

August 10, 2020

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**RE: Docket No. USCIS 2020-0013; A.G. Order No. 4747-2020, RIN: 1125-AB08,
1615-AC57 Joint Notice of Proposed Rulemaking: Security Bars and
Processing**

Dear Assistant Director Reid and Chief Davidson:

We, the undersigned Members of Congress, submit this comment in opposition to the Department of Homeland Security (DHS) and Department of Justice (DOJ) (hereinafter “the Departments”) joint notice of proposed rulemaking, *Security Bars and Processing* (hereinafter “proposed rule”).¹ As Members of Congress, we are responsible for ensuring that the Departments exercise their authority to interpret and enforce the immigration laws in accordance with the statutory framework established by Congress.

As a result of the Administration’s failure to adequately respond to the COVID-19 pandemic, the United States now has the most confirmed cases of COVID-19 in the world.² We are deeply concerned about the domestic and global impact of this disease, and support efforts to mitigate its spread. However, rather than addressing the pandemic through the development and implementation of a workable strategic plan, this Administration has repeatedly chosen to use COVID-19 as a pretext to radically alter our immigration laws.³ This proposed rule is no different. It will categorically bar individuals from relief simply for coming from or passing through a country where the disease is “prevalent,” without any individualized assessment of infection or eligibility for asylum as our laws require.

Further, as detailed in this comment, Congress addressed the need to mitigate the spread of disease through the Immigration and Nationality Act’s (INA) grounds of inadmissibility, which include health-related grounds for individuals who are “determined ... to have a

¹ 85 Fed. Reg. 41201 (July 9, 2020).

² Johns Hopkins University of Medicine, *New COVID-19 In World Countries* (as of July 31, 2020), <https://coronavirus.jhu.edu/data/new-cases>.

³ See, e.g., Centers for Disease Control and Prevention, *Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 22424 (Apr. 22, 2020); See also Letter from Chairs Engel, Nadler, and Thompson, and Ranking Member Bob Menendez to Secretary Pompeo, Secretary Azar, and Acting Secretary Wolf (May 12, 2020), <https://foreignaffairs.house.gov/2020/5/engel-thompson-nadler-menendez-reject-administration-legal-explanation-for-halting-asylum-processing>.

communicable disease of public health significance.”⁴ Tellingly, however, Congress chose not to apply these inadmissibility grounds to refugees and asylum seekers. Instead, in recognition of the particular vulnerability of asylum seekers, Congress created a separate set of bars to asylum and withholding of removal, mirrored off of the 1967 Protocol Relating to the Status of Refugees,⁵ for that population. Unlike the health-related bars for other applicants for admission, the bars for asylum and withholding do not bar individuals with communicable disease. And they certainly don’t authorize the categorical exclusion of individuals without any assessment of their medical condition or risk to public health. The proposed rule is thus unlawful in that it would categorically bar asylum seekers on grounds that Congress specifically chose to reject—not only for that population, but also for other applicants for admission.

For these reasons, the proposed rule directly conflicts with the Refugee Act of 1980 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In addition, because the Departments failed to consider alternative measures to prevent the spread of disease by individuals seeking admission, including many measures recommended by public health experts, the proposed rule is also arbitrary and capricious in violation of the Administrative Procedure Act (APA). We urge the Departments to immediately withdraw the proposed rule.

I. The Proposed Rule’s Expansion of the National Security Bars Conflicts with the Refugee Act of 1980 and IIRIRA.

More than four decades ago, Congress passed the Refugee Act of 1980, boldly “declar[ing] that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands,” and establishing the framework for current U.S. asylum law.⁶ As the Supreme Court recognized in *INS v. Cardoza-Fonseca* more than 30 years ago, “[i]f one thing is clear from the legislative history . . . of the [Refugee Act], it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.”⁷ By implementing international nonrefoulement obligations into domestic law, Congress thus created a “broad class of refugees who are eligible for a discretionary grant of asylum.”⁸

The Refugee Act set forth four bars to withholding of deportation (now known as “withholding of removal”), including one based on “reasonable grounds for regarding the alien as a danger to the security of the United States.”⁹ In implementing regulations, the Attorney General extended these four bars to asylum applications, and he added two additional bars: one for individuals who do not meet the statutory definition of “refugee” under section 101(a)(42) of the INA and one for individuals who have been firmly resettled in another country.¹⁰ In 1996,

⁴ INA § 212(a)(1)(A)(i); 8 U.S.C. § 1182(a)(1)(A)(i).

⁵ INA §§ 208(b)(2)(A)(iv), 241(b)(3)(B)(iv); 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1231(b)(3)(B)(iv).

⁶ Refugee Act of 1980 § 101(a), Pub. L. No. 96-212 (Mar. 17, 1980).

⁷ *INS v. Cardoza-Fonseca*, 40 U.S. 421, 436-37 (1987).

⁸ *Id.*, at 424. *See also* INA § 208(a)(2)(A); 8 U.S.C. § 1158(a)(2)(A).

⁹ INA § 241(b)(3)(B)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv).

¹⁰ *See* 45 Fed. Reg. 37391 (June 2, 1980); 8 CFR 208.8(f) (1980).

Congress enacted IIRIRA, which codified the six regulatory bars to asylum and modified the national security bar to withholding of removal to require “reasonable grounds to believe that the alien is a danger to the security of the United States.”¹¹

The Departments now seek to unlawfully add a new regulatory bar to asylum and withholding of removal based on whether an individual has traveled through a country in which COVID-19 is prevalent. The Departments attempt to justify this expansion by associating the possibility of disease transmission with the economic security of the United States.¹² However, although the Departments correctly note that the Attorney General in *Matter of A-H-* concluded that “the phrase ‘danger to the security of the United States’ is best understood to mean a risk to the Nation’s defense, foreign relations, or economic interests,”¹³ the Departments’ argument that economic interests extends to “public health concerns” fails. Nothing in the Refugee Act or IIRIRA permits such an interpretation.

As noted above, a primary purpose of the Refugee Act was to bring U.S. refugee law into conformance with the Refugee Protocol. The national security bars to asylum and withholding of removal are drawn directly from Articles 32(1) and 33(2) of the 1951 Convention Relating to the Status of Refugees, which were incorporated into the Protocol.¹⁴ Specifically, Article 32(1) prohibits States from “expel[ing] a refugee lawfully in their territory save on grounds of national security or public order.” Article 33(2) sets forth an exception to a State’s nonrefoulement obligations if “there are reasonable grounds for regarding [the refugee] as a danger to the security of the country.”¹⁵

When the United States ratified the Protocol, then Secretary of State Dean Rusk transmitted the Protocol to the President for signature, along with a letter. With respect to the scope of Article 32(1), he noted, “[a]s refugees by definition are without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health[.]”¹⁶ In addition, the Department of State and Department of Health, Education and Welfare—a predecessor of the Department of Health and Human Services (HHS)—explicitly rejected a proposed reservation to the Refugee Protocol on “health related grounds.”¹⁷ For these reasons alone, the Departments proposed expansion of the national

¹¹ INA §§ 208(b)(2)(A)(iv), 241(b)(3)(B)(iv); 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1231(b)(3)(B)(iv).

¹² 85 Fed. Reg. at 41207-10.

¹³ 23 I. & N. Dec. 774, 788 (A.G. 2005).

¹⁴ United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, Article VII, (1967); *INS v Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (noting that the Refugee Protocol “incorporates by reference” Articles 2 through 34 of the Refugee Convention).

¹⁵ United Nations High Commissioner for Refugees, *Convention and Protocols Relating to the Status of Refugees*, Article VII (1967).

¹⁶ Secretary of State Dean Rusk, *Letter of Submittal*, Department of State (July 25, 1968), <https://books.google.com/books?id=09Xg93YBnXEC&lpg=PR8&ots=-VjAyjyGjg&dq=%22among%20the%20rights%20which%20the%20Protocol%20would%20guarantee%20to%20refugees%20is%20the%20prohibition%22&pg=PR8#v=onepage&q&f=false>.

¹⁷ Dep’t of Health, Edu., and Welfare, Memorandum for Ambassador Graham Martin re: Protocol Relating to the Status of Refugee (July 22, 1968); Dep’t of Health, Edu., and Welfare, Letter to Ambassador Graham Martin re: Protocol Relating to the Status of Refugee (July 16, 1968).

security bar to include public health matters is an unlawful interpretation of the 1980 Refugee Act and must be withdrawn.

Congress ratified this understanding by purposefully refusing to create a health-related bar for asylum and withholding of removal. Tellingly, Congress has maintained a general health-related bar to admission since the Immigration Act of 1891.¹⁸ This bar, which renders inadmissible any individual who has a “communicable disease of public health significance,” has remained relatively unchanged since then and is currently listed in section 212(a)(1) of the INA—the first ground of inadmissibility.¹⁹ Congress, however, chose not to incorporate this grounds, as well as several others, into the Refugee Act. Instead, recognizing the unique plight of refugees and seeking to preserve the spirit and intent of the Protocol, Congress purposely created a separate set of bars to asylum and withholding of removal—a set that did not include health related grounds. Considering this history, the Executive Branch cannot implement a categorical bar to asylum and withholding of removal on a ground that Congress specifically chose to reject for those forms of relief. “Congress could not have intended to delegate a decision of such . . . significance to an agency in so cryptic a fashion.”²⁰

Nevertheless, the Departments proceed to not only propose a health-related bar to asylum and withholding of removal, but to propose a categorical approach that goes far beyond anything Congress has contemplated for other applicants for admission. Even though the existing statutory health-related bar to general admission applies only to individuals with communicable diseases, the Departments claim they can establish by regulation a more categorical bar for asylum purposes that “need not be limited to instances where each individual alien is known to be carrying a particular disease.”²¹ According to the Departments, “it is enough that the presence of disease in the countries through which the alien has traveled to reach the United States makes it reasonable to believe that the entry of aliens from that country presents a serious danger of introduction of the disease into the United States.”²² However, the Department’s attempt to impose a class-based bar to asylum and withholding of removal is simply inconsistent with congressional intent.²³

Aside from the history of the Refugee Act noted above, it is well-established under the INA that both the credible fear and asylum processes require an assessment of the facts of each individual’s case to determine eligibility—including an analysis of past-persecution or a well-founded fear of persecution, nexus to a protected ground, and an analysis of the bars to eligibility.²⁴ As the District Court noted in *Grace v. Whitaker*, a general rule barring certain types of asylum claims “runs contrary to the individualized analysis required by the INA.”²⁵ The

¹⁸ Ruth Ellen Wasem, *Immigration Policies and Issues on Health-Related Grounds for Exclusion*, CONG. RES. SERVICE (Aug. 13, 2014), <https://fas.org/sgp/crs/homesec/R40570.pdf>.

¹⁹ INA § 212(a)(1); 8 U.S.C. § 1182(a)(1).

²⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

²¹ 85 Fed. Reg. at 41210.

²² *Id.*

²³ 85 Fed. Reg. 41209-10, n.53 (“an individual’s membership within a class of aliens arriving from a country in which the spread of a pandemic poses serious danger itself presents a serious security risk”)

²⁴ See generally, INA §§ 208 and 235; 8 U.S.C. §§ 1208 and 1225.

²⁵ *Grace v. Whitaker*, Case No. 1:18-cv-01853-EGS (D.D.C. Dec. 19, 2018).

INA simply does not permit, or even contemplate, class-based bars to asylum or related forms of relief. Moreover, the Department's bald declaration that an individual is a threat to national security simply because she comes from a country where a communicable disease is prevalent is plainly contrary to the national security bar to withholding, which requires "reasonable grounds to believe that the alien *is* a danger to the security of the United States."²⁶ Indeed, as the Third Circuit has held, the national security bar to withholding does not "cover aliens who conceivably could be" a danger to national security or "have the ability to pose such a danger,"²⁷ but instead applies to individuals who "actually pose a danger to U.S. security."²⁸ Notably, the Departments miss this distinction completely, and in fact cite to an incorrect standard in the proposed regulations pertaining to withholding of removal.²⁹

II. The Proposal to Apply the National Security Bar at the Credible Fear Stage Conflicts with IIRIRA.

Although IIRIRA ushered in sweeping changes to our immigration laws, the drafters of the legislation were clear in their intent to provide full due process protections to asylum seekers with viable claims by exempting them from summary removal through the expedited removal process. Individuals who would otherwise be subject to expedited removal, but who are determined to have a credible fear of persecution are provided the opportunity to receive full consideration of their claims for relief.³⁰ As noted by Senator Orrin Hatch, "[t]he [credible fear] standard adopted in the conference report is intended to be a *low screening standard for admission* into the usual full asylum process."³¹

Breaking from more than two decades of agency practice, the Departments now propose to apply the national security/public health bar at the credible fear stage.³² Under current law, asylum officers conducting credible fear screenings apply a single uniform standard to determine if there is a "significant possibility" of a claim for asylum, withholding of removal, or relief under the Convention Against Torture (CAT).³³ Under the proposed rule, individuals who are subject to the national security bar will not be permitted to seek protection in the United States unless they demonstrate they are "more likely than not" to be tortured in the country of removal.³⁴ This effectively raises the credible fear standard set by Congress and will block the

²⁶ INA § 241(b)(3)(B)(iv); 8 U.S.C. § 1231 (b)(3)(B)(iv) (emphasis added).

²⁷ *Yusupov v. Att'y Gen.*, 518 F.3d 185, 201 (3d Cir. 2008).

²⁸ *Id.* The proposed rule attempts to bar individuals from asylum and withholding of removal without any evidence that they have contracted a disease of concern. Instead, the proposed rule attempts to broadly bar individuals based on: the fact that an individual is "coming from a country, or a political subdivision or region of that country, or has embarked at a place, where such disease is prevalent," the uninformed opinion of an adjudicator that the individual "exhibits symptoms," or the fact that the individual has been "exposed" to the disease.

²⁹ Proposed 8 C.F.R. 208.16(d)(2) and 1208.16(d)(2) attempts to bar aliens or classes of aliens based on whether they "can reasonably be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act" (emphasis added). However, section 241(b)(3)(B)(iv) of the INA bars an individual only when "there are reasonable grounds to believe that the alien is a danger to the security of the United States" (emphasis added).

³⁰ INA § 235(b)(1)(B)(ii); 8 U.S.C. § 1225(b)(1)(B)(ii).

³¹ 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (emphasis added).

³² 85 Fed. Reg. at 41212.

³³ 8 C.F.R. § 208.30(e)(2)-(3).

³⁴ 85 Fed. Reg. at 41212.

vast majority of individuals arriving at the border from receiving full consideration of their claims for protection.

Although the Departments claim that the proposed rule does not change the credible fear standard, this is disingenuous. As the Departments admit, the rule “would *require asylum officers to make negative credible fear of persecution determinations*” for aliens who may have a viable fear but are subject to the national security bar on public health grounds.³⁵ The text and legislative history of IIRIRA are clear. Congress intended that individuals who pass the “low screening standard” are to have their claims adjudicated.³⁶ The proposed rule is thus additionally unlawful for this reason.

III. The Departments Fail to Draw a Rational Connection Between the Proposed Rule and the Goal of Mitigating the Risk of COVID-19

The proposed rule should also be rescinded for violating the Administrative Procedure Act (APA). The APA requires agencies engaged in rulemaking to “examine relevant data and articulate a satisfactory explanation for [the] action including a ‘rational connection between the facts found and the choice made.’”³⁷ Absent this analysis, a rule may be set aside as arbitrary and capricious.³⁸ When assessing the validity of agency action, one factor to be considered is “whether the agency looked at all important aspects of the problem, including viable policy alternatives.”³⁹

In this case, the Departments violated the APA by proposing to categorically deny asylum without regard to the individual circumstances in a particular case, and by failing to consider alternative effective measures to prevent the spread of disease as recommended by public health experts. These alternatives include installing plexiglass barriers at inspection sites, requiring individuals to wear face coverings, taking temperatures of individuals seeking admission, providing testing as necessary, and permitting asylum seekers to await their hearings dates with family members instead of in detention where possible.⁴⁰ Indeed, over twenty European countries provided explicit exemptions for asylum seekers from entry bans and border closures during the height of the pandemic, following similar recommendations from the World

³⁵ *Id.* (emphasis added).

³⁶ INA § 235(b)(1)(B)(ii); 8 U.S.C. § 1225(b)(1)(B)(ii); H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.).

³⁷ *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

³⁸ 5 U.S.C. § 706(2)(A).

³⁹ *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983)

⁴⁰ See, e.g., *Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions* (May 18, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

Health Organization and UNHCR.⁴¹ Now most, if not all, of these countries have drastically reduced the spread of COVID-19 within their borders.⁴²

What is clear is that the proposed rule uses the pandemic as a pretext to further unlawful policy goals. Much like the Departments' current proposal, recent proposals from the Administration have introduced new barriers for those seeking asylum, including raising the threshold for credible fear screening, and developing unlawfully restrictive interpretations of the categorical bars to asylum.⁴³ Further, this proposal is the latest in a series that seeks to ban asylum seekers on the pretext of mitigating the risk of COVID-19, without any consideration of alternatives to this approach, raising concerns from members of Congress and experts as to the accuracy of the Administration's claims of protecting public health.⁴⁴ In other words, this proposal is a pretextual and disproportionate attempt to achieve unlawful policy goals—in defiance of both the law and rational, effective, and evidence-based methods to mitigate the spread of disease.

IV. Conclusion

Protecting public health and protecting individuals from persecution are not mutually exclusive. The United States must do both. The Departments must immediately withdraw the joint notice of proposed rulemaking as the legal defects contained therein cannot be addressed through simple modifications. We urge the Administration to stop using this historic pandemic as a pretext to further its unlawful policy goals, and instead work with experts to implement measures to effectively protect the health of federal employees and asylum seekers.⁴⁵

Sincerely,

Rep. Jerrold Nadler

Rep. Zoe Lofgren

⁴¹ United Nations High Commissioner for Refugees, *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic* (Apr. 15, 2020), <https://data2.unhcr.org/en/documents/download/75453>.

⁴² See, e.g., Our World In Data, *Coronavirus Pandemic (COVID-19)* (Aug. 5, 2020), <https://ourworldindata.org/coronavirus>.

⁴³ See, *Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility* (Jan. 21, 2020) (comment submitted in response to 84 Fed. Reg. 69640) and *Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (July 15, 2020) (comment submitted in response to 85 Fed. Reg. 36264).

⁴⁴ See, e.g., 85 Fed. Reg. 17060 (Mar. 26, 2020); 85 Fed. Reg. 22424 (Apr. 22, 2020); Letter from Chairs Engel, Nadler, and Thompson, and Ranking Member Bob Menendez to Secretary Pompeo, Secretary Azar, and Acting Secretary Wolf (May 12, 2020), <https://foreignaffairs.house.gov/2020/5/engel-thompson-nadler-menendez-reject-administration-s-legal-explanation-for-halting-asylum-processing>; See, e.g., Joanna Naples-Mitchell, *There is No Public Health Rationale for a Ban on Asylum Seekers*, JUST SECURITY (Apr. 20, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

⁴⁵ Centers for Disease Control and Prevention, *Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

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