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February 2, 2022

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
2707 Martin L. King Avenue, SE
Washington, DC 20528

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Mr. Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement
500 12th Street, SW
Washington, DC 20536

Re: Opposition to Docket Number USCIS 2020-0013 Security Bars and Processing

Dear Secretary Mayorkas, Attorney General Garland, and Acting Director Johnson:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to provide our comments in opposition to Docket Number USCIS 2020-0013 (Interim Final Rule). As the largest professional association for physicians and medical students, and the umbrella organization for state and national specialty medical societies, the AMA has been and continues to be deeply committed to ensuring the health and safety of all individuals regardless of immigration status. We write to strongly urge the Administration to rescind the Interim Final Rule (IFR). The AMA is concerned that the IFR would legitimize discrimination against vulnerable asylum seekers, create a right to refuse to provide certain treatments or services, and arbitrarily discriminate against individuals based on a border patrol agent's uninformed medical determination or an individual's country of origin.

Asylum seekers are an extremely vulnerable group who often face circumstances in which their health and well-being were at significant risk in their former countries and may have been further compromised during their journey to seek safety. **We strongly urge you to rescind the IFR** on the grounds that it will place asylum seekers in even greater peril and provide the U.S. Department of Homeland Security (DHS) and border patrol agents with unwarranted and heightened authority that represents an ineffective way to protect public health while reducing barriers for noncitizens seeking protection in the United States. We address a few of the more pertinent health and social equity related issues below.

§ 208.13(c) and § 1208.13 – The "Danger to the Security of the United States" bar to eligibility for asylum and withholding of removal unjustly defines asylum seekers in a mandatory bar category and inappropriately gives DHS the ability to make public health determinations.

Congress has adopted six mandatory bars to asylum eligibility, one of which is that if an asylum seeker is considered a "danger to the security of the United States" they will not be granted asylum or withholding

of removal.[1] The IFR expands the definition of a "danger to the security of the United States" beyond its designated use against terrorism and bars any asylum seeker "whose entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States...."[2] The IFR would therefore enable DHS and the U.S. Department of Justice (DOJ) to categorically bar immigrants' eligibility for asylum, statutory withholding of removal, and withholding of removal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) based on their country of origin, path of travel, or likelihood of coming into contact with a disease.

As acknowledged by the rule, "[t]here is no precedent for Congress or the administration [to] defin[e] the national security bar to include communicable diseases."[3] Thus, the IFR is attempting to set a new and unfounded precedent that would undermine the very legislative process that has already thoughtfully outlined the definition of "inadmissible aliens" and would relate the possibility of border agents getting sick from asylum seekers looking for refuge to "terrorist activity."[4]

If implemented, this IFR would allow DHS to define and determine if countries or areas have a prevalent "communicable disease of public health significance." This IFR overlooks 8 U.S. Code §1182(a)(1)(A)(i), which states that an asylum seeker is ineligible for a visa or admission to the United States if they are "determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance…." Communicable diseases of public health significance are already defined and must meet certain national or international health standards.[5] Moreover, this is currently not a mandatory bar and the decision about one's immigration status based on a potential communicable disease is determined, on a case-by-case basis, after examination from a medical examiner. If DHS is provided with more power in asserting what is encompassed within the medical definition of a "public health significance," the current process, standards, and safeholds will be removed and the list of communicable diseases could grow exponentially to include things like the annual flu and other highly treatable conditions, based on ill-informed decisions.

The AMA advocates for and publicizes medically accurate information to reduce anxiety, fear, and marginalization of immigrant populations. This IFR would categorically ban asylum seekers if they are from or passed through an area that DHS arbitrarily deemed to have a communicable disease of public health significance regardless of the health of the individual asylum seeker and without review from a medical examiner. Moreover, this IFR would indiscriminately increase the marginalization of the asylum-seeking population based on country of origin or route of travel and will likely lead to unfounded fear and prejudice towards asylee and refugee populations.

In addition, the IFR attempts to override existing law to do away with individual asylum determinations, which would diminish or remove the ability of HHS to determine what is, and is not, a communicable

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[1] https://www.govinfo.gov/content/pkg/PLAW-104publ208/html/PLAW-104publ208.htm; https://www.govinfo.gov/content/pkg/USCODE-2018-title8/html/USCODE-2018-title8-chap12-subchapIIpartIV-sec1231.htm.

[2] https://www.federalregister.gov/documents/2020/07/09/2020-14758/security-bars-and-processing.

[3] https://immigrationimpact.com/2020/07/09/asylum-bar-covid/#.XxhxaShKg2w.

[4] https://www.law.cornell.edu/uscode/text/8/1182.

[5] https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-6#footnote-2.

disease of public health significance. A recent Government Accountability Office report has proven that even with an additional $87 million allocated for U.S. Customs and Border Protection (CBP) to provide medical care, the DHS is unable to properly diagnose, treat, and meaningfully engage with public health solutions for asylum seekers.[6] If implemented, this rule would have long-lasting and devastating public health effects and erode the very foundation of making public health determinations established by evidence-based methodology. **The AMA strongly believes that decisions on testing and the exclusion of immigrants to the United States should be made only by the U.S. Public Health Service, based on the best available medical, scientific, and public health information.**

Physicians have a unique understanding of medical knowledge and the complexities associated with public health provisioning, and thus, should be intimately involved in any decisions regarding communicable diseases of public health significance and their implications on the U.S. immigration system. Public health determinations should be a collaborative partnership between physicians and public health officials, evaluating the risks posed by a potential communicable disease and the lasting consequences that may ensue following a particular public intervention. "To be ethically justifiable, public health measures must only be instituted if their prospective risks are warranted in light of their probable social benefits. Accordingly, the anticipated health benefits associated with a given policy must be weighed against potential societal consequences, including encroachment upon personal liberty and social and economic harm to individuals."[7] An integrated team approach to public health policy would help to ensure that all regulations and actions ordered follow evidence-based, clinical guidelines, as well as protect patient privacy and the well-being of those affected. However, if the IFR is implemented, physicians will be eliminated from the process of determining if individual asylum seekers have a communicable disease, what constitutes a communicable disease for immigration purposes, and what countries or regions have specific communicable diseases, leaving these decisions to untrained DHS officers. As such, this IFR does not take into consideration the training and experience that public health professionals and physicians have in public health interventions and, instead of relying on physicians and public health experts to strengthen the accuracy and efficacy of determining communicable diseases of public health significance, completely removes these experts from this process.

Furthermore, the IFR ignores the severe social consequences of the proposed public health measure including the potential physical and emotional harm that would unjustly occur when applicants are categorically barred from the U.S. immigration system due to existing temporary placement requirements. Currently, the United States immigration system forces many asylum seekers to wait in Mexico before and during their asylum process. As of February 2021, over 71,000 asylum seekers looking for protection in the United States have been forced to wait months for their cases to be heard by an immigration judge while living in sub-par conditions within some of Mexico's most dangerous cities under the "Wait In Mexico" policy that has been continued by the Biden Administration.[8] This means that currently asylum seekers are stuck in a country that has a poor public health system and is seeing a dramatic spike in COVID-19 cases despite programs attempting to vaccinate individuals.[9] It is not unreasonable to think that if there are similar outbreaks like COVID-19, under the IFR, Mexico would be considered a country that is a security risk to the United States. Therefore, the very policy that the United States created and

[6] https://www.gao.gov/products/GAO-20-536.
[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2099320/.
[8] https://theconversation.com/biden-ends-policy-forcing-asylum-seekers-to-remain-in-mexico-but-for-41-247-migrants-its-too-late-156622; https://www.reuters.com/article/us-usa-immigration-mexico-idCAKBN2JF1Z2.
[9] https://www.nytimes.com/interactive/2021/world/mexico-covid-cases.html.

enforces that makes asylum seekers wait in Mexico would, under the IFR, categorically and unjustly bar them from claiming asylum in the United States. Therefore, the IFR would create a system that cripples the asylum-seeking process from inception to the new categorically barred completion.

Finally, the implementation of this IFR would disproportionately and adversely impact international medical graduates (IMGs). Since the IFR would bar those who "come into contact with" COVID-19 as well as any future communicable disease of public significance, physicians, who treat the sick in every country, would now be categorically barred from immigrating to the United States. Physicians put their lives on the line every day to treat those who are most in need and most likely to "come in contact with" a disease of public significance. Instead of encouraging those with medical knowledge and expertise to come to the United States, especially during a public health crisis, the IFR would delay and potentially completely remove the ability of IMG physicians, residents, and fellows to obtain visas due to their country of origin and the very nature of their vital work.

§ 208.16(d) – The application of the "Danger to the Security of the United States" bars to eligibility for asylum and withholding of removal in the expedited removal process leaves asylum seekers without the ability to have a fair trial and unduly categorically subjects them to an unreasonably higher level of scrutiny.

Currently, to be subject to expedited removal an asylum seeker must have tried to obtain documentation through misrepresentation or completely lack documentation. If one of these two scenarios apply, then the asylum seeker will be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum or a fear of persecution."[10] If the individual indicates a fear of persecution, then their case is referred for further review and they are able to stay in the United States until their case is finalized.

As noted in the IFR, "under current regulations the bars to asylum and withholding of removal are generally not applied during the credible fear process."[11] However, the IFR would be enforced at the initial credible fear screening stage and would lead to the expeditious removal of asylum seekers that, in accordance with the IFR's new national security concern criteria, would subject these asylum seekers to the associated mandatory bar.

Survivors arriving at the border are ill-equipped to effectively communicate every piece of information required to comply with these new restrictions and standards necessary for asylum or withholding of removal proceedings. Under the IFR, asylum seekers would be required to make their case, not to an immigration judge with long-standing experience in these complex issues, but to a minimally trained border agent; if they misspoke or are misunderstood, they could be categorically barred from the entire United States' immigration system. As asylum seekers often arrive profoundly traumatized, hungry, exhausted, and lacking an understanding of our legal process and language, these individuals would not receive a fair or adequate review of their case. In addition, the IFR would allow applications for asylum that are deemed "barred" to be dismissed without the opportunity for the defendant to appeal their case to

[10] https://www.govinfo.gov/content/pkg/USCODE-2018-title8/html/USCODE-2018-title8-chap12-subchapIIpartIV-sec1225.htm.

[11] https://www.federalregister.gov/documents/2020/07/09/2020-14758/security-bars-and-processing.

an immigration judge. This would disproportionately impact victims with limited resources or who lack literacy in immigration law from accessing protections.

In addition, this unbalanced and heightened burden during the initial screening process would likely increase the fear and uncertainty surrounding the asylum process. Fearing that contact with authorities could lead to placement in expedited removal proceedings, survivors may decline to seek medical care or assistance from public officials. This mindset of fear surrounding proper medical care is detrimental to the United States as a whole, especially now during the COVID-19 pandemic. According to the Centers for Disease Control and Prevention, there are numerous advantages to developing policies that improve population health such as: a reduction in mortality, a reduction in medical costs, and a reduction in life expectancy inequity.

The IFR would make it close to impossible to provide and effectively deploy the resources needed to eliminate health disparities affecting immigrants, refugees, or asylees and thus, would undermine the intended public health goals of the IFR. Creating an environment where individuals and families feel safe accessing necessary medical and social support is a core public health function that can add both health and economic value to a society.[12] Now more than ever, as our world is in the midst of a pandemic, **the AMA supports immigration measures that strengthen public health and provide access to proper treatment for asylum seekers that may have recently experienced immense emotional and physical trauma.**

§ 208.16 and § 1208.16 – Streamlining screening for referral of removal in expedited removal under CAT would unduly raise the bar for asylum seekers and make it close to impossible for survivors to succeed in CAT withholding of removal or asylum-seeking claims.

Currently, Congress requires the application of the withholding of removal eligibility bars "[t]o the maximum extent [possible be] consistent with the obligations of the United States under [CAT]."[13] As such, under current law, individuals with CAT claims will have their removal deferred, even if they are subject to immigration bars.

However, the IFR would require CAT asylum seekers to meet, at the credible fear stage, their ultimate burden to demonstrate eligibility for deferral of removal under the CAT regulations, meaning that asylum seekers would be required to prove to a border agent that it is more likely than not that they would be tortured in the country of removal. Moreover, the credible fear screening standard for showing entitlement to protection under CAT (a probability of persecution or torture) is significantly higher than the standard for asylum. Thus, the proposed changes would unduly raise the bar for asylum seekers and make it close to impossible for survivors to succeed in CAT withholding of removal or asylum-seeking claims.

Additionally, the proposed changes would require asylum seekers to make their case, not to an immigration judge with long-standing experience in these complex issues, but to a border agent who has significantly less training than an immigration judge and may not understand the nuances associated with an individual's social plight. As noted in the section above, a border agent's increased decision-making

[12] https://works.bepress.com/glen_mays/307/.
[13] FARRA sec. 2242(c), 8 U.S.C. 1231 note (c).

power and lack of legal knowledge would be devastating to the asylum-seeking process and would send countless individuals back into situations where they would likely continue to be tortured or killed.

If the IFR is enacted, there are likely to be serious implications to the well-being and safety of persons who have already experienced inconceivable suffering within their home countries. For example, the IFR would create more cases like *Thuraissigiam v. USDHS*, where Vijayakumar Thuraissigiam was jailed and tortured for political activity and his ethnicity during the civil war in Sri Lanka and subsequently fled the country in 2016.[14] When he finally made it to the United States, he was arrested by a border patrol agent who, without judicial review, denied him asylum after a cursory credible fear interview. Due to this uninformed determination, he was ultimately denied refuge in the United States and has appealed this decision, which is set to be heard by the Supreme Court.[15] Under the IFR, if Sri Lanka was having an outbreak of gonorrhea and thus deemed a "danger to the security of the United States," Mr. Thuraissigiam would have been categorically barred from the United States without ever being able to speak to a judge or appeal the decision despite his valid claim, due to the increased burden on the asylum seeker that this IFR creates and the increased and unfounded power that the IFR would give to border patrol agents. Survivors that arrive at the border with limited knowledge of the English language, acute stress disorder from the traumas suffered at the hands of persecutors, and no experience with immigration law, are highly unlikely to be able to meet the requirements for demonstrating eligibility for deferral of removal at the credible fear screening stage. Moreover, if determined to be ineligible, the completely uninfected survivor could be sent to a random third country, left defenseless at the border, or sent back to their country of origin, where they are at risk of persecution and death.

The AMA believes that violence is a major public health crisis and supports appropriate interventions that may result in its prevention or cure. Additionally, the AMA opposes torture in any country for any reason and urges appropriate support for victims of torture including changing the situations in which torture is practiced or when the potential for torture is great. Antithetical to our policy, however, the IFR would allow individuals across the world to be returned to violence and continued torture without the possibility of being granted asylum in the United States, simply due to the fact that they are from, or passed through, an area that has a communicable disease of public health significance as determined by DHS which, as previously stated, is not qualified and does not have the authority to make these determinations.

§ 208.30 and § 1208.30 – The ability for prosecutors to determine whether to place asylum seekers in removal proceedings or initiate removal to a third country gives prosecutors unwarranted power and undermines the safety and well-being of asylum seekers.

At present, asylum officers and immigration judges are instructed to treat asylum requests in credible fear screenings and expedited removal screenings as an appeal for deferral of removal under CAT regulations. However, DHS and DOJ argue that this is not a procedural requirement under the Immigration and Nationality Act (INA) and that deferral of removal requests should only be implemented if "the alien indicates either an intention to apply for asylum or a fear of persecution." As such, the IFR would give DHS discretion to decide expedited processing procedures for individuals determined to be ineligible for asylum and withholding of removal as dictated by the prospective mandatory security bar. Moreover, for immigrants who may be eligible for deferral of removal under CAT, DHS, and DOJ would be able to

[14] http://cdn.ca9.uscourts.gov/datastore/opinions/2019/03/07/18-55313.pdf.
[15] https://www.npr.org/2020/06/25/883312496/supreme-court-sides-with-trump-administration-indeportation-case.

exercise their discretion to arbitrarily place the immigrant into either regular removal (240) proceedings, where asylum seekers have more opportunities to advocate for themselves, or to initiate removal to a third country where "the alien has not affirmatively established that it is more likely than not that the alien's life or freedom would be threatened on a protected ground, or that the alien would be tortured."

Moreover, asylum seekers can be removed under the U.S.-Canada Safe Third Country Agreement, the only Safe Third Country Agreement that the United States currently has. However, a Canadian court recently ruled that the Agreement is unconstitutional, per the Canadian Constitution, after finding that the United States' immigration detention system violates asylum-seekers' right to liberty and security since immigrants that are sent to the United States are immediately detained and not given proper access to legal counsel or health care.[16] Judge McDonald stated that "penalization of the simple act of making a refugee claim is not in keeping with the spirit or the intention of the [safe-third country agreement] or the foundational conventions upon which it was built."[17] **The AMA believes that physicians have a professional responsibility to advocate for social and political changes that ameliorate suffering and contribute to the well-being of all humans.** As noted by the Canadian court, the current United States' immigration system exacerbates the suffering of survivors, possibly leading to perpetuation of torture and persecution. As such, allowing prosecutors, who are often not considering the best interests of the immigrant, to independently make decisions about placing asylum seekers into removal proceedings or initiating removal to a third country only further undermines the integrity of our immigration system and continues to exploit this vulnerable population.

Overall, the AMA believes that the IFR represents an ineffective way to protect public health and unfairly increases barriers for noncitizens seeking protection in the United States.

We appreciate the opportunity to comment and urge the Administration to prioritize supporting and protecting the health and well-being of individuals and families seeking asylum by rescinding the IFR in its entirety. If you have any questions, please contact Margaret Garikes, Vice President for Federal Affairs, at margaret.garikes@ama-assn.org, or by calling 202-789-7409.

Sincerely,

James L. Madara, MD

[16] https://www.law360.com/immigration/articles/1294446/canadian-court-says-asylum-deal-with-us-isunconstitutional?nl_pk=e81010be-c163-4004-b2aa-1ad615a78630&utm_source=newsletter&utm_medium=email&utm_campaign=immigration.

[17] *Id.*