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

October 19, 2021

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

5107 Leesburg Pike, Suite 2616

Falls Church, VA 22041

## **RE: RIN 1615-AC67; Public Comment on Proposed Rules on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers**

ADL (the Anti-Defamation League) submits this comment urging the Department of Homeland Security (DHS) and Department of Justice (DOJ)(collectively, “the Departments” or “the agencies”), to withdraw or substantially revise the proposed rules discussed herein. We appreciate that the Departments are open to re-envisioning certain aspects of the asylum system. However, we have grave concerns that, as written, the proposed rules will lead to many asylum seekers being rushed through a “streamlined” system where they do not receive a full hearing on their claims and where their due process rights are greatly reduced.

ADL is a leading anti-hate organization founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. We are rooted in a community that has experienced the plight of living as refugees throughout its history. ADL has advocated for fair and humane immigration policy since our founding and has been a leader in exposing anti-immigrant and anti-refugee hate that has poisoned our nation’s debate.

## **United States Asylum Law Has Already Strayed Far From Our Obligations under International Treaties, Returning to This Country’s Shameful History of Turning Away Displaced People**

ADL is mindful that Jews have a long history of displacement throughout the world. In January 1939, two months after Kristallnacht, a poll asked whether the U.S. government should permit “10,000 refugee children from Germany — most of them Jewish — to be taken care of in American homes.” An astounding — and shameful — 61 percent said no.<sup>1</sup>

Later that year, the *USS St. Louis* carrying 937 German refugees — mostly Jews fleeing the Third Reich — set sail for Cuba. Most had applied for U.S. visas.<sup>2</sup> Turned away from Cuba, as the *St. Louis* sailed so close to Florida that the passengers could see the lights from Miami, they appealed to President Roosevelt to give them safe harbor. With public opinion opposed to lifting the stringent immigration quotas or to making an exception for the ship’s passengers, the *St. Louis* was forced to return to Europe. Almost a quarter of the passengers perished in the Holocaust.<sup>3</sup>

Then, as now, government officials — from FBI agents and members of the State Department to President Roosevelt himself — argued that refugees posed a serious threat to national security.<sup>4</sup> Antisemitism was undeniably an undercurrent of the push to deny Jews refuge, just as Islamophobia undergirds much of the anti-refugee sentiment today. It was wrong then, just as it is wrong today.<sup>5</sup> Since turning away the *St. Louis*, the United States has become a signatory to the 1967 Protocol Relating to the Status of Refugees,<sup>6</sup> which binds parties to the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”).<sup>7</sup> This obligates the U.S. to comply with the principle of *non-refoulement* — an asylum seeker cannot be sent to another territory or state where they fear threats to their life or freedom on protected grounds, even if potential refugees have allegedly committed criminal offenses. Although the Refugee Convention allows signatory states to exclude and/or expel individual asylum seekers, this is only permitted in limited circumstances and may not be applied to entire groups. It was not until 1980 that the United States asylum system was codified in statute through the Refugee Act. Along with other measures designed to bring the U.S. domestic legal code into compliance with the Refugee Convention, the Refugee Act created a “broad class” of refugees eligible for a discretionary grant of asylum.<sup>8</sup>

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<sup>1</sup> Ishaan Tharoor, “What Americans thought of Jewish refugee’s on the eve of World War II,” The Washington Post, last modified November 17, 2015, <https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii/>.

<sup>2</sup> “Voyage of the St. Louis,” Holocaust Encyclopedia, last modified July 12, 2021, <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis>.

<sup>3</sup> Ibid.

<sup>4</sup> Daniel A. Gross, “The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies,” Smithsonian Magazine, last modified November 18, 2015, <https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/?no-ist>.

<sup>5</sup> Jonathan A. Greenblatt, “Once We Were Strangers Too: The Jewish Responsibility to Welcome Refugees,” ADL, last modified November 24, 2015, <https://www.adl.org/news/op-ed/once-we-were-strangers-too-the-jewish-responsibility-to-welcome-refugees>.

<sup>6</sup> “Protocol Relating to the Status of Refugees,” opened for signature on January 31, 1967, <https://www.unhcr.org/en-us/3b66c2aa10>.

<sup>7</sup> “Convention Relating to the Statute of Refugees,” opened for signature on July 28, 1951, <https://www.unhcr.org/en-us/3b66c2aa10>.

<sup>8</sup> *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 423 (1987).

Under the current asylum system, displaced persons seeking asylum have the evidentiary burden of establishing that they are eligible for asylum.<sup>9</sup> They must do this in the face of a complex web of laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail.<sup>10</sup> The obstacles to winning asylum are overwhelmingly high; indeed, in some areas of the country and before some immigration judges, it is almost impossible to succeed.<sup>11</sup> Despite these challenges, procedural safeguards exist to ensure asylum seekers have their day in court. *The proposed regulations would severely limit and undermine these procedural safeguards.*

The proposed regulations would make multiple changes to established practices, but we will limit our focus here to certain changes of particular concern to us. The fact that we have not discussed a particular proposed change to the law in this Comment should not be read to mean that we agree with it.

### **8 CFR §§ 1003.48 and 208.14: The Proposed Rules’ Focus on “Streamlining” Would Deny Asylum Seekers Their Day in Court**

In the name of streamlining the asylum process, the proposed rule would limit the rights of asylum seekers to a full and fair hearing of their case. We are particularly concerned about changes that prevent asylum seekers from having their cases heard properly in immigration court.

Proposed sections 8 CFR §§ 1003.48 and 208.14(c)(5) would dramatically alter the rights of asylum seekers<sup>12</sup> who have been placed in expedited removal and who have passed their credible fear interview<sup>13</sup> (CFI). Under the proposed rule, asylum seekers who pass their CFI would have their applications for asylum and related relief heard by an asylum officer rather than being referred to immigration court for full proceedings under section 240 of the Immigration and Nationality Act (INA). If the asylum seeker is not granted asylum by the United States Citizenship and Immigration Services (USCIS) asylum officer, under the new rule, the asylum seeker would not be placed into § 240 removal proceedings and instead could only seek “review” of the asylum officer’s decision and the interview transcript. If the asylum seeker wants to present further evidence to the immigration court, they “must establish that the testimony or documentation is not duplicative of testimony or documentation already presented to the asylum officer, and that the testimony or documentation is necessary to ensure a sufficient factual record upon

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<sup>9</sup> 8 USC § 1158(b)(1)(B); 8 CFR § 1240.8(d).

<sup>10</sup> Daniel Connolly, Aaron Montes, and Lauren Villagran, “Asylum seekers in U.S. face years of waiting, little chance of winning their cases,” USA Today, last modified September 23, 2019, <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/>.

<sup>11</sup> Manuel Roig-Franzia, “Migrants risk it all seeking asylum. The answer in court is almost always ‘no,’” Washington Post, last modified July 24, 2019, [https://www.washingtonpost.com/lifestyle/style/migrants-risk-it-all-seeking-asylum-the-answer-in-court-is-almost-always-no/2019/07/23/9c161b2e-a3f7-11e9-b732-41a79c2551bf\\_story.html](https://www.washingtonpost.com/lifestyle/style/migrants-risk-it-all-seeking-asylum-the-answer-in-court-is-almost-always-no/2019/07/23/9c161b2e-a3f7-11e9-b732-41a79c2551bf_story.html).

<sup>12</sup> 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 of these forms of protection.

<sup>13</sup> To the extent that this comment addresses asylum seekers who have undergone reasonable fear interviews, it will use the term “credible fear interview” to mean applicants who have undergone credible fear or reasonable fear interviews.

which to base a reasoned decision on the application or applications.” 8 CFR § 1003.48(e)(1). The preamble to the rule states that the intent of this change is for these proceedings “to be more streamlined than section 240 removal proceedings.” 86 Federal Register (Fed. Reg.) 46906, 46919 (Aug. 20, 2021).

We strongly object to this radical change in the rights of asylum seekers in the United States. Under this change, asylum seekers could be ordered removed without ever having a fair day in court. Asylum officer interviews are conducted by asylum officers and give limited opportunity for counsel to question the applicant or present other witness testimony, such as expert testimony.<sup>14</sup> If the application is denied by the asylum officer, the asylum seeker would have to request review by an immigration judge to avoid an immediate, final removal order. While the rule calls the review by the judge “de novo,” we are deeply troubled that the asylum seeker can only present new evidence at the discretion of the judge. We fear that this “streamlined” approach will allow immigration judges to review an interview transcript and rubber stamp denials from asylum officers with little due process and without meaningful participation by asylum seekers’ counsel, in violation of INA § 292, which provides a right to counsel in removal proceedings. Moreover, without a traditional trial transcript to review, we are concerned that BIA and federal circuit court reviews will likewise be cursory.

We also strongly object to the proposal that if an asylum seeker is granted withholding of removal or Convention Against Torture (CAT) protection by an asylum officer, but seeks review of the asylum officer’s asylum denial, the immigration judge can review, and revoke, the protection grant. 8 CF § 1003.48(a). This provision puts those granted withholding or CAT in the untenable position of seeking review and risking being returned to persecution or torture, or not seeking review and potentially facing permanent separation from family members. The agencies should not force those fleeing harm to choose between their own safety and reuniting with their family members. Given that the stated purpose of the rule is to streamline procedures, requiring judges to review protection grants runs counter to the stated goal of addressing the immigration court backlog.

We do not object in theory to the rule’s change that would allow asylum seekers to have the opportunity to present their cases in a nonadversarial interview as a first step, but we strongly object to the changes that could result if the majority of asylum seekers who come through the expedited removal system are never afforded a full hearing in which counsel of their choosing presents evidence to an immigration judge. We suggest that if the agencies move forward with this new asylum hearing process, asylum seekers who are not granted asylum by the Asylum Office be referred for full INA § 240 proceedings.

### **The Proposed Rule Could Be Weaponized by Future Anti-Immigrant Administrations Against Asylum Seekers**

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<sup>14</sup> The proposed rule explicitly allows the representative to “ask follow-up questions” and make a statement but only at the completion of the interview. 8 CFR § 208.9(d)(1).

The Asylum Office has, in the recent past, been subject to politically motivated changes in training material and culture that have affected outcomes in cases.<sup>15</sup> While asylum officers and immigration judges alike are bound by federal court, attorney general, and Board of Immigration Appeals (BIA) precedent, immigration judges are given the ability to function more independently than their USCIS officer counterparts.<sup>16</sup> Asylum seekers should know that they will receive a fair adjudication of their claim without fear of politicization. With the new power that would be given to asylum officers to be primary decision makers in asylum claims, and with a reduced role for immigration judges, an administration hostile to asylum would likely find it easier to issue asylum office guidance that would result in reduced asylum grants. Likewise, policy memoranda by the Executive Office for Immigration Review (EOIR) or an attorney general decision could lead to a process where immigration judges generally review only the asylum office record without allowing any further evidence or testimony.

Furthermore, the prior administration sought to greatly expand the use of expedited removal. While the current administration may envision this rule as streamlining border processes for recent arrivals, a future administration that seeks to expand the use of expedited removal could prevent many noncitizens, far from the border, from accessing full removal proceedings.

Likewise, with the “streamlined” procedure proposed, a hostile administration could expedite the process further, giving asylum seekers who pass a CFI their merits “asylum hearing” within a few days or weeks, and keeping them detained throughout the process in remote border facilities. If the immigration judge conducting review of the decision listens to the recording rather than waiting for a transcript of the interview, the entire process could be completed within a few days or weeks of the asylum seeker’s arrival in the United States, similar to the widely criticized PACR and HARP procedures under the prior administration.<sup>17</sup> Asylum seekers are far more likely to succeed on their claims if they have competent counsel and the time required to gather evidence and, if needed, obtain mental health services.

### **The Proposed Rule Would Create a Massive New USCIS Infrastructure, the Cost of Which Would Be Borne by Other Applicants for USCIS Benefits**

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 Notice of Proposed Rulemaking (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. Siphoning off a tiny percentage of noncitizens

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<sup>15</sup> *Kiakombua v. Wolf*, 498 F. Supp. 3d 1 (D.D.C. 2020), appeal dismissed *sub nom. Kiakombua v. Mayorkas*, No. 20-5372, 2021 WL 3716392 (D.C. Cir. July 19, 2021); Nick Miroff, “Chief of U.S. asylum office reassigned as White House pushes for tighter immigration controls,” *The Washington Post*, last modified September 4, 2019, [https://www.washingtonpost.com/immigration/chief-of-us-asylum-office-reassigned-as-white-house-pushes-for-tighter-immigration-controls/2019/09/04/0ac3705e-cf4e-11e9-8c1c-7c8ee785b855\\_story.html](https://www.washingtonpost.com/immigration/chief-of-us-asylum-office-reassigned-as-white-house-pushes-for-tighter-immigration-controls/2019/09/04/0ac3705e-cf4e-11e9-8c1c-7c8ee785b855_story.html).

<sup>16</sup> 8 CFR § 1003.10(b), (“immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”).

<sup>17</sup> Kate Huddleston, “Ending PACR/HARP: An Urgent Step Toward Restoring Humane Asylum Policy,” *Just Security*, last modified February 16, 2021, <https://www.justsecurity.org/74678/ending-pacr-harp-an-urgent-step-toward-restoring-humane-asylum-policy/>.

cases for a “streamlined” process will do little to address these backlogs and will require extraordinary resources; the agencies should provide needed resources to EOIR and the Asylum Offices to address the existing backlogs before creating an unwieldy new system.

The agencies estimate in the preamble to the NPRM that as the newly designed Asylum Office hearing system hears more cases in the future, 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. The United States has a legal and moral obligation to offer protection to those fleeing persecution or torture. By shifting the primary burden of hearing asylum applications from the appropriations-funded immigration court to the USCIS-funded asylum office, the rule would force noncitizens to pay for asylum adjudications rather than having the cost of these important protections shouldered by all taxpayers, including U.S. citizens. Building this elaborate new USCIS system will significantly increase fees for all USCIS applications when such fees are already too high for many noncitizens to afford.

### **8 CFR § 208.30(g): The Proposed Rule Eliminates Asylum Seekers’ Abilities to Seek Reconsideration from the Asylum Office of Credible Fear Interviews**

Proposed 8 CFR § 208.30(g) would strip the Asylum Office of the ability to reconsider CFI denials if an immigration judge upholds the denial. The CFI process is generally completed quickly, while asylum seekers are detained, and often after lengthy and arduous travel to reach the U.S. border. An estimated 84% of detained immigrants do not have access to legal representation,<sup>18</sup> leaving them to navigate a complex legal system on their own. For asylum seekers who have suffered severe past persecution or trauma, it is often difficult to recount past harms immediately at a CFI. While immigration judge review is supposed to protect the rights of asylum seekers who do not pass a CFI, these reviews are often cursory. In many cases, it is only after several meetings with an advocate in a detention center that the asylum seeker is able to recount past trauma. In other instances, language barriers, especially for indigenous language speakers, may prevent fluent communication with adjudicators. The ability to file a request for reconsideration has saved countless asylum seekers from being returned to countries of feared persecution or torture without having their claim heard and it should not be removed in the name of “efficiency.”

### **8 CFR § 208.30: We Applaud Some Positive Changes to the CFI Procedure**

We applaud the agencies for clarifying in the regulations that the CFI must be performed by a USCIS officer. 8 CFR § 208.30(d). Under the prior administration, DHS allowed Customs and Border Protection officers with limited asylum law training, and with a background in law enforcement rather than protection, to conduct these critical interviews. A federal court enjoined that practice in *A.B.-B. v. Morgan*, No. 20-CV-846 (RJL), 2020 WL 5107548, at \*1 (D.D.C. Aug. 31, 2020). The proposed rule

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<sup>18</sup> Nájuez, D. (2018, August 22). Without legal representation, migrants face long odds on immigration, asylum claims. Retrieved July 2020, from <https://www.azcentral.com/story/news/politics/immigration/2018/08/15/withoutlawyer-asylum-seekers-face-long-odds/850625002/>.

would keep future administrations from again seeking to have DHS officers without the appropriate background conduct CFIs.

We also applaud the agencies for rejecting changes to the credible fear standard put forth in the “Global Asylum” rule and “Security Bars” rule and restoring the standard to what has been in effect for the past two decades. 8 Fed. Reg. 46914. The proposed rule, at 8 CFR § 208.30(e)(2), clarifies that asylum seekers need only demonstrate “a significant possibility” that they can prevail on their claim for asylum, withholding of removal, or Convention Against Torture protection. These changes provide important protections to those who are in expedited removal and comport with INA §235(b)(1)(B).

### **8 CFR §§ 208.3-208.4: Allowing the CFI to Serve as the Asylum Application Is, in Theory, a Positive Change**

We support the general idea that a positive CFI should be considered the filing of an asylum application both for purposes of meeting the one year filing deadline for asylum applications under INA § 208(a)(2)(B) and to start counting required days towards employment authorization document (EAD) eligibility.

People who flee harm and express fear at the border should not be barred from asylum by the one year filing deadline which was established by Congress based on an assumption that bona fide asylum seekers would file relatively soon after entering the United States. Processes at the border are often chaotic and seemingly arbitrary. Many asylum seekers have missed the one year filing deadline through lack of notice of the deadline, through confusion about the roles of different immigration agencies, or through the lack of coordination between DHS and DOJ leading to court proceedings not being timely initiated. *See Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018).

We do have some concerns, however, about the asylum officer’s CFI notes forming the basis of the application because these notes are not always accurate. Proposed 8 CFR § 208.4(c) leaves it within the discretion of the asylum officer or immigration court whether or not to permit an asylum seeker to amend or supplement their application; asylum seekers should be afforded this opportunity as of right.

We strongly support procedural changes that would make it easier for asylum seekers to obtain EADs as quickly as possible. Most asylum seekers come to the United States with virtually no financial resources and often live in poverty until they can obtain lawful employment. It is critical to their well-being, including having the ability to pay for competent legal counsel, that they be able to obtain an EAD as quickly as possible.

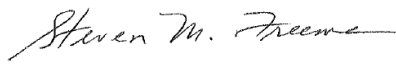
### **Conclusion**

The proposed rules would dramatically change adjudication procedures for asylum seekers who have been placed into expedited removal proceedings. While we acknowledge that it is often appropriate for asylum applications to be heard, in the first instance, in a non-adversarial interview setting, we strongly

believe that prior to being removed from the United States, potentially to a country where a noncitizen would suffer persecution or torture, the applicant should have a full day in court where their counsel can present all necessary evidence. The system proposed by this rule would be expensive to create and would not address the hundreds of thousands of asylum seekers already waiting for adjudication of their cases in the backlogs. The agencies should seek proper funding for the immigration courts through Congress and hire more asylum officers to adjudicate the claims of asylum seekers who have been waiting for years to have their cases heard rather than building a new system to “streamline” proceedings for recent border crossers.

We appreciate the opportunity to comment on these proposed changes and urge you to rescind or substantially rewrite this NPRM.

Sincerely,



Steven M. Freeman  
Vice President  
Civil Rights



Karen Levit  
National Civil Rights Counsel



Max Sevilia  
Vice President  
Government Relations,  
Advocacy, and  
Community Engagement