# HUMAN RIGHTS INITIATIVE OF NORTH TEXAS



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July 15, 2020

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**RE: Comments in Response to Proposed Rule: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,** RIN 1125-AA94/EOIR Docket No. 18-0002/A.G. Order No. 4714-2020/OMB Control Number 1615-0067

Dear Ms. Reid:

We write on behalf of the Human Rights Initiative of North Texas in strong opposition to the Department of Justice and Department of Homeland Security's proposed rule to amend the procedures for asylum and withholding of removal and credible fear and reasonable fear review, published in the Federal Register on June 15, 2020.

The proposed rule flies in the face of our country's obligations under domestic and international law, abandoning asylum seekers with legitimate claims who have fled to the United States for safety.

Human Rights Initiative of North Texas ("HRI") is a non-profit legal services agency that represents people fleeing humanitarian abuses from all over the world. Our clients include asylum seekers pursuing relief through both affirmative and defensive proceedings. Every day for nearly twenty years, HRI has represented children and adults who have fled horrifying abuse in their home countries for speaking up against government corruption, for practicing their faith, and for living their authentic lives.

This proposed regulation is technical, complex, and—at 63 pages—raises a myriad of legal issues. However, because of the abbreviated, 30-day comment period, we do not address every legal issue, and focus our

discussion on six main issues: (1) the elimination of gender-based asylum claims; (2) the narrowing of particular social groups and nexus; (3) the narrowing of political opinion cases; (4) the new pretermission standards; (5) the changes to the discretion standard; and (6) the particular impacts that the "streamlining" into asylum and withholding-only proceedings will have on children seeking asylum.

For the reasons outlined in detail below, we strongly oppose the proposed changes.

## I. THE PROPOSED RULE ATTEMPTS TO ELIMINATE GENDER-BASED ASYLUM CLAIMS, IN CONTRAVENTION OF WELL-ESTABLISHED LAW.

The proposed rule attempts to eliminate gender-based asylum claims. Proposed 8 C.F.R. § 208.1(f)(viii). Rather than codifying existing standards "rooted in case law," NPRM at 36281, the elimination of gender as an appropriate nexus for a particular social group contravenes existing case law.

At the outset, we note that the gender exclusion inexplicably appears in the proposed rule's section on "nexus." *See* Proposed 8 C.F.R. § 208.1(f). The "nexus" inquiry asks whether someone's persecution is *on account of* their particular social group. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482–83 (1992). In other words, nexus is a causal issue, which a person must prove as part of their claim. A person's gender is the protected ground: it is the basis for their membership in the particular social group. Placing gender in the nexus section improperly conflates nexus with the protected ground. That conflation reflects a jumbling of asylum law that renders the section nonsensical. It appears designed to confuse adjudicators into rejecting gender-based asylum claims because—as outlined in more detail below—case law makes clear that gender satisfies the requirements for particular social group.

### A. Gender constitutes a viable particular social group.

Contrary to the proposed rule's implications, case law has long established that gender is a viable particular social group that meets the BIA's cognizability test of immutability, particularity, and social distinction. *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (noting that sex is "an innate characteristic that could link the members of a 'particular social group'"); *accord Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010) (holding sex or gender is "a common, immutable characteristic" that qualifies as a PSG); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (recognizing applicant's "possession of the immutable trait of being female"); *Niang v. Gonzales*, 422 F.3d 1187, 1199–2000 (10th Cir. 2005) (holding gender "certainly" does constitute a cognizable PSG). Indeed, the U.N. High Commissioner for Refugees has explicitly stated that there is no need for the INA to enumerate a separate protected ground for "gender," as the refugee definition, properly interpreted, covers gender-related claims. UNHCR, *Guidelines on Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 (May 7, 2002), http://www.unhcr.org/3d58ddef4.pdf.

This is the case with respect to gender alone, as well as more discrete classes of persons whose identity involves gender—for example, LGBTQIA people, women in domestic relationships, women who are viewed as property by virtue of their position within a domestic relationship, and children who are boys or girls.

### B. Nexus is a case-specific question, which analyzes the connection between persecutors' motives and a protected ground.

Once an asylum seeker demonstrates that they are a member of a particular social group, they must show that there was a causal relationship—a "nexus"—between their persecution and their membership in that group. *See Elias-Zacarias*, 502 U.S. at 482–83. To do that, an asylum seeker must present evidence that their persecutors were motivated to inflict harm in part by their membership in the particular social group. *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 n.2 (4th Cir. 2019).

Definitionally, nexus is a case-specific, evidentiary question. *See Elias-Zacarias*, 502 U.S. at 482–83. If the evidence demonstrates that the persecutor was motivated to inflict harm in part because of the asylum seeker's membership in a social group, the evidence has proven nexus. The Administration cannot foreclose categories of evidence relating to gender (or any other of the seven categories laid out in § 208.1(f)) to prove nexus, so long as gender (or any one of the other categories) is a legitimate basis for the particular social group construction.

The proposed rule quotes from *Niang*, 422 F.3d at 1199–1200, to suggest that gender-based evidence cannot demonstrate persecution on a protected ground. But *Niang* holds the opposite, explaining that "the focus with respect to such claims should be not on whether either gender constitutes a social group ***(which both certainly do)*** but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted 'on account of' their membership." *Id.* at 1200 (emphasis added). The quoted language in *Niang* emphasizes the importance of particular, case-specific evidence demonstrating motivation (or nexus). It does not suggest that certain evidence would be categorically improper or inadmissible.

Because gender constitutes a viable particular social group, nexus evidence relating to gender cannot be categorically excluded. The Administration's attempt to do so is at odds with asylum's legal framework.

## II. THE PROPOSED RULE ATTEMPTS TO ELIMINATE PROTECTION FOR MEMBERS OF PARTICULAR SOCIAL GROUPS, IN CONTRAVENTION OF WELL-ESTABLISHED LAW.

The proposed rule also attempts to eliminate protections for members of particular social groups by setting forth a non-exhaustive list of group memberships that will not be favorably adjudicated and by prohibiting the introduction of critical evidence. Proposed 8 C.F.R. § 208.1(c) & (g). The proposal is inconsistent with well-established law.

### A. Whether a group constitutes a particular social group is a case-specific question, and therefore the Administration cannot categorically foreclose certain particular social groups.

The INA includes "membership in a particular social group" as one of its five protected characteristics to provide flexibility: the category allows the law to adapt to the realities of different immutable identities in different cultures over time. *See* 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 term membership in 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.").

Whether a group constitutes a particular social group is therefore a case-specific question that depends on the particular country and particular circumstances. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 286–87 (BIA 2014) (PSGs must be determined "on a case-by-case basis"); *see also De Pena-Paniagua v. Barr*, 957 F.3d 88, 94 (1st Cir. 2020) (same); *Canas-Flores v. Attorney General United States*, 746 F. App'x 640, 643 (3d Cir. 2018) (same); *Alvarez-Lagos*, 927 F.3d at 253 (same); *Pena Oseguera v. Barr*, 936 F.3d 249, 251 (5th Cir. 2019) (same); *Diaz-Gonazalez v. Whitaker*, 756 Fed. App'x 552, 559 (6th Cir. 2018) (same); *Escobar-Pineda v. Sessions*, 754 Fed. App'x 516, 518 (9th Cir. 2018) (same); *Amezcua-Preciado v. U.S. Att'y Gen.*, 943 F.3d 1337, 1346 n.3 (11th Cir. 2019) (same). Courts of appeals and the BIA remand cases to immigration judges who "reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity." *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014); *see also Matter of M-E-V-G-*, 26 I&N Dec. 227, at 286–87.

Despite well-established legal precedent that particular social groups require a case-specific analysis, the Administration attempts to identify nine "nonexhaustive" categories for which the Secretary "will not favorably adjudicate" particular social group findings. Proposed 8 C.F.R. § 208.1(c). This is contrary to case law and will improperly prevent asylum seekers—including children fleeing violence and persecution—with legitimate claims from seeking relief.

### B. Proving membership and nexus requires country conditions evidence, which the Administration attempts to foreclose.

Because membership in a particular social group and nexus are case-specific questions, asylum seekers must present case-specific and country-specific evidence to prove their claims. However, the proposed rule attempts to eliminate critical and necessary evidence by prohibiting evidence involving "cultural stereotypes." Proposed 8 C.F.R. § 208.1(g).

Eliminating evidence of "cultural stereotypes" all but ensures that asylum seekers whose claims are based on their membership in a particular social group will fail. Establishing the cognizability of a particular social group requires, in part, demonstrating the group's "social distinction." *Matter of A–B–*, 27 I&N Dec. 316, 320 (A.G. 2018). Without the ability to introduce evidence of country conditions and the ways in which a group is stereotyped or

stigmatized in a particular culture, it is impossible to meet the probative burden of showing that "the society in question considers the members of the group to share particular characteristics." *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014). Courts have long relied on evidence about negative or disparate treatments of groups within the society in question to conclude that someone is indeed part of a particular social group. *M-E-V-G-*, 26 I&N Dec. at 242-43; *see also Alvarez Lagos*, 927 F.3d at 250 n.2 (citing to patriarchal and machismo culture in Honduras and the gendered nature of the persecutor's slurs and threats to find petitioner was persecuted on account of her membership in the social group).

Likewise, "cultural stereotypes" are critical and necessary to show nexus—that the persecution was motivated at least in part by the person's membership in a particular social group—because that evidence shows a "broader social significance" that gives permission to and emboldens persecutors' actions. *See Sahran v. Holder*, 658 F. 3d 649, 657 (7th Cir. 2011). Courts of appeals and the BIA have long recognized nexus when the underlying motivation of a persecutor arises from cultural stereotypes that give persecutors impunity from causing harm, including gender-based harm. *See, e.g.*, *Kamar v. Sessions*, 875 F.3d 811, 818–19 (6th Cir. 2017) (honor killing by family); *Qu v. Holder*, 618 F.3d 602, 604, 608 (6th Cir. 2010) (forced marriage by family); *Matter of S-A-*, 22 I&N Dec. 1238, 1335 (BIA 2000) (physical violence by father); *Matter of Kasinga*, 21 I&N Dec. 357, 336–67 (BIA 1996) (FGM by family and community). Such evidence is especially important in many gender-based contexts because applicants are often persecuted by a person with whom they had a pre-existing relationship, not because of their relationship but because of the impunity the culture affords for their actions. *See Sahran*, 658 F. 3d at 657.

The proposed rule quotes *Matter of A-B-*, 27 I&N Dec. at 336 n.9, to suggest that "pernicious cultural stereotypes have no place in the adjudication of applications for asylum." But, *Matter of A-B-* holds the opposite, noting a "broad charge . . . [of a home country's culture] based on an *unsourced partial quotation* from a news article eight years earlier, neither contribute to an analysis . . . nor constitute appropriate evidence to support such asylum determinations." *Id.* (emphasis added). The Attorney General, in *Matter of A-B-*, called for *more* evidence of cultural stereotypes to substantiate membership in particular social groups and nexus to the harm, rather than relying on uncorroborated conclusory statements to the effect.

## III. THE PROPOSED RULE ATTEMPTS TO NARROW POLITICAL OPINION, IN CONTRAVENTION OF CLEARLY ESTABLISHED LAW.

Likewise, the proposed regulation seeks to narrow political opinion far beyond the bounds of well-established case law, confining potential claimants to circumstances that relate only to "discrete cause[s] related to political control of a state or a unit thereof." Proposed 8 C.F.R. § 208.1(d).

Political opinion is case and country specific. "The analysis of what constitutes political expression [] involves a complex and contextual factual inquiry into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place." *Hernandez-Chacon v. Barr*, 948 F.3d 94, 104 (2d Cir. 2020). For that reason, protected political opinion need not involve a particular political party or relate discretely to who controls the state;

it can include, for example, resisting corruption and abuse of power, refusing to acquiesce to gang violence, resisting state mistreatment of groups of peoples, and choosing not to engage in political activity at all. *Alvarez Lagos*, 927 F.3d at 254–55; *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010); *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 648 (9th Cir. 1997); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286 (9th Cir. 1984).

The Administration's attempt to narrow the definition of political opinion is contrary to well-established law and would prevent asylum seekers with legitimate claims from receiving protection.

## IV. THE PROPOSED RULE WILL CAUSE THE WIDESPREAD DENIAL OF ASYLUM CLAIMS, AND WILL CAUSE PARTICULAR HARM TO CHILDREN.

The narrowing of the standards for political opinion, particular social group, and nexus are not happening in a vacuum: together with the new standards for pretermitting asylum applications, the proposed rule would lead to widespread denials of asylum claims, with particular harm to children.

Under Proposed 8 C.F.R. § 1208.13(e)(2), an immigration judge can "pretermit and deny any application for asylum" if they believe that the asylum seeker "has not established a prima facie claim for relief or protection." Immigration judges are under tremendous case processing demands, subject to quotas that impact their performance evaluations. Although case law demands that many of the categorical exclusions proposed by the rule be evaluated on a case-by-case basis, the ability to pretermit cases without a hearing will result in the widespread denial of claims. From a practical standpoint, this will mean that people will be deported—back into the hands of their persecutors—without ever having the opportunity to be heard by a judge.

These pretermissions will have particular impact upon children seeking asylum. Recognizing the unique vulnerabilities of children navigating our immigration system, the government has long engaged in lawmaking, rulemaking, and policymaking to protect them. *E.g.*, Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110–457); INS Office of International Affairs Memo: Guidelines for Children's Asylum Claims, Dec. 10, 1998. The United States is also a signatory to the Convention on the Rights of the Child, which requires that a child's best interests are considered in every decision affecting that child, including decisions about their right to asylum. In accordance with these standards, our immigration system recognizes, for example, that children going through the asylum process can be fearful or less forthcoming than their adult counterparts because of their age and the trauma they have experienced, and emphasizes the importance of competent, individualized hearings. If applications can be pretermitted outright—denying the opportunity for children to appear for hearings—it is more likely their legitimate asylum claims will be denied.

## V. THE PROPOSED RULE ATTEMPTS TO IMPOSE NEW BARS TO ASYLUM, IN VIOLATION OF THE INA AND WELL-ESTABLISHED LAW.

The proposed rule also attempts to impose new bars to asylum and withholding in a section that is incorrectly titled "Discretion." Proposed 8 C.F.R. § 208.13(d). Despite its title, §

208.13(d)(2)(i) provides that the Secretary "will not favorably exercise discretion" for a category of individuals, thereby converting factors labeled as discretionary into mandatory bars, absent two very narrow circumstances. Federal rulemaking cannot be inconsistent with the federal statute that it intends to execute. By setting out additional bars beyond those laid out in the INA, these provisions constitute improper federal rulemaking.

Moreover, these bars conflict with well-established law, which provides that the "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The laundry list of factors are unrelated to whether someone should be able to seek safety in the United States and will be used as another tool to facilitate the widespread denial of claims.

We call particular attention to bar denying asylum to anyone who spent 14 days in another country while traveling to the United States to seek asylum, or who transited through more than one country and did not apply for protection in one of those countries. Proposed 8 C.F.R. § 208.13(d)(2)(A) & (B). This is an attempt to again codify the Administration's unlawful third country transit ban, promulgated las summer through an interim final rule. *See* 8 C.F.R. § 208.13(c)(4). Just nine days ago, the Ninth Circuit Court of Appeals held that the ban violates the law and cannot stand. *East Bay v. Barr*, --- F.3d ----, 2020 WL 3637585, at *9 (9th Cir. July 6, 2020). In its decision, the Court found particular problem with the ban's failure to exempt unaccompanied minors, noting that the Administration had "in no way addresse[d] the special vulnerability of unaccompanied minors," and in doing so "'entirely failed to consider an important aspect of the problem.'" *Id.* at 16. The discretionary bar suffers the same failings. This Administration cannot circumvent the law, simply by hiding provisions that are illegal in a different subsection of the same regulation.

## VI. ELIMINATING ASYLUM SEEKERS' ACCESS TO SECTION 240 PROCEEDINGS WILL PREVENT ELIGIBLE CHILDREN FROM PURSUING BOTH ASYLUM AND SPECIAL IMMIGRANT JUVENILE STATUS.

Finally, the proposed rule attempts to prevent asylum seekers with positive credible fear screenings from accessing Section 240 proceedings and would instead confine them to asylum and withholding proceedings. Proposed 8 C.F.R. § 208.30. This would unnecessarily and unfairly prevent asylum seekers who have passed their credible fear interviews to accessing other forms of relief like, for example, relief under the Violence Against Women Act, cancellation of removal, or adjustment of status. No asylum applicant should be precluded from seeking additional relief for which they are eligible, simply because asylum or withholding may be available to them.

This change would have particular impact on children, who may be eligible for both asylum and Special Immigrant Juvenile Status (SIJS). To qualify for SIJS, a minor must demonstrate that they have been abused, abandoned, or neglected by one or both of their parents. 8 U.S.C. § 1101 (a)(27)(J). Depending upon the facts of a child's case and the culture they come from, the facts giving rise to their SIJS claim may also constitute persecution on account of their membership in a particular group for asylum purposes. Alternatively, they may have experienced various forms of abuse and persecution, and facts unrelated to their SIJS claim may separately give rise to an

asylum claim. Because of these special protections in our immigration laws for minors, the "streamlining" into asylum and withholding-only proceedings would have particular impact on children.

## VII. CONCLUSION

Taken together, the changes outlined in the proposed rule propose the most significant evisceration of asylum protections we have seen in recent history. The proposal is callous rejection of the U.S.'s humanitarian obligations that jeopardizes the safety of people fleeing persecution throughout the world.

We strongly oppose the changes laid out in the proposed rule and call on the Administration to withdraw them in their entirety.

For further information, please do not hesitate to reach us at arupani@hironline.org or eheger@hrionline.org.

Respectfully,

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Sponsored by AT&T and Akin Gump