NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

October 19, 2021

Submitted via https://www.regulations.gov

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Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers; DHS Docket No. USCIS-2021-0012 ("Proposed Rules" or "NPRM")

Dear Assistant Director Reid and Acting Chief Strano,

The National Immigrant Justice Center ("NIJC" or "we") defends the rights and dignity of all immigrants, including asylum seekers. We offer comments in response to the above-referenced Proposed Rules the Department of Justice (DOJ)'s Executive Office of Immigration Review (EOIR) and the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) (collectively, "the Departments").

NIJC's strong interest to proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding

more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including many asylum seekers, torture survivors, and unaccompanied children who have entered the United States by crossing the U.S.-Mexico border. These individuals have overcome unimaginable persecution and torture in their home countries and journeyed to the United States in hopes of finding a better future.

Aiming to "simultaneously increase both the efficiency and the procedural fairness of the expedited removal process," the Departments propose to shift the epicenter of asylum processing from the immigration courts to USCIS, which comes with a myriad of significant changes. The Proposed Rules would upend existing hearing and appellate procedures, grant new authority to order asylum seekers removed, and change detention procedures for asylum seekers.[1] We urge the Departments to provide full review of asylum seekers' claims in immigration court and reconsider their goal to streamline asylum via starting from expedited removal, given its endemic harms. Our comments include suggestions aimed at protecting asylum seekers rights to due process and limit the use of detention.

Objection to comment period

We are not able to comment on every proposed change of this NPRM under the timeframe afforded for comments. Courts have recognized that "90 days is the 'usual' amount of time allotted for a comment period."[2] While we appreciate that the Departments provided 60 days rather than 30 for comments to this NPRM, the 60-day timeframe is the floor, not the ceiling expected in executive rulemaking.[3] A more robust comment period is particularly significant here, given the profound nature of the changes proposed. The Proposed Rules aim to "begin replacing" the current system for adjudicating asylum at the border for the first time in 25 years.[4] These proposed changes require careful consideration and evaluation of the impact on every step

[1] Dep't of Homeland Security & Executive Office for Immigration Review, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 86 Fed. Reg. 46906, 46909 (Aug. 20, 2021).

[2] *Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019) (quoting *Prometheus Radio Proj. v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011)).

[3] Two Executive Orders instruct agencies that, "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment . . . , with a comment period that should generally be at least 60 days." Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011) (emphasis added); see also Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735, § 6(a) (Sept. 30, 1993) ("[I]n most cases [rulemaking] should include a comment period of not less than 60 days.").

[4] 86 Fed. Reg. at 46907.

of an asylum seeker's case. Doing so further requires considering a range of possibilities that may arise under this proposed new system and how those possibilities might fluctuate from one administration to the next. And in particular, the NPRM proposes a system that is a hybrid of expedited removal proceedings and ordinary removal proceedings that has never before existed. The timeframe for this NPRM does not afford us the time and opportunity to dedicate the resources and expertise needed for such careful review. Our failure to comment on every feature of this NPRM or to provide more concrete examples and supporting data is not a tacit endorsement; it simply means we lacked the resources or the time to respond within the time allotted. As such, we object to the timeframe for this comment.

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More specific comments follow. Thank you for your consideration and please do not hesitate to contact Azadeh Erfani for further information.

/s/
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DETAILED COMMENTS

In Response to Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers; DHS Docket No. USCIS-2021-0012 ("Proposed Rules" or "NPRM")

The Departments propose significant changes to the code of federal regulations. These changes significantly broaden the authority of asylum officers, overhaul existing review mechanisms, amend parole regulations, and impose discrete changes to work authorization access and one-year deadline adjudication for asylum. Our comments below review these substantive changes.

NIJC's position is that the Departments' stated intent to build a humane and equitable system that promotes efficiency is laudable, but this effort is misguided in some critical ways and at times at odds with this purported goal. As further discussed below, 1) NIJC offers substantive revisions to the proposed parole regulations, calling attention to a drafting error and offering substantive revisions to protect the liberty of asylum seekers who pass initial screenings; 2) NIJC expresses alarm that the Proposed Rules' foundation in expedited removal will inherently conflict with the Departments' purported goals to advance fairness, as proposed changes would strip many asylum seekers of their day in court, compound existing flaws of initial screenings, and effectively do away with invaluable guardrails, including reconsideration, de novo review before immigration courts; 3) we then review the new proceedings the NPRM proposes to create in USCIS, highlighting additional due process concerns and recommending specific measures USCIS could take in its endeavor to promote fairness; 4) last, we commend the Departments for discrete changes that will mitigate existing barriers for asylum seekers in terms of the one-year bar for adjudication and access to employment, while outlining remaining concerns as to the conversion of initial screenings into asylum applications and urging USCIS to prioritize the rescission of rules that severely delay work permit adjudications.

There is no doubt that the current asylum system is deeply flawed in delivering just outcomes in line with domestic and international protection laws. We applaud the Departments' initiative in prioritizing nonadversarial reviews, but strongly object to starting from expedited removal as the vehicle for fair and humane proceedings. As our comments spell out further below, we are particularly concerned that this NPRM short-circuits due process and liberty rights in the name of efficiency—ultimately recycling old problems that hinge on failed deterrence aspirations and result in the rapid removal of people seeking lawful protection.

1) THE NPRM'S PROVISIONS RELATED TO PAROLE SHOULD BE AMENDED TO FIX A DRAFTING ERROR AND TO MODIFY THE PAROLE STANDARD FOR ASYLUM SEEKERS WHEN DETENTION IS NOT IN THE PUBLIC INTEREST.

Despite considerable tension with international treaty obligations and humanitarian interests, the current legal framework makes detention the de facto response to asylum seekers arriving on the border seeking safety. The Proposed Rules call for expanding parole authority in response to existing restrictions on the detention of families or because of capacity constraints. These changes are too narrow and thus insufficient to bring the United States into compliance with international asylum and human rights law, nor will they comport with basic standards of human morality and dignity.[5] Detention causes significant harm to the mental and physical health of asylum seekers, especially those who have endured past trauma.[6] The United States' restriction on the liberty of asylum seekers, often in jail-like facilities and without a defined end date, runs afoul of numerous international law obligations including the prohibitions on torture and arbitrary detention.[7] The federal statute providing the U.S. government with the authority to release asylum seekers on parole is broad in scope, and should be implemented as such.[8]

NIJC client Alexander is a recently arrived asylum seeker who has been detained since April, shuttled between detention facilities in three different states. He has spoken publicly about the harassment and abuse he has endured while in detention because of his sexual orientation. "'I find myself emotionally unstable because I have suffered a lot in detention,'" Alexander recently told the Associated Press. "I never imagined or expected to receive this inhumane treatment."[9]

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[5] 86 Fed. Reg. at 46910.

[6] See, e.g., von Werthern, M., Robjant, K., Chui, Z. *et al.* The impact of immigration detention on mental health: a systematic review, *BMC Psychiatry* 18, 382 (2018), https://bmcpsychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y ("The practice of detaining asylum seekers, a group with a pre-existing vulnerability to mental health problems due to higher exposure to trauma pre- and peri-migration, risks further exacerbating their mental health difficulties. The experience of detention may act as a new stressor, which adds to the cumulative effect of exposure to trauma, leading to an increased likelihood of developing mental health difficulties such as PTSD as a result of the 'building block effect'. Indeed, a 2009 systematic review reporting on the effects of immigration detention on mental health found detain[ed individuals] to have high levels of anxiety, depression and post-traumatic stress disorder. Suicidal ideation and deliberate self-harm were also common.").

[7] Center for Victims of Torture, *Arbitrary and Cruel: How U.S. Immigration Detention Violates the Convention against Torture and other International Obligations* (2021), https://www.cvt.org/sites/default/files/attachments/u93/downloads/arbitrary_and_cruel_d5_final.pdf.

[8] 8 USC § 1182(d)(5) (providing broadly the authority to parole individuals on a case-by-case basis for humanitarian reasons or if otherwise in the public interest).

[9] Philip Marcelo and Gerald Herbert, Associated Press, "Immigrant detention soar despite Biden campaign promises," Aug. 5, 2021, https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d.

NIJC client Grace[10] is an African woman who fled her home country following severe gender violence inflicted on her by her government. She was separated from her children and detained in an Immigration and Customs Enforcement (ICE) jail for nearly two years after she passed a credible fear interview and sought asylum. During that time, in addition to the extreme psychological harm from being seperated from her children, she experienced severe medical issues. An independent physician reviewing her records worried her untreated gynecological problems could lead to an unnecessary hysterectomy. She also contracted hepatitis B and had fainting spells that caused other detained individuals to fear that she would die. Despite all this, the government refused to release her and forced her to fight her case from jail. It should never be the practice of the U.S. government to subject asylum seekers to detention.

The NPRM properly acknowledges the need for a change in approach so that more individuals can "have their fear claims heard and considered outside the detention setting,"[11] which DHS acknowledges will result in a benefit "in terms of human dignity" for those paroled.[12] This goal is laudable and necessary to bring U.S. legal obligations into conformity with international law. Specifically, the United Nations Refugee Agency admonished that the detention of asylum seekers should be avoided and a "measure of last resort," because detention runs afoul of the fundamental rights to liberty and freedom of movement.[13] But the NPRM falls far short of the regulatory revisions needed to ensure that the government's statutorily provided parole authority is used effectively and compassionately and to bring the United States in line with international law.

Accordingly, we propose the following revisions to the NPRM:

(a) DHS must, at minimum, address a drafting error in the NPRM by clarifying the availability and standard for parole determinations for asylum seekers placed in the new adjudicative proceedings the rule proposes before USCIS; and

(b) DHS should amend the Proposed Rules to ensure the availability of parole for asylum seekers as provided by statute by: i) de-linking parole determinations from the availability of detention bed space; ii) providing and defining more clearly the availability of parole when detention is not in the public interest; iii) protecting the liberty interests of asylum seekers by providing that detention is presumed to not be in the public

[10] Pseudonym used to protect confidentiality.

[11] 86 Fed. Reg. at 46910.

[12] 86 Fed. Reg. at 46923.

[13] United Nations High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html.

interest for those who have passed their credible fear interview (CFI); and iv) providing procedural protections to ensure that individuals seeking parole are afforded basic due process.

We turn to each revision below.

a) Edit needed to correct drafting error: the NPRM does not address parole for asylum seekers who are placed in the new adjudicative proceedings before USCIS.

DHS describes as one of the benefits of the proposed rule that it will allow "parole to be considered for more individuals in government custody," while permitting "DHS to prioritize use of its limited detention space to detain those noncitizens who pose the greatest threats to national security and public safety . . . ."[14]

The proposed rule does provide a limited expansion of parole for individuals *before* their credible fear interview (CFI), but it is silent as to the availability of parole for individuals that receive a positive credible fear determination and are placed into this new adjudicative proceedings before USCIS. In *Jennings v. Rodriguez*,[15] the Supreme Court recognized the availability of parole under INA § 212(d)(5) for individuals subject to detention under INA § 235, such that the possibility of parole as a legal matter should not be in doubt. Nevertheless, it is important that the proposed rule explicitly provides for parole and the standard for parole determinations for individuals in the new adjudicative proceeding. The current regulation and proposed rule describe the availability and standard for parole at every other phase of proceedings for individuals initially apprehended through the expedited removal process, such that the gap in the regulatory framework will cause confusion and threaten to defeat the intent of the proposed rule.

The proposed rule's silence regarding the availability of parole for individuals in the new adjudicative proceedings appears to be a drafting error. Section III of the preamble, "Discussion of the Proposed Rule," contemplates that many individuals placed in the new adjudicative process would be non-detained by the time of their hearing before USCIS.[16] And, the proposed rules themselves describe the new hearing procedures before the asylum officer in a manner that presumes the prior release of individuals.[17]

[14] 86 Fed Reg. 46906, 46938.

[15] 138 S. Ct. 830, 837 (2018).

[16] *See* 86 Fed Reg. 46906, 46919 (describing changes to the "failure to appear" rule for the new adjudicative proceeding).

[17] *Id. at* 46942 (proposed new and amended regulations, 8 C.F.R. §§ 208.9, 208.10).

We propose the following amendments to fix this apparent drafting error. Note that the proposal here only addresses the fix necessary to ensure that the Proposed Rules are equally applicable throughout its envisioned process; in section (b) below we provide additional substantive proposed changes to these provisions. If the Department makes the modifications suggested in part (b) below, it should take care to preserve uniformity as to the treatment of individuals in these two different procedural postures.

To address the apparent drafting error, DHS should amend current 8 C.F.R. § 235.3(c) to clarify that it also applies to individuals placed into the new adjudicative proceedings and irrespective of whether they were apprehended at a port of entry or between ports of entry. The proposed new additions to the rulemaking are underlined and bolded:

> (c) ~~***Arriving a***~~ ***A****liens* ***referred for hearings under § 208.9 of this chapter or*** *placed in proceedings under section 240 of the Act.* Except as otherwise provided in this chapter, any ~~**arriving**~~ alien who appears to the inspecting officer to be inadmissible **under section 235(b) of the Act**, and who is ~~**placed in**~~ **referred for a hearing under § 208.9 of this chapter or** removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act. …

b) The NPRM needlessly restricts DHS's broad statutory authority to parole and inadequately protects the liberty of people who pass their CFI.

As the NPRM recognizes, the expedited removal statute does not limit DHS's general parole authority under INA § 212(d)(5). Under that provision, "The Attorney General may . . . parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States."[18] The Supreme Court in *Jennings* expressly recognized the availability of parole under this provision in the case of arriving asylum seekers.[19]

Consistent with this framework, prior to the Trump administration, DHS liberally granted parole to people who had passed their credible fear interview. In 2010, DHS issued enforcement priorities articulating that immigration officers should regularly exercise DHS's authority to parole asylum seekers in cases where continued detention was not "in the public interest."[20] The Trump administration rescinded the enforcement priorities in 2017, greatly limiting the exercise

[18] 8 U.S.C. § 1182(d)(5)(A).

[19] *Jennings*, 138 S.Ct. at 837.

[20] U.S. Immigration and Customs Enforcement, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," effective Jan. 4, 2010,https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

of discretion by immigration officials and effectively curtailing the use of parole. The newly issued Guidelines for the Enforcement of Civil Immigration Law that will soon govern DHS decisionmaking on enforcement and removal decisions do not explicitly extend to parole or custody-related decision-making, and harmfully categorize all recently arrived individuals as presumptive border security risks.[21]

The United Nations High Commissioner for Refugees (UNHCR) has issued "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention;" these guidelines provide:

> In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers, including safe, dignified and human rights-compatible treatment.[22]

The United States' regulatory and policy framework for the reception of arriving asylum seekers remains, therefore, entirely out of line with our ethical and legal obligations. In particular, the United States flouts the UNHCR Guidelines by providing unnecessarily restrictive standards for the consideration of release on parole and by failing to provide sufficient procedural safeguards for parole and other custody-related decision-making. The INA provides the agencies with great latitude to address most of these inadequacies but the NPRM fails to do so, making marginal changes to the standard utilized for parole in a subset of cases without sufficiently tackling the dramatic and harmful overuse of detention writ large.[23] To address these concerns, the final rule should make explicit the following changes.

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[21] U.S. Department of Homeland Security, "Guidelines for the Enforcement of Civil Immigration Law," Sept. 30, 2021, effective Nov. 29, 2021, https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

[22] United Nations High Commissioner for Refugees, "Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention" (2012), at p. 6, https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html.

[23] DHS Secretary Mayorkas testified to Congress regarding his concern at the agency's "overuse of detention." See Rebecca Beitsch, The Hill, "Biden official defends Trump-era immigration policy," May 26, 2021, https://thehill.com/policy/national-security/555551-mayorkas-defends-trump-era-covid-policy-immigration-enforcement.

i. Parole decisions should never be connected to the "availability" of detention space: the NPRM should not include detention availability as a factor for parole.

The INA provides DHS with parole authority that is defined as "case-by-case" and to be granted on the basis of factors specific to the individual seeking release—specifically, if the grant of parole would serve humanitarian reasons or is otherwise in the public benefit.[24] The NPRM takes a significant leap away from this framework by providing a basis for parole where "detention is **unavailable** or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities)."[25] We applaud the inclusion of health and safety concerns in this proposal, but strongly object to the proposed use of detention bed availability as a factor in determining when an individual should be released on parole.

The determination of whether to deprive an individual of their liberty should never be contingent on or determined by the budget or physical infrastructure of a federal agency. Recent history shows that when immigration officers are directed to engage in enforcement actions explicitly linked to the availability of detention bed space or enforcement quotas of any kind, the results are harmful and inevitably disparate. In 2013, for example, when officers were instructed to use the resources available to them to increase removals, field offices responded by "trolling state driver's license records for information about foreign-born applicants" and "dispatching … agents to traffic safety checkpoints…" Although this NPRM does not impose a quota, it will similarly result in officers making what should be individualized enforcement determinations based on an arbitrary accounting of how many detention beds are or aren't available that day.

As the chart below demonstrates, the size and breadth of the immigration detention system is inextricably linked with the lobbying patterns and fiscal growth of the private prison industry.[26] The availability of bed space is more a function of private prison lobbying than sound policy or law making. The private prison giants GEO Group and CoreCivic depend on federal contracts for 48% of their revenue, with ICE contracts alone accounting for nearly one-third of both companies' profits.[27] Further linking the use of detention with the size and availability of bed

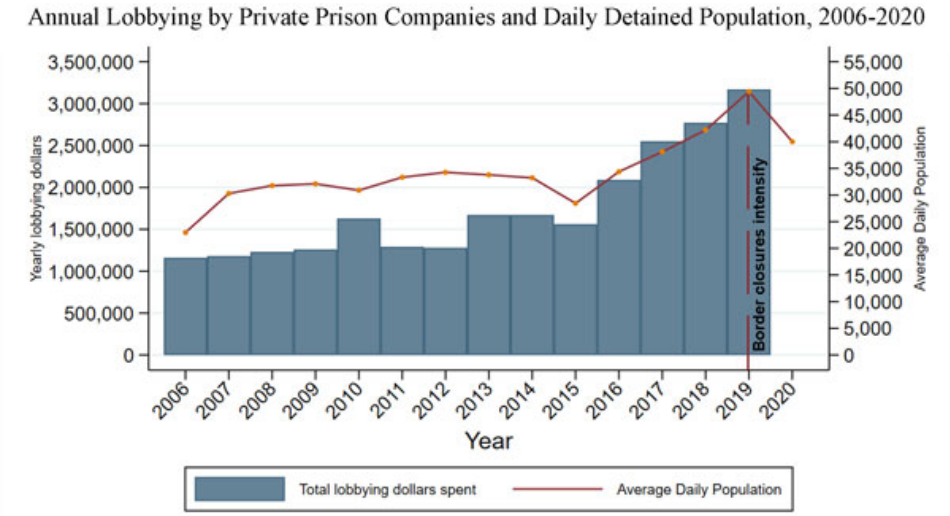
[24] 8 U.S.C. § 1182(d)(5)(A).

[25] 86 Fed. Reg. at 46926.

[26] The private prison companies represented in the chart are GEO Group and CoreCivic. The dollars spent includes lobbying for all issues, not just imigration. Sources are GEO Group and CoreCivic data on lobbying dollars from the Center for Responsive Politics, available at https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2014&id=D000022003; ADP data is from the Marshall Project, available at https://github.com/themarshallproject/dhs_immigratio_detention.

[27] Information available at https://investigate.afsc.org/company/geo-group#:~:text=escapes%2C%20and%20deaths.-,Immigrant%20Detention%20Centers,to%2028%20percent%20in%202018.

space—as the NPRM proposes to do—will more deeply entrench the perverse financial incentives that have resulted in the explosive growth of privatized immigration detention, putting lives at risk.[28]



For these reasons, we propose that the availability of detention be struck as a factor relevant to the individualized parole determination process envisioned by the NPRM.

ii. Parole should be utilized when detention is not in the public interest, which should be defined to encompass a wide range of individualized concerns.

Notwithstanding DHS's broad statutory authority to grant parole, and DHS's history of liberally using that authority for asylum seekers where continued detention was "not in the public interest," the NPRM focuses myopically on minor tweaks to the needlessly restrictive standard for parole articulated in 8 CFR 235.3(b)(2)(iii), (b)(4)(ii). Instead, DHS should amend regulations to mirror the parole statute and provide for parole when detention is not in the public interest.

For parole pending a credible fear interview under 8 C.F.R. §§ 235.3(b)(2)(iii) and (b)(4)(ii), the regulations should incorporate the parole standard from 8 C.F.R. § 212.5(b), which broadly provides for parole where continued detention is not in the public interest. The NPRM recognizes that parole has been excessively limited for this population in the past by regulation, however the Proposed Rule is needlessly restrictive compared to the broad discretion afforded to the DHS in the parole statute, INA § 212(d)(5). Adding "or because detention is otherwise not in the public interest" would better track the parole statute and existing regulations, and would

[28] *See, e.g.*, Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties, U.S. House of Representatives, *The Trump Administration's Mistreatment of Detained Immigrants: Death and Deficient Medical Care by For-Profit Detention Contractors* (Sept. 2020).

ensure against overly narrow interpretations of the circumstances in which a person qualifies for release on parole and accounts for unforeseen future circumstances without need to further amend the regulation. We propose further that the NPRM specify additional factors that are pertinent to the parole determination, including the impact detention would have on the individual's health and safety, family unity, and ability to adequately participate in asylum proceedings.

Specifically, we propose that DHS amend the proposed 8 C.F.R. § 235.3(b)(2)(iii) as follows:

> iii) Detention and parole of alien in expedited removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal. Parole of such alien, in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter, **shall be granted when DHS determines, in the exercise of discretion** ~~**may be permitted only when DHS determines, in the exercise of discretion**~~, that parole is required to meet a medical emergency, for a legitimate law enforcement objective, ~~**or**~~ because detention is ~~**unavailable or**~~ impracticable, **because** ~~**(including situations in which continued**~~ detention would ~~**unduly**~~ **negatively** impact the **physical or mental** health or safety of **the** individual~~**s with special vulnerabilities).**~~**, because detention would result in the separation of the individual from a child, spouse or partner, sibling or other close relative, because detention interferes with the individual's ability to secure or access counsel or otherwise impedes the individual's ability to meaningfully participate in their proceedings, or because detention is otherwise not in the public interest.**

Second, for consistency and to avoid confusion, we propose identical amendments to the proposed 8 C.F.R. § 235.3(b)(4)(ii):

> Detention pending credible fear interview. Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained. Parole of such alien, in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter **shall be granted when DHS determines, in the exercise of discretion** ~~**may be permitted only when DHS determines, in the exercise of discretion,**~~ that parole is required to meet a medical emergency, for a legitimate law enforcement objective, ~~**or**~~ because detention is ~~**unavailable or**~~ impracticable, **because** ~~**(including situations in which continued**~~ detention would ~~**unduly**~~ **negatively** impact the **physical or mental** health or safety of **the** individual~~**s with special vulnerabilities).**~~**, because detention would result in the separation of the individual from a child, spouse or partner, sibling or other close relative, because detention interferes with the individual's ability to secure or access counsel or otherwise impedes the individual's ability to meaningfully participate in their proceedings, or because**

detention is otherwise not in the public interest. A grant of parole would be for the limited purpose of parole out of custody and cannot serve as an independent basis for employment authorization under § 274a.12(c)(11) of this chapter. Prior to the interview, the alien shall be given time to contact and consult with any person or persons of his or her choosing. If the alien is detained, such consultation shall be made available in accordance with the policies and procedures of the detention facility where the alien is detained, shall be at no expense to the Government, and shall not unreasonably delay the process.

Finally, the Proposed Rule revises the parole standard articulated in 8 C.F.R. § 235.3(b)(2)(iii) and (4)(ii), but leaves unchanged the identical standard at § 235.3(b)(5)(i), which applies to people subject to expedited removal who claim to have been lawfully admitted for permanent residence, admitted as a refugee, granted asylum, or claim to be a U.S. citizen.

Given that all three regulations currently apply the same standard, and the justifications underlying the proposed rule changes are equally applicable to persons subject to expedited removal who have attested to possessing lawful status in the United States, NIJC recommends the same revisions to all three provisions.

Accordingly, we would propose the following amendment to the current 8 C.F.R. § 235.3(b)(5)(i):

(5) Claim to lawful permanent resident, refugee, or asylee status or U.S. citizenship—

(i) Verification of status. If an applicant for admission who is subject to expedited removal pursuant to section 235(b)(1) of the Act claims to have been lawfully admitted for permanent residence, admitted as a refugee under section 207 of the Act, granted asylum under section 208 of the Act, or claims to be a U.S. citizen, the immigration officer shall attempt to verify the alien's claim. Such verification shall include a check of all available Service data systems and any other means available to the officer. An alien whose claim to lawful permanent resident, refugee, asylee status, or U.S. citizen status cannot be verified will be advised of the penalties for perjury, and will be placed under oath or allowed to make a declaration as permitted under 28 U.S.C. 1746, concerning his or her lawful admission for permanent residence, admission as a refugee under section 207 of the Act, grant of asylum status under section 208 of the Act, or claim to U.S. citizenship. A written statement shall be taken from the alien in the alien's own language and handwriting, stating that he or she declares, certifies, verifies, or states that the claim is true and correct. The immigration officer shall issue an expedited order of removal under section 235(b)(1)(A)(i) of the Act and refer the alien to the immigration judge for review of the order in accordance with paragraph (b)(5)(iv) of this section and §

235.6(a)(2)(ii). The person shall be detained pending review of the expedited removal order under this section. Parole of such person, in accordance with section 212(d)(5) of the Act, **shall be granted when DHS determines, in the exercise of discretion** ~~**may be permitted only when the Attorney General determines, in the exercise of discretion**~~, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective, ~~**or**~~ because detention is ~~**unavailable or**~~ impracticable, **because** ~~**(including situations in which continued**~~ detention would ~~**unduly**~~ **negatively** impact the **physical or mental** health or safety of **the** individual~~**s with special vulnerabilities).**~~**, because detention would result in the separation of the individual from a child, spouse or partner, sibling or other close relative, because detention interferes with the individual's ability to secure or access counsel or otherwise impedes the individual's ability to meaningfully participate in their proceedings, or because detention is otherwise not in the public interest.**

iii. For individuals who pass their CFI, DHS should operate under a presumption that detention is not in the public interest.

For those who pass the CFI, DHS should go further to protect their liberty and avoid the unnecessary, prolonged detention of people who pose no risk of flight or danger to the community. Release is particularly necessary given the changes in the asylum-adjudication process addressed below because, if detained, a noncitizen's ability to participate in the streamlined removal proceedings that the Proposed Rule contemplates will be jeopardized.

As currently drafted, the NPRM begins with a presumption that detention is in the public interest unless proven otherwise, a harmful approach that is out of line with international norms.[29] The United States is a party to the Refugee Convention, which requires that states not penalize asylum seekers for their manner of entry.[30] UNHCR has concluded that the Convention's provision for the non-penalization of asylum seekers, combined with the right protected by U.S. and international law to seek asylum, "mean[s] that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position."

DHS should, therefore, revise 8 C.F.R. § 235.3(c) and related regulations to provide that, after a person passes the CFI, continued detention is presumed to be not in the public interest unless the agency determines, by clear and convincing evidence, that the person presents a flight risk or danger to the community.

[29] See id. at p. 13.

[30] Article 31(2), Convention relating to the Status of Refugees, 1951 (1951 Convention) as amended by the Protocol relating to the Status of Refugees, 1967.

For those who pass the CFI, the Proposed Rules leave unchanged the existing standard articulated in 8 C.F.R. § 253.3(c), which cross-references to 8 C.F.R. § 212.5. This is a significant oversight, as recent history has shown that permitting parole in the "public interest," under 8 C.F.R. § 212.5, is insufficiently protective of people's liberty. While for years, DHS implemented enforcement priorities under this provision instructing immigration officers to regularly parole asylum seekers, with the stroke of a pen, the Trump administration rescinded the enforcement priorities and greatly limited the use of parole. Furthermore, records recently obtained by Human Rights First through FOIA reveal parole rates to be widely varied depending on where a person is detained, with rates of parole having plummeted to as low as .3% of all asylum seekers who passed a CFI in the El Paso Field Office in 2017.[31]

DHS should promulgate formal rules establishing that it is presumptively not "in the public interest" to detain asylum seekers who have passed their credible fear interview. Specifically, the agency should revise the parole standard at 8 C.F.R. § 253.3(c) to provide that continued detention is presumed to be *not in the public interest*, and DHS will therefore exercise its broad statutory authority to parole, unless the agency determines, by clear and convincing evidence, that the person presents a risk of flight or danger to the community, and that no less restrictive alternative to detention would be capable of mitigating the risk.

Including the amendments described in Part A, we recommend amending 8 C.F.R. § 253.3(c) as follows:

> (c) ~~***Arriving a***~~ ***A****liens* ***referred for hearings under § 208.9 of this chapter or*** *placed in proceedings under section 240 of the Act.* Except as otherwise provided in this chapter, any ~~**arriving**~~ alien who appears to the inspecting officer to be inadmissible **under section 235(b) of the Act**, and who is ~~**placed in**~~ **referred for a hearing under § 208.9 of this chapter or** removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act. Parole of such alien shall ~~**only**~~ be considered in accordance with **section 212(d)(5) of the Act and** § 212.5(b) of this chapter. **Under section 212(d)(5) of the Act and § 212.5(b) of this chapter, continued detention is presumed to be not in the public interest, unless the agency determines, by clear and convincing evidence, that the person presents a risk of flight or danger to the community, and that no less restrictive alternative to detention would be**

[31] Human Rights First, *Immigration and Customs Enforcement Records Received Through FOIA Confirm Need for Increased Oversight of Agency's Arbitrary and Unfair Parole Decisions for Asylum Seekers* (Sept. 2021), https://www.humanrightsfirst.org/resource/immigration-and-customs-enforcement-records-received-through-foia-confirm-need-increased.

capable of mitigating the risk. This paragraph shall also apply to any alien who arrived before April 1, 1997, and who was placed in exclusion proceedings.

iv. DHS should implement basic due process procedures for parole after establishing a credible fear.

The regulations are silent on any basic due process procedures for parole determinations for people who establish a credible fear. We would urge DHS to adopt the following procedural safeguard that will promote transparency and consistency in parole determination, while also ensuring that asylum seekers have an opportunity to present information and rebut evidence related to their parole determinations.

We recommend adding a **new subsection 8 C.F.R. § 235.3(g)** as follows:

> (g) Procedures for Parole Determination after Positive Credible Fear Determination. For aliens placed into proceedings under § 208.9 of this chapter or removal proceedings pursuant to section 240 of the Act, the agency shall affirmatively consider each alien for parole as described in subsection (c). If the agency intends to deny parole, the agency shall issue the alien a notice of intent to deny (NOID) and provide the alien and their legal representative, with a written basis for the intent to deny including supportive evidence. The NOID shall give the alien at a minimum ten days to present evidence that rebuts the basis for denial or otherwise supports the positive exercise of discretion to grant parole, however the agency need not wait ten days to reverse a NOID and may grant parole at any time. After 60 days and every month thereafter, the agency shall reconsider parole for any alien subjected to detention pending proceedings under § 208.9 of this chapter or removal proceedings pursuant to section 240 of the Act, and any appeal taken therefrom.

2) BUILDING ON A FUNDAMENTALLY FLAWED SYSTEM, EXPEDITED REMOVAL, WILL NOT PROMOTE FAIR ADJUDICATIONS FOR ASYLUM SEEKERS.

The Departments' Proposed Rules purport to create "streamlined," "efficient," and "simplified" proceedings that, nonetheless, protect "equity, human dignity, and fairness" for asylum seekers.[32] However, the primary vehicle for this NPRM is one that is characterized by (including but not limited to) rushed screenings at the expense of access to counsel, poor or nonexistent interpretation, interviews conducted while asylum seekers are detained and before receiving access to mental health support and other services, and immigration court reviews that suggest

[32] 86 Fed. Reg. at 46910, 46922.

widely disparate outcomes depending on the judge reviewing negative findings.[33] In particular, we object to the use of expedited removal as the starting point, the increased reliance on the initial CFI, and a truncated review process before the immigration judge.

a) Building off expedited removal strips asylum seekers of their day in court.

NIJC urges the Departments to reverse course and refrain from building off expedited removal as the primary vehicle for asylum processing. Instead of affording all asylum seekers § 240 review, the Departments seek to cement the use of "asylum-and-withholding-only proceedings,"[34] previously proposed in the now-enjoined Global Asylum rule.[35] The use of these narrowed proceedings is misguided in various ways. First, the INA discusses only two forms of removal proceedings—expedited removal (under 8 U.S.C. § 1225), and full removal proceedings (under 8 U.S.C. § 1229a). The Departments should not create a new/hybrid process and apply that process to such a large percentage of individuals facing removal. The Departments acknowledge that Congress contemplated two forms of removal proceedings: § 240 proceedings and expedited removal.[36] In drafting the asylum statute, and in overhauling the INA via IIRIRA, it is clear the Congress contemplated that asylum seekers would be afforded an opportunity to defend against deportation in front of an immigration judge in full removal proceedings, which come with various procedural and due process safeguards, including full access to appellate review under 8 U.S.C. § 1252(a).

Second, the Proposed Rules eliminate the possibility of applying for many forms of relief for which a person may qualify. In particular, asylum seekers may be eligible for family-based adjustment, cancellation of removal, a waiver of inadmissibility, or relief not under the jurisdiction of the immigration court, including many forms of humanitarian relief for survivors of abuse, trafficking, and violent crimes—e.g., special immigrant juvenile status (SIJS) and U or T visas. However, due to the narrowed proceedings the Departments propose, these asylum seekers may no longer be able to pursue these other forms of relief. In effect, the Proposed Rules

[33] *See Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge*, TRAC (July 30, 2018), https://trac.syr.edu/immigration/reports/523/ ("depending upon the particular Immigration Court undertaking the credible fear review, the proportion of asylum seekers passing this screening step varied from as little as 1 percent all the way up to 60 percent").

[34] *See* proposed 8 C.F.R. § 1208.2(c).

[35] *Pangea Legal Servs. v. DHS*, 2021 WL 75756, at *7 (N.D. Cal. Jan. 8, 2021); *see also Nat'l Immigrant Justice Ctr. v. EOIR*, Case No. 1:21-cv-00056-RBW, Dkt. No 11, 2021 WL 1737159 (D.D.C. Jan. 14, 2021).

[36] 86 Fed. Reg. at 46917 at n.48. The Departments' rationale that the INA does not "unambiguously forbid" "asylum-and-withholding-only" proceedings inherently conflicts with the scheme put forth in the INA: no such proceedings exist, while Congress expressly created expedited removal and § 240 proceedings.

cut off access to applications for these forms of relief for some of the most vulnerable asylum seekers. The existence of these remedies in the INA indicates that an individual must be afforded an opportunity to apply for them, which these Proposed Rules largely curtail.[37] Removing access to other immigration remedies would cause harm to NIJC clients:

NIJC client Marisa[38] is a Central American asylum seeker fleeing gender-based harm in her home country. While pursuing asylum, she experienced sexual assault at her place of employment in the United States. She assisted in the prosecution of her assailant and received the certificated law enforcement necessary to seek a U visa. If successful, Marisa's U visa will ultimately allow her to adjust status and become a lawful permanent resident. If her exclusive remedy in proceedings before the immigration court is asylum, she could be prevented from accessing protection through her U visa.

Similarly, NIJC client Helen[39] met and married a U.S. citizen while her asylum application was pending. Her U.S. citizen spouse is authorized to petition for her, and if approved, that petition would allow her to adjust status to lawful permanent residency either before the immigration court of USCIS. Allowing her to only seek asylum before the immigration court would deprive Helen and her U.S. citizen husband from accessing family-based protection and stability.

Though this issue is problematic with all forms of relief now foreclosed, it is particularly problematic as it relates to individuals eligible for T Visas and children who qualify for SIJS. The INA makes T Visas available to those "physically present in the United States...or at a port of entry thereto" provided that they otherwise qualify.[40] Similarly, Congress did not permit children who were abused, abandoned, or neglected by one or both of their parents to seek SIJS from outside the United States.[41] Even where physical presence is not explicitly required, removal obstructs practical access to relief; asylum seekers and their families would experience indefinite family separation, given current processing times as well as limited ability to secure counsel with fluency in the U.S. immigration system abroad, if removed simply because their proceedings restricted them from seeking relief. In sum, Congress contemplated an array of forms of relief and physical presence in the United States is an explicit or tacit requirement to

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[37] *See, e.g., East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018) (noting that it is the "hollowest of rights that an alien must be allowed to apply for [discretionary relief]" if a regulation renders an applicant ineligible for that form of relief); *United States v. Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003) ("There may be an important distinction between an alien's claim that she has a right to seek discretionary relief, and the very different claim that she has a right to have that discretion exercised in a particular way.").

[38] Pseudonym used to protect confidentiality.

[39] Pseudonym used to protect confidentiality.

[40] 8 USC § 1101(a)(15)(T)(i)(II).

[41] INA § 101(a)(27)(J) (requiring presence in the United States); 8 C.F.R. § 204.11.

access those forms of relief. Cutting off access to otherwise available immigration remedies is contrary to existing provisions of the INA.

Third and finally, it is not sufficient that the Proposed Rule would authorize an immigration judge to place an individual into full removal proceedings in limited circumstances. The proposed motion described in 8 C.F.R. § 1003.48(d) does not mitigate the harms of these narrowed proceedings. This motion offers a one-time opportunity for asylum seekers that hinges on presenting prima facie relief for other protection under the INA; many asylum seekers may present this motion while *pro se*, failing to present their prima facie case, and become subsequently barred from pursuing this relief after retaining counsel. If their alternate relief is before the immigration court, they further must rely on the discretion of USCIS to place them into INA § 240 proceedings. Even represented asylum seekers may ultimately fail to obtain access to § 240 proceedings because of these procedural hurdles. In effect, the Departments presume narrow review of fear-based claims in most cases.

Even if the Proposed Rules enabled the immigration judge to refer someone to proceedings under INA § 240 *sua sponte*, there is little incentive for overburdened immigration courts to broaden the scope of their proceedings as they screen a high volume of pro se litigants for sensitive and fact intensive forms of relief. Immigration judges routinely fail to provide such screening,[42] and the result is that many individuals who qualify for other forms of relief from removal will be denied an opportunity to do so. Few asylum seekers would benefit from such ad hoc use of administrative authority, given the current strain on EOIR and the lack of guaranteed counsel. We urge the Departments not to make access to full proceedings a case-by-case matter.

The Departments should not codify narrowed proceedings in the name of efficiency—especially when an alternative is possible. (Notably, it is often *more* efficient for asylum seekers to resolve their removal proceedings through other forms of relief.) As the Departments note, DHS fundamentally retains discretion to place individuals in expedited removal proceedings or INA § 240 removal proceedings.[43] Section 240 is the bedrock for fairness and efficiency in immigration proceedings, as it affords noncitizens their full day in court. While recalling DHS's prosecutorial discretion, the Departments proceed to further build on expedited removal[44] and present

[42] *See, e.g., Jacinto v. INS*, 208 F. 3d 725 (9th Cir. 2000).

[43] *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011) (agreeing with DHS that the term "shall" in section 235(b)(1)(A)(i) of the INA means "may" as it is applied to the executive branch's authority to place individuals in 240 proceedings). 86 Fed. Reg. at 46911.

[44] This includes the expansion of expedited removal under the final rule *Designating Aliens for Expedited Removal*, 84 FR 35409 (July 23, 2019). We urge the Departments to revoke or rescind this regulation, consistent with Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To*

placement in § 240 as a penalty for discrete individuals DHS believes do not merit the benefits of nonadversarial review.[45] This rationale is hard to reconcile with basic principles of fairness; DHS' prosecutorial role is to promote justice, not gate-keep on what form of review asylum seekers merit.

b) The NPRM would effectively compound the harms of unreliable CFIs by making CFIs the lynchpin of an asylum seeker's claim and eliminating reconsideration.

The NPRM proposes to make the USCIS officer's transcript of the CFI the sole record for judicial review of the USCIS negative decision. Courts have questioned the reliability and disproportionate weight USCIS and EOIR have afforded CFIs in the past, reversing adverse rulings and removal orders.[46] Yet, the Departments hinge access to asylum on these inherently unreliable screenings, placing *more* weight on CFIs as well as increasing the responsibility of USCIS asylum officers.

NIJC has represented asylum seekers who have suffered greatly due to unreliable CFIs. As our client Iris has explained, the CFI was a confusing and triggering process that she underwent alone; she recalls: "When I first told my story, I thought that people wouldn't listen to me, that people wouldn't believe me. Ultimately, it was important that I had the opportunity to tell my story to a judge, as the environment in court was very different from that of the credible fear interview."[47] Other clients report asylum officers rushing them, failing to ask key follow-up questions, or failing to record their responses or guide them about the importance of the interview. Without NIJC's intervention, these clients would be removed to face the persecution and torture they fled. And yet, our clients remain the exception, rather than the norm; most asylum seekers proceed without counsel who can litigate improper reliance on expedited removal

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Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8267 (Feb. 2, 2021).

[45] 86 Fed. Reg. at 46921 ("This discretion may be exercised, for example, when a noncitizen with a positive credible fear determination may have committed significant criminal activity, have engaged in past acts of harm to others, or pose a public safety or national security threat.").

[46] *Jimenez Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016) (ruling that Dominican woman who fled to the United States to escape an abusive partner was wrongly denied protection because the immigration judge and Board of Immigration Appeals (BIA) placed too much weight on the notes USCIS officer took during the woman's initial asylum screening interview); *Cuesta-Rojas v. Garland*, 991 F.3d 266 (1st Cir. 2021) (reversing adverse credibility finding, which rested at least in substantial part on asserted discrepancies between noncitizen's credible fear interview account and his removal proceeding account).

[47] *See* Jesse Franzblau, *"Now, my children can go outside and be safe": Iris' Story*, National Immigrant Justice Center (July 29, 2020), *available at* https://immigrantjustice.org/staff/blog/now-my-children-can-go-outside-and-be-safe-iris-story.

screenings. By codifying this system further, the Departments favor speed over fairness and create a system where countless asylum seekers will never see their day in court.

Daniela's[48] CFI occurred with her five-year-old son who had entered the United States with her. Although Daniela and her son were not detained by the time of their CFI, the asylum officer required her son's presence at the interview, even though Daniela had previously presented evidence that her asylum claim was based on prior sexual violence that led to her preganncy with her son. During the interview, Daniela repeatedly limited her testimony regarding her prior rapes because of her discomfort of discussing this information in front of her young son. Had Daniela's attorney not been present to direct the officer to an affidavit from Daniela that discussed her past harm in greater detail, significant aspects of her history would not have been disclosed.

Cristina[49] fled Honduras to escape domestic violence and was then kidnapped and sex-trafficked in Mexico by individuals connected to her hometown in Honduras. Her daughter, whose father was one of Cristina's traffickers, was born in Mexico, but the asylum officer repeatedly failed to ask Cristina any questions about what had happened to her in Mexico, focusing all questions exclusively on Honduras. When Cristina's attorneys pressed the officer to ask Cristina about any harm in Mexico, the officer responded that he had already asked her to explain why she was afraid to return to Honduras. Only after the attorney continued pushing the officer did he finally ask her about Mexico, leading Cristina to disclose extensive information about the connections between the persecution in Mexico and her fears about harm in Honduras.

Since most asylum seekers are unrepresented during their CFI, an unrepresented client such as Daniela or Cristina would have likely received a negative CFI. Were these Proposed Rules to become final, these pro se asylum seekers would not benefit from reconsideration and face near-impossible odds to avert removal despite inherent limitations in the CFI record.

i. The limited opportunity under proposed 8 C.F.R. § 208.3(a)(2) to correct the CFI record is insufficient to mitigate the prejudice to applicants when CFIs fail to provide asylum seekers with a full and fair opportunity to explain their fear.

Individuals who pass their interviews will have to balance the need to amend the record with the risk of undermining their own credibility. Interpretation errors, incomplete or erroneous transcriptions, failures of memory, or simple misunderstandings between the USCIS officer and the asylum seeker will now be scrutinized with greater weight, since they will form the basis of the underlying application for asylum under the Proposed Rule. As for individuals who do not

[48] Pseudonym used to protect confidentiality.

[49] Pseudonym used to protect confidentiality.

pass their interview, it appears the Departments do not provide the opportunity to amend, correct, or supplement the record—even though the negative fear determination may hinge on an error.

During Fernando's[50] interview, the interpreter was telephonic and the sound quality was poor. The interpreter frequently had to ask for clarity or repetition in order to attempt to translate Fernando's testimony or the officer's question and, possibly due to the audio issues, there were a number of incorrectly translated words that could have led to a negative decision if no one was present to flag the incorrect translation. Fortunately, Fernando had an attorney from NIJC who spoke Spanish. The attorney had to repeatedly interrupt the interview to correct a translation.

ii. By eliminating reconsideration of negative credible fear findings, the Departments will strip a key safeguard against erroneous adjudications from asylum seekers.

Confusingly, the Departments propose to return to what they previously called an "inadvertent typographical omission"—removing DHS' ability to reconsider a negative credible fear finding that was affirmed by an immigration judge.[51] The Departments provide no justification for eliminating this procedural safeguard, despite the high risk of wrongful deportations. In NIJC's experience, this change will be devastating for many asylum seekers.

Years ago, NIJC represented Lidia,[52] an asylum seeker transferred from the U.S. border upon receiving negative credible fear findings from DHS, concurred upon by EOIR. Lidia was detained and unrepresented throughout her prior interview and review, lacked access to critical evidence to support their claims, and had serious concerns about the interpretation services she received throughout. Unable to tell her full story, she was summarily found to have no credible fear by the Departments. Upon intaking Lidia, NIJC urgently requested reconsideration, engaging DHS about the grave danger she would face if wrongfully removed. Lidia went on to win asylum. But for this procedural protection, she would have never lacked the full and fair opportunity to present her meritorious claim. The Departments' proposed amendment thus would have stripped her of a vital procedural protection and left hasty and erroneous initial decisions undisturbed.

NIJC client Alicia[53] fled her home country in Central America after persecution by multiple persecutors, including severe sexual abuse and attempted murder by strangulation. She was

[50] Pseudonym used to protect confidentiality.

[51] Dep't of Homeland Security & Executive Office for Immigration Review, *Security Bars and Processing*, 85 Fed. Reg. 84160, 84181 (Dec. 23, 2020).

[52] Pseudonym used to protect confidentiality.

[53] Pseudonym used to protect confidentiality.

detained and without counsel when she had her first CFI. Despite her best efforts to explain her case, the Asylum Officer found she did not present a credible fear of harm. Following extensive advocacy by NIJC, Alicia had a second CFI. This time, with counsel, Alicia was found to have a CFI. The interviewing officer commented the case was among the strongest he had seen and promptly found her to present a credible fear. Without the opportunity for reconsideration by USCIS, Alicia could have been foreclosed from seeking the protection she so desperately needs.

As further outlined in section 3), the NPRM raises significant due process concerns. Rather than protecting due process, the Departments propose to strip multiple procedural protections; they evade the process mandated by Congress for asylum, withholding, and relief under CAT and impose a draconian burden on asylum seekers; they grant DHS the right to remove asylum seekers to a third country prior to adjudication of their claims; and finally, the Departments propose eliminating reconsideration of negative credible fear screenings, ripping away vital procedural protection for asylum seekers in expedited removal. Altogether, these changes shatter any pretense of upholding a fair asylum system.

c) Asylum seekers seeking review before the immigration judge face truncated rather than fundamentally fair proceedings.

The Departments propose new limits that infringe upon asylum seekers' constitutional and statutory rights to a full and fair hearing,[54] such as limiting the immigration judge's ability to develop the record and receive testimony. The NPRM paradoxically calls this "de novo" review, while declining to provide asylum seekers with a full evidentiary hearing to present the claim, asserting that doing so results in "inefficiencies."[55] Put simply, this cannot and does not constitute de novo review and may violate an asylum seeker's right to Due Process.[56] NIJC has represented countless clients before the asylum office who, because of the poor structure of the interview and the restrictions on an attorney's ability to participate in the interview, lacked a full and fair opportunity to present their entire asylum claim until they appeared before the immigration judge. For example:

NIJC client Melissa[57] survived repeated incidents of physical, sexual, and verbal abuse from a young age by multiple individuals. She was highly traumatized, as detailed in an extensive therapist evaluation provided in her case. The evaluation explained Melissa had Post-Traumatic Stress Disorder and had expressed suicidal ideation. Her attorney filed her supporting

[54] 8 U.S.C § 1229a(b)(4); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2004).

[55] 86 Fed. Reg. at 46918.

[56] *See, e.g., Podio v. INS*, 153 F.3d 506, 510–11 (7th Cir. 1998) (finding due process violation where immigration judge "curtailed" asylum seekers testimony and barred corroboratory testimony.).

[57] Pseudonym used to protect confidentiality.

documentation, including a detailed affidavit from Melissa, with the Asylum Office in advance of the interview. Nonetheless, the officer conducting the interview was unfamiliar with the facts of the claim and the psychological evaluation. The officer compelled Melissa to recount intimate details of rapes despite the detailed filing and Melissa's distraught state during the interview. When Melissa stated that a persecutor touched her "private parts," the officer repeatedly asked her to explain what she meant, forcing her to state that she meant her vagina. When she stated that her persecutor had raped her, the officer asked her to explain what she meant by "rape." When she explained that her parents had not assisted her because they felt she had to stay with her persecutor since he had "dishonored" her, he first asked her to explain what "dishonored" meant and then, when she explained it mean a man has relations with a woman who has never been with a man before, he asked her what she meant by "relations." Through his failure to review the record in advance of the interview and by conducting the interview in this way, the officer demonstrated a complete lack of understanding of gender dynamics; appropriate interview techniques for survivors of gender violence; and the information necessary to properly evaluate a gender-based asylum claim. Finally, the attorney who represented Melissa at her interview was in the late stages of a pregnancy. When, around the three-hour mark during the interview, she asked for a break to use the restroom, the officer stated he would continue the interview without the attorney if the attorney took a break. Interviews conducted in this matter are not meaningfully nonadversarial.

As we discuss further in section 3)f) *infra*, the Departments should modify the Rule to enable more robust participation by attorneys in the Asylum Office hearings that is currently the norm for such interviews within USCIS. When an applicant has counsel, that counsel should be permitted to question the client in the first instance and should be permitted to make a complete opening and closing statement. The Asylum Officer would still be permitted to ask questions, but the officer should not be the primary questioner as is currently the approach taken by USCIS.

And once before the immigration court, asylum seekers should not be limited in their submission of evidence, including testimony. The Departments may consider other options to mitigate duplication, such as permitting asylum seekers to waive testimony already presented before USCIS; permitting asylum seekers to bypass the asylum office when duplicative testimony may aggravate their mental health; and/or incentivizing DHS to explore stipulations on one or more legal elements of asylum or otherwise narrow the issues before the court. These options can substantially improve proceedings before the court, while preserving fairness.

An NIJC attorney represented an unaccompanied child who had a five-hour interview before USCIS, punctuated with one bathroom break. As customary with USCIS, the attorney was unable to direct questioning and the child was forced to repeat every aspect of his declaration with harrowing details, only to receive a denial. During his de novo hearing, the immigration judge relied on the record submitted (including the same declaration), the parties stipulated to limit the

issues, and counsel directed thirty-five minutes of testimony on salient aspects of the child's asylum claim. The child expressed greater comfort with telling his story while questioned by his trusted attorney and promptly won asylum on the basis of the record submitted.

In sum, there are available tools to limit the use of duplicative evidence and minimize the harm to asylum seekers without eliminating an asylum seeker's opportunity to present their full claim before the immigration court.

Finally, this limited *de novo* review will disproportionately harm unrepresented and detained asylum seekers. *Pro se* individuals, particularly non-English speakers, may not even be aware of the full scope of evidence they can provide before the asylum office, and the asylum office's traditional use of broad, open-ended questions may not be sufficient to elicit relevant information for the adjudication of an asylum claim.[58] Similarly, those who fail to retain a lawyer prior to USCIS's adjudication may lose their opportunity to develop the facts and law in their claim; once before the immigration judge, the NPRM would place the burden[59] on the asylum seeker to demonstrate that the evidence they seek to submit is "necessary," granting the court significant discretion to restrain the scope of hearings and effectively pretermit cases based on the asylum office record.

These changes will have a chilling effect, not just in the asylum adjudication process itself, but also on judicial review. Many federal courts place onerous exhaustion requirements on immigrants before raising questions for purposes of appellate review, and some courts even suggest that noncitizens must seek reconsideration to point out ignored arguments or improper legal approaches before having those arguments considered on appeal.[60] As a result, these changes, made in the purported name of efficiency, will cause significant *inefficiencies* on the back end by forcing applicants to file motions to reconsider before the immigration courts and the Board of Immigration Appeals (BIA).

Moreover, detained applicants—even with counsel—frequently need time to contact family on the outside or in other countries to support the legal claims included in their asylum application. They, too, would need to make a case for including this evidence; given the existing backlog,

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[58] NPR, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes* (Feb. 25, 2018), https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes.

[59] 86 Fed. Reg. at 46920 ("The Departments expect that an IJ may, in appropriate cases, require parties to submit prehearing statements or briefs concerning whether they will seek to introduce additional testimony or documentation and, if so, explaining why this testimony or documentation meets the standard at 8 CFR 1003.48(e)").

[60] *See, e.g.*, *Mencia-Medina v. Garland*, 6 F.4th 846, 849 (8th Cir. 2021) (requiring the filing of a motion to reconsider raising specific issues to satisfy exhaustion);

immigration judges have little incentive under the rule to permit inclusion of this evidence and may opt to exclude evidence, if there is any indicia that the facts were already in the administrative record. In sum, the Proposed Rules adversely affect due process protections for all asylum applicants, but disproportionately disadvantages those without counsel and those in detention.

Julio[61] fled Mexico with his wife and children after their family after Mexican military officials targeted their home. After requesting asylum, U.S. immigration officers separated Julio from his wife and children and detained them in separate detention centers. Because of their separate detentions, Julio was unable to obtain critical corroborating evidence from his wife or present testimony from her.

Nathan[62] was a 19-year-old teenager detained by ICE in Texas when he proceeded on his asylum case pro se before the immigration court. His uncle and father were key witnesses in his case, but because they were held in different detention centers, Nathan had no contact with them and was unable to obtain the evidence he needed to corroborate his case.

3) THE PROPOSED RULES CREATE ADDITIONAL DUE PROCESS CONCERNS ARISING FROM THE PROCEEDINGS BEFORE USCIS.

Under the Proposed Rules and for the first time in its history, USCIS would be tasked with reviewing withholding and CAT claims, which entail new bars, statutes, regulations, and case law—all within an 180-day timeframe. In addition, USCIS officers would have the authority to order asylum seekers removed. Amid these new responsibilities, asylum officers could render mixed decisions—e.g., granting withholding but denying asylum—opening the door for Kafkaesque review before the immigration judge. We close with some recommendations to improve asylum office hearings and interviews, were these Proposed Rules to become final.

a) Withholding of removal and CAT protection are granted as to the asylum seeker's designated country of removal, yet USCIS officers lack the authority to designate a country of removal.

Unlike asylum, in which an asylum seeker must establish a fear of persecution as to their country of nationality, withholding of removal and CAT protection require an individual to establish a likelihood of persecution or torture in their specifically designated country of removal.[63] At present, the immigration judge designates the country of removal following the instructions set

[61] Pseudonym used to protect confidentiality.

[62] Pseudonym used to protect confidentiality.

[63] INA § 241(b)(3).

out in INA § 241(b)(3) and does so at one of the initial master calendar hearings.[64] This system provides the individual with clear, advance notice of the country to which the Departments plan to remove him, so that the individual can request withholding or CAT protection, if necessary, from multiple different countries.[65]

Under the proposed rules, the statutory and regulatory structure for designating a country of removal remains the same, yet USCIS officers are now supposed to determine an individual's withholding and CAT eligibility without going through the formal process for designating the country from which removal may be withheld or deferred or providing notice to the individual of the country that has been designated. Allowing USCIS officers to order individuals removed and adjudicate their eligibility for withholding and CAT protection while jumping over these critical steps violates the due process rights of those in need of protection.

b) Expanding asylum officers' review to the adjudication of withholding of removal and CAT will require asylum officers to consider legal questions over which they lack sufficient expertise.

Expanding asylum officers' purview to include withholding of removal and protection under the CAT will force asylum officers to consider complex legal questions, of the sort that are traditionally reserved for immigration judges.[66] In particular, some asylum officers are not lawyers and do not have legal training to adjudicate questions such as whether an applicant is barred from asylum based on the commission of an aggravated felony. That question, in particular, requires the application of the categorical approach and is sufficiently complex that it has been the subject of routine Supreme Court intervention.[67]

c) Expanding asylum officers' review threefold while expediting adjudications all but guarantees improper denials.

Concerningly, the Departments justify the expedited timeline for USCIS asylum hearings as a deterrent motive for individuals crossing at the border, presuming that backlogs incentivize abuse of the system.[68] This approach is misguided and misplaces the Departments' responsibility

[64] 8 C.F.R. § 1240.10.

[65] This problem is not rare. NIJC has frequently represented asylum seekers who are from one country but who have lived a significant portion of their lives in another country, and this reality has frequently prompted DHS to seek removal to both the client's country of origin and last habitual residence.

[66] Current 8 C.F.R. § 208.30(e)(4) calls on asylum officers to refer "novel or unique" issues to an immigration judge for full consideration.

[67] See, e.g., Moncrieffe v. Holder, 133 S. Ct. 1678 (2013).

[68] 86 Fed. Reg. 46909 ("The ability to stay in the United States for years waiting for an initial decision may motivate unauthorized border crossings by individuals who otherwise would not have sought to enter the United States and who lack a meritorious protection claim.").

to create fair adjudication systems. In particular, USCIS would triple its own training while imposing adjudication timelines that they often fail to meet in regular asylum interviews. Asylum officers lack the training and expertise to adjudicate withholding and CAT claims under proposed 8 C.F.R. §§ 208.2(a)(2), 208.16-208.19. We fear this proposed system would result in the most vulnerable asylum seekers (e.g., *pro se*, detained, mentally incompetent asylum seekers) facing orders of removal and complex appellate procedures they are even less able to navigate.

In NIJC's experience, USCIS officers need extensive training to properly apply existing regulations and statutes governing asylum law. Adding these two forms of relief that the agency has never adjudicated all but ensures improper decisions and, if the NPRM is finalized, orders of removal. Vast disparities between asylum officers already indicate gaps in training. We urge DHS to prioritize proper training of asylum officers prior to expanding their scope of review and imposing a limited timeline for adjudications.

Further, existing mechanisms within the asylum office frequently result in silencing asylum seekers or their attorneys, restricting direct questioning, and belaboring the most traumatic aspects of asylum seekers' stories. Transplanting withholding and CAT review in this context will give unfettered power to poorly trained officers, as asylum seekers and their counsel will have little voice to make the case for mandatory grants as afforded under the INA.

d) Permitting asylum officers to issue removal orders obfuscates the nonadversarial character of asylum interviews.

With these Proposed Rules, the Departments propose to transform USCIS into an enforcement branch of DHS while claiming to preserve the nonadversarial character of their review. In other words, USCIS will act as the asylum seekers' judge and prosecutor if these regulations become final. Eclipsing this key distinction between the different DHS component agencies will have a chilling impact on many asylum seekers, who otherwise would benefit from the nonadversarial aspect of USCIS adjudications.

Additionally, the Departments' citation to *Mitondo v. Mukasey*, 523 F.3d 784,787 (7th Cir. 2008) to permit asylum officers to order asylum seekers removed is misguided. In *Mitondo*, the immigration judge denied asylum without ordering the noncitizen removed, and the BIA affirmed the judge's order. The Seventh Circuit then reviewed whether the judge's order sufficed to grant the court jurisdiction, as no formal order of removal was entered. Concluding that the order meant that the asylum seeker was "removable," the court concluded that it had jurisdiction even absent a formal order of removal. The Departments take these distinguishable facts, which hinge on the question of appellate jurisdiction and transpose them to this NPRM—not to permit USCIS officers to find asylum seekers *removable*, but to permit officers to *enter* orders of removal. *Mitondo* merely opened an avenue for asylum seekers to seek review before the court of appeals, even absent a formal removal order.

Finally, adding a new layer of removal orders at the asylum officer's stage is all but certain to create confusion for procedural purposes. The mechanism to reopen removal orders is already intricate. Here, the Departments propose to empower a new agency to issue removal orders for failures to appear as well as upon the denying asylum or withholding of removal. Unrepresented asylum seekers will face excessive hurdles seeking vacatur of these orders before immigration courts, the BIA, and courts of appeal. NIJC recommends that the Departments rescind their proposal to grant USCIS officers authority to issue removal orders and leave the issuance of removal orders to immigration courts.

e) Mixed cases undermine asylum seekers' right to finality and appellate review.

The proposed scheme could create a scenario where an asylum seeker exercising their right to appeal could end up with no protection at all, despite a grant of withholding or CAT before USCIS. Where an asylum seeker is denied asylum but granted withholding and appeals the asylum denial, the NPRM contemplates that ICE may challenge USCIS' withholding decision—leaving the asylum seeker with no relief. The paradox of one DHS branch challenging the other is one that directly conflicts with the purpose of adversarial proceedings. As Acting EOIR Director Jean King recently stated, the purpose of immigration courts and the BIA is to resolve disputes.[69] There should be no dispute before EOIR that arises between two different branches of DHS contradicting one another, especially when the stated purpose is to streamline proceedings and diminish existing backlogs.

Mixed cases could also create confusion for asylum seekers attempting to exercise their opportunity to seek review before courts of appeal.[70] Immigration judges could reverse the asylum office's denial of withholding, but leave USCIS' denial and order of removal on the basis of prior grounds of inadmissibility undisturbed.[71] In such tiered cases, asylum seekers seeking review before courts of appeal would likely exceed the "mandatory and jurisdictional" 30-day limit to review their asylum denial and accompanying removal order.[72]

Even absent procedural hurdles related to time-limited petitions for review, the mixed cases scenario would also have a chilling effect on asylum seekers' right to seek appellate review. Fearful that they may lose the protection granted, individuals may opt not to appeal and seek

[69] Jean King, Memorandum to All Immigration Court Personnel & Board of Immigration Appeals Personnel, OOD PM 21-25 (June 11, 2021), *available at* https://www.justice.gov/eoir/book/file/1403401/download.

[70] 86 Fed. Reg. at 46921 (noncitizens under the proposed regulations would have opportunities at four levels to have their claims for asylum, withholding of removal, or deferral of removal considered: First during a nonadversarial hearing before an asylum officer and then, if necessary, on review by an IJ, the BIA, and the appropriate circuit court of appeals.").

[71] See proposed § 208.14(c)(5).

[72] Stone v. INS, 514 U.S. 386, 405 (1995).

review of the asylum denial they received below. Finality is a key goal of appellate review—one that the NPRM would largely undermine by permitting cross-appeals from ICE. Finally, these procedural hurdles would also deter pro bono attorneys from taking cases. NIJC trains and partners with a large network of attorneys who are eager to seek final protection for their clients. Jeopardizing such protection would have ripple effects on the services NIJC can provide through our pro bono network.

f) Recommendations to improve due process protections for asylum hearings before USCIS

Although our prior comments have outlined significant due process concerns, we appreciate the Departments' intent to create a nonadversarial system that builds on USCIS' existing skills and expertise. The smaller, approachable setting in USCIS is also beneficial for many asylum seekers who may share their fears and past harm for the first time. However, there are significant ways in which USCIS could improve its new hearings, as well as existing interviews.

In particular, NIJC recommends that the Departments:

- confirm that attorneys may elect to offer an opening statement and question their clients directly first, followed by the asylum officer asking questions on narrow issues that require clarification;
- confirm that attorneys may offer a closing statement at the conclusion of the interview;
- require officers to review filings in advance of asylum interviews and train them to explore credibility without requiring asylum seekers to provide such a level of detail about torture and persecution that they experienced resulting in unnecessary retraumatization;
- train them to detect indicia of incompetency that may adversely impact asylum seekers' ability to proceed,[73] especially in light of the adverse impact of trauma on memory;[74]

[73] Current USCIS procedures make clear that, unlike immigration judges, asylum officers are not trained to detect indicia of incompetency pursuant to Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011). See USCIS, Asylum Division Affirmative Asylum Procedures Manual (AAPM) (May 2016), available at https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf, at II.J.12 (p.18) ("Asylum Office personnel are neither trained nor expected to evaluate an asylum applicant's mental or physical competency and shall not make any determinations to that effect."). This means that asylum seekers living with mental or physical disabilities have little to no remedy under the Rehabilitation Act and Due Process Clause to seek the accommodations they require. For example, section III.B.6. (p.38) of the AAPM largely prevents asylum officers from waiving the asylum seeker's presence or testimony, if no other witness is available. This would force mentally incompetent asylum seekers to testify and prevent other remedies, such as ascribing the same weight to a written declaration as sworn testimony of the asylum seeker or witnesses unable to appear, or proffer from counsel based on the written submission.

[74] Saadi A, Hampton K, de Assis MV, Mishori R, Habbach H, et al., Associations between memory loss and trauma in US asylum seekers: A retrospective review of medico-legal affidavits (2021), PLOS ONE 16(3): e0247033, available at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0247033.

- make referrals to immigration judges for full removal proceedings when presented with indicia of incompetency so that applicants can be assessed and potentially appointed a Qualified Representative;
- permit USCIS to appoint counsel in other cases where counsel is necessary to ensure fairness;
- permit asylum seekers and their counsel to record objections and make requests that the record reflect nonverbal activity (e.g. "Let the record reflect the application is showing a scar on her leg," or "Let the record reflect the applicant is crying.");
- create robust oversight and complaint mechanisms, including the option to elevate complaints to a supervisor during or immediately following the interview, so that asylum seekers have recourse when officers restrict their rights, do not provide appropriate language access services, or silence witnesses or counsel.

We also urge USCIS to engage with NIJC and other stakeholders on specific measures to improve its existing procedures, prior to launching the significant changes the NPRM contemplates. No asylum seeker should be better served in immigration court than in nonadversarial proceeding. We call on USCIS to not only meet but exceed EOIR's procedural safeguards, while crafting its new asylum hearings.

4) THE NPRM INCLUDES POSITIVE PROPOSED CHANGES.

We urge the Departments to substantially revise the Proposed Rules in light of the concerns we outline prior. Nevertheless, NIJC also notes support for some changes proposed in this NPRM, including the return to the significant possibility standard and recognition that the one-year bar and the current wait period for work authorization are unfair barriers for asylum seekers. We also flag outstanding concerns regarding final work permit regulations that undermine the Departments' intent, as well as concerns over the conversion of CFIs into asylum applications.

a) Significant possibility standard under proposed 8 C.F.R. § 208.30(e)

NIJC opposed the proposed heightened standard as proposed under the Global asylum rule and the securities bar rule. The Departments correctly point out that the heightened standard of those rules, enjoined, delayed or vacated by litigation, was dissonant with the first two decades of expedited removal and Congressional intent.[75] Indeed, the Congressional record made it clear that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution."[76] Initial screenings are but the first step of an arduous path to protection under U.S. asylum law—one that asylum seekers routinely face without the benefit of counsel by their side.

[75] 86 Fed. Reg. at 46914 (reviewing history and intent underlying the screening standard chosen by 104th Congress).

[76] *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 104 (D.D.C. 2018) (citing H.R. REP. NO. 104-469, pt. 1, at 158 (1996)).

Prior regulatory efforts to raise that bar sought to short-circuit the process, rather than afford individuals the review they deserved. As such, we welcome the proposed return to the low screening standard that Congress intended.

b) Eligibility for work authorization and ability to fulfill the one-year filing deadline 8 CFR §§ 208.3-208.4

NIJC supports the general idea that a positive credible fear interview (CFI) would be considered the filing of an asylum application both for purposes of meeting the one-year filing deadline for asylum applications under INA § 208(a)(2)(B) and to start counting required days towards employment authorization document (EAD) eligibility, with the proposed amendment that asylum seekers be given ample opportunity to amend and supplement their requests for asylum as they develop their cases and approach adjudication.

i. One-year filing deadline

There is ample evidence that the one-year deadline erects an administrative hurdle that unfairly precludes asylum seekers from presenting their claim.[77] We fear that this hurdle will remain for individuals who seek asylum at later stages, after entering on a visa. We urge the Departments to broaden the exceptions provided for changed or exceptional circumstances, as many of these asylum seekers fail to meet this deadline due to trauma, grief, hope that a safe return to their country of origin will remain possible, or sheer inability to navigate the U.S.'s complex asylum laws alone in a timely manner.

In many cases it is simply unrealistic to expect people to complete a complicated immigration application within 12 months of their arrival.

Some, like NIJC client Patrick,[78] are unable to file for asylum in that first year because they are coping with the trauma they endured in their home countries and confusion surrounding the immigration system. Patrick is a Rwandan man who was a child during the 1994 genocide. At the tender age of 9 years old, Patrick watched as many of his family members were murdered. Years later, he testified against the genocidaires and then came to the United States for college. About two and a half years into his college program, Patrick learned that one of the men who had murdered his family during the genocide had been released and had killed another family member, who had been paying for Patrick's education. This death revived emotions that Patrick had been dealing with for years and made him uncertain of his own future. While coping with this death, Patrick realized that he would no longer be able to finance his education and remain safely in the United States through a student visa, so he applied for asylum. He turned in his

[77] *See generally, Mendez Rojas v. Johnson*, 305 F.Supp.3d 1176 (W.D. Wash. 2018).

[78] Pseudonym used to protect confidentiality.

application about nine months after he learned that his family member had been murdered. Patrick acknowledged that he did not apply for asylum within one year of entering the country but instead contended that he was covered by the exceptions to the filing deadline and that he applied within a reasonable time of the changes in his circumstances. The Asylum Office recognized that Patrick was entitled to an exception to the deadline, but decided that the nine months it took him to file after learning of the tragedy was unreasonably long.

Another client, Assaitou,[79] came to the United States from Guinea to attend school. About six years later, she began receiving letters and calls from her uncle threatening to harm her if she did not return home and submit to the marriage he had arranged. Although Aissatou was terrified to return to Guinea, she did not realize that women could seek asylum based on fears of a forced marriage until she sought NIJC's assistance, long after missing the one-year deadline. Aissatou's misunderstanding is not surprising given that asylum has historically been referred to as "political asylum," giving the impression that only people who fear harm based on their political affiliations can qualify. This misnomer leads whole groups of refugees, like women who fear gender violence and individuals who fear harm based on their sexual orientation, to miss the deadline.

Neither Patrick nor Assaitou would be shielded from the one-year deadline under the Proposed Rules. While we recognize the specific scope of this NPRM focusing on border arrivals, we urge them to consider broadening existing definitions to exempt more individuals who won't benefit from this proposed change.

ii. Employment authorization

We similarly appreciate the Departments' proposal to begin the EAD clock with a positive CFI, as well as exempt asylum seekers from filing an additional form to seek this vital benefit. Exempting asylum seekers from filing a duplicative and unnecessarily intricate form (I-765) offers invaluable benefits and efficiency to our clients.

However, we believe this proposed change sidesteps a preliminary step that is essential to restoring asylum seekers' access to EADs: the rescission of partially enjoined final rules that require asylum seekers to wait a full year before seeking work authorization while lifting the 30-day processing period previously required for USCIS to expedite adjudication.[80] We are

[79] *Id*.

[80] USCIS, *Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38532, (June 26, 2020); *Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications*, 85 Fed. Reg. 37502 (June 22, 2020).

heartened that USCIS announced its intent to rescind or substantially revise those final rules.[81] Yet, the instant NPRM places the cart before the horse—rather than rescind the cruel timeline that already leaves countless asylum seekers without the basic means to provide for themselves, USCIS proposes to move it up to marginally mitigate the existing harm. We urge the Departments to avert this harm and enable asylum seekers to seek EADs under (c)(11). Paroling asylum seekers without affording them access to EADs would all but ensure their exploitation and destitution and inevitably interfere with their capacity to see their claims through.

Most asylum seekers cannot obtain any form of identification, such as a driver's license, without first receiving their EAD. Delaying the ability of asylum seekers to obtain an EAD, therefore, not only deprives asylum seekers of the ability to build financial security but also undermines access to numerous building blocks of stability, such as: accessing social benefits, opening a bank account, registering their child for school, driving their children to school, or ensuring their home gets heating and electricity.

Even within the scope of the proposed changes here, we urge the Departments to document the benefits and harms[82] of moving up employment authorization. USCIS previously acknowledged that "lost compensation to asylum applicants [due to the final rule that exempts USCIS from 30-day processing] could range from $255.88 million to $774.76 million annually."[83] This NPRM would move up eligibility and enable asylum seekers to enter the labor force at an earlier stage, providing each asylum seeker an average of $225.44 per workday—a tangible benefit that would provide critical tax revenue for local, state, and federal governments.

iii. Outstanding concerns over the conversion of positive CFIs into pending asylum applications

In NIJC's experience, CFI notes, even when resulting in a positive determination, are frequently incomplete or inaccurate due to misleading direction, rushed notetaking, poor interpretation, or lack of counsel. Replacing the I-589 with a positive CFI can layer inaccuracies on the basis of the application that could result in erroneous frivolous findings or other harm to the asylum seekers' merits review. Currently, proposed 8 CFR § 208.4(c) leaves it within the discretion of

[81] USCIS, *Rescission of "Asylum Application, Interview, & Employment Authorization" Rule and Change to "Removal of 30 Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization"*, RIN: 1615-AC66 (Spring 2021).

[82] While we view benefits as largely outweighing harm, we urge USCIS to weigh alleged harms. *See U.S. v. Texas*, – — U.S. ——, 136 S. Ct. 2271, 195 L.Ed.2d 638 (2016) (affirming ruling that Texas would incur significant costs in issuing driver's licenses); *Texas v. U.S.*, —— F.Supp.3d ——, 2021 WL 3025857 (S.D. Tx. 2021) (affirming "labor market distortion" of providing work authorization for youth under Deferred Action for Childhood Arrivals).

[83] Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. at 47148.

the asylum officer whether or not to permit an asylum seeker to amend or supplement their application prior to their "asylum hearing;" asylum seekers should be afforded this opportunity as of right and without time limitation. The current time limitation ("up until 7 days prior to the scheduled asylum hearing before a USCIS asylum officer, or for documents submitted by mail, postmarked no later than 10 days before the scheduled asylum hearing" under proposed § 208.3(a)(2) is all but certain to create confusion for asylum seekers—most of whom are *pro se*, unemployed, do not understand English, may be detained, and thus will lack the basic tools to challenge the CFI written record.

Other practical challenges may arise by cementing CFI written records into asylum applications, particularly for derivatives. Where multiple family members request CFIs and name each other as relatives, how would USCIS capture the EAD filing date? Where USCIS determines that a principal individual does not qualify for asylum but is only eligible for withholding of removal or relief under the Convention Against Torture (CAT), how would derivative family members (ineligible for relief as derivatives under withholding or CAT) obtain status without a formal, individual application?

Conclusion

As outlined prior, we applaud the Departments for drafting proposed rules that seek to protect asylum seekers' rights and human dignity. However, we found many of the proposed changes to conflict with this stated intent. In particular, the NPRM could better protect asylum seekers' rights to liberty and due process. NIJC stands ready to elaborate on any of the concerns and proposals outlined above and thanks the Departments for their consideration of our concerns and feedback.