THE NJ CONSORTIUM FOR IMMIGRANT CHILDREN

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RE: RIN 1125–AA93; EOIR Docket No. 19–0010; A.G. Order No. 4843–2020, Public Comment Opposing Proposed Rules on Procedures for Asylum and Withholding of Removal

Our organization, the New Jersey Consortium for Immigrant Children, urges the Department of Justice (DOJ) to withdraw these proposed rules in their entirety. The rules would create an almost insurmountable hurdle for asylum seekers, particularly children and other vulnerable groups, and would further erode procedural protections in the asylum system.

We strongly object to all four major changes that EOIR has proposed with the NPRM. First, the proposed 15-day filing deadline for I-589s will make it virtually impossible for asylum seekers to develop their claims before filing. Second, the rule requiring immigration judges to adjudicate most applications within 180 days will prevent bona fide asylum seekers from gathering the evidence and presenting the testimony necessary to support their claims. Third, the rule turning typographic errors in I-589s into grounds for stripping the right to seek asylum would unreasonably bar a huge number of bona fide asylum seekers from seeking humanitarian protections granted them by Congress. And fourth, the proposed rule would erode the separation of adjudicative and prosecutorial functions in the immigration system and fundamentally alter the role of the immigration judge, raising serious due process concerns. We further object to the mere 30-day time period to respond to these changes.

Notably, the first two changes are particularly prejudicial to child asylum seekers and other vulnerable groups that should receive the *most* protections the asylum process. Attorneys working with child asylum seekers often need more time to build trust and develop their claims. The new rule would dramatically curtail their ability to do so, meaning that the burden of the new rule will fall most squarely on a group that Congress has repeatedly said deserves special protection.[1]

The NJ Consortium for Immigrant Children is a coalition of attorneys, young immigrants, and their families dedicated to closing the status gap for New Jersey's 110,000 undocumented immigrant youth. The Consortium's membership includes more than 50 attorneys from nearly 20 legal services providers across the state. Our legal services provider members are attorneys for immigrant children and youth at some of the preeminent nonprofit organizations, law firms, and universities in New Jersey. They collectively provide direct representation to hundreds of

[1] *See, e.g.*, Trafficking Victims Protection Reauthorization Act, Pub. L. 115-427, Jan. 9, 2019, 132 Stat. 5503.

immigrant children every year, and file many asylum applications on behalf of children and families.

Because these regulations would make multiple changes to established practices, we are not able to comment on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; it simply means we did not have the resources or the time, as explained below, to respond to every proposed change.

We Object to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

As we detail below, the proposed rules would curtail the ability of asylum seekers and their counsel to prepare adequate applications with evidentiary support. These rules would also impose severe penalties for typographical and technical errors in asylum applications. Finally, the rules would allow immigration judges to step out of the role of neutral adjudicator by permitting them to submit their own evidence while creating additional hurdles to asylum seekers presenting their own evidence. Taken together, these changes would radically alter the procedural safeguards for asylum seekers and will make it practically impossible for many applicants – particularly the most vulnerable – to present adequate applications.

Given the scope of the changes EOIR has bundled as a single rule, it is inappropriate that DOJ has allowed only 30 days for public comment as opposed to the customary 60-day period. The notice and comment process is designed to allow affected parties to provide meaningful, well-researched feedback on proposed rules. DOJ has given no reason for allowing only 30 days for comment in this case. Unfortunately, this decision is part of a pattern by the agency in recent months: it has repeatedly bundled sweeping changes to our immigration regulations, and then staggered the NPRMs to make a thoughtful response almost impossible.[2]

This pattern presents particular challenges in the midst of a nationwide pandemic that has forced government workers and immigration advocates, including many members of our coalition, to work from home while also providing childcare. Our staff and the vast majority of our member attorneys are currently working from home, most in households that were not set up to serve as offices for one or more full-time working adults. A significant number of our member attorneys are also responsible for supervising their children's remote schooling or providing other childcare during their workday. These added burdens and responsibilities have stretched our staff and members thin, making the 30-day comment period particularly inopportune.

[2] *See* "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" 85 Fed. Reg. 36264 (June 15, 2020) (proposing vast changes to asylum eligibility); "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491 (Aug. 26, 2020) (proposing to radically curtail and change the procedures for the right to appeal to EOIR). Notably, the deadline to comment on the August 26 rule was just four days before the current NPRM was issued.

Though we are submitting a comment despite these challenges, we strongly object to both the 30-day deadline for this NPRM and the timing of its release. We would have provided a far more robust comment had DOJ given us more time to assess the impact of the rule and register our concerns. For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should wait until it has finalized (or withdrawn) overlapping proposed rules that are still pending, and then grant the public at least 60 days to have adequate time to provide comprehensive comments.

We Strongly Object to the Entire Proposed Rule and Urge the Administration to Rescind It

8 CFR § 1208.4 Would Create an Impossible Filing Deadline for Individuals in Asylum only or Withholding-only Proceedings, With Particular Prejudice to the Most Vulnerable

Taken together with the proposed asylum rule from June 15, 2020,[3] *see* 85 Fed. Reg. 36264, proposed 8 CFR § 1208.4(d) would require thousands of asylum seekers to file their asylum applications within 15 days of their first master calendar hearing. This deadline will make it impossible for most asylum seekers – particularly the most vulnerable – to submit an adequate pro se asylum application, let alone to retain counsel and gather strong supporting evidence.

If both the June 15 rule and the instant rule are published as issued, thousands of asylum seekers will have to find counsel (if possible) and submit their asylum application within fifteen days of their first master calendar hearing. The burden this will place on asylum seekers and their already overstretched counsel is severe.

First, the NPRM fails to discuss the effect of this rule change on asylum seekers' ability to find immigration counsel. The majority of asylum seekers already proceed pro se, but asylum seekers are three times more likely to win their cases if they are represented by counsel.[4] Finding counsel has become still more critical as regulatory changes by DOJ alter the asylum rules on a weekly basis. Giving an asylum seeker 15 days from their first master calendar hearing to find counsel – and have counsel prepare their application – virtually ensures that the majority of asylum seekers will be forced to proceed pro se, whatever the merits of their claim.

Second, even in cases where asylum seekers are able to secure counsel, counsel will find it impossible to prepare an I-589 within the proposed time period. The adjudication process subjects an asylum seeker's I-589 to a rigorous assessment for credibility. In many adjudication processes, both government counsel and the Immigration Judge ask detailed questions about an asylum seeker's account, and any discrepancy with the content of the I-589 may lead to a denial.

[3] Because, as noted above, DOJ has chosen to release a series of interrelated rules making vast changes to the asylum system within a four-month period, it is impossible to know whether the June 15 rule will be published in the same form in which it was proposed. However, if the June 15 rule is published in its original form, it will place a vast number of asylum cases into asylum-only proceedings, meaning tens of thousands of asylum seekers will be subject to this new filing deadline. *See* Proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i).

[4] Hamutal Bernstein & Andrew I. Schoenholtz, *Improving Immigration Adjudications through Competent Counsel*, 21 Georgetown Journal of Legal Ethics 55, 55 (2008).

Because the content of many asylum claims is personal and emotionally distressing, counsel must typically work with the asylum seeker over a period of weeks or months to fully develop the content of the claim and prepare an accurate I-589. In our members' experience, and as USCIS explicitly acknowledges in its training materials for asylum officers,[5] this is particularly true for child clients, given the unique vulnerabilities of children and the way they react to emotional trauma. The 15-day period will make it virtually impossible for our members and their clients to file an I-589 that will withstand the adjudication process, regardless of the strength of the child's claim.

Third, the NPRM will make it extremely difficult for asylum seekers who proceed pro se to file an adequate application. In addition to the problems that attorneys will be forced to grapple with under this rule, asylum seekers – particularly the most vulnerable and those lacking capacity – face additional hurdles that make the 15-day deadline even less realistic. The I-589 itself is ten pages long, consists of hundreds of questions, must be submitted in English, and is accompanied by fourteen pages of instructions. Expecting asylum seekers to appropriately complete the form in 15 days is not realistic. The effect of this rule on pro se asylum seekers will be further compounded by the proposed rule at 8 CFR § 1208.3(c)(3) (discussed below).

The "good cause" exception that the NPRM proposes to this deadline is inadequate. Immigration judges will apply this exception in radically different ways, vitiating the uniformity of the adjudication process. Furthermore, even where an immigration judge initially finds good cause for an extension, if the asylum seeker misses the newly set deadline, the proposed rule does not authorize the immigration judge to further extend the filing deadline. Instead, the immigration judge "shall" deem the ability to file waived and "the case shall be returned to the Department of Homeland Security for execution of an order of removal."

8 CFR § 1208.3(c)(3) Would Require Immigration Judges to Reject Asylum Applications Based on Trivial Errors, Setting the Stage for Mass Immigration Denials on Technical Grounds in Combination with 8 CFR § 1208.4

The proposed rule at 8 CFR § 1208.3(c)(3) would bar bona fide asylum seekers from protection if they accidentally leave a box blank on the asylum application form or cannot afford the filing fee.

Because scrivener's errors on asylum forms are likely where an applicant proceeds pro se, this rule will effectively undermine Congress's intent in passing the Refugee Act of 1980. The proposed rule asks Immigration Judges and EOIR staff to pore through an asylum applicant's I 589 looking for blank boxes – including boxes with no relevance to the case, such as the name of a child when the applicant has no children. If judges or staff catch any such errors, they would be required to reject the application. The applicant would then have 30 days to make the correction or their ability to seek asylum would be waived. Any pro se asylum seeker who does not understand English will face a severe barrier to rectifying the complex I-589 form within these deadlines. Many of the attorneys in our coalition have had an asylum application returned for failure to check -

[5] *RAIO Directorate - Officer Training on Children's Asylum Claims*, USCIS (Dec. 20, 2019), at 24, 27, 30-31, 40-41, https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.

a box or fill in a field that is legally irrelevant to the applicant's case. It is important to emphasize that pro se applicants are far less likely to catch such errors, or to be able to correct them, than attorneys with years of training and work experience. Once again, the effects of this rule will fall heavily on the most vulnerable, as child asylum seekers, asylum seekers with intellectual disabilities, or those who otherwise lack capacity will find it hardest to comply despite being most deserving of procedural protections.

For the vast majority of asylum seekers who proceed pro se, the decision to elevate a scrivener's error into a matter of life or death will have disastrous consequences. The proposed rule is particularly problematic in tandem with 8 CFR § 1208.4, because 8 CFR § 1208.4 will radically limit the time asylum seekers have to prepare an application, raising the likelihood of scrivener's errors.

The clear combined effect of these rules is to use procedure as a ground for rejecting virtually all asylum applications, particularly those presented pro se. Because Congress has repeatedly indicated that it intends to allow asylum seekers into the United States, and has indicated that children in particular deserve enhanced rather than diminished protections in the asylum system, these rules raise serious questions about whether these rules constitute a reasonable interpretation of the INA.

Finally, we object the proposal to end fee waivers for asylum applicants. Many applicants who are in MPP in Mexico or are detained have severely limited incomes,[6] and will find it impossible to pay $50 to exercise their legal right to apply for asylum.

8 CFR § 1208.12 Would Severely Limit Asylum Seekers' Ability to Present Evidence While Further Eroding the Boundary Between EOIR's Adjudicatory Role and the Prosecutorial Role of ICE

The notion that EOIR proceedings provide asylums seekers with due process is partly grounded in the division of functions in these proceedings between the Immigration Judge, an EOIR employee who is supposed to be a neutral arbiter, and the ICE trial attorney who serves as a prosecutor. This boundary is sometimes transgressed in practice, but 8 CFR § 1208.12 would sanction its erosion to an unprecedented degree. 8 CFR § 1208.12 allows judges to introduce their own evidence into the record, a function now largely reserved to ICE trial attorneys and asylum seekers themselves, and to find that evidence "credible and probative."[7] The role of introducing evidence in immigration proceedings rests with the trial attorney and the asylum seeker, with the judge's role primarily limited to weighing the evidence and building a record from the parties' submissions. The new regulation upends this system and places the Immigration Judge in the role of prosecutor.

[6] *See* Aimee Picchi, *Working for Peanuts: Detained Immigrants Paid $1 a Day*, CBS News (Sept. 22, 2017), https://www.cbsnews.com/news/working-for-peanuts-detained-immigrants-paid-1-a-day/. [7] As the IJ Benchbook describes, Immigration Judges were previously allowed a much

more restricted power to take "administrative notice" of certain facts, like changes in government in foreign countries. *See Administrative Notice*, IJ Benchbook, DOJ, https://www.justice.gov/eoir/page/file/988286/download; *Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992). The proposed regulation goes far beyond this power.

Furthermore, 8 CFR § 1208.12 would greatly restrict the ability of asylum seekers to present their own evidence, while privileging evidence from government sources that has become increasingly politicized. Under the proposed rule there would be a bifurcated standard for supporting documentation about country conditions: the immigration judge "may rely" on evidence that comes from U.S. government sources but can only rely on resources from non governmental sources or foreign governments "if those sources are determined by the immigration judge to be credible and probative." By allowing the executive branch to not only be the prosecutor (ICE) and the adjudicator (EOIR), but also to be the favored provider of evidence (Department of State and other reports), the Executive Branch of government holds all of the power in immigration cases, vitiating applicants' right to fair process, especially when the asylum process becomes as politicized as it has today.[8]

8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 Would Force Immigration Judges to Complete Most Asylum Cases in 180 Days, Even Where the Equities and Vulnerabilities of the Applicant Favor a Longer Timeframe

Proposed sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to complete most asylum cases within 180 days of the filing of the application. This rule may break our already overburdened immigration system and will make it exceedingly difficult for our coalition members to represent their clients before EOIR.

In many asylum cases, collecting evidence can easily take more than six months – let alone trying to present the evidence to the judge in time to receive a decision within that period. This is particularly true where the asylum seeker is a child or a member of another vulnerable group. The members of our coalition work with many child asylum seekers over a period of months to develop trust and learn the story of the child's persecution – a process that can take longer if the child is severely traumatized. After the attorney learns the details, building a strong case often means speaking to relatives and collecting documents from the country of origin, a process that can take many months if the child is from an isolated area or if the family faces resource constraints. Attorneys will find it virtually impossible to collect evidence for these clients in the period contemplated by the regulation, presenting significant ethics questions. Again, if these regulations will make representation challenging for attorneys, their effect on pro se asylum seekers will be still greater.

The proposed waiver where an applicant faces "exceptional circumstances" is inadequate. EOIR here gives examples of qualifying circumstances that would almost never be met, "such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." Proposed 8 CFR § 1003.10(b). The types of delays that typically

[8] *See* DHS, Office of the Inspector General, Matter of Brian Murphy, (Sep. 8, 2020) https://intelligence.house.gov/ uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf (reporting that senior DHS officials asked an employee to change reports about "corruption, violence, and poor economic conditions" in Guatemala, Honduras, and El Salvador that would "undermine President Donald J. Trump's ("President Trump") policy objectives with respect to asylum.")

arise, like mail delays and waits to secure supporting evaluations, will not be covered by this waiver.

Conclusion

These proposed rules would turn asylum procedures inside out. Taken together, the rules will create insurmountable procedural hurdles to filing for most applicants, will strain dockets past their breaking point, and will erode the distinction between adjudicator and prosecutor that lies at the heart of procedural protections for immigrants. Given the rules' wide-reaching effect, it is particularly inappropriate to offer them for public comment them while multiple, pending rulemakings with crosscutting effects are still underway. In light of the numerous substantive and procedural problems with this rulemaking, we urge DOJ to rescind the proposed rule.

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