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ASSOCIATION

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Submitted via: [www.regulations.gov](http://www.regulations.gov)

**Re: Joint Notice of Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility (EOIR Docket No. 18-0002) (A.G. Order No. 4592-2019) (RIN 1125-AA87) (RIN 1615-AC41)<sup>1</sup>**

Dear Ms. Alder Reid and Ms. Dunn,

Established in 1946, the American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA and its members have extensive experience advocating for and representing noncitizens seeking asylum and other humanitarian relief.

AILA strongly opposes the above-mentioned proposed rulemaking. The draft regulations are overbroad and will exclude from asylum eligibility people who are not threats to public safety and who have well-founded fears of being persecuted abroad. It will keep people who have fled persecution and torture in a state of unprotected legal limbo, or far worse, return them to their life-threatening circumstances. AILA also objects to the inappropriately short 30-day comment period. This comment does not address every one of AILA's concerns but instead focuses on the most problematic repercussions of the proposed rule.

### **The Comment Period for the Proposed Rule Is Insufficient**

The 30-day comment period provided by U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) (collectively "the Agencies") is insufficient for the public to have a meaningful opportunity to comment adequately on a proposed rule that will have a severe impact on the availability of protection from persecution. The proposed rule is a significant change to the regulations and will greatly restrict the ability of individuals to qualify for asylum. The rule was published on Thursday, December 19, 2019 and comments must be submitted on or before January 21, 2020. This comment period includes two weeks with major holidays that fall in the middle of them, when the federal

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<sup>1</sup> Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (December 19, 2019).

**AILA National Office**

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government is closed for three days, and when many people are on vacation and spending time with their families, further limiting the ability of interested parties to fully assess and comment on the rule.

Executive Orders require that, under most circumstances, agencies furnish public comment periods of at least 60 days. Executive Order 12866 directs that agencies generally furnish “not less than 60 days” for public comment to “afford the public a meaningful opportunity to comment on any proposed regulation.” Executive Order 13563 states that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.” In this case, the agencies provide no explanation why a shorter comment period of 30 days is necessary, and there is no evidence to support that the normal time period of 60 days would be inappropriate in this case. The 30-day comment period is insufficient to allow the robust, meaningful input of interested stakeholders, particularly considering the serious consequences and human costs that this proposed regulation will have, as set forth in detail below.

### **The Proposed Regulations Undermine the Purpose of Our Asylum System**

The United States enacted the Refugee Act of 1980 in order to create a consistent legal framework for providing a safe haven to individuals fleeing persecution.<sup>2</sup> The Refugee Act of 1980 was designed to comply with the United Nations Protocol Relating to the Status of Refugees and established a “broad class” of refugees who could be granted asylum.<sup>3</sup> The U.S. asylum system was put in place to ensure that people are not sent back to places where they might be persecuted. These laws were enacted to ensure compliance with our international legal obligations and our moral and ethical obligations to protect those fleeing persecution.<sup>4</sup> While it is critical that we take measures to maintain the integrity of the U.S. asylum system, it is also essential to ensure that any potential refugee is provided a meaningful opportunity to seek protection and that bona fide refugees are not deported to be persecuted, tortured, or killed. Congress designed our current laws to provide a safe haven for asylum seekers and their immediate family members who are still in danger abroad. If an asylum claim is denied, those individuals may be killed, tortured, or subjected to grave harm after being deported.

The U.S. asylum system already has stringent eligibility criteria to asylum that balance the need to provide meaningful protection to bona fide refugees with the need to maintain the integrity of the legal system. As mentioned in the proposed regulation itself, these bars include criminal bars for those who have committed an “aggravated felony” or a “particularly serious crime.” Also barred, is anyone who “ordered, incited, or otherwise participated” in the persecution of others, individuals who committed a “serious nonpolitical crime” outside the US, individuals who are a “danger to the security of the United States,” individuals who have engaged in terrorist activity, individuals who apply more than one year after entry to the U.S. (with limited exceptions), individuals who can live in a safe third country, and individuals who are “firmly resettled” in another country prior to arriving in the U.S.<sup>5</sup> Beyond these bars to asylum eligibility, the government also has discretion to deny asylum to anyone deemed to be undeserving of protection.<sup>6</sup> The intention of these criteria is to protect the U.S. from those who pose a threat to public safety, and to reserve U.S. protection for those who applied promptly and who do not

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<sup>2</sup> See Deborah Anker, “The Refugee Act of 1980: An Historical Perspective,” *In Defense of the Alien* 5 (1982): 89-94, [https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page_scan_tab_contents).

<sup>3</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

<sup>4</sup> See Universal Declaration of Human Rights, Article 14, December 1948, <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>5</sup> See 84 Fed. Reg. at 69641.

<sup>6</sup> See *Matter of Pula*, 19 I.&N. Dec. 467 (BIA 1987).

have another safe place to go. The existing rules have properly served that purpose for decades and there is no evidence that they have failed to serve that purpose.

Overly broad restrictions like the ones being proposed in this regulation are not only superfluous, they also eviscerate the spirit and overall purpose of the U.S. asylum system by categorically refusing protection to large groups of vulnerable people who are neither a danger to the public nor a threat to U.S. national security interests, and who have no other safe and reasonable option for protection.

### **The Proposed Regulations Penalize Asylum Seekers for Actions That Are the Direct Consequence of Fleeing Persecution**

The proposed rule includes several new bars to asylum eligibility for people that have been convicted of crimes that are often a byproduct of fleeing persecution and/or living in the country without status such as using false documents, illegal re-entry, and harboring. These immigration-related crimes should not block asylum seekers who have well-founded fears of persecution and torture abroad from accessing protection. To do so is to punish individuals for doing what is necessary to save their own lives and the lives of their family members.

People fleeing harm and persecution should not be held to such a harsh standard. Under the current system, asylum adjudicators have the authority to evaluate these immigration-related crimes when deciding whether to approve an asylum application. But under current law, the crimes are not an absolute bar to receiving protection. By contrast, the proposed rule would require adjudicators to deny cases categorically without allowing them discretion to look at the circumstances surrounding a case and whether a conviction was for an act that was a byproduct of fleeing persecution or living in the U.S. with no status. In effect, the bars penalize asylum seekers for seeking safety, and AILA strongly opposes them.

#### ***Convictions for Reentry Under 8 USC § 1326***

The proposed rule would add all convictions for illegal reentry under 8 USC § 1326 as a bar to asylum eligibility. By imposing this categorical bar, the proposed rule contravenes the refugee protection provision of the INA § 208(a)(1), which states that anyone “who is physically present in the United States or who arrives in the United States . . . *whether or not at a designated port of arrival* . . . may apply for asylum” (emphasis added). The proposed rule itself acknowledges that many convictions under section 1326 *already* qualify as aggravated felonies under INA § 101(a)(43)(O), including reentry offenses committed by individuals who had previously been convicted of aggravated felonies.<sup>7</sup> Additionally, individuals who are convicted of an offense under section 1326 are also subject to reinstatement of a prior removal order, and, under current practice, generally already barred from applying for asylum under INA § 241(a)(5).<sup>8</sup> The proposed rule would broaden the bar to exclude *anyone* convicted of an offense under section 1326.<sup>9</sup>

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<sup>7</sup> See 84 Fed. Reg. at 69649.

<sup>8</sup> See INA § 241(a)(5). If an individual with a prior removal order attempts to re-enter the U.S. and expresses a fear of persecution, the DHS official must refer that individual to an asylum officer for a “reasonable fear” screening with USCIS to determine whether there is a reasonable possibility of persecution or torture. See 8 C.F.R. §§ 208.31; 241.8(e). If an asylum officer determines that the person has a “reasonable fear of persecution or torture,” the person may apply only for withholding of removal or relief under the Convention Against Torture before an immigration. See 8 C.F.R. §§ 208.31(e). See also 84 Fed. Reg. at 69649.

<sup>9</sup> See 84 Fed. Reg. at 69649.

These bars to asylum eligibility do not take into account the credible reports showing that removal orders are often issued improperly and would not withstand legal scrutiny.<sup>10</sup> DHS officers are required to inform individuals subject to expedited removal of their rights and refer those with a fear of return to asylum officers for credible fear interviews (CFIs).<sup>11</sup> These responsibilities are supposed to be carried out without harassment, intimidation, or misinformation.<sup>12</sup> However, multiple non-governmental and governmental reports show that DHS officers frequently neglect these responsibilities.<sup>13</sup> Officers routinely fail to record statements that indicate a fear of return by potential refugees and fail to refer individuals who express a fear of return for CFIs.<sup>14</sup> Additionally, officers have subjected individuals to harassment and misinformation, which interferes with their ability to pursue asylum.<sup>15</sup> Given these serious and well-documented flaws in the process, the proposed rule would essentially punish asylum seekers for the failure of DHS officers to follow the agency's own rules.

The proposed rule specifically bars people who were persecuted after their initial removal and reentry. The agencies state that this is justified because someone seeking protection “may present himself or herself at a port of entry without illegally reentering the U.S.”<sup>16</sup> However, the Administration has implemented several deterrent policies that prevent people from doing just that.<sup>17</sup> For example, in a process commonly referred to as “metering,” Customs and Border Protection (CBP) turns away asylum seekers who lawfully present themselves at ports of entry along the U.S. southern border, telling them

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<sup>10</sup> See American Immigration Lawyers Association et. al, *AILA, NIJC, and Others File CRCL Complaint Reporting Serious Flaws in CBP Fear Screening* (November 2014) (reporting that CBP officers regularly fail to properly screen individuals to determine whether they have a fear of returning to their home country), available at <https://www.aila.org/infonet/aila-nijc-and-others-file-crcl-complaint>.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See, e.g., American Immigration Lawyers Association et. al, *AILA, NIJC, and Others File CRCL Complaint Reporting Serious Flaws in CBP Fear Screening* (November 2014) (reporting that CBP officers regularly fail to properly screen individuals to determine whether they have a fear of returning to their home country); Human Rights Watch, *You Don't Have Rights Here* 6 (2014) (finding that fewer than half of individuals interviewed who claimed a fear of return were referred for credible fear hearings); Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* (2017) (describing CBP agents' coercion of and threats to asylum seekers, including making them recant their claims of fear on video, claiming that they cannot seek asylum without a ticket from officials in Mexico, and claiming that there is no more asylum for individuals from certain countries); American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, 1, 2, 5, 7- 8 (Sept. 2017) (reporting that 55.7% of a survey of 600 deported Mexican migrants were not asked if they feared return to Mexico and describing numerous incidents of CBP interference with asylum claims); Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017) (documenting CBP abuses towards asylum seekers, including ignoring asylum claims, providing false information— e.g., that the United States no longer provides asylum— mocking and intimidating asylum seekers, imposing procedures to deter asylum seekers from pursuing their claims, and coercing asylum seekers into giving up their claims); 2016 USCIRF Study at 20-32 (documenting examples of failure to properly screen for fear of return in CBP primary inspection interviews and noting “certain CBP officers’ outright skepticism, if not hostility, toward asylum claims”); American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom*, 4 (Dec. 2014) (reporting that 55% of 89 interviewed individuals who received summary removal orders, including expedited removal orders, were not asked about fear of persecution in language they could understand and 40% of those asked about fear were deported without CFI despite expressing fear of return).

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> 84 Fed. Reg. at 69648.

<sup>17</sup> See AILA, *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum* (June 1, 2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>; American Immigration Council, *A Guide to Policies Affecting Asylum Seekers at the Border* (November 19, 2019), <https://www.americanimmigrationcouncil.org/research/guide-policies-affecting-asylum-seekers-border>.

they have to wait in Mexico before they can have the opportunity to claim asylum.<sup>18</sup> In the past two years, metering has increased both in frequency and in duration, forcing asylum seekers to wait for days, weeks, and even months in Mexico before allowing them to request asylum at the port of entry.<sup>19</sup> Asylum seekers subject to metering are told to put their names on increasingly lengthy waitlists – lists that are not in any way officially maintained or even controlled by the U.S. government.<sup>20</sup> DHS does not commit to any certain number of asylum seekers it will process in any given day, and there may be some days where no individuals are taken off the waitlist at all.<sup>21</sup> In fact, there is no guarantee that they will ever be taken off the lists, meaning many are left struggling to survive and are vulnerable to serious and life-threatening danger in Mexican border towns for an indefinite time period after lawfully presenting themselves at ports of entry to request asylum.<sup>22</sup>

The agencies have also deterred people from seeking asylum at ports of entry by implementing the Migrant Protection Protocols (MPP), a policy also known as “Remain in Mexico,” which requires individuals seeking asylum at the southern border to remain in Mexico for the entire time that their U.S. removal proceedings are pending. People subject to MPP are instructed to come back to the ports of entry at specific dates and times for their next court hearings, at which time CBP transports them to either immigration courts in the border region or tent courts set up at ports of entry.<sup>23</sup> MPP is rife with serious due process concerns.<sup>24</sup> Asylum seekers subject to MPP are not asked whether they fear persecution in

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<sup>18</sup> See Amended Complaint, *Al Otro Lado, Inc. v. Nielsen*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. 2018) (ECF No. 189); American Immigration Council, *Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers*, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>; AILA, *AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum* (June 1, 2018), <https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>; American Immigration Council, *A Guide to Policies Affecting Asylum Seekers at the Border* (November 19, 2019), <https://www.americanimmigrationcouncil.org/research/guide-policies-affecting-asylum-seekers-border>; Dara Lind, *The US has made migrants at the border wait months to apply for asylum. Now the dam is breaking.*, Vox (November 28, 2018), available at <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>; James Fredrick, ‘Metering’ At The Border, NPR (June 29, 2019), available at <https://www.npr.org/2019/06/29/737268856/metering-at-the-border>; Camila DeChalus, ‘Metered’ immigrants face long waits at the border, Roll Call (October 4, 2019), available at <https://www.rollcall.com/news/congress/metered-immigrants-face-long-waits-border>.

<sup>19</sup> See Camila DeChalus, ‘Metered’ immigrants face long waits at the border, Roll Call (October 4, 2019), available at <https://www.rollcall.com/news/congress/metered-immigrants-face-long-waits-border>.

<sup>20</sup> See Dara Lind, *The US has made migrants at the border wait months to apply for asylum. Now the dam is breaking.*, Vox (November 28, 2018), available at <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>; American Immigration Council, *A Guide to Policies Affecting Asylum Seekers at the Border* (November 19, 2019), available at <https://www.americanimmigrationcouncil.org/research/guide-policies-affecting-asylum-seekers-border>.

<sup>21</sup> See Dara Lind, *The US has made migrants at the border wait months to apply for asylum. Now the dam is breaking.*, Vox (November 28, 2018), available at <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>.

<sup>22</sup> See *id.*

<sup>23</sup> See AILA, *Policy Brief: DHS and DOJ Are Opening Secretive Port Courts Along the Southern Border*, AILA Doc. No. 19090631 (September 6, 2019), available at <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-dhs-and-doj-are-opening-secret>.

<sup>24</sup> *Congress Requests Information on the Management of the Tent Courts in Laredo and Brownsville*, AILA Doc. No. 19112537 (November 25, 2019), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/congress-requests-information-on-the-management>; *Congress Calls on Secretary Pompeo and Acting Secretary McAleenan to End the Remain in Mexico Policy*, AILA Doc. No. 19120933 (August 27, 2019), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional->

Mexico and can be sent to locations in Mexico far from where they originally arrived at the border.<sup>25</sup> The program effectively denies asylum seekers their right to the tools necessary to meaningfully apply for protection, including access to counsel, witnesses, and evidence, curtailing their ability to successfully argue their case.<sup>26</sup> Additionally, AILA members and media reports have documented instances where there have been inaccurate and incomplete NTAs, documents falsely indicating future hearing dates, and other implementation concerns that impede asylum seekers' abilities to receive a fair and meaningful review of their claims.<sup>27</sup>

Both metering and MPP strand asylum seekers in dangerous parts of Mexico for weeks or months at a time without adequate access to basic life necessities like food, water, shelter, and safety. Asylum seekers are forced to stay in some of the most dangerous areas of Mexico.<sup>28</sup> Those waiting in Mexico frequently experience violence. The Dilley Pro Bono Project, a collaboration run by AILA and several other organizations, found that 90.3% of the 500 respondents they surveyed in January and February of 2019 said they did not feel safe in Mexico, and 46% reported that they or their child had experienced at least one type of harm while in Mexico.<sup>29</sup> And according to Human Rights First, there are now at least 636 public reports of rape, kidnapping, torture, and other violent attacks against asylum seekers and migrants returned to Mexico under MPP.<sup>30</sup> While in Mexico, asylum seekers often must stay in shelters or temporary camps set up by local nonprofit organizations with limited resources.<sup>31</sup> The camps have been

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[updates/congress-calls-on-secretary-pompeo-and-acting](#); *AILA Statement for House Subcommittee Hearing on Remain in Mexico*, AILA Doc. No. 19111931 (November 19, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/aila-statement-for-house-subcommittee-hearing>; *AILA Joins Organizations and Academics to Call for End to Remain in Mexico Program*, AILA Doc. No. 19111890 (November 18, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/call-for-end-to-remain-in-mexico-program>.

<sup>25</sup> Rafael Carranza, "How Trump's 'Remain in Mexico' program affects Arizona border despite no formal policy," *Arizona Republic*, October 10, 2019, <https://www.azcentral.com/story/news/politics/immigration/2019/10/10/remain-mexico-program-affects-arizona-border-despite-no-formal-policy/3866006002/>; American Immigration Council, *A Guide to Policies Affecting Asylum Seekers at the Border* (November 19, 2019), <https://www.americanimmigrationcouncil.org/research/guide-policies-affecting-asylum-seekers-border>.

<sup>26</sup> *AILA Sends Letter to DHS Acting Secretary Detailing MPP's Barriers to Counsel*, AILA Doc. No. 19060336 (June 3, 2019), available at <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>

<sup>27</sup> *AILA Statement for House Subcommittee Hearing on Remain in Mexico*, AILA Doc. No. 19111931 (November 19, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/aila-statement-for-house-subcommittee-hearing>.

<sup>28</sup> See Patrick McDonnell, *Pastor's kidnapping underscores threat to migrants returned to Mexican border towns*, *LA Times* (September 2, 2019), available at <https://www.latimes.com/world-nation/story/2019-09-01/kidnapping-of-pastor-in-mexican-border-town-dramatizes-threats-to-migrants>. For example, Nuevo Laredo and Matamoros, two locations in Mexico where MPP-subject asylum-seekers are forced to wait, have both been designated by the U.S. State Department with a level four "Do Not Travel" warning due to high rates of crime and kidnapping. Department of State, *Mexico Travel Advisory* (April 9, 2019), available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

<sup>29</sup> *AILA and Advocates Send Letter Urging Secretary Nielsen to End the Migrant Protection Protocols Policy*, AILA Doc. No. 19020631 (February 6, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/aila-and-advocates-send-letter-urging-secretary>. See also Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* (August 2019), available at <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>.

<sup>30</sup> Human Rights First, *Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue* (December 2019), available at <https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf>.

<sup>31</sup> See Patrick Timmons, *Squalid migrant shantytowns forms in Mexican border city*, May 14, 2019, available at [https://www.upi.com/Top\\_News/World-News/2019/05/14/Squalid-migrant-shantytown-forms-in-Mexican-border-city/5501557701209/](https://www.upi.com/Top_News/World-News/2019/05/14/Squalid-migrant-shantytown-forms-in-Mexican-border-city/5501557701209/).

unable to keep up with the demand for housing and basic services, and conditions are deteriorating.<sup>32</sup> When space is full, asylum seekers are forced to find alternative housing, even though they may not speak Spanish and often do not have any local family or other ties. Many end up sleeping on the streets. Conditions for asylum seekers in these border towns are squalid and life-threatening and are worse than the conditions in many refugee camps in the world due in part to the absence of international humanitarian and UN assistance.<sup>33</sup>

Desperate and fearing for their lives, asylum seekers – some of whom have been convicted of illegally entering the U.S. previously – feel they have no choice but to cross the border between ports of entry in order to access safety.<sup>34</sup> The proposed rule would ban such people from qualifying for asylum protection. Punishing individuals subject to MPP, metering, or improper removal orders for doing what is necessary to save their life is unacceptable.

### *Convictions for Harboring*

The rule also proposes to designate all offenses involving the federal crimes of bringing in or harboring individuals under INA §274(a)(1)(A) and (2) as particularly serious crimes -- and would make any such offense a bar to asylum eligibility.<sup>35</sup> All crimes under that section are already considered aggravated felonies – which already bar an individual from asylum eligibility – with the one narrow exception of a first-time offense for people that were helping their spouse, child, or parent “and no other individual.”<sup>36</sup>

The proposed rule goes further than the INA by specifically punishing family members who may be helping their loved ones flee the same persecutors they fled in their home countries. This bar would apply even to parents fleeing with their children or asylum seekers in the U.S. who help loved ones who encountered a crisis in transit after fleeing their home country. At its core, the proposed rule forces family members to choose between their loved ones remaining in danger and themselves being barred from asylum and returned to their persecutors.

### *Use of Fraudulent Documents*

The rule proposes to bar from asylum anyone who has been convicted of a federal, state, or local crime – even a misdemeanor – for the possession or use of certain fraudulent documents.<sup>37</sup> This proposal is deeply problematic for several reasons. First, it would bar from asylum eligibility people who used false documents to flee persecution abroad with only one narrow exception: if the asylum seekers can show

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<sup>32</sup> See *id.*

<sup>33</sup> See Human Rights First, *Delivered to Danger*, available at <https://www.humanrightsfirst.org/campaign/remain-mexico>.

<sup>34</sup> Dara Lind, *The US has made migrants at the border wait months to apply for asylum. Now the dam is breaking.*, Vox (November 28, 2018), available at <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>.

<sup>35</sup> 84 Fed. Reg. at 69647 (“The Attorney General and the Secretary propose to designate all offenses involving the federal crimes of bringing in or harboring certain aliens pursuant to sections 274(a)(1)(A) and (2) of the INA, 8 U.S.C. 1324(a)(1)(A), (2), as particularly serious crimes and, in all events, as discrete bases for ineligibility.”).

<sup>36</sup> INA § 101(a)(43)(N) (“except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)”).

<sup>37</sup> 84 Fed. Reg. at 69653 (“The Departments propose to make aliens ineligible for asylum when they are convicted of a federal, state, tribal, or local misdemeanor for the possession or use, without lawful authority, of an identification document, authentication feature, or false identification document as defined in 18 U.S.C. 1028(d).”).

that the document was used to leave a country in which the person fears persecution, and if they claim a fear of persecution immediately upon arrival at a port of entry.<sup>38</sup>

This narrow exception goes against years of established policy and legal precedent recognizing that making false statements or using false documents should not prevent someone from being granted protection when done for the very purpose of fleeing persecution. Courts have consistently held that making false statements or using false documents should not be held against someone if their reason for doing so was connected to their flight from persecution.<sup>39</sup>

This narrow exception is also insufficient to prevent the return of bona fide refugees to situations of persecution and torture. Often, people fleeing persecution do not know how the U.S. asylum system works, and do not have the resources to find out before fleeing or even soon after their entry. Even if they are aware of how to ask for asylum, they may be too afraid to come forward to the first uniformed CBP official they see, especially if they were persecuted by police or other authorities in their home country. This legitimate fear makes it particularly difficult for many asylum seekers to come forward immediately and disclose sensitive information, such as the use of fraudulent documents. Moreover, if they do have the opportunity to ask for asylum at the port of entry, CBP has a history of ignoring individuals who do express a fear of persecution.<sup>40</sup>

There may also be other unique issues at play for asylum seekers such as psychological trauma making it difficult for them to accurately describe their situation, especially under pressure, at the port of entry. Language barriers also prevent many asylum seekers from communicating with a CBP officer at the time of entry. As a result of these obstacles and the proposed rule, many people fleeing persecution will not qualify for the exception and will be barred from asylum.

Additionally, after arriving in the U.S., asylum seekers may use fraudulent documents in order to survive by seeking work and driving.<sup>41</sup> DHS recently made it harder for asylum seekers to support themselves by proposing a rule that would extend the waiting period for asylum seekers to apply for work authorization from 180 days to one year.<sup>42</sup> DHS is also proposing to no longer grant a work permit within 30 days to asylum applicants.<sup>43</sup> It is already exceedingly difficult for asylum seekers, who are often indigent, to survive in the U.S. for the 180 days they are not allowed to work under the current system. They can be unable to afford legal representation, dependent on charities, or prey on people that take advantage of

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<sup>38</sup> 84 Fed. Reg. at 69653 (“[T]he proposed rule would provide an exception for the bar to asylum based on convictions for use or misuse of identification documents if the alien can show that the document was presented before boarding a common carrier for the purpose of coming to the United States, that the document relates to the alien’s eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry.”).

<sup>39</sup> See e.g., *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004), *Edimo-Doualla v. Gonzales*, 464 F.3d 276, 288-89 (2d Cir 2006); *Lin v. Gonzales*, 445 F.3d 127, 133-34 (2d Cir. 2006).

<sup>40</sup> AILA, NIJC, and Others File CRCL Complaint Reporting Serious Flaws in CBP Fear Screening, AILA Doc. No. 14111748 (November 13, 2014), available at <https://www.aila.org/infonet/aila-nijc-and-others-file-crcl-complaint>.

<sup>41</sup> While there are no doubt serious crimes that could fall under this category, the rule itself notes that many such convictions already bar individuals from being eligible for asylum. 84 Fed. Reg. at 69653 (“Aliens convicted of falsifying passports or other identity documents where the term of imprisonment is at least a year are already ineligible for asylum (unless the conduct was a first-time offense for purposes of aiding a specified family member) because such conduct constitutes an aggravated felony under 8 U.S.C. 1101(a)(43)(P).”).

<sup>42</sup> Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (November 14, 2019).

<sup>43</sup> Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47148 (September 9, 2019).



their vulnerability. By actively preventing asylum seekers from working while pursuing their asylum applications for longer periods of time, the government is preventing them from being able to support themselves, and then barring them from protection when they do what is necessary to survive. Again, this highly restrictive bar is unnecessary and would result in grave harms to those in danger.

### **The Proposed Regulations Include Overbroad Criminal Bars**

The new proposed bars would single out asylum seekers and make them subject to the harshest criminal bars in the history of immigration law. The proposed rule expands who is barred from asylum for convictions to encompass minor offenses, such as shoplifting. The proposed rule would also bar individuals from asylum based on being charged with an offense rather than requiring conviction of a crime. As previously mentioned, asylum law already has stringent criteria for eligibility. By establishing several categorical bars to asylum, the proposed rule strips asylum adjudicators of the discretion and responsibility they have long exercised – to balance compelling equities with adverse factors.

#### *Felonies*

The agencies propose to bar from asylum anyone who has been convicted of a crime designated as a felony by the relevant jurisdiction or crimes punishable by more than one year’s imprisonment. Adding all felonies to the list of asylum bars will sweep in relatively minor crimes and nonviolent crimes, including, for example, shoplifting or the receipt of stolen goods.<sup>44</sup> The agencies justify the change by saying that “crimes with potential for longer sentences tend to indicate that the offenders who commit such crimes are greater dangers to the community.”<sup>45</sup> However, the agencies offer no evidence that existing asylum criteria are insufficient rigorous to screen out disqualify people who may pose a danger to the public.

For example, under current law, anyone who has been convicted of a “particularly serious crime” is already ineligible for asylum, as is anyone who may pose a threat to national security.<sup>46</sup> The definition of a “particularly serious crime” explicitly includes all aggravated felonies.<sup>47</sup> Additionally, adjudicators have authority to determine that a crime is a “particularly serious crime” and that the applicant constitutes a danger to the community.<sup>48</sup> Even beyond these bars to asylum eligibility, the government also has discretion to deny asylum to anyone deemed to be undeserving of protection.

Additionally, under state law, what is considered a felony and what is not varies greatly. For example, in Arizona, a felony charge for shoplifting stolen goods is triggered if the goods are valued more than \$1,000.<sup>49</sup> In Florida, on the other hand, a felony charge for shoplifting is triggered if the value of stolen goods are valued over \$300.<sup>50</sup> In California, individuals receiving stolen property can be charged with a felony if the value of the stolen property exceeds \$950.<sup>51</sup> In Georgia, in order for an individual to be charged with the felony of receipt of stolen goods, the goods must be valued at more than \$1,500.<sup>52</sup>

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<sup>44</sup> See AR Rev. Stat. § 13-1805; FL Stat. § 812.014; CA Pen. Code. § 496(a); O.C.G.A. § 16-8-7(a).

<sup>45</sup> 84 Fed. Reg. at 69646 (“This calculation thus reflects a recognition that crimes with the potential for longer sentences tend to indicate that the offenders who commit such crimes are greater dangers to the community.”).

<sup>46</sup> INA §208(b)(2)(B)(i); INA §208(b)(2)(A)(iv). See also *Matter of A-H-*, 23 I&N Dec. 774, at 788-89.

<sup>47</sup> INA §208(b)(2)(B)(i).

<sup>48</sup> See *Matter of N-A-M*, 24 I&N Dec. 336 (BIA 2007); INA §208(b)(2)(A)(ii).

<sup>49</sup> See AR Rev. Stat. § 13-1805.

<sup>50</sup> See FL Stat. § 812.014.

<sup>51</sup> See CA Pen. Code. § 496(a); *People v. Land* (1994) 30 Cal.App.4<sup>th</sup> 220, 223.

<sup>52</sup> See O.C.G.A. §16-8-7(a).

Including all felonies to the list of asylum bars would create disparities between similarly situated individuals.

### ***Crimes “In Furtherance of Criminal Street Gang Activity”***

The rule also proposes to bar from asylum anyone who has been convicted of *any crime* if an adjudicator decides there is “reason to believe” the crime was committed in furtherance of criminal street gang activity.<sup>53</sup> The rule does not require a conviction for a gang-related crime, as defined by federal or state law (most such crimes would already be a bar to asylum eligibility). Instead, the rule proposes that the adjudicator act as a second prosecutor and decide, without the benefit of a criminal trial and due process of law, whether a crime could have been potentially gang related.

Allowing immigration adjudicators to make this determination after the fact is a significant overreach that would turn them into prosecutor, jury, and judge. Asylum adjudicators are not experts in gang-related crimes and crime databases are notoriously inaccurate and outdated.<sup>54</sup> For example, one report showed that “race, gender and age significantly determine who ends up” in California’s statewide gang database.<sup>55</sup> Any tattoos an applicant has can be misconstrued as gang tattoos by law enforcement officials without proper training, unjustly landing the applicant in a gang database. Serious crimes are already captured by current bars – the rule itself notes that some of the “relevant criminal street gang-related offenses may already constitute aggravated felonies,” and already bar eligibility for asylum.<sup>56</sup>

### ***Bars Based on Alleged Conduct, Not Convictions***

The rule proposes to make anyone ineligible for asylum who “engaged in acts of battery and extreme cruelty in a domestic context . . . regardless of whether such conduct resulted in a criminal conviction”.<sup>57</sup> The proposed rule assumes that the mere charging of the offense renders the person guilty of these crimes. By so doing, it deprives the individual the opportunity to challenge the alleged behavior and does away with the presumption of innocence. If the criminal prosecutors thought there was sufficient evidence to charge and convict the person of an additional crime or domestic violence-based enhancement, they would have done so during a criminal trial. And, serious crimes are already captured by current bars - the

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<sup>53</sup> 84 Fed. Reg. at 69649 (“Specifically, the proposed rule would cover individuals convicted of federal, state, tribal, or local crimes in cases in which the adjudicator knows or has reason to believe the crime was committed in furtherance of criminal street gang activity.”).

<sup>54</sup> See Anita Chabria, *A routine police stop landed him on California’s gang database. Is it racial profiling?*, La Times (May 9, 2019), available at <https://www.latimes.com/politics/la-pol-ca-california-gang-database-cal-gang-criminal-justice-reform-20190509-story.html>; Hannah Dreier, *He Drew His School Mascot — and ICE Labeled Him a Gang Member*, Propublica (December 27, 2018), available at <https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/>; Sarah Gonzalez, *Undocumented Teens Say They’re Falsely Accused of Being In A Gang*, NPR (August 17, 2017), available at <https://www.npr.org/2017/08/17/544081085/teens-in-u-s-illegally-say-theyre-falsely-accused-of-being-in-a-gang>.

<sup>55</sup> Immigrant Rights Clinic, *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences*, University of California, Irvine School of Law, April 2016, [www.law.uci.edu/academics/real-life-learning/clinics/ucilawirc-MislabeledReport.pdf](http://www.law.uci.edu/academics/real-life-learning/clinics/ucilawirc-MislabeledReport.pdf).

<sup>56</sup> 84 Fed. Reg. at 69650 (“Some of the relevant criminal street gang-related offenses may already constitute aggravated felonies, such that aliens convicted of such offenses would already be ineligible for asylum.”).

<sup>57</sup> 84 Fed. Reg. at 69651 (“the regulation would also render ineligible aliens who engaged in acts of battery and extreme cruelty in a domestic context in the United States, regardless of whether such conduct resulted in a criminal conviction.”).

rule itself notes “some of the offenses described above may already render an alien ineligible for asylum.”<sup>58</sup>

The proposed rule professes to justify barring someone for alleged conduct by saying that the asylum statute “already contemplates that individuals who engage in certain harmful behavior will be ineligible.” However, in reality, the statutes only bars asylum seekers for alleged conduct in exceptional circumstances like potential terrorist activity or persecution of others.<sup>59</sup> In order to preserve the presumption of innocence and ensure that falsely accused asylum seekers are not unduly penalized, conduct-based asylum bars should be used only in very limited circumstances, and in this case should not be expanded. Again, the current asylum laws already allow for the denial of asylum protection for these types of crimes when appropriate and the new bars will bar protection for vulnerable individuals.

### *Effect of Sentence Vacatures, Expungements, and Modifications*

The proposed rule would set restrictive limits on how sentence vacatures, expungements, and modifications affect a person’s eligibility for asylum. The regulations would allow vacated or expunged convictions to bar someone from asylum, permit an adjudicator to look at a wide range of evidence to see whether an order was issued for rehabilitative or immigration purposes, and create a presumption against the asylum applicant in certain cases.<sup>60</sup> It would also put the burden on the asylum seekers to show 1) that the order was not entered for rehabilitative or immigration purposes, and 2) that the court had jurisdiction to alter the order.<sup>61</sup> This new bar to asylum would undermine valid judicial determinations of rehabilitation that typically are the basis for vacatures, expungements and other sentence modifications.

For over half a century, until the recent decision in *Matter of Thomas and Thompson*, the Board of Immigration Appeals has accepted “at face value ... a judgment regularly granted by a competent court, unless a fatal defect is evident upon the judgment's face.”<sup>62</sup> Although in 1996 Congress imposed certain limitations on vacatures of convictions, it left intact the long history of applying this principle to state court sentencing decisions and alterations.<sup>63</sup> Refusing to “go behind” state court sentencing judgments is necessary to ensure that immigration authorities do not deviate from their role in enforcing federal immigration law. This makes sense because allowing both parties and adjudicators to look behind and challenge facially valid state court judgments will bog down an already overwhelmed asylum adjudications process, produce inconsistent results, and prejudice *pro se* or detained applicants who cannot readily access the necessary state court documents. Additionally, board members and immigration judges do not have expertise in state criminal law, including the vagaries of state sentencing law.<sup>64</sup> For

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<sup>58</sup> 84 Fed. Reg. at 69651 (“Some of the offenses described above may already render an alien ineligible for asylum, to the extent that a particular conviction qualifies as an aggravated felony.”).

<sup>59</sup> INA §208(b)(2)(A)(i), (iii)–(v).

<sup>60</sup> 84 Fed. Reg. at 69654 (“For convictions or sentences imposed thereafter, the proposed rule would provide that (1) vacated or expunged convictions, or modified convictions or sentences, remain valid for purposes of ascertaining eligibility for asylum if courts took such action for rehabilitative or immigration purposes...”).

<sup>61</sup> *See id.*

<sup>62</sup> *See Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019). *See also AILA and Partners Submit Amicus Brief on Judicial Alteration of a Criminal Conviction or Sentence*, AILA Doc. No. 19081932 (August 2, 2019), available at <https://www.aila.org/infonet/aila-and-partners-submit-amicus-brief-on-judicial>.

<sup>63</sup> *See, e.g., Cota-Vargas*, 23 I&N Dec. 849, 852 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173, 174 (BIA 2001).

<sup>64</sup> *See, e.g., Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 779 (9th Cir. 2018) (observing that “the BIA has no statutory expertise in ... state law matters”) (quotation omitted); *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014) (holding that the Board has “no particular expertise” over state law) (quotation omitted); *Patel v. Holder*, 707 F.3d 77, 79 (1st Cir. 2013) (same); *Jean-Louis v. Attorney Gen. of U.S.*, 582 F.3d 462, 466 (3rd Cir. 2009) (same); *Al-Najar v. Mukasey*, 515 F.3d 708, 714 (6th Cir. 2008) (same); *Mugalli v. Ashcroft*, 258 F.3d 52, 56 (2nd Cir. 2001) (same).

this reason, the agencies are not suited to "go behind" state court sentencing decisions to determine whether they meet the requirements of state law.

### **Convention Against Torture (CAT) and Withholding of Removal Are Not Adequate Substitutes**

The proposed rule states that individuals whose asylum claims are denied because of the new eligibility bars may nonetheless be able to obtain withholding of removal or deferral of removal under the Convention Against Torture (CAT).<sup>65</sup> These alternative forms of relief are not an adequate substitute for asylum. Withholding of removal and CAT protection are substantially more difficult to qualify for than asylum. Withholding of removal requires an applicant to demonstrate past persecution and a higher than 50% likelihood of persecution (that she is "more likely than not" to be persecuted) in her country of origin on account of a protected ground, and CAT protection requires demonstrating a more than 50% likelihood of torture.<sup>66</sup> In contrast, to qualify for asylum, even a 10% likelihood of persecution (a "clear probability") satisfies the individual's burden to demonstrate a well-founded fear of persecution.<sup>67</sup>

Individuals who manage to qualify for withholding of removal or CAT protection in the United States despite these barriers will suffer indefinite legal limbo. Under both forms of protection, the individual is first ordered removed, and then a second order is entered preventing the person's removal to the country from which they were granted protection. DHS retains the authority to remove them to a third country.<sup>68</sup> Moreover, they cannot obtain lawful permanent resident status and thus later apply to naturalize. They also cannot file for overseas family members to join them in the United States, leaving their families separated—and possibly at risk abroad—on a potentially permanent basis.<sup>69</sup> Such permanent separation directly undermines our nation's interest in safeguarding family unity.

### **Conclusion**

AILA opposes the proposed regulations because they will return vulnerable individuals who deserve protection to danger and potential death. This proposed rule severely limits who is eligible for asylum protection in the U.S. Its harmful impact is compounded by several other recent agency policies that restrict asylum access including the "asylum cooperative agreements," the expansion of MPP, and an interim final rule creating a new bar to asylum for those who have transited through a third country before reaching the southern border, among other policy developments.<sup>70</sup> These policies are choking off access for asylum and are fundamentally undermining U.S. commitment to protect those fleeing persecution and harm. We urge the agencies to reconsider the proposed rule and withdraw it from consideration.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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<sup>65</sup> 84 Fed. Reg. at 69644 ("It does not affect grants of the statutory withholding of removal or protection under the CAT regulations.").

<sup>66</sup> See 8 C.F.R. § 208.16(b), (c)(2); see also *INS v. Stevic*, 467 U.S. 407 (1984); *Matter of M-B-A*, 23 I&N Dec. 474 (BIA 2002).

<sup>67</sup> See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>68</sup> 84 Fed. Reg. at 69642. See also Human Rights First, *Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk* (Nov. 2018), available at [https://www.humanrightsfirst.org/sites/default/files/CAT\\_Withholding.pdf](https://www.humanrightsfirst.org/sites/default/files/CAT_Withholding.pdf).

<sup>69</sup> *Id.*

<sup>70</sup> Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (November 19, 2019); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019); *A Guide to Policies Affecting Asylum Seekers at the Border* (November 19, 2019), available at <https://www.americanimmigrationcouncil.org/research/guide-policies-affecting-asylum-seekers-border>.