Twitter Thread by Aaron Reichlin-Melnick

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■ The June "Death to Asylum" regulation has been finalized. It is set to go into effect on Monday, January 11, just nine days before inauguration.

https://t.co/tQGwoRrjjW

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 235

RIN 1615-AC42

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1235

EOIR Docket No. 18-0102; A.G. Order No. 4922-2020

RIN 1125-AA94

Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

AGENCY: Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On June 15, 2020, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") (collectively "the Departments") published a notice of proposed rulemaking ("NPRM" or "proposed rule") that would amend the regulations governing credible fear determinations. The proposed rule would make it so that individuals found to have a credible fear will have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act ("INA" or "the Act") ("statutory withholding of removal"), or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), adjudicated by an immigration judge within the Executive Office for Immigration Review ("EOIR") in streamlined proceedings (rather than under section 240 of the Act), and to specify what standard of review applies in such streamlined proceedings. The Departments further proposed changes to the regulations regarding asylum, statutory withholding

Under this new rule, one of Trump's last parting body blows to the United States' system of humanitarian protection, none but the lucky few will be able to win asylum.

The regulation creates near-total bans on asylum for wide swathes of people and herculean procedural barriers.

Specifically, the Departments are adopting the following eight non-exhaustive circumstances, each of which is rooted in case law, that would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant's inability to demonstrate persecution on account of a protected ground: (1) interpersonal animus or retribution; (2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue; (3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state; (4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations; (5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence; (6) criminal activity; (7) perceived, past or present, gang affiliation; and (8) gender. 8 CFR 208.1(f)(1)–(8), 1208.1(f)(1)–(8). At the same time, the regulation would not foreclose that, at least in rare cases, such circumstances could be the basis for finding nexus, given the fact-specific nature of this determination.

Before I get into just how horrific this new anti-asylum regulation is, a picture of Petra I took this morning to soften the blow of what is a terrible thing to read through—even though the Biden administration will be working to end it ASAP and court challenges are certain.

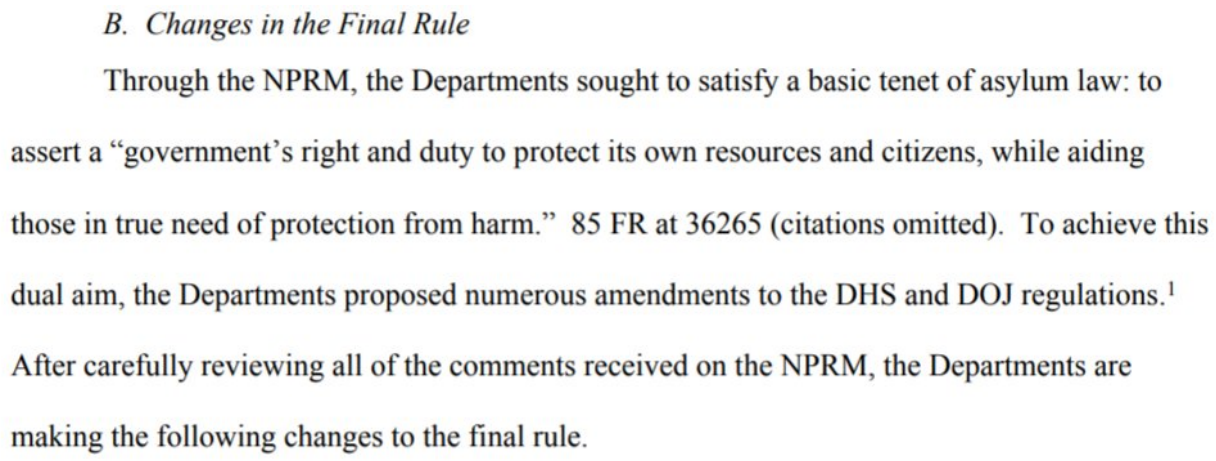
Back to the new regulation, which I wrote about in June when it was first proposed.

Today, the Trump administration says that they have "generally adopt[ed] the [Notice of Proposed Rulemaking] with few substantive changes." Meaning it's just as bad. https://t.co/EhWm9MwzFe

The Trump administration's anti-refugee policies show right at the start.

To them, refugee protections are first about "protecting [our] own resources and citizens" and only secondarily about protecting people from persecution.

That's what led us to turn away Jews in the 1930s.

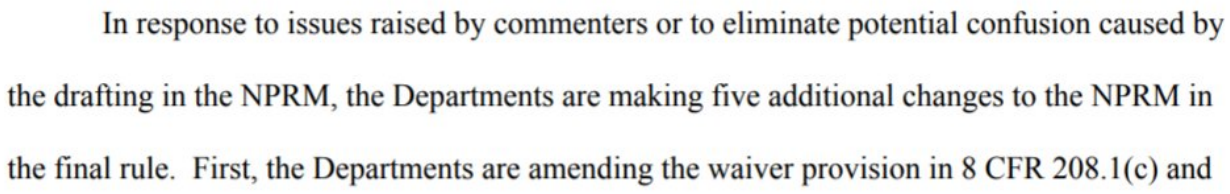


B. Changes in the Final Rule

Through the NPRM, the Departments sought to satisfy a basic tenet of asylum law: to assert a "government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm." 85 FR at 36265 (citations omitted). To achieve this dual aim, the Departments proposed numerous amendments to the DHS and DOJ regulations.[1] After carefully reviewing all of the comments received on the NPRM, the Departments are making the following changes to the final rule.

Despite over 80,000 comments in response to this rule, the overwhelming majority of which were in opposition to the rule, the Trump administration only made FIVE substantive changes.

It's clear that they never intended to respond to comments—and that'll doom them in court.



In response to issues raised by commenters or to eliminate potential confusion caused by the drafting in the NPRM, the Departments are making five additional changes to the NPRM in the final rule. First, the Departments are amending the waiver provision in 8 CFR 208.1(c) and

Before I go through those five substantive changes, I encourage people to check out my thread from June analyzing the proposed regulation.

It goes over in excruciating detail just some of the terrible changes—almost all of which have now been adopted. https://t.co/Wg31fcb0uZ

> \U0001f6a8The DHS/DOJ notice of proposed rulemaking making it harder to claim asylum at the border is out.
>
> Comments will be due 30 days from Monday.https://t.co/8PnYH8dnB2
>
> — Aaron Reichlin-Melnick (@ReichlinMelnick) June 10, 2020

Okay, the 5 changes.

First, DHS/DOJ have partially walked back their original proposal to utterly ban new Particular Social Groups in motions to reopen if not presented early on, even when it was ineffective of counsel.

Old language: New language:

determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

Second, DHS/DOJ have also partially walked back a proposal to ban claims of persecution on the basis of death threats without an attempt (i.e. even if someone said "I'm going to kill you tomorrow" that wouldn't have been enough).

Old: New:

harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

Third, DHS/DOJ have decided to graciously agree that illegal entry by CHILDREN shouldn't be a "significant adverse discretionary factor" in asylum... but kept in place penalties against CHILDREN for:

- not applying for asylum in a third country; or
- using fraudulent documents

Third, in recognition of commenters' concerns and the reality that aliens under the age of 18, especially very young children, may not have decisional independence regarding an illegal entry into the United States, the Departments are amending 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. The Departments do not believe that a similar exception is warranted in 8 CFR 208.13(d)(1)(ii) and (iii), and 1208.13(d)(1)(ii) and (iii), however. For (d)(1)(ii) to apply to an alien under the age of 18, that alien must have filed an asylum application in the United States, notwithstanding any language barriers or other impediments; thus, there is no reason to assume categorically that such an alien could not have filed an application for protection in another country. Consequently, the Departments find that no age exemption is warranted in 8 CFR 208.13(d)(1)(ii) and 1208.13(d)(1)(ii). Further, as discussed, *infra*, there is no reason that an alien of any age would need to use fraudulent documents to enter the United States in order to seek asylum. Accordingly, no age exemption is warranted in 8 CFR 208.13(d)(1)(iii) and 1208.13(d)(1)(iii). Even without age exemptions, the Departments note that these discretionary factors do not constitute bars to asylum and that adjudicators may appropriately consider an applicant's age in assessing whether a particular application warrants being granted as a matter of discretion.

Fourth, DHS/DOJ have clarified some incredibly confusing language about when a brand new (and absolutely ridiculous) definition of a "frivolous" asylum application goes into place.

Fourth, in response to commenters' concerns about the applicable effective date of the frivolousness provisions in 8 CFR 208.20 and 1208.20, the Departments have clarified the language in those provisions. The amendments to those provisions provided in this rule apply only to asylum applications filed on or after the effective date of the rule. The current definition of "frivolousness" will continue to apply to asylum applications filed between April 1, 1997, and the effective date of the rule.

And the fifth and last "substantive change"... is to make the rule even worse by eliminating a requirement that people whose applications are at risk of being deemed frivolous be given a chance to respond to concerns and argue why their case isn't frivolous.

Truly despicable.

Fifth, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), the Departments are deleting language in the former regarding an alien's opportunity to account for issues with a claim. The intent of the NPRM, expressed unequivocally in the proposed addition of 8 CFR 208.20(d) and 1208.20(d), was clear that adjudicators would not be required to provide "multiple opportunities for an alien to disavow or explain a knowingly frivolous application." 85 FR at 36276. The Departments inadvertently retained language from the current rule in the proposed additions of 8 CFR 208.20(b) and 1208.20(b), however, that was in tension with that intent. *Compare*, *e.g.*, 8 CFR 208.20(b) (proposed) ("Such finding [of frivolousness] will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim."), *with* 8 CFR 208.20(d) (proposed) ("If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding."). Accordingly, in the final rule, the Departments are deleting the sentence from 8 CFR 208.20(b) and 1208.20(b) regarding an alien's opportunity to address issues with his or her claim after receiving the statutory warning regarding the knowing filing of a frivolous asylum application to avoid any residual confusion on the point.

There were over 80,000 comments in opposition to this rule. @immcouncil and tons of other orgs submitted extensive comments identifying hundreds of problems with the rules... and DHS/EOIR made just 5 substantive changes (one making

things worse) and 13 non-substantive changes.

In the response to the comments, DHS/EOIR puts into footnotes that the regulation will not apply to pending applications, but at NO point in the actual text of the regulation (the part judges apply) is that written.

There will absolutely be extensive confusion over this point.

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[49] As discussed herein, the rule itself applies prospectively to applications filed on or after its effective date; accordingly, it will have no effect on pending applications, contrary to commenters' concerns. However, the rule also codifies many principles that are already applicable through binding case law. Thus, although the rule itself may not apply to pending applications, applicable case law that is reflected in the rule may nevertheless still apply to pending applications.

On the point of whether these rules apply to pending cases, compare the frivolousness bar—which is very explicit that it only applies to new applications—to the general language around the new definitions of asylum law.

Why should we trust DHS/EOIR's footnotes on pending cases?

§ 208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, and before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

DHS/EOIR are keeping in place a provision that would place every person who passes a credible fear interview at the border into "asylum-and-withholding-only proceedings."

Under a separate rule—also coming soon—they'd get just 15 days to file for asylum!

https://t.co/Ev7x0sxEUB

The entire regulation is a disaster procedurally and legally. It is blatantly unlawful in multiple locations because it flies in the face of decades of precedent on asylum.

Just on those grounds alone, a court is likely to strike down the rule as unlawful. But there's more!

The rule is also a procedural disaster. DHS/EOIR offers conclusory and insufficient responses to almost all concerns raised in the comments, despite being required to do more.

As a result, the rule will likely be blocked on Administrative Procedure Act grounds. But there's more!

The DHS part of the rule is also vulnerable because as commenters raised (and multiple federal courts have already with them), Chad Wolf is not lawfully serving as DHS Secretary.

Since Wolf doesn't have the authority to promulgate this rule, the DHS rule is totally void.

> Similarly, commenters stated that Acting Secretary Chad Wolf and Chad Mizelle, the Senior Official Performing the Duties of the General Counsel, both are serving in violation of the FVRA and, accordingly, both lack signature authority that has force or effect. *See* 5 U.S.C. 3348(d)(1).
>
> *Response*: Neither the NPRM nor this final rule was signed by Mr. Cuccinelli. Thus, the status of Mr. Cuccinelli's service within the Department is immaterial to the lawfulness of this rule. The NPRM and this final rule were signed by Chad Mizelle, the Senior Official Performing the Duties of the General Counsel for DHS, and not by Ken Cuccinelli. As indicated in the proposed rule at Section V.H, Chad Wolf, the Acting Secretary of Homeland Security, reviewed and approved the proposed rule and delegated the signature authority to Mr. Mizelle.

So, to sum up: this is a terrifyingly awful attack on asylum that would threaten the very foundations of the United States' promises to protect the vulnerable—but like so many Trump policies, it was done so sloppily and unlawfully that it probably won't survive in court.

One of the very first things the Biden administration should do on taking office is to declared they will not defend the rule in court, and at the same time begin the process of formally eliminating the rule and replacing it with something much better that preserves asylum.

To give an example of what I mean by "conclusory and insufficient responses" to comments, check out this one, which can only be boiled down to "nuh-uh."

Many comments oppose the NPRM because they misstate, in hyperbolic terms, that it ends or destroys the asylum system or eliminates the availability of humanitarian protection in the United States. The NPRM does nothing of the kind. The availability of asylum is established by statute, INA 208, 8 U.S.C. 1158, and an NPRM cannot alter a statute.[11] Rather, the NPRM, consistent with the statutory authority of the Secretary and the Attorney General, adds much-needed guidance on the many critical, yet undefined, statutory terms related to asylum applications. Such guidance not only improves the efficiency of the system as a whole,

[11] For similar reasons, the NPRM cannot—and does not—alter the general availability of withholding of removal under the Act or protection under the CAT.

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but allows adjudicators to focus resources more effectively on potentially meritorious claims rather than on meritless ones. In short, the NPRM enhances rather than degrades the asylum system.

Another example of total failure to engage with comments?

DHS/EOIR says people are wrong that the rules create blanket bans on certain kinds of claims because they don't "categorically rule out types of claims."

In other words, it's not a ban if 1 in 1,000 can still win. ■

Many comments misstate that the NPRM creates a blanket rule denying asylum based on its addition of certain definitions—e.g., particular social group, political opinion, nexus, and persecution. Although the rule provides definitions for these terms and examples of situations that generally will not meet those definitions, the rule also makes clear that the examples are generalizations, and it does not categorically rule out types of claims based on those definitions. In short, the rule does not contain the blanket prohibitions that some commenters ascribe to it.