

March 15, 2024

Hon. Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Hon. Alejandro N. Mayorkas
Secretary
U.S. Department of Homeland Security
301 7th Street, SW
Washington, DC 20528

By email

Re: Recommendations for Final Asylum Processing Rule

Dear Attorney General Garland and Secretary Mayorkas:

The undersigned immigrants' rights and legal services organizations are dedicated to the fair, orderly, and humane processing of those seeking asylum in the United States, including individuals and families whose asylum claims are adjudicated under the March 2022 Interim Final Rule, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers ("Interim Final Rule").¹ We write to follow up on the recommendations in our August 12, 2022 letter regarding increasing access to counsel for individuals and families processed under the Interim Final Rule.² Additionally, we urge the Departments of Justice and Homeland Security to publish a final rule incorporating recommendations to uphold and upgrade asylum.³ Finally, we request a meeting to discuss our recommendations for increasing access to counsel in Part II.

Instead of expending resources to expand expedited deportation processes, the Biden-Harris Administration should embrace processing these claims in full accordance with the United States' commitments under international law. The failure to fully process protection claims is counterproductive, as demonstrated by Title 42 and the Migrant Protection Protocols' contribution to an increase in irregular crossings and the humanitarian consequences of creating a semi-permanent refugee population along the U.S.-Mexico border.

I. Recommendations for a Final Rule

The Departments should incorporate the following revisions into any final rule they publish to achieve their goal of "increas[ing] the promptness, efficiency, and fairness of the process."⁴ Evidence from the first year of the Interim Final Rule's operation has demonstrated that many of

¹ 87 Fed. Reg. 18,078 (March 29, 2022), <https://www.federalregister.gov/d/2022-06148> [hereinafter APR].

² Letter to Sec. Mayorkas, Dep't of Homeland Sec., et al. (Aug. 12, 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/08/AsylumProcessingRuleLetter.8.12.2022.pdf>.

³ Human Rights First, Comment on DHS Docket No. USCIS-2021-0012, at 11-13, 17-18, 23-24, 29-30 (May 31, 2022), <https://www.regulations.gov/comment/USCIS-2021-0012-5321> [hereinafter HRF Comment] (providing suggested redline revisions); Human Rights First, Upholding And Upgrading Asylum: Recommendations for the Biden Administration (Oct. 2023), https://humanrightsfirst.org/wp-content/uploads/2023/10/Upholding-and-Upgrading-Asylum_Recommendations.pdf.

⁴ APR at 18,089.

its features have become counterproductive to its stated purpose.⁵ Ways to improve the Interim Final Rule include:

- Eliminating the arbitrary and unworkable deadlines for scheduling Asylum Merits Interviews (“AMI”) and instead requiring that AMIs should be scheduled no fewer than 90 days after a credible fear determination or release from government custody.⁶ The current, very short deadlines impose a structural barrier to accessing counsel, leading to inaccurate decisions and unnecessary referrals to Immigration Court.⁷
- Eliminating the arbitrary, rushed deadlines imposed on Immigration Court proceedings under 8 C.F.R. § 1240.17 and restoring full Immigration Court proceedings under 8 U.S.C. § 1229a for individuals processed under the Interim Final Rule.⁸ The blistering pace of Immigration Court proceedings required by the Interim Final Rule similarly impedes access to counsel, with only 41% of individuals subject to streamlined proceedings under the Interim Final Rule through March 31, 2023, represented by counsel.⁹
- Consistent with Congress’ one-year asylum filing deadline, requiring the Asylum Office to consider requests for rescheduling and extensions of evidentiary filing deadlines within the first year of an applicant’s most recent date of entry.¹⁰ This will help in reducing erroneous referrals from the Asylum Office to the Immigration Courts.¹¹
- Eliminating the seven-day deadline for filing and restriction to one request for reconsideration to the Asylum Office, and instead fully restoring the unrestricted authority of the Asylum Office to reconsider its negative credible fear determinations.¹² This deadline has led to clearly erroneous denials unrelated to the merits of an individual’s asylum claim.¹³

⁵ Human Rights First, Asylum Processing Rule at One Year: Urgent Fixes Needed to Provide Fair, Efficient and Humane Adjudications (June 2023), https://humanrightsfirst.org/wp-content/uploads/2023/06/Asylum_Processing_Rule_One_Year_Report_June-2023.pdf [hereinafter Asylum Processing Rule at One Year].

⁶ APR at 18,216 (codified at 8 C.F.R. § 208.9(a)(1)).

⁷ Asylum Processing Rule at One Year, *supra* note 5, at 10; Philip G. Schrag, Jaya Ramji-Nogales & Andrew I. Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 How. L.J. 571, 616-21 (2023).

⁸ APR at 18,223 (codified at 8 C.F.R. § 1240.17).

⁹ Asylum Processing Rule at One Year, *supra* note 5, at 10.

¹⁰ Philip G. Schrag, Andrew I. Schoenholtz & Jaya Ramji-Nogales, *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 651, 671-72 (2010) (detailing Congress’ rejection of a 30-day deadline in favor of a one-year deadline for filing applications for asylum).

¹¹ Cora Wright, *Erroneous Asylum Office Referrals Delay Refugee Protection, Add to Backlogs*, Human Rights First (Apr. 19, 2022), <https://humanrightsfirst.org/library/erroneous-asylum-office-referrals-delay-refugee-protection-add-to-backlogs>.

¹² APR at 18,219 (codified at 8 C.F.R. § 208.30(g)(1)(i)).

¹³ Asylum Processing Rule at One Year, *supra* note 5, at 20-23.

The potential positive benefits of the Interim Final Rule are threatened by its use within the context of Expedited Removal, specifically by its conditioning of eligibility for an AMI on a positive credible fear determination.¹⁴ The Expedited Removal system is inherently flawed,

with excessive, documented due process failings that have resulted in the return of individuals with bona fide asylum claims to their persecution and death.¹⁵ Even noncustodial credible fear interviews allowed for under the Interim Final Rule, as part of the Family Expedited Removal Management program (“FERM”), have been counterproductive to the Interim Final Rule’s goal of fairness and efficiency.¹⁶ Only 2.6% of families enrolled in FERM secured representation before their credible fear interviews as of November 22, 2023, according to data obtained from DHS.¹⁷

II. Recommendations for Increasing Meaningful Access to Counsel

In addition to the recommendations for a final rule, we urge you to implement the recommendations we previously submitted in our letter of August 12, 2022, to increase access to counsel now. Those recommendations included:

1. Making publicly available template documents used or provided to individuals processed under the Interim Final Rule, including documents that accompany service of a positive credible fear determination, like Form I-870, Record of Determination/Credible Fear Worksheet Form and G-56, Asylum Merits Interview Notice, an orientation form specific to the Interim Final Rule, and a Form I-589 receipt notice.
2. Eliminating the Asylum Office’s Form G-28 applicant-signature requirement to reduce barriers to representation. We are encouraged by Immigration and Customs Enforcement’s beta testing of an electronic filing system for Form G-28.
3. Issuing guidance regarding the availability of equitable tolling of deadlines, including the Interim Final Rule’s seven-day deadline to submit a request for reconsideration of a negative credible fear determination.¹⁸ Additionally, USCIS should consider the inability to secure representation as an exigent circumstance for the purpose of rescheduling an AMI and as good cause for continuances and extensions of filing deadlines.¹⁹

¹⁴ *Id.* at 16-18.

¹⁵ HRF Comment, *supra* note 3, at 24-25 (citing Elizabeth Cassidy & Tiffany Lynch, 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>).

¹⁶ APR at 18,220 (codified at 8 C.F.R. § 253.3(b)(4)(ii)); Cindy Woods, Am. for Immigrant Justice, The Family Expedited Removal Management Program (FERM): A Three-Month Assessment 5 (Sept. 7, 2023), <https://aijustice.org/wp-content/uploads/2023/10/FERM-Report-Americans-for-Immigrant-Justice-2023.pdf>.

¹⁷ Office of Congresswoman Pramila Jayapal, Jayapal, Barragán Inquiry Reveals 2.6% of Immigrant Families in Removal Process Have Legal Counsel (Jan 11, 2024), <https://jayapal.house.gov/2024/01/11/jayapal-barragan-inquiry-reveals-2-6-of-immigrant-families-in-removal-process-have-legal-counsel>.

¹⁸ APR at 18,219 (codified at 8 C.F.R. § 208.30(g)(1)(i)); Letter to Sec’y Mayorkas, *supra* note 2, at 3 n.1 (cataloging cases holding equitable tolling can apply to statutory deadlines).

¹⁹ APR at 18,216, 18,225 (codified at 8 C.F.R. §§ 208.9(a)(1) and 1240.17(h)).

4. Promptly sharing with legal service providers information about individuals processed under the Interim Final Rule to facilitate Know-Your-Rights presentations and ensure asylum seekers have access to legal information regarding the process.
5. Distributing to individuals subject to the Interim Final Rule a flier with non-governmental organization legal resources to facilitate representation for asylum seekers.
6. Establishing a Request for Reconsideration Quality Assurance Review Process to promote uniformity of adjudication.

Thank you for your consideration of our recommendations. We look forward to specifically discussing our recommendations to increase access to counsel and request the opportunity to meet with officials from your Departments. Please contact Robyn Barnard at Human Rights First (BarnardR@humanrightsfirst.org) to let us know how best to proceed with scheduling a meeting.

Sincerely,

Americans for Immigrant Justice
Capital Area Immigrants' Rights (CAIR) Coalition
Center for Gender & Refugee Studies
Church World Service
Coalition for Humane Immigrant Rights (CHIRLA)
ECDC
Florence Immigrant & Refugee Rights Project
Fordham Law School Feerick Center for Social Justice
Human Rights First
Immigrant Defenders Law Center
International Refugee Assistance Project (IRAP)
International Rescue Committee
ISLA
National Immigrant Justice Center
National Immigration Project
Public Counsel
The Advocates for Human Rights
Witness at the Border
Women's Refugee Commission

cc: The Honorable Ur M. Jaddou, Director, U.S. Citizenship and Immigration Services
The Honorable David L. Neal, Director, Executive Office for Immigration Review
The Honorable Rachel Rossi, Director, Office of Access to Justice



U.S. Citizenship
and Immigration
Services

May 3, 2024

Robyn Barnard
Senior Director, Refugee Advocacy
Human Rights First
1120 20th Street, NW
Washington, DC 20036
BarnardR@humanrightsfirst.org

Dear Ms. Barnard:

Thank you for your March 15, 2024 letter to the Department of Homeland Security (DHS). I am responding on behalf of the Department.

On March 29, 2022, DHS and the Department of Justice jointly published the interim final rule entitled Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078 (“Asylum Processing Interim Final Rule”). As part of that rulemaking, the Departments invited public comments. The public comment period closed on May 31, 2022. With respect to your request in part I of your letter to incorporate your recommendations into a final rule, we acknowledge your recommendations. However, as the comment period closed nearly two years ago, we will only consider comments properly submitted in response to the published Asylum Processing Interim Final Rule, including those received from Human Rights First and the other signatories to your letter, as part of any rulemaking to finalize the interim final rule.

With respect to the recommendations in part II of your letter for increasing meaningful access to counsel, please see our specific responses below.

Recommendation 1: Making publicly available template documents used or provided to individuals processed under the Interim Final Rule, including documents that accompany service of a positive credible fear determination [...].

Response: Individuals who are enrolled in the Asylum Merits Interview (AMI) process following a positive credible fear determination receive all the relevant documentation related to their case and how to navigate the AMI process, including the G-56 AMI notice (listing the date, time, and location of the interview), the AMI receipt notice, and an “Information About Your AMI” orientation document.

Recommendation 2: Eliminating the Asylum Office’s Form G-28 applicant-signature requirement to reduce barriers to representation. We are encouraged by Immigration and Customs Enforcement’s beta testing of an electronic filing system for Form G-28.

Response: A properly executed Form G-28 is one that has been properly signed by both the noncitizen and the attorney/accredited representative, in accordance with form instructions. The signature does not have to be “wet” and electronically scanned copies of signatures are sufficient. The signature requirement is important to ensure that confidentiality is protected, and procedural integrity is upheld. Additionally, representatives may participate in credible fear interviews as consultants, which does not require the submission of Form G-28.

Recommendation 3: Issuing guidance regarding the availability of equitable tolling of deadlines, including the Interim Final Rule’s seven-day deadline to submit a request for reconsideration of a negative credible fear determination. Additionally, U.S. Citizenship and Immigration Services (USCIS) should consider the inability to secure representation as an exigent circumstance for the purpose of rescheduling an AMI and as good cause for continuances and extensions of filing deadlines.

Response: Requests for reconsideration are not applications or filings, but rather, a request for USCIS to exercise its discretionary authority to reconsider its own negative credible fear determination following IJ concurrence on the negative determination. There is no right to reconsideration, and there is no statutory allowance for reconsideration of a negative credible fear determination following IJ concurrence. The Asylum Processing IFR added regulatory language providing that a request for reconsideration of a negative credible fear determination may be submitted by a noncitizen or reconsideration may be initiated by USCIS no later than seven days following IJ concurrence on the negative credible fear determination or prior to removal, whichever comes first. The seven-day timeline was adopted after extensive consideration (as explained in the Asylum Processing IFR preamble) and changed from the Asylum Processing Notice of Proposed Rulemaking’s proposal of eliminating requests for reconsideration altogether. In issuing the regulation, the Departments declined to provide flexibility in the time limitations or to suggest the time limitations could be estopped for any reason; accordingly, USCIS must follow the clear regulatory language.

In general, requests to reschedule AMIs will not be honored. Per 8 CFR 208.9(a)(1), the AMI takes place no earlier than 21 days and no later than 45 days after the positive credible fear determination, absent exigent circumstances¹. Exigent circumstances that merit rescheduling the interview beyond the initial 45 days may include: the unavailability of an asylum officer to conduct the interview, the inability of the applicant to attend the interview due to illness, the inability to timely secure an appropriate interpreter, or the closure of the asylum office. A request to reschedule an interview must include the reason for the request and any relevant evidence. Asylum offices may grant reschedule requests provided that doing so would not adversely impact the processing timeframe and may grant reschedule requests beyond the initial 45 days due to the inability to secure representation in some instances provided exigent circumstances exist.

¹ If the interview notice was not mailed to the most recent address the noncitizen provided to USCIS, then the Asylum Office will reschedule the interview without requiring exigent circumstances.

Recommendation 4: Promptly sharing with legal service providers information about individuals processed under the Interim Final Rule to facilitate Know-Your-Rights presentations and ensure asylum seekers have access to legal information regarding the process.

Response: Information contained in or pertaining to an asylum application is protected under the Privacy Act, by DHS policy, and by regulations governing confidentiality and cannot generally be disclosed.

Recommendation 5: Distributing to individuals subject to the Interim Final Rule a flier with non-governmental organization legal resources to facilitate representation for asylum seekers.

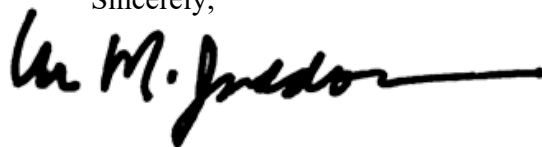
Response: Noncitizens who are placed in the AMI process receive the local EOIR List of *Pro Bono* Legal Service Providers as part of their positive credible fear determination service packet.

Recommendation 6: Establishing a Request for Reconsideration Quality Assurance Review Process to promote uniformity of adjudication.

Response: As mentioned above, requests for reconsideration are not filings or applications, they are requests for USCIS to exercise its discretionary authority to reconsider its own negative credible fear determination. Because such requests are purely discretionary in nature and are not an adjudication or formal determination, offices consider them on a case-by-case basis. All credible fear determinations are reviewed by a supervisory asylum officer and if the determination is negative, the noncitizen may request *de novo* review of the determination by an IJ. The IJ review is the mechanism provided by statute to ensure the quality and accuracy of a negative credible fear determination. Where an IJ concurs with a negative credible fear determination, there is no further mechanism for review of that determination under the statutory expedited removal process. Solely as an exercise of discretion, USCIS may, in certain instances, reconsider a negative credible fear determination that has been concurred with by an IJ. Accordingly, USCIS declines to establish a quality assurance review process for what is purely an exercise of discretion by USCIS.

Thank you again for your letter and interest in this important issue. Please share this response with the other organizations that cosigned your letter. Should you require any additional assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ur M. Jaddou', with a long horizontal flourish extending to the right.

Ur M. Jaddou
Director