

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-AC57**
Security Bars and Processing : **EOIR RIN 1125-AB08**
: **USCIS Docket No. 2020-0013**
: **A.G. Order No. 4747-2020**

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) “Security Bars and Processing” published by the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), on July 9, 2020. (85 Fed. Reg. 41,201.)

WWH strongly opposes the proposed rule. WWH submits this comment to urge DOJ and DHS to withdraw this proposed rule in its entirety. The proposed rule misuses public health to deny life-saving asylum and other humanitarian protections to individuals seeking protection in the United States. The changes to asylum eligibility are likely to cause individuals seeking protection to be deported to places where they may be persecuted or tortured.

Asylum is a lifeline for tens of thousands of vulnerable refugees. The proposed regulations use specious public health claims to justify the violation of U.S. law and treaty obligations protecting refugees. The United States has the ability to both safeguard public health in the midst of the COVID-19 crisis and to continue to protect those fleeing persecution and torture. This rule will not make us safer; it disregards the recommendations of leading public health experts and sound public health principles that would protect the health and safety of the public, while preserving access to asylum.

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, transgender, and queer (LGBTQ) 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 2019, more than 20,700 individuals received health services from Whitman-Walker. In that year, 59% percent of our health care patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or otherwise non-heterosexual, and 10% of our patients and clients—more than 2,100 individuals— identified as transgender or genderqueer.

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 LGBTQ 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 LGBTQ 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 genderqueer.

COMMENTS ON THE PROPOSED RULE

WHITMAN-WALKER HEALTH STRONGLY OBJECTS TO THE PROPOSED RULE AND URGES THE ADMINISTRATION TO RESCIND IT IN ITS ENTIRETY

This proposed rule would erroneously label certain asylum seekers as threats to national security on public health grounds, automatically block them from asylum and other humanitarian protections in the United States, and illegally deport them to persecution and torture. While the administration cites the spread of COVID-19 (and potential threats posed by other communicable disease) as justification for the rule:

- **This unprecedented public health asylum ban applies irrespective of whether an individual asylum seeker presents any public health risk.** This new mandatory bar to protection would ban asylum seekers merely for having recently transited through a country where COVID-19 is prevalent, “c[o]m[ing] into contact” with the coronavirus, including in U.S. immigration detention centers, and/or exhibiting “symptoms” possibly linked to COVID-19, like a cough or fever.
- **The rule would also give DHS and DOJ expansive authority to declare a potentially vast array of other diseases as national security threats to deny asylum to refugees even after the coronavirus threat abates.** The list of diseases potentially subject to the ban (such as cholera, diphtheria, gonorrhea, Hansen’s disease (leprosy), plague, small pox, yellow fever, viral hemorrhagic fevers, SARS, syphilis, tuberculosis, and pandemic flu) includes many that are treatable, do not present a threat of widespread transmission to the public, and/or are not subject to quarantine under U.S. laws and health regulations.

This proposed rule is not based on sound public health principles: the March 20, 2020 order from the Centers for Disease Control and Prevention (CDC) that DHS is currently using to block asylum seekers at the border under the pretext of COVID-19, is based on deceptive arguments that fail to

further public health and disregard alternative measures that can protect public health while preserving access to asylum and other protection.

The United States has the ability to both safeguard public health in the midst of the COVID-19 crisis and continue to protect those fleeing persecution and torture. Bans based on immigration status are not effective at preventing outbreaks. The United States has procedures in place to address communicable diseases that do not baselessly target asylum seekers, and experts have recommended other sensible measures that the administration has chosen not to implement that would safeguard the processing of asylum seekers while the coronavirus circulates in the United States and elsewhere.

THE PROPOSED REGULATION IS NOT BASED ON SOUND PUBLIC HEALTH PRINCIPLES

The proposed rule is not based on public health evidence or best practice and is likely to be detrimental to public health and the health of those seeking asylum. Its purported public health objectives could be achieved through less extreme and more targeted means, while preserving the right to asylum.

The World Health Organization (WHO) International Health Regulations (IHRs) provide that “[i]nternational points of entry, whether by land, sea or air, provide an opportunity to apply health measures to prevent international spread of disease.”¹ While the WHO acknowledges that some screening for communicable diseases may be needed at certain times, the IHRs stress that countries must treat people with respect and ensure that basic and medical needs are met during any screening or quarantine period. These screenings are intended to apply in a coordinated and proportionate way to significant urgent disease threats and should not apply to treatable health conditions that pose no or negligible risk to the public. Moreover, such measures need to be applied consistently with the principle of non-refoulement, enshrined in international and US law,

¹ WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (3d ed. 2005), <https://www.who.int/ihr/publications/9789241580496/en/>.

which impose an absolute prohibition on the return of individuals to places where they may face persecution or torture. Yet, the proposed rule fails to comport with basic WHO recommendations on screening of communicable diseases and the measures created by the rule do not respect the right of refugees to seek asylum.

The administration misuses public health as a pretext for denying asylum, setting a precedent for the politicization of public health and undermining the credibility of public health practitioners and science. The rule would give DHS and DOJ expansive authority to declare diseases, including treatable diseases, to be national security threats and deny asylum as a result. This authority opens the door for further use of public health as a pretext for denying the rights of asylum seekers and sidelines public health authorities, including the CDC and scientifically-sound policies and practices. U.S. public health measures have advanced significantly from the days when individuals with communicable diseases were treated merely as vectors of disease and immigrants were scapegoated for disease outbreaks and barred from the United States. The United States should not repeat past mistakes by adopting discriminatory and ineffective bans purportedly premised on public health.

This rule ignores the most fundamental public health tenet that implementing punitive measures with negative consequences for illness is a disincentive for people to engage in healthcare generally - and specific to an infectious disease, a disincentive to know one's status, be tested, take preventative measures to protect oneself and others, and to seek treatment. The ideal model of care offers few barriers to testing and treatment without punishment for being ill. In this case, the health conditions are treatable and preventable, and because the proposed rule punishes people, including those already present in the United States, for pursuing healthcare, the outcome is completely at odds with the supposed goal of this rule, namely, to avoid danger to the security of the United States.

The rule is not part of any coherent plan to stop border travel or prevent introduction or spread of contagious people or the virus, which is already widespread in the United States. Nothing limits travel from Mexico or Canada by truck drivers, those traveling for commercial or educational purposes, and many others, including green card holders and U.S. citizens. Those entrants to the United States are not tested for any contagion or symptoms by U.S. officials. This rule singles out persons seeking refuge from violence and persecution in their home countries – something that the United States is bound to provide under international law.

The rule is sweeping in scope and would apply to people who present no – or minimal – risk to public health. It would ban refugees who have never been infected with a disease potentially covered by the rule merely for having “symptoms consistent with” a designated disease, “come into contact with such a disease,” or who were recently in an affected area – including individuals who may have had an infection in the past but been subsequently treated or cured. Perversely, it would apply to individuals who have been present in the United States and who are exposed to or infected by a covered disease such as COVID-19 while awaiting asylum proceedings in the United States, even if this was due to state negligence, maltreatment, or conditions of detention. The rule would even apply to asylum-seeker health workers who are exposed to COVID-19 or another covered disease in the course of their professional duties. Many of WWH’s immigration clients, including asylum seekers, are essential workers involved in food services, construction services, and health services. These clients and their families rely on their employment to maintain housing, food, health, and safety – and their valid claims for asylum protection should not be rejected on the basis of their lawful and essential occupations. These claimants are already present in the United States and should be connected to healthcare services rather than removed to a country where they will face persecution.

As the CDC and the Department of Health and Human Services (HHS) noted in revising U.S. quarantine procedures in 2017 after a ten-year review process, “in all situations involving quarantine, isolation, or other public health measures, [CDC/HHS] seeks to use the least restrictive means necessary to prevent spread of disease.” (82 FR 6912 (2017)). Just ten years ago, the CDC lifted an immigration ban on individuals with HIV – first adopted in the 1980s when there were more known cases of HIV/AIDS in the United States than anywhere else in the world – acknowledging that the restrictions were not an effective or necessary public health measure.² These sweeping restrictions are completely inconsistent with the public health principles and would be counter-productive to public health.

The rule discriminates against individuals on the basis of immigration status, countries in which the person has lived or traveled and other attributes, rather than actual disease status. The rule does not require confirmation that an individual has a disease for that individual to be denied asylum and deported. Further, the rule would not apply to tourists, students, or business travelers from the United States even if they were infected by a disease covered by the regulation. In 2017, CDC/HHS recognized the principle of non-discrimination and explicitly rejected suggestions that quarantine provisions be applied based on immigration status, stating that public health officials should “apply communicable disease control and prevention measures uniformly to all individuals in the United States, regardless of citizenship . . . or country of residency.”³

The proposed rule disregards the availability of effective, evidence-based public health measures and treatments that can mitigate communicable disease risks while preserving access to asylum. As previously stated, leading U.S. public health experts have recommended evidence-based public health measures that can be used to safely process asylum seekers during the COVID-

² Medical Examination of Aliens— Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56,547 (Nov. 2, 2009).

³ Control of Communicable Diseases, 82 Fed. Reg. 6,890 (Jan. 19, 2017).

19 pandemic.⁴ UNHCR reports that over 20 countries in Europe have explicitly exempted asylum seekers from COVID-19 related entry bans and border closures and several states have adopted enhanced health measures and quarantine requirements while continuing to admit asylum seekers.⁵ In addition, the proposed rule disregards the availability of effective treatments for many of the listed diseases, including tuberculosis, gonorrhea, syphilis and Hansen’s disease (leprosy). Communicable diseases of public health importance are often designated as such because they require timely diagnosis, treatment, follow-up and contact tracing to limit their spread. The rule does not include provisions, however, for an appropriate public health response (such as testing, treatment, and contact tracing where appropriate) when a communicable disease is suspected, instead using this information solely as justification to deny an asylum claim.

The rule authorizes personnel who lack public health or medical expertise to make health determinations with profound implications for access to asylum and humanitarian protections. Identifying communicable diseases requires careful diagnosis, appropriate investigations and consideration of differential diagnoses. For example, syphilis, which often presents with non-specific symptoms and can resemble many other diseases, is often called “the great pretender”; gonorrhea similarly presents with non-specific symptoms. Immigration judges and DHS officers do not have the public health or medical expertise to make these health assessments, which have life-or-death implications for people fearing persecution and torture.

The rule would likely be detrimental to individual and public health. Trust and willingness to seek care are cornerstones of public health. By explicitly linking health concerns to immigration enforcement the proposed regulation is likely to erode trust and undermine public health goals.

⁴ Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions (May 18, 2020), https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf.

⁵ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, PRACTICAL RECOMMENDATIONS AND GOOD PRACTICE TO ADDRESS PROTECTION CONCERNS IN THE CONTEXT OF THE COVID-19 PANDEMIC (Apr. 15, 2020), <https://data2.unhcr.org/en/documents/download/75453>.

UNHCR has noted that border closures may also be counter-productive by pushing refugees to cross the border away from official border posts – complicating efforts to control communicable disease outbreaks.⁶

The rule fails to consider alternative measures to protect the health of asylum seekers and the public. Public health experts at leading public health schools, medical schools, hospitals, and other institutions across the United States who are working at the forefront of the response to the novel coronavirus have recommended various measures to ensure that the United States meets its obligations to asylum seekers and safeguard public health such as: the use of face coverings, hand hygiene, physical barriers, and social distancing during border processing; alternatives to detention in congregate settings, including case management and paroling asylum seekers with their families; and facilitating self-quarantine at destination locations, but only in accordance with the principle of non-discrimination.⁷

WHITMAN-WALKER HEALTH OBJECTS TO THE AGENCIES ONLY ALLOWING 30 DAYS TO RESPOND TO COMMENT ON THE PROPOSED RULE

As discussed above, these sweeping regulations would effectively rewrite and disregard fundamental aspects of U.S. asylum law. They grant DHS and DOJ authority to declare a vast array of communicable diseases as threats to national security and to block and deny asylum and other humanitarian protections to refugees on this basis. Analyzing and understanding the full import of these regulations and developing a considered response requires at least 60 days, given the need to establish a comprehensive list of potential diseases covered by the regulation and to consult with relevant medical, epidemiological, public health and immigration experts and resources. The 30-day comment period is grossly inadequate to respond to a proposed rule of this magnitude and complexity, with profound implications for refugee protection.

⁶ *Id.*

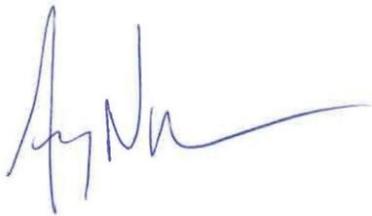
⁷ Letter to HHS Secretary Azar and CDC Director Redfield, *supra* note 4, at 2.

The ongoing COVID-19 pandemic magnifies the challenge of responding to the notice of proposed rulemaking in a timely manner.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Amy Nelson', with a long horizontal flourish extending to the right.

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August 10, 2020