



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION



June 11, 2024

Mr. Daniel Delgado
Director for Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
Washington, DC 20528

Submitted via <http://www.regulations.gov>

**Re: American Immigration Lawyers Association and American Immigration Council
Comment on Application of Certain Mandatory Bars in Fear Screenings DHS
Docket No. USCIS-2024-0005**

Dear Mr. Delgado:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) submit the following comment in response to the above-referenced U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS) notice of proposed rulemaking (proposed rule), Application of Certain Mandatory Bars in Fear Screenings (DHS Docket No. USCIS-2024-0005), 89 FR 41347 (May 13, 2024).

The situation the Biden administration faces at the U.S./Mexico border is a uniquely difficult one. Regional migratory and displacement patterns have shifted significantly in recent years. Increased numbers of asylum seekers at the southern border from countries throughout the Western Hemisphere and increasingly from elsewhere are a symptom of these changes in migration, as well as the longstanding failure by Congress to reform the immigration system to alleviate the pressure at the southern border. Compounding this is the historic asylum backlog that DHS faces.

The proposed rule adds complexity and further uncertainty to the credible fear interview (CFI) stage of the expedited removal process. As is, expedited removal undermines due process and makes it extremely difficult for someone to access legal counsel. The rule enables an asylum officer (AO) to make a complex legal determination during the time-limited credible fear interview stage as to whether a mandatory bar to asylum applies. This additional determination will be applied to asylum seekers who will not have adequate time to collect evidence, are largely unrepresented by counsel, and have little to no understanding of the legal process they are going through. Instead of bringing more consistency and predictability to the border, this will lead to erroneous and arbitrary removals of asylum seekers back to harm.

We urge DHS to reconsider and rescind this proposed rule. If, however, DHS proceeds with the rule, we offer recommendations in this comment to ameliorate possible harms.

I. About AILA and the Council

Established in 1946, AILA is a voluntary bar association of nearly 17,000 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 naturalization 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.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

II. The Existing Expedited Removal Process Has Inherent and Significant Due Process Concerns.

Asylum seekers undergoing credible fear or reasonable fear screenings ("fear interviews") do so in less than ideal humanitarian conditions with significant due process limitations. They are usually detained and are only able to "consult" with attorneys.¹ Available data for CFIs suggests that only one percent of people were represented in their CFI.² AILA members report that even when a noncitizen obtains an attorney, it often is not until after the credible fear interview itself, and instead for the immigration judge appeal. During the appeals, AILA members report that immigration judges (IJs) commonly forbid attorneys from speaking and advocating for their clients. Several additional barriers to representation exist within the expedited removal process, including that many asylum seekers are interviewed in remote detention facilities far away from legal service providers; telephone services may be prohibitively costly and not be freely accessible to noncitizens; and language barriers may prevent migrants from accessing law libraries or contacting counsel.³

Currently, most fear interviews are generally conducted telephonically from detention with a USCIS AO over the course of a few hours, with remote interpretation if needed. The AO

¹ See INA § 235(b)(1)(B)(iv).

² U.S. Department of Homeland Security Office of Homeland Security Statistics, "Asylum Processing Rule Cohort Reports," last updated April 30, 2024, <https://www.aila.org/library/policy-brief-the-asylum-credible-fear-standard>. Data is only available for CFIs under the Asylum Processing Rule.

³ See U.S. Commission on International Religious Freedom, "Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal," <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>, pgs. 52-53 ("The rural locations of many of the facilities where asylum seekers are detained continue to make it very difficult, as a practical matter, for individuals to obtain legal advice."); American Civil Liberties Union, "No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers," at 12-16, <https://www.aclu.org/publications/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers> ("There is also ample evidence that individuals in ICE custody have been forced to undergo their credible fear interviews in languages they did not fully understand."); Zefitret Abera Molla, "Improving Language Access in the U.S. Asylum System," Center for American Progress, May 25, 2023, <https://www.americanprogress.org/article/improving-language-access-in-the-u-s-asylum-system/>.

does not have the opportunity to assess whether the space the asylum seeker is in provides necessary privacy protections.⁴ They also do not have the advantage of assessing the asylum seeker's body language, such as facial expressions or non-verbal cues, as well as establishing the kind of personal connection that would occur in person.⁵

Since April 2023, some credible fear interviews have been conducted while asylum seekers are in Customs and Border Protection (CBP) custody.⁶ These interviews are held on erratic schedules—some within as little as 24 hours of asylum seekers' arrival and others after weeks in CBP detention.⁷ Access to counsel is severely obstructed, as attorneys are provided little to no notice regarding their clients' fear interviews, and CBP denies access to its facilities for attorneys to consult with their clients in person and has not established video-conferencing technology.⁸ Conditions in these facilities are often unsanitary and unsafe due to medical neglect, lack of basic hygiene and showers, and inedible food and water.⁹ Some asylum seekers decide to forgo their fear interviews simply to be released from detention.¹⁰

Since May 2023, some fear interviews have been conducted outside of detention through the Family Expedited Removal Management program ("FERM").¹¹ Families placed into FERM are generally provided a fear interview within 6-12 days of arrival in the United States.¹² The goal of FERM is to carry out a fear interview and any resultant order of deportation within 30 days.¹³ While there is a marginally higher likelihood of obtaining counsel outside of detention,

⁴ See New Mexico Immigrant Law Center, Las Americas, Innovation Law Lab, ACLU New Mexico, Complaint RE: Ongoing Due Process Violations and Human Rights Abuses at the Torrance County Detention Facility, August 21, 2023, https://innovationlawlab.org/media/TCDF_Complaint-8_21_2023_Redacted.pdf.

⁵ See U.S. Commission on International Religious Freedom, "Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal," p. 25, <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

⁶ National Immigrant Justice Center, "Obstructed Legal Access: NIJC's Findings from 3 Weeks of Telephonic Legal Consultations in CBP Custody," May 25, 2023, <https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijc-findings-3-weeks-telephonic-legal-consultations-cbp>.

⁷ National Immigrant Justice Center, "Obstructed Legal Access: June 2023 Update," June 20, 2023, <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update>.

⁸ *Id.*

⁹ See Letter to DHS, CBP, USCIS, and EOIR, "The Biden Administration Must Immediately Stop Conducting Credible Fear Interviews in CBP Custody," June 5, 2023, <https://freedomnetworkusa.org/app/uploads/2023/06/June-5-2023-Biden-Must-Stop-Conducting-CFIs-in-CBP-Custody.pdf>.

¹⁰ National Immigrant Justice Center, "Government Obstruction Forces NIJC To Discontinue Legal Consultations For People Facing Asylum Screenings In CBP Detention," August 1, 2023, <https://immigrantjustice.org/press-releases/government-obstruction-forces-nijc-discontinue-legal-consultations-people-facing>.

¹¹ U.S. Immigration and Customs Enforcement, "ICE announces new process for placing family units in expedited removal," May 10, 2023, <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal>.

¹² Araceli Garcia, "Think Immigration: A Look Inside DHS' Family Expedited Removal Management Program," *Think Immigration*, March 13, 2024, <https://www.aila.org/library/think-immigration-a-look-inside-dhs-family-expedited-removal-management-program>.

¹³ See National Immigrant Justice Center, "Policy Brief | ICE's Family Expedited Removal Management (FERM) Program Puts Families At Risk," August 31, 2023, <https://immigrantjustice.org/research-items/policy-brief-ices-family-expedited-removal-management-ferm-program-puts-families>.

practitioners report that the expedited timeframes of FERM still make access to counsel difficult.¹⁴

In contrast, in removal proceedings, an asylum seeker has the right to counsel,¹⁵ who is knowledgeable of relevant legal precedent and can review any evidence proffered by DHS. In addition, an IJ is required to develop the record for pro se asylum seekers.¹⁶ Removal proceedings are a more suitable setting for applications for asylum or withholding of removal that involve particularly nuanced areas of immigration law—such as the evaluation of the complex mandatory bars to asylum that the proposed rule would insert into the credible fear stage.

Recommendation: If DHS proceeds with this rule, every noncitizen whose case is identified with a possible mandatory bar should be notified of their right to counsel, allowed time to secure an attorney, and be eligible for judicial review.

III. Due Process Will Be Compromised By Enabling Asylum Officers to Apply Complex Mandatory Bars to Asylum During the Credible and Reasonable Fear Interview.

The Proposed Rule would alter current procedures by allowing AOs to apply bars to asylum during the already problematic expedited removal process. INA § 208(b)(2)(A)(i)–(v) and 8 U.S.C. § 1158(b)(2)(A)(i)–(v) and INA § 241(b)(3)(B) and 8 U.S.C. § 1231(b)(3)(B) lay out statutory bars to asylum and withholding of removal. People found subject to any of these bars will be denied asylum or withholding of removal even if they can demonstrate that they have a credible fear of suffering persecution if removed from the United States. As described above, the expedited removal process does not provide adequate due process. Inherent throughout is the administrative pressure to accelerate the decision process. The injection of the mandatory bars, a particularly complex area of immigration law, into the expedited removal process will further undermine due process for the impacted asylum seekers.

A. Congress Never Intended Expedited Removal to Address the Level of Complexity Present in the Mandatory Bars to Asylum

The proposed changes undercut the Congressional objectives of both the Refugee Act and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). When it enacted IIRIRA, Congress described the entire expedited removal process as “streamlined, with the objective of completing proceedings *before the immigration judge*” (emphasis added).¹⁷ Congress’ purpose for enacting the CFI was not to determine whether an applicant qualifies for asylum, but “to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process.”¹⁸ As Senator Ted Kennedy pointed out, “expedited exclusion procedures” that do not afford procedural safeguards such as “[a] hearing”

¹⁴ Cindy S. Woods, Americans for Immigrant Justice, “The Family Expedited Removal Management Program (FERM): A Three-Month Assessment,” September 7, 2023, <https://aijustice.org/ferm-report/>.

¹⁵ See INA 292; 8 U.S.C. 1362.

¹⁶ See, e.g., *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021); *Agyeman v. INS*, 296 F.3d 871, 877, 883–84 (9th Cir. 2002); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504–05 (6th Cir. 2019); and *Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004).

¹⁷ H.R. Rep. No. 104-469, pt. 1, at 139 (1996).

¹⁸ *Id.* at 158.

and “access to counsel” run the risk that the United States will “turn away true refugees.”¹⁹ By allowing AOs to make determinations for mandatory bars during credible fear interviews, the proposed changes undermine the process Congress specifically created to ensure that asylum applications are fairly reviewed.

The proposed rule will expand the scope of the credible fear interview process to include the possibility of extensive factual investigations, which may cause additional cost and delay, impose additional burdens on AOs, and go far beyond the purpose and intent of the credible fear screening. The bars to eligibility are complex from both a legal and factual standpoint, and the credible fear interview is wholly inadequate as a mechanism for determining who is subject to them.

The complexity of these bars is demonstrated by cases where DHS alleged they applied when they did not. This is something that AILA members see both in expedited removal and in removal proceedings under INA Section 240. For example, Jonathan Louis Levy, an AILA member from Texas, shared this case where an AO indicated that the persecutor and particularly serious crime bars possibly applied, even when they did not:

. . . Respondent worked for the police in a prison in [Country]. The CFI summary states that Respondent said he “worked with [a criminal group] briefly because they threatened to kill me.” The officer then asked, “What exactly did you do for them?” and, according to the CFI, [the] Respondent said, “I worked with them as a custodian of money for a little bit, keeping their inventory and guarding them and providing security.” Because of that, the officer flagged possible persecutor and PSC [particularly serious crime] bars.

At the merits hearing, the immigration judge investigated further. It turns out that as custodian, he was just keeping tabs on the prisoners’ inventory and that “providing security” meant not that he was the group’s bodyguard but that, in the IJ’s words, he was “guarding them and making sure they didn’t escape the prison.” In other words, [the] Respondent was just doing his job [as a prison guard]. The IJ found that no bar applied.

Another AILA member Andrew Younkings of Colorado shared this example of an erroneous application of the terrorism bar:

I recently prevailed in an asylum case for a [nationality] asylum seeker. . . . who was kidnapped by a separatist group, [redacted]. The government asserted the TRIG [terrorism-related inadmissibility grounds] bar on the grounds of his “material support of terrorism.” Despite the narrow strictures of this bar as applied to coerced kidnapping victims, we were able to show through credible testimony that he took no actions to materially support the [redacted], not even cooking a meal (which itself would bar him from relief under the TRIG bar). We showed that he was only forced to drill, and that this was not “material support” of the organization, despite the government’s many attempts to show otherwise. He was granted asylum . . . [i]f this bar were [to be] applied at the CFI stage,

¹⁹ See Immigration Control and Financial Responsibility Act of 1996, 142 Cong. Rec., S3282 (daily ed. April 15, 1996).

where a detailed examination of the facts and the law is nearly impossible, he probably would have failed.

These security bars are so complex that an attorney will often hire another attorney who specializes in them to consult on the case, as one AILA member reported doing, saying “I ended up hiring a mentor for help on the TRIG part of the case.”

If an experienced immigration attorney feels it is necessary to hire a specialist to navigate the nuances of these bars, it is ludicrous for DHS to expect that a pro se asylum seeker could do so—while detained, through an interpreter, during a telephonic CFI.

B. The Proposed Rule Lacks Clarity Around the Applicability of TRIG Exemptions at the CFI Level

It is unclear from the proposed rule how, or if, the terrorism-related inadmissibility grounds (TRIG) exemptions will be applied under this rule. Currently, if an immigration judge determines that an asylum application would have been granted, but that the terrorism bar applies, the case is reviewed for exemptions by specialists at USCIS, which retains jurisdiction of TRIG exemptions. These exemptions include: material support under duress, solicitation under duress, military-type training under duress, voluntary medical care, and insignificant material support, among others.²⁰

The existing TRIG exemption process lacks transparency and it is exceedingly difficult for attorneys to receive updates on cases under this office’s jurisdiction. Moreover, it can take years for the office to process an exemption. However, the fact that USCIS recognizes the complexity and nuance within the terrorism bar by designating an office of TRIG specialists who focus on this issue demonstrates just how complex this bar and its associated exemptions can be. Even though the exemption process is time consuming, the TRIG specialists at USCIS granted over 96% of the processed exemption claims (across all applications, including asylum) in FY 2022.²¹ The fact that it takes a team of specialists years to adjudicate these TRIG exemptions shows the impossibility of applying them fairly or accurately in the limited time available in expedited removal. Furthermore, it seems unlikely that each individual AO conducting telephonic CFIs could reach the same level of expertise in adjudicating this complicated issue as this small team of TRIG specialists. If they could be trained thusly, it is uncertain why USCIS’s office of TRIG specialists exists at all.

²⁰ USCIS, “Terrorism-Related Inadmissibility Grounds Exemptions,” last reviewed/updated July 13, 2022, <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions>.

²¹ Exemptions granted: 603; denied: 24. Total processed: 627. Percentage granted (603/627): 96.17%. Data is across all eligible applications and is not available for denials specific to asylum applications. USCIS Terrorism-Related Inadmissibility Grounds (TRIG) Stakeholder Meeting, Monday, April 10, 2023, <https://www.aila.org/library/statistics-from-april-2023-uscis-terrorism-related>.

TRIG exemptions are particularly important for Afghan asylum seekers, who can and do cross the southwest border.²² There are currently 6.4 million Afghan refugees globally.²³ This displacement is due in part to U.S. action, as much of the current refugee crisis stems from the August 2021 withdrawal of the U.S. military presence and the subsequent return of the Taliban to power.²⁴ Congress recognized the significance of this displacement by requiring the expeditious processing of asylum applications only a month after the withdrawal.²⁵ While the Taliban is not currently recognized as a foreign terrorist organization,²⁶ Afghan refugees are particularly vulnerable to having a history that may indicate a terrorist bar. This is demonstrated by the Secretaries of both DHS and the Department of State (DOS) issuing policy memorandums and exercise of authorities pertaining to TRIG exemptions for both Afghan Civil Servants and Afghan (U.S.) Allies.²⁷

According to AILA member reports, these nuances pertaining to Afghan asylum seekers and TRIG exemptions are already lost at the CFI level. For example, AILA member Paulina Reyes of California shares the following case example from expedited removal:

. . . This year, I had two instances where a similar application was used against my clients only because of their country of nationality. One client entered between ports of entry and the other presented himself at the Port of Entry with a CBP One appointment. Both were eventually placed in ICE custody and given a [CFI]. They both previously worked in the U.S.-backed Afghanistan government before the Taliban takeover in August 2021. Both are ethnic minorities that alone would subject them to harm, in addition to their prior employment. They have no criminal history or immigration history. They both received a positive decision, very credible and high likelihood of harm, but were also flagged with the possible bars of “terrorist” and “security risk” because of their nationality and prior employment.

Had the rule[] been applied to them, an AO could have denied their CFI even where there is a clear likelihood that the person can be granted asylum. They have

²² See U.S. Committee for Refugees and Immigrants, “Policy Brief - Afghans Arriving via the Southern Border,” Policy and Advocacy Report vol. 6 issue 12, April 11, 2023, <https://sway.cloud.microsoft/gzFXkrhztixaZA1C?ref=email>; See also Michael Neal, “Criminal Prosecution Of Afghan Asylum Seekers at the US-Mexico Border,” Villanova Law Review, March 21, 2024, <https://www.villanovawlawreview.com/post/2426-criminal-prosecution-of-afghan-asylum-seekers-at-the-us-mexico-border>.

²³ UNHCR, “Afghanistan Situation,” accessed May 23, 2024,

<https://reporting.unhcr.org/operational/situations/afghanistan-situation>.

²⁴ See UNHCR, “Afghanistan Refugee Crisis Explained,” July 18, 2023,

<https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/#Afghanistan>.

²⁵ Extending Government Funding and Delivering Emergency Assistance Act, H.R. 5305, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5305/text>.

²⁶ See DOS, “Foreign Terrorist Organizations,” accessed May 23, 2024,

<https://www.state.gov/foreign-terrorist-organizations/>; Sen. Maro Rubio, “Rubio, Colleagues Reintroduce Bill to Designate Taliban as a Foreign Terrorist Organization,” November 1, 2023,

[https://www.rubio.senate.gov/rubio-colleagues-reintroduce-bill-to-designate-taliban-as-a-foreign-terrorist-organization/#:~:text=Despite%20its%20long%20history%20of,Foreign%20Terrorist%20Organization%20\(FTO\).](https://www.rubio.senate.gov/rubio-colleagues-reintroduce-bill-to-designate-taliban-as-a-foreign-terrorist-organization/#:~:text=Despite%20its%20long%20history%20of,Foreign%20Terrorist%20Organization%20(FTO).)

²⁷ USCIS, “Terrorism-Related Inadmissibility Grounds (TRIG) - Situational Exemptions,” May 16, 2023, <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions>.

the ability to prove their case to an immigration judge. However, they are still detained because [DHS] believed they could be [a] “security risk.” They are in proceedings, and as of now DHS has not filed any evidence barring them from asylum. At the CFI, the clients both answered NO to questions about involvement with the Taliban or other terrorist groups, yet the AO still flagged them with no further explanation why they did that.

Under the proposed rule, Ms. Reyes’ Afghan clients likely would have been deported—without explanation or transparency around the application of the TRIG bar, without access to counsel, and without access to the nuanced approach USCIS’s own TRIG specialists apply around exemptions to the terrorism bar.

Recommendation: If DHS proceeds with this rule, the terrorism bar should be excluded due to its significant complexity and the availability of commonly granted exemptions that cannot be adequately applied in an expedited removal context.

IV. The Proposed Rule Lacks Significant Protections to Prevent the Erroneous Application and Subsequent Removal of These Bars.

A. The Proposed Rule Lacks Sufficient Guardrails to Prevent the Misapplication of the Rule

USCIS relies heavily on AO discretion throughout this proposed rule, to the detriment of due process, as discretion goes both ways. At one point, the proposed rule explicitly allows for the discretion to apply the bars even if there is no evidence or time to effectively engage with the mandatory bars.

If the evidence in the credible fear record before USCIS is such that a USCIS AO would be unable to apply the mandatory bars in the credible fear determination efficiently or effectively obtain sufficient information related to the bar in the time allotted for a credible fear interview, then USCIS **may** exercise its discretion **not** to apply the bars in a given case.²⁸ (emphasis added)

²⁸ Proposed Rule, 89 Fed. Reg. at 41357.

The rule should be amended to forbid an AO from applying the bar in the above situation. If a USCIS AO is unable to efficiently or effectively obtain sufficient information related to these complex bars during a CFI, the AO **should not** be permitted to apply the bars. Allowing discretion to apply these bars **despite** a lack of evidence or the time to solicit information leaves the door open to this regulation being applied in an arbitrary and capricious manner.

While we believe there is no situation where these mandatory bars should be applied in an expedited removal context, it is particularly concerning that the proposed rule may be applied in cases where even the AO believes that there is no clear evidence that a bar applies, particularly given the general lack of transparency throughout the expedited removal process. This level of discretion, which lacks sufficient guardrails, opens the door to AOs making these decisions with little or insufficient oversight and at the expense of asylum seekers who may be deported to persecution on a record that even the AO believes is inadequate.

Recommendation: Further guardrails should be implemented to ensure that discretion is not used to apply this rule in fear interviews where the evidence and information available would be insufficient to survive judicial review.

B. The Reliance on Cases Being “Clearly Ineligible” is Misguided Given the Complexity of this Area of Immigration Law.

The proposed rule will burden the adjudication process because it will result in confusion among adjudicators and could lead to arbitrary decisions and a lack of consistency in adjudications. While USCIS proposes this rule as another tool to provide “swift consequences,” it is not clear in practice to whose cases this tool will be applied.²⁹ There are several references in the preamble that the mandatory bars would be applied to cases where the evidence is obvious, such as those where the noncitizen is “clearly ineligible” or there is “easily verifiable evidence.”³⁰ However, the regulatory text does not include any such limitations on the applicability of the proposed regulatory changes, and does not define “clearly ineligible” or “easily verifiable.” Indeed, there are indications in the preamble that AOs will be allowed broad latitude in deciding when to apply these bars. For example, in the preamble, USCIS states that it “expects that AOs would choose to apply a mandatory bar” to a subset of cases with sufficient supporting evidence available to the AO.³¹ However, there is no requirement that AOs only apply them in these contexts.

USCIS provides an example of a situation where “the applicability of a bar is clear”: “if a noncitizen was convicted of murder and sentenced to ten or more years in prison in a country with a fair and independent judicial system.”³² However, it is unclear which countries USCIS would consider as having a “fair and independent judicial system,” especially if the noncitizen is claiming persecution due to their political opinion or government actors, generally. For instance, the Department of State’s 2023 Human Rights Report for Ecuador states that “[j]udges reportedly rendered decisions more quickly or more slowly due to media and political pressure or

²⁹ Proposed Rule, 89 Fed. Reg. at 41358.

³⁰ Proposed Rule, 89 Fed. Reg. at 41353-41354.

³¹ Proposed Rule, 89 Fed. Reg. at 41359.

³² Proposed Rule, 89 Fed. Reg. at 41354.

fear in some cases.”³³ The Proposed Rule does not address how an AO would provide sufficient evidentiary support of a murder conviction from a foreign country, or if or how they would support the assessment that a conviction was issued by a fair and independent judicial system.

The regulatory text does not provide further clarity. Once an AO decides to apply the bar, an officer must only show that it “appears” that a bar applies to shift the burden to the noncitizen to show that the bar does not apply.³⁴ While an AO must elicit sufficient information to determine whether a bar appears to apply to a noncitizen’s claim, it is not clear to what extent the AO must conduct legal analysis to determine whether the asylum seeker’s factual circumstances are indeed sufficient to sustain a finding that a bar applies or whether the officer is at least required to elicit information about possible defenses or exceptions that may be applicable. For example, several circuit courts have held that an asylum seeker’s mere membership in a group that persecutes others is insufficient to uphold a finding that the persecutor bar applies.³⁵ However, the proposed rule seems to indicate that membership may be enough because it would “appear” that the bar applies.

Thus, we recommend that USCIS instead use the preponderance of the evidence standard as a safeguard when an AO applies any of the mandatory bars in the proposed rule. The Board of Immigration Appeals has held other bars—which do not bar eligibility for withholding and therefore impose less severe consequences than the mandatory bars to asylum included in the proposed rule—must be met with at least a preponderance of the evidence standard.³⁶ Considering the severity of the application of this proposed rule—which would deny protection to asylum seekers who otherwise would have received provided a positive fear determination—such a standard would not only align with USCIS’ objectives that this rule be limited to cases where asylum seekers are “clearly ineligible,” but it would also provide more

³³ U.S. Department of State, “Ecuador 2023 Human Rights Report,” at 10-11,

https://www.state.gov/wp-content/uploads/2024/02/528267_ECUADOR-2023-HUMAN-RIGHTS-REPORT.pdf.

³⁴ See 8 C.F.R. 208.30(e)(5) (proposed) (related to credible fear interviews); 8 C.F.R. 208.31(c) (proposed) (related to reasonable fear interviews).

³⁵ See *Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (noting that “a distinction must be made between genuine assistance in persecution and inconsequential association with the persecutors”); *Xu Sheng Gao v. U.S. Attorney Gen.*, 500 F.3d 93, 99 (2d Cir. 2007) (“the mere fact that Gao may be associated with an enterprise that engages in persecution is insufficient by itself to trigger the effects of the persecutor bar”); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927-29 (9th Cir. 2006) (noting that “mere acquiescence,” membership in an organization, or standing alone, simply being a bystander to persecutory conduct are insufficient to trigger the persecutor bar); *Singh v. Gonzales*, 417 F.3d 736, 739-40 (7th Cir. 2005) (finding that “simply being a member of a local [] police department during the pertinent period of persecution is not enough to trigger the statutory prohibitions on asylum”);

³⁶ See *Matter of Y-L-*, 24 I&N Dec. 151, 158 (BIA 2007) (the frivolousness bar at INA Section 208(d)(6) requires that the IJ “must provide cogent and convincing reasons for finding by a preponderance of the evidence. . . .”); *Matter of Acosta*, 19 I&N Dec. 211, 219 n.4 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (“we do not construe [the statutory] language [related to the prosecutor bar] as establishing a fifth statutory element an alien must initially prove before he qualifies as a refugee”); See generally Brief of Amicus Curiae AILA for Petitioner at 12, *Matter of Negusie*, 28 I&N Dec. 120 (B.I.A. 2020), <https://www.aila.org/library/amicus-brief-on-the-application-of-the-persecutor> (“*A-G-G-* and *Y-L-* provide a floor for the minimum procedural safeguards required in the persecutor bar context. Both *A-G-G-* and *Y-L-* place the initial burden of proof squarely on the government. . . [a]nd, while *A-G-G-* states that the government’s burden is to produce prima facie evidence . . . the more serious frivolousness bar requires ‘cogent and convincing reasons for finding by a preponderance of the evidence.’ . . . [s]imilarly, both decisions require some form of notice and opportunity to respond. . . the decisions require that the IJ consider the applicant’s response, and the availability of any exception, before determining whether the bars actually apply”); citing *Matter of Y-L-*, 24 I&N Dec. 151 and *Matter of A-G-G-* 25 I&N Dec. 486 (BIA 2011).

clarity to asylum seekers and practitioners. Ultimately, if USCIS wants to apply these bars at the screening stage within the expedited removal process, which is riddled with due process concerns, it must make sure that the regulations provide enough clarity and accountability to its AOs.

While agency guidance may be given to AOs if the regulation is finalized to determine exactly how the new policy is applied, such training manuals and memoranda are not proactively released and generally require both a Freedom of Information Act (FOIA) filing and litigation. As a result, such directives will inherently not be transparent or accountable to the public and are an insufficient replacement for clear regulatory text.

Improving the consistency, efficiency, and fairness of the asylum system requires seeking to ensure that all asylum seekers go through the same process after entering the U.S.—or at least that two people with identical asylum claims will not experience different outcomes merely based on the government’s resource constraints. The lack of clarity of how and when this rule will be applied in this proposed rule will exacerbate the existing inequities in asylum processing, inequities which serve neither asylum seekers nor the U.S. government’s need to manage the border.

Recommendation: To provide more clarity and reduce the improper application of the bars, USCIS should modify the proposed regulatory language so that AOs must prove by a preponderance of the evidence that any of the mandatory bars in the proposed rule apply. USCIS should also provide asylum seekers a complete copy of all information relied on by the AO in applying a bar to their claim.

V. The proposed rule undermines predictability at the border, causes confusion, and will not save agency resources.

When the U.S. government adds additional components to a screening interview, it decreases the possibility that someone will pass, but it also forces the AO to take longer conducting and adjudicating the interview. DHS acknowledges this in the NPRM.³⁷ By allowing AOs discretion about whether to consider the bars, DHS says it preserves “operational flexibility” so that interviews can be conducted more quickly when needed.³⁸ However, adding more complex procedures, like the 2023 Circumvention of Lawful Pathways regulation has,³⁹ may decrease the number of interviews officers can conduct on the margin, as it will likely take more time to adjudicate each case.

³⁷ See Proposed Rule, 89 FR at 41351 (DHS and the Department of Justice previously rejected the application of the mandatory bars at the screening stage because it “would increase credible fear interview and decision times because [AOs] would be expected to devote time to eliciting testimony, conducting analysis, and making decisions about all applicable bars”).

³⁸ Proposed Rule, 89 Fed. Reg. at 41351 (“This proposed rule is intended to provide DHS additional operational flexibility in screening determinations by giving AOs discretion, at the earliest stage possible, to consider whether a given noncitizen is unlikely to be able to establish eligibility for asylum or statutory withholding of removal...”).

³⁹ Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023), <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>.

AOs will need additional specialized training to implement this rule. Currently, training manuals, released only due to FOIA litigation,⁴⁰ indicate that AOs must merely “flag” whether a bar “appears to apply” to an asylum seeker.⁴¹ Determining whether a bar potentially applies is different from determining whether a bar actually applies, which requires an AO to undertake a factual and legal analysis. As explained above, there is significant complexity involved in determining whether a bar applies, well beyond simple issue spotting, including whether there are relevant defenses and exceptions.

While USCIS “proposes to apply those bars in a manner that would not increase the length of expedited removal proceedings except in those cases in which there is evidence indicating that they may apply,”⁴² our extensive experience with the fear interview process leads us to conclude that the application of these bars will rarely be straightforward in practice.

The preamble states that a goal of this proposed legislation is to conserve detention and adjudicatory resources, in particular, by removing noncitizens who may otherwise be held in detention or be referred to the immigration court. However, USCIS acknowledges that this rule would likely apply to a relatively small population of asylum seekers. Applying mandatory bars will not address any of the issues currently existing, such as lack of AOs and other resources needed to conduct the interviews in the first place.

VI. 30 days is insufficient time to prepare a comment on a rule involving such a complex area of immigration law

The Biden administration has provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. Additionally, Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations.⁴³

This timeframe is insufficient for a proposed rule that would deny many people access to asylum in violation of U.S. law. On May 21, 2024, 78 immigrant rights, advocacy, and legal services organizations, including AILA and the Council, wrote to DHS urging the agency to

⁴⁰ See Victor Romero-Hernandez, “Legal Challenge Prompts USCIS to Release Key Immigration Manuals to the Public,” Innovation Law Lab, April 24, 2024,

<https://innovationlawlab.org/blog/legal-challenge-prompts-uscis-to-release-key-immigration-manuals-to-the-public/>.

⁴¹ USCIS, “Credible Fear Procedures Manual,” last updated May 20, 2023,

<https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf>, at 39.

⁴² Proposed Rule, 89 Fed. Reg. at 41354.

⁴³ Exec. Order 12866, 58 Fed. Reg. 190,

<https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> (Sep. 30, 1993) (stating “. . . each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”); Exec. Order 13563, 76 Fed. Reg. 3821, 3822, <https://www.federalregister.gov/documents/2011/01/21/2011-1385/improving-regulation-and-regulatory-review> (Jan. 18, 2011) (stating “[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.”).

provide at least 60 days to comment on this proposed rule.⁴⁴ Notably, AILA attempted to poll its 17,000 members for cases demonstrating the nuance of these bars to asylum. It takes time to advertise, collect, and analyze such complex case examples, and 30 days is simply not enough time to do so and at a level that could have contributed significantly to this comment.

DHS does not provide sufficient rationale for the 30 day time period. DHS believes this comment period is reasonable because the “discrete topic” has been addressed in prior notice-and-comment rulemaking as detailed in section II.D.⁴⁵ However, this discrete topic was addressed most directly in 2020, with the now-enjoined regulations jointly released with the Department of Justice that instructed “adjudicators to apply the mandatory bars during [CFIs] for the first time.”⁴⁶

In the four years since the last time this discrete topic was addressed explicitly in the notice and comment period:

- The Circumvention of Lawful Pathways bar was implemented in 2023, with significant implications for asylum law both within expedited removal and throughout the country. While the regulation is currently being litigated, 30 days is not sufficient time to consider and review the implications of how these two regulations interact.
- DHS and DOS issued four new memoranda in 2022 related to the exemptions to the terrorist bars related to the Taliban’s return to power in Afghanistan in 2021.⁴⁷
- DHS implemented fear interviews in CBP custody.
- Mexico began accepting the repatriations of nationals of Cuba, Haiti, Nicaragua, and Venezuela who have been issued orders of expedited removal to Mexico.⁴⁸

The rationale for the 30 day time period holds an inherent contradiction: simultaneously claiming that this rule will not impact many people (“[t]he population to which this rule will apply is likely to be relatively small”)⁴⁹ but also relying on the rationale that “swiftly finalizing this change” will expand operational flexibility.⁵⁰ If this rule genuinely will not be applied to many people, then the actual expansion of operational flexibility is limited and the difference the full 60 day comment period would have for DHS is nominal.

In addition, on June 4, 2024, President Biden invoked Section 212(f) of the INA to suspend the entry of migrants crossing the border between ports of entry and issued an Interim

⁴⁴ Letter to Daniel Delgado, Request to Provide a Minimum of 60 days for Public Comment in Response to the DHS NPRM: Application of Certain Mandatory Bars in Fear Screenings, May 21, 2024, AILA Doc. No. 24060609, <https://www.aila.org/library/aila-joins-letter-urging-uscis-to-provide-a-minimum-of-60-day-comment-period-on-nprm-on-mandatory-bars-in-fear-screening>.

⁴⁵ Proposed Rule, 89 FR at 41358.

⁴⁶ 89 FR at 41350.

⁴⁷ USCIS, “Terrorism-Related Inadmissibility Grounds (TRIG) - Situational Exemptions,” May 16, 2023.

⁴⁸ See Austin Fisher, “Venezuelan refugees detained in NM fearful of more deportations to Mexico,” *Source NM*, April 18, 2024, <https://sourcenum.com/2024/04/18/venezuelan-refugees-detained-in-nm-fearful-of-more-deportations-to-mexico/>.

⁴⁹ 89 FR at 41359.

⁵⁰ 89 FR at 41358.

Final Rule—which also has a 30 day comment period.⁵¹ This sea change in border processing has the potential to upend decades of experience with the fear interview process. This change will likely heavily impact the proposed rule’s application to asylum seekers at the border and significantly impacts the stated rationale for the rule, potentially obviating any need for it. Because the comment period closes mere days after this occurred, commenters will not be able to adequately analyze the interaction between these new policies.

Just as the complexities of the mandatory asylum bars require a more nuanced approach than is possible in expedited removal, the interconnected and complex nature of these asylum bars and the proposed rule requires more than 30 days to properly comment on.

VII. Recommendations

DHS should rescind this proposed rule in its entirety. There is no way this proposed rule can be applied while maintaining access to due process and without risking nonrefoulement.

If DHS decides to continue with this proposed rule:

- Every noncitizen whose case is identified with a possible mandatory bar should be notified of their right to counsel, allowed time to secure an attorney, and be eligible for judicial review.
- The terrorism bar should be excluded from the proposed rule due to its significant complexity and the availability of commonly granted exemptions that cannot be adequately applied in an expedited removal context.
- The evidentiary burden the AO must meet to apply a mandatory bar must be set to a standard that aligns with USCIS’s articulated application of the rule in the preamble, such as by a preponderance of the evidence.
- Asylum seekers must be provided with a complete copy of all information relied on by the AO in applying a bar to their claim.
- Further guardrails should be implemented to ensure that discretion is not used to apply this rule in fear interviews where the evidence and information available would be insufficient to survive judicial review.

VIII. Conclusion

AILA and the Council urge the administration not to move forward with this proposed rule and to rescind the proposed rule. The consequences of this proposed rule are too grave and its implementation too impractical while maintaining due process.

For any questions, please reach out to Amy Grenier at agrenier@aila.org or Adriel D. Orozco at aorozco@immcouncil.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

⁵¹ Securing the Border, 89 Fed. Reg. 48710 (June 7, 2024) (to be codified at 8 CFR 208, 235, 1208). <https://www.federalregister.gov/public-inspection/2024-12435/securing-the-border>.