

**UNITED STATES OF AMERICA**

**BEFORE THE DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, AND THE DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**Joint Notice of Proposed Rulemaking:** : **USCIS RIN 1615-AC41**  
**Procedures for Asylum and Bars to** : **EOIR RIN 1125-AA87**  
**Asylum Eligibility** : **EOIR Docket No. 18-0002**  
**A.G. Order No. 4592-2019**

*Submitted via Federal eRulemaking Portal: [http:// www.regulations.gov](http://www.regulations.gov)*

**COMMENTS OF WHITMAN-WALKER HEALTH**

Whitman-Walker Health (WWH or Whitman-Walker) submits these comments in response to the joint notice of proposed rulemaking (Notice or Proposed Rule) “Procedures for Asylum and Bars to Asylum Eligibility” published by the Department of Homeland Security, (DHS) U.S. Citizenship and Immigration Services, (USCIS) Department Of Justice, (DOJ) and the Executive Office for Immigration Review (EOIR), on December 19, 2019. (84 Fed. Reg. 69640.)

WWH strongly opposes the proposed rule. The proposed rule contradicts the language of the INA and runs counter to the goals of our immigration system. The changes to asylum eligibility are likely to create fear and uncertainty for aliens when contacting law enforcement and exacerbate structural vulnerabilities in communities of marginalized aliens, many of whom are disproportionately profiled by law enforcement agencies and subjected to plea-bargained convictions without adequate understanding of the immigration consequences.

**EXPERTISE AND INTEREST OF WHITMAN-WALKER HEALTH**

Whitman-Walker Health is a community-based, Federally Qualified Health Center offering primary medical care and HIV specialty care, community health services and legal

services to residents of the greater Washington, DC metropolitan area. WWH has a special mission to the lesbian, gay, bisexual and transgender (LGBT) members of our community, as well as to all Washington-area residents of every gender and sexual orientation who are living with or otherwise affected by HIV. In calendar year 2018, more than 20,700 individuals received health services from Whitman-Walker. In that year, 58% percent of our health care patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or otherwise non-heterosexual, and 9% of our patients and clients—more than 1,800 individuals—identified as transgender or gender queer.

Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Department. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBT or living with or affected by HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including immigration and asylum cases. Our Legal Services Department, with the assistance of hundreds of volunteer attorneys throughout the area, has provided a wide range of immigration-related services to foreign-born LGBT individuals and families. Our staff attorneys are experts in asylum law and other laws that protect vulnerable, persecuted people from removal. Many of our clients come to the U.S. fleeing persecution in their countries of birth because of their sexual orientation or gender identity. In 2018, 52% of our legal services clients who provided their sexual orientation identified as lesbian, gay, bisexual or otherwise non-heterosexual; 20% identified as transgender or gender queer.

## COMMENTS ON THE PROPOSED RULE

The Notice categorizes the changes in three sections:

- (1) establishing additional bars to eligibility for asylum for aliens with certain criminal convictions;
- (2) clarifying the effect of criminal convictions; and
- (3) removing the regulations regarding reconsideration of discretionary denials of asylum

In the first category DHS proposes to bar asylum applicants to aliens convicted of:

- I. Any felony, defined as any offense defined as a felony under state or federal law, or any conviction where the statute allows for incarceration of a year or more;
- II. Concealing, harboring, shielding from detection, or transporting an alien, or attempting to do so, removing existing exceptions for providing mutual aid to the defendant's child or immediate family member;
- III. Illegally attempting to reenter the United States after having been subject to a removal order;
- IV. Any offense involving criminal street gang activity, whether a misdemeanor or felony;
- V. Two or more offenses of driving under the influence, or a single offense resulting in death or serious bodily injury;
- VI. Having engaged in— whether convicted or not, an act of domestic violence; and
- VII. Offenses, whether a misdemeanor or felony, involving the use of fraudulent documents, the receipt of public benefits under false pretenses, or the possession or trafficking of drugs.

**The proposed rule is an overreach of the delegated authority in the Immigration and Nationality Act (INA).** The language of the INA sets the bar for the criminal convictions that may be used to restrict Asylum. The relevant portion of the INA creates mandatory bars to asylum for an alien, “having been convicted by a final judgment of a particularly serious crime” in the United States. 8 U.S.C. § 1158(b)(2). The NPRM is in direct conflict with this clear statutory language.

In the second category, the proposed rule “clarifies the effect of criminal convictions” by stating that vacated, expunged, or modified convictions or sentences remain valid for the purposes of determining asylum eligibility if the presiding judge took such action for immigration or rehabilitative purposes. The notice places the burden on the asylum seeker to prove that the judge’s order was not for immigration or rehabilitative purposes and that the court issuing the order had jurisdiction to do so. Further, the notice creates a rebuttable presumption against the applicant if the judge’s order was issued after removal proceedings were initiated or if the applicant moved to vacate the conviction more than one year after the original order.

**We are opposed to the first and second categories of changes as inconsistent with the INA and likely to reproduce and exacerbate social inequities.** The words “particularly serious crime” are not void of meaning; they are carefully crafted to express Congress’ intent. The words express an understanding by Congress that asylum should be accessible to most people who have minor criminal records. The statutory language expresses an understanding that not all crimes are similarly detrimental to society. The INA does not delegate to the Executive Branch the wholesale authority to designate all felonies, and even many misdemeanors, as “particularly serious crimes” that can bar asylum to otherwise deserving individuals.

Moreover, designating a wide range of relatively minor offenses as bars to asylum is grossly unjust, and in conflict with the goals of our asylum laws, because it would give particularly harsh effect to the outcomes of many criminal proceedings, which disproportionately affect communities of color, people with limited English proficiency, and others that our immigration system is designed to protect. The Congress and the President have recognized in recent years that our criminal legal system is deeply flawed.<sup>1</sup> The sentencing guidelines implemented by the Comprehensive Crime Control Act of 1984 (18 U.S.C. § 1) have had widely reported disproportionate impacts on communities of color.<sup>2</sup> For example, the US Sentencing Commission found persistent demographic disparities in sentencing across all reporting periods. The most recent report found that Black men are sentenced on average of 19.1% longer than similarly situated White men and Hispanic men received sentences 5.3% longer.<sup>3</sup>

The enumerated bars are also likely to disproportionately impact many LGBT asylum applicants, who are more likely to be poor because of they are so stigmatized and marginalized, even within immigrant communities. LGBT immigrants are more likely to convicted of crimes of poverty due to police profiling and discriminatory treatment in the criminal justice system. Poor alien applicants are more likely to have committed offenses related to accessing food, shelter, or security, including of participating in survival sex work; using falsified documents to

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<sup>1</sup> Levine, M., *Senate Approves Trump-backed Criminal Justice Overhaul*, Politico, Dec. 18, 2018, *accessed via* <https://www.politico.com/story/2018/12/18/criminal-justice-reform-bill-vote-1068268>

<sup>2</sup> See *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project, March 2018, *accessed via* <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>. “For decades, the United States of America has employed mass incarceration as a convenient answer to inconvenient questions. These policies have produced dramatic rates of incarceration, with a particularly disproportionate impact on communities of color.”

<sup>3</sup> *Demographic Differences in Sentencing*, United States Sentencing Commission, Nov. 14, 2017, *accessed via* [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf)

access food stamps or health care; accommodating the demands of a street gang that may be construed as “joining”; and providing aid to undocumented immigrants.

**The changes limiting the effectiveness of court vacatur are counter to public policy of preserving the expertise of the judiciary.** While it is the asylum officer’s role to determine if the applicant has grounds of asylum, it is inefficient to dismiss a judge’s conclusion that the asylum applicant is not a threat to public safety. The presiding judge has more information to ascertain the circumstances of the offence and set the consequences for conviction. In our experience, judges, prosecutors, and defendants are often insufficiently aware of the immigration consequences of criminal convictions. Vacatur and expungements are an opportunity to judges to mitigate potentially harsh consequences of criminal convictions.

#### CONCLUSION

For these reasons, Whitman-Walker Health strongly opposes the proposed rule and recommends that the Administration promptly rescind it.

Respectfully submitted,



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