September 23, 2019

Via Federal e-Rulemaking Portal

Acting Secretary Kevin K. McAleenan
Department of Homeland Security
Washington, DC 20229


Dear Acting Secretary McAleenan:


The ABA is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding of the importance of the rule of law around the world. Through its Commission on Immigration, the ABA provides continuing legal education to the legal community, judges, and the public on immigration topics; and develops and assists in the operation of pro bono legal representation programs. We use our experience and subject matter expertise to advocate for improvements to immigration law and policy.

The ABA has direct experience working with and on behalf of non-citizens subject to expedited removal through two of our public service projects -- the South Texas Pro Bono Asylum Representation Project (ProBAR) located in Harlingen, Texas, and the Immigration Justice Project (IJP), located in San Diego, California. Among the many services they provide to detained individuals, both ProBAR and IJP have experience preparing individuals for credible and reasonable fear interviews. Both projects also have represented individuals in credible and reasonable fear interviews, and represented individuals in review of negative credible and reasonable fear findings by immigration judges.

In addition to the first-hand experience and expertise gained through these projects, the ABA has developed numerous policies addressing the importance of providing all non-citizens with due process of law in removal proceedings. In our view, here, where liberty is at stake, due process should include proceedings in person and on the record, with notice and opportunity to
present evidence and argument, access to the assistance of legal counsel, a decision that includes findings of fact and conclusions of law, and the availability of full, fair, and meaningful administrative and judicial review. The ABA has long opposed the use of expedited removal because it includes few of these safeguards.

The American Bar Association views DHS' decision to expand expedited removal to include individuals encountered anywhere in the United States who have been continuously present in the United States for less than two years to be a direct affront to due process. This expansion will significantly increase the number of individuals subjected to this summary procedure that could result in their removal from the United States without the opportunity to consult with counsel or seek review from an impartial adjudicator.

The Notice fails to address how DHS will ensure that individuals are given a reasonable opportunity to provide the information required to challenge an expedited removal designation. For example, an individual subject to expedited removal has the burden of showing that she was not admitted or paroled, is not inadmissible, and satisfies the continuous physical presence requirement. Yet the Notice provides no explanation of the standard officers will use to evaluate evidence, what documentation will be considered sufficient, and what opportunity individuals will be given to gather relevant information. It is not clear whether the individual will be able to contact her counsel or family members, who may have copies of such evidence. The Notice also does not state whether an individual will be given the opportunity to review and respond to any purported evidence relied upon by DHS to determine that she is subject to expedited removal.

This expansion of expedited removal authority also is of serious concern because it gives broad discretion to immigration officers, with little opportunity for meaningful review. DHS asserts that immigration officers have unreviewable discretion to permit individuals subject to expedited removal to return to their country voluntarily, withdraw their applications for admission, or be placed in full removal proceedings, in lieu of expedited removal. To ensure the fundamental fairness inherent in due process, this nearly unfettered discretion should be subject to clear guidance and to review by an independent adjudicator.

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1 84 Fed. Reg. at 35409.
3 See 8 U.S.C. § 1225(b)(1)(A)(i) (expedited removal orders not subject to further hearing or review); 8 C.F.R. § 235.3(b)(7) (any expedited removal order entered by an examining immigration officer must be reviewed and approved by a supervisor); 84 Fed. Reg. at 35412 (“[I]mmigration officers generally have broad discretion to apply expedited removal to individuals covered under the New Designation.”).
4 84 Fed. Reg. at 35412; see, e.g., 8 U.S.C. § 1225(a)(4) (providing that noncitizens seeking admission “may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission”).
5 The Notice indicates that DHS plans to issue guidance to immigration officers on how to use their discretion in referring individuals for expedited removal. 84 Fed. Reg. at 35412. Given the amount of discretion granted to immigration officers in expedited removal, DHS should have made this guidance publicly available concurrent with the Notice’s publication.
Finally, the Notice has serious implications for non-citizens who fear return to their home countries. The ABA’s concerns about the impact of summary procedures, such as expedited removal, are especially acute when asylum seekers are subject to such procedures, due to their vulnerabilities and the consequences of their potential return to persecution or violence. With this Notice, more asylum seekers will be subjected to this truncated procedure. The ABA opposes the detention of asylum seekers, except in extraordinary circumstances. Yet individuals subject to expedited removal who express a fear of return will be detained pending a final determination of credible fear of persecution. And, recently, in Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019), Attorney General Barr eliminated the longstanding authority of immigration judges to grant bond to individuals who are placed in expedited removal proceedings after entering the United States without inspection and pass their credible fear interviews.

We must address the immigration challenges facing the United States by means that are humane, fair, and effective – and that uphold the principles of due process. Therefore, for the reasons discussed above, we respectfully urge DHS to rescind the Notice expanding expedited removal and instead work toward strengthening the framework of legal protections available to non-citizens, including asylum seekers.

If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at kristi.gaines@americanbar.org.

Sincerely,

Judy Perry Martinez

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6 If DHS does not withdraw this Notice, it must ensure that the protections for noncitizens in expedited removal proceedings who fear return to their home countries are followed. See 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(i), (iv); 8 C.F.R. §§ 235.3(b)(4), 208.30.
8 The government is currently enjoined from enforcing this decision. See Padilla v. ICE, Order, No. 19-35565 (9th Cir. July 22, 2019).