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Office of Information and Regulatory Affairs,  
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725 17th Street NW, Washington, DC 20503;  
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

**RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067**

As an organization with expertise in global asylum law and process, Asylum Access opposes the proposed rulemaking EOIR-2020-0003 and urges the Department of Justice and the Department of Homeland Security to withdraw these proposed rules in their entirety.

The global Asylum Access organization is based in the United States and has worked in refugee policy in multinational organizations and countries around the world for 15 years. Our local affiliate organization, Asylum Access México, works with refugees and asylum-seekers in Mexico and advocates for improvements in Mexican refugee law. We have advised governments in many countries on ways to improve their asylum procedures. This comment is informed by our expertise on the impacts of US policy on asylum-seekers in the US and Mexico, the experiences of refugees around the world, and the global best practices for asylum processing.

This regulation is meant to interpret the US Refugee Act of 1980 (the Act) but instead piles on restrictions that violate the letter and spirit of the Act and basic principles of Due Process in an attempt to eliminate asylum altogether. It is arbitrary, it is capricious, and it is cruel. **We strongly urge the agencies' to rescind the rule in its entirety.**

I.	A 30-DAY COMMENT PERIOD IS INSUFFICIENT FOR A RULE OF THIS MAGNITUDE AND COMPLEXITY	2
II.	TIME IN AND TRANSIT THROUGH OTHER COUNTRIES DOES NOT QUALIFY AS FIRM RESETTLEMENT	2
A.	Many refugees spend over 14 days or over a year in Mexico without being firmly resettled.	4
B.	Some refugees who qualify under the law of asylum will not be safe in Mexico.	4
C.	US officials cannot determine if a refugee “could have” received asylee status because many asylum seekers who fit the Mexican legal definition of a refugee will not in fact receive asylum due to an overloaded asylum system, a bar on applications after 30 days from entry, and deportations of qualified applicants by Mexican immigration officials.	5
D.	Many countries have similar barriers to access to asylum rights, so it is inappropriate to categorically bar asylum seekers on the grounds of firm resettlement if they “could have” applied in another country.	8
E.	Transit through more than one country does not qualify as firm resettlement.	9
III.	ALLOWING IMMIGRATION JUDGES TO DENY ASYLUM ON THE BASIS OF THE APPLICATION FORM WITHOUT A HEARING WOULD DENY DUE PROCESS	9
IV.	THE CUMULATIVE EFFECT OF THESE RULES WOULD BE TO REJECT ALMOST ALL REFUGEES AND WE URGE THE WITHDRAWAL OF THE ENTIRE REGULATION	10

**I. A 30-DAY COMMENT PERIOD IS INSUFFICIENT FOR A RULE OF THIS MAGNITUDE AND COMPLEXITY**

**We also object to the 30-day limit to submit comments** to an 160-page rule that would constitute a sweeping overhaul of the asylum system. There are no exigent circumstances to justify this short period. A standard 60-day comment period is required. If the Administration wishes to issue this proposed rule, it should withdraw it and reissue with a 60-day comment period. Given the short period to reply and the fact that our staff is working remotely under pandemic conditions, this comment will only cover a small section of our many objections to this regulation. The inability of the public to fully respond means that any final regulation issued after this period cannot be properly considered in the light of all the necessary information.

**II. TIME IN AND TRANSIT THROUGH OTHER COUNTRIES DOES NOT QUALIFY AS FIRM RESETTLEMENT**

EOIR-2020-0003 would modify 8 CFR § 208.15 to significantly expand which refugees are barred from asylum under INA § 208(b)(2)(A)(vi), applying to an applicant who “was firmly resettled in another country prior to arriving in the United States.” The proposed rule adds the following categories of refugees ineligible under this provision:

1. “The alien either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status,” or
2. “the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States;”

Moreover, this regulation would require “a decision-maker to consider whether an alien has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States” and “make transit through more than one country prior to arrival in the United States a significant adverse factor.” The notice of proposed rulemaking argues that these factors are supported by existing law surrounding firm resettlement.<sup>1</sup>

Our experience working with refugees in Mexico shows that these factors cannot be fairly equated with firm resettlement. While not all United States asylum seekers transit through Mexico, substantial numbers do pass through Mexico on their way to the United States. The experience of refugees in transit in Mexico illustrates why the categories in the regulation outlined above do not qualify as “firm resettlement” under the terms of the law. Moreover, our global experience shows that many other transit countries have similar factors that make equating transit to firm resettlement equally flawed.

We work within the Mexican asylum system every day to secure refugee status for our clients. Once Mexico grants asylum to a refugee, if they do not face further persecution in the country, it may be appropriate to deem them firmly resettled under the terms of the law. However, a judgment by a United States official that a person who did not apply for or who was not granted asylum “could have” resided in a legal immigration status cannot be equated with firm resettlement.

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<sup>1</sup> Although this comment focuses on the arbitrariness and lack of factual basis of the proposed rule, we strongly disagree with this legal analysis, and note that the firm resettlement bar must be interpreted, “with lenience toward migrants to avoid infringing on the commitments set forth in the 1951 Convention and 1967 Protocol.” See *East Bay Sanctuary, et. al. v. Donald J. Trump*, D.C. No. 4:18-cv-06810- JST (9th Cir Feb. 28, 2020).

**A. Many refugees spend over 14 days or over a year in Mexico without being firmly resettled.**

It frequently takes more than 14 days to cross Mexico. Many refugees take the journey on foot due to a lack of financial resources for transportation. It is absurd to equate time on a journey to “firm resettlement,” even as an adverse factor. Moreover, many refugees are delayed for months or even years in the south of Mexico by the government’s refusal or delay in issuing travel documents. The Mexican government has further restricted movement of refugees by threatening and imposing fines on transportation companies that sell tickets to those without travel documents. Mexico regularly detains migrants and refugees for extended periods of time, making a quick transit impossible. Even those refugees who could find protection in Mexico often struggle to access the asylum system, for reasons discussed below.

The US “metering” policy at the northern border and the practice of turning away refugees under the CDC order during the COVID-19 pandemic have also meant that refugees spend long periods of time in Mexico without being safely or firmly resettled. Some are further delayed by kidnappers who target migrants and hold them for ransom from their families. Thus, the bar on refugees who have lived in another country for over a year, and viewing a 14 day stay as an adverse factor, is not justified under the firm resettlement exception.

**B. Some refugees who qualify under the law of asylum will not be safe in Mexico.**

Moreover, not everyone who would qualify under the law for asylum in Mexico will be safe from their persecutors or other violence in Mexico. Some of our clients from Central America report a well-founded fear that their persecutors will be able to cross the border and attack them in Mexico. Additionally, human rights groups were able to document violent attacks on over 1,000 asylum seekers waiting under the Migrant Protection Protocols at the US-Mexico border, including murders, kidnappings, beatings, and sexual assault. Please read Human Rights First, *A Year of Horrors: The Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico* (Jan. 2020), <https://www.humanrightsfirst.org/resource/year-horrors-trump-administration-s-illegal-returns-asylum-seekers-danger-mexico>. Violence against migrants in transit through Mexico is also common. Cartels routinely target people in migration to kidnap and hold for ransom. The fact that a refugee is forced to transit through another country and faces substantial delays while in that country does not mean that refugee is firmly or safely resettled.

**C. US officials cannot determine if a refugee “could have” received asylee status because many asylum seekers who fit the Mexican legal definition of a refugee will not in fact receive asylum due to an overloaded asylum system, a bar on applications after 30 days from entry, and deportations of qualified applicants by Mexican immigration officials.**

While Mexico has an asylum system that offers permanent residency to those who are granted asylum, the fact that a refugee theoretically “could have” applied for asylum cannot be fairly equated to being firmly resettled. The Mexican asylum system was facing a serious asylum processing backlog even before the COVID19 pandemic slowed the processing of refugee applications. The Comisión Mexicana de Ayuda a Refugiados (COMAR), the Mexican asylum agency, received 70,302 applications in 2019, which was more than double the 29,630 applications received in 2018 and more than 20 times the 3,424 applications received in 2015. See COMAR statistics from Dec. 2019, [https://www.gob.mx/cms/uploads/attachment/file/522537/CIERRE\\_DICIEMBRE\\_2019\\_07-ene\\_.pdf](https://www.gob.mx/cms/uploads/attachment/file/522537/CIERRE_DICIEMBRE_2019_07-ene_.pdf).

The agency’s budget and personnel have not kept up with this increase in applications. The 2015 budget, when there were 5,000 asylum claims, was 25 million pesos. The 2019 budget was only 20 million pesos to process over 70,000 claims. The 2020 budget went up to 47 million, which was just over a third of the 124 million the agency said it needed to complete its work. See Manu Ureste, *Comisión de Refugiados pidió 124 mdp y solo le dieron 47, aunque hay récord de solicitudes de asilo*, Animal Politico (Nov. 25, 2019), <https://www.animalpolitico.com/2019/11/comision-refugiados-presupuesto-solicitud-s-asilo/>. Under these circumstances, COMAR cannot hire or train the needed staff or give applications the necessary attention.

An analysis of COMAR data obtained through a transparency law in October of 2019 shows the administrative barriers refugees face in Mexico. The analysis looked at asylum data for applications submitted between January 1, 2018 and October 25, 2019. Of the 90,397 total applicants in this period, COMAR granted asylum to 11.3%, denied 2.7%, and had yet to consider the vast majority, 70.6%, by October 2019. This represents at least a 63,860 person backlog. 13,089 people who applied in 2018 were still waiting in October 2019 – 44% of total 2018 applicants. 6,230 had been waiting over a year.

Mexican law requires asylum cases be decided within 45 working days, or 90 days in exceptional circumstances; however, the data shows that tens of thousands of asylum seekers are forced to wait well beyond the legal limit. Perhaps as a consequence, 11.1%

of all applications in 2018 and 2019 were marked as either abandoned or withdrawn by the applicant. The average time between application and abandonment or withdrawal for 2018 applicants was 164 days – a wait far longer than the 45 day period in which asylum cases must be decided under Mexican law. Please read Asylum Access Mexico, *Asylum in Mexico by the Numbers* (2020), <https://asylumaccess.org/wp-content/uploads/2020/01/Asylum-in-Mexico-by-the-Numbers.pdf>. Since the pandemic, COMAR has suspended many of its services and processing of new asylum applications has slowed to a crawl, which will aggravate existing problems.

A refugee waiting for an asylum determination cannot be considered to be firmly resettled. While the law grants the right to live and work in Mexico to asylum seekers, the required documentation is rarely issued in practice, leaving many asylum seekers in a state of limbo where they cannot work and risk deportation if they are detained by immigration authorities.

Moreover, refugees are required to wait in the state of application for the entirety of the pendency of their asylum claims. Because asylum-seekers in Mexico are required to apply within 30 days of entering the country, most apply in the southernmost states. Between January 1, 2018 and October 25, 2019, 62% of applications were received in the state of Chiapas. Mexico's southern border states are poorer, have worse infrastructure, and fewer job opportunities than the rest of the country. There is also a significant presence of Central American gangs and other agents of persecution in the southern states.

Our lawyers working with refugee clients in the southern states have found that many clients are forced, by poverty and violence in these states, to abandon their asylum applications to look for work in northern states or seek asylum in the United States. Some, hoping to be able to settle permanently in Mexico, wait for long periods of time before abandoning their applications.

Many refugees who ultimately seek asylum in the United States after spending lengthy periods in Mexico do so because they have come to the conclusion that they will not survive to see legal status and firm resettlement in Mexico – the very opposite of the assumption of firm resettlement encoded in this rule. Others may take longer than 14 days to pass through Mexico and decide against applying for asylum because they reasonably conclude from the experiences of others that they will not make it through the process.

Many potential refugees in Mexico never get the chance to apply for asylum at all. Asylum applications are barred for any refugee who has been in the country for more than 30 days. See *Ley Sobre Refugiados, Protección Complementaria y Asilo Politico*, Art. 18 (2011, as modified 2014). It is possible to obtain a waiver for this bar, but many refugees are told of the bar by immigration officials and deported without ever learning about the possibility of a waiver and waivers are routinely denied.

The Instituto Nacional de Migración (INM), the Mexican immigration enforcement agency, does not have a uniform process to screen migrants in detention or seeking admission to the country for well-founded fear of persecution upon return to their own country. Our experience working with refugees in Mexican migrant detention centers and our correspondence with organizations working with deported migrants in Central America show many refugees to be deported to their home countries without ever learning of the possibility of applying for asylum in Mexico.

For example, over two weeks in January of this year, INM deported over 2,000 migrants from a group traveling from Honduras, while denying Asylum Access México and other legal aid providers access to detention facilities. Not only did the officials fail to apprise these migrants of their rights, they actively prevented legal service providers from offering information about asylum applications. Had some of these refugees escaped detention and deportation and ultimately made it to the United States, they would be denied under this Rule because they are purportedly eligible for asylum in Mexico. In practice, they were denied all access to the asylum process. See *Activist visits to Mexico's migrant centers up in air*, AP (Jan. 28, 2020), <https://apnews.com/24db4676c4adf1b0456184b346580881>; Pablo Ferri, *México restringe el acceso a los centros de detención migratorios a las organizaciones de derechos humanos*, El País (Jan. 24, 2020), [https://elpais.com/internacional/2020/01/23/mexico/1579814165\\_414927.html?ssm=TW\\_CC](https://elpais.com/internacional/2020/01/23/mexico/1579814165_414927.html?ssm=TW_CC).

Even those refugees who know their rights often face stonewalling by INM. For example, INM deported an Asylum Access México client from the Mexico City airport after she requested asylum and showed documents to support her request. The INM official claimed refugee status did not exist anymore. Further investigation and consultation with other refugees and asylum agencies suggests that this was common practice at Mexico's busiest airport. See Asylum Access Mexico, *El Instituto Nacional de Migración Viola los Derechos Humanos de una Mujer que por Segunda Ocasión Solicita Asilo en México* (Dec. 3, 2019),

<https://asylumaccess.org/el-instituto-nacional-de-migracion-viola-los-derechos-humanos-de-una-mujer-que-por-segunda-ocasion-solicita-asilo-en-mexico/>.

These many barriers to asylum in Mexico mean that it is not reasonable to assume that refugees who transited through Mexico without receiving asylee status could have accessed asylum or that they were “firmly resettled,” even if they spent more than a year in the country.

**D. Many countries have similar barriers to access to asylum rights, so it is inappropriate to categorically bar asylum seekers on the grounds of firm resettlement if they “could have” applied in another country.**

Asylum Access works in collaboration with refugees and asylum advocates in countries around the world and at large international multilateral institutions. As global asylum experts, we can attest that many countries have similarly large gaps between legal asylum rights available and access to those rights in practice. Firm resettlement may be found through inquiry into the facts in a particular case, but it cannot be presumed based on the number of countries transited through or the amount of time spent in transit countries.

Millions of refugees now live for years or decades in countries where they do not have the right to leave refugee camps, to work, to send their children to school, to access healthcare, or to ever obtain legal status – rights that are essential for refugees to be able to rebuild their lives. We work directly in Malaysia and Thailand and indirectly through allies in countries in Latin America, Asia, Africa, and the Middle East to improve these host country policies, but there is a long way to go. One year of residency does not indicate firm resettlement in the places that most refugees live. UNHCR estimates that nearly 16 million refugees had been in exile for five consecutive years in a country that hosted large numbers of their compatriots where they could not be considered resettled:

“UNHCR defines a protracted refugee situation as one in which 25,000 or more refugees from the same nationality have been in exile for five consecutive years or more in a given host country... 15.9 million refugees were in protracted situations at the end of 2018. This represented 78 per cent of all refugees, compared with 66 per cent the previous year. 10.1 million refugees were in protracted situations of less than 20 years, more than half represented by the displacement situation of Syrians in Egypt, Iraq, Jordan, Lebanon and Turkey. 5.8 million were in a situation lasting 20 years or more, dominated especially by the 2.4 million Afghan refugees in the Islamic Republic of Iran and Pakistan where the displacement situation has lasted for 40 years.”



*Global Trends: Forced Displacement in 2018*, UNHCR,  
<https://www.unhcr.org/globaltrends2018/>.

Acknowledging this reality, the US regularly accepts refugees through the UNHCR resettlement program who have been outside of their country of origin for more than one year.

To begin to grasp the scope of long-term displacement, please read United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2018*, <https://www.unhcr.org/globaltrends2018/>; *Refugee Work Rights Report: Refugee Access to Fair and Lawful Work in Asia*, Asylum Access (2019), [https://asylumaccess.org/wp-content/uploads/2019/11/Asia-RWR\\_FINAL.pdf](https://asylumaccess.org/wp-content/uploads/2019/11/Asia-RWR_FINAL.pdf); *Refugee Work Rights Report: The Syrian Crisis and Refugee Access to Lawful Work in Greece, Jordan, Lebanon, and Turkey*, Asylum Access (2017), <https://asylumaccess.org/wp-content/uploads/2017/09/Middle-East-Refugee-Work-Rights-Syrian-Crisis.pdf>.

The expansions of the interpretation of “firm resettlement” proposed in this rule are thus contrary to the terms and intent of the statute.

**E. Transit through more than one country does not qualify as firm resettlement.**

It is also unreasonable to make transit through more than one country a “significant adverse factor” under firm resettlement doctrine. Whereas an agency may interpret ambiguous terms in a statute (see *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)), here there is no ambiguity in the phrase “firm resettlement” that could make it applicable to transferring planes in two countries, or even walking the length of them as part of a journey. The journeys refugees take to reach safety demonstrate nothing more than visa restrictions and lack of financial resources for travel, not any evidence that intervening countries are safe for refugees. For example, common transit countries like Guatemala, Honduras, and El Salvador do not have developed asylum systems and do not provide a sufficient degree of safety to be considered safe third countries where a refugee can resettle. Please read *Deportation with a Layover*, Human Rights Watch (May 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-u-s-guatemala-asylum-cooperative>. Transit through these and other countries provides asylum officials with no information about resettlement options.

### **III. ALLOWING IMMIGRATION JUDGES TO DENY ASYLUM ON THE BASIS OF THE APPLICATION FORM WITHOUT A HEARING WOULD DENY DUE PROCESS**

Section 8 CFR § 1208.13 (e) would allow immigration judges to deny asylum to asylum seekers without even allowing them a hearing or chance to testify, if judges determine, *sua sponte* or at the request of a DHS attorney, that the application form does not adequately make a claim.

Asylum law is immensely complicated. Asylum applications must be completed in English, a language that many applicants do not speak. Some applicants are not literate. The vast majority do not have lawyers. When they flee their countries and arrive in the country where they will seek asylum, most applicants do not know anything about asylum law. They may fail to properly articulate the reasons that they were attacked on their applications, not because those reasons are not genuine but because they do not understand the importance of the motivation behind the attack or the identification of their persecutor. They may not explain why their government is unable or unwilling to prevent the attack because it is something that everyone where they come from already knows. There is a great deal of crucial information to cases that can be determined by a judge's questioning that an asylum seeker may fail to write on a form. This rule would inevitably lead to the rejection of strong asylum cases and the deportation of refugees to countries where they will be persecuted or killed.

### **IV. THE CUMULATIVE EFFECT OF THESE RULES WOULD BE TO REJECT ALMOST ALL REFUGEES AND WE URGE THE WITHDRAWAL OF THE ENTIRE REGULATION**

The remainder of the regulation includes the removal of long-recognized grounds for asylum, raised bars for persecution for asylum and Convention Against Torture protections, an expanded definition of "frivolous" applications, a categorical bar on asylum for people who have been in the country for more than a year with no statutorily-required changed circumstances exception, and a host of other changes designed to chip away at the asylum protections that Congress codified in statute after the United States committed to them by acceding to the 1967 Protocol to the 1951 Refugee Convention. This regulation will virtually eliminate asylum in the United States. While the 30-day limit on comments does not permit us to respond to each of these changes individually, we oppose the regulation as a whole and urge the agencies to withdraw it.

Asylum Access as an organization and our supporters in the United States are proud of the long asylum tradition in the US. As an international organization, we know that the United States is seen as a leader in the world and other countries will use the choice of the United States to turn its back on refugees and its international commitments as justification to do the same.

We call upon the administration to withdraw these proposed rules in their entirety.

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Asylum Access