



Via Federal e-Rulemaking Portal

January 21, 2020

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

Re: Request for Comment on Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69,640 (Dec. 19, 2019)  
EOIR Docket No. 18-0002

Ms. Reid:

The American Immigration Council (the Council) writes in response to EOIR Docket No. 18-0002, the Executive Office for Immigration Review (EOIR) request for comments on the above-referenced Proposed Rules to amend regulations relating to eligibility for asylum, 84 Fed. Reg. 69,640 (Dec. 19, 2019) (hereinafter, Proposed Rules).

The Council is a nonprofit organization that strengthens America by shaping how America thinks about and acts towards immigrants and immigration. In addition, the Council works toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council envisions an America that values fairness and justice for immigrants and advances a prosperous future for all. If promulgated, the Proposed Rules would shut America's doors to many of those most in need of protection.

For the reasons detailed below, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) should withdraw the Proposed Rules.

## **I. Introduction**

On December 19, 2019, DHS and DOJ issued a joint set of Proposed Rules that would make three primary changes to the regulations governing asylum adjudications. The Council opposes all three changes as unlawful, unsound, and unjust policy.

The first section of the Proposed Rules adds the following seven *categorical* bars to asylum eligibility: (1) any conviction for an offense with a possible sentence of incarceration greater than one year; (2) any conviction for "smuggling or harboring" under 8 U.S.C. § 1324(a), even if the asylum seeker committed the offense for the purpose of bringing her own spouse, child or parent to safety; (3) any conviction for illegal reentry under 8 U.S.C. § 1326; (4) any conviction for an offense an adjudicator has "reason to believe . . . involv[ed] criminal street gangs," with the adjudicator empowered to look to any evidence to determine applicability; (5) any second

conviction for an offense involving driving while intoxicated or impaired; (6) any conviction *or accusation of conduct* for acts of battery involving a domestic relationship; and (7) any conviction for several newly defined categories of misdemeanor offenses, including *any* drug-related offense except for a first-time marijuana possession offense, any offense involving a fraudulent document, and fraud in public benefits.

The second section of the Proposed Rules provides a multi-factor test for immigration adjudicators to determine whether a criminal conviction or sentence is valid for the purpose of determining asylum eligibility. The third section rescinds a provision in the current regulations regarding the reconsideration of a discretionary denial of asylum.

Taken together, these proposed changes constitute an unnecessary, harsh, and unlawful gutting of the asylum protections enshrined in United States and international law. The Council opposes the entirety of the Proposed Rules and expresses grave concerns regarding the agency's continued efforts to exclude refugees from obtaining the security and stability the United States asylum system has long promised.

## **II. The Proposed Definitions of “Conviction” and “Sentence” Violate Binding Principles of Full Faith and Credit**

The Proposed Rules improperly authorize immigration adjudicators to second-guess the decision of a state court vacating a conviction or sentence, even where the order on its face cites substantive and procedural defects in the underlying proceeding. The agencies misread the applicable law, however, by authorizing adjudicators to disregard otherwise valid state orders. Immigration case law only requires that to be effective for immigration purposes, orders vacating or modifying convictions must be based on substantive or procedural infirmities in the underlying proceedings.<sup>1</sup> Principles of full faith and credit, long a part of immigration law, forbid “look[ing] beyond the face” of a criminal court order.<sup>2</sup>

Since at least the post-World War II era, the Board of Immigration Appeals (Board) has recognized that state court judgments generally are not subject to collateral attack, even when the state court has erred. “Where a State court has jurisdiction of the subject matter and the person, the fact that an erroneous judgment is entered does not render the judgment void or subject to collateral attack in a Federal court.”<sup>3</sup> In so holding, the Board has complied with Congress’ command that “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”<sup>4</sup>

Even when the Board has compelling evidence that the state court lacked jurisdiction, the Board will generally accept a state court’s assertion of jurisdiction.<sup>5</sup> The burden to undermine a state

<sup>1</sup> *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

<sup>2</sup> 84 Fed. Reg. at 69,655.

<sup>3</sup> *Matter of J- & Y-*, 3 I. & N. Dec. 657, 659-60 (BIA 1949).

<sup>4</sup> 28 U.S.C. § 1738.

<sup>5</sup> *See Matter of F-*, 8 I. & N. Dec. 251, 253-54 (BIA 1959); *Matter of Kwan*, 11 I. & N. Dec. 205, 208-09 (BIA 1965).

court order “is a heavy one.”<sup>6</sup> In *Matter of F-*, the beneficiary of a visa petition admitted to immigration authorities that he did not reside in Florida at the time of his divorce, a jurisdictional prerequisite to obtaining a divorce decree under Florida law.<sup>7</sup> The Board nevertheless gave full faith and credit to the decree, explaining that immigration officers “are not equipped to adjudicate troublesome legal questions” regarding state divorce law and so the judgment “should be accepted at face value.”<sup>8</sup>

In a similar case, the Board accepted a state court order recognizing the petitioner and beneficiary’s marriage and purporting to invalidate the beneficiary’s prior marriage, even though the prior spouse was not a party to the action.<sup>9</sup> In rejecting a challenge to the marriage by the former Immigration and Naturalization Service (INS), the Board explained:

Exploration of the ramifications of the legal questions presented would inevitably lead into labyrinths of jurisdiction, domicile, residence and status with no satisfactory goal and an involvement in complexities utterly foreign to the responsibilities of administering the immigration laws. It would not appear to be sound administrative practice to expect immigration officers to pause in executing their exacting duties to embark upon the collateral inquiry as to whether state decrees were supported by proper jurisdiction and such inquiry would impede the expeditious administration of the immigration laws.<sup>10</sup>

“The wisest course,” the Board explained, was to “accept at face value” the state court judgment.<sup>11</sup>

While the Attorney General has recently asserted that 28 U.S.C. § 1738 does not bind immigration agencies,<sup>12</sup> he did not overrule nearly half a century of Board precedent applying principles of full faith and credit to limit when adjudicators may look behind a state court judgment. Nor could he, for federal courts have refused to “endorse a test which requires speculation about, or scrutiny of, the reasons for judges’ actions other than those reasons that appear on the record.”<sup>13</sup> A state court judgment vacating a conviction or sentence must be accepted “at face value.”<sup>14</sup> The Proposed Rules purport to authorize immigration adjudicators to “look beyond the face of the [state court] order,” in contravention of this well-established case law.<sup>15</sup>

---

<sup>6</sup> *Matter of F-*, 8 I. & N. Dec. at 253.

<sup>7</sup> *Id.* at 252-53.

<sup>8</sup> *Id.* at 253-54.

<sup>9</sup> *Matter of Kwan*, 11 I. & N. Dec. at 208-09.

<sup>10</sup> *Id.* at 208.

<sup>11</sup> *Id.*; see also *Matter of San Juan*, 17 I. & N. Dec. 66, 68-69 (BIA 1979) (according divorce decree full faith and credit despite petitioner’s admission that she did not meet any of the jurisdictional requirements for the divorce).

<sup>12</sup> *Matter of Thomas*, 27 I. & N. Dec. 674, 687 (AG 2019).

<sup>13</sup> *Pinho v. Gonzales*, 432 F.3d 193, 212 (3rd Cir. 2005); see *Rodriguez v. U.S. Att’y Gen.*, 844 F.3d 392, 397 (3d Cir. 2016) (“If the order explains the court’s reasons for vacating the conviction, the [Immigration Judge]’s inquiry must end there.”) (quotation omitted); see also *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077-78 (9th Cir. 2011) (noncitizen’s motives for seeking vacatur irrelevant when determining immigration effect of vacatur; instead, sole inquiry is the state court’s rationale for vacating a conviction).

<sup>14</sup> *Matter of F-*, 8 I. & N. Dec. at 253-54.

<sup>15</sup> 84 Fed. Reg. at 69,655.

### III. Asylum is an Essential Protection That Must Not Categorically Exclude People Accused or Convicted of Crimes Except in Extraordinary Circumstances

By acceding to the 1967 Protocol Relating to the Status of Refugees,<sup>16</sup> which binds parties to the United Nations Convention Relating to the Status of Refugees,<sup>17</sup> the United States is obligated to develop and interpret United States refugee law in a manner that complies with the Protocol's principle of non-refoulement (the commitment not to return refugees to a country where they will face persecution on protected grounds). The United States asylum system was first codified in statute through the Refugee Act of 1980, described by one prominent scholar as a bipartisan attempt to “reconcile our rhetoric with our law, our national immigration policy and our international treaty obligations so that we could maintain a consistent posture towards the world as a nation with a strong humanitarian tradition and a unique historic role as a haven for persons fleeing oppression.”<sup>18</sup> The Act—among other measures designed to bring the United States domestic legal code into compliance with the provisions of the Protocol—created a “broad class” of refugees eligible for a discretionary grant of asylum.<sup>19</sup>

The asylum protections provided by United States and international law are sacred. Asylum provides those fleeing horrors with physical safety, a path to citizenship and security, and the opportunity to ultimately reunite with immediate family members abroad, including those who are in danger. Some see the domestic asylum system as a symbol of the United States' commitment never to repeat its failure to save thousands of Jewish refugees refused entry to the United States on the *St. Louis* and others fleeing the Holocaust.<sup>20</sup> Others point to the critical role that domestic asylum policy plays in serving the United States' foreign policy interests abroad.<sup>21</sup> For individuals seeking asylum in the United States, the stakes could not be higher—a claim denied can mean return to death or brutal persecution.<sup>22</sup>

The possibility of seeking alternative relief in the form of withholding of removal or protection under the Convention Against Torture (CAT) is of little comfort to asylum seekers. Even those who can meet the higher evidentiary burdens<sup>23</sup> to obtain withholding of removal or CAT

<sup>16</sup> United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

<sup>17</sup> Convention Relating to the Statute of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 [hereinafter Refugee Convention].

<sup>18</sup> Deborah Anker, *The Refugee Act of 1980: An Historical Perspective*, 5 In Defense of the Alien 89, 89-94 (1982), [https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page_scan_tab_contents).

<sup>19</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).

<sup>20</sup> Dara Lind, *How America's Rejections of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, Vox (Jan. 27, 2017, 8:12 AM), <https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust>.

<sup>21</sup> Council on Foreign Rel., *Independent Task Force Report No. 63: U.S. Immigration Policy* 116 (2009) (additional or dissenting view by Robert C. Bonner) (“For better or worse, the United States sets the standard for reasonable and humane treatment of migrants around the world. If the United States endorses harsh treatment of immigrants, it erodes the norms designed to protect them, and other countries will have license to do the same.”).

<sup>22</sup> See, e.g., Sarah Stillman, *When Deportation is a Death Sentence*, The New Yorker (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

<sup>23</sup> Withholding of removal requires the individual to demonstrate his or her “life or freedom would be threatened in that country because of her race, religion, nationality, membership in a particular social group, or political opinion.” *INS v. Stevic*, 467 U.S. 407, 411 (1984) (quoting 8 U.S.C. § 1231(b)(3)). Unlike asylum, however, a person must show a “clear probability” of the threat to life or freedom if deported to his or her country of nationality. *Id.* at 413.

protection face, among other things, permanent separation from family members,<sup>24</sup> an inability to travel,<sup>25</sup> no pathway to become a permanent resident or citizen,<sup>26</sup> and the threat of removal to another country.<sup>27</sup>

Given the stakes, people accused or convicted of crimes should not be categorically barred from asylum protections. The Board has cautioned that, “in light of the unusually harsh consequences which may befall a [noncitizen] who has established a well-founded fear of persecution[,] the danger of persecution should generally outweigh all but the most egregious of adverse factors.”<sup>28</sup>

Safeguarding asylum availability for bona fide asylum seekers is necessary to comply with the United States’ obligations under international law. While the Convention allows states to exclude and/or expel potential refugees from protection in certain circumstances, those circumstances are extremely limited. The Convention authorizes states to deny refugee protection if the individual “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”<sup>29</sup> However, this clause is intended for “extreme cases,” in which the particularly serious crime at issue is a “capital crime or a very grave punishable act.”<sup>30</sup> The United Nations High Commissioner for Refugees (UNHCR) has asserted that to constitute a “particularly serious crime,” the crime “must belong to the gravest category” and be limited “to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum.”<sup>31</sup> Moreover, the UNHCR has specifically noted that the particularly serious crime bar does not encompass less extreme crimes; “[c]rimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the threshold of seriousness.”<sup>32</sup> Finally, when determining whether an individual should be barred from protection for having been convicted of a particularly serious crime, the adjudicator must conduct an individualized analysis and consider any mitigating factors.<sup>33</sup>

---

The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id.*; see also *Cardoza-Fonseca*, 480 U.S. at 431 (describing the difference between a well-founded fear of persecution and a clear probability of persecution). For CAT protection, a person must show it is more likely than not that he or she will be tortured or killed by or at the government’s acquiescence if removed to the country of origin. 8 C.F.R. § 1208.16(c)(2).

<sup>24</sup> Only asylees and refugees are eligible to petition for a spouse and children to join them as derivatives on that status. See 8 C.F.R. § 208.21(a).

<sup>25</sup> By regulation, refugee travel documents are available only to asylees. 8 C.F.R. § 223.1. And the Board requires that an individual granted withholding or CAT—unlike an individual granted asylum—simultaneously must have been ordered removed, making any international travel a “self-deportation.” See *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 n.3 (BIA 2008); 8 C.F.R. § 241.7.

<sup>26</sup> *Matter of Lam*, 18 I. & N. Dec. 15, 18 (BIA 1981); 8 C.F.R. § 245.1(d)(1) (explaining that only those in “lawful immigration status” can seek permanent residency and excluding withholding recipients from such status); 8 C.F.R. § 209.2(a)(1) (authorizing adjustment of status to permanent residence for asylees); 8 C.F.R. § 316.2 (naturalization available only to permanent residents).

<sup>27</sup> See 8 C.F.R. § 208.22; *R-S-C v. Sessions*, 869 F.3d 1176, 1180 (10th Cir. 2017).

<sup>28</sup> *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987).

<sup>29</sup> Refugee Convention, *supra* note 17, at art. 33(2).

<sup>30</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 154-55, U.N. Doc. HCR/IP/Eng/REV.1 (Sept. 1979, reissued Jan. 2019).

<sup>31</sup> UNHCR, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading*, ¶ 7 (July 2007), <http://www.unhcr.org/enus/576d237f7.pdf>.

<sup>32</sup> *Id.* at ¶ 10.

<sup>33</sup> *Id.* at ¶ 10-11.

The Proposed Rules are predicated on the assumption that, with the exception of only the most trivial criminal charges, *any* conviction (and in some cases, even a mere accusation) for a crime establishes either that a person constitutes a danger to the community or that she does not merit a favorable exercise of discretion. But there is no evidence to support that assumption, and a criminal record without more, does not, in fact, reliably predict future dangerousness.<sup>34</sup> It is arbitrary and capricious to presume a noncitizen's supposed danger to the community even in circumstances when a federal, state, or local judge has concluded that no danger exists by, for example, imposing a noncustodial sentence.

Similarly, the Proposed Rules fail to address or account for the fact that innocent people may agree to plead guilty to a crime to avoid the threat of a severe sentence; not only is a conviction an unreliable predictor of future danger, it can also be an unreliable indicator of past criminal conduct.<sup>35</sup>

The Proposed Rules unlawfully restrict an adjudicator's ability to consider the individual circumstances surrounding a conviction and fail to exempt conduct influenced by trauma, mental illness, addiction, or duress. Asylum seekers are an inherently vulnerable population because of the trauma they have experienced in their countries of origin and, often, along the journey to find safety.

In sum, the Proposed Rules violate the letter and the spirit of our international obligations and decimate the asylum system Congress put in place almost forty years ago. If promulgated, they will unlawfully deny essential asylum protections to people with well-founded fears of persecution.

#### **IV. The Proposed Rules Are Unnecessary Because Current Law Already Includes Harsh Criminal Bars to Asylum and Allows for Consideration of All Criminal History**

The laws, regulations, and process governing asylum adjudications already are exceedingly harsh. Asylum seekers bear the evidentiary burden of establishing their eligibility for asylum<sup>36</sup> in the face of a complex web of laws and regulations, without the benefit of appointed counsel and

---

<sup>34</sup> See U.S. Sent'g Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017), [https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf) (noting that recidivism rates fall substantially with age); U.S. Sent'g Comm'n, *Recidivism Among Federal Violent Offenders* (2019), [https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124\\_Recidivism\\_Violence.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf) (noting that non-violent offenders recidivate at significantly lower rates); Javier Ramos & Marin Wenger, *Immigration and Recidivism: What is the Link?* Just. Q. (2019) (finding no correlation between recidivism rates and citizenship status among those formerly incarcerated for felonies in Florida prisons).

<sup>35</sup> John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157 (2014), <https://pdfs.semanticscholar.org/c00f/96d421adf1846d120bf802a8854b5e2c0ff2.pdf>.

<sup>36</sup> 8 U.S.C. § 1158(b)(1)(B); 8 CFR § 1240.8(d).

often from a remote immigration jail.<sup>37</sup> The obstacles to winning asylum are exceedingly high; indeed in some parts of the country and before certain immigration judges, almost no one succeeds.<sup>38</sup> At present, many, if not most, individuals seeking safety at the southern border are subject to return to dangerous conditions in Mexico and an overlapping web of policies that preclude asylum eligibility for countless migrants simply because of their national origin, manner of entry, or their flight path.<sup>39</sup> There are consistent reports of the documented deaths and brutalities endured by those who sought, but were denied, asylum in the United States.<sup>40</sup>

Significantly, the bars to asylum based on allegations of criminal conduct are *already* sweeping and over-broad in nature and scope.<sup>41</sup> Any conviction for an offense determined to be an “aggravated felony” is considered a *per se* “particularly serious crime” and therefore a mandatory bar to asylum.<sup>42</sup> As the Council has reported, “aggravated felony” is a notoriously vague and broad term, which exists only in immigration law.<sup>43</sup> Originally limited to murder, weapons trafficking and drug trafficking,<sup>44</sup> it has metastasized to encompass hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses such as misdemeanor shoplifting, simple misdemeanor battery, or sale of counterfeit DVDs.<sup>45</sup> The existing crime bars should be narrowed, not expanded. Even for those not categorically barred from relief, the immigration adjudicator maintains full discretion to deny asylum.<sup>46</sup>

Immigration adjudicators already have discretion to deny asylum to those who meet the refugee definition and have been convicted of criminal conduct, but must look to the specific circumstances of the offense as well as other mitigating evidence, when making that discretionary determination.<sup>47</sup> Further categorical bars are not needed. The agencies’ efforts to

<sup>37</sup> See Daniel Connolly, *et al.*, *Asylum Seekers in U.S. Face Years of Waiting, Little Chance of Winning Their Cases*, USA Today (Sept. 25, 2019, 12:40 PM), <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/>.

<sup>38</sup> Manuel Roig-Franzia, *Immigrants Risk It All Seeking Asylum. The Answer is Almost Always ‘No,’* Wash. Post (July 24, 2019, 6:00 AM), [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](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).

<sup>39</sup> American Immigration Council, *Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, the Asylum Transit, and Metering* (Jan. 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/policies\\_affecting\\_asylum\\_seekers\\_at\\_the\\_border.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf).

<sup>40</sup> See, e.g., Stillman, *Death Sentence*, *supra* note 22 (reporting on a database of more than sixty cases of individuals killed after deportation); see also Maria Sachetti, *‘Death is Waiting for Him,’* Wash. Post (Dec. 6, 2018) <https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/> (telling the story of Santos Chirino, denied asylum by a Virginia immigration judge, deported, and then murdered by those he told the immigration judge he feared); Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, Wash. Post (Dec. 26, 2018), <https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/>.

<sup>41</sup> See 84 Fed. Reg. at 69,641 (discussing the additional categorical bars to asylum).

<sup>42</sup> 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

<sup>43</sup> American Immigration Council, *Aggravated Felonies: An Overview* (Dec. 2016), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview>.

<sup>44</sup> Alcohol and Drug Safety Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (1988).

<sup>45</sup> 8 U.S.C. § 1101(a)(43); see also Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1939, 1939-40 (2000) (criticizing the “Alice-in-Wonderland-like definition of the term ‘aggravated felony’”); Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provisions of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. Third World L.J. 293 (2003).

<sup>46</sup> See *Pula*, 19 I. & N. Dec. 467.

<sup>47</sup> See *id.*

add *seven* new sweeping categories of barred conduct to the asylum eligibility criteria is unnecessary and unjustified.

The Proposed Rules are also arbitrary and capricious in that they would constitute a marked departure from past practice without any evidence or sound reasoning to justify the change. The agencies have proffered no evidence or data to support these changes.

## V. The New Proposed Bars Are Extraordinarily and Unjustifiably Broad

The Proposed Rules include overbroad conviction and conduct bars that are contrary to the plain terms of the statute, which bars asylum only for those convicted of a “*particularly serious crime*.”<sup>48</sup> The Proposed Rules suggest the increased categorization of the particularly serious crime bar is necessary because the case-by-case adjudication previously used for non-aggravated felony offenses was “inefficient.”<sup>49</sup> However, as discussed *supra* at Part III, an individualized analysis is exactly what is required to ensure only those individuals who have been convicted of crimes that are truly serious and present a future danger are placed at risk of refoulement.

*Any Conviction Punishable by More Than One Year’s Imprisonment (84 Fed. Reg. at 69,645-69,647)*

The Proposed Rules create a categorical bar to asylum—not based on the sentence of incarceration a person actually receives—but instead on the *possibility* of a sentence over one year. Thus, even where a criminal court has determined that a person presents no danger and the offense was not serious enough to warrant any period of incarceration, the Proposed Rules would preclude asylum protection. The mere possibility of a sentence is insufficient to render an offense “particularly serious” or so repugnant as to require the denial of asylum in the exercise of discretion.

Moreover, though identified as a bar for those with felony convictions, in fact this provision would cover a wide range of misdemeanor convictions. In some states, an offense may remain a misdemeanor even if the potential penalty is greater than one year of incarceration.<sup>50</sup> As a result, misdemeanors such as simple theft,<sup>51</sup> simple assault without the use of a weapon,<sup>52</sup> a single offense of driving under the influence,<sup>53</sup> and borrowing a car without permission<sup>54</sup> would be included in this sweeping bar.

<sup>48</sup> 8 U.S.C. § 1158(b)(2)(A)(ii) (emphasis added).

<sup>49</sup> 84 Fed. Reg. at 69,646.

<sup>50</sup> *See, e.g.* Colo. Rev. Stat. § 18-1.3-501 (misdemeanor may carry maximum penalty of 18 months in jail); Mass. Gen. Laws ch. 274, § 1 (misdemeanor includes any offense not punishable in state prison).

<sup>51</sup> Colo. Rev. Stat. § 18-4-401(2)(e).

<sup>52</sup> Mass. Gen. Laws ch. 265, § 13A.

<sup>53</sup> Mass. Gen. Laws ch. 90, § 24(1)(a)(1).

<sup>54</sup> Mass. Gen. Laws ch. 90, § 24(h)(2)(a).

*Convictions for Assisting Family Members Entering the United States (84 Fed. Reg. at 69,647-69,648)*

Under current law, with one exception, a person convicted of unlawfully aiding a noncitizen to enter or remain in the United States pursuant to 8 U.S.C. § 1324 is considered to have an aggravated felony conviction and, therefore, already is barred from asylum.<sup>55</sup> However, Congress has determined that those who commit the offense for the first time in order to assist a spouse, parent, or child have not committed an offense so serious that it should qualify as an aggravated felony.<sup>56</sup> Cruelly, and contrary to congressional intent as reflected in the aggravated felony definition, the Proposed Rules would eliminate this exception and categorically bar from asylum a mother convicted of assisting her child in fleeing to the United States and a husband helping to save his wife from violence.

*Convictions for Reentry After Removal (84 Fed. Reg. at 69,648-69,649)*

The Proposed Rules also deny asylum protection to those convicted of illegal reentry under 8 U.S.C. § 1326. Their inclusion is premised on conclusory statements regarding the dangerousness of recidivist offenders, without consideration of the seriousness of prior convictions.<sup>57</sup> Reentry after a removal order is an offense with no element of danger or violence to others and has no victim—a conviction for such an offense is no proof of dangerousness.

The Proposed Rules also fail to account for asylum seekers who have been prevented from seeking asylum during prior entries. U.S. Customs and Border Protection officers and agents are notorious for failing to properly screen for fear, coercing those who express a fear of return into abandoning their claims, and failing to refer those who express a fear for a credible fear interview.<sup>58</sup> And yet others may have previously entered or attempted to enter the United States before the onset of circumstances giving rise to their fear. Preserving discretion to grant asylum in these circumstances allows meritorious asylum seekers to be heard and corrects errors that might have previously occurred.

Most significantly, barring asylum based on the manner of entry directly violates the Convention's prohibition on imposing penalties based on a person's manner of entry or

---

<sup>55</sup> 8 U.S.C. § 1101(a)(43)(N).

<sup>56</sup> *See id.*

<sup>57</sup> 84 Fed. Reg. at 69,648.

<sup>58</sup> *See, e.g.,* John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, The Intercept (Aug. 11, 2019, 12:20 PM), <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>; Human Rights First, *Fact Sheet: Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees* (Apr. 2019) [https://www.humanrightsfirst.org/sites/default/files/CBP\\_Credible\\_Fear.pdf](https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf); Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf>; Guillermo Cantor & Walter Ewing, American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (Aug. 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/still\\_no\\_action\\_taken\\_complaints\\_against\\_border\\_patrol\\_agents\\_continue\\_to\\_go\\_unanswered.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf); U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

presence.<sup>59</sup> This prohibition is a critical part of the Convention because it recognizes that refugees often have little control over the place and manner in which they enter the country where they are seeking refuge.

*Convictions an Adjudicator “Has Reason to Believe” Were Committed in Furtherance of Gang Activity (84 Fed. Reg. at 69,649-69,650)*

In a provision that is likely to disproportionately target young men of color, the Proposed Rules would permit adjudicators to look beyond a criminal conviction to determine if there is a “reason to believe” the person committed any offense to assist a “criminal street gang.” Past legislative efforts to expand the grounds of removal and inadmissibility in the Immigration and Nationality Act to include gang membership have failed to pass both houses of Congress and for good reason.<sup>60</sup> In recent years, the expansion of gang databases for use in the apprehension and removal of foreign nationals—including children—has generated tremendous concern among advocates and the communities they serve.<sup>61</sup> The use of gang databases by local law enforcement and U.S. Immigration and Customs Enforcement has been widely criticized as an overbroad, unreliable and often biased measure of gang membership and involvement.<sup>62</sup> The Proposed Rules bar those accused of gang involvement in the commission of minor criminal offenses, embracing an open-ended adjudicative process that will inevitably result in asylum adjudicators relying unfairly on these discredited methods of gang identification. This would compound the disparate racial impact of inclusion in gang databases and bar asylum seekers who are themselves fleeing violence from gangs in their countries of origin.<sup>63</sup>

In addition, immigration adjudicators already routinely premise discretionary denials of relief or release on bond on purported gang membership, and scores of alleged gang members have already been deported on grounds related to immigration violations or criminal convictions for which no relief is available.<sup>64</sup> Creating a “gang-related crime” bar only will exacerbate the due

<sup>59</sup> Refugee Convention, *supra* note 17, at art 31.

<sup>60</sup> See Jessica Chacon, *Whose Community Shield?: Examining the Removal of the ‘Criminal Street Gang Member,’* Univ. of Chicago Legal F. 317, 333-36 (2007) (reviewing legislative history of failed efforts to expand removability of those accused of gang related offenses and noting criticism that “[t]he only legal effect of the proposed legislation would be to increase the number of noncitizens lawfully present who would be subject to removal on the basis of their purported associations with individuals involved in group criminal activity”).

<sup>61</sup> See Nermeen Arastu, *et al.*, *Swept Up In The Sweep: The Impact of Gang Allegations on Immigrant New Yorkers* (May 2018), [https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp\\_Report\\_Final-1.pdf](https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf).

<sup>62</sup> Ali Winston, *Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants*, The Intercept (Aug. 11, 2016, 11:34 AM), <https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/>.

<sup>63</sup> See Jonathan Blitzer, *How Gang Victims Are Labeled As Gang Suspects*, The New Yorker (Jan. 23, 2018), <https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects>.

<sup>64</sup> See Mark Joseph Stern, *Bad Liars*, Slate (May 16, 2018, 5:18 PM), <https://slate.com/news-and-politics/2018/05/federal-judge-accused-ice-of-making-up-evidence-to-prove-that-dreamer-was-gang-affiliated.html> (illustrating Immigration and Customs Enforcement’s propensity to make gang allegations on the basis of questionable if not fabricated evidence, and the deference to which the evidence is often granted by immigration adjudicators).

process violations already occurring as the result of unsubstantiated information about supposed gang ties.<sup>65</sup>

Moreover, this provision dramatically would expand the number and type of convictions for which an analysis of eligibility is required, sweeping in even petty offenses that would otherwise not trigger immigration consequences. Thus, an asylum applicant convicted of simple assault without use of a weapon, a non-violent property crime, or even possession of under 30 grams of marijuana for personal use (otherwise exempted from the reach of the Proposed Rule), could trigger a bar to asylum if the adjudicator concludes she has “reason to believe” the offense was committed in furtherance of gang activity.<sup>66</sup> In making these determinations, asylum adjudicators would be able to rely on uncorroborated allegations contained in arrest reports and could nevertheless shield their decisions by relying on discretion.<sup>67</sup>

*Convictions for Driving Under the Influence (84 Fed. Reg. at 69,650-69,651)*

The Proposed Rules wrongly expand the criminal bars to include a second conviction for driving under the influence—a conviction that can generally be obtained without proof of intentional misconduct.<sup>68</sup> A person’s culpability is typically measured by the level of intent necessary to commit the crime.<sup>69</sup> It is thus arbitrary and capricious to make driving under the influence a *categorical* bar to asylum, rather than permitting an adjudicator to examine the facts of the case, including the age of the convictions and subsequent substance abuse treatment and recovery.

Moreover, as Judge Reinhardt explained in a concurring opinion in *Delgado v. Holder*,<sup>70</sup> a decision the Proposed Rules cite in support of the expanded bars, crimes like driving under the influence have “little in common” with other crimes the Board has deemed particularly serious—e.g., felony menacing with a deadly weapon, armed robbery, and burglary of a dwelling in which the offender is armed or causes injury.<sup>71</sup> Judge Reinhardt further noted that public opinion does not treat them similarly either: “American voters would be unlikely to elect a president or vice president who had committed a particularly serious crime, yet they had no difficulty in recently electing to each office a candidate with a DUI record.”<sup>72</sup> Barring individuals from asylum based on these relatively minor offenses renders the “particularly serious” part of the “particularly serious crime” bar meaningless.

<sup>65</sup> See Yvette Cabrera, *New ICE Tactic Raises Questions About Due Process*, ThinkProgress (Oct. 6, 2017, 8:27 AM), <https://thinkprogress.org/ice-targets-gangs-6775356473a8/>; Rebecca Hufstader, *Immigration Reliance On Gang Databases: Unchecked Discretion And Undesirable Consequences*, 90 N.Y.U. L. Rev. 671 (2015).

<sup>66</sup> 84 Fed. Reg. at 69,649 (stating the applicable standard for determining when to apply the bar on asylum seekers convicted of a crime involving criminal street gangs is “reason to believe,” as used in 8 U.S.C. § 1182(a)(2)(c), and that asylum adjudicator may consider “all reliable evidence” in making their decision).

<sup>67</sup> See *Garces v. U.S. Att’y Gen.*, 611 F.3d 1337, 1349-50 (11<sup>th</sup> Cir 2010) (reversing finding of “reason to believe” that the respondent was a participant in drug trafficking based on unsubstantiated arrest reports); *Matter of Rico*, 16 I. & N. Dec. 181, 185-86 (BIA 1977) (relying on pre-hearing admissions to uphold finding of inadmissibility).

<sup>68</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004).

<sup>69</sup> Cf. *Matter of Tavdidishvili*, 27 I. & N. Dec. 142, 143 (BIA 2017) (holding that a “culpable” mental state for purposes of a crime involving moral turpitude is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness).

<sup>70</sup> 648 F.3d at 1110 (J. Reinhardt, concurring).

<sup>71</sup> *Id.* at 1110.

<sup>72</sup> *Id.*

*Convictions or Allegations of Domestic Offenses (84 Fed. Reg. at 69,651-69,653)*

The Proposed Rules too broadly categorize domestic violence offenses as particularly serious and sweep both offenders and survivors into their dragnet. The domestic violence sections of the Proposed Rules include the only categorical bar to asylum for which a conviction is not required. Domestic violence incidents all too often involve the arrest of both the primary perpetrator of abuse and the survivor.<sup>73</sup> These “cross-arrests” do not always yield clear determinations of victim and perpetrator. Authorizing asylum adjudicators to determine the primary perpetrator of domestic assault in the absence of a judicial determination—a task wholly beyond their expertise and training—unfairly prejudices survivors who are wrongly arrested in the course of police intervention in domestic disturbances.

Finally, the exemption for asylum applicants who can demonstrate their eligibility for a waiver under 8 U.S.C. § 1227(a)(7)(A) does not cure the harm to asylum seekers caused by imposition of a categorical domestic violence related bar. Rather, it converts a non-adversarial asylum proceeding into a multi-factor, highly specific inquiry into culpability based on circumstances that may be difficult for an asylum seeker to prove—especially those who must proceed without counsel or who have limited English proficiency.

*Convictions for Other Misdemeanors*

- Controlled Substance Offenses, Including Possession for Personal Use (84 Fed. Reg. at 69,654)

While courts and the law enforcement agencies across the country, as well as the general public, have come to recognize that addiction is a disease that must be treated with compassion, not penalties,<sup>74</sup> the Proposed Rules take a draconian and outdated approach to substance abuse-related convictions. Under current law, convictions for the sale and distribution of controlled substances already bar asylum.<sup>75</sup> The Proposed Rules would additionally exclude from asylum protections those convicted only of possession for personal use.

---

<sup>73</sup> David Hirschel, *et al.*, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. of Crim. L. & Criminology 255 (2007-2008), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7284&context=jclc> (noting that “[i]n some cases, dual arrests may be the result of legislation, department policies, or both failing to require officers to identify the primary aggressor. In addition, when such provisions are present, police may lack the training or information needed to identify the primary aggressor when responding to a domestic violence assault. This situation may be compounded by batterers who have become increasingly adept at manipulating the criminal justice system, and may make efforts to ‘pre-empt’ victims from notifying police in order to further control or retaliate against them.”).

<sup>74</sup> Zachary Seigel, *Opioids, Pot and Criminal Justice Reform Helped Undermine This Decade’s War on Drugs*, NBCNews.com (Dec. 29, 2019: 4:30 AM), <https://www.nbcnews.com/think/opinion/opioids-pot-criminal-justice-reform-helped-undermine-decade-s-war-ncna1108231> (“With an extraordinary number of Americans suffering, the door has opened to understanding and treating the pain of drug use rather than apply brute force.”); Pew Research Center, *America’s New Drug Policy Landscape* (Apr. 2, 2014), <https://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/> (reporting that two-thirds of Americans favor treatment, not jail, for use of illegal drugs).

<sup>75</sup> 8 U.S.C. § 1101(a)(43)(B).

The harsh nature of the Proposed Rules is especially evident when viewed through a trauma-informed lens. Studies also consistently reveal a high prevalence of comorbidity of post-traumatic stress disorder (PTSD) and substance use disorders, with individuals with PTSD up to 14 times more likely to struggle with a substance use disorder.<sup>76</sup> Asylum seekers in the United States are often unable to access affordable medical care and treatments for complex trauma,<sup>77</sup> making them vulnerable to substance abuse.<sup>78</sup> The proposed new bars to asylum include *any* drug-related conviction (with one exception for a first minor marijuana possessory offense). This approach is not only cruel but also ignores the evidence. Particularly given the vulnerabilities of asylum-seeking populations, prior struggles with addiction should be addressed with treatment and compassion, not a closed door and deportation order.

Immigration adjudicators already maintain the discretionary authority to deny asylum to individuals with drug-related criminal histories; denying asylum seekers even the opportunity to present the countervailing factors of their past trauma and potential recovery is simply cruel.

- Public Benefits and Document Fraud (84 Fed. Reg. at 69,653-69,654)

The Proposed Rules expand the asylum bar to include any asylum seeker who has been convicted of a misdemeanor offense for use of a fraudulent document or unlawfully obtaining public benefits. In so doing, the Rules entirely ignore the migration-related circumstances that often give rise to convictions involving document fraud. Individuals fleeing persecution often leave their countries of origin with nothing but the clothes on their backs and must rely on informal networks to navigate their new circumstances.<sup>79</sup> Extension of a blanket bar to asylum seekers who are compelled to resort to fraudulent means to enter the United States, or to remain safely during their applications for asylum, upends decades of settled law directing that violations of law arising from an asylum applicant's manner of flight should constitute only one of many factors to be consulted in the exercise of discretion.<sup>80</sup>

Moreover, migrants in vulnerable communities who are struggling to survive during the pendency of their asylum proceedings often are exploited by unscrupulous intermediaries who offer assurances and documentation that turn out to be fraudulent.<sup>81</sup> The expansion of criminal asylum bars to sweep in all document fraud offenses, on the other hand, would unfairly prejudice

---

<sup>76</sup> Jenna L McCauley *et al.*, *Posttraumatic Stress Disorder and Co-Occurring Substance Use Disorders: Advances in Assessment and Treatment*, 19 *Clinical Psych. Sci. & Prac.* 3 (Oct. 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3811127/>.

<sup>77</sup> For more information on immigrant eligibility for federal benefits, see <https://www.nilc.org/issues/health-care/>.

<sup>78</sup> Carrier Clinic, *Trauma and Addiction* (2019), <https://carrierclinic.org/2019/08/06/trauma-and-addiction/> (“...some people struggling to manage the effects of trauma in their lives may turn to drugs and alcohol to self-medicate. PTSD symptoms like agitation, hypersensitivity to loud noises or sudden movements, depression, social withdrawal and insomnia may seem more manageable through the use of sedating or stimulating drugs depending on the symptom. However, addiction soon becomes yet another problem in the trauma survivor's life. Before long, the ‘cure’ no longer works and causes far more pain to an already suffering person.”).

<sup>79</sup> See *Pula*, 19 I. & N. Dec. at 474.

<sup>80</sup> *Id.*

<sup>81</sup> See American Bar Ass'n, *About Notario Fraud* (July 19, 2018), [https://www.americanbar.org/groups/public\\_interest/immigration/projects\\_initiatives/fight-notario-fraud/about\\_notario\\_fraud/](https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/).

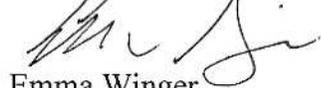
immigrants with meritorious asylum claims and force them deeper into the dangerous informal economy.

In sum, the unduly harsh new criminal bars included in the Proposed Rules are contrary to United States and international law and must not be promulgated.

## VI. Conclusion

For the foregoing reasons, DHS and DOJ should not implement the Proposed Rules. Please do not hesitate to contact us if you have questions regarding our comments.

Respectfully submitted,



Emma Winger  
Staff Attorney  
ewinger@immcouncil.org  
(617) 505-5375



Trina Realmuto  
Directing Attorney  
trealmuto@immcouncil.org  
(857) 305-3600

AMERICAN IMMIGRATION COUNCIL  
1318 Beacon Street, Suite 18  
Brookline, MA 02446