

August 12, 2022

Hon. Alejandro N. Mayorkas
Secretary of Homeland Security
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Ave, SE, Washington, DC 20528

Hon. Ur Mendoza Jaddou
Director
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive, Camp Springs, MD 20588

Hon. Rachel Rossi
Director
Office for Access to Justice
Department of Justice
950 Pennsylvania Ave NW, Washington, DC 20530

Re: Opportunities to Bolster Access to Counsel for Asylum Seekers Processed Under the Asylum Processing Rule

Dear Secretary Mayorkas, Director Rossi, and Director Jaddou:

The undersigned immigrant and refugee advocacy and legal services organizations are dedicated to expanding access to legal services for individuals seeking asylum, including individuals and families whose asylum claims are adjudicated under the March 2022 Interim Final Rule, titled “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers” (Asylum Processing Rule). Despite our commitment to expand legal services for these individuals seeking asylum, the capacity of pro bono and other legal service providers is greatly stretched. Given the administration’s stated commitment of maximizing access to counsel for those subject to the Asylum Processing Rule, we write to urge the Department of Homeland Security take the following steps immediately:

- (1) Establish Asylum Processing Rule-specific national and local stakeholder engagements on a monthly basis during the phased implementation process and provide designated agency points of contact on the Asylum Processing Rule:** The Asylum Processing Rule creates sweeping changes to asylum regulations and procedures. These changes invariably entail unique challenges and opportunities for asylum seekers, asylum officers, and practitioners. Asylum Processing Rule-focused national stakeholder engagements and local stakeholder engagements with the Boston, Chicago, Houston, Los Angeles, Miami, New York, Newark, and San Francisco Asylum Offices (as well as any

additional locations that are later included in implementation of the rule) will facilitate timely information-sharing regarding systemic challenges, create space for quick and collaborative solutions, and enable legal service providers to more effectively represent asylum seekers processed under the rule. We believe these stakeholder engagements will be most effective if practitioners are afforded ample opportunity to ask questions and provide feedback, and are provided with regular statistics on the number, nationality, language, gender, age, whether the individual is represented at each stage of the process, and detention and destination locations of individuals processed under the rule (like the detailed data now published regarding the Remain in Mexico policy's re-implementation). It would also be extremely helpful to provide legal service providers with points of contact at Immigration and Customs Enforcement (ICE) and the U.S. Citizenship and Immigration Services (USCIS) Asylum Office who can answer questions about implementation and specific cases, to better facilitate legal representation of asylum seekers processed under the rule.

(2) Make publicly available template government documents used for or provided to applicants processed under the Asylum Processing Rule: We understand individuals processed under the rule are issued the following documents upon service of the positive I-870 Record of Determination/Credible Fear Worksheet: (1) Form G-56 indicating the date and time of their asylum merits interview, (2) an orientation Form specific to the Asylum Processing Rule, and (3) an I-589 Receipt notice. We request a blank or redacted copy of each of these documents and any other documents that are routinely issued to individuals who are processed under the Asylum Processing Rule, including all available translations of documents that are being provided. This information will help us to identify, assist, and represent asylum seekers processed under the rule by enabling us to effectively determine which individuals are being processed under the rule, explain these documents to clients and potential clients, and train volunteer pro bono counsel. We are also seeking a copy of template government documents provided to those with negative credible fear determinations. Finally, we respectfully request an opportunity to provide comments on template documents issued to individuals processed under the rule as well as individuals who receive negative credible fear determinations, to help improve the process and ensure that asylum seekers are adequately informed about the process and their legal rights.

(3) Eliminate the Asylum Office's Form G-28 applicant-signature requirement to reduce barriers to representation: The Houston Asylum Office recently informed our network that it has reverted back to its pre-pandemic policy and will no longer accept the Form G-28 Notice of Entry of Appearance as Attorney or Accredited Representative (G-28) unless it includes the signature of the applicant. To support its signature requirement, the Asylum Office relies upon the confidentiality protections embedded in 8 C.F.R. 208.6. However, ICE has accepted G-28 Forms without requiring the detained

individual's signature and the Executive Office for Immigration Review does not require the signature of the noncitizen to recognize counsel as an asylum seeker's attorney of record (when accepting the Form E-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court). This position is justified because attorneys are bound by strict ethical guidelines which prohibit abusive conduct and disclosure of confidential client information. Moreover, for practical reasons given the unforgiving timelines established by the Asylum Processing Rule and significant obstacles legal representatives face securing signatures from individuals who are detained and/or served virtually, and the greater role the credible fear interview (CFI) notes will play in the asylum seeker's merits adjudication, this requirement should be eliminated to improve access to counsel for asylum seekers.

(4) Provide guidance to USCIS asylum offices regarding the equitable tolling of deadlines, including the seven-day deadline to submit a Request for Reconsideration (RFR) of a negative credible fear determination, to ensure that asylum seekers who have been unfairly hindered from accessing counsel have a meaningful opportunity to seek protection: Since implementation of the Asylum Processing Rule, we have spoken with asylum seekers issued negative credible fear determinations who were barred from requesting reconsideration due to the seven-day deadline before they could consult with legal counsel about their case. Many asylum seekers were not even aware that they could request reconsideration because they had not spoken with an attorney until after the deadline had passed, and only learned of this right after speaking with an attorney. Additional barriers including delays in obtaining the CFI determinations from the Asylum Office, difficulties with scheduling legal calls at detention facilities, and the above-mentioned Houston Asylum Office's G-28 applicant-signature requirement, block asylum seekers from requesting reconsideration of wrongful negative CFIs. Federal courts have consistently found untimely filings, despite strict statutory requirements, subject to equitable tolling.¹ When a noncitizen has been issued a negative credible fear determination in error, or a non-citizen's need for protection has changed subsequent to the issuance of their credible fear determination, equitable tolling bridges the gap between the agency's desire to have finality in case outcomes and non-refoulement obligations as codified in 8 U.S.C. § 1231 and 8 C.F.R. §208.16 and required by the Refugee Convention and Protocol and Convention Against Torture. *See also, Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). We recommend the Asylum Office issue guidance regarding equitable tolling under the Asylum Processing Rule and

¹ *Holland v. Florida*, 560 U.S. 631 (2010); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Alzaarir v. Att'y Gen.*, 639 F.3d 86 (3d Cir. 2011); *Barry v. Mukasey*, 524 F.3d 721 (6th Cir. 2008); *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d Ny Congr1176 (9th Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

encourage equitable tolling, on a case-by-case basis, when circumstances beyond the control of the noncitizen impede access to counsel.

(5) Promptly provide information about individuals identified for processing under the rule in order to facilitate Know-Your-Rights (KYR) presentations and ensure asylum seekers have access to legal information regarding the process:

We applaud all efforts DHS has taken to facilitate access to legal orientation for individuals who are detained at the South Texas Detention Complex and the Houston Contract Detention Facility. Access to legal orientation for credible fear applicants prior to their interview is of utmost importance. Facilitating a meaningful touch point between asylum seekers and legal service providers *after* the Asylum Office has determined that an asylum seeker will be processed under the Asylum Processing Rule will help create clarity for asylum seekers regarding their rights and responsibilities. It will also provide legal service providers an opportunity to share critical information that would facilitate appearance at interviews, such as information about Asylum Office locations, logistics of the asylum merits interview, and obtaining legal representation in destination cities. An Asylum Processing Rule-tailored KYR presentation will also maximize access to counsel by allowing providers to secure consent to make direct referrals to legal service providers in the asylum seeker's final destination. Therefore, for those sites where the Asylum Processing Rule is currently in place, we recommend that DHS either directly refer or provide a list of individuals who have been referred for processing under the rule to the Legal Orientation Provider or legal service agency conducting KYR presentations. We also respectfully request that DHS provide Legal Orientation Providers and legal service agencies serving the facilities where the rule is being implemented with daily statistics regarding people identified for potential processing under the rule prior to the credible fear interview, scheduled credible fear interviews, outcomes, and referrals under the Asylum Processing Rule, to further facilitate access to counsel and legal information.

(6) Distribute an NGO flyer with legal resources to facilitate representation for asylum seekers processed under the rule:

Legal services providers are creating a short document that guides asylum seekers to Asylum Processing Rule-specific KYRs content and referral information, including information accessible on the internet. In line with the administration's commitment to increasing access to counsel and legal information, we recommend the Asylum Office provide this document in the credible fear determination packet of all asylum seekers who will be subject to the Asylum Processing Rule. The Asylum Office has previously distributed similar flyers to detained asylum seekers that list pro and low bono legal service providers that are not government-funded via LOP. We also request that DHS ensure that all asylum seekers processed under the rule receive the Department of Justice list of recognized organizations and accredited representatives for the destination city where they intend to reside when they are served with the positive credible fear determination.

(7) Provide stakeholders with at least two months advance notice prior to rolling out each new phase of implementation of the Asylum Processing Rule to improve access to counsel for asylum seekers processed under the rule: We are working diligently to build initiatives to support individuals who are processed under the Asylum Processing Rule. This work requires advance notice of which populations will be processed under the rule (e.g. anticipated nationalities and locations of detention and asylum merits interviews), which asylum offices will be tasked with adjudicating asylum merits interviews or CFIs (including should individuals be subjected to the entirety of the process in a non-detained setting), and estimates for how many individuals will be processed under the Asylum Processing Rule in destination locations. Without this advance notice, we are greatly restricted in our ability to effectively and timely enable access to legal representatives which may include, but is not limited to, seeking additional funding and hiring necessary staff to respond to the increased need.

(8) Implement a Request for Reconsideration Quality Assurance Review Process: Requests for Reconsideration are an important tool to correct erroneous negative credible fear determinations. The Asylum Processing Rule's new seven-day and one-request limitations sharply elevate the risk of refoulement. To address this concern, we recommend the Asylum Office establish a dedicated and robust quality assurance review process for RFR adjudication. To make quality assurance review meaningful, Supervisory Asylum Officers should complete a written analysis of their RFR determination for quality assurance review *prior* to issuing a decision. Although we recommend this quality assurance review process include review of every RFR decision, we also recommend a dedicated national inbox for requesting quality assurance review of an RFR decision at the headquarters level.

We share the administration's desire to safeguard the fairness and integrity of the asylum process. Access to counsel and legal information has been shown time and again to help asylum seekers understand our legal system, comply with the law, and ultimately increase access to justice for all. It has also been shown to maximize efficiencies in the adjudication process and facilitate meaningful information sharing between the administration and service providers, enabling the administration to implement smart immigration policy. We appreciate your attention to these issues and your consideration of these recommendations. In furtherance of the desire to assist in implementing these recommendations and improving the Asylum Processing Rule implementation process, we request a dedicated meeting to discuss this letter and our recommendations with the relevant agencies and officials as soon as possible.

Respectfully,

The Advocates for Human Rights
American Immigration Lawyers Association
Aldea - The People's Justice Center
AsylumWorks
Bellevue Program for Survivors of Torture
Black Alliance for Just Immigration (BAJI)
Capital Area Immigrants' Rights Coalition
Catholic Legal Immigration Network, Inc. (CLINIC)
Center for Gender & Refugee Studies
Center for Victims of Torture
Church World Service
Coalition for Humane Immigrant Rights (CHIRLA)
Communities United for Status & Protection (CUSP)
Florence Immigrant and Refugee Rights Project
Fordham Law School Feerick Center for Social Justice
Haitian Bridge Alliance
Human Rights First
Immigrant & Refugee Services, Catholic Charities Community Services, Archdiocese of New
York
Immigrant Defenders Law Center
Immigration Equality
Institute for Justice & Democracy in Haiti
International Refugee Assistance Project (IRAP)
Justice Action Center
National Immigrant Justice Center
National Immigration Law Center
The National Immigration Project of NLG
RAICES
Refugees International
Robert F. Kennedy Human Rights
Rocky Mountain Immigrant Advocacy Network
Tahirih Justice Center
Texas Civil Rights Project
UndocuBlack Network
Vera Institute of Justice
Witness at the Border