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June 12, 2024

Alejandro N. Mayorkas
Secretary
U.S. Department of Homeland Security

Re: DHS Docket No. USCIS-2024-0005, Application of Certain Mandatory Bars in Fear Screenings

Dear Secretary Mayorkas:

The U.S. Committee for Refugees and Immigrants (USCRI) respectfully submits these comments in response to the notice of proposed rulemaking (NPRM) entitled "Application of Certain Mandatory Bars in Fear Screenings" by the Department of Homeland Security (DHS) initially published on May 13, 2024. Drawing on experience from its Mexico field office and other programs across the United States and Latin America, USCRI appreciates the opportunity to submit comments regarding the NPRM.

I. USCRI's Interest in the Proposed Rule

USCRI, established in 1911, is a nongovernmental, not-for-profit international organization dedicated to addressing the needs and rights of refugees, immigrants, unaccompanied children, asylum seekers and asylees, returnees, human trafficking survivors, and other vulnerable populations.

Through various programs, USCRI has served foreign national survivors of human trafficking and unaccompanied children (UCs) in the United States for over 20 years. USCRI has served immigrants by providing legal services since 2010 and has expanded to 17 field offices and seven affiliate legal sites in recent years. Since 2020, USCRI has operated a legal services program in Tijuana, Mexico, aimed at assisting vulnerable populations of migrants and asylum seekers.

The NPRM would impact various populations that USCRI serves. The Proposed Rule would allow Asylum Officers (AO) to apply certain bars to asylum eligibility earlier in the application process, specifically during initial fear screenings. USCRI provides the following comments on the Proposed Rule regarding the DHS failure to support its change in policy, congressional intent and refoulement, concerns over violations of due process, and special considerations on the impact of the Proposed Rule on survivors of human trafficking, family separation, and LGBTQIA+ individuals.

II. Failure to Support Policy Change

Prompted by an executive order (Executive Order 14010) mandating federal agencies to review regulations (85 FR 36264) from the previous Administration, in an interim final rule (IFR)—effective May 31, 2022—DHS and the Executive Office for Immigration Review (EOIR) determined that it would be best not to apply these bars during fear screenings by stating:

> "…requiring asylum officers to apply mandatory bars during credible fear screenings would make these screenings less efficient, undermining congressional intent that the expedited removal process be truly expeditious. Because of the complexity of the inquiry required to develop a sufficient record upon which to base a decision to apply a mandatory bar, such a decision is most appropriately made in the context of a full merits hearing, whether before an asylum officer or an IJ [imigration judge], and not in a screening context (87 FR 18134)."

DHS claims to "refine" its prior position by stating that the "permissive consideration" of the mandatory bars does not conflict with the previous rulemaking (89 FR 41354). However, DHS fails to explain how the complexity of the inquiry required to develop a sufficient record to apply the mandatory bars has become less complex when considering recent cases. Since the 2022 IFR, fear screenings have only become more complicated for AOs and asylum seekers now that the Circumvention of Lawful Pathways rule (88 FR 31314) and the Securing the Border interim final rule (89 FR 48710) must also be considered in initial screenings.

Considering DHS's inability to support its change in policy, USCRI recommends that DHS withdraw the Proposed Rule in its entirety. If implemented, USCRI warns that the Proposed Rule would negatively impact asylum seekers and efficient processing.

III. Contradicts Congressional Intent and Risks Refoulement

Congress originally intended initial fear screenings to act as a lower standard for admission into the full asylum process (Congressional Record, Vol. 142, No. 136, 11491) to avoid the exclusion of individuals with valid asylum claims. In 2020, a federal court recognized that Congressional intent on this question is unambiguous— "Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution," recognizing that AOs should apply the lower standard to "identify persons who could qualify for asylum (*Grace v. Whitaker*, 344 F. Supp. 3d 96, 104 (D.D.C. 2020) (citing H.R. REP. No. 104-469, pt. 1, at 158 (1995))".

Congress reiterated this in 2023 when 12 U.S. Senators submitted a comment to the federal register on the Circumvention of Lawful Pathways rule stressing that the credible fear

standard was lower than the well-founded fear standard needed to be granted asylum in the United States. The Senators added that:

> "Congress was fully aware that there would be a gap between the number of people determined to have a credible fear of persecution and the number ultimately determined to have a well-founded fear. Rather than being motivated in 1996 to keep that gap as small as possible, Congress—even as it was granting the Executive the enormously consequential expedited removal authority—focused on ensuring that noncitizens whose claims for asylum at the screening stage would be permitted to have their claims considered further (Comment to 88 FR 31314, Document ID USCIS-2022-0016-12291)."

DHS and EOIR recognized this in the 2022 IFR, determining that the goals of preserving efficiency and ensuring due process for individuals with a significant possibility of establishing protection claims could be accomplished "by returning to the historical practice of not applying mandatory bars at the credible fear screening stage (87 FR 18135)."

Historically, the bars are only considered once an asylum seeker presents their case in front of an immigration judge. However, the Proposed Rule would make the initial screenings harder for certain individuals to pass, preventing them from ever receiving a full hearing in immigration court, and risking refoulement.

a. Risk of Refoulement

The United Nations defined the role of governments in upholding the right to seek and enjoy asylum in the 1951 Refugee Convention and the 1967 Refugee Protocol. As a signatory of the Refugee Protocol—a legally binding international document—the United States agreed to the principle of non-refoulement, which prevents governments from deporting asylum seekers to countries where they may face persecution.

While the United States was a signatory of the Refugee Protocol, it did not establish the legal system to protect individuals fleeing persecution until the Refugee Act of 1980, which also included the principle of non-refoulement. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, and the asylum and withholding provisions in 8 U.S.C. 1158 and 1231(b)(3) reiterate the principle of non-refoulement.

Asylum procedures, established in 2000, specifically addressed the question of processing individuals who are potentially subject to one or more of the mandatory bars. The regulation established that individuals who appear to be subject to one or more of the

mandatory bars would be referred to removal proceedings for full consideration of their claim, consistent with international refugee law (65 FR 76137).

The United Nations High Commissioner for Refugees (UNHCR) welcomed the changes in the 2022 IFR that amended the regulations requiring mandatory bars in initial fear screenings. In comments to the federal register, UNHCR noted:

> "Implementing mandatory bars during pre-screening could lead to the denial of access to territory and full asylum procedures for some asylum-seekers with valid claims for protection. Especially in view of the potentially serious consequences of an erroneous determination—an asylum-seeker who wrongfully receives a negative fear determination could be returned to a place where they will suffer persecution, violence and even death—UNHCR considers it inappropriate in principle to consider bars to asylum during screening (Comment to 87 FR 18078, Document ID USCIS-2021-0012-5192)."

The Proposed Rule runs counter to the United States' long-standing tradition of providing refuge to those fleeing persecution and upholding our domestic and international obligations to allow individuals who may qualify for international protection to access the asylum system.

IV. Concerns Over Violation of Due Process

In the 2022 IFR, DHS and EOIR stated:

"…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 (87 FR 18134)."

Again, DHS fails to provide a valid rationale for why considerations of due process and fairness should no longer be taken into account when applying mandatory bars during initial fear screenings, especially during expedited removal. In comments to the Circumvention of Lawful Pathways rule, the Asylum Officers Union described the situation that many asylum seekers face in initial fear screenings:

> "Noncitizens undergoing credible fear screenings often do so mere days after their initial encounter with DHS. They are frequently detained and face inadequate access to counsel. Most have undertaken a long and difficult journey to the U.S. border. Many have recently suffered traumatic events… Our country's existing law

> recognizes the challenges faced by individuals seeking protection under the asylum system or the CAT, and thus requires them to meet the requirements of their claim in proceedings where they are afforded due process rights (Comment to 88 FR 31314, Document ID USCIS-2022-0016-12267)."

The Proposed Rule, however, ignores these realities and would prevent asylum seekers, who face barriers to accessing counsel and language services, from factually presenting claims before an AO. The Proposed Rule would also exacerbate due process concerns and increase the likelihood of erroneous applications of a mandatory bar in the fear screening process.

V. Considerations for Survivors of Human Trafficking, Family Separation, and LGBT Individuals

a. *Impact on Survivors of Human Trafficking*

The interpretation of the mandatory bars has led to years of litigation. The "persecutor bar" specifically raises concerns that the Proposed Rule would negatively impact survivors of human trafficking or other coerced crimes.

Whether the persecutor bar applies to acts committed under duress has split the Department of Justice (DOJ). The issue of whether the persecutor bar applies to coerced conduct made it to the Supreme Court several times. The *Matter of NEGUSIE* reversed the long-standing assumption by the Board of Immigration Appeals (BIA)—based on an earlier Supreme Court decision interpreting the Displaced Persons Act—that the persecutor bar did not recognize a defense of duress (*NEGUSIE v. Holder*, 555 U.S. 511, 522-23 (2009)). In 2018, BIA reversed course and issued a decision recognizing the duress defense (*Matter of NEGUSIE*, 27 I&N Dec. 347 (BIA 2018)). In 2020, then-Attorney General Barr reversed that decision again (*Matter of NEGUSIE*, 28 I&N Dec. 120 (A.G. 2020)). In 2021, Attorney General Garland certified the case to himself and it is still pending his review (*Matter of NEGUSIE*, 28 I&N Dec. 399 (A.G. 2021)). In 2023, DHS and DOJ announced efforts to "modify the regulations regarding the persecutor bar to include provisions addressing duress, lack of knowledge, and general principles (RIN 1125-AB25)." However, no such regulation has been proposed.

The Trafficking Victims Protection Act of 2000 (TVPA), as amended, defines severe forms of trafficking in persons as:

> "(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (22 U.S.C. 7102)."

Traffickers often force victims to participate in illicit activities and to recruit others. This practice is a coercive tactic used by traffickers to maintain control over their victims and expand their operations. Victims may be threatened, manipulated, or subjected to violence to compel them into recruiting others, often as a way to ensure their safety or survival. This creates a cycle of exploitation where victims are both controlled and used to control others.

An individual who escapes a trafficking scheme, similar to the situation above, and seeks refuge in the United States may be denied protection based on the "persecutor bar" because under the Proposed Rule, they might not have the opportunity to present their asylum case fully.

During initial fear screenings, AOs ask catchall questions about whether an individual has been subject to persecution but do not ask specific questions about trafficking history. Being a survivor of human trafficking does not alone qualify someone to meet the definition of a refugee, which is why the TVPA was created in 2000. Before the TVPA, survivors had to pursue piecemeal protections in a system not created for them. However, the Proposed Rule undermines these protections for survivors who may have been coerced into making difficult decisions to stay alive.

USCRI warns that the implementation of this bar without adequate guidance from DOJ will hurt survivors of human trafficking as well as others seeking asylum.

b. *Impact on Families and Children*

USCRI has observed that during times of increased border enforcement, families are often forced to make impossible decisions for their children's protection and well-being, including sending children to migrate alone. The Proposed Rule threatens to separate families and puts more children at risk.

c. *Impact on LGBTQIA+ Individuals*

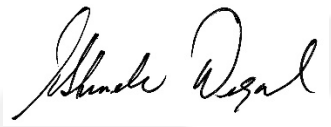
The interpretation of these bars frequently involves the reliability, context, and analysis of foreign records and laws, which may contain biases against particular groups. The "serious nonpolitical crime" bar raises concerns with countries, like Uganda, that are actively passing national-level laws targeting LGBTQIA+ individuals.

Earlier this year, Uganda's Constitutional Court, upheld a 2023 law that criminalized consensual same-sex conduct with penalties of up to life imprisonment and death in certain circumstances. The White House issued a statement condemning the decision and urging human rights protections (The White House, Statement from National Security Advisor Jake Sullivan on Ugandan Court Upholding the Anti-Homoseuxuality Act). As Kenya follows suit, there are no remaining countries in eastern Africa that are safe for LGBTQIA+ individuals and refugees, forcing them to seek asylum outside of the region.

Under the Proposed Rule, LGBTQIA+ asylum seekers searching for safety who were criminalized under the harsh laws may be barred by the "serious nonpolitical crime" bar because they may not have the opportunity to adequately present their case in the context of a full merits hearing.

USCRI thanks DHS for the opportunity to submit comments regarding the Proposed Rule and looks forward to continuing dialogue about our remarks.

Sincerely



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