

September 28, 2026

Asylum Division
U.S. Citizenship and Immigration Services (USCIS)
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via <http://www.regulations.gov>

Re: Comment in Opposition to Department of Homeland Security, U.S. Citizenship and Immigration Services, Interim Final Rule; *Affirmative Asylum Referrals Without Interview* (DHS Docket No. USCIS-2026-0199; CIS No. 2851-26; RIN 1615-AD18)

Dear Department of Homeland Security, USCIS, and the Asylum Division:

The American Immigration Lawyers Association (AILA) submits the following comment in opposition to the Department of Homeland Security (DHS) Interim Final Rule (“IFR”), *Affirmative Asylum Referrals Without Interview*, 91 Fed. Reg. 47,101 (July 28, 2026), DHS Docket No. USCIS-2026-0199; CIS No. 2851-26; RIN 1615-AD18.

Established in 1946, AILA is a voluntary bar association of more than 18,000 immigration law professionals practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes advancing the law pertaining to immigration and nationality and facilitating justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and other noncitizens regarding the application and interpretation of U.S. immigration laws.

I. Introduction

AILA respectfully urges DHS to withdraw the IFR in its entirety. The IFR is legally deficient, administratively unworkable, and inconsistent with longstanding agency regulations governing asylum procedures within the Asylum Division’s asylum offices (hereinafter “Asylum Division” or “Asylum Offices”).

The rule would fundamentally alter DHS’s longstanding affirmative asylum framework, impede USCIS asylum staff’s ability to evaluate claims under the law, and invite inconsistent outcomes nationwide because it fails to define clearly which cases may proceed without an interview.

Before this IFR, the regulations and accompanying guidance, processes, and procedures provided for a non-adversarial interview between asylum officers and asylum applicants, as explained in detail below. The non-adversarial asylum interview before a specially trained asylum officer is essential. Officers trained in asylum law, country conditions, and trauma-sensitive interviewing can elicit facts that asylum seekers—many of whom have survived persecution, torture, or trauma—may not initially know how to present or be able to disclose. The IFR eliminates this requirement and allows asylum officers to determine, based solely on the written record, that an

applicant is ineligible for asylum and to refer the case to immigration court. In contrast to a non-adversarial interview with an asylum officer, immigration court proceedings are adversarial, often involve unrepresented applicants, and include cross-examination by DHS counsel. Sending cases directly to court without an interview can deprive applicants of a meaningful and fair opportunity to present their claims, especially as the IFR coincides with a sharp rise in pretermission of asylum cases in immigration court and with soaring denial rates and rapid case completions, which resulted in 94 percent of asylum cases being denied in June 2026.

Further, this rule threatens the United States' standing internationally. The United States has long been a world leader in accepting and adjudicating protection claims and upholding international obligations adopted after World War II to provide protection to those fleeing persecution and torture. This rule would set a troubling example by denying asylum seekers a fair chance to present their cases in a more suitable environment than adversarial court proceedings.

II. The Proposed Rule Would Cause Significant Operational, Administrative, and Humanitarian Harms

A. Operational and Administrative Impacts

The proposed rule would burden USCIS and EOIR without improving program integrity. By transferring large numbers of cases from USCIS to EOIR, it would increase immigration court backlogs and impose new burdens on immigration judges, court staff, DHS counsel, and legal service providers.

The proposed rule will create vague standards to govern which cases should proceed with interviews and will inevitably generate inconsistent adjudications, avoidable appeals, and longer-pending asylum cases as they are added to the already significant immigration court backlog.

Because the asylum eligibility standards in the proposed rule are unclear, applicants will be unable to determine what evidence will satisfy the standards. The proposed rule lacks sufficient detail for adjudicators to understand what is required for an asylum application to proceed with an interview. As a result, adjudicators will inevitably apply these standards inconsistently, resulting in due process violations and increased appeals.

In a Congressional letter¹ to USCIS led by Congressman Morgan McGarvey and signed by 69 members of Congress, the members stated that “[t]his rule will not fix the asylum application backlog; it will exacerbate it.” The letter underscores that the proposed rule would add additional review, confusion, and litigation to an already overburdened system. The members urged USCIS

¹ Members of Congress to Joseph Edlow, Director, U.S. Citizenship and Immigration Services, Re: Opposition to Interim Final Rule on Affirmative Asylum Referrals Without Interview (Aug. 15, 2026), <https://mcgarvey.house.gov/imo/media/doc/081526mcgarveyletterasylumprocess.pdf>.

to withdraw the proposed rule and recommended capacity-building measures, including hiring additional USCIS asylum officers to address the backlog.

B. Humanitarian Consequences

The proposed rule would also cause significant negative humanitarian consequences. The population affected by this proposal includes individuals paroled into the United States for urgent humanitarian reasons or significant public benefit, people with diminished capacity and disabilities, people presenting their applications pro se, and people who have been persecuted or tortured in the past. This includes unaccompanied immigrant children and survivors of domestic violence, sexual assault, and human trafficking. All these categories of people have been afforded greater protections under U.S. immigration laws and agency regulations, yet this proposed rule would undercut those protections.

The proposed rule argues that asylum seekers will still be able to present their cases in immigration court before immigration judges. But under new policies implemented by the current administration, immigration courts have severely truncated asylum proceedings, denying people the opportunity to present full testimony on the merits or additional evidence in support of their claims. Recent restrictive asylum policies have led DHS attorneys to move for pretermission of asylum claims and immigration judges to grant those motions. In some cases, immigration judges are ordering pretermission sua sponte (without a motion from counsel) before asylum seekers can fully present their claims in immigration court.

Facing an adversarial system in immigration court poses a humanitarian hardship to many asylum seekers who are unable to obtain legal representation. About 50 percent of people in immigration court removal proceedings do not have legal representation, and unaccompanied children are among those who often do not have legal representation in immigration court.² In 2024, EOIR reported a 56 percent representation rate for all pending unaccompanied children's cases and a 60 percent rate for cases pending before immigration court for more than one year.³ Recently, it has become much more difficult for unaccompanied children to obtain legal representation because DHS cut funding for legal representation programs and ended legal assistance contracts.⁴

The proposed rule will result in more erroneous referrals because it relies solely on review of the paper application and dispenses with the more thorough review conducted during an interview. Paper applications often cannot capture the full claim. Applicants may lack communication accommodations; be unable to read or write in English; experience blindness, low vision, illiteracy, disability, or trauma; struggle with timelines, dates, or traumatic events; lack familiarity with asylum law; or face isolation, poverty, housing insecurity, discrimination, or

² Vera Institute of Justice, [Immigration Court Legal Representation Dashboard](#) (last visited Sept. 28, 2026).

³ U.S. Department of Justice, Executive Office for Immigration Review, [Adjudication Statistics: Current Representation Rates](#) (Jan. 18, 2024).

⁴ Chiara Eisner, [More Than 25,000 Children Lose Previous Legal Protections, as Federal Contract Ends](#), NPR (Aug. 1, 2026).

stigma. Children face additional barriers because they may be unable to speak for or defend their own interests and have diminished cognitive capacity due to ongoing development.

Asylum seekers struggle to present their persecution claims comprehensively in written form because doing so requires narrative development, clarifying details, and a deep understanding of asylum's legal requirements. Even immigration judges and courts of appeals frequently struggle to navigate asylum law because it is one of the most complex, politically volatile, and under-resourced sectors of the American legal system. The IFR's expectation that asylum seekers can navigate it in written form without the opportunity to discuss it with an asylum officer risks harming the very population the U.S. government is required to protect.

Even when asylum seekers find help, their dependence on others in filling out and mailing Form I-589 (the asylum application form) and supporting documents can cause the asylum claim to be presented through the lens of the person assisting them rather than in the applicant's own voice. An asylum officer has the expertise, training, and skills to elicit relevant facts using appropriate interviewing techniques tailored to the applicant's specific circumstances. The circumstances under which information was obtained for Form I-589 and supporting documents may be unknown until the interview. During the interview, the officer can assess whether the asylum seeker had confidential space, whether the asylum seeker trusted the helper, and whether the asylum seeker was being exploited at the time of submission.

Asylum officers serve critical functions such as obtaining testimony through child-sensitive, trauma-informed, culturally competent questioning—something the asylum seeker likely never received when submitting the paper file. Asylum officers receive specialized training to clarify inconsistencies caused by age, developmental limitations, capacity, competency, and trauma—training that the asylum seeker or helper may not possess. Because of this specialized training, the interview allows asylum seekers to present relevant facts they may not have realized were relevant when they submitted the paper file.

C. Unaccompanied Children

The proposed rule contradicts Congress's statutory mandate to protect children and account for their specialized needs, including providing USCIS with exclusive initial jurisdiction over unaccompanied children's asylum claims and an exemption from the one-year filing deadline. In 2008, in response to concerns that unaccompanied immigrant children are uniquely vulnerable to trafficking, abuse, and coercion—and are impeded by developmental limitations, lack of parental support, and difficulty explaining trauma and persecution—Congress created special protections for unaccompanied children in the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA").⁵ Congress designed the TVPRA to broaden protections for unaccompanied children and provide a legal process that is easier, not harder, for children to navigate compared to the adult asylum processes.⁶ To satisfy this purpose, the TVPRA created

⁵ See *Trafficking Victims Protection Reauthorization Act of 2008*, Pub. L. No. 110-457, 122 Stat. 5044 (codified at 8 U.S.C. § 1158(b)(3)(C)) ("An asylum officer shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child...").

⁶ 8 U.S.C. § 1232(d); Cong. Rec. S10886–01 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein, cosponsor of original Senate version); *Flores v. Sessions*, 862 F.3d 863, 880 (9th Cir. 2017).

provisions addressing the care and safety of children and requiring agencies to account for the specialized needs of unaccompanied children when promulgating regulations addressing both procedural and substantive aspects of their cases.⁷

Congress specifically provided USCIS with initial jurisdiction over unaccompanied children's asylum claims to ensure that applications filed by this vulnerable population are interviewed and adjudicated in a less adversarial, child-appropriate setting. The proposed rule directly undermines this statutory goal by creating a process in which a child's application could be referred based on the one-year filing deadline, or for other reasons, without an interview or an opportunity to supplement the record. Additionally, the TVPRA requires screening of unaccompanied children for human trafficking indicators—a function USCIS would be unable to complete without an asylum interview. Because the TVPRA sought to expand protections for unaccompanied children, referral without an asylum interview would deny them an essential opportunity to present evidence and testimony, contrary to the TVPRA.

D. Persons with Disabilities

USCIS is also bound by Section 504 of the Rehabilitation Act, which prohibits disability discrimination by federal executive agencies.⁸ Federal disability law broadly protects people with physical or mental conditions that substantially limit major life activities, a history of such conditions, or perceived disabilities. The ADA likewise recognizes discrimination against disabled people and requires broad coverage of disability. Even where a noncitizen is competent, safeguards or reasonable accommodations may be necessary to ensure full and fair participation.⁹ Without an interview, disabled or incompetent asylum seekers may be denied the individualized assessment needed to identify necessary accommodations or safeguards.

III. The Proposed Rule Does Not Reflect Reasoned Decision-Making Required by the Administrative Procedure Act

The IFR violates the APA because it bypasses notice-and-comment requirements and is arbitrary, capricious, and otherwise contrary to law. First, the IFR claims to be exempt from the typical notice-and-comment requirement under the foreign affairs exception, but DHS has not justified applying that exception here. Second, the IFR is arbitrary and capricious because it is not the product of reasoned decision-making. Finally, the rule is contrary to the statute it purports to implement.

A. The Foreign Affairs Exception to the Notice-and-Comment Requirement Does Not Apply

The IFR relies on the “foreign affairs exception” to avoid the APA's requirement that federal regulations undergo notice and comment before taking effect. The IFR does not provide a case-specific analysis of why the foreign affairs exception should apply. Instead, it relies on a State Department determination issued by Secretary of State Marco Rubio in February 2025, which

⁷ 8 U.S.C. § 1232 (d)(8).

⁸ 6 C.F.R. 15; USCIS, Affirmative Asylum Procedures Manual, Section III.B.14, 39 (2013) (hereinafter “AAPM”).

⁹ *Matter of M-A-M-*, 25 I&N Dec. at 480; accord *Matter of J-R-R-A-*, 26 I. & N. Dec. 609, 611–12 (BIA 2015).

declared that all immigration-specific regulations necessarily involve “foreign affairs” and therefore do not require notice and comment.

DHS cannot invoke the foreign affairs exception through a blanket assertion. Courts generally require either a showing that notice and comment would “provoke definitely undesirable consequences” and that the international consequences are obvious or explained,¹⁰ or that the rule directly concerns foreign affairs, such as an international agreement.¹¹ Most internal immigration procedures do neither. Reading the exception to cover all immigration rules would improperly “distend” the exception.¹²

This IFR does not implicate foreign affairs or activities. It addresses how the Asylum Division within the United States processes asylum applications from applicants already within the United States; it does not regulate foreign nationals’ entry or exit, as DHS contends. Any relationship to foreign affairs is tenuous at best.

B. The IFR Violates the APA because it is Arbitrary and Capricious

The IFR is arbitrary and capricious because it has not meaningfully considered feasible alternatives, disregards the substantial reliance interests of individuals who have already applied for affirmative asylum, and is contrary to law.

An agency action is considered arbitrary and capricious when the agency “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.”¹³ The IFR here failed to consider meaningful alternatives; did not consider serious reliance interests on the previous regulations; and is contrary to the statute. For these reasons, the IFR is arbitrary and capricious in violation of the APA.

C. The Agency Did Not Consider Alternatives

“When an agency rescinds a prior policy, its reasoned analysis must consider the ‘alternatives’ that are ‘within the ambit of the existing policy.’”¹⁴ That did not happen here. Asylum interviews have long been part of the asylum process. USCIS and its predecessor INS have conducted

¹⁰ *Louisiana v. Centers for Disease Control & Prevention*, 603 F.Supp.3d 406 (W.D. La. 2022).

¹¹ *E.B. v. U.S. Dept. of State*, 583 F.Supp.3d 58 (D. D.C. 2022); *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F.Supp.3d 25 (D. D.C. 2020).

¹² *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) (declining to “distend the foreign affairs function exception” to cover agency action with insufficient foreign-affairs implications).

¹³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁴ *Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (holding that when rescinding a prior policy, the agency must consider “important aspect[s] of the problem,” including alternatives “within the ambit of the existing policy” (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 51 (1983))).

affirmative asylum interviews in non-adversarial proceedings since October 1, 1990, when the modern Asylum Offices were established.¹⁵ Asylum officers are specially trained to conduct trauma-informed, non-adversarial interviews, and some receive additional training in international relations and international law. The statute itself also requires an interview as part of asylum procedure.¹⁶

USCIS conducts interviews in a non-adversarial format because “[i]t is well-established that a non-adversarial approach...is the most effective interview style for eliciting credible information.” As discussed in Section III.E below, the Immigration and Nationality Act’s asylum provision expressly anticipates that the applicant will provide testimony to satisfy the burden of proof and gives significant weight to such testimony by specifying that “testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.” Yet DHS disregards this thirty-six-year framework, allegedly because of the affirmative asylum backlog, without analyzing alternatives to reduce that backlog. Because the IFR does not analyze meaningful alternatives, it is arbitrary and capricious.

D. The Agency Disregarded the Substantial Reliance Interests of Individuals Who Already Applied for Affirmative Asylum

The IFR would radically change the asylum process by ending the guarantee of asylum interviews for affirmative applicants, yet it did not meaningfully consider the serious reliance interests of those who filed for asylum with the expectation that they would have a non-adversarial asylum interview. “It would be arbitrary and capricious to ignore such matters.”¹⁷

DHS, in retroactively applying this policy change, barely addresses the reliance of those applicants who already submitted applications and are awaiting interviews. Rather than providing detailed analysis, the IFR instead jumps to generalized concerns about national security, public safety, discretionary denials, and possible mandatory bars, without explaining why interviews create such risks, particularly given that interviews have been conducted in this manner for thirty-six years.

The IFR also does not weigh the fact that applicants who have already applied for asylum might be able to overcome a finding of an asylum bar, prove eligibility, or demonstrate that they merit discretion if given the opportunity to provide testimony and corroborating evidence during an interview. By DHS’s own accounting, millions of affirmative asylum applicants filed with the expectation that they would receive an interview under the INA and the procedural system in place for decades. The statute and prior regulations notified applicants that their testimony alone could satisfy their burden, but the IFR now penalizes those who relied on that guarantee. Applicants who lack sufficient written evidence to demonstrate credibility, eligibility, and a

¹⁵ 55 Fed. Reg. 30674, 30680 & 30682 (July 27, 1990).

¹⁶ Congress set forth the requirement that asylum procedures must include an “initial interview or hearing” within a time period specified by statute. INA § 208(d)(5)(A)(ii).

¹⁷ *Regents of the Univ. of Cal.*, 591 U.S. at 30.

favorable exercise of discretion may have their cases sent to immigration court instead of receiving the opportunity to provide additional evidence in an interview.

Many asylum applicants have applied for asylum with the assistance of nonprofit organizations that represent applicants in affirmative asylum proceedings. Many of those who have received assistance from nonprofits will struggle to find adequate and affordable representation before the immigration courts. Many others have been traumatized by the persecution they suffered and will struggle to present their cases in adversarial proceedings before immigration judges and DHS attorneys who may not have the same specialized training in trauma-informed interviewing, international law, and international relations as asylum officers.

DHS did not meaningfully analyze these reliance interests, identify a legitimate policy justification outweighing them, or consider the severe harm applicants will suffer if the interview is eliminated. Because the IFR ends a longstanding procedure without weighing those interests, it is arbitrary and capricious.

E. The IFR Runs Contrary to the INA's Recognition of the Importance of Asylum Interviews

The IFR ignores several provisions of the INA that clearly anticipate Asylum Offices will conduct interviews. The IFR claims that the statute does not explicitly require USCIS to conduct interviews. But the IFR itself notes that Congress ordered the agency to set forth procedures for asylum applications, and the procedures the agency created “shall provide... that in the absence of exceptional circumstances the initial interview or hearing shall commence not later than 45 days after” the application was submitted to the agency.¹⁸ Congress also provided that an applicant who fails to appear for an interview, absent exceptional circumstances, can have his or her asylum application dismissed.¹⁹ By 1996, when this provision of the statute was enacted, the Asylum Offices and the process for conducting interviews had been well-established. Clearly, Congress contemplated that the existing procedure of Asylum Offices holding non-adversarial interviews would be a constituent part of the procedures enacted by the Attorney General.

Moreover, § 208 contains two additional provisions that contemplate that Asylum Offices will base decisions on the testimony of the applicants:

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony,

¹⁸ INA § 208(d)(5)(A)(ii).

¹⁹ INA § 208(d)(5)(A)(v).

such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made)...²⁰

Congress, in setting forth how asylum applicants can satisfy their burdens and prove credibility, assumed that the primary evidence would be "testimony." In fact, testimony alone can satisfy the burden of proof, so long as, among other things, it is credible and persuasive. And the credibility of an applicant is to be determined based on the applicant's "demeanor, candor, or responsiveness," which can only be established in a face-to-face interview.

Considering all the provisions in INA § 208 that reference an interview and an applicant's testimony, it is clear that Congress considered an interview to be an integral part of the asylum process. By removing the asylum interview from the affirmative asylum adjudication process in each case and making determinations of eligibility without the applicant's testimony, the IFR is contrary to the statute and violates the APA.

IV. The Proposed Rule Fails to Satisfy Other Statutory and Regulatory Requirements

A. The Statutory and Regulatory Framework Makes the Asylum Interview a Foundational Requirement

The statutory and regulatory defects discussed above are reinforced by the history and structure of the U.S. affirmative asylum system. The Refugee Act of 1980 formally adopted the United Nations' refugee definition and provided the first statutory basis for asylum. One of Congress's primary purposes was "to bring United States refugee law into conformance" with relevant U.S. treaty obligations and the bedrock principle of non-refoulement.

Section 1158 of the INA establishes asylum as a form of protection for individuals who qualify as refugees. The statute provides that "any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum," regardless of the applicant's immigration status.²¹ An eligible applicant may be granted asylum as a matter of discretion. The statute also identifies specific bars to asylum, including certain forms of persecution of others, particularly serious crimes, serious nonpolitical crimes, national security concerns, terrorism-related activity, and certain prior resettlement or safe-third-country circumstances.²² Thus,

²⁰ INA § 208(b)(1)(B).

²¹ 8 U.S.C. § 1158(a)(1)

²² 8 U.S.C. § 1158(a)(2), (b)(2)(A).

adjudicating an affirmative asylum application requires an individualized assessment of both the applicant's eligibility for asylum and whether any statutory bar or other prohibition applies.

In 1990, INS revised 8 C.F.R. § 208.1 and established new regulations governing the adjudication of affirmative asylum applications. These regulations helped establish a professional asylum officer corps and structured the non-adversarial interview process. They specified that, in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence no later than 45 days after the date an application is filed. This regulatory framework established the interview as a foundational component of the affirmative asylum process, through which an asylum officer would conduct an individualized eligibility assessment.

In 2002, the U.S. split INS into different agencies within DHS, and tasked USCIS with adjudicating immigration benefits, including affirmative asylum. After this split, asylum officers continued to receive specialized training in asylum and refugee law and non-adversarial interviewing techniques, among other issues relevant to asylum adjudications. USCIS's Refugee, Asylum, and International Operations Directorate (RAIO) Officer Training Manual includes sections on other factors that may affect the interview such as stress and the officer's individual experiences. It also trains on how to interview as opposed to interrogate, underscoring the importance of a non-adversarial setting.²³

In keeping with congressional intent, the affirmative asylum process has long included the asylum interview as a key component. Until DHS promulgated the present IFR, the instructions for Form I-589, Application for Asylum and for Withholding of Removal, guaranteed an interview. DHS's regulations similarly state that the purpose of an interview is to "elicit all relevant and useful information bearing on the applicant's eligibility."

B. The IFR Impermissibly Departs from the Longstanding Interview Requirement

The IFR now departs from this longstanding framework. DHS removes regulatory language recognizing an interview requirement and language providing that an asylum officer will review and determine filing prohibitions during the interview. The IFR relies on a fundamentally untenable reading of the asylum statute. The IFR reads the language in 8 U.S.C. § 1158(d)(5), providing that an interview or hearing "shall" take place within 45 days of filing, as making the timeframe, but not the occurrence of the interview or hearing itself, mandatory.²⁴ But the statutory language indicates that the interview is itself mandatory, not merely the timeframe in which it must occur. The interview is therefore a crucial component of the affirmative asylum process.

The IFR allows referral of applications without an interview on a broad range of grounds for declining to approve an application. This includes bars to asylum, that the applicant "is not eligible on the merits of the claim," or that the applicant "does not merit a grant as a matter of discretion."²⁵ The IFR allows asylum officers to refer a case to court on discretionary grounds

²³ See USCIS, RAIO Directorate Officer Training Manual (Training Manual).

²⁴ See 91 Fed. Reg. at 47107 & n.21.

²⁵ 91 Fed. Reg. at 47128 (new 8 C.F.R. § 208.9(a)(2)).

without assessing the merits of the underlying asylum claim.²⁶ This approach is particularly problematic because DHS's own training materials recognize that the asylum interview is often the only source of individualized evidence relevant to whether a bar to asylum applies.²⁷ More broadly, the interview is the principal mechanism through which USCIS obtains individualized testimonial evidence bearing on an applicant's eligibility for asylum.

C. Referral Without an Interview Deprives Applicants of a Meaningful Opportunity to Present Testimonial Evidence

Eliminating the interview therefore has significant consequences for an applicant's ability to establish eligibility. An application submitted on paper cannot replicate the interview process, which permits the officer to ask follow-up questions, seek clarification, and develop facts relevant to the applicant's eligibility. This is especially significant because the applicant's own testimony may provide sufficient evidence to establish eligibility for asylum. Courts have repeatedly recognized that credible testimony alone can be sufficient to establish eligibility for asylum. Congress likewise affirmed this principle in the 2005 amendments to the INA, making clear that an applicant's testimony may, by itself, provide the evidence necessary to sustain an asylum claim.²⁸

The asylum applicant bears the burden of establishing that they fall within the refugee definition.²⁹ The applicant must testify under oath regarding the truth of their application to meet that burden.³⁰ Testimony can be sufficient to sustain the applicant's burden if it is credible.³¹ The interview provides the principal opportunity for the applicant to develop that testimony before USCIS, the agency charged with adjudicating the affirmative asylum application. Without an interview conducted by a trauma-informed, trained asylum officer, the applicant may be deprived of a meaningful opportunity to present, develop, and explain the facts supporting their claim in the non-adversarial setting that has long characterized affirmative asylum adjudication.

D. Eliminating Credibility Assessments Undermines Due Process and Reliable Adjudication

The IFR compounds this problem by removing the requirement that a letter communicating the basis for referral of an asylum application to immigration court include an assessment of the applicant's credibility. Asylum officers' training materials emphasize that evaluating the credibility of an applicant's oral testimony is fundamental to determining eligibility and, in many cases, can be decisive. The materials also require officers to evaluate credibility in every case and carefully analyze an applicant's testimony in light of all the evidence in the record. Although DHS argues that this change will promote efficiency, eliminating the credibility assessment

²⁶ *Id.* at 47102.

²⁷ *See* Training Manual at 647.56.

²⁸ *See* REAL ID Act of 2005, Pub. L. 109-13, § 101(a)(3), 119 Stat. 302 (May 11, 2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(ii)).

²⁹ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

³⁰ *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

³¹ *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

undermines due process by omitting crucial testimonial evidence and reducing transparency in the adjudication process.

DHS may now decide to refer a person to removal proceedings without hearing that person testify and without being required to explain whether it found the person's account credible. Asylum seekers may be survivors of violence and trauma, and affirmative asylum applicants have relied on trained asylum officers to conduct interviews—a process better suited to asylum adjudication than an adversarial court proceeding.

An asylum interview allows the adjudicator to focus on fact-finding and understand how trauma may affect memory, disclosure, and the ability to recount traumatic experiences accurately and consistently. By contrast, adversarial immigration court proceedings can intensify re-traumatization and undermine an applicant's ability to present a complete and accurate claim. A trained asylum officer can promote more reliable and transparent adjudication. Allowing DHS to bypass this step sacrifices due process in the name of purported efficiency; adding more cases to an already overburdened court system is counterproductive and undermines the efficiency the rule purports to advance.

V. The Proposed Rule Raises Significant Fairness Concerns That DHS Has Not Adequately Addressed

Beyond the statutory defects discussed above, the proposed rule raises serious procedural fairness concerns. DHS must account for procedural safeguards, reliance interests, and transitional measures when changing longstanding expectations and creating outcomes different from those produced under prior asylum procedures.

A. The IFR Denies Asylum Seekers a Meaningful Opportunity to Be Heard

Due process requires that asylum seekers receive a full and fair process that provides a meaningful opportunity to be heard.³² Due process analysis generally considers three factors: the private interest affected; the risk of erroneous deprivation under the procedures used and the value of additional safeguards; and the government's interest, including fiscal and administrative burdens.³³

B. The IFR Disregards Applicants' Reliance on Longstanding Procedures

This rule restricts access to asylum and represents a sweeping departure from established INA and TVPRA procedures on which asylum seekers relied when filing their applications. The INA guarantees asylum seekers an opportunity to present evidence, including testimonial evidence.³⁴ The INA also provides for examination and cross-examination.³⁵ Regulations place the burden on the asylum seeker to establish refugee status and recognize that credible testimony alone may

³² See *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

³³ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³⁴ See INA § 240(b)(4)(B); *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989).

³⁵ INA § 240(b)(1).

be sufficient to sustain that burden.³⁶ Asylum seekers have long relied on these references to testimony, as well as the requirement that asylum and withholding applications be decided after an evidentiary hearing to resolve disputed facts.³⁷

Asylum seekers have also relied on USCIS's longstanding procedures and national best practices permitting applicants to file a skeletal asylum application and supplement it once the interview is scheduled.³⁸ Applicants with cases pending before USCIS relied on Form I-589 and its instructions informing them of the right to an interview before final adjudication. By applying retroactively without considering that reliance, the IFR strips a settled procedural expectation in violation of due process.³⁹

C. Referral Without an Interview Creates an Unacceptable Risk of Erroneous Deprivation

In the IFR, USCIS acknowledges that some individuals who would have been granted asylum after an interview may instead be referred to immigration court under the new process. This is significant because asylum claims often depend heavily on detailed oral testimony, explanations of perceived inconsistencies, clarification of legal issues, and updated facts and country conditions. Without an interview, asylum seekers lose the primary mechanism for presenting evidence that could have resulted in a grant of asylum and may be referred to immigration proceedings with no guarantee of an opportunity to testify during the affirmative asylum process.

D. The One-Year Filing Deadline Requires Individualized Inquiry

The one-year filing deadline (OYFD) is a bar to applying for asylum, but exceptions may apply and are typically explored in depth and confirmed during the asylum interview. Referral based on the OYFD is especially harmful for trauma survivors, individuals with mental or physical health challenges, people with disabilities, children, and LGBTQ+ asylum seekers. Historically, the interview has provided an important opportunity for applicants to explain why an exception to the OYFD applies. Without that opportunity—particularly where applicants relied on USCIS's guarantee of an interview—the IFR may allow the Asylum Division to refer to immigration court, without an interview, cases that appear not to satisfy the OYFD but may qualify for an exception and previously could have resulted in asylum grants after testimony and clarification.

E. Referral on Discretionary Grounds Requires Consideration of the Full Record

By permitting referral on discretion alone, without first assessing the merits, the IFR prevents officers from weighing discretionary concerns against the circumstances of persecution. Facts underlying the claim may explain conduct DHS might otherwise view negatively, including conduct by trafficking survivors, trauma survivors, political dissidents, children, and LGBTQ+

³⁶ 8 C.F.R. § 1208.13(a); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

³⁷ 8 C.F.R. § 1240.11(c)(3).

³⁸ See, e.g., USCIS Affirmative Asylum Procedures Manual Ch. II.G, II.H, II.I, II.J (2023).

³⁹ See *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

applicants. The IFR removes the opportunity to consider rehabilitation, positive equities, eligibility, and risk of return before referral.

F. The IFR Eliminates Essential Procedural Protections for Unaccompanied Children

Before the IFR, unaccompanied children benefited from USCIS's specialized, non-adversarial asylum process and trauma-informed interviewing practices designed to elicit facts relevant to asylum eligibility. After the IFR, USCIS may refer children's asylum applications to court without an affirmative interview.

The IFR does not adequately address these issues. Instead, it creates new grounds for automatic referral, broad discretionary standards, and significant changes to asylum adjudication without explaining how affected individuals can prepare applications to merit an interview, correct agency errors, or ensure consistent adjudications across asylum offices in life-altering cases.

VI. Recommendations

AILA urges DHS to withdraw the IFR in its entirety. DHS should take the following steps:

- preserve the affirmative asylum interview as a mandatory and substantive component of the adjudication process, consistent with 8 U.S.C. § 1158(d)(5);
- provide applicants with at least 30 days' notice of any intent to refer without interview and a meaningful opportunity to supplement the record;
- retain individualized credibility, eligibility, and discretionary assessments and require asylum officers to document the individualized basis for any referral, including credibility assessments where relevant;
- consult with disability rights, child welfare, indigenous rights, trauma-survivor advocacy, and immigration-rights stakeholders before changing affirmative asylum procedures;
- develop comprehensive nondiscrimination, accessibility, and trauma-informed adjudication policies;
- consider more effective and cost-saving alternatives that preserve due process while addressing the affirmative asylum backlog, including staffing, capacity-building, improved scheduling systems, and targeted case-management reforms; and
- refrain from applying any final policy retroactively in a manner that harms the reliance interests of applicants who filed with the expectation of an interview.

VII. Conclusion

AILA opposes the IFR because it would dismantle a core safeguard of the affirmative asylum process: the non-adversarial interview before a trained asylum officer. DHS has not justified bypassing notice and comment, adequately considered reliance interests or less harmful alternatives, or reconciled the rule with statutory provisions contemplating testimony, credibility determinations, and individualized adjudication. The IFR would shift cases into an already overburdened immigration court system, heighten the risk of erroneous referrals, and disproportionately harm pro se applicants, trauma survivors, disabled applicants, children, and others unable to fully present complex claims on paper. It would undermine access to asylum and

the United States' commitment to protect those fleeing persecution and torture. AILA therefore urges DHS to withdraw the IFR.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION