

Swift Action to Improve Fairness and Enable Timely Asylum Hearings in Immigration Courts

The United States is capable of welcoming with dignity children, families, and adults seeking protection at the U.S.-Mexico border. The challenges at the border today can be met through measures, recommended by refugee protection experts, to protect children, restart asylum at the border, support case management, unrig asylum adjudications, address root causes of migration, and promote refugee protections regionally.¹ The Biden administration should implement measures to safely and humanely manage the reception of unaccompanied children and asylum seekers.

As part of this effort, the Biden administration should take immediate steps to improve the fairness and timeliness of hearings in the immigration courts. The actions outlined below can help enable asylum cases to move through the system without delays and ensure that asylum seekers have their cases resolved in a timely manner while upholding due process - without imposing counterproductive and failed strategies like rocket-dockets that have only [exacerbated backlogs](#) and delays or other policies that have undermined both effectiveness and fairness.

Trump administration policies rigged immigration court hearings against asylum seekers² and actually [added](#) to the court's backlogs and resulting delays. It is therefore crucial to quickly undo policies that impede the court from effectively, efficiently and fairly managing its docket, as well as Trump-era policies and Attorney General rulings that were not only designed to render refugees ineligible for asylum, but also layered new and confusing legal standards and evidentiary burdens on already complex adjudications, making asylum hearings unnecessarily long and difficult. While the Biden administration should work with Congress to enact legislation making the immigration courts independent, as the [American Bar Association](#) and [other organizations](#) have recommended, the Department of Justice's (DOJ) leadership should - immediately - implement safeguards against politicized hiring and interference, vacate erroneous Attorney General and Board of Immigration Appeals (BIA) precedents, and restore immigration judge authority to manage dockets, and take steps to reduce court backlogs - including by restoring discretion through the use of administrative closure and the termination of cases that can be better resolved through adjudication by U.S. Citizenship and Immigration Services (USCIS) or referral to the asylum office.

The Biden administration should also inject some key game-changing measures into the system that will quickly enable cases to move ahead in a timely manner. These include:

- **Surge legal representation and legal orientation presentation capacities**, injecting them as early as possible into the process;
- **Improve hearing efficiencies through use of pre-hearing conferences and stipulations**; and

¹ The recommendations of the Welcome With Dignity campaign have been submitted to the White House and Department of Homeland Security. The recommendations included in this paper should be advanced in conjunction with those broader recommendations, many of which are also detailed in the blueprint recommendations prepared by various non-governmental organizations, including the [Center for Gender & Refugee Studies](#) and [Human Rights First](#).

² In fiscal year 2020, immigration courts denied [72 percent](#) of all asylum cases, a historic record in denial rates and an increase of about 20 percent compared to both the Obama and Bush administrations, as the American Immigration Lawyers Association (AILA) and other groups noted in a February 1, 2021 [letter](#) outlining recommendations for immigration court reform.

- **Enhance asylum decision-making capacities** through asylum and other trainings, ensuring a sufficient number of asylum-trained clerks and legal assistants, and potentially tapping retired or former adjudicators with significant asylum expertise to temporarily serve.

Asylum seekers [appear overwhelmingly](#) for their hearings, and court appearance rates are even higher - over 96 percent - when immigrants are [represented](#). Cost-effective and humane [case support initiatives](#) that include legal representation and are community-based - not inhumane immigration detention - should be employed.

Support and Provide Legal Representation and Orientation Programs

Legal representation sharply increases the [efficiency and fairness of legal proceedings](#), in addition to [supporting](#) high court appearance rates. The Biden administration should call for the dramatic expansion of government-funded legal representation programs with the goal of guaranteeing counsel to all people facing removal who cannot afford it. In addition to announcing this commitment, and working to advance this objective as quickly as possible through appropriations and other mechanisms, U.S. agencies should take immediate steps to expand legal representation for vulnerable populations – including for asylum seekers whose cases originate at the border.

For example, in the interim while such funding is lacking or not yet sufficient, the Biden administration should use its bully pulpit to inspire the philanthropic community, private donors, and state and local governments - whose residents often have family members in removal proceedings and in need of legal representation - to surge resources to a major legal representation initiative. The provision of legal representation should be treated as a core component of any case management or case support programs.

Key steps include:

- Fully support legal orientation programs (LOP) and ensure access at master calendar hearings at all courts, as well as other locations;
- Provide and encourage resources needed to provide counsel so that asylum seekers are represented early in the process;
- Fully support and leverage the expertise and efficiency of experienced legal service providers;
- Inspire law firms, law students and volunteers to provide pro bono legal services and to help fill gaps, while also supporting the infrastructure needed to train and mentor them; and
- Support and encourage support for torture treatment programs that provide critical care to survivors of trauma and recruit volunteer medical experts to document evidence of torture and trauma in asylum cases.

Swiftly Reverse the Rigging of Immigration Courts

As bar associations and other advocates have urged, the Biden administration should support, and work with Congress, to enact legislation making the immigration courts independent of the executive branch and transforming them into [Article I courts](#). In the meantime, however, it is imperative that DOJ take swift steps to reverse the Trump administration's [rigging of immigration courts](#). For example, DOJ should:

- **Select new Executive Office for Immigration Review (EOIR) leadership that can set standards of judicial conduct, as [recommended](#) by AILA and other organizations.**

- **Implement safeguards against [politicized](#) hiring and interference, as well as abusive or biased conduct, at the [immigration courts](#), including:**
 - Put career professionals in control of the hiring process, require significant prior immigration law experience of diverse professional backgrounds for new hires, select immigration judges through fair and objective hiring and elevate judges based on experience and performance;
 - Review the process and reassess the validity of appointments to the BIA of immigration judges with unusually high [asylum denial rates](#) and/or an established histories of abusive behavior on the bench, review the selection process for the chief immigration judge and EOIR director to remedy, and safeguard against, politicized hiring, and appoint new, highly experienced BIA members and/or tap retired members or BIA attorneys to temporarily serve;
 - Abolish the newly-created court “[office of policy](#)” and EOIR director’s powers so that immigration courts are controlled by statute, regulation and federal court case law, rather than politically influenced policies; and
 - Develop and implement a transparent process for individuals to file complaints against immigration judges, without fear of retaliation.

- **Terminate Trump-era policies that pressured immigration judges to rush and deny asylum cases**—including eliminating case [quotas](#), rushed [rocket-dockets](#), and [BIA processing deadlines](#), and, as outlined below, **restore immigration judge discretion to manage court dockets**. Rushing cases through the system, without allowing sufficient time for asylum seekers to secure legal representation and gather evidence for hearings, has - and will - lead to mistaken asylum denials and to appeals that would otherwise be unnecessary.

Rescind Rules, Rulings and Policies that Deny Refugees Asylum

In order to ensure cases can move effectively through the adjudication system (whether the USCIS asylum officer or the immigration courts), without triggering otherwise unnecessary delays and appeals, the Department of Homeland Security (DHS) and DOJ should take swift action to reverse Trump administration rules, rulings and policies that deny refugees U.S. asylum, separate families, and undermine integration. These include the [third-country transit asylum ban](#), [asylum entry ban](#), “[death to asylum](#)” rule, [public health bars](#), and [work authorization deprivations](#) that are preventing asylum seekers from supporting themselves and their families.³

In addition, the Attorney General should take steps to vacate Attorney General and BIA rulings, including *Matter of A-B-*, *Matter of A-C-A-A-*, and *Matter of L-E-A-*, and quickly promulgate new regulations and rulings adopting the correct legal standards.⁴

The administration and executive agencies should move ahead swiftly to conduct the reviews directed under the President’s February 2, 2021 [executive order](#), end these harmful policies, and issue rules ensuring protection, consistent with U.S. and international law, for asylum seekers fleeing domestic or gang violence, and addressing other key issues. Agencies should make clear that a “particular social group” is one whose members share an immutable or fundamental characteristic, past experience or voluntary association that cannot be changed, or are perceived as a group by society, without any

³ A list of these policies and rules is attached as an appendix to these recommendations.

⁴ A full list of the Attorney General and BIA rulings that should be vacated is attached as an appendix.

additional requirements. Agencies should also, by rule, affirm that “[nexus](#)” in asylum claims encompasses instances where (1) a protected ground is at least one reason for the applicant’s persecution; (2) persecution would not have occurred but for a protected ground; (3) persecution has the effect of causing harm to the applicant because of a protected ground; or (4) the state’s failure to protect an applicant is on account of a protected ground.

Enable Timely, Effective and Fair Decisions

DOJ should take steps to enable timely, effective and fair asylum decisions in immigration courts through strategies that make proceedings more efficient and effective, such as pre-hearing conferences, trainings and steps to enhance asylum expertise and capacities of immigration courts. These steps include:

- **Restore immigration judges’ case management capacities** by rescinding [EOIR policy memos](#) and [Attorney General](#) and [BIA rulings](#) that limit their ability to control the scheduling of cases and result in additional cases added to the [backlog](#), which will help decrease unnecessary delays in immigration courts. As the National Association of Immigration Judges (NAIJ) [confirmed](#), reversing [administrative micromanagement](#) of immigration judges is critical to alleviating the court’s backlog. For example, NAIJ has [explained](#) that “judges can no longer determine when and how frequently to schedule master/arraignment calendars and how much time to allocate to a given merits hearing when scheduled,” noting that “this practice often results in matters being rescheduled on short notice, resulting in great cost to the litigants and contributing to the massive case backlog.” In addition, [electronic filings](#) can reduce delays by ensuring hearings are not adjourned due to lost files.
- **Implement and leverage a pre-hearing conference [policy](#) to [identify issues](#) actually in dispute and [facilitate efficient resolution](#) of cases.** Immigration judges should be instructed to direct counsel - including Immigration and Customs Enforcement (ICE) trial attorneys - to confer together in a [pre-hearing conference](#) (including via telephonic or video conferencing) to discuss the potential to narrow issues for the hearing and/or stipulate to areas where the applicant’s burden is met and there is no dispute.
- **Ensure ICE trial attorneys [stipulate](#) and agree to [narrow issues](#), where there is no actual legal or factual dispute to avoid wasting court time and resources.** ICE attorneys should be reminded that it is part of their job to uphold U.S. asylum laws, and to not advocate for the return to persecution of a person who qualifies as a refugee and is not barred from protection. DHS should instruct ICE attorneys to review cases in advance to determine if they can make stipulations or narrow the issues before trial, which would help greatly reduce hearing time – and hence immigration court capacity. In the past, ICE attorneys had often, upon reviewing case submissions, agreed to narrow the issues for trial and/or to limit the scope of questioning of witnesses.
- **Swiftly fill existing positions, surge [staffing](#) and asylum support to the courts** and request funding from Congress to increase immigration court interpreters, support staff, BIA legal and administrative staff - and, with reforms to eliminate politicized hiring (outlined above) - immigration judges and BIA members fairly and objectively selected. In addition, EOIR should require that all immigration court interpreters meet federal court certification standards.
- **Prevent counterproductive rocket dockets:** Ensure any immigration court dockets do not act as [rocket dockets](#), which undermine accurate decision-making and due process, rushing cases through the system with arbitrary timelines and without sufficient time to obtain counsel or gather necessary evidence. When asylum seekers are working with their attorneys to prepare their cases and submit the requisite materials to the court, and when judges are afforded space on their dockets (with the

removal of many cases from the court dockets to reduce the backlog, as detailed below) and manage their dockets guided by due process, rather than arbitrary deadlines, cases will be decided in a more timely manner.

Rapidly Reduce Immigration Court Backlog, Enabling Speedier Adjudications

The Biden administration should take action to rapidly reduce the immigration court backlog by restoring immigration judges' ability to administratively close cases, terminating cases where individuals have avenues for relief through USCIS, facilitating asylum office adjudication for certain cases pending in the immigration courts, and deprioritizing and removing cases from the court docket.

- **Reverse Trump-era directive on administrative closure.** To keep thousands of cases out of the court backlog, former-Attorney General Sessions' directive to reopen administratively closed cases should be reserved and his ruling in [Matter of Castro-Tum](#) withdrawn. In addition, DOJ should rescind a [rule](#) to end administrative closure and work with DHS to identify additional cases to be [administratively closed](#) or terminated, including through restored prosecutorial discretion.
- **Work with ICE to quickly terminate immigration court cases that can be resolved through pending USCIS petitions,** such as Special Immigrant Juveniles, U-visa applicants, and I-130 petitions for people married to U.S. citizens or legal permanent residents. DHS and DOJ should also work together to terminate cases of people granted Temporary Protected Status (TPS), if they so request, to facilitate adjustment before USCIS (through recognition by the DHS Office of General Counsel that TPS constitutes inspection and admission - an issue that currently divides the federal courts, withdrawal of the recently filed DOJ [brief](#) in *Sanchez v. Mayorkas*, and reversal of the USCIS [policy](#) position on TPS).
- **Conduct case review to reduce court docket.** AILA has estimated that at least [600,000](#) cases are suitable to be removed from the immigration courts' docket, thereby improving both efficiency and fairness. The organization has [urged](#) that these nonpriority cases be quickly identified at headquarters through a search of the court database without the need for case-by-case review.
- **Asylum office adjudication for categories of asylum cases.** DHS and DOJ should work together to create mechanisms to refer asylum cases, with the consent of the applicant, to the USCIS asylum office for adjudication. For instance, following issuance of a new ruling or rule affecting their eligibility for asylum, affected asylum cases could be scheduled for asylum office interviews upon termination of immigration court proceedings.

In addition, the number of asylum cases referred into the immigration courts from the border or ports of entry could be significantly reduced by developing a mechanism to refer these asylum seekers for full initial asylum eligibility interviews with USCIS asylum officers. The process would then be essentially the same as for other U.S. asylum adjudications. Such a process would lead to quicker initial decisions in many cases and limit the number that will ultimately need immigration court removal hearings. These full asylum interviews should not be conducted within the expedited removal process (which should be rolled back, and not used), and should not be used to cut off access to removal hearings or appeals. Due process protections should be strengthened, not sacrificed, as efficiencies are implemented. Instead, asylum cases could be scheduled for an asylum office interview in the asylum office located near where the asylum seeker is staying (typically with U.S. family), upon termination of immigration court proceedings. While many cases will efficiently be

granted asylum by the asylum office without the need for a hearing, the significantly reduced numbers will then be referred back into removal proceedings. DHS should also ramp up asylum office staffing to conduct these full asylum interviews.

- **Access to prompt hearings for asylum seekers whose cases are stuck in the backlog.** EOIR should also create a uniform process to request prompt hearings for other asylum seekers whose cases have been stuck in the immigration court backlog (often for years now) and are facing humanitarian challenges - such as children and spouses stranded in danger abroad or pressing health or other urgent concerns.

Appendix of Regulations and Rulings for Rescission to Restore Fairness and Ensure Timely Adjudication of Asylum Cases

AGENCY REGULATIONS

DHS, DOJ and the Department of Health and Human Services (HHS) should initiate new notice-and-comment rulemaking to rescind the below rules. For rules subject to litigation, agencies should coordinate with plaintiffs' counsel and/or withdraw appeal where applicable.

DHS Rules:

- *Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications*, [85 FR 37502](#); RIN 1615-AC19; eliminating prompt adjudication of work authorization applications for asylum seekers who have already waited 5-6 months to apply. See [CASA v. Wolf](#), 8:20-cv-02118-PX (permanent injunction for class members only).
- *Asylum Application, Interview, and Employment Authorization for Applicants*, [85 FR 38532](#), RIN 1615-AC27; doubling wait time for asylum seekers to apply for work authorization and barring access to work permits for many. See [CASA v. Wolf](#), 8:20-cv-02118-PX (permanent injunction for class members only).
- *Procedures for Asylum and Bars to Asylum Eligibility*, [85 FR 67202](#), RIN 1125-AA87, 1615-AC41; creating seven new bars to asylum eligibility. See [Pangea v. DHS](#), 3:20-cv-07721 (temporary restraining order prior to implementation).

Joint DHS/DOJ Rules:

- *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, [85 FR 80274](#), RIN 11225-AA94, 1615-AC43; also known as the “Death to Asylum” regulation; overhauls credible fear reviews, asylum and withholding adjudications, and adjudication of claims under the Convention against Torture (CAT), largely guts the asylum system as we know it. (Executive Office of Immigration Review (EOIR)’s [implementing memo](#) will also require rescission, dated 12/12/20, entitled *Guidance Regarding New Regulations Governing Procedures for Asylum and Withholding of Removal and Credible Fear and Reasonable Fear Reviews*.) See [Pangea Legal Servs. v. DHS](#), 3:20-cv-09253 (complaint for declaratory and injunctive relief); [Immigration Equality v. DHS](#), 3:20-cv-09258 (same); [Human Rights First v. Wolf](#), 1:20-cv-03764 (same). A nationwide injunction was entered before the rule’s implementation. See [Pangea v. DHS](#), 3:20-cv-09258 (nationwide injunction; consolidating *Pangea* and *Immigration Equality*).⁵
- *Asylum Eligibility and Procedural Modifications*,⁶ [85 FR 82260](#) (final rule), [84 FR 33829](#) (Interim Final Rule (IFR)), effective on 01/19/2021, RIN 1125-AA91, 1615-AC44; also known as the “asylum transit ban.” See [CAIR Co v. Trump](#), 1:19-cv-02530-TJK (vacating IFR; government appeal to D.C. Cir. with briefing extended through 4/01/21); [East Bay Sanctuary Covenant v. Barr](#), 19-16487, 19-16773 (holding that IFR violates APA; government petition to 9th Cir. for rehearing *en banc* filed 10/05/20; decision pending); [East Bay Sanctuary Covenant v. Barr](#), 19-04073 (issuing a preliminary injunction against the final rule on 2/16/21).

⁵ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the Attorney General and DHS Secretary to promptly review and determine whether to rescind this final rule.

⁶ For background on the impact of the asylum transit ban, see this Human Rights First July 2020 [report](#).

- *Security Bars and Processing*, [85 FR 41201](#), initially effective on 01/22/2021 but effective date [delayed](#) until Dec. 31, 2021, RIN 1125-AB08, 1615-AC57; barring refugees from both asylum and withholding of removal, improperly labeling them as “dangers to the security of the United States,”⁷ resurrecting transit ban on health grounds.
- *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*,⁸ [83 FR 55934](#), IFR effective November 9, 2018; barring asylum for individuals who enter at the southern border in contravention of a presidential proclamation suspending or limiting entry in the United States. See *O.A. v. Trump*, 18-cv-02718-RDM (D.D.C.) (vacating rule) (appeal to DC Circuit stayed until 4/26/21); *East Bay Sanctuary Covenant v. Trump*, 18-17274 (9th Cir. 2019) (affirming preliminary injunction against the final rule on 2/28/20).

Joint DHS/HHS Rule:

- *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, [84 FR 44392](#), RIN 0970-AC42, 1653-AA75; overhauling protections for children subject to the *Flores* Settlement Agreement. See *Flores v. Barr*, 2:85-cv-04544-DMG-AGR, ECF No. 690 (permanent injunction prior to implementation); *Flores v. Rosen*, 2020 WL 7705556 (upholding aspects of injunction with respect to DHS and HHS regulations).

Misuse of Public Health Authority to Block and Expel Asylum Seekers⁹

HHS Rule:

- *Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes*,¹⁰ [85 FR 56424](#), RIN 0920-AA76; in conjunction with the Centers for Disease Control and Prevention (CDC) order, closing border to all, including children and asylum seekers. See *P.J.E.S. v. Wolf*, 1:20-cv-02245-EGS-GMH (preliminary injunction for unaccompanied children only), stayed by *P.J.E.S. v. Pekoske*, 1:20-cv-02245.

⁷ Public health experts [wrote](#) to the DHS Secretary and the AG opposing the proposed rule and condemning it as “xenophobia masquerading as a public health measure.”

⁸ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the Attorney General and DHS Secretary to “promptly review and determine whether to rescind” this interim final rule.

⁹ For more on this policy see: [Letter](#) from 61 Members of Congress to Secretary Mayorkas Calling for an End to Title 42 Expulsions (February 23, 2021); NGO [Letter](#) to HHS and CDC on Orders Authorizing Border Expulsions (February 22, 2021); NGO [Letter](#) to Biden Administration Urging End to Misuse of Title 42 Public Health Authority (February 2, 2021); Public Health Experts [Letter](#) to CDC on Title 42 (January 28, 2021); Public Health [Recommendations](#) for Processing Families, Children and Adults Seeking Asylum or Other Protection at the Border (December 2020); Oona Hathaway, COVID-19 and International Law: Refugee Law – The Principle of Non-Refoulement, [Just Security](#) (November 30, 2020); Public Health Experts [Letter](#) Urging CDC to Withdraw Proposed Rule That Would Bar Refugees from Asylum and Other Humanitarian Protections in the U.S. (August 6, 2020); Public Health Experts [Letter](#) Urging CDC to Withdraw Order Enabling Mass Expulsion of Asylum Seekers (May 18, 2020); Lucas Guttentag, Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors, [Just Security](#) (April 13, 2020).

¹⁰ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the HHS Secretary and CDC Director to “promptly review and determine whether termination, rescission, or modification . . . is necessary and appropriate”; President Biden’s January 26, 2021 [Executive Order](#) on COVID-19 directs the HHS Secretary, the Secretary of Transportation, and the Secretary of DHS to “within 14 days of the date of this order, the Secretary of HHS (including through the Director of CDC), the Secretary of Transportation, and the Secretary of Homeland Security shall submit to the President a plan to implement appropriate public health measures at land ports of entry.”

CDC Order:

- *Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*,¹¹ [85 FR 65,806](#). See *P.J.E.S. v. Wolf*, 1:20-cv-02245-EGS-GMH; in conjunction with the HHS rule, closing border to all, including children and asylum seekers (preliminary injunction for unaccompanied children only), stayed by *P.J.E.S. v. Pekoske*, 1:20-cv-02245; modified by *Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination*, [86 FR 9942](#) (Feb. 17, 2021).

DOJ Rules

- *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, [85 FR 81588](#), RIN 1125-AA96; curbing access to appeal and scope of appellate review, eliminating administrative closure, imposing rushed adjudication timeframe, and improper expansion of EOIR director powers. See *CLINIC v. EOIR*, 1:21-cv-00094-RJL (staying rule pending litigation).
- *Executive Office for Immigration Review (EOIR); Fee Review*, [85 FR 82750](#), RIN 1125-AA90; proposing up to eightfold fee increases and new fee on right to seek asylum. See *CLINIC v. EOIR*, 1:20-cv-03812-APM (preliminary injunction prior to implementation) 1:20-cv-03812-APM (preliminary injunction prior to implementation)
- *Executive Office for Immigration Review (EOIR); Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*, [84 FR 31463](#), RIN 1125-AA58; clarifying that regulations governing the form of a BIA opinion do not create any substantive right to review, specifically, affirmances without opinions. Final rule remains in effect.
- *Executive Office for Immigration Review (EOIR); Organization of the Executive Office for Immigration Review*, [85 FR 69465](#), RIN 1125-AA85; transferring Office of Legal Access Program (OLAP) under newly established Office of Policy and authorizing EOIR director to adjudicate Board of Immigration Appeals (BIA) cases. Final rule remains in effect.
- *Procedures for Asylum and Withholding of Removal*, [85 FR 81698](#), RIN 1125-AA93; 15-day filing deadline for Form I-589 in asylum-and-withholding-only Proceedings; 180-day adjudication deadline; Blank space policy for Form I-589; NGO evidence bar. See *NIJC v. EOIR*, 1:21-cv-00056 (temporary restraining order and preliminary injunction prior to implementation); [USCIS](#) eliminated “blank space” policy for Form I-589 and others (Apr. 1, 2021).

ADDITIONAL DHS POLICIES

DHS should rescind the following web of policies and agency directives that jeopardize the rights of asylum seekers, children, and noncitizens in affirmative and defensive proceedings.

¹¹ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the HHS Secretary and CDC Director to “promptly review and determine whether termination, rescission, or modification...is necessary and appropriate”; President Biden’s January 26, 2021 [Executive Order](#) on COVID-19 directs the HHS Secretary, the Secretary of Transportation, and the Secretary of DHS to “within 14 days of the date of this order, the Secretary of HHS (including through the Director of CDC), the Secretary of Transportation, and the Secretary of Homeland Security shall submit to the President a plan to implement appropriate public health measures at land ports of entry.”

Migrant Protection Protocols (MPP) ¹²

- DHS: January 25, 2019 [Policy Guidance](#) for Implementation of the Migrant Protection Protocols (claiming statutory authority to implement MPP and providing guidance on the implementation of the program).

“Metering” at the U.S.-Mexico border, *see* [Al Otro Lado, Inc. v. Wolf](#), 2:17-cv-05111.

- DHS: June 5, 2018 Memorandum from Secretary Nielsen, “[Prioritization-Based Queue Management](#)” (instructing ports of entry that processing inadmissible noncitizens (who include asylum seekers) was not one of Customs and Border Protection (CBP)’s main priorities, and to consider re-assigning staff away from such processing).
- DHS: “[Metering Guidance](#),” April 27, 2018 (instructing CBP to, when “necessary or appropriate,” meter arriving individuals and inform them that the port is at capacity).

Policies related to the prosecution of asylum seekers

- DHS: “[Implementing the President’s Border Security and Immigration Enforcement Improvements policies](#),”¹³ February 20, 2017 (directing DHS agencies to prioritize targeting people for offenses including unauthorized entry or reentry).¹⁴

Policies that attempt to raise the credible fear standard

- U.S. Citizenship and Immigration Services (USCIS) Asylum Division Revised Credible Fear and Reasonable Fear Lesson Plans, “Lesson Plan on Credible Fear of Persecution and Torture Determinations,” April 30, 2019 (imposing new provisions in violation of the Immigration and Nationality Act). *See* [Kiakombua v. Wolf](#), 2020 WL 6392824 (D.D.C. 2020) (vacating unlawful lesson plan).

USCIS policies on processing applications

- July 15, 2020, USCIS, [Applying Discretion in USCIS Adjudications](#), PA-2020-10 (imposing new burdens on discretionary review for all applications, including work permits).
- August 21, 2020, USCIS, [Clarifying Procedures for Terminating Asylum Status in Relation to Consideration of an Application for Adjustment of Status](#), PA-2020-12 (facilitating the termination of asylee status and derivative status, and permitting stripping of Legal Permanent Resident (LPR) status).
- November 2, 2020, USCIS, [Special Instructions for Form I-589](#) (requiring asylum filings previously accepted in local asylum office, to go to an “asylum vetting center” in Georgia and beginning shift of all intake).

¹² Although DHS has begun to wind down MPP, continued steps will be needed, including to addressing MPP populations whose cases were unfairly denied or ordered closed. See Human Rights First’s [recommendations](#) on the wind-down of MPP. Redress measures should be implemented to restore access to U.S. protection for asylum seekers denied a fair opportunity to pursue their requests for refugee protection under Trump administration policies, including MPP, that blocked, turned back, and expelled them to danger.

¹³ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the Secretary of State, Attorney General, and DHS Secretary to “promptly take steps to rescind any agency memoranda or guidance issued in reliance” on the Border Security and Immigration Enforcement Improvements Executive Order.

¹⁴ *See e.g.*, Human Rights First, “[Punishing Refugees and Migrants](#): The Trump Administration’s Misuse of Criminal Prosecutions,” (Jan. 2018); Bipartisan Group of [Former United States Attorneys](#) Call on Sessions to End Family Separation (June 18, 2018).

- November 17, 2020, USCIS, [Use of Discretion for Adjustment of Status](#) (new laundry list of discretionary factors, including history of underemployment or unemployment, or employment in the legal marijuana industry, not having close family or community ties, “moral depravity or criminal tendencies reflected by a single serious crime,” failure to meet tax obligations).
- November 18, 2020, USCIS, [Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization](#), PA-2020-23 (inviting re-adjudication of LPR status at naturalization, loosened standard for abandonment).
- December 15, 2020, USCIS, [Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines](#), PA-2020-26 (increasing adjustment interviews for asylees and refugees under pretense of fraud and national security concerns).

Vetting

- ICE [Policy Memorandum](#)¹⁵ (expanding criminal background checks of all adult members of unaccompanied minor’s household).
- May 15, 2018 [USCIS Policy Alert](#) (requiring interviews for employment-based and fiancé-based adjustment cases).
- November 18, 2020 USCIS [Policy Memorandum](#) (expanding interviews of previously interviewed refugees/asylees filing relative petitions).

Procedure and due process

- July 11, 2018 [ICE Memorandum](#)¹⁶ to OPLA Attorneys (providing guidance on litigating domestic violence-based persecution claims following *Matter of A-B*).
- July 13, 2018 USCIS [Policy Memorandum 602-0163](#) (authorizing USCIS adjudicators to deny a family-based or employment-based application or petition without issuing a request for evidence (RFE) or notice of intent to deny (NOID), if the original submission lacks sufficient evidence).
- July 29, 2019 USCIS [Asylum and Internal Relocation Guidance](#) (removing consideration of reasonableness in internal relocation assessment).
- September 30, 2019 USCIS [Policy Memorandum](#)¹⁷ (instructing asylum officers to decline to recognize nuclear families as particular social groups pursuant to *Matter of L-E-A-*).
- August 21, 2020 [USCIS Policy Alert](#) 2020-12 (terminating asylum status in relation to consideration of adjustment of status).

Detention

- December 14, 2017 [ICE Policy Directive](#) (ending presumption of release for pregnant detainees).
- [DHS transfer of funds from FEMA to ICE](#) (DHS appropriations transfer of \$10 million to fund expanded immigration detention).

¹⁵ A March 1, 2021 HHS [fact sheet](#) reinforces that “ORR also conducts background checks on adult household members and individuals identified in a potential sponsor’s care plan.”

¹⁶ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the Attorney General and DHS Secretary to “within 180 days of the date of this order, conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards.” The Attorney General should immediately vacate *Matter of A-B-*.

¹⁷ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the Attorney General and DHS Secretary to “within 270 days of the date of this order, promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a ‘particular social group,’ as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.”

- February 18, 2021 [ICE Interim Guidance](#)¹⁸ on Enforcement (designating for 90 days categories of noncitizens as enforcement priorities, including on criminal grounds as well as people who recently crossed the border).

Border and immigration enforcement policies

- [Electronic Nationality Verification](#) (ENV)
- [Interior Repatriation Initiative](#) (IRI)
- July 23, 2019 [DHS Notice](#)¹⁹ (designating new categories of migrants for expanded expedited removal to cover persons more than 100 miles from border within two years of arrival). See [Make the Road New York v. Wolf](#), No. 19-5298 (reversing the district court injunction of the rule and remanding the case for further proceedings).
- August 11, 2004 [DHS Notice](#) (expanding use of expedited removal to individuals who are within 100 air miles of the border and who have not been physically present in the United States for 14 days or more).
- Policies directing departments to waive statutory requirements for environmental and historical protections to expedite construction of the Southern Border Wall, including: July 28, 2017 [DHS Notice of Determination](#) (waiving environmental legal requirements at the Southern Border); January 22, 2018 [DHS Notice of Determination](#) (waiving legal environmental requirements in New Mexico); October 11, 2018 [DHS Notice of Determination](#) (waiving environmental legal requirements in Texas); February 8, 2019 [DHS Notice of Determination](#) (waiving environmental legal requirements in California); April 24, 2019 [DHS Notice of Determination](#) (waiving environmental legal requirements in Arizona); May 15, 2019 [DHS Notice of Determination](#) (waiving environmental legal requirements in Arizona); July 1, 2019 [DHS Notice of Determination](#) (waiving environmental legal requirements in Texas); October 1, 2019 [DHS Notice of Determination](#) (waiving 31 historical preservation and environmental protection legal requirements in Texas); February 20, 2020 [DHS Notice of Determination](#) (waiving environmental legal requirements in Arizona, California, New Mexico, and Texas); March 16, 2020 [DHS Notice of Determination](#) (waiving environmental legal requirements in Texas); April 15, 2020 [DHS Notice of Determination](#) (waiving environmental legal requirements in Texas); January 4, 2021 [DHS Notice of Determination](#) (waiving environmental legal requirements in California).
- January 4, 2018 [CBP Directive No. 3340-049A](#) (providing guidance for searching electronic devices at the border).
- January 10, 2018 [ICE Policy Directive](#) (directing ICE to perform enforcement actions at public courthouses for certain classes of immigrants).²⁰
- May 6, 2019 Announcement of the [Warrant Service Officer program](#) (empowering local law enforcement to cooperate with federal immigration enforcement despite local policies that limit cooperation with federal agencies).
- Policies and directives designating [CBP](#) and [ICE](#) as “security” agencies.

ATTORNEY GENERAL AND BIA RULINGS

¹⁸ For analysis of the harm that the interim guidance inflicts and alternative recommendations, see National Immigrant Justice Center’s [analysis](#).

¹⁹ President Biden’s February 2, 2021 [Executive Order](#) on asylum directs the DHS Secretary to “promptly review and consider whether to modify, revoke, or rescind” the expansion of expedited removal.

²⁰ For this particular rule, we recommend partial withdrawal to preserve the constructive change for torture survivors.

The following decisions imposed confounding, additional requirements for establishing the cognizability of a particular social group (PSG) such as ‘social distinction,’ ‘social visibility,’ and ‘particularity,’ straying farther away from clear standards set by *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985); they also heightened the nexus standard. These decisions have contributed to countless erroneous decisions, are inconsistent with international norms and guidance, and therefore undermine U.S. commitment to non-*refoulement* and should be vacated or reversed.

- *Matter of E-R-A-L-*, 27 I&N Dec. 767 (BIA 2020) (compounding requirements for particular social group despite alignment with *Matter of Acosta*); *but see Albizures-Lopez v. Barr*, No. 20-70640, 2020 WL 7406164, 2020 U.S. App. LEXIS 38725 (9th Cir. Dec. 10, 2020) (vacating *Matter of E-R-A-L-*).
- *Matter of L-E-A-* (I), 27 I&N Dec. 40 (BIA 2017) (limiting asylum relief for claims based on family membership); *Matter of L-E-A-* (II), 27 I&N Dec. 581 (A.G. 2019) (overruling BIA’s recognition of immediate family as a cognizable social group)
- *Matter of A-B-* (I), 27 I&N Dec. 316 (A.G. 2018) (attempting to limit asylum relief for victims of domestic abuse violence, gang-related violence, and other violence by private actors); *Matter of A-B-* (II), 28 I&N Dec. 199 (A.G. 2021) (narrowing standard to establish breach of government duty to protect its citizenry; vacating BIA decision and remanding to three-member panel)
- *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) (barring asylum relief for asylum seekers who fail to provide exact articulation of PSG at the outset of the case).
- Prior decisions that cemented deviation from *Acosta*: *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of A-M-E- and J-G-U-*, 24 I&N Dec. 69 (BIA 2007); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).
- Decisions that suggest heightened standard for nexus: *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (asserting that nexus must be scrutinized for large particular social groups and that applicant must show persecutor’s animus against the broad social group rather than personal animus arising from relationship with applicant); *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that “one central reason” standard for nexus in asylum claims also applies to withholding of removal applications).

Decisions curbing access to asylum protections:

- *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) (rejecting exception to persecutor bar where refugee was subject to coercion or duress).
- *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (creating new obstacles for the BIA to affirm asylum grants or independently order a grant of asylum).
- *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G.2020) (certifying decision from 2006 and signaling sweeping interpretation of asylum bars).
- *Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020) (applying firm resettlement bar absent permanent status), *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) (same).
- *Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018) (barring relief for *de minimis* material support bar under duress).
- *Matter of Alvarado*, 27 I&N Dec. 27 (BIA 2017) (holding that persecutor of others bar applies without regard to applicant’s personal motivation for assisting or participating in persecution).

- *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016) (rejecting implied exception to terrorism bar for material support provided under duress).
- *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015) (applying one-year bar to asylum seeker for amending application).

Decisions endangering protection for torture survivors under the Convention against Torture (CAT):

- *Matter of R-A-F-*, 27 I&N Dec. 778 (A.G. 2020), (disturbing prior CAT grant to require BIA to reconsider whether certain acts would constitute torture).
- *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020), (limiting CAT protection through a restrictive definition of whether officials who commit torture are “acting in an official capacity”).
- *Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018) (requiring narrow finding of specific intent for CAT relief).
- *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (requiring proof of various links in a hypothetical chain for CAT claims, undermining required aggregate consideration of torture claims).

Decisions contributing to prolonged detention:

- *Matter of R-A-V-P-*, 27 I&N Dec. 803 (BIA 2020) (finding asylum seeker with pending application but no family or employment a “flight risk,” denying release on bond).
- *Matter of M-S-*, 27 I&N Dec. 509 (2019) (denying bond release for asylum seekers who pass credible fear); *but see Padilla v. ICE*, No. 19-35565 (9th Cir. 2020)(partially affirming preliminary injunction; holding class members are entitled to bond hearings without procedural protections ordered by district court; government petition for certiorari pending before Supreme Court).
- *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (placing burden for bond determinations on noncitizen); *but see Pereira Brito v. Barr*, 415 F.Supp.3d 258 (D. Mass. 2019) (shifting burden to DHS on due process grounds); *Dubon Miranda v. Barr*, 463 F.Supp.3d 632 (D. Md. 2020) (same).
- *Matter of Joseph*, 22 I&N Dec. 799 (1999) (creating excessive burden for individuals in mandatory detention challenging their custody determination).

Decisions undermining procedural Due Process protections:

- *Matter of O-M-O-*, 28 I&N Dec. 191 (BIA 2021) (finding torture survivor not credible largely due to IJ speculation that document was fraudulent, absent forensic analysis or expert testimony).
- *Matter of J.J. Rodriguez*, 27 I&N Dec. 762 (BIA 2020), (prohibiting immigration judges from terminating MPP cases where DHS failed to provide the respondent with sufficient notice of his hearing).
- *Matter of Herrera-Vasquez*, 27 I&N Dec. 825 (BIA 2020), (prohibiting immigration judges from terminating MPP where DHS fails to properly fill out notice to appear).
- *Matter of H-Y-Z-*, 28 I&N Dec. 156 (BIA 2020) (limiting relief due to ineffective assistance of counsel).
- *Matter of Niveló Cardenas*, 28 I&N Dec. 68 (BIA 2020) (denying motion to reopen where notice to appear had typo for respondent’s address).

- *Matter of M-A-M-Z*, 28 I&N Dec. 173 (BIA 2020) (finding that asylum seeker failed to meet burden after refusing expert evidence corroborating nexus).
- *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (ending administrative closure); *but see Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (overturning *Castro-Tum* in Fourth Circuit) and *Meza Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020) (same holding in Seventh Circuit).
- *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018) (curbing Immigration Judge grant of continuances); *Matter of L-N-Y*, 27 I&N Dec. 755 (BIA 2020) (curbing continuances where relief pending before other agency).
- *Matter of S-O-G- & F-D-B*, 27 I&N Dec. 462 (A.G. 2018) (curbing Immigration Judge authority to terminate cases).
- *Matter of E-F-H-L*, 27 I&N Dec. 226 (A.G. 2018), (vacating a BIA decision that held that a respondent applying for asylum and withholding of removal was entitled to a full evidentiary hearing).
- *Matter of M-A-C-O*, 27 I&N Dec. 477 (BIA 2018) (stripping unaccompanied youth of right to non-adversarial asylum interview before USCIS).
- *Matter of M-B-C*, 27 I&N Dec. 31 (BIA 2017) (assigning noncitizen burden of disproving any applicable mandatory bar if there is “some evidence” from which a reasonable factfinder “could” conclude it applies).
- *Matter of R-K-K*, 26 I&N Dec. 658 (BIA 2015) (imputing lack of credibility to asylum applicant because of similarity with other applicant).
- Decisions undermining Supreme Court holding requiring time, date, and location of hearing on notice to appear: *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018); *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019); *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA), *Matter of Rosales Vargas & Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020).
- *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) (precluding U visa applicant from having inadmissibility waiver considered in removal proceedings); note that there is a circuit split on this issue, with two circuits deferring to the Board, such that correcting course would avoid further litigation and resolve the split.
- *Matter of H-G-G*, 27 I&N Dec. 617, 617 n.1 & 641 (A.A.O. 2019); *see also Matter of Padilla Rodriguez*, 28 I&N Dec. 164, 167-168 (BIA 2020) (precluding noncitizens admitted into Temporary Protected Status from adjusting status to permanent resident); note that the Supreme Court has granted certiorari on this issue, such that correcting course would likely moot the Supreme Court case.