October 23, 2020

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:

Our organization, Council on American-Islamic Relations – California (CAIR-CA), submits this comment urging the Department of Justice (DOJ) to withdraw these proposed rules in their entirety. The Notice of Proposed Rulemaking (NPRM) would take away procedural protections for asylum seekers in removal proceedings, making it more difficult for asylum seekers to find safety in the United States. The proposed rule would require asylum cases to be adjudicated within 180 days of filing, resulting in great difficulty for asylum seekers trying to find competent counsel or prepare for their cases. Likewise, the proposed rule would create a 15-day filing deadline for asylum applications for those in asylum-only proceedings, again making it very difficult to obtain counsel or to fully develop their asylum claims. The rule would require judges to reject asylum applications for minor errors in completing the form, or for failing to pay the asylum fee, potentially making the asylum seeker waive their ability to ever seek asylum. And the proposed rule would fundamentally alter the role of the immigration judge by allowing judges to submit their own evidence in asylum proceedings.

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. This new rule would make it increasingly difficult for them to obtain the legal remedy they need to protect themselves and their families.

## I. The proposed rule requires the customary sixty days to illicit meaningful comments from the public.

The Administrative Procedure Act requires agencies to give the public a meaningful opportunity to provide input on proposed regulatory changes. This NPRM only allows the public to comment within 30 days rather than the customary 60 days. The proposed rule would drastically

change the status quo for asylum cases and therefore requires a meaningful comment period before such changes are implemented. As was earlier mentioned, this rule inhibits an asylum seeker's ability to present a thorough case by creating a 15 day filing deadline from their first hearing, allowing cases filed to be rejected on minor technical errors, hurrying the resolution of complex asylum cases within 180 days after filing, and discarding with fairness and impartiality by allowing judges to add their own evidence to the record and giving greater weight to government information over others. These changes require more than 30 days to comment on.

Furthermore, in order to properly comment on the new proposed rule it would require understanding the current legal landscape around asylum. Two recent proposed rules (NPRM issued on June 15, 2020 titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" 85 Fed. Reg. 36264 and NPRM issued on August 6, 2020 titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 52491) directly affect asylum seekers rights and have just finished their comment period. Without knowing how those two rules may or may not be implemented, commenting on the current rule within 30 days requires working through hypotheticals and does not allow for meaningful commentary.

Finally, the government has not provided any reason for the shortened comment period. Due to the global pandemic and the challenges our staff and other legal services providers are currently facing with balancing work and family from home, the customary 60-day comment period is more important than ever. We have seen an increased demand for our services as the pandemic has caused delays in immigration processing, unemployment, and barriers to travel. The government should allow more time for the public to comment on the rule.

## II. The proposed rule expedites asylum cases at the cost of fairness to asylees by requiring resolution of asylum cases within 180 days of filing.

Proposed sections 8 CFR §§ 1003.10(b), 1003.29, 1003.31, and 1240.6 would require immigration judges to complete asylum cases within 180 days after the asylum application is filed in all cases, unless the respondent can demonstrate exceptional circumstances. The proposed rule presents serious due process concerns for asylum seekers, both past and present. The current backlog of asylum cases is at a staggering 1,246,164 cases. It is not clear whether the rule would apply to asylum seekers with pending applications as well as new asylum seekers. If the rule applies to asylum seekers with pending applications, the courts would be overwhelmed with cases, and attorneys with hundreds of clients with new due dates and deadlines would be overburdened and unable to provide competent legal counsel. If the rule only applies to future asylum seekers, there is still the problem that 180 days is inadequate to compile all the information to present a strong case. Additionally, asylum seekers with already pending cases would struggle to have their cases heard if judges are pressed to adjudicate all new cases within 180 days.

The only way for asylum seekers to have the 180-day deadline extended is if they show "exceptional circumstances" which they define as "clearly out of the ordinary, uncommon, or rare." United States v. Larue, 478 F.3d 924, 926 (8th Cir. 2007). That includes "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). More common challenges asylum seekers may face in complying with a 180-day deadline—such as seeking counseling in order to overcome trauma and better articulate their claim—can allow one to seek a continuance, but only if it is within the 180 day window. However, those challenges will not qualify as "exceptional circumstances" for purposes of extending this hard deadline.

Additionally, it is challenging for asylum seekers to gather evidence and obtain counsel within 180 days. Presenting a strong asylum claim takes many hours of research and investigation. The documents available may only be in a foreign language and need interpretation which can take many more hours. In some cases an expert opinion is needed, in which case it may take days to find and get in touch with an expert who may take weeks or months to write an expert opinion to present in the case. This may discourage attorneys from taking cases because they will not have time to do this work for a large volume of cases in a short period of time. And in many cases asylum seekers will be forced to present their cases without representation. Asylum seekers who present their cases without representation are much more likely to be denied because they weren't able to present the appropriate evidence and a 180-day deadline will only aggravate this issue.[1]

## III. The proposed rule violates an asylum seeker's due process rights by requiring them to file their cases within 15 days of their first hearing, a time period that is insufficient to properly support their claim.

The new proposed rule requires asylum seekers to file their applications within 15 days of their first hearing. Within those 15 days an asylum seeker would be required to find counsel, research and gather documents to support their claim, and file. Oftentimes it takes weeks to compile all the information and gather the documentation necessary to file the claim. Furthermore, as was described earlier, the rules around asylum are in flux. Particularly harmful would be the June 15th rule that would allow judges to pretermit an asylum seekers case without holding a hearing if they do not show a "prima facie claim for relief," *see* proposed 8 CFR § 1208.13(e). It is here where it would be necessary to have competent legal counsel to guide an applicant through the process and gathering the materials needed to show a "prima facie" claim for relief. However, the ability of an asylum seeker to seek counsel under this proposed rule would be difficult. If the rule is put into place as is, it would not be hard to imagine overwhelmed attorneys turning away asylum seekers because of their obligations to provide competent counsel to current clients also trying to comply with such a short deadline.

This problem would be especially serious for asylum seekers who are detained since their ability to find legal counsel or even a competent interpreter is extremely limited. Almost all asylum seekers who seek asylum at the border would be detained at the time of their first hearing and are unlikely to secure bond before their 15 day window to submit an application expires. Because of the limited capacity and availability of legal representation to people in detention centers, the result would be that almost all asylum seekers who arrive at the border will be submitting their applications without legal counsel and without a competent interpreter. This increases the

[1] Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases, TRAC IMMIGRATION, Aug. 15, 2015, https://trac.syr.edu/immigration/reports/396/.

likelihood that technical errors will be made, and individuals eligible for asylum will be wrongfully deported to countries where they will be persecuted. The deadline creates a serious due process issue, since applicants cannot effectively exercise their right to apply for asylum if they do not have access to the instructions in a language that they can understand and do not have effective access to legal counsel.

As a nonprofit organization, a 15-day filing deadline will leave no time to prepare an application within the deadline along with the demands of other cases. Nonprofit organizations, like ours, who provide representation to some of the most vulnerable clients with little to no financial means, receive hundreds of requests for assistance each year. As a result, we are often unable to even return the first call within the first week of contact. A 15-day deadline would mean that we would likely be unable to serve many asylum seekers simply because we would not be able to provide competent representation within the deadline. Furthermore, asylum seekers may lose time needed to prepare their case waiting to hear back from attorney and are more likely to file a weak claim or make an error in their filing as a result of the deadline.

## IV. The proposed rule requires immigration judges to reject asylum applications based on minor technical errors, penalizing a vulnerable group for not understanding arbitrary rules.

The proposed rule would reject any incomplete application and would require applicants to return a completed application within 30 days. Reasons that qualify as "incomplete" could be as minor as leaving blank the field for middle name if you do not have one.[2] This new rule would not reject cases based on their merits, but rather on the person's lack of knowledge of arbitrary rules. The proposed rule only further makes inaccessible legal remedies to a group of people who need them the most. Pro se asylum seekers, in particular, would be greatly harmed by this rule because they may not know about the rule and the 30-day turnaround deadline.

Additionally, asylum seekers are often new arrivals to the United States and with limited to no English language skills. As a result, they are more likely to make a mistake simply because they do not understand the instructions. The proposed rule adds many additional deadlines and technical requirements which asylum seekers must comply with to even get a hearing on the merits of their cases. There is a real danger that many asylum seekers will not receive adequate notice of these rules in a language that they understand. The lack of adequate notice of the already existing one year deadline to file an asylum application after arriving in the United States has already been the subject of litigation (*see Mendez-Rojas v. Wolf*), and this proposed rule would create even more confusion. Furthermore, the tight deadlines will make it more difficult for them to find interpretation or legal assistance to help them understand the technical filing requirements. Therefore, asylum seekers with valid claims may be denied and risk their lives simple due to technical errors.

[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-d88518c57dcc_story.html.

## V. The proposed rule allows judges to introduce their own evidence into the record, thereby improperly placing judges in the role of prosecutor.

The new proposed rule will also give the judge the opportunity to supplement the record with his or her own evidence. The only safeguard written into the act is that the judge must provide "a copy of the evidence . . . to both parties and both parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision." Asylum seekers and DHS are required by the immigration court procedures to submit evidence 15 days before a hearing. This rule only requires a judge to present evidence prior to issuing a decision. Presumably the judge could offer new evidence on the day of the hearing not allowing applicants time to prepare a response. Additionally, an unrepresented asylum seeker may not know that they can comment or object to evidence presented by the judge. Furthermore, allowing judges to supplement the record with their own evidence would put judges in the role of prosecutor not fact-finding adjudicator. The role of the judge is to play an impartial adjudicator, not one who can advocate for or against a position.

## VI. The proposed rule gives greater weight to information from government agencies over non-government sources, creating the potential for political bias to inhibit an asylum seeker's claim.

Additionally, the type of evidence a judge may rely on is changed under the proposed rule. Judges may rely on information from government agencies or other government sources but can only rely on the information from non-government sources "if those sources are determined by the immigration judge to be credible and probative." This is problematic because government sources may not have all the relevant information and could be subject to political bias.[3] Therefore an asylum seeker trying to support their claim may have to rely on inaccurate and potentially biased information from the government sources. If they choose to support their claim with non-governmental sources, immigration judges would have to first decide if the evidence is "credible and probative." The rule does not define what a judge looks for to decide if a source is credible and probative, further leaving asylum seekers scratching their heads as to what would qualify and what would not.

There are many rebuttable and established non-governmental organizations providing country of origin information that asylum seekers rely on to support their claims. These organizations include Amnesty International, Center for Gender and Refugee Students, Freedom House, Human Rights Watch, and International Crisis Group. All of these organizations provide important unbiased reports from work they do on the ground in countries where individuals are facing persecution. In addition, these organizations often report on issues before government sources do and have the most up to date information, providing crucial information to the immigration judge adjudicating an asylum claim. If the credibility of these sources is left for debate in every hearing it will add unnecessary decision making in an already challenging process.

[3] *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.

## Conclusion

The proposed rule would drastically change the asylum process. Asylum seekers escaping from harsh conditions in their home countries would have to work fast in order to file their claim within 15 days of their first hearing. Such a quick turnaround would inevitably result in filing weaker cases because the complexity of asylum cases requires lots of research and gathering documentation. Additionally, asylum seekers may struggle to secure counsel to help them because attorneys may be overwhelmed with obligations to current cases and would be unable to provide competent counsel within the proposed deadline. Should an asylum seeker succeed in filing without being rejected for technicalities, an asylum seeker's case would be adjudicated within 180 days, not nearly enough time to understand a person's claim. Furthermore, during such an adjudication, a judge could potentially introduce his or her own evidence or discount the non-governmental information supplied by an asylum seeker. This proposed rule paints a dark picture of the asylum process and is a grave injustice to those seeking a protection from persecution they desperately need. For these reasons CAIR-CA objects to the proposed rule in its entirety and urge you to rescind it.