PROYECTO DILLEY


October 19, 2021

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Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

Dear Ms. Strano and Ms. Alder Reid:

We appreciate the opportunity to comment on the Department of Homeland Security's (DHS) and Department of Justice's (DOJ) (collectively, the Departments) proposed rulemaking regarding Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.

Each of our organizations, based at the Southwest border, represents migrants in expedited removal proceedings. That work informs our reactions to the proposed rule. We believe that the Departments must consider how the credible fear screening process currently functions, its significant limitations, and its frequent errors as they evaluate the proposed rule and consider necessary modifications to that proposal. We submit this comment to provide that information.

In brief, we understand that the Departments' goal is to make the credible fear screening process more efficient and expeditious. The Departments' proposal that U.S. Citizenship and Immigration Services (USCIS) asylum officers be empowered to resolve asylum claims for individuals who pass initial credible fear screenings is a step toward that outcome, so long as that new process includes appropriate procedural protections. The Departments fail to understand, however, that the credible fear interview (CFI) and subsequent immigration judge (IJ) review of a negative credible fear (CF) determination are fundamentally unfair—they regularly fail to comply with the low screening standard, violate regulatory and statutory protections, and result

in expulsions of asylum seekers with potentially valid claims.[1] As part of this rulemaking, the Departments should reform credible fear screenings to ensure that they do not build a new regulatory scheme on a fundamentally unfair foundation.

Beyond that, given the inadequacies of the current system, until a new system is in place and has been proven to be fair and equitable, the Departments' proposal to eliminate the opportunity to request reconsideration of negative CF determinations should not be adopted. Rather than eliminating this protection, the Departments should take steps to bring the credible fear screening process into compliance with legal requirements, as discussed in more detail below. Doing so will result in a fairer and more orderly system, with the attendant benefit of making requests for reconsideration less necessary. Regardless, the Departments should regularize the USCIS reconsideration process and provide guidelines for requests they will consider, not eliminate it.

This comment provides information about our experiences with CFIs, IJ reviews of negative CF determinations, and subsequent requests for reconsideration (RFRs), and recommends modifications to the proposed rule based on these experiences. Accordingly, we do not opine on all aspects of the proposed rule in this comment. Several of us provide additional information and reactions in other comments, however.

I. Our organizations.

Florence Immigrant & Refugee Rights Project (FIRRP) provides free legal and social services to adults and unaccompanied children in immigration detention in Arizona. We work in four detention centers in Arizona— Eloy Detention Center, La Palma Correctional Center, Florence Correctional Center, and Florence Detention Center. In addition, in 2017 we partnered with the Kino Border Initiative, a binational organization in the U.S.-Mexico border region. As part of that partnership, we provide services to hundreds of asylum seekers every year who arrive at their humanitarian aid center in Nogales, Mexico.

Las Americas Immigrant Advocacy Center provides free and low-cost legal services to immigrants and refugees in West Texas and New Mexico. Our Detained Deportation Defense Program serves detained migrants in the El Paso Processing Center, Otero Service Center, and West Texas Detention Center.

Proyecto Dilley (formerly the Dilley Pro Bono Project/CARA) utilizes large cohorts of volunteers that travel from across the country to provide pro bono legal services to all immigrant families detained at the South Texas Family Staging Center in Dilley, Texas.

[1] At the outset, we note that each of our organizations opposes the use of expedited removal entirely and intends to advocate with Congress to eliminate it from statute. In our experience, expedited removal is one of the most harmful aspects of U.S. immigration law and violates both international and domestic law by resulting in wrongful deportation of asylum seekers and torture survivors. However, for purposes of this comment, we seek to suggest reform of the expedited removal process to better protect the due process rights of asylum seekers, and the fundamental fairness of the asylum adjudication system.

Refugee and Immigrant Center for Education and Legal Services (RAICES) provides affirmative, defensive, and litigation services to low-income immigrants, including for asylum seekers in expedited removal proceedings. Our staff works in detention centers in Texas, including the South Texas ICE Processing Center (known as Pearsall), the Karnes County Family Residential Center, and detention centers in and around Dallas, Houston, and Laredo.

Collectively, we have provided legal services to tens of thousands of asylum seekers who have undergone expedited removal proceedings across the Southwest border of the United States.

II. The credible fear standard is low and protective of applicants, but this standard frequently is not realized.

It is worth remembering that expedited removal began at a time when most individuals subjected to it were not asylum seekers—it was not created to be an asylum screening process.[2] Accordingly, the CFI "is an initial review meant to quickly identify potentially meritorious claims and screen out frivolous ones," not a final adjudication of the asylum claim.[3] Congress intended the credible fear standard "to be a low screening standard for admission into the usual full asylum process."[4] It was intentionally set so low that "there should be no danger that an alien with a genuine asylum claim" would be summarily "returned to persecution."[5] Accordingly, the credible fear standard requires only that applicants show "a significant possibility" that they could establish eligibility for asylum, withholding of removal, or CAT protection. 8 U.S.C. § 1225(b)(1)(B)(v) (defining "credible fear of persecution"); 8 C.F.R. § 208.30(e)(2), (e)(3).

An applicant can establish "eligibility" for asylum in full proceedings by showing either any instance of past persecution or a well-founded fear of future persecution,[6] defined as a one-in-ten chance that a noncitizen will be persecuted on account of a protected ground.[7] At the credible fear stage, an applicant does not need to establish even that, however, only a much

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[2] David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int'l L. 673, 675 (2000) (The "vast majority of people subjected to [expedited removal] never assert a fear of return or of persecution."). As the Departments are aware, however, the nature of migration over the Southwest border has changed dramatically in the decades since, making many more asylum seekers go through expedited removal than was ever intended.

[3] Barriers to Protection at 34; *see also* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) (credible fear standard is a screening mechanism that sets "a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum").

[4] 142 Cong. Rec. S11491-02 (1996).

[5] H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

[6] *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 42 (D.D.C. 2020).

[7] *See Cardoza-Fonseca*, 480 U.S. at 431-432 (describing well-founded fear standard as a one-in-ten chance of persecution).

lower "significant possibility" that the applicant will be able to do so later, in full proceedings, with the benefit of more time and resources to prepare their case and the possible assistance of counsel. 8 U.S.C. § 1225(b)(1)(B)(v).

Recent federal court decisions interpreting the statutory credible fear definition have made clear how low this standard is, and the importance of focusing the standard not on whether the applicant has shown in a single interview that they *are* eligible for relief, but merely that they might be able to show they are eligible for relief in the future.[8] Further, because full proceedings could take place in a different judicial circuit that than in which the credible fear interview occurs, and because the standard focuses on the possibility of success in those future full proceedings, asylum officers and IJs applying the credible fear standard must give the applicant the benefit of the most-favorable Circuit court precedent on any legal issue of potential consequence.[9] And because the law concerning particular social groups is difficult for even experienced adjudicators to parse after full briefing, asylum officers and IJs cannot find a lack of credible fear because the applicant failed to delineate a particular social group.[10] Because the statutory credible fear standards focuses on the possibility of establishing "eligibility" for asylum, for which showing past persecution or a well-founded fear of persecution alone is sufficient, an asylum officer or IJ must find credible fear if a significant possibility of establishing either is shown, without going on to consider internal relocation or changes in circumstances.[11] Because an applicant satisfies the credible fear standard by merely showing they "*might* be able to establish the elements of her claim with the assistance of counsel during the subsequent full removal proceedings," a credible fear finding is often compelled "even if the noncitizen cannot be said to have established all of [the] elements [for eligibility for asylum] at the time of her credible fear interview.[12]

As discussed in detail below, we frequently observe asylum officers failing provide the procedural protections that ensure asylum seekers are considered under this low standard or actually applying the wrong legal standard.

III. <u>The experience of an asylum seeker in expedited removal at the Southwest border.</u>

A full understanding of asylum seekers' experiences in expedited removal is necessary to inform the Departments' analysis of the proposed rule. The rule's proposed changes would make the initial credible fear interview and associated record more important in the adjudication of the asylum seekers' fear claim and subsequent asylum application. But making these changes without enhancing procedural protections does not reflect an accurate understanding of how the

[8] *See, e.g., Grace v. Whitaker*, 344 F. Supp. 3d 96, 139 (D.D.C. 2018), *aff'd in relevant part by Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); *Kiakombua v. Wolf*, 498 F. Supp.3d 1 (D.D.C 2020), *appeal dismissed by Kiakombua v. Mayorkas*, No. 20-5372, 2021 WL 3716392 (July 19, 2021).

[9] *Grace v. Whitaker*, 344 F. Supp. at 139.

[10] *Id.* at 134.

[11] *Kiakombua*, 498 F. Supp. 3d at 38-44.

[12] *Id.* at 45-46.

credible fear screening process works, particularly the ways in which it frequently fails applicants.

A. Asylum seekers' experiences of trauma and language barriers make it difficult for them to explain the basis for their asylum claim.

A person with a valid asylum claim will typically have suffered from one or more traumatic incidents—indeed, those traumas are often the basis for the claim.[13] Accordingly, in our experiences, asylum seekers often suffer from anxiety, depression, and other effects of trauma, including post-traumatic stress disorder.[14] An ICE Advisory Committee has agreed with our assessment.[15] Additionally, migrants' journeys to the Southwest border are dangerous, often compounding prior experiences of trauma, and current United States policies imposed at the border, including the Migrant Protection Protocols, compound this trauma further.

These conditions make it difficult for asylum seekers to navigate procedural requirements and advocate for themselves. Traumatized people often find it difficult to describe traumatic events clearly and completely,[16] a difficulty that is made worse in adversarial conditions. For example, trauma often causes asylum seekers to respond to interviews in the following ways:

- The asylum seekers' stories contain ambiguities, to the point that they do not seem to add up.

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[13] "Extensive trauma experienced in the pre-migration period provides the basis for fleeing the circumstances in the country of origin and are emblematic of the need to seek asylum." Madeleine C. Silverstein et al., *Continued Trauma: A Thematic Analysis of the Asylum-Seeking Experience Under the Migrant Protection Protocols*, Health Equity, 279 (Apr. 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8175263/pdf/heq.2020.0144.pdf.

[14] Our impressions are consistent with the research. *See*, *e.g.*, U.S. Comm'n on Int'l Religious Freedom, Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal (2016) (Barriers to Protection), available at https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf (Physicians for Human Rights, a non-governmental organization, reported in a 2003 study that among 70 detained asylum seekers interviewed, 77 percent reported clinically significant levels of anxiety, 85 percent depression, and 50 percent PTSD.); *see also* Silverstein *supra* n.2, at 283 ("Globally, asylum seeker populations have experienced extensive pre-migration trauma and have been shown to have a high prevalence of PTSD and depression.").

[15] U.S. Immigration and Customs Enforcement (ICE), *Report of the ICE Advisory Committee on Family Residential Centers* 114 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf.

[16] It can take experienced asylum attorneys several meetings over many days to build the trust needed for clients to share the traumatic circumstances that prompted them to flee to the United States. *See*, *e.g.*, Am. Immigration Laws. Ass'n, *Letter from Am. Immigration Council et al. to Directors of USCIS and ICE*, 2-3 (Dec. 24, 2015) (AILA Letter), https://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process.

- They answer some open-ended questions with one-word answers.
- They provide lengthy answers to other questions, but the answers are hard to follow—places, dates, and times blur.
- Their emotional behavior does not make sense; they show no emotion at all when discussing distressing events but exhibit significant emotion about things that seem mundane.
- They are not fully present, appearing to drift in and out mentally.
- Their story contains significant, seemingly inexplicable gaps.[17]

Further, for the many asylum seekers who have been victimized by government personnel, who were unable to obtain protection from government personnel, or for whom government personnel collaborated with their persecutors, it is difficult to believe that it is safe to provide complete accounts of their victimization to the U.S. government personnel who interview them. As a result, especially without legal counsel and trauma-informed questioning, asylum seekers may not be able to describe the basis for their asylum claims accurately and completely, and they may appear non-credible when in fact the history of trauma prevents the asylum seeker from fully participating in the process through no fault of their own.

As an ICE Advisory Committee found, detention compounds these problems.[18] Numerous studies, including the Committee's analysis, show that the negative mental health consequences of detention are particularly acute for children, asylum seekers and other vulnerable populations.[19] Detention re-traumatizes survivors of violence and sharply limits access to legal counsel and mental health services.[20]

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[17] The Ctr. for Victims of Torture, *Designing a Trauma-Informed Asylum System in the United States* 8 (2021), https://www.cvt.org/sites/default/files/attachments/u101/downloads/2.4.designing_a_trauma_informed_asylum_report.feb42021.pdf. Depression and PTSD negatively affect the encoding of memories. As a result, refugees suffering from those conditions are less likely to recall the details of their persecution, especially peripheral details, consistently over time, and are more likely to recall memories in overgeneralized terms. Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. Health & Biomedical L. 37, 44-45, 49 (2010); Jane Herlihy et al., *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, 26 Applied Cognitive Psychology 661, 663-669, 671 (2012); *see also* Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 Hastings Race & Poverty L.J. 235, 257 (2007).

[18] ICE *supra* n. 15, at 11, 118; *see also* Barriers to Protection at 38 ("Research also has shown that prolonged detention of torture victims can cause severe chronic emotional distress, including chronic anxiety and dread, dangerous and physically damaging levels of stress, depression and suicide, and post-traumatic stress disorder (PTSD).")

[19] ICE *supra* n. 15, at 114.

[20] *Id.*; Craig Haney, *Conditions of Confinements for Detained Asylum Seekers Subject to Expedited Removal*, U.S. Comm'n on Int'l Religious Freedom 178 (Feb. 2005),

Asylum seekers, including our clients, also typically face serious language barriers. The numbers of rare and indigenous language speakers seeking asylum at the Southwest border have increased over the last several years.[21] Translation and interpretation services are frequently only available for common languages such as Spanish, French, and Portuguese.[22] As an ICE Advisory Committee previously concluded, for detainees who speak various Central American indigenous languages, "DHS systematically fails to provide appropriate language access. That failure threatens both their health and safety while they are in DHS custody, and their fair immigration adjudication."[23] The Committee observed that "providing indigenous language interpretation is almost certainly too challenging for ICE to manage." Our experiences working with rare and indigenous language speakers in expedited removal are consistent with those of the Committee.

B. Asylum applicants receive little notice prior to their credible fear interviews, making it difficult to prepare or have the assistance of counsel.

CFIs screen asylum applicants in expedited removal proceedings to see if the applicants could qualify for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The interview is profoundly important: applicants found to have a credible fear are no longer subject to expedited removal, proceeding instead through the regular and more robust removal process (known as Section 240 proceedings, by reference to the relevant section of the Immigration and Nationality Act).[24] Migrants who fail the credible fear screening may be

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https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/conditionConfin.pdf. For more information and examples of due process failures in expedited removal proceedings for traumatized applicants in detention please see the following complaint to the DHS Office of Civil Rights and Civil Liberties: https://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention.

[21] *See*, *e.g.*, Rachel Nolan, *A Translation Crisis at the Border*, The New Yorker (Jan. 6, 2020), https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border; Tom Jawetz & Scott Shuchart, *Language Access Has Life-or-Death Consequences for Migrants*, Ctr. for Am. Progress (Feb. 20, 2019), https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/.

[22] Memorandum from Ted H. Kim, Acting Chief, USCIS Asylum Division to USCIS Asylum Office Directors (June 14, 2013), https://www.uscis.gov/sites/default/files/document/memos/Processing-CF-RareLanguageInterpreter-Unavailable.pdf.

[23] https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf (p.79); *see also* Human Rights First, Family Detention: Still Happening, Still Damaging 11-12 (2015), http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf.

[24] The proposed rule would change this process by allowing USCIS asylum officers to fully adjudicate protection claims of individuals who establish a credible fear. 86 Fed. Reg. at 46,917. While this comment does not address the merits of that proposal in detail, we note that while we believe there are significant benefits from the proposal given asylum officers' expertise, we are

removed from the United States with minimal additional process. The record of the CFI also remains part of the applicant's official file, against which future claims will be compared.

DHS regulations provide asylum seekers with a reasonable opportunity to consult with counsel and other third parties: asylum seekers "shall be given time to contact and consult with any person or persons of his or her choosing," 8 C.F.R. § 235.3(b)(4)(ii); they "shall" be informed of that right, *id*. § 235.3(b)(4)(i), and that the persons they consult "may be present at the interview," and may even be permitted to "present a statement at the end of the interview," *id*. § 208.30(d)(4). In promulgating these regulations, which were the product of the government's "careful[] consider[ation]" of how best to ensure that bona fide asylum seekers can assert their claims while simultaneously expediting the removal process, the government specifically noted that it "intends that aliens will normally be given 48 hours from the time of arrival at the detention facility, in which to contact family members, friends, attorneys, or representatives.[25] *id*. at 10,320. Families should receive 72 hours to do the same.[26]

Practically, however, applicants in detention frequently cannot realize the right to have time to prepare for their CFIs and coordinate with counsel. Applicants are regularly scheduled for the interviews with little or no notice. Our clients are frequently notified in the morning that their interview will occur later that day. We understand that one reason for this lack of advance notice is that the interview schedule is provided by USCIS, but USCIS does not have a physical presence at most detention centers, which requires it to rely on ICE and the detention facility staff to provide the notice. This process frequently breaks down. For applicants with counsel, counsel is almost never notified of an upcoming CFI by USCIS. This is true even when we have officially notified the asylum office of our representation of the applicant (via submission of the "G-28" form).[27] This lack of notice makes it difficult to prepare applicants for their interviews because we cannot prioritize which of our many clients to prepare based on when the interview will occur.

The lack of sufficient notice also makes it difficult to ensure that representation will be available at the time of the interview. Typically, the asylum officer will ask an applicant at the beginning of the interview if the applicant has legal representation. If the applicant responds affirmatively, the officer will call the counsel—sometimes by calling the lawyer directly and sometimes by calling the legal organization's main number. This lack of notice and the corresponding need to be available immediately makes it extremely difficult to participate in our

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concerned about the attendant loss of procedural protections in the Section 240 removal proceedings.

[25] 62 Fed. Reg. at 10,318, 320.

[26] *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 11 (D.D.C. 2020).

[27] In certain sectors it can be logistically difficult to submit a G-28 that will be honored. The form requires a signature from the represented party but obtaining those signatures in a timely way for detained asylum seekers can be impossible given delays in mail and visitation access. Some ICE offices accept G-28s which are unsigned by the client if the attorney indicates that the client is detained, and they honor those forms at least on an emergency basis. This practice facilitates access to counsel.

clients' CFIs. The problem is further compounded by asylum officers conducting interviews remotely from different time zones, which results in interviews occurring as early as 6 or 7 a.m. local time. If we had advance notice of those early morning interviews, we could prepare to attend them but, without any notice, doing so is difficult.

If the attorney is not immediately available, the asylum officer conducting the CFI will ask the applicant if the applicant would like to proceed forward without counsel. While being represented by an attorney is in their best interest,[28] our clients often agree to proceed without one because they believe it may be their best or only chance to talk to an asylum officer. They are also motivated to proceed with the interview to have a chance at release from detention. To that point, we have observed significant delays in conducting CFIs, sometimes by a matter of months. Combined with the frequently inhuman conditions in detention, asylum seekers are effectively coerced by the fear of further prolonged detention to proceed with any chance for release, even if doing so forgoes representation.[29]

Representation prior to and during the CFI makes it substantially more likely that an asylum seeker will be able to effectively explain the basis for his or her asylum claim. We counsel applicants on the importance of including all relevant facts, even those they may not realize are important (like threats experienced by family members, which can help establish an asylum claim), and those that are difficult to talk about because of trauma and stigma (such as sexual assaults). As we discuss in further detail below, while asylum officers are required to elicit all relevant and useful facts, they often fail to do so, making support by counsel profoundly important. In addition, we have found that our presence makes it more likely that the asylum officer will follow required procedures. And, finally, when we attend interviews, we can identify errors or omissions in the record of the interview, which is essential because the interviews are not recorded or transcribed.

We have also observed that rare language speakers are more likely to be unrepresented in their CFIs, and often only contact legal service providers after they have already been issued a negative CF determination. They will not have received information in a language they understand well (or, frequently, at all) and do not have a community within the detention center to help them find our organizations or other legal assistance. By the time we connect with asylum seekers in this situation, it is very difficult to prepare for the IJ review hearing because we must find a rare language interpreter on short notice in addition to requesting and reviewing their negative CF determination and preparing for court.

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[28] Barriers to Protection at 52.

[29] For more information on the unacceptable conditions in migrant detention facilities, please *see* ACLU Research Report, *Justice-Free Zones, U.S. Immigration Detention Under the Trump Administration* (2020), available at https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration.

C. In practice, CFIs typically do not meet the requirement to "elicit all relevant and useful information."

The purpose of CFIs is "to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). But, in practice, they frequently fail to meet this standard. For people in detention, the CFI typically takes place in circumstances that make it difficult, if not impossible, for applicants to tell their story completely and be understood by the asylum officer.

First, the interview is typically conducted by telephone.[30] Although the COVID-19 pandemic limited in-person interviews, phone interviews were increasingly common even before the pandemic.[31] Typically the applicant is in a room alone with a telephone, while the asylum officer, the interpreter, and counsel (if any) are on separate phone lines.[32] In some circumstances, especially in the Arizona detention facilities, the applicant may be on the phone in a not-fully-private booth or a public space where they may be overheard and where there can be significant background noise. The phone connections are typically poor—in our experience at least half of these phone interviews have connection problems with poor quality audio and frequent dropped calls. It is common for a single interview to utilize two or more interpreters because calls keep dropping. Conducting the interview over the phone makes it difficult to communicate clearly and completely. Communication is even more difficult over the phone when describing the violent and traumatic events that support claims for asylum.[33] Conducting CFIs over the phone is particularly problematic for asylum seekers with diminished capacity, including serious mental health illnesses, as the asylum officers are unable to observe their facial or body cues.

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[30] An EOIR-commissioned study found many of the same problems in IJ proceedings conducted by videoconference (VTC) that we discuss herein about telephonic CFIs, including that "[f]aulty VTC equipment, especially issues associated with poor video and sound quality, can disrupt cases to the point that due process issues may arise." It also noted that VTC technology limits the ability to make eye contact and transmit nonverbal cues. Booz Allen Hamilton, *EOIR Legal Case Study Summary Report* at 23 (Apr. 2017), available at https://www.aila.org/casestudy. And, of course, phone interviews lack even the visual benefit of video.

[31] In 2009, only two percent of all 5,369 credible fear interviews were conducted by telephone. The number and rate of telephone interviews skyrocketed in just five years: By 2014, 59 percent of the 51,001 credible fear interviews were conducted by telephone. Barriers to Protection at 36.

[32] During the COVID-19 pandemic, ICE facilities have implemented quarantine protocols, which significantly restrict the movement of individuals held in detention. For families detained at the Family Residential Centers, childcare has been severely curtailed during the pandemic. As a result, the Asylum Office routinely conducts CFIs with children and other family members present with the individual being interviewed, which significantly impacts the adult asylum seeker's ability to share incidents of harm for fear of further traumatizing their child.

[33] "Asylum seekers interviewed by telephone may find it more difficult to recount fully to the asylum officer, through an interpreter, the details of violent and traumatic events." Barriers to Protection at 36.

When we represent clients in these interviews, we are also typically on the phone and are not permitted to speak until the end, when we are sometimes permitted to make a closing statement. When our phone connection is dropped during the interview, it is impossible to rejoin unless the asylum officer realizes the call has been dropped and calls us back. This denies our clients their right to counsel, particularly since there is no knowing, voluntary, or intelligent waiver when our absence goes unnoticed for prolonged periods of the interview.

Not being physically present also makes it nearly impossible to establish rapport with our client or provide the moral support that attorneys are able to provide during in-person interviews. In our experience, being physically present with a client and providing nonverbal encouragement to continue describing the traumatic events that led them to flee their home countries facilitates their ability to describe their experiences completely.

These difficulties in communication are compounded by the fact that most asylum seekers require language interpreters to facilitate the interview. Even for languages for which qualified interpreters are typically available (e.g. Spanish, French, Portuguese), communicating through an interpreter is difficult. Our clients frequently have the experience of an interpreter interrupting their narrative or telling them to slow down, and then not being able to continue that portion of the narrative because the asylum officer then asks another question. In this way, essential information is omitted.

Language is an even more substantial barrier for rare and indigenous language speakers, for whom qualified interpreters are difficult to locate. CFIs are required take place "competently in a language the alien speaks and understands." 8 C.F.R. § 208.30(d)(5). Frequently, however, asylum officers instead ask if the applicant speaks Spanish (or another common language), and applicants who speak only some Spanish will agree to proceed with the interview despite lack of fluency. Indigenous and rare language speakers are often pressured to proceed with the interview in their second or third-best language when rare language interpreters are unavailable. Our clients tell us they do so because they don't wish to frustrate the asylum officer who will adjudicate their fear claim, they don't realize they have other options, they are afraid of discrimination based on their indigenous identity (as they frequently suffered in their home countries), or they wish to proceed rather than delay the interview further and prolong their time in detention. As a result, rare and indigenous language speakers often proceed with a profoundly important interview in a language they don't fully understand. This results in errors and omissions. In one typical instance, a Guatemalan indigenous speaker detained in Texas was interviewed in Spanish (in which she was not fluent). Her credible fear interview notes demonstrated that the asylum officer understood a particular event took place on ten occasions; but the woman maintains she was referring to ten perpetrators.[34]

USCIS guidance provides that rare language speakers for whom a qualified interpreter is not available should be placed in Section 240 proceedings rather than processing their asylum

[34] More information about the problems faced by detained rare and indigenous language speakers in expedited removal is available in following complaint filed with the DHS Office of Civil Rights and Civil Liberties: https://www.aila.org/File/DownloadEmbeddedFile/66618.

claim through expedited removal.[35] In practice, however, asylum officers are very hesitant to follow this guidance, even when issues locating a proper interpreter arise. Only occasionally are we successful in advocating for this outcome on behalf of a client. Given the resistance by asylum officers to offering this protection, we doubt that unrepresented applicants receive this protection with any regularity.

There are also no effective safeguards in the CFI for applicants with physical or mental health issues, even though disabled applicants are entitled to protections under the Rehabilitation Act.[36] Towards the beginning of the interview, asylum officers typically ask a broad question about the applicant's health and if the applicant wants to proceed with the interview. The asylum officers do not ask about mental health concerns, nor do they ask any follow up questions to the general question about health. Applicants with physical or mental health issues that may impact their ability to participate in the interview often hesitate to share the gravity of their health concerns as they fear further postponement of the interview and the resulting extension of their time in detention. Others with serious mental health conditions may not be sufficiently aware of their conditions to alert the asylum officer to them or may not do so because of stigma. Even if an applicant does express mental health concerns, it generally has little impact on the interview. Asylum officers use the same worksheet as they would for people without mental health concerns. We have also observed reluctance by asylum officers to provide reasonable accommodations or other procedural protections for clients with serious mental health issues (for example, even for one individual ultimately deemed incompetent in a subsequent IJ proceeding). And since the interviews occur by phone, as mentioned, asylum officers are unlikely to notice signs that an applicant has health limitations or is not competent to proceed with the interview.

Asylum officers are required to conduct CFIs in a non-adversarial manner and to elicit all relevant and useful information. 8 C.F.R. § 208.9(b). In practice, however, interviews frequently become adversarial and elicit only limited information. For example, we have observed asylum officers insisting on yes or no answers by applicants and refusing any efforts to clarify answers or provide nuance. Asylum officers often interrupt applicants or redirect them to answer only the question posed. They often fail to ask follow-up questions to elicit additional information or to explore clear alternative grounds for asylum. Asylum officers frequently cut off applicants who begin describing an incident that happened to a family member or friend, directing the applicant to discuss only his or her own experiences, even though those other incidents may be relevant to the claim. Applicants, unaware of the viable grounds for asylum, and feeling disempowered in an interview where all of the power lies with the government official, may not raise critical information themselves.[37] Some asylum officers appear overtly hostile to asylum applicants. We have observed them introducing outside sources (news articles, reports, studies, etc.), either during the interview or in their written decision, to attempt to contradict or undermine the applicant's testimony.

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[35] Ted H. Kim Memorandum *supra* n.22.

[36] 5 U.S.C. § 794(a); *see also Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (holding that the Rehabilitation Act applies to removal proceedings and requires reasonable modifications for disabled individuals).

[37] *See also* AILA Letter *supra* n.16 (detailing errors in credible fear interviews).

Asylum officers tell us that they are under significant pressure to conduct interviews quickly, which is incompatible with their obligation to elicit all relevant and useful information. We have observed officers become angry and say that they only have a limited window in which to conduct the interview in response to applicants attempting to provide more information or relevant details about themselves. As a result, applicants are actively discouraged from telling their stories completely despite trying to do so. It is also typically difficult for traumatized applicants to discuss painful memories and violent events that happened to them or family members without some introductory questions and time to work up to describing the event. (This is all the more true given language barriers, diminished capacity, and difficulty communicating over a poor telephone connection). Asylum officers are also often hampered by their need to take contemporaneous notes as well as asking questions. These practices lead to essential information never coming out during the interview.

The following descriptions of CFIs in which our clients participated reveal the inadequacy of these interviews and the ways in which they fail to elicit complete information.

- A Cuban man whose interview took place by phone told us that the asylum officer frequently asked him to pause in the middle of his answers so the officer would have time to type, but would then move on to the next question rather than allowing him to finish his answer. This disjointed form of questioning made it extremely difficult to remember what he had already told the asylum officer and interfered with his ability to present what had happened to him before leaving his home country.

- Another man from Cuba who also had a phone interview told us that the asylum officer frequently asked him to pause in the middle of his answers and would not let him finish answering the question before he would move on to the next question. The asylum officer appeared to be in a rush and told him she only wanted to hear details about the "first, worst, and last" time he was detained by Cuban authorities. This led him to only discuss two of several incidents involving persecution by Cuban authorities, as the worst incident he experienced was also the last.

- A woman from El Salvador who had a CFI by phone while detained at a Border Patrol Station told us that she had difficulty understanding the questions the interpreter relayed to her and that if she did not respond to a question immediately the asylum officer would move on without giving her a chance to answer. She said that she sometimes gave long, nuanced answers in Spanish, only to hear the interpreter provide a very brief interpretation to the asylum officer in English. That client's female teenage daughter, who was interviewed at the same time as part of the same CFI, told us that she did not describe the full extent of her persecution because it was difficult to discuss the details of a rape threat in front of her mother and to a male asylum officer.

- A man from Cuba who had his CFI over the phone told us that (i) the asylum officer interrupted him whenever he tried to relate things that had happened to his father or brothers to tell him to focus on things that had happened to him, even though the persecution of his family members was important context for his own claim; (ii) the asylum officer told him to relate his story more quickly, making the client feel rushed;

(iii) the entire interview lasted only 45 minutes; and (iv) there are multiple relevant details in the asylum officer's notes that are incorrect. For example, the notes indicate the client said nothing bad had happened to his brother in Cuba, seemingly refuting the client's account that individuals with anti-Castro beliefs faced danger in Cuba. In fact, the client had stated that nothing bad had happened to his brother *after leaving* Cuba and reaching the U.S. His brother had faced significant persecution in Cuba.

- A woman from Cuba whose CFI took place over the phone told us that her interview felt like a hostile cross-examination, that it triggered memories of interrogations by Cuban government officials that were a key part of her asylum and CAT claims, that the asylum officer repeatedly interrupted her in the middle of her answers and failed to return to the same question afterwards to let her finish, and that the asylum officer repeatedly asked her why she had said something earlier in the interview, when she had never made the statement the asylum officer claimed.

- A woman from El Salvador whose CFI took place over the phone told us that the interpreter cut her off whenever she tried to elaborate or add nuance to her answers and that the interview felt disjointed and confusing because the asylum officer used five separate interpreters during the conversation, some of whom were difficult to understand.

- A woman from El Salvador whose CFI took place over the phone told us that that the asylum officer and interpreter had side conversations in English throughout her interview, and that she would sometimes give long, detailed answers, only to hear the interpreter relay a very short English sentence to the asylum officer.

- A woman from Guatemala whose interview took place over the phone told us that whenever she tried to qualify her answers or add nuance to what she was saying, the asylum officer interrupted her to demand a shorter answer, and that this made it difficult for her to relay what had happened to her.[38]

D. Asylum officers misapply legal standards when making credible fear determinations, especially when the applicant is *pro se*.

We have observed asylum officers making legal errors in their adjudication of CFIs, such as adjudicating the interviews at a higher standard,[39] or failing to apply other legal requirements,

[38] For more examples of violations of CFI procedures and other due process violations in expedited removal, please see AILA Letter *supra* n.16.

[39] Our experiences are consistent others' observations and research into how the credible fear standard is applied in practice. *See*, *e.g.*, *Reflections from the Border*, Harvard Law Today (Nov. 2, 2018), https://today.law.harvard.edu/reflections-from-the-border/ (immigration judge reviewing negative credible fear findings "was misstating the legal standards, mixing up the higher bar for those who had already been previously deported from United States with the lower one for those who had just entered for the first time"); *id.* (asylum seeker in a negative credible fear proceeding "compellingly recounted his story of horrific persecution on account of his race only for the [immigration] judge to declare, inexplicably, that he had not testified that he was

such as evaluation of country conditions, or canvassing circuit court law for the most favorable interpretation of a specific element of asylum or CAT law.[40] *See* 8 U.S.C. § 1225(b)(1)(B)(v), § 1225(b)(1)(E)(i); 8 C.F.R. § 208.30(e)(2). For example, asylum officers often make negative CFI determinations when our clients, appearing *pro se* for their CFI, fail to articulate the connection between the severe violence they suffered and their gender and/or sexual orientation. The connection (or in its technical term nexus) to a protected ground exists, but asylum seekers often do not feel comfortable repeating the horrific insults used by their perpetrators to the asylum officer, especially given the way these interviews are conducted - in haste, not allowing individuals to explain their answers or add additional information, and at times, not in a private space, rather within earshot of others. It is also common for asylum officers to make negative CF determinations without reviewing clearly relevant country conditions reports that support and provide further context for the claim, information that it is almost impossible for detained clients who do not speak or read English to find on their own, as in the example discussed below at page 21-22.

Asylum officers also routinely cite negative federal appellate case law in denying credible fear, even where there are differing federal appellate decisions in other circuits on the same point. For instance, in one recent case, an asylum officer wrote in a negative CFI determination that he was rejecting a particular social group determination based on former gang membership because "criminal activity cannot form the basis of a particular social group" and cited First and Ninth Circuit precedent for the proposition, even though the Fourth, Sixth, and Seventh Circuits have directly held that former gang membership *can* serve as the basis for membership in a particular social group.[41]

E. The written record of the credible fear interview is inadequate.

The proposed rule would have the record of the CFI take on increased importance by forming the basis of the applicant's asylum application. 86 Fed. Reg. at 46,916. The proposed rule does not, however, adequately grapple with the limitations of the credible fear decision and record in practice.

Among the most problematic aspects of the current process is that the asylum officer's notes serve as the official record of the CFI. But the notes are not a verbatim transcript. Instead, the asylum officer records them simultaneously while questioning the applicant. There is no

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persecuted on account of his race"); *see also* Karen Musalo *et al*., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 1, 70 (2001) (three-year study documenting problems with "the accuracy of determinations made during the expedited removal process" and with officers' handling of "complex legal or factual determinations").

[40] *See also* Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19-161), 2020 WL 402611.

[41] *See, e.g.*, *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014).

audio recording process for CFIs. As a result, the record of the CFI, based on the notes, is often incomplete and inaccurate. We have observed asylum officers include notes from the wrong applicant's interviews and mis-record the applicant's answers. There is no established process to correct the notes after the fact.

While there is a regulatory requirement that asylum officers review the summary of the interview with applicants, 8 C.F.R. § 208.30(d)(6), this has not served as an effective check against errors in the record. Officers rarely summarize an applicant's claim adequately. The summaries are typically only a few sentences in length and often leave out key information. There is no requirement that applicants be able to review the notes of the interview. Applicants do not necessarily know which information is legally significant for the summary or feel comfortable correcting the asylum officer. When applicants or their representatives request information be added to the summary, asylum officers often downplay the importance of the summary and insist adding information is unnecessary. This is of particular consequence, as IJs often rely heavily on the asylum officer's interview summary during an applicant's review hearing after a negative CF determination.

It is also difficult for applicants to obtain complete and timely copies of the records of their CFIs. While regulations require that applicants be provided "with a written notice of decision" after a negative fear determination, 8 C.F.R. 208.30(g), DHS frequently fails to do so timely or at all. Our organizations have all observed that asylum applicants are typically notified of a negative credible fear determination by telephone, not in writing. The problem is compounded by the fact that most interviews take place telephonically, with the asylum officer located outside of the detention center, and when the written notice of the negative fear determination needs to be served on the asylum seeker, it is typically someone other than a USCIS official conducting the service. Usually, the document is transmitted electronically from USCIS to ICE or CBP, and then an ICE or CBP officer, or one of their contractors, is expected to serve the document on the asylum seeker. Additionally, no repercussions exist when the government fails to serve the CF determination to the applicant.

Similarly, DHS frequently fails to provide applicants with a copy of the entire record supporting the CF determination. While DHS is required to provide the complete record of negative credible fear determinations (including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based) to the immigration judge for the review hearing. 8 C.F.R. § 208.30(g)(2)(ii). But no similar requirement clearly applies to ensure asylum seekers have access to that record[42], and DHS frequently fails to provide this information in a timely way, even when requested by counsel. Applicants frequently obtain a copy of their interview record only just before their review hearing. Without knowing the reason for the negative CF determination, it is much more difficult to prepare for the IJ review effectively.

When we are involved as counsel, DHS's asylum office often takes days or weeks to respond to a request for a copy of the record, if they respond at all. Notably, it is possible for

[42] While 8 C.F.R. §§ 208.30(g)(l)(i) and (g)(2) can be read together to impose this requirement, that interpretation is not widely understood or accepted by asylum officers and IJs. It requires clarification to be effective.

asylum offices to provide the record electronically to counsel who have filed a notice of appearance—the Houston asylum office has done so for Proyecto Dilley, for example. But the asylum offices do not do so consistently, nor do they do so for unrepresented clients or clients represented by lawyers who do not have a frequent presence before the asylum office.

When provided, the record is often incomplete. Many times, counsel will determine during the IJ review hearing itself that the court has different or additional documents than the applicant; in our experience, sometimes the judge will pause the hearing and give his or her file to counsel to review the documents, but often the judge will simply continue the hearing as is. It is profoundly unfair, and ultimately inefficient, to expect an asylum seeker to prepare adequately for a court hearing when the court is provided different information and documents than the asylum seeker.

Finally, when the record is provided, it is provided in English, without any requirement that it be translated or any other accommodations for the vast majority of asylum seekers who are not English speakers. Accordingly, non-English speaking *pro se* applicants generally have no idea how the asylum officer's notes describe their asylum claims and supporting facts, nor any meaningful ability to correct errors or misrepresentations.

F. The IJ review process is not an effective check on erroneous negative fear determinations.

The only remaining process guaranteed after a negative credible fear determination is a review hearing by an IJ. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 208.30(g)(1), 235.6(a)(2)(i), 1003.42(a), 1208.30(g)(2)(i). This process generally does not provide meaningful review and routinely affirms erroneous negative credible fear determinations.

In theory, applicants have the right to consult with a representative of their choice before the IJ review hearing. 8 C.F.R. § 1003.42(c). This right is often illusory in practice. As with the CFI, applicants typically have little notice of when the hearing will occur or time to prepare. Unrepresented applicants often have no notice of when the hearing is scheduled. In some cases, we can obtain the docket of the next day's hearings the day before; in other cases, attorneys never receive notice of the hearing.[43] As a result, we are often unable to consult with potential clients until *after* the IJ has upheld a negative credible fear determination.

Similarly, while the INA requires that "[i]n any removal proceedings before an immigration judge … the person concerned shall have the privilege of being represented…", 8 U.S.C. § 1362, the DOJ has taken the position that representation is not allowed in IJ review hearings.[44] Many IJs prohibit the legal counsel from advocating or providing any legal arguments

[43] *See* Letter from Am. Immigr. Law. Ass'n, et al., to Leon Rodriguez, Dir., USCIS, & Sarah Saldana, Dir., ICE 3 (Dec. 24, 2015), available at http://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process.

[44] There is "no right to representation prior to or during" IJ review, Exec. Office Immigration Review, *Interim Operating Policy and Procedure Memorandum 97-3* 10 (1997) (emphasis deleted); Exec. Office Immigration Review, *Immigration Court Practice Manual,* Ch.

in support of the client's case during the hearing. This makes it extremely difficult to raise errors in the conduct of the CFI. And these hearings are not accessible for unrepresented applicants. Typically, the IJ begins by reading boilerplate language written in dense legalese to inform the applicant of her rights and the purpose of hearing. The IJ does not ask if the applicant understands this information before beginning questioning.

The IJ review is required to be *de novo*. 8 C.F.R. § 1003.42(d)(1). In practice, however, we observe IJs deferring heavily to the asylum officer's determination. It is common for IJs to ask only one or two perfunctory questions before affirming a negative CF determination. Most IJs spend no more than ten minutes with applicants before making a ruling. We often send short submissions to the IJ because the regulations provide the IJ with the option of receiving additional evidence. 8 C.F.R. § 1003.42(c). But the IJs rarely review supplemental evidence we provide and typically rely exclusively on the credible fear record—some have told us that they view their role as an appellate tribunal and are bound by the record elicited below.

Compounding this problem, as discussed above, the credible fear record frequently is not complete, but IJs typically do not appreciate its limitations. We frequently observe IJs (at both the determination review hearing and later merits hearings), treating the asylum officer's notes as a verbatim transcript. As mentioned, there is no process to correct the notes prior to the hearing. The asylum officer who took the notes does not attend the review hearing, meaning that it is the word of the applicant or counsel, if counsel was able to attend the CFI and is allowed to speak or advocate for their client in the course of the IJ review) against the notes. Most, if not all, IJs place significant weight on the asylum officer's record over the in-court sworn testimony of applicants.

Further, any errors or omissions in the notes make applicants appear noncredible when they provide different or additional information before the IJ. We have had several applicants omit discussion of sexual assaults in their CFI, for example, and then not be believed by an IJ when they raise the assault in the review hearing.[45] When applicants have such additional facts relevant to their asylum claim that the asylum officer did not elicit, at times we have had to advise them that it may not be advantageous to raise those new facts before the IJ, given the risk of a negative finding on credibility. Applicants' ability to contest their fear determination is entirely dependent on what the asylum officer elicits *and* includes in the notes.

Problematically, review hearings typically *do not evaluate* whether there were procedural errors in the CFI. In our experience, the majority of IJs inexplicably do not consider procedural errors to be within the scope of their *de novo* review, meaning that absent requesting reconsideration within DHS there is no opportunity to raise these errors. In fact, many IJs have

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7.4(d)(iv)(C) (Dec. 2016) ("the alien is not represented at the credible fear review") available at https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf.

[45] There are many reasons an applicant may fail to mention a sexual assault (or other traumatic event)—doing so is a common typical trauma response; they may feel stigmatized; they may have been interviewed by an opposite gender asylum officer or alongside a family member (such as a child) with whom it would be difficult to discuss the incident; or they may not have realized its significance for their asylum claim and the officer may have failed to elicit it.

told counsel that they can only consider the merits of the asylum officer's decision, that procedural deficiencies in the initial CFI are irrelevant to the merits decision, and that if we believe procedural deficiencies affected the outcome of the decision then we should request reconsideration from USCIS. The types of common procedural errors that IJs *will not review* and that prejudice asylum seekers' rights to a fundamentally fair proceeding include:

- Failure to provide reasonable accommodations to disabled applicants (29 U.S.C. § 794(a); 28 C.F.R. § 35.130(b)(7)); and otherwise failing to consider whether applicants are able to participate effectively in the interview because of illness, fatigue, or other impediments (8 C.F.R. 208.30(d)(1));
- Failure to conduct a non-adversarial interview (8 C.F.R. § 208.9(b));
- Failure to provide a female asylum officer and interpreter to female survivors of gender-based violence[46];
- Language and interpretation issues, including the use of a non-primary language, incomplete or incorrect interpretations of the applicant's testimony (8 C.F.R. § 208.30(d)(5));
- Failure to provide orientation on the CFI process 48 hours in advance of the CFI (for single adults, and longer for families)[47];
- Failure to elicit relevant testimony (8 C.F.R. § 208.9(b));
- Failure to provide a confidential space for the CFI, including by permitting other family members and children to be present while one family member testifies[48];

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[46] *See* INS Memorandum, *Subject Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995), available at https://www.aila.org/infonet/ins-guidelines-from-womens-asylum-claims, ("we must also recognize that, because of the very delicate and personal issues arising from sexual abuse, some women claimants may understandably have inhibitions about disclosing past experiences to male interviewers"). In addition, the form M-444, Information about Credible Fear Interview, provides the option to request a female or male interpreter if it makes it easier for the applicant to speak about very person information that is difficult to discuss.

[47] *See* USCIS, *Questions and Answers: Credible Fear Screening*, available at https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening; *see also L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 11 (D.D.C. 2020) (noting that 72 hours applies for families).

[48] The 2017 Refugee, Asylum and International Operations Directorate Officer Training Lesson Plan for Credible Fear of Persecution and Torture Determinations provides that "When questioning family members, special attention should be paid to the privacy of each family member and to the possibility that victims of domestic abuse, rape and other forms of persecution might not be comfortable speaking in front of other family members." We agree that this is an important protection, but it is frequently not followed. *Cf. Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 58 (D.D.C. 2020) (vacating subsequent version of the Lesson Plan).

- Incomplete and inaccurate CFI records (8 C.F.R. § 208.30(e)(1)); and
- Failure to interview children in an age-appropriate manner and failing to provide any procedural safeguards to children in their CFIs.[49]

These hearings are not a reliable procedural check on erroneous negative credible fear determinations. Confirming this conclusion, EOIR statistics obtained by others through FOIA demonstrate that whether a credible fear determination is affirmed depends significantly on which IJ reviews a determination. The rates for individual IJ's affirmations of negative credible fear determinations range as high as 100 percent down to 8.5 percent (for IJs who reviewed at least 100 determinations).[50] While such variation exists in the ordinary removal process as well, that process provides opportunities for review of the decisions that are not available in expedited removal.

G. Requests for Reconsideration have saved many of our clients from being forced to return to persecution and danger.

All of our organizations rely on RFRs of IJ affirmations of negative CF determinations to save our clients from being forced to return to dangerous conditions. RFRs are essential because they are the only opportunity for asylum seekers in expedited removal to provide a complete and organized explanation of the basis for their asylum claim. RFRs provide an important, albeit inadequate, safeguard for a credible fear interview and IJ review process that fails to identify many valid asylum claims. RFRs have provided relief for many of our clients. For example, *in 2020 Proyecto Dilley succeeded in obtaining rescission of negative CF determinations for 79% of clients for whom they filed an RFR*.

While current regulations provide for RFRs, they do not establish any specific procedures. 8 C.F.R. § 1208.30(g)(2)(iv)(A). Accordingly, in our experience, the process is not transparent or consistent. Generally, if the asylum office determines that the asylum seeker "has made a reasonable claim that compelling new information concerning the case exists," it can exercise its discretionary authority to grant a new interview or reverse the asylum officer's negative finding.[51] Asylum offices typically require that the RFR be emailed to the office (and as a practical matter, using regular mail would be too slow to ensure the RFR is received before an applicant is removed). The correct email addresses for submission are not made publicly available by USCIS, making the process difficult to access for anyone without experienced

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[49] Immigration and Naturalization Service, *Guidelines for Children's Asylum Claims* at 5 (Dec. 10, 1998), available at https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf (noting that instructions are useful for children's asylum cases generally).

[50] *See* Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19-161), 2020 WL 402611, at 24-25.

[51] Michael A. Benson, Exec. Assoc. Comm'r for Field Operations, Immigr. & Naturalization Serv., Expedited Removal: Additional Policy Guidance (Dec. 30, 1997), reprinted in 75 Interpreter Releases (West) 255, 270 (Feb. 23, 1998).

counsel and effectively impossible to access for detained, unrepresented applicants. We are not aware of any *pro se* applicants who have sought an RFR entirely unassisted.

The RFR also provides the only opportunity under the current procedure for an asylum applicant to raise procedural deficiencies in the way the CFI was conducted. By and large, the RFRs we file are based on an error in the conduct of the CFI which prejudiced the applicant's ability to participate fully and provide all relevant and useful information.

- For example, RAICES obtained relief through an RFR for a man from Burkina Faso who had been persecuted based on his religion. He was interviewed in French, even though he told the asylum officer French was not his best language and that he spoke Mossi. The CFI had failed to elicit key information showing the significant possibility that he would be persecuted in the future, namely that his family, which disapproved of his conversion to Christianity and threatened him with death, was still looking for him.

- A client from Nicaragua obtained relief following an RFR because the CFI and the IJ review failed to elicit the fact that he had a lasting brain injury, with symptoms including memory loss, difficulty concentrating, and speech impediments, and the fact that his brain injury was caused by police beatings following his participation in anti-government marches.

- Another client from Cote d'Ivoire obtained relief from the RFR based on multiple errors by the asylum officer (affirmed by the IJ), including mischaracterizing the fact that the man had been repeatedly attacked and sliced with a machete as having been beaten by sticks, interviewing the applicant in French even though his best language was Jula, and applying an inappropriately high evidentiary standard.

- RAICES used an RFR to obtain relief for a man from Nicaragua who had been threatened with "death and rape" for his political views by paramilitary groups. These paramilitary groups found him and his family after they moved four hours away and again threatened them. Despite these threats, the asylum officer (affirmed by the IJ) inexplicably determined that there was no future threat of harm, and failed to identify the man's traumatic brain injury, which impaired his ability to provide complete information.

- A man and child from Angola who had been persecuted for their political activism likewise obtained relief from an RFR. The client's wife was raped by the members of the opposing political party, and he was threatened by death. Many other members of the political party were killed, and the police took no action despite reports. The asylum officer interviewed the family in a language that was not their best and incredibly determined that, while the death threats could amount to persecution, they did not meet the credible fear standard. The IJ found the family not credible because they provided additional details in the IJ hearing that were not in the CFI notes.

- Las Americas used the RFR process to obtain relief for a Haitian man who faced likely criminal charges in Haiti if removed but had not been in Haiti since 2008. His claim was based on his past torture by Haitian police and prison guards and overwhelming country

conditions evidence concerning ongoing egregious, tortuous treatment of prisoners in Haitian jails. Despite a statutory requirement to consider "relevant country conditions," 8 U.S.C. § 1225(b)(1)(B)(v), the asylum officer did not reference or consider country conditions in his decision, disregarded a written closing argument with attached country conditions submitted by counsel, and based his decision entirely on the fact the applicant had not been threatened by Haitian police and prison guards in 13 years—even though the applicant had been in the U.S. during that span of time. The IJ reviewing the asylum officer's decision spent about five minutes reading the record to himself in front of counsel, asked a single question about the merits of the case, and then affirmed the decision without explaining why. Following a successful RFR, the Haitian applicant ultimately won deferral of removal under the Convention Against Torture, meaning he proved there was a more than 50% chance he would be tortured or killed if he were returned to Haiti.

- Proyecto Dilley successfully advocated for rescission of a negative CF determination for an indigenous Guatemalan mother and her child, who were fleeing a lifetime of gender-based violence on account of her indigenous identity. The initial CFI was conducted by a Border Patrol agent under the HARP/PACR programs. The client was denied access to counsel, was required to recount incidents of rape in front of her young son, and was ill while participating in the interview.

IV. To the extent the Departments continue using expedited removal, any final rule should make changes to the credible fear screening process to limit unfairness and the expulsion of many applicants who likely have valid asylum claims.

As we have described in detail above, our experiences representing clients in expedited removal reveals a credible fear screening process that does not function as intended or required. Regardless of whether the Departments decide to finalize the proposed rule, to the extent they continue to rely on expedited removal, they should take the steps described below to make the credible fear screening process fairer and more accurate. They should establish these enhanced protections in regulation to limit the ability of a future administration to reverse or subvert them.

If finalized, however, the proposed rule would make the screening process even more important. Applicants would lose a key opportunity for review of negative CF determinations, and the CFI would serve as the basis for the asylum application itself—meaning that any omissions in the questioning or the notes result in holes in the application. These changes are premised on the "high quality of USCIS initial screening determinations." 86 Fed. Reg. at 46,915. But in our experience the credible fear screening process does not meet that standard, and nothing in the proposed rule would improve upon its current functioning. Accordingly, we respectfully request that the Departments make the following changes in the proposed rule.

A. The Departments should improve access to counsel prior to the CFI and the IJ review hearing.

Expedited removal and asylum law are complex. Presenting an asylum claim requires knowledge of relevant country conditions and legal requirements. It is common for asylum seekers not to associate their fear with a protected ground (e.g., gender-based persecution,

identifying political persecution when the asylum seeker has not recognized it in those terms, indigenous communities that have normalized systemic oppression, violence, and racism). Consultation with counsel regarding fear of persecution is key in empowering, educating, and creating an emotionally safe environment in which asylum seekers can discuss their persecution before they must formally discuss it with a government official. In these consultations counsel can advise asylum seekers as to what facts are critical to share during their interview so that valid claims for asylum are not inadvertently excluded.[52] Counsel can also work to identify evidence, witnesses, or other material that can corroborate their clients' claims.

During consultation with counsel, asylum seekers can also be informed of their rights. For example, counsel can reassure asylum seekers that their testimony will not get back to their country (e.g., explaining the legal term "confidentiality"), and that they should ask for clarification if they do not understand a question during their fear screening. For women who have survived sexual abuse, counsel can advise them of the option of asking for a female asylum officer and interpreter if they will be uncomfortable or unable to share the details of their persecution with a male officer or interpreter. Counsel can provide confidence that asking for a rare language interpreter will not harm their claim. As discussed, this is especially important for some indigenous speakers who have experienced language-based discrimination. Counsel can also directly advocate with the Asylum Office for necessary, reasonable accommodations on behalf of the applicant as well. Applicants represented by counsel are much more likely to succeed in their claims.[53]

Improving access to counsel would also advance the Departments' efficiency objectives and efforts to streamline and speed up the process, as "unrepresented cases are more difficult and time consuming for adjudicators to decide."[54] Allowing counsel more ability to prepare asylum seekers to testify, to present material directly to the reviewing official, or to submit written material that will be reviewed facilitates efficiency by presenting the key facts and legal issues for decision. Asylum officers frequently tell us that they can tell when applicants have counsel because applicants are better able to understand and participate in the screening process.

The most effective way to improve access to counsel during the CFI process is to release more detained asylum seekers. Being detained, especially outside of metropolitan areas, severely

[52] In addition to the other examples discussed throughout, applicants often do not disclose their experiences with law enforcement because they believe that law enforcement behavior in their home countries is already widely known, and indigenous populations frequently do not disclose racial slurs made by perpetrators because such discrimination was so pervasive.

[53] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, Am. Immigr. Council (Sept. 28, 2016), *available at* https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[54] Barriers to Protection at 52.

impairs applicants' ability to identify and meet with counsel, making representation rates for detained applicants dramatically lower than for those who are not detained.[55]

Access to counsel would also be improved by ensuring that notice of when CFIs and IJ review hearings will occur is provided in a timely to applicants as well as to counsel. It would be straightforward and effective to require that, when either the CFI or IJ hearing is scheduled, any counsel with a notice of entry of appearance on file receive an electronic notification. Any final rule should also facilitate access to counsel by instructing ICE offices to honor, at least on an emergency basis, unsigned G-28 forms where the attorney indicates that the client cannot sign the form in a timely manner because of detention. Further, an ICE Advisory Committee has identified additional "logistical obstacles to meeting with counsel [that] are unnecessary and easily overcome."[56]

The final rule should also state explicitly that counsel may participate fully before IJs, both in reviews of negative credible fear determinations and in the proposed reviews of asylum decisions by USCIS. Current regulations permit representation "in proceedings before an Immigration Judge." 8 C.F.R. § 1003.16(b). But EOIR's guidance is to the contrary and as we have observed, many IJs do not permit meaningful participation by counsel in hearings reviewing negative CF determinations, making explicit provision of the right to counsel in those circumstances necessary.

B. CFIs should be conducted in person. Any CFIs conducted over the telephone should not include negative credibility findings.

The proposed rule does not discuss how the common practice of conducting CFIs by telephone impairs the effectiveness of the CFIs and fails to elicit all relevant and useful information. If USCIS cannot accommodate the number of in-person CFIs required, it should place those applicants it cannot accommodate in Section 240 proceedings, rather than depriving them of an adequate opportunity to explain their credible fear. Conducting CFIs in person would also be a check against proceeding with the interview for an applicant who is not competent to proceed, because the lack of competency frequently is not evident over the telephone.

The Departments repeatedly state that the "streamlined" procedures in the proposed rule are consistent with congressional intent in creating expedited removal proceedings. *See*, *e.g.*, 86 C.F.R. at 46,914. But as discussed above, until recently, CFIs were predominantly conducted in person, a circumstance that is much more protective of the applicant.[57] The Departments cannot reasonably claim to be making the proposed changes to align with congressional intent without also considering—which they do not—whether the current telephonic CFI process is consistent with congressional expectations of how expedited removal would function, including that the

[55] For more detail, please see *Access to Counsel in Immigration Court*, *supra* n. 52; *see also* Barriers to Protection at 52-53.

[56] ICE, *supra* n. 15, at 47.

[57] Barriers to Protection at 36.

initial screening be protective enough of applicants that "there should be no danger that an alien with a genuine asylum claim" would be summarily "returned to persecution."[58]

If USCIS continues to conduct CFIs by telephone, which they should not, asylum officers should be prohibited from making any negative credibility determinations of the applicant based on the phone interview. As discussed, phone interviews lack the ability to develop rapport as well as the ability to consider facial expressions and body language, and they are frequently subject to connection or other communication difficulties. As we have observed, these limitations can result in a traumatized applicant appearing non-credible, despite telling the truth. Yet negative credibility determinations can doom the determination of their CFI as well as subsequent IJ review. Accordingly, asylum officers should be prohibited from making negative credibility findings for interviews conducted by phone. IJs should be instructed about this prohibition and should similarly be prohibited from relying on any such credibility findings.

C. The credible fear screening process should ensure a trauma-informed approach to evaluating asylum applicants.

As discussed, in practice, the current credible fear screening process does not adequately take into consideration the trauma experienced by asylum seekers, and the proposed rule fails entirely to address it. But applicants' trauma impairs the Departments' abilities to conduct fair fear screenings. Any final rule must correct this omission, preferably by imposing a regulatory requirement that CFIs and IJ review hearings employ trauma-informed methods of questioning. The current guidance to this effect has plainly proven inadequate.

Further, appropriate consideration of trauma requires enhanced early access to counsel who can, as discussed above, help prepare traumatized applicants to participate effectively in interviews. It also requires enhanced training for both asylum officers and IJs regarding trauma-informed interviews. Given our observations of CFIs, asylum officers have not been adequately trained in how to conduct trauma-informed interviews; and IJs do not receive any consistent training on trauma and its impacts. Asylum officers and IJs should be required to undergo regular trainings and be subject to supervisory review on appropriate and effective questioning of trauma survivors, and the ways in which trauma can affect an applicant's ability to describe traumatic experiences completely and appear credible when so doing.

D. Protections for rare and indigenous language speakers and for individuals with diminished capacity should be enhanced, including by routine placement of these individuals into Section 240 proceedings.

The proposed rule fails to consider the impact of language barriers entirely. Any final rule should amend 8 C.F.R. § 208.30(d)(5) to ensure that the CFI take place in a language in which the applicant speaks and understands *fluently* to avoid applicants being interviewed in languages in which they have only basic competence.

The proposed rule also fails to consider the unique experiences and needs of indigenous and rare language speakers. Indeed, given the documented unfairness to these groups, an ICE

[58] H.R. Rep. No. 104-469, pt. 12 1, at 158 (1996).

Advisory Committee previously recommended that individuals who speak rare languages "be placed into ordinary rather than expedited proceedings, to expand the time available to arrange language services."[59] Despite this prior recommendation, the proposed rule does not provide for such a carveout, and instead adjusts expedited removal procedures without regard for the language abilities of the affected individuals. The Departments have not considered the impact of the rule on this particularly vulnerable class. While we encourage the Departments to limit the use of expedited removal generally (via DHS's discretion to place applicants into Section 240 proceedings), there is a particular imperative to do so for rare and indigenous language speakers. Rare and indigenous language speakers should be placed into Section 240 proceedings routinely. This should always occur when a certified interpreter is not available. Finally, the Departments must consider language barriers experienced by applicants regardless of whether the applicants are detained—while release from detention is always preferable, it does not solve the problem of language barriers, particularly for unrepresented applicants.

Similarly, the Departments fail to consider the impact of the rule on individuals with diminished capacity. Given the likelihood, discussed above, that credible fear screenings may fail to identify qualified asylum seekers in this population, any final rule should provide procedural protections for this population. Specifically, the Departments should require that if there are indicia of incompetency (as set forth in *Matter of M-A-M-*, 25 I & N Dec. 474 (BIA 2011), and subsequent case law), expedited removal is inappropriate, and the individual should be referred for Section 240 proceedings, including a *Matter of M-A-M-* hearing along with information regarding the indicia of incompetency.

E. The Departments should ensure that CFIs are conducted in a non-adversarial manner and elicit all relevant and useful information, including with expanded and improved training and providing asylum officers with enough time to conduct a complete non-adversarial interview.

The Departments cannot reasonably finalize a rule that would enhance the importance of the CFI when CFIs currently routinely fail to meet the legal requirements of being non-adversarial and to elicit all relevant and useful information. 8 C.F.R. § 208.9(b). We believe that this failing frequently results from asylum officers not having adequate time to complete an effective non-adversarial interview. More training, supervision, and time for asylum officers to conduct interviews are necessary, including meaningful supervisory review of whether the CFIs are unfairly rushed. We applaud the Departments' plan to expand the number of asylum officers. 86 Fed. Reg. at 46,932. But the hiring plan must include enough new officers to ensure that CFIs are not rushed and must allow the necessary time to ensure such officers are thoroughly trained in relevant skills, including trauma informed interviewing.

Given that asylum officers do not have enough time now to conduct credible fear screenings appropriately and, accordingly, unfairly rush interviews, any final rule should provide that if there are too few asylum officers to process asylum applicants through expedited removal consistently with procedural protections, remaining applicants be placed into Section 240

[59] ICE *supra* n. 15, at 114.

removal proceedings. Such a provision would help prevent the ineffective and unfair proceedings we so frequently observe.

F. The proposed rule would appropriately return credible fear screening to the "low screening standard" intended by Congress. The Departments should take additional steps to ensure that asylum officers and IJs apply this standard and associated procedural protections correctly.

We support the Departments' proposed changes to 8 C.F.R. § 208.30 to make the screening standard for all protection claims uniform. 86 Fed. Reg. at 46,914. As the Departments note, several policies issued from 2018 to 2020 attempted to change the credible fear screening process. 86 Fed. Reg. at 46,914.[60] We believe these policies have created confusion amongst the asylum officers and IJs about the appropriate standard and have contributed to frequent errors in applying the correct standards. Any steps to promote simplicity and clarify that the appropriate standard is low are, accordingly, welcome. We ask that the Departments go further, however, to ensure that fear screenings in fact be evaluated at the appropriately low standard. Along with this new rule, the Departments should require improved and expanded training, continuing education programs, and more rigorous supervisory review for both asylum officers and IJs.

The Departments should also freely permit review of the screening standard applied, including by modifying any final rule to: (1) permit USCIS to reconsider its negative CF determination at any time, including while IJ review is pending, which is not currently allowed. Doing so would promote efficiency as it would allow USCIS to quickly correct its own errors without burdening IJs; (2) provide that USCIS will consider any plausible claims of error as to application of the credible fear standard in its reconsideration process (a modification to rather than the proposed elimination of the protections in 8 C.F.R. 208.30(g)(2)(i)); and (3) permit additional testimony or documentation in the IJ review where such testimony or documentation is relevant to whether the correct credible fear standard was applied (proposed 8 C.F.R. § 1003.48(e)).

G. The Departments must improve the quality and accessibility of the record of credible fear determinations.

The proposed rule incorrectly assumes that the CFI record is accessible to the applicant and is complete and accurate. As discussed, CFIs are not recorded and the accompanying notes are often incomplete or inaccurate. Discrepancies between these notes and subsequent information provided by the applicant may result in a negative credibility determination or prejudice future decisions on asylum. Yet, under the proposed rule, that record would serve as the basis for the asylum application for positive CF determinations, and one avenue to correct the record (via RFRs) for negative determinations would be eliminated. The Departments correctly identify benefits from having the CFI record serve as the asylum application for positive fear determinations—ensuring that eligible applicants don't miss the one-year deadline to submit

[60] These attempted changes introduced unlawfully high and incorrect standards into the credible fear screening process. *See*, *e.g.*, *Kiakombua*, 498 F. Supp. 3d at 10.

their application and by starting the clock earlier for work authorizations. To avoid reinforcing the unfairness caused by the current process, the Departments should make changes to any final rule to improve the quality and accessibility of the CFI record.

Any final rule should require that written copies of credible fear determinations, including all notes and other materials on which the decision was based provided to the IJ, 8 C.F.R. § 1208.30(2)(ii), be provided to the applicant and to any counsel or other representative who has filed a G-28 form at the same time as notification of the decision and no less than 72 hours from receipt before the IJ review hearing. Applicants who cannot effectively review the record due to language barriers should be simultaneously provided with a copy of the record translated into a language that they understand well, or, alternately, placed into Section 240 removal proceedings. Absent this change, *pro se* applicants who do not read English have no opportunity to identify factual errors in their record, which can result in removal of a qualified asylum applicant due to a notetaking error by the asylum officer.

For negative CF determinations, the Departments must establish a mechanism by which applicants can supplement or correct these records prior to the IJ review. It would be efficient to provide the applicant with a brief period after serving the record on the applicant for the applicant to review the record and identify and request correction of any inaccuracies in the record. Thereafter, USCIS would finalize the negative CF determination (or reverse its decision if warranted) and IJ review would be triggered. This change would promote efficiency by correcting factual errors in the record quickly, thereby preventing removals of potentially eligible asylum applicants and facilitating a streamlined review process with a better record for any necessary reviews.

Finally, any final rule should require that applicants be able to correct or supplement the CFI record (either for an IJ review of a negative fear determination or as part of an asylum application) without any negative credibility determination resulting from the omission of this information from the CFI.

H. Any final rule should improve IJ hearings that review negative credible fear determinations and should expand protections in the new IJ reviews of asylum decisions.

As we have discussed, IJ hearings are often perfunctory and inadequate to review errors. Especially if they proceed with eliminating RFRs (which they should not), the Departments must take steps to improve these hearings. Rather than strengthening protections, the proposed rule would only "inform the individual that the IJ review will include an opportunity for the individual to be heard and questioned by the IJ." 86 Fed. Reg. at 46,915. While this change is useful to the extent it provides some additional information about the process to the applicant, it does not actually make any changes to enhance fairness in IJ review hearings.

Because regulations require credible fear interviews be "nonadversarial" and impose an affirmative duty on the Asylum Officer to "elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution," a lack of sufficient evidence in the credible fear record may just as well indicate that the Asylum Officer violated the credible fear standard, not that the applicant does not have a significant possibility of ultimately prevailing on

their claim.[61] The Departments should ensure that IJs understand this, and also understand that notes are not a verbatim transcript of the CFI and that material facts may have been omitted via training and supervisory review.

Given our experience with IJs' frequent failure to provide a truly *de novo* review of negative credible fear determinations (despite 8 C.F.R. § 1003.42(d)(1)), and refusal to consider the sufficiency of the record, any final rule should ensure proper application of that standard of review. Our experience makes clear that merely stating that the review be *de novo* in the regulation does not result in consist application of that standard. Instead, any final rule must state explicitly that such reviews include procedural error in prior proceedings, such as the legal sufficiency of the CFI. Because procedural errors prejudice an applicant's ability to participate in the CFI, the IJ should be given the direction and power to disregard the CF record completely in the event of such error. The Departments should also require training for IJs on procedural requirements of the CFI and increase supervisory review of decisions. Any final rule should also prohibit negative credibility determinations based on omissions or errors in the credible fear record, without requiring a negative credibility finding as to the applicant.

Given our frequent observation that IJs defer excessively to asylum officer conclusions, the Departments should impose a new requirement that IJs reach an independent conclusion as to whether the applicant meets the credible fear standard and provide a written explanation of the basis for that decision.

Finally, any final rule should provide for motions to reopen IJ decisions upholding negative credible fear determinations in specified circumstances, such as on the basis of prejudicial procedural errors.[62]

I. The Departments should regularize the opportunity to request review of an asylum officer's negative credible fear determination, not eliminate it.

The Departments correctly acknowledge the need for a "safeguard against erroneous negative screening determinations by an asylum officer," 86 Fed. Reg. at 46,915, but unreasonably expect that the current IJ review is adequate to provide this safeguard. As we have described above, our experience shows that the IJ review process is limited, inconsistent, and fails to provide an opportunity for review of key errors. DHS should regularize a process for exercising discretionary authority to reconsider asylum officer decisions, not eliminate this safeguard.

While the INA does not provide for an administrative appeal within DHS as of right, 8 U.S.C.§ 1225(b)(1)(C), DHS has previously recognized its inherent discretionary authority to reconsider prior agency decisions. 8 CFR 208.30(g)(2)(i). Although the Departments argue that eliminating this process is consistent with the streamlined expedited removal scheme, they

[61] *Id.*; *see also* 8 C.F.R § 208.30(d).

[62] *See Thuraissigiam*, 140 S. Ct. at 1983 n. 28 ("Department officials and immigration judges may reopen cases or reconsider decisions … and the Executive always has discretion not to remove.") (citation omitted).

ignore the established principle that "[e]mbedded in an agency's power to make a decision is its power to reconsider that decision." *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010); *see also Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. Federal Communications Commission*, 182 F.2d 397, 399 (D.C. Cir. 1950)); *Belville Min. Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993) ("Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision.") (citing *Dun & Bradstreet Corp. Found. v. United States Postal Serv.,* 946 F.2d 189, 193 (2d Cir. 1991)); *see also Thuraissigiam*, 140 S. Ct. at 1983 n. 28. And agencies, including DHS, may, of course, establish standards and procedures for the exercise of their discretionary authority. *Cf*., *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

As our experiences described above reveal, CFIs routinely do not comply with the requirements of governing regulations and policy, but IJs are unwilling to review the procedural adequacy of the CFI itself. Accordingly, we recommend that the final rule be amended to permit DHS to reconsider a negative credible fear finding for applicants who make a plausible claim that required procedures—including but not limited to failing to elicit all relevant and useful facts and failing to conduct the interview in the appropriate language—were not followed or a plausible claim that the appropriate legal standards were not applied.

The Departments argue that RFRs should be eliminated to respond to a "growing number of meritless reconsideration requests," which have strained resources and caused delays in expedited removal. 86 Fed. Reg. at 46,915. The Departments do not attempt to quantify the number of RFRs received or their outcomes, making this assertion impossible to evaluate. The implication that RFRs are typically frivolous or unlikely to change the credible fear determination does not match our experience, however. As noted, Proyecto Dilley filed RFRs for 68 clients in 2020, of which 79% resulted in a rescission of the negative credible fear determination. The Departments must assess the existing process transparently—*e.g*. by publishing information about it, including the number of RFRs received and the frequency with and bases on which they are granted. The failure to do so makes the proposed elimination arbitrary. Such an assessment would also reveal appropriate procedures for RFRs as well as the inefficiencies in the underlying CFI and IJ review process that led to the need for RFRs.

Providing for reconsideration of a negative CF determination following such showings of plausible error is necessary to ensure that people with viable asylum claims are not arbitrarily and summarily removed. Doing so is consistent with the Congressional purpose that expedited removal not result in exclusions based on "erroneous decisions by lower level immigration officials at points of entry."[63] Indeed the Departments' acknowledgement that RFRs periodically lead to new interviews, 86 Fed. Reg. at 46,915, requires the conclusion that they are a necessary check on erroneous decisions, not that the time spent conducting the interview is wasted.

[63] *See* 142 Cong. Rec. S11491-02, S11491 (1996).

Frivolous RFRs can typically be resolved quickly, and meritorious ones deserve the time spent to prevent removal of potentially eligible asylum applicants.

Making the reconsideration process more transparent and regularized could also eliminate some of the concerns that led the Departments to propose eliminating it. DHS could, for example, provide public guidelines that it would consider exercising its discretion to reconsider negative credible fear determinations when presented with a plausible showing of error, but will not do so for duplicative requests submitted without new information. With such clarification, there is no need for significant delay resulting from resubmissions of "reconsideration requests that previously were considered … without additional information." 86 Fed. Reg. at 46,915. The Departments could also propose a timeframe prior to removal of the applicant within which requests for reconsideration would be considered. Doing so would eliminate some of the impetus for multiple RFRs—*e.g.* submitting one immediately in an effort to forestall removal while simultaneously working to prepare a more detailed submission. These more limited changes would accomplish the Departments' objectives of limiting time spent on non-meritorious requests for reconsideration without sacrificing the necessary safeguard for meritorious requests.

The Departments should also make RFRs available to *pro se* applicants to avoid the profound unfairness of making a crucial mechanism to prevent erroneous removals only available to represented applicants. We suggest posting in a prominent location information (translated as appropriate) in all detention centers describing how to file an RFR, the bases for which they may be granted (e.g. specific procedural errors), and providing mailing information and establishing a telephone hotline to receive requests.

J. Any final rule should explicitly end the Prompt Asylum Claim Review (PACR) program and the Humanitarian Asylum Review Process (HARP).

If the Departments proceeds to finalize the proposed rule, they should take the opportunity to PACR and HARP. CBP began these two programs in late October 2019. The HARP program applies to Mexican nationals, and the PACR program applies to non-Mexican nationals, although they operate almost identically. They provide for the credible fear screening process to take place while the applicant remains in CBP custody. CBP does not have detention facilities that are appropriate for long term detention. The applicant is never transferred to ICE detention. People put through the programs are typically given only 30 minutes to an hour to contact a lawyer or family members before the credible fear interview and are not permitted any further phone calls outside of CBP detention. Unlike detention facilities managed according to ICE standard, legal professionals are not allowed to visit individuals detained at CBP facilities, phone access is not guaranteed and rarely provided, and individuals are essentially held without the ability to communicate. If they do not pass the credible fear interview, the immigration judge appeal occurs over the telephone.

While credible fear screenings in ICE detention are problematic, the PACR and HARP programs are profoundly worse. The DHS Inspector General concluded that PACR and HARP were inconsistent with CBP detention standards and design, lack protections for asylum seekers

available in ICE custody, and are "not conducive to" preparation for screening interviews.[64] And the Government Accountability Office determined that while 74% of applicants passed their CFI, whereas for those subjected to PCR/HARP and held in CBP facilities, the passage rate was only 23%.[65]

While President Biden ordered that DHS cease implementing these programs,[66] the Departments should codify their elimination by regulation, including by imposing enhanced procedural protections for all CFI interviews, including that they not be conducted while in CBP custody. As the Departments revisit their asylum screening procedures, they should take this opportunity to prevent reintroduction of the programs by a future administration.

V. Conclusion.

Thank you for considering our views as the Departments determine whether and how to finalize any proposed rule. If you have any questions, please contact Robin Thurston, Democracy Forward Foundation (rthurston@democracyfoward.org), counsel for RAICES.

Sincerely,

Florence Immigrant & Refugee Rights Project

Las Americas Immigrant Advocacy Center

Proyecto Dilley

Refugee and Immigrant Center for Education and Legal Services

[64] Department of Homeland Security, Office of the Inspector General, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs* (Jan. 25, 2021), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-16-Jan21.pdf.

[65] Government Accountability Office, *Southwest Border: DHS and DOJ Have Implemented Expedited Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry* (Accessible Version) (Jan. 2021), *available at* https://www.gao.gov/assets/720/711974.pdf.

[66] Executive Order 14010, Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8267 (Feb. 2, 2021).