



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

September 23, 2019

Acting Secretary Kevin K. McAleenan
Department of Homeland Security
Washington, DC 20528

Submitted via: www.regulations.gov

**RE: DHS Docket No. DHS–2019–0036
Request for Comment on Designating Aliens for Expedited Removal, 84 Fed.
Reg. 35409 (Jul. 23, 2019)**

Dear Acting Secretary McAleenan,

The American Immigration Lawyers Association (AILA) submits the following comments in response to DHS Docket No. DHS–2019–0036, the Department of Homeland Security (DHS) request for comments on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019) (hereinafter, the Notice).

Founded in 1946, 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. Our 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, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this Notice and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

This immediately effective Notice broadly expanded the scope of expedited removal to include individuals apprehended after residing in the United States for up to two years and/or in the interior of the United States. The Notice will have immediate and long-lasting effects on the due process and statutory rights of individuals subject to expedited removal. For the following reasons, DHS should immediately halt implementation of the expansion of expedited removal and take steps to ameliorate the well-documented problems in the expedited removal process as it existed prior to the Notice.

The Expedited Removal Process Is Already Fundamentally Flawed

There are fundamental defects built into the expedited removal process that have made it deeply problematic even in its prior form. Under expedited removal, DHS officers have broad authority to carry out the fast track removals, with so little oversight from an impartial judge or other third party, that mistakes or violations of procedures are rarely discovered and remedied. The removals themselves also happen so quickly, that individuals do not have the time or ability to

AILA National Office

1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

AILA Doc. No. 19092300. (Posted 9/23/19)

consult with family members or attorneys in order to collect evidence or build their case for relief. These flaws have led to well-documented and widespread errors, government misconduct, and the violations of individuals' legal rights.ⁱ

Officers routinely record inaccurate or false information on expedited removal forms

The content of the paperwork that DHS officers complete during expedited removal proceedings has a profound impact on the individuals subject to expedited removal—for many, it will result in their immediate deportation; for others, the content of forms filled out during initial interviews will impact assessments of their credibility in subsequent proceedings. Yet this paperwork is often replete with errors.

Multiple reports document the frequent practice by DHS officers' of including inaccurate information in expedited removal paperwork, failing to provide people in expedited removal proceedings with the opportunity to review and respond to information in the paperwork, using coercion to force people to sign forms they do not understand, and requiring individuals to sign paperwork despite interpretation failures that impact their ability to understand the proceedings.ⁱⁱ

In addition, practitioners report that immigration officers routinely fail to advise people of their rights in expedited removal proceedings, including that they may request to withdraw their applications for admission, which allows noncitizens to leave the United States voluntarily and avoid penalties that include permanent inadmissibility to the country. *See* 8 U.S.C. § 1225(a)(4) (providing that noncitizen seeking admission “may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission”). There is a significant risk that noncitizens subject to the Notice likewise will be erroneously denied this important opportunity, provided by statute, to withdraw their applications for admission.

Forcing tens of thousands more individuals, many of whom will have lived in the United States for significant periods of time and developed substantial ties, through this flawed and fast-tracked system is not appropriate. AILA recommends DHS halt the implementation of the Notice to avoid subjecting more individuals with claims to relief to a system replete with coercion, factual errors, and inadequate translation.

Officers regularly interfere with the rights of individuals in expedited removal to pursue asylum claims

DHS officers, usually those employed by U.S. Customs and Border Protection (CBP), are required to inform individuals potentially subject to expedited removal of their rights and refer those with a fear of return to their countries of origin to asylum officers within U.S. Citizenship and Immigration Services (USCIS) for credible fear interviews (CFIs). These responsibilities are to be carried out without misinformation, harassment, or intimidation.

Multiple government and non-governmental organization reports show that DHS officers have neglected to carry out these responsibilities. They regularly fail to record statements by

individuals subject to expedited removal that indicate a fear of return; fail to refer individuals who express fear of return for CFIs, fail to ask individuals in expedited removal proceedings about their fear of return, and subject these individuals to harassment and misinformation that actively interferes with their ability to pursue asylum claims.ⁱⁱⁱ

AILA, along with several other organizations, filed a complaint with DHS Civil Rights and Civil Liberties in 2014 detailing the government's increased dependence on summary removal procedures and the harmful consequences it has on asylum seekers, and summarizing the experiences of a number of individual complainants who experienced serious errors made by CBP officers.^{iv} For example, in one case highlighted in the complaint, a gay man from El Salvador who had been sexually abused as a child and spent most of his life hiding his sexual orientation fled to the United States. When he was apprehended at the border, he asked to apply for asylum. The CBP officer told him he didn't qualify and had no rights. The individual repeatedly asked for protection but was never referred for a credible fear interview and was deported soon after.

While cases like the once described above are already all too common, DHS's implementation of the Notice will mean that the failure of immigration officers to fulfill their basic obligations to asylum seekers is likely to be even more frequent. In fact, the Notice itself suggests that, now that DHS has expanded the scope of expedited removal, tens of thousands more individuals each year could be forced through this flawed system that routinely deprives individuals of their right to speak to an asylum officer for a credible fear interview. *See* 84 Fed. Reg. at 35411. In order to safeguard asylum seekers' right to seek protection from persecution and torture, DHS should halt implementation of the Notice.

There are well-documented failures in the credible fear process

Even those individuals who receive credible fear interviews after DHS inspection in expedited removal face significant barriers to fair adjudication of their claims. As well-documented reports indicate, these individuals may not receive adequate consideration of their claims during the credible fear interview process typically conducted by an asylum officer.^v Instead, they are denied access to counsel and receive poor interpretation during interviews resulting in wrongful denials of asylum. Deeply troubling is DHS's decision to conduct CFIs using CBP officers, who are inadequately trained and ill-suited for making the complex, legal determination required for a persecution claim. Expanding expedited removal to a larger population, as set forth in the Notice, will compound these long-standing problems in the CFI system.

DHS officers have wrongfully removed numerous individuals through expedited removal

As a result of the widespread flaws in the expedited removal process, numerous individuals have been wrongfully removed from the United States. This includes many reported instances of deportations of U.S. citizens.^{vi} Similarly, due to the streamlined procedures use for expedited

removal, DHS frequently fails to identify immigrants who are not legally subject to expedited removal. For example, people who have lived in the United States for many years or they have credible fear of persecution are not subject to expedited removal, but DHS has erroneously applied the procedure to many such individuals.^{vii}

Errors Will Increase Under the Notice Expanding Expedited Removal

These errors are likely to increase with this expansion of expedited removal. It will be exceedingly difficult for people to prove they have two years of continuous physical presence in the United States while they are detained and facing an accelerated removal procedure. As a result more people will be wrongfully subject to the expanded expedited removal process. In order to prevent improper deportation of long-time residents or citizens of the United States, including to countries where those individuals face persecution or torture, DHS should halt implementation of the Notice.

Conclusion

We request that DHS consider these recommendations, halt expansion of the scope of expedited removal, and act immediately to address the long-standing problems with implementation of the pre-July 23, 2019 expedited removal system. Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your consideration.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

ⁱ U.S. Comm'n on Int'l Religious Freedom, [Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations](#) (2005); [Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal](#) (2016); Immigrant Legal Resource Center, [Fair Treatment Denied: The Trump Administration's Troubling Attempt to Expand "Fast-Track" Deportations](#) (June 2017); American Immigration Council, [The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers](#) (May 2017).

ⁱⁱ See, e.g., Borderland Immigration Council, *Discretion to Deny* at 13 (noting that "[i]ndividuals are forced to sign legal documents in English without translation" and "that CBP affidavits are often inconsistent with asylum-seekers' own accounts"); 2016 USCIRF Study at 2, 20-22 (discussing "continuing and new concerns about CBP officers' interviewing practices and the reliability of the records they create"); American Civil Liberties Union, *American Exile* at 34-36 (describing noncitizens who were required to sign forms in languages they do not understand); 2005 USCIRF Study at 74 (explaining that statements recorded by CBP officers "are often inaccurate and are almost always unverifiable"); *id.* at 55 ("Study observations indicate that paper files created by the inspector are not always reliable indicators" of whether a credible fear interview was merited.); *id.* at 53 (noting that expedited removal forms were routinely inaccurate); *United States v. Sanchez-Figuero*, No. 3:19-cr-00025-MMD-WGC, slip op. at 2, 9 (D. Nev. July 25, 2019) (dismissing unlawful reentry indictment where defendant, who had not slept for 36 hours at the time of apprehension, "was not informed of the charge against him and never received a meaningful opportunity to

review the sworn statement”); *United States v. Raya-Vaca*, 771 F.3d 1195, 1205-06, 1210-11 (9th Cir. 2014) (holding that immigration officer’s failure during expedited removal process to advise the defendant of the charge of removability and to permit him to review the sworn statement prepared by the officer violated his due process rights to notice and an opportunity to respond).

ⁱⁱⁱ 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); Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* 12 (2017) (“In 12% of the cases documented for this report, individuals expressing fear of violence upon return to their country of origin were not processed for credible fear screenings and instead, were placed into removal proceedings.”); DHS Office of the Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) (describing CBP practices amounting to failure to properly refer asylum seekers for CFIs in order to “regulat[e] the flow of asylum-seekers at ports of entry”); 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); American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, 9 (Aug. 2017) (reporting CBP’s failure to act in response to complaints of misconduct, including complaints that agents ignored claims of fear or persecution); 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); 2005 USCIRF Study at 4, 10, 64 (documenting numerous “serious problems” in the expedited removal process “which put some asylum seekers at risk of improper return” and describing expedited removal as “a [s]ystem with [s]erious [f]laws”), *id.* at 53-54 (finding that in 15% of observed cases, when a noncitizen expressed a fear of return to an immigration officer during the inspections process, the officer failed to refer the individual to an asylum officer for a credible fear interview).

^{iv} American Immigration Lawyers Association et. al, [AILA, NIJC, and Others File CRCL Complaint Reporting Serious Flaws in CBP Fear Screening](#) (November 2014).

^v See, e.g., U.S. Dep’t of Homeland Sec. Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers* 96-100 (2016) (discussing inadequate or nonexistent interpretation services during credible fear interviews and immigration judge reviews of negative credible fear determinations); Borderland Immigration Council, *Discretion to Deny* at 13 (describing interpretation failures during CFIs); 2016 USCIRF Study at 28 (describing case of a detained Ethiopian asylum seeker who was denied an interpreter); American Civil Liberties Union, *American Exile* at 34 (“Most of the individuals interviewed . . . stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter.”); *Interior Immigration Enforcement Legislation: Hearing Before the H. Judiciary Subcomm. on Immigration & Border Sec.* 5 (Feb. 11, 2015) (statement of Eleanor Acer, Dir., Refugee Protection, Human Rights First) (“In some cases, interviews are

sometimes rushed, essential information is not identified due to lack of follow up questions, and/or other mistakes are made that block genuine asylum seekers from even applying for asylum and having a real chance to submit evidence and have their case fully considered”).

^{vi} See, e.g., *Lytle v. United States*, 867 F. Supp. 2d 1256, 1272-73 (M.D. Ga. 2012); *Maria de la Paz v. Jeh Johnson*, No. 1:14-CV-016 (S.D. Tex. habeas petition filed Jan. 24, 2014); Ian James, *Wrongly Deported, American Citizen Sues INS for \$8 Million*, L.A. Times (Sept. 3, 2000) (recounting expedited removal of U.S. citizen Sharon McKnight).

^{vii} See, e.g., *American Exile* at 63 (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id.* at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id.* at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview); *United States v. Mejia-Avila*, No. 2:14-CR-0177-WFN-1, 2016 WL 1423845, at *1 (E.D. Wash. Apr. 5, 2016) (dismissing indictment where defendant was not subject to expedited removal because the record was “clear” that he had lived in the United States for more than two years).