The Green Card

Judge Lawrence O. Burman, Founder and Designated Mascot of The Green Card. Photo by Helen Parsonage.

Quote of the Month

If we will be quiet and ready enough,
we shall find compensation
in every disappointment

Henry David Thoreau

In This Issue

Fall 2020 **Published by the Immigration Law Section of the Federal Bar Association**

Message from the Editor

Dr. Alicia Triche

As we prepare to go to press with Green Card/Fall 2020, the future is full of uncertainty. The US Presidential election is fast approaching, the second wave of COVID-19 is in full swing, and the new school (and work, and court) year is proceeding virtually in many jurisdictions. In this era of uncertainties, the Green Card looks to the future. We bring you the fresh perspective of 3 current law students, with articles prepared over the Summer of COVID—a Summer of isolation, and, hopefully, perspective. May their fresh voices be sources of enthusiasm, and also hope, that the difficulties of the present may soon draw to a close.

Spotlight on FBA-ILS Law Student Committee

A (lightly edited) interview with committee Chairs, Profs. Rachel Poarch and Hiroko Kusuda

by Dr. Alicia Triche

Q: When was the committee formed?

A: In 2019, to encourage law student participation in the Immigration Law Section.

Q: Who are the official chairs? Are there any official student members?

A; Co-Chairs are Prof. Hiroko Kusuda, Loyola University-New Orleans, and Prof. Rachel Poarch, Managing Attorney at Poarch Thompson Law in Salem, VA. The Committee is currently open to law student membership.

Q: Are there reduced dues for law students who wish to join FBA-ILS?

A: Yes! https://www.fedbar.org/membership/join/associate-membership/law-students/

- Join FBA based on your current year in school and get an added post-graduation year of membership at no cost.
- First year law students. Get FOUR years of membership for $50.
- Second year law students. Get THREE years of membership for $30.
- Third year law students. Get TWO years of membership for $20.
- Single year option. Any one year only membership is $20.

Q: What are some of the opportunities for law students as FBA/ILS members?

A: This flyer sums it up nicely. https://www.fedbar.org/wp-content/uploads/2019/10/Benefits-of-Membership-flyer_STUDENT-pdf-1.pdf

Additionally, FBA-ILS offers an opportunity to be mentored with a seasoned attorney, reduced fee to attend the annual conference, opportunity to connect with immigration attorneys across the country.

Q: How can a law student wishing to get involved in ILS sign up?

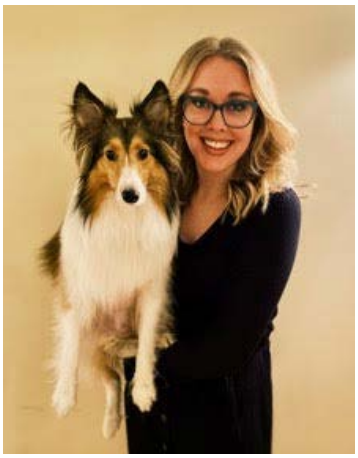
A: They could email Prof. Thompson for more information (rachel@poarchlaw.com). They can also sign up here. https://www.fedbar.org/membership/join/

Q: Are there any upcoming events for law students in the pipeline?

A: We are completing the Green Card issue which features submissions by Law Students. We also hope to pair with the Young Lawyer's Division for activities and events at the annual conference next year.

TPS, Admission, and Adjustment of Status: A Circuit-Splitting Proposition

BY MARY SIRMANS



Mary Sirmans currently lives in Lynchburg, VA, but she is originally from South Georgia. She is finishing her third year of law school at Liberty University School of Law. Beginning in January of 2021, she plans on working at Poarch Thompson Law Firm, which is an immigration firm in Roanoke, VA. In her free time, she enjoys playing outside with her dog Marley.

TPS and Adjustment of Status

Temporary Protected Status (TPS) allows the Secretary of Homeland Security to designate certain countries for protection due to conditions in the country that make it unsafe for a non-citizen to return home. These conditions may include civil war, natural disasters, or other extraordinary circumstances. In many instances, a TPS recipient will remain in the United States for many years and begin a new life. In such circumstances, a TPS recipient who qualifies for permanent residence might want to adjust status.

To adjust status to that of Lawful Permanent Resident (LPR), a non-citizen must first meet specific requirements under 8 U.S.C. §1255(a), which requires an applicant to have been inspected and admitted or paroled into the United States. Under the law, "admission" usually refers to instances where a non-citizen passes through a port of entry with valid immigration documents. *See, e.g.,* 8 U.S.C. § 1101(a)(13)(A); *Matter of Quilantan,* 25 I&N Dec. 285 (BIA 2010). This definition of admission creates a problem for non-citizens applying for adjustment of status, who, like many TPS recipients, have initially entered the country unlawfully.

Due to a recent Administrative Appeals Office (AAO) decision, as well as several circuit court cases, TPS recipients now have a more difficult time meeting the requirements for adjustment of status. Specifically, the AAO has concluded that a grant of TPS does not satisfy the requirement that an immigrant be inspected and admitted for purposes of 8 U.S.C. §1255.

Matter of H-G-G-

In the *Matter of H-G-G-,* 27 I&N Dec. 617 (AAO 2019), the applicant was a native of Honduras who applied to adjust his status under 8 U.S.C. § 1255. *H-G-G-* had been living in the United States for twenty-eight years, but he had not been inspected upon his first entry into the country. Concluding *H-G-G-* had not been admitted or paroled, USCIS denied his adjustment application. Ultimately, the AAO concluded that a grant of TPS did not confer admission, constructive or otherwise; and that lawful status as a nonimmigrant was maintained only during the period that TPS was in effect. 27 I&N Dec. at 641.

Circuit Court Split

In 2011, the Eleventh Circuit Court of Appeals addressed the issue of whether TPS conferred admission in the context of adjustment of status. In *Serrano v. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011), the TPS beneficiary was a citizen of El Salvador who had entered the country without inspection, and then received the benefit of TPS. He later filed a Form I-485, but his adjustment application was denied. The Eleventh Circuit concluded that 8 U.S.C. §1254a did not alter the inspected and admitted or paroled limitation on eligibility for adjustment of status under 8 U.S.C. §1255. 655 F.3d at 1265–66. The court noted that the plain language of the statute suggests that an immigrant is eligible for adjustment of status only if he was initially inspected and admitted or paroled. *Id.*

Serrano, however, is not the end of the story. Over the last seven years, a circuit court split has formed regarding whether TPS constitutes an admission. In 2013, the Sixth Circuit Court of Appeals decided *Flores v. USCIS,* 718 F.3d 548 (6th Cir. 2013), holding that a TPS beneficiary currently in status did satisfy the admission requirement, and was eligible to adjust. In *Flores*, the applicant was a citizen of Honduras who had been in the United States for fifteen years. 718 F.3d at 549–50. He had entered the country without inspection, and later qualified for TPS. *Id.* The court agreed Flores had met the admission requirement because the plain language of 8 U.S.C. §1255(a) was in harmony with the language of 8 U.S.C. 1254a(f)(4), which bestows nonimmigrant status upon an immigrant for purposes of adjustment of status. *Id.* at 553.

Five years later, the Ninth Circuit Court of appeals faced the same issue. In *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017), the applicant was a citizen of El Salvador

who entered the United States without inspection, was granted TPS, and later sought to adjust his status. *Id.* at 955–56. The court agreed with the Sixth Circuit that TPS satisfies the admission requirement for adjustment. More specifically, the court agreed with the reasoning of the Sixth Circuit—that the plain language of 8 U.S.C. 1254a(f)(4), which states than an individual shall be considered as being in, and maintaining, lawful status as a nonimmigrant for purposes of adjustment of status under 8 U.S.C. §1255, justified considering TPS an admission for adjustment of status. 858 F.3d at 958–64. In supporting its conclusion, the court also reasoned that the application and approval process for securing TPS shares many of the main attributes of the usual admission process for nonimmigrants. *Id.* at 960.

Remaining Circuit Responses

Since 2011, when the issue first arrived in the Eleventh Circuit Court of Appeals, District Courts in the First, Third, Fifth, and Eight Circuits have addressed the issue of TPS granting admission. In *Bhujel v. Wolf*, 444 F.Supp.3d 268 (D. Mass. 2020) (First Circuit), the District Court of Massachusetts concluded that a citizen of Nepal who entered the United States under a temporary non-agricultural worker nonimmigrant visa, then was granted TPS, met the admission requirement for adjustment of status. The court did note that the beneficiary was inspected upon entrance into the country, but the court also agreed that 8 U.S.C. 1254a(f)(4) alternatively provided a pathway for TPS holders to obtain LPR status pursuant to 8 U.S.C §1255, even if they had not been inspected upon entering the country. 444 F.Supp.3d at 275.

In 2014, the Eastern District of Pennsylvania (Third Circuit), was also confronted with the option to join the courts that have declared TPS satisfies the admission requirement. The District Court concluded in *Medina v. Beers*, 65 F.Supp.3d 419 (E.D. Pa. 2014), that the applicant, a native of Honduras, who entered the United States without inspection was eligible to adjust status because his grant of TPS satisfied 8 U.S.C. §1255(a)'s inspected and admitted/paroled prerequisite. The court justified its conclusion through statutory interpretation. It declared that requiring the statute to be read in a way that would not allow TPS to satisfy admission would be going against statutory construction. Said the court: In construing a statute, the court tries to avoid a result that would render statutory language superfluous, meaningless, or irrelevant. *Id.* at 423. The court reasoned that requiring TPS beneficiaries to return to the country that the Attorney General deemed dangerous to re-enter in order to utilize consular processing would make the statute meaningless. *Id.*

The District Court of New Jersey, also in the Third Circuit, addressed the same issue in *Santos-Sanchez v. Johnson*, 2018 WL 6427894 (D. N.J. 2018), *rev'd, Santos v. Sec'y, U.S. Dep't of Homeland Security,* 967 F.3d 242 (3d Cir. 2020). The applicants were a married couple from El Salvador who had entered the county without inspection, then received TPS. When they attempted to adjust status, USCIS denied their applications. The New Jersey District Court concluded that the plain language of 8 U.S.C. 1254a(f)(4) satisfied the threshold requirement of 8 U.S.C. §1255(a); and, therefore, the applicants had satisfied the threshold requirement for adjustment of status. The District Court also noted that the Eleventh Circuit's in *Serrano* had offered little persuasive analysis, stating "The conclusion *is* simply because it *is*." *Santos-Sanchez,* 2018 WL at 5 (italics in original).

The Western District of Texas (Fifth Circuit) has also joined the majority of courts in concluding that TPS does constitute admission in a Court order denying the Plaintiff's Motion to Dismiss in the unpublished decision of *Rodriguez-Solorzano v. Nielson*, (W.D. Tex. Jan. 15, 2019). In that case, the applicant was a citizen of Honduras who entered the United States without inspection, was granted TPS, and later received a denial of his request to adjust status. The court concluded that the plain language of the statute indicated Congress' clear intent that an immigrant granted TPS is admitted for purposes of adjustment.

Lastly, the Minnesota District Court (Eight Circuit) has had three opportunities to address the TPS admission issue. In each of the three cases, the immigrants entered the United States without inspection, were granted TPS, and, later, received a denial for adjustment of status. In *Bonilla v. Johnson*, 149 F. Supp.3d 1135 (D. Minn. 2016), the court supported its conclusion that a TPS beneficiary is considered inspected by explaining that 8 U.S.C. 1254a(f)(4) clarifies that for purposes of adjustment of status under 8 U.S.C. §1255, a person granted TPS who was not inspected and admitted or paroled shall be considered as being in, and maintaining, lawful status as a nonimmigrant. In *Leymis v. Whitaker*, 355 F. Supp.3d 779 (D. Minn. 2018), the court added that Congress has attached significance to the term "nonimmigrant" by consistently linking nonimmigrant status with inspection and admission, and TPS shares many of the attributes as the inspection and admission process for nonimmigrants. Third, in *Melgar v. Barr*, 379 F. Supp.3d 783 (D. Minn. 2019), the court added that TPS is not an avenue to circumvent admission, but a practical, safe, alternative to obtain it.

TPS should constitute admission

The Sixth and Ninth Circuit Court of Appeals were correct in deciding that a TPS beneficiary has satisfied the inspected and admitted requirement of 8 U.S.C. §1255. First, the interplay between Section 1255, which provides the process for adjustment of status, and 8 U.S.C. 1254a(f)(4), which provides guidance as to the status of a TPS beneficiary, suggests that TPS satisfies admission. Section 1255 is titled "Adjustment of Status of nonimmigrant to that of person admitted for permanent residence." This heading holds extreme significance, the language directly links the adjustment statute to the TPS statute. Section 1254a(f)(4) states that "for purposes of adjustment of status under section 1255 of this title . . . , the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant." This language explicitly refers to the adjustment of status of 8 U.S.C §1255 and confers the status of lawful nonimmigrant on TPS recipients when looking at adjusting their status. Section 1254a(f)(4)'s language is broad and is not limited to any specific section of 1255. Therefore, by stating in 8 U.S.C. 1254a(f)(4), that the beneficiary shall be deemed as being in, and maintaining, lawful immigrant status, Congress deems that TPS can satisfy the admission requirement.

Second, if a TPS beneficiary was not allowed to adjust status because he had not been admitted, this could result in them having to leave the country and use other means of obtaining LPR status such as consular processing. However, this would result in many TPS recipients being ripped from the life and families they have built in America. TPS is rarely ever short-lived; in many cases, a country will maintain TPS designation for fifteen to twenty years due to TPS renewal. The statute that allows the Attorney General to designate a country for TPS recognizes that an immigrant's country is no longer safe due to conditions out of their control. Therefore, not allowing TPS beneficiaries to adjust status, would leave thousands of immigrants waiting in limbo.

Lastly, the 11th Circuit Court of Appeals did not base their decision on legal analysis. The court states that the fact an immigrant with Temporary Protected Status has "lawful status as a nonimmigrant" for purposes of adjusting his status does not change § 1255(a)'s threshold requirement. However, the court does not give any reasoning as to why it comes to that conclusion. The court came to its conclusion without fully considering the interplay between 8 U.S.C. §1255 and 8 U.S.C. 1254a(f)(4).

Conclusion

TPS provides thousands of immigrants a way to seek refuge in the United States, but if the Eleventh Circuit Court of Appeals view wins the day, TPS beneficiaries will have no way to adjust their status. Many of the TPS beneficiaries have built a life in America after being here for fifteen to twenty years. Forcing this group of people to leave their families and go back to a country they have not called home in years, that may still be unsafe, would be unfair and unjust. Therefore, TPS should be viewed as granting admission for purposes of adjustment of status.

Notice of Errata

The Summer 2020 Green Card contained two errors. On Page 1, Ms. Nikita Vasudevan's name was misspelled. On page 16, the Vice Chair position was listed as vacant; however, Jeff Joseph was, in fact, Vice Chair of ILS at that time.

Asylum Seekers No Longer Welcome

By Kelly Keown

Kelly Keown is the Treasurer of the Immigration Law Students Association at New York Law School. She expects to graduate in May of 2021. She is also a student member of AILA, the Federal Bar Association, and the New York City Bar Association's Immigration and Nationality Law Committee.

On June 15, 2020, the Department of Justice and Department of Homeland Security issued a joint Notice of Proposed Rule Making ("NPRM") setting forth drastic changes to both the substantive and procedural availability of asylum and withholding protections. The 161-page Proposed Rule contains more than 60 pages of substantive changes that would upend decades of precedent and dismantle asylum protections for hundreds of thousands of people. With changes to procedure, governing standards, and crucial definitions, immigration practitioners have never seen such a wide variety of substantive reforms issued in one single rule. What is equally outrageous is the truncated, 30-day comment period afforded for public feedback. The Administrative Procedure Act (APA) normally requires 60 days.

Amidst the challenges of an international pandemic, an onslaught of other immigration policy changes, and the ongoing nation-wide protests against police brutality, advocates never stood a chance in their attempts to redirect public attention to the Proposed Rule. Nevertheless, nonprofits, law school clinics, professors, and bar associations managed to encourage over 80,000 submissions. Each individual provision of the Proposed Rule is consequential enough to deny protections to thousands who currently qualify. The combination of these provisions, as discussed below, makes it difficult to imagine almost any asylum seeker who could realistically mount a successful claim.

Changing the Fundamentals of Asylum

Under the proposed regulations, immigration judges would be allowed to deny asylum, without a hearing, if they find that the application form does not establish a *prima facie* claim for relief. This extreme departure from current practice would allow judges to "pretermit" asylum claims either upon a motion from DHS or *sua sponte* on the IJ's own authority. Considering that IJ's are currently mandated to hear at least 700 cases annually, this provision alone is a death sentence for thousands of meritorious claims. Using a metaphorical "Deny" stamp, IJ's can now end an asylum seeker's claim without considering personal testimony, additional evidence, or testimony from factual or expert witnesses. The fact that most asylum seekers prepare their applications without any assistance means this will be the end of the road for applicants who do not speak English, have limited reading and writing skills, or – like most Americans – have no familiarity with U.S. asylum law. Applicants under these circumstances, especially those in detention, often struggle to complete the convoluted 12-page asylum application as it is. Requiring that application to articulate an air-tight legal argument to pass muster will wipe out most claims upon DHS' motion. Even in the absence of such a motion, IJ's will have incentive to "pretermit" applications *sua sponte* if for no other reason than to overcome their insurmountable performance quotas. The implications of pretermission are compounded by the rule's lack of specificity regarding implementation. It is unclear whether the new regulations will apply retroactively to the 900,000 applicants currently awaiting adjudication. If so, DHS and DOJ now have a handy tool with which to clear their backlogs.

Another major shift alters the nature of "frivolous" findings. Currently, only IJ's can deem an asylum claim as frivolous. The new rule will extend this power to asylum officers adjudicating affirmative applications. More importantly, the definition of "frivolous" is expanded to include claims that are "patently without merit or substance" and those where applicable law "clearly prohibits the grant of asylum." This overturns *Matter of Y-L-*'s requirement that a frivolous determination be based on specific findings that an applicant "deliberately fabricated material elements of the asylum claim." The rule further erodes *Y-L-*'s standard by establishing that an applicant "knowingly" submits a frivolous application if she was aware of a high probability that her claim was frivolous and deliberately avoided learning otherwise. To the untrained eye, the word "frivolous" may not look sinister; however, immigration practitioners are well aware of the devastating consequences of knowingly filing a frivolous asylum claim: a permanent bar to all immigration relief. Realistic application of this standard is difficult to picture. What is clear is that the potential consequence for filing a faulty application have risen from

denial and deportation to deportation and a permanent ban. This will undoubtedly cause an immense chilling effect on the pursuit of meritorious claims.

The Proposed Rule also codifies definitions and legal standards that had previously only been defined by the courts. For the first time, the Code of Federal Regulations will provide a definition for "persecution," and it is not one that advocates are happy about. Where courts have historically focused on threats to freedom on account of a protected ground, the regulatory definition will underscore harm that is "exigent" and "extreme." The rule also asserts a number of circumstances that do not rise to the level of persecution, including intermittent harassment or brief periods of detention. Adjudicators are not required to consider the cumulative effects of sporadic harm. Even if persecution is found, the new regulations provide a non-exhaustive list of reasons that persecution will not be considered to have been inflicted "on account of" a protected ground. This list of negative "nexus" factors plainly targets claimants from Central America, emphasizing circumstances of which former Attorney General Jeff Sessions disapproved in his notorious *Matter of A-B-* decision. Sufficient nexus will not be found when persecution is based on gender, resistance to gang recruitment, objection to gang activity, extortion based on perception of wealth, or a host of other factors related to private criminal enterprises. Adjudicators will also be prohibited from considering evidence that promotes cultural stereotypes, like the machismo culture that perpetuates violence against women in much of Latin America.

Death of the Particular Social Group

The refugee definition establishes five grounds for persecution which give rise to eligibility for international protection: race, religion, nationality, membership in a particular social group ("PSG"), and political opinion. Ask any immigration attorney which ground is the most complicated and they are likely to choose the enigmatic PSG. The category is intentionally broad to account for changing needs of refugee populations over time. Refugee protections were initially developed to accommodate Jewish populations fleeing Nazi-occupied Europe. In the decades since, protections have been extended – largely through judicial recognition of new PSG's – to persons fleeing dangers which could not have been foreseen by past generations. If the PSG category had not been allowed to evolve over the years, there would be no recourse for women fleeing female genital mutilation or people persecuted for their sexual orientation or gender identity.

The new regulations will effectively foreclose the legal evolution of PSG's while simultaneously making it nearly impossible to win a PSG claim. The rule codifies *Matter of W-Y-C- and H-O-B-*'s requirement that an applicant specify his proposed PSG with exactness in the record before the IJ. Any PSG's not clearly formulated at the application stage can never be asserted subsequently. There are no stated exceptions, even for applicants with ineffective counsel. Attorneys who spend their entire careers studying asylum still struggle to navigate the ins and outs of PSG analysis. It is difficult to imagine how any unrepresented asylum seeker would even be aware of this requirement, let alone satisfy it by stating a legally cognizable formulation of one or more PSG's in English on her application. In addition to this extraordinary change, the rule also sets forth another laundry list of negative factors weighing against the establishment of a PSG. This list, adhering to a clear pattern, emphasizes factors Jeff Sessions addressed with disdain in *Matter of A-B-*. Notable examples include "presence in a country with generalized violence or a high crime rate," and "private criminal acts of which governmental authorities were unaware or uninvolved."

These aspects of the rule will not only close the door on countless legitimate claims, but when considered in conjunction with other provisions, will prevent IJ's and appellate bodies from reviewing new PSG formulations as they become relevant. As IJ's will be encouraged to "pretermit" any facially insufficient applications, they are likely to deny members of PSG's which have not been historically recognized. Thorough case-by-case analysis of asserted PSG's within the context of individual claims is what has allowed the category to adapt to changing needs of various societies. Now, an applicant will be denied if she argues for a PSG that should be, but is not currently, recognized. In fact, if she is aware that existing law does not recognize the PSG, an IJ could find that she knowingly submitted a claim "patently without merit or substance," which will now designate the claim as frivolous.

These implications are difficult to reconcile with 8 C.F.R. 1003.102(j)(1), which explicitly prohibits a frivolous finding based on "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law..." How can an applicant argue for a change to existing law without pursuing a claim that the law does not currently recognize? Taking a chance on a novel PSG will now expose asylum seekers to the risk of a permanent bar to immigration relief. It is difficult to imagine how PSG's can continue to evolve when IJ's are incentivized to deny applicants who do not clearly fall into a currently recognized cognizable group. If the Proposed Rule is implemented, PSG's will cease to evolve, and claims based on this ground will overwhelmingly be denied.

Stripping IJ's of Their Discretion

A grant of asylum depends not only upon the applicant's ability to show that he meets the refugee

definition, but also upon an IJ's favorable exercise of discretion. Until now, the basic calculation used to weigh discretionary factors was based on *Matter of Pula*, which establishes that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." The Proposed Rule changes that by codifying negative factors which must be considered by an IJ when present. The rule intrudes further into IJ discretion by mandating that when certain adverse factors are in play, an IJ can only favorably exercise discretion if the applicant meets his burden to show that a denial would result in an exceptional and extremely unusual hardship to him. This means that for the first time, the regulations will force IJ's to deny a claim for discretionary reasons no matter the level of vicious persecution that awaits the applicant at home.

The new "adverse" discretionary factors are so consequential that they cannot be fully addressed here. Most describe circumstances that pervade the claims of Central American asylum seekers. For instance, an applicant will be denied as a matter of discretion if she remained in another country for 14 days during her journey to the U.S. The reason this particular factor is so extreme is that countless applicants are currently awaiting their court dates in Mexico pursuant to the Migrant Protection Protocols ("MPP"). Applicants subject to MPP are forced to wait in Mexico for months or longer through absolutely no fault of their own. Now following the government's instructions to wait will prejudice their asylum claim. These same applicants will be impacted by another discretionary factor: unlawful entry or attempted entry. Those waiting across the Southern Border are exploited by criminals, targeted by racists, and deprived of basic necessities. Many take their chances on a border-crossing attempt because they have no other choice for survival. Pursuing that survival now results in an unfavorable discretionary finding.

Other factors are particularly discriminatory against female, black, and impoverished asylum seekers. If an applicant passes through more than one country or fails to apply for asylum in at least one country before arriving in the U.S., they will be denied for discretionary reasons. Black asylum seekers are more likely than others to have to pass through multiple countries on their way to the U.S. Further, the use of fraudulent documents is an adverse factor unless the applicant took a direct trip without passing through other countries. This will prejudice claims from asylum seekers without the means to obtain a plane ticket or legitimate travel documents. In some countries, women cannot obtain such documents without the approval of a male family member. The discretionary factors also doom applicants who have accrued a cumulative year of unlawful presence, have not paid their taxes, or have previously abandoned an asylum claim.

The effect of these discretionary factors cannot be overstated. It is quite literally a list of reasons an IJ must deny refuge to a person who has proven a well-founded fear of persecution. While other aspects of the rule are offensive to principles of due process and stare decisis, the adverse discretionary factors may be the most morally offensive. With this list, DOJ and DHS make clear the kinds of asylum seekers the U.S. simply does not want as a matter of discretion.

Minimizing Public Feedback

It is impossible to address all implications of the Proposed Rule in one article. Each individual provision is substantial enough to warrant its own 60-day comment period. Immigrant rights advocates have become accustomed to the current administration's practice of quietly announcing large-scale policy changes and minimizing the public's opportunities to respond before their implementation. That said, even the most cynical of advocates have been floored by the allotment of a measly 30 days to comment on 60+ pages of complex substantive changes. The rule supersedes decades of case law, altering applicable standards and definitions within every element of asylum. It raises thresholds for obtaining withholding of removal and CAT protections. It even gives the government the right to disclose information related to applicants' asylum, withholding, and CAT claims in unrelated proceedings. To adequately address this magnitude of change would take longer than a month under ordinary circumstances.

Current circumstances are not ordinary, however. The global COVID-19 pandemic continues to disrupt workplaces for millions of Americans. Those working from home are subject to productivity hindrances from balancing work, family, and other responsibilities in a suppressed economy. Many are directly impacted by the virus and are either recovering themselves or caring for ill loved ones. Over 500 organizations signed a letter making such concerns known to DOJ and DHS, requesting the comment period be extended to 60 days. As of this article's writing, neither agency had responded.

For Notice and Comment Rule Making to work, the public needs fair opportunity to review the rule and consider all of its potential consequences. Time must be spent mobilizing stakeholders, researching, collaborating, and drafting. Generally, federal agencies afford a standard 60 days for this process. If a rule is particularly complicated or far-reaching, longer periods may be allotted. Several federal agencies have explicitly acknowledged the impairments that COVID-19 restrictions impose on the process. For instance, the Bureau of Consumer Financial Protection recently published a NPRM with an initial 60-day comment period. Upon

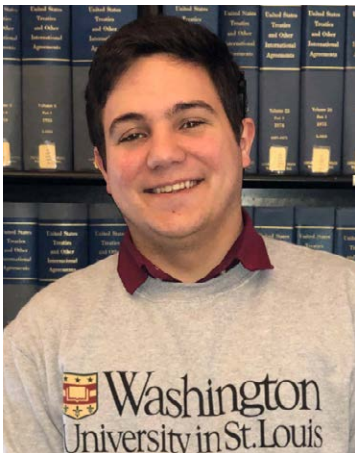
requests from just three interested parties, the agency then extended that period to 150 days to accommodate stakeholders while many businesses remain closed. In its announcement of the extension, the agency expressly agreed with the commenters that COVID-19 "makes it difficult to respond to the SNPRM thoroughly." The Commodity Futures Trading Commission also recently extended comment periods to 90 days or more for rule-making issued during the pandemic. Notably, the CFTC chairman's explanation emphasized the tremendous value his agency places on feedback from interested parties.

Unsurprisingly, these financial agencies appear to value their stakeholders' input more significantly than DHS and DOJ do. The former have relaxed standards to provide commenters with flexibility while the latter have cut the standard comment period in half without explanation. The motive is clear: restrict the comment process so the rule can be implemented as quickly as possible. Last year approximately 260,000 comments were submitted in response to DHS' public charge rule, delaying its implementation by 10 months. DHS has learned its lesson since then. During the 30 days since announcing the Proposed Rule, it has announced an onslaught of other immigration reforms, from banning international students to banning asylum seekers from countries with significant COVID-19 outbreaks. This too is a common tactic of the current administration: misdirection. As nationwide protests continue in the wake of George Floyd's death, the greatest hindrance to the rule's implementation would be to direct an alert public's attention toward the massive stripping away of refugee protections. As the nation collectively expressed outrage in defense of international students, the Proposed Rule's condensed comment period slipped by. Ultimately, 86,661 comments were submitted in response. The government must read and respond to each one before finalizing the rule.

As advocates have come to learn over the past few years, the comments are unlikely to change or prevent the Proposed Rule's implementation. The best they can do is postpone it and set the stage for potential litigation down the road. Much depends on the result of November's election. No speculation will be made here, but with this dramatic rule the current administration makes one thing abundantly clear: asylum seekers are not welcome in the United States.

A Trojan Horse Regulation: Why the June 26 DHS Regulations Are About More than Work Authorizations

BY NATHAN HALL



Nathan Hall is a second-year law student at Washington University in St. Louis School of Law. He is originally from Southern Indiana and is oldest of six siblings. He is interested in asylum law and is participating in the Immigration Clinic at Washington University during the upcoming spring semester.

On June 26, the Department of Homeland Security finalized a series of regulations that will greatly diminish the ability of immigrants seeking asylum to obtain a work permit. In addition, what DHS has done in these new regulations comprise a series of changes, that has not only made it more difficult to apply for and receive a work permit, but also made it more difficult to seek asylum in the United States. While the changes to employment authorization have been the focus of much of the attention brought to this new rule, and rightfully so, it is crucial that those in the immigration law community have a firm grasp on just how much more will also change for those seeking asylum.

Perhaps the most plainly obvious problem with the proposed regulations is that it pulls at the pockets of a group of people who already often struggle to afford legal representation. Moreover, the regulation seems almost targeted at terminating work permits for those who need quality representation the most. First, the rule bars immigrants seeking asylum from obtaining a work permit if they have been convicted of an aggravated felony in the U.S., been convicted of a serious non-political crime outside the U.S., been convicted of domestic violence, assault, child abuse, drug or alcohol related charges, and driving under the influence. It also grants DHS discretionary power to make determinations involving unresolved charges of domestic violence, assault, child abuse, drug or alcohol related charges, and driving under the influence.

What this limitation does the broader asylum process is twofold. First, it practically hampers the asylum seeker's ability to effectively make their case. Without money to pay for representation, these cases, which often turn on the nature of the crime and convoluted, will more and more often result in removal. Second, these preliminary determinations by DHS kneecap immigration judges' ability to make the decisions independently. Surely, the fact that DHS has already made a determination that the asylum seeker committed a serious non-political crime will be the first piece of evidence introduced in an asylum hearing. Thus, these cases become even harder; and the need for competent representation, which might now be completely unaffordable, will be even greater.

In a similar vein, the rule prohibits (c)(8) work authorizations for those who are appealing their claim to a federal court. The same rule, however, does not apply for timely BIA appeals. Again, there is a clear choice by DHS to reinvest power within the executive branch, and make it impracticable, if not impossible, for asylum seekers to have their claim heard with quality representation. Some federal circuit courts provide a meaningful check on the BIA's decisions, and when DHS made the decision to financially impair petitioners at that stage in particular, it was a clear message of the agency attempting to hold power within their own branch by denying the right to a meaningful appeal. Federal court appeals represent a critical moment in the asylum process, but without applicants' ability to pay for representation, these courts will become less of a check on the BIA.

While these regulations hinder more complex asylum cases, the rule also has sweeping provisions that will affect a huge portion of asylum seekers' ability to seek legal representation. First, the rule extended the waiting period to apply for work authorization from 180 days to 365. As addressed by a public comment to the proposed regulation, the new 365-day waiting period subjects asylum seekers to an incredible amount of hardship and would force many of them, regardless of what kind of finances they came to the United States with, into homelessness. The MIT living wage calculator (https://livingwage.mit.edu/metros/49740) estimates, even with no taxes, a single adult living in Yuma, Arizona with no children would need to make $19,770 dollars to avoid tragedy. A family of five with a stay-at-home parent would need to make $51,775. The inability to work will force

not just already poor asylum seekers into homelessness, it will force anyone who is not bringing tens of thousands of dollars across the U.S. border with them into extreme situations. Even at reasonably low rates, the costs of paying an attorney and the application and filing fees charged by USCIS can drain thousands of dollars from these families. Without the ability to legally work, these costs might be unpayable, financially sink asylum seekers, or incentivize illegal work or high interest loans.

The next provision likely to effect a large number of asylum applicants involves illegal entry. The rule prospectively prohibits any asylum seeker who entered the United States outside of a legal port of entry from applying for a work permit unless: (i) they presented themselves no later than 48 hours after they arrived to the Secretary of Homeland Security or their delegate, (ii) they indicated to a DHS officer the intent to apply for asylum or expressed a fear of persecution or torture, or (iii) otherwise had good cause for illegal entry. Good cause is to be determined on a case-by-case basis. As the rule correctly notes, the vast majority of asylum seekers, although in the United States legally on their pending asylum claim, do enter the country between or outside of legal ports of entry. This means that unless there is a major new trend in immigration patterns, there will be huge swaths of asylum seekers who will be entirely unable to seek work legally in the United States.

Handicapping an asylum seeker's ability to financially support themselves leaves them with an impossible decision between unauthorized employment and waiting out a serious and lengthy period of financial instability. Put simply, the regulation leaves an asylum seeker with three legitimate options: be rich, starve, or risk legal status. The proposed rule itself mentions the possibility of incentivizing unauthorized work, but brushes it aside saying,

DHS has considered that some asylum applicants may seek unauthorized employment without possessing a valid employment authorization document, but is unable to estimate the size of this effect and does not believe this should preclude the Department from making procedural adjustments to how aliens gain access to employment authorization based on a pending asylum application.

As aforementioned, these provisions greatly diminish asylum seekers financial power. In doing so, they appear to be attacking the asylum seeking process at some of its most critical junctures by prohibiting those who will already have complex or difficult asylum claims. They also seem to be targeting the greatest number of applicants possible by increasing the wait time to apply and prohibiting people who did not use a legal port of entry. This will not only affect the asylum process generally by making it a much less appealing route to take to legal status in the United States, but also by financially burdening the immigration lawyers who represent asylum clients (if they are not representing them in a pro bono capacity). They will have to wait longer for payment of fees and services rendered, and may find it difficult to convince their clients to file the proper documentation and applications because of USCIS's fees.

This regulation also makes serious changes to the filing process for asylum, often using denial of work authorization as a penalty. First, the USCIS changed its policy of marking any asylum application "complete" that was not returned to the applicant within 30 days. This will undoubtedly remove any incentive for USCIS to process claims in a timely manner. While the proposed rule points out that it brings it into line with other rules surrounding immigration benefit requests, it is clear that this will negatively impact the process as a whole. It will become even more backlogged, claims will take longer to process, and if applications take over a year to process, might become a hindrance to obtaining work authorization. In this way the rule shows that the real objective is not expediting the asylum process, something that it desperately needs, even though its feigns this with provisions like the applicant-caused delay provision.

As mentioned, the rule excludes from eligibility for work authorization anyone who has failed to file for asylum within the one-year filing deadline, unless and until the Immigration Judge determines that there is an exception. With the massive delays that immigration courts face, this creates an unusually harsh penalty for failing to file within the correct time frame. This is a perfect example what I meant by titling the new regulation a "Trojan Horse." This clearly implicates work authorization, as promised by the regulation, but it also drastically changes a piece of the asylum process by doing so. It "ups the ante" for those who fail to file on time in such a way as to significantly burden them if they cannot meet the deadline for some reason. Even if it is a legitimate reason, they will not be able to seek work authorization until it has been deemed such by an Immigration Judge. According to TRAC Immigration (https://trac.syr.edu/immigration/reports/579/#:~:text=Projected%20average%20wait%20times%20have,out%20as%20December%2018%2C%202023.), the average wait time in 2019 for an Immigration Judge in Arlington, VA, where the backlog is at its worst, was 1,607 days, or 4.4 years.

The rule also eliminates recommended approvals from the asylum process. The agency will discontinue its practice of recommending asylum applications for approval before investigation and background checks. As with the changing the completed application process, this removes a practice of the agency that helped the

asylum process flow more smoothly and function better for applicants. Now, there will be another massive delay in the process, and possibly, as one public commenter smartly pointed out, confuse applicants. Referral to an Immigration Judge in these cases might lead an applicant to believe that their work authorization has been revoked. At the very least, it is another place for massive delay of which practicing immigration lawyers should be made aware.

Another important filing mechanism that has changed with this regulation is the effect of "applicant caused delays." Any delay that is caused or requested by the applicant, that has not been resolved by the time of the work authorization request, will cause that request to be denied. This is another important requirement that both applicants and their counsel need to be aware of when submitting applications for work authorizations. By the time that USCIS processes the application, realizes that there was an outstanding applicant-caused delay, and sends the rejected application back to the applicant, who knows how much time the asylum seeker lost that they might have been working. Examples of applicant caused delays are articulated in 8 CFR 208.7(a)(1)(iv) and include: requesting an extension to submit additional evidence prior to an interview; a request to transfer a case to a new asylum office or interview location, including when the transfer is based on a new address; a request to reschedule an interview for a later date; failure to appear at an interview or fingerprint appointment; failure to provide a competent interpreter at an interview; a request to provide additional evidence after an interview; and failure to receive and acknowledge an asylum decision in person.

Asylum interviews are currently scheduled twenty-one days prior to the date of the interview itself. This new regulation stipulates that applicants must give DHS fourteen days of notice if they plan on filing any additional evidence prior to their interview. This leaves the applicant and anyone who is helping to fill out his application, gather evidence, and prepare for the interview, a seven day window to do so. Given current mailing procedures (many public commenters mentioned USCIS's inability to use the postal system efficiently) this will leave applicants with an incredibly quick turnaround to prepare any evidence. If they need more time, it will be considered, as mentioned previously, an applicant caused delay which, if unresolved, will prohibit the applicant from getting a work authorization. This is another procedural hurdle that was thrown into the regulation and might have flown under the radar if the narrative around the regulation remained focused on work authorizations.

DHS has also decided to incorporate biometric processing into the employment authorization process for asylum applicants. While there are serious problems with what this assumes about those legally in the United States seeking asylum, it adds another place for asylum applicants to potentially slip up. Failure to appear for a biometric services appointment may result in the USCIS denying the asylum application or referring the application to an Immigration Judge. Any rescheduling or delaying of appointments will be considered an applicant caused delay. The agencies have also clarified that the USCIS is not obligated to send notice to the applicant of their failure to appear for a biometric services appointment or interview as a prerequisite to their decision on the asylum application. Biometric service processing only puts more potential obstacles in the way of asylum applicants on their way to having their asylum granted.

Lastly, the regulation eliminates (c)(11) work authorizations for applicants in the United States on parole or credible fear. In fact, the rule explicitly states, "All (c)(11) EAD applications filed on or after the effective date of this Final Rule by aliens who have established credible fear and are paroled into the United States on that basis will be denied." This is important to note because it funnels all applicants into the (c)(8) work authorization process regardless of whether or not they are here on parole. By doing this, DHS ensures that all applicants, regardless of their status, are subject to the same hurdles and obstacles put into place by this regulation. This is another pertinent example of a small regulatory change that has the potential to create problems for applicants and their advocates alike.

This rule, while about work authorizations on its face, affects the entire asylum process, and will make it increasingly difficult for asylum applicants to have their claims adjudicated on their merits. Between financially crippling asylum applicants and introducing procedural land mines left and right, the rule will both be difficult to navigate and likely to produce delays rather than reduce them. The rule almost seems to target the points in the asylum process that are the most critical, in order to introduce financial roadblocks. On top of that, it finds broad, sweeping ways to affect all or the majority of asylum applicants. Even if an asylum applicant navigated the process perfectly, they would still be subject to a year of waiting without any way to create income for themselves. It leaves asylum applicants with impossible choices between working illegally and devastating financial hardship. The procedural problems that it produces for applicants and advocates are equally frustrating. They range from changing wait times, to rushed information gathering, to entirely new procedures that the rule introduces. Work authorizations may be the focus of the new DHS rule, but they are not the only thing that it drastically alters.

The Green Card

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