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Washington, DC 20530-0001

Kevin McAleenan
Acting Secretary
U.S. Department of Homeland Security
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June 5, 2019

White House Memorandum Proposing Additional Asylum Restrictions

Dear Attorney General Barr and Acting Secretary McAleenan:

The undersigned organizations write to express our deep concern and profound disagreement with the Trump administration's April 29 memorandum instructing the Department of Justice (DOJ) and the Department of Homeland Security (DHS) to propose regulations that would further undermine the asylum system and risk the lives of asylum seekers in the United States.

The regulations the White House seeks would: impose an unprecedented fee on asylum applications; severely restrict the ability of asylum seekers to support and feed themselves and their families in the United States while waiting for final adjudication of their cases; assign immigration enforcement officers to conduct sensitive fear screenings; threaten due process by rushing the adjudication of asylum cases before already overburdened immigration courts; and place asylum seekers in limited proceedings that would restrict their access to protections for victims of crime in the United States.

We urge the administration to refrain from adopting such regulations which would erode the protections of the asylum system Congress created, violate U.S. immigration laws and treaty obligations to refugees, and put asylum seekers in danger of return to persecution in their home countries as well as exploitation and harm in the United States.

I. By charging an unprecedented fee for asylum applications, the regulations the President seeks to impose would quite literally put a price on safety for refugees.

The memorandum directs your agencies to levy fees on applications for asylum, in a significant departure from longstanding U.S. practice. Requiring asylum seekers, many of whom flee their countries with little but the clothes on their backs, to pay a fee would put a price on access to a fundamental human right.

The overwhelming majority of countries do not charge a fee for [asylum applications](#). There is good reason not to charge a fee: states have an obligation to protect people fleeing persecution, and that obligation should not be conditioned on an asylum seeker's ability to pay. In the decades-long history of U.S. asylum law, based on its understanding of this obligation as a party to the Refugee Protocol, the U.S. government has never charged an asylum seeker to exercise their right to seek protection.

Forcing asylum seekers to pay a fee to seek asylum is particularly cruel considering they're unable to lawfully work for at least six months after initially filing their application -- and could now be barred from seeking employment authorization at all until their cases are finally adjudicated. Practitioners [have described](#) how [even a \\$50 fee](#) could put asylum out of the reach of many of their clients or prevent them from submitting an application within the one-year filing deadline, given how little most arrive with and how difficult it is for them to earn, particularly with the existing bar on employment authorization for the first 180 days after filing a claim. The administration should reject the imposition of a fee that would put asylum out of the reach of many simply based on their ability to pay.

II. Regulations curtailing access to employment authorization sought by the President would arbitrarily penalize some asylum seekers and expose them to grave risks of exploitation and abuse.

The regulations included in the Presidential Memorandum that would bar certain asylum seekers from accessing the right to lawful employment until their asylum proceedings have concluded will increase the risks of harm for already vulnerable individuals and their families.

Asylum seekers come to the United States to ask for refugee protection. Access to lawful employment enables them to survive while they are seeking safety. This potential regulatory change would upend the well-settled principle that asylum seekers should be authorized to work after filing their claims and while waiting for their cases to be decided. It bars asylum seekers who entered the United States between ports of entry from being able to access employment authorization during their proceedings -- a process that often takes years. This dramatic policy change should not be implemented.

These requested regulations would effectively punish asylum seekers by denying them employment authorization based on how they entered the country, even though this fact has nothing to do with their underlying eligibility for asylum. As the U.S. Court of Appeals for the Ninth Circuit noted in [rejecting](#) another administration proposal conditioned on an asylum seeker's manner of entry, U.S. law and international obligations under the Refugee Convention prohibit the government from "impos[ing] penalties on refugees on account of their irregular entry or presence." Yet this is effectively what the rule at hand does: it cuts off a critical means of survival for asylum seekers based on the arbitrary fact of how they entered. Given the lack of a right to court-appointed legal counsel for asylum seekers in the United States, the bar on employment authorization also effectively prevents asylum seekers from earning the money needed to hire legal representatives, thus disadvantaging them from presenting their cases and from being granted asylum. As [studies](#) have shown unrepresented asylum seekers are considerably less likely to be granted asylum than those who are represented.

Conditioning employment authorization on manner of entry is particularly pernicious considering that the administration's role in choking off access to asylum at ports of entry is causing asylum seekers to cross the border elsewhere. In a recent investigation, the [Associated Press](#) found that DHS officials continue to turn away people who attempt to claim asylum at ports of entry forcing them to wait for weeks to months in precarious conditions in Mexican border towns, and that waitlists at the ports of entry along the southwest border now number in the tens of thousands. DHS's own Inspector General [concluded](#) that the government's practice of "metering" has pushed many who otherwise would have sought legal entry to the United States to cross the border between ports of entry. Foreclosing individuals who were unable to seek

asylum at ports of entry because of the administration's restrictions from accessing employment authorization is nothing short of cruelty.

Finally, preventing asylum seekers from accessing employment authorization would have extremely harmful [practical consequences](#). Already, the six months asylum seekers must wait before accessing legal employment can have devastating consequences: they often have no support networks in the United States and are forced to fend for themselves while battling significant past trauma and the challenges of adapting to a new country. Many are exploited as undocumented workers and are at serious risk of homelessness and hunger, as they are ineligible for most social support programs. They are often at the mercy of distant relatives and bosses who may abuse and mistreat them because of their precarious status. Far from radically restricting it, the administration should instead be promoting access to the lifeline that employment authorization represents for asylum seekers.

III. Assigning Customs and Border Protection (CBP) officers to conduct fear screenings of asylum seekers would undermine safeguards to prevent the deportation of refugees to persecution.

The Presidential Memorandum directs DHS to reassign immigration officers to conduct credible and reasonable fear interviews allegedly to "improve the[ir] integrity." DHS has already reportedly begun to train and assign Border Patrol agents to carry out these screenings in place of asylum officers from the United States Citizenship and Immigration Service (USCIS) Asylum Office. Replacing asylum officers specially trained in asylum adjudication with CBP officers hired for border security and immigration enforcement to conduct these interviews will increase the likelihood that refugees at risk of persecution are summarily deported to their home countries without an opportunity to apply for asylum.

Credible fear interviews involve the discussion of sensitive, difficult issues. Asylum seekers, typically traumatized and exhausted by their journey to the United States, are asked to recount details of often violent and traumatic events that led them to flee to the United States, which can include torture, beatings, and rape. Thus, [federal law](#) and [regulations](#) require that asylum officers with "professional training in country conditions, asylum law, and interview techniques" conduct these interviews in a non-adversarial manner. As such, professional, specialized asylum officers who adjudicate full asylum applications have been assigned to conduct these fear interviews, not immigration enforcement officers.

Tasking CBP officers, including Border Patrol agents, with conducting credible and reasonable fear interviews would undermine the safeguards put in place to prevent the deportation of refugees to persecution. CBP's immigration enforcement mission is incompatible with the sensitive, non-adversarial nature of credible fear interviews. Just as a hospital would not assign security guards to triage incoming patients in the emergency ward, CBP border officers should not make life-or-death decisions about refugees seeking protection at the border. Moreover, instances of CBP officer misconduct against asylum seekers raise major [concerns](#) about the impartiality and fairness of the officers who would be conducting these screenings. CBP officers sometimes [fail to ask](#) individuals about whether they fear persecution in their home country and [fail to refer](#) those who indicate a fear to an asylum officer for a fear interview, as [required](#) by federal [regulations](#). Harassment and misinformation by some CBP officers have also [interfered](#) with asylum seekers' right to pursue their claims.

Re-assigning immigration enforcement officers from CBP to conduct credible and reasonable fear screenings will not “improve the integrity” of these interviews but will instead have the opposite effect - increasing the risk of erroneous determinations that put the lives of refugees at risk. The administration should leave these interviews in the hands of the trained professional asylum officers from USCIS who specialize in asylum adjudication. With DHS already shifting personnel to assist CBP along the United States-Mexico border, creating additional duties for officers who lack training to conduct fear interviews and who CBP contends are overstretched is illogical and inefficient. CBP officers should focus on effectively performing their existing legal responsibilities to ensure that asylum seekers arriving at ports of entry or otherwise crossing the border are referred to USCIS asylum officers for fear screenings.

IV. Forcing immigration judges to potentially rush through asylum cases in fewer than six months threatens due process and will create even more chaos in our overburdened, under-resourced immigration courts.

The Presidential Memorandum cites existing [law](#) as the basis for the proposed regulations. However, the same [law](#) provides due process protections for asylum seekers, including that they shall have a reasonable opportunity to examine the evidence against them, to present evidence on their own behalf, and to cross-examine witnesses presented by the government. The existing statutory provision on the adjudication of asylum application is not currently complied with because successive administrations, coupled with an historical lack of adequate funding from Congress, have failed to provide sufficient judges, support staff, and technology for immigration courts in contrast to the vastly increased resources flowing toward enforcement. Promulgating a new regulation will not solve the problem of the immigration courts' extreme lack of resources.

To the extent that immigration judges are forced to abide by the new regulation, two negative results are entirely predictable. First, the immigration court system will become even more chaotic and less functional. If only newly filed asylum cases are subject to a new rapid completion rule, the existing backlog of over 800,000 removal cases of all types would be pushed even further down the line, as court dockets are reshuffled yet again to prioritize these cases. If instead all pending asylum cases are subject to this new rule, immigration judges would have to go through their packed dockets now stretching years into the future to identify the cases where asylum is being sought as a form of relief and somehow reschedule all those cases forward for adjudication within the six-month window.

Further, the regulations the White House seeks could prevent immigration judges from exercising their discretion to allow asylum seekers who are diligently seeking legal representation and preparing their cases sufficient time to do so. Asylum law is complicated, and even many non-specialist attorneys don't understand it. Asylum seekers do not receive court-appointed attorneys. They often need months to find affordable legal assistance and to begin to understand whether they have strong cases and the evidence needed to prove their claims. Delays in receiving and translating police reports, medical records, and other critical corroborating documents from the home country are common. Asylum seekers may need to prove that their injuries are consistent with the persecution or torture they describe, or that they suffer from post-traumatic stress disorder, major depressive disorder, or other serious mental health issues as a result of past trauma. Find an affordable health care provider in the United States to conduct such examinations and write a report for the court can take months. In our current immigration court system, with no appointed counsel, complex legal standards, and a heavy evidentiary burden on asylum seekers, eliminating the discretion of immigration judges to

grant continuances when needed could have severe implications for the due process rights of asylum seekers. Many mistaken denials of asylum will result if asylum seekers are not provided a realistic opportunity to secure legal representation and the evidence to support their claims. The administration should focus on expanding legal representation, modernizing our immigration court system, and supporting efforts to transform it into a truly independent court.

V. Limiting asylum seekers to “asylum-only” proceedings may violate federal law and would bar asylum seekers from relief Congress created specifically for immigrant victims of crime.

The Presidential Memorandum also calls for regulations that would place individuals who pass credible fear interviews into so-called “asylum-only” proceedings where they would not be permitted to seek any other form of immigration relief regardless of eligibility. This proposal runs afoul of the clear command of Section 240 the [Immigration and Nationality Act](#) which provides that “[u]nless otherwise specified,” full removal proceedings “shall be the sole and exclusive procedure” for admitting and removing noncitizens. Nowhere do the immigration laws authorize the administration to place asylum seekers who pass a credible fear interview in limited “asylum-only” proceedings. The Presidential Memorandum does not point to any statutory authority for this proposed regulation.

Moreover, asylum seekers who qualify for other forms of immigration relief, including for victims of [trafficking](#), domestic violence, and other serious crimes in the United States, would be effectively unable to access these protections in “asylum-only” proceedings. Congress specifically authorized these benefits, including T and U visas as well as protection under the Violence Against Women Act, for immigrant victims of crime. Preventing individuals placed in “asylum-only” proceedings from benefiting from these protections runs counter to Congress’ intent to encourage immigrant victims to report serious crimes to authorities. Further, abused, abandoned, and neglected children placed in these limited proceedings would not be able to receive the immigration status Congress adopted especially for these minors through the Special Immigrant Juvenile classification. The administration should not pursue these regulations as they may well violate federal law and could effectively prevent immigrant victims of crime and abuse from receiving the protections Congress created for them.

Conclusion

We urge the administration to abandon its plans to adopt such regulations that would threaten to unravel the crucial protections that asylum offers to refugees fleeing persecution in their home countries and which would place these vulnerable people at risk of harm and exploitation in the United States.

Sincerely,

Amnesty International USA
Asylum Seeker Advocacy Project (ASAP)
Black Alliance for Just Immigration (BAJI)
Bellevue/NYU Program for Survivors of Torture
Bridges Faith Initiative
Catholic Legal Immigration Network, Inc.
Center for Gender and Refugee Studies

Center Global, a program of the DC Center for the LGBT Community
Church World Service
Center for Victims of Torture
DC-MD Justice for Our Neighbors
The Florence Immigrant & Refugee Rights Project
Freedom House Detroit
Harvard Immigration and Refugee Clinical Program
HIAS
Human Rights Initiative of North Texas
Human Rights First
Human Rights Watch
International Refugee Assistance Project (IRAP)
International Rescue Committee
The Lawyers' Committee for Civil Rights of the San Francisco Bay Area
LGBT Freedom and Asylum Network
NIJC
NYLAG | New York Legal Assistance Group
Physicians for Human Rights
Refugees International
Sanctuary for Families
Tahirih Justice Center
USC Gould School of Law, International Human Rights Clinic
Women's Refugee Commission

CC: Office of Management and Budget