August 10, 2020

Mr. Andrew Davidson
Asylum Division Chief, Refugee, Asylum and International Affairs Directorate
U.S. Citizenship & Immigration Services
20 Massachusetts Ave., NW, Suite 1100
Washington, DC 20529-2140

RE: Security Bars and Processing, 85 Fed. Reg. 41201 (July 9, 2020); Docket Number USCIS 2020-0013

Dear Chief Davidson:

On behalf of the American Bar Association (ABA), I submit the following comments in response to USCIS 2020-0013 the Notice of Proposed Rulemaking on Security Bars and Processing, 85 Fed. Reg. 41201 (July 9, 2020) (hereinafter the Proposed Rule). The ABA urges the Department of Homeland Security (DHS) and the Department of Justice (DOJ) (collectively, the Departments) to rescind the Proposed Rule, for the reasons described in detail below.

The ABA is the largest voluntary association of lawyers 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 around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable. Our views are informed in part by our experience in operating two direct representation immigration projects at the border (ProBAR in Harlingen, Texas and the Immigration Justice Project in San Diego, California) that serve detained (and some non-detained) adult and unaccompanied minor immigrants and asylum seekers, as well as the Children’s Immigration Law Academy (CILA) a technical support project in Houston that serves children’s immigration legal services programs throughout Texas.

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 bars to asylum eligibility and the lack of due process protections governing these determinations. Therefore, we have significant concerns about the Proposed Rule, which would substantially expand the applicability of an existing statutory bar to eligibility for both asylum and withholding of removal to include considerations of potential exposure to a communicable disease. As framed in the Proposed Rule, this additional bar is inconsistent with the United States’ international law obligations and is overbroad. For example, the language of the Proposed Rule indicates that the bar could be applied to an individual who traveled through a country with an outbreak of a treatable medical condition\(^1\) rather than a pandemic disease such as COVID-19.

The COVID-19 pandemic has presented many challenges for the United States and other countries. While the ABA is mindful of the Departments’ legitimate public health and safety concerns, we respectfully suggest that the government should address the challenges presented by each communicable disease as they arise with policies tailored to address each disease’s specific potential danger that pose the least possible disruption to our nation’s asylum system.

Under the Proposed Rule, applicability of this new bar would be determined during expedited removal proceedings. The ABA has long opposed the use of expedited removal proceedings, especially for those seeking humanitarian refuge, because it includes few of the procedural safeguards necessary to provide non-citizens with due process of law. Disqualifying non-citizens seeking protection from the opportunity to apply for asylum or withholding of removal, without giving them a meaningful opportunity to present evidence and argument to a neutral factfinder; access legal counsel; receive a decision including findings of fact and conclusions of law; or pursue administrative and judicial review is antithetical to our principles of fairness and due process.

Moreover, under the Proposed Rule, those individuals found to be subject to the bar, and thus ineligible to apply for asylum and withholding of removal, would need to affirmatively express a fear of torture if returned to their home country to be screened for relief in the form of deferral of removal under the Convention Against Torture (CAT). In addition, an asylum seeker would have to demonstrate that it is more likely than not that she will be tortured in that country to establish eligibility for deferral of removal in an initial screening interview. The ABA has concerns that these procedures do not comply with the United States’ non-refoulement obligations because they require an asylum seeker to affirmatively express a fear of torture and meet the ultimate standard for relief on the merits during an initial screening interview, when the asylum seeker is unlikely to have access to counsel or the evidence necessary to present her case on the merits.

\(^1\) See 42 C.F.R. § 34.2(b) (including gonorrhea and syphilis in the list of diseases considered to be a communicable disease of public health significance).
The Proposed Rule would, for the first time, provide DHS with the unreviewable discretion to remove to a third country those asylum seekers subjected to the security bar but who demonstrate eligibility for deferral of removal in a screening interview, rather than giving them the opportunity to present their case to an immigration judge. This proposal would further truncate asylum seekers’ access to a full and fair adjudication of their protection claim while still resulting in an order of removal.

Finally, the Proposed Rule would further restrict access to protection for asylum seekers subjected to an entirely separate eligibility bar that is unrelated to national security or the threat of communicable disease – the third-country transit bar. Under the Proposed Rule, an individual who is found ineligible for asylum based on the third-country transit ban, but who demonstrates a reasonable fear of persecution or torture in an initial screening interview, could be removed to a third country by DHS, rather than having the opportunity to present her claims for withholding of removal and CAT protection before an immigration judge. This proposed restriction on the due process rights of asylum seekers comes within two weeks of orders by two federal courts enjoining enforcement of the third-country transit bar. Yet the Proposed Rule does not note these decisions or consider their impact on this aspect of the Proposed Rule. The ABA understands the Departments’ desire to protect the United States from the threats presented by a global pandemic, but they must do so in a manner that preserves due process and complies with court orders.

The combined effects of the Proposed Rule would have a particularly harsh effect on vulnerable individuals seeking humanitarian protection. Under the Proposed Rule, an asylum seeker could receive a removal order, with all of its attendant consequences, based on circumstances that: (a) will only exist for a short period of time (the length of a communicable disease’s incubation period); (b) occur without any affirmative act by or fault of the asylum seeker; (c) are unrelated to the merits of the asylum seeker’s protection claim; and (d) deprive the asylum seeker of a full and fair adjudication that comports with fundamental notions of due process. The ABA respectfully submits that the Departments can manage the public safety challenges presented by COVID-19 and future pandemics without such extreme measures.


Any proposed rule that purports to expand an existing statutory bar to eligibility for humanitarian protection is concerning to the ABA, given our long-standing support for broad access to our nation’s asylum system and compliance with international law obligations. This Proposed Rule

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is especially concerning because it follows the implementation of multiple other recent policies that seek to or have succeeded in severely restricting access to asylum in the United States.  

Specifically, the Proposed Rule would interpret, for the first time, the statutory bar to eligibility for asylum and withholding of removal that address non-citizens who present a danger to the security of the United States to include non-citizens “whose entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States.”

The Immigration and Nationality Act (INA) sets forth six bars to eligibility for asylum, and four bars to eligibility for withholding of removal. One of the six bars to asylum eligibility applies where the Attorney General determines that “there are reasonable grounds for regarding the [non-citizen] as a danger to the security of the United States.” Similar statutory language bars non-citizens from eligibility for withholding of removal where the Attorney General decides “there are reasonable grounds to believe that the [non-citizen] is a danger to the security of the United States.” These bars are drawn directly from Article 33(2) of the 1951 Geneva Convention Relating to the Status of Refugees which provides that refugees may not benefit from protection if “there are reasonable grounds” for regarding the refugee “as a danger to the security” of the receiving country. Article 33(2) is an exception to the principle of non-refoulement, set forth in Article 33(1), 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.” The U.S. is a signatory to the United Nations

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3 See, e.g., Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (interim final rule banning immigrants from receiving asylum if they were subject to a Presidential Proclamation suspending or limiting entry across the Southern border with Mexico); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (interim final rule barring asylum seekers who enter or attempt to enter the United States at the Southern border from asylum eligibility unless they also applied for and were denied asylum in at least one country of transit on the journey to the United States); Kirstjen M. Nielsen, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf (“Nielsen Policy Guidance”) (guidance for implementing the Remain in Mexico policy, which prevents migrants from remaining in the United States during the adjudication of their asylum claims); Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (Nov. 19, 2019) (procedures for implementing “asylum cooperative agreements” with Guatemala, El Salvador, and Honduras); Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (Dec. 19, 2019) (proposing to place additional barriers to asylum eligibility based on criminal history).

6 Id. § 1231(b)(3)(B).
7 Id. § 1158(b)(2)(A)(iv).
8 Id. § 1231(b)(3)(B)(iv).
10 Id.
Protocol Relating to the Status of Refugees (1967 Protocol), as a result of which the U.S. became obligated to comply with the 1951 Refugee Convention.\textsuperscript{11} Later, Congress codified these obligations in the Refugee Act of 1980\textsuperscript{12} (Refugee Act), and made them part of the INA. As the U.S. Supreme Court recognized: “The [Refugee Act] establish[ed] a broad class of refugees who are eligible for …asylum” in the U.S.\textsuperscript{13} Given the United States’ obligations under international and domestic law, as well as our commitment to ensuring due process for those seeking humanitarian refuge, the ABA has serious concerns regarding the proposed bar.

First, the Proposed Rule would give broad discretion over how to deal with a broad range of potential diseases to government officials without public health expertise. For example, the Proposed Rule would charge the DHS Secretary and the Attorney General with determining whether a non-citizen “exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such a disease.”\textsuperscript{14} To the extent this determination is made by DHS officers during initial screening interviews (as will be discussed in the next section), or immigration judges, this is problematic. DHS officers and immigration judges are not public health experts and thus do not know how to distinguish between a cough caused by the common cold, and one caused by COVID-19, or what type of contact with a particular disease is necessary to determine if an individual non-citizen presents a health risk.

The Proposed Rule also allows the Secretary of DHS and the Attorney General, in consultation with the Department of Health and Human Services (HHS), to make determinations regarding when a communicable disease of public health significance is prevalent or epidemic in another country or place such that the entry of a non-citizen or class of non-citizens who are from or have passed through such area(s) would cause a danger to the public health in the United States.\textsuperscript{15} It permits the Attorney General and the DHS Secretary to determine the period of time or circumstances under which it is necessary for the public health that a non-citizen or class of non-citizens be regarded as a danger to the security of the United States.\textsuperscript{16} The Proposed Rule does not define the “nature of the consultation” with the HHS Secretary, but rather seeks public comment on what the process should entail.\textsuperscript{17} The Secretary of DHS and the Attorney General are law enforcement officers, not public health experts. Determinations regarding whether communicable diseases of public health significance in another country would cause a danger to

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\bibitem{13} \textit{INS v. Cardoza-Fonseca}, 480 U.S. 421, 423 (1987) (emphasis added). The Supreme Court noted that the Refugee Act “mirrors the provisions of the [1967 Protocol], which provided the motivation for the enactment of the [Refugee Act].” \textit{Id.}
\bibitem{14} 85 Fed. Reg. at 41211.
\bibitem{15} \textit{Id.} at 41211-12.
\bibitem{16} \textit{Id.} at 41212.
\bibitem{17} \textit{Id.}
\end{thebibliography}
the public health of the United States, and the circumstances under which a non-citizen or class of non-citizens should be considered a danger to the national security as a result, should be made primarily by public health officials -- in consultation with other agencies, as appropriate -- not the other way around.

In addition, diseases of public health significance are listed at 42 C.F.R. § 34.2(b)\(^\text{18}\) and currently include treatable diseases such as gonorrhea and syphilis that are not spread through casual contact. This means that under the Proposed Rule, the Secretary of DHS and the Attorney General, in consultation with the Secretary of HHS, could determine that there is an epidemic of gonorrhea in a particular region of a country, such that individuals traveling through or from that area who seek humanitarian protection in the United States are barred from eligibility for asylum or withholding of removal because they present a danger to the security of the United States. It is one thing to determine that an individual seeking entry to the United States must be quarantined for a period of time, given potential exposure to a communicable disease, but it is another to bar that person from eligibility for humanitarian protection and subject them to potential removal from the United States due to potential exposure to a treatable illness.

Second, from a due process perspective, it is disturbing that the determination whether a person is subject to the bar and therefore ineligible for asylum or withholding of removal could be based on a standard akin to probable cause using evidence that does not meet the standard of admissibility for court proceedings.\(^\text{19}\) The Proposed Rule also makes clear that the determination would not need to be based on an individualized assessment of a particular non-citizen’s health risk or situation because “an individual’s membership within a class of [non-citizens] arriving from a country in which the spread of a pandemic poses serious danger itself presents a serious security risk.”\(^\text{20}\) While asymptomatic transmission is a serious concern with COVID-19 (and may be a concern with other communicable diseases as well), it is extremely troubling that an individual could be barred from eligibility for humanitarian protection and removed from the United States without an individualized assessment of health risk that is supported by admissible evidence and made by someone who has the appropriate expertise.

Third, legal guidance\(^\text{21}\) issued by the United Nations High Commissioner for Refugees (UNHCR) on asylum protections in the COVID-19 pandemic suggests that the Proposed Rule is not consistent with the United States’ obligations under international law. That guidance makes clear that “imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk . . . would be discriminatory and would not meet international standards.”\(^\text{22}\) While states may use health

\(^{18}\) Id. at 41211.

\(^{19}\) Id. at 41210 (quoting Matter of A-H, 23 I&N Dec. 774, 789 (A.G. 2005)).

\(^{20}\) Id. at 41210 n.53.

\(^{21}\) UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response (Mar. 16, 2020), https://www.refworld.org/docid/5e7132834.html.

\(^{22}\) Id. at 2.
measures such as testing, screening, or quarantine, “such measures may not result in denying [asylum seekers] an effective opportunity to seek asylum or result in refoulement.”

The addition of the security bar is particularly concerning because it would foreclose asylum seekers from receiving withholding of removal as well as asylum. Withholding of removal is a mandatory form of relief if an asylum seeker demonstrates that it is more likely than not that she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal, and was meant to codify the United States’ obligations under Article 33 of the Refugee Convention. The only potential relief from removal available for a non-citizen subjected to the security bar would be deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Article 3 of CAT provides that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Asylum seekers granted deferral of removal do not have lawful or permanent immigration status in the United States, and are not entitled to release from detention. Deferral of removal also is subject to termination at any time upon motion of the government and a hearing before an immigration judge.

This new interpretation of the security bar is proposed at a time when the United States continues to struggle to contain the spread of COVID-19 within our borders; however, the Departments recognize that the pandemic may no longer be a threat by the time a Final Rule would be published. In addition, it is difficult to know at this time the impact that a future communicable disease would have on the United States. These factors counsel against finalizing a rule that would add an additional, restrictive bar to eligibility for humanitarian protection when the public health situation in the United States at the time the rule would be finalized may obviate any need for such restrictions, and they may not be necessary to contain future pandemics.

23 Id. at 1.
24 Aguirre-Aguirre, 526 U.S. at 427.
26 CAT art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-277, Div. G Title XXII, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”).
27 8 C.F.R. § 208.17(b)-(c).
28 Id. § 208.17(d).
29 85 Fed. Reg. at 41208, 41211
30 The ABA also questions one of the premises for the Proposed Rule, that the challenges presented by COVID-19 or a future pandemic cannot be addressed by existing DHS policies and procedures. The Departments fail to recognize that their concerns regarding the potential for the spread of disease among asylum seekers detained during full removal proceedings can be addressed by expeditious initial processing near the border in a safe and socially-distanced manner followed by the release of asylum seekers to family and friends in the interior of the country where they can safely quarantine while they wait for their immigration hearings. The ABA has long opposed the use of detention, especially for asylum seekers, except in extraordinary circumstances where a judge determines, in a hearing subject to judicial review, that the individual presents a threat to national security or public safety, or

The Proposed Rule also is concerning because, for those asylum seekers placed in expedited removal proceedings, the applicability of the new security bar would be determined during the initial screening process, rather than by an immigration judge during a hearing on the merits of the claim for protection. This means that a potentially final determination of eligibility for asylum and withholding of removal would be made in many cases at the earliest stage of the process, when an asylum seeker has little or no access to legal counsel or information, without the guarantee of a full hearing, and without meaningful administrative or judicial review. The Departments justify this change by pointing to “considerable inefficiencies” created by a system that provides access to full removal proceedings for asylum seekers who establish a credible fear of persecution despite appearing to be subject to one or more statutory bars to eligibility for asylum or withholding of removal. However, the Proposed Rule ignores that this process exists precisely to avoid refoulement through an initial screening for potential eligibility for asylum and withholding of removal, followed (only for those who pass the screening) by a full hearing. The change in process contemplated by the Proposed Rule would increase the burdens placed on those seeking humanitarian refuge at an early stage in the process, thereby increasing the chance that they will be returned to a country where they are in danger of being persecuted or tortured. An asylum seeker’s right to avoid return to a country where she risks persecution, torture, or death is at the very heart of the asylum process and outweighs potential administrative inefficiencies caused by providing the procedural protections of a full removal hearing.

This aspect of the Proposed Rule also would give broad, largely unreviewable authority to individual asylum officers to make findings on medical and public health questions, such as whether an asylum seeker is exhibiting symptoms consistent with a particular disease or has come into contact with such disease. Asylum officers are not qualified to make such determinations. For this additional reason, frontloading a determination regarding the

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31 As a practical matter, it is difficult to impossible for asylum seekers to obtain counsel at the initial screening stage, due primarily to their recent arrival in the United States, lack of funds to pay a lawyer, and difficulty contacting lawyers or family while detained.

32 Under current regulations, bars to asylum and withholding of removal eligibility generally are identified by the interviewing officer but not applied during the credible fear interview process. 85 Fed. Reg. at 41207. As long as a credible fear of persecution is established, the applicant receives a positive fear determination and is referred to Immigration Court for full removal proceedings, where an immigration judge considers the ultimate applicability of any potential bars, along with other legal issues.

33 85 Fed. Reg. at 41207.
application of the security bar deprives asylum seekers of a full and fair determination. It also is likely to make the adjudication of credible fear claims less efficient, at a time when both the immigration court system and the USCIS asylum adjudication system are confronting substantial backlogs.

The Proposed Rule Would Elevate the Screening Standard for Deferral of Removal

Compounding the due process problems resulting from frontloading consideration of the security bar, if an asylum officer determines, during the initial screening interview, that the new security bar applies to an asylum seeker, the proposed process for screening the individual for eligibility for deferral of removal under CAT does not contain sufficient safeguards to comply with the United States’ non-refoulement obligations.

Asylum seekers would be afforded a screening for deferral of removal eligibility only if they affirmatively express a fear of torture. The asylum officer would not affirmatively ask individuals subject to the security bar whether they fear torture if returned to their home country. It is not even clear whether asylum seekers would be informed of their right to seek relief under CAT or their obligation to request a fear of torture before being screened for eligibility.34

Where an asylum seeker does express a fear of torture, she must demonstrate that it is more likely than not that she will be tortured if returned to avoid being expeditiously removed to her home country.35 This is the same standard that the asylum seeker would be required to meet to be granted deferral of removal by an immigration judge.36 It also is higher than the standard currently used to determine asylum eligibility, as well as for screening interviews in current expedited removal and reinstatement of removal proceedings, where asylum seekers are screened to determine whether they will be able to present their protection claim before an immigration judge.

This proposed change to the screening standard for individuals subject to the security bar would collapse the ultimate adjudication of a deferral of removal claim into the screening process by forcing an asylum seeker to meet her ultimate burden of proof during the initial phase. It is fundamentally unfair to expect that an asylum seeker would be in a position to satisfy this higher legal standard without the assistance of counsel, the ability to develop and present evidence, or the opportunity to present factual and expert witnesses.

34 See id. at 41213.
35 Id.
36 8 C.F.R. §§ 208.16(c)(2), 208.17(a) (a non-citizen must establish that it is more likely than not that she will be tortured if removed to the proposed country of removal).
The Proposed Rule Would Allow DHS to Remove Individuals Who Demonstrate Eligibility for Protection from Torture to a Third Country Without a Hearing

The Proposed Rule would permit DHS to remove to a third country asylum seekers who are subject to the security bar and who have demonstrated eligibility for deferral of removal, rather than permitting them to present their claim for deferral of removal before an immigration judge. Existing regulations permit DHS to remove an individual to a third country only after an immigration judge has found the asylum seeker to be removable from the United States, entered a removal order, and deferred the removal order because the judge has determined that it is more likely than not that the individual will be tortured if returned to the country of removal.

This aspect of the Proposed Rule makes little sense, as it would allow DHS to remove someone to a third country before an immigration judge has determined that a non-citizen is removable or ordered removal. It also is unclear why DHS believes it would be successful in removing an asylum seeker to a third country where it has determined that there is reason to believe that the asylum seeker presents a danger to the security of the United States due to potential exposure to a communicable disease. Most importantly, this provision would deprive individuals seeking humanitarian refuge of any opportunity to respond to a formal charge of removability in court; have an immigration judge determine that they are removable; and participate in a full hearing before an immigration judge where they are able to develop facts, present evidence, provide legal argument, and give testimony in support of their claim for protection.

The Departments claim that the existing statutory provisions governing expedited removal proceedings provide DHS with this discretion because they do not mandate or reference consideration of withholding of removal or CAT protection as part of the credible fear screening process or in follow-on removal proceedings. However, this is not a justification for stripping existing due process protections meant to ensure a full and fair adjudication of protection claims.

The Proposed Rule also would provide for an advisal to the asylum seeker at the time of requesting deferral of removal of the possibility of being removed to a third country prior to a decision on the merits of her claim and the opportunity to withdraw her request and agree to be removed under existing procedures. The ABA has concerns that asylum seekers will be confused by this advisal and feel coerced into abandoning any claim for protection out of fear that they might be removed to a country that they may never have been to, and where they have no support system or means of ensuring their safety or survival.

37 85 Fed. Reg. at 41211.
38 8 C.F.R. § 208.17(b)(2).
40 Id. at 41216 (proposed 8 C.F.R. 208.16(f)(2)).
The Proposed Rule Would Circumvent Due Process for Asylum Seekers Subjected to a Different Eligibility Bar

Finally, at the end of the Proposed Rule, the Departments propose to dramatically alter the procedures applicable to an unrelated bar to asylum eligibility -- a third-country transit bar -- that has been enjoined by two courts within the past six weeks. The Departments do not reference these two court decisions in the Proposed Rule, and they fail to explain why a proposed rule focused on an eligibility bar based on potential exposure to communicable disease needs to address procedures under an unrelated eligibility bar.

The third-country transit bar is not contained in the INA, but rather an eligibility bar created by the Departments one year ago. On July 16, 2019, the Departments issued an interim final rule that bars asylum seekers, even unaccompanied children, who enter or attempt to enter the United States at the Southern border from asylum eligibility unless they also applied for and were denied asylum in at least one country of transit on the journey to the United States (with some narrow exceptions). Other than Mexican nationals, every person fleeing over land to the Southern U.S. border necessarily transits at least one third country. While individuals impacted by the rule are still eligible to apply for withholding of removal and protection under CAT, in expedited removal proceedings they need to demonstrate a “reasonable fear” of persecution or torture before being able to present their withholding or CAT claim to an immigration judge.

One year later, the Departments now propose that, if an asylum seeker is unable to establish a credible fear because she is subject to the third-country transit bar, but is able to establish a reasonable fear of persecution or torture, DHS may place the asylum seeker in removal proceedings or remove the asylum seeker to a third country, before the asylum seeker has the opportunity to present her claims for withholding of removal and CAT protection to a judge.

The ABA opposes the imposition of limitations that restrict eligibility for asylum based on submission of applications for protection in countries in transit. This proposed provision presents the same serious due process concerns as those presented in proposed 8 C.F.R. § 208.16(f)(2), discussed above. The Departments also ignored that in many of the countries through which asylum seekers transit on the way to the U.S. seeking asylum is either impracticable or impossible. It is particularly concerning that the Departments propose to further restrict access to due process and humanitarian protection in this Proposed Rule, given that it addresses an unrelated bar to eligibility for asylum and withholding of removal and comes less than two weeks after two federal court decisions enjoining the Departments from enforcing the third-country transit bar.

43 85 Fed. Reg. at 41216-17 (proposed 8 C.F.R. § (e)(5)(iii)).
Conclusion

For the reasons discussed above, the ABA is deeply concerned about the potential adverse impacts and lack of procedural protections provided in the Proposed Rule. The United States must address the immigration and public health challenges facing our country by means that are humane, fair, and effective – and that uphold the principles of due process. Overbroad and inflexible restrictions on eligibility for humanitarian protection do not further these goals. We respectfully urge the Departments to rescind this Proposed Rule.

Sincerely,

Patricia Lee Refo
President