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Ms. Maureen Dunn,
Chief, Division of Humanitarian Affairs, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
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Submitted electronically via <http://www.regulations.gov>

July 13, 2020

Re: RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020, entitled “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”

Dear Ms. Alder Reid,

On behalf of AJC, the global Jewish advocacy organization, and its Jacob Blaustein Institute for the Advancement of Human Rights, we write to express opposition to the Department of Justice’s Executive Office for Immigration Review (EOIR) and the Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS), proposed [regulations](#), “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” (85 Fed. Reg. 36264) which would change existing regulations governing the U.S. asylum system in numerous ways.

As outlined below, our assessment of the proposed regulations is that several of them contravene U.S. obligations under international law, specifically the UN Convention and Protocol relating to the Status of Refugees and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and will result in the return by U.S. authorities of many asylum-seekers with legitimate claims for protection to places where they have a well-founded fear of persecution or face a substantial risk of torture, in violation of the duty of *nonrefoulement*.

For the reasons detailed in the comments that follow, AJC urges DOJ and DHS to withdraw the proposed regulations in favor of actions that would ensure that the U.S. fully respects the right to seek asylum and the prohibition of *refoulement*, in line with international obligations that the U.S. voluntarily assumed and that AJC has long championed.

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AJC comments in opposition to RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020, entitled “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”

For more than 110 years, AJC has been a consistent voice for a fair, non-discriminatory, and generous U.S. refugee and immigration policy. We firmly believe that all those who come to the U.S. seeking refuge from the risk of persecution, violence, sexual assault, or even death in their home countries deserve compassion and a fair hearing. While recognizing that governments have a responsibility to ensure the integrity of their borders and protect national security, AJC advocated for the creation of international law in the area of refugee assistance and it has called on the U.S. and other governments to uphold their international human rights and refugee assistance obligations, including by respecting the right to seek asylum and the absolute prohibition of *refoulement* in their domestic law and practice.

The U.S., along with 148 other countries, ratified either the 1951 Refugee Convention or its 1967 Optional Protocol,¹ which set out that asylum-seekers have a right to seek international protection if they have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” in their home country, so long as they have not committed particularly serious crimes or acts.² Other international instruments, like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),³ and the International Covenant on Civil and Political Rights (ICCPR),⁴ which the U.S. has also ratified, enshrine this *non-refoulement* obligation for any person facing a substantial risk of torture or ill-treatment if returned to another country, without exception.

We oppose numerous aspects of the proposed regulations because, if enacted, it is very likely that they will result in the U.S. taking actions that will jeopardize the lives and well-being of innumerable asylum-seekers with legitimate claims for protection by wrongly denying them access to the U.S. asylum system and returning them to places where they will be at risk of persecution or other serious harm.

Moreover, we note with regret that the agencies have not acknowledged that their proposals will create a substantial risk that asylum-seekers with legitimate claims will be denied protection in the U.S. and will be forced to return to countries where they face a significant risk of persecution or other serious harm. Further, the agencies have not presented justifications claiming that the policy interests they are seeking to advance through the proposed regulations – primarily, to provide clarification for adjudicators and increase efficiency and consistency in the handling of asylum claims – outweigh the risk of harm to asylum-seekers that the proposed regulations will create; nor have they indicated that they considered any less harmful alternatives than the proposed measures that could have advanced the same policy interests.⁵

¹ As of March 2020, 149 countries had ratified the 1951 Convention and/or its protocol, including the United States, which ratified the protocol on November 1, 1968. *Convention relating to the Status of Refugees*, United Nations Treaty Collection (last updated Jul. 9, 2020), https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en; *Protocol relating to the Status of Refugees*, United Nations Treaty Collection (last updated Jul. 9, 2020), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=en.

² Convention relating to the Status of Refugees, art. 1, Jul. 28, 1951, 189 U.N.T.S. 150.

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, U.N.T.S. 85 (no exception to the principle of non-refoulement of persons facing a substantial risk of torture).

⁴ International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171; *see* Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), para. 9, U.N. Doc. HRI/ GEN/1/Rev.7 (Mar. 10, 1992) (“States parties must not expose individuals to the danger of torture...upon return to another country by way of their extradition, expulsion or refoulement”).

⁵ *See* Department of Homeland Security v. Regents of Univ. of Cal., 591 U.S. ____ at 26 (2020) (finding a DHS regulation “arbitrary and capricious” in violation of the Administrative Procedure Act (APA) because it failed to assess whether there were reliance interests in the policy it proposed to rescind, determine whether they were significant, and weigh any such interests against competing policy concerns. *See also East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487 & 19-16773, D.C. No. 4:19-

The following areas are those in which our concerns with the proposed regulations are most acute:

- 1. The proposed regulation would dramatically limit the categories of victims of violence and persecution that are eligible for asylum in the United States in ways that are inconsistent with America’s international obligations, and in a manner that will likely result in U.S. authorities sending innumerable asylum-seekers with legitimate claims for protection to places where they will face persecution or torture.**

We object to the numerous sections of the proposed regulation that would redefine terms set out in the Refugee Convention and Protocol, the CAT, and the ICCPR in ways that are incompatible with U.S. obligations under these instruments, as interpreted by the United Nations High Commissioner for Refugees (UNHCR) and the expert treaty bodies that monitor States parties’ compliance with the CAT and ICCPR. We note that U.S. courts have considered the interpretive guidance on States’ obligations under the Refugee Convention and Protocol produced by UNHCR to be an important source of authority for interpreting refugee law,⁶ and the pronouncements of the Committee against Torture as a source of “significant guidance” in interpreting U.S. human rights treaty obligations,⁷ and generally have affirmed that U.S. law should be interpreted in conformity with our international obligations when possible.⁸

The following proposals are of particularly serious concern:

- A. *Proposals to discourage the granting of asylum claims brought by individuals seeking protection from violence and persecution by criminal gangs*** by amending 8 CFR 208.1(c), (f) and 1208.1(c), (f) so as to narrow the grounds on which people can claim persecution because they belong to a “particular social group,” indicating that claims should generally be rejected from asylum-seekers claiming they resisted recruitment by gangs,⁹ and amending CFR 208.1(d) and 1208.1(d) to redefine “political opinion” as “one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof,”¹⁰ which would also generally preclude claims from people fleeing persecution from criminal gangs acting outside government control.¹¹ The proposal to Amend 8 CFR 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), and 1208.16(b)(3) to create a presumption that anyone fleeing private-actor violence can be safely relocated within their country of origin would also discourage the granting of asylum claims by such individuals.¹²

cv-04073- JST at *28, *36 (9th Cir. 2020) (Finding a Rule arbitrary and capricious in part because in promulgating it, the agencies “entirely failed to consider an important aspect of the problem,” specifically that aliens might fail apply for asylum while traveling through Mexico or Guatemala because they are dangerous places for asylum-seekers, not because the asylum-seekers do not have meritorious asylum claims.).

⁶ See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

⁷ See, e.g., *Khouzam v. Hogan*, 529 F.Supp.2d 543, 555 (M.D. Pa. 2008) (citing *I.N.S. v. Aguirre– Aguirre*, 526 U.S. 415, 427–28, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999)).

⁸ *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001).

⁹ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36281 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235).

¹⁰ *Id.* at 36280.

¹¹ *Id.* (“Moreover, in recognition of that definition, the Secretary or Attorney General, in general, will not favorably adjudicate claims of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior 30 in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”).

¹² *Id.* at 36282 (“Thus, the Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be. This presumption would apply regardless of whether an applicant has established past persecution.”).

These proposed changes contradict UNHCR’s longstanding guidance that individuals merit international protection from persecution not only by state actors that affirmatively intend to harm them, but also by non-state actors from whom government authorities are *unwilling or unable to protect them*.¹³ The UN Committee against Torture, which monitors States’ compliance with their obligations under the Convention against Torture, and the Human Rights Committee, which monitors States’ compliance with the ICCPR, have similarly found that the duty of *non-refoulement* prohibits governments from expelling individuals to places where they face a substantial risk of severe harm at the hands of non-State actors to which State actors have consented or acquiesced, whether by action or omission.¹⁴

On the subject of criminal gangs, UNHCR has said that “individuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender and social status,” and thus may fit the definition of a “particular social group.”¹⁵ UNHCR has also said that asylum claims related to gang activity can be seen as persecution based on political opinion “where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition,” or where an applicant “fears harm because of his/her opposition to a government’s policy or to the authorities’ investigation of gang related crime.”¹⁶

- B. *Proposals to discourage the granting of asylum claims brought by individuals seeking protection from gender-based violence***, by amending 8 CFR 208.1(c), (f) and 1208.1(c), (f) to narrow the definition of “particular social group,” to exclude those seeking protection from “private criminal acts for which the governmental authorities were unaware or uninvolved,”¹⁷ which would deny protection to victims of domestic violence,¹⁸ and to exclude persons who transgressed “cultural stereotypes related to race, religion, nationality, and gender”¹⁹

This proposal also directly contradicts guidance by UNHCR, which indicates that women at risk of violence can constitute a “particular social group” specifically at risk because of their gender, for example in cases where they “face harsh or inhuman treatment due to their having transgressed the

¹³ See UNHCR, *Agents of Persecution - UNHCR Position*, para. 4 (14 March 1995).

¹⁴ See e.g. Committee against Torture, General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, UN Doc. CAT/C/GC/4, para 30 (2018) (“States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter,” citing *S.S. Elmi v. Australia* (CAT/C/22/D/120/1998), paras. 6.8 and 6.9; and *M.K.M. v. Australia* (CAT/C/60/D/681/2015), para. 8.9; Human Rights Committee, *Jose Henry Monge Contreras v. Canada*, Communication No. 2613/2015, Views of 12 May 2017, UN Doc. CCPR/C/119/D/2613/2015, paras. 8.2, 8.7-8.11

¹⁵ UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (Mar. 31, 2010).

¹⁶ *Id.*

¹⁷ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36279 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235).

¹⁸ See *Matter of A–B–*, 27 I&N Dec. 316, 327 (A.G. 2018) (Vacating a decision granting asylum to a victim of domestic violence because “An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government’s difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.”)

¹⁹ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36282 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235).

social mores of the society in which they live,” and have suffered harms such as rape or other forms of sexual violence, or severe or cumulative discrimination.²⁰

- C. **Proposals to narrow the definition of “persecution”** under 8 CFR 208.1 and 1208.1 from “a threat to the life or freedom of, or the infliction of suffering or harm”²¹ against an individual to “an extreme concept of a severe level of harm.”²²

This contradicts UNHCR’s guidance that “persecution embraces all serious violations of human rights,”²³ and that “whether other *prejudicial actions or threats* [aside from threats to life and freedom] would amount to persecution will depend on the circumstances of each case.”²⁴

- D. **Proposals to narrow the definition of “torture” to exclude pain and suffering inflicted by public officials acting against official state policy (creating a “rogue official” loophole)** by amending 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7).²⁵

This proposal is inconsistent with the jurisprudence of the UN Committee against Torture, which has clarified that the infliction of severe pain and suffering by any actor, whether or not that person is a public official, amounts to torture where State officials consent or acquiesce to its infliction, including by omission.²⁶ The proposed loophole would wrongly deny protection to people subjected to harm by so-called “rogue officials” without requiring an assessment of whether, for example, higher-level officials either knew of the torture or remained willfully blind to it and therefore breached their legal responsibility to prevent it. As the proposed regulation notes,²⁷ this change is also inconsistent with several recent decisions of U.S. federal courts that have rejected the concept of the “rogue official” exception.²⁸

²⁰ UNHCR, *UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender*, 3-4 (Nov. 2016).

²¹ *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

²² *Id.* (This level of harm would not include “every instance of harm that arises generally out of civil, criminal, or military strife in a country,” nor “any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional.”).

²³ See UNHCR, *Agents of Persecution - UNHCR Position*, para. 3 (14 March 1995).

²⁴ See UNHCR at 55.

²⁵ *Id.* at 36287 (“The Departments propose revising 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) to clarify (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under “color of law”) and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law (i.e., a “rogue official”) does not constitute a “pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” even if such actions cause pain and suffering that could rise to the severity of torture.”)

²⁶ UN Committee against Torture, General Comment No. 2, 18 (“Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission.”)

See also *Matter of O-F-A-S-*, Respondent, I&N Dec. 709, 718 (BIA 2019), (“Even if a public official has engaged in torture in a private capacity, and therefore not under color of law, an alien may nevertheless qualify for protection under the Convention Against Torture if he demonstrates that a public official or other person acting in an official capacity consented to or acquiesced in the torture. ... An applicant may establish acquiescence by citing to evidence, particularly country conditions evidence, showing that the torturous conduct is “routine” and sufficiently connected to the criminal justice system for an adjudicator to reasonably infer that higher-level officials either know of the torture or remain willfully blind to it and therefore breach their legal responsibility to prevent it.” (citing *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004)).

²⁷ *Id.* at 36286 (“When faced with questions of such “rogue” officials, the federal courts have generally implied from the lack of further explanation regarding the definition of “public official” that no exception excluding “rogue” officials from the definition exists.”).

²⁸ See *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017).

2. The proposed regulations will make it more likely that U.S. authorities will return asylum-seekers who transited through other countries on their way to the U.S. to places where they face persecution or torture, in violation of the prohibition of *refoulement*.

We object to the *proposal to require U.S. officials to consider the fact that an asylum seeker transited through a third country en route to the U.S. as a significant adverse factor in the decision of whether to grant him/her asylum*, without assessing whether he/she would have faced a risk of persecution or torture in that third country²⁹ (proposed amendments to 8 CFR 208.13(d) and 1208.13(d)).

We also object to *the proposal to expand the concept of “firm resettlement”* by making individuals ineligible to obtain asylum if they transited through any third country en route to the U.S. where they *could have* resided legally, regardless of whether they applied for or were offered status in that country, again without an assessment of whether they would have faced a risk of persecution or torture there (proposed amendments to 8 CFR 208.15(a), and 1208.15(a)).³⁰

In contrast, the UNHCR recommends that in any case in which a government seeks to expel an asylum-seeker, whether to their country of origin or a third country, it should perform an individual assessment as to whether the third country will grant the asylum seeker access to a fair and efficient refugee status determination procedure; permit them to remain in the third country while the decision is made; treat them in accordance with the standards of the 1951 Convention, including, among others, the right to maintain an adequate standard of living, freedom of movement, and the prohibition of *refoulement*; and ultimately, grant them refugee status if their claim is successful.³¹

We note that this proposed change also contravenes existing U.S. law, which only permits the return of an asylum-seeker to a third country through which he or she has transited in cases where the U.S. has entered into a formalized agreement with that third country, where returning the asylum-seeker would not violate the prohibition of *refoulement*, and where the asylum-seeker would have access to a full and fair determination procedure for asylum claims or for equivalent temporary protection.³² We note that the 9th Circuit Court of Appeals recently found a substantially similar regulation³³ unlawful under the Administrative Procedures Act because it is not in accordance with law and is arbitrary and capricious. In

²⁹ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36288 (proposed Jun. 15, 2020).

³⁰ *Id.* at 36286 (“Specifically, the Departments propose to specify three circumstances under which an alien would be considered firmly resettled: (1) The alien either resided or could have resided in any permanent legal immigration status or any nonpermanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status.”)

³¹ Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, UNCHR, ¶ 4 (2018).

³² 8 U.S.C. §1158(a)(2)(A) (“(1) In general Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title. (2) Exceptions (A) Safe third country Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.”)

³³ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (proposed Jul. 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, and 1208) (This regulation bars aliens who enter/attempt to enter the US across the southern land border after failing to apply for protection from persecution or torture while in a third country through which they transited en route to the United States from asylum).

reaching its determination, the Court noted that Mexico does not provide adequate arrangements for asylum-seekers that could justify banning them from seeking asylum in the United States, and also that the agencies justified the regulation on the grounds that if asylum-seekers' claims were meritorious, they would not wait to make them until they reached the U.S., without considering that they might instead fail to apply for asylum while traveling through Mexico or Guatemala because these are dangerous places for asylum-seekers.³⁴

We note the rationale presented by the agencies for proposing these measures: that asylum is a discretionary form of relief, and that not all asylum seekers who meet the definition of refugee are entitled to a grant of asylum. However, the agencies should not exercise this discretion in a manner that would eliminate an individualized determination of asylum-seekers' motivations for declining to seek asylum in another country prior to reaching the U.S. or of the risks they would face if forced to return to such country.

3. The proposed regulations penalize illegal entry into the United States for asylum-seekers, in violation of international refugee law.

We object to the *proposal to instruct immigration judges to consider a person's unlawful entry into the U.S., and/or use of fraudulent documents to enter the U.S. as significant adverse factors* when deciding whether to grant asylum (proposed amendments to 8 CFR 208.13(d) and 1208.13(d)).³⁵

In contrast, the Refugee Convention and other international instruments clearly set out that states should not impose penalties on asylum-seekers for entering or being in their territory illegally as long as they promptly present themselves to the authorities.³⁶ We note that these standards reflects the reality that asylum-seekers fleeing for their lives often have a limited ability to obtain appropriate documentation and follow proper procedures.

Although we recognize the agencies' stated rationales for this proposal – to lower costs related to enforcing immigration laws and to lessen the burden of the growing number of asylum claims on the U.S. system – we are concerned that the proposed regulations do not acknowledge that asylum seekers may face significant challenges attempting to leave their country of origin, including an inability to obtain necessary documentation to do so, and that they may have no option but to enter the U.S. illegally in order to escape persecution. The proposed regulation appears to be an unnecessarily punitive approach to achieving these policy concerns.

4. The proposed regulations are likely to result in many asylum-seekers' claims for protection being dismissed summarily and without appropriate review.

The new proposed regulation would make a number of changes to current asylum procedures that would be seriously detrimental to many asylum-seekers, and for which a compelling need has not been established, including the following:

³⁴ *East Bay Sanctuary Covenant v. Barr*, Nos. 19-16487 & 19-16773, D.C. No. 4:19-cv-04073- JST at *28, *36 (9th Cir. 2020) (The Court held found that the rule was arbitrary and capricious because “First, evidence in the record contradicts the agencies’ conclusion that aliens barred by the Rule have safe options in Mexico. Second, the agencies have not justified the Rule’s assumption that an alien who has failed to apply for asylum in a third country is, for that reason, not likely to have a meritorious asylum claim. Finally, the agencies failed to adequately consider the effect of the Rule on unaccompanied minors.”).

³⁵ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36283 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235).

³⁶ Convention relating to the Status of Refugees, art. 31(1), Jul. 28, 1951, 189 U.N.T.S. 150 (States “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”).

- A. ***Proposals to require asylum-seekers who fail their initial “credible fear” assessment to affirmatively ask for it to be reviewed by an immigration judge*** (amendments to 8 CFR 208.30(g) and 1208.30(g)(2)).³⁷

In our view, it is entirely unreasonable to expect asylum-seekers to know that they have the right to ask for judicial review of a negative determination. Moreover, the stated rationale for the proposed change – to improve efficiency and reduce the burden on immigration courts –overlooks the various factors that could lead an asylum-seeker with a meritorious claim to fail to ask for a negative decision in his or her case to be reviewed, including language barriers, fear and confusion, and a lack of understanding of U.S. law and procedures.

- B. ***Proposals to allow asylum officers, not solely immigration judges and the Board of Immigration Appeals, the ability to find an asylum-seeker’s claim to be “frivolous”*** for reasons including not meeting the new legal definitions set out above; this determination by an asylum officer would render an individual who has lawful status permanently ineligible for asylum (amendments to 8 C.F.R. 208.2 and 1208.20).³⁸

In our view, it is not appropriate to provide asylum officers employed by US Customs and Border Protection the ability to impose such a harsh penalty on asylum-seekers. Moreover, the stated rationale for the change – to limit the waste of resources on truly frivolous claims and increase efficiency – does not justify the significant risk that asylum-seekers with meritorious claims will be permanently barred from protection in the U.S. as a result of misapplication of the “frivolous” designation by asylum officers.

- C. ***Proposals to raise the degree of risk of future harm that asylum-seekers must demonstrate they face*** from a “significant possibility” to a “reasonable possibility” in order to qualify for statutory withholding of removal or for protection under the CAT regulations during credible fear screenings (amendments to 8 CFR 208.30, 1003.42, and 1208.30).³⁹

In our view, it is unnecessary to increase the burden on asylum-seekers to demonstrate a risk of future harm at the initial stage of proceedings, and indeed would introduce greater uncertainty for asylum officers, as they must determine if the asylum seeker meets the heightened burden of proof for withholding of removal, alongside the burden of proof for asylum. Additionally, the proposed regulation does not take into account the likely increase in rejection of asylum-seekers with meritorious claims that will result from this change.

- D. ***Proposals to create a presumption that anyone fleeing private-actor violence can be safely relocated within their country of origin*** (amendments to 8 CFR 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), and 1208.16(b)(3)).⁴⁰

³⁷ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36273 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235).

³⁸ *Id.* at 36274-36275 (“The Departments propose to amend these regulations to allow asylum officers adjudicating affirmative asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status). For an alien not in lawful status, a finding by an asylum officer that an asylum application is frivolous would not render an alien permanently ineligible for immigration benefits unless an immigration judge or the BIA subsequently makes a finding of frivolousness upon de novo review of the application as stated in the current and proposed 8 CFR 208.20 and 8 CFR 1208.20.”)

³⁹ *Id.* at 36269.

⁴⁰ *Id.* at 36282 (“Thus, the Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be. This presumption would apply regardless of whether an applicant has established past persecution.”).

In our view, the proposing agencies have not sufficiently addressed the significant challenges that asylum-seekers will encounter in affirmatively proving that they would face a risk of private-actor violence anywhere in their country of origin. They also have not properly considered the potential reach of certain private actors, for example criminal gangs, throughout certain countries.

E. Proposals to permit immigration judges to deny asylum applications without providing an individual hearing if the applicant does not include sufficient evidence in their application (amendment to 8 C.F.R. 1208.13).⁴¹

We note that this change appears to be inconsistent with the principle articulated by the UNHCR that “fair and efficient” procedures are an essential element in the full and inclusive application of the Refugee Convention. UNHCR has also indicated that “standards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures” and has recommended that states “create the possibility for the appeal or review authority to gain a personal impression of the applicant,” among other measures.

Similarly, past BIA decisions have held that asylum applicants are entitled to a hearing on the merits of their application without having to establish their prima facie eligibility, on the grounds that an oral examination is an essential aspect of ensuring “fairness.”⁴²

Conclusion

AJC is deeply concerned that the proposed regulations would effectively deny many people fleeing for their lives and livelihoods their right to seek asylum and would put them at risk of being returned or expelled to countries where they face a substantial risk of persecution, torture, or other serious harm. We urge DOJ and DHS to withdraw the proposed rule and consider alternative ways to advance such policy aims as increasing efficiency and consistency in the asylum system that also uphold the human right to seek asylum and respect the prohibition of *refoulement*, in line with international legal obligations that the U.S. has freely assumed, and that AJC has long championed as reflecting our core values.

⁴¹ *Id.* at 36277.

⁴² *Matter of E-F-H-L-*, 26 I&N Dec. 319, 322 (BIA 2014) (citing *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989)); *but see* 27 I&N Dec. 226 (A.G. 2018) (Attorney General Session’s decision vacating *Matter of E-F-H-L*).