

June 12, 2024

Daniel Delgado
Director for Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

Re: Notice of Proposed Rulemaking “Application of Certain Mandatory Bars in Fear Screenings” (DHS Docket No. USCIS-2024-0005)

Director Delgado and Chief Deshommes,

We at Immigrant ARC write to comment on the recently proposed rule, “Application of Certain Mandatory Bars in Fear Screenings” published on May 13, 2024 (“proposed rule”).¹ We write to register our disagreement with the proposed rule allowing asylum officers to consider bars to asylum during the credible fear interview (CFI). This proposal would increase the risks of erroneous asylum denials and make the asylum process more inefficient and inconsistent. The proposed rule raises major concerns about due process violations for asylum seekers. We strongly oppose its implementation.

I. Immigrant ARC (I-ARC)

Immigrant ARC is a coalition of over 80 member organizations providing legal services across the state of New York. Our mission is to increase access to justice and legal counsel for immigrant New Yorkers by mobilizing New York’s legal service providers and addressing the systemic barriers to justice that immigrants face. Our members hold deep expertise in asylum law and the experiences of people seeking asylum. Many provide direct services to asylum seekers as they navigate the complexities of our immigration system, and we offer that expertise in the concerns addressed below.

II. Assessment of Asylum Bars is Inappropriate in the Interview Setting

The bars to asylum are some of the most opaque and complex facets of immigration law. Questions such as whether the applicant engaged in persecution or material support of a terrorist organization have decades of case law attached to them. Without legal assistance or the ability to present relevant evidence, questions around potential bars become all the harder to answer with confidence.

This proposed rule is especially detrimental for individuals persecuted by powerful groups in their home countries. It is not uncommon for a person in such circumstances to be forced to engage in certain activities to preserve the lives of themselves and their loved ones. Case law surrounding what constitutes “material support” to a terrorist organization is complex, and there is no explicit guidance on

¹ Federal Register, “Application of Certain Mandatory Bars in Fear Screenings,” Notice of Proposed Rulemaking, DHS Docket No. USCIS-2024-0005, May 13, 2024, available at <https://www.federalregister.gov/documents/2024/05/13/2024-10390/application-of-certain-mandatory-bars-in-fear-screenings>.

what constitutes “duress” in such circumstances.² Legal experts and advocates have long raised concerns about these bars, which can be applied unfairly and arbitrarily and are often based on evidence obtained from foreign governments, which may be inaccurate and unverifiable by immigration officials in the United States.³

Even with training and the best intentions, an asylum officer does not have the necessary resources, evidence, or legal expertise to determine whether an asylum seeker may be subject to a bar.

III. Deprivation of Due Process

The proposed rule states that “...the purpose of the screening process is to identify individuals who are ineligible for relief at the earliest stage possible in order to create systematic efficiencies while simultaneously protecting legal rights...”⁴ However, the proposed rule itself is antithetical to the legal right of an asylum seeker with a credible fear to return to present their case in front of an immigration judge. In previous considerations to add mandatory bar determinations to the credible fear interview, the U.S. Department of Homeland Security (“DHS”) rightfully concluded that

“...due process and fairness considerations counsel against applying mandatory bars during the credible fear screening process. Due to the intricacies of fact finding and legal analysis required to make a determination on the applicability of any mandatory bars, individuals found to have a credible fear of persecution should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 proceedings provide.”⁵

The conditions that led to such a conclusion just two years ago remain in place, regardless of national rhetoric around border security.

In the context of a screening interview, an asylum seeker usually has yet to receive legal counsel at all, let alone have an attorney present. Since they are still in custody after crossing the U.S./Mexico border, it is also very difficult for the interviewee to present evidence to support their claim or preclude the assumption of a potential bar to asylum.

² See Tyler Anne Lee, “When ‘Material’ Loses Meaning: Matter of A-C-M- and the Material Support Bar to Asylum,” *Columbia Human Rights Law Review* 51, no. 1, (2019): 376-429, available at <https://hrlr.law.columbia.edu/hrlr/when-material-loses-meaning-matter-of-a-c-m-and-the-material-support-bar-to-asylum/>.

³ See Anwen Hughes, *Denial and Delay The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States*, Human Rights First, November 2009, <https://humanrightsfirst.org/wp-content/uploads/2022/12/HRF-Denial-and-Delay-Terrorism-Bars-2009.pdf>; See also Pooja R. Dadhanian, “Paper Terrorists: Independence Movements and the Terrorism Bar,” *California Law Review* 108, no. 6, (2020): 1733-1780, <https://doi.org/10.15779/Z38MC8RH1B>.

⁴ Federal Register, “Application of Certain Mandatory Bars in Fear Screenings,” May 13, 2024.

⁵ Federal Register, “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,” Interim Final Rule, 87 FR 18078, effective May 31, 2022, available at <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

Should an applicant be found ineligible for asylum, they may be considered for alternative forms of protection indicated in Form I-589, including the Convention Against Torture (CAT) and Withholding of Removal.⁶ It is a violation of due process for an officer to deny an asylum seeker with an otherwise viable relief claim the opportunity to pursue all relevant options with legal counsel and in front of a judge.

IV. Contradiction with U.S. and International Law

Applying potential bars before an applicant can identify legal counsel and build their case chips away at the basic right to apply for asylum. Under international treaties and our own federal law, the United States vowed to protect those fleeing persecution.⁷ The proposed rule undermines the spirit of this promise, disqualifying someone before they can tell their full story. The U.N. High Commissioner for Refugees (UNHCR) holds that

*“[g]iven the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and **not in either admissibility or accelerated procedures**, so that a full factual and legal assessment of the case can be made”* (emphasis added).⁸

Blanket exclusion under an assumed bar outside of the regular determination procedure in immigration court contradicts such guidance and the tenets of U.S. asylum law.

V. Complicating Factors and Lack of Accountability

Allowing a bar to be applied at the credible fear interview also opens the door to erroneous determinations at that stage. The only way to challenge such a determination is to ask for a review of the CFI—a hearing that must occur seven days from the asylum officer’s determination.⁹ Even if the applicant knows to request review, a review is conducted, and it is determined that the bar should not be applied, a record of all fear screenings stays on the applicant's file. This additional procedure on their record may raise concerns about credibility, whether or not such concerns are warranted. While the person has a right to an attorney present at such a hearing, an attorney is not allowed to represent them in a credible fear interview.

⁶ Hillel R. Smith, “An Overview of the Statutory Bars to Asylum: Limitations on Applying for Asylum (Part One),” Legal Sidebar (LSB10815), Congressional Research Service, September 7, 2022, available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10815>.

⁷ See Honorable Jeffrey S. Chase “Proposed Asylum Bar Regs Are At Odds With International Law (And Why That Matters),” Lexis Nexus, May 16, 2024, <https://www.lexisnexis.com/community/insights/legal/immigration/b/insideneews/posts/proposed-asylum-bar-regs-are-at-odds-with-international-law-and-why-that-matters>.

⁸ U.N. High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, September 4, 2003, <https://www.unhcr.org/us/media/guidelines-international-protection-no-5-application-exclusion-clauses-article-1f-1951>.

⁹ 8 CFR § 1003.42(e) - Review of credible fear determinations, available at <https://www.law.cornell.edu/cfr/text/8/1003.42>.

Regardless, it is unlikely they will be able to contract an attorney in such a short time frame.

The proposed change also implies that there is an easily identifiable population of people who officials know will be ineligible for asylum but are forced to pass through screening interviews anyway. However, because of the opacity of the screening interview process and the discretion given to asylum officers, this is impossible to verify. This rule's effects will necessarily be opaque and unaccountable to the public, obscuring due process and discrimination concerns.

VI. Conclusion

Asylum law is not a border-management tool. Improving the consistency, efficiency, and fairness of the asylum system requires that all asylum seekers go through the same process after entering the United States—at the very least, two people with identical asylum claims should not experience different outcomes merely based on the government's resource constraints. This proposed regulation could exacerbate the existing inequities in asylum processing, inequities that serve neither asylum seekers nor the U.S. government's need to manage the border.

Thank you for your time and attention to this comment, and we look forward to your response. Please contact **Dorian Rojas**, Director of Programs at Immigrant ARC (drojas@immigrantarc.org or 518-949-7889) with any follow-up or questions.

Sincerely,

Immigrant ARC

150 State Street, 4th Floor
Albany, NY 12207

<https://www.immigrantarc.org/>