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DEPARTMENT OF JUSTICE

Office of the Attorney General

8 CFR Chapter V

27 CFR Chapter II

28 CFR Chapter I

[Docket No. OAG196; AG Order No. 7205-2026]

Department of Justice; Response to Correspondence Requesting Rulemaking

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Petitions for rulemaking; denial.

SUMMARY: This document responds to 10 submissions received by the Department of Justice ("DOJ" or "the Department") or its components that asked the Department or a component to initiate rulemaking. After reviewing these submissions, the Department declines to initiate rulemakings in response to them.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT:

For submissions to the Executive Office for Immigration Review: Jamee E. Comans, Acting Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041; telephone: (703) 305-0289.

For submissions to the Bureau of Alcohol, Tobacco, Firearms, and Explosives: Vivian Chu, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648-7070.

For other submissions: Christina Greer, Senior Counsel, Office of Legal Policy, Department of Justice, Room 4254, 950 Pennsylvania Avenue NW, Washington, DC 20530; telephone: (202) 514-5739.

SUPPLEMENTARY INFORMATION:

I. Background

The Administrative Procedure Act provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. 553(e). The Department and its components have reviewed the submissions requesting rulemaking listed in Sections II and III of this Notice and decline to initiate the requested rulemaking actions for the reasons provided below.

II. Submissions Relating to Immigration Issues

A. Submission from 100 Law Professors Dated May 27, 2021

On May 27, 2021, 100 law professors submitted correspondence, "express[ing their] views" on the construction and application of the "unable or unwilling" element of the "refugee" definition. Recently, the Attorney General issued a decision[1] concluding that the legal framework within *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), is the best reading of the statute, inclusive of the "unable or unwilling" element of the refugee definition. *See Matter of S-S-F-M-*, 29 I&N Dec. 207, 208 (A.G. 2025). Moreover, the Attorney General instructed that inquiries regarding the proper application of the "unable or unwilling" standard "are legal questions appropriately resolved as part of the Attorney General's authority to issue 'controlling' decisions 'with respect to all questions of law.'" *Id.* at 209 (quoting Immigration and Nationality Act ("INA"), 103(a)(1), 8 U.S.C. 1103(a)(1)). Accordingly, as there is now current controlling agency precedent on the "unable or unwilling" standard, which specifically concludes that the issue is a legal question best left to case-by-case adjudication, the Department declines to undertake rulemaking as suggested in the law professors' submission. The petition for rulemaking is, therefore, denied.

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[1] Attorney General Pamela Bondi directed the Board of Immigration Appeals to refer the case for her review pursuant to 8 CFR 1003.1(h)(1)(i). *See Matter of S-S-F-M-*, 29 I&N Dec. 207, 207 (A.G. 2025).

B. Submission from Jonathan M. Kaufman Dated January 5, 2022

On January 5, 2022, Jonathan M. Kaufman submitted correspondence requesting that the Department engage in rulemaking to implement the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. 110-457, 122 Stat. 5044, asserting that his client is entitled to a decision from an Immigration Judge that has been informed by regulations promulgated in accordance with the TVPRA. Although described in the correspondence as a petition for rulemaking, this letter more squarely seeks resolution of issues for a particular case that are more appropriately addressed through the administrative adjudication or appeals process.

Additionally, the Department is already considering potential regulatory action to implement the TVPRA and declines to take additional rulemaking action at this time. *See, e.g.*, Spring 2025 Unified Agenda, RIN 1125-AA70, Implementation of Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008; Treatment of Unaccompanied Children, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=1125-AA70 [https://perma.cc/QM54-QS29]. Should the Department decide to engage in rulemaking on these topics in the future, the public is welcome to comment on any proposed rule the Department may publish, as appropriate.

C. Submission from Members of Congress Dated October 30, 2023

On October 30, 2023, four members of Congress (Senators Richard J. Durbin and Alex Padilla and Representatives Jerrold Nadler and Pramila Jayapal) submitted a letter to former Attorney General Merrick Garland and former Department of Homeland Security ("DHS") Secretary Alejandro Mayorkas requesting rulemaking to amend custody procedures, including: shifting the burden of proof in bond proceedings; requiring consideration of an alien's ability to pay bond when setting a bond amount; providing aliens the opportunity to request review of mandatory detention determinations under section 236(c) of the INA, 8 U.S.C. 1226(c); and

scheduling periodic assessments of detained aliens to identify unreasonably prolonged detention. Since this letter was submitted, President Donald J. Trump issued an Executive Order titled "Securing Our Borders," which establishes that it is the policy of the United States "to take all appropriate action to secure the borders of our Nation" by "[d]etaining, to the maximum extent authorized by law, aliens apprehended on suspicion of violating Federal or State law, until such time as they are removed from the United States." E.O. 14165, 90 FR 8467 (Jan. 20, 2025). The Department does not believe that the requested actions comport with this directive. As such, the Department denies the petition for rulemaking. Should the Department decide to engage in rulemaking on these topics in the future, the public is welcome to comment on any proposed rule the Department may publish, as appropriate. The Department also notes, with respect to the request to provide aliens the opportunity to seek review of mandatory detention determinations, that Department regulations already provide that aliens who are removable because of criminal or terrorism-related grounds, and are therefore subject to mandatory detention under section 236(c)(1)(A)–(C) of the INA, 8 U.S.C. 1226(c)(1)(A)–(C), may seek "a determination by an [I]mmigration [J]udge that the alien is not properly included within" that class of aliens. 8 CFR 1003.19(h)(2)(ii).

D. Submission from Marta Alicia Mejia Alvarenga Dated September 11, 2023

Marta Alicia Mejia Alvarenga ("Mejia Alvarenga"), through counsel, submitted correspondence dated September 11, 2023, titled "Petition for Rulemaking Concerning the '"Unable or Unwilling" Standard, the Proper Application of That Standard, and the Meaning of the Statutory "One Central Reason" Test' (*Matter of A-B-*, 28 I & N Dec. 307, 309 (A.G. 2021))," in which Mejia Alvarenga requests that the Attorney General issue regulations clarifying certain requirements for asylum and a related form of protection from removal. The petition invokes President Joeseph R. Biden's Executive Order titled "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at

the United States Border," *see* E.O. 14010, 86 FR 8267 (Feb. 2, 2021), which ordered the Attorney General and Secretary of Homeland Security to promulgate regulations within 270 days addressing certain requirements for asylum and protection claims, *id.* at 8271, a deadline that had passed by the time of the correspondence. Mejia Alvarenga also expresses "surpris[e]" that a "draconian standard" for determining whether a foreign government was or will be unable or unwilling to provide protection from a persecutor was applied to her asylum application and that the Department defended its application on judicial review. Finally, Mejia Alvarenga asks that the Attorney General issue the requested regulations unilaterally without the concurrence of the Secretary of Homeland Security, if obtaining such concurrence would "slow down" the process.

The Department declines to initiate rulemaking in response to this correspondence for three reasons. *First*, on his first day in office, President Trump revoked the Executive Order Mejia cites in her petition. *See* Sec. 3(a), E.O. 14159, 90 FR 8443, 8443 (Jan. 20, 2025) ("Protecting the American People Against Invasion"); Sec. 2(u), E.O. 14148, 90 FR 8237, 8238 (Jan. 20, 2025) ("Initial Rescissions of Harmful Executive Orders and Actions"). Thus, the basis for Mejia Alvarenga's request for rulemaking has been revoked. *Second*, although labeled as a petition for rulemaking, the document more squarely relates to Mejia Alvarenga's since-resolved challenge to her removal order and her arguments as to the proper standard to apply for determining whether a government is "unable or unwilling" to provide protection from a persecutor. Notably, the Fifth Circuit has denied her petition for review of her removal order. *Mejia-Alvarenga v. Garland*, 95 F.4th 319 (5th Cir. 2024). In so doing, the Fifth Circuit concluded that the formulation of the "unable or unwilling" standard applied to her—that is, whether the government condones the harm or is completely helpless to protect the alien—is "interchangeable" with the "unable or unwilling" standard. *Id.* at 324 (citing *Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019)). *Third*, the Department is otherwise unable to evaluate Mejia Alvarenga's request for rulemaking because she provides no other reasons why the Department should grant her broad request and fails to identify any specific regulatory changes

that she wants the Department to pursue. For these reasons, the Department declines to initiate a rulemaking in response to Mejia Alvarenga's correspondence. If the Department's view changes, Mejia Alvarenga is welcome to comment on any proposed rule it may publish, as appropriate.

E. Submission from Sandra Beatriz Bustamante Leiva Dated September 11, 2023

On the September 11, 2023, Sandra Beatriz Bustamane Leiva and her sons, through counsel, submitted a letter titled "Petition for Rulemaking Concerning 'Circumstances in Which a Person Should Be Considered a Member of a "Particular Social Group," as That Term is Used in 8 U.S.C. § 1101(A)(42)(A)' (Ex[e]cutive Order No. 14010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021))." The correspondence requests that the Department take regulatory action so that their cases can be "reviewed under new regulations."

The Department notes that the Executive Order cited as the basis for the correspondence, Executive Order 14010, "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border," has been revoked by two Executive Orders signed by President Trump on January 20, 2025. *See* E.O. 14159, 90 FR 8443; E.O. 14148, 90 FR 8238. Accordingly, the Department will not be issuing rulemakings as directed by Executive Order 14010. Should the Department decide to engage in rulemaking on these topics in the future, the public is welcome to comment on any proposed rule the Department may publish, as appropriate.

F. Submission from the American Civil Liberties Union, et al., Dated April 15, 2024

The American Civil Liberties Union ("ACLU") and 52 other organizations filed a petition dated April 15, 2024, titled "Petition for Rulemaking to Promulgate Regulations Governing the Provision of Interpreters for Affirmative Asylum Interviews," in which they request that DOJ and DHS promulgate regulations governing the provision of interpreters for affirmative asylum interviews before U.S. Citizenship and Immigration Services ("USCIS").

The Department thereafter received letters supporting the petition from the New Mexico Immigrant Law Center, American Gateways, the American Translators Association, and the Florence Immigrant & Refugee Rights Project, among other organizations.

The Department is denying this petition because the Department does not have authority to amend regulations governing interviews before DHS's asylum officers. As the petition for rulemaking recognizes, authority over the adjudication of asylum applications is divided between DOJ and DHS. The Homeland Security Act of 2002 ("HSA"), Pub. L. 107-296, 116 Stat. 2135, as amended, transferred the authority over affirmative asylum applications from the Attorney General to the Secretary of Homeland Security. *See* HSA 451(b)(3), 6 U.S.C. 271(b)(3). Accordingly, DHS has authority over the consideration of affirmative asylum applications and the concomitant procedures for such matters pending at USCIS. *See* INA 103(a), 208(b), 8 U.S.C. 1103(a), 1158(b). The petition for rulemaking seeks an amendment to 8 CFR 208.9(g)(1), a DHS regulatory provision located in chapter 1 of title 8 of the Code of Federal Regulations. That provision governs interpreters in affirmative asylum interviews before USCIS and outlines the procedures applicable before USCIS in the affirmative asylum context—matters that are within the exclusive purview of DHS. Accordingly, the Department declines to initiate the rulemaking requested by the petition to amend the applicable DHS regulation.

G. Submission from Amica Center for Immigrant Rights Dated July 12, 2024

In a petition for rulemaking dated July 12, 2024, the Amica Center for Immigrant Rights, on behalf of itself and 28 other organizations, urged DOJ and DHS to adopt regulations allowing for Immigration Judge review of supervision conditions for aliens enrolled in the Alternatives to Detention ("ATD") programs overseen by DHS. The organizations' stated concerns were based on the expanded use of ATD programs, the lack of meaningful review of ATD conditions for specific aliens, and the alleged harms caused by the use of such ATD programs.

For the same reasons described in Section II.C of this Notice, the Department denies the petition. Specifically, since the petition was submitted, President Trump issued an Executive

Order entitled "Securing Our Borders," which establishes that it is the policy of the United States "to take all appropriate action to secure the borders of our Nation" by "[d]etaining, to the maximum extent authorized by law, aliens apprehended on suspicion of violating Federal or State law, until such time as they are removed from the United States." E.O. 14165, 90 FR 8467. The Department does not believe that the requested actions comport with this directive. As such, the Department denies the petition for rulemaking. Should the Department decide to engage in rulemaking on these topics in the future, the public is welcome to comment on any proposed rule the Department may publish, as appropriate.

H. Submission from the American Bar Association Dated December 12, 2024

On December 12, 2024, the American Bar Association ("ABA") through its President, William R. Bay, submitted correspondence recommending that DOJ and DHS expedite Federal regulations that enhance protections for individuals seeking asylum due to "gender-based violence." Specifically, the ABA recommended that DOJ and DHS: (1) amend procedural standards regarding credibility assessments and interpretations of the nexus prong and the particular social group ground for asylum and withholding of removal; (2) develop and implement trauma-informed procedures, training, and safeguards for all interviews, hearings, and adjudications of "gender-based" claims for protection; and (3) implement procedural safeguards to minimize the risk of re-traumatization during interviews and hearings.

The Department believes that the Attorney General's recent decision in *Matter of S-S-F-M-*, 29 I&N Dec. 207, provides sufficient clarity regarding particular social group and nexus standards. Moreover, procedural standards regarding credibility assessments and interpretations of the nexus prong are sufficiently defined and explained in the regulations and case law. *See* INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i) (establishing that the protected ground must be "at least one central reason for persecuting the applicant"); *id.* 1158(b)(1)(B)(iii) (establishing the factors required for a credibility determination); *Matter of S-S-F-M-*, 29 I&N Dec. at 209–210. Finally, Immigration Judges receive robust training, and training requirements do not need

to be addressed through regulation. *See, e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). Accordingly, the ABA's request is denied.

III. Submissions Relating to Other Subjects

A. Submission from the American Clinical Laboratory Association Dated September 30, 2024

The American Clinical Laboratory Association ("ACLA") submitted a petition dated September 30, 2024, pertaining to the Eliminating Kickbacks in Recovery Act of 2018 ("EKRA"), 18 U.S.C. 220. EKRA penalizes anyone who "pays or offers any remuneration (including any kickback, bribe, or rebate) . . . to induce" a referral of a patient to a lab, as well as anyone who solicits such remuneration. 18 U.S.C. 220(a)(1)–(2). EKRA was enacted after the Department of Health and Human Services noted that abusive patient-brokering practices affected private health insurance plans and that there was a gap in enforcement because the Anti-Kickback Statute prohibited kickbacks impacting only public payors and did not apply to privately insured patients. Elayne J. Heisler & Jonathan H. Duff, Cong. Research Serv., R45423, *Public Health and Other Related Provisions in P.L 115-271, the SUPPORT for Patients and Communities Act* at 60–61 (updated Dec. 3, 2018).

ACLA's petition requests that the Attorney General issue rules to permit a laboratory or any other employer to provide remuneration, in any manner (including variable compensation), to an employed sales representative provided that the employee does not knowingly and willfully provide materially false or misleading information to healthcare providers or patients. This appears to circumscribe the scope of the statute to apply only in situations involving fraud, which is already prohibited under other statutes. In addition, it would contradict existing legal authority that recognizes that sales representatives providing misleading information "is not a necessary set of circumstances" for violating EKRA, although "it is sufficient." *United States v. Schena*, 142 F.4th 1217, 1226 (9th Cir. 2025). It also misunderstands the legislation's core purpose:

preventing financial incentives that could compromise patient care. Even in the absence of fraud, such arrangements are harmful because they deprive patients of choice and lead to unfair competition, overutilization of services, unnecessary testing, and increased health care costs. *See Schena*, 142 F.4th at 1224–25 (kickback payments to physicians that induce referrals are illegal under EKRA); *see also United States v. Miles*, 360 F.3d 472, 481 (5th Cir. 2004) (discussing an Anti-Kickback Statute case in which a sale representative's "judgment was shown to have been improperly influenced by the payments" without any fraudulent misrepresentations); *HHS-Office of Inspector Gen. Advisory Opinion No. 98-10* (Aug. 31, 1998) (Anti-Kickback Statute Advisory Opinion), https://oig.hhs.gov/documents/advisory-opinions/385/AO-98-10.pdf (certain marketing arrangements that include compensation based on a percentage of sales "appear to be associated with an increased potential for program abuse, particularly overutilization and excessive program costs").

While framed as a narrow exception, allowing variable compensation to sales representatives could effectively reintroduce the very kickback structures EKRA was designed to eliminate. Adopting a requirement that employees not knowingly and willfully provide false information would set a high bar for enforcement that could hinder efforts to prosecute cases where laboratories intentionally implement commission-based payment systems to directly reward referrals. The existing EKRA framework already permits reasonable employee compensation structures unrelated to referral volume, while restricting arrangements that create direct financial incentives for increasing referrals.

Finally, any claimed regulatory burden imposed by EKRA on the laboratory industry is substantially mitigated by the law's age and established status. EKRA was signed into law by President Trump on October 24, 2018, and it has now been in effect for almost eight years, providing ample time for laboratories to adapt their business models and compliance programs to align with its requirements. The laboratory industry also has operated successfully under similar Anti-Kickback Statute restrictions for variable compensation in connection with Medicare and

Medicaid for decades, with clear understanding of compliant compensation structures. *See United States ex rel. Lutz v. Mallory*, 988 F.3d 730, 738 (4th Cir. 2021) ("[F]ederal appellate courts have frequently, and indeed invariably, upheld Anti-Kickback Statute violations based on commission payments to third parties."); *United States v. St. Junius*, 739 F.3d 193, 210 (5th Cir. 2013) ("The Anti-Kickback Statute prohibits receiving commissions in return for referring a Medicare patient to a Medicare provider."). The Department has used its criminal enforcement power under EKRA judiciously and there are no allegations in the request for rulemaking that it has overreached. For these reasons, the Department denies ACLA's petition.

B. Submission from Howard S. Spokane Dated July 13, 2021

In July 2021, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") received a petition for rulemaking that suggested ATF create a new licensing requirement for people possessing "high-velocity" ammunition, which was developed for military use (the petitioner stated this was explained in *Wound Ballistics*, a 1940s publication) and causes much more severe injuries than conventional ammunition. The petitioner suggested that this licensing requirement include: (1) a law enforcement right to periodically inspect to ensure the ammunition is stored safely; and (2) a psychiatrist's certification that the applicant does not suffer from or have a history of mental illness.

ATF declines to pursue this rulemaking. The Gun Control Act of 1968, as amended, prohibits the manufacture, importation, and distribution of "armor piercing ammunition," 18 U.S.C. 922(a)(7)–(8), and also requires that individuals engaged in the business of importing or manufacturing ammunition be licensed under 18 U.S.C. 922(a)(1)(B). However, there is no statutory authority to regulate the sale or mere possession of standard ammunition. As a result, ATF cannot establish a licensing framework to possess high-velocity ammunition, as the petitioner requests. To the extent that the petitioner considers high-velocity ammunition to also be armor-piercing ammunition, ATF also cannot pursue the petitioner's request because determining whether ammunition is armor-piercing is a materials-based assessment under the

law and does not measure or test velocity. If a given high-velocity ammunition is determined to be armor-piercing due to its materials, it will already be regulated under ATF's current framework and additional regulation would be unnecessary. Moreover, even in cases of armor-piercing ammunition, ATF does not have statutory authority to license possession.

Dated: September 21, 2026

Todd Blanche,
Attorney General.

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