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July 15, 2020

Lauren Alder Reid, Assistant Director,
Office of Policy,
Executive Office for Immigration Review,
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

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

Dear Desk Officer,

The Council on American-Islamic Relations – California (CAIR-CA) strongly opposes the proposed rule presented in the Department of Homeland Security (DHS) and Department of Justice (DOJ) Notice of Proposed Rulemaking, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" which was published in the Federal Register on June 15, 2020.

CAIR-CA is a nonprofit 501(c)(3), grassroots civil rights and advocacy group. CAIR-CA is California's largest Muslim civil rights organization, with regional offices across the state. Our mission is to enhance the understanding of Islam, protect civil rights, promote justice, and empower American Muslims. CAIR-CA handles cases involving immigration, employment discrimination, FBI visits and other interactions with law enforcement, hate crimes, prisons, public accommodation, school bullying, and travel. Our immigration services include assisting individuals with adjustment of status, asylum, family petitions, naturalization, temporary protected status, T-Visas, U-Visas, and VAWA. Many of our asylum clients are fleeing religious persecution from countries such as China and Myanmar or political persecution from countries like Syria or Egypt.

We urge DHS and DOJ to reject the proposed rule in its entirety. We know from the experiences of our clients that the proposed rule will cause uncertainty, inconsistency, and chaos in the adjudication of protection claims and expose countless people to persecution and torture because of their religion, political opinions, or other protected grounds.

Below, we outline some of the major problems with the proposed rule.

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I. The Proposed Rule Would Increase Inefficiency in Immigration Court Proceedings by Placing Individuals Who Pass Their Credible Fear Interviews into Asylum and Withholding Only Proceedings

Contrary to its stated purpose, the proposed rule would decrease efficiency in immigration court proceedings. The proposed rule would place individuals who pass their credible fear interviews into asylum and withholding only proceedings, in contrast to the current practice of placing applicants in regular removal proceedings. This is an inefficient use of government resources because some people may have an alternative way to resolve their immigration case. Compared to nearly any other type of application, asylum cases are very complex and require more resources from immigration judges, DHS attorneys, and the applicants themselves.. Allowing for applicants to be placed in regular removal proceedings allows for the immigration court in some situations to dispense with cases that can be resolved by means other than asylum more quickly and efficiently. Placing applicants in asylum and withholding only proceedings effectively forces them to pursue only the most complicated and time-consuming claim that they have, to the exclusion of other simpler claims that might be more quickly adjudicated.

The proposed rule does not meet its stated purpose of promoting efficiency, but rather seeks to force applicants to only pursue the claim with the highest evidentiary burden. Applicants for asylum carry the burden of proof to show that they would be persecuted on account of a protected ground, and most applications involve highly technical arguments and hundreds of pages of supporting evidence. In contrast, most other applications have more straightforward legal standards and require evidence that is less voluminous and is easier to obtain. Forcing applicants and the courts to wade through complicated asylum applications when there may be a simpler alternative that would dispose of the claims is a much less efficient way of managing the immigration court's heavy docket.

II. The Proposed Rule Violates Due Process by Having Asylum Officers Apply the Bars to Asylum During the Credible Fear Process.

The proposed rule also provides that asylum officers evaluate cases for internal relocation and other bars during the credible fear interview, and if a bar were to apply, the result would be a negative credible fear finding. This is an inadequate way to adjudicate potentially complicated issues related to bars to asylum. Applicants undergo credible fear interviews within days of their arrival in the U.S., while in detention, after an often traumatic and physically and mentally draining journey. The purpose of the credible fear process is to quickly screen out false or otherwise invalid claims for asylum. Interviews are often conducted without adequate interpretation services, no prior access to counsel, or ability to obtain and translate foreign documents. The brief interview applicants have with an asylum officer, without access to the resources necessary to fully present their claims, is not an adequate forum for their cases to be decided.

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III. The Proposed Rule Violates Due Process by Excluding Many Claims from Review by an Immigration Judge.

The proposed rule's provision that refusing to request review of a negative credible fear finding from an immigration judge would be interpreted as declining review also violates due process by preventing review of a negative credible fear determination by an impartial adjudicator. Currently, and applicant who does not indicate whether he or she desires to have the credible fear finding reviewed by an immigration judge is referred to an immigration judge for review as a safeguard. The proposed change greatly increases the likelihood of misunderstanding and abuse in cases of ambiguity. Applicants are almost always detained during their interviews and are relying on phone interpreters to navigate an unfamiliar legal system. Due process, as enshrined in our constitution, requires that they have access to a fair and adequate process and that claims are subject to review by an impartial immigration judge.

IV. The Definition of Frivolousness Proposed in the Rule Does Not Allow For the Development of the Law and Discourages Applicants from Pursuing Bona Fide Applications

An applicant who knowingly files a frivolous application is subject to severe penalties, including ineligibility for nearly all immigration relief in the future. The proposed rule provides that an application is frivolous if a grant of asylum "is clearly foreclosed by applicable law". The provision that applications which are "clearly foreclosed by applicable law" are frivolous would severely hamper the ability of the law to adapt and respond to novel circumstances. Because "applicable law" here includes decisions by the BIA or the Attorney General, many attorneys and applicants may be hesitant to file bona fide applications for protection for fear of subjecting themselves to a bar from protection or even criminal penalties.

V. The Definition of Frivolousness Proposed Does Not Adequately Allow for Applicants to Respond to Allegations of Improper Applications.

The proposed rule also provides that an immigration judge or asylum officer need not confront the applicant with a potential issue of frivolousness before making a frivolousness finding. It is unclear how an immigration judge would be able to determine if an applicant is "knowingly" filing a frivolous application if he or she is not required to confront the applicant to find out if the applicant understands that the application is frivolous. For example, an immigration judge could have no way of knowing if an applicant has "knowingly" filed an application that is "foreclosed by applicable law" without questioning the applicant in this regard.

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VI. The Lists of "Generally" Barred PSGs, Political Opinions, and Situations Where Nexus Cannot "Generally" Be Established Do Not Appear to Have Any Valid Justification and Will Create Confusion Among Adjudicators Because Each of These Factors is Fact Specific Depending on the Country in Question and the Evidence Presented in a Particular Case.

The proposed definition of a particular social group (PSG) is unclear and subject to an extreme variance in interpretation. The requirement that a PSG be simultaneously socially distinct and particular has already caused a great deal of confusion in the immigration bar and the courts and has been subject to wildly different interpretations by the courts.

The proposed definition provided in the regulations of "generally invalid" PSGs and political opinions and "generally invalid" theories of nexus is also confusing, especially given the proposed changes to the definition of frivolousness with respect to "claims clearly foreclosed by applicable law". This approach to rulemaking will cause additional confusion and inconsistent adjudications because the proposed regulation does not categorically bar the use of these PSGs, political opinions, or theories of nexus and does not explain why they are invalid given the explicit definitions of PSG created by this regulation. Furthermore, whether a proposed PSG in a given country meets the regulatory requirements is in large part a factual question, and thus not appropriate for invalidation via a blanket regulatory provision. *See* Matter of M-E-V-G-, 26 I&N Dec. 227, 242-43 (BIA 2014). Whether a particular PSG is cognizable will vary by country and by the evidence submitted in a given case. Discouraging the use of certain PSGs by regulation would therefore create undue confusion and inconsistency in immigration court proceedings, which are the appropriate forum for the resolution of fact specific and case specific questions. The listing of examples without explanation creates ambiguity and not clarity for adjudicators.

VII. The Proposed Rule's Revision of the Firm Resettlement Standard Does Not Take Into Account The Complexities of Immigration Law in Third Countries of Alleged Resettlement and Does Not Account for Changed Circumstances in the Applicants' Home Countries or Country of Temporary Residence.

The proposed changes to the definition of firm resettlement will also increase the burden on adjudicators and lead to inefficiency and inconsistent results. The proposed rule would preclude an applicant from receiving asylum if he or she resided or could have resided in legal immigration status in another country, even if that status is not permanent but "potentially indefinitely renewable." This rule would require adjudicators to consider complicated questions of foreign law and how a particular applicant would fit into the immigration system of a foreign country. The current rule, which focuses on the immigration benefits an individual actually applied for or received is a much simpler inquiry and would preserve judicial resources and achieve the INA's goal of providing protection to those who cannot receive it elsewhere. It is unclear how an adjudicator would be able to determine if a temporary immigration benefit in a third country is "indefinitely renewable." Conditions or policies in the third country, which has made no binding promises of protection to the applicant, can change. The applicant could then be left with no protection and risk refoulment to the country of persecution.

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Additionally, the expanded definition of firm resettlement exposes the United States to potential violations of international law, such as Article 33 of the 1951 Convention Relating to the Status of Refugees/1967 Protocol. As a signatory, the United States is prohibited from "expelling or returning" a refugee in any manner to a territory where their life or freedom would be threatened on account of the five protected grounds. Many of the countries that asylum-seekers travel through are no safer than the ones from which they have fled. Requiring adjudicators to find firm resettlement using this expanded definition is equivalent to violation of the non-refoulment principle.

This burden on applicants and adjudicators is especially heavy because the proposed rule would require asylum officers to considers bars, including the firm resettlement bar, at the credible fear interview stage. An applicant who has just arrived in the United States will not have with them the immigration code of each country that they passed through in order to be able to demonstrate to an officer that the firm resettlement bar does not apply in their case.

The provision summarily barring applicants who were physically present in another country for more than a year from applying for asylum does not take into account the potential for changed conditions in the home country. Many applicants only become subject to persecution, and thus eligible for asylum, after leaving their home countries. Many of our clients are students who came to the United States or another country to pursue their educations, but while in the United States or a third country, events took place in their home countries that make it unsafe for them to return. Applicants in this situation would be subjected to this rule, and barred from protection, even though they had no reason to and no intention of applying for asylum when they first left their home countries.

In conclusion, the proposed changes do nothing to streamline the asylum process or provide clarity to adjudicators. Rather, they muddy the waters in an already complicated field of law, and deny desperate people seeking protection from persecution the basic guarantees of due process, by denying them access to a fair and adequate forum for the resolution of their legal claims. We strongly urge the Departments to reject the rule in its entirety.

Sincerely,

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