The State of Asylum Processing

& U.S. Immigration Policy:

The Impact on Families

July 12, 2022
12 - 2 pm

Course Materials
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Emerson Argueta was born in El Salvador, emigrated to the United States with his family in the early 1990s, and settled on Long Island. Emerson’s experience working in immigration started in his first year at Fordham University School of Law when he volunteered with the CARA Family Detention Pro Bono Project. He continued advocating for immigrants through four service trips to the family detention center in Dilley, Texas, and internships with Central American Refugee Center (CARECEN) and Human Rights First. Emerson worked with Immigrant Justice Corps’ Adults with Children project where he represented underserved vulnerable women and children facing removal to Central American countries where they fear gang and domestic violence. He continues to serve the Long Island immigrant community as a supervising attorney for CARECEN.

Azadeh Erfani is a Senior Policy Analyst for NIJC's D.C.-based Policy team. Azadeh previously led impact litigation on racial justice and immigrants' rights at the Washington Lawyers' Committee for Civil Rights and Urban affairs. Prior to that position, Azadeh was a Managing Attorney at the Capital Area Immigrants' Rights Coalition, defending detained children from deportation. Azadeh leads NIJC's response to regulatory attacks, asylum, and immigrant children and youths' rights. Azadeh holds a B.A. from Bryn Mawr College, an M.A. from DePaul University, and a J.D. from Villanova University; she is licensed in Virginia and the District of Columbia.

Shalyn Fluharty is an attorney consultant to the Feerick Center, where she is providing inaugural leadership in the Feerick Center’s dedicated effort to expand access to counsel for families who seek asylum. In August, Shay will join Americans for Immigrant Justice, in Miami, as its new Executive Director.
Shay has over fifteen years of experience representing unaccompanied children and families who seek protection in the United States. Most recently Shay directed the Asylum Defense Project, an initiative of Texas RioGrande Legal Aid, where she represented immigrant families detained at the South Texas Family Residential Center in Dilley, Texas and individuals forced to remain in Mexico under the Migration Protection Protocols (MPP). Previously Shay served as Supervising Attorney for the Young Center for Immigrant Children’s Rights in Harlingen, Texas and as a Staff Attorney with Catholic Charities Community Services in New York City.

Shay obtained a Juris Doctor at the University of California, Davis King Hall School of Law, a Masters of Teaching at Dominican University, and a Bachelor of Arts from Southern Methodist University. Before law school Shay taught Spanish at Harper High School in Chicago. She is a proud alumna of Teach for America, Education Pioneers, and the Equal Justice Works fellowship program.

Maryann Tharappel is the Attorney-in-Charge for Immigrant & Refugee Services, Catholic Charities Community Services (CCCS), Archdiocese of New York, where she oversees the legal services delivery of over 105 attorneys, paralegals, and legal support staff; and provides programmatic and contractual management for numerous key programs, including: CCCS’ state-wide Pro Bono Project, the Immigration Court Helpdesk and Family Group Legal Orientation Program, ActionNYC in Schools, CCCS’ Unaccompanied Minors Program, and Day Laborers programming. She is a passionate leader with exemplary communication skills and a strong history of successful management experience providing strategic, program, operations, and fiscal leadership in uniquely challenging situations. Maryann is an inspiring and motivational legal director with dynamic interpersonal skills, capable of resolving multiple and complex (fundraising, partner engagement, community services, legal representation, human resources, operational, financial) issues. She possesses the abilities to develop and execute the vision of any organizations she manages, and she thrives in high-paced workspaces. Born in India, beginning her first migration at two months old, she and her family then fled the civil war in Central Africa to seek refuge in the United States. Her story proves that education is a foundational priority for success and that no challenge is insurmountable with willpower and community support. An immigrant and a woman of color, she brings over a decade of direct services experience and a lifetime of advocacy for vulnerable communities seeking equity and justice.
A Timeline of the Trump Administration’s Efforts to End Asylum  
Last updated: January 2021

United States law enshrines the protections of the international Refugee Convention, drafted in the wake of the horrors of World War II. The law provides that any person “physically present in the United States or who arrives in the United States ... irrespective of such alien’s status, may apply for asylum ....” Since President Trump’s inauguration, the federal government has unleashed relentless attacks on the United States asylum system and those who seek safety on our shores. Internal memos have revealed these efforts to be concerted, organized, and implemented toward the goal of ending asylum in the United States as we know it. This timeline highlights the major events comprising the administration’s assault on asylum seekers.

<table>
<thead>
<tr>
<th>Date and Event</th>
<th>Policy Description and Status</th>
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<tr>
<td>December 2020</td>
<td>Far from winding down, the Trump administration released 7 final rules in one week that will have devastating consequences for asylum seekers. These rules (1) send asylum seekers to El Salvador, replicating the agreement with Guatemala that already endangered 1000+ asylum seekers, primarily women and children (see February 2020 for more information); (2) impose a historic fee on asylum applications and 800% fee increase for appeals (see March 2020); (3) overhaul the asylum system and imposing a plethora of new bars on relief (see June 2020); (4) label asylum seekers a “danger to national security” under the pretense of public health (see July 2020); (5) reinstate the “transit ban,” barring asylum seekers who traveled through another country (see July 2020); (6) tamper with access to appellate review (see August 2020); (7) and deny protection to asylum seekers and torture survivors if they fail to apply within two weeks of their first hearing (see September 2020).</td>
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<tr>
<td>Status: All these rules are final, unless enjoined by a federal court. A federal lawsuit seeks an injunction of the historic fees (2) that would thwart access to justice of asylum seekers and noncitizens. Three different lawsuits have already sought to halt the overhaul (3) of asylum rules, leading to a nationwide halt three days before its implementation; meanwhile the transit ban (5) and the agreements that permit offshoring asylum seekers to Central America are subject to ongoing litigation. NIJC filed another federal lawsuit to halt the implementation of a two-week deadline on all asylum applications (7).</td>
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<td>Complaint denounces Trump administration’s rampant use of criminal prosecutions for asylum seekers seeking protection</td>
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<td>US laws criminalizing entry and re-entry in the U.S. were first proposed by a segregationist US Senator, who advocated for racist groups such as the KKK. Since taking office, the Trump administration prioritized migrant prosecutions and used them to separate families and deter asylum seekers from seeking protection.</td>
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<td>Status: Migrant prosecutions continue daily. NIJC filed a complaint on behalf of three asylum seekers with the Department of Homeland Security’s (DHS) Office of Civil Rights and Civil Liberties and Office of Inspector General. NIJC asks the DHS inspector general and civil rights offices to investigate these cases and the violation of their rights under U.S. asylum law.</td>
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<tr>
<td>Proposed rule makes challenging erroneous removal orders near impossibility for asylum seekers and noncitizens</td>
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<td>The Executive Office for Immigration Review (EOIR) proposed a regulation to limit the ability to reopen a matter that was erroneously decided, making it almost impossible to stop – or “stay” – a deportation to avert irreparable harm. This rule would bar asylum seekers and noncitizens from reopening their cases even where they suffered ineffective assistance of counsel.</td>
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<tr>
<td>Status: Pending issuance of final rule. NIJC filed a comment calling for its rescission.</td>
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<td>November 2020</td>
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<td>New proposed rule would strip work permits from asylum seekers seeking appellate review</td>
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<td>In newly proposed rule, DHS reaches a new level of cruelty. Targeting people with final orders of removal, DHS proposes to strip work authorization for 95% of individuals with final orders released on supervision; those individuals include asylum seekers, stateless individuals, and individuals seeking appellate review. These individuals often wait for years to reach a decision</td>
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on their claims or for DHS to arrange for their removal.

- Status: Pending issuance of final rule. NIJC filed a [comment](#) denouncing its cruelty and opposing most changed proposed in this rule.

### Federal Court stops the systematic expulsions of children at the border (P.J.E.S. v. Wolf)

- In March 2020, the Centers for Disease Control and Prevention (CDC) closed the U.S. border over the outcry of public health experts; such experts included high-ranking CDC officials, who were ultimately [strong-armed](#) by Vice-President Pence and Stephen Miller. Customs and Border Protection (CBP) proceeded to expel over 200,000 migrants and asylum seekers at the border, including over 13,000 children—some of whom were [arbitrarily sent to Mexico](#) despite having no roots or caregiver there.

- Status: A federal court [enjoined](#) the expulsions of children in a class action suit led by an indigenous child seeking asylum. Unfortunately, adult asylum seekers and parents remain subject to the summary expulsions, in violation of [U.S. and international law](#).

### October 2020

### Flouting hundreds of opposing comments, new final rule adds myriad new bars to asylum eligibility (Pangea Legal Services v. DHS)

- DHS and EOIR published a [final rule](#) adding many new bars to asylum eligibility, including any felony offense, nearly any drug-related offense, and even allegations of conduct never adjudicated by a criminal court. Additionally, the rule bars anyone convicted of unauthorized reentry from asylum eligibility—a perverse consequence given this administration’s [regular punishment](#) of asylum seekers through cruel prosecutions. NIJC [condemned](#) this cruel, final iteration. (See December 2019 for more information)

- Status: A federal judge temporarily [halted](#) the final rule, before its implementation in November. Organizations representing asylum seekers have [sued](#) and sought a preliminary injunction.

### September 2020

### EOIR proposes rule to codify rushed and
### August 2020

| **potentially biased hearings for asylum seekers** | asylum seekers who fail to file asylum applications within two weeks of their first hearing. Completing the laborious and scrutinized asylum application so quickly will be impossible for many asylum seekers who are without counsel, detained, traumatized, and without access to evidence they need. The regulation would also permit judges to minimize the evidence that asylum seekers submit in support of their claims, and add the judge’s own evidence packet—an unprecedented power that falls short of due process standards. |
| **Status:** Pending issuance of final rule. NIJC has filed comments in opposition to this rule and calling for its rescission. (See December 2020 for recent updates.) |

| **The U.S. Citizenship Immigration Services (USCIS) issues policy to strip asylum status years after granted protection** | USCIS has bolstered a policy to terminate asylum for asylees seeking permanent residency. Under a new provision of their policy manual, USCIS would place asylees and their spouse and children straight back into deportation proceedings. Even asylees who are permanent residents would not be immune, as they could be stripped of their status within five years of getting their green card. |
| **Status:** USCIS’ asylum termination policy took immediate effect. Besides creating inefficiencies, this policy is also likely to chill asylees and their derivatives from seeking permanent status, out of fear that they will be stripped of the protection of asylum. |

| **EOIR proposes rule tampering with due process protections for appeals** | EOIR issued a proposed regulation making dramatic changes to the appeals process. The proposed rule would dramatically undermine asylum seekers’ access to appellate review of deportation orders, causing particular harm to those who cannot afford counsel. Among other things, the proposed rule would limit the extensions available to immigrants to prepare appellate briefs and remove the Board’s discretion to reopen cases when otherwise barred by time and numerical restrictions. |
| **Status:** Pending issuance of final rule. Comments for this proposed regulation closed on September 25, 2020. NIJC submitted comments opposing this proposed rule, and calling for its withdrawal. (See December 2020 for recent updates.) |
| **Federal Judge finds that CBP violated the law by conducting initial fear screenings**  
* (A.B.-B. v. Morgan) | √ By law, asylum seekers who arrive at the border are entitled initial fear screenings. By law, these screenings should be conducted by specialized asylum officers with training and expertise in asylum law. Nevertheless, the administration began the practice of having CBP officers conduct these screenings, denying asylum seekers at disproportionate rates. (See March 2020 update for more information.)  
√ Status: A federal judge blocked CBP from conducting further asylum screenings. While this is an important victory, the CDC border closure thwarts any return to lawful asylum processing. |
| Class action suit challenges unlawful border expulsions  
* (P.J.E.S. v. Wolf) | √ Since March, the Trump administration has been exploiting the COVID-19 pandemic to expel nearly all noncitizens, including asylum seekers and thousands of children. These unlawful expulsions began in response to CDC’s order closing the Southern border. (See May 2020 update for more information.) Though mostly shrouded in secrecy, news broke that the government was confining children alone in hotels for weeks, without access to counsel or proper medical care.  
√ Status: An unaccompanied child filed a class action suit to challenge the legality of these expulsions, which contravene U.S. asylum law and trafficking protections for children. To date, CBP has used the CDC’s order to unlawfully expel over 100,000 individuals at the Southern border, including over 2,000 children. |
| **Federal Judge permits suit challenging bias in immigration court against asylum seekers to proceed**  
* (Las Americas v. Trump) | √ In December 2019, nonprofit organizations representing asylum seekers sued in federal court to challenge the weaponization of the nation’s immigration court system to serve the Trump administration’s anti-immigrant agenda. Their complaint challenged the bias of the immigration court system, under control of Attorney General Barr; the existence of “asylum-free zones” where judges deny virtually all asylum claims; the financial incentives of immigration judges to deny cases more quickly; and the subjection of recently arrived families to expedited dockets, which curb their due process right to prepare for their asylum hearings and find an attorney.  
√ Status: Federal suit is ongoing. In August 2020, the federal court allowed the plaintiffs’ claim to move forward, largely denying the Trump administration’s motion to dismiss. |
### July 2020

| **New proposed rule** seeks to codify public health ban on asylum seekers | ✓ DHS and EOIR issued a proposed rule designed to exclude asylum seekers who flee from or travel through a country where infectious or highly contagious diseases are “prevalent,” or exhibit symptoms “consistent with” such disease or illness. This new rule would consider such asylum seekers a “danger to the security” of the U.S. This rule is reminiscent of the now-indefinite border closure imposed by the CDC in contravention of decades of U.S. and international law. (See May 2020 update for more information.)

✓ Status: Comments are due on August 10, 2020. NIJC submitted comments opposing these proposed regulations, as they violate U.S. and international mandates not to turn away those who seek refuge from persecution, even during public health emergencies. 170 public health experts unequivocally rejected DHS’s and EOIR’s reasoning. (See December 2020 for recent updates.) |

| **Trump’s asylum Transit Ban ruled unlawful by two separate courts** ([Capital Area Immigrants’ Rights Coalition v. Trump](https://www.capitalimmigrants.org/) | ✓ In July, a D.C. federal judge vacated the Trump administration’s asylum regulatory ban, which precludes anyone who had transited through a third country en route to the United States from gaining protection under asylum law. The judge ruled that the administration’s rushed rationale for imposing such sweeping obstruction on asylum protection violated the Administrative Procedures Act (APA). In a separate ruling ([East Bay Sanctuary Covenant v. Barr](https://www.eastbaysanctuary.org/)), the Ninth Circuit Court of Appeals also held that the rule violates the APA, as well as exceeds the bounds of asylum law. The court also found that that the rule was likely to cause irreparable harm to asylum seekers, including children, warranting an injunction.

✓ Status: The transit ban is blocked at this time based on the D.C. court’s ruling. A separate stay from the Supreme Court remains in effect with respect to East Bay. Both these rulings show that the Trump administration has abused the regulatory process to try to change asylum law. (See December 2020 for recent updates.) |

| **Canadian Court finds Safe Third Country Agreement with U.S. unconstitutional** | ✓ Under a Safe Third Country Agreement implemented in 2004, Canada may return many asylum seekers back to the U.S. if they arrive from the U.S. Due to the Trump administration’s draconian and cruel policies, many asylum seekers have turned to Canada for relief, raising the number of individuals subject to this Agreement. Upon review of the consequences asylum... |
because the U.S. violates asylum seekers’ rights

- seekers face in the U.S., the Federal Court of Canada **ruled** that the Safe Third Country Agreement with the United States is unconstitutional. In particular, the Court took issue with the U.S.’s punitive use of detention. As the Court explained, "Canada cannot turn a blind eye to the consequences ... The evidence clearly demonstrates that those returned to the U.S. by Canadian officials are detained as a penalty."

√ Status: The Canadian government has until January 22, 2021 to respond to this ruling, either via appeal or reconsideration of this Agreement. Human rights advocates, who brought this case along with asylum seekers, called for the Agreement to end immediately, in order to avert further human rights violations and subject more asylum seekers to the COVID-19 outbreak, rampant in U.S. detention.

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<th>Court of Appeals restricts summary deportations of asylum seekers who flee domestic and gang violence (Grace v. Barr)</th>
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| √ In 2018, former Attorney General Jeff Sessions issued a precedential decision, **Matter of A-B-**, that dismantled asylum protections for domestic violence survivors and undermined the validity of claims based on gang violence. (See June 2018 update for more information.) DHS then applied A-B- to credible fear screenings, where officers decide whether asylum seekers will face immediate deportation or be permitted to present their asylum claims to a judge. Summary deportations ensued for countless domestic and gang violence survivors, and asylum seekers challenged their credible fear screenings as contradicting decades of domestic and international law. In December 2018, a D.C. federal judge **enjoined** DHS’ use of A-B- to deny asylum seekers their day in court. DHS appealed.

√ Status: The D.C. Court of Appeals **vacated** or limited DHS’ credible fear policies implementing A-B-. The D.C. Circuit upheld the injunction on key aspects of A-B- that imposed unduly burdensome requirements on asylum seekers.

June 2020

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<th>Two precedential court decisions place asylum seekers at risk of detention and summary</th>
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| √ The Trump administration expanded “expedited removal” away from the borders, allowing immigration agents to pick up any person anywhere in the country and deport them without judicial review unless the person can convince the immigration agent that they are a citizen, or that they have some lawful status in the United States. (See July 2019 update for more information.) This expansion was **enjoined by a federal judge in September 2019**. The
| deportation nationwide, without due process | government proceeded to appeal. Concurrently, the government also challenged an asylum seeker’s right to seek habeas corpus review, a last resort judicial remedy to challenge the lawfulness of his expedited removal proceedings. NIJC filed an amicus brief arguing that access to habeas review is critical for asylum seekers.

√ Status: A federal court of appeal lifted the injunction stopping the dramatic expansion of expedited removal, setting the stage for draconian implementation nationwide. A few days later, the U.S. Supreme Court eliminated habeas corpus review of expedited removal proceedings—tossing the last window for judicial review available to all noncitizens. The combined effect of these decisions will morph expedited removal into a nationwide rapid deportation program operating in the shadows. |

| DHS publishes two final rules on work authorization, engineered to keep asylum seekers impoverished | DHS published two highly contested regulations that will harm asylum seekers’ ability to work while their cases are pending. One lifts a rule to process applications for work permits within 30 days of receipt—a measure previously tailored to the unique vulnerability of asylum seekers whose cases are frequently pending for years. A second rule erects even greater barriers. On the one hand, this rule prevents asylum seekers who have filed asylum more than one year after entry or entered without inspection from gaining work authorization. On the other hand, it requires asylum seekers who are eligible to wait a full year before they can seek work authorization, all but ensuring irreparable harm while many fall prey to food and shelter insecurity.

√ Status: A federal suit is currently pending, along with the plaintiffs’ request for a preliminary injunction to stop these two rules from going into effect 60 days after publication—respectively by August 21 and August 25 2020. See November 2019 update for more information. |

| New proposed rule guts few remaining asylum protections; flouts U.S. and international law and due process protections for asylum seekers | DHS and EOIR issued a joint proposed rule that guts asylum law. Among other things, the rule would ensure that no women, LGBTQ individuals, or gang violence survivors can win asylum. The law dramatically expands findings of fraud or frivolous applications, short-circuits due process, and builds the pathway to rushed fear and torture screenings. |
- Status: Pending final publication; comments were due on July 15, 2020. NIJC issued a **categorical condemnation** of this rule and submitted **comments** calling for rescission of this illegal rule. Opposition to this rule is overwhelming—more than 88,000 comments were submitted. (See December 2020 for recent updates.)

### May 2020

**Executive branch closes U.S. border indefinitely to asylum seekers under the guise of containing COVID-19**

- In March, the CDC made the draconian and unprecedented decision to close the border—**largely based on the false assumption that asylum seekers must be detained** rather than paroled to shelter-in-place with their relatives. In May, the [CDC extended its order](https://www.cdc.gov) with no end in sight. Since the CDC closed the border in March, CBP began mass expulsions of nearly **150,000 migrants**—including nearly **9,000 unaccompanied children**. (See March & April 2020 updates for more information.)

- Status: The CDC's order drew **strong condemnation from public health experts**, who have found **no public health justification** to shut out asylum seekers. The human toll of this policy is devastating, **including on children**. In June, **two children** seeking asylum have brought a legal challenge to the legality of their expulsion. (See August & November 2020 for more information.)

### April 2020

**Trump administration continues unlawful expulsions of asylum seekers at the border for another month**

- In March 2020, the CDC issued an [interim final rule](https://www.cdc.gov) (IFR) using a 75-year-old quarantine law to close the border. Armed with the CDC's order, **CBP expelled 90% of migrants in April alone**—returning vulnerable adults and children straight back to the conditions they fled.

- Status: After **extending** the rule for one month, the CDC issued a **final regulation**, upholding the border closure over the overwhelming objections of legal and medical experts. The border remains closed to asylum seekers until at least March 21, 2021, although the CDC can extend it again. NIJC **submitted comments** condemning the CDC's IFR and calling for its immediate rescission. Although the administration **walled off asylum seekers long before COVID-19**, this latest assault on the right to asylum is a blatant violation of U.S. and international law.
### March 2020

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<th>Proposed rule seeks to raise fees in immigration court up to 800% and impose historic fee on asylum applications</th>
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<td>✓ EOIR, part of the Department of Justice (DOJ), proposed a rule to drastically raise fees on applications, motions, and appeals. For example, appeals, which currently cost $110, would cost $975 under the proposed EOIR rule. Additionally, EOIR proposes to charge a $50 fee for asylum seekers—mirroring the proposed rule by USCIS seeking to impose their own fee on asylum applications. (See December 2019 update for more information.)</td>
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<tr>
<td>✓ Status: Pending issuance of the final rule. The comment period for the proposed rule closed on March 30, 2020. NIJC strongly opposes this rule and the imposition of an unprecedented wealth tax on asylum claims. (See December 2020 for recent updates.)</td>
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<th>CBP interferes with asylum seekers’ rights to fear-based screenings (A.B.-B v. Morgan)</th>
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<td>✓ When asylum seekers enter the U.S., they have the right to a credible or reasonable fear interview (CFI/RFI) with a trained asylum officer from USCIS. Applying the appropriate, non-adversarial standard in CFIs and RFIs is a matter of life-or-death, as asylum seekers can be summarily deported if they do not pass their CFI. In 2019, CBP entered into an agreement with USCIS to allow CBP officers to take over CFIs. Unlike USCIS asylum officers, CBP officers are purely trained in law enforcement and have a hostile track record toward asylum seekers. That is why federal laws and regulations require CBP officers to refer asylum seekers to USCIS asylum officers, not take their place.¹</td>
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<tr>
<td>✓ Status: In September 2020, a federal judge blocked further implementation of this policy. See August 2020 for more recent updates.</td>
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<th>Trump administration uses COVID-19 pandemic to further ban and detain asylum seekers</th>
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<td>✓ The White House submitted a $45.8 billion emergency supplemental funding request to Congress as the pandemic stretches federal agency funding thin. The request includes $567 million to fund, in part, up to nine “migrant quarantine facilities” along the border operated by CBP and $249 million, in part to convert ICE facilities to use for quarantine. The Trump administration also announced the closure of the U.S. border with Canada and Mexico. There is ample evidence that the pandemic bears no connection from migration from the U.S. Mexico border, while the U.S. and Canada’s numbers of viral infections far exceed those of their southern neighbors.</td>
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<td>Status: Congress has not agreed to fund ICE and CBP quarantine centers to date. However, the border remains closed to all migrants—including asylum seekers and children—in violation of U.S. and international law. NIJC strongly condemns the administration’s exploitation of a public health crisis to further detain and wall off asylum seekers and migrants. These proposals do not heed the advice of public health experts and double down on anti-immigrant policies fueled by xenophobia. The continued and expansive use of detention of migrants and asylum seekers has become a public health hazard, in addition to the flagrant violations of U.S. law and international human rights protections.</td>
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<tr>
<td>Board of Immigration Appeals (BIA) decision issues precedent against release of asylum seekers on bond (Matter of R-A-V-P-)</td>
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<td>Status: The decision is in place and operational and certain to justify the indefinite detention of countless asylum seekers.</td>
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<td>Court of Appeals reinstates order that protected class of asylum seekers unlawfully “turned back” following asylum transit ban (Al Otro Lado v. Wolf)</td>
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2019, the Trump administration appealed the district court’s ruling and successfully obtained an emergency stay of the injunction pending appellate review.

- Status: Preliminary injunction upheld on appeal. On March 5, 2020, the Ninth Circuit removed the emergency stay and reinstated the district court’s preliminary injunction, protecting “all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019, because of the U.S. Government’s metering policy, and who continue to seek access to the U.S. asylum process.” This ruling restored the right to seek asylum for the class of asylum seekers who were turned back or metered and barred from seeking asylum before July 16, 2019.

### Federal Court vacates administrative asylum directives from USCIS acting director because he was not lawfully appointed

In September 2019, a number of asylum seekers detained with their families in Texas and the non-profit RAICES brought suit in federal court challenging USCIS directives that rushed asylum seekers through the credible fear evaluation process within a day of their arrival at the detention center. The directives left families no time to understand their rights and the procedures for those interviews or consult with an attorney and made it nearly impossible for asylum seekers to seek an extension to prepare for the interview or consult with counsel. The legal challenge to the validity of these directives is based on the claim that Acting USCIS Director Ken Cuccinelli was not lawfully appointed under the Federal Vacancies Reform Act and the Appointments Clause of the U.S. Constitution at the time he implemented the policies.

- Status: The directives have been vacated by a federal court, but their standing is unclear. On March 1, 2020, the federal court concluded that Cuccinelli was not lawfully appointed to serve as acting director and thus “lacked authority” to issue the asylum directives. The Court did not reach the other legal challenges. There are reports that USCIS staff is operating as though the directives are no longer in effect, but a potential legal challenge is likely forthcoming. Confusion about Cuccinelli’s role lives on.

### February 2020

### Migrant Protection Persecution Protocols (MPP) remains in full

- A full year has passed since MPP (“Remain in Mexico”) was implemented and the human toll is staggering; approximately 60,000 have been forced to remain in Mexico in life-threatening conditions while awaiting their court hearings. In April 2019, a federal district court enjoined
**force despite recent litigation and short-lived relief granted by the 9th Circuit Court of Appeals (Wolf v. Innovation Impact Lab)**

MPP, finding it “lacks sufficient protections against [persons] being returned to places where they face undue risk to their lives or freedom.” This decision was stayed, however, pending the government’s appeal to the 9th Circuit Court of Appeals. Meanwhile, Doctors Without Borders issued a report that found 80% of migrants waiting in Nuevo Laredo under MPP to have been abducted by criminal networks and 45% to have suffered violence or violation.

Status: MPP remains fully operational, with harms continuing unabated. In two decisions both issued on February 28, 2020, the Ninth Circuit removed and then reinstated the injunction against MPP. On March 11, 2020, the Supreme Court declined to lift the emergency stay and granted review of this case in October 2020.

**Trump Administration further expands new expedited deportation procedures and agreements to deter asylum seekers**

The Acting Commissioner for CBP testified before Congress in late February that DHS has: put more than 3,700 migrants through HARP and PACR, expedited deportation programs described in more detail below; and removed approximately 700 asylum seekers to Guatemala under the existing Asylum Cooperative Agreement, also described below.

Ongoing reports reveal the massively harmful impact that these programs are unleashing on refugees at the southern border. Asylum seekers forcibly sent to Guatemala under the “asylum cooperative agreements” (ACA) endure squalid conditions that deter many from seeking protection; 75% of the asylum seekers (all of whom are Hondurans and Salvadorans) are women and children. Guatemala’s asylum infrastructure is ill-equipped to process the volume of requests it receives, and many asylum seekers fear that they will meet the same persecution they fled from their home country.

Status: These programs are fully operational. The legal challenges to PACR/HARP (by the ACLU) and to the ACA (by NIJC and other organizations) are ongoing. In July 2020, a broad coalition of Central and North American organizations delivered a petition to Congress, stating that the ACAs “threaten the security and dignity of migrants, and are a violation of the sovereignty of these countries.” The Trump administration extols the “successes” of these programs and seeks their expansion, reporting that they have effectively walled off 95% of asylum seekers who seek lawful entry to the U.S. (See December 2020 for recent updates.)
### January 2020

| CBP begins **expanding two new programs to the Rio Grande Valley** – cutting off asylum seekers from accessing legal counsel and rushing them through the credible fear process (*Las Americas v. Trump*) | √ Two new programs – the Prompt Asylum Claim Review (PACR), applying to individuals from countries other than Mexican nationals, and the Humanitarian Asylum Review Process (HARP), applying to Mexican nationals—*were initially launched in the El Paso area* in October 2019. Under the PACR and HARP programs, asylum seekers remain in CBP custody rather than being transferred to Immigration & Custody Enforcement (ICE) for their credible fear processing (the threshold interviews for determining asylum eligibility). PACR and HARP result in asylum seekers being unjustly rushed through the credible fear process and ultimately sent back to dangerous situations. Additionally, asylum seekers are *effectively precluded from receiving meaningful help* and support from counsel or loved ones due to limited access to phone calls. Preliminary rates of CFI passage in these programs are appallingly low because of the due process challenges. | √ Status: These programs are fully operational. In December 2019, the ACLU filed a federal lawsuit in the U.S. District Court for the District of Columbia, challenging, among other things, the legality of the PACR and HARP programs. See February 2020 for more recent status updates. |

### December 2019

| USCIS published **proposed rule increasing fees**, eliminating most fee waivers, and **imposing an unprecedented fee for asylum seekers** | √ Besides seeking drastic increases that will disproportionately harm indigent and low-income immigrants, USCIS proposed the introduction, for the first time ever, of fees for affirmative asylum filings and for initial work authorization for asylum seekers. This rule requires asylum seekers to pay a fee for their asylum application and work authorization. Among the 147 state parties to the 1951 Convention Relating to the Status of Refugees, only three others charge a fee for asylum applications. Any fees imposed on asylum seekers who first arrive may create an unsurmountable barrier and deter countless individuals with *bona fide* claims. | √ Status: Pending issuance of final rule. NIJC submitted comments strongly opposing the proposed fees, calling for rescission of the proposed rule. |
DHS and the DOJ publish a **proposed rule** severely curbing the number of individuals who may qualify for asylum

- This joint proposed rule adds seven new bars to asylum eligibility based on prior conduct or involvement in the criminal legal system, and significantly alters the way immigration adjudicators determine whether allegations of wrongful or criminal conduct render an individual ineligible for asylum. The proposed rule will severely impact asylum seekers and threatens U.S. compliance with its obligations under international and domestic asylum law.

- Status: Final rule issued. NIJC **opposed** this rule during the comment period and **condemned** this latest cruelty upon its final publication. (See October 2020 update for more information)

### November 2019

DHS and DOJ issue IFR,\(^5\) effectively immediately, that allows the U.S. to enter into **unsafe third country agreements** with Honduras, El Salvador, and Guatemala (**U.T. v. Barr**)

- Under these agreements, known as ACAs, individuals would be prohibited from applying for asylum in the U.S. if the following four requirements are met: 1) the U.S. entered into a bilateral or multi-lateral agreement; 2) at least one of the signatory countries is a “third country” for the asylum seeker; the asylum seeker’s “life or freedom would not be threatened in that third country” on account of their race, religion, nationality, political opinion, or particular social group; and 4) the “third country provides [asylum seekers] removed there . . . ‘access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.’” Under this new rule, asylum officers and CBP would have the discretion to conduct threshold screenings to determine which country will consider an asylum seeker’s claim.

- Status: This policy is **in effect** but litigation is pending. On January 15, 2020, NIJC and several other organizations filed a federal lawsuit challenging the legality of the so-called “safe third country” agreements. The lawsuit, **U.T. v. Barr**, was filed in the U.S. District Court of Washington D.C. and cites violations of the Refugee Act, Immigration and Nationality Act, and APA. Plaintiffs are asylum seekers who fled to the U.S. and were unlawfully removed to Guatemala, as well as organizations that serve asylum seekers. See February 2020 for more recent status updates.

DHS proposes **rule to double wait time for or block** asylum seekers seeking **work authorization** based on

- If finalized, the proposed rule would, among other changes, extend the time an asylum applicant would have to wait before submitting an application for a work permit from 180 days to 365 days; exclude individuals who did not lawfully enter the U.S. through a port of entry from being eligible to apply for asylum; and exclude individuals who did not file an asylum application within one year of their last entry from being eligible for asylum. The
United States’ legal and moral obligation to protect those seeking safety from persecution includes the obligation to ensure that those seeking and those granted asylum are able to access the benefits and services that enable them to live a full life. Chipping away at the ability of asylum seekers to access this form of relief and the ability to work directly contravenes these obligations.

- **Status:** [Final rule issued](#). The comment period for the proposed rule closed on January 13, 2020. See June 2020 for more recent status updates.

**USCIS** publishes a [proposed rule](#) that would **eliminate** the 30-day processing time for work permits given to asylum seekers.

- **Status:** [Final rule issued](#). NIJC submitted [comments opposing](#) this proposed rule on November 8, 2019. See June 2020 for more recent status updates.

### September 2019

**Administration reaches agreement with Honduras, effectively blocking asylum seekers from reaching the United States**

- **Status:** No explicit details about the agreement or when it could be implemented have been released.

Similar to a deal reached with Guatemala and El Salvador, this new agreement will enable the U.S. to reject asylum seekers who have not first applied for asylum in Honduras. Once more, it is clear the Administration has a complete disregard for the underlying reasons many Central Americans flee their home countries. In Honduras, “[t]wo-thirds of its roughly 9 million people live in poverty” with rampant gang and gender-based violence. Forcing asylum seekers to remain in a country with their persecutor can actually be a matter of life or death.
Acting DHS Secretary McAleenan announces **DHS will no longer allow any arriving asylum seekers to be released** into the community. Acting Secretary announced that asylum seeking migrant families, who do not express a fear of return to their home country, would no longer be released into the interior of the United States after being arrested and detained by CBP; however, there will be some humanitarian and medical exceptions. For those families who do express a fear, they will be returned to Mexico under MPP policy. This will only exacerbate the **violence and danger** asylum seekers stuck in Mexico currently face.

√ Status: The timing and/or details of this new policy is unclear.

United States and El Salvador sign a **bilateral agreement as a way to combat** the flow of **migration from Central America**. In another callous attempt to stop the flow of migration from Central America, the United States has **entered into an agreement** with El Salvador to have the Central American country develop its asylum process so that migrants will first seek asylum there. Acting DHS Secretary McAleenan stated in a press conference with El Salvador's foreign minister, Alexandra Hill Tinoco, that the agreement will “provide opportunities [for asylum seekers] to seek protection . . . as close as possible to the origin of individuals that need it . . . .” The reality is that El Salvador should be one of the last places for an asylum seeker to be; in fact, the State Department's travel advisory for El Salvador asks potential visitors to “[r]econsider travel to El Salvador due to crime,” stating “[v]iolent crime, such as murder, assault, rape, and armed robbery is common” and that “[g]ang activity, such as extortion, violent street crime . . . is widespread.”

√ Status: Neither text nor details of the agreement have been formally released and negotiations around the agreement are on-going.

Supreme court allows full implementation of **Asylum Ban 2.0** (barring migrants who cross through another country prior to arriving at the U.S. border from asylum eligibility). In July 2019, the administration published an IFR banning all people, including children, who have traveled through another country to reach the United States from applying for asylum. This rule is a de facto asylum ban for nearly all asylum seekers seeking to enter the U.S. through the southern border.

√ Status: The rule is now fully in effect, after the Supreme Court stayed a partial Temporary Restraining Order. A federal district court judge in California issued a **Temporary Restraining Order** on July 16, 2019 in California in *East Bay Sanctuary Covenant et al. v. Barr*, finding the ban to likely violate the asylum provisions of U.S. federal law and raising concerns regarding
the administration’s failure to allow for notice-and-comment rulemaking. The government appealed to the U.S. Circuit Court of Appeals for the Ninth Circuit, which kept the injunction in place only with regard to the geographic region covered by the Ninth Circuit (California and Arizona) and allowed the government to implement the rule across the rest of the southern border. On September 11th, the Supreme Court issued a decision allowing the ban to be fully implemented during the pendency of litigation. See July 2020 update for more information.

<table>
<thead>
<tr>
<th>July 2019</th>
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<tr>
<td>All undocumented immigrants in the interior become targets for arrests and deportation through new IFR expanding procedures that expedite deportation</td>
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<td>Attorney General Barr certifies yet another case to himself and further diminishes grounds of asylum - Matter of L-E-A-</td>
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<tr>
<td>New pilot program gives border patrol officers the authority to conduct credible fear interviews</td>
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fresh trauma, to articulate their fear of return to uniformed CBP officers will certainly mean that many asylum seekers will be forcibly returned to harm and death.

√ Status: Mark Morgan, Acting Chief of CBP, testified to Congress in July 2019 that CBP officers are currently undergoing training in order to conduct these types of interviews. In September 2019, it was reported that CBP agents were beginning to screen families for credible fear, with CBP agents at the Dilley Family Residential Center identifying themselves to children and families as “asylum officers.”

The administration announces it has reached a deal with Guatemala to halt the flow of Central American migrants to the U.S.

√ In July the U.S. government announced it had reached an agreement with the government of Guatemala. Although the details are uncertain, the administration seems to consider the agreement to set the stage for a “safe third country” agreement that would require all asylum seekers arriving at the southern border who passed through Guatemala, other than Guatemalans, to be transferred to Guatemala to present an asylum claim there. The announcement of the agreement has prompted widespread condemnation in both countries, as it appears to constitute a back-door sealing of the southern border to asylum in the U.S. and would likely prompt an unmitigated political and humanitarian crisis in Guatemala, one of the most dangerous countries in the world.

√ Status: The agreement was published in the Federal Register on November 19, 2019.

May 2019

USCIS issues a memo attempting to undercut protections provided to unaccompanied children during the asylum process

√ The memo undermines the few but essential protections provided to unaccompanied children in their asylum proceedings, including exemption from the one-year filing deadline and non-adversarial asylum interviews with an asylum officer, by requiring immigration adjudicators to continually re-adjudicate a child’s designation as unaccompanied. These new procedures undoubtedly impact children’s ability to effectively access their right to asylum by stripping away protections specifically designed to reflect the vulnerability of children who arrive at a border alone.
<table>
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<th>Status: The memo became effective June 30, 2019. In August 2019, a federal district court issued a Temporary Restraining Order prohibiting USCIS's implementation of the memo.</th>
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<tr>
<td><strong>January 2019</strong></td>
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<td><strong>MPP a.k.a “Remain in Mexico”</strong></td>
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<td>✓ The MPP program constituted a dramatic undermining of the foundation of the U.S. asylum system by systematically returning asylum seekers who have been inspected at a port of entry and put into removal proceedings to Mexico to await their proceedings. Since its inception, the program has been implemented at ports of entry all across the southern border, placing asylum seekers at risk for violence, exploitation at the hands of cartels, and death. Approximately one percent of people returned to Mexico under the program are able to find representation in their court cases and the program regularly results in family separations.</td>
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<tr>
<td>✓ Status: This policy is in effect and continues to cause massive harms and rights abuses. Human Rights First partners with other human rights organizations to publish a running database of publicly reported kidnappings and violent assaults on asylum seekers forced to return to danger in Mexico through this program. The program has additionally caused wait times on the international bridges to increase and asylum seekers to become so desperate that they cross between ports of entry and suffer injuries or even death. A lawsuit challenging the policy is ongoing (Innovation Law Lab v. Nielsen); although the district court issued a preliminary injunction in April 2019 the program continues to be operational. See February 2020 for more recent status updates.</td>
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<tr>
<td><strong>November 2018</strong></td>
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<td><strong>Asylum Ban 1.0</strong> (barring migrants who cross between ports from asylum eligibility)</td>
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<td>✓ In response to groups of asylum seekers from Central America arriving in the fall of 2018 (known colloquially as caravans), the administration, via proclamation, banned individuals who do not present themselves at a point of entry from applying for asylum. The proclamation was implemented through an IFR, allowing for immediate implementation without the ordinary notice and comment period usually required for significant regulatory changes. The ban imposes an arbitrary geographic restriction on individuals who are fleeing for their lives.</td>
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Status: Enjoined; not operational pending ongoing litigation on two fronts. (1) In *O-A v. Trump*, a Washington, D.C. federal court declared the rule illegal and prohibited its implementation. On September 30, 2019, the U.S. Government appealed the D.C. federal court’s decision. No decision has been issued on the appeal. The D.C. federal court’s decision remains in effect during the pendency of this appeal. (2) In *East Bay Sanctuary Covenant v. Trump*, North California federal court imposed a restraining order on the rule. The government immediately appealed and sought an emergency stay before the federal district court, the Ninth Circuit Court of Appeals, and the U.S. Supreme Court—all of whom denied the government’s request and left the restraining order in place until the Ninth Circuit reviewed the merits of the district court’s decision. On February 28, 2020, the Ninth Circuit’s Federal Court of Appeal also ruled in *East Bay Sanctuary Covenant v. Trump* that the rule is unlawful.

### September 2018

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<tr>
<th>Status</th>
<th>DHS and HHS both issued notices in the federal register of a proposed rule that would, among other things, allow for the indefinite detention of families, enable DHS to self-license family detention facilities, and undermine unaccompanied children’s rights to a bond hearing. Despite receipt of more than 100,000 comments on the proposed rule, DHS and HHS proceeded to publish the rule in final form in August 2019, with few meaningful changes from the proposed rule. The publication marks the latest step in the administration’s ongoing efforts to irrevocably alter the Flores settlement, a binding court settlement providing protections and guidelines related to the timing and conditions of detention for migrant children.</th>
<th>The OIG report stated that the practice of metering, which constitutes the turning-back of asylum seekers at ports of entry where they are forced to wait in haphazardly operated queues amounting to weeks or months of delay, had been a tactic used by CBP going back to 2016. This policy “compounds other longstanding border-wide tactics that CBP has implemented to prevent migrants from applying for asylum in the U.S., such as lies, intimidation, coercion,</th>
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<td>DHS and the Department of Health and Human Services (HHS) attempt to dismantle the Flores settlement agreement and the Trafficking of Victims Protection Reauthorization Act of 2008 (TVPRA) through the regulatory process</td>
<td>Official “turn back” (or metering) policy executed by CBP is confirmed in the Office of the Inspector General (OIG) report about family separations</td>
<td></td>
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verbal abuse, physical force, outright denials of access, unreasonable delays, and threats—including the threat of family separation.”

- Status: Litigation challenging the legality of metering is pending in the U.S. District Court for the Southern District of California, where the judge has rejected the government's second attempt to dismiss the case. See March 2020 for more recent status updates.

| June 2018 |
|-----------------|-----------------------------|
| Then-Attorney General Sessions severely limits the availability of asylum for survivors of domestic violence and gang violence *(Matter of A-B)*. | Again utilizing his ability to certify BIA cases to himself, Sessions overruled *Matter of A-B*, effectively limiting the availability of asylum to most individuals fleeing gender-based violence or violence at the hands of gangs and making it easier for ICE counsel to argue for deportation.  

- Status: In December 2018, a federal court issued a decision generally preventing the administration from implementing this and other policies. Recently, 21 state attorneys general filed an amicus brief in support of the court’s decision. See July 2020 update for more information.

| April 2018 |
|-----------------|-----------------------------|
| DOJ requires immigration court judges to comply with case quotas | Despite opposition from the National Association of Immigration Judges, this policy requires immigration judges to make final rulings on 700 cases per year (about three per day) with repercussions—either being sent to a different immigration court or termination—if they do not comply. With judges under pressure to rush through court proceedings, the policy threatens the ability of asylum seekers to properly prepare and present their case.

- Status: This policy went into effect in the fall of 2018. The combination of this and several other unprecedented policies have resulted in chaos in the immigration court system, including increasing the backlog crisis by 25 percent rather than cutting down the number of pending cases that continues to creep closer to one million.
Attorney General Sessions introduces the “zero-tolerance” policy, triggering widespread family separations

- The “zero tolerance” policy, announced by Sessions via memo, required that all arriving migrants, including asylum seekers, be referred to the DOJ for criminal prosecution for illegal entry or reentry. What resulted was the mass systemic separation of families, as parents were prosecuted and children were taken into custody, causing irreversible, life-long trauma to over 2,600 children. Subsequently revealed internal government memos show that this policy was explicitly intended to serve as a deterrence mechanism for asylum seekers.

- Status: Family separation is still happening on a mass scale despite an Executive Order issued in July 2018 that allegedly ended the zero-tolerance policy and despite a court order enjoining the practice (more than 900 separations in the year following the court order). Separations sometimes involve prosecutions but not always; in other cases, DHS cites vague and often unsubstantiated reasons such as the parent’s criminal history, gang affiliations, or even medical issues such as HIV status as justification for separation.

ICE, CBP, and the Office of Refugee and Resettlement (ORR) enter into an agreement to share information obtained from unaccompanied children amongst the three agencies, and inserting ICE into the approval process for reunification of unaccompanied children with sponsors

- The administration intended the information sharing agreement to provide ICE with the information it needed to target, arrest, and deport family members attempting to reunite with children entering the United States unaccompanied. ICE arrested more than 300 potential sponsors from the date of the agreement until an appropriations bill prohibiting most arrests of sponsors was signed into law.

- Status: The agreement is still in place, as is the provision in appropriations law prohibiting enforcement against most sponsors. Although ORR has made some modifications in the implementation of this agreement, the fear it instilled in immigration communities remains; with many family members too afraid to come forward as sponsors, children remain in ORR custody for prolonged periods. Children enduring prolonged detention face numerous barriers to presenting asylum or other claims to relief from removal.

March 2018

Attorney General Jeff Sessions vacates decision in Matter of E-F-H-L,

- In Matter of E-F-H-L, Sessions utilized a provision of law that was used only sparingly under previous administrations to certify to himself and then overturn a decision of the
<table>
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<th>Date</th>
<th>Event Description</th>
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<td>July 2017</td>
<td>ICE ends the Family Case Management Program, signaling a concerted policy of prolonged and indefinite detention of asylum seekers</td>
<td>✅ The Family Case Management Program allowed some asylum seekers to remain in the community during their asylum proceedings while receiving case management services including referrals to legal and social services. The Trump administration terminated the policy for blatantly political reasons in April 2017, and subsequently unrolled a de facto policy of the prolonged and indefinite detention of asylum seekers—in violation of ICE’s own policy directive requiring that the agency release asylum seekers on humanitarian parole if they have a sponsor and pose no community safety risk. By the summer of 2019, ICE’s own data revealed it to be jailing approximately 9,000 immigrants who had already been found to have a credible or reasonable fear of persecution or torture.</td>
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<td>✅ Status: ICE is facing federal litigation for its systemic violation of its own parole guidance. In August 2018, a federal court in Damus v. McAleenan ordered ICE to resume individualized release considerations in five field offices, an order plaintiffs have had to go back to court to enforce. In Heredia-Mons v. McAleenan, plaintiffs have produced evidence that only two of 130 cases out of the New Orleans ICE Field Office were granted in 2018. Both cases are on-going.</td>
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<td>February 2017</td>
<td>USCIS raises the threshold for demonstrating credible fear in asylum interviews</td>
<td>✓ This new guideline ordered asylum officers to be stricter in assessing claims of fear made during “credible fear interviews,” the threshold interview that is required before an asylum seeker is allowed to present their claim to an immigration judge. Immigration law experts warned that the heightened standards would result in erroneous deportations of asylum seekers back to harm or death.</td>
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√ Status: The implementation of this policy quickly resulted in a high rate of denials, causing a significant rise in deportations of those with meritorious asylum claims they were never permitted to present fully.

January 2017

Trump issues Executive Order 13767, “Border Security and Immigration Enforcement Improvements”

√ The Executive Order, which was issued along with a parallel Executive Order focusing on immigration policies in the interior of the United States, put forth a blueprint for many of the anti-asylum and anti-immigrant policies the administration has implemented since, including the construction of a border wall, the increased and prolonged jailing of asylum seekers, and the increased use of expedited deportation procedures.

√ Status: Implementation is ongoing. Many of these policies, including expanded expedited case processing and the prolonged detention of asylum seekers, have already been actualized.

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1 See 8 U.S.C. § 1225(b)(1)(A)(ii) & (b)(1)(B); 8 C.F.R. 235.3(b)(4); see also 8 C.F.R. § 208.30.
4 See Matter of R-A-V-P-., 27 I&N Dec. 803 (BIA 2020). This decision affirms the troubling pattern of summary dismissals of asylum claims before they reach their merits, a trend already concerning after Matter of E-F-H-L- (see March 2018 update).
5 Issued as an IFR, this rule becomes effective immediately upon publication. However, the agencies could change parts of or the entire rule should they determine that it is warranted based on public comments. In this case, DHS and DOJ have allowed a 30-day comment period set to expire December 19, 2019.
7 Put in place by Congress to codify Flores, the law requires children to be placed in the “least restrictive setting.” 8 U.S.C. § 1232(c)(2).
The United States has long guaranteed the right to seek asylum to individuals who arrive at our southern border and ask for protection. But since March 20, 2020, that fundamental right has been largely suspended. Beginning on that date, both migrants seeking a better life in the United States and those wanting to apply for asylum have been turned away and “expelled” back to Mexico or their home countries. These border expulsions are carried out under a little-known provision of U.S. health law—section 265 of Title 42—which the former Trump administration invoked to achieve its long-desired goal of shutting the border to asylum seekers. Over 1.8 million expulsions under Title 42 have been carried out since the pandemic began. However, nearly half of those expulsions were of the same people being apprehended and expelled back to Mexico multiple times. This is because Title 42 has led to a significant increase in repeat crossings at the border. Half of all single adults from Mexico, Guatemala, Honduras, and El Salvador who have been expelled to Mexico under Title 42 have been apprehended crossing the border again. As a result, Title 42 has significantly increased overall border crossings. In fact, 1 in 3 apprehensions since Title 42 expulsions began have been of a person on at least their second attempt to cross the border.

Despite the claim made by the Centers for Disease Control and Prevention (CDC) that this order was necessary from a public health perspective to protect the United States, public reporting has shown that the policy originated in the U.S. Department of Homeland Security (DHS) and the Trump White House. Reports indicate that CDC scientists expressed opposition to the invocation of Title 42, arguing that there was no public health rationale to support it. Ever since then, public health experts outside the CDC have continued to agree, arguing that while international borders largely remain open to other travelers, there is no need to turn away refugees and expel them to their home countries or Mexico.

The Biden administration kept Title 42 in place until April 2022, when the CDC announced that it no longer believed Title 42 was necessary for public health purposes. The CDC cited the widespread availability of rapid tests and vaccination for COVID-19 as measures sufficient to limit concerns about public health. The termination of Title 42 was set to go into effect on May 23, but a federal court in Louisiana blocked the Biden administration from doing so. As of the time of publication, Title 42 remains in effect following that court order.

There also are ongoing court battles as to whether expulsions under Title 42 were legal in the first place. In March 2022, the D.C. Circuit Court of Appeals announced that it was unlawful to expel migrant families under Title 42 without giving them an opportunity to seek protection from persecution.
What is the Title 42 policy and how was it created?

On March 20, 2020, the Department of Health and Human Services (HHS) issued an emergency regulation to implement a specific aspect of U.S. health law. Section 265 of U.S. Code Title 42 permits the Director of the CDC to “prohibit … the introduction” into the United States of individuals when the director believes that “there is serious danger of the introduction of [a communicable] disease into the United States.” The HHS regulation allows any customs officers—which includes officers of U.S. Customs and Border Protection (CBP) such as Border Patrol agents—to implement any such order issued by the CDC.

The same day, CDC Director Robert R. Redfield relied on this regulation to issue an order suspending the “introduction” into the United States of certain individuals who have been in “Coronavirus Impacted Areas.” The order targets individuals who have entered the United States from Canada or Mexico and “who would be introduced into a congregate setting” at a port of entry or in a Border Patrol station. This includes individuals who would normally be detained by CBP after arriving at the border, including asylum seekers, unaccompanied children, and people attempting to enter the United States without inspection. Citing the new CDC order, that same day the Border Patrol began “expelling” individuals who arrive at the U.S.-Mexico border without giving them the opportunity to seek asylum.

The CDC order does not apply to U.S. citizens, lawful permanent residents, and their spouses and children, nor does it apply to U.S. military personnel or those who arrive at a port of entry with valid travel documents, although the CDC maintains that it has the authority to expel U.S. citizens under Title 42 if it chooses. The CDC order also includes an exemption for anyone that DHS determines should be allowed into the United States on “consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.”

On September 11, 2020, HHS published the final version of the March interim regulation enabling the CDC Director to issue orders suspending the “introduction” of people at the border. In the final version of the regulation, the CDC acknowledged for the first time that its order is being used to turn away refugees and asylum seekers and declared its belief that doing so was legal. This was followed by a new CDC order in October 2020 which was largely the same as the March order and reinforced the government’s plan to continue expelling people encountered at the southern border.

The CDC’s order has been modified five times since the Biden administration took office, including the April 1, 2022, order to terminate Title 42 expulsions in May, which is currently on hold due to a court order. On February 2, 2021, the CDC issued a notice temporarily exempting unaccompanied children from expulsion. Following a “reassessment” of public health protocols, on July 16, 2021, the CDC again formalized this exemption for unaccompanied children. On August 2, 2021, the CDC replaced the October 2020 order with a new order continuing Title 42 expulsions while exempting unaccompanied children. On March 12, 2022, the CDC formally terminated Title 42 for unaccompanied children in response to a court order overturning the exemption.
Under an agreement reached with the Mexican government in late March 2020, the Border Patrol began sending to Mexico most Mexican, Guatemalan, Honduran, and Salvadoran families and single adults encountered at the southern border. The group of nationalities subject to expulsion to Mexico remained unchanged until May 2022, when the Biden administration reached an agreement with Mexico to accept "thousands" of Cubans and Nicaraguans as well. Despite this agreement, there has been extensive documentation of individuals expelled to Mexico who do not fit within this category, including Haitian asylum seekers. People expelled are usually driven by bus to the nearest port of entry and told to walk back to Mexico, often without their luggage and other belongings. Since late January 2021, the Mexican state of Tamaulipas (which borders South Texas) has barred CBP from expelling families with children under the age of seven. In response, CBP has carried out "lateral" transfers by plane or bus to other locations along the border, such as El Paso, where Mexican authorities will allow the agency to expel families with young children. However, because the capacity to carry out "lateral flights" is limited, CBP has been forced to release the majority of families who cross the border in South Texas, despite President Biden’s prior insistence that he would expel all families if he could.

People who are subject to Title 42 are not given an opportunity to contest their expulsion on the grounds that they would face persecution in the country to which they will be expelled. There is an extraordinarily limited exception to Title 42 for people who “spontaneously” inform CBP officers that they fear being tortured in the country to which they will be expelled. However, in order to receive an official screening by an asylum officer for exemption under that provision, the CBP officer must first determine that the claim is “reasonably believable.” From March 2020 through September 2021, just 3,217 people were screened for torture prior to being expelled, and only 272 people were granted an exemption and permitted to seek asylum.

Those subject to Title 42 who aren’t sent to Mexico are held in U.S. Immigration and Customs Enforcement (ICE) or CBP detention and flown back to their home countries without any opportunity to seek asylum. For example, since Title 42 expulsions began, over 18,000 Haitian nationals seeking asylum have been subjected to this process and summarily returned to Haiti. Flights to Haiti were briefly suspended in summer 2021 after an outcry following President Biden’s inauguration. In September 2021, over the objections of the United Nations High Commissioner for Refugees, as well as advocacy groups and many Democratic members of Congress, the Biden administration expelled by plane more than 8,000 Haitians who had sought asylum after crossing the border near Del Rio, Texas.

Individuals who are expelled do not receive an order of deportation, but CBP collects their biometrics and records their contact with the agency. It is unclear how this information will be used in the future, or how it may impact an individual’s ability to seek protection in the United States once the Title 42 policy is ultimately terminated.
Title 42 not only applies to individuals crossing the border between ports of entry, but also applies equally to individuals seeking asylum at ports of entry. In March 2020, as part of Title 42, CBP stopped processing all asylum seekers who arrive at ports of entry and ask for humanitarian protection. This left nearly 15,000 people in limbo who had been waiting on lists for an opportunity to request asylum at ports of entry (a practice known as "metering").

Before the practice of expelling unaccompanied children was blocked in court and then later formally ended by the Biden administration, CBP used Title 42 to turn away and expel nearly 16,000 unaccompanied children. These expulsions took place despite provisions of the Trafficking Victims Protection Reauthorization Act which require the government to protect children who arrive at the border without a parent or legal guardian.

Through the end of April 2022, the Border Patrol carried out more than 1.87 million expulsions. From April 2020 through April 2022, 60.5% of encounters at the U.S.-Mexico border led to an expulsion.

FIGURE 1: OUTCOMES OF BORDER PATROL APPREHENSIONS, FEBRUARY 2020 - APRIL 2022

It is important to keep in mind that, just because a person is processed under “normal immigration law” and not expelled, that does not mean they are released into the United States. Thousands are subject to “expedited removal” or have a prior order of deportation reinstated. Many people who are not expelled are instead sent to ICE detention, where they may seek asylum through the credible fear process (CFI). Similarly, roughly 1 in 10 people encountered after crossing the border are unaccompanied children who are sent to federal shelters. At no point have more than a third of people apprehended after crossing been directly released at the border (see Figure 2).

FIGURE 2: ESTIMATED OUTCOMES OF BORDER APPREHENSIONS, FEBRUARY 2021 THROUGH APRIL 2022

What have public health experts said about Title 42?

Despite the claim that Title 42 is needed to protect against the spread of COVID-19, many public health experts have called for an end to the practice of border expulsions. Starting as early as May 2020, and continuing to the present, public health leaders have called on the CDC to lift the order.44 According to the experts, the fundamental problem with Title 42 expulsions is that they are targeted primarily at a small number of people seeking asylum at a time when other restrictions in place at ports of entry have been lifted and large numbers of people cross the border daily.45

In a letter to the Biden administration in September 2021, public health experts noted that the risk of infection from COVID-19 could be mitigated at the border with “social distancing, providing appropriate personal protective equipment (PPE), ensuring frequent testing, and offering vaccination” to migrants.46 The experts also asserted that Title 42 expulsions themselves could pose a public health threat given that people are detained together “for days to weeks prior to transporting them” for expulsions, which heightens “the risk of COVID-19 transmission across national borders.”47

How has Title 42 affected asylum seekers?

Title 42 has led to the mass expulsion of thousands of asylum seekers, including those in desperate straits. Many individuals have been sent back to persecution in their home countries or forced to wait in Mexico for a time when the border will reopen to those seeking asylum. Over 215,000 parents and children have been expelled together since the restrictions went into place.48

After the Biden administration took office, Mexican officials in the state of Tamaulipas, which borders South Texas, began refusing to permit CBP to expel families with children under the age of seven, citing a new law relating to the treatment of migrant children.49 As a result, more families are now being admitted to the United States rather than expelled. These families are generally provided with COVID-19 tests and are connected with local nonprofit organizations which help secure transportation to their ultimate destination or a place to quarantine if necessary.50

Asylum seekers expelled back to Mexico are often targeted by criminal cartels for violence and extortion. Advocates have documented through surveys and public media coverage nearly 10,000 reports of violence against migrants expelled back to Mexico under Title 42.51 Hundreds of parents, fearing for the lives of their children, have chosen to self-separate and send their children across the border alone, knowing they will be safer in the United States than in northern Mexico.52

Some asylum seekers are expelled back to their home countries, which are the very same countries from which they fled persecution. For instance, over 7,000 Haitians have been expelled back to Haiti after arriving at the U.S. border since September 19.53 Other asylum seekers have been expelled to southern Mexico, where the Mexican government then expels them to Guatemala in a process of “chain expulsions.”54 The United Nations has expressed concerns that this practice is a violation of international law.55
However, not all migrants seeking asylum are expelled. Rising numbers of people from countries other than Mexico, Guatemala, Honduras, or El Salvador have been permitted to seek asylum in the United States because Mexico will not allow the Biden administration to expel them back to Mexico. Many of these individuals are sent to ICE detention centers, and during the initial months of the Biden administration the number of people sent to detention from the border rose significantly.

As a result, the outcome for asylum seekers crossing the border can vary wildly and depends more on their nationality and their family status than on any policies or laws inside the United States.

How has Title 42 affected border crossings?

Despite claims that Title 42 is necessary for immigration deterrence purposes, it has actually had the counterproductive effect of significantly increasing the number of arrests at the border. That is because, under Title 42, individuals who are expelled to Mexico within hours after being apprehended at the border can simply try again a second or third time in hopes of getting through. Some individuals have made dozens of failed attempts to cross the border and been turned back under Title 42 each time. This increase in apprehensions has been seen most among single adults who are not seeking asylum.

Before the pandemic began, just 7% of people arrested at the border had crossed the border more than once. But by October 2020, 38% of all people arrested had crossed the border multiple times that year. In Fiscal Year 2021, 1 in 3 people apprehended at the border had already crossed the border at least once that year. This has led to a dramatic shift in the demographics of border arrests, with the number of encounters of single adults rising every month from April 2020 through May 2021, reaching levels not seen in over a decade (see Figure 3).

FIGURE 3: APPREHENSIONS AT THE U.S.-MEXICO BORDER, OCTOBER 2012 TO APRIL 2022

Single adult apprehensions vs. family unit and unaccompanied child apprehensions

Because many people cross the border repeatedly after having been expelled under Title 42, the number of border encounters reported to the public greatly overstates the number of people who are crossing the border. In the 19-month period from the start of Fiscal Year 2021 through April 2022, there were over 900,000 “repeat encounters,” meaning that 1 in 3 border encounters was of a person on their second or higher attempt to cross the border (see Figure 4).

Among some groups, recidivism rates are even higher. According to DHS, half of all single adults from Mexico, Guatemala, Honduras, and El Salvador who are expelled back to Mexico under Title 42 are later arrested on a subsequent attempt to cross the border. And because not every person is apprehended on their second attempt, that means that more than half of individuals expelled to Mexico will cross the border at least one additional time.

FIGURE 4: ESTIMATES OF UNIQUE APPREHENSIONS, FY 2005 TO FY 2022 THROUGH APRIL 2022


8. Ibid.


10. Ibid.


13. Ibid.


15. Ibid.


ENDNOTES


60. Ibid.


May 16, 2022

Submitted via https://www.regulations.gov

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Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and Convention Against Torture Protection Claims by Asylum Officers  
(03/29/2021)

Dear Chief Cutlip-Mason & Assistant Director Reid,

The National Immigrant Justice Center (NIJC) offers comments in response to the above-referenced Interim Final Rule (IFR) issued by the Department of Justice (DOJ)’s Executive Office of Immigration Review (EOIR) and the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) (collectively, “the Departments”).

NIJC’s strong interest to proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many asylum seekers, torture survivors, and children who have entered the United States by crossing the U.S.-Mexico border. These individuals have overcome profound persecution and torture in their home countries and journeyed to the United States to find a better future.
Below, we (I) address improvements made by the Departments from the NPRM to the IFR and express concerns regarding unresolved issues regarding liberty interests of asylum seekers and due process protections; (II) express grave concerns that the Departments fail to promote fair and reasonable rules under the new timelines at all stages of review; (III) discuss how the IFR will effectively deprive many asylum seekers of work authorization.

I. The IFR includes some improvements from the NPRM; we commend those changes and urge the Departments to commit to further protections prior to implementation.

The Departments have made much needed changes to the Notice of Proposed Rulemaking (NPRM). These changes will avert some types of irreversible harm stemming from provisions in the prior NPRM or pre-existing regulations. We commend the Departments for these changes and urge them to use these protective measures and advance its humanitarian mandate in efficient and fair terms. In particular, we highlight and commend the following changes made:

- **Return to significant possibility screening standard and elimination of the review of bars during initial fear screenings:** We applaud the IFR’s changes to reflect the use of the significant-possibility screening standard in conformance with existing law. The Departments correctly point out that this return to the significant possibility standard is more efficient, conforms with the first two decades of expedited removal practice, and aligns with Congressional intent. Similarly, the elimination of screening for asylum bars in these initial screenings removes unnecessary hurdles in the arduous path to protection under U.S. asylum law and reduces the possibility of highly prejudicial erroneous assessments that will infect a case for its duration. In particular, because asylum seekers routinely undergo their initial screening without the benefit of counsel, fairness requires reserving the often-technical considerations that are relevant to evaluating a potential bar to asylum for future consideration.

- **Permitting USCIS to reconsider negative fear determinations:** The IFR provides for one reconsideration by USCIS so long as it is either requested by the asylum seeker or initiated by USCIS no more than seven days after the Immigration Judge’s (IJ) concurrence of a negative determination. NIJC has commented that reconsideration by USCIS is a critical guardrail for erroneous negative determinations, which result in the deportation and five-year bar on individuals in dire need of protection and an outright bar to asylum for any person who is erroneously removed and then subject to reinstatement if they flee to the United States a second time. NIJC also welcomes the Departments’ treatment of an individual’s silence, refusal, or failure to request IJ review as a request for

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1. See 8 C.F.R. § 208.30(e) and throughout.
3. See 8 C.F.R. § 1208.30(g).
review. This is more fair for all asylum seekers, including pro se individuals and individuals with little language access or literacy to navigate complex asylum procedures. NIJC notes, however, that the seven-day deadline for an individual to request reconsideration is unreasonably short, particularly for unrepresented individuals struggling to interpret USCIS’s preliminary finding in a language they may not understand. Furthermore, there is often a delay between issuance of an IJ decision and receipt by the asylum seeker and USCIS; this delay may leave little to no time for asylum seekers to avail themselves of the reconsideration option.

- **Correcting parole provisions at § 235.3(b)-(c):** The IFR makes two ministerial changes relating to parole that NIJC welcomes, but we urge the Departments to adopt greater safeguards when depriving arriving asylum seekers of their liberty.
  - First, the Departments fixed a drafting error that precluded parole consideration for individuals who passed fear screenings. We alerted DHS to this error in our comment and commend the Departments for the correction.
  - Second, the NPRM proposed to permit parole of individuals prior to their fear screenings “only when DHS determines, in the exercise of discretion, that parole is required to meet a medical emergency, for a legitimate law enforcement objective, or because detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities).” NIJC raised serious concerns regarding the proposal to weigh unavailable/impracticable detention bedspace as a trigger for parole consideration and proposed safeguards to bring the U.S. in compliance with international standards against the presumed detention of asylum seekers. We appreciate the elimination of those proposals from the IFR and return to the standard articulated under § 212.5(b).
  - But these corrections are insufficient. In a failed opportunity to better protect the rights of asylum seekers, the IFR left in place the already-problematic current regulatory scheme relating to the availability of parole, which prompted consideration of public interest but gives insufficient weight to factors relevant to individualized assessments, such as negative impact on an individual’s health,

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4 87 Fed. Reg. at 18094.
5 87 Fed. Reg. at 18088 (explaining technical amendment).
7 See generally UN High Comm’r for Refugees (UNHCR), Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), ¶ 2, available at https://www.refworld.org/docid/503489533b8.html (“In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review.”).
family separation, access to counsel, and meaningful participation in proceedings. The ongoing use of language adopted in 1997 fails to account for significant growth of immigration detention and the needs of present-day asylum seekers. The Departments should implement new guardrails to avert mass detention, especially as asylum seekers frequently await their Credible Fear Interview (CFI) for weeks or months in confinement. NIJC urges the Departments to consider incorporating these factors so that case-by-case parole reviews are meaningful and fair, and so that ongoing detention of asylum seekers for the entirety of their immigration process is the exception rather than the rule. This is particularly urgent given the serious due process concerns with the expedited procedure discussed in section II. As it stands, the IFR risks leaving countless asylum seekers in detention — a disastrous circumstance for anyone seeking the assistance of counsel while facing rushed deadlines and an array of procedural requirements.

- **Rescinding proposal that USCIS asylum officers (AOs) issue removal orders at § 208.16(c) and § 208.17(b):** The NPRM’s proposal to allow AOs to issue final removal orders obfuscated the non-adversarial purpose of AO reviews and created many problems relating to access to fair proceedings. NIJC commends the Departments for rolling back this proposal and leaving those powers to immigration judges (IJs). However, we remain concerned about the IFR’s expansion of review for AOs, encompassing eligibility determinations for withholding of removal and relief under the Convention Against Torture (CAT).

- **Withdrawing proposal to have asylum-and-withholding-only proceedings for the majority of asylum seekers in immigration court:** The IFR withdrew a proposal that aimed to resurrect enjoined asylum-and-withholding-only proceedings proposed under the prior administration. We welcome this revision. However, the Departments propose a new form of IJ review that would require respondents eligible for multiple forms of relief to face an additional procedural hurdle — while affirmatively seeking review of claims for non-fear-based protections, respondents would need to make a *prima facie* showing of eligibility for such relief before IJs permit them to proceed on their alternate forms of relief and exempt them from the expedited time frame this rule contemplates. As we discuss further in the next Section, this will severely limit respondents’ access to full proceedings under INA § 240 because IJs will face tremendous pressure to move cases speedily toward adjudication of fear-based claims. In turn, individuals would not benefit from IJs

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8 See NIJC comment to NPRM at pp. 8-16, available at [https://www.regulations.gov/comment/USCIS-2021-0012-4849](https://www.regulations.gov/comment/USCIS-2021-0012-4849).
9 See 87 Fed. Reg. at 18121.
10 8 C.F.R. § 1240.17(k).
developing the record and exploring other forms of relief.

- **Improvements on the treatment of dependent spouses and children**: The Departments tried to address some concerns we and others flagged about preserving spouses and children’s ability to pursue their claim if the principal asylum seeker is not granted relief at the asylum office. Specifically, the IFR now requires AOs to elicit information pertinent to asylum, withholding and CAT for the dependent spouse and children and determine whether the dependent family members have a significant possibility of separate eligibility from the principal asylum seeker for fear based claims. We welcome these changes and the Departments’ efforts to protect the rights of spouses and children.

- **Elimination of mixed case review proposal, lack of de novo review, truncated hearings that limit evidence submitted to the IJ, and other concerns under proposed § 1003.48**: We commend the Departments for doing away with proposals in the NPRM that posed a myriad of due process concerns for asylum seekers, including limitations on finality and appellate review, limitations on evidence accepted before the immigration court, and confusing proceedings where DHS trial attorneys may disturb asylum grants from USCIS. Along with former IJs, NIJC raised significant alarm at those proposals in the NPRM. However, as we discuss further in the next section, we continue to have grave due process concerns with section 1240.17, newly crafted and introduced in this IFR.

- **Clarification that only USCIS can conduct CFIs under U.S. law (§ 208.30(d))**: It is well documented that CBP officers frequently violate the rights of asylum seekers. Although we outline ongoing concerns about CBP’s significant control as gatekeepers for access to CFIs in Section II.A.1. *infra*, we commend the Departments for stating the obvious — that CBP has neither the expertise nor the statutory right to conduct CFIs.

These changes show attention to comments received in the NPRM period, as well as adjustments that reflect the Departments’ interest in improving proposed procedures. However, as we explain below, the Departments preserved key elements of the NPRM that undermine due process.

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11 C.F.R. § 208.9(b).
12 *See* Comment Submitted by Round Table of Former Immigration Judges to NPRM, available at https://www.regulations.gov/comment/USCIS-2021-0012-4874.
13 *See* Josiah Heyman, Jeremy Slack, and Daniel E Martínez, *Why Border Patrol Agents and CBP Officers Should Not Serve as Asylum Officers* (2019) (citations omitted) (“11 percent of the 1,095 [surveyed recently deported] respondents who answered the question on physical abuse reported being hit, pushed, grabbed, or attacked physically while in US custody. Sixty-seven percent of the physical abuse reports were attributed to the Border Patrol. Twenty-three percent of the 1,092 respondents who answered the question reported being yelled at, threatened, or verbally abused while in US custody. Seventy-five percent of those verbal abuses reports were attributed to the Border Patrol”).
II. The IFR raises a number of Due Process concerns for asylum seekers at every step of their claim.

The IFR introduces a new affirmative procedure that builds on the existing use of fear referrals and screenings in expedited removal. For asylum seekers, this new process would entail three phases: (A) apprehension and CFI, (B) asylum merits interview before USCIS, and (C) review before the immigration court. All three phases, as currently envisioned in the IFR, would impose significant obstacles to meaningful asylum access for large categories of asylum seekers, including individuals unable to obtain parole; pro se individuals; people with limited language access; and survivors of trauma.

A. Apprehension and CFIs: How the IFR’s continued reliance on expedited removal will inevitably harm asylum seekers.

We continue to urge the Administration to reconsider its approach to asylum processing, which remains structured around the irreparably harmful expedited removal system. As we raised in our comment to the NPRM, expedited removal relies on two flawed processes: first, it requires CBP officers to ask questions designed to elicit a fear of return and accurately identify that fear as a potential basis for asylum, even though CBP has long been documented to routinely fail to perform these basic assessments; second, it requires asylum seekers to disclose intimate information about their fear and trauma to government officials, who they may perceive as hostile, usually without the presence of an attorney, while detained, with minimal language access, and often a very short time after arrival. NIJC has represented countless asylum seekers who were unable to present their claims because of these elements of expedited removal.

1. Routine failures by CBP agents to refer individuals for fear screenings, resulting in summary removal

Under expedited removal, CBP officers are gatekeepers to the asylum process. Historically, they

15 Despite the Departments’ aspirations, they opt to leave the 1997 regulations largely intact, adopting the same standard for parole review that has created mass immigration detention. As mentioned in Section I, we call on the Departments to expand the factors for consideration so that individuals do not have to choose between life and liberty when presenting their asylum claims.

16 See Coalitional letter to DHS Secretary Mayorkas (Feb. 16, 2021), [link], calling on DHS Secretary to reject the use of expedited removal due to fundamental flaws including CBP failure to refer individuals who seek protection.

17 See e.g., U.S. Department of Homeland Security, Detained Asylum Seekers: Fiscal Year 2014 Report to Congress (Sept. 9, 2015) (indicating that 35,598 of 42,187 or 84 percent of credible fear applicants were detained in ICE custody).

18 See Complaint to Dep’t of Homeland Sec. Office of Civil Rights and Civil Liberties (CRCL) calling for an investigation of the Houston Asylum Office’s handling of CFIs (Apr. 27, 2021), available at [link] (“The Houston Asylum Office routinely fails to provide appropriate language interpreters to asylum seekers, forcing them to proceed with CFIs in languages in which they are not fluent. Asylum seekers have also agreed to move forward with CFIs in languages in which they lack fluency because they were unaware of their right to insist upon an interpreter in their primary language. Asylum Officers often pressure asylum seekers to go forward with interviews in their second or third-best language.”).
have consistently failed to record expressions of fear and have thus failed to refer individuals for CFIs — frequently disparaging asylum seekers, baselessly claiming that individuals’ fear claims have no merit, and subjecting them to threats and abusive conditions rather than promptly referring them to AOs. In 2014, NJIC and other nonprofit organizations filed a complaint with DHS’ Office of Civil Rights and Civil Liberties as well as the Office of Inspector General. This complaint detailed the cases of nine complainants and observations of legal service providers pertinent to CBP’s failure to elicit or record individuals’ fear and refer them for CFIs. The complaint documented a pattern of CBP’s failure to acknowledge asylum seekers’ fear when these individuals expressed them; coercive measures used by CBP to force these individuals to sign their own removal orders, permanently barring them from seeking asylum again; intimidation used to deter asylum seekers from presenting their claims, threatening them with detention and/or criminal charges; and failure to ask individuals if they have a fear of return, despite their statutory mandate.

These systemic failures are not a relic of the past. In 2019, Congress expressed alarm that CBP personnel routinely fail to elicit expressions of fear from arriving refugees in contravention of the Refugee Convention, consistent with a prior finding of the DHS Office of Inspector General. In 2021, Human Rights Watch published records obtained via the Freedom of Information Act that revealed over 160 USCIS officers’ internal reports regarding the treatment of asylum seekers in CBP custody, including blatant refusal to record expressions of fear and CBP forcing asylum seekers to sign documents certifying their own removal via the threat of rape and jail. Accountability for this conduct is elusive, even when abusive conduct is blatant and public, such as the graphic photographs depicting CBP officers violently rushing asylum seekers out of the


20 See id. at 13-22.

21 Id.


24 See Human Rights Watch, They Treat You Like You Are Worthless: Internal DHS Reports of Abuses by US Border Officials (Oct. 21, 2021), available at https://www.hrw.org/report/2021/10/21/they-treat-you-like-you-are-worthless/internal-dhs-reports-abuses-us-border-officials [sharing dozens of internal reports where DHS officials “prevent[ed] would-be asylum seekers from lodging claims or compelling them to sign papers they did not understand. One, for example, says the “applicant testified that she told the immigration officers that she was afraid to return. They wrote down that she said she was not. The applicant stated that the immigration officers did not tell her what she was signing when they typed in her signature.”].

2. Asylum seekers already face systemic barriers to present their claims in Credible Fear Interviews

The Departments’ scheme presumes that CFIs are a reliable and fair vehicle for the screening of asylum seekers. This presumption stands in stark contrast to the experience of many of NIJC’s clients, who would not have received protection but for layered efforts by large legal teams to obtain their fair day in court — a luxury not available to most asylum seekers.

NIJC client Iris experienced her CFI as a confusing and retraumatizing process that she underwent alone. She recalls: “When I first told my story, I thought that people wouldn’t listen to me, that people wouldn’t believe me. Ultimately, it was important that I had the opportunity to tell my story to a judge, as the environment in court was very different from that of the credible fear interview.” Other clients report asylum officers rushing them, failing to ask key follow-up questions, and/or failing to record their responses or guide them about the importance of the interview. Without NIJC’s intervention, these clients would be removed to face the persecution and torture they fled. And yet, most asylum seekers proceed through the CFI without counsel who can challenge improper reliance on expedited removal screenings. By codifying this system further, the Departments favor speed over fairness and create a system where countless asylum seekers will never have their fair day in court.

Daniela’s CFI occurred with her five-year-old son who had entered the United States with her. The asylum officer required her son’s presence at the interview, even though Daniela had previously presented evidence of sexual violence that led to her pregnancy with her son. During the interview, Daniela repeatedly limited her testimony regarding her prior rapes because of her discomfort discussing this information in front of her young son. Had Daniela’s attorney not been present to direct the officer to an affidavit from Daniela that discussed her past harm in greater detail, significant aspects of her history would not have been disclosed.

Cristina fled Honduras to escape domestic violence and was then kidnapped and sex-trafficked in Mexico by individuals connected to her hometown in Honduras. Her daughter, whose father was one of Cristina’s traffickers, was born in Mexico. However, the asylum officer repeatedly failed to ask Cristina any questions about what had happened to her in Mexico, focusing all questions exclusively on Honduras. When

26 See Felipe de la Hoz, Biden Is Finally (Maybe!) Ending Title 42. But Trump’s Cruel Border Policies Aren’t Over, The New Republic (Apr. 21, 2022), available at https://newrepublic.com/article/166155/joe-biden-title-42-donald-trump-immigration-border (“When the images of hat-wearing, horse-mounted agents of the state lashing scattering Black migrants with their reins began sparking outcry, the administration went into damage-control mode, with Homeland Security Secretary Ali Mayorkas promising a swift investigation that would “be completed in days—not weeks.” Nearly seven months later, the results remain pending, though the agents have now been cleared of potential criminal charges.”).
28 Pseudonym used to protect confidentiality.
29 Pseudonym used to protect confidentiality.
Cristina’s attorneys pressed the officer to ask Cristina about any harm in Mexico, the officer responded that he had already asked her to explain why she was afraid to return to Honduras. Only after the attorney continued pushing the officer did he finally ask her about Mexico, leading Cristina to disclose extensive information about the connections between the persecution in Mexico and her fears about harm in Honduras.

Without counsel (as most asylum seekers are during their CFI), Daniela or Cristina would almost certainly have received a negative finding, despite their strong legal claims to relief. Asylum seekers who have survived traumatic experiences, suffered gender-based violence, or identify as members of the LGBTQ community frequently are often unable to pass CFIs under the current system despite having viable claims. In NIJC’s experience, many asylum seekers, especially survivors of gender-based violence, simply do not know that the harm they experienced is pertinent under U.S. asylum law because their country of origin normalized or condoned this violence. Even when AOs are able to elicit more information about past harm, alarming reports persist of systematic failures to properly implement trauma-informed interview techniques.30 The IFR would sanction and continue this systemic problem, despite the questionable reliability of these screenings already documented in federal court.31

B. The new Asylum Merits Interview: How the IFR’s procedures for the new USCIS Asylum Merits Interview will result in routine erroneous referrals to the immigration courts and deportation orders.

The IFR introduces an array of new deadlines that expedite the entire application process to the point of being often untenable, while also requiring USCIS asylum officers to render eligibility determinations in withholding and CAT, two new areas of immigration law riddled with complexity.

Asylum seekers are supposed to go through their CFI within days of their apprehension. During that brief window, in which asylum seekers are detained by default, finding legal representation and gathering evidence is difficult or impossible. From there, the IFR states that the Asylum Merits Interview must be scheduled within 21 to 45 days of an individual’s positive fear screening, which could mean that an asylum seeker’s merits adjudication could occur in their first month in the United States.32 Amidst this rapid timeline, some evidence is due 14 days prior to the interview while other evidence is due 7 to 10 days prior.33 Following the interview, AOs may have as little as two weeks to render their decision.34 This timeline would severely compromise the ability of asylum seekers to meaningfully present their claims.

30 See Complaint supra n.18.
31 See Jimenez Fereira v. Lynch, 831 F.3d 803 (7th Cir. 2016) (ruling that Dominican woman who fled to the United States to escape an abusive partner was wrongly denied protection because the Immigration Judge and Board of Immigration Appeals (BIA) placed too much weight on the notes USCIS officer took during the woman’s initial asylum screening interview); Cuesta-Rojas v. Garland, 991 F.3d 266 (1st Cir. 2021) (reversing adverse credibility finding, which rested at least in substantial part on asserted discrepancies between noncitizen’s credible fear interview account and his removal proceeding account).
32 8 C.F.R. § 208.9(a).
33 8 C.F.R. §§ 208.4(b)(1); 208.9(e)(1).
34 8 C.F.R. § 208.9(e)(2).
Based on NIJC’s experience in working with asylum seekers who have recently arrived to the southern border, this timeline means that the vast majority will undergo their fear screening and their subsequent USCIS Asylum Merits interview without counsel. The IFR leaves individuals with as little as one week to retain counsel — an impossible feat even in areas of the country with the greatest possible access to attorneys with asylum expertise; and particularly unreasonable when accounting for the likelihood that asylum seekers will be detained for much, if not all, of this time. The Departments acknowledge the significant strain imposed by these timelines, but opt to rush people through these interviews anyway, without sufficient time to prepare. USCIS can only deviate from the expedited interview scheduling of this IFR in the case of exigent circumstances, which the Departments define restrictively as interpreter issues, AO sickness, or the asylum office’s closure — i.e., none of which relate to asylum seekers’ needs to prepare or gather evidence.

Proceeding without an attorney will create cascading problems for asylum seekers. Asylum seekers face two confusing deadlines right before their interview: up to seven days before the interview, asylum seekers have a window to correct any mistakes on their CFI, now converted into an asylum application; concurrently and up until 14 days before the interview, asylum seekers must submit any relevant evidence to support the merits of their asylum claim. The seven-day submission window for corrections of AO errors is critical, because these errors, misunderstandings, or even mistranslations, may all be consequential or determinative of credibility assessments and other legal determinations made by AOs and IJs. Missing this window could taint the entire proceeding for asylum seekers — something pro se applicants are largely unable to anticipate. Meanwhile, the 14-day track is key to an applicant’s ability to provide basic support for their claims, including coordinating the receipt and submission of evidence from their home country, supporting affidavits, country conditions evidence, and articulating the basis of their asylum claim under proper (extremely complex) legal precedent. Preparing this submission is onerous for experienced attorneys and can often take 100 hours or more, let alone unrepresented and often detained people with little understanding of the burden they bear under U.S. law. Rushing asylum seekers through these deadlines will compromise the search for counsel and compliance with these new requirements, even though the former is key to the latter.

This rushed timeline will also hinder NIJC and other legal service providers who endeavor to match asylum seekers with pro bono representation. It is only thanks to this model that NIJC is able to serve more than 800 asylum seekers at any given moment. But it often takes weeks or even months to place a case with pro bono counsel. The compressed timeline will also make the proper presentation of cases practically impossible. For example, NIJC and its pro bono teams frequently retain experts to provide evidence to support the legal claims to meet the asylum

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35 See 87 Fed. Reg. at 18143 ("While recognizing that affirmative asylum applicants often spend a greater amount of time preparing their asylum application in advance of filing and have more time inside the United States to procure and consult with counsel, the Departments also must consider that delaying the Asylum Merits interview for any considerable length of time to allow applicants in the Asylum Merits process a similar amount of time would undermine the basic purpose of this rule: To more expeditiously determine whether an individual is eligible or ineligible for asylum.").

36 8 C.F.R. § 208.9(a)(1).

37 8 C.F.R. § 208.4(b)(2).
burden. NIJC also obtains forensic evaluations to serve as corroboration when a client presents with physical scars or other medical signs of torture. Similarly, NIJC regularly endeavors to present psychological evaluations, and corroborating evidence from the client’s home country. Under the timelines imposed by the IFR, little of this evidence-collection will be possible. As such the IFR will impair NIJC’s efforts to advance its mission of defending the legal rights of immigrants and asylum seekers.

Even asylum seekers with counsel will lack the full and fair opportunity to present their claim under these strenuous deadlines. In NIJC’s experience, intakes for asylum seekers can take multiple conversations, which can last hours at a time, and in some cases must be spread out over time to limit retraumatization. In addition to this assessment, NIJC conducts conflict checks and assesses its capacity to provide representation in-house, refer for pro bono representation with training and ongoing guidance from NIJC attorneys, or refer asylum seekers to other service providers. If NIJC accepts a case in-house or via pro bono placement, merely gathering evidence and reviewing the CFI can take weeks to months, often requiring extensive research, contacting relatives and other witnesses in asylum seekers’ home country, and developing the rapport and trust necessary for asylum seekers to share their full personal story. In cases where NIJC is able to place a case with pro bono counsel, it can take that legal team, which generally consists of non-immigration experts, weeks to build competency so that they can meaningfully begin their representation. This timeline will not be possible under the IFR.

Furthermore, the IFR’s inclusion of withholding and CAT within the scope of AO review renders proper preparation and evidence submission even more critical. Making out a claim for relief under withholding or CAT requires meeting different burdens and establishing different legal elements than asylum, and some of these elements are not consistently applied across the country. In NIJC’s experience, applying for withholding of removal and CAT while concurrently seeking asylum requires scrupulous review of circuit court and BIA precedent as well as an assessment of relevant regulations. Preparing these cases further requires counsel to assess the proper evidence required for meeting the requirements of each claim and to triage the importance of collecting that evidence on a particular timeline. The expedited time frame the IFR requires is not only untenable for asylum claims; it is prohibitive given the Departments’ aim to expand AO’s scope of review.

The consequences of truncated preparation and evidence submission are dire. Such expedited time frames may result in returning individuals to their persecutors or torturers and barring them from return for five years, with scant judicial review. It also poses organizational and even ethical issues for organizations like NIJC. Two of NIJC’s key priority areas are (a) ensuring access to counsel in immigration proceedings, which includes providing high quality legal counsel and advocating for a guaranteed right to counsel and (b) defending, maintaining, and expanding access to asylum and related forms of relief. NIJC will not be able to ethically advance this mission without dramatically reducing the number of asylum seekers it is able to serve at any given time. These issues are also present for private attorneys because attorneys have ethical obligations to engage in zealous representation and to maintain a reasonable and workable caseload. These lawyerly obligations are all but impossible to satisfy while representing individuals subject to the IFR, which may dissuade attorneys from taking on this representation entirely.
Asylum seekers and legal service providers won’t be alone in suffering adverse consequences of these rushed timelines; so will the Departments. The Departments presume that the AO’s non adversarial review will decrease referrals to the immigration court under this rule. This supposition presumes one of two scenarios: individuals promptly prevailing at the asylum office or declining review by the IJ. Historically, asylum seekers have had greater success before IJs than AOs. The IFR is unlikely to reverse that tide under this rushed timeframe, which will inevitably limit evidence submitted without lessening the complex requirements of U.S. asylum law. And once a person is referred to an IJ following an on-the-merits denial from the AO, there will be new concerns introduced into the proceedings before the IJ (like improper credibility assessments and incorrect consideration of the asylum elements stemming from rushed or incomplete briefing) that will compromise those proceedings as well. In other words, even though the IFR will make the process more efficient for a small minority of applicants who are able to prevail quickly, it will prolong and complicate the system for most others, and will introduce additional complications that undermine access to a fair process for those in this majority.

Given these challenges, the Departments should, at a minimum, withdraw or expand on these rushed timelines. Even if the Departments withdrew these rushed timelines, we note that their plan to field claims through USCIS fails to incorporate essential improvements to the existing interview process in order to avert unnecessary referrals to IJs. The Departments emphasize their plan to proceed with a phased implementation “to hire new employees and spend additional funds to fully implement the new Asylum Merits process” and outline their plan to place individuals who pass fear screenings in 240 proceedings until USCIS has sufficient support for the full roll-out of this rule. NIJC appreciates this cautionary approach, but notes that any implementation of this IFR (phased or in full) would require substantive changes to the asylum interview process to comport with due process requirements. In our comment on the NPRM, NIJC outlined several ways in which USCIS should improve its new merits interviews for asylum seekers to conform with the Departments’ intent to uphold fairness:

- confirm that attorneys may elect to offer an opening statement and question their clients directly first, followed by the AO asking questions on narrow issues that require clarification;
- confirm that attorneys may offer a closing statement at the conclusion of the interview;
- require officers to review filings in advance of asylum interviews and train them to explore credibility without requiring asylum seekers to provide such a level of detail

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38 87 Fed. Reg. at 18090 (“This IFR will help more effectively achieve many of the goals outlined in the Global Asylum rule — including improving efficiency, streamlining the adjudication of asylum, statutory withholding of removal, and CAT protection claims, and lessening the strain on the immigration courts — albeit with a different approach. This rule helps meet the goal of lessening the strain on the immigration courts by having USCIS asylum officers adjudicate asylum claims in the first instance, rather than IJs. As explained further in this rule, the Departments anticipate that the number of cases USCIS refers to EOIR for adjudication will decrease”).

39 See TRACImmigration, Asylum Grant Rates Climb Under Biden (Nov. 10, 2021), available at https://trac.syr.edu/immigration/reports/667/ (“Historically, asylum seekers have had greater success in the Immigration Court for affirmative as compared with defensive asylum cases.”).

40 87 Fed. Reg. at 18185 (declining to proceed with pilot and favoring phased implementation).

41 The IFR adds but one new safeguard to this new Asylum Merits Interview, the clarification that attorneys can question witnesses. See 8 C.F.R. § 208.9(d).
about torture and persecution that they experienced resulting in unnecessary retraumatization;\(^{42}\)

- train officers to detect indicia of incompetency that may adversely impact asylum seekers’ ability to proceed,\(^{43}\) especially in light of the adverse impact of trauma on memory;\(^{44}\)
- make referrals to IJs for full removal proceedings when presented with significant indicia of incompetency so that applicants can be assessed and potentially appointed a Qualified Representative;\(^{45}\)
- permit USCIS to appoint counsel in other cases where counsel is necessary to ensure fairness;
- permit asylum seekers and their counsel to record objections and make requests that the record reflect nonverbal activity (e.g. “Let the record reflect the application is showing a scar on her leg,” or “Let the record reflect the applicant is crying.”);
- create robust oversight and complaint mechanisms, including the option to elevate complaints to a supervisor during or immediately following the interview, so that asylum seekers have recourse when officers restrict their rights, do not provide appropriate language access services, or silence witnesses or counsel.

In sum, we call on the Departments not only to withdraw their proposed expedited timeframes, but to engage with NIJC and other stakeholders on specific measures to improve its AO interview procedures prior to launching the significant changes they contemplate. No asylum seeker should be better served in immigration court than in non-adversarial proceedings. USCIS should not presume that the existing interview process (layered with expedited timeframes) will be sufficient to comply with asylum seekers’ rights under domestic law as well as international

\(^{42}\) This is particularly important as USCIS interviews often take many hours to a full work day. In NIJC’s experience such long interviews do not permit asylum seekers to benefit from the non-adversarial setting of the affirmative process, as they would spend less time testifying in immigration court than before USCIS. NIJC would urge USCIS to refrain from such lengthy interviews that are bound to retraumatize applicants.

\(^{43}\) Current USCIS procedures make clear that, unlike immigration judges, asylum officers are not trained to detect indicia of incompetency pursuant to Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011). See USCIS, Asylum Division Affirmative Asylum Procedures Manual (AAPM) (May 2016), available at https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf, at II.J.12 (p.18) (“Asylum Office personnel are neither trained nor expected to evaluate an asylum applicant’s mental or physical competency and shall not make any determinations to that effect.”). This means that asylum seekers living with mental or physical disabilities have little to no remedy under the Rehabilitation Act and Due Process Clause to seek the accommodations they require. For example, section III.B.6. (p.38) of the AAPM largely prevents asylum officers from waiving the asylum seeker’s presence or testimony, if no other witness is available. This would force mentally incompetent asylum seekers to testify and prevent other remedies, such as ascribing the same weight to a written declaration as sworn testimony of the asylum seeker or witnesses unable to appear, or proffer from counsel based on the written submission.


\(^{45}\) As noted in this section and n. 43 supra, USCIS does not have robust procedural safeguards to screen and process the claims of incompetent asylum seekers. Until USCIS can adopt stronger procedures and policies so these individuals can properly benefit from the affirmative process without compromising their rights under the Due Process Clause and the Rehabilitation Act, we recommend sending those claims to immigration judges.
treaty obligations to fair consideration of their claims.

C. Immigration Court Review: More untenable timeframes and procedural requirements will harm asylum seekers’ right to fundamentally fair hearings.

The IFR introduces a wholly new procedure for immigration court review, which was not included in the original NPRM and therefore did not benefit from comments about it. Under the guise of “streamlined section 240 removal proceedings,” the Departments propose rapid immigration court deadlines and procedures that will result in removal orders for many people with viable asylum claims. As we explain below, (1) the Departments fail to justify these new, unreasonably rushed timelines; (2) this new process will fail to safeguards the due process rights of unrepresented asylum seekers; (3) even represented asylum seekers will not have sufficient time to prepare and benefit from fair proceedings; (4) the IFR’s new procedural hurdles and timelines will harm respondents most, in the name of speed and efficiency; and (5) the discrete safeguards they propose are insufficient to avoid irreversible harm to asylum seekers.

1. The IFR’s expedited processing and deadline are unreasonable, do not actually achieve the purported purpose of balancing efficiency and fairness, and have not been sufficiently explained.

The timelines contemplated under this IFR are no less confusing and stringent for IJ proceedings than they are for AO interviews. The IFR requires the first master calendar hearing to occur 30 days after service of a notice to appear (NTA). This change is problematic for asylum seekers, their attorneys, and the Departments.

First, there is frequently a substantial gap between when an NTA is served upon the respondent and when it is filed with EOIR. DHS has struggled mightily to issue NTAs that even have hearing dates on them, much less NTAs with hearing dates within 30 days. In addition, the Departments have been unable to manage the scheduling of master calendar hearings for those individuals who are already in proceedings before EOIR, the result being ongoing cancellations.

46 87 Fed. Reg. at 18097.
47 87 Fed. Reg. at 18089.
49 8 C.F.R. § 1240.17(b).
50 See Pereira v. Sessions, 138 S.Ct. 2105, 2119 (2018) (government citing administrative burden of meeting threshold statutory requirements in serving NTA with time, date, and place of proceedings); Niz Chavez v. Garland, 141 S.Ct. 1474, 1484 (2021) (“The government admits that producing compliant notices has proved taxing over time.”).
and failures to address cases that are already on the immigration courts’ dockets. The inevitable
delay for existing cases will prejudice individuals who wish to move forward with their case as
quickly as possible, including asylum seekers who want to reunite with family and applicants for
cancellation of removal who risk becoming ineligible for that relief as their qualifying-relative
children approach adulthood. Requiring hearings to be set within 30 days when EOIR is in no
position to effectively manage its docket for people with existing cases is unreasonable in that it
forces newly arrived asylum seekers to proceed on an unfeasibly fast timeline even though EOIR
is in no position to accommodate that timeline. There are simply not enough adjudication
resources for this timeline to be workable on EOIR’s end.

Additionally, for cases directly impacted by the IFR, the Departments fail to consider how the
gap between service and filing of NTAs, paired with the demanding timeline in this rule, would
complicate the case-completion process. Asylum applicants cannot file materials with EOIR,
including changes of address forms and notice of appearance by an attorney, until the NTA is
served on the court. Delays in that process when accompanied by a short 30-day window will
create a significant risk that attorneys and asylum seekers alike will not receive notice of
hearings or be able to file requests to make changes to those hearings. These changes are likely
to result in improper notice to respondents and unfair in absentia removal orders for failure to
appear.

Second, once the NTA is filed, asylum seekers have two back-to-back hearings and only one
month from their first master calendar hearing to prepare key elements of their claim (discussed
further at section II.C.3. infra). Their second hearing could be their last, leaving asylum seekers
without a merits hearing. These timelines and procedures undermine the Departments’ stated
purpose by forcing applicants for asylum, withholding of removal, and CAT protection to gather
sufficient evidence — especially from foreign countries that must be translated — to meet their
burden for their claims under unreasonably restrictive deadlines. Combined with the rushed
timeline at the asylum office, the EOIR deadlines will be unworkable for many asylum speakers,
who often have limited language access, are navigating proceedings pro se, need to gather
significant evidence to support their cases, and may also be detained. In many cases, asylum
seekers are forced to flee their home countries with little or no opportunity to plan for their
departure. In practice, this means that many asylum seekers arrive in the United States with little
or no supporting documentation. In order to obtain such evidence, asylum seekers must often
coordinate with family or loved ones in their home country. Family or loved ones may then have
to travel to remote locations or navigate bureaucratic procedures to obtain the documents or
evidence requested. This is a practice that can take weeks or months. The timelines in the IFR
fail to take into consideration the reality many asylum seekers are forced to navigate and will
effectively preclude many individuals from accessing protection.

Third, even the stated goal of “operational efficiency” is unlikely to be achieved. It is virtually
certain that the sort of rushed adjudication that will result from the timeline imposed by the IFR
will result in adjudicative errors and deprivation of a fair opportunity to seek relief. Those errors
will yield many more appeals, to the Board of Immigration Appeals and to the Circuit Courts. So

51 See e.g., Giulia McDonnell Nieto Del Rio, Chaotic Reopening of Immigration Courts Make New York Immigrants
Fear Deportations, Documented (June 24, 2021), available at https://documentedny.com/2021/06/24/chaotic-
while it is true that, for some applicants, things will proceed more quickly, for many others they will just have to endure an appeal process that is already prolonged and subject to timeline concerns not addressed by the IFR. Even if operational efficiency could be a valid excuse for depriving asylum seekers of a fair chance at protection from persecution — a tradeoff that NIJC categorically rejects — the truth of this IFR is that it merely moves the delay to another part of the adjudication process. And it does so while imposing a timeline that will make it virtually impossible for many asylum seekers to access counsel, obtain evidence, and meaningfully advance their claims to protection. This is a trade that the Departments should not make.

Finally, there is no justification for these expedited timelines under the Immigration and Nationality Act (INA). First, the Rule sets individuals down a path of expedited adjudication even though the INA gives noncitizens one year from the date of their arrival in the United States to file their asylum applications.\(^{52}\) Congress adopted this one-year deadline after rejecting a 30-day deadline because it would be harmful to those “most deserving” of protection to impose an impossible timeline.\(^{53}\) Congress established no deadline at all for withholding of removal or CAT applications, which are mandatory forms of protection.\(^{54}\) One of the factors that makes the timelines in the IFR especially unreasonable is that, for all applicants subject to this IFR, they will have zero lead time before they are forced into this expedited track. Even though Congress gives them up to a year to file an application for asylum, they will be forced to apply and start defending their applications within days of entry. This is particularly troubling given the extensive record of evidence showing that even the one-year deadline already improperly precludes many asylum seekers from presenting their claims.\(^{55}\) As stated above, NIJC urges the Departments to develop more efficient and predictable adjudication systems both at the asylum office and before the immigration courts. But it cannot do so while also depriving applicants of statutorily provided preparation time that would have allowed them to find counsel and gather documents to support their asylum applications.

Notably, the Departments previously attempted to limit the availability of extensions and longer filing timelines in a Trump-era Rule, “Procedures for Asylum and Withholding of Removal,” that was a companion to the Global Asylum Rule referred to in the IFR.\(^{56}\) The IFR cites this Rule and the related injunction but fails to justify implementing case completion timelines and procedures that are similar to an already-enjoined rule and that are implementing the same statutory provisions. In particular, the rule enjoined by \textit{NIJC v. EOIR} gave applicants just 180 days to complete their cases in front of IJs, and the parties in that litigation argued that the

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\(^{53}\) \textit{See} Sen. Rep. 104-249, at 43 (1996) (explaining that “the persons most deserving of asylum status — those under threat of retaliation, those suffering physical or mental disability, especially when abuse resulting from torture — would most be hurt by the imposition of any filing deadline, and particularly so, if the deadline was thirty days”).


\(^{55}\) \textit{See} Human Rights First, \textit{Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families} (Sept. 30, 2021), available at https://www.humanrightsfirst.org/resource/draconian-deadline-asylum-filing-ban-denies-protection-separates-families#%7E:text=The%20one%20year%20filing%20deadline%20is%20an%20exception%20to%20the%20one%20year%20filing%20deadline%20in%20the%20INA%20and%20the%20Court%20of%20Appeals%20has%20ruled%20that%20this%20deadline%20is%20unconstitutional.%20By%202008,%20more%20than%2053,400%20asylum%20seekers%20had%20had%20their%20cases%20denied,%20rejected,%20or%20delayed%20due%20to%20the%20filing%20ban.).

timeline contemplated by that rule was contrary to law because it undermined the one-year filing
deadline for asylum cases and because Congress clearly contemplated that it could take longer
than 180 days for cases to be completed. The plaintiffs in that case also raised similar access to
counsel and due process concerns that arise with this IFR. The Departments’ statement in
footnote 26 that the enjoined Rule is going to be replaced by separate rulemaking is not
responsive to the fact that this IFR and that Rule do many of the same things. Instead, they punt
to future rulemaking to address the necessary revisions to comply with the injunction.57

Like the enjoined Trump rule, the IFR purports to rush asylum seekers through adjudication in
between 45 and 180 days based on an overly strict reading of the INA.58 The National
Association of Immigration Judges previously explained that “the overwhelming numbers of
applicants in 2020 make it impossible to meet the 180-day deadline while ensuring due
process.”59 Unlike the enjoined Trump rule, the Departments not only seek to have respondents
go through their claim within 180 days, but expect them to do so while appearing between two
separate agencies and meeting many critical deadlines in the interim.

Despite these many logistical and statutory conflicts, the Departments fail to address prior
comments raising concerns about time frames, and instead impose a timeline that was largely
absent from the initial IFR with the purported goal of “achieving a streamlined process.”60 The
IFR dodges the core of these concerns, instead rationalizing that only modest modifications or
edits to the credible fear determination are envisioned. This explanation appears to gloss over
each asylum seekers’ right to meaningfully participate in their case.

2. Implementation of the IFR with its current expedited timeframes is not realistic
for unrepresented respondents.

The master calendar hearing may be the only time that asylum seekers learn of their right to
appear with counsel. Yet the IFR provides a mere 30 to 35 days after the master calendar hearing
before an applicant must appear at a “status conference,”61 which could be outcome-
determinative as to the scope or even occurrence of an asylum seekers’ merits hearing. The
Departments hinge the IFR’s “efficiencies and timeline”62 on this newly created status
conference where parties are to come fully prepared to narrow the issues at hand; however, this
presumes equal negotiating parties — rather than pro se individuals facing trained ICE attorneys
in a language and system few understand.

Generally, NIJC supports the use of status conferences as a means of resolving issues,
eliminating disputes, or even reaching agreement on case outcomes prior to a merits hearing.

58 See 87 Fed. Reg. 18090 at n. 14 (citing INA § 208(d)(5)(A)(ii)–(iii), 8 U.S.C. § 1158(d)(5)(A)(ii)–(iii) to support the
regulatory change that asylum interviews will occur within 45 days and that adjudication should be completed within 180
days).
59 See National Association of Immigration Judges Comment to NPRM at 2 (Oct. 23, 2020), available at
60 87 Fed. Reg. at 18144.
61 8 C.F.R. § 1240.17(f)(2).
However, the IFR incorrectly presumes that (a) asylum seekers will be able to obtain counsel in time to participate in these conferences or (b) that pro se individuals will be in a position to meaningfully negotiate effectively in these hearings. The reality is most legal service providers and private immigration attorneys have limited capacity to immediately commence preparation on a case. In NIJC’s experience as a service provider of Legal Orientation Programs (LOP) for detained individuals, there is no guarantee that individuals will even have access to LOP services, let alone retain counsel, prior to their first court hearing.63 NIJC and similar organizations would need to make significant deviations in existing work-flows to screen and offer representation to asylum seekers in a timely fashion to prepare for the status conference under the IFR. This would likely place us and other organizations in a position of choosing between helping those who have been waiting for our services (many of whom may remain detained because the Departments opted not to spell out public interest factors for their release) and those who we will need to serve immediately lest they be forced to proceed pro se on an unworkable timeline.

The reality is that presenting an asylum case has become exceedingly complicated, and changes in the law over the past several years have only increased that complexity. This complexity grows exponentially for asylum seekers who do not benefit from having an attorney by their side. The IFR imposes a timeline that would be viable only if presenting an asylum case were straightforward and did not require, for example, documentation to prove the “social distinction” of a particular social group, substantial corroboration to establish credibility, and either direct or circumstantial evidence to show that an individual’s membership in a protected group was “one central reason” for the harm they faced. Ignoring the complexity of this law, while erecting new deadlines that make securing counsel near impossible, will all but ensure the unfair removal of pro se asylum seekers.

3. Even represented respondents are not guaranteed fair proceedings under this new rocket docket.

Asylum seekers who manage to secure counsel are not necessarily more likely to succeed in a status conference. Preparing for this conference would be a tall order for most experienced attorneys, as respondents are required to: plead to the charges against them; indicate whether they intend to testify before the court; identify any witnesses they intend to call provide additional supporting documentation; describe alleged errors or omissions in the AO’s decision or the record of proceedings before USCIS; articulate or confirm any additional bases for asylum and related protection (whether or not they were presented to or developed before the AO); and state any additional requested forms of relief or protection. This new status conference concentrates and consolidates many issues that cannot be resolved on the relevant timeline. For example, the obligation to identify witnesses and provide supporting documentation will require applicants to find expert witnesses (whether medical providers or country conditions experts), secure declarations from them, and verify their availability on an unrealistic timeline. And the obligation to describe errors and omissions and identify additional avenues for relief will require (for those lucky enough to have counsel) that attorneys fully review the record and coordinate with the applicant within days or weeks of having come into contact with the client. In sum, the

63 See 85 Fed. Reg. 81,716 (nearly one in four LOP participants do not receive any services until after their first master calendar hearing).
IFR requires asylum applicants to meet every requirement within one month of their very first court hearing, which is unreasonable in the best of circumstances.64

For legal services providers such as NIJC who rely on the private bar to amplify their ability to provide services, these expedited case timelines and deadlines will undermine our ability to find pro bono attorneys willing and able to take on asylum representation cases. Even law firms and corporations with the most active asylum pro bono practices usually require at least a week simply to vet a case for consideration and run conflicts; additionally, pro bono attorneys are juggling their asylum caseload along with their caseload of paying clients. NIJC is already finding it increasingly difficult to find pro bono attorneys willing to provide asylum representation because of the varied and chaotic nature of immigration court proceedings; under these expedited timeframes our pro bono practice would be compromised, particularly if much of this work occurs while individuals remain detained at the Southern border.

NIJC would welcome predictable and reasonably faster timelines for the adjudication of asylum cases. In our experience, pro bono attorneys are more inclined to take cases that they know will be resolved at a date certain in the foreseeable future. The current system, which is rife with hearing cancellations and resets multiple years into the future does not do asylum seekers, their counsel, or organizations like NIJC any favors. But the IFR is not a viable solution to this problem. Instead, it takes a system with timelines that are far too slow and replaces it with one that is entirely too fast.

The Departments cannot sacrifice the fairness of these proceedings in the name of expediency and efficiency, and that is precisely what the IFR does. Immigration cases before EOIR took an average of 184 days to adjudicate in 1998, which steadily increased to an average of 533 days by 2019, according to Syracuse University’s nonprofit data research center “TRAC.”65 Newly arrived asylum seekers are not responsible for that delay, and it is unreasonable and contrary to the United States’ international treaty obligations to place the onus of fixing this problem on their backs. When Congress adopted the one-year filing deadline for asylum cases, it did so after debating and rejecting a much shorter, 30-day deadline.66 It rejected shorter timelines reasoning that “the persons most deserving of asylum status — those under threat of retaliation, those suffering physical or mental disability, especially when abuse resulting from torture — would most be hurt by the imposition of any filing deadline, and particularly so, if the deadline was thirty days.”67 The timelines imposed by the IFR run contrary to both the spirit and the letter of the INA as presented by the one-year filing deadline for asylum cases.

4. These new deadlines and requirements create imbalanced proceedings that improperly penalize asylum seekers.

64 Proceeding pro se does not exempt asylum seekers from most requirements of this new status conference, as only the last three elements are excluded. § 1240.17(6)(2)(i)(A)(2).
65 See Immigration Court Processing Time by Outcome, TRAC Immigration, available at https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (select “Average Days” under “What to Tabulate”; “All” under “Outcome Type”; and “Entire US” under “Fiscal Year 2021”).
67 Id.
To further complicate the fairness concerns, the Departments are significantly more lenient when it comes to DHS’s burden for status conferences than for applicants. They do require that DHS present their position on asylum seekers’ claim so as to narrow the issue, but permit DHS to revise its position before or at the merits hearing — a grace they do not afford respondents. They also permit DHS to decline to participate in the proceedings altogether. While NIJC welcomes the requirement that DHS engage with cases earlier on in the process, and is particularly encouraged by the possibility of DHS stipulating to relief at the status hearing, the IFR does not do enough to require or incentivize meaningful participation in this process. At present, it is NIJC’s experience that, because the burden is on the respondent to demonstrate eligibility for relief, DHS is generally disinclined to agree to anything prior to seeing an applicant’s evidence. NIJC is concerned that, in the context of expedited timeframes and without any incentive to do something different, most DHS attorneys will continue to assert a blanket opposition, particularly when they are likely to face an institutional interest in simply deferring to the adverse decision of the asylum officer who completed the Merits Interview.

At every step, poor preparation and misunderstanding of the IFR’s requirements will unlock a chain of consequences that penalize respondents. For example, a botched status conference can have serious consequences for asylum seekers, from truncating their claims for relief to obtaining an adverse decision without a merits hearing — a disturbing outcome that could afflict many pro se respondents who fail to understand procedural requirements during the status conference. Improper or rushed pleadings and proffers can also result in admissions that raise credibility concerns that compromise the merits decision. These proceedings are rushed until the finish line, as the IFR requires IJs to issue oral decisions wherever possible, overlooking once more the inherent complexity of asylum, withholding, and CAT precedent.

5. The IFR’s safeguards are insufficient to protect respondents’ due process rights.

The IFR does incorporate a few safeguards, but these will do little to mitigate due process concerns:

- The Departments require service of the USCIS record of proceeding, the AO’s written decision, and the I-213 to the respondent by the master calendar date. We welcome this requirement, as seeking these records is frequently burdensome and time-consuming. However, the rushed nature of immigration court proceedings under this IFR will leave little time for respondents to benefit from this new discovery requirement, as they

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68 8 C.F.R. § 1240.17(f)(2)(C).
69 Respondents can merely supplement what they proffered in the status conference, as well as respond to DHS’ statement up to 5 days before the merits hearing but no later than 25 days after the status conference — a confounding timeline since merits hearings are to occur 60 days after the status conference. See 8 C.F.R. §§ 1240.17(f)(3)(ii); 1240.17(f)(2).
70 See 8 C.F.R. § 1240.17(f)(4)(i-ii) (permitting decision without merits hearing within 30 days of the status conference if DHS waives cross and neither respondent nor DHS want to present witnesses). NIJC welcomes the Departments’ idea of permitting IJs to grant without needing a merits hearing, but we are troubled by the possibility that rushed IJs could dispense with merits hearings after ill-prepared respondents fail to meet the many demands of the status conference, such as presenting a witness list.
71 8 C.F.R. § 1240.17(i).
72 8 C.F.R. § 1240.17(e)
scramble to prepare for the extraordinarily substantive (and fast coming) status conference.

- The IFR broadens proceedings to permit review of non-fear-based claims. However, the Departments place the burden on respondents to request review of non-fear-based claims and then to proactively present a prima facie case in order to be exempted from the IFR’s rushed timelines. Here as with other aspects of these expedited proceedings, the Departments overlook IJs’ duty to develop the factual record to safeguard pro se respondents’ right to fundamentally fair hearings. Without an IJ’s intervention, respondents may miss their opportunity to raise other forms of relief.

- The Departments abandon their flawed “mixed cases” proposal, but leave a significant loophole for DHS to invalidate USCIS eligibility determinations. Under 8 CFR § 1240.17(i)(2), IJs can give effect to the AO’s eligibility determination for withholding or CAT if that determination is favorable, unless DHS presents new evidence that the respondent is in fact ineligible. Concerningly, DHS could disturb its own sub-agency’s finding by offering even one new country-conditions article that runs counter to the evidence previously in the record. Such a scenario echoes the harmful mixed cases proposal in the NPRM.

- The Departments permit requesting continuances before the IJ, but permit those in two narrow circumstances. Most continuances are limited to a meager 10-day extension (unless the IJ determines that a longer period is “more efficient”). Exigent circumstances can warrant continuances or filing extensions, but they are limited to cases where the IJ has made a specific finding of exigent circumstances and the extension provided is the “shortest period feasible.” Like with the AO interview, the Departments reduce exigent circumstances to illness and governmental office closures and deliberately exclude respondents’ need for adjournments to obtain evidence or prepare for their case to avert return to danger. Alternatively under § 1240.17(h)(iii), the Departments afford respondents negligible relief from the 10-day extension but require finding that longer adjournments are necessary under a statute or the Constitution. These changes impose a significant increase in the burden on applicants seeking continuances from the good cause required under regular 240 proceedings and is inconsistent with the “good cause” standard that exists elsewhere in regulations and that is generally endorsed by courts.

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73 See Arevelo Quinteno v. Garland, 998 F.3d 612, 622 (4th Cir. 2021) (joining “unanimous view among [circuit courts]” that IJs have duty to develop the factual record under the Fifth Amendment).
74 8 C.F.R. § 1240.17(h).
75 This is particularly troubling given the echoes between these narrow exigent circumstances and the Departments’ previously enjoined rule, that also adopted an exceedingly narrow definition of exceptional circumstances. See supra section II.C.1.
76 Respondents seeking to salvage their claims after failing to meet the strenuous timelines here have a limited window for post-merits supplemental evidence, so long as they submit this evidence before judges’ decision and prove that they could not have been reasonably obtained this evidence prior or if exclusion would violate the law or the Constitution. § 1240.17(g). Again, the threshold here is unreasonably high and will preclude most asylum seekers from benefiting from this safeguard.
Currently, IJs can grant continuances and adjournments “for good cause shown,” with no restriction based on the adjudicatory goal of deciding cases within 180 days.\footnote{\textit{See} 8 C.F.R. §§ 1003.29, 1240.6.} The Departments’ narrow proposal for continuances will effectively keep respondents on a fast track to their removal, regardless of their pleas for more time to prepare their claim.

Importantly, the Departments recognize that these expedited timelines are untenable for many by including in the IFR a plan to exempt certain individuals.\footnote{\textit{See} 8 C.F.R. § 1240.17(k) (exempting from expedited timelines under § 1240.17(f-h) particular individuals: served their NTA while children, with indicia of incompetency, with prima facie cases for other forms of eligibility, whom IJs find removable to third countries before they express fear of removal to that country, who are not removable as charged, with rescinded removal orders).} NIJC welcomes exempting those individuals but urges the Departments not to implement these rushed deadlines for any asylum seeker; even the most resourceful, English-speaking, and represented asylum seekers would struggle to meet the intricate requirements and pace of this IFR.

\section*{III. The IFR creates new, harmful barriers for individuals to gain employment authorization while their asylum application is pending.}

The IFR provides that the positive credible fear determination will be considered a complete asylum application for the purpose of requests for employment authorization.\footnote{\textit{See} 87 Fed. Reg. at 18085.} As stated in NIJC’s previous comment,\footnote{\textit{See} NIJC comment to NPRM, \textit{supra} n.8, at 30.} NIJC supports removing the burden from the applicant of having to file a formal I-589 after completing the credible fear process. We also agree with the Departments’ interests in promoting expeditious access to work authorization. The ability to work lawfully is essential for basic survival and wellbeing during an often-challenging time of integration into a new community. The Departments seem to agree with this principle. They list “expeditiously beginning the waiting period for employment authorization” as one of the motivating purposes of the IFR.\footnote{\textit{See} NPRM, 86 Fed. Reg. at 46931-32 (analyzing benefits to labor market, companies, and taxation).} The IFR also references the positive effects of individuals receiving employment authorization earlier as a result of “efficiencies” introduced by the IFR.\footnote{82 87 Fed. Reg. at 18115; 18197 (table summarizing expected impacts of IFR, including the benefit of $225.44 to individuals per workday, which would bring numerous positive contributions to the economy).}

But the rushed timeline introduced in this IFR effectively moots this proposal, suggesting that the Departments either did not consider important aspects of this issue or that they did not in fact intend to improve access to work authorization as the IFR suggests.

The timeline for most asylum cases subject to the IFR is as follows:
As this diagram demonstrates, cases that are completed on the timeline contemplated by the IFR will mostly be finished within 160 days (this will be the case when no continuances are granted, and that there is no delay between the AO decision and service of the NTA). For those who are granted asylum during that time, they will no longer need access to work authorization because asylees do not require work authorization. For those who are denied by the IJ — a number that is likely to grow under the IFR’s crushing timeline — that denial will stop their EAD “clocks,” making them ineligible for work authorization for the duration of the appeal process which is likely to take a year or more. In addition, the timelines set forth in the IFR are likely to result in numerous “applicant caused delays” in proceedings. These “delays” will be necessary to gather evidence and ensure a fair hearing, but they are also likely to stop the “clock” that governs eligibility for work authorization.

In other words, the Departments’ stated commitment to ensuring that asylum seekers can gain a livelihood is not borne out by the IFR because the expedited timeframes mean that nearly all asylum seekers who must seek immigration court review will be precluded from ever obtaining work authorization during their proceedings.

As submitted in our earlier comment, the Departments should remedy this problem by enabling asylum seekers who are released on parole to seek EADs under (c)(11). Paroling asylum seekers

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84 See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588 at 81,619 (Dec. 16, 2020) (acknowledging a “323-day median case appeal time period” as of December 2020).

85 8 C.F.R. § 208.7(a)(2) (discussing applicant-caused delays).

86 See NIJC Comment, supra n.8, at 34.
without affording them access to EADs will all but ensure they are impoverished throughout the asylum process, inevitably interfering with their capacity to see their claims through. The Departments should also engage in separate rulemaking that eliminates “applicant-caused delays” as barriers to work authorization and that enables applicants to seek work authorization in the first instance even during the appeal process.

In addition to depriving asylum seekers of the ability to provide for themselves and their families, precluding EAD eligibility during asylum processing has myriad other harmful consequences. Most asylum seekers cannot obtain any form of identification, such as a driver’s license, without first receiving their EAD. Delaying the ability of asylum seekers to obtain an EAD, therefore, undermines access to numerous building blocks of stability, such as: accessing social benefits, opening a bank account, registering a child for school, driving children to school, or ensuring heating and electricity at home.

Conclusion

NIJC has three decades of experience providing legal services to asylum seekers. Based on this cumulative experience, we are deeply concerned about the new timelines and procedures this IFR pilots. Asylum seekers are in desperate need of a fair and reliable asylum process. Unfortunately, the process the Departments propose is rushed beyond justification and strips asylum seekers of the precious time they need to prepare their cases, retain counsel, and sustain themselves. NIJC calls on the Departments not to implement the IFR under the proposed timelines and consult with experts on the proper procedure to protect asylum seekers’ rights.

Thank you for providing this opportunity to comment: please do not hesitate to reach out to aerfani@heartlandalliance.org with any questions.

Respectfully,

National Immigrant Justice Center

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