



Protecting Immigrant  
Women and Girls  
Fleeing Violence

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Lauren Alder Reid, Assistant Director  
Office of Policy, Executive Office for Immigration Review  
United States Department of Justice

**Re: Comments in Response to Proposed Rule: *Procedures for Asylum and Bars to Asylum Eligibility*: EOIR Docket No. 18-0002; 84 F.R. 69640 / A.G. Order No. 4592-2019**

Dear Assistant Director Reid:

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments in response to the Executive Office for Immigration Review's (EOIR) and United States Citizenship and Immigration Services' (USCIS) Proposed Rule (NPRM) and Request for Comment on *Procedures for Asylum and Bars to Asylum Eligibility*; EOIR Docket No. 18-0002; 84 F.R. 69640 / A.G. Order No. 4592-2019 issued on December 19, 2019.

## I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) over the past twenty-two years. Our clients endure horrific abuses such as human trafficking, domestic violence, sexual assault, forced marriage, and honor crimes. **As an organization that promotes safety and justice for survivors, we are strongly opposed to this NPRM ("the proposed rule") and urge EOIR and USCIS to promptly rescind it for reasons including the following.**

## II. The Proposed Rule Will Cause Irreparable Harm to Survivors of GBV

1. Barring Asylum for those who have Committed Domestic Violence Acts and/or Offenses will Punish Survivors, Despite the Rule's Exception for Non-Primary Perpetrators

The NPRM proposes to amend current regulations to render ineligible for asylum any individuals who have been convicted of a crime involving domestic violence, and those whom there are "serious reasons for believing" have engaged in acts of domestic "battery or extreme cruelty."<sup>i</sup> The rule provides a narrow exception modeled after the waiver of the domestic violence ground of deportability, for those who themselves have endured battery or extreme cruelty and who are/were not the "primary perpetrator" of abuse. For the exception to apply, a finding must be made that the applicant "(1) ... acted in self-defense; (2) ...

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was found to have violated a protection order intended to protect him or her; or (3) ... committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury, and there was a connection between the crime and the applicant's having been battered or subjected to extreme cruelty.”<sup>ii</sup> For several reasons, this exception will prove inadequate in practice to shield survivors from its reach, and will result in grave injustices.

*a. It is Difficult to Determine the Primary Perpetrator of Domestic Violence in Dual Arrest Cases, Particularly when Immigrant Victims are Involved*

As recognized by the rule’s proposed exception, dual arrests are well-known to arise in the domestic violence context.<sup>iii</sup> Dual arrests are in fact often the product of jurisdictions’ zealous response to domestic violence but can unwittingly function to the detriment of victims. Such arrests typically occur when a victim acts in self-defense or when, to avoid accountability or retaliate, an abuser fabricates a cross-complaint for abuse against the victim. In these cases, even trained law enforcement officers can be reluctant to determine which party is the primary aggressor when arriving at the scene of an incident.<sup>iv</sup> Language and/or cultural barriers exacerbate the situation, which is frequently the case when the survivor is an immigrant.<sup>v</sup> Well-aware of this reality, abusers are quick to exploit it and manipulate a victim’s particular vulnerability in the abuser’s favor.

In 2017, Tahirih conducted a nationwide survey of immigrant women and advocates working with them to determine the most urgent and prevalent challenges immigrant women face in the United States. The responses to that survey indicate that language barriers faced by survivors allow many abusers to control the narrative in dual-arrest situations. One advocate noted that an interpreter “is often someone the victim knows personally. I’ve even had cases where the only available interpreter was the accused perpetrator of the crime.” Another stated: “We’ve had women arrested when they were abused by their spouse because they can’t explain to the officer what happened, especially since they are under so much stress in that moment.” Other problematic scenarios arise when children are used as interpreters. Children who translate for their mothers regarding abuse are traumatized by that experience. Children might not have the vocabulary or cognitive ability to adequately express what they are seeing or hearing, while also being primary or secondary victims of abuse themselves.<sup>vi</sup> Faced with an impossible “choice,” some intentionally mistranslate their mother’s words for fear of sending their father to jail or causing his deportation.<sup>vii</sup>

Abusers are also known to retaliate against victims by framing them for crimes. Tahirih is aware of a case in which an abuser planted drugs in his wife’s car and then smashed her tail light to get her pulled over and arrested. In another case, an abuser set fire to his home himself and called the fire department to report that his wife did it. She was arrested and jailed for weeks. These examples show the insidious lengths to which perpetrators are willing to go to manipulate the legal system to silence and intimidate their victims.

As another tool of abuse, perpetrators notoriously try to thwart survivors’ immigration cases by fabricating damaging information about the survivor and then reporting it to DHS. In the marriage-based visa petitioning context, Congress expressly recognized and addressed this through the bipartisan Violence Against Women Act.<sup>viii</sup> There are no analogous protections in the asylum context to protect a survivor from the devastating effects of a vindictive abuser’s unfounded

allegations. Furthermore, steps the Administration has recently taken to allow for anonymous tips to be submitted on an online form and establishing a dedicated office and phone line to receive complaints from supposed “victims” of immigrants has undoubtedly emboldened perpetrators more and newly lent more strength to otherwise weak accusations.<sup>ix</sup>

*b. The Proposed Rule’s Evidentiary Standards are Unjustly Low and Allow DHS Unfettered, Unreviewable Discretion in Implementing them*

Under the proposed rule, asylum-seekers will be subject to the domestic violence bar where there are “serious reasons for believing” that they have engaged in acts of domestic “battery or extreme cruelty.”<sup>x</sup> Furthermore, the limited exception theoretically available to abused non-primary perpetrators will fall short of protecting those swept up in the bar because “all reliable evidence”<sup>xi</sup> can be considered in administering it:

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the asylum officer is not limited to facts found by the criminal court or provided in the underlying record of conviction.<sup>xii</sup>

The proposed rule leaves the door wide open for adjudicators to abuse discretion in deciding, subjectively, that there are “serious reasons for believing” that an applicant has engaged in acts of domestic battery or extreme cruelty. It is unclear how “serious” will be defined, and whether and how detrimental and potentially false information provided by abusers will be considered in decision-making. The risk of erroneous decisions at the expense of survivors is high.

In addition, this limited primary perpetrator exception will be extremely challenging for adjudicators to apply. Law enforcement agents are themselves ill-equipped to make primary aggressor determinations for the reasons explained above. Immigration adjudicators are even further removed from the immediate circumstances involved. The dynamics of domestic violence are nuanced and complex, particularly when victims are immigrants, as even more tools can be employed to cruel advantage by abusers to isolate, control, and intimidate their victims. It is essential for decisionmakers to have a deep understanding of these dynamics and the exploitative patterns abusers engage in to manipulate their victims. It is likewise critical that evidence be deemed inherently “unreliable” when provided by an alleged abuser. While the proposed exception to the asylum bar ostensibly aims to promote protection of individuals from domestic violence, we are deeply concerned that in practice, it will instead inflict harm on victims.

*i. A High Standard of Proof is Appropriate When a Denial of Protection is at Stake*

To bolster the validity of applying a liberal “conduct-specific” inquiry to trigger the bar, the rule notes that this same inquiry is used in the VAWA context when domestic violence victims seek lawful status based on the abuse they have suffered.<sup>xiii</sup> In other words – DHS argues that because self-petitioners must only meet a low standard of proof to establish eligibility for protection, so, too

should DHS be entitled to a similarly low evidentiary burden to trigger a bar to asylum. Yet, the equivalence drawn here is superficial. The vastly different interests at stake in these circumstances demand different burdens of proof. A low burden is appropriate and necessary to protect victims in the VAWA self-petitioning context because 1) more harm is done by erroneously denying relief than erroneously granting it;<sup>xiv</sup> 2) a low standard maximizes the self-petitioner’s confidentiality and therefore, safety;<sup>xv</sup> 3) certain forms of evidence can be inaccessible to a victim precisely because the abuser has blocked her access to doctors or courts, for example; and 4) no liberty interests are implicated for alleged perpetrators. By contrast, a rigorous burden of proof is appropriate when potentially barring applicants from asylum. The consequences of invoking the bar are dire, with the applicant’s life and safety hanging in the balance. Per the Supreme Court, asylum itself is granted to those who establish a well-founded fear of persecution – i.e., where the chance of persecution is “one in ten,”<sup>xvi</sup> for this very reason.

c. *The Domestic Violence Asylum Bar and Primary Perpetrator Exception Must Not be Implemented Arbitrarily*

Tahirih firmly opposes the proposed rule. If finalized, however, we urge USCIS and EOIR to implement each of the following measures in their entirety to mitigate the harm the bar will inflict and maximize the utility of the primary persecutor exception for victims:

- Highly specialized relevant training in the dynamics of domestic violence and the unique vulnerabilities of immigrant victims should be required for all adjudicators, informed by meaningful input from all stakeholders, including advocates for survivors
  - When an applicant is deemed not to meet the exception to the bar, the decision should be automatically subject to supervisory review
  - Adjudicators should provide a detailed description as to how a decision that an applicant does not merit the exception was made; i.e., the adjudicator should indicate in writing what and how specific factual findings were made and how they were weighed against other evidence
  - Adjudicators should also explain in detail, in writing, their initial decision to apply the bar, i.e., how they determined that “serious reasons” existed for believing that the applicant engaged in acts of domestic violence or extreme cruelty
  - When an applicant doesn’t meet the exception, adjudicators should identify what, if any, evidence was relied on that was provided by the alleged primary perpetrator, how it was weighed, and what the adjudicator did to determine whether it was false or fabricated
  - Agencies should regularly engage with stakeholders to assess the impact of the bar/exception on survivors
2. Removing Automatic Review of Solely Discretionary Denials of Asylum is Arbitrary and Capricious and will Needlessly Harm Survivors of GBV

The proposed rule rescinds the current regulation requiring automatic reconsideration of a solely discretionary denial of asylum.<sup>xvii</sup> While an asylum applicant in this context is still granted withholding of removal, she 1) can no longer protect and/or reunite with her spouse or minor

children at home; 2) is susceptible to removal at any time; 3) cannot travel abroad; and 4) cannot regularize her status to secure lawful permanent residence and ultimately citizenship.

In revoking this provision, the NPRM claims confusion, inefficiency, and lack of necessity as the justification. Among the sources of confusion are 1) who is to reconsider the denial of asylum; and 2) how the process for reconsideration should be initiated. The NPRM goes on to say that “continued litigation on these questions would be an ongoing burden for applicants, the immigration system, and courts.”<sup>xviii</sup> As to lack of necessity, the NPRM points to various other avenues for review of asylum denials.<sup>xix</sup> However, in light of the dire interests at stake in the asylum context – the loss of life and freedom – it is arbitrary and capricious to attempt to cure this provision’s alleged deficiencies by simply eliminating it entirely, without considering viable alternatives. Put another way, it is USCIS’ obligation to develop a clear process for reconsideration, and it cannot evade this responsibility by claiming before undertaking it that it would simply be too difficult.

Withholding of removal is an insufficient substitute for asylum, and those fleeing persecution should have every opportunity to pursue asylum. This is particularly evident in cases where an individual has fled persecution, but they cannot protect their family through asylum and they are ultimately harmed in their home country.

In one Tahirih case, Sarah\* from Nigeria, fled to the US after suffering severe domestic violence. It was unsafe for Sarah’s 14-year-old daughter to accompany her initially. While Sarah’s claim was pending, someone brutally attacked her daughter on her way home from school and she died the next day of her injuries. Sarah’s husband had been threatening her children for months. Sarah’s other son is in hiding and her attorney is requesting humanitarian parole for him and an expedited asylum interview as a result.<sup>xx</sup>

Confusion and inconsistency within the current provision’s implementation can be addressed through amending the rule and/or issuing guidance outlining a specific process to implement reconsiderations, as is done routinely in other contexts. We urge EOIR and USCIS to do either or both, with meaningful input from stakeholders, including those serving asylum seekers, given the grave protection interests at issue.

### **III. The Proposed Rule Violates the Fourteenth Amendment as it Disproportionately Harms Non-White Immigrants**

The proposed rule also raises serious equal protection concerns. Asylum seekers are predominantly people of color.<sup>xxi</sup> By targeting asylum seekers specifically for additional bars to relief, the NPRM seeks to operationalize the animus that high-ranking government officials, including the supposed Acting Director of USCIS, have repeatedly expressed about keeping non-white immigrants from places as disparate as Central America, Haiti, Mexico, the Middle East, and Nigeria out of the country.<sup>xxii</sup> A policy implemented on that basis violates the Equal Protection Clause of the Fourteenth Amendment.

### **IV. Conclusion**

Excluding from asylum individuals deemed to have committed domestic violence offenses will ultimately punish those escaping life-threatening persecution at home and have a particularly harsh impact on survivors of domestic violence themselves. This sweeping proposed rule is not necessary to serve any government interest. While the NPRM purports to protect survivors and deter domestic abuse, in practice, the rule's potential to deepen trauma and double-down on injustice for survivors is very high. **We therefore urge EOIR and USCIS to immediately abandon the proposed rule. If the rule is finalized, we ask that our recommendations to ensure accountability in its application and to mitigate the harms that will result from its application are adopted and implemented.**

We look forward to your detailed feedback on these comments, and please contact me at [irenas@tahirih.org](mailto:irenas@tahirih.org) or 571-282-6180 for additional information.

Respectfully,



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<sup>i</sup> Proposed Rule §§208.13(c)(6)(v) and (vii).

<sup>ii</sup> Proposed Rule §208.13(c)(6)(vii)(F); *See also* INA §237(a)(7)(A) and (a)(2)(E)(i)-(ii).

<sup>iii</sup> <https://permanent.access.gpo.gov/lps104035/usdoj/www.ojp.usdoj.gov/nij/publications/dv-dual-arrest-222679/dv-dual-arrest.pdf>; <https://www.tandfonline.com/doi/abs/10.1080/08974454.2013.759068>; <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1279&context=yjlf>

<sup>iv</sup> *See* <https://journals.sagepub.com/doi/abs/10.1177/0886260517739290?journalCode=jiva>

<sup>v</sup> <https://journals.sagepub.com/doi/abs/10.1177/0886260517739290?journalCode=jiva&>; Finn, M. A., & Bettis, P. (2006). Punitive action or gentle persuasion: Exploring police officers' justifications for using dual arrest in domestic violence cases. *Violence Against Women*, 12, 268-287.

<sup>vi</sup> §208.13(c)(6)(v)(A) of the proposed rule also bars from asylum an individual who has been convicted of a crime involving child abuse, neglect, or abandonment. Yet, many states have "failure-to-protect" statutes that have been used to prosecute battered mothers for not shielding their children from being abused by a spouse or partner, or even from being exposed to the abuse of the mother. Such statutes already penalize the victim who is often put in an impossible position, as she is likely to lose her children and exacerbate the violence if she attempts to leave and may have nowhere to go and no supports available to her. Women are more often prosecuted than men under such statutes. Exacerbating the immigration consequences that can flow from this kind of punitive use of such statutes (to justify the state's removal of children from the mother, or to coerce the mother to testify against the abuser) subjects the victim to further institutional violence and systemic injustice. *See, e.g.*, Sarah Rogerson, [Special Issue: Immigration and the Family Court: Special Issue Article: Unintended and Unavoidable: the Failure to Protect Rule and its Consequences for Undocumented Parents and their Children](#), 50 *fam. ct. rev.* 580 (October 2012) and Margo Lindauer, [Symposium: Theory and Praxis in Reducing Women's Poverty: Damned if you Do, Damned if you Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win](#), 20 *am. U.J. Gender Soc. Pol'y & L.* 797 (2012).

<sup>vii</sup> <http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf>; *See also* Casa de Esperanza: National Latin@ Network. Wrongful Arrests and Convictions of Immigrant Victims of Domestic Violence: Stories from the Field. Retrieved from [https://www.nationallatinonetwork.org/images/files/Quote\\_Sheet\\_for\\_Hill\\_Visits\\_-\\_Service\\_Providers.pdf](https://www.nationallatinonetwork.org/images/files/Quote_Sheet_for_Hill_Visits_-_Service_Providers.pdf).

<sup>viii</sup> *See* 8 U.S.C. §1367.

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<sup>ix</sup> See <https://www.federalregister.gov/documents/2019/08/08/2019-17022/agency-information-collection-activities-new-collection-uscis-tip-form#addresses> and <https://www.ice.gov/voice>.

<sup>x</sup> Proposed rule §§208.13(c)(6)(v) and(vii).

<sup>xi</sup> Proposed rule at 69652.

<sup>xii</sup> Proposed rule §208.13(c)(6)(v)(B).

<sup>xiii</sup> See proposed rule FN 4: "...a conviction would not be required in certain situations involving battery or extreme cruelty. That conduct-specific inquiry is essentially identical to the inquiry already undertaken in situations in which an alien seeks to obtain immigration benefits based on domestic violence that does not necessarily result in a conviction. See, e.g., INA 240A(b)(2)(A), 8 U.S.C. 1229b(b)(2)(A); 8 CFR 204.2(c)(1)(i)(E), (c)(1)(vi), (c)(2)(iv), (e)(1)(i)(E), (e)(1)(vi), and (e)(2)(iv)."

<sup>xiv</sup> And, in fact, historically very low rates of fraudulent filings have been found among VAWA self-petitions. According to USCIS data from 2012-2018, the rate of fraud among VAWA self-petitions was miniscule – a mere .142%. Data is available upon request. See also Congressional Research Service report, "Immigration Provisions of the Violence Against Women Act (VAWA)", by William Kandel, June 7, 2012 (hereafter CRS Report), 2<sup>nd</sup> page of summary: "While some suggest that VAWA provides opportunities for dishonest and enterprising foreign nationals to circumvent U.S. immigration laws, empirical evidence offers minimal support for these assertions."

<sup>xv</sup> Requiring further proof might involve seeking documents and statements directly from an abuser that would put him on notice that the victim was trying to escape, immediately exacerbating the risk to her safety.

<sup>xvi</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 1987.

<sup>xvii</sup> §208.16(e) would be rescinded; See proposed rule at 69660.

<sup>xviii</sup> See proposed rule at 69656-7; See *Shantu v. Lynch*, 654 F. App'x 608, 613-14 (4th Cir. 2016) (discussing these ambiguities); see also *v. INS*, 436 F.3d 89, 93 (2d Cir. 2006). These ambiguities have not been "definitively resolved," *Shantu*, 654 F. App'x at 614.

<sup>xix</sup> See proposed rule at 69657.

<sup>xx</sup> Sarah is applying for asylum, but the facts illustrate how dangerous it is for family unable to follow to join relatives who have fled to the US.

<sup>xxi</sup> See Transactional Records Access Clearinghouse, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum> (showing nationality of people seeking asylum in the United States).

<sup>xxii</sup> See, e.g., Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://perma.cc/F7LT-A8MC>; President Donald Trump, Remarks on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018), <https://perma.cc/F4DX-RZ84>; Jeff Sessions, U.S. Att'y Gen., Remarks on Immigration Enforcement, Las Cruces, NM (Apr. 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement> (Last accessed Dec. 12, 2019), <https://perma.cc/DT3U-X4UG>; Rebekah Entralgo, *Conservatives want a man who compared immigrants to rats to lead DHS* (Apr. 11, 2019), <https://thinkprogress.org/conservatives-cuccinelli-dhs-immigrants-trump-7233d8f6f1ce/>