June 12, 2024

Submitted online via the Federal Docket Management System

Daniel Delgado, Director
Border and Immigration Policy,
Office of Strategy, Policy, and Plans,
U.S. Department of Homeland Security
Washington, D.C.

RE: Comments in Opposition to the Joint Notice of Proposed Rulemaking entitled Application of Certain Mandatory Bars in Fear Screenings; DHS Docket No. USCIS-2024-0005

Dear Director Delgado:

The Door's Legal Services Center ("The Door's LSC") respectfully submits this comment on the Department of Homeland Security (DHS)'s Proposed Rule, Application of Certain Mandatory Bars in Fear Screenings, as published in the Notice of Proposed Rulemaking (NPRM) on May 13, 2024, in the Federal Register, Volume 89, No. 93 at 41347-41361 (herein, the "Proposed Rule").

We anchor this comment in our experience representing vulnerable young immigrants in asylum applications and other forms of humanitarian relief. The Door's LSC is an office of over 50 individuals, including attorneys, social workers, and support staff. We specialize in serving vulnerable children and young people, including those who are unhoused, undocumented, and/or LGBTQ. Our attorneys represent youth in removal proceedings and those seeking to regularize their status through filing affirmative humanitarian applications. Many of these young people have sought and have received asylum. We encounter and represent numerous young people fleeing their home countries who are seeking safety in New York, In the fiscal year 2023, we handled 3,282 immigration matters for young people. The Proposed Rule jeopardizes the safety of children and young people and unfairly impedes their ability to apply for and receive asylum.

I. Executive Summary

The Door opposes the Proposed Rule in full. The Proposed Rule builds upon this Administration's evisceration of the fundamental right to seek asylum. Like the Circumvention of Lawful Pathways Rule ("CLP"), 88 FR 31314 (May 16, 2023), President Biden's June 4th "Proclamation on Securing the Border," and the Administration's Interim Final Rule, "Securing the Border," prioritizes expediency and preservation of resources over the fundamental rights that asylum seekers are entitled to under international and domestic law. Expediency and preservation of resources do not justify departure from domestic and international asylum obligations. These

actions are an affront to the humanitarian spirit and mandate of asylum, placing the lives of refugees and asylum seekers in grave danger for ill-conceived political gain.

Our comment focuses on the Proposed Rule's unlawful expansion of the CLP and the dangers it poses to young people seeking asylum, particularly during Credible Fear Interviews ("CFIs"). The fact that we have not addressed how the rule affects all asylum seekers, including families and single adults, should not be interpreted as a lack of objection to the entire Proposed Rule. We further note that the Proposed Rule's 30-day comment period is insufficient to fully address the multitude of legal and moral issues raised by the Proposed Rule and its interaction with the CLP and the "Securing the Border" Interim Final Rule while also continuing to serve the vulnerable children and young people we represent.

By allowing Asylum Officers ("AOs") to consider mandatory bars to asylum and withholding of removal in CFIs, this Proposed Rule forces asylum seekers, including vulnerable young people, to answer questions related to complex legal questions, often in a language that they do not understand fully, during traumatic border encounters before they have had the opportunity find counsel and reach a place of safety. For the reasons discussed below we oppose this Proposed Rule and urge DHS to rescind the rule in full.

II. Discussion

a. The Proposed Rules Relies on and Expands the Circumvention of Lawful Pathways Rule, Which Is Fundamentally Unfair and Currently Being Challenged in Court

The Door's LSC previously submitted comments opposing the CLP and opposes its application by AOs during CFIs and reasonable fear interviews ("RFIs"). The CLP violates international law, disregards the asylum standard and procedural safeguards of U.S. law, has a negative disparate impact on young people (particularly Black, Brown, and Indigenous people of color), and fails to protect young people at their most vulnerable time. Now, the Administration proposes to expand the application of the CLP to interviews by AOs.

The CLP created a burden for asylum seekers to rebut a presumption of ineligibility, a presumption that did not exist before. Now, not only does the CLP go against long held case law by requiring asylum seekers to rebut the presumption of ineligibility, it requires them to rebut the presumption at the CFI stage. Implementation of the CLP in the Proposed Rule harms individuals by requiring expression of their fear at the very beginning of the immigration process. Applying the CLP to CFIs forces asylum seekers to articulate a response and gather evidence to rebut the presumption of the CLP almost immediately upon arrival at the border. In fact, the Department amended the credible fear regulations in 2022 so that the AOs would not consider the mandatory

bars in CFIs[1], specifically noting that AOs applying the bars at the CFI stage would increase credible fear interview and decision times" which would go against the "fact-intensive inquiry" necessary when considering the mandatory bars.[2] Simply making the application of the mandatory bars at the CFI stage optional, but not required, in no way removes the concerns the Department themselves have recognized.

The CLP has gutted the individualized, fact-based inquiry of asylum claims, which is further exacerbated by its implementation in the CFI process in the Proposed Rule. The Board of Immigration Appeals (BIA) has held that judges' discretion should be exercised favorably in cases in which an individual has demonstrated a well-founded fear of persecution:

> [I]nstead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted. . . . *the danger of persecution outweigh all but the most egregious of adverse factors*.[3]

The Proposed Rule does the opposite, removing the ability of asylum seekers to even be seen by an immigration judge if an AO believes a mandatory bar applies.

Finally, the Proposed Rule asserts that the application of the CLP would be a minor change since it has been implemented since 2023. However, the CLP is currently being challenged in federal courts,[4] and a court has already found CLP unlawful.[5] Implementation of the CLP in a manner with even fewer procedural protections is extremely dangerous.

b. The Proposed Rule Would Force Individuals to Address Complex Legal Questions That Are Best Addressed in a Final Hearing

The CFI is an "initial screening" designed to protect individuals against return to persecution or torture in the expedited removal process in accordance with U.S. obligations under domestic and international law.[6] Congress intended the CFI to involve "a low screening standard for admission into the usual full asylum process,"[7] in order to prevent the return to persecution of

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[1] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18219, 18221–22 (Mar. 29, 2022) (''Asylum Processing IFR'').
[2] *See id.*, at 18093.
[3] Matter of Pula, 19 I.&N. Dec. 467, 474 (B.I.A. 1987).
[4] https://immigrantjustice.org/system/files/legal-resource-files/m.a._v._mayorkas_-_amended_complaint_-_7.10.2023_-_final.pdf
[5] *East. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).
[6] H.R. REP. NO. 104-469, pt. 1, at 158 (1996).
[7] *See* 142 CONG. REC. S11491-02 ("The credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process[.]"); *see also Grace v. Whitaker*, 344 F. Supp. 3d 96, 107 (D.D.C. 2018).

individuals with "genuine asylum claim[s]."[8] CFIs do not displace hearings in immigration court, but rather serve as a precursor to adjudication of an asylum claim.

The Proposed Rule fundamentally alters the role of CFIs and RFIs by allowing AOs to consider certain mandatory asylum and withholding of removal bars ("mandatory bars") located in INA §§ 208(b)(2)(A)(i)-(v) and 241(b)(3)(B) in making a fear determination. By allowing Asylum Officers to consider mandatory bars in making credible and reasonable fear determinations, this rule will require AOs and asylum seekers to navigate complex legal questions and factually heavy inquiries that are best addressed in a full hearing.

The application of the mandatory bars to asylum and withholding of removal located in INA §§ 208(b)(2)(A)(i)-(v) and 241(b)(3)(B) are complex legal questions frequently litigated in court. The definitions of "material support" to a terrorist organization[9] and a "particularly serious crime,"[10] all key to applying the mandatory bars, have been widely contested. The Proposed Rule specifically notes that cases involving potential bars are assigned to OPLA attorneys specializing in such cases, further emphasizing the complex nature of these legal questions.[11] By allowing AOs to pass judgement on the application of a mandatory bar during a CFI or RFI, the regulation asks AOs to make legal determinations well beyond the scope of the CFI or RFI. Further, it removes the opportunity to litigate the application of a mandatory bar in immigration court with the assistance of an attorney.

Furthermore, the question as to whether an individual is subject to a mandatory bar is fact-intensive inquiry. In order to properly present a defense to accusations of a mandatory bar, an individual would need to present documentation from their home country to demonstrate that the bar does not apply. However, the Proposed Rule's emphasis on the quick removal of noncitizens to whom mandatory bars purportedly apply leaves little time for the noncitizen to gather documentation such that an AO would find a significant possibility that the noncitizen can establish by a preponderance of the evidence that the bars do not apply.[12]

It is unreasonable to expect asylum seekers without legal training in the United States immigration system to navigate complex legal standards that rarely have straightforward answers. Without the assistance of an attorney, asylum seekers, many of whom have recently arrived at the border after long and treacherous journeys, are asked to litigate questions they can only begin to answer by analyzing large volumes of case law and to present documents that few will have available to them.

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[8] H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

[9] *See, e.g.* Matter of A-C-M-, 27 I&N Dec. 303 (BIA 2018) (describing the extensive litigation history regarding the material support bar); *see also* Tyler Anne Lee, *When 'Material' Loses Meaning: Matter of A-C-M- and the Material Support Bar to Asylum*, 51.1 Columbia Human Rights Rev. 376, (2019).

[10] *See* Delgado v. Holder, 648 F.3d 1095, 1103 (9th Cir. 2011) (explaining that what constitutes a particularly serious crime can be determined on a case-by-case basis)

[11] Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 41352 (May 13, 2024) (Mandatory Bar Rule).

[12] *See* Mandatory Bar Rule, 89 Fed. Reg. 41360 (explaining the standard for overcoming a mandatory bar in a CFI for an individual seeking asylum).

In a previous rulemaking in 2022, DHS and the Department of Justice intentionally decided to exclude the adjudication of mandatory bars in CFIs in the final rule due to the "intricacies of fact finding, and legal analysis required to make a determination on the applicability of any mandatory bars."[13] DHS justified the change in the current Proposed Rule by explaining that in the current rule does not require AOs to apply the mandatory bars, but rather grants them discretion to apply a bar.[14]

However, by leaving to the discretion of asylum officers to determine whether to apply a mandatory bar, the Proposed Rule will lead to increased risks of discrimination and inequity for individuals undergoing CFIs. The Proposed Rule explains that the rule would increase "operational flexibility" by allowing AOs to "use their judgement" to determine whether to apply a mandatory bar during the CFI, thus triggering a negative fear finding.[8] By shifting broad discretion to AOs conducting CFIs to make that determination, the Proposed Rule increases the risk of arbitrary and discriminatory decisions by AOs that do not comport with law.

For example, the rule states that an AO can consider a mandatory bar "where there is evidence that such a mandatory bar could apply."[15] However, the rule does not specify what kind of evidence the AO should consider in making this determination nor what kinds of evidence would be acceptable from a noncitizen to rebut the application of a mandatory bar. As discrimination in the U.S. immigration system, including against Black and Muslim asylum seekers, is well documented,[16] we believe the broad discretion granted to AOs will lead to inconsistencies in which individuals get the opportunity to present their case before an immigration judge that a mandatory bar does not apply versus which individuals are removed upon the determination by an AO that they are subject to a mandatory bar.

By allowing AOs to consider mandatory bars in CFIs, the Proposed Rule will result in the expedited removal of asylum seekers who are unable to make complex legal arguments nor provide extensive documentation to rebut the mandatory bar.

c. The Proposed Rule Fails to Consider Serious Language Access Issues during CFIs, thereby Harming Asylum Seekers who do not Speak English or Spanish

If implemented, the Proposed Rule would also unfairly harm new arrivals to the U.S. who do not speak English or Spanish. Many of the newly arrived young people that we see at The Door speak a variety of languages with varying levels of fluency. A large number of these young people, for example, speak French, Wolof, Fulani, Pulaar, K'iche', Mam, Kakchikel, Bambara, or Arabic dialects (among others) as their first language. While some of these young people also speak English or Spanish, only some report these as their preferred languages, and many others do not speak these languages at all. This is particularly true for young people who have little to no formal

[13] Asylum Processing IFR, 87 Fed. Reg. 18078, 18134-35, (Mar. 29, 2022).
[14] Mandatory Bar Rule, 89 Fed. Reg. 41353.
[15] *Id.* at 41355.
[16] *See e.g.*, HUMAN RIGHTS FIRST, U.S. BORDER AND ASYLUM POLITIES HARM BLACK ASYLUM SEEKERS (Feb. 2024) https://humanrightsfirst.org/wp-content/uploads/2024/02/Asylum-Policies-Harm-Black-Asylum-Seekers-FACTSHEET-formatted.pdf.

education. Under the Proposed Rule, many asylum seekers will be asked to provide evidence about mandatory bars in languages they do not speak or fully comprehend. This will happen before they have been informed in their preferred language about their options for relief in the United States, the purpose of CFIs, or what mandatory bars even are.

When CFIs are conducted, asylum seekers are frequently detained, have no access to counsel, and are still experiencing significant trauma due to the harm they suffered in their home countries.[17] As a result, it is often incredibly difficult for asylum seekers, even speaking in their native language, to recount their past experiences and fears during the CFI process.[18] Language barriers severely exacerbate this problem.[19] DHS has itself admitted that qualified interpreters in certain languages are not always available,[20] and asylum seekers may be asked to proceed in a language they do not speak fluently. Many of our clients, for example, report that border officials did not ask about or speak to them in their native languages. Young people specifically may feel increased pressure to continue in a language they do not speak fluently because of inherent power imbalances between them and U.S. immigration officials.

If interpreters do happen to be available, they still may not speak the same dialect of a language as a young person, which could lead them to misinterpret idioms and regional terms. Furthermore, CFIs are frequently conducted over the phone,[21] which can make communication all the more difficult. This is especially true if a young person is already uncomfortable with the language they are being asked to speak.

Under the Proposed Rule, if an AO screens for mandatory bars in a CFI and determines that one applies, the burden is on the asylum seeker to prove why the bar does not apply. As

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[17] *See* H.R. REP. NO. 104-469, pt. 1, at 158 (1996); Giulia Turrini et al., *Common mental disorders in asylum seekers and refugees: umbrella review of prevalence and intervention studies*, 11 INT'L J. OF MENTAL HEALTH SYSTEMS 51 (Aug. 25, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5571637/ (finding that at least one out of every three asylum seekers struggles with post-traumatic stress disorder, depression, and/or anxiety); Megan Brooks, *Refugees have high burden of mental health problem*s, Psychiatry and Behavioral Health Learning Network, (June 19, 2019) https://www.psychcongress.com/article/refugees-have-high-burden-mental-health-problems. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 2 (2015) (finding that only "only 37% of all immigrants, and a mere 14% of detained immigrants" were represented by counsel in removal proceedings).

[18] *See generally Dep't of Homeland Security, et al. v. Thuraissigiam*, Brief of Asylum Law Professors Amici Curiae, Jan. 2020, https://www.supremecourt.gov/DocketPDF/19/19-161/129571/20200122164055218_Refugee%20Scholars%20Amicus%20Brief_FINAL%20TO%20BE%20FILED.pdf.

[19] *Id.*

[20] *See* U.S. Department of Homeland Security, *Memorandum on Language Access in Credible Fear Screenings*, at 1-2 (2022), https://www.uscis.gov/sites/default/files/document/memos/Language-Access-in-Credible-Fear-Screenings.pdf ("In the credible fear process, persons who do not speak English may face barriers accessing the credible fear process…certain languages are difficult to fill due to a lack of cleared interpreters. There may be no interpreters available or a limited number of interpreters available for these languages.").

[21] *See* U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 36 (2014) ("59 percent of [credible fear] interviews were conducted" telephonically in FY2014, with "[t]he greatest use of telephonic interviews . . . for asylum seekers in Expedited Removal who crossed the southern border.").

discussed, such a task can pose an insurmountable challenge even to young people who are fluent in the language an AO speaks with them, in part given the difficulties associated with obtaining official documents as a minor. Minors often face barriers in attaining official state documents without the support of a parent or guardian and may be unable to do so if they are fleeing a government that is persecuting them and/or unwilling and unable to protect them. Young people who are asked to show why a mandatory bar does not apply to them in a language they are not fully comfortable with may not understand what they are being asked to prove or why they are being asked to prove it. This in turn could mean that they do not obtain documentation deemed sufficient by the AO to prove that a mandatory bar does not apply to them.

Accordingly, even slight errors in interpretation can have grave consequences for young asylum seekers, many of whom are fleeing mistreatment and violence at home. Miscommunication caused by insufficient language access or interpretation may result in a wrongful application of a mandatory bar to asylum for a young person, which in turn will render them ineligible for asylum—before the young person even has a chance to reach a safe place or obtain legal advice in their native language. Without asylum eligibility, the likely result is that many of these newly arrived young people will be ordered removed to a country where their wellbeing—and, sometimes, lives—are at risk.

d. The Proposed Rule also Fails to Contemplate Protections or Safeguards for Children and Young People we Represent who are not Identified as UACs

The Proposed Rule fails to consider the impact of applying mandatory bars to asylum and withholding of removal on children and young people seeking asylum. Unaccompanied children as defined in 6 U.S.C. 279(g)(2) (under the statute "unaccompanied alien child" or "UAC" means a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody) are *not* subject to expedited removal procedures. *See* 8 U.S.C. § 1232(a)(5)(D) (providing for the placement of unaccompanied alien children in formal removal proceedings under INA § 240). *But there are many children and young people who cross our borders in search of asylum who do not receive a UAC designation.*

The Door works with many young people who arrive at the border between the ages of 18 to 20 who do not meet the definition of a UAC and, thus, do not receive an exemption from the expedited removal processes. Under the Proposed Rule, these young people may be forced to answer complex mandatory bar questions before they have reached a place of safety or found counsel. The Door's LSC also represents many children and young people who cross the border as a family unit and later experience family dissolution, separation, and/or decide to seek asylum alone based on their particular vulnerabilities and fears. These young people often go through expedited removal as a family unit, and under the Proposed Rule, they may be barred from seeking asylum and/or withholding of removal because of a family member's answers to a mandatory bar screening question under the Proposed Rule.

Importantly, The Door also represents many young people who cross the border alone who have been mistakenly denied UAC classification by border officials. As discussed, young people and children under the age of 18 often struggle to attain appropriate documentation, particularly if they are fleeing a government that is persecuting them and/or unwilling and unable to protect them. Age determination when children and young people lack identification documentation is not always accurate and precise, and often border officials fail to take the time to properly determine the age and vulnerability of young people at the border.[22] Young people fleeing persecution are sometimes forced to acquire documents under other names and ages to flee their country of origin, as some countries bar minors from traveling outside their borders alone. This can lead to border officials mistakenly categorizing unaccompanied children as adults and placing them in expedited removal. In some cases, border officials have refused to designate a child as a UAC, even when presented with their correct documents, when they suspect a young person has used a document bearing a different age along their journey. Children who have wrongfully been denied a UAC designation because of a lack of documentation or false documentation will be unfairly penalized by the application of the Proposed Rule and the application of the CLP. No asylum seekers should be penalized for their lack of documentation or their reliance on false documentation. Courts have long maintained that the use of false documents does not bar asylum seekers from relief.[23] As one court has noted, "[i]f illegal manner of flight and entry were enough independently to support a denial of asylum . . . virtually no persecuted refugee would obtain asylum."[24]

DHS has long recognized the particular vulnerabilities of children fleeing persecution in its own policies and has acknowledged that children's experiences of trauma and persecution differ from those of adults.[25] And yet, the Proposed Rule does not adequately acknowledge and protect these vulnerabilities. The Proposed Rule does not account for or even recognize the particularities involved in appropriately adjudicating the asylum claims and expressions of credible fear of

[22] See, e.g., Ranit Mishori, *"The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights*", (July 23, 2019), Children (Basel), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6678520/.

[23] *See* In re Kasinga, 21 I. & N. Dec. 357, 367–68, (B.I.A. 1996), where the BIA exercised discretion favorably despite the applicant's use of a fraudulent document to gain entry to the United States; the Board noted that the applicant had told the immigration inspector the truth when she arrived and did not attempt to use the false document to enter. *See also* Hussam F. v. Sessions, 897 F.3d 707, 712 (6th Cir. 2018) (finding that BIA abused its discretion when it overturned the IJ's grant of asylum to a noncitizen who had entered on a stolen passport because BIA precedent "dictates that asylum may not be denied solely due to violations of proper immigration procedures, and also that the danger of persecution—which all agree exists in this case—should outweigh all but the most egregious countervailing factors"); Dong v. Gonzales, 421 F.3d 573, 579 (7th Cir. 2005) ("[T]he use of false documents to facilitate travel or gain entry does not serve to impute a lack of credibility to the petitioner." (Internal citation omitted).

[24] Huang v. I.N.S., 436 F.3d 89, 100 (2d Cir. 2006); Fisenko v. Lynch, 826 F.3d 287, 292 (6th Cir. 2016) (ultimately denying the petitioner's application but affirming the holding in Huang that family reunification is a crucial factor in weighing asylum as a discretionary matter).

[25] See, e.g., Citizenship and Immigration Services Ombudsman, *Ensuring a Fair and Effective Asylum Process for Children* ,Sept. 20, 2012 (discussing issues arising in determining unaccompanied minor status, including difficulty of interviewing minors, and identifying Department's inadequacies in addressing children's needs); *see also* United States Department of Justice, *INS Guidelines for Children's Asylum Claims*, (1998).

vulnerable children and young people. This is especially egregious given that DHS, Congress, and this nation's highest courts have all confirmed that children's asylum claims must be treated differently than adults', both substantively and procedurally, in order to account for children's particular vulnerabilities.[26] On December 21, 2023, Director David L. Neal issued further guidance for Immigration Judges on children's cases in immigration court. *See* Office of Director DM 24-01, *Children's Cases in Immigration Court*. This guidance provides further protection for young people in removal proceedings and specifically mandates that children's cases, which are "not limited to, those where the respondent has been designated as an unaccompanied child… require special consideration." *Id.* The Proposed Rule and the CLP unfairly prohibit young people from receiving this due consideration. Young people and children express credible fear in different manners than adults,[27] and this should be accounted for at *every* stage of the asylum process.

III. Conclusion

The Proposed Rule states that it will only produce "modest, unquantified" benefits reducing financial strains on the Department, while subjecting individuals to enormous harm. As a youth-centered organization, we are particularly concerned with the ways in which the Proposed Rule unduly burdens already vulnerable children and young people. Based on the foregoing, we respectfully request that DHS rescind the rule in full and refocus its efforts toward creating a safe, efficient, and trauma-informed pathway towards citizenship for children, young people, and all people facing persecution.

Respectfully Submitted,

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[26] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (noting that the UNHCR Handbook, which provides guidance on assessing child's claims of persecution, is significant in construing the 1967 Protocol, which Congress incorporated in adopting the Refugee Act of 1980); *Winata v. Holder*, 446 Fed. Appx. 923, 925 (9th Cir. 2011) ("the harm a child fears or has suffered can be relatively less than that of an adult and still qualify as persecution"); Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004) (when assessing asylum claims, adjudicators should be mindful that young children may be incapable of expressing fear with the same level of detail as an adult).

[27] See *id; see also INS Guidelines for Children's Asylum Claims* (December 10, 1998) at 19 ("[t]he harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution."), *cited by* Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006).

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