



## ASYLUM SEEKER ADVOCACY PROJECT

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### **To Whom It May Concern:**

The Asylum Seeker Advocacy Project (ASAP) respectfully submits the following comment to the Notice of Proposed Rulemaking and Request for Comment on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers 86 Fed. Reg. 46906 (Aug. 20, 2021) (DHS Docket No. USCIS–2021–0012) [hereinafter “the Notice” or “the rule” or “the proposed rule.”].

### **I. ASAP’s Interest in the Proposed Rule and Overarching Recommendations for Reform**

#### *ASAP and its members*

The Asylum Seeker Advocacy Project (ASAP) is a non-profit organization with over 175,000 asylum seeker members from over 175 countries. ASAP is the largest organization of asylum seekers in the United States (U.S.). Our work has three primary components: one, building digital communities through the power of technology in order to create the largest community of asylum seekers in U.S. history; two, creating legal resources that help asylum seekers navigate the legal system, stay up to date on critical news, and succeed in their cases; and three, advancing

member-led advocacy efforts to fight for a U.S. that welcomes asylum seekers, through litigation, press, and policy work. Because of our mission, and the likely impact of the proposed rule on our current and future members, ASAP is highly invested in the outcome of this rulemaking process.

When someone becomes a member of ASAP, the organization asks: What is one thing you would change about the asylum process? Of ASAP's first 150,000 members, more than 34,000 asylum seekers from over 150 countries responded.<sup>1</sup> ASAP's staff read each of those responses to understand better the issues ASAP members care about most and to formulate policy priorities for the organization. As a result of this process, ASAP's current policy priorities are: (1) the government should speed up processing times for work permits and asylum interviews; (2) work permits should be easier to obtain; (3) more people should be granted asylum, and it should be easier to get immigration status; (4) the asylum process should be more accessible and transparent; (5) asylum seekers should be treated more humanely. ASAP's staff has used those policy priorities to decide what aspects of the proposed rule to focus our comments on and attempted to share concerns in our members own words wherever possible.

### *The likely impact of the proposed rule on our flawed asylum system*

ASAP members insist that major policy reforms be geared towards making the asylum system accessible, humane, faster, transparent, and easier to successfully navigate. Unfortunately, the current reality of asylum processing in the U.S. falls far short of ASAP's vision, and ASAP is concerned that the proposed rule risks exacerbating major flaws in the current system.

There are limited aspects of the proposed regulation that are in line with ASAP members' vision for an improved asylum system, and ASAP commends the agency for proposing these changes and discusses them below in the comment. However, on the whole, ASAP is concerned that the proposed rule fails to meaningfully address the underlying problems with the asylum system articulated by our membership and risks worsening the lives of asylum seekers and their families. Indeed, no genuine project of reforming the asylum system can be taken seriously as long as major policies remain in place that fundamentally undermine the right to seek safety from persecution. Moreover, effective policymaking requires genuine engagement with directly impacted parties — the Department of Homeland Security (DHS) and the Department of Justice (DOJ) cannot achieve the goals of improving the asylum system without first speaking with and addressing the concerns of the asylum seekers whom its proposals affect.

### *ASAP's alternative recommendations for reform*

The agency can and must do better. ASAP recommends an alternative approach. Instead of finalizing the proposed rule, DHS should convene a series of stakeholder meetings, including with impacted asylum seekers. DHS should receive recommendations directly from impacted asylum seekers about how to better improve the asylum system, and then reissue a new notice of proposed rulemaking based on the recommendations of impacted stakeholders.<sup>2</sup> Additionally,

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<sup>1</sup> See ASAP, *34,000 Members' Ideas for Change*, ASYLUM SEEKER ADVOCACY PROJECT (Oct. 5, 2021) [available at <https://www.asylumadvocacy.org/5-ways-to-change-the-asylum-process/>].

<sup>2</sup> Along these lines DHS should consider issues an advance notice of proposed rulemaking as it has done in other contexts. See, e.g., USCIS, Advance Notice of Proposed Rulemaking and Notice of Virtual

DHS must rescind entirely the suite of inhumane policies that make it virtually impossible to successfully seek asylum, including, but not limited to, Title 42, the Remain in Mexico Program, and the rules restricting asylum seekers' access to work authorization.<sup>3</sup>

### *Summary of comment*

In the remainder of this comment, we address the major pros and cons of the proposed rule based on the feedback of ASAP members. As mentioned above, over 34,000 ASAP members recently expressed detailed views about changes they would like to see in the asylum system.<sup>4</sup> ASAP members' feedback provides one of the most detailed and significant sources on asylum seekers' views of the current asylum processing system and should be of paramount importance to the government in this and any future rulemaking.<sup>5</sup>

We begin by discussing some of ASAP members' proposals for less harmful alternative approaches to asylum processing. We then provide an overview of the major flaws plaguing the current system that conflict with members' priorities and will impede all efforts at reform until resolved. Next, we address in detail how different provisions of the proposed rule align with or fall short of members' priorities. The most significant positive aspect of the proposed rule is that there is the possibility that it may allow for swifter access to work authorization by treating the initial positive credible fear determination as the "filing of the asylum application." However, the proposed rule provides so little detail as to how this plan would work in practice that it is not clear whether the proposed changes would ultimately benefit asylum seekers. Additionally, we express concerns about numerous flaws in the proposed rule, including the many ways in which it risks undermining access to asylum, transparency, and accessibility. We conclude by urging the agency to reconsider its approach to reforming the asylum system and to begin engaging impacted individuals in a meaningful stakeholder process before reissuing a new notice of proposed rulemaking.

Importantly, ASAP's comment here addresses only those aspects of the proposed rule that are clearly related to members' priorities. This does not, however, mean that ASAP endorses those aspects of the rule not explicitly discussed herein. Rather, as detailed below, ASAP remains deeply concerned about the overarching potential impacts of the proposed rule, especially due to the lack

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Public Listening Sessions on Public Charge Ground of Admissibility, 86 Fed. Reg. 47025 (Aug. 23, 2021).

<sup>3</sup> As part of the termination of these pernicious programs, DHS should invite meaningful review of its practices and procedures, including by empowering independent regulatory bodies who will solicit testimony from impacted asylum seekers, to investigate its ongoing practices of abuse, violence, and coercion of asylum seekers. *See, e.g., The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials Against Parents Who Were Forcibly Separated From Their Children*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (Aug. 23, 2018) [available at <https://www.aila.org/advocacy/media/press-releases/2018/complaint-re-coercive-tactics-on-separated-parents/the-use-of-coercion-by-us-department-of-homeland>].

<sup>4</sup> *See, supra*, note 1.

<sup>5</sup> ASAP members previously provided extensive feedback about the ways in which USCIS might improve access to its services. *See* ASAP, *Members Propose Changes to USCIS*, ASYLUM SEEKER ADVOCACY PROJECT (Jun. 1, 2021) [available at <https://www.asylumadvocacy.org/members-propose-changes-to-uscis/>].

of clarity and ambiguity of many of its provisions. ASAP feels that this lack of clarity has, moreover, deprived it of an opportunity to comment further on the proposed rule or assess its likely overall impact on its members' priorities. ASAP urges DHS and DOJ not to finalize the proposed rule in any form, but to instead solicit the feedback of directly impacted stakeholders and then reissue a new notice of proposed rulemaking after considering the recommendations it receives.

## **II. Less Harmful Alternatives**

Less harmful alternatives to processes like expedited removal and Title 42 expulsions are readily available to DHS and DOJ, but the agencies fail to seriously consider these alternatives in the proposed rule. These alternatives were articulated by ASAP members when asked what they would change about the asylum system. The depth and clarity of their comments serve as further evidence that the agency should reissue a new notice of proposed rulemaking after providing asylum seekers meaningful opportunities to present their own recommendations for reforming the asylum system.

### **A. ASAP members have proposed changes that increase efficiency and accessibility of the asylum process**

Many of the ideas shared by our members would increase efficiency and accessibility— stated goals of the proposed rule — while also safeguarding asylum seekers' right to due process. We briefly provide a small sample of some of our members' recommendations here to help DHS understand the available alternatives and the importance of including asylum seekers' input in the development of regulations that will impact them.

For example, ASAP members recommend significant reforms to curtail the length, expenses, and logistical obstacles plaguing applications for asylum:

“The asylum process is long, expensive, and stressful. One mistake can drag it on for years, whether it's the judge's fault or your own. Something as simple as a judge retiring can extend the court date by years. Meanwhile, you need to pay tons of money and wait months to receive your needed documents. If I could change something, it would be if your case drags on for over 8 years, you automatically get granted your desired status. Nobody should have to have 12+ years just to listen to judges say the same exact thing.”

—ASAP member from Russia

Promote a better understanding and accommodation in the legal system of the structural violence against indigenous peoples that leads them to seek asylum in the US.”

—ASAP member from Guatemala

“As an asylum seeker with a pending asylum case, one of the worst feelings is not knowing an actual or estimated time frame and can't do anything about it. You sleep every night knowing that the life you're building here is not yours yet and can be taken away from you any day. USCIS should add regulations about pending asylum cases. Asylum seekers

should have more access to information about their pending case’s status and time frame. We have the right to know and make decisions for our life or even help expedite the process.”

—ASAP member from Sudan

Among their suggestions, many members also noted that accessibility can be improved by providing more informational resources for asylum seekers.

Several members also recommended enacting less stringent procedural requirements, especially for pro se applicants, which would allow asylum seekers to better argue their cases, reducing the number of wrongful denials and appeals:

“Get rid of so many questions and interviews, the government should understand that if we are seeking asylum it is out of fear of what can happen to us, not like they say that we should bring proof in order to be credible (a bullet, a severed arm or something like that), if we flee it is out of fear we don’t want anything like that to happen to us.”

—ASAP member from Mexico

Furthermore, members emphasized that accessibility and basic human dignity — as well as overall governmental cost-savings — can be preserved by more expeditiously granting asylum seekers the ability to work legally. When asylum seekers have work authorization, they are able to provide for themselves and their families without relying on social services and are less vulnerable to exploitation by employers:

“I found it most inhumane to have to wait 365 days after applying for asylum to be eligible to apply for a work permit. How is anyone expected to survive – during a pandemic of all things – a full year with no income? It’s like we are being cornered to work illegitimately because it’s either that or homelessness/going hungry. And then we continue to be vilified as if we’re bad because we break the law...a vicious cycle that is completely preventable.”

—ASAP member from Lebanon

“The wait to be processed, and the inability to work legally to pay for healthcare, rent, and food while I wait to be processed. I have a graduate degree obtained in the States. Before my life unraveled, I had a decent-paying job, and contributed by paying taxes and making donations to my church and other worthy causes. I can’t do it now. I can’t even work at Safeway or McDonald’s. I worry about getting COVID. I worry about getting sick since I am uninsured.”

—ASAP member from Hong Kong

Some of these changes have been requested by asylum seekers and advocates for years.<sup>6</sup> Focusing future rulemaking on the recommendations of asylum seekers shows that increased efficiency of the asylum system need not come at the cost of due process, especially where thousands of people's lives depend on it.

**B. ASAP members have proposed changes to increase fairness, humane treatment, and due process throughout the asylum process.**

To improve fairness and due process, many ASAP members have also voiced the need to loosen evidentiary requirements for asylum because these requirements make the asylum system harder to access and result in unnecessary denials of relief to many individuals. As one ASAP member stated,

“No one wakes up one day to plan and prepare to leave their home at free will for them to have all necessary evidence. Traumatic circumstances lead us to leave our homes and as such we cannot have the required evidence to prove our fear in most cases, which is a common scenario in the most legit asylum cases. All we want is to leave all the trauma behind in hopes to start a new life in a safer place. Unfortunately the asylum process makes the traumas we are running away from even worse.”

—ASAP member from Uganda

Another member described the immense barriers to establishing credibility that can prevent someone from ultimately winning asylum:

“The asylum interview asks for people to provide very specific details, dates, time, etc. most asylum seekers have suffered trauma and the mind blocks out details just so you survive, and can't remember all this info in just a flash and asylum seekers end up denied due to “inaccurate” or “lack of credibility” especially if you don't have a lawyer. Asylum officers need to be trained in trauma informed interviewing, and trauma looks different in different people.”

—ASAP member from Rwanda

Lowering the evidentiary requirement would save time, ensure that meritorious cases are not thrown out for procedural reasons, and reduce the number of immigration court appeals.

The government can further improve efficiency and fairness in the asylum system by taking steps to widen asylum law eligibility. As one ASAP member put it,

“I believe that the asylum process is organized in a way that denies more cases than it approves. Many people like myself, who have genuine fear and who escaped from their countries because our lives were at risk, never have a realistic opportunity to

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<sup>6</sup> See, e.g., *2021 Immigration Action Plan* (Aug. 2020) [available at <https://static1.squarespace.com/static/5b60b2381aef1dbe876cd08f/t/5f3bed0ace93e01231a3343b/1597762828090/2020+Immigration+Action+Plan+-+08182020.pdf>].

win asylum. I escaped because gang members threatened to kill my son and cut him into pieces if I did not allow him and my niece to go around and work with them.”

—ASAP member from El Salvador

Additionally, many ASAP members shared comments advocating for more humane treatment and the elimination of unnecessary detention.<sup>7</sup> As one ASAP member noted,

“[T]oday people are often incarcerated in detention centers for taxpayers’ money for months, while they represent no danger to the public and no flight risk, and could be safely released to await their court appearance at home much, much sooner.”

—ASAP member from Ukraine

ASAP is aware that further changes to asylum law are forthcoming and urges the departments to sincerely consider asylum seekers’ input and priorities in the instant and future proposed rulemaking. Rather than proceed to issuing a final rule, DHS should take a more active role in creating stakeholder meetings where it can receive asylum seekers feedback, and then issue a new notice of proposed rulemaking.

### **III. The Proposed Rule Does Not Address How and Whether its Changes Will Interact with Inhumane Policies Making It Harder to Access Asylum**

As a threshold matter, the agency cannot plausibly account for the impact of the proposed rule in economic or policy terms, when it does not even address whether it will be implemented alongside Trump-era policies that the Biden administration has chosen to continue, such as Title 42<sup>8</sup> and the Remain in Mexico Program (disturbingly named the Migrant Protection Protocols or MPP).<sup>9</sup> Under these current policies, the asylum system is not a functioning one, and, importantly, is fundamentally at odds with ASAP members’ priorities for reform. ASAP members believe the asylum system must become more humane, faster, accessible, and that asylum should go to a

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<sup>7</sup> Moreover, DHS acts more humanely when it releases individuals to their families and communities from immigration detention. Detention separates families, devastates communities, and inflicts long-term physical, mental, and emotional harm. *See The Effect of Family Detention on Children*, HUMAN RIGHTS FIRST (Aug. 20, 2018), <https://www.humanrightsfirst.org/resource/effect-family-detention-children>; M. von Werthern, et. al., *The Impact of Immigration Detention on Mental Health*, BMC PSYCHIATRY (Dec. 6, 2018) [available at <https://bmcp psychiatry.biomedcentral.com/articles/10.1186/s12888-018-1945-y>]. Advocates have also voiced that by eliminating immigrant detention, DHS could divert billions of dollars to hiring more asylum officers to expedite processing of applications for asylum and work permits. *See , e.g., Laurence Benenson, The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NATIONAL IMMIGRATION FORUM (May 9, 2018) [available at <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/>].

<sup>8</sup> *See* Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42,828 (Aug. 5, 2021) (“Title 42 order”) (extending the prior Trump administration CDC orders).

<sup>9</sup> *See* Julia Ainsley, *Biden Administration Plans to Restart Trump’s ‘Remain in Mexico’ Policy at the Border in mid-November*, NBC NEWS (Oct. 15, 2021) [available at <https://www.nbcnews.com/politics/immigration/biden-admin-plans-restart-trump-s-remain-mexico-policy-border-n1281580>].

greater number of individuals. The policies addressed below, however, have denied hundreds of thousands the basic right to seek asylum, inflicted cruel and inhumane suffering upon asylum seekers, and greatly exacerbated the asylum backlog. Indeed, the system is currently so deeply dysfunctional that it resulted in the immediate deportation of 7,500 Haitians to a country described by a senior Biden administration official as a “humanitarian nightmare.”<sup>10</sup> ASAP thus urges DHS to terminate the existing policies discussed here that diverge deeply from ASAP members’ priorities.

If left in place, these policies would make the rule utterly ineffective, because it remains unclear which populations of asylum seekers would even be subjected to it, rather than simply refoiled under these other programs. By failing to address the relationship between the proposed rule and these ongoing policies, the agency has failed to meet its own obligations of assessing the likely impact of the rule and failed to consider major aspects of the problem it purports to solve. As advocates have repeatedly documented, such a fair and just asylum system cannot be achieved as long as Trump-era policies eviscerating asylum law remain in place.<sup>11</sup>

Insofar as the proposed rule fails to account for the ongoing impact of these policies on the right to seek asylum, it cannot plausibly achieve its stated purpose of increasing “efficiency and...procedural fairness,”<sup>12</sup> rendering it fundamentally incompatible with ASAP members’ priorities. Indeed, under current conditions the proposed rule would, if implemented, fail to force efficiency and fairness into this deeply flawed framework.<sup>13</sup> Merely “streamlining”<sup>14</sup> the current process at the expense of due process does not address the deep-rooted problems that asylum seekers and advocates have fought against for years. Therefore, before implementing any significant new changes to the asylum system, the agency must address the devastating impact of the policies enumerated below, and make sure that it takes into consideration the views of impacted people.

### *Expedited Removal*

The proposed rules would rely heavily on the expanded use of expedited removal, including by distressingly “eliminat[ing]...barrier[s] to placing families in expedited removal.”<sup>15</sup> ASAP members believe the asylum system must be more humane, accessible, and that asylum should be available to a greater number of individuals — expedited removal, however, remains an inhumane policies with reports of widespread abuse, which is also notoriously opaque,

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<sup>10</sup> Harold Koh, *Re: Ending Title 42 Return Flights to countries of Origin, Particularly in Haiti*, 3 (Oct. 2, 2021) [available at <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000>] [hereinafter, “Koh Resignation Letter”].

<sup>11</sup> *Recommendations for Biden Administration: Welcoming the Persecuted, Restoring Order, and Upholding Asylum Law, Refugee Treaties and Values*, HUMAN RIGHTS FIRST (Jan. 2021) [available at <https://www.humanrightsfirst.org/sites/default/files/HRF%20Recs%20Jan%202021.pdf>].

<sup>12</sup> Notice at 46909.

<sup>13</sup> See Notice at 46907 (“The aim of this rule is to begin replacing the current system, within the confines of the law, with a better and more efficient one that will adjudicate protection claims fairly and expeditiously.”).

<sup>14</sup> See, e.g., Notice at 46910 (“[The proposed rule] would establish a streamlined and simplified adjudication process...”)

<sup>15</sup> Notice at 46910.

inaccessible, and the reason thousands of individuals feeling persecution are denied a meaningful opportunity to apply for asylum. For years, advocates and scholars have documented the ways in which expedited removal is a fundamentally flawed process that denies asylum seekers due process and the opportunity to fairly litigate their claims.<sup>16</sup> Immigration officials select people for expedited removal based on factors completely irrelevant to their need for protection or fear of persecution, such as where they are apprehended and how they crossed the border.<sup>17</sup> Asylum seekers placed into expedited removal proceedings are subsequently detained, denied the right to counsel, denied the opportunity to apply for many immigration protections, and can be deported without ever even seeing an immigration judge.<sup>18</sup> The fact that such a process even exists entirely undermines the U.S.'s obligations under both domestic and international law to protect people fleeing from persecution.<sup>19</sup>

The proposed rules deliberately ignore this reality and do not address how the “expansion” of expedited removal may further undermine the due process rights of asylum seekers.<sup>20</sup> By failing to address the endemic problems with expedited removal, the proposed rule fails to anticipate major problems that will arise from its expansion and extension to families, including litigation risks and potential violation of existing settlement orders, such as the *Flores* agreement.<sup>21</sup> Rather, the proposed rule seeks to wield expedited removal as a tool to eliminate the immigration courts’ years of backlogs and long processing times.<sup>22</sup> However, efficiency should not come at the cost of other priorities articulated by the asylum-seeking members of ASAP, such as accessibility and humane treatment. Efficiency and ease for the government should not be prioritized over making an asylum system that is accessible, transparent, and that makes it easier for asylum seekers to navigate and ultimately succeed.

#### *Title 42*

The implementation of Title 42 expulsions with regards to asylum seekers further illustrates the asylum system’s failure to ensure protection for people fleeing persecution.<sup>23</sup> Under

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<sup>16</sup> See Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2005).

<sup>17</sup> Alvaro Peralta, *Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. UL REV. 1303 (2014).

<sup>18</sup> *Asylum Seekers and the Expedited Removal Process*, HUMAN RIGHTS FIRST (Nov. 2015) [available at <https://www.humanrightsfirst.org/sites/default/files/FAQ-asylum-seekers-and-the-expedited-removal-process.pdf>].

<sup>19</sup> See Geoffrey A. Hoffman, *Contiguous Territories: The Expanded Use of Expedited Removal in the Trump Era*, 33 MD. J. INT'L L. 268 (2018).

<sup>20</sup> Notice at 46909-46911 (promoting the expansion of expedited removal to asylum seeking families without considering the due process implications, or potential conflicts with the U.S.'s Constitution, international legal commitments, or the Refugee Act).

<sup>21</sup> See *Reno v. Flores*, 507 U.S. 292, 315 (1993).

<sup>22</sup> Notice at 46922.

<sup>23</sup> See *Advocates Letter to President Biden, Secretary Mayorkas and Attorney General Garland on Continued use of Title 42* (Sept. 17, 2021) [available at [https://www.humanrightsfirst.org/sites/default/files/Joint%20Letter%20to%20President%20Biden%2C%20Secretary%20Mayorkas%2C%20Attorney%20General%20Garland%20on%20Title%2042\\_09172021.pdf](https://www.humanrightsfirst.org/sites/default/files/Joint%20Letter%20to%20President%20Biden%2C%20Secretary%20Mayorkas%2C%20Attorney%20General%20Garland%20on%20Title%2042_09172021.pdf)].

Title 42, the United States has expelled nearly 700,00 people to the very countries they fled, with little opportunity to state their claims for asylum or express their fear of return.<sup>24</sup> According to high ranking officials in the Biden administration, the Title 42 process creates an “unacceptably high risk that a great many people deserving of asylum will instead likely be returned to countries where they fear persecution, death or torture.”<sup>25</sup>

In addition to being inhumane and cruel, these expulsions are expressly forbidden under the Convention Against Torture and the 1967 Protocol relating to the Status of Refugees.<sup>26</sup> And in the case of Haitians, the expulsions are painfully hypocritical given Haiti’s recent designation for TPS status, citing “a deteriorating political crisis, violence, and a staggering increase in human rights abuses.”<sup>27</sup> As advocates and public health experts have repeatedly observed, Title 42 is a means to facilitate deportations, poorly disguised as a health order.<sup>28</sup>

Moreover, because of Title 42’s sweeping effect and the Biden administration’s refusal to provide clear criteria for when the temporary emergency policy will be retracted, it is impossible to anticipate the genuine impact of the proposed rule — indeed, absent a rescission of Title 42 and other policies, it is difficult to anticipate which, if any, populations of asylum seekers would be subjected to the final rule (let alone the estimated hundreds of thousands anticipated in the Notice). Title 42 is thus fundamentally in conflict with ASAP members’ priorities: the policy makes asylum inaccessible to hundreds of thousands of individuals fleeing violence and results in excessively cruel and inhumane treatment of migrants, as evidence by recent expulsions of Haitians.<sup>29</sup> The proposed rule will be ineffectual and must not be implemented before the Title 42 order has been rescinded and the basic right to seek asylum restored.

### *Remain in Mexico and other Trump-era regulations*

Just short of eliminating asylum entirely, the Trump administration took steps to solidify our asylum system as a means of expulsion, rather than protection.<sup>30</sup> One of the most abhorrent of these policies was the Remain in Mexico program, which unlawfully expelled asylum seekers to

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<sup>24</sup> See Koh Resignation Letter, *supra* note 10, at 2 (describing the process through which migrants must affirmatively raise their fear of return and then show they are “more likely than not” to face persecution or torture in order to be admitted).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1-2 (explaining that these expulsions constitute *refoulement* and violate the U.S.’s obligations under international law).

<sup>27</sup> U.S. Citizenship and Immigration Services, Designation of Haiti for Temporary Protected States, 86 Fed. Reg. 41863 (Aug. 03, 2021).

<sup>28</sup> See *Public Health Experts Letter to Secretary Becerra, Director Walensky, and Secretary Mayorkas* (Sept. 1, 2021) [available at [https://www.publichealth.columbia.edu/sites/default/files/sept\\_1\\_2021\\_title\\_42\\_letter.pdf](https://www.publichealth.columbia.edu/sites/default/files/sept_1_2021_title_42_letter.pdf)].

<sup>29</sup> See, Koh Resignation Letter, *supra* note 10, at 2.

<sup>30</sup> See *Chaos, Cruelty, and Illegality: the Trump Administration’s Record on Asylum*, HUMAN RIGHTS FIRST (Jan. 12, 2021) [available at <https://www.humanrightsfirst.org/sites/default/files/Chaos%20Cruelty%20and%20Illegality-%20The%20Trump%20Administration%20Record%20on%20Asylum.pdf>]; Andrew I. Schoenholtz, Philip G. Schrag & Jaya Ramji-Nogales, *THE END OF ASYLUM*, 31–106 (2021).

peril in Mexico to await their removal proceedings.<sup>31</sup> The inhumanity and cruelty associated with the Remain in Mexico program makes its continuation fundamentally incompatible with ASAP members' priority of creating a more welcoming and humane asylum process. Unfortunately, rather than use all available means to rescind this program, the Biden administration has recently announced its plans to reinstate a version of this program and inaccurately argued that this reinstatement was required by court order.<sup>32</sup> As advocates have repeatedly emphasized, there is no "humane version" of the Remain in Mexico program, which has resulted in thousands of kidnappings, rapes, and violent assaults of asylum seekers.<sup>33</sup> Moreover, the scope of the reinstatement of this program remains unclear, and it is not evident how the Biden administration's Remain in Mexico policy is meant to interact with the proposed rule. For instance, the likely costs of the proposed rule — not to mention its due process implications — cannot be adequately assessed when it remains unclear which asylum seekers will be subject to its provisions, and who may alternatively be refouled to Mexico. The proposed rule cannot and should not be implemented until the unlawful Remain in Mexico program has been rescinded in its entirety.

Additionally, a host of other Trump-era regulations and policies remain in effect that must be eliminated before any major new changes to the asylum system can be effective.<sup>34</sup> For instance, the Trump-era rules surrounding work authorization for asylum seekers remain in effect.<sup>35</sup> The proposed rule treats aspects of these rules as authoritative,<sup>36</sup> even as they are subject of a major preliminary injunction,<sup>37</sup> and even though DHS itself has announced an intent to rescind one of these rules.<sup>38</sup> The effect of these rules remains that significant numbers of asylum seekers are made to struggle for months before they can even obtain a work permit to support themselves while awaiting a decision on their case, and others are denied access to work authorization entirely.<sup>39</sup>

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<sup>31</sup> See, e.g., *DHS OIG Formal Complaint Regarding 'Remain in Mexico,'* HUMAN RIGHTS WATCH (Jun. 2, 2020) [available at <https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico>].

<sup>32</sup> See Amanda Holpuch, *Biden to Reinstate Trump-era 'Remain in Mexico' Migrant Policy*, THE GUARDIAN (Oct. 15, 2021) [available at <https://www.theguardian.com/us-news/2021/oct/15/biden-reinstate-remain-in-mexico-trump>].

<sup>33</sup> See *Forced into Danger: Human Rights Violations Resulting from the U.S. Migrant Protection Protocols*, PHYSICIANS FOR HUMAN RIGHTS (Jan. 2021) [available at <https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger-Human-Rights-Violations-and-MPP-January-2021.pdf>].

<sup>34</sup> See Schoenholtz, et al., *supra* note 24, at 108–129 (detailing the list of Trump era regulations and policies that the Biden administration must rescind to restart basic access to asylum).

<sup>35</sup> Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (June 26, 2020).

<sup>36</sup> Notice at 46930.

<sup>37</sup> See *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 935 (D. Md. 2020) (enjoining the application of certain work authorization regulations to members of ASAP and CASA).

<sup>38</sup> See DHS Unified Agenda, Agency Rule List – Spring 2021, RIN 1615-AC66 (stating that DHS proposes the “Rescission of ‘Asylum Application, Interview, & Employment Authorization’ Rule and Change to ‘Removal of 30 Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization’”) [available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1615-AC66>].

<sup>39</sup> See Anonymous, *I’m a Legal Asylum Seeker: Why Can’t I work? Trump-era regulations are forcing asylum seekers like me to beg for help*, THE NATION (Aug. 30, 2021) [available at <https://www.thenation.com/article/politics/asylum-regulation/>].

ASAP members have made clear that fast and straightforward access to work authorization is a top priority for them, and the perpetuation of the Trump-era work authorization directly conflicts with this goal by extending wait times and creating burdensome procedures and needless bars to eligibility. These rules must be also rescinded or vacated through litigation before implementing the proposed changes to the asylum system.

The Biden administration must first take steps to undo the oppressive regulations and policies issued under the Trump administration. But the administration must not stop there. As long as the U.S. limits the movement of people seeking refuge across borders, it must, at a minimum, live up to its obligations under domestic and international law and protect the basic due process rights of the people who enter the country. Adopting the recommendations of ASAP members would significantly increase U.S. compliance with existing obligations, and more importantly, help create a more humane and accessible asylum system that welcomes those who are seeking safety. As detailed in section IV below, the proposed regulations fall short of both the U.S.'s existing obligations and ASAP members' priorities for change.

#### **IV. Analysis of the Proposed Rule**

##### **A. Employment authorization & work permit processing**

- i. DHS should revoke the 365-day period asylum seekers must wait before applying for employment authorization, reinstate 30-day processing of work permit applications, and clarify the proposed rules' application to members of ASAP and CASA in order to increase asylum seekers' access to work authorization**

ASAP members have consistently indicated that the ability to work legally in the U.S. as they await adjudication of their asylum claim is a necessity and top priority. Our members, most of whom arrive in this country with little or no money or financial support systems, have report that work authorization gives them a basic degree of safety and security. A work permit helps them provide food and shelter for themselves and their family members who come seeking refuge with them. As one ASAP member from China explained, work authorization gives asylum seekers a chance to “at least make a simple living with dignity.”

Some asylum seekers are fortunate to receive lodging and limited financial support from extended family members or charitable organizations. But, at least one ASAP member has explained to us directly that charity is no substitute for access to employment authorization:

“It is completely arrogant and abusive to [tell] asylum seekers ‘We must live on Christian charity’ until we get our permits and find decent jobs. Asylum seekers are people who have gone through traumas with deep wounds to the integrity and life of our families. A Protective State should not further violate our lives by submitting and exposing us to illegal working conditions”

– ASAP member from Colombia

Existing laws and regulations make work authorization exceedingly difficult to obtain. Although the law allows the government to issue work authorization to asylum seekers 180 days “after the date of filing of the application for asylum,”<sup>40</sup> regulations implemented in August, 2020 by the Trump administration imposed a 365-day waiting period before asylum seekers are permitted to apply for work authorization, added new biometrics requirements and processing fees, and barred many groups of asylum seekers from obtaining work permits altogether.<sup>41</sup> Another set of Trump-era regulations also revoked the requirement that the government process pending work permit applications within 30 days.<sup>42</sup>

On September 11, 2020, the U.S. District Court for the District of Maryland issued a preliminary injunction in *CASA de Maryland, Inc. v. Mayorkas*<sup>43</sup> (formerly *CASA v. Wolf*) that enjoins the application of the 365-day waiting period to ASAP and CASA members. But for all asylum seekers who are not ASAP members, these harmful rules remain in effect. Regrettably, the proposed rule takes no steps to rescind them and treats them as authoritative, even though DHS has stated publicly, including in litigation filings, that it intends to rescind or substantially alter these rules.<sup>44</sup> Because DHS has announced its intention to “rescind or substantively revise”<sup>45</sup> the aforementioned regulatory changes, the Department’s failure to consider how the new and proposed EAD rules will also change this process is an example of bifurcated rulemaking that risks depriving the public of a meaningful opportunity to comment.<sup>46</sup> Indeed, the public cannot meaningfully assess the proposed rules’ likely impact on asylum seekers’ access to work authorization because it does not yet know if the 365-day waiting period will be in effect when the proposed rule is finalized, or whether DHS plans to reinstitute, extend, or eliminate the 30-day processing time requirement for asylum seekers initial work authorization applications.

Additionally, although the *CASA v. Mayorkas* injunction is acknowledged by the Proposed Rule,<sup>47</sup> the Notice fails to accurately assess the economic impact of the enjoined provisions by treating the 365-day waiting period for employment authorization as the default for all asylum seekers. This is not the case, however, because even if the proposed rule were implemented, the injunction in *CASA v. Mayorkas* prohibits the application of the 365-day waiting period to members of ASAP and CASA, and will, presumably, continue to do so even if the proposed rule is finalized. In the past year alone, DHS’s internal reports indicate that nearly 120,000 members of ASAP and CASA had their applications adjudicated under the preliminary injunction who were not subject to the 365-day waiting period.<sup>48</sup> DHS must make clear that, even if it finalizes the

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<sup>40</sup> 8 U.S.C. § 1158(d)(2).

<sup>41</sup> See Asylum Application, Interview, & Employment Authorization, 85 Fed. Reg. 38532 (August 25, 2020).

<sup>42</sup> Removal of 30-Day Processing Provision for Asylum Applicant, 85 Fed. Reg. 37502 (June 22, 2020).

<sup>43</sup> 486 F. Supp. 3d 928 (D. Md. 2020).

<sup>44</sup> See Defendants’ Status Report, May 7, 2021, ECF No. 116, *CASA v. Mayorkas*, 486 F. Supp. 3d 928 (2020).

<sup>45</sup> See DHS Unified Agenda, Agency Rule List – Spring 2021, *supra* note 38.

<sup>46</sup> See, e.g., *CASA v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020).

<sup>47</sup> Notice at 46914, n.32.

<sup>48</sup> Table 1, I-765 - Application for Employment Authorization Eligibility Category: C08, Pending Asylum Initial Permission to Accept Employment Completions by Processing Time Buckets August 1, 2020 - September 30, 2021, Aggregated by Fiscal Year and Month Potential Rosario Class Members

proposed rule, it still intends to abide by the strictures of the court order in *CASA v. Mayorkas*, and that it will continue to accept ASAP and CASA members' I-765 work authorization applications 150 days after the filing of their asylum applications. Moreover, DHS must make clear that if the new rule is implemented, ASAP and CASA members' filings of their asylum applications may also be construed as the passing of a positive CFI and that ASAP and CASA members will be eligible to apply for work authorization 150 days after their initial positive CFI determinations.

ASAP also continues to insist that DHS rescind the Trump-era work authorization rules because those rules were issued by agency officials without lawful authority to act and otherwise in violation of the Administrative Procedure Act.<sup>49</sup> DHS must rescind the harmful provisions of those rules, and immediately restore the 150-day waiting period and 30-day processing time requirement for all asylum seekers. Doing so would ensure adequate transparency in the rulemaking process and consistency in the government's treatment of individuals applying for work permits. Additionally, DHS should receive additional feedback from impact asylum seekers about ways to improve access to work authorization and implement their recommendations. Only by taking these steps can the employment authorization components of the proposed rule be a genuine improvement for both ASAP members and asylum seekers at large.

ii. **Treating a positive credible fear determination as a complete asylum application may increase the speed of work authorization access for some asylum seekers, but DHS should not decrease access to work authorization by expeditiously denying asylum applications**

DHS has proposed changes to § 208.3(a)(2) and § 208.30(d) that could potentially simplify and speed up the process by which asylum seekers can apply for work permit authorization.<sup>50</sup> The proposed rule states that the written record of information provided during a positive credible fear interview may be treated as a complete asylum application.<sup>51</sup> As discussed in the previous section,

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*Casa De Maryland, Inc, et al., v. Mayorkas et al*, 20-cv-2118-PX (D.Md) (“Rosario report”), U.S. Citizenship and Immigration Services (“USCIS”) (Oct. 1, 2021).

<sup>49</sup> See, e.g., Plaintiffs’ Motion for a Stay of Effective Dates Under 5 U.S.C. § 705 or, in the Alternative, Preliminary Injunction at 26-30, *CASA de Maryland, Inc. v. Mayorkas*, 486 F. Supp. 3d 928 (D. Md. 2020).

<sup>50</sup> It is also ASAP’s understanding that this proposed procedural change would have the effect of eliminating the one-year filing deadline for individuals who pass their initial credible fear interview. The one-year filing deadline has long been a source of concern for asylum seekers, and conflicts with ASAP members’ priority of increasing access to asylum by imposing a needless procedural barrier. Form I-589 also conflicts with ASAP members’ accessibility and transparency goals because it is a complex, inaccessible document that is only available in English and requires asylum seekers to share traumatic details about the persecution they face in their country of origin. Moreover, as evidenced by the settlement agreement in *Mendez Rojas v. Johnson*, the government has routinely failed to provide adequate notice to asylum seekers about the one-year filing deadline. This jeopardizes their applications on the merits and further hinders their ability to seek employment authorization. 305 F. Supp. 3d 1176 (W.D. Wash. 2018).

<sup>51</sup> See Notice at 46941 (proposing changes to § 208.3(a)(2), “The written record of the positive credible fear determination shall be considered a complete asylum application for purposes of §§ 208.4(a), 208.7, and 208.9(a)”); Notice at 46944 (proposing changes to § 208.30(d), “The information provided during the interview may form the basis of an asylum application.”).

under the current system, an asylum seeker must first complete and submit an I-589 application and then wait an additional 365 days before they are eligible to apply for employment authorization.<sup>52</sup> DHS is correct that treating a positive credible fear interview as the “filing of the asylum application” may make many asylum seekers eligible for work authorization at an earlier stage in their asylum application process. Insofar as this aspect of the rule may result in more expeditious access to work authorization for some asylum seekers, it is aligned with ASAP members’ express priority of increasing speed and access to work authorization.

The difficulty and broader inaccessibility of obtaining employment authorization has been a top concern of ASAP members, who often struggle to sustain themselves and their loved ones as they spend years awaiting a decision on their primary case. Many ASAP members told us about the challenges of not being able to legally work that are faced by asylum seekers and their children living in the United States:

“It cannot be that we have to wait so long to obtain a work permit, especially if we have children to support. One comes looking for help and finds more obstacles to provide a decent standard of living for their own. We saved ourselves from oppression to face poverty away from our family and our land.”

—ASAP member from Venezuela

“I hope that decision makers hear our voice. Children are the cornerstone and pillar of the country. Life is already difficult. Parents no longer get a work permit. It is difficult to find a job. Without a job, there is no income. We are struggling to survive. What should we nurture? Talents who will be useful in the future? How can a child’s childhood not leave shadows and trauma? Will this be good for society?”

—ASAP member from China

The process of applying for work authorization is complex and cumbersome, resulting in years-long waits before applicants are able to work legally in the country.<sup>53</sup> During that time, asylum seekers have no practical means to support themselves and their families in the United States.

As noted above, one of ASAP members’ priorities is that a greater number of individuals have access to asylum and work authorization. The fact that the proposed rule may increase the number of asylum applicants placed in expedited removal, may also mean that a greater number of asylum seekers have their initial applications denied on a shorter timeline. Moreover, the potential for more expedited denials of asylum seekers’ asylum applications by the asylum office also risks making some asylum seekers less likely to receive work authorization while their cases are pending. Because DHS fails to estimate the number of asylum seekers who would likely have their asylum cases denied by an asylum officer prior to the adjudication of their work permit

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<sup>52</sup> As previously mentioned, the waiting period for ASAP members is 150 days, due to the preliminary injunction in *CASA v. Mayorkas*.

<sup>53</sup> See Human Rights Watch, *At Least Let Them Work*, 12–16 (Nov. 12, 2013) [available at: <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>].

applications, it is impossible for the public, including ASAP members, to have a meaningful opportunity to assess the likely impact of this provision of the proposed rule.

Additionally, DHS must make clear how the proposed rule will interact with other aspects of the Trump-era work authorization regulations. Under those regulations, for instance, the denial of an asylum application by an “asylum officer” or “immigration judges,” bars an asylum seeker from work authorization. Asylum officers (AO) do not “deny” affirmative asylum cases, but merely refer those cases to immigration court for standard 240 proceedings if they decline to grant asylum. Under the new rule, it should be clear that an asylum officers’ failure to grant asylum is not construed as a denial for purposes of work authorization eligibility under 8 CFR § 208.7(a)(1)(3)(E).<sup>54</sup> Treating AO referrals as denials would undermine DHS analysis because it would result in substantial curtailment of work authorization and risk forcing a substantial number of asylum seekers into poverty while IJs and the BIA review their cases. By failing to clarify that this provision would not apply to AO non-grants under the new rule, DHS has further denied the public, including ASAP members with much at stake, a meaningful opportunity to comment on a significant aspect of the proposed rule. Furthermore, by segregating rulemaking on asylum seeker work authorization, DHS has deprived the public of a meaningful opportunity to comment on the interaction of the proposed rule with future rulemaking on work authorization for asylum seekers.

In sum, considering an asylum application to be filed upon an applicant’s successful completion of a credible fear interview may help some asylum seekers have a significantly faster and more straightforward process for requesting and obtaining employment authorization. This process, however, needs to be clarified and DHS must make clear its intention to rescind Trump-era work authorization regulations before finalizing the proposed rule. ASAP members’ policy priorities make clear that changes to work authorization access should not come at the expense of more asylum seekers being unable to access work permits as a result of expeditious denials of asylum applications. To the contrary, DHS should address ASAP members’ priorities that work authorization applications be processed more quickly, *and* that a greater number of individuals have access to seek asylum and receive work authorization while their applications are pending.

iii. **Due to a lack of clarity in the proposed rule, ASAP is unable to determine whether its elimination of redundant and burdensome biometrics requirements may align with ASAP members’ goals of increasing accessibility and transparency**

Currently, asylum seekers must have their biometric information taken at a USCIS Application Support Center (ASC) before they can submit an asylum application and apply for employment authorization. Since October 2020, applicants have additionally been required to pay an \$85 service fee for their biometric appointments associated with their I-765 applications. Although this \$85 fee has been waived for ASAP members applying work permits because of the injunction in *CASA v. Mayorkas*, it is still collected from all other asylum seekers applying for work authorization.

The proposed rule states, in part, that biometric information collected during expedited removal proceedings may be used to verify the identity of asylum seekers for the purpose of their

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<sup>54</sup> Employment Authorization, 8 CFR § 208.7(a)(1)(3)(E) (2021).

asylum application and for “any subsequent immigration benefit.”<sup>55</sup> Therefore, the rule suggests that asylum seekers would no longer travel to an USCIS Application Support Center to submit their biometric information. Instead, they will have their biometric information taken at an asylum office and be able to use this same biometrics collection for other benefits applications, including I-765 work authorization applications.

Compelling asylum seekers to travel to an Application Support Center to submit their biometric information prior to requesting work authorization is an unnecessarily duplicative, time-consuming, and costly process. Several ASAP members have shared their discontent with the existing biometrics procedures, including one asylum seeker from China, who expressed confusion about why additional biometric collection is necessary for EAD submissions, noting that it “is extra work, because we already did it [after entering the U.S. for our asylum applications].”

Moreover, the process by which ASC collects biometric information from individuals applying for employment authorization has caused confusion and created opportunities for bureaucratic errors that have harmed our members, even when the errors were not their fault. Several ASAP members shared stories about the problems that can arise during biometric screening:

“Mistakes done by USCIS (not made by the asylum seeker) should not affect or slow down the asylum process. Examples: biometrics appointment received after the date the appointment was scheduled. USCIS has stopped the EAD clock although we provided the evidence that the letter was delivered after the date the appointment was scheduled for. Now it's been more than a year and we're still waiting for the employment authorization card.”

—ASAP member from Kazakhstan

“The notifications do not arrive on time or they arrive too late, in our case we received the letter with the date to take the biometric fingerprints and when we received said letter the appointment had already passed!! We missed that appointment because the letter arrived too late. Then we sent another letter to request a new appointment for the prints and they left us in limbo. We received nothing. It is a painful situation.”

—ASAP member from Venezuela

“I missed my mail the first time so I missed my biometrics appointment. This has delayed my work permit and I had no option but to move to a shelter as I could not afford paying rent. I would appreciate it if they could consider adjusting the number of days it takes as people are suffering.”

—ASAP member from Kenya

While comments from some ASAP members indicate potential support for the elimination of duplicative and costly biometric services, there are other critical details required to better understand the ramifications. For example, there is a potential concern that the relatively low number of asylum offices throughout the country could place significant time and travel-cost

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<sup>55</sup> Notice at 46941 (proposing changes to § 208.3(a)(2)).

burdens on asylum seekers whose biometric information is not captured at the border, which would conflict with members' goals of creating greater accessibility. The proposed rule acknowledges that "the average distance and travel time is likely to differ between asylum offices and ASCs" but does not attempt to calculate the economic impact of these changes on asylum seekers.<sup>56</sup> The Department must engage in a full accounting of the impact this change will have on asylum seekers and encourages the government to ensure that services provided in just 10 asylum offices nationwide are more widely available and accessible to asylum seekers throughout the country. Without an adequate analysis of the time and burden of travel on asylum seekers associated with new biometrics collection, the public, including ASAP's members, cannot meaningfully assess and comment on the likely impacts of DHS's proposal, and ASAP cannot adequately determine whether this proposed change aligns with its members' priorities.

iv. **The proposed change eliminating parole as an independent basis for employment authorization conflicts with ASAP members' priority of increasing swift access to work authorization**

Asylum seekers who have been paroled into the country and who have passed a credible or reasonable fear interview are currently ineligible to apply for employment authorization on the basis of their parole due to changes made by the Trump-era work authorization regulations.<sup>57</sup> Individuals who have been granted parole but were *not* given a credible fear interview may apply for employment authorization on the basis of their parole status or on the basis of a pending asylum application after they have completed form I-589 and completed the requisite 365 day waiting period.<sup>58</sup> In the proposed rule, however, DHS proposes to eliminate parole-based work authorization entirely, by amending section 235.3(b)(4)(ii), which would specify that a grant of parole "cannot serve as an independent basis for employment authorization" for asylum seekers.<sup>59</sup> This proposal is again at odds with DHS's averment that it plans to "rescind" the Trump era-work authorization regulation that first eliminated parole based work permits for asylum seekers who are given a CFI or RFI.<sup>60</sup> In the absence of clarity as to how these two proposed rules will interact, and whether parole-based work authorization will be eliminated entirely, the public, including ASAP members, have been denied a meaningful opportunity to comment.

Crucially, ASAP members' believe DHS should increase work authorization access, rather than eliminate eligibility. Rather than eliminate parole-based work authorization, DHS should act in line with ASAP members' priorities and rescind the Trump-era work authorization rules and fully restore parole-based EADs for asylum seekers. Although some asylum seekers may be able to apply for work authorization based on the asylum applications, applications for work

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<sup>56</sup> Notice at 46929.

<sup>57</sup> Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (June 26, 2020).

<sup>58</sup> See 8 CFR § 274a.12(c)(11).

<sup>59</sup> Notice at 46946.

<sup>60</sup> See DHS Unified Agenda, Agency Rule List – Spring 2021, *supra* note 38 (stating that DHS proposes the "Rescission of "Asylum Application, Interview, & Employment Authorization" Rule and Change to "Removal of 30 Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization").

authorization based on parole can allow for immediate work authorization applications, not subject to the 365-day waiting period for asylum-based applications.

In this way, parole-based work authorization can serve an important gap-filling function and avoid forcing asylum seekers into exploitative labor relationships while they wait for their asylum cases and other work permit applications to be processed. Several ASAP members have shared that being forced to wait months or years before an adjudication of their claim without any means to find legal employment lends itself to abusive and harmful employment arrangements. These are marked by unscrupulous employers taking advantage of our members' desperation and lack of options to support themselves and their families.

“I think that you should not wait so long for a work permit, I think that like everything, it should have a filter, but keeping a person for so long without the possibility of working legally allows the rate of illegal jobs and employers to increase. They abuse workers while paying a pittance. And it is the same need that leads people to accept any job for the payment that suits the employer best. I think they should give priority to work permits.”

—ASAP member from Venezuela

ASAP strongly encourages DHS not to move forward with the proposed change to section 235.3(b)(4)(ii) and, to make sure future regulations ensure that a grant of parole may continue to serve as an independent basis for employment authorization while also considering other recommendations from directly impacted asylum seekers about how to expand and expedite work authorization access.

## **B. Placement of asylum-seekers in affirmative proceedings**

### **i. ASAP is concerned that the proposal to place asylum seekers initially in affirmative proceedings may conflict with member priorities by decreasing accessibility and transparency, and limiting the overall number of individuals eligible for immigration relief**

In the absence of clarity as to the likely effect of the rule, ASAP cannot adequately assess whether it aligns with its members' priorities, or whether it may diverge from those priorities by decreasing the overall number of individuals eligible to seek asylum. As a result of the lack of detail, it is not clear the extent to which asylum seekers who be negatively impacted if placed in affirmative proceedings without a guarantee of full 240 proceedings for those who do not initially receive asylum an Asylum Officer. For example, the departments failed to report critical information, including the percentage of asylum seekers who win asylum in 240 proceedings after being referred by an Asylum Officer who did not grant asylum. Moreover, if the rule would, in fact, decrease the due process protections of asylum seekers by denying them the benefit of full 240 proceedings, it may run afoul of ASAP members' demands for increased accessibility and easy access to the asylum process. At minimum, the proposed rule as written conflicts with ASAP members' priorities because it raises major transparency concerns about how DHS will handle cases once they have been reviewed by an AO.

Crucially, the limited number of asylum offices in the U.S. — 10 total — also presents major accessibility concerns insofar as DHS has not addressed whether the proposed rule will increase backlogs and wait times for affirmative cases. DHS has not clarified its plans to expand the number of offices, whether it otherwise has plans to allow remote or virtual hearings, or whether it will place greater burdens of travel and resource expenditure on asylum seekers. It is also not clear how placing more individuals in affirmative proceedings will address the long wait times already associated with asylum offices. As our members have made clear, it is excruciatingly difficult and stressful to spend up to five years in limbo awaiting a decision on their asylum application:

“We’ve been waiting for an interview for six years. [This] whole six years was so stressful and challenging for us. We feel we are stuck here, and nobody can help/hear us. Every day we wake up with the hope that today we will receive our interview notice. We cannot go out of the country to see our families, and they cannot come to visit us because of the travel ban.”

—ASAP member from Iran

“The asylum process is long, expensive, and stressful. One mistake can drag it on for years, whether it’s the judges fault or your own. Something as simple as a judge retiring can extend the court date by years.”

—ASAP member from Russia

Speeding up the asylum process is among our members’ top priorities, but DHS must not enact a faster process at the expense of important due process protections, which conflicts with ASAP members’ other priorities of increasing access to asylum. We are concerned that several components of the proposed rule, discussed below could, if not adequately clarified or amended, result in the creation of a de-facto “rocket docket” that would place asylum seekers at risk of summary deportations — absent clarification on the potential impact of these provisions, ASAP has been denied an opportunity to meaningfully comment on the proposed rule.

ii. **The proposal to require a full transcript and recording of all hearings of asylum proceedings may align with ASAP members’ priorities of increasing accessibility and transparency**

The Proposed Rule includes a provision specifying that all affirmative proceedings before an asylum officer must be recorded, and that a transcript of that recording must be included in the record if an asylum seeker appeals a negative judgment of their claim.<sup>61</sup> We believe this proposed requirement aligns with ASAP members’ priorities of increasing transparency and accessibility by providing a full transcript of asylum seekers’ of CFI interviews and other proceedings before USCIS in their referral package.<sup>62</sup>

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<sup>61</sup> Notice at 46942 (proposing changes to § 208.9(f)(2)).

<sup>62</sup> ASAP also supports the inclusion of electronic communication as a means of communicating an AO’s notes, findings, and decision to applicants. This change would improve accessibility and was requested by numerous ASAP members. (*Id.* “...the asylum officer will so inform the [noncitizen] and issue the [noncitizen] a record of the positive credible fear determination, including copies of the asylum officer’s

Asylum seekers and pro bono attorneys alike have expressed frustration that full transcripts of credible fear interviews and other proceedings before immigration judges are not typically available to them. This lack of transparency can pose challenges for our members and—for those who are fortunate enough to secure legal counsel—for their attorneys as well. As a result, asylum seekers’ only option is often to go through the arduous process of submitting a FOIA request to get information about their case. But, as one ASAP member from Nicaragua explains, submitting a FOIA for a transcript of their CFI or other merits hearing is rarely practicable or useful by the time a transcript is ultimately received — a reflection of ASAP members’ broader concern that how needless procedural requirements make the asylum system less accessible:

“In Immigration Court cases, the government should be required to automatically produce to the noncitizen (or the noncitizen’s atty) all documents in the noncitizen’s file, including but not limited to all interview transcripts. The FOIA process takes six months or longer and is onerous. The FOIA process is worthless to detained noncitizens because their individual hearings take place quickly, months before any FOIA documents are produced by USCIS.”

—ASAP member from Nicaragua

ASAP asks, however, that DHS clarify how asylum seekers will be able to access these hearing transcripts. Such information is crucial for our members to understand before ASAP can take a position on this provision. Specifically, it would be helpful to understand whether asylum seekers would functionally be required to seek assistance from counsel or whether the process would allow for most asylum seekers to complete their own asylum applications pro se. ASAP also asks the Departments to respond to the possibility of widening the scope of this provision to ensure that full transcripts of all proceedings before Immigration Judges are made easily accessible to asylum seekers as well. These transcripts can be similarly crucial for asylum seekers as they prepare appeals and take other action related to their case.

**iii. ASAP is concerned that the proposed restriction on including family members who have not gone through credible fear screening in an asylum seeker’s application may conflict with its members’ priority of increasing access to asylum**

Under proposed §208.3(a)(2), an asylum seeker’s spouse and children may only be included in their asylum application if they were also included in the asylum seeker’s credible fear screening or they have also completed a credible fear screening and consequently have their own pending application for asylum with USCIS.<sup>63</sup> Currently, an asylum seeker has up to one year after arriving in the U.S. to file their asylum application, and can subsequently include their spouse and children who are present in the United States at any time up until the final decision is made, in

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notes, the summary of the material facts, and other materials upon which the determination was based. The documents may be served in-person, by mail, or electronically.”)

<sup>63</sup> Notice at 46941 (proposing changes to § 208.3(a)(2), “The applicant’s spouse and children may be included in the request for asylum only if they were included in the credible fear determination pursuant to § 208.30(c), or also presently have an application for asylum pending adjudication with USCIS pursuant to § 208.2(a)(1)(ii).” 208.2(a)(1)(ii) refers to the process for credible fear screening.)

affirmative cases. This flexibility is important for many families who arrive to the U.S. at different times or through different ports of entry, but whose asylum claims are connected.

The proposed rule §208.3(a)(2), combined with the new procedures for credible fear screening and filing an asylum application, will cause many families to have difficulty joining and fighting their claims for asylum. Because the proposed credible fear screening process would result in the automatic filing of an asylum application for people in expedited removal, many applications will be filed virtually upon arrival, joining only the claims of the family members who arrived together.

While this has several benefits in terms of timing, DHS has failed to consider how this timing will affect the many asylum seekers who do not cross the border with their family members and will therefore not have any opportunity to join their claims. The proposed changes may thus prevent some individuals from joining family members meritorious asylum claims, and if so would conflict with ASAP members' priority of increasing access to asylum.

Oftentimes, one or two family members will enter the U.S. first. Some family members may be placed into expedited removal, while others are not (currently some are expelled under Title 42, for instance). This is true even though their claims of persecution and fear may be identical or tied together. Under the proposed rule, family members who arrive separately but are not given a CFI do not even have the option to file an asylum application and then join their claim, because to be eligible for inclusion, their applications must be filed through the credible fear screening process under 208.2(a)(1)(ii).<sup>64</sup> Explicitly limiting the family members who can be included on an asylum application not only complicates the process for asylum-seeking families, but undermines efficiency by forcing asylum officers to adjudicate multiple separate cases for the same claims.

Finally, this rule may result in family separations, which is a cruel and inhumane result in conflict with ASAP members' priorities; given disparities in asylum officer approval rates, differences in access to evidence and testimony, and availability of legal counsel, inevitably, some family members' asylum cases will be approved, and others denied, where they could have otherwise been joined.

If DHS plans to implement a new process for filing asylum applications, ASAP believes it must take into account the realities of when and how asylum seekers arrive to the U.S.: at different times and in different places, in groups or alone, and most often, overwhelmed by the complexity of the asylum system they have only just encountered. As exists now, in order to increase accessibility to asylum in line with ASAP members' priorities, there should be a straightforward mechanism for including family members, not only at the filing stage but up until adjudication.<sup>65</sup> Any proposed rules must also make this procedure clear and accessible.

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<sup>64</sup> Notice at 46941 (proposing changes to § 208.3(a)(2)).

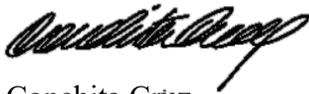
<sup>65</sup> Likewise, ASAP believes that the default inclusion of concurrently arriving family members on the principal applicant's CFI evaluation is likely in line with its members' priorities of increasing access to asylum. However, ASAP does not believe that judges should have discretionary authority to exclude spouses and family members not included in the original credible fear determination because this will likely decrease access to asylum for asylum seekers' family members.

## V. Conclusion

As an alternative approach to the proposed rule, ASAP urges DHS to strive to create an asylum system that, at minimum, welcomes with dignity — one that prioritizes accessibility and recognizes the humanity of each person who crosses our borders. Instead of finalizing the proposed rule the government should convene stakeholder meetings with impacted asylum seekers and reevaluate its approach to reforming of the asylum system based on their recommendations.

Thank you for your time and consideration of this comment.

Sincerely,



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