



NEW YORK
CITY BAR

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Submitted via www.regulations.gov

Ms. Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Mr. Andrew Davidson
Asylum Division Chief
Refugee, Asylum and International Affairs Directorate
U.S. Citizenship and Immigration Services

Re: RIN 1615–AC57 or Docket No. USCIS 2020–0013, and RIN 1125-AB08 or A.G. Order No. 4747–2020, Public Comment Opposing Proposed Rules on Security Bars and Processing

Dear Ms. Alder Reid and Mr. Davidson:

We write on behalf of The New York City Bar Association (the “City Bar”), a voluntary association of over 24,000 members from all parts of our nation that is committed to improving the administration of justice and the rule of law. The City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. For the reasons explained below, the City Bar urges the administration to withdraw the proposed rule which would effectively gut protections for vulnerable populations and close the U.S. border to all persons.

We submit this comment, asking the U.S. Department of Justice (“DOJ”) and U.S. Department of Homeland Security (“DHS”) to withdraw the Proposed Rule, titled “Security Bars and Processing,”¹ posted in the Federal Register on July 9, 2020 (85 Fed. Reg. 41201) (the “proposed rule”) and, if the agencies wish to reissue it, that they provide —at bare minimum— the

¹ United States Citizenship and Immigration Services, DHS and Executive Office for Immigration Review, DOJ, Proposed Rule – “Security Bars and Processing,” 85 Fed. Reg. 41201 (July 9, 2020), <https://www.federalregister.gov/d/2020-14758> (all websites last visited Aug. 6, 2020).

60-day period for public comment contemplated by Executive Order 12866. The 30-day timeline is both inadequate and, as with other recently proposed regulations which would radically change asylum adjudications, seems calculated to minimize public participation in commenting, given the complexity of the proposed rule.²

The proposed rule expands on Health and Human Services (“HHS”) March 24, 2020 interim final rule that authorized the Centers for Disease Control and Prevention (“CDC”) to “suspend the introduction of persons from designated countries or places, if required, in the interest of public health.”³ The proposed rule would: (1) let Departments consider “emergency public health concerns” based on communicable diseases when determining asylum eligibility under the “danger to the security of the United States” standard; (2) to use this so-called *mandatory bar* in credible fear screening; (3) allow DHS to remove applicants for deferral of removal under the Convention Against Torture (“CAT”) to third countries without adjudicating their claims; and (4) modify the process for evaluating eligibility of asylum seekers for deferral of removal who are ineligible for withholding of removal.⁴

The proposed rule would expand the definition of communicable diseases to cover any disease declared to be a public health emergency (e.g.: COVID-19, zika, etc.), any determined to be a communicable disease of public health significance (e.g.: syphilis, gonorrhea, smallpox, etc.), or any other emerging or reemerging communicable disease (e.g.: e. coli, tuberculosis, measles, influenza, etc.). This expansion would apply to diseases whether they are determined to be a public health emergency by the US government or designated by another country.⁵ Under current regulations, “danger to the US” criteria do not include any health-related standard. Rather, they address terrorism and war-like crimes.⁶ In a significant departure from prior practice and the plain language of the Immigration and Nationality Act, the Departments propose to embed this “public health concern” under the “danger to the US” criteria when assessing eligibility for asylum and withholding of removal.⁷

² See Immigration and Nationality Law Committee, New York City Bar Association, Committee Report – Opposition to Inadequate Comment Period Allocated for Proposal Which Would Radically Alter the Substantive & Procedural Rules Governing all Adjudications of Applications for Asylum, July 14, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/rewriting-us-asylum-rules-opposition-to-inadequate-comment-period>.

³ U.S. Centers for Disease Control and Prevention (“CDC”) and U.S. Department of Health and Human Services (“HHS”), Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (March 20, 2020), <https://www.federalregister.gov/d/2020-06327>.

⁴ 85 Fed. Reg. 41201 at 41201.

⁵ See World Health Organization, International Health Regulations (third ed., 2005), <https://www.who.int/publications/i/item/9789241580496> and CDC, Legal Authorities for Isolation and Quarantine (last reviewed February 24, 2020), <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

⁶ 85 Fed. Reg. 41201 at 41206-41207, 41209-41210.

⁷ 85 Fed. Reg. 41201 at 41210.

The Departments also propose to apply the bars to asylum and withholding of removal in the credible fear process,⁸ a process for which Congress intentionally created a low threshold, that the applicant must merely show a “significant possibility” of being eligible for asylum.⁹ Under current regulations, such bars are generally not applied during the credible fear process.¹⁰

For individuals ineligible for asylum and withholding of removal based on the proposed “danger to the US” criteria, the rule would provide DHS with the unreviewable discretionary option, to either place such individual into removal proceedings under INA § 240 or to remove them.¹¹ Currently, such individuals are eligible to be placed in removal proceedings before an immigration judge.¹² However, the proposed rule would create a new ground for expedited removal that would circumvent existing asylum laws and proceedings.

Finally, during the process for eligibility, the proposed rule would remove individuals to a third country, if they could not establish during the credible fear process that they are “more likely than not to face torture” in that third country.¹³ This change would serve as a *de facto* expedited removal before adjudication of their claims through regular proceedings, further removing protections for individuals seeking asylum.¹⁴

The City Bar strongly opposes the proposed regulation for several reasons.

First, the “public health concerns” standard is inconsistent with the INA which defines other security-related bars to include terrorism and war-like crimes elements.¹⁵ However, the Departments, with no rational explanation, have equated the current economic hardship to the United States with terrorism and war-like crimes, under the pretext of a concern for public health. The current Administration is simply using the COVID-19 pandemic as a ground to further erode the immigration system and close the U.S. border to asylum seekers. Using the pandemic to bypass the duly enacted immigration statute not only undermines the rule of law, but also erodes confidence in public health recommendations during a pandemic.

Second, the definition of a communicable disease in the proposed rule is overly broad, effectively using any number of diseases, for which simple treatments are available, to discriminate against individuals seeking asylum. The proposed regulation, furthermore, suggests that any individual that would pose a “potential risk” of bringing communicable diseases to, or facilitating their spread within, the United States, would also be denied asylum. It is alarming that under the proposed rule, such vague criteria would be considered. There are no criteria in the proposed rule

⁸ 85 Fed. Reg. 41201 at 41207.

⁹ INA § 235 (b)(1)(v)..

¹⁰ *See* 8 C.F.R. 208.30.

¹¹ 85 Fed. Reg. 41201 at 41211.

¹² *See* 8 U.S.C. 1225.

¹³ 85 Fed. Reg. 41201 at 41212.

¹⁴ *See* 8 C.F.R. 208.16, 1208.16.

¹⁵ INA § 208(b)(2)(A).

for how DHS officers would ascertain who poses a “potential risk” nor do the proposed regulations specify what communicable diseases will be added to the list.

Third, the Departments propose to give DHS the unreviewable discretion in expedited removal proceedings to send asylum seekers to third countries without any access to an immigration judge. This proposal circumvents Congress’ protections to ensure proper immigration procedures, further undermining the immigration system. This proposal would provide DHS with the authority to exercise complete discretion without a removal proceedings under INA § 240 review and to remove individuals even before adjudication.

Finally, the alleged reason to change asylum procedures by expanding the *mandatory bar* is to protect asylum seekers, government employees, and U.S. citizens from COVID-19 and other communicable diseases. However, this result can be achieved by establishing a robust testing strategy, provision of personal protective equipment for all (e.g. masks), educational sessions, baseline treatment for communicable diseases (when feasible), and quarantine in humane conditions. Rather than choose the least restrictive path for those seeking asylum, the Departments appear to have chosen the most restrictive means to address COVID-19.

For the reasons stated above, the City Bar strongly opposes the proposed regulation. We urge the Departments to withdraw this proposed regulation out of respect for the rule of law and humanitarian protections which form the foundation of our free and democratic society.

Respectfully,

A handwritten signature in black ink, appearing to read "Victoria Neilson".

Victoria Neilson
Chair, Immigration & Nationality Law Committee