



Submitted via www.regulations.gov

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Lauren Alder Reid, Assistant Director,
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

**RE: RIN 1125-AA93; EOIR Docket No. 19-0010; A.G. Order No. 4843-2020,
Public Comment Opposing Proposed Rules on Procedures for Asylum and Withholding of
Removal**

Dear Ms. Reid:

I am writing on behalf of Futures Without Violence (FUTURES), in response to US Department of Justice (DOJ) Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal*.

FUTURES strongly opposes the proposed rule which creates new draconian procedures for asylum seekers and denies them their due process rights under the United States (US) Constitution. This proposed rule will foreclose asylum protections for hundreds of thousands of vulnerable refugees, especially immigrant survivors of domestic violence, sexual assault, and other gender-based abuses, leading to more women and children being beaten, raped, trafficked and killed. Additionally, because the proposed rule is expansive and the timeframe to respond exceedingly short, we are not able to comment on every proposed change in the detail that we would like. The fact that we do not set forth and discuss a particular change to the law with specificity, does not mean that we agree with it. We oppose the proposed rule in its entirety and strongly urge DOJ to withdraw and rescind the entire proposed rule.

FUTURES is a national nonprofit organization that has worked for more than 35 years to prevent and end violence against women and children in the US and around the world. We educate about and work to eliminate domestic violence, sexual assault, child abuse, and human trafficking through education and prevention campaigns; training and technical assistance to state agencies, public and private entities, judges and court systems, colleges and universities, and global organizations; and we advance sound policies and evidence-based practices at the state and federal level that prevent violence and help survivors and their children heal and thrive.

FUTURES staff are experts on family violence prevention, sexual assault, child trauma and human trafficking and the services and supports necessary for children and women to heal from violence and trauma. Based on that experience, we know that violence against women and children is a global pandemic, affecting one in three women in the world and up to ¾ of the world's children. Recent data from the World Health Organization reveals that up to 1 billion children aged 2–17 years, have experienced physical, sexual, or emotional violence or neglect in the past year. A report co-authored by FUTURES in partnership with the Civil Society Working Group on Women, Peace and Security, shows that women and children in the Northern Triangle – the countries of origin for the overwhelming majority of those seeking asylum at our southern border --- experience rates of sexual assault and violence higher than global averages.

I. DOJ Has Failed to Provide a Meaningful Opportunity for the Public to Comment on this Proposed Rule.

FUTURES submits that a 30-day comment period is insufficient and the proposed rule should be rescinded on this basis alone. Typically, agencies should allow a comment period of at least 60 days following publication of the proposed rulemaking to provide the public a meaningful opportunity to comment. Here, despite the complexity of this new rule and its harmful effects, DOJ has afforded the public only 30 days to comment.

There is no justification for rushing through a proposed rule that sets forth new restrictions and has the power to send those fleeing gender-based violence back to their countries where they face continued persecution and even death. Any one of the sections of these proposed regulations, standing alone, would merit 60 days for the public to fully understand the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, DOJ has allowed the public just 30 days to respond to a rule that unjustly deprives asylum seekers of their due process rights.

The importance of a sufficient comment period is even more critical due to the extraordinary changes to working conditions affected by the COVID-19 pandemic. The pandemic has caused an increased rate of domestic violence and augmented the complexity and challenges of serving survivors. Agencies that serve survivors of violence are either at capacity or must now navigate additional and novel barriers in their service provision.

FUTURES is a national organization with offices in San Francisco, Boston, and the District of Columbia and, like many organizations, is attempting to work remotely while allowing staff necessary leave to care for themselves and family members affected by the pandemic. It is challenging to access documents, information, and technology as well as coordinate, convene, and respond to a proposed rule in such a short time period. For this reason alone, we urge DOJ to rescind the proposed rule.

II. The Proposed Rule Eliminates Asylum as a Pathway to Safety and Protection for Survivors of Gender-Based Violence.

Immigrant survivors of gender-based violence who flee to the US to seek asylum do not make the choice lightly. They must leave everything they know, brace themselves for the tremendous danger and peril that awaits them and their children during their journey, and traverse thousands of miles with very few possessions of their own. They do this because they have no choice. They know that they will be killed or seriously injured if they stay in their countries of origin where their governments do little to protect them from their abusers. Thus, for many survivors of gender-based violence, asylum is their pathway to safety and protection. As shown below, the proposed rule seeks to bar these vulnerable survivors of violence from qualifying for asylum.

A. The Proposed Rule Contravenes the Immigration and National Act and Imposes an Unachievable Asylum Filing Deadlines that Denies Survivors of Gender-Based Violence Due Process.

The proposed rule would require many asylum seekers to file their asylum applications within 15 days of their first master calendar hearing. The 15-day time limitation contravenes the Immigration and Nationality Act (INA) and imposes an arbitrary filing deadline that ignores the realities that survivors of gender-based violence face.

Congress, by statute, set the time limit for filing asylum applications at one year after an individual enters the United States (subject to tolling).¹ That statutory deadline applies across the board—to individuals who are in removal proceedings and to those who are not.² The proposed rule would impermissibly preempt this statutory deadline. Where an individual's hearing is held less than 350 days after the individual enters the country, the regulation would cut short the statutory deadline. Where an individual's first hearing is held more than 350 days after entry, it would extend the statutory deadline. A regulation may not preempt a statute in this way.

The proposed rule also violates due process. The 15-day deadline is arbitrary and capricious and completely fails to consider circumstances faced by survivors of violence and other asylum seekers. Most survivors of gender-based violence who arrive at the border and request asylum do not have access to legal counsel. Many are ill equipped to effectively communicate with immigration officials due to profound traumatization, hunger, exhaustion, lack of understanding of the US legal and immigration process, and language and cultural barriers. It is unfair and unconscionable to expect survivors who are fleeing persecution in their home countries to meaningfully recount their stories and complete an asylum application without

¹ 8 U.S.C. § 1158(a)(2)(B).

² See, 8 U.S.C. § 1158(a)(1) (“[a]ny” individual “physically present in the United States or who arrives in the United States” may apply for asylum “in accordance with” § 1158).

medical, mental health and other services. Indeed, at the very least, survivors of violence require at least six months to begin processing and healing from their trauma in order to effectively describe their ordeals in even the most basic terms needed for filling out their asylum applications. Requiring those in asylum-only proceedings to file applications for relief within a mere 15 days of their initial court hearings will all but guarantee that their applications will be denied and they will be deported back to their abusers and persecutors.

US immigration law is complex and the multitude of new regulations passed by this Administration make the asylum process even more complicated. Survivors of violence desperately need the assistance of counsel to help them prepare their asylum applications. Even the most straightforward cases require technical legal analysis to ensure meaningful access to the asylum process. Indeed, the cases involving gender-based persecution are exceedingly complex and often involve new and contradictory interpretations and decision by various circuits of the U.S. Court of Appeals, the Board of Immigration Appeals, and the Attorney General. All of these decisions must be understood, reviewed and considered when filing an asylum application, especially in light of a recently proposed rule that changes the definition of a “frivolous” application.

Unfortunately, for many survivors of violence, finding and hiring an attorney is nearly impossible. Many survivors who arrive at the border seeking asylum will be in tent cities in Mexico or detained in immigration jails and are unlikely to have access to an attorney or have funds to hire an attorney. Moreover, they are also unlikely to be able to understand the 12-page asylum application and the requirements that they must meet to receive relief under US asylum law. Even if an asylum seeker does manage to find a lawyer, the lawyer will barely have enough time to prepare the case properly. Mistakes and inaccuracies will be the norm in the rushed situations like this, meaning that there will be easy reasons for an immigration judge to deny asylum to someone who would otherwise be qualified.

B. The Proposed Rule Imposes An Arbitrary Cap on Asylum Adjudications that Denies Survivors of Gender-Based Violence Due Process.

The proposed rule also precludes asylum seekers from receiving continuances that would extend the adjudication of their asylum applications more than 180 days after the application is filed absent “exceptional circumstances.” Exceptional circumstances include: “battery or extreme cruelty to the [applicant] or any parent or child of the [applicant], serious illness of the [applicant], or serious illness or death of the spouse, child, or parent of the [applicant].” FUTURES strongly believes that the proposed rule’s definition of “exceptional circumstances” is too restrictive and utterly discounts how challenging it is for survivors of violence to put together strong asylum applications.

An application for asylum is not merely filling out the I-589 Form. It involves gathering supportive evidence to show that the asylum seeker was persecuted or has a well-founded fear of persecution if she is returned to her home country. Gathering evidence takes time, particularly in the case of survivors of gender-based violence. For instance, it may take months

to set up an appointment for a client to receive a psychological evaluation, attend the appointment, and receive the report. It may take months to receive reports from professors and other experts on country conditions within the applicant's home country. It may take months to receive necessary documentation from an applicant's home country, especially because many asylum seekers flee for their lives without documentation and paperwork. It may take months to get statements from witnesses. And, critically important, it may take months or longer for a survivor who has experienced trauma to be able to describe the circumstances that led her to apply for asylum.

Decades of research confirm that trauma interferes with an individual's ability to effectively develop testimony, as is necessary to present an asylum case. Trauma affects demeanor in ways that could easily impact an adjudicator's perception of credibility: nervousness, passivity, inability to make eye contact, reluctance to speak, speaking too fast, giving too much detail or not enough. In addition, trauma may result in vague or evasive testimony due to the victim's desire to avoid or stop a flood of memories of the abuse. It also might result in a withdrawn or detached witness if a victim tries to dissociate from the memory or event. Indeed, the experience of simply testifying about sexual abuse can be traumatic, because it forces the victim to relive the crime mentally and emotionally.

Courts across the country have recognized the effects of trauma on survivor interviews and testimony. The Third Circuit, for instance, has recognized the "numerous factors that might make it difficult for an [individual] to articulate his/her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties, nor haunted by the traumatic memories, that may hamper communication between a government agent in an asylum interview and an asylum seeker."

By simply ignoring the realities of gathering evidence for a strong asylum application and ignoring the impact of trauma on asylum seekers, especially for survivors of violence, the proposed rule is completely arbitrary and in violation of asylum seekers' due process rights.

C. The Proposed Rule Harms Survivors of Gender-Based Violence By Impermissibly Restricting Sources from Non-Governmental Entities and Impermissibly Allowing Immigration Judges to Submit Their Own Evidence in Immigration Proceedings.

The proposed rule imposes an unjust standard for supporting documentation about country conditions of asylum seekers. Under the proposed rule, the immigration judge "may rely" on evidence that comes from U.S. government sources but can only rely on resources from non-governmental sources or foreign governments "if those sources are determined by the immigration judge to be credible and probative." Additionally, the proposed rule allows immigration judges to submit their own evidence in the asylum proceeding.

FUTURES strongly opposes both the revised standards for evidence and the ability of immigration judges to submit evidence into asylum proceedings. Essentially, what the

proposed rule does is to take away the asylum seeker's right to a fair adjudication as the prosecutor, adjudicator, and provider of evidence are all government agencies.

Additionally, given the politicization of the Executive Branch in this current Administration, it is likely that the government reports are biased and do not give all the relevant facts about country conditions. In fact, a Department of Homeland Security (DHS) whistleblower recently filed a report accusing senior DHS officials of asking him to change reports about "corruption, violence, and poor economic conditions" in Guatemala, Honduras, and El Salvador that would "undermine President Donald J. Trump's ("President Trump") policy objectives with respect to asylum." Non-governmental organizations—whose evidence the immigration judge could only consider after it has been found to be "credible and probative"—have likewise found that DOS reports are subject to political pressure. Thus, as the DOS reports become less critical of government abuses in countries with high numbers of asylum seekers, asylum seekers have no choice but to supplement the record with other, non-governmental materials. If the proposed rule is published, immigration judges would have to first conduct an analysis of whether that evidence is "credible and probative" while being able to "rely" on potentially biased U.S. government reports with no comparable analysis.

Further, allowing immigration judges to submit their own evidence in asylum proceedings is another tactic to prejudice asylum seekers. Immigration judges should be impartial adjudicators and should not act like parties to the case. They should consider evidence given by the applicant and their attorney fairly and impartially with an eye to upholding the law. The proposed rule completely alters the role of immigration judges and erodes the rights of asylum seekers who appear in immigration court.

D. The Proposed Rule Would Prevent Bona Fide Asylum Seekers from Pursuing Asylum Because of Minor, Technical Errors.

Legal service providers and advocates have noticed that for more than a year, the US Citizenship and Immigration Services (USCIS) has been rejecting affirmative asylum applications if any box on the asylum application is left blank, even boxes that have no legal relevance to the case, or questions that obviously do not apply to the asylum seeker. The proposed rule codifies these rejections and requires immigration judges to reject any incomplete application. Once the court rejects the application, the applicant would have 30 days to make the correction or forfeit their ability to seek asylum.

This rule change is arbitrary and especially unfair and injurious to asylum seekers who do not have legal representation. The effects of the proposed rule would be especially profound and harmful on those in detention and those subjected to the "Migrant Protection Protocols" (MPP). For example, an asylum seeker with no children, might leave that box blank rather than writing in the word "none." If the immigration judge rejected the application on that basis and she did not understand the need to write the word "none" in the box, she would be unable to seek asylum. An asylum seeker's life should not be dependent on her ability and knowledge to

fill in every single box on the asylum application, especially if the question does not apply to her.

Additionally, the proposed rule imposes a \$50 filing fee for asylum applications that must be submitted at the time the application is filed. Even assuming the lawfulness of the fees, the requirement of full payment up front is arbitrary. As an initial and dispositive matter, DOJ provides no rationale at all for its proposal. Furthermore, the proposed rule fails to mention or account for the fact that very few asylum seekers will be able to afford any fee up front. The proposed rule completely disregards the plight, risks, and challenges that asylum seekers, especially survivors of gender-based violence, make as they flee from their persecutors. Indeed, survivors of violence often have limited access to financial resources because their abusers, in order to assert power and control, take their money and access to bank accounts.

Further, asylum seekers who are forced to remain in Mexico have no ability to visit a DHS office in the United States to “fee in” an asylum application. Many asylum seekers subject to MPP are living in shelters or tent cities in Mexico and if the proposed \$50 filing fee is mandated, many, if not most, would be unable to pay. If the asylum seeker submits the application without proof of payment of the fee, the immigration judge would be required to reject the asylum application. The asylum seeker would then have only 30 days to resubmit the application with the fee or they would waive their ability to seek asylum. FUTURES fervently believes that asylum seekers should never have to pay to seek safety in the United States, but if DOJ begins charging a fee for asylum applications, it is critical that the agency implement reasonable steps for asylum seekers who are detained or subjected to MPP to obtain fee waivers or to pay their application fees.

Conclusion

The proposed rule creates additional draconian barriers that work to prevent survivors of violence from seeking safety and protection in the United States. The laws, regulations, and processes governing asylum adjudications are already exceedingly stringent and harsh. Asylum seekers bear the evidentiary burden of establishing their eligibility for asylum in the face of complex laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail or a tent erected at the border. These new proposed changes are the Administration’s latest attempt to completely shut the door to vulnerable individuals seeking protection from persecution.

For the reasons set forth above, Futures Without Violence strongly urges DOJ to rescind the proposed rule in its entirety. It violates our nation’s laws and moral obligations and cruelly prevents survivors of domestic violence, sexual assault, and human trafficking who are fleeing persecution from obtaining the asylum protections they need and deserve. We instead urge DOJ to promote policies that account for the desperate reality that immigrant survivors face and seek to maximize their safety throughout the asylum process.

Thank you for the opportunity to submit comments on the Department of Justice (DOJ) Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal*.

Please contact me if you have any questions or concerns relating to these comments.

Respectfully submitted,

Kiersten Stewart
Director, Public Policy and Washington Office
Futures Without Violence
1320 19th Street, NW #401
Washington, DC. 20036
(202) 595-7383