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Andria Strano, Acting Chief, Division of Humanitarian Affairs,
Office of Policy and Strategy,
U.S. Citizenship and Immigration Services,
Department of Homeland Security,
5900 Capital Gateway Drive,
Camp Springs, MD 20588-0009

Lauren Alder Reid, Assistant Director
Office of Policy,
Executive Office for Immigration Review,
Department of Justice,
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

Submitted via http://www.regulations.gov

Re: Department of Homeland Security, CIS No. 2692-21; DHS Docket No. USCIS-2021-0012, RIN 1615-AC67, Department of Justice, RIN 1125-AB20, A.G. Order No. 5116-2021, 86 FR 159, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers*

Dear Acting Chief Strano and Assistant Director Alder Reid,

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council), along with their joint initiative, the Immigration Justice Campaign (Justice Campaign), submit the following comments in response to the above-referenced Department of Justice (DOJ) and the Department of Homeland Security (DHS) (collectively, "the Departments") Notice of Proposed Rulemaking, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers*, (DHS Docket No.USCIS-2021-0012; A.G. Order No. 5116-2021, RIN 1125-AB20). 86 Fed. Reg. 159 (August 20, 2021).

Established 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. 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.

AILA Doc. No. 21102003. (Posted 10/20/21)

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for 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.

The Immigration Justice Campaign (Justice Campaign) is a joint initiative of AILA and the Council. The Campaign's mission is to strengthen the community of defenders, comprised of attorneys and other supporters, who are ready to vigorously advocate for the rights of detained immigrants in removal proceedings and advocate for systemic change. The primary focus of the Campaign is to channel the energy of the broader legal community into pro bono work for detained immigrants and asylum seekers. The Campaign has a network of more than 12,000 volunteers across the country who serve noncitizens detained in Texas, Colorado, New Jersey, California, and throughout the Southeast.

AILA, the Council, and the Justice Campaign Support Some Aspects of the Proposed Rule but Express Strong Reservations About the New Streamlined Removal Proceedings

Collectively, our organizations express our support for the administration's willingness to envision a new system of processing asylum seekers who may be subject to the expedited removal process.[1] We urge the administration to continue thinking through solutions that balance the government's interest in quickly identifying individuals eligible for asylum and affording every individual due process protections. The proposed regulations include some laudable proposals but too many aspects raise significant concerns. For this reason, we cannot support the proposed regulatory changes.

I. Overall Support for New Authority to Asylum Officers & Treatment of Positive Credible Fear Determination

A. We Support Proposed 8 C.F.R. §§ 208.2(a)(1)(ii) and 208.9, Which Would Give USCIS Initial Jurisdiction Over Claims for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture.

This regulation proposes to give initial jurisdiction over applications for asylum, withholding of removal, and protection under the Convention Against Torture for individuals who have received a positive credible fear determination to U.S. Citizenship and Immigration Services ("USCIS") at 8 C.F.R. §§ 208.2(a)(1)(ii) and 208.9. A USCIS asylum officer ("AO") would conduct a credible fear interview and subsequently, if the applicant received a positive determination, an asylum hearing. The process before USCIS is non-adversarial and would assist in expediting the review of some applications for asylum.

[1] To the extent that this comment addresses issues that affect applicants for asylum, withholding of removal, and protection under the Convention Against Torture, it will use the term "asylum seekers" to mean applicants for all these forms of protection.

We support the proposal for USCIS to have initial jurisdiction over these applications for protection. The non-adversarial process before USCIS is appropriate for processing claims of individuals, many of whom have suffered substantial trauma prior to their arrival in the United States.

B. We Strongly Support Proposed 8 C.F.R. § 208.30(b)'s Clarification That Only USCIS Asylum Officers Can Carry Out Credible Fear Interviews.

Current 8 C.F.R. § 208.30(b) provides that "an asylum officer" may carry out a credible fear interview ("CFI"). The proposed regulation would clarify that this interview must be carried out by a *USCIS* asylum officer.

We strongly support this proposed regulatory change, which would prevent a future administration from illegally cross-detailing Border Patrol agents to carry out CFIs. The regulatory change will ensure the proper role for USCIS in the asylum process and prevent law enforcement officers from being directly responsible for credible fear interviews.

C. We Support Proposed 8 C.F.R. § 208.3(a) and Encourage Expansion of the Right to Amend or Supplement the Written Record of a Positive Credible Fear Determination as an Asylum Application.

We support the change in the Proposed Rule to treat the written record of a positive credible fear determination as an asylum application, particularly for purposes of meeting the statutory, one-year filing deadline and starting the "clock" for employment authorization purposes. *See* 86 Fed. Reg. 46906, 46941 (Aug. 20, 2021) (to be codified at 8 C.F.R. § 208.3(a)(2)). But asylum seekers should have the opportunity to amend or supplement such an asylum application as a right and should receive adequate notice of any deadlines to do so. *See id.* (to be codified at 8 C.F.R. §§ 208.3(a)(2), 208.4(c)) (leaving the ability to amend or supplement the asylum application to the discretion of the asylum officer or judge and requiring any such change within a certain number of days of the asylum hearing).

For decades, the statutory one-year filing deadline for asylum applications has presented a barrier to asylum, despite congressional intent that the deadline should not foreclose legitimate claims to asylum "for technical deficiencies." 142 Cong. Rec. S11, 840 (daily ed. Sept. 20, 1996) (statement of Sen. Hatch). In 2018, a federal district court recognized that the government's failure to adequately notify asylum seekers about the one-year filing deadline violated the constitutional protections of due process and the Immigration and Nationality Act, as well as congressional intent. *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176, 1183, 1187 (W.D. Wash. 2018).

In reaching this conclusion, the court relied upon evidence confirming that many asylum seekers "reasonably believe they have *already* applied for asylum in their credible fear interviews." *Mendez Rojas*, 305 F. Supp. 3d at 1186. Asylum seekers' misunderstanding is not surprising because during the credible fear interview, asylum seekers go before a U.S. government official, answer questions about their asylum claim, and those answers are

documented in a written record. This misunderstanding was exacerbated by the vulnerabilities of asylum seekers, who underwent credible fear interviews shortly after fleeing danger in their countries of origin while detained, often with language access issues and frequently without access to counsel. *See infra* Part IV.B.

Without adequate notice from the government about the need to file a specific asylum application by a statutory deadline, it is not surprising that 12 years after the enactment of the deadline, "more than 53,400 applicants [] had their requests for asylum denied, rejected or delayed due to the filing deadline." Human Rights First, *The Asylum Filing Deadline* (Sept. 29, 2010), https://www.humanrightsfirst.org/resource/asylum-filing-deadline. We applaud the agencies for recognizing this unjust result and recommending that the written record of a positive credible fear determination serve as an asylum application to lessen the impact of such technical deficiencies serving as a barrier to asylum in the future.

However, as the agencies themselves realize, asylum applicants may need or "want to modify, correct, or supplement the initial presentation of their protection claims." 86 Fed. Reg. at 46916. Particularly given the well-documented flaws with the credible fear process, including the lack of meaningful access to counsel and language access issues, *see infra* Part IV, asylum seekers should be given the opportunity to amend or supplement their asylum application as of right, and not subject to the discretion of an asylum officer or immigration judge (IJ). 86 Fed. Reg. at 46941 (to be codified at 8 C.F.R. §208.4(c)). The agencies must not prioritize "greater efficiency in the system," *id.* at 46909, over the viability of legitimate asylum claims.

Moreover, as recognized in the *Mendez Rojas* litigation, Congress did not intend for a deadline to thwart legitimate claims of asylum due to technical defects. *See* 305 F. Supp. 3d at 1183. If the agencies intend to impose a deadline by when asylum seekers must submit a modification or supplement to their asylum applications, then the government must provide asylum seekers with adequate notice, in a language they understand, of any such deadline. 86 Fed. Reg. at 46941 (to be codified at 8 C.F.R. §208.3(a)(2)) (requiring that any modification or supplement be "submitted directly to the asylum office no later than 7 calendar days prior to the scheduled asylum hearing, or for documents submitted by mail, postmarked no later than 10 days prior to the scheduled asylum hearing").

D. <u>We Support Proposed 8 C.F.R. § 208.9(f)'s Requirement That Asylum Hearings be Recorded and Transcribed, but Express Concern that Credible Fear Interviews Would Not Likewise Be Recorded.</u>

We support the requirement that the new asylum hearing process would be recorded and a transcript would be made available. The ability of an asylum officer to take notes that accurately reflects what has occurred during an asylum interview creates due process issues when asylum is not granted. The IJ can then use what may be incomplete notes to impeach the applicant. A transcription will allow for a more complete and accurate reflection of what occurred during the interview.

However, we express concern that this provision does not extend to the credible fear interview itself. As the credible fear interview is being used to create the I-589 Application for

Asylum, it will be evidence during the asylum hearing which can be used to impeach the applicant on credibility. Given that the proposal to record and transcribe the asylum hearing properly recognizes that relying on asylum officer's notes to create a record is problematic, this realization should also extend to the credible fear interview itself, and Commenters recommend recording and transcribing those interviews as well.

II. The Proposed Rule Should Eschew the New Compressed Immigration Judge Proceedings in Favor of Full Evidentiary INA § 240 Removal Proceedings

A. We Express Concern Regarding the Proposed Processing Timeline for Claims under 8 C.F.R. §§ 208.2(a)(1)(ii) and 208.9.

The government states that the purpose of these expedited hearings with USCIS is to bring the expedited removal process timeframe in line with the timeframe delineated under INA § 208(d)(5), which calls for an initial hearing on an asylum application within 45 days after the filing of the application.

We caution that an unnecessarily rapid process fails to account for difficulty accessing counsel, trauma, and the need to collect and organize documentary evidence in support of claims for protection. A strict claims processing timeline fails to account for individualized challenges and prejudices the asylum claims for those subjected to it.

The timeline of adjudication of asylum claims needs to account for these important issues to ensure fairness and ensure that we meet our legal and moral obligations to those fleeing persecution.

B. We Oppose Proposed 8 C.F.R. §§ 1208.2(c) and 1003.48, Which Would Create New Immigration Judge Proceedings for Review of USCIS Protection Denials.

We strongly oppose proposed 8 C.F.R. §§1208.2(c) and 1003.8. These proposed regulations would create new IJ proceedings for review of USCIS protection denials. If an individual is found not to qualify for asylum, withholding of removal, or protection under the Convention Against Torture, the proposed regulation would create new IJ proceedings for administrative review of the decision under 8 C.F.R. §§ 1208.2(c) and 1003.48. Pursuant to this regulation, individuals denied protection would be required to affirmatively request IJ review of USCIS' decision. The IJ would conduct a de novo review of the USCIS record to determine whether the individual merits asylum, withholding of removal, or protection under the Convention Against Torture. The IJ would not conduct a full evidentiary hearing or consider alternative forms of relief from removal under this proposed new process. The individual seeking protection would be required to file a written motion with the IJ to introduce additional evidence or testimony in support of their claim.

i. The Government's Justifications for This Proposed Regulation Are Already Being Addressed Via Other Administrative Actions

The notice's summary of its proposed rulemaking posits that the expedited removal proceedings process which Congress created in 1997 is no longer adequate to meet the increased volume of asylum and related claims and, as such, is unfit for its intended purpose. We disagree. IJs can adjudicate protection claims efficiently and fairly within the existing system (that is, in removal proceedings) when they receive appropriate support. That support has been sorely lacking, and the Administration has already taken steps to improve EOIR's functioning, and to give common-sense case management and adjudicatory authority back to IJs— authority which had been stripped from them in recent years. We applaud the administration's actions thus far, urge it to continue its efforts to support the agency and improve its functioning, and reject the notion that creating an entirely new, separate set of immigration court proceedings to address protection claims is either warranted or wise.

The notice attributes the Immigration Court backlog to the increase in the number of southern border arrivals, as well as the increase in the percentage of those who claim a fear of persecution or torture. While there is no doubt that there are more cases moving through the system, that fact in and of itself does not account for the current backlog. The backlog, we believe, has been caused by a number of factors acting in concert:

- A rise in the number of individuals seeking protection in the United States.

- Confusing and rapid fluctuations in the agencies' interpretation of the particular social group definition. *See, e.g.*, *Matter of A-B-*, 28 I & N Dec. 307 (A.G., 2021); *Matter of L-E-A-*, 28 I & N Dec. 304 (A.G. 2021).

- A change in DHS prosecutorial discretion policies which, among other things, mandated that USCIS institute removal proceedings against any noncitizen it encountered who was not lawfully present in the United States or was otherwise subject to grounds of removability. *See* Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0050.1 (June 28, 2018).

- The recent history of divesting Immigration Judges of the authority to control their dockets and adjudicate cases efficiently and fairly. This included: EOIR instituting explicit case completion guidelines (*See* EOIR Director McHenry III, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018)); DHS rescinding the 2011 and 2014 prosecutorial discretion memos which, during the Obama administration, had authorized OPLA to seek administrative closure in low-priority cases (*See* DHS Secretary Kelly, Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017)); and the Attorney General's decision to divest EOIR of its authority to

administratively close removal proceedings opinion in *Matter of Castro-Tum*, 27 I & N Dec. 271 (AG 2018).[2]

- Board of Immigration Appeals and Attorney General opinions which preclude IJs from relying on the parties' stipulations, thus requiring IJs to spend time hearing evidence and considering issues which are not in dispute, *Matter of A-C-A-A-*, 28 I & N Dec. 84 (AG 2020) and encouraging them to essentially second-guess expert opinions, *Matter of J-G-T-*, 28 I & N Dec. 97 (BIA 2020).

- Finally, as the Notice points out, court and Asylum Office closures and slowdowns during the COVID-19 pandemic have increased the backlog.

As a preliminary matter, the delays caused by the COVID pandemic are temporary anomalies; they are not indicative of flaws or inadequacies in the underlying system. Nor is the backlog attributable to more family units (as opposed to single adults) arriving at the southern border. While it is true that the trend might result in more individual people being placed in removal proceedings (thus adding to the number of cases in the backlog), most of those proceedings are consolidated before EOIR; in those cases the IJs are able to adjudicate all of the family members' claims in a single set of proceedings, rather than scheduling separate hearings for each individual.

With regard to the other, more durable, causes of the backlog, the administration is already taking significant and effective steps to address the problem by increasing adjudicatory capacity and giving IJs the tools they need to manage their dockets with efficiency and fairness—addressing those cases which are ripe for adjudication while ensuring that people have the time they need to pursue all appropriate avenues to legal status. For example:

- Rescinding the 2018 NTA memo and returning to common-sense enforcement priorities which allows DHS to focus its resources on high priority cases rather than fully litigating every case in the Immigration Courts.

- Returning common-sense authority to the nation's IJs by returning the authority to manage their dockets efficiently and fairly. Specifically, the vacatur of *Matter of Castro-Tum* and *Matter of A-C-A-A-*, as well as guidance which encourages parties in immigration court to resolve issues through written pleadings, stipulations, and joint motions. Chief Immigration Judge Short, Revised Case Flow Processing Before the Immigration Court, OCIJ PM 21-18 (April 2, 2021), https://www.justice.gov/eoir/book/file/1382736/download.

- Bringing clarity and consistency to the law by instructing the agencies to publish a regulatory interpretation of the particular social group definition. Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to

[2] Of the 376,439 cases that have been administratively closed since EOIR was created in 1983, 88,249 were closed under the Obama Administration's prosecutorial discretion policy.

Manage Migration Through North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, §4(c)(ii), February 2, 2021.

- Hiring new IJs. The administration has announced plans to increase the number of Immigration Judges. Alone, the hiring of more judges will not fix the backlog, but there should be adequate numbers of adjudicators to ensure that each has sufficient time to adjudicate every case fully and fairly. Any increase in judges should be accompanied by commensurate increases in administrative and support staff.

- Finally, as outlined above, we applaud the agencies' proposal to grant initial jurisdiction over post-CFI asylum and related claims to the Asylum Office and agree that it is a fair and effective means to resolve some cases and lessen the burden on the Immigration Court.

ii. INA §240 Proceedings Are Governed by Procedural Protections Required To Ensure Fairness

We oppose the creation of an entirely new set of Immigration Court proceedings which will not, in the end, serve the agencies' stated purpose of efficiency and fairness. We recommend that those cases which are not granted by the Asylum Office can and should be adjudicated in INA §240 removal proceedings; proceedings which afford asylum seekers more robust procedural protections.

That balance is absolutely critical to a fair and consistent application of our nation's immigration laws. Immigration law is an extraordinarily complex area of law which can be unintelligible to those without legal training. *Castro-Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth."). Presenting a claim for asylum in immigration court proceedings requires an understanding of statutes, regulations, and years of oftentimes conflicting federal court and administration decisions interpreting those laws, most of which involve legal terminology which is unfamiliar to laypeople. And all of this occurs in an adversarial proceeding, where the asylum applicant bears the burdens of proof and persuasion to prove their claim for asylum, and where the applicant is facing off against trained DHS attorneys arguing for their deportation.

Presumably in recognition of this fundamental imbalance, the INA and its implementing regulations require that IJs take an active role in removal proceedings to develop the record and to ensure that respondents are advised of the nature of the proceedings, as well as their rights and responsibilities therein. See INA §240(b)(1) (requiring IJs to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses); 8 C.F.R. §1003.10(b) (same and requiring IJs to take other actions that are "appropriate and necessary for the disposition of" each case); 8 C.F.R. §1240.10(a) (requiring IJs to, inter alia, advise noncitizens of certain rights in removal proceedings and to explain factual allegations and legal charges in the Notice to Appear in non-technical language); 8 C.F.R. §1240.11(a)(2) (requiring IJs to inform noncitizens of "apparent eligibility to apply for any other benefits enumerated in this chapter"); 8 C.F.R. §1240.1(a)(1)(iv) (authorizing IJs to "take any other action consistent

with applicable law and regulations as may be appropriate" to ensure appropriate resolution of a case).

The Board of Immigration Appeals and the Circuit Courts of Appeals have interpreted those statutory and regulatory provisions as placing an affirmative duty on the IJs to develop the record and ensure that the noncitizens who appear before them can meaningfully participate in their proceedings.[3] These duties apply in all removal proceedings but are, of course, all the more critical in those cases in which the noncitizen proceeds pro se. As the Second Circuit noted, "our removal system relies on IJs to explain the law accurately to pro se [noncitizens]. Otherwise [they] would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal." *United States v. Copeland*, 376 F.3d 61, 71 (2nd Cir. 2004).

This duty differentiates IJs from Article III judges but is consistent with other types of administrative proceedings. *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (an adjudicator in administrative proceedings "acts as an examiner charged with developing the facts"). And in the immigration context, the Courts have recognized that the unique features of immigration court proceedings require that IJs take on this role in order to ensure fair and accurate adjudications. By way of example, in *Jacinto v. INS*, the 9th Circuit noted that immigration proceedings often involve pro se individuals who lack familiarity with the setting, legal intricacies and English language but bear the legal burden to present a detailed and accurate accounting of the relevant facts to establish asylum eligibility. 208 F.3d 725, 733 (9th Cir. 2002). It recognized that an IJ is often in the best position to "draw out those facts that are relevant to the final determination" and that, absent development of the record by the IJ, "information crucial to [the applicant's] future" will remain[] undisclosed." *Id.*

It is also fully in keeping with the United Nations High Commissioner for Refugees' (UNHCR) understanding of an asylum adjudicator's role. *See* UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status at ¶196 (Geneva, 1979) ("[T]he duty to ascertain and evaluate all of the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce

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[3] *See Matter of E-F-H-L-*, 26 I & N Dec. 319, 323-24 (BIA 2014); *Matter of J-F-F-*, 23 I & N Dec. 912, 922 (A.G. 2006); *Matter of M-A-M-*, 25 I & N Dec. 474, 482 (BIA 2011); *Tabaku v. Gonzales,* 425 F.3d 417, 422 (7th Cir. 2005); *Al Khouri v. Ashcroft,* 362 F.3d 461, 464-65 (8th Cir. 2004); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 130 n.14 (1st Cir. 2004); *Ageyman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002); *Yang v. McElroy*, 277 F.3d 158, 162 (2nd Cir. 2002); *Zheng v. Holder,* 507 Fed. Appx. 755, 762 (10th Cir. 2013) (unpublished); *Louis v. Att'y. Gen.*, 271 Fed. Appx. 985, 991 n.3 (11th Cir. 2008) (unpublished); *Toure v. Att'y. Gen.,* 443 F.3d 310, 325 (3rd Cir. 2006) ("[A]n IJ has a duty to develop an applicant's testimony, especially regarding an issue that she may find dispositive.") (*citing Matter of S-M-J-*, 21 I & N Dec. 722 (BIA 1997)); *Abdurakhmanov v. Holder*, 735 F.3d 341, 346 n.4 (6th Cir. 2012) ("An IJ has… an obligation to ask questions of the [noncitizen] during the hearing to establish a full record… [The questioning] should be designed to elicit testimony relevant to the fair resolution of the [noncitizen's] applications.").

the necessary evidence in support of the application."); and ¶ 205(b)(i) ("The examiner should… ensure that the applicant presents his case as fully as possible and with all available evidence.").

That duty to facilitate the noncitizen's ability to effectively participate in his or her proceedings, and to ensure that the factual record is properly developed is, of course, critical to ensuring full and fair adjudication of each claim.

III. The Following Sections of The Proposed Regulation Must Be Amended to Avoid Inequitable Results

A. We Oppose Proposed 8 C.F.R. § 208.10(a)(1)(v) Because It Grants USCIS an Unprecedented and Dangerous Authority to Issue Orders of Expedited Removal *In Absentia* With No Notice to the Asylum Seeker.

We strongly oppose the changes to 8 C.F.R. § 208.10, "Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application." The proposed regulation does more than just add references to asylum hearings throughout section 208.10, it also adds a fifth action that USCIS may take following an applicant's failure to appear in front of USCIS. Specifically, proposed section 208.10(a)(1)(v) would provide that USCIS may automatically "issu[e] [] an order of removal based on the inadmissibility determination of the immigration officer under section 235(b)(1)(A)(i) of the Act" to "individuals whose case is retained by USCIS for consideration of their application for asylum after a positive credible fear determination" who fail to appear for an asylum hearing.

We presume that "an order of removal based on the inadmissibility determination of the immigration officer under section 235(b)(1)(A)(i)" actually means the issuance of Form I-860, Notice and Order of Expedited Removal. Not only has USCIS not provided any explanation for this harsh penalty for failure to appear, it also violates due process.

Notably, the Departments do not offer any explanation for this choice. The only reference to modifications to section 208.10 consists of a single sentence. It appears that the Departments were unaware of the magnitude of this change. But for the reasons explained below, this would be a *significant* change in practice when it comes to the issuance of orders of removal *in absentia*.

Proposed 8 Section 208.10(a)(1)(v) would grant USCIS an unprecedented power to issue orders of expedited removal *in absentia*. The authority to issue an order of removal *in absentia* has previously been granted only to immigration judges in full 240 removal proceedings.

Importantly, Congress provided extensive statutory protections to respondents who are ordered removed *in absentia*. Before an *in absentia* removal order may be issued, DHS must prove by "clear, unequivocal, and convincing evidence that the written notice was [] provided" and that the respondent is removable. 8 U.S.C. 1229a(b)(5)(A). And even after such an order is issued, respondents have the statutory right to file a motion to reopen the order within 180 days if the failure to appear was due to exceptional circumstances *or* at any time if the failure to appear was due to lack of notice. 8 U.S.C. § 1229a(b)(5)(C).

But none of those protections would be required under proposed section 208.10, because the Departments do not appear to have appreciated the difference between the issuance of a *notice to appear* previously allowed under section 208.10(a)(1)(i) and the issuance of an *order of removal* under proposed section 208.10(a)(1)(v).

For example, because of the inclusion of "or hearings" in proposed section 208.10(a)(2), USCIS would not even be required to "send a notice to an applicant that he or she failed to appear for his or her asylum interview **or hearing** … prior to issuing a decision on the application" (emphasis added). It goes without saying that it offends due process to issue an order of expedited removal with no notice to the applicant.

The inclusion of "or hearing" in proposed 208.10(b) also would not provide an adequate defense for asylum seekers against this unprecedented new authority. That regulation would provide that "USCIS, in its sole discretion, may excuse the failure to appear for an asylum interview **or hearing**… and reschedule the appointment" (emphasis added) if the applicant demonstrated "exceptional circumstances" for failure to appear.

There are two reasons why this is not an adequate defense. First, it is entirely unclear whether the unmodified regulatory language of "excuse the failure to appear … and reschedule the missed appointment" would permit USCIS to rescind an order of expedited removal that had already been issued.

Second, this language would keep the decision to "excuse the failure to appear" entirely discretionary, unlike the statutory right to reopen an order of removal in absentia under INA 240(b)(5)(C). Thus, USCIS could refuse to excuse a failure to appear *even if* the asylum applicant proved that the failure was due to exceptional circumstances. The proposed regulation would also not permit applicants the same statutory right under INA 240(b)(5)(C) to reopen an *in absentia* removal order due to lack of notice.

Due process requires notice and an opportunity to be heard. The proposed regulation would thus violate due process by not providing an effective remedy for lack of notice and providing only a discretionary opportunity to be heard. Thus, DHS should not include Proposed Section 208.10(a)(1)(v) in the final regulation.[4]

If DHS still believes, after sufficient explanation, that asylum officers should be permitted to enter an order of expedited removal following a failure to appear for the asylum

[4] Compounding the problem raised by the authority of USCIS to issue *in absentia* orders of removal, we express concern about the challenges created by asylum hearings being held exclusively at asylum offices. Currently, there are 13 asylum offices and suboffices, the majority of which are on the coasts and all are in major population centers. As many asylum applicants who arrive at the border settle in more remote areas of the U.S. that are far from asylum offices, being required to appear for an asylum hearing at one of the current asylum office locations would create a heavy burden for many applicants. Commenters recommend greater use of remote interviews or embedding asylum officers in USCIS field offices to help alleviate some of the logistical challenges applicants would face.

hearing, then the only way that this regulation would survive constitutional muster would be to ensure that the procedural protections afforded to asylum applicants are *at least* coterminous with the protections provided to respondents under INA § 240(b)(5).

B. We Oppose Proposed Section 208.14(c)(5), Which Provides Inadequate Procedural Protections for Individuals Denied at An Asylum Hearing

Under proposed 8 C.F.R. § 208.14(c)(5), any individual who fails at the asylum hearing stage "will be provided a written notice of the decision" and provided 30 days to "affirmatively request" review of the decision by an immigration judge. Pursuant to proposed 8 C.F.R. § 208.19, the written notice must be provided "in-person, by mail, or electronically."

While the agency may believe that 30 days is a sufficient period of time in which to respond to a denial, we suggest significant modifications to this provision to ensure that no person is denied immigration judge review.

Under current regulations, when an individual does not affirmatively request immigration judge review of a negative credible fear finding, but does not waive review, the agency refers them to the judge anyway. 8 C.F.R. § 208.30(g)(1). As the agency is aware, this is necessary because many individuals do not understand the process and may not understand the consequences of failure to request an appeal in front of an immigration judge. As such, the agency errs on the side of caution and ensures that judicial review is provided in a situation of uncertainty.

These protections are particularly important in the asylum hearing context, where any denial may be served through the mail, which has become significantly less reliable than in the past. A 30-day time period is insufficient to ensure that a person can receive a denial, retain counsel to examine next steps (if no counsel has previously been retained), and then reply through the mail within 30 days.

We believe that individuals who do not affirmatively request review of the denial, but do not waive their right to review, should nevertheless be referred to the immigration judge. As such, the agency should include similar language to what is currently in 8 C.F.R. § 208.30(g)(1) and provide that "A refusal to make such indication shall be considered a request for review." Alternatively, at the very minimum, the time period should be extended to 60 days.

IV. The Proposed Regulation Must Take Steps to Address the Following Significant Concerns with Due Process and Access to Counsel Issues

A. Limitations on the Submission of Evidence During IJ Review Violate Due Process and Fundamental Fairness

The proposed rule's limitations on the submission of additional evidence and testimony during the IJ review stage violate principles of due process and fundamental fairness under the guise of efficiency. The proposed rule imposes a requirement that applicants may only submit additional evidence or testimony after establishing that it is "not duplicative of testimony or documentation already presented to the asylum officer" and that it is "necessary to ensure a

sufficient factual record upon which to base a reasoned decision on the application or applications." 86 Fed. Reg. at 46947. Not only will this requirement increase the judicial strain it seeks to resolve, it will have a chilling effect on noncitizens' ability to develop their claims for protection, particularly for *pro se* individuals.

As discussed *supra* at Part II, applicants denied protection by an asylum officer should be placed in 240 removal proceedings and provided a full and fair opportunity to present evidence and testimony supporting their claim for protection. The standard in 240 removal proceedings is that evidence must be "material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 CFR § 1240.7(a); *see also Matter of Lam*, 14 I&N Dec. 168, 172 (BIA 1972) ("The sole criterion in appraising documentary evidence lawfully obtained is whether it has probative value and whether its use is consistent with a fair hearing."). Applicants who are denied protection after the asylum office hearing should be afforded the same standard in immigration court. If the proposed process cannot be amended to guarantee full 240 removal proceedings for asylum seekers, the government should at least dispense with the standard outlined in 8 CFR 1003.48(e) and allow applicants to freely present evidence and testimony at the IJ review stage.

Robust development of the factual record is necessary in all asylum cases, and particularly so when applicants are raising novel claims. Asylum jurisprudence is not, and was never intended to be, static. Since the passage of the Refugee Act of 1980, asylum law has evolved as applicants have brought novel claims to immigration courts, and then to the Board of Immigration Appeals and federal courts. Over time, courts have recognized new categories of claims, in response to changes in threats, changes in societal norms, and changing populations of asylum seekers. Sexual orientation, for instance, is now a recognized particular social group. *See, e.g. Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990). Women who oppose being subjected to female genital cutting are now widely recognized as a particular social group. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

As it currently operates, the Asylum Office interview process is not adequate to provide for full development of the factual record, including the asylum seeker's testimony, in novel cases. Asylum Officers are not employed as attorneys and have very limited legal training. Furthermore, during an asylum interview, testimony is directed and guided entirely by the Asylum Officer's questions. Even when an applicant is represented by counsel, the applicant's attorney role is to listen and take notes; some officers may allow the applicant's attorney to ask one or two concluding questions, but overall, the attorney may not direct questioning or testimony.

The evidentiary limitations in the proposed rule would create greater inefficiencies in the immigration system and prevent IJs from conducting a meaningful review of the asylum officer's decision. IJs have a duty to develop the record in immigration proceedings and the ability to personally examine the applicant is a crucial tool for judges to fully develop the record. *See* 8 CFR §1003.10(b) (requiring IJs to "administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses" and to take other actions that are "appropriate and necessary for the disposition of" an individual case); *Matter of E-F-H-L-*, 26 I & N Dec. 319, 323-324 (BIA 2014), vacated on other grounds (recognizing that IJs have a "duty to fully

develop the record"). This is especially true in asylum cases, where the applicant's credibility is essential to the IJ's ultimate decision. *See Oshodi v. Holder*, 729 F.3d 883, 885 (9th Cir. 2013) ("It is well established that live testimony is critical to credibility determinations."). Under the proposed rule, if the applicant's credibility were at issue in the asylum officer decision, an IJ could not hear new testimony from the applicant unless the applicant meets the standard in 8 CFR 1003.48(e) and can show that the testimony is not duplicative. These limitations create greater inefficiencies by requiring additional briefing from the parties instead of allowing IJs to develop the record as needed. Preventing IJs from developing the record would also lead to wrongful denials of protection and therefore additional appeals to the Board of Immigration Appeals and the courts of appeals.

For applicants with legal counsel, the proposed regulation will slow immigration court proceedings even further. Attorneys will regularly file extensive motions to introduce testimony and evidence. Immigration judges will need to spend time ruling on these motions to introduce evidence. Presumably in some cases, attorneys for applicants will file interlocutory motions to the BIA when immigration judges deny motions. This will present a burden on the BIA as well as on the immigration courts.

Beyond efficiency concerns, the proposed rule's evidentiary restrictions violate asylum seekers' due process rights by placing unnecessary burdens on applicants to fully develop their claims before the IJ. Due process requires a meaningful opportunity for individuals to be heard and to present evidence orally. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. . . . Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."). These protections are especially important for *pro se* applicants and those with limited English proficiency, who are already on unequal footing in the immigration system. Additionally, "the facts underlying an application for relief from removal may continue to develop up to the time of, and even during, the final individual hearing on the merits." *Oshodi*, 729 F.3d at 889-93 (holding that an asylum seeker's Fifth Amendment due process right to a full and fair hearing, which includes the opportunity to present evidence and testify on one's behalf, was violated where the IJ attempted to limit the applicant's testimony to "nonduplicative" information). Therefore, applicants must be given the opportunity to supplement evidence as needed to develop their claims in the IJ review stage. The ability to testify and present additional evidence before the IJ is crucial to ensuring due process for immigrants seeking protection.

Rather than provide asylum applicants with a meaningful opportunity to be heard, the rule creates a nearly insurmountable hurdle to presenting evidence to the IJ. The proposed rule contemplates that IJs may require applicants to "submit prehearing statements or briefs," 86 Fed. Reg. at 46920, to show that the proposed evidence or testimony is not duplicative and is necessary for developing the factual record. Requiring a written legal argument for an applicant to submit evidence presents a significant hurdle for represented applicants and would be an insurmountable obstacle for most unrepresented asylum seekers. This is especially true for individuals who have recently arrived in the United States, with little or no English proficiency or familiarity with the U.S. legal system or asylum law. Beyond the difficulties in drafting a

complicated legal filing, *pro se* applicants may lack access to a computer, printer, or copy machine and therefore be unable to comply with the Immigration Court's procedural requirements for filings. *See* Immigration Court Practice Manual, Immigration Court Practice Manual (justice.gov). Most asylum seekers simply cannot be expected to meet these additional procedural burdens to submit evidence.

Finally, the standard for accepting new evidence is unclear and overly complicated. Applicants, particularly *pro se* individuals, may shy away from submitting additional evidence out of fear that it will be rejected as duplicative or unnecessary. However, corroborating accounts of persecution, such as declarations from multiple witnesses about the same event, can often assist in showing the applicant's credibility and the severity of the persecution they suffered. Moreover, IJs' interpretation of the proposed rule's standard will likely be widely different, leading to confusion, even for applicants who have secured counsel.

The proposed rule's evidentiary standards will cause judicial inefficiency, requiring noncitizens and attorneys to submit additional briefing regarding any new evidence or testimony. Most troubling, however, the evidentiary requirements will deprive noncitizens of their fundamental rights and lead to removals of asylum seekers to countries where their lives are in danger.

B. The Proposed Rule's Goal of Fast-Tracking Asylum Claims Would Exacerbate Preexisting Barriers to Access to Counsel

The proposed rule seeks to speed up the adjudication of asylum seekers' claims by limiting avenues for subsequent review by an IJ. *See supra* Part II. By placing emphasis on the earliest stages of review and expediency, the proposed rule would exacerbate preexisting barriers to access counsel while simultaneously increasing the need for counsel.

The importance of legal representation cannot be overstated. A person who can retain an attorney is far more likely to succeed in immigration court. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 48–59 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review [hereinafter "Eagly, *Access to Counsel*"]. A 2015 study showed that for non-detained immigrants, people with lawyers were nearly five times more likely to obtain immigration relief than those without (63% of those with representation obtained relief versus 13% of those without representation obtain relief). American Immigration Council, *Access to Counsel in Immigration Court*, 2-3 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. Among detained immigrants, people with lawyers were twice as likely to obtain relief than those without lawyers (49% of those with representation are able to obtain relief whereas only 23% of those without representation are able to obtain relief). *Id.* Recently arrived asylum seekers—who often have added vulnerabilities, including trauma, language barriers, and a lack of familiarity with the U.S. legal system—are especially dependent on counsel to understand and navigate our evolving and highly complex U.S. asylum laws.

The proposed rule would create a new set of procedures for credible fear screening and consideration of asylum, withholding of removal, and CAT protection claims that will increase the need for counsel. Given the proposal to limit IJ review to the record created before the asylum officer, *supra* Part II, it will be essential that asylum seekers are able to fully present their claims and all supporting evidence to the asylum officer. A lawyer is necessary to ensure that the asylum officer elicits all necessary facts, is presented with any available evidence, and considers the relevant protected ground, especially in particular social group claims. Counsel will also be essential on IJ review. As discussed at length above, the proposed rule contemplates "prehearing statements or briefs" to permit the consideration of new evidence and demands a motion in order to vacate the asylum officer's order of removal. 86 Fed. Reg. at 46920. These are legal pleadings that require an attorney. *See supra* Part II.

Notwithstanding the importance of counsel, many people are forced to defend against deportation without an attorney.[5] At least 40% of all people currently in deportation proceedings do not have a lawyer. Executive Office for Immigration Review, *Adjudication Statistics* (July 8, 2021), https://www.justice.gov/eoir/page/file/1062991/download. For the many individuals who express a credible fear and are detained, the stakes are much higher. The unrepresented rate is much higher for people in detention. Between 2015 and 2017, around 70% of detained individuals in deportation proceedings did not have attorneys. TRACImmigration, *Who is Represented in Immigration Court* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/. There are already many significant obstacles to retaining counsel, including an inability to afford an attorney and limited free legal services. Some regions of the country—particularly rural areas—have very few immigration attorneys. ACLU Research Report, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, 20-21 (2020), https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration; Eagly, *Access to Counsel*, 30–43. People in immigration detention face a myriad of additional obstacles, including limited access to telephones, no access to email or the internet, and detention in remote facilities far from the immigration defense bar. *Id.*

The proposed rule does nothing to address these issues. Rather, with its emphasis on speed, and by placing the most consequence on the earliest stages of the process, the proposed rule exacerbates these problems. Even legal services providers funded to represent detained individuals in the credible fear process report being unable to reach potential clients before their credible fear interview. It frequently takes the Justice Campaign—an initiative staffed by attorneys with myriad resources and connections—a month or more to place a case with an attorney for full asylum representation, particularly for individuals in underserved parts of the country, like the Southeast. Fast-tracking the process increases the risk that immigrants will be left to fight their cases without legal representation.

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[5] USCIS does not publicly release data on representation rates before the agency, so we are forced to rely on EOIR data as a proxy. However, based on our experience and that of other legal services providers, commentors believe that a significant percentage of people are currently unrepresented in the credible fear process.

It is not enough to reiterate by regulation that people have a right to counsel at their own expense. *See* 8 Fed. Reg. at 46911. To give that right meaning, there must be meaningful access to counsel, including government-funded counsel.[6] At a minimum, DHS should not institute a high-speed process that leaves no time to access counsel and will prevent pro se applicants from obtaining full consideration of their claims.

V. Conclusion

AILA, the Council, and the Justice Campaign urge the administration to address the due process and fairness issues unnecessarily created by emphasizing speed over accurate and considered decision-making of protection claims by asylum seekers. EOIR and USCIS should retain the proposed change to authorize asylum officers with initial jurisdiction but for those asylum seekers who do not receive protection in the first instance, full evidentiary proceedings must follow.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCATION

THE AMERICAN IMMIGRATION COUNCIL

[6] *See* Greg Chen and Jorge Loweree, Policy Brief: The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal (Jan. 15, 2021), https://www.aila.org/advo-media/aila-policy-briefs/legal-representation.