

August 15, 2019

Executive Office for Immigration Review, Department of Justice
U.S. Citizenship and Immigration Services, Department of Homeland Security

RE: EOIR Docket No. 19-0504, Interim Final Rule: “Asylum Eligibility and Procedural Modifications”

The City of New York (“NYC”) through its Mayor’s Office of Immigrant Affairs (“MOIA”) submits this comment to oppose the U.S. Department of Justice’s (“DOJ”) and the Department of Homeland Security’s (“DHS”) joint interim final rule (“IFR”) governing asylum claims at the southern U.S. border with Mexico, entitled *Asylum Eligibility and Procedural Modifications*. The IFR would make individuals ineligible for asylum relief in the United States if they crossed our southern border and did not apply for relief in a country they traveled through en route to the United States—regardless of the validity of their underlying claim to asylum. This is not DHS’s first attempt to effectively end access to asylum through executive action. Indeed, less than a year ago, MOIA submitted a comment opposing the administration’s previous attempt to use an IFR, entitled *Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*, to radically curtail asylum access. NYC submits that this IFR, as the previous one, is in plain contravention of law—specifically the Administrative Procedure Act and the Immigration and Nationality Act (“INA”). However, as the legality of this IFR is already being challenged in federal court, NYC focuses this comment on its opposition to this IFR on policy grounds.

DOJ and DHS maintain that the IFR would deter migrants who are coming to the United States for economic reasons, and help curb “meritless” asylum claims. The reality is that individuals with valid asylum claims—those fleeing persecution or well-founded fears of persecution—will continue to flee. All the IFR will do is effectively eliminate asylum as a form of relief available to such individuals arriving at our southern border. The IFR will not “mitigate the strain on the country’s immigration system” by “limiting the availability of asylum for those who are seeking to choose among a number of safe countries”¹ as the proposing agencies purport; rather it will unnecessarily and dramatically exacerbate human suffering by preventing individuals with valid asylum claims from pursuing asylum relief in the closest safe country: the United States.

The IFR will also prevent asylum seekers with valid claims from stabilizing their lives in the United States because the only forms of relief available to them under this IFR—withholding of removal and protection under the Convention Against Torture (“CAT”)—lack key features of

¹ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,834 (July 16, 2019) (to be codified at 8 CFR 208, 8 CFR 1003, 8 CFR 1208).

asylum status that make it a more humane and enduring option for some of the world's most vulnerable people. Specifically, neither withholding of removal nor CAT relief (1) permit access to certain federal public benefits; (2) grant status to “derivatives” of the primary status holder; (3) prevent the federal government from removing someone to a third country where they are not likely to face persecution, or (4) provide a pathway to lawful permanent residence and citizenship. Additionally, these remaining channels—CAT and withholding of removal—are forms of immigration relief that are only available as a defense in removal proceedings. Thus, as opposed to affirmative asylum seekers, those being considered for CAT or withholding of removal risk being removed as an immediate consequence of denial of their petitions. In sum, this IFR would further destabilize and traumatize those individuals who would be able to demonstrate eligibility for withholding of removal or CAT, and it would in many cases effectuate family separation upon them as well.

Cities will be among those entities left to address the repercussions of the IFR—specifically, the needs of a population that arrives in their jurisdictions often in need of emergency medical care and facing vastly curtailed legal options, which offer less certainty and stability than asylum. As the largest and most culturally diverse city, which is home to 3.1 million immigrants and a regular destination of asylum-seekers, NYC and its residents would be significantly harmed by the implementation of the IFR. This IFR is just another chapter of DHS's continuous effort to curtail the rights of the foreign-born and shirk America's history of addressing humanitarian crises, in contravention of law. For all of these reasons NYC calls upon DOJ and DHS to rescind the IFR.

I. The Interim Final Rule

On July 17, 2019, DHS and DOJ published the IFR in the Federal Register. The IFR would amend the regulations interpreting the INA to bar persons who enter the United States from the southern border and cross through another country (e.g., Guatemala, Mexico) from qualifying for asylum in the United States, with limited exceptions to this bar. These exceptions include: victims of human trafficking; immigrants who demonstrate that they applied for protection in at least one of the countries they traveled through on the way to the United States and received a final judgement denying relief in that country; and immigrants who transited to the United States only through countries that were not parties to the 1951 Convention on the Status of Refugees, the 1967 Protocol, or the United Nations Convention Against Torture.

In practice, for migrants coming to the United States from Central America, these last two “exceptions” are hardly exceptions at all because Mexico, Guatemala, El Salvador, and Honduras are all parties to the 1951 Convention and the Refugee Protocol and none of them have the infrastructure to handle a large volume of asylum claims, nor are they suitable places to wait for the adjudication of asylum claims. As a result, would-be asylum seekers from Central

America who arrive in the United States at the southern border would only be eligible for withholding of removal pursuant to the INA or protection from removal pursuant to CAT, both of which are adjudged under “reasonable fear” standard. Because this standard is substantially higher than the “credible fear” standard under which asylum determinations are made, these would-be asylum seekers with valid asylum claims would face an additional barrier to protection within the United States.

Additionally, CAT is intended to address a significantly narrower set of humanitarian concerns (torture) than those addressed through asylum (persecution), and as a result, CAT claims are approved at rates radically lower than asylum claims. Moreover, as discussed above, withholding of removal and CAT relief also provide fewer protections than asylum relief, and the lack of these protections prevents vulnerable populations from stabilizing their lives in the United States. In contrast to asylum relief, statutory withholding of removal and CAT protections do not: 1) offer firm protection from deportation because the Government can remove an immigrant to a third country where the immigrant would not face persecution or torture, even in the absence of an agreement with that third country; 2) create a pathway to legal permanent residency and citizenship; 3) allow derivative protection for family members; or 4) provide access to federal means-tested public benefits. These protections are inadequate to help a vulnerable population stabilize, and as a result, the IFR would essentially shift the burden to states and localities to ensure the health and general welfare of this population.

II. The IFR fails to justify the policy changes it proposes because Guatemala and Mexico are not “safe countries” and lack the resources to absorb asylum seekers.

The IFR’s radical curtailment of asylum access is completely untenable because it relies on the fiction that Guatemala and Mexico are safe places for asylum seekers to file asylum claims and wait for the adjudication of such claims. Both countries are demonstrably unsafe and both lack the infrastructure to adjudicate large volumes of asylum claims.

The government’s own data indicate that the IFR will be targeting people with valid asylum claims, many of whom are women and children. According to the IFR, there has been a sharp increase in credible fear claims, and the demographics of migrants crossing our southern border have shifted from Mexican single male adults to predominantly Central American family units and children.² The Government’s own asylum grant rate data tell the same story: from FY14 to FY18, there was a 721.56 percent increase in asylum grants for individuals from El Salvador, a 688.8 percent increase for Honduras, and a 407.3 percent increase for Guatemala.³ The recent

² Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,838 (July 16, 2019) (to be codified at 8 CFR 208, 8 CFR 1003, 8 CFR 1208).

³ Executive Office for Immigration Review Data received through the Freedom of Information Act. *See* Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions*. available at: <https://trac.syr.edu/phptools/immigration/asylum/>. Data from Federal Fiscal Year 2001 through June 2019.

increase in asylum grants for this population indicates that Central Americans are fleeing their homes with valid claims for asylum.

And yet, the “solution” that the IFR proffers for these individuals—waiting for an asylum adjudication in Mexico or Guatemala—is untenable. Neither Mexico nor Guatemala has a strong enough law enforcement network to prevent continued crimes against asylum seekers. In fact, many asylum seekers experience violence on their journeys through Guatemala and Mexico. Asylum-seekers forced to wait in Mexico for their hearings in the United States under the “Migrant Protection Protocols” have also faced extreme violence in Mexico.⁴ The State Department (“DOS”) warns against traveling to Mexico due to extreme levels of “common” violent crime, including homicide, sexual assault, and kidnapping.⁵ Additionally, despite the recent “safe third country” agreement between Guatemala and the United States, DOS’s website states that Guatemala has high crime rates and “[r]eports of sexual assault remain high” while “[s]upport for victims of sexual assault is lacking.”⁶ The DOS website also says “[g]ang activity, such as extortion, violent street crime, and narcotics trafficking, is widespread” in Guatemala.

Contrary to the agencies’ claim that Mexico has a “robust protection regime” and a “functioning asylum system,” Mexico does not have the capacity to deal with the hundreds of thousands of asylum seekers coming to the United States. Neither does Guatemala have the capacity to adjudicate asylum claims for the thousands of individuals seeking asylum from El Salvador and Honduras.⁷

III. The IFR will lead to more family separations and trauma

As discussed above, withholding of removal and CAT protection are significantly less robust than asylum relief. The combination of having no access to federal public benefits, no firm protection from deportation,⁸ and no ability to bring family members to safety in the United States will exacerbate trauma that many asylum-seekers endured before being forced to leave their home countries, which in many cases was further exacerbated upon crossing the southern

⁴ Doctors Without Borders, *Mexican city of Nuevo Laredo not a safe place for people seeking asylum—US-Mexico policy puts asylum seeker in extreme danger*, 7/3/19, available at: <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/mexican-city-nuevo-laredo-not-safe-place-people-seeking-asylum#breadcrumb-block>

⁵ U.S. State Department, *Travel Advisory: Mexico*, available at: <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (accessed 7/26)

⁶ U.S. State Department, *Travel Advisory: Guatemala*, available at: <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html> (accessed 7/26)

⁷ The Washington Post, *Trump says he has agreement with Guatemala to help stem flow of migrants at the border*, 7/26/19 available at: https://www.washingtonpost.com/politics/trump-says-he-has-agreement-with-guatemala-to-help-stem-flow-of-migrants-at-the-border/2019/07/26/23bf0cba-afe3-11e9-b071-94a3f4d59021_story.html?utm_term=.709e445cda4a

⁸ U.S. Department of Justice, *Factsheet on Asylum and Withholding of Removal Relief*, 1/15/09 available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf>

U.S. border. This will leave NYC with the burden of allocating local resources and funding to adequately aid these vulnerable populations, including medical and mental health services.

The trauma of family separation faced by asylum seekers has had devastating consequences in New York. In July 2019, Heydi Gámez García, a Honduran asylee who resided in NYS, become despondent after being separated from her father for four years because his asylum claims were repeatedly denied. Heydi died after attempting to commit suicide.⁹ Such a tragic response to family separation trauma is unfortunately not unique: according to a DHS Office of Inspector General Report from June 2019, DHS inspectors found nooses in detainee cells, indicating that the mental trauma caused by being isolated is pervasive in our current immigration system.¹⁰ The IFR would increase the likelihood of more severe mental health impacts, which would be confronted locally by NYC health care providers and health officials.

IV. The IFR will prevent asylum seekers from accessing federal public benefits, leaving states and localities to backfill these needs

The IFR blocks asylum seekers who gain entry to the United States from receiving vital benefits that allow them to stabilize their lives here, thus forcing localities like NYC to provide basic necessities to this vulnerable population. As previously discussed, the limited protections offered to asylum seekers pursuant to this IFR do not provide access to federal means-tested public benefits to help recipients of these protections stabilize their lives and become self-sufficient. This leaves localities, like NYC, responsible for providing resources to help this vulnerable population become self-sufficient.

The federal government has recognized the importance of helping refugees and asylees stabilize their lives when they first arrive in the United States, and has instated laws and regulations to promote the economic self-sufficiency of this population by providing them with access to federal public benefits and integration programs.¹¹ The available data on refugees' and asylees' access to public benefits demonstrates that these basic supports from the federal government have been successful in helping this population become more self-sufficient: their participation in public benefit programs declines as their length of residence increases.¹² These refugees and asylees become vital members of our communities and make significant economic contributions. In fact, refugees are more likely to be employed than the U.S.-born population:

⁹ The New York Times, *A Border Kept Him From His Daughter. He Came Only in Time to Say Goodbye.* 7/17/2019, available at: <https://www.nytimes.com/2019/07/17/us/migrant-teen-suicide-long-island.html>

¹⁰ DHS Office of Inspector General, *Concern about ICE detainee Treatment and Care at Four Detention Facilities.* 6/3/19, available at: <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>

¹¹ See U.S. Department of Health and Human Services, *Refugee Economic Self-Sufficiency: An Exploration Study of Approaches Used in Office of Refugee Resettlement Programs*, 11/2008 <https://aspe.hhs.gov/system/files/pdf/75561/report.pdf>

¹² Migration Policy Institute, *The Integration Outcomes of U.S. Refugees*, June 2015, available at: [file:///C:/Users/sbanerjee/Downloads/UsRefugeeOutcomes-FINALWEB%20\(1\).pdf](file:///C:/Users/sbanerjee/Downloads/UsRefugeeOutcomes-FINALWEB%20(1).pdf)

refugee men are more likely to work than U.S.-born men, and refugee women work at the same rate as their U.S.-born counterparts, according to a study by the Migration Policy Institute.¹³

Additionally, refugees' economic contributions outweigh the cost of providing them with public benefits when they initially arrive in the United States. According to a 2017 report from the federal government, the refugee and asylee population paid \$63 billion more in taxes than they received in benefits from 2005 to 2014.¹⁴ This population was able to make these significant economic contributions, in part, because their access to public benefits helped them secure necessities like food and shelter when they first arrived in the United States. The IFR will prevent these individuals from accessing federal public benefits, and NYC will be left to backfill the needs of this population on their path to self-sufficiency.

V. The IFR will impede access to legal services

This IFR does not address the root causes of migration from Central America—the rampant violence there—and therefore will not stop the flow of individuals who seek protection in the United States; rather, it will make the process of providing relief and legal counsel to such individuals more complex, and further burden our immigration system.

As NYC is a destination for many asylum seekers, the IFR will have a disproportionate impact on NYC. It will specifically impede New Yorkers' access to counsel and ultimately to relief because the IFR would dramatically narrow the percentage of the asylum-seeking population that will be able to win relief. As discussed above, the forms of relief that the IFR will leave available to would-be asylum seekers have radically lower approval rates. As of this writing, over 70,000 individuals residing in the five boroughs of NYC have cases pending in immigration court.¹⁵ Thanks to NYC and private resources, these cases are overwhelmingly likely to be represented by an attorney.¹⁶ In fact, New York State's ("NYS") immigrants have one of the nation's highest rates of legal representation,¹⁷ contributing significantly to the high rate of asylum case wins in NYS.¹⁸ At the immigration court in Manhattan, judges granted

¹³ Migration Policy Institute, *The Integration Outcomes of U.S. Refugees*, June 2015, available at: [file:///C:/Users/sbanerjee/Downloads/UsRefugeeOutcomes-FINALWEB%20\(1\).pdf](file:///C:/Users/sbanerjee/Downloads/UsRefugeeOutcomes-FINALWEB%20(1).pdf)

¹⁴ The New York Times, *Rejected Report Shows Revenue Brought in By Refugees*, 9/19/2017, available at: <https://www.nytimes.com/interactive/2017/09/19/us/politics/document-Refugee-Report.html?mtrref=www.cato.org&gwh=CFA911C8B4A35214694CBBC6519277F7&gwt=pay>

¹⁵ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Individuals in Immigration Court by Their Address*, available at: <https://tinyurl.com/TRAC-Syr>. Data through February 2019.

¹⁶ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Individuals in Immigration Court by Their Address*, available at: <https://tinyurl.com/TRAC-Syr>. Data through February 2019.

¹⁷ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Individuals in Immigration Court by Their Address*, available at: <https://tinyurl.com/TRAC-Syr>. Data through February 2019.

¹⁸ WNYC, *Will Jeff Sessions Make New York's Immigration Courts Tougher for Asylum Seekers?*, 5/24/2018, available at: <https://www.wnyc.org/story/will-jeff-sessions-make-new-yorks-immigration-courts-tougher-asylum-seekers>.

asylum in 85 percent of all asylum cases in FY16, and 98.7 percent of these asylum seekers had representation.¹⁹ Additionally, over 97 percent of asylum seekers who had hearings in immigration court in Manhattan were represented in FY17, FY18, and FY19 through June.²⁰

A significant proportion of those individuals granted asylum nationally in any given year reside in NYC and NYS. For example, Queens County in NYC is home to more asylees than any other county in the United States—as of February 2019, 46,278 asylees resided there.²¹ In addition, NYS and NYC are major destinations for children asylum-seekers. In FY18, 2,837 unaccompanied immigrant children (UACs) were released from federal custody to adult sponsors in NYS—more than the vast majority of other states. The UAC population in NYS is growing at an alarming rate. In FY19 through June, 4,628 UACs were released to sponsors in NYS—almost twice the number as in FY18, in half as much time.²²

The IFR would significantly reduce the reach of the substantial investments NYC has made in legal services for its immigrant residents, totaling more than \$40 million dollars in city fiscal year 2019. NYS has the highest number of asylum grants in the country,²³ thanks in large part to the incredibly high rate of immigrant representation. Because CAT and withholding of removal are forms of immigration relief that are only available as a defense in removal proceedings, immigration attorneys, including non-profit legal service providers, will be forced to shift strategy when representing clients who would have otherwise qualified for asylum. The added complexity of litigating defensive applications, as well as the increased evidentiary requirements of withholding of removal and CAT claims, will place time and financial strains on limited resources that NYC has allocated to connect residents to immigration legal service providers.

VI. Conclusion

In addition to being unlawful, the IFR would inflict serious harm upon NYC, its residents, and its resources. Instead of helping these families and unaccompanied children escape violence and stabilize their lives in a safe country, the IFR intends to block these vulnerable Central Americans from receiving the benefits that come with asylum relief in the United States. As a result, the IFR burdens localities by forcing us to provide resources to help stabilize this traumatized population. For all of the foregoing reasons, the IFR should be withdrawn.

¹⁹ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions*. available at: <https://trac.syr.edu/phptools/immigration/asylum/>. Data from Federal Fiscal Year 2001 through June 2019.

²⁰ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions*. available at: <https://trac.syr.edu/phptools/immigration/asylum/>. Data from Federal Fiscal Year 2001 through June 2019.

²¹ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions*. available at: <https://trac.syr.edu/phptools/immigration/asylum/>. Data from Federal Fiscal Year 2001 through Feb 2019.

²² Off. of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State* (last updated Nov. 29, 2018), available at: <https://tinyurl.com/UAC-state>. Only California, Florida, and Texas received more unaccompanied immigrant children released from federal custody in FY18.

²³ See Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Asylum Decisions*. <https://trac.syr.edu/phptools/immigration/asylum/>. Data from Federal Fiscal Year 2001 through June 2019.