BEFORE THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, AND DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Interim Final Rule; Request for Comment: (RFC): Asylum Eligibility and Procedural: Modifications :	**8 CFR Parts 208, 1003 and 1208 [EOIR Docket No. 19-0504 A.G. Order No. 44088-2019]**

Submitted via Federal eRulemaking Portal: http:// www.regulations.gov.

COMMENTS OF WHITMAN-WALKER HEALTH

Whitman-Walker Health (WWH or Whitman-Walker) submits these comments in Response to the Federal Rule "Asylum Eligibility and Procedural Modifications" EOIR Docket No. 19-0504 in response to Department of Homeland Security (DHS) and the Department of Justice (DOJ) Interim Final Rule Filed July 15, 2019, Federal Register Vol. 84, No. 136.

Whitman-Walker Health opposes the interim final rule because it is inconsistent with the plain language of the Immigration and Nationality Act (INA), with the implementing regulations and with the case law, and because it will have particularly harsh effects on lesbian, gay, bisexual and transgender (LGBT) persons fleeing persecution.

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 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 20,000 individuals received health services from Whitman-Walker.

In calendar year 2018, 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 nonconforming. We have a 42 year-long history of dedication to LGBT communities and are recognized experts on LGBT health and wellness. We routinely provide trainings and conduct research on the health impacts of stigma and discrimination on the LGBT community. We also provide trainings and do research on delivering healthcare to communities that are historically underserved by our medical system.

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, 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. Many 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 clients who provided their sexual orientation identified as lesbian, gay, bisexual or otherwise non-heterosexual; 20% of our legal clients identified as transgender or gender nonconforming.

COMMENTS ON THE INTERIM FINAL RULE

THE INTERIM FINAL RULE IS INCONSISTENT WITH THE LANGUAGE OF THE STATUTE

Due to the geography and history of the United States, asylum seekers regularly transit third countries on their way to seeking refuge in the United States. When crafting the statutory provisions governing asylum, Congress accordingly ensured that noncitizens arriving at the border or within the country would be able to apply for asylum despite traveling through another country to arrive in the United States.

Congress specifically identified the circumstances when a noncitizen may be deemed ineligible for asylum based on his or her relationship with a third country. Asylum applicants that are ‘‘firmly resettled in a foreign country’’ are barred from receiving asylum in the United States in 8 U.S.C. § 1158(b)(2)(A). In the statute there are six enumerated exceptions to the general rule that the AG may grant asylum to an applicant.

> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; ‘‘(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; ‘‘(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; ‘‘(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; ‘‘(v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or ‘‘(vi) the alien was firmly resettled in another country prior to arriving in the United States.
> 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(i-vi).

The "firmly resettled" exception specifically mentions the possibility that continuing presence of the asylee in another country can create a bar to asylum. This bar was first established by regulation and then codified by Congress into statute. This presents a statutory framework wherein Congress has decided the standard by which a potential asylum seeker can disqualify themselves by their presence in a foreign country: firm resettlement. Mere presence is not sufficient.

The Interim Final Rule is inconsistent with the statute with regard to the standard necessary to return an asylum seeker to a safe third country. Congress established a framework for the requirements of a safe third country for removal of asylum seekers. Congress defines a ‘‘safe third country" in 8 U.S.C. 1158(b)(2). Congress allows that

> the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection
> 8 U.S.C. 1158(b)(2)

These conditions are not yet met by Mexico and the Northern Triangle countries of El Salvador, Guatemala, and Honduras, especially, as noted below, for victims of domestic violence, homophobia and transphobia.

The Attorney General has the authority to determine ''additional limitations and conditions . . . under which an alien shall be ineligible for asylum,'' if they are established after and by a regulation that is ''consistent with'' section 208 of the INA, see INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). In instances of ineligibility as a result of presence in a foreign country and of removal to a foreign country, Congress has already described and delineated the ways in which asylum seekers may be made ineligible and the circumstances necessary in foreign countries to require removal. The Attorney General does not have the authority to create stricter bars.

THE INTERIM FINAL RULE IS INCONSISTENT WITH THE INTERPRETATIONS OF THE STATUTE IN CASE LAW AND EXISTING REGULATIONS

The regulation promulgated in the Interim Final Rule is inconsistent with the statute by placing a higher requirement on asylum seekers in the countries they pass through than the one needed to establish credible fear for the lives in their country of habitual residence. In 2017, the 9th Circuit court recognized, in an en banc decision *Bringas-Rodriguez v. Sessions* that it is reasonable that a gay male did not report his childhood sexual abuse to the Mexican police

because the country reports support the fact that it was futile and potentially dangerous to do so.[1] The court refuses to require asylum applicants to endanger their lives in meaningless attempts to fulfill unreasonable requirements.

The courts have decided that the DOJ and DHS may not require a refugee to seek state protection from governments where there is no reasonable expectation of relief from persecution. The proposed regulation does not provide an exemption to filing for asylum in a third transit country if the applicant feared the government in that country due to corruption, or because they fear similar persecution in that country as the persecution in their country of origin, which is inconsistent with the purpose of the statute and with the plain language of 8 C.F.R. § 208.15.

The Interim Final Rule is inconsistent with previous regulations and therefore must undergo Notice and Comment periods required by the Administrative Procedures Act (APA). The DHS has defined firm resettlement in previous regulations.

> An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:
> (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
> (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges,

[1] The en banc court held that the evidence Bringas-Rodriguez adduced before the agency—credible written and oral testimony that reporting his abuse would have been futile and potentially dangerous, that other young gay men had reported their abuse to the Mexican police to no avail, and country reports and news articles documenting official and private persecution of individuals on account of their sexual orientation—satisfied longstanding evidentiary standards for establishing past persecution and compelled the conclusion that Bringas-Rodriguez suffered past persecution that the Mexican government was unable or unwilling to control.

> such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.
> 8 C.F.R. § 208.15

These conditions are easily met by the majority of asylum seekers at the southern border who are transiting through Mexico to reach the United States. The Interim Final Rule represents an attempt to promulgate new regulation without properly following the Notice and Comment requirements of the APA. DHS has not offered sufficient justification, analysis, or process for this radical change.

THE INTERIM FINAL RULE WILL HAVE AN DISPROPORTIONATELY HARMFUL EFFECT ON ASYLUM SEEKERS WHO ARE SURVIVORS OF DOMESTIC VIOLENCE AND/OR LGBTQ INDIVIDUALS AND FAMILIES

The Interim Final Rule is particularly dangerous for LGBT people and victims of domestic violence because of discrimination, misogyny, homophobia and transphobia. Under the INA, many LGBT people and victims of domestic violence in Mexico and the Northern Triangle Countries are eligible for asylum as members of particular social groups. The danger for LGBT people extends south of Mexico and north of the Northern Triangle countries, irrespective of border walls and formal demarcations. In El Salvador, for example, Human Rights researchers found that LGBT

> Salvadorans regularly experience discrimination and violence perpetrated by State actors. Members of the police and military have raped, beaten, stalked, arbitrarily searched, arbitrarily detained, extorted, intimidated, and threatened LGBT people. Police and soldiers initiate violence against people on the street whose nonconforming sexual orientation or gender identity is readily apparent. Police and soldiers escalate routine encounters (such as ID checks) into violent ones when they learn that a person is lesbian, gay, bisexual, and/or transgender. Police and military violence toward LGBT people is often sexual or gendered in nature."
> Human Rights Institute, Uniformed Injustice: State Violence against LGBT People in El Salvador 10 (Apr. 17, 2017), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2017-HRI-Report-Uniformed-Injustice.pdf

The United Nations Human Rights Council recent country reports on Mexico[2], Honduras[3], and Guatemala[4] note the continuing lack of access to justice and vulnerability to state violence that results in a culture of corruption and impunity and contributes to the highest murder rates in the world. Even if it were safe for LGBT people and survivors of domestic violence in these commonly transited countries, the nascent asylum systems in Mexico and Guatemala are insufficient to handle the current asylum cases and are drastically under-resourced to handle the potential influx of cases imagined by the DOJ and DHS in the Interim Final Rule.[5]

These conditions make it particularly dangerous for victims of domestic violence, homophobia, and transphobia to assert their rights to asylum in countries along, and leading up to, the southern border of the United States. Therefore, requiring people who present at the border seeking asylum to apply for asylum first in a third country without providing a fear-based exception would not only create unreasonable barriers to accessing asylum protections in the U.S., but would unnecessarily put more lives in danger, particularly LGBTQ-identified individuals who are fleeing violence that is pervasive in the entire region.

[2] "Mexico is going through a serious crisis of violence and insecurity, with alarming rates of murder, displacement and disappearance. Links between organized crime networks and some municipal, state and federal authorities contribute to the climate of corruption and impunity." OHCHR Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico, 11, Jun. 28, 2018, A/HRC/39/17/Add.2 39th Sess.

[3] "According to various statistics, the homicide rate per 100,000 head of the population in Honduras was somewhere between 85.6 and 90.4 in 2012, and in 2014 it was about 68.8 A person who becomes a human rights defender in Honduras stands an increased risk of falling victim to violence." OHCHR Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras, 6, Jul. 21, 2016, A/HRC/33/42/Add.2 33th Sess.

[4] "Notwithstanding these efforts, [] people continue to experience serious difficulty, against a backdrop of extreme impunity, in obtaining access to the ordinary justice system in a way that meets the relevant international standards." OHCHR Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala, 15, Aug. 10, 2018, A/HRC/39/17/Add.2 39th Sess.

[5] By geographic necessity, Mexico and Guatemala are mostly likely to be transited by asylum seekers from South and Central America.

WWH OPPOSES THE INTERIM FINAL RULE BECAUSE THE REQUEST FOR COMMENT PERIOD IS INSUFFICIENT TIME FOR PUBLIC COMMENT.

The public requires additional time to review whether the government's view of the Homeland Security Act and the Immigration and Nationality Act are accurate and without error or alternative interpretation. The bars to asylum and barriers for refugees require fact specific analysis and the 30 days comment period provided by the DOJ and DHS is insufficient to review the relevant record and to respond accordingly.

CONCLUSION

Thank you for this opportunity to submit comments. We would be happy to provide any additional information that might be helpful.

Respectfully submitted,

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