



NEW YORK
CITY BAR

**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

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January 4, 2019

The Honorable Kirstjen Nielsen, Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue NW
Washington, D.C. 20528

The Honorable Matthew Whitaker, Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Via Federal eRulemaking Portal: <https://www.regulations.gov>

Re: City Bar Comments Opposing Interim Final Rule, Department of Homeland Security and Department of Justice, Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934

The New York City Bar Association (City Bar) submits this comment in opposition to the interim final rule entitled “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” which would eliminate the ability of those who enter the United States unlawfully at the southern border to seek asylum. On November 9, 2018, the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (DOJ) jointly issued interim final regulations which will restrict asylum eligibility to those who enter the United States at a port of entry.¹ This rule is contrary to U.S. law and international

¹ See Interim Final Rule, Department of Homeland Security and Department of Justice, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, Nov. 9, 2018, <https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>. (All websites cited in this letter were last visited on January 3, 2019.)

obligations and undermines the U.S. role as a worldwide leader in the protection of refugees and the City Bar has already condemned the proposed changes.²

The City Bar and its 24,000 members have a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The Interim Final Rule (IFR) in conjunction with the Presidential Proclamation³ issued on November 9, 2018, purport to circumvent the legislative process and allow the executive branch to rewrite the law to address a manufactured crisis of border crossers.⁴

Under the Immigration and Nationality Act, (INA) § 208(1), “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum” Nonetheless, the IFR would restrict the ability to apply for asylum to those who enter the U.S. at ports of entry. A federal court has already issued a preliminary injunction preventing the government from implementing the rule,⁵ but the court case did not stay the time period for submitting comments on the IFR. The court found, “Considering the text and structure of the statute, as well as the interpretive guide of the U.N. Protocol, reveals Congress's unambiguous intent. The failure to comply with entry requirements such as arriving at a designated port of entry should bear little, if any, weight in the asylum process. The Rule reaches the opposite result by adopting a categorical bar based solely on the failure to comply with entry requirements.”⁶

The Notice of Interim Rulemaking (NIR) cites the high rate of positive credible fear findings—currently 89%—as a reason why the regulations governing asylum must be changed,⁷ rather than understanding that the high credible fear passage rate is proof of the extremely dangerous conditions these asylum seekers have fled. In fact, the increase of credible fear claims by migrants from Honduras, El Salvador, and Guatemala corresponds with increasing violence and control of large parts of those countries by transnational criminal organizations whose power

² *City Bar Statement Opposing the Presidential Proclamation and Interim Final Rule to Limit Asylum Eligibility*, Nov. 9, 2018, <https://www.nycbar.org/media-listing/media/detail/city-bar-statement-opposing-the-presidential-proclamation-and-interim-final-rule-to-limit-asylum-eligibility>.

³ President Trump, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, Nov. 9, 2018, <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>.

⁴ The Notice of Interim Rulemaking itself concedes that the number of border crossers has actually dropped in recent years explaining that when the credible fear process was put into place with the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), and shortly thereafter, “the overall number of illegal aliens apprehended was far higher than it is today (around 1.6 million in 2000).” 83 Fed. Reg. 55935.

⁵ *East Bay Sanctuary Covenant, et al., v. Donald J. Trump, Et Al., Defendants.*, No. 18-CV-06810-JST, 2018 WL 6660080, at 17 (N.D. Cal. Dec. 19, 2018).

⁶ *Id.* at 12.

⁷ 83 Fed. Reg. 55945.

and control is often minimized by the term “gangs.” In fact, the U.S. Department of State has issued travel warnings for U.S. citizens to avoid these countries.⁸

Although the IFR would allow for those fearing return to their countries to seek withholding of removal under INA § 241(b)(3) or protection under the Convention against Torture (CAT), those protections are in no way the equivalent of asylum. If an applicant wins either withholding of removal or CAT, he or she is ordered removed and the removal order cannot be enforced only as to that country.⁹ Many such people are ordered to report to ICE regularly and to keep a passport on hand to effectuate removal should conditions improve in their home countries or should a third country agree to accept them. There is no ability for the individual who has won to improve his or her immigration status in the United States, to ever travel outside of the United States and be permitted to return, or to petition for family members to come to the United States. Moreover, the reasonable fear interview¹⁰ that such individuals will be required to undergo, in place of the credible fear interview to which they are currently entitled, will make it much less likely that they will ever receive a day in court in the United States. An asylum seeker at a credible fear interview must prove that he or she has a “significant possibility” of establishing asylum eligibility, whereas an applicant subjected to the reasonable fear interview process must show a “reasonable possibility” of persecution or torture under 8 CFR 208.31(c) to even have the opportunity to be placed into removal proceedings and then meet a higher burden of proof—that persecution or torture is “more likely than not”—before an immigration judge.

Limiting protections to those afforded by withholding of removal or CAT does not comply with international law. The Convention Relating to the Status of Refugees states that the “[c]ontracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or

⁸ For example, there is currently a Level 3 U.S. Department of State (DOS) Travel Advisory, warning Americans to “reconsider travel” to Honduras, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Honduras.html>, and a similar warning for El Salvador, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/ElSalvador.html> (both stating: “Violent crime, such as homicide and armed robbery, is common. Violent gang activity, such as extortion, violent street crime, rape, and narcotics and human trafficking, is widespread. Local police and emergency services lack sufficient resources to respond effectively to serious crime.”). Guatemala has a level 2 travel advisory, urging travels to “exercise increased caution,” and to “reconsider travel” to six states, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html>. DOS cautions travelers to “exercise increased caution” in traveling to Mexico, with the highest, Level 4, “Do not travel” warning in effect for five Mexican states, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html>.

⁹ See *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008).

¹⁰ One justification for the rule is the strain on resources that conducting credible fear interviews places. Yet the government will have to expend the exact same resources in having asylum officers conduct reasonable fear interviews. 83 Fed. Reg. 55941.

presence.”¹¹ The inability to become a citizen or to reunite with family members is a penalty and is therefore impermissible under the Convention.

The IFR does not comply with existing statutory law, which only Congress can amend, are ill-advised and are aimed only to hurt the most vulnerable who cross the southern border because they have no other options.¹² The President should rescind the Proclamation, and the United States government should rescind the regulations.

Respectfully,

Immigration & Nationality Law Committee
Victoria F. Neilson, Chair

¹¹ Convention Relating to the Status of Refugees art. 31(1), July 28, 1951, 189 U.N.T.S. 137, https://treaties.un.org/doc/Treaties/1954/04/19540422%2000-23%20AM/Ch_V_2p.pdf.

¹² Many asylum seekers enter the United States unlawfully after being turned away at ports of entry. Robert Moore *At the U.S. border, asylum seekers fleeing violence are told to come back later*, WASHINGTON POST, June 13, 2018, https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/79a12718-6e4d-11e8-afd5-778aca903bbe_story.html?utm_term=.06f743add984..