

*Submitted via [www.regulations.gov](http://www.regulations.gov) and  
Email ([DHSDeskOfficer@omb.eop.gov](mailto:DHSDeskOfficer@omb.eop.gov))*

July 15, 2020

Lauren Alder Reid, Assistant Director  
Office of Policy  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 1800  
Falls Church, VA 22041

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503  
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

*Re: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed  
Rules on Asylum, and Collection of Information OMB Control Number 1615-0067*

Dear Ms. Alder Reid:

I am writing on behalf of the Legal Aid Society of the District of Columbia (Legal Aid) in response to the Department of Justice’s (DOJ) and the Department of Homeland Security’s (DHS) (collectively, the “Departments”) Joint Notice of Proposed Rulemaking (JNPRM or the “proposed rule”) to express our strong opposition to the changes regarding “procedures for asylum,” published in the Federal Register on June 15, 2020.

Legal Aid is the oldest general legal services program in the District of Columbia. Legal Aid’s mission is to make justice real – in individual and systemic ways – for persons living in poverty in the District. Over the past 88 years, Legal Aid has provided legal assistance to tens of thousands of individuals. Today, we provide legal services in five broad areas: housing, family law, public benefits, consumer, and immigration, our newest practice area added in 2018. Our work includes individual and systemic advocacy with the District and federal governments to eliminate access barriers to vital public benefits for eligible District residents. In this initiative, as in all of our work, Legal Aid is proud to represent citizens and non-citizens alike as we work to make the District a more equitable and just city.

***Legal Aid strongly opposes the proposed rule because it unfairly changes current U.S. asylum policies and processes.*** Collectively, these sweeping changes have the potential to severely and

unfairly restrict the number of individuals who may obtain asylum relief.<sup>1</sup> We object in particular to how these changes will prevent victims of brutal gender-based violence<sup>2</sup> and oppression from obtaining protection under our immigration laws.<sup>3</sup> We urge the Departments to withdraw the proposed rule.

### **The 30 Day Comment Period Denies A Meaningful Opportunity to Provide Input Into Sweeping Changes in the Law.**

At the outset, we oppose the 30-day comment period, which halves the typical 60-day comment period without any stated reason, and denies our organization a meaningful opportunity<sup>4</sup> to provide input on these sweeping changes and the grave human costs that would result from their implementation. The proposed rule is extremely long, dense, technical, and contains many different and substantial changes to current and long-standing asylum regulations. Under any circumstances, it would be unfair to give the public such a short time to comment on changes that are this extensive. But the challenges to respond to this JNPRM are magnified at this time by the ongoing COVID-19 pandemic. Our organization, like many others, is occupied with serving clients affected by COVID-19. Many staff members are unable to work at full capacity due to child care duties. Unless withdrawn completely, the JNPRM should be republished with an

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<sup>1</sup> See American Immigration Lawyers Association, *Proposed Rule Would Deny Asylum Seekers Fundamental Human Rights*, (June 12, 2020), <https://www.aila.org/advo-media/press-releases/2020/proposed-asylum-rule> (On Monday, June 15, 2020, the Trump Administration will publish a proposed rule seeking to fundamentally rewrite U.S. asylum laws and policies, and removing almost any chance for those fleeing persecution to gain protection.).

<sup>2</sup> Gender-based asylum includes individuals fleeing female genital mutilation, intimate partner violence, rape, forced marriage, honor killings, human trafficking, and harm based on sexual orientation. Tahirih Justice Center, *Tahirih Explains Gender-Based Asylum*, (June 2020), <https://www.tahirih.org/wp-content/uploads/2020/06/Tahirih-Explains-Gender-Based-Asylum.pdf>.

<sup>3</sup> See NPR, *Trump Administration Proposes Rules to Sharply Restrict Immigration*, (June 11, 2020), <https://www.npr.org/2020/06/11/875419571/trump-administration-proposes-rules-to-sharply-restrict-asylum-claims> (“‘If implemented, the rule would eliminate gender-based asylum — shutting the door to anyone fleeing life-threatening persecution due to their gender, while undoing decades of legal precedent,’ the [Tahirih Justice Center] said in a statement. ‘Women fleeing rape and severe domestic violence, LGBTQ+ individuals facing deadly attacks, and those escaping other fatal gender-based harms will no longer be allowed to seek safety within our borders if the regulations take effect.’”).

<sup>4</sup> Executive Order 12866 directs that agencies generally furnish “not less than 60 days” for public comment to “afford the public a meaningful opportunity to comment on any proposed regulation.” Executive Order 13563 states that “[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”

additional 60-day comment period in order for the public and stakeholders, like Legal Aid, to have adequate time to provide comments.

### **The Proposed Rule Would Prevent Deserving Asylum Seekers from Obtaining Protections.**

If the proposed rule was implemented, many asylum seekers like those we see at Legal Aid would have their claims foreclosed. For example, at Legal Aid, we represent a client who has suffered years of brutal physical assaults and multiple rapes at the hands of family members and her spouse. She was also threatened multiple times and her property was ransacked by a gang who was targeting her, in part because she expressed disapproval of gang violence, and also in part because her sister was a protected witness in a criminal case against the gang. Although this client reported both the gender-based violence and gang violence she suffered multiple times to law enforcement in her country, she was not provided with any protection or assistance.

Under current asylum rules, this client could potentially have an asylum claim under three established grounds:<sup>5</sup> (1) “political opinion” for her opinion regarding gangs;<sup>6</sup> (2) family-based (which fits under particular social group);<sup>7</sup> and (3) gender-based (which also fits under particular social group).<sup>8</sup> The proposed rule however, expressly denies relief due to persecution based on “retribution,” “interpersonal disputes,” or “private criminal acts.” It narrows “political opinions” to expressly exclude “generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations.” Thus under the proposed rule, this client’s asylum claim would be severely undercut, if not completely eliminated.

In addition to substantively barring certain asylum claims, the proposed rule imposes harsh procedural limitations, which would make it virtually impossible for many asylum applicants to prevail, given the practical realities of the asylum seeking process. For decades, the United States has recognized the often desperate and widely varied experiences of asylum seekers. Hence, adjudicators were permitted discretion in considering cases involving certain adverse facts, such as an applicant’s criminal history. The proposed rule, however, would turn this discretion on its head. Adjudicators would have discretion to categorically deny applications—regardless of their

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<sup>5</sup> To be eligible for asylum, an applicant must have suffered in the past, or must fear in the future, persecution that is “on account of” or that has a “nexus” to at least one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.- INA § 101(a)(42); *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); U.S.C.I.S., *Nexus and the Protected Grounds*, (Dec. 20, 2019), available at [https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus\\_minus\\_PSG\\_RAIO\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf).

<sup>6</sup> See generally *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012); *Matter of ME-V-G-*, 26 I&N Dec. 227 (BIA 2014).

<sup>7</sup> See *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

<sup>8</sup> See generally *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of Acosta*, 19 I&N Dec. 211 (1985).

merits—if an applicant failed to meet the one-year filing deadline, entered without inspection, stayed 14 days in a country en route to the U.S., used fraudulent documents, or did not pay taxes. Moreover, denied applications could be deemed “frivolous,” which would mean that the applicant would be permanently barred from ever obtaining any form of immigration relief in the future. Finally, judges deciding claims in the defensive/removal proceedings posture could “prepermit” claims, meaning that they could order a person deported based on the paper application alone, without a hearing.<sup>9</sup>

This change ignores the reality of how asylum applicants bring these cases and what is involved in preparing them. For example, currently, when clients come to Legal Aid many have not yet applied for asylum. Sometimes, due to delays associated with detention, lack of resources, lack of knowledge of asylum relief, or many other reasons, they are close to their one-year filing deadline.<sup>10</sup> Every single case brings its own unique challenges, as asylum cases are inherently very complex and require intense care when assessing them, for both attorneys and adjudicators. Legal Aid’s preparation for an asylum case can involve any and all of the following steps.

- We first meet with clients and obtain information about their eligibility for asylum.
- We then assist them with filing their paper application for asylum on the Form I-589 Application for Asylum. We are often required to submit the Form I-589 in a very short period of time in order to ensure that the application is received before the one-year filing deadline.
- After the application is submitted, we conduct many additional meetings with clients to gather additional details about their experiences and continue building their case.
- For clients in an affirmative posture (meaning they are not in removal proceedings), we prepare them for their asylum interview, compile and submit additional supporting documents and legal arguments prior to the submission deadline at the asylum office, and represent them at their interview.
- After their interview, applicants could either receive a grant of asylum, or be referred to immigration court and be placed in removal proceedings.
- Applicants in this defensive posture (in removal proceedings), must appear at a master calendar hearing. At the master calendar hearing, an applicant’s individual hearing will be scheduled, which is the hearing where the merits of their individual asylum case will be adjudicated.

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<sup>9</sup> “The prepermit rule would allow a judge to make a legal determination of an asylum case based only on a written application, and the judge could deny an application if the applicant did not present a viable claim on paper.” Lawfare, *New Proposed Asylum Regulations Would Endanger Women’s Lives*, <https://www.lawfareblog.com/new-proposed-asylum-regulations-would-endanger-womens-lives>, (July 7, 2020).

<sup>10</sup> Applicants must file paper applications for asylum within one year after they arrive in the United States, unless there are “extraordinary circumstances” or “changed circumstances.” See U.S.C.I.S., *Asylum Officer Training Course*, [https://www.uscis.gov/sites/default/files/files/nativedocuments/One\\_Year\\_Filing\\_Deadline\\_Asymylum\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/One_Year_Filing_Deadline_Asymylum_Lesson_Plan.pdf), (May 6, 2013).

- Prior to the individual hearing we meet with clients regularly in order to further develop facts, gather evidence, and obtain expert witnesses. We examine case law and even adapt our theories and arguments if new case law or guidance is implemented. We file an extensive document submission, along with a legal brief, to support our client’s case before the designated deadline. Finally, we represent them at the individual hearing itself.

**Because this rule would unfairly deny asylum seekers with legitimate claims for protection and impose irrational restrictions that ignore the reality of preparing for such a claim, we urge that the rule be withdrawn in its entirety, and that the current principles and procedures surrounding asylum relief remain in effect.** Specifically, we oppose this rule because, if implemented, it would:

- (1) Effectively gut asylum relief by allowing sweeping categorical denials, severely restricting eligibility, and imposing potential bars to relief on nearly every asylum seeker; and
- (2) Unjustly deprive asylum seekers of due process and eliminate long-standing requirements and jurisprudence regarding fair adjudication of cases.

**The Proposed Rule Effectively Guts Asylum Relief by Allowing Sweeping Categorical Denials, Severely Restricting Eligibility, and Imposing Potential Bars to Relief on Nearly Every Asylum Seeker.**

*Adjudicators could categorically deny cases related to “gender-based violence,” “retribution,” or “criminal activity.” 8 CFR § 208.1(f); 8 CFR § 1208.1(f).*

The proposed rule would effectively eliminate gender-based persecution as a basis for asylum.<sup>11</sup> Asylum in the U.S. can be a critical possible lifeline for the survivors we serve, and must continue to provide protection for them. Returning survivors of gender-based violence to countries where they face persecution will put them at life-threatening risk. When the police, courts, legislatures, and other official systems in survivors’ home countries will not or cannot protect them, survivors of gender-based violence need international protection in the form of asylum. Asylum was created as a path to safety for people harmed because of something about them that they cannot—or should not have to—change. Gender—just like race, religion, nationality, or political opinion—is a core aspect of who someone fundamentally is, and is recognized in international human rights law.

Implementation of the proposed rule would essentially eliminate the ability to claim asylum on the basis of gender-based violence in two ways. First, the proposed rule says that a persecuted group cannot be defined by circumstances related to “interpersonal disputes,” “retribution,” or

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<sup>11</sup> Under current rules, certain gender-based claims may constitute a protected characteristic under “particular social group.” See generally *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of Acosta*, 19 I&N Dec. 211 (1985).

“private criminal acts” as to which governmental authorities were “unaware or uninvolved.”<sup>12</sup> However, *all* asylum claims involve “retribution,” a word that is generally synonymous with “punishment. Moreover, virtually all harm that rises to the level of persecution could be characterized as “criminal acts,” because beatings, rape, and threatened murder is criminalized activity in almost all countries. This blanket rule regarding “criminal activity,” would, therefore, effectively eliminate the ability to obtain asylum based on any private actor harm, including gang violence, intimate partner violence, or other gender based persecution.

Second, while the rule purports to allow gender-based claims in “rare circumstances,” in practice, this exception will have no effect. The rule allows judges to pre-emptively terminate any “legally insufficient” claims—e.g., those based on gender—at the outset. Such claims could then be deemed “frivolous” under another provision in the rule, forever barring an applicant from any immigration status or benefits of any kind. Survivors will be deterred or prevented from applying at all, and the parameters of the exception will go untested.

***Adjudicators would have “discretion” to categorically deny cases where an applicant failed to meet the one-year filing deadline, entered without inspection, stayed 14 days in a country en route to the U.S., used fraudulent documents, or did not pay taxes in the U.S. 8 CFR § 208.13; 8 CFR § 1208.13.***

Under current law, in addition to meeting the legal standard for asylum, applicants must merit a favorable exercise of discretion by adjudicators in considering factors that would otherwise prevent an applicant from submitting a claim.<sup>13</sup> Adjudicators were permitted discretion in considering cases involving certain adverse facts, such as an applicant’s criminal history. Current jurisprudence on this topic provides that “the danger of persecution should *generally outweigh* all but the most egregious of adverse factors.”<sup>14</sup> In addition, whether an asylum applicant crossed the United States border without documentation was not considered a basis to deny a claim.

The proposed rule would turn this discretion on its head by giving adjudicators the discretion to categorically deny applications based on specified adverse factors. For example, the proposed rule contradicts the plain language of INA § 208(a)(2)(d), which explicitly allows exceptions to the one-year filing deadline for asylum if there are changed or extraordinary circumstances. The proposed rule would simply (and unlawfully) allow barring the application of any asylum seeker who has been in the United States for more than one year without lawful status without any consideration of their circumstances. This rule change ignores the fact that some individuals are in the United States for many years with no need to seek asylum until there is a “changed circumstance,” such as political conditions in the country of origin, or a personal change such as

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<sup>12</sup> See Proposed Rule at <https://www.federalregister.gov/documents/2020/06/15/2020-12575/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>

<sup>13</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

<sup>14</sup> *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) (emphasis added).

an altered understanding of one's sexual orientation. In addition, many asylum seekers are prevented by "extraordinary circumstances"—including serious illness, disability, or mental health issues like post-traumatic stress disorder often as a result of the persecution from which they have fled—from filing for asylum within one year of arriving in the United States.

For example, Legal Aid has assisted individuals who are seeking asylum based on their sexual orientation after being in the United States for longer than a year. For many of these individuals, it took some time for them to acknowledge or understand their sexual orientation or sexual identity. Additionally, many of these individuals only started receiving threats from their home country once they were "out" and publicly displaying their sexual orientation or sexual identity. For these types of cases, an asylum seeker's fear of returning to their home country may not be actualized until after they have been in the United States for over a year. The administration cannot eliminate these vital exceptions to the one-year-filing deadline in the guise of "discretion."

In addition, under the proposed rule, an adjudicator would have discretion to deny the application of any asylum seeker who enters or attempts to "enter without inspection," meaning that the applicant crossed the border without an authorized entry document. This could foreclose relief to a broad swathe of asylum seekers who have made the harrowing journey through Mexico in order to arrive in the United States. These individuals experience unimaginable trauma and hardship on their journey through Mexico, risking their lives in order to escape violence and persecution and being subjected to physical violence and sexual abuse during the journey. We have heard stories of people sleeping in garbage bags in the desert while listening to fellow travelers being raped, and having to cross the Rio Grande in a flimsy inflatable swimming pool. These migrants often walk for days on foot, possibly traveling for weeks, in order to simply arrive at the border while facing severe dehydration, lack of food, serious illness, and general exhaustion. Many of our clients bring their young children with them, making the journey even more risky and dangerous. It would be unjust to permit categorical denials of these individuals and their families who crossed the border at such great risk if that was their only way of coming to this country.

The proposed rule would also add another discretionary bar, preventing most refugees who spend 14 days in any country en route to the United States from qualifying for asylum. This change conflicts with the current "remain in Mexico" program, this Administration's policy requiring migrants to wait in Mexico while their asylum cases get adjudicated.<sup>15</sup> Due to the large backlog in asylum cases, many applicants must wait more than 14 days to get into this country.<sup>16</sup> And the COVID-19 pandemic has exacerbated this backlog, causing court dates to be postponed.<sup>17</sup> Thus,

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<sup>15</sup> Houston Public Media, *Asylum Seekers In Mexico Worry About Waiting Longer In Dangerous Conditions Due To Covid*, (April 28, 2020), <https://www.houstonpublicmedia.org/articles/news/politics/immigration/2020/04/28/368196/asylum-seekers-in-mexico-worry-about-waiting-longer-in-dangerous-conditions-due-to-covid-19/>.

<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

the proposed rule arbitrarily and irrationally places asylum seekers' crossing the southern border in an impossible position, since they must "remain in Mexico" for adjudication of their cases for prolonged periods, but will be denied if they remain for 14 days.

In addition, the rule would allow an immigration judge to deny asylum to a refugee who uses or attempts to use fraudulent documents to enter the United States, unless they are arriving in the United States directly from their country of origin. This punitive change would deny many legitimate asylum seekers the ability to seek protection. Often those fleeing harm are unable to obtain travel documents because they fear their government or the government refuses to provide the documents. Additionally, in some countries women cannot apply for passports unless a male family member signs off on the application.

The proposed rule would generally require denial of asylum applications if an asylum seeker did not file taxes in the United States prior to applying for asylum. Payment of taxes is in no way related to whether a person would suffer persecution in their home country. Moreover, while undocumented individuals can pay taxes by obtaining an Individual Tax ID Number (ITIN), many are unaware of this, and are fearful of reporting income to the government when they are technically not legally authorized to work in the United States.

***The proposed rule makes it virtually impossible to prevail based on a "particular social group" claim. 8 CFR § 208.1(c); 8 CFR § 1208.1(c).***

Applicants for asylum must demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group (PSG), or political opinion.<sup>18</sup> The inclusion of "particular social group" (PSG) within this list was intended to allow flexibility and capture those who do not fall within the other listed characteristics, including gender.<sup>19</sup>

The proposed rule, however, would permit an adjudicator to deny a PSG asylum claim based on unrelated issues, such as the applicant's "presence in a country with generalized violence or a high crime rate." Such restrictions would make it impossible for certain asylum seekers, especially those from Central America and Mexico, to win protection based on PSG membership.

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<sup>18</sup> INA § 101(a)(42).

<sup>19</sup> "The term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms." United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

Furthermore, the proposed rule would require that asylum seekers state with exactness every PSG that they could be a member of before the immigration judge or forever lose the opportunity to present the PSG, even on appeal, and even after a determination of ineffective assistance of counsel. An asylum seeker's life should not be dependent on an applicant's ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements of asylum.

At Legal Aid, developing a theory of PSG membership for our clients is a lengthy and complex process due to the difficulty of recounting traumatic experiences, and the ever-changing case law surrounding PSG membership. We have had cases where it took several meetings, often spanning several months, to fully develop a theory of an asylum seeker's case. Our clients have often endured unimaginable trauma and it takes several meetings to build trust with our clients as we gather some of the most intimate and difficult information that they could possibly share with anyone. We then apply these facts to case law regarding PSG membership, which often changes during the life of the case. Given the evolving nature of the legal analysis required, even represented clients sometimes have difficulty articulating the precise PSG grounds pertaining to their case. It would be unconscionable, therefore, to send an applicant back to persecution for failure to adequately craft PSG language themselves.

***The proposed rule further excludes applicants by narrowly redefining “political opinion.”  
8 CFR § 208.1(d); 8 CFR § 1208.1(d)***

As previously mentioned, “political opinion” constitutes one of the “protected characteristics” that could be the basis of an applicant's fear of persecution. Current precedent includes certain opinions regarding private actors as qualifying as “political opinions.” These include, for example, women holding feminist political opinions that men do not have the right to rape them, or indigenous people who oppose gangs taking their land.

In a radical shift, the proposed rule states that political opinion claims can only be based on “furtherance of a discrete cause related to political control of a state or a unit thereof.” The proposed rule explicitly rejects the possibility that an applicants' expression of opposition to terrorist or gang organizations can qualify as a political opinion. The convoluted wording of the proposed rule states that applicants will be denied asylum based on any political opinion “defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”

This restriction utterly fails to recognize that many asylum seekers flee their homelands precisely because the government of their country is unable or unwilling to control non-state actors such as international criminal organizations. In many countries where regimes are unstable, these non-state actors run rampant, and operate as de facto governments. Many of these non-state actors engage in horrible persecution of community members with absolute impunity. Individuals who are unable to seek protection in their countries, or whose governments are unwilling to protect

them from such persecution, should be able to seek safety and security elsewhere. However, this rule eliminates that possibility for these individuals.

***The rule creates a regulatory definition of “persecution” that is unduly restrictive. 8 CFR § 208.1(e); 8 CFR § 1208.1(e)***

The most fundamental aspect of asylum law is the obligation of countries to protect individuals with well-founded fears of persecution from being returned to harm.<sup>20</sup> The proposed rule would, for the first time, provide a regulatory definition of persecution – a definition that is unduly restrictive. The rule requires that the harm must be “extreme” and that threats must be “exigent.” This would prevent asylum relief to the many individuals suffering cumulative harm in the form, for instance, of repeated minor beatings or multiple short detentions.

At Legal Aid, we are currently representing a client who has suffered immense harm over her entire life. Though she is in her mid-twenties now, she suffered “minor” persecution from her early childhood to the time that she fled her home country to seek asylum in the United States. Like many clients, the harm that this client suffered escalated noticeably, and she feared what could happen to her if she stayed in her home country any longer. There is no rationale for deciding that years of continuing and escalating harm is less worthy of being the basis for asylum than one instance of “extreme” harm.

### **The Proposed Rule Unjustly Eliminates Long-Standing Due Process Requirements and Jurisprudence Regarding Fair Adjudication of Cases**

***Immigration judges could deny cases without giving applicants an opportunity to be heard in court. 8 CFR § 1208.13 (e).***

Under current, long-standing rules, immigration judges “consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.”<sup>21</sup> However, the proposed rule would allow an immigration judge to deny asylum applications without conducting a hearing if the judge determines, on their initiative or at the request of a DHS attorney, that the application form does not adequately make a *prima facie* claim. This radical change would allow judges to “pretermite” asylum claims, meaning that they could deport applicants based on their paper submissions alone, without a hearing.<sup>22</sup> Allowing judges to “pretermite” claims without a

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<sup>20</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

<sup>21</sup> *See Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

<sup>22</sup> “The pretermite rule would allow a judge to make a legal determination of an asylum case based only on a written application, and the judge could deny an application if the applicant did not present a viable claim on paper.” Lawfare, *New Proposed Asylum Regulations Would Endanger Women’s Lives*, <https://www.lawfareblog.com/new-proposed-asylum-regulations-would-endanger-womens-lives>, (July 7, 2020).

hearing, would contravene existing jurisprudence requiring immigration judges to “consider the full examination of an applicant.”<sup>23</sup>

An examination of a paper application alone provides an incomplete picture of an applicant’s circumstances. Many asylum seekers, especially those who are unrepresented and those who are detained, struggle to complete the 12-page, English-language asylum application form at all. They may have to use unofficial translators with whom they fear sharing intimate details of their past or their present victimization. And others may be unable to secure any assistance in filling out the application. Moreover, most asylum seekers are unfamiliar with the complexities of the U.S. asylum system and cannot be expected to establish every element of their claim in their paper application on their own.

Even in cases where an asylum seeker is represented by counsel, it is not uncommon that attorneys have to submit a basic application for asylum, without many details, in order to file the application before the one-year filing deadline. In those instances, and in our experience at Legal Aid, cases significantly evolve between submission of the paper application and the adjudication of the case. This gap between filing and adjudication can take years. During that time, clients often become more comfortable with sharing the often-traumatic facts of their case. As a result, their cases become stronger than originally described in the paper application. Allowing immigration judges to deny asylum cases without taking any testimony or looking beyond the asylum application would inevitably lead to meritorious cases (even under the new rule) being denied and vulnerable asylum seekers being returned to harm.

***The proposed rule allows immigration judges to deem claims to be “frivolous” without a hearing, thereby permanently barring applicants any future immigration relief. 8 CFR § 208.20; 8 CFR § 1208.20.***

Under the new rule an immigration judge could determine, without a hearing, that an asylum claim is “frivolous” if it is considered to lack “merit” or be “foreclosed by existing law.” This provision would bar the applicant from ever obtaining any form of immigration relief in the future. The practical effect of this provision would be unlimited discretion to permanently bar claims because “existing law” is now in flux due to this proposed rule. Moreover, without the possibility of a hearing, the submission of an application that would eventually show a meritorious claim could not only be dismissed but serve as a bar to any future filings. This provision would therefore greatly inhibit an attorney’s ability to zealously advocate for a client, and create great risk for countless asylum seekers.

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***For all of the foregoing reasons, DOJ and DHS should immediately withdraw the proposed rule in its entirety.*** The proposed rule represents a radical re-write of asylum law. Taken together, the collective changes contained in the proposed rule would eviscerate asylum protections that have been in place in the United States for decades. The vast majority of asylum

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<sup>23</sup> See *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

seekers are likely to be denied asylum under the proposed rule even if they have well-founded fears of persecution. In short, the proposed rule all but destroys our national tradition of offering refuge to those marginalized and vulnerable individuals and families.

Thank you for considering our comments on the proposed rulemaking. Please do not hesitate to contact Julia Ward, Staff Attorney at Legal Aid, at (202) 661-5944 or [jward@legalaiddc.org](mailto:jward@legalaiddc.org) to provide further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Chinh Q. Le". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Chinh Q. Le  
Legal Director

/s/ Julia Ward  
Staff Attorney

/s/ June Lee  
Staff Attorney