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Lauren Alder Reid
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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

Submitted via www.regulations.gov

**Re: RIN 1125-AA94; EOIR Docket No.18-0002, Public Comment Opposing
Proposed Rules on Asylum**

Dear Assistant Director Reid:

We respectfully submit this comment to the U.S. Department of Homeland Security’s Notice of proposed rulemaking – Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, published on June 15, 2020 (“Proposed Rule or Regulation”). We write to express our profound concern related to this devastating and sweeping proposal. While we find the entire Proposed Rule to be flawed—and echo the excellent critiques made by numerous other commenters—we are focusing our comments on the provisions related to what are tantamount to new asylum bars falsely dressed in the garb of “discretion.”¹

We lead the Immigrant Rights Clinic at Duke Law School, which represents asylum seekers in affirmative claims for protection, as well as defensive claims both before the Immigration Court and the Board of Immigration Appeals. Collectively, we have represented scores of asylum seekers. In addition to our amicus work related to the mandatory grounds of

¹ See generally Proposed Rule § 1208.13(d).

ineligibility for asylum,² we have published scholarship on the 1980 Refugee Act, as well as the United States' international treaty obligations under the United Nations Protocol Relating to the Status of Refugees,³ which adopted by reference the provisions of the Convention Relating to the Status of Refugees.^{4 5}

The Proposed Rule would radically restrict the scope of asylum in a manner that cannot be reconciled with clear congressional intent as expressed in the Refugee Act.⁶ Congress carefully defined eligibility and created a series of detailed and circumscribed grounds of ineligibility.⁷ Yet, the Proposed Rule both interferes and conflicts with the statute's framework by dramatically limiting who can qualify for relief through far-reaching disqualifying provisions that would bar vast numbers of bona fide refugees.⁸ Additionally, the Rule represents a breathtaking departure from nearly four decades of Agency interpretation and practice related to discretionary asylum adjudications.⁹

I. The Proposed Rule's Discretionary Bars are Utterly Antithetical to the Structure and Intent of the Asylum Statute.

The Immigration and Nationality Act ("INA") provides that "any [noncitizen] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of . . . status, may apply for asylum."¹⁰ Section 208(b)(1) sets out the eligibility criteria, stating that a noncitizen may be granted asylum "if [an asylum officer or immigration judge] . . . determines that [she] is a refugee."¹¹ A refugee is defined as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided . . . , and who is unable or unwilling to avail . . . herself of the protection of that country because of

² See *Amici Curiae Brief of International Refugee Law Scholars*, and *Amici Curiae Brief of American Immigration Lawyers Association*, et al., *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018), briefs available at <https://www.uidaho.edu/law/academics/practical-skills/clinics/immigration/practice-advisory>.

³ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

⁴ Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

⁵ Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN.L.REV.453 (2016); Kate Evans, *Litigation Update in Negusie v. Holder: The Board of Immigration Appeals Nears Decision on the Persecutor Bar*, 22 BENDER'S IMMIGR. BULL. 1383 (Dec. 1, 2017); Kate Evans, *Matter of M-E-V-G-and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group,"* 14-06 IMMIGR. BRIEFINGS 1 (June 2014) (co-authored); Charles Ellison and Anjum Gupta, *Un(avail)able Protection: The Shifting Legal Landscape in the Eighth Circuit and Beyond for Asylum Seekers Fleeing Nonstate Persecution*, BENDER'S IMMIGR. BULL. (forthcoming); Charles Ellison, *Defending Refugees: A Case For Protective Procedural Safeguards In the Persecutor Bar Analysis*, 33 GEO. IMMIGR. L.J. 2013 (2019).

⁶ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of the Immigration and Nationality Act).

⁷ INA § 208(b)(1)-(b)(2).

⁸ See Proposed Rule 1208.13(d).

⁹ *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); *Matter of H-*, 21 I. & N. Dec. 337, 347-48 (BIA 1996); *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989); *Matter of McMullen*, 19 I. & N. Dec. 90, 99-100 (BIA 1984).

¹⁰ INA § 208(a)(1).

¹¹ *Id.*

persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹²

The statute then carefully demarcates the grounds of *ineligibility* that prevent an applicant—who otherwise meets the refugee definition—from being granted asylum.¹³ Among those are the safe third country bar,¹⁴ one-year filing bar,¹⁵ previously denied asylum bar,¹⁶ persecutor bar,¹⁷ particularly serious crime bar,¹⁸ serious nonpolitical crime bar,¹⁹ danger to U.S. security bar,²⁰ terrorist related inadmissibility bars,²¹ and firm resettlement bar.²² While the Act contemplates that the “Attorney General may by regulation establish additional limitations and conditions,” the statute cabins the AG’s authority by requiring any such “additional limitation[]” or “condition” to be “consistent with this section under which [a noncitizen] shall be ineligible for asylum.”²³ Put another way, and consistent with administrative law principles, the Agency cannot rewrite the statute through regulation.²⁴

Nevertheless, that is precisely what the Proposed Regulation seeks to do, rendering a nullity much of Congress’ careful balancing of statutory provisions related to eligibility and ineligibility. For example, the Rule considers the following three factors to be “significantly adverse,” barring asylum for individuals who: (1) “unlawful[ly] enter” or attempt to enter the United States, “unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country;” (2) fail to “apply for protection from persecution or torture in at least one country” through which they “transited before entering the” U.S.;²⁵ and (3) use “fraudulent documents to

¹² INA § 101(a)(42).

¹³ See INA § 208 (a)(2), (b)(2). The statute “is rooted in the 1951 Convention, which excludes from protection two . . . categories of [noncitizens]—those persons “considered not to be *deserving* of international protection,” and those persons “not considered to be in *need* of international protection.” *E. Bay Sanctuary Covenant v. Barr*, 2020 WL 3637585, at *10 (9th Cir. July 6, 2020) (citing U.N. High Commissioner for Refugees (“UNHCR”) Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) ch. 4, ¶¶ 144–63 (emphases added); see *Cardoza-Fonseca*, 480 U.S. at 439 n.22, 107 S.Ct. 1207 (noting that Handbook provides “significant guidance” in interpreting refugee law)).

¹⁴ INA § 208(a)(2)(A).

¹⁵ INA § 208(a)(2)(B).

¹⁶ INA § 208(a)(2)(C).

¹⁷ INA § 208(b)(2)(A)(i).

¹⁸ INA § 208(b)(2)(A)(ii).

¹⁹ INA § 208(b)(2)(A)(iii).

²⁰ INA § 208(b)(2)(A)(iv).

²¹ INA § 208(b)(2)(A)(v).

²² INA § 208(b)(2)(A)(vi).

²³ INA § 208(b)(2)(C).

²⁴ See *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961 (7th Cir. 2019), *reh'g denied* (July 18, 2019) (It is an “uncontroversial proposition that an agency has no power to rewrite the text of a statute.”) (citing *Chevron v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If Congress has defined a term, then an implementing regulation cannot re-define that term in a conflicting way.”)).

²⁵ Proposed Rule § 1208.13(d)(1). The Proposed Rule exempts from this bar only those who “received a final judgement denying . . . protection” in a transit country who can demonstrate they are victim of a “severe form of trafficking in persons,” or who traveled through countries that are “not parties to the 1951 [Convention] . . . , the 1967 Protocol, or the [Convention Against Torture].”

enter the United States, unless the [noncitizen] arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.”²⁶

The Proposed Rule also creates nine other “adverse factors” that all but guarantee “the denial of asylum as a matter of discretion” to any individual who has: (1) “spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States;”²⁷ (2) traveled through “more than one country prior to arrival in the” U.S.;²⁸ (3) incurred certain “criminal convictions that remain valid for immigration purposes;” (4) accrued “more than one year’s cumulative” unlawful presence prior to filing an application for asylum; (5) failed to file a required tax return; (6) “had two prior asylum applications denied for any reason;” (7) “withdrawn with prejudice or abandoned an asylum application;” (8) missed an asylum interview without prior authorization or in the absence of exceptional circumstances; or (9) failed to file a motion to reopen within one year of a change in circumstances.²⁹ Only where such applicants can establish “extraordinary circumstances... involving national security or foreign policy consideration,” or demonstrate “by clear and convincing evidence . . . that the denial . . . would result in exceptional and extremely unusual hardship” can they *possibly* overcome these new asylum bars.³⁰ Indeed, the Proposed Rule explains that “a showing of extraordinary circumstances *might still be insufficient to warrant a favorable exercise of discretion.*”³¹

In their combination, these so-called “discretionary factors,” which are near-absolute bars, create a reticulated series of additional restrictions that effectively eliminate asylum protection. The Proposed Rule moves far beyond what the Refugee Convention or Congress contemplated as grounds of ineligibility. In fact, when considered collectively it is difficult to see what residual work is left for the statutory bars should the Agency adopt these proposed so-called “discretionary factors.”³²

Likewise, the Proposed Regulation’s discretionary provisions *individually* interfere and conflict with the statute in at least five distinct ways: (1) the “unlawful entry” discretionary bar³³ contradicts INA § 208(a)(1), which states that “*any[one] who is physically present in the United States . . . [] whether or not [she arrived] at a designated port of arrival . . . may apply for asylum;*” (2) the “one-year unlawful presence” discretionary bar³⁴ renders many of INA § 208(a)(2)(D)’s exceptions to the one-year filing deadline superfluous; (3) the “fraudulent document” discretionary bar³⁵ is incongruent with INA § 209(c)’s inadmissibility waiver for fraud and material misrepresentations; (4) the discretionary transit bars³⁶ convert to mere surplusage the provisions

²⁶ Proposed Rule § 1208.13(d)(1).

²⁷ This bar has the same exception as noted in *supra* note 25.

²⁸ This bar has the same exception as noted in *supra* note 25.

²⁹ Proposed Rule § 1208.13(d)(2)(i).

³⁰ Proposed Rule § 1208.13(d)(2)(ii).

³¹ *Id.* (emphasis added).

³² See *infra* notes 112-118 and accompanying text.

³³ Proposed Rule § 1208.13(d)(1)(i).

³⁴ Proposed Rule § 1208.13(d)(2)(i)(D).

³⁵ Proposed Rule § 1208.13(d)(1)(iii).

³⁶ Proposed Rule § 1208.13(d)(1)(ii); (d)(2)(i)(A), (B).

of INA § 208(a)(1)(2) and (b)(2)(A)(vi) related to safe third country and firm resettlement; and (5) the remaining miscellaneous discretionary bars³⁷ apply to conduct so insignificant as to be utterly out of step—and thus irreconcilable with—the statutory bars Congress selected.

A. The “unlawful entry” discretionary bar contradicts INA § 208(a)(1), which defines the scope of who can seek asylum in the U.S.

The statute unambiguously states that anyone who is present in the U.S.—regardless of manner of entry or status—can seek asylum. However, the Proposed Rule categorically bars relief to virtually all applicants who enter the U.S. outside of a port of entry.³⁸ It should be beyond dispute that such a proposal is inconsistent with INA § 208(a)(1).³⁹ Courts have already recognized that a “rule barring asylum for immigrants who enter the country outside a port of entry *irreconcilably conflicts* with the INA and the expressed intent of Congress.”⁴⁰ Whatever the scope of the Agency’s authority may be, it “may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden.”⁴¹

Although the Agency may promulgate regulations that create “additional limitations” or “condition[s],” those additions must be “consistent with” Congress’ judgment related to asylum eligibility and ineligibility.⁴² Any construction of the statute that would allow the Agency to prohibit what Congress has allowed would render superfluous the “consistent with” language of INA § 208 (b)(2)(C).⁴³ As the Ninth Circuit Court of Appeals recently noted, “[t]he legislative history of [the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)] emphasizes the importance Congress attached to the constraints on the Attorney General’s discretion to prescribe criteria for asylum eligibility.”⁴⁴

Indeed, “[w]hen enacting IIRIRA, Congress went out of its way to insert the ‘consistent with’ language into [§ 208(b)(2)(C)], adding it to an earlier draft of IIRIRA that had not contained that language.”⁴⁵ Since “[t]he authority that the Attorney General and the Secretary of Homeland Security” must invoke “in support of the Rule is their authority to promulgate regulations ‘consistent with’ [§ 208(b)(2)(C)], they *cannot sidestep the statutory restriction* on their authority.”⁴⁶ As such, this aspect of the Proposed Rule must fail.

³⁷ See generally Proposed Rule § 1208.13(d).

³⁸ Compare INA § 208(a)(1) with Proposed Rule § 1208.13(d)(1)(i).

³⁹ See *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018), *aff’d*, 950 F.3d 1242 (9th Cir. 2020), and *aff’d*, 950 F.3d 1242 (9th Cir. 2020).

⁴⁰ *Id.* (emphasis added).

⁴¹ See *id.*

⁴² INA § 208(b)(2)(C).

⁴³ *E. Bay Sanctuary Covenant v. Barr*, 2020 WL 3637585, at *13 (9th Cir. July 6, 2020).

⁴⁴ *Id.*

⁴⁵ *Id.*; compare H.R. Rep. No. 104-469, at 80 (1996), with H.R. Rep. No. 104-828, at 164; H.R. Rep. No. 104-828, at 164 (1996) (Conf. Rep.).

⁴⁶ *O.A. v. Trump*, 404 F. Supp. 3d 109, 151 (D.D.C. 2019) (emphasis added).

B. The “one-year unlawful presence” discretionary bar conflicts with the one-year filing deadline exceptions of INA § 208(a)(2)(D).

The statute provides that an applicant for asylum must file her application within one year after her last date of arrival in the United States.⁴⁷ However, Congress included two broad exceptions for one who misses her filing deadline: she can “demonstrate . . . either [1] the existence of changed circumstances which materially affect [her] eligibility for asylum or [2] extraordinary circumstances related to the delay in filing [her] application.”⁴⁸ Long recognized examples that satisfy these exceptions range from changes in one’s country that give rise to a new asylum claim,⁴⁹ to “serious illness[,] mental or physical disability,”⁵⁰ or “ineffective assistance of counsel.”⁵¹

Nevertheless, the Proposed Rule does not take any of these statutory exceptions to the one-year filing deadline into consideration. Instead, the Rule mandates that one who has “[a]ccrued more than one year of unlawful presence in the United States prior to filing an application for asylum” must be denied relief⁵² absent the extraordinary showing described in Proposed Rule § 1208.13(d)(1)(ii).⁵³ For applicants who immediately begin to accrue unlawful presence upon entry,⁵⁴ the effect of this discretionary bar is to override all of the one-year filing deadline’s exceptions. For example, an applicant with more than one year of unlawful presence—who is from a country where his life is in danger due to a recent coup—would be excepted from the one-year filing deadline,⁵⁵ but denied under the Proposed Rule because there is no equivalent exception to the accrual of unlawful presence.⁵⁶ The same outcome could be expected for those with more than one year of unlawful presence who failed to timely file for asylum due to a “serious illness[,] mental or physical disability,”⁵⁷ or “ineffective assistance of counsel.”⁵⁸

As noted above, the Agency is prohibited from promulgating regulations that supplant congressional will related to eligibility and ineligibility for asylum.⁵⁹ Because Congress has seen fit to provide exceptions to the one-year filing deadline, it is error for the Agency to issue a Rule that renders those exceptions inoperable for any asylum-seeker.

⁴⁷ INA § 208(a)(2)(B).

⁴⁸ INA § 208(a)(2)(D).

⁴⁹ 8 C.F.R. § 208.4(4)(i)(A).

⁵⁰ 8 C.F.R. § 208.4(5)(i).

⁵¹ 8 C.F.R. § 208.4(5)(iii).

⁵² Proposed Rule § 1208.13(d)(2)(i)(D).

⁵³ As noted elsewhere in this comment, the required showing in § 1208.13(d)(1)(ii) will rarely be satisfied. *See supra* note 30-31.

⁵⁴ This would include all who enter without inspection or overstay a visa. *See* INA § 212(a)(9)(B)(ii).

⁵⁵ 8 C.F.R. § 208.4(4)(i)(A).

⁵⁶ *Cf.* INA § 212(a)(9)(B)(iii).

⁵⁷ 8 C.F.R. § 208.4(5)(i).

⁵⁸ 8 C.F.R. § 208.4(5)(iii).

⁵⁹ INA § 208(b)(2)(C).

C. The “fraudulent document” discretionary bar is incongruent with the inadmissibility waiver of INA § 209(c).

Congress has provided a broad waiver of inadmissibility related to fraud and material misrepresentations for refugees and asylees.⁶⁰ The statutory eligibility/ineligibility provisions related to asylum operate within the widespread understanding that refugees are frequently forced to make use of desperate measures in order to escape their country of feared persecution.⁶¹ There are no statutory provisions in INA § 208 that would cause document fraud to disqualify an asylum applicant. Instead, Congress through INA § 209(c) provided that “the Secretary of Homeland Security or the Attorney General may waive any . . . provision of [INA § 212(a)(6)(C) related to fraud and material misrepresentations] . . . for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”⁶²

However, the Proposed Regulation creates a bar for any asylum-seeker who “use[s] . . . [a] fraudulent document[] to enter the United States, unless the [noncitizen] arrived . . . by air, sea, or land directly from the applicant's home country without transiting through any other country.”⁶³ Since most asylum-seekers are unable to obtain travel documents from within their country, the Proposed Rule’s exception will apply to very few.⁶⁴

But even putting that aside, the Rule categorically removes access to asylum for conduct that Congress did not deem disqualifying, and for which Congress expressly provided a waiver.⁶⁵ The Agency may not like the waiver that Congress created, but it cannot through regulation rewrite the statute to eliminate it.⁶⁶

D. The discretionary transit bars make superfluous the safe-third-country and firm resettlement provisions of INA § 208(a)(1)(2)(A) and (b)(2)(A)(vi).

Congress, “[i]n enacting the two safe-place bars . . . , specifically addressed the circumstances in which [a noncitizen] who has traveled through, or stayed in, a third country can be deemed sufficiently safe in that country to warrant a denial of asylum in the United States.”⁶⁷ The purpose of the two statutory bars is to “limit [a noncitizen’s] ability to claim asylum in the United States when other *safe* options are available.”⁶⁸ However, they are not intended to bar from

⁶⁰ INA § 209(c).

⁶¹ *Matter of Pula*, 19 I. & N. Dec. at 473–74. The Board has long noted that the “use of fraudulent documents to escape the country of persecution . . . is *not a significant adverse factor*,” *id.*, as this is frequently required to flee one’s country and seek asylum.

⁶² INA § 209(b), (c). This waiver applies to applications for adjustment of status for both refugees and asylees.

⁶³ Proposed Rule § 1208.13(d)(1)(iii).

⁶⁴ The “Supreme Court has long recognized that . . . ‘many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops [in several countries] along the way.’” *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *11 (citing *Rosenberg*, 402 U.S. at 57 n.6, 91 S.Ct. 1312).

⁶⁵ INA § 209(b), (c).

⁶⁶ INA § 208(b)(2)(C). The Agency cannot promulgate regulations that are not “consistent with” Congress’ judgment related to eligibility and ineligibility for asylum. *Id.*

⁶⁷ *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at 12.

⁶⁸ *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013) (emphasis added).

protection those “with nowhere else to turn.”⁶⁹ As noted in *E. Bay Sanctuary Covenant* “[a] critical component of both bars is the requirement that the [noncitizen’s] ‘safe option’ be genuinely safe.”⁷⁰

However, the three discretionary bars contained with the Proposed Rule regarding transit through third countries in route to the U.S.⁷¹ stand in irreconcilable conflict with the provisions of INA § 208(a)(1)(2)(A) (related to the safe-third-country agreements) and (b)(2)(A)(vi) (related to firm resettlement). It is difficult to conceive of any work left for those statutory provisions should the Agency finalize the Proposed Rule.⁷² As with past proposals from this administration, the Rule “would make entirely superfluous the protection provided by the two safe-place bars” because mere transit through a country blocks eligibility for asylum without any regard for whether those countries are actually safe.⁷³ Under the Proposed Rule, the government need not enter into a safe-third-country agreement, nor show firm resettlement in a third country, in order to deny an applicant protection. Rather, asylum-seekers will be barred simply for (1) spending more than 14 days in any one country;⁷⁴ (2) failing to apply for protection in any country, regardless of time spent there;⁷⁵ and (3) transiting through more than one country en route to the U.S.⁷⁶ The Proposed Rule exempts only those who “received a final judgement denying . . . protection” in a transit country, who can demonstrate they are victim of a “severe form of trafficking in persons,” or who traveled through countries that are “not parties to the 1951 [Convention] . . . , the 1967 Protocol, or the [Convention Against Torture].”⁷⁷

The Rule gives absolutely no consideration for that “critical component” that the applicant have a “genuinely safe option.”⁷⁸ It patently ignores whether the applicant “would have access to a full and fair procedure for determining [her] claim to asylum.”⁷⁹ And, it contains no exception

⁶⁹ *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996).

⁷⁰ *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *10-11 (“The safe-third-country bar requires that the third country enter into a formal agreement with the United States; that the [noncitizen] will not be persecuted on account of a protected ground in that country; and that the [noncitizen] will have access to a “full and fair” asylum procedure in that country. . . . The requirement of a pre-existing [safe-third-country] agreement was an essential procedural safeguard agreed to among members of Congress to prevent arbitrary denials of asylum. . . . The firm-resettlement bar requires the government to make an individualized determination whether [a noncitizen] has truly been firmly resettled, or, if only an offer of permanent resettlement has been made, an individualized determination whether [a noncitizen] has too tenuous a tie to the country making the offer or is too restricted by that country’s authorities. . . . The safe-place requirements embedded in the safe-third-country and firm-resettlement bars ‘ensure that if the United States denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution’—an outcome which ‘would totally undermine the humanitarian policy’” of the refugee system.).

⁷¹ Proposed Rule § 1208.13(d)(1)(ii); (d)(2)(i)(A), (B).

⁷² Even with the Proposed Rule’s contorted and redefined firm resettlement bar, it is difficult to see when that bar would ever apply given the expansive nature of these discretionary transit bars.

⁷³ See e.g., *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *12.

⁷⁴ Proposed Rule § 1208.13(d)(2)(i)(A).

⁷⁵ Proposed Rule § 1208.13(d)(2)(i)(3)(B).

⁷⁶ Proposed Rule § 120813(d)(1)(ii).

⁷⁷ See *supra* notes 74-76.

⁷⁸ *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *10-11.

⁷⁹ Cf. INA § 208(a)(1)(2)(A).

for unaccompanied immigrant children—who are exempted entirely from the firm resettlement bar.⁸⁰ As such, the Proposed Rule again fails the litmus test of INA § 208 (b)(2)(C).

E. The miscellaneous discretionary bars are inconsistent with INA § 208 as a whole.

The Asylum bars enumerated above “fall into two broad categories:” (1) those that bar individuals “who may otherwise be entitled to asylum but who pose a threat to society,” (e.g., persecutors, those convicted of particularly serious crimes, terrorists, or those who pose a danger to the security of the United States);⁸¹ and (2) those “who do not need the protection of asylum in the United States—[]who may be removed to a safe third country, and . . . who have firmly resettled in another country.”⁸² The remaining miscellaneous discretionary bars⁸³—like all of the discretionary bars discussed so far—bear no resemblance to the type of conduct Congress has deemed disqualifying.

As noted above, the Proposed Rule’s discretionary bars apply to conduct so inconsequential as to be entirely out of step and thus inconsistent with the statutory bars Congress selected in INA § 208. Where Congress, in keeping with the Refugee Convention and Protocol,⁸⁴ has determined to exclude those who are persecutors, who have been convicted of particularly serious crimes, who constitute a danger to the community, who have committed serious nonpolitical crimes outside the U.S., who are a threat to national security, and who have engaged in terrorist activities,⁸⁵ the Proposed Rule aims to bar those who forgot to file their taxes or missed an asylum appointment. Such criteria is fundamentally at odds with intent and text of the Refugee Act.⁸⁶

⁸⁰ INA § 208(2)(2)(E); 6 U.S.C. § 279(g).

⁸¹ *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *10 (citing 8 U.S.C. § 1158(b)(2)(A)(i)–(iv)).

⁸² *Id.*

⁸³ See Proposed Rule § 1208.13(d)(2)(i) (Barring an individual who (1) incurred certain “criminal convictions that remain valid for immigration purposes;” (2) failed to file a required tax return; (3) “had two prior asylum applications denied for any reason;” (4) “withd[rew] with prejudice or abandoned an asylum application;” (5) missed an asylum interview without prior authorization or in the absence of exceptional circumstances; or (6) failed to file a motion to reopen within one year of a change in circumstances.)

⁸⁴ *E. Bay Sanctuary Covenant*, 2020 WL 3637585, at *10 (“The statute is rooted in the 1951 Convention, which excludes from protection . . . those persons ‘considered not to be *deserving* of international protection.’”) (citing U.N. High Commissioner for Refugees (“UNHCR”) Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) ch. 4, ¶¶ 144–63 (emphases added)).

⁸⁵ *Id.* (“Scholars have noted that the bars of § 1158 “rough[ly] parallel[]” the bars of the 1951 Convention.) (citing Legomsky & Rodríguez at 1016; see also Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int’l L. 1, 50–51, 55–60 (1987)).

⁸⁶ INA § 208, 209(b), (c). Another example of the asymmetry between the Proposed Rule and the INA is that the latter allows “the Secretary of Homeland Security or the Attorney General [to] waive [almost any provision of INA § 212(a)] . . . for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” INA § 209(c). Congress did not deem those convicted of “crimes involving moral turpitude,” those who “without reasonable cause failed to attend . . . [removal] proceedings,” or those who have engaged in “smuggling” to be categorically ineligible for relief, though the Proposed Rule disqualifies applicants for conduct far more innocuous.

* * *

Whether analyzed in the aggregate or individually, the Proposed Rule is completely antithetical to the asylum statute. Rather than carefully define actual discretionary factors, the Proposed Rule's apparent aim is to eliminate asylum protection for as many people as possible, the latest in a series of unlawful attempts by this administration at the same objective.⁸⁷

II. The Proposed Rule's Discretionary Bars Represent a Radical Departure from Nearly Four Decades of Agency Policy and Practice.

While the Proposed Rule purports to “build on the BIA’s guidance regarding discretionary asylum determinations,”⁸⁸ it actually represents an extraordinary departure from Board precedent.⁸⁹ For decades the Board has held that “the *danger of persecution should generally outweigh all but the most egregious of adverse factors.*”⁹⁰ Of important relevance here, the Board has noted that “[a] situation of *particular concern* involves an [noncitizen] *who has established his statutory eligibility for asylum* but cannot meet the higher burden required for withholding of deportation.”⁹¹ The Board reasoned that for such a person there is “*a strong possibility* that” removal will result in “*persecut[ion]*,” and that “the discretionary factors should be carefully evaluated *in light of the unusually harsh consequences* which may befall [a noncitizen] who has established a well-founded fear of persecution.”⁹²

The Board thus has directed adjudicators to consider “the totality of the circumstances,” which includes (1) whether a noncitizen who transited through a third country “is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where [she] fears persecution,” (2) “whether the noncitizen has . . . personal ties to this country which motivated [her] to seek asylum here rather than elsewhere,” and (3) “general humanitarian considerations, such as an [noncitizen’s] tender age or poor health.”⁹³ Rather than allowing any one negative factor to be outcome-determinative, the Board directs adjudicators to “balance” the positive and negative factors.⁹⁴ Nevertheless, the reasonable possibility of future persecution

⁸⁷ See e.g., *Innovation Law Lab v. Wolf*, 951 F.3d 1073, (9th Cir. 2020); *CAIR Coalition et al v. Trump*, Case 1:19-cv-02117-TJK (D.C. Dist. Ct June 30, 2020).

⁸⁸ *Proposed Rule, Section 6. Factors for Consideration in Discretionary Determinations.*

⁸⁹ *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); *Matter of H-*, 21 I. & N. Dec. 337, 347–48 (BIA 1996); *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989).

⁹⁰ *Matter of Pula*, 19 I. & N. Dec. at 474 (emphasis added).

⁹¹ *Id.* (emphasis added).

⁹² *Id.* (emphasis added).

⁹³ *Id.*

⁹⁴ *Id.*; *Matter of H-*, 21 I. & N. Dec. 337, 347–48 (BIA 1996) (“Our caselaw also recognizes that general humanitarian reasons, independent of the circumstances that led to the applicant’s refugee status, such as his or her age, health, or family ties, should also be considered in the exercise of discretion.”); *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989) (“[W]hile the likelihood of future persecution is a factor to consider in exercising discretion in cases where an asylum application is based on past persecution, asylum may in some situations be granted where there is little threat of future persecution. Moreover, as with any case involving the exercise of discretion, all other factors, both favorable and adverse, should also be considered, with recognition of the special considerations present in asylum cases”).

should outweigh all but the most exceptionally negative factors.⁹⁵ For this reason, discretionary denials—as they should be—are “exceedingly rare.”⁹⁶

In sharp contrast to the Agency’s long-standing treatment of discretionary decisions, the Proposed Rule directs adjudicators to only consider negative factors, and it effectively treats those negative factors as dispositive. For example, the three “significantly adverse” factors are apparently decisive and incapable of being offset with any countervailing positive factors.⁹⁷ Similarly, the Proposed Rule’s nine additional “adverse factors” virtually ensure “the denial of asylum as a matter of discretion” to any individual covered.⁹⁸ As noted above, only where one can establish “extraordinary circumstances . . . involving national security or foreign policy consideration,” or demonstrate “by clear and convincing evidence . . . that the denial . . . would result in exceptional and extremely unusual hardship” can they *possibly* overcome these new asylum bars.⁹⁹ And even then, the Proposed Rule explains that “a showing of extraordinary circumstances *might still be insufficient to warrant a favorable exercise of discretion.*”¹⁰⁰

As it relates to the “unlawful entry” factor, the Proposed Rule represents another 180-degree reversal of the Agency’s policy of more than thirty years.¹⁰¹ The Board has explained that “while . . . [a noncitizen’s] manner of entry or attempted entry is a . . . relevant discretionary factor to consider in adjudicating asylum applications . . . [,] *it should not be considered in such a way that the practical effect is to deny relief in virtually all cases.*”¹⁰² Yet, that is exactly what the Proposed Rule does.

Likewise, under the Proposed Rule the use “fraudulent documents to enter the United States”¹⁰³ results in an automatic denial in virtually all cases. However, the Board has long noted that the “use of fraudulent documents to escape the country of persecution . . . is *not a significant adverse factor,*”¹⁰⁴ as this is frequently required to flee one’s country and seek asylum.

⁹⁵ *Matter of Pula*, 19 I. & N. Dec. at 474; *Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996) (“The danger of persecution will outweigh all but the most egregious adverse factors.”); *Cf. Matter of McMullen*, 19 I. & N. Dec. 90, 99–100 (BIA 1984) (The BIA noted “the serious adverse factor of [applicant’s] involvement in the [Provisional Irish Republican Army]’s random violence directed against innocent civilians,” and that “[h]e may not separate the active and effective role he played in the PIRA’s operations from responsibility for . . . indiscriminate bombing campaigns or its murder, torture, and maiming of innocent civilians who disagreed with the PIRA’s objectives or methods.” The BIA thus held that “[t]he record contains no counter-vailing equities to overcome the extremely negative discretionary factors present.”).

⁹⁶ *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008) (noting that “discretionary denials of asylum do occur,” but that “such denials are ‘exceedingly rare,’ . . . and are generally based on egregious conduct by the applicant.”)(citing *Huang v. I.N.S.*, 436 F.3d 89, 97-102 (2d Cir. 2006) and *Aioub v. Mukasey*, 540 F.3d 609, 612 (7th Cir.2008) (applicant’s fraudulent marriage)).

⁹⁷ Compare Proposed Rule § 1208.13(d)(1) with Proposed Rule § 1208.13(d)(2)(ii).

⁹⁸ Proposed Rule § 1208.13(d)(2)(i).

⁹⁹ Proposed Rule § 1208.13(d)(2)(ii).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987).

¹⁰² *Id.* (“[M]anner of entry or attempted entry . . . is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case.”) (emphasis added).

¹⁰³ Proposed Rule § 1208.13(d)(1).

¹⁰⁴ *Matter of Pula*, 19 I. & N. Dec. at 473–74 (emphasis added).

As explained last month by Chief Justice Roberts, “the Government should turn square corners in dealing with the people.”¹⁰⁵ It is a core value “of administrative law” that agencies should be held accountable “by ensuring that . . . the public can respond fully and in a timely manner to an agency’s exercise of authority” and the reasons provided therein.¹⁰⁶ Here, the Agency is seeking to upend decades of policy and practice without providing any explanation for why this dramatic departure is necessary, let alone justified. Likewise, the Agency has not shown that it has fully considered the alternatives. The Supreme Court has warned that “[w]hen an agency changes course. . . , it must be cognizant that *longstanding policies may have engendered serious reliance interests* that must be taken into account[;] [i]t would be arbitrary and capricious to ignore such matters.”¹⁰⁷ Yet, the Proposed Rule appears to give no consideration for the significant reliance interests involved here, as evidenced both by the Agency’s failure to include a future effective date¹⁰⁸ and the absence of any procedural safeguards related to notice and opportunity to respond to a decision to apply one of the discretionary bars in an individual case.¹⁰⁹

The Proposed Rule does not call for an even-handed balancing of positive and negative factors. And despite calling them “discretionary factors,” the Rule actually removes all discretion by placing an exceptionally large thumb on the side of denial, betraying what appears to be the Agency’s true intention with these rules: to guarantee the denial of as many future claims as

¹⁰⁵ *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1913 (internal quotations omitted) (emphasis added).

¹⁰⁸ See e.g., *De Niz Robles v. Lynch*, 803 F.3d 1165, 1173-74 (10th Cir. 2015) (J. Gorsuch) (“[A] new agency rule announced by notice-and-comment rulemaking” must not be applied retroactively given the “due process and equal protection concerns that traditionally attend retroactive lawmaking. . . . For the concerns that attend retroactive legislation equally attend retroactive agency action. . . . In both cases permitting retroactivity would undo settled expectations. . . .”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1145-46 (10th Cir. 2016) (J. Gorsuch) (“[T]o the extent the executive is permitted to exercise delegated legislative authority to overrule judicial decisions, logic suggests it should be bound by the same presumption of prospectivity that attends true legislative enactments. . . . The due process concerns are obvious: when Mr. Gutierrez-Brizuela [applied for relief], he had no notice of the law the [Agency] now seeks to apply. And the equal protection problems are obvious too: if the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter.”)

¹⁰⁹ When USCIS contemplates denying an application based upon surprising derogatory information, the applicant “shall be advised of this fact and *offered an opportunity to rebut the information and present information* in his/her own behalf *before the decision is rendered.*” 8 C.F.R. § 103.2(b)(16)(i) (emphasis added).

possible.^{110 111} This point is most saliently illustrated by considering a hypothetical asylum-seeker's options for coming to the U.S. to seek asylum.¹¹²

Given the urgency surrounding the need to flee persecution, many bona fide asylum-seekers are unable to wait in their country long enough to obtain a visa to enter the U.S. For those few who have the resources and ability to seek a U.S. visa from a third country, the requirement of nonimmigrant intent ensures that if an applicant discloses her fear of persecution, and thus her intent to abandon her foreign residence, she will not be granted a U.S. visa to enter.¹¹³ If she obtains a visa by misrepresenting her true intentions to seek asylum in the U.S. or by presenting fraudulent documents, she faces denial under the Proposed Rule.¹¹⁴ If she remains for more than two weeks in that third country while waiting for her visa decision, she faces an additional ground of denial under the Proposed Rule.¹¹⁵ If she accurately represents her intentions during her visa interview—resulting in a denial of her visa—and is thus forced to travel through other countries to present herself at a U.S. port of entry, she has added yet another reason for denial under the Proposed Rule.¹¹⁶ Once she arrives at the U.S. border, because of metering, the remain in Mexico policy, and the current ban on entry for all asylum-seekers,¹¹⁷ she will be denied entry. If out of

¹¹⁰ White House Senior Policy Adviser, Stephen Miller has said that stopping asylum seekers is “all he cares about” and that he would be “happy if not a single refugee came to the United States.” See Michael Shear & Maggie Habberman, *Trump’s Temporary Halt to Immigration is Part of Broader Plan, Stephen Miller Says*, N.Y. Times (April 25, 2020), available at <https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-immigration-stephen-miller.html>; Molly Olmstead, *Stephen Miller: Stopping Asylum Seekers is “All I Care About,”* Slate (Feb. 21, 2020), <https://slate.com/news-and-politics/2020/02/stephen-miller-immigration-this-is-my-life.html>; Ellen Cranley, *Stephen Miller Said He Would Be Happy If Not a Single Refugee Came to the U.S.*, Business Insider (Jan. 29, 2019); <https://www.businessinsider.com/stephen-miller-said-he-would-be-happy-if-not-a-single-refugee-came-to-us-2019-1>.

¹¹¹ The Proposed Rule appears to “raise[] the possibility of a ‘significant mismatch between the decision ... made and the rationale ... provided.’” *Id.* at 1918 (Justice Sotomayor Concurring) (citing *Department of Commerce v. New York*, 588 U.S. —, —, 139 S.Ct. 2551, 2575, 204 L.Ed.2d 978 (2019)).

¹¹² As noted above, the statute provides that “any[one] who is physically present in the United States or who arrives in the United States [] whether or not at a designated port of arrival... may apply for asylum.” INA § 208(a)(1) (emphasis added).

¹¹³ See INA § 101(a)(15)(B) (requiring a noncitizen to prove she has “a residence in a foreign country which [she] has no intention of abandoning and who is visiting the United States temporarily”); (a)(15)(F), (J), (M) (same for students); (a)(15)(H)(ii)(A) (same for temporary agricultural workers); see also (a)(15)(P), (Q).

¹¹⁴ See Proposed Rule § 1208.13(d)(1)(iii) (denying due to fraud “unless the [noncitizen] arrived in the United States . . . directly from the applicant's home country without transiting through any other country.”)

¹¹⁵ See Proposed Rule § 1208.13(d)(2)(i)(A) (denying where the noncitizen “spent more than 14 days in any one country” en route to the U.S.).

¹¹⁶ See Proposed Rule § 1208.13(d)(2)(i)(b) (denying where the noncitizen “[t]ransits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States.”)

¹¹⁷ Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 Tulane L. Rev. 707, 763-68 (2019); see also Jennifer Lee Koh, *Barricading the Immigration Courts*, Duke L. R. Online, 34-47 (Feb. 2020); Centers for Disease Control and Prevention, Interim Final Rule: Control of Communicable Diseases: Foreign Quarantine; Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes (Mar. 20, 2020, extended on April 20, and May 19, 2020), <https://www.cdc.gov/quarantine/order-suspending-introduction-certain-persons.html>; Human Rights First Fact Sheet, *Year of Horrors: The Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico* (January 2020); see also *Delivered to Danger*, <https://www.humanrightsfirst.org/campaign/remain-mexico> (recounting 1001 cases of murder, rape, kidnapping, torture, and other violent assaults of MPP asylum seekers as of Feb. 28, 2020); TRAC Immigration, *Contrasting Experiences: MPP v. Non-MPP Court Cases*, (Dec. 19 2019),

fear and desperation, she seeks to enter the U.S. outside of a port of entry to seek asylum from within the U.S., she will incur yet another reason for denial under the Proposed Rule.¹¹⁸

In effect, the Proposed Rule—when considered in conjunction with this administration’s other assaults on asylum—will serve as the last nail in the coffin of the U.S. asylum system. It effectively creates a catch-22 for refugees so they are denied protection no matter what they do.¹¹⁹ Congress has given the AG discretion in considering individual claims for asylum, but that discretion cannot extend to eliminating asylum altogether.¹²⁰ It cannot include the creation of insuperable barriers to relief; that is not a faithful execution of the delegated authority Congress has given to the Agency.

Sincerely yours,



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SP:

<https://trac.syr.edu/immigration/reports/587/> (“Immigrants who were allowed to wait in the U.S. were over seven times more likely to find an attorney to represent them than those diverted to the MPP program...[A]ccess to attorneys is extremely limited for those required to remain in Mexico. Representation rates do generally increase over time the longer individuals have to obtain attorneys. So far only 4 percent of immigrants in MPP cases have been able to find representation. In contrast, nearly a third (32%) of those who were allowed to remain in the U.S. have obtained counsel over the same time period.”)

¹¹⁸ See Proposed Rule § 1208.13(d)(1)(i) (denying where the noncitizen “unlawful[ly] ent[ered] or unlawful[ly] attempted entry into the United States”).

¹¹⁹ See *supra* note 110.

¹²⁰ See INA § 208(b)(2)(C) (Any “additional limitation[.]” or “condition” the AG imposes on asylum-seekers must be “consistent with this section under which [a noncitizen] shall be ineligible for asylum.”) (emphasis added); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that . . . no part will be inoperative or superfluous, void or insignificant.”).

Addendum

In these comments, we have expressed our sincere belief that the Proposed Rule poses a grave risk of virtually eliminating asylum protections, or dramatically reducing the numbers of legitimate refugees who can qualify. To test those assumptions, we are requesting that the Agency obtain, consider, and share the following data.¹²¹

Both to serve as a baseline and to understand how many bona fide asylees could be denied under the Proposed Rule's new so-called "discretionary" factors, we pose the following questions:

- 1) From the first asylum adjudications that occurred after the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (i.e., April 1, 1997)¹²² to the present, how many asylum applicants have been granted?¹²³
 - a) Of those granted, how many had entered the United States other than through a designated port of entry?
 - b) During the same period, how many asylum applicants have been denied or referred?
 - c) Of the asylum applicants denied or referred during this period, how many were denied or referred in an exercise of discretion?
- 2) During the same period, how many asylum applicants who were granted relief were found to have satisfied either the changed or extraordinary circumstance exception to the filing deadline?¹²⁴
 - a) Of that group, how many had entered the United States other than through a designated port of entry?
 - b) Of the group described in question 2), how many had accrued more than one year of unlawful presence?
- 3) During the same period, how many asylum applicants who were granted relief had used fraudulent documents to enter the U.S.?
 - a) During the same period, how many asylee adjustment applications had INA §212(a)(6)(C)(i) (related to the use of fraudulent documents and material misrepresentations) waived under INA §209(c)?

¹²¹ See e.g., *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“[T]he failure to disclose to interested persons the . . . data upon which the [Agency] relied was procedurally erroneous. Moreover, the burden was upon the agency to articulate rationally why the rule should apply to a large and diverse class. . . . It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.”).

¹²² *Matter of N-J-B-*, Int. Dec. 3309 (BIA 1997).

¹²³ For all of the questions posed in this addendum, we are interested in all asylum adjudications from the Agency, including the Asylum Office, Immigration Court, and Board of Immigration Appeals.

¹²⁴ INA § 208(a)(2)(B).

- 4) During the same period, how many asylum applicants who were granted relief had transited through one or more countries prior to arriving in the U.S.?
- 5) During the same period, how many asylum applicants who were granted relief failed to “apply for protection from persecution or torture in at least one country” through which they “transited before entering the” U.S.?¹²⁵

In order to compare and contrast the Proposed Rule’s discretionary bars with the statutory bars, we pose the following additional questions:

- 6) From the first asylum adjudications that occurred after the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (i.e., April 1, 1997), how many asylum applications were denied or referred under the safe third country bar?¹²⁶
- 7) During the same period, how many asylum applications were denied or referred under the firm resettlement bar?¹²⁷
- 8) During the same period, how many asylum applications were denied or referred as a result of the persecutor bar?¹²⁸
- 9) During the same period, how many asylum applications were denied or referred as a result of the particularly serious crime bar?¹²⁹
- 10) During the same period, how many asylum applications were denied or referred as a result of the serious nonpolitical crime bar?¹³⁰
- 11) During the same period, how many asylum applications were denied or referred as a result of the danger to U.S. security bar?¹³¹
- 12) During the same period, how many asylum applications were denied or referred as a result of one of the terrorist related inadmissibility bars?¹³²

¹²⁵ Proposed Rule § 1208.13(d)(1).

¹²⁶ INA § 208 (a)(2)(A).

¹²⁷ INA § 208 (b)(2)(A)(vi).

¹²⁸ INA § 208 (b)(2)(A)(i).

¹²⁹ INA § 208 (b)(2)(A)(ii).

¹³⁰ INA § 208 (b)(2)(A)(iii).

¹³¹ INA § 208 (b)(2)(A)(iv).

¹³² INA § 208 (b)(2)(A)(v).