EOIR would essentially recreate the "Last In, First Out" policy that the Asylum Offices use. Those who would file asylum cases after the rule is published would have to go forward on their applications, regardless of their ability to obtain evidence or otherwise prepare. This would create serious due process concerns for any newly filed asylum claims. At the same time, asylum seekers whose cases have already been languishing in the EOIR backlog would see their hearing dates irregularly and unpredictably pushed behind any newly filed asylum application, as immigration judges would struggle to comply with the newly imposed requirement that no asylum adjudication could take more than 180 days absent exceptional circumstances. There are serious concerns if their cases languish so long that evidence becomes stale and memories fade.[9] This would have a devastating impact on

[8] U.S. DOJ, Office of Public Affairs, https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-investiture-20-new-immigration-judges-resulting

[9] *See*, Southern Poverty Law Center and Innovation Law Lab, *The Attorney General's Judges How The U.S. Immigration Courts Became A Deportation Tool* at 20 (June 2019), www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf, ("'arbitrary prioritizations wreak havoc on case

asylum seekers themselves. Asylum seekers who have waited, in some cases for years, to travel outside the United States to see their families would be forced to wait even longer. These asylum seekers would also have to wait longer to bring their family members to the United States. Asylum seekers would also be forced to wait to learn whether they will be sent back to a country where they believe they will be persecuted. There is a real cost to this unpredictability. HIAS helped a client whose case was continued with very little notice to the asylum seeker, and the asylum seeker then expressed that she wanted to take her own life. We were forced to obtain emergency mental-health support for her.

The Proposed Rule's definition of "exceptional circumstances" is also unduly restrictive and fails to consider the harm it will cause to asylum seekers. INA § 208(d)(5)(ii) does not define the term "exceptional circumstances," but EOIR proposes to import a definition from a section of the INA that relates to asylum seekers failing to appear for immigration court proceedings. In doing so, the Proposed Rule gives examples of qualifying circumstances that would almost never be met—"such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." Proposed 8 CFR § 1003.10(b). By importing this definition, the Proposed Rule conflates circumstances where an asylum seeker cannot physically attend a hearing with circumstances where an asylum seeker cannot fairly proceed with their asylum claim. This definition therefore misses numerous reasons that an asylum seeker might not be able to proceed within 180 days of filing their asylum application. For example, the asylum seeker may need mental health counseling or medical evaluations to be able to articulate their asylum claim, and as many asylum seekers cannot afford such a service, they would be forced to wait months for free services such as Physicians for Human Rights. Similarly, asylum seekers may be waiting to receive critical documentation from abroad in order to prove their case. The definition also limits the potential inquiry to only those circumstances related to the asylum seeker, as opposed to exceptional circumstances related to the court and the previously discussed case backlog. Though the Proposed Rule would generally allow for continuances for reasons such as these if an immigration judge finds there is "good cause,"[10] the immigration judge would

management,' giving so-called 'priority' cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.'")

[10] The attorney general has already substantially limited the definition of "good cause" for continuing cases in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) while DOJ has imposed performance metrics that give immigration

be prohibited from granting a continuance for these reasons, absent exception circumstances, if doing so would push the hearing beyond the 180-day mark.

Furthermore, this Proposed Rule does not consider the recently published asylum employment authorization document (EAD) rules, which now prohibit asylum seekers from applying for an EAD until 365 days after their asylum application has been pending. 8 CFR § 208.7(a)(ii). The overlap of that rule with the currently Proposed Rule would mean that asylum seekers who file defensive asylum applications would not be authorized to work until after there is a decision on their application, thereby making it much less likely that they could afford counsel for their individual hearing, and interfering with their statutory right to representation. *See* INA § 292.

8 CFR § 1208.3(c)(3)—The Proposed Rule Would Require Immigration Judges to Reject Asylum Applications Based on Minor, Technical Errors

The Proposed Rule at 8 CFR § 1208.3(c)(3) would prevent bona fide asylum seekers from pursuing protection if they accidentally leave a box blank on the asylum application form or cannot afford the asylum filing fee.

Since 2019, USCIS has been rejecting affirmative asylum applications if any box on the Form I-589 is left blank, even boxes that have no legal relevance to the case, or questions that obviously do not apply, such as the work history of someone who is eight years old. HIAS has seen our clients' I-589 applications rejected for similarly small reasons, such as failure to put "present" in the address field or failing to put an "N/A" in a field. The Proposed Rule would now codify these "Kafkaesque"[11] rejections and require immigration judges to reject any incomplete application. Under the Proposed Rule, immigration judges, or the under-staffed EOIR support staff, would similarly be required to comb through the 12-page application form[12] to see whether any box is

judges a financial incentive to complete cases quickly. *See,* Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* (Apr. 18, 2018), www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf ("production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.")

[11] Catherine Rampell, *The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, THE WASHINGTON POST, Aug. 6, 2020, www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

[12] It is worth noting that pursuant to the Information Collection that accompanied the June 15, 2020 Procedures Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, NPRM, www.regulations.gov/document?D=EOIR-2020-0003-0001, the form I-589 would jump to 16 pages and would include complex questions

not completed and reject the application. Once the court rejects the application, the applicant would have 30 days to make the correction or their ability to seek asylum would be waived. Depriving asylum seekers of their right to pursue asylum because of a missing word on the application is cruel and undercuts U.S. obligations pursuant to the Refugee Act of 1980.

Beyond the obvious issues in requiring overburdened immigration courts to undertake additional pointless and illogical work, this rule change would have a devastating impact on pro se asylum seekers in a legal system that does not provide appointed counsel. If an asylum seeker's application is rejected for a counter-intuitive reason, for example if the applicant did not give an address for their parents because their parents are dead, it is likely that a pro se applicant will have nobody to explain this arcane requirement to them. The Proposed Rule also contains no discussion regarding illiterate asylum seekers and the unique challenges they would face without legal representation. The proposed 8 CFR § 1208.3(c)(3) additionally does not list any requirements that a rejected application include an enumerated list of deficiencies or include any notice in the applicant's native language, further raising the possibility that a pro se applicant will accidentally abandon a legitimate claim due to simple confusion. This is especially troubling for those in detention and those subjected to the "Migrant Protection Protocols" (MPP), where of the 66,688 people forced into the program, 61,830 are not represented.[13]

The text of the Proposed Rule itself requires the applicant to refile the application "within 30 days of rejection" rather than the date the applicant is notified or even the date the notice is mailed. *See* Proposed 8 CFR § 1208.3(c)(3). HIAS has already seen long delays in receiving receipt notices as well as rejections. In fact, multiple HIAS clients have missed their biometrics appointments because the notices arrived after the appointments. As currently worded, this Proposed Rule threatens to punish asylum seekers for delays beyond their control.

Not only does the rule fail to account for routine mail delays within the United States, the rule also ignores the realities of other programs currently being enforced by the Federal Government, particularly the previously mentioned MPP program forcing many asylum seekers to remain in

calling for legal analysis by the applicant. The current NPRM makes no reference to the pending change in the asylum application form or how that might affect an asylum seeker's ability to fully complete the form.

[13] TRAC, Details on MPP (Remain in Mexico) Deportation Proceedings, https://trac.syr.edu/phptools/immigration/mpp/

Mexico. The Proposed Rule includes no discussion about the MPP program and the challenges it would pose to an asylum seeker attempting to return a rejected application within 30 days. Specifically, the rule fails to demonstrate that there is any option for an asylum seeker stuck in MPP to receive and return a rejected application within 30 days. There is no analysis that shows that 30 days is sufficient time for a court to send a rejected application to an asylum seeker in a foreign country and have the asylum seeker send a corrected version back. The transit time alone could easily exceed 30 days. Further complicating matters, the mail system in Mexico is unreliable and is not a realistic option for returning a rejected application. Those in MPP also cannot return a rejected application by hand, as they are barred from entering the United States except on the date of their next court hearing. With court hearings spaced months apart, this too is not a realistic option. The Proposed Rule contains no explanation for how asylum seekers in this program are supposed to overcome these impossibilities, nor does it suggest a third option that courts would be required to use. The Proposed Rule does contain an exception for "exceptional circumstances," but as explained above in this comment, the definition is unduly restrictive and would fail to capture the situations just described.

While this comment is not exhaustive in listing the ways the Proposed Rule fails to consider the impact on those in MPP, it is important to additionally note that many asylum seekers within MPP do not have a mailing address for such a notice to be sent to. While a Notice to Appear (NTA) is legally required to have the asylum seeker's mailing address, there are clear examples of false addresses being affixed to an NTA.[14] In one example, the asylum seeker's address was listed as "Facebook." In other examples, the addresses listed were Mexican shelters where the asylum seekers had never been. As previously mentioned, HIAS operates a network of border fellows along the Southern United States border, and multiple border fellows have witnessed fake addresses being used for NTAs. One border fellow reports that El Paso Customs and Border Protection has routinely used the same Mexican shelter (Casa Migrante in Juarez) as the asylum seeker's address, regardless of whether the asylum seeker resides there. EOIR routinely does not ask asylum seekers for actual addresses in Mexico either. Another border fellow provided multiple redacted NTAs with fake addresses in Matamoros (see attached). These fake addresses are an

[14] Debbie Nathan, *U.S. Border Officials Use Fake Addresses, Dangerous Conditions, and Mass Trials to Discourage Asylum-Seekers*, The Intercept, October 9, 2019, https://theintercept.com/2019/10/04/u-s-border-officials-use-fake-addresses-dangerous-conditions-and-mass-trials-to-discourage-asylum-seekers/

unofficial and accidental acknowledgement that the MPP program has forced many asylum seekers into homelessness, with limited or no ability to receive any court notices including a rejected application. Beyond overtly fake addresses, HIAS has also witnessed other examples of courts sending paperwork to incorrect addresses, including a court sending paperwork to one of HIAS lawyer's old addresses, and NTAs being sent to our office for people who are not our clients. Without clear processes in place to ensure actual notice to the asylum seeker of a rejected application, this requirement virtually eliminates due process for asylum seekers forced into this government program.

Equally troubling, this rule would require the court to reject the asylum application of any asylum seeker who cannot pay the filing fee. Because DOJ has engaged in staggered rulemaking, there is not yet a final rule on the proposed EOIR fees, *see* 85 Fed. Reg. 11866 (Feb. 28, 2020), making it impossible to comment fully on this aspect of the current rule. This is especially concerning for those who are detained or subjected to MPP. The rule lays out the steps an asylum seeker must take to "fee in" the application with the Department of Homeland Security (DHS), but does not clarify how an unrepresented detained person would be able to accomplish these steps. Moreover, asylum seekers who are forced to remain in Mexico have no ability to visit a DHS office in the United States to "fee in" an asylum application. Further still, many asylum seekers subject to MPP are living in shelters or tent cities in Mexico and if EOIR adopts the proposed $50 filing fee, many, if not most, would be unable to pay. HIAS has personally seen multiple examples of this; including one lawyer who reports that one third of his clients would be unable to pay the fee. If the asylum seeker submits the application without proof of payment of the fee, the immigration judge would be required to reject the asylum application. The asylum seeker would then have only 30 days to resubmit the application with the fee or they would waive their ability to seek asylum. Putting aside the strong equities against forcing asylum seekers to pay to seek safety in the United States, if EOIR begins charging a fee for asylum applications, it is critical that EOIR implement reasonable steps for asylum seekers who are detained or subjected to MPP easily obtain fee waivers or to pay their application fees.

8 CFR § 1208.4—The Proposed Rule Would Create an Impossible Filing Deadline for Individuals in Asylum-only or Withholding-only Proceedings

Proposed 8 CFR § 1208.4(d) would require many asylum seekers to file their asylum applications within 15 days of their first master calendar hearing. This Proposed Rule, when coupled with the proposed asylum rule from June 15, 2020, *see* 85 Fed. Reg. 36264, would mean that all asylum seekers who have gone through the credible fear process would have a severely time-limited ability to submit their asylum application.

To justify this proposed change, DOJ notes that there is already a comparable filing deadline for foreign born crewmembers who are onboard vessels and express a fear of persecution or torture if returned. The Proposed Rule asserts that the existence of this narrow class of people indicates that attorneys "may be familiar" with the crewmember deadline and implies that, as a result, the newly proposed 15-day filing deadline would not pose a problem for counsel. *See* 85 Fed. Reg. 59698. However, the Proposed Rule does not discuss the vast expansion of asylum-and-withholding-only proceedings ("asylum-only proceedings") proposed in the June 15, 2020 rule. *See* Proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i). Currently only narrow categories of people, including individuals in the Visa Waiver Program and previously mentioned crewmembers, are subject to asylum-only proceedings. And as of 2018, there were only 726 asylum-only proceedings pending before EOIR.[15] Under proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i), any asylum seeker who is put through expedited removal and passes a credible fear interview would be placed in asylum-only proceedings. Thus, instead of asylum-only proceedings comprising fewer than 1 percent of cases before EOIR, a huge proportion of asylum cases would fall within the purview of this Proposed Rule. In 2018, DHS found a credible fear in 74,287 cases it heard.[16] Thus, tens of thousands of asylum seekers would be subject to the new 15-day deadline. Yet the Proposed Rule contains no analysis of how the deadline would affect asylum seekers, their counsel, or court operations.

With the staggered rulemaking that DOJ is using, it is again impossible to adequately comment on the scope of this change since there is no way to know whether the June 15 rule will be published in the same form in which it was proposed. However, if tens of thousands of asylum seekers are placed into asylum-only proceedings, they would all have to file their asylum

[15] U.S. DOJ, EOIR, Statistical Yearbook 2000, at 13, www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf

[16] See DHS, *Credible Fear Cases Completed and Referrals for Credible Fear Interview*, www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview.

applications within 15 days of their first master calendar hearing. The Proposed Rule does not analyze how this expedited process would affect their ability to find counsel. As asylum rules change on a nearly daily basis, through regulations and attorney general decisions restricting noncitizens' rights, it is critical that asylum seekers have legal representation to prepare their application for asylum. The legal completeness of the application would only become more important if the June 15 asylum rule allowing immigration judges to pretermit asylum cases if the asylum seeker "has not established a prima facie claim for relief," *see* proposed 8 CFR § 1208.13(e), without holding a hearing goes into effect.

The Proposed Rule indicates that those who have gone through the credible fear process have "no reason not to expect to" present their protection claim quickly, 85 Fed. Reg. 59694, but this statement minimizes the complex legal requirements needed to successfully claim asylum. The Proposed Rule does not discuss the very different statutory legal standard between establishing a "significant possibility" of succeeding on an asylum claim that is required to demonstrate a credible fear, versus bearing the burden of proof on every element of the asylum claim. *See Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020). The Proposed Rule also would require asylum seekers to accurately formulate their particular social group (PSG) in their initial application, as there appears to be no way for an asylum seeker to update it.[17] It is simply not realistic to expect an asylum seeker to articulate a cognizable PSG within 15 days of arriving in a foreign country, in English, often without counsel.

While the Proposed Rule would allow immigration judges to extend this filing deadline "for good cause," if the asylum seeker misses the newly set deadline, the Proposed Rule does not authorize the immigration judge to further extend the filing deadline; instead the Proposed Rule requires that if the second deadline is missed the immigration judge "shall" deem the ability to file waived and "the case shall be returned to the Department of Homeland Security for execution of an order of removal."

8 CFR § 1208.12—The Proposed Rule Would Severely Limit Immigration Judges' Ability to Consider Country Conditions Evidence Submitted by Asylum Seekers While Allowing

[17] The Proposed Rule does contain a mechanism for extending the 15-day filing deadline for good cause, *see* proposed 8 CFR § 1208.4, but this provision contains no language regarding reopening an application.

Immigration Judges' to Compile and Introduce Their Own Evidence, Turning Immigration Judges into Prosecutors Instead of Adjudicators

8 CFR § 1208.12 would impose new hurdles for asylum seekers to meet their burden of proving that they would face persecution if returned to their country. Under the Proposed Rule there would be a bifurcated standard for supporting documentation about country conditions: the immigration judge "may rely" on evidence that comes from U.S. government sources but can only rely on resources from non-governmental sources or foreign governments "if those sources are determined by the immigration judge to be credible and probative." These revised standards are deeply harmful. By allowing the executive branch to not only be the prosecutor (DHS) and the adjudicator (EOIR), but also to be the favored provider of evidence (Department of State and other reports), a presidential administration that chooses to politicize agency decision-making holds all of the power in immigration cases. In fact, a DHS whistleblower recently filed a report accusing senior DHS officials of asking him to change reports about "corruption, violence, and poor economic conditions" in Guatemala, Honduras, and El Salvador that would "undermine President Donald J. Trump's ("President Trump") policy objectives with respect to asylum."[18] Non-governmental organizations—whose evidence the immigration judge could only consider after it has been found to be "credible and probative"—have likewise found that Department of State (DOS) reports are subject to political pressure.[19] Thus, as the DOS reports become less critical of government abuses in countries with high numbers of asylum seekers, asylum seekers have no choice but to supplement the record with other, non-governmental materials. If the Proposed Rule is published, immigration judges would have to first conduct an analysis of whether that evidence is "credible and probative" while being able to "rely" on potentially biased U.S. government reports with no comparable analysis.

The Proposed Rule also ignores the limits of government reports in proving an asylum case. For example, one HIAS attorney noted that DOS reports tend to be insufficient for proving a "pattern or practice" case. Among other elements, in these cases an asylum seeker must establish a

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[18] *See* DHS, Office of the Inspector General, Matter of Brian Murphy, (Sep. 8, 2020) https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf.

[19] *See* Amanda Klasing & Elisa Epstein, Human Rights Watch *US Again Cuts Women from State Department's Human Rights Report*, (Mar. 13, 2019) www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rights-reports; Tarah Demant, Amnesty International *A Critique of the US Department of State 2017 Country Reports on Human Rights Practices*, (May 8, 2018) https://medium.com/@amnestyusa/a-critiqueof-the-us-department-of-state-2017-country-reports-on-human-rights-practices-f313ec5fe8ca.

pattern or practice of persecution of similarly situated individuals based upon a protected ground.[20] The DOS' Country Reports on Human Rights Practices are too broad for this purpose, and instead the HIAS attorney relies upon newspaper articles to establish this element. The Proposed Rule makes no acknowledgement of the limits of official government reports such as this and the effects this will have on bona fide asylum claims.

This section of the rule contains another provision that would further tilt the playing field against asylum seekers by allowing judges to introduce their own evidence into the record. This provision would fundamentally alter the role of the judge: they could have their own country conditions packet for each case, find their own evidence "credible and probative" and deny asylum seekers' claims despite any evidence the asylum seeker introduces. Simply stated, this completely removes any illusion of judicial independence. The only procedural safeguard the Proposed Rule would provide is that the immigration judge would have to provide "a copy of the evidence . . . to both parties and both parties have had an opportunity to comment on or object to the evidence *prior to the issuance of the immigration judge's decision*." [Emphasis added.] Thus, although the asylum seeker and DHS are required by the Immigration Court Procedures Manual to submit evidence at least 15 days before the hearing,[21] the only temporal requirement for the immigration judge to introduce evidence, is that they do so before *issuing* a decision. The immigration judge could therefore, presumably, hand both parties a copy of the immigration judge's own evidence packet the day of the hearing. The regulation is silent as to how a non-English speaker would be able to understand the documents in English, nor is there any provision allowing for a continuance for the parties to respond to the newly introduced evidence.

The Proposed Rule disingenuously likens this proposed change to the immigration judge's existing duty to develop the record. 85 Fed. Reg. 59695. However, the immigration judge's duty to elicit testimony about their claims from unrepresented respondents is wholly consistent with the role of a fact-finding adjudicator. The role of the immigration judge is to weigh the facts that the parties put before the court, not to introduce their own facts into the record. Allowing the immigration judge to create their own record in the case would fundamentally alter the

[20] *See* 8 C.F.R. § 1208.13(b)(2)(iii)(A)

[21] EOIR, Immigration Court Practice Manual, at 36 (Jul. 2, 2020), www.justice.gov/eoir/page/file/1258536/download.

immigration judge's role in removal proceedings and even further erode the rights of respondents who appear in immigration court.

Conclusion

These Proposed Rules rewrite many aspects of long-established immigration court practice concerning asylum adjudication. The Proposed Rule would prioritize speed over fairness and would introduce new hurdles for asylum seekers to ever have their day in court. Moreover, the Proposed Rule would change the balance of power in the courtroom, allowing immigration judges to introduce their own evidence and rely on it, while forcing them to evaluate whether evidence introduced by the asylum seeker from non-governmental sources is "credible and probative." The far-reaching changes proposed through these rules do not account for the multiple, pending rulemakings that have been issued over the summer. By staggering its rulemaking in this way, the Department of Justice has made it impossible to fully consider the reach of these rules and how they might be affected by the Proposed Rules on which agencies are currently evaluating the comments that have been submitted. For these reasons, we urge you to rescind this Proposed Rule in its entirety.