



Freedom Network USA

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Re: Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020

Assistant Director Reid:

On behalf of Freedom Network USA (FNUSA), I submit these comments in response to the above-referenced Proposed Rules to express **our strong opposition** to the Proposed Rules to amend regulations relating to eligibility for asylum published in the Federal Register on June 15, 2020, and to request that the Department of Homeland Security and the Department of Justice immediately withdraw their current proposal, and instead dedicate their efforts to ensuring that individuals fleeing violence are granted full and fair access to asylum protections in the United States.

FNUSA, established in 2001, is a coalition of 68 non-governmental organizations and individuals that provide services to, and advocate for the rights of, human trafficking survivors in the United States. Our members include survivors themselves as well as former prosecutors, civil attorneys, criminal attorneys, immigration attorneys, and social service providers who have assisted thousands of trafficking survivors. Together, our members provide services to over 2,000 trafficking survivors each year.

As a preliminary matter, FNUSA strongly objects to the unusually short notice and comment period for such an important and complex piece of rulemaking. Even in normal circumstances, rulemaking of this complexity would deserve a period of at least 45 days. And yet, these are not normal circumstances. We are in the midst of a global pandemic that is reducing work hours and access across the US. Child care and schools are shuttered or operating at reduced capacity, further reducing the availability of workers and advocates to engage in the rulemaking process. Additionally, immigrants are disproportionately impacted by the pandemic, falling ill and dying at disproportionately high rates. Service providers who work with asylees are critical stakeholders for this rulemaking, but must focus on the increased needs, vulnerabilities, and outreach gaps for the asylee and immigrant populations; making them less available to focus on rulemaking comment periods. Therefore, releasing this proposed rulemaking with such a short comment window seems designed to exclude critical stakeholders from this important process. **For this**

reason, FNUSA urges the Departments to rescind the proposed rule immediately as a matter of procedural fairness to the public and key stakeholders. The Departments may choose to reissue the proposed rule with a comment window of at least 60 days to respond in order to have adequate time to provide comments.

These proposed changes constitute an unnecessary, harsh, and unlawful gutting of the asylum protections enshrined in US and international law. FNUSA is especially concerned about the extraordinary impact and harm that would befall human trafficking survivors, including those who were trafficked outside of the US and have fled to the US seeking safety and protection, and those who entered the US for any reason and were trafficked inside the borders of the US. These changes would preclude many trafficking survivors from the protection and support that the US Government has promised in domestic and international law.

I. Human Trafficking Survivors as Asylum-Seekers

Trafficking victims are often left unprotected or even trafficked by their own governments. Justice is often denied trafficking survivors, leaving them with no option but to seek safety in the US. Others respond to what they believe to be legitimate employment or travel offers, only to find themselves exploited and abused in the US. The proposed rule would bar many of these vulnerable and traumatized survivors from qualifying for asylum. All but one of the top 10 countries for affirmative asylum filings from FY2016 to 2018¹ have been identified by the US Department of State as failing below Minimum Standards for the Elimination of Trafficking in Persons.² Both Venezuela and China, the number 1 and 4 source countries for affirmative asylum in FY2018, have been found to neither meet the minimum standards, not even attempt to meet the standards. As a result, they have a Tier 3 ranking and are subject to restrictions on funding from the US Government.³ Guatemala, El Salvador, Mexico, and Honduras all received Tier 2 rankings, indicating that they do not meet the minimum standards, although there is some evidence of efforts to meet the standards.⁴

Trafficking victims may have been forced to commit crimes by their traffickers in their home country, on the journey to the US, or once they arrive in the US. Traffickers use forced criminality as a tactic to entrap their victims, causing them to fear reporting to law enforcement or seek social services. Once the trafficking victim has a criminal record, they feel trapped by the trafficker. Legal schemes that feed into this control tactic assist traffickers in isolating and abusing their victims. Instead, it is critical to remove barriers to services and support for trafficking survivors.

¹ DHS Annual Flow Report: Asylees and Refugees 2018, available at: https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf

² Department of State, Trafficking in Persons Report, June 2020, hereinafter 2020 TIP Report, available at: <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>

³ Id. at 55.

⁴ Id. at 55.

While many trafficking survivors present in the US apply for the T Visa⁵, a visa specifically created for trafficking survivors, not all do. Those who experienced trafficking outside of the US are unlikely to qualify for a T Visa, but may be eligible for asylum. Unfortunately, some who are likely eligible for a T Visa may not apply for one because they are unaware that it exists. Few T Visas are approved annually⁶, and far fewer immigration practitioners are experienced with T Visas than asylum applications. Therefore, those who have been trafficked both outside and inside of the US may be applying for, and qualified for, asylum in the US.

II. The Proposed Rule Will Unfairly Prevent Gender-based Trafficking Survivors from Obtaining Asylum

The proposed rule seeks to restrict the definition of a “particular social group” in such a way that trafficking survivors will be excluded even though they legitimately fear returning to their home country which is unable or unwilling to protect them from the traffickers.

A. Gender-based Trafficking is Common

Sex traffickers often target girls and women, some specifically target transgender women, others target boys. Labor traffickers also target based on gender, targeting girls for housework, men for some forms of physical labor, women for other forms of labor including textile factories. Traffickers are specifically seeking individuals of a specific gender, sometimes along with other characteristics, who are vulnerable to abuse and exploitation. DHS, HHS and DOJ should analyze their own data about the gender patterns in human trafficking by industry. HHS and DOJ both gather extensive data about the characteristics of trafficking survivors served by the programs that they fund, as well as the type of trafficking experienced. DOJ and DHS should have extensive records of the trafficking victims they have identified in the course of the criminal investigations. HHS keeps data on trafficking survivors who have been either certified or provided a letter or eligibility. This data should confirm that there are clear patterns of gender-based trafficking in both labor and sex trafficking, and that analysis should be included in this rulemaking process.

B. Gender-based Trafficking is Not an “Interpersonal Dispute” or a “Private Criminal Act”

Gender-based human trafficking is not just an interpersonal dispute or a private criminal act. Traffickers may exploit their family members, but it is not an interpersonal dispute. Traffickers engage in local, regional, and international commerce by building businesses

⁵ See 8 USC 1101 (15)(T).

⁶ T Visa applications reached an all-time high of 1,613 in FY2018, but fell to 1,214 for FY2019, and only 613 have been received in the first half of FY20. See USCIS, Form I-914 Data, available at: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2020_qtr2.pdf. By contrast, 105,472 affirmative asylum applications were filed in FY 2018. See https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf.

and personal wealth from their trafficking enterprises. There are often co-conspirators, customers, and sometimes global supply chains that are involved in the commercial impact of the trafficking scheme. Entire national economies are built on forced labor, as detailed in the 2020 TIP Report, including the brick kilns of India and the drug trade in Afghanistan.

C. Governments Around the World Refuse to Protect Trafficking Victims, Some Directly Exploit Them

The 2020 TIP Report from the US State Department clearly describes how governments around the world fail to protect survivors. Some governments and government officials are complicit in the trafficking, may financially benefit, or are traffickers themselves. The Report lists 14 countries who continue to recruit or use child soldiers, a form of child trafficking that targets boys.⁷ The Report further lists 19 countries⁸ which are subject to automatic US sanctions due to their Tier 3 ranking, for “failure to comply with minimum standards for the elimination of trafficking or make significant efforts to bring itself into compliance.”⁹ The US government has prosecuted scores of diplomats who have trafficked household workers into the US, using their governmental authority as a mechanism of power and control. Diplomats who traffic workers into other countries may not face any sort of discipline. The 2020 TIP Report describes the ongoing struggle to address trafficking by UN Peacekeepers who are operating under color of law.¹⁰ The Report, in fact, notes that “the lack of accountability for public officials complicit in sexual exploitation and abuse.”¹¹ Beyond the public officials actually engaged in human trafficking, there are even more officials who are unable or unwilling to protect trafficking survivors and ignore, deny, or refuse to act on reports of trafficking.

III. The Proposed Procedural Changes Will Deny Trafficking Survivors a Meaningful Opportunity to Seek Protection

The Proposed Rule would limit procedural protections for survivors who are subject to expedited removal to a more narrow form of proceedings, with the only available protections being asylum or withholding of removal.

A. The Proposed Rule May Deny Trafficking Victims Access to a T Visa, Even if They Are Eligible

The T Visa was established by the Trafficking Victims Protection Act of 2000 in order to provide immigration protection, access to federally-funded benefits, and support to survivors of human trafficking physically present in the US. The Proposed Rule provides many exceptions to otherwise cruel eligibility restrictions for those immigrants found to be a victim of a severe form of trafficking in persons as defined in 8 CFR 214.11. However, the

⁷ 2020 TIP Report at 34-35.

⁸ Id. at 55.

⁹ Id. at 12.

¹⁰ Id. at 22-23.

¹¹ Id. at 23.

proposed rule does not describe the process through which these survivors will be able to access the more complete services and protection that are established by the TVPA.

DHS and DOJ must explain in their proposed rulemaking, and give adequate opportunity for comment, on how they will ensure the following:

- All immigrants subject to Expedited Removal will be thoroughly assessed, in an age-appropriate, culturally-appropriate, trauma-informed, and victim-centered way, to determine if they are survivors of a severe form of trafficking in persons
- Survivors of a severe form of trafficking in persons will be able to apply for a T Visa (for which sole jurisdiction lies with USCIS)
- Survivors of a severe form of trafficking in persons will have access to services and support to address their trauma and physical injuries which may have resulted from the trafficking as provided in the TVPA
- Which agency or court officer will be responsible for filing applications for Continued Presence for all survivors of a severe form of trafficking in persons identified through the Expedited Removal process, as required by the TVPA to be filed within 24 hours of the identification of a survivor of a severe form of trafficking in persons by a federal law enforcement agency
- The mechanism, process, forms, and authorities through which DHS will ensure that survivors of a severe form of trafficking in persons will not be removed, detained, or limited to lesser forms of immigration relief while their T Visa application is pending

B. Withholding of Removal or Protection Under the Convention Against Torture Are Not Sufficient Alternatives to Asylum for Trafficking Survivors

The protections afforded by Withholding and CAT are limited in scope and duration, and they are harder to obtain. As a result, a Rule that limits *bona fide* asylum-seekers fleeing human trafficking to Withholding and CAT would impose a very real harm to these survivors.

First, Withholding and CAT protections demand a higher level of proof than asylum claims: a clear probability of persecution or torture.¹² Thus, an individual could have a valid asylum claim but be unable to meet the standard under the other forms of relief and therefore would be removed to their country of origin, where they would face persecution or even death at the hands of the traffickers.

¹² Withholding of removal requires the petitioner to demonstrate his or her “life or freedom would be threatened in that country because of the petitioner’s race, religion, nationality, membership in a particular social group, or political opinion.” *INS v. Stevic*, 467 U.S. 407, 411 (1984) (quoting 8 U.S.C. § 1231(b)(3)). Unlike asylum, however, the petitioner must show a “clear probability” of the threat to life or freedom if deported to his or her country of nationality. The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id.*; see also *Cardoza-Fonseca*, 480 U.S. at 431 (describing the difference between a well-founded fear of persecution and a clear probability of persecution). For CAT relief, an applicant must show it is more likely than not that he or she will be tortured or killed by or at the government’s acquiescence if removed to the home country. 8 C.F.R. § 1208.16(c)(2).

Even if they are successful, Withholding and CAT recipients are not as protected as those granted asylum. For example, they have no ability to travel internationally. Withholding and CAT recipients do not have access to a travel document. By regulation, refugee travel documents are available only to asylees.¹³ And the Board of Immigration Appeals requires that an individual granted Withholding or CAT—unlike an individual granted asylum—must simultaneously be ordered removed, making any international travel a “self-deportation.”¹⁴ Trafficking survivors granted only Withholding or CAT protection are thus effectively trapped within the United States in long-term limbo.

Withholding and CAT recipients also face permanent separation from their spouses and children. Because international travel is prohibited, they cannot reconnect with their families in a third country. And they also cannot reunite with family in the United States because only asylees and refugees are eligible to petition for a spouse and children to join them as derivatives.¹⁵

Withholding recipients also face hurdles in access to employment. They must apply for work authorization, and they face frequent delays in the adjudication of these applications, which often result in the loss of legal authorization to work.¹⁶ After escaping the trauma and financial ruin of human trafficking, they will be forced to face long-term uncertainty for their financial future.

Perhaps most fundamentally, there is continuing jeopardy for Withholding and CAT recipients that does not exist for asylum recipients. When a noncitizen is granted asylum, the person receives a legal status.¹⁷ Asylum, once granted, protects an asylee against removal unless and until that status is revoked.¹⁸ None of these protections exists for Withholding and CAT recipients. They have no access to permanent residency or citizenship.¹⁹ Instead, they are subject to a removal order and vulnerable to the permanent prospect of deportation to a third country and subject to potential check ins with immigration officials where they can be made to pursue removal to third countries to which they have no connection.²⁰

IV. Weakening Confidentiality Protections Puts Trafficking Survivors at Risk

Asylum applicants are currently assured that “United States law provides strict rules to prevent disclosure of what you tell an asylum officer about the reasons you fear harm.”

¹³ 8 C.F.R. § 223.1.

¹⁴ See *Matter of I-S- & C-S-*, 24 I.&N. Dec. 432, 434 n.3 (BIA 2008); 8 C.F.R. § 241.7.

¹⁵ 8 C.F.R. § 208.21(a).

¹⁶ 8 C.F.R. § 274a.12(a)(10); *Northwest Immigrant Rights Project, et al. v. USCIS, et al.*, No. 2:15-cv-00813-JLR (W.D. Wash., filed May 22, 2015) (class action regarding delays in adjudication of work authorization).

¹⁷ See, e.g., 8 C.F.R. 245.1(d)(1) (defining “lawful immigration status” to include asylees).

¹⁸ See 8 U.S.C. § 1158(c)(1)(A).

¹⁹ *Matter of Lam*, 18 I.&N. Dec. 15, 18 (BIA 1981); 8 C.F.R. § 245.1(d)(1) (explaining that only those in “lawful immigration status” can seek permanent residency and excluding withholding recipients from such status); 8 C.F.R. § 209.2(a)(1) (authorizing adjustment of status to permanent residence for asylees); 8 C.F.R. § 316.2 (naturalization available only to permanent residents).

²⁰ See *R-S-C v. Sessions*, 869 F.3d 1176, 1180 (10th Cir. 2017).

The Proposed Rule, however, would allow for the disclosure of information contained within an asylum application for a wide range of purposes. Trafficking survivors are often under continuing threat of retaliation against themselves and/or their family members. As discussed above, the trafficker may be a diplomat or otherwise wield power in their home country. Assurances of confidentiality are critical to developing an atmosphere in which a survivor feels safe to disclose the abuse and exploitation that they have suffered.

Additionally, traffickers are subject to both civil and criminal prosecution under US law. DHS and DOJ should clarify how this amendment to the confidentiality protections intersects with any possible prosecution initiated by the DOJ and their Brady obligations for the disclosure of information. **In other words, could the notes from the asylum case become subject to a Brady disclosure and potentially undermine a future human trafficking or other prosecution?**

Conclusion

In summary, these proposed revisions would put severe restrictions on access to asylum protections that would very specifically harm survivors of human trafficking seeking protection in the US. These harms cannot be mitigated with small edits or by providing exemptions for trafficking survivors. The existence of these barriers will deter survivors from even coming forward for protection and support, leaving them in continued abuse and exploitation. The US Government must act to protect survivors, not embolden traffickers. **Therefore, Freedom Network USA urges the Departments to discard these proposed changes and to, instead, stand in solidarity with human trafficking survivors.**

Thank you for the opportunity to submit comments on the Proposed Rules. Please do not hesitate to contact me at jean@freedomnetworkusa.org to provide further information.

Sincerely,



Jean Bruggeman
Executive Director
Freedom Network USA