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via www.regulations.gov

August 10, 2020

Andrew Davidson
Asylum Division Chief
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U.S. Citizenship and Immigration Services, DHS

Lauren Alder Reid
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Executive Office for Immigration Review

RE: Comments in Response to Proposed Rule: Security Bars and Processing, Docket Number USCIS 2020-0013, A.G. Order No. 4747-2020, RIN 1125-AB08 & 1615-AC57

Dear Mr. Davidson and Ms. Reid:

We write on behalf of the Human Rights Initiative of North Texas in strong opposition to the U.S. Department of Citizenship and Immigration Services and Executive Office for Immigration Review's proposed rule to amend existing DHS and DOJ regulations concerning security bars related to people seeking asylum or protection of removal, published in the Federal Register on July 9, 2020.

The proposed rule comes on the heels of the Administration's other recent assault on asylum: 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.

Working together, these proposed rules would completely eliminate any humanitarian protection available to someone fleeing to the United States for safety. They are a shameful realization of President Trump's promise to shut America's doors in the face of those who most need refuge.

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.

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

I. THE PROPOSED RULE WILL PROHIBIT THE TYPE OF PEOPLE HRI SERVES FROM REACHING OUR DOORS.

The Proposed Rule would amend 8 C.F.R. §§ 208.13(c) and 1208.13(c) to add a subsection (10) and §§ 208.16(d) and 1208.16(d) to add a subsection (2), which create a new, mandatory bar for asylum and withholding of removal, respectively.[1] These bars would also apply at the credible fear stage through amendments to 8 C.F.R. §§ 208.30 and 1208.30,[2] meaning that an asylum seeker with an otherwise legitimate claim for protection would be expelled from the country without any opportunity to make their case before an immigration judge.

The bars would inexplicably deny relief to individuals who have recently come from or passed through a country where certain diseases were prevalent, who have come into contact with such diseases, or who exhibit symptoms consistent with having contracted such diseases.[3] Those diseases include those which have triggered an ongoing declaration of a public health emergency, such as COVID-19, and other communicable diseases of public health significance, as designated by the Secretary of DHS and Attorney General and with reference to 42 C.F.R. § 34.2(b), such as Gonorrhea, Ebola, Zika, SARS, and many others.

Applying this bar at the credible fear stage will prevent the types of people that HRI serves from ever reaching our doors. They are people like:

- Beza,* who is Eritrean by descent and born in Ethiopia, and fled to the U.S. from Sudan after years of forced displacement because of her Pentecostal Christian faith. She and her husband hired smugglers to get passports and get to the U.S. They flew from Khartoum to Dubai to Spain, and then on to Mexico City. From Mexico City, they took a bus to a U.S. border city and then a taxi to the U.S. port of entry, where they presented themselves and asked for asylum. They were granted asylum in 2013.

- Emilio,* who fled to the U.S. from Nicaragua at the age of 10, where he had been beaten and neglected by his grandmother and sexually assaulted by an adult close to his family. His mother purchased him a flight to Guatemala, where he met a coyote who took him on buses to Mexico and crossed into the U.S. He was granted asylum in 2017.

- Baati,* who fled to the U.S. from Ethiopia after surviving and witnessing a massacre of his people, who were targeted by the government. He was a healthcare professional in his country, and continued that work in the United States as an asylum seeker in a DFW-area emergency room. Since the COVID-19 outbreak, he has continued his emergency room

[1] 85 Fed. Reg. at 41215, 41217.
[2] *Id.* at 41216, 41218.
[3] *Id.* at 41215, 41217.

work and is providing care to those affected by COVID-19. He was granted asylum in 2020.

II. IN TODAY'S MOMENT, THE PROPOSED RULE WILL APPLY TO NEARLY EVERYONE WHO TRIES TO SEEK SAFETY IN THE UNITED STATES..

The Proposed Rule would apply to anyone who has recently come from or passed through a country where the applicable diseases, including COVID-19, are prevalent. In this moment, the Proposed Rule would have a nearly universal application. The COVID-19 pandemic is just that—a pandemic. It has broken out across the globe. As of August 9, 2020, there are nearly 20 million cases, with the highest levels of outbreak in the Americas.[4] Nearly every country has reported cases. Any person fleeing their home to come to the United States must come from or pass through a country where COVID-19 is present. Even assuming that the disease is only prevalent in countries where the WHO has identified community transmission, as of August 9, the standard would apply to half of the world.[5] Because of the Proposed Rule's definition, it would function as a nearly complete bar to anyone who reaches our country's doorstep to seek safety.

III. THE PROPOSED RULE WILL ABSURDLY PUNISH FIRST-RESPONDERS PROTECTING OUR COMMUNITIES FROM THE PANDEMIC.

The Proposed Rule would apply to anyone who has come into contact with the applicable diseases, including COVID-19. This broad definition could apply to the brave first-responders who are providing medical care and sanitation services across the world, fighting the pandemic and other communicable diseases—including asylum seekers who are already here in the United States, using their work authorization to provide care here within our borders.

This is an absurd and callous result. Asylum seekers are people healing from serious trauma—trauma that caused them to flee their homeland to a country they do not know and, in some cases, trauma along the journey. The fact that they are able to rebuild their lives in the United States—often separated from their families, navigating in a language they do not yet speak—is a testament to their strength.

Those asylum seekers who have chosen to rebuild their lives by continuing to serve their communities as health workers, medical professionals, and support staff in hospitals do our country a tremendous service. Like their American counterparts, they show extraordinary courage and strength, putting their health at risk to help save the lives of others. They are people like Baati, who continued to work his emergency room job in the DFW area as the pandemic spread this spring and who was finally able to celebrate in June that his asylum application had been approved after a three year wait. Barring people like Baati, who have come into contact with COVID-19 because of their service to our country, is cruel.

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[4] WORLD HEALTH ORGANIZATION, CORONAVIRUS DISEASE SITUATION REPORT – 202 (2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200809-covid-19-sitrep-202.pdf?sfvrsn=2c7459f6_2 (last visited Aug. 10, 2020).

[5] *Id.*

IV. THE PROPOSED RULE PERMITS NON-MEDICAL PROFESSIONALS TO MAKE HEALTHCARE DETERMINATIONS.

The Proposed Rule would also grant extraordinary powers to asylum officers and individual immigration judges to make findings concerning medical and public health questions. The Proposed Rule allows asylum officers and immigration judges authority to determine whether or not a person "can reasonably be regarded as a danger to the security of the United States" after "consider[ing] whether the [individual or noncitizen] exhibits symptoms [that are] consistent with being inflicted with any contagious or infectious disease," as designated in subsections (i) and (ii).[6] This amounts to a grant of power that allows asylum officers and individual immigration judges to make decisions that they are neither trained, nor qualified to make.

USCIS has a history of recognizing that the parties that are best equipped to make decisions should make them.[7] In doing so, it has found that immigration officials sometimes lack the expertise to make particular decisions, and relies on non-immigration officials with the proper and appropriate expertise to make such determinations.[8] This is exactly why, for example, when a noncitizen is applying for Special Immigrant Juvenile Status ("SIJS"), juvenile courts, rather than the immigration judge, make the factual finding about whether a child has been neglected, abandoned, and/or abused in accordance with the state's applicable laws.

The same principle applies here: the required determination triggering the proposed bar is a medical one, on which asylum officers and immigration judges are not situated to opine. Asylum officers are required by law to have "professional training in country conditions, asylum law, and interview techniques;"[9] their training does not include medicine. Likewise, immigration judges are required to only have a degree in law, and a least seven years of experience in litigation and/or administrative law; there are no medical prerequisites for their service.[10] The Proposed Rule itself seems to recognize that USCIS and EOIR lack the medical and technical proficiency to make these determinations: it requires that the Department of Health and Human Services ("DHHS")[11] be involved in the decisions concerning which communicable diseases will trigger the bar.

Nevertheless, the Proposed Rule does not require a diagnosis from a medical professional to make a finding; instead, it tasks asylum officers and immigration judges with considering whether a person "exhibits symptoms" consistent with a disease triggering the bar. The absurdity of this proposal is particularly obvious with respect to COVID-19, whose symptoms (which the Proposed Rule identifies[12]) include fever, cough, and shortness of breath. These are broadly applicable symptoms, which medical experts agree could also be indicative of the common cold

[6] 85 Fed. Reg. at 41215, 41217, 41218.
[7] USCIS recognizes that it needs to rely on the expertise of individuals who are better positioned to make a decision based on factual and reasonable determinations. 6 Policy Manual, Pt. J, ch. 2.
[8] *Id.*
[9] 8 U.S.C. § 1225(b)(1)(E).
[10] *E.g.*, *Immigration Judge*, EOIR, June 9, 2017, https://www.justice.gov/legal-careers/job/immigration-judge.
[11] 85 Fed. Reg. at 41215.
[12] *Id.* at 41202.

or the flu.[13] COVID-19, like other communicable diseases that could be included in the Proposed Rule, also presents with non-specific symptoms. Accordingly, identifying COVID-19 and other diseases requires careful diagnosis and a consideration of differential diagnoses.

However, if an individual presented themselves at the border or in immigration court and presented with a cough, the Proposed Rule would have the asylum officer or immigration judge consider whether or not the cough is more likely to be COVID-19 or the common cold or the flu. Assigning individuals, who are often lawyers, to make these medical decisions would be antithetical to the role Congress has chosen to assign to asylum officers and immigration judges. Such a task would lead to arbitrary enforcement of the Proposed Rule, with life-or-death implications.

V. THE PROPOSED RULE IGNORES THE UNIQUE VULNERABILITY OF CHILDREN SEEKING PROTECTION.

The Proposed Rule also makes no special considerations for children, in violation of international law and our own legal standards. Recognizing the unique vulnerabilities of children navigating our immigration system, the government has long engaged in lawmaking, rulemaking, and policymaking to protect them.[14] 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 has created, for example, a separate detention system for children through the Office of Refugee Resettlement, which prioritizes efficient and safe release of children out of custody while they await their immigration hearings.

However, the Proposed Rule makes no provision for unaccompanied children, who may otherwise have nowhere to return and have no adult to help them navigate their expulsion. It would apply to people like Patricia,* a teen girl who fled to the U.S. from Guatemala, where neither her family nor the police did anything in response to her uncle brutally raping her at 12 years old, despite his repeated threats to harm her again. Patricia is currently safe, sheltering in place in long-term foster case, while her application for asylum and withholding of removal is being adjudicated—but had she been prevented from escaping until this Proposed Rule's finalization, she would be expelled from the U.S. to fend for herself.

VI. THE PROPOSED RULE COMPLETELY EVISCERATES ANY PROTECTIONS BY APPLYING EQUALLY TO WITHHOLDING.

The Proposed Rule applies equally to asylum and withholding of removal—an outrageous evisceration of the back-stop in our law designed to ensure we do not send people back to persecution. Withholding of removal exists to implement the United States' non-refoulment

[13] *E.g.*, *Flu and Coronavirus: Similar Symptoms, Different Fears*, AP NEWS, Mar. 10, 2020, https://apnews.com/fc233effe10f7dcf535f758fb1b0d2ce; *Common Cold*, MAYO CLINIC, Apr. 20, 2019, https://www.mayoclinic.org/diseasesconditions/common-cold/symptoms-causes/syc-20351605 (listing fever, cough, and shortness of breath as symptoms of the common cold).

[14] *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.

obligations under international law. Although withholding of removal is a lesser benefit than asylum—requiring a person to live in the U.S. without legal permanent residence and prohibiting them from bringing their family members to safety through family-based petitions—it is nevertheless a critical promise for those who have failed to qualify for asylum for some technical reason. The Proposed Rule eliminates this possibility, creating a near certainty that our country will send people back to certain death.

This is especially egregious in light of the Administration's most recent NPRM, "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." That rule proposes to narrow asylum protections dramatically, premised on the justification that a person would still remain eligible for withholding of removal.[15] But such people—even assuming they somehow made it into the United States—would nevertheless be barred from withholding protection because of the instant Proposed Rule. Together, these proposed rules eliminate any possibility of protection.

VII. THE PROPOSED RULE IGNORES SCIENCE-BASED PUBLIC HEALTH SOLUTIONS TO MEANINGFULLY ADDRESS THE SPREAD OF DISEASE.

Despite its language to the contrary, the Proposed Rule is not justified by public health. Leading public health experts from across the country have underscored that the United States has the ability to both safeguard public health in the midst of the COVID-19 crisis and safeguard the lives of families, adults, and children seeking asylum and other humanitarian protection. Such measures must be applied consistently with the principle of non-refoulement, enshrined in international law and U.S. law, which impose an absolute prohibition on the return of individuals to places where they may face persecution or torture.

The WHO,[16] UNHCR,[17] and the United States' own public health experts[18] all agree that it is possible—and imperative—to honor our asylum obligations while protecting public health through evidence-based measures such as social distancing, appropriate masks, and sanitation measures, as well as the use of parole to family and friends rather than detention in congregation settings; and through the use of quarantine and self-isolation when necessary. The Proposed Rule fails to comport with basic recommendations from leading public health experts and fails to uphold the United States' obligations to asylum seekers.

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[15] 85 Fed. Reg. 36272 ("For instance, if an alien is subject to the firm resettlement bar, the alien is barred from asylum eligibility, but not barred from statutory withholding eligibility.").

[16] WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (2005), https://www.who.int/ihr/publications/9789241580496/en/.

[17] UNHCR, PRACTICAL RECOMMENDATIONS AND GOOD PRACTICE TO ADDRESS PROTECTION CONCERNS IN THE CONTEXT OF THE COVID-19 PANDEMIC (2020), https://data2.unhcr.org/en/documents/download/75453.

[18] HUMAN RIGHTS FIRST ET AL., PUBLIC HEALTH MEASURES TO SAFELY MANAGE ASYLUM SEEKERS AND CHILDREN AT THE BORDER (2020), https://www.humanrightsfirst.org/sites/default/files/PublicHealthMeasuresattheBorder.05.18.2020.pdf.

VIII. THESE CHANGES ARE ABITRARY AND CAPRICIOUS, AND CANNOT HOLD.

For the reasons outlined above, the Proposed Rule will be found to be both arbitrary and capricious. Agency rules are arbitrary and capricious when they rely "on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[19] In the immigration context, courts also consider whether the policy at question aligns with the purpose of immigration laws and whether it is tied to the appropriate operation of the immigration system.[20] The Proposed Rule rises to such a level: it fails to consider critical issues, offers explanations based on nonsensical reasoning and illegitimate health concerns, and is entirely counter to the non-refoulment policies in the 1951 Convention Relating to the Status of Refugees, to which the United States is a party.

The purpose of United States immigration laws concerning asylum seekers is to abide by the 1951 Convention Relating to the Status of Refugees, which the United States codified into law through the Refugee Act of 1980. In Section 101(a) of the Refugee Act of 1980,

> Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United states, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees in the fullest extent possible. (b) the objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provision for the effective resettlement and absorption of those refugees who are admitted.[21]

As Congress's own words make plain, the United States was founded as a place of refuge. It continued that tradition when it signed on to the 1951 Convention and codified the Refuge Act of 1980.

The Proposed Rule completely undermines the purpose of those laws. As we have discussed in detail, it will practically eliminate asylum and withholding of removal as avenues of relief for the vast majority of migrants seeking asylum. It will bar asylum and withholding of removal for asylum seekers who have traveled through a country where COVID-19 is prevalent, which will apply to nearly every person who is able to reach the United States border. It will bar asylum and withholding of removal for asylum seekers currently in the United States who are nurses,

[19] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[20] *Judulang v. Holder*, 565 U.S. 42, 55 (2011).
[21] Refugee Act of 1980 (P.L. 96-212).

doctors, health aides, cleaners, and other essential personnel who have come into contact with COVID-19 or any of the communicable diseases listed.

The Proposed Rule also impermissibly ties public health concerns to the national security bar, which Congress never intended. Under the INA, the national security bar to asylum applies where the Attorney General determines that "there are reasonable grounds for regarding the alien as a danger to the security of the United States."[22] Similarly, asylum seekers are barred from withholding of removal where the Attorney General decides "there are reasonable grounds to believe that the alien is a danger to the security of the United States."[23] These exclusions are drawn directly from Article 33.2 of the 1951 Refugee Convention (which provides an exception to a state's obligation to avoid the refoulement of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country"). The public health concerns over diseases that are largely treatable and where there exist alternatives measures for protecting public health are not reasonable grounds for regarding the alien as a danger to the security of the United States. Congress intended for "the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees in the fullest extent possible," not exploit a public health emergency to categorically ban migrants from seeking asylum.

The ramifications are so disastrous and the justifications so implausible that the Proposed Rule cannot be ascribed to the Administration's expertise in this matter or simply a difference in view of the pandemic and its implication for public health safety. As we have discussed in detail, the Proposed Rule tasks non-medical personnel with making medical decisions, and runs counter to recommendations from leading public health experts about how to manage our borders during outbreaks of disease. In fact, it completely ignores the reality that there are alternative measures that can simultaneously protect public health and preserve access to asylum and withholding of removal.

In short, the Proposed Rule rests on unfounded public health concerns to bar migrants from seeking asylum and withholding of removal, re-engineering those concerns as a misplaced threat to the security of the United States. It flies in the face of historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands. The Proposed Rule is arbitrary and capricious, and it cannot stand.

IX. CONCLUSION

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 kcohn@hrionline.org.

[22] 8 U.S.C. § 1158(b)(2)(A)(iv).
[23] 8 U.S.C. § 1231(b)(3)(B)(iv).

Respectfully,

/s/ Kali Cohn
Kali Cohn
Community Education & Advocacy Director

/s/ Pilar Ferguson
Pilar Ferguson
Asylum Program Director

/s/ Anna Rupani
Anna Rupani
Children's Program Director

/s/ Emily Heger
Emily Heger
Equal Justice Works Fellow,
Sponsored by AT&T and Akin Gump

* Indicates names changed for anonymity.