

Shoba Sivaprasad Wadhia

Samuel Weiss Faculty Scholar

Director, Center for Immigrants’ Rights

329 Innovation Boulevard, Ste. 118

University Park, PA 16802

814-865-3823

Fax: 814-865-9042

ssw11@psu.edu

pennstatelaw.psu.edu

Lauren Alder Reid

Assistant Director, Office of Policy

Executive Office for Immigration Review

5107 Leesburg Pike, Suite 1800

Falls Church, VA 22041

Re: RIN 1125-AA94; EOIR Docket No.18-0002

Dear Assistant Director Reid,

With respect to my educational background and qualifications, I have received a Juris Doctorate degree from the Georgetown University Law Center. I am currently the Associate Dean for Diversity, Equity, and Inclusion, Samuel Weiss Faculty Scholar and Clinical Professor of Law at Penn State Law, and my research focuses on the role of prosecutorial discretion in immigration law and the intersections of race, national security, and immigration. At Penn State Law, I teach doctrinal courses in immigration, asylum, and refugee law. I also serve as the founder and director of the Center for Immigrants’ Rights Clinic (CIRC).

I have worked in the immigration law field for more than twenty years, and taught asylum and refugee law since 2005. Throughout my career in private practice, non-profit and academia, I have represented, consulted with, or assisted scores of asylum seekers. I am also the author or co-author of three books, including an immigration law textbook, and with specialized expertise on the role of discretion in immigration and refugee law. See e.g., Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases (NYU Press 2015); *Darkside Discretion in Immigration Cases*, 72 Admin. L. Rev. (forthcoming, Sept. 2020); [*My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758), 27 Geo. Immig. L.J. (2013); [*In Defense of DACA, Deferred Action, and the DREAM Act*](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195735), 91 Texas L. Rev. SEE ALSO 59  (2013); [*The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033803)*,* 16 Harv. Latino L. Rev.  39 (2013); [*Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443), 10 U. N. H. L. Rev. 1 (2012); [*The Role of Prosecutorial Discretion in Immigration Law*](https://pennstatelaw.psu.edu/sites/default/files/Wadhia%20ForPrinter.pdf), 9 Connecticut Pub. Int. L. J. 243 (2010). This comment is submitted in my individual capacity.

This comment responds to the Department of Homeland Security’s Notice of proposed rulemaking – Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, published on June 15, 2020 (Proposed Rule). While there are multiple changes proposed to asylum and withholding of removal, my comment focuses on the changes made to discretionary determinations. My failure to comment on other proposed changes is not indicative of agreement with those provisions on which I do not comment.

As background, asylum is a form of relief that requires the individual to show they have suffered persecution or face a well-founded fear of persecution in the future because of race, religion, nationality, political opinion, or membership in a particular social group. Congress created asylum as a response to an international treaty signed by the United States. The details of asylum can be found in section 208 of the Immigration and Nationality Act (“The Act”). In addition to codifying asylum, Congress enacted bars to asylum which means that an asylum seeker who meets the definition as a refugee may still be statutorily ineligible because of a disqualifying factor such as the failure to file an application within one year of arrival, conviction of a “particularly serious crime”, or firm resettlement in a third country. Indeed, Congress created a robust statute with rigid criteria for qualifying for asylum and specific ineligibilities. The framework for asylum is also discretionary so this means a person who meets the statutory definition must also qualify for asylum in the exercise of discretion. Importantly, the Board of Immigration Appeals held in a seminal decision known as *Matter of Pula* more than thirty years ago that when assessing discretion, the persecution suffered by the applicant should outweigh “all but the most egregious adverse factors”. *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987). This passage has been understood for decades to favor the asylum seeker in most cases. The *Pula* standard also makes sense when considering the legislative purpose of asylum and at the normative level to the extent that remedies like asylum should generally favor the noncitizen.

And yet, the Proposed Rule attempts to dismantle the *Pula* standard and reverse course normatively by denying more asylum seekers in the exercise of discretion. The changes to discretion are deeply troubling and ignore the reality that anyone at the discretionary stage has satisfied the refugee definition and proven eligibility for asylum as required by the statute. Rather than emulate the heart of the *Pula* standard for adjudicators to consider the “totality of the circumstances” and generally favor a noncitizen who has been persecuted, the Proposed Role lists three specific negative factors to be considered as a tool for increasing discretionary denials: (1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country; (2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and (3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country. According to the Proposed Rule, one of these factors should be “significantly adverse” to a discretionary determination for asylum. This new standard undermines *Pula* and the general role of discretion in immigration cases involving immigration factors. The Proposed Rule is misleading in the way it positions the language in *Pula* against the factor of unlawful entry. The reality is that scores of asylum seekers enter the United States unlawfully because they are unable to retrieve or obtain travel documents from their home country or because they might use fraudulent documents as a way to escape harm and flee from their home countries. Recognizing this reality, Article 31 of the Refugee Convention states in part “1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” <https://www.unhcr.org/en-us/3b66c2aa10> These facts are absent from the Proposed Rule. Instead, the factor of unlawful entry as a possible negative is cherry picked and showcased in the Proposed Rule in ways that are inconsistent with longstanding precedent and the humanitarian purpose of asylum.

 The Proposed Rule is also misleading in the way it frames the irregular entry of asylum seekers to inadmissibility or federal criminal law. By law, a person is eligible to apply for asylum regardless of how they entered the United States and regardless of their immigration status. As such, mixing in issues of inadmissibility as the way the administration does with this Proposed Rule confuses the public about the legal standard and ignores the legislative purpose for asylum. Had Congress wanted to tie inadmissibility to eligibility for asylum it could have done so.

The Proposed Rule also labels passage into at least one country before arrival into the United States as a “significant adverse factor” when considering discretion. The Proposed Rule concludes “the Departments believe that the failure to seek asylum or refugee protection in at least one country through which an alien transited while en route to the United States may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection. [citations omitted] As a result, the Departments would consider the failure to seek protection in such a third country to be a significant adverse factor.” Again, treating an asylum seeker’s journey to the United States as a significant adverse factor undermines the humanitarian purpose of asylum and the practical realities that asylum seekers may be forced to transit through another country before arriving in the United States. The commentator has spoken to many individuals and families who passed through Mexico, Honduras, or Guatemala before arriving in the United States. This passage was a necessary consequence of their journey to the United States. It defies common sense and the rule of law to require every asylum seeker to arrive in the United States without stepping foot in another country. Indeed, the immigration laws as they exist today exempt asylum seekers from the “firm resettlement” doctrine if their time in another country was a “necessary consequence of their flight” to the United States.

The Proposed Rule labels the use of fraudulent documents as a way to enter the United States as a third “significant adverse factor” when considering asylum in the exercise of discretion “unless an applicant arrived in the U.S. directly from a home country.” Again, this change ignores the fact that many asylum seekers obtain fraudulent documents as a means to escape the harm and basis on which they are seeking protection from in the United States. Many precedential decisions from the Board of Immigration Appeals recognize this reality. See e.g., *Matter of Kasinga.* Isolating the use of a fraudulent document (as this Proposed Rule does) from the full and complete story about why a person flees and how they arrived in the United States undermines the humanitarian purpose of asylum and the jurisprudence around manner of entry to the United States.

Together, the three newly proposed “significant adverse factors” violate the immigration statute by blocking protection for those who arrived irregularly and undermine the legal precedent that requires adjudicators to consider factors based on a “totality of the circumstances” and with a standard that to favor the noncitizen unless the most egregious adverse factors are present. Further, the proposal attempts to overstep Congress by legislating new bars to asylum. The existing statutory bars to asylum indicate that when Congress wants to restrict asylum for an individual(s) it can and will do so. Finally, these factors undermine the humanitarian purpose of asylum by overwhelming the standard with negative criteria for denying asylum in the exercise of discretion.

As if the three significant adverse factors did not do enough damage, the Proposed Rule lists nine additional factors adjudicators should consider when denying asylum. These nine factors include:

* Whether an asylum seeker has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States.
* Transit through more than one country prior to arrival in the United States a significant adverse factor.
* Criminal convictions, regardless of whether the convictions have received a “reversal, vacatur, expungement, or modification of conviction or sentence if the alteration is not related to a procedural or substantive defect in the underlying criminal proceedings.”
* Unlawful presence of more than one year's cumulative duration prior to filing an application for asylum.
* Failure to file taxes or fulfill related obligations.
* Two or more prior asylum applications denied for any reason.
* Withdrawing an asylum application with prejudice or abandoned an asylum application.
* The Departments' consideration of an alien's failure to attend the asylum interview, unless the alien demonstrates by a preponderance of the evidence the existence of exceptional circumstances or that the interview notice was not mailed to the last address provided.
* Failure to file a motion to reopen within one year of the change in country conditions.

Three observations can be made when reviewing the above-nine factors. First, many of them exceed the statutory limits of asylum set out by Congress. The commentator anticipates that if these factors are codified, lawsuits will follow precisely because of the ways in which they exceed the contours of the language drawn by Congress in designing asylum law and procedure. As one example, Congress did not include a time limit for filing a motion to reopen when country conditions have changed. Further, barring anyone with a criminal conviction throws a sledgehammer into the calibrated list of ineligibilities Congress wrote for asylum seekers who have committed certain crimes. Second, nothing in this Proposed Rule includes positive factors that an adjudicator should use in deciding if discretion should be exercised favorably, increasing the possibility that this Proposed Rule will only lead to more and more discretionary denials. Finally, many of these new negative factors show a lack of understanding for the human experience of asylum seekers or the rule of law. For example, an asylum seeker may be denied asylum because they had fill out an application without assistance of counsel. Further, tax returns have never been a factor at the adjudicator stage of asylum. More logically, filing tax returns surfaces later in the process, when the asylee applies for adjustment of status. The Department’s suggestion that asylum seekers can be granted in the wake of these factors if there are “extraordinary circumstances” makes the possibility for a favorable grant of asylum impossible.

 The changes to discretion in asylum in the Proposed Rule are significant, undermine legislative intent, and exceed the immigration statute and legal precedent.

As a final note, this commentator notes her support for using notice and comment rulemaking in immigration cases. But the choice by the Departments to use this tool as a way to undermine the asylum system and increase the humanitarian crisis is deeply troubling. The Departments could have used the tool of rulemaking to help to add clarity to undefined terms in the asylum statute or to codify longstanding precedent around social group or discretion in ways that are consistent with the existing statutory framework, a recommendation refugee advocates have long supported. But instead, the Departments abuse the rulemaking process and resources by using the tool to propose an asylum system that undermines our rule of law and humanity.

I can be reached at ssw11@psu.edu for further discussion of these proposed regulation and would be happy to comment on the remaining provisions of the proposed regulations untouched by the above comment if given more time to do so. Indeed, the choice by the Departments to provide only a thirty-day comment period for such a significant rule change during a global pandemic is inadequate. Thank you for your consideration of this comment.

Sincerely,



Shoba Sivaprasad Wadhia