



**Seattle**  
Office of Immigrant and  
Refugee Affairs  
**Cuc Vu, Director**

Submitted via [www.regulations.gov](http://www.regulations.gov)

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**RE: Document Number 2020-14758; RIN 1125-AB08 and 1615-AC57; EOIR Docket No. USCIS 2020-0013-0001: Public Comment Opposing the Entirety of the Proposed Rule “Security Bars and Processing”**

Dear Division Chief Davidson and Assistant Director Alder Reid:

The Seattle Office of Immigrant Refugee Affairs (OIRA) submits this comment in opposition to the Executive Office for Immigration Review (EOIR) and U.S. Citizenship and Immigration Services (USCIS) rule, USCIS Docket No. 2020-0013-0001, Security Bars and Processing, 85 Fed. Reg. 41201 (July 09, 2020) (the “Proposed Rule”). The Proposed Rule would use the COVID-19 pandemic as a pretext for practically eliminating an applicant’s ability to obtain asylum-related relief in the United States. The Proposed Rule would gut U.S. asylum protections and use specious public health claims in an attempt to justify the violation of both U.S. law and treaty obligations to refugees.

Contrary to the assertion in the Proposed Rule, vulnerable refugees are not a “danger to the security of the United States” simply because they are applying for asylum during a public

health crisis. As many other countries have shown,<sup>1</sup> COVID-19 can be managed through sensible quarantine policies, testing, and contact tracing without sacrificing fundamental protections and rights.

The City of Seattle is a Welcoming City with a commitment to protect the rights of immigrants and refugees, who are integral parts of our families and communities. Seattle has made great efforts to protect our immigrant and refugee workers and residents. Such efforts include executive orders<sup>2</sup>, resolutions<sup>3</sup>, and ordinances<sup>4</sup> to ensure immigrants feel welcome and safe in the city. The City has also funded social programs to help income-eligible residents with what we consider to be basic needs. In 2012, the City created the Office of Immigrant and Refugee Affairs (OIRA) to improve the lives of Seattle's immigrant and refugee families. The City of Seattle, through OIRA, funds and coordinates the Expanded Legal Defense Network (ELDN) that provides removal defense to low-income residents of Seattle and King County, Washington. Many clients represented by the ELDN are individuals seeking asylum and asylum-related relief in the United States.

**As a Welcoming City that respects and upholds the American value of welcoming immigrants, OIRA strongly urges EOIR and USCIS to withdraw the Proposed Rule.** During the COVID-19 pandemic and beyond, the administration can, and must, use rational, non-discriminatory, evidence-based measures to safeguard public health and ensure the United States upholds its legal responsibilities to protect those seeking safety in our country.

#### **I. The Agencies Have Not Provided Enough Time for Comment on the Proposed Rule**

These sweeping regulations would rewrite fundamental aspects of U.S. asylum law and would grant the Department of Homeland Security (DHS) and the Department of Justice (DOJ) unprecedented authority to declare a vast array of communicable diseases as threats to national security and accordingly and also to unjustly use this as justification to block and deny humanitarian protections to refugees. To thoughtfully respond to the proposed rule requires at least 60 days, especially given the need to both ascertain the potential scope and impact of the regulation and consult with public health and medical experts. Instead, the agencies have allowed only 30 days to comment. Under any circumstances, 30 days would be insufficient to comment on regulatory changes of this complexity and wide scope, but these challenges are magnified by the ongoing COVID-19 pandemic.

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<sup>1</sup> For example, Canada: <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/refugees.html#resettlement>; the United Kingdom: <https://www.gov.uk/claim-asylum>; and Germany: <https://www.bamf.de/DE/Themen/AsylFluechtlingsschutz/asylfluechtlingsschutz-node.html;jsessionid=9535B43859CACB09CBE6DF6084E575B0.internet531>

<sup>2</sup> See [http://murray.seattle.gov/wp-content/uploads/2016/11/Executive-Order-2016-08\\_Welcoming-City.pdf](http://murray.seattle.gov/wp-content/uploads/2016/11/Executive-Order-2016-08_Welcoming-City.pdf)

<sup>3</sup> See <http://clerk.seattle.gov/~scripts/nph-brs.exe?s1=&s3=&s2=&s4=Ordinance+121063&Sect4=AND&l=200&Sect2=THESON&Sect3=PLURON&Sect5=RESNY&Sect6=HITOFF&d=RESF&p=1&u=%2F~public%2Fresny.htm&r=7&f=G>

<sup>4</sup> See <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CBOR&s1=114436.cbn.&Sect6=HITOFF&l=20&p=1&u=/~public/cbor2.htm&r=1&f=G>

In addition, we cannot effectively comment on the proposed regulations given that DHS and DOJ failed to explain how the expedited removal procedures imposed by this Proposed Rule would be reconciled with rules proposed by these same agencies on June 15, 2020 (85 FR 36264). The Proposed Rule “acknowledge[s] that these procedures for processing individuals in expedited removal proceedings...differ from expedited removal procedures set forth in” the earlier proposed rules and invites comments on how to reconcile this conflict. The agencies are trying to evade notice and comment requirements by not providing the public with enough time to adequately comment on proposed regulations. Short of rescinding both proposed rules, the agencies must publish a reconciled rule and provide an additional notice and comment period to comply with their obligations under the Administrative Procedure Act.

## **II. The Proposed Rule Illegally Expands the National Security Exception and Violates U.S. and International Law**

The proposed regulations would exploit and illegally expand the narrow national security exception under U.S. Asylum Law and Refugee Protocol obligations. Under the Immigration and Nationality Act, an individual is ineligible for asylum and withholding of removal if there are reasonable grounds to conclude that they are “a danger to the security of the United States,” 8 U.S.C § 1158(b)(2)(A)(iv), 8 U.S.C § 1231(b)(3)(B)(iv). This provision was never intended to and has never been codified by regulation to bar asylum seekers based on public health grounds. When the United States ratified the Refugee Protocol, it made clear that it understood that deporting refugees for “reasons of health” would violate U.S. obligations to protect refugees.<sup>5</sup>

By invoking the national security exception, the Proposed Rule would mislabel asylum seekers as threats to national security on public health grounds, automatically block them from asylum and other humanitarian protections in the United States, and summarily deport many without any opportunity to seek asylum-related relief. This unprecedented expansion and abuse of the limited national security exception under domestic and international refugee law violates U.S. laws and treaty obligations. Legal guidance<sup>6</sup> issued by United Nations High Commissioner for Refugees (UNHCR) on asylum protections in the COVID-19 pandemic makes clear that states may not put in place measures that categorically deny people an effective opportunity to seek asylum.

Like the March 20, 2020 order<sup>7</sup> from the Centers for Disease Control and Prevention (CDC) that DHS is currently using as a pretext to block asylum seekers at the U.S.-Mexico border, the Proposed Rule serves no discernible public health purpose. Indeed, public health and medical experts have concluded that the proposed regulation is not based on sound public health

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<sup>5</sup> <https://books.google.com/books?id=09Xg93YBnXEC&lpg=PR8&ots=-ViAiyGig&dq=%22among%20the%20rights%20which%20the%20Protocol%20would%20guarantee%20to%20refugees%20is%20the%20prohibition%22&pg=PR8#v=onepage&q&f=false>

<sup>6</sup> <https://www.refworld.org/docid/5e7132834.html>

<sup>7</sup> [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf)

principles and would actually be detrimental to public health.<sup>8</sup> At the same time, the administration has repeatedly failed to implement non-discriminatory, science-based measures to safeguard public health that would allow the U.S. to uphold its legal responsibility to protect refugees seeking safety in our country. Rather than implementing these reasonable measures, the administration is attempting to unfairly scapegoat people seeking safety in the United States. Meanwhile, Immigration and Customs Enforcement (ICE) detains most asylum seekers entering the U.S., which puts them at increased risk of infection in the detention facility, and deportations from the U.S. are reported to have spread COVID-19 both domestically and globally due to unchecked transmission in detention facilities.<sup>9</sup> There is a deep and deranged irony to the administration's efforts to implicate asylum seekers for the potential transmission of a virus that its agencies have themselves irresponsibly and actively spread around the world.

### **III. DHS and DOJ Lack the Expertise to Make the Medical and Public Health Assessments Required Under the Proposed Rule**

The Proposed Rule would amend existing federal regulations and grant DHS and DOJ – agencies that lack medical and public health expertise – extraordinary and expansive authority to declare a vast array of communicable diseases (including cholera, diphtheria, gonorrhoea, syphilis, tuberculosis, and Zika) to be national security threats. The Proposed Rule would give DHS and DOJ the authority to identify the countries experiencing outbreaks, decide the periods of “incubation and contagion” of covered diseases, and then block, bar, and deport asylum seekers on the basis of these determinations. Many of these diseases are not currently subject to U.S. quarantine laws, are treatable, and/or do not present a risk of widespread transmission.<sup>10</sup> Further, the regulations leave many key terms undefined, including the level of disease required to trigger a finding that a disease is “prevalent” in a country or sub-national region. While the agencies are required to “consult” with the Department of Health and Human Services (HHS), both DHS and DOJ would have the final authority to make public health determinations with potential life-or-death consequences for asylum seekers. These agencies not only lack public health expertise, but in recent years, have promoted numerous controversial and politicized anti-immigration policies.

### **IV. The Proposed Rule Would Unlawfully Bar Refugees from Obtaining Asylum and Withholding of Removal**

The proposed changes to sections 208.13/1208.13 and 208.16/1208.16 of the U.S. Code of Federal Regulations would create unprecedented public health bars to asylum and withholding of removal protections that will return countless refugees to persecution. By asserting specious public health justifications, the Proposed Rule would establish mandatory national security bars

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<sup>8</sup> <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>

<sup>9</sup> <https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html>

<sup>10</sup> [https://www.publichealth.columbia.edu/sites/default/files/public\\_health\\_primer\\_20200730.pdf](https://www.publichealth.columbia.edu/sites/default/files/public_health_primer_20200730.pdf)

to asylum and withholding of removal for applicants deemed by immigration judges to present symptoms of, or to have been exposed to, a list of specified diseases. It would further impose a categorical bar on asylum seekers who departed from, or even passed through, certain countries designated by DHS and DOJ. This categorical bar, as proposed under these rules, also violates U.S. law and treaty obligations.

These bars could potentially eliminate humanitarian protections for the thousands of asylum seekers who have been waiting, some for over 18 months, on the Mexican side of the southern U.S. border, due to the metering of those seeking asylum at U.S. ports of entry and the Migrant Protection Protocols (MPP). As documented by countless media reports<sup>11</sup> and human rights agencies,<sup>12</sup> these individuals have been forced to wait in Mexico in dangerous and substandard conditions. If DHS and DOJ determine that COVID-19 is “prevalent” in Mexico, these asylum seekers will likely be barred from obtaining asylum and withholding. Denying humanitarian protections to individuals, many of whom have been victims of kidnapping, rape, and assault, based on their presence in a country in which the United States has forced them to remain for extended periods of time, would be cruel and unjust.

Using sweeping and vague criteria, the proposed rules would also direct immigration judges (who do not have medical and/or public health expertise and qualifications) to deny asylum and withholding of removal to individual asylum seekers based on their potential exposure to a covered disease. The regulations create a mandatory bar to asylum/withholding where an individual “exhibits symptoms consistent with” the diseases and/or where the person has “come into contact with such a disease.” 8 CFR § 208.13(c)(10), 208.16(d)(2), 1208.16(d)(2). Yet the regulations do not explain how immigration judges are supposed to elicit an asylum seeker’s “symptoms” or how an untrained asylum adjudicator is to determine whether said symptoms are “consistent with” a particular disease. An asylum seeker could be denied relief for experiencing common, typically innocent symptoms, like a cough or fever. The rule describes the time it would take for an immigration judge to make such a determination as “minimal”, which does not suggest a thorough inquiry. This proposed change to the regulations give the immigration judge the authority to make medical conclusions based on limited and speculative information.

Further, the regulations do not set time or geographical restrictions on potential exposure with respect to diseases declared as public health emergencies. As a result, asylum seekers exposed to COVID-19 in U.S. immigration detention or even through employment in healthcare would perversely be denied asylum or withholding. Given the widespread nature of COVID-19 and its

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<sup>11</sup> For example: <https://www.nytimes.com/2019/04/05/us/politics/asylum-united-states-migrants-mexico.html>  
<https://www.newsweek.com/asylum-seekers-trapped-border-camp-face-coronavirus-cartels-storms-but-still-no-help-u-s-1520702>

<https://www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-us-iom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez>  
<sup>12</sup> For example: <https://www.aclu.org/issues/immigrants-rights/real-border-crisis>  
<https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf>  
[https://www.doctorswithoutborders.org/sites/default/files/documents/Doctors%20Without%20Borders\\_No%20Way%20Out%20Report.pdf](https://www.doctorswithoutborders.org/sites/default/files/documents/Doctors%20Without%20Borders_No%20Way%20Out%20Report.pdf)

disproportionate impact on communities of color, many asylum seekers will have “come into contact” with COVID-19 within family or community settings. It is conceivable that an individual who was previously infected with, but had recovered from COVID-19, or an individual who has tested negative, could also be barred from asylum and withholding as the regulations do not specify that they apply only to recent exposure. There is no rational public health or national security justification to deny humanitarian protections to individuals potentially exposed to COVID-19 *inside* the United States, particularly when the administration’s indifference and negligence have contributed to widespread exposure in immigration detention facilities and among the public at large.

**V. The Proposed Rule Makes It Virtually Impossible to Pass a Preliminary Credible Fear Screening and Returns Refugees to Danger Without a Hearing**

Sections 208.30 and 1208.30 of the U.S. Code of Federal Regulations would illegally elevate the credible fear standard set by Congress, making it all but impossible for refugees to pass the preliminary screening interviews required to have an asylum hearing before an immigration judge. The Proposed Rule directs DHS officers conducting credible fear screenings to enter a negative determination for asylum seekers who passed through a country where a covered disease is prevalent (as determined by DHS/DOJ), exhibit symptoms of a covered disease, or have come into contact with such a disease. Officers would be permitted to enter a positive fear determination only if an asylum seeker establishes that she is more likely than not to face torture if removed to her home country. As a result of this rule, asylum seekers who could have otherwise established eligibility for asylum or withholding of removal will be deported to the places where their lives would be at risk. It is a violation of U.S. law and treaty obligations to return refugees to persecution without proper screening, and there is no rationale to do so simply because an individual has had contact with a country or setting in which the disease is present.

People seeking safety in the United States are also likely to be deported to places where they fear torture given the extremely high evidentiary burden created by this proposal at the preliminary screening stage. For instance, from March through May 2020, under the order from the CDC that DHS has been using to effectively eliminate asylum protections at the border, only four people managed to pass screenings for torture under the current standard, demonstrating how prohibitively high this evidentiary bar will be.<sup>13</sup>

It is unrealistic and unfair to expect asylum seekers in expedited removal proceedings, most of whom are detained, rarely represented by legal counsel, and generally unable to present witnesses or request independent medical assessments at the time of their preliminary interviews, to meet this heightened standard.

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<sup>13</sup> <https://www.cbsnews.com/news/us-ramps-up-mass-expulsions-migrants-border-crossings-rise-coronavirus-restrictions/>

## **VI. The Proposed Rule Gives DHS Authority to Remove Asylum Seekers to Third Countries, even if They Have Met the Elevated Credible Fear Standard**

Even for the small number of asylum seekers able to meet the elevated preliminary screening standard imposed by the rule (i.e., showing a more likely than not possibility of torture), DHS would be allowed to remove them to third countries (countries besides the U.S. or their country of citizenship), even ones where they might experience persecution. This provision places an unfair and onerous burden on asylum seekers to affirmatively prove the harm they would suffer if removed to a particular, (but not specified by DHS) third country, an impossible feat if it is a country the applicant has not previously lived in or visited. An asylum seeker could meet an extremely high standard only to be transported against their will to a third country where they have no ties and could potentially face similar persecution.

## **VII. There Is No Legitimate Public Health Justification for the Proposed Rule**

The proposed regulation relies on unfounded public health claims that have been repeatedly debunked by leading public health experts. Rather than protecting public health through non-discriminatory screening, isolation, treatment, and other measures, the Proposed Rule and regulations potentially bar individuals from obtaining asylum-related relief regardless of whether asylum seekers present any public health risk, have a positive diagnosis for a disease, or could self-isolate until the risk, if any, passes. In practice, there is no objective standard for applying this. It ignores measures already in place and recommendations by experts to promote the safe processing of asylum seekers.<sup>14</sup> Many European countries have implemented public health measures while also protecting access to asylum, such as medical screenings at borders, health certification, contact tracing, and temporary quarantine.<sup>15</sup> The proposed rule baselessly singles out asylum seekers as a threat to public health when there is no justification to do so. The proposed changes in this rule seem to be derived solely from the administration's capricious discriminatory intent to block refugees.

## **VIII. Conclusion**

While the U.S. government has prerogative to protect public health, it cannot abandon the laws and treaties that protect refugees seeking safety and freedom. The Proposed Rule does not protect public health and instead causes additional harm by categorically denying protection to the most vulnerable. If the Proposed Rule goes into effect, countless refugees will be summarily returned to their home countries to face persecution, torture, and even death. The agencies did not provide the public with adequate time to study and respond to the Proposed Rule, nor does it address the clear conflict between the Proposed Rule and existing asylum procedures.

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<sup>14</sup> <https://www.humanrightsfirst.org/resource/public-health-measures-safely-manage-asylum-seekers-and-children-border>

<sup>15</sup> <https://www.unhcr.org/en-us/news/press/2020/4/5ea68bde4/coronavirus-unhcr-offers-practical-recommendations-support-european-countries.html>

The Proposed Rule would provide agencies and officials without any medical expertise the authority to make determinations related to an individual's health status, even if there was limited information and no definitive diagnosis, in addition to decisions better made by a public health expert or epidemiologist. The fear caused by an international public health crisis does not justify a rule that demonizes asylum seekers who are in no way responsible for the prevalence of COVID-19 in the U.S.

**The Seattle Office of Immigrant and Refugee Affairs stands in opposition to this proposed rule and urges DOJ and DHS to rescind it immediately.**

Sincerely,



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