San Francisco
1458 Howard Street
San Francisco, CA 94103

Washington, D.C.
600 14th Street, NW
Suite 502
Washington, D.C. 20005

San Antonio
500 Sixth Street
Suite 204
San Antonio, TX 78215

Austin
6633 East Hwy 290
Suite 102
Austin, TX 78723

ilrc@ilrc.org
www.ilrc.org

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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

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

Submitted via http://www.regulations.gov

RE: RIN 1615–AC67; DHS Docket No. USCIS–2021–0012; CIS No. 2692–21
RIN 1125–AB20; A.G. Order No. 5116–2021
Public Comment on 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 Reid:

The Immigrant Legal Resource Center (ILRC) submits this comment on the proposed rule, "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," issued by the Department of Homeland Security (DHS) and Department of Justice (DOJ). While we applaud certain features of the proposed rules, we urge the Departments to withdraw or substantially revise the rules.

The ILRC is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. We serve the individuals and community of organizations that are most impacted by this rule.

The ILRC builds the capacity of immigration advocates to assist immigrants in their removal defense cases in order to provide more immigrants with a meaningful chance at justice. We support immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants. The ILRC provides technical assistance on immigration court procedure through our webinars and our Attorney of the Day service, in which we work with advocates on their specific cases and questions. As experts in the field, the ILRC publishes *Removal Defense: Defending Immigrants in Immigration Court*, a manual which provides a thorough guide to the immigration court

process with practice tips. We also publish *Essentials of Asylum Law*, a widely referenced treatise on U.S. asylum law and practice. As such, the ILRC has a wide breadth of knowledge and experience in the field to make the following comments regarding the proposed rule.

I. The Proposed Parole Regulations at 8 C.F.R. §§ 235.3(b)(2)(iii) and (b)(4)(ii) Would Result in Arbitrary and Potentially Unlawful Lengthy Detention of Asylum Seekers, Due to the Agency's Historic Record of Denying Release on Parole and the Lack of Clarity Regarding Procedures and Standards That Would Apply.

A. The proposed parole regulations fail to adequately protect vulnerable populations from arbitrary and unfair parole denials.

Proposed regulations 8 C.F.R. §§ 235.3(b)(2)(iii) and (b)(4)(ii) would expand the categories for parole to permit release when "detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)." Although we support the general principle of expanding parole categories, the proposed regulations are overall deficient and fail to adequately protect vulnerable asylum seekers from arbitrary and unfair parole denials. Given the well-documented, harmful effects of continued detention on asylum seekers, release on parole should be expanded rather than limited to specific categories.

U.S. Immigration Customs and Enforcement (ICE) officers have historically used their discretion to deny rather than grant parole. Even when a person establishes a credible fear, ICE routinely ignores the 2009 Parole Directive, which requires ICE to parole arriving asylum seekers if they (1) establish their identity, (2) are not a flight risk, and (3) do not pose a security threat.[1] ICE continues to issue denials without sufficiently addressing the release factors.[2] ICE routinely justifies the continued detention of individuals even when a person's medical vulnerabilities are substantiated by record evidence.[3] The decision to release a person on parole is often determined by the location of the ICE field office rather than the strength of a release request. In some jurisdictions, ICE field offices issued blanket denials to almost all asylum seekers who established a credible fear.[4] Clearly, past guidance has been insufficient to trigger release of those seeking refuge. Therefore, although adding a third category may seem positive on its face, in practice, such broad guidelines without more will not reform the system. ICE will likely

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[1] Human Rights First, *Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency's Arbitrary and Unfair Parole Decisions for Asylum Seekers*, at 1 (September 2021), https://www.humanrightsfirst.org/sites/default/files/FOIARecordsParole.pdf (Between 2017 and 2018 ICE denied parole to over 6,000 asylum seekers who passed a credible fear interview).

[2] *Id*. at 2 ("ICE officers failed to state any basis for denial, simply noting that the asylum seeker was an 'enforcement priority,' that there was 'no urgent humanitarian need' or 'medical necessity' for release, or that there were 'limited equities and lack of urgent humanitarian factors.'").

[3] Human Rights Watch, *Systemic Indifference Dangerous & Substandard Medical Care in US Immigration Detention*, (May 8, 2017), https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention (Report highlights a case of an immigrant detained for four years who died of organ failure and cancer).

[4] Human Rights First, *Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency's Arbitrary and Unfair Parole Decisions for Asylum Seekers,* at 2, ("[I]n 2017, the El Paso Field Office granted parole to just 0.3 percent of adult asylum seekers who had passed a CFI [credible fear interview] and the New Orleans Field Office found only 1.6 percent of asylum seekers eligible for parole in 2018.").

continue to use its discretion to deny parole, even if a person has a medical vulnerability and "continued detention would unduly impact" their health.

Furthermore, the critical decision to deprive a person of their liberty should not be determined by the availability of detention bed space. The harmful effects of the continued detention of asylum seekers are well-known - individuals in immigration facilities face re-traumatization and separation from family and friends.[5] While in ICE custody, a person's access to quality medical care is severely limited, resulting in harmful medical consequences to the asylum seeker.[6] The dangerous medical situations of ICE facilities have never been more evident than during the COVID-19 pandemic.[7]

A person's due process rights are also negatively impacted when they are in detention, as their ability to access legal resources and legal representation is often non-existent.[8] ICE detention facilities are frequently located in remote areas, creating additional barriers for people dependent on vital legal and familial support.[9] Asylum seekers are unable to make phone calls or access the internet without paying a fee, limiting their contact with the outside world. Because the continued detention of asylum seekers has a demonstrable overwhelming negative impact on their access to vital support services and well-being, the regulations should make clear that release on parole is favored.

We recommend that the expedited removal regulations incorporate the parole standard for individuals who have established a credible fear listed under 8 C.F.R. § 212.5(b), which more broadly provides for parole where continued detention is not in the public interest.[10] Incorporating this standard to apply to individuals in expedited removal will help ensure individuals and families are free from harmful conditions and can meaningfully access their right to due process of the law to pursue their

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[5] The Center for Victims of Torture (CVT), *Statement for the Record by the Center for Victims of Torture U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship 'The Expansion and Troubling Use of ICE Detention'*, (September 26, 2019), https://www.congress.gov/116/meeting/house/110017/documents/HHRG-116-JU01-20190926-SD005.pdf; American Psychiatric Association, *Public Comment on Immigration Detention Centers and Treatment of Immigrants*, (May 13, 2019), https://www.psychiatry.org/File%20Library/Psychiatrists/Advocacy/Federal/APA-Letter-USCoCR-Immigration-Detention-05132019.pdf.

[6] Human Rights Watch, *Systemic Indifference Dangerous & Substandard Medical Care in US Immigration Detention*, at 2, (May 8, 2017), https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention (21 people died in U.S. immigration detention between May 2012 and June 2015).

[7] U.S. Department of Homeland Security, Office of Inspector General, *Violations of Detention Standards amid COVID-19 Outbreak at La Palma Correctional Center in Eloy, AZ*, at 4, (March 30, 2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-30-Mar21.pdf (Report "identified violations of ICE detention standards that threatened the health, safety, and rights of detainees. […] In addressing the coronavirus disease 2019 (COVID-19), [the facility] did not enforce ICE's precautions including facial coverings and social distancing, which may have contributed to the widespread COVID-19 outbreak at the facility."); Detention Watch Network, *Hotbeds of Infection*, (December 9, 2020), https://www.detentionwatchnetwork.org/pressroom/releases/2020/hotbeds-infection-new-report-details-contribution-ice-s-failed-pandemic (ICE detention facilities were responsible for more than 245,000 COVID-19 cases throughout the U.S.).

[8] *See* American Immigration Council, *Access to Counsel in Immigration Court*, at 4-5, (September 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (Rates of legal representation were affected by the geographic location of the detention center and immigration courts).

[9] *Id*. at 6.

[10] Immigration and Nationality Act (INA) § 212(d)(5)(A), 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c).

asylum claims. Clear incorporation of this broader standard will also help protect asylum seekers from future administrations who may seek to weaponize the proposed regulation's vagueness to systematically detain asylum seekers in an effort to deter or weaken their claims.

B. The proposed regulations fail to include clear parole procedures for individuals who have established a credible fear.

The Department should modify the proposed regulations to include clear parole procedures to ensure the timely and comprehensive review of parole requests. Clear procedures are needed to guarantee asylum seekers have meaningful access to the parole process. A person's liberty interests are of the greatest importance. Therefore, reviewing and responding to parole requests should be prioritized. We recommend the proposed regulations be modified to include a specific timeframe in which ICE officers must review parole requests and issue parole decisions. This process should occur automatically after a positive credible fear determination, in order to ensure *pro se* applicants are properly considered for release. ICE often issues parole decisions without ever interviewing or speaking with an individual. In many situations, parole interviews are non-existent, and an individual doesn't even know the name of the ICE officer evaluating their parole request. We recommend parole interviews be mandated before issuing a denial of a parole request. An interview prior to denial will provide individuals with an opportunity to sufficiently address the release factors and respond to any of ICE's concerns or questions. Interpreters who speak the individual's native or best language, should also be available during the parole interview.

ICE officers arbitrarily and routinely issue denials without justification.[11] Although a supervising ICE officer can review parole decisions, supervisors often affirm denials without any meaningful oversight.[12] We recommend the proposed language be modified to address the problem of unsubstantiated parole denials. As depriving a person of their liberty has substantial implications, ICE officers should be required to clearly specify and support the reasons for rejecting a release request. We suggest parole language be modified to ensure a legitimate presumption of release supported by a clear legal standard. We propose that absent clear and convincing evidence that a person is a flight risk or a danger to the community, ICE should release an individual from immigration detention.

To ensure sufficient oversight of parole decisions, we recommend an independent department routinely review each ICE field office's parole grant and denial rates. We also recommend that the proposed regulations require detailed record-keeping of grant and denial rates to help provide transparency and oversight of parole decisions. Record keeping will help alert DHS to important trends. Without robust procedures and supervision, ICE will use its discretion to deny legitimate parole requests and keep people in detention, as it has historically done.

C. The proposed regulations fail to clearly establish parole standards for asylum seekers placed in the newly created process before USCIS.

The current regulations under 8 C.F.R. § 235.3(c) set forth the parole standard for individuals detained under INA § 235(b) (i.e. arriving asylum seekers) and who establish a credible fear and are subsequently placed in removal proceedings under section 240. However, the proposed regulations

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[11] Human Rights First, *Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency's Arbitrary and Unfair Parole Decisions for Asylum Seekers*.

[12] ACLU, *Judge Blocks Blanket Detention of Asylum Seekers*, (July 5, 2018), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/judge-blocks-blanket-detention-asylum-seekers.

create a new process in which individuals designated as "arriving" who establish a credible fear will not be referred to 240 proceedings but will instead continue to pursue their asylum claim before U.S. Citizenship and Immigration Services (USCIS). The proposed regulations fail to set forth a clear standard for release on parole for individuals deemed as "arriving." They also fail to establish a parole standard for people detained under INA § 236(a) (i.e., entry without inspection). The proposed regulation's silence regarding this category of people is even more troublesome considering the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which limited the release options for detained individuals.

Although we believe that individuals in these proceedings can still request their release from immigration custody, we are concerned that the ambiguity in the proposed parole regulations could cause unnecessary confusion leading to the unjust and inhumane deprivation of an asylum seeker's liberty. The lack of clarity can also unintentionally lead to an increase in the number of detained asylum seekers.

We are also concerned that future administrations could use the ambiguity to create additional barriers for release that purposefully target and harm vulnerable groups. We recommend the agency modify the proposed parole regulations under 8 C.F.R. § 235.3(c) to explicitly encompass immigrants deemed "arriving" and immigrants who "enter without inspection," and who are placed in the newly created proceedings before USCIS after establishing a credible fear. Including clear language will help ensure that the liberty interests of asylum seekers in both categories are sufficiently protected.

D. Limiting work authorization for individuals released under 8 C.F.R. § 235.3(b)(4)(ii) will endanger the lives of asylum seekers and their families.

The proposed regulations under 8 C.F.R. § 235.3(b)(4)(ii) state: "a grant of parole would be for the limited purpose of parole out of custody and cannot serve as an independent basis for employment authorization […]." The reason for including this limitation on work authorization is unspecified. Individuals released on parole under 8 C.F.R. § 212.5(b) can apply for work authorization. However, it is unclear why a distinction exists in the proposed rule limiting work authorization in the former parole category but not the latter. We recommend the proposed regulations be modified to allow the parole category relating to asylum seekers, serve as a basis for work authorization. An even simpler solution would be to release individuals who pass the credible fear screening under the new procedures, using "humanitarian parole" under INA § 212(d)(5), which would allow them to apply for work authorization upon release.[13]

Whether released pursuant to humanitarian parole or a separate parole category, it is essential that individuals released after a positive credible fear determination be allowed to apply for work authorization. Asylum seekers must have the means to support themselves and their families during the pendency of their case. Although a pending asylum application can serve as a basis for work authorization, individuals must wait 365 days after their asylum application is filed before they can apply for work authorization.[14] Individuals forced to wait a year to apply for work authorization will likely be unable to secure necessities such as food, shelter, and medical care.[15] Asylum seekers with limited

[13] 8 C.F.R. § 274a.12(c)(11).
[14] 8 C.F.R. § 208.7(a)(1)(ii).
[15] *See* Human Rights First, *Callous and Calculated: Longer Work Authorization Bar Endangers Lives of Asylum Seekers and Their Families*, (April 2019), https://www.humanrightsfirst.org/sites/default/files/Work_Authorization.pdf.

economic opportunities will be vulnerable to living in unsafe conditions, food shortages, and even exploitation.[16]

Many individuals forced to wait to apply for work authorization will also likely be without a valid identification during this time since they are often forced to flee their countries without identification documents. The USCIS employment authorization card is often the only government-issued identification an asylum seeker may have in their possession. Without a valid government-issued identification card, an individual will likely have difficulty navigating their day-to-day affairs. Individuals without proper identification will have challenges securing necessities such as housing or opening bank and utility accounts. Individuals without valid identification may also have issues when encountering law enforcement, as they may be unable to prove their identity. As limiting employment authorization can have a substantially harmful impact on an asylum seeker and U.S. communities, it is essential an individual's access to apply for work authorization is increased, not further limited. Considering the importance of work authorization, we strongly recommend the proposed language be modified to allow for work authorization under the parole category listed under § 235.3(b)(4)(ii).

II. The Amendments Proposed at 8 C.F.R. §§ 208.30(b)-(d), (g), Eliminating The Option of Reconsideration by USCIS, Would Expand the Potential for Erroneous Negative Credible Fear Findings and Worsen, Not Improve, Efficient Administration of the Credible Fear Screening Process.

A. *Reconsideration by USCIS is an important procedural safeguard against erroneous negative credible fear findings, or where there are new factual or legal developments.*

The proposed rule seeks to return the credible fear screening process to the one that was in place for expedited removal's first two decades of implementation. However, this framing fails to address the shortcomings of that process and how the Departments' use of expedited removal has led to the summary expulsion of bona fide asylum seekers even before the radical changes introduced in 2018. Ultimately, the framework that the Departments propose fails to adequately protect asylum seekers from wrongly being subjected to expedited removal and being deprived of their statutory right to apply for asylum. Instead, the proposed rule further erodes the few existing protections for people subjected to expedited removal by eliminating requests for reconsideration with USCIS.

The proposed rule is intended to return to the pre-2018 statutory scheme, and it does in fact reverse some of the recent changes that erroneously heightened the burden of proof on asylum seekers in the initial credible fear screening. For example, we applaud the Departments' proposal to replace the Global Asylum rule's "reasonable possibility" standard with the former "significant possibility" standard. However, the proposed rule also inexplicably seeks to alter the pre-2018 statutory scheme by eliminating requests for reconsideration or reinterview by USCIS entirely. Requests for reconsideration to USCIS were an important protection in that scheme. Although the proposed rule seems to view reconsideration by USCIS and immigration judge review as redundant, the two types of review are not interchangeable. The

[16] Human Rights Watch, "*At Least Let Them Work*" *The Denial of Work Authorization and Assistance for Asylum Seekers in the United States* (November 12, 2013), https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united.

existing regulations provide for USCIS review because it serves an important function that credible fear reviews by immigration judges cannot.

A request for reconsideration is needed where there is new evidence, new legal authority, or where there was a legal error in the initial credible fear interview. Reconsideration is also needed where the original interviewing asylum officer employed inappropriate or inadequate interview techniques or otherwise failed to properly develop a sufficient record. In contrast to a credible fear interview, a credible fear review before an immigration judge is a short hearing, typically only lasting a few minutes. The hearing is not as thorough as a credible fear interview and although it is purportedly subject a *de novo* review, its effectiveness depends on the accuracy and completeness of the agency record under review. In cases where the interviewing officer has failed to develop a complete record, a perfunctory credible fear review on the incomplete record is not an acceptable substitute for agency reconsideration or reinterview.

As such, a scheme that provides for credible fear reviews by an immigration judge as the sole "check to ensure that individuals who have a credible fear are not returned based on an erroneous screening determination" will lead to erroneous denials. In addition, the reconsideration by USCIS allows for a more efficient check on the system to correct these issues than invoking the full court machinery. A simple reconsideration can resolve a situation where there were errors in the initial interview procedure, or where severe trauma made it impossible for the asylum seeker to express the realities of the danger they face.

B. The inefficiencies USCIS seeks to remedy by eliminating agency reconsideration will only be passed onto EOIR, thus further straining the immigration courts.

The Departments support the elimination of reconsideration requests by citing the inefficiencies and burden to USCIS caused by requests for reconsideration. However, limiting review to immigration judges will only shift that burden onto EOIR, forcing immigration judges to conduct credible fear reviews on incomplete interview records that the agency cannot reconsider or supplement through reinterview. In any case, the Departments cannot address these burdens it has identified by reducing credible fear interviews into a perfunctory step where an erroneous negative fear determination, no matter how clear the error, cannot be reconsidered by the agency that made the determination.

III. While Some of the Proposed Changes to 8 C.F.R. §§ 208.3(a) and 208.9(a) Would Result in Improvements to the Current Framework, Others Would Seriously Undercut Asylum Seekers' Right to a Fundamentally Fair Procedure.

Proposed regulation 8 C.F.R. § 208.3(a)(2) provides that the written record of a positive credible fear determination "shall be considered a complete asylum application for the purposes of 8 C.F.R. §§ 208.4(a), 208.7, and 208.9(a)." While the proposed provision would have some positive effects, treating an officer's notes as an asylum claim for the purpose of determining its merits is a deeply flawed proposal that will lead to erroneous asylum denials. Moreover, as mentioned below, the expansion of asylum office jurisdiction is a positive step, but the proposed framework fails to provide the procedural protections and right to full judicial review that the current Section 240 proceedings offer.

A. The proposed rule's treatment of a positive credible fear determination as an asylum application for purposes of the one-year filing deadline and work authorization would help mitigate the harsh effects of these provisions.

A positive credible fear determination constituting an asylum application for the purpose of the one-year filing deadline would help mitigate a harsh barrier to asylum that has nothing to do with the substance of asylum law. The filing deadline was enacted in part so that asylum seekers would come forward and file affirmatively rather than waiting to file for asylum until they had been apprehended by immigration authorities. Applying the one-year filing deadline in the case of someone who has already been apprehended or presented themselves to immigration authorities makes little sense. Yet this deadline has been used widely in defensive cases to deny asylum relief to applicants who were found to have a credible fear, often because they were never properly informed of the filing deadline for Form I-589, after already raising their claim at time of entry.

Similarly, treating a positive credible fear determination as a complete application for the purposes of work authorization would reduce the lengthy waiting period for work authorization for asylum applicants whose claims have already met the credible fear threshold. Currently, asylum seekers are expected to support themselves and their families without being able to work for either 180 or 365 days after filing their application depending on which regulation applies to them. As discussed below, it often takes some time after the asylum seeker's entry to be able to file a complete application, further extending the time that they must go without being authorized to work. Treating a positive credible fear determination as an application for asylum for work authorization purposes would help lessen this waiting period for asylum seekers who have already demonstrated a credible fear of return.[17]

B. Treating an officer's interview notes as an asylum application for the purposes of adjudicating the merits of the claim is deeply flawed and will deprive many asylum seekers the opportunity to fully state their claim.

Using a credible fear determination as a substitute for a full asylum application for the purposes of determining asylum eligibility is a deeply flawed idea that would deprive many asylum seekers of the opportunity to fully state their claim.

Notes of credible fear interviews are often completed in a rushed setting, typically during the interview itself. The applicant's testimony is often summarized or paraphrased.[18] Occasionally the notes contain errors. Even when recorded verbatim, the applicant's testimony is often missing important contextual details. Finally, the interview is often limited in duration and does not rely on supporting documentation outlining the claim. This often results in the asylum officer asking questions unrelated to the core claim and missing vital details of an asylum seeker's claim.

At the credible fear interview stage, an asylum seeker may face barriers that prevent them from fully stating their claim. The credible fear interview typically takes place shortly after the applicant's arrival in the United States, often while they are detained. They are usually not represented by counsel and may be unfamiliar with the asylum system. Those who have survived past persecution may be dealing with

[17] As mentioned previously at Part I.D., we recommend that release on parole after a positive credible fear finding should establish eligibility for work authorization, regardless of when the asylum application is considered filed.
[18] *See* Proposed 8 C.F.R. § 208.30(e) (written record of determination shall include "a summary of the material facts").

trauma, exacerbated by the dangers of their flight from persecution and their current detention. If they were persecuted by their home country's government, they may be wary of trusting government officials. Yet the proposed rule would require them to fully detail their asylum claim at this juncture to serve as the basis of what in some cases, especially if they are unrepresented, may be the only piece of documentary evidence to support their asylum claim.

A full asylum application often takes much longer to complete than the duration of a typical credible fear interview. Asylum practitioners will frequently gather the information and details needed to prepare the application over the course of several client meetings. A competent legal representative will ensure that their client fully understands the asylum process and will take time to gain their client's trust. Some clients, especially those who have suffered severe trauma, will need more time than others to be able to relate their full story to their legal representative. They may even need to first work with a trauma-informed counselor or psychologist before they are ready to give the full detail of their story.

If credible fear interview notes serve as a complete asylum application, asylum seekers risk losing the opportunity to state their claim if they are unable to fully relate it to an officer while they are still detained and shortly after their arrival in the United States. Moreover, an interviewing officer's errors and incomplete details in the notes could be used to wrongly question an asylum seeker's credibility and lead to erroneous denials based solely on transcription errors by the officer.

Highlighting the procedural problems with treating interview notes as a complete application, proposed subsection (c) of the provision states that an applicant's spouse and children may only be included in the asylum application if they arrive concurrently with the principal applicant. This will wrongly deprive asylum seekers of extending protection to their spouse or children. It will also be tremendously inefficient, as USCIS will have to adjudicate I-730 petitions for all of the derivatives who should be included in the principals' asylum applications, but do not make it into the credible fear interview notes.

As mentioned above, there are positive elements to this proposed rule. Treating a positive credible fear determination as satisfying the one-year filing deadline and beginning the waiting period for work authorization are both improvements on the existing framework. The expansion of initial asylum office jurisdiction for persons who have demonstrated credible fear of persecution could also be a positive step. However, these positive developments are undermined by the framework the Departments are seeking to create. This rule attempts to streamline the asylum process, even if it means depriving asylum seekers of critical due process protections and a meaningful opportunity to fully state their claims.

IV. The Streamlined Process Proposed at 8 C.F.R. §§ 208.2(a) and (c); 208.9(a), (f), and (g); 208.14(c)(5); 208.30(e) and (f); 235.6(a)(1); 1003.42; and 1208.30(g), Raise Serious Concerns Regarding the Training and Infrastructure That Will Be Required to Implement the New Procedures, As Well As the Lack of Qualification of Asylum Officers to Conduct "Hearings."

A. Asylum Offices do not have the training or infrastructure to conduct asylum hearings.

The proposed rule seeks to create a new procedure whereby an asylum officer will conduct a full "asylum hearing" to determine an applicant's eligibility for asylum, withholding of removal, and CAT protection, thus bypassing the current process in which only immigration judges can make final determinations on the merits of these applications. The Departments justify this streamlined process by

pointing out that INA section 235(b)(1) uses the phrase "further consideration," rather than specifying that individuals with positive credible fear findings be referred for section 240 proceedings. Under the statutory framework, as identified by the proposed rules, there is nothing inherently objectionable about asylum officers conducting asylum interviews after credible fear determination. However, what is objectionable is the lack of certain critical procedural safeguards during the asylum interview process, the effects of which would only be exacerbated by the lack of meaningful review by an immigration judge.

The proposed rule assumes, without evidence, that asylum interviews would be more "efficient" than asylum hearings before immigration judges. It further states, without explanation, that the protections inherent in section 240 proceedings add no "additional value" or "procedural protections" to the asylum process.

The proposed rule attempts to bridge some of the procedural gaps in asylum interviews by creating several new requirements during the asylum interview process. Infrastructure is not currently in place to implement these requirements and asylum officers would need to be trained in these new procedures, thus calling into serious question the Departments' claim that the new procedures would contribute to efficiency.

First, audio recording equipment and transcription services would need to be set up for asylum interviews. Once set up, officers would need to be trained on using the electronic systems and using the record accurately in their adjudications. Second, asylum offices will need to provide interpreters during interviews, which again, would be an entirely new procedure for most officers, who will require training. There would also be an additional cost to the Departments in not only providing professional interpreters for removal hearings, but also asylum interviews. Third, given the potential removal of individuals to countries where they may be persecuted or tortured, officers will need to undoubtedly provide reasonable time for applicants to secure counsel – thus further undercutting the goal of efficiency. Without reasonable time to secure counsel, the process would lack fundamental fairness. Finally, officers will need to learn the unique law relating to withholding of removal and Convention Against Torture claims, with which asylum officers are currently unfamiliar.

B. Asylum Officers are not qualified to conduct "hearings."

The proposed rule refers to the asylum interview in this context as a "hearing." But officers are not judges and have no expertise in conducting "hearings." Asylum officers are not trained in, nor do they have a background in, conducting the type of quasi-judicial hearings that immigration judges conduct.[19]

Simply calling the interviews "hearings" does not address the fact that officers cannot conduct judicial hearings, which differ from interviews in that hearings provide for an adversarial process allowing for direct and cross-examination of witnesses, the presentation of expert and lay witnesses, the right to review all evidence in the "record," and the right to a reasonable amount of time to secure counsel.[20]

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[19] *Compare* USCIS Asylum Division Training Programs, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs) *with* Office of Chief Immigration Judge, USDOJ, *Immigration Judge Qualifications*, https://www.justice.gov/legal-careers/job/immigration-judge-4.

[20] INA § 240(b)(4). While the proposed rule states that counsel will have an opportunity to make a "statement" or ask "follow-up questions," it does not provide the opportunity for counsel or pro se applicants to make an initial showing of eligibility through direct examination. The rule is further silent on an applicant's ability to confront

These are important due process rights guaranteed in removal proceedings, which the new asylum "hearings" will curtail. As the Ninth Circuit Court of Appeals has noted, there are "significant procedural distinctions between the initial quasi-prosecutorial informal conferences conducted by asylum officers after the filing of an asylum application, and the 'quasi-judicial functions' exercised by immigration judges, who preside over hearings."[21]

V. The Proposed Rule at 8 C.F.R. §§ 1208.2(c), 1003.48, Fails to Provide the Opportunity for Meaningful Review, and Instead Encourages Immigration Judges to Rubberstamp Removal Orders.

To the extent the new proposed asylum interview process would lack the elements of a full and fair proceeding, any prejudice to an applicant could potentially be remedied by a true *de novo* hearing before an immigration judge, under section 240. But that is not what the Departments propose. While the proposed rule refers to the immigration judge's authority to conduct *de novo* review, what it describes is not *de novo* review. Rather, an immigration judge would have the ability to choose not to conduct an evidentiary hearing on a noncitizen's asylum application.

In fact, the proposed rule states that the immigration judge generally would be able to complete a *de novo* review solely on the basis of the record before the asylum officer. The rule proposes that a party may seek to introduce additional testimony or documentation so long as the party demonstrates to the immigration judge that the testimony or documentation is not duplicative of what was considered by the asylum officer and that it is necessary to develop the factual record to allow the immigration judge to issue a reasoned decision in the case. But as the proposed rule acknowledges, immigration judges are currently overburdened with overflowing dockets. Therefore, immigration judges would be inclined to deny requests for submission of additional evidence or testimony on even a vague finding that the submissions would be duplicative or unnecessary.[22] The proposed rule would perpetuate the recent deterioration of the immigration court system as a rubber-stamping tool for removal orders issued by DHS.[23] This would upend the purpose of the courts, which is to serve as impartial arbiters tasked with adjudicating immigration cases fairly.[24]

Moreover, the proposed rule states that the provisions of 8 C.F.R. §§ 1003.2 and 1003.23 governing motions to reopen and reconsider generally would be applicable to decisions rendered by immigration judges or the Board of Immigration Appeals in these proceedings. The rule is silent on what procedures would be involved in cases where an individual becomes eligible for other relief, for example, a U visa or

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adverse witnesses or review and rebut information accessed by the officer. These are fundamental elements of judicial hearings.

[21] *Singh v. Gonzales*, 403 F.3d 1081, 1087 (9th Cir. 2005) (internal quotation marks and citation omitted); *Matter of J-C-H-F-*, 27 I. & N. Dec. 211, 212 (BIA 2018) (acknowledging that credible fear interviews can be unreliable due to the lack of uniform procedures).

[22] See USDOJ, *Case Priorities and Immigration Court Performance Measures, Office of the Chief Immigration Judge* (Jan. 17, 2018), https://www.justice.gov/eoir/statistics-and-reports.

[23] See Innovation Law Lab, Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

[24] See USDOJ, Policy Memo, *Adjudicator Independence and Impartiality, EOIR Director* (Jan. 19, 2021), https://www.justice.gov/eoir/eoir-policy-manual/vii.

VAWA-based adjustment. However, if individuals were placed in section 240 proceedings, the procedure would be straightforward - leading to more clarity and efficiency of the process.

Finally, in these proposed proceedings, the immigration judge would have the authority to review all decisions issued by the asylum officer, even positive ones. For example, the rule proposes that if asylum is denied but the Asylum Office grants withholding of removal, the immigration judge can not only deny asylum upon review, but also reverse USCIS' decision to grant withholding of removal. There is no cognizable rationale for this rule except to disincentivize individuals from utilizing their statutory right to have their asylum claims considered by the court. An immigration court's function, as a neutral arbiter, is to settle disputes between parties. Once DHS has determined that an individual is eligible for withholding of removal, an immigration judge's unilateral decision to reverse that finding would undercut the immigration judge's role as a neutral arbiter. It is difficult to imagine how reconsidering USCIS' decision to grant relief would further the rule's purported goal of achieving efficiency.

Indeed, the rule proposes that setting up an entirely separate process through the asylum office and courts would somehow create efficiency, while the same players will still be tasked with their current functions and duties. The Departments put forward no meaningful rationale why a separate procedure apart from 240 proceedings is needed to carry out efficient, just results for asylum seekers. Instead, the regulations unnecessarily complicate the process while simultaneously cutting off the ability of asylum seekers to meaningfully present their claims with the benefit of counsel, time to prepare, and a guaranteed right to present their claims in an adversarial proceeding. An adversarial proceeding as provided for by statute is crucial in providing the important procedural safeguards of allowing parties to present testimonial and documentary evidence, the ability to cross-examine adverse witnesses, and the right to review and rebut all evidence considered by the adjudicator.

VI. Implementation of the Proposed Rule Will Lead to Inconsistent Adjudications for Asylum Seekers and Put a Strain on Agency Resources Resulting in an Impermissible Increase in Application Fees.

A. Phased implementation and DHS discretion to place certain individuals in section 240 proceedings will lead to inconsistent treatment of asylum seekers at the border.

Should this rule go into effect, we urge DHS to reconsider its phased implementation given the high risk of inconsistent treatment between asylum seekers subject to the new regulation and all other asylum seekers. Giving DHS officers the discretionary authority to choose whether an individual would be subject to the new procedures or regular 240 proceedings would exacerbate the existing disparities already experienced by asylum seekers in defensive proceedings.[25] The inevitable inconsistencies will have a profound, negative effect on the due process rights of asylum seekers. Where the stakes are so high, in some cases literally a matter of life or death, a phased in testing approach is inappropriate. As such, if this rule is promulgated after the comment period, DHS should not implement this rule until it is able to ensure consistency in its application.

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[25] TRAC, Syracuse University, *Asylum Decisions Vary Widely Across Judges and Courts - Latest Results*, https://trac.syr.edu/immigration/reports/590/; United States Government Accountability Office, Report to Congressional Committees, *Variation Exists in Outcomes of Applications Across Immigration Courts and Judges*, November 2016, https://www.gao.gov/assets/gao-17-72.pdf.

All asylum seekers should have the right to have their cases heard by an immigration judge with the full protections of 240 proceedings. Singling out cases based on perceived ineligibilities is problematic. Placing only flagged cases before an immigration judge presents two problems. First, it would exacerbate negative bias, which a good procedural rule should curtail. Second, it implies all cases before a judge present problems of eligibility. This is very distinct from a process which provides full due process under INA 240 in every case. The DHS enforcement apparatus has a history of discriminatory exercises of discretion that have included racial profiling and other abuses.[26] As such, the wide discretion to select which individuals are subject to the new regulatory procedures and which are placed in 240 proceedings, will only exacerbate the problem of non-uniformity and arbitrariness in the asylum process.

Moreover, the proposed language in the rule specifically states that 240 proceedings will be utilized "when a noncitizen with a positive credible fear determination may have committed significant criminal activity, have engaged in past acts of harm to others, or pose a public safety or national security threat." This practice would likely result in a significant number of asylum seekers being denied the same meaningful chance to present their asylum claims as they will already be proceeding under the guise of assumed criminality or national security threats. Further, the proposed regulation states, "In some cases, DHS may determine that it is more appropriate for such noncitizens' protection claims to be heard and considered in the adversarial process before an IJ," but does not justify this statement. We are concerned that the use of this provision has the potential to be arbitrary or retaliatory in nature and will block certain populations from obtaining a full and fair hearing. Therefore, we urge DHS to eliminate the use of discretion by DHS officers to determine in which proceedings to place asylum seekers.

B. Agency resources are not equipped to fully implement this rule and fee increases are an unacceptable solution.

We are also concerned that this new rule will put a strain on existing DHS resources. Creating an unwieldy new process of asylum officers as the main arbiters of verbally asserted asylum claims in the credible fear process will not create efficiencies, but require more adjudicators, more trainings, and increased appellate resources. In addition, it is likely that many bona fide asylum seekers will be left without protection due to the inability to present a full claim at entry. While it is clear that new resources – namely, qualified staff[27] – will be sought to implement this rule, we are concerned as to the pace at which new staff can be hired, trained and deployed to implement this new regulation. We are also concerned about the financial strain it would have on an agency already struggling with insolvency and processing delays.[28] The burden of implementing the proposed rule will likely result in the continued and

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[26] Surana, Kavitha, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, ProPublica (June 8, 2018), https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania.

[27] The proposed rule would require USCIS to add over 800 new employees to handle an additional 75,000 cases per year. 86 Fed. Reg. 46921. According to the NPRM, there are currently backlogs in the immigration court of over 1.4 million cases, 86 Fed. Reg. 46908, and in the asylum offices of over 400,000 cases. 86 Fed. Reg. 46921.

[28] Pierce, Sarah and Doris Meissner, USCIS Budget Implosion Owes to Far More than the Pandemic, Migration Policy Institute (June 2020), https://www.migrationpolicy.org/news/uscis-severe-budget-shortfall; Jordan, Miriam, *Immigration Agency That Issues Visas, Green Cards Struggles to Stay Afloat*, N.Y. Times (May 17, 2020), https://www.nytimes.com/2020/05/17/us/immigration-agency-uscis-budget.html?

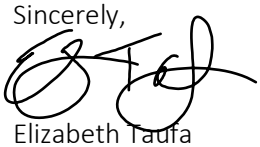
expanded use of video teleconferencing technology for CFIs and asylum hearings to the asylum office, which have historically created well-documented due process concerns.[29]

At the same time, we are concerned with DHS' position regarding the possible increase in fees to meet the new demands the proposed rule will put on existing resources.[30] Even with appropriated funding for USCIS backlog reduction in the September 30, 2021 Continuing Resolution passed by Congress, the financial strain that this new rule would put on the agency would offset any benefit provided by Congressional funding. As such, should this rule be implemented, we are strongly opposed to any increase to existing fees to offset the costs of implementation.

VII. Conclusion

The ILRC strongly urges DHS to reconsider certain aspects of this proposed rule as detailed above. While some of the changes proposed are positive, the provisions we have highlighted here present serious concerns regarding the due process rights of asylum seekers, without achieving the stated goal of efficiency. Mitigating or removing these harmful provisions will allow USCIS to implement an asylum rule that improves efficiency and enables backlog reductions, while maintaining statutory and Constitutional protections for asylum seekers. Please reach out if there are any questions we can answer, by contacting etaufa@ilrc.org.

Sincerely,



Elizabeth Taufa
Policy Attorney and Strategist

[29] Bannon, Alicia and Janna Adelstein, The Impact of Video Proceedings on Fairness and Access to Justice in Court, The Brennan Center for Justice (September 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court; American Immigration Lawyers Association, Featured Issue: Use of Video Teleconferences During Immigration Hearings (March 12, 2020), https://www.aila.org/infonet/video-teleconferences-immigration-hearings.

[30] According to the NPRM, USCIS will need to raise application fees by 13-26 percent, above and beyond any other needed fee increases in order to meet the costs of the additional staff. 86 Fed. Reg. 46937