Dear friends of Bay Area Border Relief (BABR),

WE NEED YOUR HELP TO PROTEST THE PROPOSED RULE CHANGES TO U.S. ASYLUM LAW by submitting a public comment by July 15, 2020. ***Please join BABR to formally oppose these rules and request their withdrawal on the grounds that they are unlawful and inhumane.*** *The current U.S. administration is proposing the elimination of most avenues to legally claim asylum. The ability to seek asylum from persecution is a core human right enshrined in international and domestic law. This is an illuminating article summarizing the issue in the Washington Post: https://www.washingtonpost.com/opinions/2020/06/19/we-cannot-let-trump-administration-turn-this-countrys-back-asylum-seekers/*

Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review *was published in the Federal Register on June 15, 2020). As the full text of the Proposed Rules is 161 pages long, BABR has selected a more manageable number of topics for your consideration and comment. In providing this summary, we acknowledge CLINIC (Catholic Legal Immigration Network, Inc.) who created an amazing general template to use in drafting public comments. https://cliniclegal.org/resources/asylum-and-refugee-law/asylum-rule-template-comment.* ***CLICK IF YOU HAVE TIME, OTHERWISE PLEASE FOLLOW THE SUMMARY BELOW****.*

Many thanks to the inspiring David H. Square, Esq., of the Square Law Group in Brownsville, Texas, for helping us decipher this complex area of immigration law.

Abbreviations:

AOs – Asylum Officers
CAT – Convention Against Torture
CFR – Code of Federal Regulations
CF – Credible Fear
DHS – Dept. of Homeland Security
IJs – Immigration Judges
IR – Internal Relocation
PO – Political Opinion
PSG – Particular Social Group

HOW TO SUBMIT YOUR COMMENT (CLINIC also has step-by-step instructions available **here**.)
https://cliniclegal.org/resources/federal-administrative-advocacy/step-step-instructions-how-submit-public-comment

- Go directly to the comments form https://www.regulations.gov/comment?D=EOIR-2020-0003-0001
- Enter your comment in the text box (less than 5,000 characters) or upload your comment as a PDF
- Use your own original words. Comments that are too similar may be disregarded.
- Attach statistics or supporting documents cited in your comments so that they are clearly part of the administrative record
- If you are a subject-matter expert and want to offer comments on your area of expertise, explain why you are qualified to offer this perspective. Explain your educational and professional background or attach a copy of your CV to your comment. Feel free to talk about your faith in your comment.
- Organizational comments should be signed by a representative of the organization and provide the business contact information of the representative for any follow-up questions or concerns.

NOTE: DO NOT INCLUDE PERSONAL CONTACT INFORMATION AS THESE ARE PUBLIC COMMENTS!

It would help substantiate your comments if you added one or more of the following:

- Your personal story
- A story about what you heard or saw at the border on your journey(s) there
- An affidavit of someone who is or was seeking asylum, demonstrating how difficult the process is under the current rules never mind how impossible it will become
- Data to support statements you make
- Maps showing the countries that need to be crossed and length of journey to the US
- Other information, stories, *etc.* to give the reviewers proof of your comments

HERE'S WHAT SOME OF THE PROPOSED RULES SEEK TO DO:

1. **Deprive Asylum Seekers of "Due Process" – Their Long-Established Right to Have Their Day in Court! (8 CFR § 1208.13 (e))**
   - Would allow IJ's to deny asylum without even permitting a hearing or chance to testify
   - If IJs determine, on their own initiative or at the request of DHS attorneys, that the application form does not adequately make a claim, they may "pretermit" or refuse to hear the full claim

   CONCERNS:
   - Currently, many asylum seekers do not have lawyers or speak English fluently
   - Many struggle to complete the 12-page asylum application at all, often reluctant to share intimate details of their past and present fears with unofficial translators
   - Unlikely to be well versed in complexities of US asylum system or lay out their entire case in the application
   - Would further restrict their eligibility and right to DUE PROCESS
   - Would be an abrupt change to decades of established precedent and practice before the immigration courts which calls for the FULL examination of the applicant
   - Would undermine the fairness and integrity of the entire asylum adjudication process by preventing the IJs from reviewing ALL the evidence

2. **Make it Virtually Impossible to Prevail on a PARTICULAR SOCIAL GROUP Claim (8 CFR § 1208.1(c))**
   - Would make it impossible to win protection for those coming from a country with "generalized violence or high crime" (restrictions seem calculated to discriminate against individuals from Mexico and Central America)
   - Requires applicants to exactly state every applicable PSG before the IJ or forever lose the opportunity to make that claim, even in the case of ineffective assistance of counsel

   CONCERNS:
   - Currently, applicants for asylum or withholding must demonstrate they fear persecution based on a protected characteristic: race, religion, nationality, membership of a PSG or political opinion
   - Definition intended to be evolutionary and open to the diverse and changing nature of groups (UN Commissioner on Refugees Guidelines on International Protection)
   - Asylum seekers' lives should not depend on their ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements
   - The AO or IJ has a DUTY to help develop the record
   - It would be UNCONSCIONABLE to send an applicant back to persecution for failure to adequately craft PSG language
   - Applying this to asylum seekers, including unrepresented individuals, would raise serious DUE PROCESS issues

3. **Redefines POLITICAL OPINION, Contravening Long-Established Legal Principles (8 CFR § 1208.1(d))**
   - Redefines PO in the NARROWEST possible way, excluding well-established principles of international law
   - Seeks to erase all PRECEDENT that is favorable to asylum seekers where PO claims are adjudicated on a CASE-BY-CASE basis
   - Explicitly states that a PO or imputed PO must be against a state or entity not a culture

   CONCERNS:
   - Would send many bona fide asylum seekers back into harm's way.
   - Fails to recognize that many asylum seekers flee their homelands precisely because the GOVERNMENT OF THEIR COUNTRY IS UNABLE OR UNWILLING TO CONTROL NON-STATE ACTORS, such as international criminal organizations
   - Rejects that expressed OPPOSITION TO TERRORIST OR GANG ORGANIZATIONS could qualify as a PO unless the "expressive behavior" is related to state action
   - INDIGENOUS PEOPLE who oppose gangs taking their land would be barred
   - WOMEN holding feminist POs that men do not have the right to rape them would likely be barred

4. Narrowly Defines PERSECUTION, Impermissibly Altering the Accepted Definition (8 CFR § 208.1(e))

- For the first time provides a regulatory definition of PERSECUTION that would be restrictive
- The harm must be "extreme" and would EXCLUDE every instance arising out of civil, criminal, or military strife in a country; and any treatment that the US regards as unfair, offensive, unjust, or even unlawful or unconstitutional
- Does not require adjudicators to consider CUMULATIVE HARM

CONCERNS:

- The most fundamental aspect of asylum law is the obligation of countries to protect individuals with WELL-FOUNDED FEARS OF PERSECUTION from being returned to harm
- Limits the long-accepted broad definition of PERSECUTION, currently defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive"
- Currently requires a FACT-SPECIFIC ENQUIRY
- Fails to provide any guidance on adjudicating claims by CHILDREN who may experience harm differently from adults
- Applicants who have suffered multiple "minor" beatings or multiple short detentions would likely be disqualified

5. Imposes a Laundry List of Anti-Asylum Measures Under the Guise of NEXUS (8 CFR § 208.1(f))

- Some of the most RESTRICTIVE aspects of the proposed rule are laid out in the NEXUS section
- Would allow BLANKET DENIALS of claims that have long been found to meet the standard for asylum
- Essentially eliminates the ability to grant asylum based on private-actor harm, such as CRIMINAL ACTIVITY
- Would also virtually eliminate GENDER as a ground for asylum

CONCERNS:

- Courts have long held that each asylum application should be adjudicated on a CASE-BY-CASE BASIS, including where GENDER is part of the NEXUS
- GENDER is similar to other protected characteristics like race and nationality, and adjudicators should determine on an INDIVIDUAL BASIS whether the facts of a given case meet the standard
- Most harm that rises to the level of PERSECUTION could be characterized as "criminal activity," since in virtually every country beatings, rape, and threatened murder is criminalized activity
- Basically, an ANTI-ASYLUM WISH LIST, directing adjudicators to deny most claims

6. Redefines the INTERNAL RELOCATION Standard, Greatly Increasing the Burden on Those Seeking Protection (8 CFR § 208.13(b)(3); 1208.16)

- Would create an outright presumption that asylum seekers have to first relocate within their own country – a practical impossibility for most
- Shifting the burden of proof to the applicant to prove by a preponderance of the evidence that IR is not reasonable
- Would force adjudicators to make decisions in a vacuum ignoring the overall context of an applicant's plight

CONCERNS:

- Would prematurely stop the legal process by preventing the adjudicators from considering CRITICAL FACTORS (e.g., whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties)
- Should be adjudicated on a CASE-BY-CASE basis and the regulations should not suggest justifications to deny applications of bona fide asylum seekers.
- Would overturn years of jurisprudence by SEVERELY LIMITING THE DISCRETION adjudicators exercise and denying most asylum applications
- This presumption would apply whether or not the applicant has proven past persecution

7. Imposes a Laundry List of Anti-Asylum Measures Under the Guise of DISCRETION (8 CFR § 208.13, § 1208.13)

- Sets up 3 tough factors that adjudicators must consider when exercising DISCRETION to grant asylum:

(a) Unlawful or attempted unlawful entry into the US, unless feeling persecution from a contiguous country
(b) Failure to seek asylum in at least one other country transited
(c) Use of fraudulent documents, unless arriving directly from country of feared persecution with no transit along the way

- In addition, the proposed Rules set up nine adverse factors to consider, such as spending 14 or more days in transit in another country and transit through more than one country; criminal "convictions" that have been expunged; failure to pay taxes; and 2 or more asylum applications denied for any reason

CONCERNS:

- The proposed Rule is CRUEL; it would turn on its head years of jurisprudence to deny most asylum applications
- Severely LIMITS ACTUAL DISCRETION of adjudicators by mandating criteria that they must use in their determinations
- Each adverse factor, by itself, establishes conditions nearly IMPOSSIBLE to meet

8. Redefines FIRM RESETTLEMENT to Include Those Who Are Not Firmly Resettled (8 CFR § 208.15, § 1208.15)

- Would expand the definition of FIRM RESETTLEMENT for individuals seeking asylum, and significantly increase the number of asylum seekers who would be considered firmly resettled and therefore barred from asylum
- Includes applicants who have resided in another country for a year or more after fleeing their country of persecution and prior to coming to the U.S. (even if there is no offer or pathway to residency or citizenship); cases where they could have kept a non-permanent but renewable status in any country before coming to the U.S. (regardless of whether the status was applied for or offered); and, lastly, citizenship in another country and being present there prior to coming to the U.S.

CONCERNS:

- Would BAR APPLICANTS even if they were not offered permanent residence or citizenship in another country.
- INCREASES DISCRETION for IJs to decide whether the applicant "could have" sought some status in that country, ignoring any safety concerns in or ties to that country.
- No exception based on: INABILITY to leave the third country, being TRAFFICKED, being unable to leave for FINANCIAL reasons, or on FEAR of remaining in the third country.
- US "Remain in Mexico" policy forces asylum seekers to spend more time in Mexico before their applications are considered, thus potentially bolstering potential DHS FIRM RESETTLEMENT arguments against these forced to remain in Mexico – a Catch 22!
- Takes no account of the long wait times that applicants are already subjected to, the geographical reality of arriving to the United States to apply for asylum and the specific circumstances that they endure throughout their journeys

9. Imposes a Nearly Impossible Evidentiary Burden by Eroding Protections Established by the Convention Against Torture (8 CFR § 208.18; 8 CFR § 1208.18)

- Would require CAT applicants to specifically prove that a government official who has inflicted torture has done so "under color of law" and is not a "rogue official" (an official claiming to be acting in an official capacity, wearing an official uniform, or otherwise making it known to the applicant that they are a government official)

CONCERNS:

- A DANGEROUS INTERPRETATION of the CAT as it would LIMIT THE PROTECTIONS afforded by narrowing the definition of torture and likely invalidating a large number of claims by survivors of torture
- A CAT applicant would have no reason to know whether the official is acting lawfully or as a "rogue" official
- Creates a substantial, unreasonable, and often IMPOSSIBLE BURDEN OF PROOF on the applicant to obtain the required detailed information from a government official who has tortured or threatened him or her
- IGNORES THE ACTUAL CIRCUMSTANCES and the realities of victims of torture who flee for their lives and seek asylum

10. **Radically Redefines the Definition of FRIVOLOUS and May Prevent Asylum Seekers from Pursuing Meritorious Claims (8 CFR § 208.20, § 1208.20)**
    - Would expand the meaning of a FRIVOLOUS application if the adjudicator determines it lacks merit or is foreclosed by existing law
    - Would allow AOs to deem applications FRIVOLOUS and refer to the IJ on that basis

    CONCERNS:
    - Currently, FRIVOLOUS asylum determinations may only be made by an IJ or the Board of Immigration Appeals, not AOs
    - Respondent is currently afforded a sufficient opportunity to account for any discrepancies or implausible aspects
    - The definition is quite narrow: limited to DELIBERATE FABRICATION OF MATERIAL ELEMENTS
    - Applicant could be subject to one of the harshest bars in immigration and forever foreclosed from immigration relief

11. **Impermissibly Heightens the Legal Standards for CREDIBLE AND REASONABLE FEAR Interviews and Will Turn Away Refugees Without Providing Them a Full Hearing (8 CFR § 208.20, § 1208.20)**
    - Would make it significantly harder for asylum seekers subject to expedited removal to have their request for asylum fully considered by an IJ
    - To establish CREDIBLE FEAR, an applicant will now have to demonstrate a "reasonable possibility" that they will be able to establish eligibility for relief, a far higher standard to meet than the previous need to show "a significant possibility" adopted by Congress to protect refugees from deportation to persecution

    CONCERNS:
    - By Increasing the complexity of CF screenings and making the preliminary screening stage more stringent and subjective, this would make it even more difficult to prove CF and would prevent cases from being reviewed fully before they are thrown out
    - Asylum seekers may not be aware that their cases may be thrown out arbitrarily if they do not indicate whether they want an IJ to review the CF denial
    - As with other draconian proposed changes to the Rules, massive language and legal barriers would exist to create an unlevel playing field for the applicant

CONCLUSION

These Proposed Rules represent a radical rewriting of the U.S. asylum system. Each section of these monumental proposed changes merits a full 60-day comment period for the public to adequately prepare comments. Taken together, these Proposed Rules would eviscerate asylum protections that have been in place in the United States for decades. The vast majority of asylum seekers are likely to be denied asylum 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 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 IJs.

Since World War II, the United States has been a beacon of hope for those fleeing danger and harm. These rules would require immigration officials to slam the door on those seeking safety. We call upon the Administration to withdraw these Proposed Rules in their entirety.

THANK YOU!

If you are comfortable doing so, please send Bay Area Border Relief a copy of your public comments: bayareaborderrelief@gmail.com