



*Practice Alert Update*  
*Proposed Criminal Bars to Asylum:*  
**Current Status of Regulations Governing Eligibility for Asylum and (c)(8) EAD<sup>1</sup>**  
May 3, 2021

## **Introduction**

Beginning in late 2019, the Trump administration proposed a trio of rules that would have severely curtailed eligibility for asylum and employment authorization for noncitizens with minor contacts with law enforcement.<sup>2</sup> In June 2020, the administration proposed an additional, sweeping rule that would have expanded the limitations on asylum proposed in the earlier rulemakings.<sup>3</sup> On July 9, 2020, NIPNLG published a [Practice Alert](#) examining the intersection of the criminal bars proposed in those regulations. In the latter half of 2020, final versions of all three proposed rules were issued, and were subsequently challenged in litigation before their effective dates. This Practice Alert provides an update on the current status of the rules as they apply to asylum seekers with criminal contacts in light of the litigation developments. As these proceedings are ongoing, this update should be read as a snapshot in time, rather than a definitive final statement of the status of the regulations.

First, we address the current status of the regulation enlarging the criminal bars to asylum, which was referenced in the two other rulemakings. Next, we discuss the regulation imposing limitations on asylum seekers' eligibility for employment authorization that incorporated the criminal bars to asylum in its final version. Finally, we address the broader "death to asylum" regulation that sought to incorporate criminal bars to asylum at earlier stages in the asylum process.

### **I. The Criminal Bars to Asylum Rule and the Status of the *Pangea I* Litigation**

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<sup>2</sup> See Asylum Application, Interview, and Employment, 84 Fed. Reg. 62396 (proposed Nov. 14, 2019), [hereinafter "Proposed EAD Rule"]; Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (proposed Dec. 19, 2019) [hereinafter "Proposed Criminal Bars"].

<sup>3</sup> 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 Rule"].

On October 21, 2020, DOJ and DHS issued a final rule adopting the proposed expansion of “particularly serious crime” in 8 C.F.R. §§ 208.13(c)(6) and 1208.13(c)(6) as additional regulatory grounds for denial of asylum applications.<sup>4</sup> The final rule, which was substantially similar to the proposed rule, imposed broad bars to asylum based on certain low-level offenses including, in some cases, mere allegations of conduct. On November 2, 2020, four immigrant rights organizations – Pangea Legal Services, Dolores Street Community Services, Catholic Legal Immigration Network, Inc., and Capital Area Immigrants’ Rights Coalition – [filed a challenge](#) to the new rule in the U.S. District Court for the Northern District of California. The National Immigration Project of the National Lawyers Guild (NIPNLG), the Harvard Immigration and Refugee Clinical Program (HIRC), the Immigrant Defense Project (IDP), and the law firm of Sidley Austin LLP represent the organizational plaintiffs. The plaintiffs moved for a temporary restraining order (TRO), requesting that the district court enjoin the new rule before its effective date, November 20, 2020.

**On November 19, 2020, District Judge Susan Illston granted the plaintiffs’ TRO motion**, issuing a nationwide injunction to halt the implementation of the new rule in full. *Pangea Legal Services v. DHS*, No. 3:20-cv-07721, 2020 WL 6802474 (N.D. Cal. Nov. 19, 2020) (“*Pangea I*”). On November 24, 2020, the district court converted the TRO into a preliminary injunction (PI), ordering that the rule be enjoined while the lawsuit is pending. *Id.*, ECF No. 74 (N.D. Cal. Nov. 24, 2020). Under the PI, the agencies are prohibited from implementing or enforcing the rule nationwide while the lawsuit is pending. The government appealed to the Ninth Circuit, but the PI remains in effect, and the appeal is stayed pending the government’s review of regulatory actions taken under the previous administration.

**Currently**, the criminal bars to asylum include only those that existed prior to the promulgation of the proposed rule enjoined in *Pangea I*, and apply only to asylum applicants with final convictions.<sup>5</sup> Practitioners should note that the eCFR that is published by the government includes the version of the criminal bars contained in the final, now enjoined regulation, and appears in many online searches for the applicable regulations at 8 CFR §§ 208.13(c)(6) and 1208.13 (c)(6). It is incorrect, as noted in Westlaw, which has published a warning that the rule is currently enjoined.<sup>6</sup> Practitioners should be cautious when consulting

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<sup>4</sup> Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (issued Oct. 21, 2020) [hereinafter “Final Criminal Bars Rule”]. The Final Criminal Bars Rule contained the same categorical bars as the Proposed Criminal Bars, but identified them as additional regulatory grounds requiring mandatory denial of asylum under 8 CFR §§ 208.13 and 1208.13, citing the Attorney General’s authority to establish by regulation additional limitations on asylum eligibility at 8 USC § 1158(d)(5)(B). *Id.* at 67207.

<sup>5</sup> 8 U.S.C. § 1158(b)(2)(A)(ii) (“the [noncitizen], having been convicted by a final judgment of a particularly serious crime[]”). Currently, the particularly serious crime bar to asylum applies only to convictions (not conduct) listed in 8 C.F.R. § 208.13(c) and regulations and caselaw interpreting the term “particularly serious crime.” USCIS officers adjudicating EADs after August 25, 2020 are thus required to conduct the same individualized, multi-factor analyses that are currently conducted by asylum and EOIR adjudicators. See *Immigrant Defense Project & The Harvard Immigration and Refugee Clinical Program*, “Particularly Serious Crime Bars on Asylum and Withholding of Removal, Case Law Standards and Sample Determinations,” at <https://www.immigrantdefenseproject.org/idp-report-misapplication-of-the-particularly-serious-crime-bar-to-deny-refugees-protection-from-removal-to-countries-where-their-life-or-freedom-is-threatened/>.

<sup>6</sup> Westlaw has inserted the following language before the regulations found at 8 CFR §§ 208.13 and 1208.13: “<In *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, No. 20-09253-JD, 2021 WL 75756 (N.D. Cal. Jan. 8, 2021), the court listed those “preliminarily enjoined from implementing, enforcing, or applying the rule titled

online sources of these regulations, as the current version does not reflect the status of the regulation across all platforms. For an overview of the criminal bars that are currently in effect, practitioners should consult the 2018 report produced by *Immigrant Defense Project & The Harvard Immigration and Refugee Clinical Program*, “[Particularly Serious Crime Bars on Asylum and Withholding of Removal, Case Law Standards and Sample Determinations.](#)”

## II. The Asylum EAD Rule and the Status of the *CASA v. Mayorkas* Litigation

In the 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) if, among other things, they had specified contacts with the criminal legal system.<sup>7</sup> On June 26, 2020, the DHS published the final rule limiting the EAD eligibility of asylum seekers.<sup>8</sup> The rule applies to noncitizens whose EAD applications are filed pursuant to pending asylum applications (using code “(c)(8)” on Form I-765). Although the proposed rule 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 1 above, “if finalized.”<sup>9</sup>

On July 21, 2020, four immigrant rights organizations – CASA de Maryland (“CASA”), Centro Legal de la Raza, Oasis Legal Services, Pangea Legal Services, and the Asylum Seeker Advocacy Project (“ASAP”) – [challenged the final rule](#) in the U.S. District Court for the District of Maryland. ASAP, the International Refugee Assistance Project (IRAP), and the law firm of Gibson Dunn, LLP represent the organizational plaintiffs. **On September 11, 2020, Judge Paula Xinis issued a nationwide preliminary injunction barring the government from enforcing portions of the new restrictions on members of ASAP and co-organizational plaintiff CASA.** *CASA v. Wolf*, 486 F.Supp.3d 928 (D. Md.) (Sept. 11, 2020). The government appealed the decision, and the plaintiffs filed a cross-appeal, but on March 23, 2021, the parties jointly moved to withdraw their appeals, allowing the proceedings in the District Court to continue. *CASA v. Mayorkas*, No. 20-2217 ECF No. 24 (4th Cir. Mar. 23, 2021).

The PI issued by Judge Xinis, which enjoined the non-criminal bars to EAD eligibility, *does not* apply to all asylum seekers. Specifically, the PI applies only to members of ASAP and CASA, because Judge Xinis recognized only the standing of membership-based plaintiff organizations to challenge the rule. Thus, the aspects of the rule that were enjoined – relating to temporal filing limitations, fees, and discretionary denials – are no longer in effect for members of ASAP or CASA. In response, membership in those organizations, particularly ASAP, has increased exponentially. Because Judge Xinis found that ASAP and CASA members did not

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Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Dec. 11, 2020), or any related policies or procedures, including the Policy Memorandum entitled, Guidance Regarding New Regulations Governing Procedures For Asylum and Withholding of Removal and Credible Fear Reviews, issued by the Department of Justice on December 11, 2020”. See, 86 FR 6847-01 footnote 2 (Jan. 25, 2021). See, also, KeyCite citing references for this section on Westlaw for additional judicial decisions and other materials regarding this rule. >”

<sup>7</sup> Proposed EAD Rule, *supra* note 2.

<sup>8</sup> See Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed Reg. 38532 (published June 26, 2020) [hereinafter “Final EAD Rule”].

<sup>9</sup> *Id.* See also Proposed EAD Rule, *supra* note 2; Final Criminal Bars Rule, *supra* note 4.

present injuries sufficient to justify injunction of the criminal bars, however, she did not enjoin those provisions of the final rule. Currently, the criminal bars summarized above apply to all asylum seekers filing EAD applications using the code (c)(8). As proceedings continue in the case, now known as *CASA v. Mayorkas*, practitioners are encouraged to keep abreast of [new developments](#) to determine which parts of the rule apply to their clients.

**Currently**, the final rule bars from **EAD eligibility** any asylum applicant (*including* members of ASAP and CASA):

- 1) Who was “convicted on or after [August 25, 2020] of a *particularly serious crime*,”
- 2) 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
- 3) 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.

**Practitioners should note that the bars for particularly serious crimes not deemed “aggravated felonies,” and serious non-political crimes are *not* retroactive.** DHS will apply them only to convictions occurring on or after August 25, 2020 (the effective date of the rule). EAD applicants applying under the (c)(8) code whose convictions occurred before then will not be barred from EAD eligibility on that basis. It is important to further note that because the final rule expanding the criminal bars to asylum was enjoined in full, practitioners should only employ the analysis currently in effect to determine if their clients are eligible for (c)(8) EADs.<sup>10</sup>

**In contrast, the bar to EAD eligibility for asylum seekers convicted of offenses deemed to be “aggravated felonies” is retroactive.** It also is unaffected by the injunction against the Final Criminal Bars rule, which did not amend the definition of aggravated felony at INA § 101(a)(43). Practitioners representing asylum seekers should continue to monitor the litigation for any new developments pertaining to the criminal bars to EAD eligibility, as well as new developments in the designation of convictions as either aggravated felonies or particularly serious crimes.

### **III. “The Death to Asylum” Rule and the Status of the *Pangea II* Litigation**

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 meet in credible fear interviews for those who are subject to expedited removal.<sup>11</sup> The proposed regulation contained provisions relating back to the criminal bars to asylum.<sup>12</sup> Specifically, they would have

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<sup>10</sup> See *supra* note 5.

<sup>11</sup> Proposed Asylum Rule, *supra* note 3.

<sup>12</sup> *Id.*

encouraged adjudicators to discretionarily deny asylum claims by applicants who would have been subject to the criminal bars but for their attainment of post-conviction relief, and required adjudicators conducting Credible Fear Interviews (“CFIs”) to consider whether any of the mandatory bars to asylum apply.<sup>13</sup>

The agencies released the final rule, which was substantially the same, on December 11, 2020.<sup>14</sup> The rule was [promptly challenged](#) by Pangea Legal Services, Dolores Street Community Services, Catholic Legal Immigration Network, and Capital Area Immigrants’ Rights Coalition, who were represented by co-counsel from Center for Gender & Refugee Studies, the Harvard Immigration and Refugee Clinical Program, and Sidley Austin LLP. A [second action](#), which was consolidated with the first, was filed by Immigration Equality, Oasis Legal Services, the TransLatin@ Coalition, Black LGBTQIA+ Migrant Project, and Transgender Law Center, with counsel from Lambda Legal, Immigration Equality, and Kramer Levin.

**Fortunately, on January 8, 2021, the District Court for the Northern District Court of California enjoined this rule nationwide, in its entirety.** *Pangea Legal Services v. DHS*, No. 3:20-cv-09253, 2021 WL 75756 (N.D. Cal. Jan. 08, 2021) (“*Pangea II*”). As in *Pangea I*, the government appealed the injunction to the Ninth Circuit, but it remains in effect, and the appeal is stayed pending the government’s review of regulatory actions taken under the previous administration.

**Currently**, adjudicators are not required to apply the criminal bars to asylum when conducting CFIs, and asylum adjudicators need not abide by provisions of the rule encouraging them to deny claims in their exercise of discretion if the applicant received post-conviction relief. Practitioners should continue monitoring the *Pangea II* litigation for new developments relating to the status of the Final Asylum Rule.

## Conclusion

The last two years of the Trump administration saw the proposal of massive, intersecting regulatory changes aimed at limiting eligibility for asylum and ancillary benefits. Thanks to the ongoing efforts of the many advocates referenced herein, those changes largely did not take effect and continue to be challenged. Practitioners should continue to follow the developments of the litigation challenging the expansion of criminal bars to asylum and its related benefits discussed here for the most current application to asylum seekers who have had contact with the criminal legal system.

For questions about this practice alert, please contact Cristina Velez at [cristina@nipnlg.org](mailto:cristina@nipnlg.org).

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<sup>13</sup> *Id.*

<sup>14</sup> See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 [hereinafter “Final Asylum Rule”].