



Submitted via www.regulations.gov

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Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

**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**

Dear Assistant Director Reid,

Innovation Law Lab respectfully submits this comment urging withdrawal of the proposed rule. The Notice of Proposed Rulemaking (NPRM) would cruelly and unnecessarily destroy procedural protections for asylum seekers in removal proceedings, making it nearly impossible for people fleeing persecution to find safety in the United States. The proposed rule's creation of an 180 day adjudication mandate would make it extremely difficult for asylum seekers to find counsel and gather necessary evidence to present their asylum claims. The rule would also require the rejection of asylum applications for minor and spurious reasons, including for failure to pay. Additionally, the rule would fundamentally destroy any semblance of impartiality by immigration judges by allowing them to submit their own evidence in a case. These changes should be rejected.

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. Founded in 2014 in response to the mass detention and deportation of asylum-seeking immigrant families, Innovation Law Lab specializes in the creation of scalable, highly replicable, and connected sites of resistance that create paradigm shifts in immigration representation, litigation, and advocacy. By bringing technology to the fight for immigrant justice, Innovation Law Lab empowers advocates to scale their impact and provide effective representation to immigrants in detention and in hostile immigration courts across the country. Innovation Law Lab works directly with low-income immigrants and the pro bono attorneys who

serve them, providing legal services, direct representation, and tactical support before USCIS and the Executive Office for Immigration Review (EOIR).

We describe below how the NPRM will impact our organization and our clients, and the reasons for our opposition. Omission of any proposed change from this comment should not be interpreted as tacit approval. We oppose all aspects of the proposed implementation.

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

As noted *supra* and *infra*, the proposed changes would make dramatic changes to the current asylum system, significantly curtailing both the rights of people fleeing persecution who are seeking safety in the United States and the capacity of organizations like ours to fulfill their mission of providing assistance and representation to people in asylum proceedings. 30 days is an insufficient amount of time in which to respond to the proposal of such dramatic changes, and the customary 60-day comment period should be allowed.

This abbreviated comment period is especially inappropriate in light of the rapid series of overlapping changes being proposed to the immigration court system at this time, including, but not limited to the June 15, 2020 NPRM titled “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” 85 Fed. Reg. 36264 (June 15, 2020), which proposed the most dramatic changes to asylum eligibility since the 1996 Illegal Immigration Reform and Immigrant Responsibility Act; and the August 6, 2020 EOIR NPRM proposing substantial changes to the procedural rights of asylum seekers and others in removal proceedings, titled “Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure,” 85 Fed. Reg. 52491 (Aug. 26, 2020). Additionally, we are in the midst of a global pandemic that is exerting significant pressure on stakeholders who would otherwise have time to submit more robust comments.

II. 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6—The Proposed Rule Would Prioritize Speed over Fairness in Asylum Adjudications

Proposed sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to adjudicate asylum applications within 180 days of filing, absent very limited exceptional circumstances. Though this limit exists in the Immigration and Nationality Act (INA), it has never been implemented by regulation. Now is not the time to do so. There are currently over **one million** cases in the immigration court backlog.¹ Given the crushing

¹ See TRAC, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

workloads that immigration judges already face, there is simply no way that this mandatory adjudication deadline could be met without severely prejudicing the rights of people seeking asylum. Given that, in the case of most asylum seekers, the government can quickly meet its burden of establishing removability, in the vast majority of cases the burden is on the respondent to prove eligibility for humanitarian relief from removal. An abbreviated adjudication timeline therefore prejudices the asylum-seeking respondent exclusively, since it is the respondent who must gather evidence, prepare testimony, and present a case that proves their eligibility.

The proposed rule puts forth examples of “exceptional circumstances” that would justify an exception to the 180-day adjudication rule that would be extremely hard to meet: “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). No allowances would be made to allow respondents to find immigration counsel, obtain relevant evidence, and prepare their case for the merits hearing. This rule clearly would obstruct the right to access counsel in immigration proceedings, which is protected by the Due Process Clause of the Fifth Amendment. *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018).

Moreover, this change would be extremely prejudicial to people fleeing persecution who suffer from post-traumatic stress disorder and other conditions because of the severity of their past harm. Innovation Law Lab’s programs serve many people who are seeking humanitarian protection after being subject to extreme forms of discrimination and harm, including survivors of domestic and gender-based violence, those targeted for being members of the LGBTQ community, survivors of child abuse, and survivors of torture. In all of these cases, particular care must be taken to prepare clients from the emotionally grueling process of reliving their painful stories in the hostile environment of immigration court. This preparation often involves multiple meetings between the client and their attorney, a mental health evaluation, ongoing mental health counseling, and time to build trust. A hard-line 180 day adjudication period, implemented regardless of the individual needs of a case, will wreak havoc on the representation process and leave many attorneys unable to properly prepare clients for their final hearings in immigration court. Again, this is especially true during a global pandemic, as representing clients remotely or with extreme safety measures in place prolongs the preparation process even more.

III. 8 CFR § 1208.3(c)(3)—The Proposed Rule Would Require Immigration Judges to Reject Asylum Applications Based on Minor, Technical Errors

The proposed rule would require immigration judges and court staff to reject asylum applications for minor technical mistakes or for leaving any section on the application blank. This proposed change is in line with a recent practice of U.S. Citizenship and Immigration

Services, who began rejecting applications on these grounds in 2019.² This change is nonsensical and should be rejected. There is no possible justification for this proposed regulation other than a desire to increase the agency's ability to deny asylum applications and shut additional people out of our nation's system for seeking humanitarian protection.

The application for asylum, Form I-589, is 12 pages long, and asks a series of highly detailed questions *that are not all relevant to every person asking for asylum*.³ For example, the form provides boxes in which an applicant must list their spouse and children. An applicant who is unmarried and has no children would have to write "N/A" or "none" in *over one hundred boxes* in order to comply with this proposed rule. There is no conceivable way in which imposing this busywork on applicants and their legal representatives improves case outcomes or the accuracy of the asylum adjudication system. If an applicant did not correct an application rejected on these grounds within 30 days, their right to seek asylum would vanish.

This rule is particularly cruel considering that many respondents who are seeking asylum do not speak English and will not have access to legal representation or legal advice on how to accurately complete their application - especially in light of the proposed 15-day filing deadline, discussed *infra*. The consequences will be particularly harsh for those who are held in detention or in the "Migrant Protection Protocols" during the duration of their cases, as access to counsel and appropriate legal guidance is even more limited for these populations. Unrepresented respondents who are unable to meet this onerous and unnecessary requirement will be unable to successfully file their applications for asylum, leading to removal orders and deportation to countries where they face persecution, torture, and death.

Additionally, this rule would significantly decrease the capacity of already-overworked nonprofit immigration legal service providers and immigration attorneys, who are already a scarce resource in the face of a large number of unrepresented persons seeking asylum. This new rule would require legal advocates to take significant additional time to complete the application, and to review, and review again, to ensure no box was missed. This will prevent legal service organizations from assisting additional asylum applicants whose applications could have been completed in the time spent providing non-information to EOIR.

² Catherine Rampell, *The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, The Washington Post, Aug. 6, 2020, www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57d_cc_story.html.

³ See <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

Finally, we object strongly to the fact that the proposed rule would require rejection of asylum applications where the applicant cannot pay the filing fee. The filing fee rule has yet to be finalized, *see* 85 Fed. Reg. 11866 (Feb. 28, 2020), but assuming it goes into effect, it would wreak grave injustice on asylum seekers to require payment of money to pursue their right to humanitarian protection in the United States. Many people seeking asylum who Innovation Law Lab works with struggle to meet their basic needs, like food, shelter, and transportation, and do not readily have access to funds that could cover this filing fee. Most lack access to traditional banking services, making it extremely difficult to coordinate the logistics of payment of this fee to the immigration court or by “feeing in” with U.S. Citizenship and Immigration Services. Like with the “incomplete application” proposed change, this rule would eliminate a person’s right to seek asylum if an application is not resubmitted with the correct fee within 30 days. This is nothing more than a blatant attempt to punish the poor and exclude them from protections that they are entitled to seek under our Congressionally-enacted immigration laws.

IV. 8 CFR § 1208.4—The Proposed Rule Would Create an Impossible Filing Deadline for Individuals in Asylum-only or Withholding-only Proceedings

We object strongly to the rule’s proposed 15-day filing deadline, which would require many people seeking asylum to file their applications within 15 days of their first master calendar hearing. Proposed 8 CFR § 1208.4(d). When considered in conjunction with the proposed asylum rule of June 15, 2020, *see* 85 Fed. Reg. 36264, this would mean all asylum seekers who have undergone the credible fear process would have an extremely time-limited window in which to file a complete application that also complies with the nonsensical and burdensome rules above.

The proposed rule attempts to justify this accelerated time period by citing to the 15-day rule currently applied to crewmembers and persons in the Visa Waiver program, but fails to mention the *extremely low* number of people who move to asylum-only proceedings from those categories. In 2018, there were only 728 such proceedings pending before EOIR.⁴ Under proposed 8 C.F.R. § 208.2(c)(3)(i); 8 C.F.R. § 1208.2(c)(3)(i), any asylum seeker who moves out of expedited removal after passing a credible fear interview would be placed in asylum-only proceedings would now be subject to the 15-day deadline. This would increase the applicability of the rule to literally tens of thousands of asylum seekers. The NPRM entirely fails to acknowledge this, and does not consider or weigh the significant impact this would have on persons seeking humanitarian protections, immigration attorneys and accredited representatives, and on EOIR itself.

⁴ U.S. DOJ, EOIR, Statistical Yearbook 2000, at 13, www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf.

It should go without saying that 15 days is an extremely short period of time in which to locate and obtain representation in an asylum case, or even competent and quality limited legal assistance with application preparation and filing. Implementation of this change would require organizations like Innovation Lab to significantly change its existing operating procedures in order to attempt to assist persons with filing on the shortened deadline. For example, our Defend Asylum asylum clinic, which assists unrepresented respondents with completing their applications for asylum, could no longer operate on a monthly basis, as the 15-day filing timeline would elapse for many people before having the opportunity to attend a monthly clinic. Innovation Law Lab has worked with many respondents who were about to have their applications deemed abandoned after unsuccessfully seeking legal counsel for months; there are simply not enough low-cost and free immigration resources to serve people in the current system, much less within a two-week period. This rule would leave a significant percentage of people seeking asylum unable to complete their applications within the deadline, leading to orders of removal and deportation to countries where they face harm and even death.

V. 8 CFR § 1208.12—The Proposed Rule Would Severely Limit Immigration Judges’ Ability to Consider Country Conditions Evidence Submitted by Asylum Seekers While Allowing Immigration Judges’ to Compile and Introduce Their Own Evidence, Turning Immigration Judges into Prosecutors Instead of Adjudicators

Finally, we strongly object to the proposed changes regarding the submission and consideration of country conditions evidence. The proposed change would destroy any remaining independence in the immigration courts by presumptively crediting government-submitted evidence over evidence submitted by the respondent. Proposed 8 CFR § 1208.12 would allow an immigration judge to rely on evidence from U.S. government sources, but only allow reliance on non-governmental or foreign government sources after an additional finding that these sources are “credible and probative.” This change would even more effectively merge the case’s prosecutor, adjudicator, and fact-provider in the U.S. government- a change that is especially dangerous in light of increased politicization of agency decision making in immigration cases. Political interference with U.S. government sources on foreign country conditions is not merely a possibility, but already a reality: a recent DHS whistleblower report accused senior Department of Homeland Security officials of pressuring changes to a report on “corruption, violence, and poor economic conditions” in Guatemala, Honduras, and El Salvador that would “undermine President Donald J. Trump’s policy objectives with respect to asylum.”⁵ There is also evidence to suggest that the Department of State reports lack reliability due to political manipulation; for example, DOS reports released in March 2019 “remove[d] analysis of

⁵ 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.

women's reproductive health and rights, including country-level analysis of maternal mortality and unmet contraceptive needs"⁶- information that is highly relevant to gender-based asylum claims.

Moreover, the proposed change would allow immigration judges to introduce evidence into the record- a power that is entirely inconsistent with a judge's purported role as an impartial adjudicator. The rule would require only that "a copy of the evidence [be provided]. . . to both parties and [that] both parties have had an opportunity to comment on or object to the evidence *prior to the issuance of the immigration judge's decision*" (emphasis added). Thus, theoretically, a judge could provide evidence to the respondent during their individual hearing, ask for comment, and then issue a decision immediately. No provisions are made for translating such evidence into a language the respondent can understand, nor for explaining the evidence to unrepresented respondents. Allowing judges to introduce outside evidence is entirely inconsistent with the role of a neutral fact-finder, and would be in the nail in the coffin of EOIR's transformation into a kangaroo court.

VI. Conclusion

The proposed changes are highly unnecessary and extremely prejudicial to people seeking humanitarian protection in the United States. This shameless attempt to further restrict access to asylum and increase removals of vulnerable persons should be emphatically rejected.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me should you have any questions about our comments or require further information.

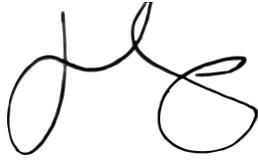


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⁶ See Amanda Klasing & Elisa Epstein, Human Rights Watch *US Again Cuts Women from State Department's Human Rights Report*, (Mar. 13, 2019), <https://www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rights-reports#>.



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