



Working to Reduce Poverty in America

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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

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Catholic Charities USA (CCUSA) respectfully submits this comment in opposition to the Department of Justice (DOJ) and Department of Homeland Security's (DHS) proposed rule on asylum in its entirety. Pursuing asylum is a legal pathway to our country and recognized as a critical lifeline for migrants fleeing deadly circumstances. The proposed rule amounts to another unfortunate example of American withdrawal from its role as a global leader for migrants under both domestic law and international law. Further, as a faith-based organization, we see the proposed rule of essentially eliminating the pursuit of asylum for the majority of those who seek it as morally wrong: *"For I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me" (Matthew 25:35).*

CCUSA is a national membership organization representing more than 167 diocesan Catholic Charities member agencies, which operate more than 2,600 service locations across the country. Their diverse array of social services reached more than 13 million individuals in need last year, and included immigration and refugee services. Our Catholic heritage includes a scriptural call to provide hospitality to newcomers as if welcoming Christ Himself. The Catholic Church, like our nation as a whole, finds its identity and roots in various immigrant communities. We affirm the inherent dignity bestowed by God on every human person, including immigrants and refugees, no matter the circumstances that compel a person to begin a new life in our community.

We note that the proposed rule covers a vast and broad array of important aspects of the asylum process with a common intent: to limit the ability of vulnerable populations to pursue asylum. While not every proposed change is discussed in our comments, we oppose these regulations and call upon the agencies to withdraw them in their entirety.



I. The Proposed Rule Raises Due Process Concerns and Deprives Asylum Seekers of the Opportunity to Pursue Justice in Immigration Court - 8 CFR § 1208.13 (e)

Section 8 CFR § 1208.13 (e) would allow immigration judges to deny asylum to asylum seekers if the judge preemptively determines, on their initiative or at the request of a DHS attorney, that the application form does not adequately make a claim. This causes grave concerns for due process. Our agencies provided services to over 300,000 people along the southern border, including legal services. Despite our efforts, many asylum seekers must navigate the legal process on their own and frequently in an unfamiliar language. The proposed rule would inevitably lead to denying due process and would be an abrupt change from decades of precedent and practice before the immigration court *See Matter of Fefe* 20 I&N Dec. 116, 118 (BIA 1989).

Allowing immigration judges to preemptively dismiss cases ignores the existing asylum procedural difficulties and would exacerbate these complications. Unrepresented asylum seekers, especially those who are detained, struggle to complete the 12-page asylum application form. These forms and processes are not always available in an asylum seeker's native language, which adds another level of difficulty, especially if a translator is not available throughout the process. Allowing immigration judges to deny asylum cases without an adequate level of due process would inevitably lead to the denial of meritorious cases. CCUSA strongly opposes this additional burden for vulnerable populations.

II. The Proposed Rule's Limitations on a "Particular Social Group" are Unacceptably Narrow

Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, ***membership in a particular social group (PSG)***, or political opinion. INA § 101(a)(42) (emphasis added). Membership in a PSG in this list was designed to allow the asylee/refugee definition to be flexible and capture those who do not fall within the other listed characteristics. "The term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."¹

The proposed rule provides a non-exhaustive list of factors on whether an alleged group exists and, if so, whether it is cognizable as a PSG. The proposed rule's narrow definition of PSG all but denies asylum seekers, especially those from Central America and Mexico, to win protection under the category. The section on PSG prohibits a favorable adjudication of a PSG asylum claim based on issues unrelated to its cognizability, such as "presence in a country with generalized violence or a high crime rate." These restrictions appear to be calculated to target individuals from Mexico and Central American countries.

¹ United Nations High Commissioner on Refugees (UNHCR) Guidelines On International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

Catholic Charities agencies continue to provide legal services to migrants across the country and recognize the intricacy required to develop PSG arguments. The demand for these services is often greater than any organization's collective resources and we are particularly concerned for migrants who pursue their asylum claims without legal representation. It would be unconscionable to send an applicant back to persecution in his or her home country for failure to adequately craft PSG language. Applying this proposed regulation to asylum seekers, including unrepresented individuals, would raise serious due process issues.

III. The Proposed Rule's "Nexus" List Ignores the Root Causes of Migration - 8 CFR § 208.1(f); 8 CFR § 1208.1(f)

The proposed rule includes a "nexus" section that would allow claim denials for grounds that have historically met the standard for asylum. Courts have held that each asylum application should be adjudicated on a case-by-case basis. The proposed rule provides a non-exhaustive list of vague and overbroad harms in which the Secretary of Homeland Security and the Attorney General, in general, will not favorably adjudicate asylum or statutory withholding of removal claims based on persecution. These harms are common in asylum claims because they reflect the realities in which migrants are fleeing. Harms such as being persecuted by "criminal activity" or "personal animus or retribution" among others should continue to be considered because they are part of the root causes leading to migration. Creating a list to deny common factors associated with asylum claims fits into an unfortunate trend that ignores the realities migrants continue to face.

Finally, the rule in its current form runs contrary to the INA. INA § 208(b)(1)(B)(i) specifically states that a protected ground must be "at least one central reason" for the harm. Federal courts have explicitly held that the "one central reason" continues to allow for a mixed motive analysis. If the proposed rule were to take effect, asylum seekers who have been harmed, or fear harm, for multiple reasons such as "retribution" and a protected characteristic will not be afforded asylum protection, in direct violation of the INA.

IV. The Proposed Rule Utilizes "Discretion" Factors Incorrectly - 8 CFR § 208.13; 8 CFR § 1208.13

In addition to meeting the legal standard for asylum, asylum seekers must merit a favorable exercise of discretion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423, (1987). The United States has recognized the unique situation of asylum seekers and found that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The proposed rule would overturn years of discretionary jurisprudence and must be rescinded.

Under the proposed rules, one discretionary consideration is whether any asylum seeker who enters or attempts to enter the United States without inspection could be denied asylum. Another discretionary consideration is preventing an asylum seeker who spent 14 days in any country en-route to the United States from qualifying for asylum. This change would conflict with the concept of firm resettlement and could disqualify most asylum seekers who travel through Mexico where the Administration blocks asylum seekers, forcing them to wait for months to request protection at ports of entry. The proposed rule places asylum seekers in an impossible position where they

will be denied asylum if they wait on the “metering” lists at ports of entry but will also be denied asylum if they cross the border in order to make their requests for protection. Catholic Charities continues to stand ready to serve these populations while they pursue their asylum claims. Allowing discretion in denying their case because they waited in a foreign country for an arbitrary amount of time or entered the U.S. and still sought to claim asylum does not appropriately consider a migrant’s plight nor the treacherous journey they face.

The proposed rule also contradicts the plain language of INA § 208(a)(2)(d), which explicitly allows exceptions to the one-year filing deadline for asylum based on changed or extraordinary circumstances by barring any asylum seeker who has been in the United States for more than one year without lawful status. This rule change ignores the fact that some individuals are in the United States for many years with no need to seek asylum until there is a changed circumstance in their country of origin or personal circumstances. Likewise, many asylum seekers are prevented by extraordinary circumstances, including mental health issues such as post-traumatic stress disorder often as a result of the persecution they have fled, from filing for asylum within one year of arriving in the United States. The Administration cannot eliminate these vital exceptions to the one-year-filing deadline in the guise of “discretion.”

The government makes many of these “discretionary” bars practically mandatory, allowing for the possibility of a positive exercise of discretion only in narrow circumstances for reasons of national security or foreign policy interests, or, if the asylum seeker can show by a preponderance of the evidence that they would suffer exceptional and extremely unusual hardship if denied asylum. Even this extremely limited exception only applies to some of the “discretionary” factors. The combination of the heightened evidentiary standard and the intentionally onerous legal standard will mean that virtually no asylum seeker will be able to qualify for asylum as a matter of discretion.

V. The Proposed Rule Imposes an Unjustifiable Evidentiary Burden on Asylum Seekers Pursuing the Convention Against Torture Protection - 8 CFR § 208.18; 8 CFR § 1208.18

The proposed rule would hinder the pursuit of the Convention Against Torture (CAT) protections and place them out of reach for the majority of individuals fleeing torture or the threat of torture. Under the proposed rule, an applicant would have to prove that a home country government official who has inflicted torture has done so “under color of law” and is not a “rogue official.” The regulation ignores realistic circumstances under which migrants flee for their lives. Clearly, if a government official claims to be acting in an official capacity, is wearing an official uniform, or otherwise makes it known to the applicant that they are a government official, a CAT applicant would have no reason to know whether the official is acting lawfully or as a “rogue” official. Requiring an applicant pursuing CAT protection to obtain this kind of detailed information from a government official who has tortured or threatened the applicant with torture is unreasonable and unrealistic.

Conclusion

The United States must return as a global leader focused on addressing the root causes of migration and providing justice and humane treatment for those seeking asylum. The proposed rule is another unfortunate example of misdirected policy that shirks our country's standing as a global leader in exchange for concepts that offer no solution to the realities of migration. The vast majority of asylum seekers are likely to be denied asylum under these proposed rules even if they have well-founded fears of persecution. Further, it is difficult to imagine any asylum seeker arriving at the southern border who would not be subject to one of the many bars imposed under these, and prior, recent rules, or who would be able to meet the elevated evidentiary burdens, both in preliminary border fear screenings and in asylum interviews and proceedings before immigration judges. Based on the Administration's approach to all forms of immigration during its tenure, the proposed rule is another unfortunate policy example that lacks comprehension and compassion for the root causes of migration. We respectfully urge the Administration to withdraw the proposed rule in its entirety.

Sincerely,



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