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Department of Homeland Security, U.S. Citizenship and Immigration Services
Office of the Principal Legal Advisor, Regulatory Affairs Unit
500 12th Street SW
Washington, DC 20536-5901

**RE: DHS Docket No. USCIS-2026-0199 Affirmative Asylum Referrals
Without Interview**

Dear Office of the Principal Legal Advisor, Regulatory Affairs Unit:

MALDEF (Mexican American Legal Defense and Educational Fund) submits this public comment to urge the Department of Homeland Security (“DHS”) to rescind its Interim Final Rule found at 91 Fed. Reg. 47101 (“IFR”), which eliminates affirmative asylum applicants’ right to an interview, and authorizes Asylum Officers (“AO”) to adjudicate their applications and refer certain applicants to immigration court to be placed in removal proceedings without ever making an eligibility determination.¹

For the reasons given below, DHS lacks the authority to make these changes via an interim final rule. It also lacks the statutory authority to (1) impose this rule upon Unaccompanied Alien Children (“UAC”), and (2) authorize credibility determinations based on paper asylum applications alone; the IFR will likely cause due process violations; and it is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). DHS must accordingly rescind the IFR and restore the AO interview as of right for affirmative asylum applicants.

I. Background

a. Prior Regulatory Regime

For decades, AOs (who are located within USCIS), have provided all affirmative asylum applicants with an interview as of right before adjudicating their applications.² Although there is no regulatory definition of “affirmative” applicant,

¹ See *Affirmative Asylum Referrals Without Interview*, 91 Fed. Reg. 47101, 47102 (July 28, 2026) (“IFR”).

² See *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30674, 30675 (July 27, 1990) (final rule providing, prior to the initiation of removal proceedings,

USCIS appears to treat noncitizens who are physically present in the United States and who apply for asylum with USCIS (while not concurrently in expedited removal or traditional section 240 removal proceedings) as “affirmative” applicants.³ USCIS appears to treat all UAC asylum applications as affirmative, regardless of the posture of the application, because statutorily AOs have “initial jurisdiction over any asylum claim filed by” a UAC.⁴

The mandatory interview provided by AOs was required to be conducted in “a nonadversarial manner and, except at the request of the applicant, separate and apart from the general public.”⁵ This is because, in USCIS’ own words, “[i]t is well established that a non-adversarial approach in which the interview builds rapport is the most effective interview style for eliciting credible information.”⁶ The AO had a nondiscretionary obligation to “elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.”⁷ This included a nondiscretionary duty to “give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing” an asylum claim.⁸ When a bar did not apply, the longstanding practice was for the AO to make a determination on the applicant’s eligibility for asylum, including an assessment of the applicant’s credibility, and further determine whether discretion should be exercised to grant asylum to an individual who is statutorily eligible.⁹

After the interview, the AO could grant, dismiss, or deny the asylum claim, or in certain instances where the applicant lacked a lawful basis to remain in the United States, refer the individual to be placed in removal proceedings.¹⁰ His or her decision needed to be “communicated in writing to the applicant” and “state the basis for denial or referral and include an assessment of the applicant’s credibility.”¹¹

b. IFR Changes

The IFR does not purport to change how interviews are conducted, but it eliminates AO’s longstanding obligation to interview affirmative asylum applicants.¹² It claims these changes are necessary because of the backlog of asylum applications, identifying applicants barred by the one-year filing deadline (“OYFD”) as a main contributing factor.¹³ Under the IFR, AOs must only consider the record and other relevant evidence, and can refer the applicant to EOIR to be placed in removal proceedings if the AO determines the applicant is barred from applying, barred from a grant, does not merit a grant as a matter

“for adjudication of initial [asylum] applications in a nonadversarial setting by a specially-trained corps of Asylum Officers”).

³ See *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> (last updated 08/26/26).

⁴ 8 U.S.C. § 1158(b)(3)(C); IFR at 47121.

⁵ 8 C.F.R. § 208.9(b) (2026).

⁶ U.S. CITIZENSHIP AND IMMIGR. SERVS., RAO Directorate – Officer Training, *Interviewing – Introduction to the Non-Adversarial Interview* § 6 (rev. Dec. 13, 2024), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing - Intro to the NonAdvers.](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdvers.)

⁷ 8 C.F.R. § 208.9(b) (2026).

⁸ *Id.* at § 208.4(a).

⁹ See *id.* at § 208.14(b).

¹⁰ See *id.* at § 208.14(b)-(d).

¹¹ *Id.* at § 208.19.

¹² IFR at 47128.

¹³ *E.g., id.* at 47108, 47116-17.

of discretion, or is not eligible on the merits for asylum, and does not otherwise have a lawful basis to remain in the country.¹⁴

The IFR provides no formal guidance or framework for how an AO should determine whether to grant an interview.¹⁵ DHS instead states that it “will implement guidance for referrals without interview in various situations where, based on preliminary review of the record and evidence, the alien is ineligible for asylum or does not merit a grant of asylum.”¹⁶ For now, it only suggests that “USCIS will *generally* schedule an interview for any case where the AO cannot determine eligibility to apply or to be granted asylum from the record and evidence alone[.]”¹⁷ The IFR claims that AOs will conduct “an interview for cases where the [applicant] maintains a lawful basis to remain in the United States”—but that limitation appears nowhere in the new regulations.¹⁸

If an AO declines to provide an interview, the IFR provides no guidance for how AOs should review applications on the papers, indicating that it will be provided in future guidance at some point.¹⁹ While the IFR purports to require AOs to “adjudicate” a claim prior to a referral, the decisions the IFR authorizes are hardly adjudications.²⁰ AOs, for example—even when they determine no filing or eligibility bar applies—are not required to decide whether the applicant is statutorily eligible for asylum.²¹ Instead, they can skip this step and reject the application on discretionary grounds, even though a finding of statutory eligibility is an important positive factor favoring the exercise of discretion to grant the application.²²

The IFR also allows AOs to make credibility assessments without an interview, relying exclusively on the paper application.²³ It, moreover, is unclear when AOs must include credibility determinations in their decisions. The IFR’s preamble states that “a credibility assessment is not required in a referral decision letter where credibility is not the basis for referral.”²⁴ But the new regulations state that a “letter communicating denial of asylum or referral of the application shall state the basis for denial or referral and include an assessment of the applicant’s credibility for *denials*.”²⁵ The new regulations appear to only require a credibility assessment for denials, not referrals. Accordingly, an AO can refer an applicant to be placed in removal proceedings for lack of credibility without including a credibility assessment in the decision.²⁶

Although evidentiary development will shift entirely to the papers for many applicants, AOs may, but are “not required to[,]” issue requests for evidence (“RFE”) from applicants.²⁷ The regulations and the IFR itself provide no instance when an AO would be required to issue an RFE, and the IFR states that “revised

¹⁴ *Id.*

¹⁵ See IFR at 47128.

¹⁶ *Id.* at 47111.

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* at 47128.

¹⁹ *E.g., id.* at 47113-15.

²⁰ 8 C.F.R. § 208.9(a) (dictating that USCIS “shall adjudicate the claim of each asylum applicant”).

²¹ IFR at 47114.

²² See *id.* at 47104, 47107.

²³ *Id.* at 47111.

²⁴ *Id.*

²⁵ 8 C.F.R. § 208.19.

²⁶ *Id.*

²⁷ IFR at 47112.

Form I-589 filing instructions will ... highlight that the application and any supporting documentation provided at the time of filing may be the only opportunity” for the applicant “to meet his or her burden.”²⁸

Despite this fundamental change in how affirmative asylum applicants must present their claims, the IFR applies retroactively to all affirmative asylum applicants “who have not yet been scheduled for an asylum interview,” even if the individual applied prior to the IFR with the expectation that they would be provided an interview as of right.²⁹

While AOs remain statutorily required to exercise “initial jurisdiction” over all UAC asylum claims, the IFR does not treat this category of applicants any differently.³⁰ All UAC applications can be reviewed and referred to EOIR by an AO on the papers alone.³¹ The IFR fails to address how paper-only adjudication squares with the child-appropriate, non-adversarial procedures that Congress’ grant of initial jurisdiction was designed to secure.³²

c. Procedural Background

Although the last time DHS considered removing the mandatory interview requirement, it proceeded via the traditional notice-and-comment process (which the IFR itself cites),³³ DHS chose on this occasion to proceed via an interim final rule.³⁴ DHS concluded it could do so because, in its view, two exceptions to the traditional notice-and-comment process applied: first, the procedural exception under 5 U.S.C. § 553(b)(A);³⁵ and second, the foreign affairs function exception under 5 U.S.C. § 553(a)(1).³⁶

II. Analysis

a. The IFR’s Failure to Follow Standard Notice-and-Comment Procedures Violates the APA

“In general, the APA requires agencies to publish notice of proposed rules in the Federal Register and to accept and consider comments from the public.”³⁷ There are “only limited exceptions to [its notice-and-comment] requirements.”³⁸ This IFR relies upon the “procedural exception” under 5 U.S.C. § 553(b)(A)³⁹

²⁸ *Id.*

²⁹ *Id.* at 47110.

³⁰ *Id.* at 47112-13. The IFR states that UACs will not be referred without an interview based on the OYFD, but that is only because they are not subject to that deadline in the first place. 8 U.S.C. § 1158(a)(2)(E).

³¹ *Id.* at 47113.

³² See generally IFR.

³³ *Id.* at 47108 n.24 (citing *Rules and Procedures for Adjudication of Applications of Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 14779 (Mar. 30, 1994) (proposed rule); *Rules and Procedures for Adjudication of Applications of Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 62284 (Dec. 5, 1994) (final rule declining to make the asylum interview non-mandatory)).

³⁴ *Id.* at 47101.

³⁵ *Id.* at 47115-16.

³⁶ *Id.* at 47116.

³⁷ *AFL-CIO v. NLRB*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (citing 5 U.S.C. § 553(b)-(c)).

³⁸ *Id.* (quoting *Batterton v. Marshall*, 648 F.2d 694, 700-01 (D.C. Cir. 1980)).

³⁹ *Id.*

and the foreign affairs function exception under 5 U.S.C. § 553(a)(1).⁴⁰ For the reasons given below, the IFR does not fall within either exception. By proceeding via an interim final rule, DHS has thus acted “without observance of procedure required by law” in violation of the APA.⁴¹

i. The Procedural Exception Does Not Apply

“[A]s the text of the APA makes clear, not all rules that might be categorized as [making] procedural [changes] are exempted” from the notice-and-comment process.”⁴² This exception is a “limited carveout ... intended for ‘internal housekeeping measures organizing agency activities.’”⁴³ It “must be narrowly construed.”⁴⁴

When a rule “imposes ‘substantial burden[s],’” “encodes a substantive value judgment,” “trenches on substantive private rights [or] interests,” “or otherwise alter[s] the rights or interests of the parties”—even if it might typically be understood as making only procedural changes—it does not meet the procedural exception.⁴⁵ For example, when an administrative body adopts procedural guidelines “calculated to have a substantial effect on [its] ultimate decisions[,]” those guidelines do not fall within the procedural exception.⁴⁶ A rule, moreover, cannot meet the procedural exception when it “foreclose[s] [the] effective opportunity to make one’s case on the merits[.]”⁴⁷

The IFR fails to explain why DHS did not apply the procedural exception the last time it considered removing the mandatory asylum interview⁴⁸ and runs headfirst into several of these barriers to the narrow procedural exception.

First, it trenches on substantive private rights and interests. Because an affirmative asylum application is a means of obtaining legal status and preventing deportation, the private interests involved are “indisputably substantial[.]”⁴⁹ Moreover, for asylum applicants who are in detention, courts have held that “the private interest ... is the most significant liberty interest there is—the interest in being free from imprisonment.”⁵⁰ By allowing AOs to review applications on the papers without an interview and without any obligation to issue an RFE when more information would help determine an applicant’s eligibility, many claims that AOs would have otherwise granted after an interview will instead be referred to EOIR for removal proceedings. And many of these individuals will be detained during the pendency of their unnecessary immigration proceedings—a clear entrenchment upon their substantial private rights and interests.

⁴⁰ 5 U.S.C. § 553(a)(1).

⁴¹ *Id.* at § 706(2)(D).

⁴² *AFL-CIO*, 57 F.4th at 1034.

⁴³ *Id.* (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)).

⁴⁴ *Elec. Priv. Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011).

⁴⁵ *AFL-CIO*, 57 F.4th at 1034-35 (internal quotations and citations omitted).

⁴⁶ See *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974).

⁴⁷ See *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 328 (D.C. Cir. 1983).

⁴⁸ See generally IFR.

⁴⁹ *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1145 (9th Cir. 2019) (quoting *Dillingham v. INS*, 267 F.3d 996, 1010 (9th Cir. 2001)).

⁵⁰ *Al-Thuraya v. Warden, Orange Cnt’y Corr. Facility*, 809 F. Supp. 3d 135, 144 (S.D.N.Y. 2025) (quoting *Black v. Decker*, 103 F.4th 133, 151 (2d. Cir. 2024)).

The IFR's changes, moreover, are calculated to have a substantial effect on USCIS' ultimate decisions. Courts have repeatedly held that even switching from in-person testimony to video conferencing can harm a fact-finder's ability to make accurate credibility assessments.⁵¹ While this harm may be "of little consequence in certain types of proceedings[.]" asylum claims are not such proceedings, as "findings made with respect to a petitioner's credibility are usually central to the resolution of an asylum claim[.]"⁵² The prior regulations also required AOs, if it "appear[ed] that one or more [filing bars] appl[ied]," to "give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing"—an explicit acknowledgment that providing oral testimony on filing bars is important to making accurate decisions regarding whether such a bar applies.⁵³ By allowing AOs to make filing bar decisions and negative credibility determinations without oral testimony, the IFR will have a substantial effect on USCIS' ultimate decision on an applicant's asylum claim.

The IFR also raises due process concerns by foreclosing the opportunity for many asylum applicants to make their case on the merits, altering a right they previously held. Because of the substantial private interests at stake, due process requires that asylum applicants "are accorded an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., that they receive a full and fair hearing on their claims."⁵⁴ But the new regulations are designed to entirely foreclose some applicants' ability to be meaningfully heard on their claim, at all. Buried in a footnote of the IFR, is an acknowledgment that the BIA has recently authorized EOIR "to pretermitt legally deficient asylum applications 'without a hearing.'"⁵⁵ As such, if an AO declines to provide an interview, many affirmative applicants who EOIR determines have presented legally deficient asylum applications will not just lose the ability to be heard at a meaningful time and in a meaningful manner, they will lose the right to be heard at all.

Last, for reasons discussed later in this Comment, the IFR alters UACs' statutory right to an interview with an AO, as is required by 8 U.S.C. § 1158(b)(3)(C). The aforementioned due process concerns, moreover, are particularly heightened for UACs. The procedural exception, accordingly, does not apply.

ii. The Foreign Affairs Function Exception Does Not Apply

Under 5 U.S.C. § 553(a)(1), an agency need not follow the notice-and-comment procedures "to the extent there is involved ... a military or foreign affairs function of the United States."⁵⁶ The phrase "to the extent there is involved" requires the enumerated category (the foreign affairs function) to be "*clearly and directly* involved in the regulatory effort at issue[.]"⁵⁷ Foreign affairs functions, in turn, are understood as "activities or actions that are especially characteristic of foreign affairs[.]" where foreign affairs is "the conduct of international relations between sovereign states."⁵⁸ Thus, "to be covered by the foreign affairs

⁵¹ See, e.g., *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir.2001); *Edwards v. Logan*, 38 F. Supp. 2d 463, 467 (W.D.Va.1999).

⁵² *Rusu v. U.S. I.N.S.*, 296 F.3d, 316, 322 (4th Cir. 2002) (citations omitted).

⁵³ 8 C.F.R. 208.4(a) (2026).

⁵⁴ *Rusu*, 296 F.3d at 321-22 (citations omitted).

⁵⁵ IFR at 47107 n.22 (quoting *Matter of H-A-A-V-*, 29 I&N Dec. 223 (BIA 2025)).

⁵⁶ 5 U.S.C. § 553(a)(1).

⁵⁷ *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 52 (D.D.C. 2020) (quoting *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978)) (emphasis in *Cap. Area Immigrants' Rts.*), dismissed as moot by, *I.A. v. Garland*, No. 20-5271, 2022 WL 696459, at *1 (D.C. Cir. Feb. 24, 2022) (per curiam).

⁵⁸ *Id.* at 52-53.

exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations.”⁵⁹

Courts have already, in effect, rejected the IFR’s argument by holding that interim final rules which significantly changed the procedures for how noncitizens in removal proceedings presented their appeals to the Board of Immigration Appeals (“BIA”)⁶⁰ and “significantly change[ed] the United States’ asylum procedures[.]”⁶¹ did not “excuse the [government] from failing to engage in the notice-and-comment rulemaking before promulgating the rule.”⁶²

The changes to asylum procedure were substantial—“categorically disqualif[y]ing] aliens arriving at the southern border from receiving asylum unless they have already unsuccessfully sought similar protection in another country on the way here.”⁶³ These changes bore some relation to “activities or actions characteristic to the conduct of international relations[.]”⁶⁴ but did not “themselves involve[] the mechanisms through which the United States conducts foreign relations with foreign states. Nor were they the product of any agreement between the United States and another country[.]”⁶⁵ Any “indirect effects” the rule might have [had] on foreign policy did not “clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs function exception.”⁶⁶ Similarly, changes to the BIA’s appellate procedures fell well below the foreign affairs function exception’s requirements as well. As that court explained, such proceedings: (1) take place in the United States, (2) relate to individuals who are present here, and (3) apply U.S. law.⁶⁷ It then concluded that the rules governing these proceedings clearly “do not ‘carry out obligations to a foreign nation,’ nor do they constitute or implement ‘quintessential foreign affairs functions such as diplomatic relations [or] the regulation of foreign missions[.]’”⁶⁸

These decisions dictate that the foreign affairs function does not apply to the IFR. The IFR implicates the foreign affairs function of the United States even less than the third-country transit rule, which placed a new filing bar on individuals’ ability to receive asylum and reside in the United States. The IFR, in contrast, only changes (albeit significantly) how affirmative asylum applicants present their case, without purporting to change who can live in the United States as an asylum beneficiary. And because affirmative asylum applicants must be present in the United States,⁶⁹ like BIA appeals, AO review: (1) takes place in the United States, (2) relates to individuals who are present here, and (3) applies US law.⁷⁰ As the rules governing the procedures for how an asylum applicant appeals a denial of their application to the BIA fell well below the foreign affairs function exception, so too do the rules governing how an asylum applicant

⁵⁹ *Id.* at 53.

⁶⁰ *Amica Ctr. for Immigrant Rts. v. Exec. Off. for Immigr. Rev.*, 822 F. Supp. 3d 119, 163-65 (D.D.C. 2026).

⁶¹ *Cap. Area Immigrants’ Rts.*, 471 F. Supp. 3d at 31.

⁶² *Id.* at 31, 51-55.

⁶³ *Id.* at 31.

⁶⁴ *Id.* at 53.

⁶⁵ *Id.* at 55.

⁶⁶ *Id.* (emphasis omitted).

⁶⁷ *Amica Ctr. For Immigrant Rts.*, 822 F. Supp. 3d at 164.

⁶⁸ *Id.* (quoting *Int’l Broth. of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994); *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 202 (2d Cir. 2010)).

⁶⁹ *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> (“To apply for asylum in the U.S., you must be physically present in the U.S.”) (last updated 08/26/26).

⁷⁰ *Amica Ctr. For Immigrant Rts.*, 822 F. Supp. 3d at 164.

presents their case to an AO. Neither the foreign affairs nor the procedural exception applies, thus DHS has violated the APA by failing to follow notice-and-comment process.

b. DHS Lacks the Statutory Authority to Apply the IFR to UACs Because AOs Are Statutorily Required to Provide a Non-Adversarial Interview to Such Children

In statutory interpretation, it is generally “presume[d] that Congress is knowledgeable about existing laws pertinent to the legislation it enacts.”⁷¹ And when Congress legislates against the backdrop of an agency’s “long-held position[,]” it can “effectively ratify the [agency]’s long-held position” without precisely adopting that position in statute.⁷² As such, “a specific policy embodied in a later federal statute should control ... construction of the [earlier] statute, even though it ha[s] not been expressly amended.”⁷³

In 1996, Congress passed the Trafficking Victims Protection Reauthorization Act (“TVPRA”) and made two important modifications to immigration law regarding UACs. First, it rendered the expedited removal process inapplicable to UACs.⁷⁴ The government would have to place all UACs it sought to remove into traditional section 240 removal proceedings, which provide far greater procedural protections than the expedited removal process.⁷⁵ Next, the TVPRA provided AOs mandatory “initial jurisdiction over *any* asylum application filed by an unaccompanied minor child ..., regardless of” how the UAC filed their asylum claim.⁷⁶ Because IJs otherwise have exclusive jurisdiction over asylum claims filed in immigration court, as well as claims filed before the initiation of removal proceedings that USCIS has not yet adjudicated,⁷⁷ the function of this provision is to ensure that AOs, and AOs alone, exercise “initial jurisdiction” over all UAC asylum applications.

Congress chose to shuttle all such UAC asylum claims to AOs for one reason. In 1996 and up until the issuance of this IFR, the critical distinguishing factor between an asylum hearing before an IJ and review by an AO, was that the latter provided a non-adversarial interview in a private setting as of right, where the AO was affirmatively obligated to “elicit all relevant and useful information bearing on the [UAC’s] eligibility for asylum.”⁷⁸ The affirmative interview obligation was top of mind in 1996, as DHS had just considered, but rejected, eliminating the mandatory AO interview requirement.⁷⁹ Legislating against this regulatory backdrop, Congress “effectively ratifi[ed] the [agency]’s long-held position”⁸⁰ when it

⁷¹ *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (citing *Dir., OWCP v. Perini North River Assocs.*, 459 U.S. 297, 319-20 (1983)).

⁷² See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-44 (2000).

⁷³ *Id.* at 143 (internal quotation and citations omitted).

⁷⁴ E.g., *L.G.M.L. v. Noem*, 800 F. Supp. 3d 100, 111 (D.D.C. 2025) (“[T]he TVPRA excludes for unaccompanied alien children—[] ‘expedited removal.’”)

⁷⁵ See 8 U.S.C. § 1232(a)(5)(D) (providing the general rule that UACs sought to be removed shall be placed into section 240 removal proceedings). For UACs from continuous countries who fail to meet certain criteria, the inspecting officer can permit the child to withdraw their application for admission and return to their home country. *Id.* at § 1232(a)(2)(B). But if these children do not wish to voluntarily return, and the government seeks to remove them, they are placed in section 240 removal proceedings under subsection (a)(5)(D).

⁷⁶ 8 U.S.C. § 1158(b)(3)(C) (emphasis added).

⁷⁷ 8 C.F.R. 208.2(b); see also *In re P-L-P-*, 21 I&N Dec. 887, 888 (BIA 1997) (“Immigration Judges have exclusive jurisdiction over asylum applications filed by [noncitizens] who have been served an Order to Show Cause[,]” even if the petitioner “filed his asylum application before the Order to Show Cause was served on him.”)

⁷⁸ 8 C.F.R. § 208.9(b) (2026).

⁷⁹ *Supra* n.33.

⁸⁰ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 143-44.

provided AOs “initial jurisdiction” over all UAC asylum claims,⁸¹ “even though [Congress] had not ... expressly amended” the asylum statutes.⁸² Accordingly, an AO fails to exercise this “initial jurisdiction” if they adjudicate a UAC’s asylum claim without providing the non-adversarial interview first.

Moreover, if section 1158(b)(3)(C) does not require the AO interview as of right to all UACs as part of the AO’s “initial jurisdiction” over those applications, it results in absurd outcomes that only harm the children—particularly those in removal proceedings.⁸³ Rather than provide a child the opportunity for more expedient oral testimony before an IJ, this provision would put that hearing on hold to place the child’s asylum claim in the long backlog of applications AOs must review. Because of massive funding cuts by this administration, more and more of these UAC paper asylum applications before AOs will be filed pro se.⁸⁴ The AO will then review the child’s paper application, without an interview or RFE requirement in any instance, only to send the child right back to where they started in immigration court. No additional procedural protections are provided—only substantial delays. Congress did not intend for AOs to exercise “initial jurisdiction” over UAC asylum claims only for AOs to delay their resolution.⁸⁵

For these reasons, an AO does not exercise “initial jurisdiction” over a UAC’s asylum application without providing them a non-adversarial interview, where the AO elicits all relevant and useful information bearing on the UAC’s eligibility for asylum. DHS accordingly lacks the statutory authority to apply these changes to UACs and must rescind this portion of the IFR.

c. DHS Lacks the Statutory Authority to Authorize AOs to Make Credibility Determinations Based on Paper Applications Alone

Congress has foreclosed, in statute, an adjudicator from making a credibility determination for an asylum application without first providing the applicant an interview or hearing. In 8 U.S.C. § 1158(b)(1)(B)(iii), Congress authorized credibility determinations to be made only by “trier[s] of fact[,]” and the first three factors it lists that such triers of fact may consider are the applicant’s “demeanor, candor, or responsiveness[.]”⁸⁶ A trier of fact is a person “who hear[s] testimony and review[s] evidence to rule on a factual issue.”⁸⁷ Such individuals “may be the judge (in a bench trial) or a jury.”⁸⁸ Demeanor, candor, and responsiveness, moreover, are all considerations that can only be analyzed at an in-person interview or hearing. The statute goes on to dictate that triers of fact may consider “the consistency between the applicant’s or witness’s oral statements (whenever made and whether or not under oath, and considering the circumstances under which statements were made), [and] the consistency of such statements with other

⁸¹ 8 U.S.C. § 1158(b)(3)(C).

⁸² *Brown & Williamson Tobacco Corp.*, 529 U.S. at 143.

⁸³ *United States v. Garcon*, 54 F.4th 1274, 1283 (11th Cir. 2022) (The absurdity “doctrine permits a court to depart from the literal meaning of an unambiguous statute ... where a rational Congress could not conceivably have intended the literal meaning to apply.”) (internal quotation and citation omitted).

⁸⁴ Ruben Vives, *More than 24,000 immigrant children could lose legal representation as federal contract expires*, L.A. TIMES (July 29, 2026), <https://www.latimes.com/california/story/2026-07-29/24-000-migrant-children-could-lose-legal-representation-as-contract-is-set-to-expire>.

⁸⁵ 8 U.S.C. § 1158(b)(3)(C).

⁸⁶ *Id.* at §1158(b)(1)(B)(iii).

⁸⁷ *Trier of Fact*, Black’s Law Dictionary (12th ed. 2024) (referencing “factfinder” as the definition for trier of fact); *Factfinder*, Black’s Law Dictionary (12th ed. 2024) (defining a factfinder as “[o]ne or more persons who hear testimony and review evidence to rule on a factual issue” and asserting that a “factfinder may be the judge (in a bench trial) or a jury”).

⁸⁸ *Id.*

evidence of record[.]”⁸⁹ In limiting who can make credibility determinations to “triers of fact,” and providing a list of relevant factors that can only be considered if the “trier of fact” has conducted a hearing or provided the opportunity for an interview, Congress foreclosed AOs from making credibility determinations on the papers alone. DHS accordingly lacks the statutory authority to authorize AOs to make such determinations without first providing an interview, and it must rescind this portion of the IFR.

d. Failing to Provide AO Interviews, Particularly for UACs, Will Result in Due Process Violations

It is well established that “[d]eportation and asylum hearings, ... are subject to the requirements of procedural due process.”⁹⁰ “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”⁹¹ To determine whether administrative procedures are constitutionally adequate, courts weigh three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹²

These factors, when balanced against each other, demonstrate that the IFR will deprive certain asylum applicants, particularly UACs, of their due process rights. First, courts have repeatedly held that noncitizens present in the United States have a “significant” private interest in not being removed to a country where they fear persecution, the basis of an asylum claim.⁹³

Second, the IFR’s decision to remove the mandatory interview, in view of recent BIA decisions holding that IJs may “pretermite legally deficient asylum applications ‘without a hearing[.]’”⁹⁴ will result in the deprivation of the private interests at stake for many applicants, especially for unrepresented UACs. Under the IFR and current BIA precedent, pro se UACs may be forced to draft asylum claims themselves, which an AO can review on the papers. An AO can then deny that claim without issuing an RFE or providing an interview and refer the child to immigration court, where an IJ can decide as a matter of law to reject the application without providing the opportunity for oral testimony—denying the unaccompanied child a meaningful opportunity to be heard on his or her asylum claim entirely.

Moreover, the non-adversarial asylum interview has substantial value. The interview gives pro se applicants who are unfamiliar with or incapable of competently understanding the requirements of an asylum claim the opportunity to have their application analyzed by an AO with expertise and an obligation

⁸⁹ 8 U.S.C. § 1158(b)(1)(B)(iii).

⁹⁰ *Rusu*, 296 F.3d at 320 (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903); *Gandarillas–Zambrana v. BIA*, 44 F.3d 1251, 1255 (4th Cir.1995)); see also, e.g., *Serrano-Alberto v. Attorney General*, 859 F.3d 208, 213 (3d Cir. 2017).

⁹¹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

⁹² *Id.* at 335.

⁹³ E.g., *Pineda v. Noem*, 833 F. Supp. 593, 603 (E.D. Va. 2026) (citing *Cruz Medina v. Noem*, 806 F.Supp.3d 536, 549 (D. Md. 2025) (collecting cases)).

⁹⁴ IFR at 47107 n.22 (quoting *Matter of H-A-A-V-*, 29 I&N Dec. 223 (BIA 2025)).

to elicit all information relevant to their application. In these interviews, important facts can emerge indicating the applicant should be granted asylum. Without this opportunity, many applications will be mistakenly denied and referred to EOIR. The adversarial hearing before an IJ may not elicit information bearing on asylum eligibility that the non-adversarial interview would have elicited, and people and children will be wrongly returned to countries where their lives are at risk.

Third, while USCIS' interest in efficiently processing asylum applications is material, undoing some or all of the changes in the IFR would not be overly burdensome. Indeed, the IFR may actually impose greater fiscal burdens on the federal government. While USCIS had roughly 1.4 million pending affirmative asylum cases at the close of FY 2025, EOIR had 3.5 million pending matters.⁹⁵ If USCIS refers the majority of its asylum applications to EOIR, it will substantially increase EOIR's backlog and force claims that may have otherwise been resolved by AOs without the need for IJ review to be heard in that far more expensive forum for the government. As the total permanent IJ population has fallen from 735 IJs at the end of FY 2024 to only 557 at Q1 of FY 2026, the IFR merely moves USCIS' growing backlog to EOIR, an agency facing its own administrative crunch with a more fiscally burdensome adjudicative process.⁹⁶

USCIS has, moreover, adequately managed the affirmative asylum interview process for over 30 years. In 2025, it also got a substantial funding boost to support its mission, with 50% of the new mandatory asylum fee being credited to USCIS.⁹⁷ Rather than use this additional funding to process asylum claims more effectively, the agency has deliberately imposed (sometimes illegal) delays and inefficiencies upon the system. In late 2025, for example, USCIS paused adjudication of all Form I-589 asylum applications nationwide.⁹⁸ It began to process applications from some countries again in March 2026, but continued to refuse to adjudicate applications from countries it deemed high risk.⁹⁹ USCIS paused this policy in June, but only because a court held it illegal.¹⁰⁰ And shortly after USCIS issued this IFR, it redirected Fraud Detection and National Security Directorate ("FDNS") officers away from their asylum duties and training function to focus on "South African refugee screening and unlawful voter screening[.]"¹⁰¹

Last, USCIS is not faced with a growing and intractable administrative burden but rather a spike in asylum applications. However, this increase in annual applications appears to be reversing. For example, USCIS received 99,232 I-589 applications in Q4 of FY 2024 alone, but only received 29,261 in Q2 of FY 2026—an over 70% reduction trending down toward historical norms.¹⁰² If USCIS focused on expeditiously

⁹⁵ Compare IFR at 47109, with EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUSTICE, ADJUDICATION STATISTICS, PENDING CASES, NEW CASES, AND TOTAL COMPLETIONS (July 24, 2026), available at <https://www.justice.gov/eoir/media/1344791/dl?inline>.

⁹⁶ CONG. RSCH. SERVS., EXEC. OFF. OF IMMIGR. REV. IMMIGR. JUDGE STAFFING ISSUES (Mar. 2, 2026), available at <https://www.congress.gov/crs-product/IN12664>.

⁹⁷ 8 U.S.C. § 1802(d)(2).

⁹⁸ DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., Hold and Review of all Pending Asylum Applications and all USCIS Benefit Applications Filed by Aliens from High-Risk Countries, PM-602-0192 (Dec. 2, 2025).

⁹⁹ *Dorcas Int'l Inst. Of Rhode Island v. USCIS*, --- F. Supp. 3d ---, 2026 WL 1622708, at *7 (D.R.I. June 5, 2026).

¹⁰⁰ *Id.* at *36-*40.

¹⁰¹ Joseph Gedeon, *US immigration officers reassigned to screen South African refugees and find 'unlawful' voters*, THE GUARDIAN (Aug. 25, 2026), available at <https://www.theguardian.com/us-news/2026/aug/24/uscis-immigration-officers-reassigned>.

¹⁰² Compare U.S. CITIZENSHIP AND IMMIGR. SERVS., DEP'T OF HOMELAND SEC., NUM. OF SERVICE-WIDE FORMS BY QUARTER, FORM STATUS, AND PROCESSING TIME, JULY 1, 2024 – SEPT. 30, 2024, available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.uscis.gov%2Fsites%2Fdefault%2Ffiles%2Fdocu>

resolving asylum applications instead of developing ways to delay or prevent their adjudication, it could reduce the backlog stemming from this spike in applications without the need for this IFR.

Given the weight of the first two factors, USCIS' long-standing ability to manage the mandatory asylum interview process, and much of the recent backlog being attributable to USCIS' own illegal conduct, the IFR will fail the *Mathews* factors for many applicants, particularly pro se UACs.

e. The IFR Is, for Myriad Reasons, Arbitrary and Capricious in Violation of the APA

The APA prohibits agencies from taking action that is “arbitrary” and “capricious.”¹⁰³ This standard “requires agencies to engage in reasoned decisionmaking” and to explain “the bases for the actions they take and the conclusions they reach,”¹⁰⁴ that includes “a rational connection between the facts found and the choice made.”¹⁰⁵ An agency acts arbitrarily and capriciously when it “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁰⁶ For several reasons, the IFR is arbitrary and capricious.

First, the IFR fails to provide a reasoned explanation for changing its longstanding position that all UACs receive an AO interview as of right. While the IFR briefly cites, in a footnote, AOs' obligation to exercise “initial jurisdiction” over UAC asylum claims, it never explains why the IFR is consistent with that statutory obligation.¹⁰⁷ The IFR, moreover, does not acknowledge the absurdity of requiring AOs to exercise initial jurisdiction over asylum applications for UACs who are in removal proceedings without providing them an interview. By failing to address this important aspect of the rule change, the IFR violates the APA.

Second, the IFR fails to consider the important due process concerns raised by its changes. It only briefly acknowledges that the BIA has authorized IJs to pretermite certain asylum claims without providing the opportunity for oral testimony, and it fails to recognize the due process concerns that arise out of this new regime.¹⁰⁸ The only time the IFR mentions due process in relation to its changes is to assert that noncitizens who are not provided an interview with an AO “will be afforded due process in presenting his or her claim to an IJ[.]”¹⁰⁹ But this new regime created by the IFR and the BIA authorizes, for example, the denial of

[ment%2Fdata%2Fquarterly_all_forms_fy2024_q4.xlsx&wdOrigin=BROWSELINK](#), with U.S. CITIZENSHIP AND IMMIGR. SERVS., DEP'T OF HOMELAND SEC., NUM. OF SERVICE-WIDE FORMS BY QUARTER, FORM STATUS, AND PROCESSING TIME, JAN. 1, 2026 – MAR. 31, 2026, available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.uscis.gov%2Fsites%2Fdefault%2Ffiles%2Fdocument%2Fdata%2Fquarterly_all_forms_fy2026_q2_v1.xlsx&wdOrigin=BROWSELINK. See also EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUSTICE, TOTAL ASYLUM APPLICATIONS (Oct. 12, 2023), available at <https://www.justice.gov/eoir/page/file/1106366/dl>.

¹⁰³ 5 U.S.C. § 706(2)(A).

¹⁰⁴ *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020)).

¹⁰⁵ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰⁶ *Id.*

¹⁰⁷ IFR at 47113 n.49 (quoting 8 U.S.C. § 1158(b)(3)(C)).

¹⁰⁸ *Id.* at 47107, 47125.

¹⁰⁹ *Id.* at 47124.

a UAC pro se asylum application without ever providing that child the opportunity to give oral testimony, as discussed above. In failing to consider the obvious due process implications of how this rule interacts with recent BIA decisions, the IFR violates the APA.

Third, the IFR fails to consider “significant and viable and obvious alternatives[.]”¹¹⁰ The IFR, for example, attributes much of USCIS’ backlog to applicants who fail to meet the OYFD.¹¹¹ It, however, fails to consider obvious and more narrowly tailored alternatives to address that issue. It could have, for instance, continued to provide mandatory interviews as a general rule. But for individuals who appear to be clearly subject to the OYFD, AOs could be required to issue an RFE, and if the applicant does not provide evidence indicating the OYFD may not apply, authorize AOs to adjudicate the application without an interview. This obvious alternative would address what USCIS claims is the primary culprit for its backlog, without stripping other applicants of the critical procedural protection of the non-adversarial interview. USCIS could have adopted many more variants of this type that it failed to consider as well.

Fourth, the IFR fails to consider the important reliance interests of those who have already applied for asylum but have not yet had an interview with an AO.¹¹² Such individuals may not have filed as thorough an applications as they might have otherwise, because they expected an interview as of right to present their claim orally. Despite this population’s obvious reliance interests, AOs will nevertheless be allowed to refer these individuals to EOIR for removal proceedings, without any requirement to notify the applicant that their application may be referred to EOIR without providing an interview.

Fifth, the IFR is internally inconsistent regarding what AOs must provide in their referral letter for applicants who are referred for lacking credibility. The preamble states that “a credibility assessment is not required in a referral decision letter where credibility is not the basis for referral.”¹¹³ But the new regulations state that a “letter communicating denial of asylum or referral of the application shall state the basis for denial or referral and include an assessment of the applicant’s credibility for *denials*.”¹¹⁴ The regulatory text appears to contradict the preamble and allow AOs to refer applicants to EOIR for lack of credibility without making a formal credibility determination.

Sixth, the IFR fails to provide a reasoned explanation for changing its longstanding position that applicants are entitled to a credibility determination by an in-person officer. This failure is particularly egregious because, as discussed earlier, allowing AOs to make paper credibility determinations violates 8 U.S.C. § 1158(b)(1)(B)(iii).¹¹⁵ Moreover, courts have highlighted the significant concerns with making credibility determinations via video conferencing—let alone on the papers.¹¹⁶ But the IFR does not consider the issues associated with paper-based credibility determinations. In changing this longstanding position without a reasoned explanation, the IFR violates the APA.

¹¹⁰ *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013).

¹¹¹ *See, e.g.*, IFR at 47117 (asserting that “at least 444,724 (31 percent) of ... the affirmative asylum backlog may be impacted by this rule due to the OYFD”).

¹¹² *Id.* at 47116-17 (considering reliance interests but failing to address this population).

¹¹³ *Id.*

¹¹⁴ 8 C.F.R. § 208.19.

¹¹⁵ *Supra* Part II(c).

¹¹⁶ *E.g.*, *Rusu*, 296 F.3d at 322.

Seventh, while the IFR claims it will continue to provide interviews to individuals who have a lawful basis to remain in the United States, the regulations actually appear to authorize AOs to decline such interviews.¹¹⁷ This is particularly problematic because an applicant who receives a final denial of their claim does not have a right to an appeal to be able to present oral testimony in support of their claim.¹¹⁸ Because these individuals will have no opportunity to provide oral testimony other than before an AO, the regulations must make the interview requirement explicit in this instance.

Last, the IFR's changes appear to be pretextual.¹¹⁹ On the heels of USCIS' unlawful months-long pause on the processing of all asylum applications, the IFR now claims that it is seriously invested in reducing the asylum backlog, and its only means of doing so is to immediately implement a policy that substantially reduces the procedural protections provided to applicants and pushes more asylum applicants into removal proceedings and detention. Meanwhile, USCIS shuttled FDNS officers away from their asylum duties and training function.¹²⁰ It can only logically be concluded that USCIS' goal is to encumber grants of asylum. DHS' justification disingenuously obscures the record and its primary reason for issuance of the IFR.

III. Conclusion

The IFR's changes will unnecessarily funnel individuals whose asylum claims would have otherwise been granted by AOs following an interview into removal proceedings and detention. Applicants will not necessarily have the opportunity to present oral testimony at a hearing before an IJ, and even if they are provided that opportunity, oral testimony in an adversarial setting is no replacement for the non-adversarial private AO interview. Beyond these important policy considerations, the IFR is unlawful for all the reasons discussed in this Comment. DHS must accordingly reinstate the mandatory AO interview for affirmative asylum applicants.

Please feel free to contact us with any questions or concerns about these comments at (202) 559-1823 or jcalo@maldef.org.

Thank you.

Sincerely,



Jesse Calo
Legislative Staff Attorney

¹¹⁷ IFR at 47111, 41128.

¹¹⁸ *Types of Affirmative Asylum Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-affirmative-asylum-decisions> (last updated May 31, 2022) (“You cannot appeal the asylum officer’s decision” when the officer issues a “final denial[.]”)

¹¹⁹ *See Dep’t of Commerce v. New York*, 588 U.S. 752, 773-74 (2019) (finding that agency action is arbitrary and capricious when its “stated rationale was pretextual,” because “contrived reasons ... defeat the purpose of” the “reasoned explanation requirement of administrative law”).

¹²⁰ *See supra* n.101.