Immigration Equality

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Submitted via https://www.regulations.gov

Andrew Davidson
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U.S. Citizenship and Immigration Services

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review

Re: USCIS Docket No. 2020-0013-0001, Security Bars and Processing, 5 Fed. Reg. 41201 (July 09, 2020)

Dear Mr. Davidson and Ms. Reid:

Immigration Equality is a national non-profit offering free legal services to the LGBTQ and HIV-positive immigrant community. We have been advocating for this community for over 25 years. Currently, through direct representation and our nationwide pro bono program, we represent more than 600 LGBTQ and HIV-positive asylum seekers. We write to urge the Department of Homeland Security (DHS) and the Department of Justice to revoke their proposed rule barring asylum seekers from entering the United States because of the COVID-19 pandemic. The proposed rule undermines the treaty obligations to which the United States has pledged itself and it may have serious unintended consequences for the public health.

In 1994, Immigration Equality was created, in part, to lift the ban on people living with HIV from entering the U.S. Like the current proposed COVID-19-related rule, the HIV Ban served no legitimate government purpose and was deleterious for the public health. It was an exclusion borne not through the recommendations of scientists or public health officials, but rather through animus to a disfavored group—namely gay men and poor people.[1] The HIV Ban existed for more than two decades, tearing families apart and exacerbating the HIV epidemic from the 1980s to the early 2000s. During this time, when an applicant for non-immigrant or immigrant status in the U.S. tested positive for HIV, they were required to disclose that to DHS. If they did, they were deemed inadmissible for immigration purposes. As such, many immigrants became too afraid to get tested for HIV because of the dire consequence to their legal status in the United States. Asking someone to choose between their immigration status and their health is unconscionable. The HIV Ban had

[1] While a waiver existed for certain middle or high income married couples, it excluded low income families and same-sex couples who were unconstitutionally denied the right to marry.

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serious and sometimes fatal consequences for individual immigrants and undoubtedly contributed to the spread of the illness. The U.S. government should not institute a health-based ban on asylum seekers. It has made this sort of mistake before, and it should not repeat such a folly.

The Proposed Rule Serves No Legitimate Government Purpose

The proposed rule will harm asylum seekers, whom the United States has a legal and moral obligation to protect, without serving the public health. As of the date of this comment, the U.S. has confirmed more than 5,000,000 COVID-19 cases—more than any other nation in the world. The proposed rule does not protect Americans from the virus. Its only effect would be to prevent refugees from securing protection from persecution and torture. This includes many hundreds in the LGBTQ community who flee to the United States every year because they are persecuted or tortured based on their sexual orientation and gender identity. Enacting the proposed rule will result in the assault, mutilation, rape, and death of hundreds of LGBTQ refugees while having no positive public health outcome.

Furthermore, the protection of employees who work for Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) is not a justifiable reason for the proposed rule. The proposed rule expresses concern about the potential exposure to COVID-19 for CBP and ICE officials who detain immigrants. However, if DHS is concerned that detaining asylum seekers for an average of 55 days puts ICE employees at risk of exposure to COVID-19, it should reduce or eliminate the detention of asylum seekers. If asylum seekers were not detained at all, the risk of infection to DHS employees who work in detention would diminish almost entirely.[2]

The Proposed Rule Contradicts the Will of Congress

Congress's intent to exclude a very limited number of individuals from the protections of asylum and withholding of removal were made clear when it made an exhaustive list of ineligible immigrants, including those who are:

- Nazis;
- Genocidal;
- Torturers;
- Persecutors; and
- Convicted of particularly serious crimes.

See INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B).

The proposed rule seeks to add asylum seekers impermissibly to that list by shunting them into the final Congressional category of individuals who are deemed "a danger to the security of the United States." However, given the serious human rights infractions required for exclusion in all of the

[2] Doing so would also greatly decrease the likelihood that asylum seekers would contract COVID-19 in detention.

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other categories (Nazism, torture, etc.), being possibly or actually sick with any kind of illness alone cannot justify the conclusion that a person is "a danger to the security of the United States" under this provision. Illness and potential illness lack the nefarious intent element associated with the grounds for exclusion in this entire section. This clearly violates the intent of Congress.[3]

Conclusion

As with the HIV Ban, the current proposed rule would prevent immigrants with strong claims for protection and status in the United States from having their day in court without serving any legitimate government purpose. And, like the HIV Ban, the proposed rule may well have seriously unintended harmful consequences to the public health. The proposed rule should be revoked in its entirety.

Sincerely,

Immigration Equality

[3] Similarly, a categorical bar to asylum and withholding of removal cannot be couched under the umbrella of "prosecutorial discretion."

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