



Practice Alert
**Proposed Criminal Bars to Asylum:
Intersection with New and Proposed Asylum Regulations¹**
July 9, 2020

Introduction

Since taking office, the Trump administration has embarked on a multi-pronged effort to dismantle asylum in the United States, targeting those arriving at our southern border and those with mostly minor contacts with law enforcement. In November 2019, the administration initiated the first of three intersecting notice and comment rulemakings that would limit eligibility for asylum and employment authorization for asylum applicants.² Each of the rules, in their current form, refer to the particularly serious crime (PSC) bar that was expanded in the proposed rule published on December 19, 2019.³ In this practice alert, we will summarize the proposed changes to the PSC definition and identify the potential impact of the expanded PSC bar on applicants for asylum and employment authorization. Attached to this alert is Appendix A, which highlights the intersection of each of the rules with the PSC bar.

In the first proposed rule, released on November 14, 2019, the Department of Homeland Security (DHS) sought to limit the eligibility of asylum seekers for employment authorization documents (EADs) while they await the outcome of applications for relief from persecution.⁴ On December 19, 2019, DHS and the Department of Justice (DOJ) jointly published a proposed rule expanding the PSC definition and setting forth procedures for evaluating the validity of post-conviction relief as it relates to the PSC bar.⁵ On June 15, 2020, DHS and DOJ jointly released an expansive proposed rule that would drastically limit asylum eligibility for those making certain claims, expand the definition of “frivolous” filings, and impose new procedures and higher standards to

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² See Asylum Application, Interview, and Employment, 84 Fed. Reg. 62396 (proposed Nov. 14, 2019), [hereinafter “Proposed EAD Rules”], at <https://www.federalregister.gov/d/2019-24293>.

³ See Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed Reg. 69640 (proposed Dec. 19, 2019) [hereinafter “Proposed Criminal Bars”], at <https://www.federalregister.gov/d/2019-27055>.

⁴ Proposed EAD Rules, *supra* note 2.

⁵ Proposed Criminal Bars, *supra* note 3.

meet in credible fear interviews for those who are subject to expedited removal.⁶ On June 26, 2020, the administration issued its final rule limiting eligibility for EADs and revised it to bar EAD eligibility for asylum seekers who fall within the proposed criminal bars regulation.⁷

In the first part of this alert, we will summarize the proposed criminal bars to asylum. In the second part, we will examine the final version of the rule limiting EAD eligibility as it relates to criminal bars. In the third part of the alert, we will examine the provisions in the newly proposed asylum rules that relate back to the PSC provisions in the immigration statute and regulations and consider how the proposed criminal bars would affect the analysis of eligibility under the proposed asylum rules.

KEY NOTES FOR PRACTITIONERS

- Final rule for EAD eligibility goes into effect on August 25, 2020, and applies to all applications filed thereafter, and to convictions or conduct occurring after August 25, 2020.
 - Until the final criminal bars rule is released and becomes effective, the EAD eligibility rule applies to the PSC bar as currently defined.
- The proposed PSC rule greatly expands the number and type of convictions and conduct barring asylum relief and authorizes a searching inquiry into the validity of post-conviction relief.
- The newly proposed asylum regulations would import the sweeping inquiry of the proposed PSC rule into credible fear interviews and encourage discretionary denials of anyone not subject to the PSC bar solely because of post-conviction relief.

I. Summary of the Proposed Criminal Bars to Asylum

The “particularly serious crime bar” to asylum originates in an exception to the principle of *non-refoulement* in the 1951 Refugee Convention, whereby refugee status may be denied to anyone “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted of a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁸ The exception was incorporated into the

⁶ See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed Reg. 36264 (proposed June 15, 2020) [hereinafter “Proposed Asylum Rules”], at <https://www.federalregister.gov/d/2020-12575>.

⁷ See Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed Reg. 38532 (published June 26, 2020) [hereinafter “Final EAD Rule”], at <https://www.federalregister.gov/d/2020-13544>.

⁸ Convention Relating to the Statute of Refugees art. 33(2), July 28, 1951, 140 U.N.T.S. 1954. For a more fulsome examination of the PSC bar and its interpretation under domestic and international law, see *Immigrant Defense Project & The Harvard Immigration and Refugee Clinical Program*, “United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugee Protection From Removal to Countries Where Their Life or Freedom is Threatened,” Fall 2018, [hereinafter “IDP/HIRC Report”]

Refugee Act of 1980, and since then, Congress has amended the definition of PSC to make convictions for certain crimes, including “aggravated felonies” *per se* particularly serious.⁹ Congress has also authorized the Attorney General to designate by regulation offenses that are *per se* PSCs, and to evaluate on a case-by-case basis when a criminal conviction meets the definition, leading to the development of case law further defining the PSC bar.¹⁰

The proposed rule will severely narrow asylum eligibility by expanding the offenses considered *per se* bars, and impose on asylum adjudicators an onerous burden-shifting inquiry into the validity of criminal court judgments vacating or altering the effect of convictions and reducing sentences. In the final EAD eligibility rule and the proposed rule limiting asylum eligibility, the agencies have included references to the PSC bar that would, if the proposed criminal bars become final, greatly enlarge the impact of these changes throughout the immigration law.

The most expansive set of proposed changes would add the following seven *categorical* bars to asylum eligibility:

- (1) any conviction of a felony offense;
- (2) any conviction for “smuggling or harboring” under 8 U.S.C. § 1324(a), even if the asylum seeker committed the offense for the purpose of bringing her own spouse, child or parent to safety, and even if it is a first offense;
- (3) any conviction for illegal reentry under 8 U.S.C. § 1326;
- (4) any conviction for an offense “involving criminal street gangs,” with the adjudicator empowered to look to any evidence to determine applicability;
- (5) any second conviction for an offense involving driving while intoxicated or impaired;
- (6) any conviction *or accusation of conduct* for acts of battery involving a domestic relationship; and
- (7) any conviction for several newly defined categories of misdemeanor offenses, including *any* drug-related offense except for a first-time marijuana possession offense, any offense involving a fraudulent document, and fraud in public benefits.

Text of the actual proposed rules is included in the chart at [Appendix A](#). Of particular concern to advocates who opposed the rule was the conflation of migration and crime, and the reliance on uncorroborated information gathered by law enforcement in discredited and unreliable gang

<https://blogs.harvard.edu/clinicalprobono/2018/09/21/hirc-idp-release-particularly-serious-crime-bars-report-and-chart/>

⁹ 8 U.S.C. § 1158(b)(2)(B)(i) (“[A]n alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.”). *See also* IDP/HIRC Report, *supra* note 8.

¹⁰ *See* 8 U.S.C. § 1158(b)(2)(B)(ii). *See, e.g.*, Matter of N-A-M-, 24 I. & N. Dec. 336, 338 (BIA 2007). For a thorough examination of the standards used to designate particularly serious crimes in caselaw *see* Fatma Marouf, “A Particularly Serious Exception to the Categorical Approach,” *Boston Univ. Law Review* 97 (2017): 1427.

databases that disproportionately target youth of color, and in the course of arrests for trafficking and domestic disturbances where both parties are arrested. Also of concern was the agencies' authorization of adjudicators to conduct extensive factfinding regarding the asylum seeker's culpability for domestic violence related offenses, including the very existence of a domestic relationship.

The second section of the proposed criminal bars rule provides a multi-factor test for use by immigration adjudicators to determine whether a criminal conviction or sentence is valid for the purpose of determining eligibility for asylum. If this section of the rule becomes final, it will also be used to determine the eligibility for employment authorization of asylum seekers. The third section rescinds a provision in the current rules regarding the reconsideration of a discretionary denial of asylum, thus reducing the internal oversight of adjudications within the agencies.

The Immigrant Justice Network, among many other advocates, submitted comments opposing this proposed rule, which can be read [here](#). The proposed criminal bars would apply only to convictions or conduct occurring on or after the effective date of the rule. The proposed rule was published in December 2019, and the final version of the rule is now with the OMB pending review.

II. The Final Rule Limiting EAD Eligibility for Asylum Applicants

On June 26, 2020, the DHS published the final rule limiting EAD eligibility for asylum applicants.¹¹ Although in the proposed rule, DHS delineated several so-called “public safety” offenses as criminal bars to EAD eligibility, in the final rule DHS instead announced that it would adopt the criminal bars to asylum set forth in the proposed rule described in Section I above, “if finalized.”¹² The final rule bars from EAD eligibility any asylum applicant “convicted on or after [the effective date of the rule] of a particularly serious crime,”¹³ along with any applicant who “fails to establish that [they are] not subject to a mandatory denial of asylum due to any regulatory criminal grounds under 8 CFR 208.13(c),” and any asylum applicant who “was convicted at any time in the United States or abroad of any aggravated felony as described in section 101(a)(43) of the Act.”¹⁴

A. Retroactivity:

- 1. The PSC and Serious Non-Political Crime Bars to EAD Eligibility Applies Only to Convictions or Conduct Occurring After the Effective Date of the Rule.**

Practitioners should note that the criminal bars for particularly serious crimes and serious non-political crimes are not retroactive. The final EAD eligibility rule applies to convictions or conduct occurring after the effective date of the rules. DHS will apply the particularly serious

¹¹ Final EAD Rule, *supra* note 7.

¹² *Id.*

¹³ *Id.*, at 38626.

¹⁴ *Id.*

crime and serious non-political crime bars only where the conviction or offense triggering them occurred on or after the effective date of the rule. EAD applicants applying under the (c)(8) code whose convictions or conduct occurred before the effective date will not be barred from EAD eligibility on that basis.

2. The Aggravated Felony Bar to EAD Eligibility Is Retroactive

DHS has announced that it will apply the aggravated felony bar to any conviction regardless of the conviction date. A full analysis of the retroactivity of the aggravated felony provision of this rule is beyond the scope of this advisory, but practitioners should note pursuant to this rule, USCIS officers may determine that certain offenses are aggravated felonies in the course of adjudicating an asylum seeker's EAD application.

B. The PSC analysis applied to EAD applications will depend on the PSC bar in effect at the time of adjudication

Currently, the PSC bar to asylum applies only to convictions (not conduct) listed in 8 C.F.R. § 208.13(c) and the caselaw interpreting the term “particularly serious crime.”¹⁵ USCIS officers adjudicating EADs after August 25, 2020 will, unless the proposed criminal bars rule goes into effect, be required to conduct the same individualized, multi-factor analyses that are currently conducted by asylum and EOIR adjudicators.¹⁶

If the newly proposed rule expanding the PSC bar goes into effect, USCIS will be required to conduct the inquiries discussed in Section I to determine if an applicant is barred from EAD eligibility, in addition to applying the existing analytical framework for convictions not included in the proposed rule's expanded definition.

C. The final EAD rule may not limit EAD ineligibility to “convictions” if the criminal bars rule goes into effect

Currently, the PSC bar to asylum applies only to applicants with final convictions.¹⁷ Similarly, in the final EAD rule, subsection (B) of the revised 8 CFR 208.7(a)(iii) bars asylum applicants who are “convicted” of a PSC from eligibility for work authorization.¹⁸ The final rule contains another provision, however, that if the proposed criminal bars go into effect, would prevent asylum applicants from accessing employment authorization based on conduct alone.

Subsection (D) of the final EAD rule bars applicants who fail “to establish that [they are] not subject to a mandatory denial of asylum due to any regulatory criminal grounds under 8 CFR 208.13(c),” which is where the proposed expanded PSC definition would lie. If the proposed

¹⁵ See *supra* note 10.

¹⁶ See IDP/HIRC Report, *supra* note 8 and Appendix F, “Particularly Serious Crime Bars on Asylum and Withholding of Removal, Case Law Standards and Sample Determinations,” at https://immigrantdefenseproject.org/wp-content/uploads/2011/10/FINALAppendix-F_FINAL5thEd.pdf.

¹⁷ 8 U.S.C. § 1158(b)(2)(A)(ii) (“the [noncitizen], having been convicted by a final judgment of a particularly serious crime[.]”).

¹⁸ Final EAD Rule, *supra* note 7, at 38626.

criminal bars go into effect, the conduct related provisions in that rule would also bar asylum applicants with pending claims from being eligible for work authorization.¹⁹

III. Intersection of the Proposed Criminal Bars to Asylum with the Proposed Rules Limiting Asylum Eligibility

The regulations proposed on June 15, 2020 that would drastically limit eligibility for asylum and impose higher standards for credible fear interviews also contain provisions relating back to the PSC bar and the proposed criminal bars to asylum.²⁰ Specifically, they encourage adjudicators to exercise their discretion to deny claims for asylum where the applicant would have been subject to the PSC bar but for their attainment of post-conviction relief, and require adjudicators conducting CFI interviews to consider whether any of the mandatory bars to asylum apply. If the expanded criminal bars to asylum go into effect, these sections of the proposed asylum limitation rules will become exponentially more complex.

First, section 208.13(d)(2)(i)(C) of the proposed rule states that discretion will not be “favorably” exercised for a noncitizen who “would otherwise be subject to one of the criminal conviction-based asylum bars at 8 CFR § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence unless the [noncitizen] was found not guilty.”²¹ The proposed criminal bars contain a provision at 8 CFR § 208.13(c)(7)(v) requiring an adjudicator to conduct a multi-step inquiry to determine the validity for immigration purposes of a vacatur, expungement, or modification of a conviction or sentence to determine if the PSC bar applies.²² The provision of the proposed asylum rule cited here instructs the adjudicator to deny relief even if the conviction was set aside or modified to correct a defect in the underlying criminal proceeding and not for ameliorative or rehabilitative purposes, unless the applicant can demonstrate that they would suffer “exceptional and extremely unusual hardship.”²³ The intersection of these two proposed rules would impose a nearly insurmountable burden on any asylum applicant, even if they were injured by a faulty prosecution and obtained relief, short of exoneration, in criminal court.

Second, section 208.30(e)(1)(iii) of the proposed asylum rule would require that officers conducting CFI interviews for persons subject to expedited removal consider “the applicability of any bars to being able to apply for asylum or eligibility for asylum set forth at [208(b)(2)] of the Act, including any bars established by regulation under section 208(b)(2)(C),” which includes the proposed criminal bars discussed in Section I above, along with the other mandatory bars to asylum.²⁴

Those submitting comments to the proposed asylum rule may therefore wish to consider the impact of the existing and proposed criminal bars to asylum, and how and whether asylum seekers would navigate them if the above described provisions become final.

¹⁹ *Id.*

²⁰ Proposed Asylum Rule, *supra* note 6.

²¹ *Id.* at 36293. Note that the proposed rule includes a counterpart at 1208.13, with identical language.

²² Proposed Criminal Bars, *supra* note 2.

²³ Proposed Asylum Rule, *supra* note 6, at 36293. Note that the proposed rule includes a counterpart at 1208.30, with identical language.

²⁴ *Id.*, at 36296.

Conclusion

As the current administration continues its multi-layered effort to curtail asylum, the interplay of these new and proposed rules with the criminal legal system is of special concern to the many asylum seekers fleeing persecution in their countries of origin. Given the overlap of the rules and the expansive and drastic changes to asylum they represent, it is crucial to consider their impact on the marginalized populations disproportionately affected by the criminal legal system.

Please do not hesitate to contact Cristina Velez at cristina@nipnlg.org if you have any questions or need any further information.

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Appendix A: Proposed New Particularly Serious Crime (PSC) Bars to Asylum, and intersections with related new and proposed rules.

EAD Rule – Final, Effective Date 8/25/2020

Exclusions to EAD Eligibility

New 8 CFR 208.7(a)(iii)

- (A) The applicant was convicted [] of **any aggravated felony**¹ as described in section 101(a)(43) of the Act;
- (B) The applicant was convicted on or after [August 25, 2020] of a **particularly serious crime**;
- (D) The applicant fails to establish that he or she is not subject to a mandatory denial of asylum due to the regulatory criminal grounds under **8 CFR 208.13(c)**²;

Asylum Eligibility Rules – Proposed 6/15/2020

Discretion (Proposed 8 CFR 208.13(d)):

(2)(i) The Secretary, except as provided in paragraph (d)(2)(ii) of this section, will **not favorably exercise discretion** [to grant asylum] under section 208 of the Act for a [noncitizen] who:

(C) would otherwise be subject to one of the criminal conviction-based asylum bars at **8 C.F.R. § 208.13(c)** but for the reversal, vacatur, expungement, or modification of the conviction or sentence, unless the [noncitizen] was found not guilty;

¹ The INA imposes a separate mandatory asylum bar for persons with “aggravated felony” convictions, separate from the definition of a “particularly serious crime.” 8 USC § 1158(b)(2)(B)(i), INA § 208(b)(2)(B)(i).

² Highlighted references to 8 USC § 208(b)(2)(C) and 8 CFR § 208.13(c) mark where the rules refer to the source of authority and PSC definition.

Expedited Removal: Credible Fear (Proposed 8 CFR 208.30)

(e) Procedures for determining credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture.

(1) A [noncitizen] establishes a credible fear of persecution if there is a significant possibility the [noncitizen] can establish eligibility for asylum under section 208 of the Act. “Significant possibility” means a substantial and realistic possibility of succeeding. When making such a determination, the asylum officer shall take into account:

(iii) The applicability of any bars to being able to apply for asylum or to eligibility for asylum set forth at section 208(a)(2)(B)-(C) and (b)(2) of the Act, **including any bars established by regulation under section 208(b)(2)(C)** of the Act. [particularly serious crime]

(5)(i)(A) Except as provided in paragraphs (e)(5)(ii) through (iii), (e)(6), or (e)(7) of this section, if a [noncitizen] would be able to establish a credible fear of persecution but for the fact that the [noncitizen] is subject to one or more of the mandatory bars to applying for asylum or being eligible for asylum contained in section 208(a)(2)(B)-(D) and (b)(2) of the Act, including any bars established by regulation under section **208(b)(2)(C)** of the Act, then the asylum officer will enter a negative credible fear of persecution determination with respect to the [noncitizen’s] eligibility for asylum.

Criminal Bars Rule – Proposed December 19, 2020; Final version at OMB 6/20/2020

Definition of Particularly Serious Crime

Proposed **8 CFR 208.13(c)/1208.13(c)**

(6) Additional limitations on eligibility for asylum. For applications filed on or after [the effective date of the final rule], a [noncitizen] shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense [including a **first offense**] arising under sections 274(a)(1)(A) [“bringing in and **harboring** certain aliens”], 274(a)(2) [same], or 276 of the Act [“**reentry of removed aliens**”];

(ii) The [noncitizen] has been convicted on or after such date of a [] crime that the Secretary *knows or has reason to believe* was committed in *support, promotion, or furtherance* of the activity of a **criminal street gang** as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The [noncitizen] has been convicted on or after such date of an offense for **driving while intoxicated or impaired** [] without regard to whether the conviction is classified as a misdemeanor or felony [] *in which such impaired driving was a cause of serious bodily injury or death of another person*;

(iv)(A) The [noncitizen] has been convicted on or after such date of a **second or subsequent offense for driving while intoxicated or impaired** [] without regard to whether the conviction is classified as a misdemeanor or felony [];

(v)(A) The [noncitizen] has been convicted on or after such date of a **crime that involves conduct** amounting to a crime of **stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence**, [] *or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:*

(1) A current or former spouse[];

(2) A [noncitizen] with whom the person shares a child in common;

- (3) A [noncitizen] who is cohabiting with or has cohabited with the person as a spouse;
- (4) A [noncitizen] similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
- (5) Any other [noncitizen] against a person who is protected from that [noncitizen's] acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(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*;

(C) [Exception] if the [noncitizen] would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act. [not the primary perpetrator of the DV]

(vi) The [noncitizen] has been convicted on or after such date of—

(A) **Any felony** ;

(B) **Any misdemeanor offense** **involving:**

(1) **[possession or use of fraudulent documents]**; [exception if used only in the course of fleeing persecution and] without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(2) The **receipt of Federal [or state or local] public benefits** , without lawful authority; or

(3) **Possession or trafficking of a controlled substance or controlled-substance paraphernalia**, other than a single offense involving possession for one's own use of 30 grams or less of marijuana;

(vii) There are **serious reasons for believing** the [noncitizen] has engaged on or after such date in **acts of battery or extreme cruelty**³ , upon a person, and committed by:

(A) A current or former spouse of the person;

(B) A [noncitizen] with whom the person shares a child in common;

(C) A [noncitizen] who is cohabiting with or has cohabited with the person as a spouse;

(D) A [noncitizen] similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other [noncitizen] against a person who is protected from that [noncitizen's] acts under the domestic or family violence laws , *even if the acts did not result in a criminal conviction*;

³ As defined in the VAWA regulations at 8 CFR § 204.2(c)(1)(vi).

(F) [Exception] if the [noncitizen] would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act. [not the primary perpetrator of the DV]

[Definitions]

(7) For purposes of paragraph (c)(6) of this section:

(i) The term “felony” means any crime defined as a felony by the relevant jurisdiction [] of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term “misdemeanor” means any crime defined as a misdemeanor by the relevant jurisdiction [] of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

[Relating to post-conviction relief]

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the asylum officer determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the [noncitizen] from the United States; or

(ii) The [noncitizen] moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An asylum officer is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.