Brooklyn Defenders

Brooklyn Defender Services
177 Livingston St., 7th Fl.
Brooklyn, NY 11201

Tel (718) 254-0700
Fax (718) 254-0897
ksiegel@bds.org

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Via Federal e-Rulemaking Portal
Daniel Delgado
Director for Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
2707 Martin Luther King Jr. SE
Washington, DC 20032

Re: Application of Certain Mandatory Bars in Fear Screenings
89 Fed. Reg. 41,347 (May 13, 2024)
RIN 1615-AC91
Dkt. No. USCIS-2024-0005

Dear Daniel Delgado,

Brooklyn Defender Services ("BDS") submits this comment in response to Application of Certain Mandatory Bars in Fear Screenings, a Notice of Proposed Rule ("NPRM") published on May 13, 2024 by the Department of Homeland Security ("DHS"). For the reasons set forth below, BDS firmly opposes the NPRM in its entirety. If implemented, the NPRM would undermine the ability of people fleeing persecution—and of adjudicators in the United States—to fairly and comprehensively evaluate eligibility for asylum and other fear-based protection. This impairment, in turn, would expand the recent executive and regulatory action to restrict the right to seek asylum at the United States's southern border—efforts that specifically target people of color. BDS urges DHS to rescind the unlawful NPRM in its entirety.

BDS is a public defense office in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal, family, and immigration defense, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system. About a quarter of BDS' criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore are at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project ("NYIFUP") providers and has represented more than 1,700 people in detained deportation proceedings since the inception of the program in 2013. BDS represents noncitizens in removal proceedings in New York's immigration courts, petitions for review before the U.S. Circuit Court of Appeals for the Second and Third Circuits, and writs of mandamus and habeas corpus in U.S. district courts.

I. Overview of Proposed Rule

The NPRM proposes changes to the expedited removable process to empower Asylum Officers ("AO") to apply certain mandatory bars to asylum and withholding of removal during credible fear interviews ("CFI") and reasonable fear interviews ("RFI") of noncitizens arriving in the United States and subject to expedited removal proceedings under 8 U.S.C. § 1225.[1] During the expedited removal process, the government is able to deport noncitizens without an immigration hearing unless they express a fear of return and show *either* a significant possibility of establishing eligibility for asylum in CFI *or*, if ineligible for asylum, the higher standard of a reasonable fear of persecution or torture in an RFI.[2] This process as employed in the southern border is already flawed, resulting in people with a legitimate fear of return and/or those who have resided in the U.S. for many years to be erroneously removed without a hearing. The current NPRM would exacerbate these erroneous removals, sending people back to countries in which there is a likelihood they may experience persecution and/or separating families in the U.S.

Under the NPRM, AOs would be authorized to issue a negative credible or reasonable fear determination—regardless of the merits of a noncitizen's claim for fear-based relief—where there is a "reasonable possibility" that the following mandatory bars to asylum "could apply to the noncitizen:"[3]

(1) *Persecutor bar*: noncitizens who "ordered, incited, assisted or otherwise participated in the persecution of any person" "on account of" or "because of" a protected ground, 8 U.S.C. § 1158(b)(2)(A)(i), 1231(b)(B)(i);
(2) *Particularly serious crime*: noncitizens convicted of a "particularly serious crime," 8 U.S.C. § 1158(b)(2)(A)(ii), 1231(b)(2)(B)(ii);
(3) *Serious nonpolitical crime*: where "there are serious reasons to believe that the [noncitizen] committed a serious nonpolitical crime outside the United States," 8 U.S.C. § 1158(b)(2)(A)(iii), 1231(b)(2)(B)(iii);
(4) *Danger to security*: where "there are reasonable grounds to believe the [noncitizen] is a danger to the security of the United States," 8 U.S.C. § 1158(b)(2)(A)(iv), 1231(b)(2)(B)(iv); and
(5) *Terrorism*: noncitizens who have participated in or threatened to use unlawful force to harm other or damage property or who have supported a group that uses unlawful violence. 8 U.S.C § 1158(b)(2)(A)(v), 1231(b)(2)(B).[4]

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[1] The credible fear standard is applied to applicants for admission who may be referred to full immigration proceedings and eligible for asylum. *See* 8 C.F.R. § 208.30. The reasonable fear standard applies to noncitizens previously ordered removed, who may only be referred to proceedings for consideration of withholding of removal. *See* 8 C.F.R. § 1208.31.

[2] *See generally* 8 U.S.C. § 1125(b); 8 C.F.R. § 253.3.

[3] 89 Fed. Reg. 41,355.

[4] 89 Fed. Reg. 41,348.

The NPRM would not include consideration of the firm resettlement bar, and it would not affect determinations that a noncitizen has a credible or reasonable fear of torture.[5]

Where standard procedures apply, the AO would enter a negative credible fear determination "if the noncitizen fails to demonstrate a significant possibility that the noncitizen would be able to prove by a preponderance of the evidence that the given bar would not apply and if the noncitizen was otherwise unable to demonstrate a credible fear of torture."[6] The AO would enter a negative reasonable fear determination "where the noncitizen appears subject to one or more mandatory bars [and] fails to show that there is a reasonable possibility that no bar applies."[7]

The NPRM provides for a special proceeding where the rebuttable presumption of ineligibility for asylum, created in 2023's Circumvention of Lawful Procedures ("CLP") rule, applies. This temporary rule currently applies to most noncitizens who have entered the United States via the southwest border. Where the presumption applies and has not been rebutted, the CLP rule provides that AOs proceed to screen noncitizens *only* for the limited fear-based reliefs of withholding of removal and protection under the Convention Against Torture ("CAT"). At this stage, the NPRM would authorize AOs to issue a negative reasonable fear determination based on the application of the mandatory bars.[8]

DHS acknowledges that, in 2020, the Trump administration issued a rule that sought in part to incorporate consideration of the mandatory bars into the CFI and RFI process and that this rule was enjoined in its entirety.[9] DHS further acknowledges that, in 2022, the current administration "again amended the credible fear regulations to instruct AOs to *not* consider the applicability of mandatory bars."[10] DHS quotes its own explanation that "'[r]equiring asylum officers to broadly apply mandatory bars at credible fear screening would increase [CFI] and decision times' and it would require a 'fact-intensive inquiry requiring complex analysis that would be more appropriate in a full adjudication before an asylum officer or in section 240 proceedings with the availability of judicial review than in credible fear screenings."[11]

DHS suggests that its current change of position—back to favoring the application of mandatory bars at the CFI stage—is justified because (1) the NPRM is permissive in nature and

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[5] 89 Fed. Reg. 41,355.

[6] *Id.*

[7] 89 Fed Reg. 41,357.

[8] *Id.*

[9] 89 Fed. Reg. 41,350 (citing Global Asylum Rule, 85 Fed. Reg. 80,274 (Dec. 11, 2020) and *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021)).

[10] *Id*. (emphasis added).

[11] *Id*. (quoting Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18219, 18221-22 (Mar. 29, 2022)) (alteration in original).

therefore allows AOs "flexibility to choose to consider a bar based on the individual facts and circumstances" and "information available;" (2) its experience with CLP rule shows that AOs can efficiently implement bars to asylum when screening noncitizens encountered at the border; (3) the NPRM does not conflict with Congress' intent that expedited proceeding be swift; and (4) the screening standards in the NPRM "ensure a fair process."[12]

For asylum seekers, the stakes of being denied asylum despite being eligible are extremely high: being returned to their home country, where they will face violence, brutal persecution, and even death. It is already exceedingly difficult to win an asylum claim and the laws, regulations, and processes governing asylum in the United States have become increasingly harsh.[13] Asylum seekers may be detained, lack access to counsel, and must overcome barriers such as past trauma, language access, and mental health issues.

Standing alone, the NPRM's deficiencies are myriad as it needlessly and unfairly short-circuits review of asylum applications and will disproportionately affect Black and brown refugees. Taken together with the administration's other actions—particularly the recent grossly unlawful Interim Final Rule ("IFR") Securing the Border, and the related presidential proclamation, the NPRM reflects a xenophobic, racist, and politically motivated effort to end asylum.

The Departments must rescind the NPRM in its entirety and recommit to strengthening the statutory right of refugees to apply for asylum in the United States regardless of manner and place of entry or their path to the United States.

II. Analysis and Recommendations

A. The 30-day comment period is insufficient for a rule of the NPRM's magnitude.

Just as it did with the CLP rule last year, DHS offers stakeholders like BDS only 30 days to provide comment on a proposed sweeping change to the rights of people seeking fear-based protection. This abbreviated comment period effectively denies the public its right to meaningfully

[12] 89 Fed. Reg. 41,354.

[13] Manuel Roig-Franzia, "Immigrants risk it all seeking asylum. The answer is almost always 'no,'" *Washington Post,* July 24, 2019, https://www.washingtonpost.com/lifestyle/style/migrants-risk-it-all-seeking-asylum-the-answer-in-court-is-almost-always-no/2019/07/23/9c161b2e-a3f7-11e9-b732-41a79c2551bf_story.html; Daniel Connolly, Aaron Montes, and Lauren Villagran, "Asylum seekers in U.S. face years of waiting, little chance of winning their cases," *USA Today,* Sept. 25, 2019, https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/.

comment on the NPRM,[14] including, for example, to discuss the NPRM with other stakeholders or with clients whose family members may be impacted. A minimum comment period of 60 days is necessary to allow the public to comment on the NPRM's attempt to create a wholesale reordering of asylum at the border in a way that violates U.S. and international law.

DHS's decision to truncate the comment period is reminiscent of the practices of the previous administration. In *Centro de la Raza v. EOIR*, for example, the District Court for the Northern District of California found that the previous administration violated the Administrative Procedures Act ("APA") by providing only 30 days to comment on a rule that would have significantly changed immigration court procedures.[15] In addition to highlighting the magnitude of the rule, the court noted that, as here, DHS and the Department of Justice ("DOJ") "acknowledged that the Rule constituted a 'significant regulatory action,' and stated that they 'drafted the rule consistent with the principles of Executive Orders 12866 and 13563.'"[16] Those executive orders, in turn, state that "a comment period . . . should generally be at least 60 days."[17] The court found it "curious" that EOIR had not explained its departure from those executive orders despite stating that it had complied with them.

DHS attempts to justify the abbreviated comment period by alluding to its desire "to provide an additional tool to more promptly remove noncitizens who pose public safety and national security risks" and by stating that the NPRM "relates to a discrete topic that has been addressed in multiple recent notice-and-comment rulemakings."[18]

As a coalition of over 30 interested organizations has already alerted, DHS does not show that an abbreviated comment period is appropriate.[19] The agency is proposing a reversal in an existing policy and the repeal of an existing rule—circumstances that *increase* the burden on DHS to justify shortening the comment period.[20] Moreover, DHS's mere desire to take quick regulatory action does not indicate any urgency that would justify departing from the 60-day standard.[21]

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[14] 5 U.S.C. § 553(b), (c); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (noting that the requirement under the APA is for a "meaningful opportunity" for comment).

[15] 524 F. Supp. 3d 919, 954-56 (N.D. Cal. 2021).

[16] *Id*. at 955 (quoting 85. Fed Reg. 81,463).

[17] Exec. Order No. 13,563, 76 Fed. Reg. 3821, 2821-22 (Jan. 18, 2011); *see also* Exec. Order. 12866, 58 Fed. Reg. 51,735 § 6(a)(1) (Oct. 4 1993).

[18] 89 Fed. Reg. 41, 3458.

[19] The Advocates for Human Rights, et al., Comment on Proposed Rule Regarding the Application of Certain Mandatory Bars in Fear Screenings, USCIS-2024-0005-0037 (May 20, 2024), https://www.regulations.gov/comment/USCIS-2024-0005-0037.

[20] *See id*. (citing *California v. Dep't of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019)).

[21] *See id*.

DHS's own statements that the NPRM would apply to a "relatively small" number of people[22] and that its goal is "to deliver swift decisions" and unburden "tax limited resources"[23] cast further doubt on the idea that the agency cannot provide stakeholders the usual 60 days to comment.

B. The NPRM will deny fear-based relief to eligible people without proper adjudication.

If implemented, the NPRM would compromise the ability of eligible noncitizens to obtain fear-based relief and lead to their unjust summary removal. It must therefore be rescinded.

DHS takes the position that the NPRM's "screening standards themselves ensure a fair process in that the noncitizen need only meet the significant possibility or reasonable possibility standard in order to pass through the screening process." This statement broadly misrepresents the actual procedures that DHS is proposing.

The NPRM does not exist in a vacuum. DHS is also proposing to make the vast majority of people who cross the southern border without authorization ineligible for asylum and to screen them for fear-based relief *only* if they proactively manifest a fear of return.[24]

Within the four corners of the NPRM, DHS invokes an extreme example to attempt to justify the rule's fairness: a noncitizen "convicted of murder and sentenced to ten or more years in prison in a country with a fair and independent judicial system." Although such a conviction is clearly for a particularly serious crime, DHS fails to indicate how an AO would verify their statement or determine that they were convicted in a fair and independent process (not to mention the lack of any sense of the import of an AO's suspicion that a murder trial was not fair or independent).

The extremity of DHS's example masks what would happen in practice. Nearly every case that actually reaches the mandatory bar stage would be far more ambiguous. Given the diffuse nature of the other four bars, noncitizens would be responding to vague questions about conduct, for example, for which they were never arrested and about their affiliations or community ties in their home countries. AOs would have wide latitude to interpret answers like these in ways that indicate a substantial possibility that a mandatory bar applies—even if a comprehensive examination of the facts and documents does not bear it out. The result would be that eligible noncitizens are denied the opportunity to seek protection in the United States.

In BDS's experience, immigration officials—including AOs and other USCIS employees—generally take a restrictive approach that interprets any contact with the criminal system as an outsized barrier to eligibility for relief. These decisions are frequently erroneous. BDS regularly, for example, assists asylum seekers in successfully reversing negative CFI and RFI

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[22] 89 Fed. Reg. 41,359.

[23] 89 Fed. Reg. 41,253.

[24] *See generally* Securing the Border, 89 Fed. Reg. 48,710 (published June 7, 2024).

determinations before the Immigration Court. In one case, an AO determined that an asylum seeker did not have a reasonable fear of persecution on account of his political opinion in part because he only knew his political party by initials—the common name for the party. Represented by BDS, he was able to show an Immigration Judge that he did have a substantial fear of persecution. In another example, just one attorney at BDS has represented at least two people with drug-related convictions that DHS alleged to be particularly serious crimes, but that Immigration Judges later determined did not constitute such crimes and were not a bar to fear-based relief. These are precisely the kinds of decisions the NPRM would entrust to AOs at the border where asylum seekers do not have access to counsel or accurate information or documentation. In proceeding after proceeding, BDS successfully proves that DHS is erroneously applying criminal bars to people seeking asylum. That these bars are often litigated in immigration proceedings is no surprise given that they all have complicated legal definitions developed over decades in both Board of Immigration Appeals and Court of Appeals decisions.

BDS's experience demonstrates the importance of evaluating claims for fear-based relief in full and fair hearings before a neutral judge. Expedited removal, including its procedures for evaluating fear-based relief, is fundamentally unfair because it leads to the summary deportation without process of vulnerable people fleeing persecution.[25] BDS and other stakeholders have every reason to expect that the deficiencies of the CFI and RFI procedures will only be magnified by allowing AOs to apply mandatory bars.

These harms are particularly acute because noncitizens subject to the NPRM will not be represented by counsel and will be unlikely to possess documentation to show by a preponderance of the evidence that a mandatory bar does not apply. And it is not at all clear how noncitizens

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[25] *See, e.g.*, "You Don't Have Rights Here:" US Border Screening and Returns of Central Americans to Risk of Serious Harm, Human Rights First (2014), https://www.hrw.org/report/2014/10/16/you-dont- have-rights-here/us-border-screening-and-returns-central-americans-risk ("Research by Human Rights Watch and others show that the CBP's methods for interviewing migrants in expedited removal procedures are seriously flawed."); Sara Campos and Guillermo Cantor, Ph.D., Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants 12, American Immigration Council (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf ("[A]s noted in some of the testimonies, immigration authorities often ignore these significant requirements [to inform migrants of charges against them and the opportunity to review their sworn statement.]"); American Civil Liberties Union 63, American Exile: Rapid Deportations That Bypass the Courtroom (2014) (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id.* at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id.* at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview).

would make that showing. BDS is able to assist the people it represents in showing that bars to fear-based do not apply to them *precisely* because it is able to collect necessary documentation and elucidate complicated legal definitions before Immigration Judges. It is fundamentally unfair to ask asylum seekers upon arrival in the United States and generally without counsel to make a similar showing.

DHS touts its record of applying the rebuttable presumption in the CLP rule as evidence that it can "effectively" apply the mandatory bars, which it describes as "easily verifiable," during CFIs and RFIs. Congress' intent in including CFIs in the expedited removal statute was to "provide adequate protections to legitimate asylum claimants" by preventing "erroneous decisions by lower-level immigration officials at points of entry."[26] DHS, however, defines its success solely as its ability to "move [noncitizens encountered at the border] through the [expedited removal] process quicker than ever." It does not purport to have any evidence of the accuracy of its denials under the CLP rule. Indeed, citing government figures, Human Rights First has found that, following the implementation of the CLP rule, noncitizens' rate of failures in CFI interviews increased threefold.[27] DHS's focus on processing speed goes against the congressional intent and ignores the real possibility that its short-circuiting dressed up as streamlining has led to erroneous decisions.

C. The application of mandatory bars would disparately harm Black, brown, and indigenous asylum seekers.

The policies within the NPRM will have a disparate impact on refugees of color and will particularly harm Black, brown, and indigenous asylum seekers. The NPRM targets those seeking asylum at the southern border.[28] The vast majority of these people are people of color and people from Latin American countries.[29]

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[26] 142 Cong. Reg. S11491 (1996) (statement of Sen. Orrin Hatch).

[27] Human Rights First, Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm 46 (2023).

[28] *See, e.g.*, USCIS, Credible Fear Screenings, https://wwwhttps//www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings#:~:text=Noncitizens%20attempting%20to%20enter%20the,receive%20a%20credible%20fear%20interview..uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings#:~:text=Noncitizens%20attempting%20to%20enter%20the,receive%20a%20credible%20fear%20interview (last updated Aug. 7, 2023) (describing heightened procedures for receiving a CFI at the northern border).

[29] *See, e.g.*, John Gramlich, *Monthly encounters with migrants at U.S.-Mexico border remain near record highs*, Pew Research Center (Jan. 13, 2023), https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/#:~:text=But%20that%20is%20no%20longer,%2C%20Nicaragua%2C%20Peru%20and%20Venezuela (noting that Mexico, Guatemala, El Salvador, and Honduras account for 37 percent

As stated above, the CLP rule—which explicitly applies only to people entering the United States through the southern border—has led to a threefold increase in the number of people who failed to pass CFIs.[30] Moreover, of the 31,000 people subject to the CLP rule between May and October 2023, nearly half were ordered deported—a figure that only covers people apprehended shortly after entering the country.[31]

It is reasonable to expect that the present NPRM will only reproduce and magnify the effects of the CLP rule—both curtail due process during expedited removals. Black and brown immigrants and other immigrants of color, and particularly immigrants from discriminated indigenous backgrounds, will bear the brunt of the new rule. This discrimination based on race, ethnicity, and national origin is another reason that the NPRM is untenable and must be rescinded in its entirety.

III. Conclusion

The administration has made clear that it intends to limit the availability of asylum to refugees arriving at the southern border. This NPRM, which allows AOs to short-circuit fear-based proceedings by applying certain mandatory bars at the CFI or RFI stage, is merely among the latest nails the administration seeks to drive into the coffin. BDS, however, knows that these mandatory bars involve complex factual and evidentiary questions, unanswerable in the rushed environment of CFIs and RFIs. The NPRM would moreover continue DHS's policy of restricting fear-based relief through mechanisms that disproportionately affect refugees of color.

DHS must rescind the NPRM in its entirety.

Sincerely,

/s/ Kevin Siegel
Kevin Siegel
Staff Attorney, Civil Rights and Law Reform

/s/ Lucas Marquez
S. Lucas Marquez
Director, Civil Rights and Law Reform

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of border encounters and that there have been steep increases in the number of encounters with nationals of Colombia, Cuba, Nicaragua, Peru, and Venezuela).

[30] *Supra* n.27, Inhumane and Counterproductive: Asylum Ban Inflicts Mounting Harm at 46.

[31] *Id*. at 48.