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September 18, 2019

Via Federal e-Rulemaking Portal

Acting Secretary Kevin K. McAleenan
Department of Homeland Security
Washington, DC 20229

RE: Request for Comment on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409
(Jul. 23, 2019)
Docket No. DHS-2019-0036-0001

Dear Acting Secretary McAleenan,

The National Immigration Project of the National Lawyers Guild (NIPNLG) writes in response to Docket No. DHS-2019-0036-0001, the Department of Homeland Security (DHS) request for comments on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019) (hereinafter, the Rule). This immediately effective notice broadly expanded the scope of expedited removal to include individuals apprehended after residing in the United States for up to two years and/or in the interior of the United States. The Rule will have immediate and long-lasting effects on the equal protection, due process and statutory rights of individuals subject to expedited removal.

Since its initial implementation over 20 years ago, expedited removal has been rife with error, misconduct, and rights violations. A 2005 study commissioned by Congress documented numerous “serious problems” in the expedited removal process “which put some asylum seekers at risk of improper return.” U.S. Comm’n on Int’l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 4-5, 10 (2005) (“2005 USCIRF Study”). A 2016 follow-up study “revealed continuing and new concerns about [Customs and Border Protection (“CBP”)] officers’ interviewing practices and the reliability of the records they create, including . . . certain CBP officers’ outright skepticism, if not hostility, toward asylum claims; and inadequate quality assurance procedures.” U.S. Comm’n on Int’l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 2 (2016) (“2016 USCIRF Study”). NIPNLG has successfully represented individuals who have been wrongfully issued expedited removal orders. *See for e.g.* Letter from Efrain Solis Jr., CBP Port Director, Hidalgo, Texas Port of Entry, to Trina Realmuto, National Immigration Project of the National Lawyers Guild (Oct. 3, 2016), available at https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2016_3

October_CBP-Decision-Hidalgo-MTR.pdf. The Rule's expansion of expedited removal would unacceptably expand these problems, which have long gone unaddressed by DHS.

For the following reasons, NIPNLG requests that DHS immediately halt implementation of the expansion of expedited removal and take steps to ameliorate the well-documented problems in the expedited removal process as it existed prior to the Rule.

1. DHS should not expand the scope of expedited removal because its officers regularly interfere with the rights of individuals in expedited removal to pursue asylum claims

DHS officers, usually those employed by U.S. Customs and Border Protection (CBP), must inform individuals potentially subject to expedited removal of their rights and refer those with a fear of return to their countries of origin to asylum officers within U.S. Citizenship and Immigration Services (USCIS) for credible fear interviews (CFIs). These responsibilities are to be carried out without misinformation, harassment, or intimidation.

Multiple reports show that DHS officers have utterly failed to carry out these responsibilities. Instead, the officers regularly fail to record statements by individuals subject to expedited removal that indicate a fear of return; fail to refer individuals who express fear of return for CFIs, fail to ask individuals in expedited removal proceedings about their fear of return, and subject these individuals to harassment and misinformation that actively interferes with their ability to pursue asylum claims. *See, e.g.,* Human Rights Watch, *You Don't Have Rights Here* 6 (2014) (finding that fewer than half of individuals interviewed who claimed a fear of return were referred for credible fear hearings); Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* 12 (2017) ("In 12% of the cases documented for this report, individuals expressing fear of violence upon return to their country of origin were not processed for credible fear screenings and instead, were placed into removal proceedings."); DHS Office of the Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) (describing CBP practices amounting to failure to properly refer asylum seekers for CFIs in order to "regulat[e] the flow of asylum-seekers at ports of entry"); Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* (2017) (describing CBP agents' coercion of and threats to asylum seekers, including making them recant their claims of fear on video, claiming that they cannot seek asylum without a ticket from officials in Mexico, and claiming that there is no more asylum for individuals from certain countries); American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, 1, 2, 5, 7-8 (Sept. 2017) (reporting that 55.7% of a survey of 600 deported Mexican migrants were not asked if they feared return to Mexico and describing numerous incidents of CBP interference with asylum claims); American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, 9 (Aug. 2017) (reporting CBP's failure to act in response to complaints of misconduct, including complaints that agents ignored claims of fear or persecution); Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017) (documenting CBP abuses towards asylum seekers, including ignoring asylum claims, providing false information—e.g., that the United States no longer provides asylum—mocking and intimidating asylum seekers, imposing procedures to deter asylum seekers from pursuing their claims, and coercing asylum seekers into giving up their claims); 2016 USCIRF Study at 20-32 (documenting examples of

failure to properly screen for fear of return in CBP primary inspection interviews and noting “certain CBP officers’ outright skepticism, if not hostility, toward asylum claims”); American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom*, 4 (Dec. 2014) (reporting that 55% of 89 interviewed individuals who received summary removal orders, including expedited removal orders, were not asked about fear of persecution in language they could understand and 40% of those asked about fear were deported without CFI despite expressing fear of return); 2005 USCIRF Study at 4, 10, 64 (documenting numerous “serious problems” in the expedited removal process “which put some asylum seekers at risk of improper return” and describing expedited removal as “a [s]ystem with [s]erious [f]laws”), *id.* at 53-54 (finding that in 15% of observed cases, when a noncitizen expressed a fear of return to an immigration officer during the inspections process, the officer failed to refer the individual to an asylum officer for a credible fear interview).

Should DHS continue to implement the Rule, the well-documented failure of immigration officers to fulfill their basic obligations to asylum seekers facing expedited removal is likely to expand as well. The Rule itself suggests that, now that DHS has expanded the scope of expedited removal, tens of thousands more individuals each year could be forced through this flawed system that routinely deprives individuals of their right to speak to an asylum officer for a credible fear interview. *See* 84 Fed. Reg. at 35411.

In order to safeguard asylum seekers’ right to seek protection from persecution and torture, DHS should halt implementation of the Rule and fix the substantial issues present in the pre-July 23, 2019 expedited removal system.

2. DHS should not expand the scope of expedited removal because its officers routinely record inaccurate or false information on expedited removal forms, coerce noncitizens into signing forms they do not understand, and fail to advise noncitizens of their rights

The content of the paperwork that DHS officers complete during expedited removal proceedings has a profound impact on the individuals subject to expedited removal—for many, it will result in their immediate deportation; for others, the content of forms filled out during initial interviews will impact assessments of their credibility in subsequent proceedings. Yet this paperwork is often replete with errors.

Multiple reports document DHS officers’ practice of including inaccurate information in expedited removal paperwork, failing to provide people in expedited removal proceedings with the opportunity to review and respond to information in the paperwork, using coercion to force people to sign forms they do not understand, and requiring individuals to sign paperwork despite interpretation failures that impact their ability to understand the proceedings. *See, e.g.,* Borderland Immigration Council, *Discretion to Deny* at 13 (noting that “[i]ndividuals are forced to sign legal documents in English without translation” and “that CBP affidavits are often inconsistent with asylum-seekers’ own accounts”); 2016 USCIRF Study at 2, 20-22 (discussing “continuing and new concerns about CBP officers’ interviewing practices and the reliability of the records they create”); American Civil Liberties Union, *American Exile* at 34-36 (describing noncitizens who were required to sign forms in languages they do not understand); 2005 USCIRF Study at 74 (explaining that statements recorded by CBP officers “are often inaccurate and are almost always unverifiable”); *id.* at 55 (“Study observations indicate that paper files created by the inspector are not always reliable indicators” of whether a credible fear interview

was merited.); *id.* at 53 (noting that expedited removal forms were routinely inaccurate); *United States v. Sanchez-Figuero*, No. 3:19-cr-00025-MMD-WGC, slip op. at 2, 9 (D. Nev. July 25, 2019) (dismissing unlawful reentry indictment where defendant, who had not slept for 36 hours at the time of apprehension, “was not informed of the charge against him and never received a meaningful opportunity to review the sworn statement”); *United States v. Raya-Vaca*, 771 F.3d 1195, 1205-06, 1210-11 (9th Cir. 2014) (holding that immigration officer’s failure during expedited removal process to advise the defendant of the charge of removability and to permit him to review the sworn statement prepared by the officer violated his due process rights to notice and an opportunity to respond).

In addition, practitioners report that immigration officers routinely fail to advise noncitizens of their rights in expedited removal proceedings, including that they may request to withdraw their applications for admission, which allows noncitizens to leave the United States voluntarily and avoid penalties that include permanent inadmissibility to the country. *See* 8 U.S.C. § 1225(a)(4) (providing that noncitizen seeking admission “may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission”). There is a significant risk that noncitizens subject to the Rule likewise will be erroneously denied this important opportunity, provided by statute, to withdraw their applications for admission.

Forcing tens of thousands more individuals, many of whom will have lived in the United States for significant periods of time and developed substantial ties, through this flawed and fast-tracked system is not appropriate. To avoid subjecting more individuals with claims to relief—who never should have been subject to expedited removal even under the Rule’s broad scope—to a system replete with coercion, factual errors, and inadequate translation, DHS should halt implementation of the Rule and remedy the long-standing problems with the prior expedited removal system.

3. There are well-documented failures in the credible fear process

Furthermore, even those individuals who receive credible fear interviews after DHS inspection in expedited removal face significant barriers to fair adjudication of their claims. As multiple reports indicate, individuals who must establish a credible fear—rather than immediately being placed in immigration court proceedings to pursue their asylum claims—may not receive adequate consideration of their claims.

Instead, they face erroneous denials of credible fear, denials of access to counsel, and inadequacies in interpretation. *See, e.g.*, U.S. Dep’t of Homeland Sec. Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers* 96-100 (2016) (discussing inadequate or nonexistent interpretation services during credible fear interviews and immigration judge reviews of negative credible fear determinations); Borderland Immigration Council, *Discretion to Deny* at 13 (describing interpretation failures during CFIs); 2016 USCIRF Study at 28 (describing case of a detained Ethiopian asylum seeker who was denied an interpreter); American Civil Liberties Union, *American Exile* at 34 (“Most of the individuals interviewed . . . stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter.”); *Interior Immigration Enforcement Legislation: Hearing Before the H. Judiciary Subcomm. on Immigration & Border Sec. 5* (Feb. 11, 2015) (statement of Eleanor Acer, Dir., Refugee Protection, Human Rights First) (“In some cases,

interviews are sometimes rushed, essential information is not identified due to lack of follow up questions, and/or other mistakes are made that block genuine asylum seekers from even applying for asylum and having a real chance to submit evidence and have their case fully considered”).

Rather than placing additional strain on the CFI system, DHS should halt implementation of the Rule and ensure that individuals in the pre-July 23, 2019 expedited removal system are provided with a fair opportunity to present their asylum claim.

4. DHS officers have wrongfully removed numerous individuals through expedited removal

As a result of the widespread flaws in the expedited removal process, numerous individuals have been wrongfully removed from the United States. This includes multiple reported instances of deportations of U.S. citizens. *See, e.g., Lyttle v. United States*, 867 F. Supp. 2d 1256, 1272-73 (M.D. Ga. 2012); *Maria de la Paz v. Jeh Johnson*, No. 1:14-CV-016 (S.D. Tex. habeas petition filed Jan. 24, 2014); Ian James, *Wrongly Deported, American Citizen Sues INS for \$8 Million*, L.A. Times (Sept. 3, 2000) (recounting expedited removal of U.S. citizen Sharon McKnight). Similarly, due to the rushed system of expedited removal, DHS fails to identify immigrants who should not be subject to the process because, for example, they have lived in the United States for many years or they have credible fear of persecution. *See, e.g., American Exile* at 63 (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id.* at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id.* at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview); *United States v. Mejia-Avila*, No. 2:14-CR-0177-WFN-1, 2016 WL 1423845, at *1 (E.D. Wash. Apr. 5, 2016) (dismissing indictment where defendant was not subject to expedited removal because the record was “clear” that he had lived in the United States for more than two years).

These errors are likely to increase under the Rule. Proving two years of continuous physical presence, while detained and alone, will be unfeasible for many people detained under the Rule under the short timeframe provided for expedited removal proceedings. In order to prevent improper deportation of long-time residents or citizens of the United States, including to countries where those individuals face persecution or torture, DHS should halt implementation of the Rule and address the long-standing issues with the pre-July 23, 2019 expedited removal system which has led to wrongful removals.

5. Expansion of expedited removal will wrongfully target immigrants of color

In general, the regulatory limitations present in the pre-July 23, 2019 expedited removal regime allowed DHS to enforce the policy only against those apprehended near the border. *Designating Aliens for Expedited Removal*, 69 FR 48877 (Aug. 11, 2004) (purpose of 2004 expansion was to focus “enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border”). The Rule now authorizes DHS officers to apply expedited removal to noncitizens arrested anywhere in the country who cannot show that they have been lawfully and

continuously present in the United States for at least two years. Because the Rule now covers the entire interior of the United States and applies to all those who have been present in the United States for less than two years, DHS officials will have free reign to stop and question anyone in the entire country who they *suspect* to be subject to the Rule.

Due to its broad application and the vast amount of discretion it affords to DHS officers, the Rule will lead to racial profiling of immigrants of color. DHS has an extensive record of racial profiling against immigrants of color. *See Zelaya, et al. v. Miles, et al.*, No. 3:19-cv-00062 (E.D. Tenn. filed Feb. 21, 2019) (suit alleging that ICE agents detained every worker who looked Latino during an immigration raid at a meat processing plant and used racial slurs in the process); Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, ProPublica (Jun. 8, 2018); People Helping People, *Checkpoint Monitoring Report* (Oct. 26, 2014) (finding that a Latino-occupied vehicle at a AZ checkpoint is more than 26 times more likely to be required to show identification than a white-occupied vehicle); Press Release, U.S. Department of Justice Office of Public Affairs, *Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office* (Sept. 18, 2012) (DOJ investigation concluded that DHS and local law enforcement's 287(g) program in Alamance County, North Carolina demonstrated an "egregious pattern of racial profiling"); Chief Justice Earl Warren Inst. on Law & Soc. Policy, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Oct. 2011) (finding that more than 93 percent of people arrested under the Secure Communities program are Latino, even though Latinos make up only 77 percent of the undocumented population in the United States); Chief Justice Earl Warren Inst. on Law & Soc. Policy, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Sept. 2009) (finding racial profiling of Latino and Hispanic individuals in DHS's Criminal Alien Program).

Because of the over-expansive nature of the Rule and DHS's consistent track record of racial profiling, it is almost inevitable that, when implementing this expansion of expedited removal, DHS officers will target those who "look like" immigrants. In order to prevent the Rule's disproportionate and unlawful effect on communities of color, DHS should halt the implementation of the Rule and address the issues of racial profiling that are rife throughout the agency.

6. Low-income individuals, children, and those with mental illnesses are especially vulnerable to being wrongfully subject to removal

Under the Rule, even those who are not properly subject to expedited removal, including U.S. citizens, can be summarily removed if they are unable to meet their burden of proof whenever a DHS officer encounters them. For instance, individuals who have resided in the United States for over two years but who are unable to provide adequate paperwork to show their physical presence to the satisfaction of DHS officials may be subject to expedited removal.

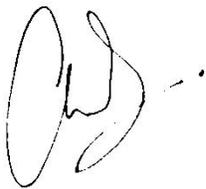
Low-income individuals may have much greater difficulty affirmatively demonstrating two years of physical presence, particularly when suddenly detained and given only a short period of time to gather any necessary evidence. Children and individuals with mental illnesses would face similar difficulties in meeting their burden under the Rule. Individuals belonging to such marginalized groups are less likely to have or carry necessary paperwork and they may not be able to produce the paperwork without assistance of counsel. Therefore, under the Rule, they are especially vulnerable to being wrongfully deported.

Because of the adverse effects of the expansion of expedited removal on marginalized groups, DHS should halt the implementation of the Rule and address the well-documented problems with the prior expedited removal system.

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We request that DHS considers these recommendations, halts expansion of the scope of expedited removal, and acts immediately to address the long-standing problems with implementation of the pre-July 23, 2019 expedited removal system. Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'AQ', with a small dot at the end of the stroke.

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