

Congress of the United States

Washington, DC 20515

June 12, 2024

RECEIVED

By ESEC at 12:20 pm, Jun 14, 2024

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
U.S. Department of Homeland Security
2801 Nebraska Avenue, NW
Washington, DC 20528

The Honorable Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

Dear Secretary Mayorkas and Director Jaddou:

We, the undersigned Members of the House of Representatives, are writing to express our concerns related to the Department of Homeland Security's Notice of Proposed Rulemaking on "Application of Certain Mandatory Bars in Fear Screenings."¹ Allowing the consideration of mandatory bars to asylum during initial asylum screening interviews will force asylum seekers to present legally and factually complex arguments explaining the life-threatening harms they are fleeing shortly after enduring a long, traumatic journey and while being held in immigration detention and essentially cut off from legal help.

Without serious effort to dramatically expand access to legal counsel for asylum seekers during initial screenings and without evidence of having comprehensive safeguards assuring asylum officers can fairly conduct the fact-intensive, legal analysis required to adjudicate bars during initial screenings, the proposed rule would very likely undermine basic principles of fairness, the humane treatment of those fleeing persecution or torture, and our nation's compliance with due process and non-refoulement obligations.

The Biden Administration just two years ago concluded that the inclusion of mandatory bars in credible fear screenings would make the screenings less efficient, undermining Congress's intent that the expedited removal process be swift, and would undermine procedural fairness, leading to substantial due process concerns. In the proposed rule, the administration offers four reasons for reversing its prior conclusion, but none attempt to address how the proposed rule would mitigate a likely worsening of these due process concerns.

The proposed rule claims to differentiate itself from prior attempts to apply mandatory bars to initial screening interviews by granting asylum officers discretion to consider bars instead of such consideration being mandatory. However, this does nothing to help due process concerns for asylum seekers for whom the bars are considered, and it introduces a new element of potential procedural unfairness, as the proposed rule offers no information on how asylum officers will decide which cases will be subject to a bars analysis. This type of discretion opens the door to profiling people on the basis of their nationality, religion, or other characteristics.

In addition, the proposed rule offers no plan for how the administration would adhere to domestic and international obligations. The vast majority of people undergoing a credible fear

¹ DHS Docket No. USCIS-2024-0005

screening do not have access to legal assistance² as they navigate the highly consequential and potentially life-or-death screening process that itself has been marred by evidence of disturbing practices – including scheduling interviews without notice to counsel or without proper interpretation, denying phone calls with counsel, and using the wrong burden of proof for screenings.³ The proposed rule adds considerations to initial screenings with no analysis for how prior additions, such as those in the Circumvention of Lawful Pathways rule and complementary measures, affected the United States’ ability to uphold the Fifth Amendment’s Due Process Clause and our binding nonrefoulement obligation under international law (which is enshrined in U.S. statute).⁴ According to unofficial CBP numbers, the screen-in rate for credible fear interviews in CBP custody is around 23 percent,⁵ compared to 83 percent from 2014 to 2019,⁶ when credible fear screenings occurred after CBP processing and when asylum seekers had more access to legal counsel and community support. Expecting asylum seekers to articulate a coherent, complex legal defense to overcome a mandatory bar while held in unsafe conditions in detention facilities,⁷ and having to justify their traumatic experiences within as little as one day of arrival into the United States in a foreign language without legal counsel, is dishonest and incongruent with U.S. and international refugee law. Further, even if an asylum seeker found a way to access an attorney while in custody, the attorney would likely not have enough time in an initial screening to gather the extensive evidence needed to show why a bar should not apply.⁸

Further, the proposed rule focuses on increasing efficiency in asylum adjudication but fails to address its contradiction to Congress’s clear intent for the credible fear standard to be “a low screening standard for admission into the usual full asylum process” to minimize the risk of screening out noncitizens with potentially sound asylum claims.⁹ During the committee of

² DHS does not consistently report representation rates for individuals subject to credible fear interviews in ICE or CBP custody. However, available DHS data for credible fear interviews under the Asylum Processing Rule shows one percent of asylum seekers has legal representation during the process: <https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report>.

³ National Immigrant Justice Center (NIJC), *Obstructed Legal Access: NIJC’s Findings From 3 Weeks of Telephonic Legal Consultations in CBP Custody* (May 25, 2023), <https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijcs-findings-3-weeks-telephonic-legal-consultations-cbp>; NIJC, *Obstructed Legal Access: June 2023 Update* (June 20, 2023), <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update>.

⁴ The full extent of the harm inflicted by the Circumvention of Lawful Pathways rule is unknown, as most of those subject to the rule never speak to a lawyer and information about specific fear outcomes for those in CBP jails has not been made public despite requests for data. However, immigration groups have reported numerous examples of people with credible asylum claims getting deported after having their credible fear interviews in CBP custody. See for example: <https://immigrantjustice.org/press-releases/government-obstruction-forces-nijc-discontinue-legal-consultations-people-facing>; https://humanrightsfirst.org/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report_final-formatted_5.13.24.pdf, p. 27.

⁵ <https://immigrationimpact.com/2024/05/03/volunteers-credible-fear-interview-cbp-hotline/>.

⁶ <https://www.documentcloud.org/documents/23855145-post-title-42-border>, p. 9.

⁷ In November 2023, for example, DHS’s Office of Inspector General conducted an unannounced inspection of the facilities in the San Diego area, where DHS was implementing “Enhanced Expedited Removal”. The Office of Inspector General reported problems with overcrowding, prolonged detention, and other systemic issues.

⁸ For example, Aida had escaped from an “abuser who exploited his connections with the Salvadoran police to intimidate her, leading to the issuance of trumped up criminal charges and an Interpol Red Notice. With the help of an attorney, she was able to retain an expert witness, have the Interpol notice voided, and ultimately win her asylum case.” All of this took time to gather, and under the proposed rule, Aida could have been barred from asylum before even having the opportunity to consult with an attorney. <https://cgrs.uclawsf.edu/news/biden-rule-would-return-refugees-harm-increase-inefficiencies>.

⁹ 142 Cong. Rec. S11491-02 (daily ed. September 27, 1996) (statement of Sen. Hatch).

conference for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), conferees expressed concern “about the harsh consequences that could result to asylum applicants who do have a valid claim but who may not speak English, may not have the necessary proof of their claim with them,” and those in similar situations.¹⁰

In the IIRIRA, Congress required an asylum seeker to demonstrate a “significant possibility” they “could establish eligibility for asylum,” which an asylum officer determines through a credible fear interview. Congress passed the “significant possibility” standard after it considered and rejected a more stringent standard offered in the House version of the bill that would have required removal unless a noncitizen could show it was more probable than not they had a credible fear of persecution.¹¹ Specifically, the credible fear standard was redrafted to ensure the “too restrictive” House language of “more probable than not” did not prevail.¹² The revised bill, with the lower burden credible fear standard, “cure[d] important deficiencies,”¹³ that “would not have provided adequate protection to asylum claimants.”¹⁴

The U.S. Supreme Court has acknowledged the standard for this screening interview is lower than the standard for asylum, as “[t]he applicant need not show that he or she is in fact eligible for asylum – a ‘credible fear’ equates to only a ‘significant possibility’ that the alien would be eligible.”¹⁵ Further, as one federal district court stated, under the IIRIRA, “to prevail at a credible fear interview, the alien need only show a ‘significant possibility’ of a one in ten chance of persecution, i.e., a fraction of ten percent.”¹⁶ However, current USCIS policy for overcoming mandatory bars stipulates, “if the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply. A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is true).”¹⁷ Thus, allowing mandatory bars, which requires an applicant to prove a preponderance of the evidence against a ground (more than 50 percent), to be applied during a credible fear interview contradicts the congressional intent and federal court rulings of the credible fear standard, which requires an applicant to only show a significant possibility of a fraction of ten percent.

Lastly, while the proposed rule suggests DHS may apply a bar primarily in cases where an asylum officer believes an applicant may be barred from protection due to a criminal conviction abroad or because evidence suggests the person committed a serious non-political crime abroad, this kind of evidence is not always as clear as it may at first appear. In addition, while the proposed rule offers the example of a hypothetical applicant convicted of a very serious crime in

¹⁰ 142 Cong. Rec. S4457-91 (daily ed. May 1, 1996) (statement of Sen. Hatch).

¹¹ See H.R. 2202, 104th Cong. § 235(b)(1)(B)(v) (1995). The “more probable than not” standard also appears in the Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 422(b)(1)(C)(v), 110 Stat. 1214, 1271 (1996), which was enacted while Congress was still considering the IIRIRA. The IIRIRA superseded that standard, replacing it with the simple “significant possibility” standard in the context of asylum cases.

¹² 142 Cong. Rec. H11071, H11081 (daily ed. Sept. 25, 1996) (statement of Rep. Hyde).

¹³ 142 Cong. Rec. H11066-67 (daily ed. Sept. 25, 1996) (statement of Rep. Christopher Smith)

¹⁴ 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

¹⁵ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 (2020).

¹⁶ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018) (quoting *Cardoza-Fonseca*, 480 U.S. at 431-32, *aff'd in part, rev'd in part and remanded sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)).

¹⁷ Asylum Officer Basic Training Course, Mandatory Bars To Asylum and Discretion, March 25, 2009, p. 33.

a country “with a fair and independent judicial system,” the proposed rule offers no insight into how an officer shall assess another country’s judicial system nor is the proposed rule limited to criminal records issued from such countries. The proposed rule leaves no assurance for how an asylum officer can determine during the credible fear screening whether an arrest, warrant, conviction, or another record from a foreign country resulted from a fair due process.¹⁸ Situations where criminal acts on the part of the applicant were alleged but never tried in a country outside of the United States can be even murkier and impossible to resolve accurately in an initial interview process.

The proposed rule also does not explain how asylum officers would screen for forced criminality during the expedited credible fear interview setting when determining if a mandatory bar applies (for the bars that have an exception for coercion or duress).¹⁹ In particular, human trafficking victims often do not realize their victimization and may feel complicit in their own trafficking and abuse, as is often seen with victims who have been recruited by traffickers into gangs or forced to conduct criminal activity. Uncovering forced criminality takes an immense level of training, trust, and care highly unlikely to be found in the initial screening process. The proposed rule will also be particularly dangerous for people fleeing persecution that includes actions taken against them by state security forces, such as an arrest or issuance of a warrant. In these cases, there will be a high risk of erroneous deportation should an asylum officer apply an exclusionary bar on the basis of this arrest or warrant, triggering deportation before the individual can provide evidence in their own defense.

The proposed rule unfairly frontloads highly fact-specific and nuanced legal questions that starve asylum seekers of the opportunity to put their best case forward with guidance from an attorney. As such, this proposed rule cannot comply with existing due process and non-refoulement obligations and contravenes congressional intent, and we urge USCIS to rescind the proposed rule. Unless the administration dramatically expands access to legal counsel for asylum seekers in immigration custody and ensures comprehensive safeguards against sending asylum applicants with valid claims back to persecution, the rule cannot be responsibly implemented.

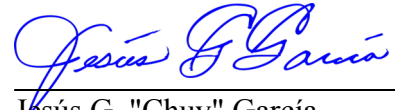
Sincerely,

¹⁸ On unreliability of foreign data used against asylum seekers: Jesse Franzblau, *Caught in the Web: The Role of Transnational Data Sharing in the U.S. Immigration System*, Nat’l Immigrant Justice Center (Dec. 13, 2022) https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2022-12/NIJC_Policy_Brief_Foreign_data_sharing_December-2022.pdf. An example of ICE itself reconsidering the use of Interpol Red Notices due to their unreliability, though they were routinely used in enforcement actions. In 2023, Immigration and Customs Enforcement (ICE) issued a directive also noting that a Red Notice “conveys no legal authority to arrest, detain, or remove a person” and should be “sparingly” and “not exclusively” used. www.ice.gov/doclib/foia/dro_policy_memos/15006.1_InterpolRedNoticesWpDiffusions.pdf.

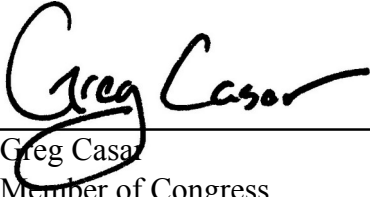
¹⁹ David Baluarte, *Refugees Under Duress: International Law and the Serious Nonpolitical Crime Bar*, 9 Belmont L. Rev. 406 (2022), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1733&context=wluofac>. The administration’s own actions demonstrate the persecutor bar is particularly murky, making it unsuitable to consider in a preliminary screening. The Attorney General certified Matter of Negusie to himself in 2021 (28 I.&N. Dec. 399) but has taken no further action. In the Fall 2023 Unified Regulatory Agenda, DHS and DOJ indicated they will issue a Notice of Proposed Rulemaking “to modify the regulations regarding the persecutor bar to include provisions addressing duress, lack of knowledge, and general principles.” RIN 1125-AB25. However, they have taken no action except to include it in the list of bars that may be applied in initial screening interviews.



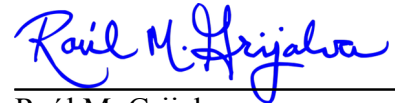
Delia C. Ramirez
Member of Congress



Jesús G. "Chuy" García
Member of Congress



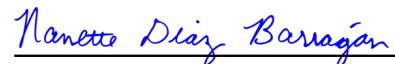
Greg Casar
Member of Congress



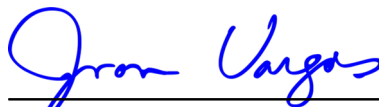
Raúl M. Grijalva
Member of Congress



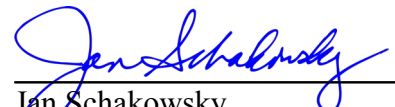
Eleanor Holmes Norton
Member of Congress



Nanette Diaz Barragán
Member of Congress



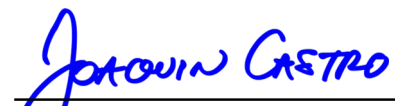
Juan Vargas
Member of Congress



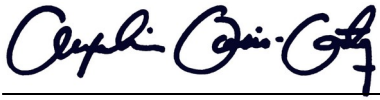
Jan Schakowsky
Member of Congress



Rashida Tlaib
Member of Congress



Joaquin Castro
Member of Congress



Alexandria Ocasio-Cortez
Member of Congress



James P. McGovern
Member of Congress



Jamaal Bowman, Ed.D.
Member of Congress



Cori Bush
Member of Congress



André Carson
Member of Congress



Tony Cárdenas
Member of Congress



Veronica Escobar
Member of Congress



Yvette D. Clarke
Member of Congress



U.S. Citizenship
and Immigration
Services

August 1, 2024

The Honorable Delia Ramirez
U.S. House of Representatives
Washington, DC 20515

Dear Representative Ramirez:

Thank you for your June 12, 2024 letter in response to the Department of Homeland Security's proposed rule, Application of Certain Mandatory Bars in Fear Screenings.¹ I am responding on behalf of the Department.

We note that your letter was also included as a comment that was submitted to the official docket on regulations.gov in response to the proposed rule. U.S. Citizenship and Immigration Services (USCIS) will review all comments, including yours, received to the docket on regulations.gov in response to the proposed rule and will consider those comments in the development of any forthcoming rulemaking.

Thank you again for your letter and interest in this important issue. The cosigners of your letter will receive a separate, identical response. Should you require any additional assistance, please have your staff contact the USCIS Office of Legislative Affairs at (240) 721-3801.

Respectfully,

A handwritten signature in black ink that reads "Ur M. Jaddou" followed by a long horizontal flourish.

Ur M. Jaddou
Director

¹ See 89 Fed. Reg. 41,347 (May 13, 2024).