January 21, 2020

Ms. Lauren Alder Reid  
Assistant Director, Office of Policy  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA  22041

Ms. Maureen Dunn  
Chief, Division of Humanitarian Affairs, Office of Policy and Strategy  
U.S. Citizenship & Immigration Services  
20 Massachusetts Ave., NW, Suite 1100  
Washington, DC  20529-2140

RE:   Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (Dec. 19, 2019); EOIR Docket No. 18-0002

Dear Assistant Director Alder Reid and Chief Dunn:

On behalf of the American Bar Association (ABA), I submit the following comments in response to EOIR Docket No. 18-0002, the joint notice of proposed rulemaking on Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (Dec. 19, 2019) (hereinafter the Proposed Rule). The ABA urges the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to rescind the Proposed Rule, for the reasons described in further detail below.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. The ABA’s Commission on Immigration provides continuing education to the legal community, judges, and the public, and develops and assists in the operation of pro bono legal representation and information programs.

The ABA has long supported the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. We also have voiced our concern about the already expansive immigration consequences of criminal convictions, and the lack of due process protections governing these determinations. Therefore, we have significant concerns about the Proposed Rule, which would create additional barriers to asylum eligibility based on criminal history. These additional bars are inconsistent with the United States’ international law obligations and unnecessary. Non-citizens who are convicted of an aggravated felony already are ineligible for
asylum, and immigration judges already have the discretion to deny requests for asylum from applicants with criminal histories that do not rise to the level of aggravated felonies.

The ABA also opposes the Proposed Rule because it would create additional obstacles for federal and state courts to provide relief from the immigration consequences of criminal convictions through vacated, expunged, or modified convictions or sentences. Due to the often severe and disproportionate immigration consequences of criminal convictions, the ABA has supported the restoration of authority to state and federal sentencing courts to reduce or eliminate these consequences.

The Proposed Rule should not be adopted for the following specific reasons.

**Non-Citizens Who Have Been Convicted of an Aggravated Felony Covering a Broad Array of Criminal Conduct Are Already Ineligible for Asylum**

Current law already provides that non-citizens convicted of an aggravated felony are considered to have been convicted of a particularly serious crime, and thus are not eligible for asylum.\(^1\) The ABA has expressed concern about the expansion of what is considered to be an “aggravated felony” to include an additional large number of offenses, some of them minor.\(^2\) For this reason, the ABA has recommended that Congress amend the definition of “aggravated felony” in the Immigration and Nationality Act (INA) to include only a felony for which a sentence of more than one year was imposed. Such an amendment would avoid serious immigration consequences for non-citizens who receive suspended sentences or for whom no jail term is ordered.

The Proposed Rule would go further inappropriately limiting those who are eligible for asylum by making non-citizens ineligible for asylum if they have been convicted of several additional categories of criminal offenses. These offenses would include: a misdemeanor offense under federal, state, tribal, or local law involving the possession or use of an identification document or false identification document without lawful authority; the receipt of federal public benefits, or similar public benefits, without lawful authority; and possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.\(^3\) While the ABA is mindful of the Departments’ legitimate public safety concerns, the definition of an “aggravated felony” already encompasses a broad array of conduct, making it unnecessary to exclude additional individuals from asylum eligibility based on criminal history.

In certain circumstances, the Proposed Rule remarkably would make a non-citizen ineligible for asylum if “[t]here are serious reasons for believing” that he has engaged “in acts of battery or extreme cruelty,” even if he has not been convicted of such conduct.\(^4\) The ABA strongly opposes any effort to exclude individuals from the asylum system based only on allegations of criminal conduct. That notion goes against the foundational beliefs of our U.S. Constitutional system that individuals have a right to defend themselves against criminal charges and are

---

\(^2\) Id. § 1101(a)(43).
\(^3\) 84 Fed. Reg. at 69653-54; id. at 69659-61 (proposed 8 C.F.R. §§ 208.13(c)(6)(vi)(B), 1208.13(c)(6)(vi)(B)).
\(^4\) Id. at 69651-53, 69660-61 (proposed 8 C.F.R. §§ 208.13(c)(6)(vii), 1208.13(c)(6)(vii)).
presumed innocent until proven guilty. Individuals should not be excluded from asylum eligibility based on allegations of criminal misconduct that have not been proven in a court of law.

**Immigration Judges Already Have Discretion to Deny Asylum Based on Additional Criminal Conduct**

The changes in the Proposed Rule are unnecessary and punitive because immigration judges already have the discretion to deny applications for asylum based on convictions for crimes that are not aggravated felonies (as well as the presence of other adverse factors in the record). The ABA has long been concerned about provisions in the immigration laws that strip immigration judges of discretion by mandating removal and detention, or precluding eligibility for certain forms of relief. For this reason, we have urged the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal, such as asylum. The ABA therefore opposes the Proposed Rule because it would prevent immigration judges from exercising their discretion to weigh the equities in individual cases and grant asylum when non-citizens have been convicted of the criminal offenses outlined in the Proposed Rule.

**The Proposed Bars Are Inconsistent with International Law Obligations**

The ABA also is concerned about the proposed expansion of the bars to asylum eligibility based on criminal history because they are inconsistent with the United States’ obligations under international law. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the 1951 Convention Relating to the Status of Refugees. Article 33(1) of the Convention sets forth the principle of *non-refoulement*, which provides that “[n]o contracting state shall expel or return (‘*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 33(2) provides that refugees may not benefit from this protection if “there are reasonable grounds” for regarding the refugee “as a danger to the security” of the receiving country or if the refugee has “been convicted by a final judgment of a particularly serious crime” and “constitutes a danger to the community” of the receiving country. Article 1F of the Convention also excludes from the Convention’s provisions any person where “there are serious reasons for considering that” he has engaged in certain conduct, including that “he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.” Congress has codified these exclusions in the INA.


---

5 E.g., *Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (noting that, if a non-citizen is convicted of an offense that is determined not to be an aggravated felony, she may seek relief from removal such as asylum, but the Attorney General may still deny relief because asylum is a discretionary remedy).


Refugees.

But their reliance is misplaced. First, the serious non-political crime bar applies to conduct that occurred outside of the United States, which the Proposed Rule does not address.9 Second, DHS and DOJ ignore Paragraph 154 of the Handbook, which states that:

A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. In extreme cases, Article 33 paragraph 2 of the Convention permits a refugee’s expulsion or return to his former country if, having been convicted by a final judgment of a “particularly serious” common crime, he constitutes a danger to the community of his country of refuge.10

UNHCR has elaborated on what constitutes a particularly serious crime for purposes of Article 33. UNHCR noted that a “serious crime” is a “capital or a very grave crime normally punished with long imprisonment,” meaning that a “particularly serious crime” “must belong to the gravest category.”11 “Article 33(2) therefore applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum” and “hinges on the assessment that the refugee in question poses a major actual or future threat.” Because “the Article 33(2) mechanism has always been considered as a measure of last resort” the threat must be “exceptional . . . a threat such that it can only be countered by removing the person from the country of asylum.”12 “[T]he gravity of the crimes should be judged against international standards” and Article 33(2) “should not be applied solely by reason of the existence of a past crime but on an assessment of the present or future danger posed by the wrong-doer.”13 The burden is on the State to prove that the conviction means that the refugee presents a danger to the community.14

DHS and DOJ fail to take into consideration UNHCR’s opinion that only “extreme” cases should qualify as a “particularly serious crime,” and do not even attempt to argue that convictions for some of the crimes included in the Proposed Rule demonstrate that an individual poses an actual or future threat to the safety of the community.15 Because DHS and DOJ have not properly

---

9 See 84 Fed. Reg. at 69645 (the Proposed Rule does not cover foreign convictions).
10 UNHCR Handbook ¶ 154.
11 UNHCR, Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading ¶ 7 (July 2007), https://www.unhcr.org/uk/576d237f7.pdf (“UNHCR Briefing for the House of Commons”). Paragraph 155 of the Handbook similarly states that a “serious” non-political crime in the context of Article 1F “must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(b) even if technically referred to as ‘crimes’ in the penal law of the country concerned.”
12 UNHCR Briefing for the House of Commons ¶ 7.
13 Id. ¶¶ 10, 11.
14 Id. ¶ 12.
15 See 84 Fed. Reg. at 69647-48, 69653 (not saying that, inter alia, convictions for first-time alien smuggling offenses involving immediate family members, use of fraudulent document offenses, or unlawful receipt of public benefits offenses indicate that the offender poses an actual or future threat to the community); UNHCR Briefing for the House of Commons ¶ 10 (noting that “[c]rimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the threshold of seriousness”).
considered the United States’ obligations under international law, they should reevaluate the Proposed Rule.

The Availability of Additional Relief Is Not a Sufficient Safeguard

DHS and DOJ claim that the Proposed Rule is consistent with international obligations because it affects only an individual’s eligibility for asylum, and not for withholding of removal or protection under the Convention Against Torture (CAT).\textsuperscript{16} However, the standard for demonstrating eligibility for withholding of removal under INA §241(b)(3) and CAT protection is more onerous than the standard that applies to asylum,\textsuperscript{17} and those forms of relief confer fewer benefits on their recipients.\textsuperscript{18} Therefore, the availability of withholding of removal and CAT relief do not justify the restrictions in the Proposed Rule.

The Executive Branch Should Not Further Constrain Efforts to Reduce the Immigration Consequences of Criminal Convictions

The ABA also opposes the Proposed Rule because it creates very strict criteria for when an order vacating, expunging, or modifying a conviction or sentence will be recognized for purposes of determining whether a non-citizen is eligible for asylum. Under the Proposed Rule, in order for a non-citizen to be eligible for asylum despite a potentially disqualifying conviction, courts could not enter an order vacating, expunging, or modifying a conviction or sentence for rehabilitative or immigration purposes. In making this determination, adjudicators may look to evidence other than the order itself to determine whether it was issued for rehabilitative or immigration purposes and the non-citizen bears the burden of showing that the vacatur, expungement, or sentence modification was not for rehabilitative or immigration purposes. In addition, there is a rebuttable presumption that an order vacating, expunging, or modifying a conviction or sentence is not effective for immigration purposes if the order was entered after the initiation of a removal proceeding, or the non-citizen moved for the order more than one year after the date of the original order of conviction or sentencing.\textsuperscript{19}

The ABA believes that state and federal sentencing courts should have more discretion to ameliorate the consequences of criminal convictions for a non-citizen’s immigration proceedings. Collateral sanctions imposed on persons convicted of crimes – such as ineligibility to apply for relief from removal and other immigration consequences – should be subject to

\textsuperscript{16} 84 Fed. Reg. at 69644.
\textsuperscript{17} Moncrieffe, 569 U.S. at 187 n.1.
\textsuperscript{18} A person with asylum status may not be removed to her country of origin, can petition for his or her spouse and children, may apply for a refugee travel document, is eligible for work authorization, and can apply to become a lawful permanent resident after one year. 8 U.S.C. §§ 1158(b)(3)(A), (c)(1), 1159(b). A person who is granted withholding of removal is eligible to apply for an employment authorization document, but may not travel outside of the United States, adjust status to that of a lawful permanent resident, or confer status on his or her family members. Protection under CAT can take the form of withholding of removal or deferral of removal. Deferral of removal under CAT is for those individuals who are not eligible for withholding of removal (generally because of past criminal convictions) and means that the individual does not receive any lawful or permanent immigrant status in the United States, and may continue to be detained. Deferral of removal status also is subject to review and termination. 8 C.F.R. § 208.17(a), (b).
\textsuperscript{19} 84 Fed. Reg. at 69654-55; id. at 69660, 69661 (proposed 8 C.F.R. §§ 208.13(c)(7)(v), (c)(8), 1208.13(c)(7)(v), (c)(8)).
waiver, modification, or another form of relief if the sanctions are inappropriate or unfair in a particular case. The ABA previously has raised concerns about the extension of the interpretation of the term “aggravated felony” to reach not only low-level offenses, but also state dispositions – such as convictions that are set-aside or expunged – that are not considered convictions under state law. This Proposed Rule would exacerbate the current situation by making it impermissible for state and federal sentencing courts to issue orders for the purpose of ameliorating the collateral consequences of criminal convictions for an individual’s eligibility for asylum, and placing the burden on the non-citizen to show the order was for other than a rehabilitative or immigration purpose.

The Proposed Rule Would Lead to Mini-Trials that Lack Fundamental Due Process Protections

Moreover, the ABA is opposed to several aspects of the Proposed Rule because they would require the adjudicator (the immigration judge or the asylum officer) to conduct a separate factual inquiry into the basis for a criminal conviction or allegations of criminal conduct to determine whether the individual is eligible for asylum. Such mini-trials will likely become necessary to determine whether, for example: an individual has been convicted of a crime where the adjudicator “knows or has reason to believe” that the crime “was committed in support, promotion, or furtherance of the activity of a criminal street gang”;20 whether an individual has been convicted of a crime “that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense”21 or “[t]here are serious reasons for believing the [non-citizen] has engaged on or after such date in acts of battery or extreme cruelty” even if the acts did not result in a conviction.22

The ABA has long believed that U.S. immigration authorities should interpret immigration laws in accordance with the categorical approach, whereby the adjudicator relies on the criminal statute and record of conviction only to determine the immigration consequences of criminal convictions. The ABA, as well as the U.S. Supreme Court, support the categorical approach because it promotes fairness and due process.23 Immigration proceedings may occur long after a criminal conviction and lack the procedural due process protections available in criminal cases. Evidence may be old and witnesses unavailable. In immigration court, the Federal Rules of Evidence do not apply, non-citizens are not entitled to appointed counsel, and there is no right to

---

20 Id. at 69659, 69660 (proposed 8 C.F.R. §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii)). To make this determination, the adjudicator could consider “all reliable evidence.” Id. at 69649. To demonstrate that this determination would require a fact-intensive inquiry, DHS and DOJ themselves seek public comment on “[w]hat should be considered a sufficient link between a [non-citizen’s] underlying conviction and the gang-related activity in order to trigger the application of the proposed bar[.]” Id. at 69650.

21 Id. at 69659, 69661 (proposed 8 C.F.R. §§ 208.13(c)(6)(v)(A), 1208.13(c)(6)(v)(A)). To make this determination, the adjudicator could consider “the underlying conduct of the crime” and the adjudicator “is not limited to facts found by the criminal court or provided in the underlying record of conviction[.]” Id. (proposed 8 C.F.R. §§ 208.13(c)(6)(v)(B), 1208.13(c)(6)(v)(B)).

22 Id. at 69660, 69661 (proposed 8 C.F.R. §§ 208.13(c)(6)(vii), 1208.13(c)(6)(vii)).

23 Moncrieffe, 569 U.S. at 200-01 (noting that the Supreme Court has deemed “post hoc investigation into the facts of predicate offenses” in immigration proceedings “undesirable” and that the categorical approach promotes “judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact” and reduces “potential unfairness”).
a jury trial. This makes it very difficult for a non-citizen to defend against challenges to his eligibility for discretionary relief based on prior criminal history.\footnote{Id. at 201 (“[T]he minitrials the Government proposes would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention, § 1226(c)(1)(B), where they have little ability to collect evidence. A noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution.”) (internal citations omitted).} Inquiring into the factual basis for past convictions also disrupts the expectations of non-citizen defendants, prosecutors, judges, and defense lawyers as to the immigration consequences of a plea in a criminal case.\footnote{See Padilla v. Kentucky, 559 U.S. 356 (2010) (holding that the Sixth Amendment requires that defense counsel must inform her non-citizen client whether his plea carries a risk of deportation).}

Such mini-trials also are likely to make the adjudication of asylum applications less efficient, at a time when both the immigration court system and the USCIS asylum adjudication system are confronting substantial backlogs.\footnote{Moncrieffe, 569 U.S. at 201 (noting that post hoc investigation into the facts of predicate offenses would require overburdened immigration courts to conduct minitrials).}

**DOJ Should Exercise Discretion in Prosecuting Asylum Seekers for Illegal Entry**

Finally, the ABA has urged the Attorney General to exercise prosecutorial discretion and refrain from prosecuting asylum seekers for the offense of illegal entry into the United States. Section 208(1) of the INA provides that any non-citizen who is physically present in the United States, or arrives in the United States (whether or not at a designated port of arrival) may apply for asylum, irrespective of such person’s status. Prosecuting asylum seekers based on their manner of entry arguably is also inconsistent with Article 31 of the Refugee Convention, which prohibits a contracting state from imposing penalties on asylum seekers on account of their illegal entry, as long as asylum seekers present themselves to authorities without delay and show good cause for their illegal entry. The INA and the Refugee Convention recognize the reality for many asylum seekers fleeing persecution: they frequently cannot obtain documentation that enables them to enter the protection country lawfully, because they fear persecution from the government that would need to issue such documents. It is therefore concerning that DHS and DOJ propose to bar from asylum eligibility non-citizens who are convicted of illegal re-entry. Immigration judges should not be prevented from considering the circumstances surrounding an applicant’s illegal entry when deciding whether to exercise their discretion and grant a request for asylum.\footnote{E.g., Matter of Pula, 19 I&N Dec. 467, 473 (BIA 1987) (“Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.”).}

**Conclusion**

The ABA repeatedly has emphasized that our government 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. Inflexible restrictions on asylum eligibility based on a broad array of past criminal conduct do not further these goals. Therefore, the ABA respectfully urges DHS and DOJ to rescind the Proposed Rule.
Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at 202-662-1763 or kristi.gaines@americanbar.org.

Sincerely,

Judy Perry Martinez
President