



**COMMUNITY
LEGAL SERVICES**
IN EAST PALO ALTO

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Submitted via www.regulations.gov

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Re: Comments in Opposition to Proposed Rulemaking: 85 FR 36264
RIN 1125-AA94; 1615-AC42
EOIR Docket No. 18-0002; A.G. Order No. 4714-2020

Dear Ms. Alder Reid and Ms. Dunn,

I am writing on behalf of Community Legal Services in East Palo Alto (CLSEPA), a nonprofit legal services organization, to express our strong opposition to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.

CLSEPA's mission is to provide transformative legal services that enable diverse communities in East Palo Alto and beyond to achieve a secure and thriving future. CLSEPA's team of attorneys, paralegals, and social worker work side-by-side with low-income communities and partner with community-based organizations, churches, and schools to bring about lasting change. We train and support community members to navigate the legal system and exercise their rights. We achieve our mission using multiple, innovative strategies, including community education, individual legal advice and representation, legal assistance to community groups, policy advocacy, and impact litigation. CLSEPA's immigration program provides services that focus on helping immigrant survivors of domestic violence and other crimes, refugees and asylum seekers, immigrant youth and young adults, and immigrants facing deportation in court.

I. Introduction

On June 15, 2020, the Department of Justice and Department of Homeland Security (the Departments) published a Joint Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review. The proposed rules seek

to amend four distinct procedures including: 1) credible and reasonable fear review procedures; 2) requirements for Form I-589; 3) standards for review of an application for Asylum or statutory withholding of removal; 4) information disclosure. The below comments will address each of these issues in the order they appear in the proposed regulatory sections.

The proposed regulation attempts to completely dismantle nearly every aspect of our asylum laws and seeks to eliminate critical pathways to humanitarian relief that our laws were designed to protect. The rule strikes at the very heart of our historic commitment to providing safe haven to people fleeing persecution and calls into question our integrity as a country. We strongly object to the substance of the entire proposed rule and urge the Departments to rescind it in its entirety.

As a preliminary matter, the Departments seek to overturn longstanding caselaw through their publication of this proposed rule. The Departments acknowledge that is their intention in footnote one, citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005): “the Departments note that portions of this rule, in accordance with well-established administrative law principles, would supersede certain interpretations of the immigration laws by federal courts of appeals... A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Brand X*, 545 U.S. at 982 (internal quotations omitted).¹ The Departments’ use of *Brand X* to suggest it can entirely eviscerate federal court caselaw is misplaced and illegal. The Departments, in the proposed regulations, have not gone through each case in the decades of caselaw they seek to overturn to assert that the statute provides sufficient ambiguity for agency interpretation. Therefore, the reliance on *Brand X* is misplaced. Moreover, through the publication of the proposed regulations, the Departments seek to re-write asylum law rather than interpret the statute. Accordingly, the proposed regulations are not a reasonable interpretation of the statute and are unlawful.

II. 8 CFR § 208.6, 1208.6 – The Proposed Rule Would Eliminate Confidentiality Protections for Asylum Seekers

The Departments seek to amend the confidentiality provision in the regulations to minimize confidentiality protections for asylum seekers as well as those in credible and reasonable fear proceedings.² The confidentiality provisions that currently exist in the regulations is vital to those seeking protection, as refugees rely on the confidentiality of their applications when providing highly sensitive information to the United States government. Many asylum seekers are afraid to disclose the intimate details of the persecution they suffered, as they worry about the information being disclosed to their government and other third parties. While the proposed

¹ 85 FR 36265, 36265 n. 1.

² 85 FR at 36288.

amendment suggests the information disclosure will remain limited, it clearly expands the individuals to whom information from credible fear, reasonable fear, and asylum proceedings may be disclosed. We strongly object to this amendment.

III. 8 CFR § 1208.13 (e)—The Proposed Rule Would Deprive Asylum Seekers of Their Day in Court

Section 1208.13 (e) of 8 CFR would allow immigration judges to deny asylum to applicants without a hearing, if judges determine, on their initiative or at the request of a Department of Homeland Security (DHS) attorney, that the application does not adequately state a claim. This radical change would allow judges to “pretermite” asylum claims.

Allowing judges to “pretermite” claims and deprive asylum seekers, many of whom do not have attorneys and do not speak English fluently, would deny applicants due process and would be an abrupt change from decades of precedent and practice before the immigration court. *See Matter of Fefe* 20 I. & N. Dec. 116, 118 (BIA 1989) (“In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.”).

Many asylum applicants, especially those who are unrepresented and those who are detained, struggle to complete the 12-page Form I-589. The Department only accepts filing of this form in the English language. Asylum applicants often use unofficial translators with whom they fear sharing intimate details of their past or present fears because they do not have access to legal assistance or official interpreters. Asylum seekers who are detained and do not speak English fluently may be unable to secure any assistance in filling out the application. Moreover, asylum applicants are not well-versed in the complexities of the U.S. asylum laws and cannot be expected to lay out every element of their asylum claims in the application before arriving in court. Allowing immigration judges to deny asylum cases without taking any testimony or looking beyond the asylum application would inevitably lead to meritorious cases being denied and vulnerable asylum seekers being returned to harm.

Our office provides pro se assistance to numerous asylum seekers, as we cannot meet the demand for legal services through individual representation. Although we provide competent pro bono assistance through pro se workshops, we are unable to provide all details of each applicant’s claim in her Form I-589. However, we feel confident that our assistance is helpful and crucial, as the applicant can subsequently develop her claim at an individual calendar hearing. If this proposed rule goes into effect, organizations like ours that provide pro se assistance to asylum applicants will be unable to continue such work, and more asylum applicants will go without any legal assistance. This will further impact legitimate asylum seekers. We therefore oppose this proposed change in the strongest possible terms.

IV. 8 CFR § 208.1(c); 8 CFR § 1208.1(c)—The Proposed Rule Will Make it Nearly Impossible to Prevail on a Particular Social Group Claim

Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group (PSG), or political opinion. INA § 101(a)(42). Membership in a particular social group is a term specified in the statute, designed to allow the refugee definition to be flexible and capture those who do not fall within the other listed characteristics. “The term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.” United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

The proposed regulations would make it impossible for asylum seekers, especially those from Central America and Mexico, to win protection based on a particular social group claim. The regulatory section on social groups directs that adjudicators cannot grant asylum to applicants in several common categories, including: 1) past or present criminal activity; 2) past or present terrorist activity; 3) past or present persecutory activity; (4) presence in a country with generalized violence or a high crime rate; (5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups; (6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; (7) interpersonal disputes of which governmental authorities were unaware or uninvolved; (8) private criminal acts of which governmental authorities were unaware or uninvolved; (9) status as an alien returning from the United States.³ Specifically, the proposed rule asserts, “[w]ithout additional evidence, these circumstances are generally insufficient to demonstrate a particular social group that is cognizable because it is immutable, socially distinct, and particular, that is cognizable because the group does not exist independently of the harm asserted, or that is cognizable because the group is defined exclusively by the alleged harm.”⁴ To foreclose such an extensive list of proposed social groups while also permitting immigration judges to preterm applications serves to eliminate access to asylum for legitimate refugees.

Another particularly problematic portion of this section of the proposed rule is its requirement that an asylum seeker state with exactness every proposed particular social group before the immigration judge or forever lose the opportunity to present the claim.⁵ This is entirely unrealistic and unfair in a court system where the asylum applicants have no right to appointed counsel. An asylum seeker’s life should not be dependent on an applicant’s ability to expertly

³ 85 FR at 36279.

⁴ *Id.*

⁵ *Id.*

craft arguments in the English language in a way that satisfies highly technical legal requirements.

The Ninth Circuit has recognized the importance of construing asylum claims liberally for pro se applicants.⁶ In the context of assessing exhaustion, the Ninth Circuit concluded that “[p]etitioners need not ‘argue’ anything so long as the issue is presented to the BIA.”⁷ The Court reached this conclusion because of the extremely high stakes in asylum proceedings and the lack of care exercised by the Immigration Courts and the Board of Immigration Appeals.⁸

Moreover, as discussed above, our organization provides pro se assistance to many asylum seekers. Such assistance protects applicants’ rights to apply for asylum. Even with our pro se assistance, there is insufficient time and resources to delve into each applicant’s claim to be able to specifically articulate every potential social group. Without any legal assistance, applicants are wholly unable to develop legally accurate particular social groups. This rule unduly prejudices the poor and those who are not fortunate enough to secure the limited pro bono resources available to asylum seekers.

V. 8 CFR § 208.1(d); 8 CFR § 1208.1(d)—The Proposed Rule Redefines Political Opinion Contravening Long-Established Principles

The proposed rule would redefine “political opinion” in contravention of existing law. The proposed rule states that political opinion claims can only be based on “furtherance of a discrete cause related to political control of a state or a unit thereof.” The proposed rule goes on to explicitly reject the possibility that applicants’ expression of opposition to terrorist or gang organizations can qualify as a political opinion, unless the asylum seeker’s “expressive behavior” is “related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”⁹ However, this restriction utterly fails to recognize that many asylum seekers flee their homelands precisely because the government of their country is unable or unwilling to control non-state actors.

The proposed rule’s redefinition of political opinion in the narrowest possible way contradicts existing case law, is contrary to international law, and will send many bona fide asylum seekers back to harm’s way. For example, women holding feminist political opinions that men do not have the right to rape them, or indigenous people who oppose gangs’ taking their land would be barred from meeting the political opinion definition under this rule. Rather than following precedent that recognizes political opinion in such circumstances, the Departments seek to erase all precedent that is favorable to asylum seekers through this rule.

⁶ *Ren v. Holder*, 648 F.3d 1079, 1083–84 (9th Cir. 2011).

⁷ *Ren v. Holder*, 648 F.3d at 1084–85 (9th Cir. 2011) citing *Figueroa v. Mukasey*, 543 F.3d 487, 493 (9th Cir.2008).

⁸ *Ren v. Holder*, 648 F.3d at 1084–85.

⁹ 85 FR at 36279.

This change in the definition of political opinion is contrary to international law. According to the United Nations High Commissioner for Refugees, “[t]he concept of ‘political opinion’ as a ground for recognition as a refugee should be interpreted in a broad sense, as encompassing any opinion concerning matters on which the machinery of the state, government or society is engaged. It goes beyond identification with a specific political party or recognized ideology, and may include for example an opinion on gender roles.”¹⁰

In addition, circuit courts have long interpreted the definition of political opinion broadly. Political opinion has been interpreted to include more than electoral politics and formal political ideology or action and has included opinions about a wide range of issues including women’s rights.¹¹

Our organization has provided and continues to provide assistance to many women who suffered gender based violence in countries with gender biased, misogynistic, male-dominated cultures. These cultures and attitudes permeate society, including the government. Women who stand up to traditional gender roles and openly oppose the misogyny are undoubtedly expressing a political opinion within their country. These proposed rules specifically seek to eliminate asylum protection for women in these situations and would therefore disproportionately impact our clients who need protection.

VI. 8 CFR § 208.1(e); 8 CFR § 1208.1(e)—The Proposed Rule Narrowly Defines Persecution, Impermissibly Altering the Accepted Definition

The most fundamental aspect of asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm.¹² The proposed rule would, for the first time, provide a regulatory definition of persecution—a definition that would unduly restrict what qualifies as persecution. The rule emphasizes that the harm must be “extreme” and that threats must be “exigent.”¹³ The new proposed definition is contrary to established caselaw and fails to provide any guidance on adjudicating claims by children who may experience harm differently from adults. It also does not require adjudicators to consider cumulative harm.

The Departments are proposing to define persecution as an extreme concept with a severe level of harm. The notice in the Federal Register explains that under the proposed amendment, the new definition of persecution would not include, “(1) Every instance of harm that arises generally out of civil, criminal, or military strife in a country; (2) any and all treatment that the

¹⁰ UNHCR Protection Training Manual for European Border and Entry Officials, page 4, <https://www.unhcr.org/4d944d089.pdf>.

¹¹ See *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020); *Jalloh v. Barr*, 794 Fed. Appx. 418 (5th Cir. 2019); *Xinbing Song v. Sessions*, 877 F.3d 889 (9th Cir. 2017); *Regalado-Escobar v. Holder*, 717 F.3d 724 (9th Cir. 2013); *Ruqiang Yu v. Holder*, 693 F.3d 294 (2d Cir. 2012); *Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010).

¹² INA §§ 101(a)(42), 208; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428, (1987).

¹³ 85 FR at 36280.

United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (3) intermittent harassment, including brief detentions; (4) repeated threats with no actions taken to carry out the threats; (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.”¹⁴ This strict definition is contrary to long established BIA and circuit law that allows for a wide range of activities, including threats without physical harm, to meet the standard, as context and the personal attributes of the asylum applicant are relevant when making the assessment of whether they have suffered persecution.¹⁵ It also disproportionately impacts children fleeing persecution, as the impact of harm on children should be analyzed differently.¹⁶

Our organization represents many children and other vulnerable populations fleeing persecution. A strict definition of persecution disproportionately impacts the most vulnerable refugees, which is contrary to the purpose of asylum protection, contrary to international law, and violates the United States’ treaty obligations.

VII. 8 CFR § 208.1(f); 8 CFR § 1208.1(f)—The Proposed Rule Imposes a Laundry List of Anti-Asylum Measures Under the Guise of “Nexus”

Although the BIA and circuit courts have long held that each asylum application should be adjudicated on a case-by-case basis, the proposed rules would allow blanket denials of claims that have long been found to meet the standard for asylum. This section of the proposed regulation is essentially an anti-asylum list, directing adjudicators to deny most claims.

Specifically, this section states that in general, asylum claims should be denied where there is: “(i) Interpersonal animus or retribution.”¹⁷ However, virtually *all* asylum claims involve “retribution,” a word that is generally synonymous with “punishment.”¹⁸

The rule provides a further laundry list of harms that adjudicators generally should not consider in their nexus analysis.¹⁹ Among these harms is “criminal activity.” However, virtually all harm that rises to the level of persecution could be characterized as “criminal activity,” since in virtually every country beatings, rape, and threatened murder is criminalized activity. This blanket rule essentially eliminates the ability to grant asylum based on private actor harm.

¹⁴ 85 FR at 36280-81 (internal citations omitted).

¹⁵ See *Matter of O-Z & I-Z*, 22 I. & N. Dec. 23 (BIA 1998); *Sopheap Sok v. Mukasey*, 526 F.3d 48 (1st Cir. 2008); *Edimo-Doualla v. Gonzales*, 464 F.3d 276 (2d Cir. 2006); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015); *Tamara-Gomez v. Gonzales*, 447 F.3d 343 (5th Cir. 2006); *Odua v. INS*, 324 F.3d 445 (6th Cir. 2003); *Kantoni v. Gonzales*, 461 F.3d 894 (7th Cir. 2006); *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008); *Canales-Vargas v. Gonzales*, 441 F.3d 739 (9th Cir. 2006); *Min Yong Huang v. Holder*, 774 F.3d 1342 (11th Cir. 2014).

¹⁶ See *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012).

¹⁷ 85 FR at 36281.

¹⁸ Definition of retribution, <https://www.merriam-webster.com/dictionary/retribution>.

¹⁹ *Id.*

The proposed rule also attempts to categorically eliminate gender as a ground for asylum, contrary to long standing BIA and circuit court case law. The Departments acknowledge that *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) is a seminal decision regarding asylum. *Matter of Acosta* highlights that gender can form the basis of asylum.²⁰ Moreover, gender is similar to other protected characteristics like race and nationality. Adjudicators must determine on an individual basis whether the facts of a given case meet the standard and must not be precluded from granting asylum to an entire category of people, despite clear eligibility under the statute.

Finally, the rule in its current form runs contrary to the INA. INA § 208(b)(1)(B)(i) specifically states that a protected ground must be “at least one central reason” for the harm. Federal courts have explicitly held that the “one central reason” continues to allow for a mixed motive analysis. If this rule is published in its current form, asylum seekers who have been harmed, or fear harm, for more than one reason—“retribution” and a protected characteristic—will not be afforded asylum protection in direct violation of the INA.

As discussed above, our organization has represented and continues to represent many women fleeing their countries due to gender based violence. This proposed rule would eliminate eligibility for asylum for legitimate refugees who have suffered harm and are at risk of harm due to government-supported gender-focused harm and discrimination.

VIII. 8 CFR § 208.13(b)(3); 1208.16; 8 CFR § 208.13(b)(3); 1208.16—The Proposed Rule Redefines the Internal Relocation Standard, Greatly Increasing the Burden on Those Seeking Protection

The proposed rule sets forth a standard for analyzing the reasonableness of internal relocation that is so restrictive, most applicants will be precluded from meeting their burden of proof. Under the new rule, the adjudicator must take into consideration “the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.”²¹ The implication of this language is that if an asylum seeker is able to travel to the United States, any testimony about the unreasonableness of relocating within the country of origin should be discounted. However, this proposed rule ignores the realities of refugees and the fact that asylum seekers make the journey to the United States in order to seek safety.

Moreover, the proposed rule implies that if an asylum seeker comes from a large country, or if the persecutor lacks “numerosity,” the applicant should be able to relocate internally. While the size of a country or the support of the persecutor may be a factor in the internal relocation analysis, it cannot be dispositive. Asylum applications should be adjudicated on a case-by-case basis, as has been the standard under BIA and circuit caselaw.

²⁰ *Matter of Acosta*, 19 I. & N. Dec. at 233.

²¹ 85 FR at 36282.

In addition, and particularly concerning, the proposed rule would remove important considerations that adjudicators must currently take into account. Currently, adjudicators must consider numerous factors, including, “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.”²² The new rule would force adjudicators to make decisions in a vacuum, ignoring the overall context of an applicant’s plight.²³ Further exacerbating the removal of these protections, the proposed rule increases and shifts the burden when the persecutor is a non-governmental actor.²⁴ It is unfair and contrary to the statute as well as long-standing BIA and circuit law to impose this greater evidentiary burden on asylum seekers who have proven past persecution and met their burden to show that the government is unable or unwilling to protect them.

Our office represents many asylum seekers who have suffered severe past persecution at the hands of non-governmental actors. Such persecution includes beatings, rape, kidnapping, and murder of close family members, and is often excessively violent and gruesome. Requiring a heightened standard for such individuals contravenes the statute and international law.

IX. 8 CFR § 208.13; 8 CFR § 1208.13—The Proposed Rule Imposes a Laundry List of Anti-Asylum Measures Under the Guise of “Discretion”

In addition to meeting the legal standard, asylum seekers must merit a favorable exercise of discretion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). For decades, the United States has recognized the unique situation of asylum seekers and found that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”²⁵ The proposed rule would overturn years of jurisprudence to deny most asylum applications on discretionary grounds and severely limit the actual discretion adjudicators are permitted to exercise.

Under the proposed rules, any asylum seeker who enters or attempts to enter the United States without inspection could be denied asylum as a matter of discretion.²⁶ The rule would implement yet another asylum ban, preventing most refugees who spent 14 days in any country en route to the United States from qualifying for asylum.²⁷ Such a ban would conflict with the concept of firm resettlement. Moreover, the proposed rule would disqualify many asylum seekers who travel through Mexico and are prevented from timely entering the United States due to United States policy. Therefore, the government’s own actions and policies in conjunction with new rules will prevent legitimate refugees from obtaining a grant of asylum. This is clearly

²² 8 CFR § 208.13(3); 8 CFR § 1208.13(3).

²³ 85 FR at 36282.

²⁴ *Id.*

²⁵ *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

²⁶ 85 FR at 36283.

²⁷ *Id.* at 36283-84.

contrary to the statute, BIA and circuit caselaw, international law, and United States' treaty obligations.

In addition, the rule would allow an immigration judge to deny asylum to a refugee who uses or attempts to use fraudulent documents to enter the United States, unless they are arriving to the United States directly from their country of origin.²⁸ This punitive rule change would deny many legitimate asylum seekers the ability to seek protection. Long-standing caselaw recognizes that those fleeing harm are often unable to obtain travel documents because they fear their government.²⁹ Sometimes such documents are needed to exit the country of persecution. Preventing a positive exercise of discretion based on the use of false documents, in many cases, is contrary to the purpose of asylum.

The proposed rule also contradicts the plain language of INA § 208(a)(2)(d), which explicitly provides for an exceptions to the one year filing deadline for asylum based on changed or extraordinary circumstances by barring any asylum seeker who has been in the United States for more than one year without lawful status from obtaining asylum.³⁰ This proposed rule change fails to consider the common scenario, wherein individuals are in the United States for many years with no need to seek asylum, and after a changed circumstance in their country of origin or change in personal circumstances, they develop a fear. Likewise, many asylum seekers are prevented by extraordinary circumstances, including mental health issues such as post-traumatic stress disorder often as a result of the persecution they have fled, from filing for asylum within one year of arriving in the United States. The statute provides for an exception for these very reasons.³¹

Many of our organization's clients require an exception to the one year filing deadline because they were too traumatized to talk about their persecution. Regulating away the exception to the filing deadline impacts legitimate refugees who suffered the most severe harm in their home countries.

The government renders many of these "discretionary" bars practically mandatory, allowing adjudicators to exercise discretion only in narrow circumstances for reasons of national security or foreign policy interests, or if the asylum seeker can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum. Even this extremely limited exception only applies to some of the "discretionary" factors. The combination of the heightened evidentiary standard and the intentionally onerous legal standard will mean that few legitimate asylum seekers will qualify as a matter of discretion. Such limitations are contrary to caselaw, international law, and the United States' international treaty obligations.

²⁸ *Id.* at 36283.

²⁹ *Matter of Pula*, 19 I. & N. Dec. at 474; *Matter of D-X- and Y-Z-*, 25 I. & N. Dec. 664 (BIA 2012).

³⁰ 85 at 36284.

³¹ INA § 208(a)(2)(D).

X. 8 CFR § 208.15; 8 CFR § 1208.15—The Proposed Rule Redefines “Firm Resettlement” to Include Those Who Are Not Firmly Resettled

The proposed regulations would expand the definition of firm resettlement. Under the new rule, if the asylum seeker has resided in another country for a year or more, even if there is no offer or pathway to permanent status, the asylum seeker would be considered firmly resettled and barred from asylum.³² There is no exception based on the asylum seeker’s inability to leave the third country based on being trafficked, based on being unable to leave for financial reasons, or based on fear of remaining in the third country. This is contrary to long-standing caselaw and violates international law and the United States’ international treaty obligations.

XI. 8 CFR § 208.18; 8 CFR § 1208.18—The Proposed Rule Imposes a Nearly Impossible Evidentiary Burden on Those Seeking CAT Protection

The proposed rule would render protection under the Convention Against Torture (CAT) out of reach for the majority of individuals fleeing torture or facing a threat of torture in their home countries. Under the proposed regulation, an applicant would be required to prove that a government official who inflicted torture has done so “under color of law” and is not acting as a “rogue official.”³³ This heightened standard is contrary to the purpose of the CAT, an international treaty to which the United States is a signatory. The proposed regulation is also contrary to long-standing caselaw that has developed since the CAT was incorporated into the INA.

Our organization’s clients who have sought and obtained protection under the CAT would have been unable to meet their burden had they been required to prove that the official was acting under “color of law.” In our experience, it is rare that government officials who engage in torture do so under color of law. This requirement essentially ends CAT protection entirely.

XII. 8 CFR § 208.20; 8 CFR § 1208.20—The Proposed Rule Radically Redefines the Definition of Frivolous and May Prevent Asylum Seekers from Pursuing Meritorious Claims

The proposed rule would redefine the meaning of a “frivolous” asylum application, which has severe consequences.³⁴ Under the new rule an asylum seeker could be charged with such consequences, including being ineligible for most immigration benefits in the future, if the adjudicator determines that the application lacks “merit” or is “foreclosed by existing law.”³⁵ This provision is exceptionally unfair, particularly to pro se applicants. Asylum law is in a state of constant flux, and immigration law is extremely complicated. The federal courts have held

³² 85 FR at 32686.

³³ 85 FR at 32686-87.

³⁴ 85 FR at 36273.

³⁵ *Id.*

that immigration law is one of the most complicated areas of law, only second to tax law.³⁶ Accordingly, requiring asylum seekers, many of whom are unrepresented and most of whom are non-English speakers, to understand the intricacies of the ever-evolving law, is contrary to the purpose of asylum and unfair to the most vulnerable.

Moreover, as discussed above, our organization assists pro se asylum seekers. Once the application is prepared, our organization is no longer involved in the case. Because asylum law is constantly changing, an application that clearly meets the standard under the law at the time the application is prepared may no longer meet the standard once the case is heard. It is unrealistic to require organizations, like ours, to follow all pro se applicants' cases to ensure the law does not change. If that were required, our organization would no longer be able to ethically assist pro se asylum seekers.

XIII. 8 CFR § 208.20; 8 CFR § 1208.20—The Proposed Rule Impermissibly Heightens the Legal Standards for Credible and Reasonable Fear Interviews and Will Turn Away Refugees Without Providing Them a Full Hearing

The proposed rule would also make it significantly more difficult for asylum seekers subject to expedited removal to have their request for asylum fully considered by an immigration judge. When Congress added expedited removal to the INA, it intentionally set the “significant possibility” standard for the credible fear interview low so that genuine refugees are not immediately removed to their countries of persecution. Under the proposed rule, the government redefines the broad “significant possibility” standard to mean “a substantial and realistic possibility of succeeding.”³⁷ This language contradicts the clear language of “significant possibility” that Congress set forth at INA § 235(b)(1)(B)(v) and is therefore *ultra vires*.

The proposed rule would also greatly increase the burden on those who may only be eligible for withholding of removal or protection under CAT to pursue their claim before an immigration judge.³⁸ The proposed rule increases the standard for withholding only and CAT protection such that few applicants, the majority of whom are detained and rarely represented during the reasonable fear process, would be able to meet the standard. Individuals subject to the heightened standard for reasonable fear review include legitimate refugees who face the current “transit ban” found at 8 CFR § 208.13 (c)(4)(ii).³⁹ This proposed rule, in conjunction with prior regulatory amendments, renders it nearly impossible for many legitimate refugees to even apply for, much less receive asylum, withholding of removal, or protection under the CAT. The rule is

³⁶ *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 809 (9th Cir. 2007) (“immigration laws have been termed second only to the Internal Revenue Code in complexity”); *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

³⁷ 85 FR at 36265-66.

³⁸ *Id.* at 36268.

³⁹ A preliminary injunction was issued suspending the implementation of the regulation in *CAIR v. Trump, I.A. v. Barr*, Nos. 19-2117, 19-2530 (D.DC June 30, 2020).

in violation of the statute, international law, and the United States' international treaty obligations.

XIV. Conclusion

These proposed rules represent a radical rewriting of United States asylum law and procedure. The rules violate long-standing caselaw and international treaty obligations that are incorporated into our legal system. The proposed rules, particularly in conjunction with other proposed and final rules that impact asylum law, would eviscerate asylum protections that have been in place in the United States for decades. These protections specifically exist to protect the most vulnerable people in the world. The rules will impact the vast majority of legitimate refugees who are likely to be denied asylum should they go into effect. We urge the Departments to withdraw these proposed rules in their entirety.

Very truly yours,

/s/ Cristina Dos Santos

Cristina Dos Santos
Director, Immigration Program