



January 21, 2020

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Re: Comments in Response to Proposed Rulemaking Procedures for Asylum and Bars to  
Asylum Eligibility  
84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019;  
RIN 1125-AA87, 1615-AC41;  
*Submitted via <https://www.regulations.gov>*

Dear Ms. Reid and Ms. Dunn:

On behalf of ASISTA, we are submitting comments in response to the Department of Homeland Security (DHS) and Department of Justice's (DOJ) Joint Notice of Proposed Rulemaking Procedures for Asylum and Bars to Asylum Eligibility ("proposed rule") published in the Federal Register on December 19, 2019.<sup>1</sup> We wish to express our strong opposition to the proposed changes to the asylum process and eligibility requirements.

ASISTA's mission is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and

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<sup>1</sup> Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security. "Procedures for Asylum and Bars to Asylum Eligibility" (hereinafter "proposed rule"; 84 FR 69640 (December 19, 2019), available at: <https://www.federalregister.gov/documents/2019/12/19/2019-27055/procedures-for-asylum-and-bars-to-asylum-eligibility>

other crimes created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors. We submit this comment based on these guiding principles and our extensive experience.

We firmly oppose the proposed rule as it diminishes access to asylum for survivors of domestic violence, sexual assault, human trafficking and other forms of gender-based violence. We urge DHS and DOJ to immediately withdraw the proposed rule, and instead work to ensure vulnerable immigrants can obtain immigration relief for which they are eligible.

## I. General Comment

The proposed rule is extremely problematic in both substance and in form. Executive Order 12866 provides that agencies “should afford the public a *meaningful opportunity* to comment on any proposed regulation, which in most cases should include a comment period of *not less than* 60 days.”<sup>2</sup> The proposed rule contains sweeping changes to U.S. asylum law and has only given the public 30 days to provide comment. As U.S. Senator Richard Blumenthal indicated in his letter to DHS and DOJ leadership, “Given the complexity of the legal and policy issues implicated by this rule, including the potential violation of the United States’ domestic and international legal obligations, a thirty day comment period is simply inadequate, especially when those thirty days include two federal holidays.”<sup>3</sup> In addition, the letter states:

“This rule has the potential to inflict irreparable harm on those individuals who meet the definition of a refugee but are rendered ineligible for asylum under the rule—by definition, those individuals face the very real threat of torture, death, or other forms of persecution....Given the gravity and complexity of this proposed rule, a thirty day comment period is not sufficient.”<sup>4</sup>

As DHS has made other significant changes to administrative policy within the same timeframe, the DHS and DOJ have not provided adequate opportunity to review *this* proposed rule.<sup>5</sup> DOJ

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<sup>2</sup> [Emphasis added]. Executive Order 12866 58 Fed. Reg. 190 (September 30, 1993), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>

<sup>3</sup> Letter to Attorney General William A Barr, Acting DHS Secretary Chad Wolf, Acting USCIS Director Ken Cuccinelli et al (January 6, 2020), available at <https://www.blumenthal.senate.gov/imo/media/doc/01.07.20%20-%20DOJ%20-%20Asylum%20Bar%20Comment%20Period.pdf>

<sup>4</sup> *Id.* Internal citations omitted.

<sup>5</sup> See e.g. U.S. Citizenship and Immigration Service. “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements”(hereinafter “proposed rule”) 84 FR 62280 (November 14, 2019), available at <https://www.regulations.gov/document?D=USCIS-2019-0010-0001>

and DHS have willfully and deliberately made a mockery of the administrative process by providing such insufficient time to review and provide comments.

## **II. The Proposed Rule will Harm Immigrant Survivors Seeking Protection in the United States**

Many asylum seekers seeking protection in the United States may be fleeing horrific violence at the hands of intimate partners and criminal gangs, as well as face increased risks of human trafficking.<sup>6</sup> Sexual and gender-based violence was reported as a significant reason that causes women and girls from Honduras, Guatemala, El Salvador and Mexico to seek asylum protections.<sup>7</sup> Often asylum seekers undertake dangerous journeys because their abusers are able to commit atrocities without accountability, and government institutions fail to provide survivors with protection. For asylum seekers from the Northern Triangle countries of El Salvador, Honduras, and Guatemala, domestic violence is widespread<sup>8</sup> and they face some of the highest rates of femicides in the world.<sup>9</sup> This problem is not limited to these countries however, as survivors of gender-based violence elsewhere “struggle to have governments ensure, or in some cases recognize, their right to protection. In other countries, criminal law does not adequately focus on domestic violence.”<sup>10</sup>

The proposed rule released by DHS and DOJ proposes to bar many asylum seekers from qualifying for relief in express violation of U.S. obligations under domestic and international law. In particular, the proposed rule seeks to 1) establish *seven* new bars to eligibility for asylum, 2) authorize immigration adjudicators to determine whether a criminal conviction or sentence is valid for the purpose of determining eligibility for asylum, and 3) rescind a provision in the current regulation regarding reconsideration of discretionary denials of asylum.

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<sup>6</sup> Kids in Need of Defense, *Neither Security nor Justice: Sexual and Gender Based Violence in El Salvador, Honduras, and Guatemala*, May 4, 2017, [https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice\\_SGBV-Gang-Report-FINAL.pdf](https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf).

<sup>7</sup> United Nations High Commissioner for Refugees, *Women on the Run* (Oct. 26, 2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>;

<sup>8</sup> Kids in Need of Defense, Latin America Working Group, Women’s Refugee Commission, *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet*, July 2018, <https://supportkind.org/wp-content/uploads/2018/08/SGBV-Fact-sheet.-July-2018.pdf>

<sup>9</sup> Geneva Declaration of Armed Violence and Development, “Lethal Violence Against Women and Girls” in *Global Burden of Armed Violence 2015: Every Body Counts*, May 8, 2015, 87-120, [http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3\\_Ch3\\_pp87-120.pdf](http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf).

<sup>10</sup> Human Rights Watch. “US: Protect Right to Asylum for Domestic Violence” (January 23, 2019), available at <https://www.hrw.org/news/2019/01/23/us-protect-right-asylum-domestic-violence> This extends to gender-based violence more generally. For example, Ghana, India, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka and Tanzania do not criminalize marital rape. See Equality Now. “The World’s Shame: The Global Rape Epidemic” (February 2017), available at: [https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/208/attachments/original/1527096293/EqualityNowRapeLawReport2017\\_Single\\_Pages.pdf?1527096293](https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/208/attachments/original/1527096293/EqualityNowRapeLawReport2017_Single_Pages.pdf?1527096293)

Immigrant survivors of violence already face numerous barriers to applying for asylum, and these proposed changes will only create additional ones. The proposed rule will make it harder for immigrant survivors to obtain the asylum protections they desperately need. Instead, the administration should focus on expanding opportunities for vulnerable immigrant survivors to access safety and protection.

### **III. The Proposed Rule Violates U.S. Obligations Under Both Domestic and International Law**

For decades, the United States has been committed to protecting those who are fleeing persecution, including gender-based persecution. In particular, in 1968, the United States signed onto the 1967 Protocol Relating to the Status of Refugees,<sup>11</sup> which incorporated the provisions of United Nations Convention Relating to the Status of Refugees.<sup>12</sup> The proposed rule's significant and arbitrary hurdles to protection are wholly incongruent with the letter and spirit of the Refugee Convention and the Immigration and Nationality Act<sup>13</sup> to protect vulnerable refugees and asylum seekers fleeing persecution.

### **IV. The Proposed Rule Will Unfairly Harm Survivors of Gender-Based Violence**

The proposed rule seeks to add seven new criminal bars to asylum eligibility, which constitute an abuse of agency discretion and are sweeping in scope.<sup>14</sup> We incorporate by reference the comments made by the Asian Pacific Institute on Gender-based Violence (API-GBV) showing the harm that the categorical bar for smuggling or harboring as well as the bar for illegal reentry will have on survivors fleeing abuse in their home countries. However, given our expertise and experience working on protecting and enhancing survivor-based forms of relief under the Violence Against Women Act (VAWA) and Trafficking Victims Protection Act (TVPA), we are especially concerned about how the proposed rule distorts language contained in VAWA, a law designed to provide ameliorative benefits to survivors of domestic violence, in order to create barriers for asylum seekers, including those fleeing gender-based violence.

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<sup>11</sup> United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

<sup>12</sup> Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention").

<sup>13</sup> See e.g. INA 208

<sup>14</sup> See Proposed Rule at 69645. Individuals would be ineligible to seek asylum if they are convicted of 1) a felony offense; 2) "smuggling or harboring" under 8 U.S.C. § 1324(a); 3) illegal reentry under 8 U.S.C. § 1326; 4) an offense involving "criminal street gangs"; 5) a second offense of driving while intoxicated or impaired; 6) conviction or accusation of conduct of acts of battery or extreme cruelty in the domestic context; 7) certain newly defined misdemeanor offenses.

## A. The Bar for Domestic Violence Harms Survivors.

The proposed rule bars from asylum all applicants who have been convicted of domestic assault or battery, stalking, or child abuse in the domestic context. The proposed rule also alarmingly seeks to bar immigrants absent a conviction in cases where there are “serious reasons for believing” they engaging in battery and extreme cruelty.<sup>15</sup> Indeed, this provision is the only categorical bar to asylum for which a conviction is not required. The Proposed Rule also broadly categorizes domestic violence offenses as particularly serious, which can have a detrimental impact on survivors.<sup>16</sup>

There are many cases in which immigrant survivors, not their abusers, are arrested and prosecuted for domestic violence offenses. Immigrant survivors who have limited English proficiency (LEP) may not be able to fully describe to police officers the situation and the abuse they experienced. In fact, a service provider explained that many survivors are arrested in dual arrests because the police use *perpetrators* as interpreters.<sup>17</sup> Survivors may be arrested for use of self-defense, or else because their abusers make false claims of abuse to get survivors arrested. One prosecutor notes,

“Batterers are savvier about the laws. They have learned that calling 911 first to “tell their story” may help them avoid being held accountable. They have found that it helps to retaliate against the victim for previous police calls because the victims naturally become reluctant to make further calls to the police. With more allegations of women using violence at the scene, the case becomes ‘messy’ and hard to sort out. It is difficult for police officers to determine whom to arrest.”<sup>18</sup>

Service providers report that it is common to see abusers make false allegations to police and the courts to have immigrant survivors arrested. The proposed rule’s lack of requirement of a conviction increases that likelihood, given the lack of case completion or a judicial fact-finding. Furthermore, in the context of VAWA protections, Congress recognized that perpetrators will try to manipulate legal systems against survivors and created certain protections discouraging reliance on unreliable sources, i.e., abusers, crime perpetrators, and those associated with them. Congress stated that these protections, codified at 8 USC § 1367, are “designed to ensure that

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<sup>15</sup> Proposed Rule at 69645, 69660.

<sup>16</sup> Proposed Rule at 69652.

<sup>17</sup> Casa de Esperanza: National Latin@ Network. Wrongful Arrests and Convictions of Immigrant Victims of Domestic Violence: Stories from the Field. Retrieved from [https://www.nationallatinonetwork.org/images/files/Quote\\_Sheet\\_for\\_Hill\\_Visits\\_-\\_Service\\_Providers.pdf](https://www.nationallatinonetwork.org/images/files/Quote_Sheet_for_Hill_Visits_-_Service_Providers.pdf).

<sup>18</sup> Gael B. Strack, “She hit me, too” Identifying the Primary Aggressor: A Prosecutor’s Perspective, available at [http://www.ncdsv.org/images/she\\_hit\\_me.pdf](http://www.ncdsv.org/images/she_hit_me.pdf)

abusers and other perpetrators cannot use the immigration system against their victims.”<sup>19</sup> DHS and other government agencies may not make adverse determinations on a survivor’s immigration matter based on information solely provided by a perpetrator or a member of a perpetrator’s household or family member.<sup>20</sup>

Congress created these statutory protections for survivors because it realized “threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims and to avoid criminal prosecution.”<sup>21</sup> DHS guidance provides that “when a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, *DHS employees treat the information as inherently suspect*.”<sup>22</sup> There is no similar provision in the asylum context that would protect survivors from the devastating impact of a false accusation.

#### B. Evidentiary Standards for the Domestic Violence Bar Inappropriate and Unjust

Authorizing individual asylum adjudicators to determine the primary perpetrator of domestic assault, in the absence of a judicial determination, unfairly prejudices survivors who are wrongly arrested. Under the proposed rule, asylum-seekers will be subject to the domestic violence bar where there are “serious reasons for believing” that they have engaged in acts of domestic “battery or extreme cruelty.”<sup>23</sup> There is no indication what “serious reasons” may entail, and what evidence may be considered or evaluated in this determination.

Although there is a proposed waiver for survivors who are deemed to not be the primary aggressor, the waiver is insufficient to mitigate the harm that many survivors will experience. Adjudicators are not limited to facts found by the criminal court or provided in the underlying record of conviction.<sup>24</sup> The proposed rule seemingly creates no framework or limits to an adjudicator’s considerations, and is silent on how false accusations may be considered. This will lead to inconsistent and unjust results in adjudication.

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<sup>19</sup> “Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402” H.R. Rep. No. 109-233, at 120 (2005). Available at: <https://www.congress.gov/109/crpt/hrpt233/CRPT-109hrpt233.pdf>

<sup>20</sup> See 8 USC 1367, note there are extremely limited exceptions enumerated in 8 USC 1367(b).

<sup>21</sup> Representative Conyers Jr. Congressional Record 151: 164 (December 18, 2005) E2606, Available at: <https://www.congress.gov/crec/2005/12/18/CREC-2005-12-18-pt1-PgE2605-4.pdf>

<sup>22</sup> DHS. “Implementation of Section 1367 Information Provisions” available at <https://asistahelp.org/wp-content/uploads/2019/04/Implementation-of-Section-1367-Information-Provisions-Instructions.pdf> [Emphasis added]

<sup>23</sup> Proposed Rule at 69660.

<sup>24</sup> Proposed Rule at 69659.

### C. The Proposed Rule Creates Inconsistency in Adjudications and Provides Immigration Adjudicators with an Unprecedented Amount of Authority.

Under the proposed rule, DHS and DOJ aim to permit individual immigration adjudicators and immigration judge to determine whether a conviction or conduct related to domestic violence or battery and extreme cruelty would render an immigrant ineligible for asylum. First, the definition of battery and extreme cruelty in particular differs from state-law domestic violence criminal definitions, creating inconsistency in determining who is covered by the asylum bar. While such language is appropriate in providing protection for those seeking it, it is highly inappropriate in the context of barring individuals seeking protection against persecution.<sup>25</sup>

In addition, in order to properly and accurately assess domestic violence, battery, or extreme cruelty, one must have experience and in-depth knowledge of the intricacies of abuser-survivor relationships and dynamics; the nuances of the tactics abusers and perpetrators use to control, intimidate, and manipulate survivors; understanding of the ongoing pattern of behavior in abusive relationships; specific vulnerabilities of immigrants to being victimized; and many other important analyses of the domestic nature of abusive conduct. Indeed, the dynamics of domestic violence and the impact of trauma on survivors is a complex subject, which is why for the last several decades that survivor-based forms of immigration benefits like VAWA self-petitioners, U and T visa adjudications have been centralized at the Vermont Service Center (and later a U visa workshare at the Nebraska Service Center). These specialized units receive advanced and detailed training in order for them to appropriately adjudicate cases submitted by survivors of domestic violence, sexual assault, and other crimes.

Immigration adjudicators lack this expertise and detailed understanding. As such, putting the responsibility on immigration adjudicators to make these complex decisions about whether conduct amounts to a covered act of battery or extreme cruelty without court findings, following presentations of evidence by adverse parties, is wholly inappropriate, and will likely result in erroneous determinations that will deny immigrant survivors of their ability to seek asylum.

### **V. Removing Reconsiderations of Discretionary Denials of Asylum Will Harm Immigrant Survivors**

The proposed rule seeks to remove automatic review of a discretionary denial of an asylum seeker's application in the event that the immigrant is denied asylum solely in the exercise of discretion. We strongly oppose this provision as it will detrimentally impact immigrant survivors of violence. Many immigrant survivors are LEP or do not have sufficient resources to find an attorney to help with their case. Given that the U.S. immigration legal system is extremely

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<sup>25</sup> See Comment to Proposed Rule from Tahirih Justice Center, submitted January 21, 2020.

difficult to navigate, many immigrant survivors with viable claims for asylum find their cases denied due to these barriers.

Even if the survivor is granted withholding of removal or protection under CAT, these alternative forms of protection do not allow for the same level of relief and benefits as asylum protection. Maintaining reconsiderations of discretionary denials of asylum is therefore absolutely critical to ensuring that immigrant survivors who are eligible for asylum have access to due process and an opportunity to defend their ability to seek asylum protections.

### **Conclusion**

For the foregoing reasons, ASISTA urges DOJ and DHS to rescind the proposed rule, which violates our nation's laws and moral obligations and prevents many survivors of domestic violence, sexual assault, and human trafficking who are fleeing persecution from obtaining the asylum protections they need and deserve.

Respectfully submitted,

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