

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 208 and 235

[CIS No. 2692–21; DHS Docket No. USCIS–2021–0012]

RIN 1615–AC67

## DEPARTMENT OF JUSTICE

### Executive Office for Immigration Review

### 8 CFR Parts 1003, 1208, and 1235

[A.G. Order No. 5116–2021]

RIN 1125–AB20

### Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

**AGENCY:** Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice (“DOJ”) and the Department of Homeland Security (“DHS”) (collectively, “the Departments”) are proposing to amend the regulations governing the determination of certain protection claims raised by individuals subject to expedited removal and found to have a credible fear of persecution or torture. Under the proposed rule, such individuals could have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (“INA” or “the Act”) (“statutory withholding of removal”), or protection under the regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) initially adjudicated by an asylum officer within U.S. Citizenship and Immigration Services (“USCIS”). Such individuals who are granted relief by the asylum officer would be entitled to asylum, withholding of removal, or protection under CAT, as appropriate. Such individuals who are denied protection would be able to seek prompt, de novo review with an immigration judge (“IJ”) in the DOJ Executive Office for Immigration Review (“EOIR”), with appeal available to the Board of Immigration Appeals (“BIA”). These changes are intended to improve the Departments’ ability to

consider the asylum claims of individuals encountered at or near the border more promptly while ensuring fundamental fairness. In addition, among other changes to the asylum process, the Departments are proposing to return to the regulatory framework governing the credible fear screening process in place before various regulatory changes made from the end of 2018 through the end of 2020, so as to apply once more the longstanding “significant possibility” screening standard to all protection claims, but not to apply the mandatory bars to asylum and withholding of removal (with limited exception) at this initial screening stage.

**DATES: Submission of public comments:** Written comments and related material must be submitted on or October 19, 2021. The electronic Federal Docket Management System will accept comments prior to midnight Eastern standard time at the end of that day.

**ADDRESSES:** You may submit comments on the entirety of this rulemaking package, identified by DHS Docket No. USCIS–2021–0012, through the Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS, USCIS, DOJ, or EOIR officials, will not be considered comments on the proposed rule and may not receive a response from the Departments. Please note that the Departments cannot accept any comments that are hand-delivered or couriered. In addition, the Departments cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. The Departments also are not accepting mailed comments at this time. If you cannot submit your comment by using <https://www.regulations.gov>, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

#### FOR FURTHER INFORMATION CONTACT:

*For USCIS:* Andria Strano, Acting Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588–0009; telephone (240) 721–3000 (not a toll-free call).

*For EOIR:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041; telephone (703) 305–0289 (not a toll-free call).

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#### I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this rule by the deadline stated above. The Departments also invite comments that relate to the economic, environmental, or federalism effects that might result from this rule. All comments must be submitted in English or accompanied by an English translation. Comments that will provide the most assistance to the Departments in developing these changes will reference a specific portion of the rule; explain the reason for any

recommended change; and include data, information, or authority that support such recommended change. Comments submitted in a manner other than the one listed above, including emails or letters sent to departmental officials, will not be considered comments on the proposed rule and may not receive a response from the Departments.

**Instructions:** If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2021–0012 for this rulemaking. All submissions will be posted, without change, to the Federal eRulemaking Portal at <https://www.regulations.gov> and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to the Departments. The Departments may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at <https://www.regulations.gov>.

**Docket:** For access to the docket and to read background documents or comments received, go to <https://www.regulations.gov>, referencing DHS Docket No. USCIS–2021–0012. You also may sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

## II. Background

There is wide agreement that the system for dealing with asylum and related protection claims at the southwest border has long been “overwhelmed” and in desperate need of repair.<sup>1</sup> As the number of such claims

has skyrocketed over the years, the system has proven unable to keep pace, resulting in large backlogs and lengthy adjudication delays. A system that takes years to reach a result is simply not a functional one. It delays justice and certainty for those who need protection, and it encourages abuse by those who will not qualify for protection and smugglers who exploit the delay for profit. The aim of this rule is to begin replacing the current system, within the confines of the law, with a better and more efficient one that will adjudicate protection claims fairly and expeditiously. The proposed rule would accomplish this goal by transferring the initial responsibility for adjudicating asylum and related protection claims<sup>2</sup> made by noncitizens encountered at or near the border from IJs in EOIR to asylum officers in USCIS. The proposed rule would also provide for the prompt filing of asylum applications by such individuals, while also providing ample procedural safeguards designed to ensure due process, respect human dignity, and promote equity.

The current U.S. protection system at the border was initially designed in the mid-1990s.<sup>3</sup> Congress established an expedited removal process for noncitizens who present themselves at a port of entry for inspection or are encountered at or near the border and who are found to be inadmissible because they lack valid entry documents or because they sought to enter the United States by fraud or misrepresentation. INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); INA 212(a)(6)(C), (7), 8 U.S.C. 1182(a)(6)(C), (7). Congress authorized DHS to extend the expedited removal process to certain noncitizens apprehended shortly after crossing the border unlawfully, and DHS has exercised that authority. INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii).<sup>4</sup>

Markowitz, *Recommendations for DOJ and EOIR Leadership To Systematically Remove Non-Priority Cases from the Immigration Court Backlog* 1, Am. Immigr. Law. Ass’n (Feb. 11, 2021), <https://www.aiala.org/infonet/remove-non-priority-cases> (“The bottleneck for the entire removal system caused by the court backlog, if not addressed quickly, presents a serious obstacle to the Biden administration’s goal of ensuring the fair and efficient processing of all removal cases.”).

<sup>2</sup> The generic term “protection claims” is used here to refer to all three forms of protection addressed in this proposed rule (asylum, statutory withholding of removal, and protection from removal under the regulations implementing U.S. obligations under Article 3 of the CAT).

<sup>3</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, div. C, 110 Stat. 3009, 3009–546 (1996) (“IIRIRA”).

<sup>4</sup> The former Immigration and Naturalization Service (“INS”) initially implemented expedited removal only against noncitizens arriving at ports of entry. In 2002, DHS expanded the application of

A DHS immigration officer who encounters a noncitizen subject to expedited removal may order the noncitizen to be “removed from the United States without further hearing or review” unless the noncitizen indicates either “an intention to apply for asylum” or “a fear of persecution.” INA 235 (b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i). If the noncitizen indicates such an intention or fear, the immigration officer must refer the noncitizen for an interview by an asylum officer to determine whether the noncitizen has a “credible fear of persecution.” INA 235(b)(1)(A)(ii), (B)(ii), 8 U.S.C. 1225(b)(1)(A)(ii), (B)(ii). A credible fear is defined by statute as a “significant possibility” that the noncitizen could establish eligibility for asylum. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Before various regulatory changes published between 2018 and 2020, explained in greater detail below, the “significant possibility” standard also was applied to screening for eligibility for statutory withholding of removal and CAT protection.<sup>5</sup> Because those recent regulatory changes have been vacated or enjoined, the “significant possibility” standard presently applies to all three forms of protection claims.<sup>6</sup> If the asylum officer determines that the noncitizen lacks a credible fear, that determination is subject to expedited review by an IJ, but not by the BIA or an Article III court. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); see INA

expedited removal to noncitizens who (1) entered the United States by sea, either by boat or other means, (2) were not admitted or paroled into the United States, and (3) have not been continuously present in the United States for at least 2 years. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 FR 68924 (Nov. 13, 2002). In 2004, DHS published an immediately effective notice in the **Federal Register** to expand the application of expedited removal to noncitizens encountered within 100 miles of the border and to noncitizens who entered the United States without inspection fewer than 14 days before they were encountered. Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004). In 2019, DHS expanded the process to the full extent authorized by statute to reach noncitizens who entered the country without inspection less than 2 years before being apprehended and who were encountered anywhere in the United States. Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019). President Biden has directed DHS to consider whether to modify, revoke, or rescind that 2019 expansion. E.O. 14010, *Ensuring a Timely and Fair Expedited Removal Process*, 86 FR 8267, 8270–71 (Feb. 2, 2021).

<sup>5</sup> See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994).

<sup>6</sup> See *infra* note 24.

<sup>1</sup> See DHS, Homeland Security Advisory Council, *Final Emergency Interim Report: CBP Families and Children Care Panel*, at 1 (Apr. 16, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0416\\_hsac-emergency-interim-report.pdf](https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf); Randy Capps et al., *From Control to Crisis: Changing Trends and Policies Reshaping U.S.-Mexico Border Enforcement* 7, Migration Policy Institute (MPI) (Aug. 2019), <https://www.migrationpolicy.org/sites/default/files/publications/BorderSecurity-ControltoCrisis-Report-Final.pdf> (“as arrivals have surged to levels unseen in years, border enforcement and asylum systems have been overwhelmed”); Lora Ries, *Securing the Border and Fixing Our Broken Immigration System*, Heritage Foundation (Sept. 21, 2020), <https://www.heritage.org/immigration/commentary/securing-the-border-and-fixing-our-broken-immigration-system> (“our immigration court system is so overwhelmed, [asylum] cases of merit are combined with meritless cases, each of which can take years to resolve”); Greg Chen & Peter

242(a)(2)(A)(iii), (e)(2), 8 U.S.C. 1252(a)(2)(A)(iii), (e)(2).

Noncitizens placed into expedited removal and determined to have a credible fear of persecution or torture by an asylum officer or an IJ must be referred for “further consideration of the application for asylum.” INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). The INA is silent as to the procedures by which this “further consideration” should occur. Under regulations in place before December 2020,<sup>7</sup> such individuals are currently referred to IJs for removal proceedings under section 240 of the INA, 8 U.S.C. 1229a, (“section 240 removal proceedings”) and its implementing regulations, 8 CFR 208.30(f), 235.6(a)(1)(ii)–(iii), 1208.30(g)(2)(iv)(B). In those proceedings, IJs conduct adversarial hearings to determine removability and adjudicate applications for asylum, withholding or deferral of removal, and any other forms of relief or protection.

The process put into place in 1997, under which noncitizens who establish credible fear generally must have their asylum claims decided through an adversarial removal proceeding before an IJ, is no longer fit for its intended purpose. It does not adequately address the need to adjudicate in a timely manner the rapidly increasing number of asylum claims raised by individuals arriving in the United States.

This system was designed at a time when the vast majority of southwest border encounters involved single adults from Mexico and relatively few asylum claims were filed. This system has proven unable to manage the increasing numbers and changing demographics of noncitizens<sup>8</sup> with asylum claims arriving in recent years at the southwest border. Since the mid-2010s, the demographic characteristics of noncitizens encountered at the border with Mexico have been utterly transformed from being dominated by Mexican nationals to consisting mainly of nationals from the Northern Triangle countries of Central America (El Salvador, Guatemala, and Honduras) along with other Western Hemisphere states; from consisting almost entirely of

adults traveling without children to including large numbers of families and unaccompanied children; and from including very few asylum seekers to asylum seekers making up a large share of southwest border encounters.<sup>9</sup> As a result, even as overall encounters at the southwest border have been lower in recent years than in the 1990s and 2000s, the demands on the U.S. asylum system have increased sharply.

Recent demographic changes in southwest border encounters have been dramatic. As recently as 2009, Mexican nationals accounted for 92 percent of southwest border apprehensions.<sup>10</sup> Their share fell below 50 percent for the first time ever in 2014, remained below 50 percent between 2016 and 2019, and fell to an all-time low of 20 percent in 2019, the last full year before the COVID–19 pandemic disrupted ongoing migration trends.<sup>11</sup> Single adults accounted for about 89 percent of southwest border encounters in 2013—a number that was likely near an all-time low at the time—and fell to just 38 percent in 2019.<sup>12</sup> Over much of this period, U.S. Border Patrol (“USBP”) agents have apprehended an increasing number of families and children from Northern Triangle countries. Individuals from Northern Triangle countries accounted for 71 percent of USBP apprehensions in 2019, a record high, and families from all countries accounted for 56 percent of the total, also an all-time high.<sup>13</sup>

<sup>9</sup> Office of Immigration Statistics, *Fiscal Year 2020 Enforcement Lifecycle Report 1*, Dep’t of Homeland Security (Dec. 2020) (“OIS FY 2020 Lifecycle Report”), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special\\_Reports/Enforcement\\_Lifecycle/2020\\_enforcement\\_lifecycle\\_report.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special_Reports/Enforcement_Lifecycle/2020_enforcement_lifecycle_report.pdf).

<sup>10</sup> Dep’t of Homeland Security, *Fiscal Year 2019 Border Security Metrics Report 52* (Aug. 5, 2020), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/BSMR/ndaa\\_border\\_security\\_metrics\\_report\\_fy\\_2019\\_0.pdf.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/BSMR/ndaa_border_security_metrics_report_fy_2019_0.pdf.pdf).

<sup>11</sup> U.S. Customs and Border Protection, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Aug. 4, 2021); see also OIS FY 2020 Lifecycle Report, *supra* note 9, at 7. Mexico’s share of southwest border encounters returned to 65 percent during the first year of the COVID–19 pandemic, but preliminary data indicate that Mexican nationals accounted for fewer than half of southwest border encounters during the first eight months of Fiscal Year 2021 and only about one-third of unique individuals when controlling for higher than usual repeat encounters due to border COVID–19 protocols.

<sup>12</sup> *Id.* The phenomenon of families being encountered at the border was sufficiently rare that U.S. Border Patrol only began recording data on family unit apprehensions in 2013, and the Office of Field Operations did so beginning in 2016.

<sup>13</sup> Mike Guo, *Immigration Enforcement Actions: 2019* at 4, Dep’t of Homeland Security (Sept. 2020), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement\\_actions\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf).

These demographic changes have coincided with—and contributed to the reversal of—what had been a long-term trend in declining border encounters. Moreover, as the population of individuals encountered at or near the southwest border has changed, the number of people making fear claims after being placed in expedited removal has increased sharply. Southwest border apprehensions by the U.S. Border Patrol fell from over 1.6 million in 2000 to under 330,000 in 2011 before rising back to over 850,000 in 2019.<sup>14</sup> During the same period, however, credible fear referrals to USCIS initially decreased from just over 10,000 in 2000, to just under 5,000 in 2008, before increasing back over 11,000 in 2011, to over 105,000 in 2019.<sup>15</sup> Thus, even as overall border encounters fell 48 percent between 2000 and 2019, the number of individuals making fear claims increased over 900 percent. These changing demographics have had an equally dramatic impact on the immigration courts responsible for determining removability. EOIR now faces a pending caseload of approximately 1.3 million cases,<sup>16</sup> with approximately 610,000 pending asylum applications.<sup>17</sup> While the corps of IJs has more than doubled since 2014, going from 249 at the end of FY 2014 to 539 as of April 2021,<sup>18</sup> the number of pending cases has more than tripled in that same period, growing by nearly 500,000 cases since the end of Fiscal Year (“FY”) 2018.<sup>19</sup> This surge in

<sup>14</sup> United States Border Patrol, *Southwest Border Sectors, Total Illegal Alien Apprehensions by Fiscal Year*, [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Apprehensions%20%28FY%201960%20-%20FY%202019%29\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Apprehensions%20%28FY%201960%20-%20FY%202019%29_0.pdf) (last visited Aug. 4, 2021).

<sup>15</sup> Bruno, Andorra, *Immigration: U.S. Asylum Policy* (CRS Report No. R45539), at 37 (Feb. 19, 2019) (data through 2018), <https://crsreports.congress.gov/product/pdf/R/R45539>; see also U.S. Citizenship and Immigration Services, *Creditable Fear Workload Report Summary—FY2019 Total Caseload* (2019 data), [https://www.uscis.gov/sites/default/files/document/data/Creditable\\_Fear\\_Stats\\_FY19.pdf](https://www.uscis.gov/sites/default/files/document/data/Creditable_Fear_Stats_FY19.pdf) (last visited Aug. 4, 2021).

<sup>16</sup> EOIR, *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1242166/download>.

<sup>17</sup> EOIR, *Executive Office for Immigration Review Adjudication Statistics: Total Asylum Applications* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1106366/download>.

<sup>18</sup> EOIR, *Executive Office for Immigration Review Adjudication Statistics: Immigration Judge (IJ) Hiring* (Apr. 2021), <https://www.justice.gov/eoir/page/file/1242156/download>.

<sup>19</sup> EOIR, *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1242166/download>.

<sup>7</sup> See *infra* note 24 discussing recent regulations and their current status. The final rule entitled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 FR 80274, 80276 (Dec. 11, 2020) (“Global Asylum” rule), revised the process used to hear the asylum claim, placing noncitizens into asylum/withholding-only proceedings instead of removal proceedings under section 240 of the INA.

<sup>8</sup> For purposes of this discussion, the Departments use the term “noncitizen” synonymously with the term “alien” in the INA. See INA 101(a)(3), 8 U.S.C. 1101(a)(3).

pending and new cases, along with the temporary, partial closure of the immigration courts to in-person hearings in 2020 and 2021 because of the COVID-19 pandemic, has resulted in significantly increased adjudication times. While the median completion time for cases involving individuals who are detained through the 2nd quarter of FY 2021 was 43 days, for non-detained individuals in removal proceedings, including arriving asylum seekers initially screened into expedited removal who establish a credible fear of persecution, the recent average case completion time in immigration court has been 3.75 years.<sup>20</sup> Most asylum seekers arriving at the southwest border in recent years must therefore often wait several years to have their claims adjudicated in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. Absent changes to the current system, the continuing arrival of large numbers of noncitizens at the southwest border with protection claims is likely to lengthen adjudication times further.

In 2020 and 2021, the situation at the southwest border was complicated further by the COVID-19 pandemic. Pursuant to sections 362 and 365 of the Public Health Service Act, Public Law 78-410, 58 Stat. 682 (1944), 42 U.S.C. 265 and 268 (“Title 42”), the Centers for Disease Control and Prevention (“CDC”) determined in March 2020 that it was necessary to prohibit the introduction of certain persons from Mexico and Canada to protect the public health by preventing the further introduction of the virus that causes COVID-19 into the United States.<sup>21</sup> To mitigate the risks presented by COVID-19, the CDC Order requires returning all covered noncitizens as rapidly as possible—and with the least amount of time spent in congregate settings as is feasible—to the country from which they entered the United States, to their country of origin, or to another location as practicable and appropriate.<sup>22</sup> Covered noncitizens are those persons traveling from Canada or Mexico (regardless of their country of origin) who otherwise would be introduced into a congregate setting in

<sup>20</sup> According to a review of data collected as part of the FY 2020 Lifecycle Report by DHS OIS, 39% of cases of noncitizens encountered at the southwest border in 2013 through 2019 who made fear claims remain in EOIR proceedings as of this date. As those cases are eventually completed, the median and average completion time for cases could be further impacted.

<sup>21</sup> See *Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 85 FR 65806, 65807 (Oct. 16, 2020) (“CDC Order” or “Title 42 order”) (extending March 20, 2020 order, 85 FR 16559).

<sup>22</sup> *Id.* at 65812.

a land (and, as amended, coastal) port of entry or USBP station at or near the U.S. borders with Canada and Mexico. The CDC Order does not apply to, among others, U.S. citizens, lawful permanent residents, and those who arrive at a port of entry with valid travel documents.<sup>23</sup>

Border encounters in FY 2021 remain high. To date, the data does suggest that single adults make up a greater percentage of apprehensions than in FY 2019 and, controlling for repeat encounters, the actual number of unique encounters (the number of unique individuals encountered irrespective of potential repeated attempts to enter) has been lower to date in FY 2021 than in FY 2019 (given the continuing use of Title 42 authority to expel many adults and families soon after they are apprehended). But *total* encounters at or near the southwest border through April for FY 2021 has surpassed the FY 2019 highs over the same period. The high number of southwest border apprehensions is presenting serious challenges for an already overwhelmed U.S. asylum system at the border.

#### *A. Improving the Expedited Removal Process*

The principal purpose of this proposed rule is to simultaneously increase both the efficiency and the procedural fairness of the expedited removal process for individuals who have been found to have a credible fear of persecution or torture. When individuals who have been placed into the expedited removal process make a fear claim, they are referred to a USCIS asylum officer, who interviews them to determine whether they have a credible fear of persecution or torture. See INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). Under current procedures, individuals who receive a positive credible fear determination are referred to an immigration court for removal proceedings, in the course of which they have the opportunity to apply for asylum and other forms of relief or protection from removal. See 8 CFR 208.30(f) (2018) (providing that if a noncitizen, other than a stowaway, “is found to have a credible fear of persecution or torture, the asylum officer will so inform the [noncitizen] and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act”). As explained above, it may take years before the individual’s protection claim is first adjudicated by an IJ. The ability to stay in the United

<sup>23</sup> *Id.* at 65808.

States for years waiting for an initial decision may motivate unauthorized border crossings by individuals who otherwise would not have sought to enter the United States and who lack a meritorious protection claim. This delay creates additional stress for those ultimately determined to merit asylum and other forms of humanitarian protection, as they are left in limbo as to whether they might still be removed and unable to petition for qualified family members, some of whom may still be at risk of harm.

To respond to this problem, this rule proposes at 8 CFR 208.2(a)(1)(ii) and 208.9 to provide USCIS asylum officers the authority to adjudicate in the first instance the protection claims of individuals who receive a positive credible fear determination, and that they do so in a nonadversarial hearing. The rule also proposes at 8 CFR 208.3(a)(2) that the record of a credible fear interview may serve as an asylum application for those noncitizens whose cases are retained by or referred to USCIS for adjudication after a positive credible fear determination, thereby helping to ensure that asylum seekers meet the statutory requirement to apply for asylum within one year of arrival. These steps are meant to ensure greater efficiency in the system, which was initially designed for protection claims to be the exception, not the rule, among those encountered at or near the border. The proposed rule will also stem the rapid growth of the EOIR caseload, described in greater detail above.

As noted earlier, the current system for processing protection claims made by individuals encountered at or near the border and who establish credible fear was originally adopted in 1997. Within the last 3 years, however, several attempts have been made to issue new rules to change the credible fear screening process. Many of these attempts have been vacated or enjoined, and the implementation of others has been delayed pending consideration of whether they should be revised or rescinded.<sup>24</sup>

<sup>24</sup> On November 9, 2018, the Departments issued an interim final rule (“IFR”) that barred noncitizens who entered the United States in contravention of a covered Presidential proclamation or order from eligibility for asylum, required that they receive a negative credible fear finding on their asylum claims, and required that their statutory withholding and CAT claims be considered under the higher reasonable fear screening standard. See *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 FR 55934, 55939, 55943 (Nov. 9, 2018). A month later, the U.S. District Court for the Northern District of California preliminarily enjoined the Departments from implementing the rule, *E. Bay Sanctuary Covenant v. Trump*, 354 F.

This proposed rule offers another approach. It would establish a streamlined and simplified adjudication process for individuals encountered at or near the border, placed into expedited removal, and determined to have a credible fear of persecution or torture, with the aim of deciding protection claims in a more timely fashion while ensuring procedural protections against erroneous denials of relief.<sup>25</sup> The proposed rule would

Supp. 3d 1094, 1121 (N.D. Cal. 2018), and the Ninth Circuit affirmed, *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021).

On July 16, 2019, the Departments published another IFR, entitled Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019), which generally barred noncitizens from asylum eligibility if they entered or attempted to enter the United States across the southwest border after failing to apply for protection from persecution or torture while in any one of the third countries through which they transited, required a negative credible fear finding for such noncitizens' asylum claims, and required their withholding and CAT claims be considered under the higher reasonable fear screening standard. *Id.* at 33837–38. The U.S. District Court for the District of Columbia vacated that IFR after concluding that the Departments violated the Administrative Procedure Act by forgoing notice-and-comment rulemaking. *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 45–57 (D.D.C. 2020). The Departments issued a final rule on December 17, 2020, entitled Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020), which again attempted to bar from asylum eligibility those noncitizens who transited a third country before arriving at the border. The U.S. District Court for the Northern District of California subsequently issued a preliminary injunction against implementation of that rule, which remains in place as of this writing. *E. Bay Sanctuary Covenant v. Barr*, No. 19–cv–04073–JST, 2021 WL 607869, at \*5 (N.D. Cal. Feb. 16, 2021).

Around the same time, the Departments also issued the final rule entitled Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020) (“Global Asylum” rule). That rule revised the credible fear screening process to require that all the mandatory bars to asylum and withholding be considered during the credible fear screening process and established a new screening standard for withholding of removal and CAT protection. On January 8, 2021, the U.S. District Court for the Northern District of California preliminarily enjoined the Departments from implementing the rule. *Pangea Legal Servs. v. DHS*, No. 20–cv–09253 JD, 2021 WL 75756, at \*7 (N.D. Cal. Jan. 8, 2021). That preliminary injunction remains in place.

Finally, the Departments also published a final rule entitled Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020) (“Security Bars” rule), which added an additional bar to asylum and withholding that would be applied to the credible fear screening process. The Departments have delayed the rule's effective date to December 31, 2021, *see* Security Bars and Processing; Delay of Effective Date, 86 FR 15069 (Mar. 22, 2021), as the Departments consider possible action to rescind or revise the rule.

<sup>25</sup> Section 4(b)(i) of E.O. 14010 instructed the Secretary of Homeland Security to review the procedures for individuals placed into expedited removal at or near the border and issue a report with recommendations “for creating a more efficient and orderly process that facilitates timely adjudications [of asylum/protection claims] and adherence to standards of fairness and due process.” 86 FR at 8270.

authorize USCIS asylum officers to adjudicate in the first instance the protection claims of individuals who receive positive credible fear determinations under the expedited removal framework in section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1). The procedures that USCIS asylum officers would use to adjudicate these claims would be nonadversarial, and the decisions would be made within timeframes more in line with those established by Congress in section 208(d)(5) of the INA.<sup>26</sup>

To ensure effective implementation of the expedited removal system, this rule also proposes to revise the parole considerations prior to a positive credible fear determination in 8 CFR 235.3. The current rule limits parole consideration before the credible fear determination to situations in which parole “is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.” 8 CFR 235.3(b)(2)(iii), (b)(4)(ii). Under this proposed rule, DHS also would be able to consider whether parole is required “because detention is unavailable or impracticable.” The current narrower parole standards effectively prevent DHS from placing into expedited removal many noncitizens who would otherwise be eligible for this process, especially families, given the requirements of the Flores Settlement Agreement (“FSA”).<sup>27</sup> These restrictions

<sup>26</sup> *See* INA 208(d)(5), 8 U.S.C. 1158(d)(5) (specifying that an initial hearing on an asylum application should generally occur within 45 days after the filing of the application and that an initial administrative decision should generally be made within 180 days).

<sup>27</sup> In 1985, a class-action suit challenged the policies of the former INS relating to the detention, processing, and release of alien children; the case eventually reached the U.S. Supreme Court. The Court upheld the constitutionality of the challenged INS regulations on their face and remanded the case for further proceedings consistent with its opinion. *See Reno v. Flores*, 507 U.S. 292, 315 (1993). In January 1997, the parties reached a comprehensive settlement agreement, referred to as the Flores Settlement Agreement. *See Flores v. Rosen*, 984 F.3d 720, 727 (9th Cir. 2020) (describing litigation history). The FSA was to terminate 5 years after the date of final court approval; however, the termination provisions were modified in 2001, such that the FSA does not terminate until 45 days after publication of regulations implementing the agreement. *Id.* In August 2019, DHS and HHS jointly issued a final rule entitled Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392 (Aug. 23, 2019). In September 2019, about a month before the Final Rule was to take effect, a Federal district court granted the plaintiff class's motion to enforce the FSA and denied the government's motion to terminate it, because the final rule was inconsistent with the FSA and thus did not “implement[ ]” it as required by the FSA's termination provisions. *See Flores v. Barr*, 407 F. Supp. 3d 909, 914 (C.D. Cal. 2019). The Ninth Circuit affirmed in part, and the provisions of the FSA that are relevant here thus generally remain in effect. *See Flores v. Rosen*, 984

on DHS's ability to detain families, coupled with capacity constraints imposed by the COVID–19 pandemic, have effectively prevented the Government from using the third option to detain families subject to expedited removal for more than a very limited number of families and for more than a very limited period of time. This proposed rule would, when finalized, eliminate that barrier to placing families into expedited removal. The proposed parole provision would allow more noncitizens arriving at the U.S. border without proper documents for entry into the country to be placed into expedited removal and allow for them to have their fear claims heard and considered outside the detention setting when space is unavailable or impracticable to use.

This proposed rule would apply prospectively and only to adults and families who are placed into expedited removal.<sup>28</sup> The proposed rule would not apply to unaccompanied children, *see* 6 U.S.C. 279(g)(2) (defining “unaccompanied alien child”), as they are statutorily exempt from expedited removal proceedings. 8 U.S.C. 1232(a)(5)(D)(i) (providing that “any unaccompanied alien child” “shall be— (i) placed in removal proceedings under section 240” of the INA).<sup>29</sup> The

F.3d at 737, 744. Under the requirements of the FSA, when DHS apprehends an alien parent or legal guardian with their child(ren) either illegally entering the United States between the ports of entry or found inadmissible at a port of entry, it has, following initiation of removal proceedings, three primary options for purposes of immigration custody: (1) Parole all family members into the United States; (2) detain the parent(s) or legal guardian(s) and either release the juvenile to another parent or legal guardian or transfer them to HHS to be treated as an unaccompanied child; or (3) detain family members together by placing them at an appropriate DHS Family Residential Center (“FRC”) during their immigration proceedings. *See, e.g., id.* at 737–38 (discussing “transfer of unaccompanied minors from DHS to HHS,” “DHS custodial care immediately following apprehension,” and parole).

<sup>28</sup> According to EOIR data, as of April 2021, over 220,000 of EOIR's pending removal cases originated with a credible fear claim. EOIR, *Executive Office for Immigration Review Adjudication Statistics: Pending I–862 Proceedings Originating With a Credible Fear Claim and All Pending I–862s* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1112996/download>. These cases are in various stages of the removal process, and hearings may have already been scheduled or held. Moving these cases to a new process at this stage would risk further delaying adjudication of their protection claims and create an immediate backlog of tens of thousands of cases for USCIS as it prepares to implement this proposed process for future border arrivals.

<sup>29</sup> The statute provides that any unaccompanied child whom DHS seeks to remove shall be placed in removal proceedings under section 240 of the INA. In lieu of being placed in removal proceedings, unaccompanied children from contiguous countries who meet special criteria may be permitted to withdraw their applications for

proposed rule also would not apply to individuals already residing in the United States who are not designated by the Secretary as subject to expedited removal.<sup>30</sup> Such individuals would continue to have their asylum claims heard in removal proceedings under section 240 of the INA, or through an affirmative asylum application under section 208 of the INA if they have not yet been placed into removal proceedings. The proposed rule also would not apply to (1) stowaways or (2) noncitizens who are present in or arriving in the Commonwealth of the Northern Mariana Islands who are determined to have a credible fear. Such individuals would continue to be referred to asylum/withholding-only proceedings before an IJ under 8 CFR 208.2(c).

Finally, the Departments clarify that nothing in this proposed rule, if finalized, is intended to displace DHS's (and, in particular, USCIS's) prosecutorial discretion to place a covered noncitizen in, or to withdraw a covered noncitizen from, expedited removal proceedings and issue a Notice to Appear ("NTA") to place the noncitizen in section 240 removal proceedings at any time after they are referred to USCIS for a credible fear determination. See *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011).

The credible fear screening regulations proposed under this rule generally would recodify the current screening process, returning the regulatory language, in large part, to what was in place prior to the various regulatory changes made from the end of 2018 through the end of 2020. Noncitizens encountered at or near the border or ports of entry can be placed into expedited removal and provided a credible fear screening if they indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home countries. See INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); 8 CFR 235.3(b)(4), 1235.3(b)(4)(i). Individuals claiming a fear or an intention to apply for protection are referred to USCIS asylum officers for an interview and consideration of their fear claims under the credible fear screening standard, which applies to all relevant protection claims. If an asylum officer determines that an individual does not have a

credible fear of persecution or torture, the individual can request that an IJ review the asylum officer's negative credible fear determination. See INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g). If the IJ concurs with the asylum officer's negative credible fear determination, no administrative appeal is available, 8 CFR 1208.30(g)(2)(iv)(A), and DHS can execute the individual's expedited removal order, promptly removing the individual from the United States.

If the noncitizen is found to have a credible fear, however, the proposed rule would change the procedures in place prior to this rulemaking that are described above. Under this proposed rule, rather than referring the individual to an IJ for an adversarial removal proceeding under section 240 of the INA, or, as provided for in a presently-enjoined regulation, an asylum/withholding-only hearing, the individual's asylum application instead could be retained by USCIS for a nonadversarial hearing before an asylum officer. See 8 CFR 208.30(f) (proposed). Similarly, if, upon review of an asylum officer's negative credible fear determination, an IJ finds that an individual does have a credible fear of persecution or torture, the individual also could be referred back to an asylum officer for proceedings on the individual's protection claims. *Id.* §§ 1003.42, 1208.30(g). The Departments plan to implement these procedures by having asylum hearings conducted for those individuals who are referred to or retained by USCIS after the positive credible fear determination would be adjudicated in a separate queue, apart from adjudications made with respect to affirmative asylum applications filed directly with USCIS. The individual would have the right to representation during this proceeding. *Id.* § 208.9(b). If, at the conclusion of an asylum hearing described in this proposed rule, the asylum officer grants asylum, the individual would be allowed to remain in the United States indefinitely with the status of "asylee" and eventually may apply for lawful permanent residence. *Id.*; see also INA 208(c)(1), 209(b), 8 U.S.C. 1158(c)(1), 1159(b). If the asylum officer denies asylum and orders the individual removed based on the immigration officer's initial inadmissibility determination under section 235(b)(1)(A)(i) of the INA, 8 U.S.C. 1225(b)(1)(A)(i), the asylum officer will also issue a decision regarding withholding or deferral of removal. 8 CFR 208.14(c)(5) (proposed). An individual who is denied asylum

may request review by an IJ of the asylum decision, as well as any denial of withholding or deferral of removal. *Id.* §§ 208.14(c)(5)(i), 1003.48(a).

In cases in which a noncitizen seeks review of an asylum officer's adverse decision, the Departments propose that the IJ would make an independent de novo determination based on the record of the hearing before the Asylum Office plus any additional, non-duplicative evidence presented to the court that is necessary to reach a reasoned decision. *Id.* § 1003.48(e) (proposed). The individual would also have the right, consistent with the INA, to representation during this review. See 8 CFR 1003.12 (proposed) (providing that the rules in this subpart apply to the proposed proceedings under 8 CFR 1003.48); 8 CFR 1003.16(b) (providing that a noncitizen "may be represented in proceedings before an Immigration Judge by an attorney or other representative"). The IJ also would be authorized to vacate proceedings when the judge finds the individual is prima facie eligible for other forms of relief from removal, so that DHS, in the exercise of DHS's discretion, could place the noncitizen into removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. See 8 CFR 1003.48(d) (proposed).

Finally, the rule proposes that both parties would be able to appeal the IJ's decision to the BIA under procedures similar to those used in section 240 removal proceedings and asylum/withholding-only proceedings under 8 CFR 208.2(c), 1208.2(c). See 8 CFR 1003.1(b)(15) (proposed). In addition, the individual would be able to petition for review of the BIA decision with the Federal courts. See *infra* note 59.

#### *B. DOJ and DHS Authority To Propose This Rule*

The Attorney General and the Secretary jointly propose this rule pursuant to their respective authorities concerning asylum determinations. The Homeland Security Act of 2002 ("HSA"), Public Law 107-296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the execution of Federal immigration law. The HSA charged the Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens," INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granted the power to take all actions "necessary for carrying out" the Secretary's authority under the immigration laws, INA 103(a)(3), 8 U.S.C. 1103(a)(3). The Secretary's authority also includes the authority to

admission and be voluntarily returned to their country of nationality or country of last habitual residence. Actual removal proceedings for unaccompanied children, whether from contiguous countries or not, however, must be under section 240 of the INA.

<sup>30</sup> See *supra* note 4.



publish regulatory amendments governing the apprehension, inspection and admission, detention and removal, withholding of removal, and release of noncitizens encountered in the interior of the United States or at or between the U.S. ports of entry. INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The HSA thus transferred to DHS authority to adjudicate asylum applications, as well as the authority to conduct credible fear interviews and make credible fear determinations in the context of expedited removal. INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* HSA 451(b), 6 U.S.C. 271(b) (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services, now USCIS). By operation of the HSA, the reference to “Attorney General” in the INA is understood also to encompass the Secretary in matters with respect to immigration proceedings before DHS. That authority has been delegated within DHS to the Director of USCIS. *See* 8 CFR 208.2(a), 208.30.

In addition, under the HSA, the Attorney General retained authority over individual immigration adjudications (including section 240 removal proceedings and certain adjudications related to asylum applications) conducted within EOIR. *See* HSA 1101(a), 6 U.S.C. 521(a); INA 103(g), 8 U.S.C. 1103(g). IJs within DOJ continue to adjudicate all asylum applications filed by noncitizens during the pendency of removal proceedings, and they also review asylum applications referred by USCIS to the immigration court. *See* INA 101(b)(4), 240(a)(1), 8 U.S.C. 1101(b)(4), 1229a(a)(1); 8 CFR 1208.2(b), 1240.1(a).

Section 235(b)(1)(B)(ii) of the INA, 8 U.S.C. 1225(b)(1)(B)(ii), provides that if a noncitizen in expedited removal proceedings is determined to have a credible fear of persecution by an asylum officer, the noncitizen is entitled to “further consideration of the application for asylum.” This proposed rule addresses how that further consideration will occur. Section 208(d)(1) of the INA, 8 U.S.C. 1158(d)(1), provides the Attorney General with the authority to establish procedures for the consideration of asylum applications, including those filed in accordance with section 235(b) of the INA, 8 U.S.C. 1225(b). *See* INA 208(a), 8 U.S.C. 1158(a).

Section 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), authorizes the Secretary to establish rules and regulations governing parole. Section

212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), vests in the Secretary the discretionary authority to grant parole to applicants for admission on a case-by-case basis.

### C. The Current Asylum and Expedited Removal Process

#### 1. Asylum

The Refugee Act of 1980, Public Law 96–212, 94 Stat. 102, was the first comprehensive legislation to establish the modern refugee and asylum system in the United States. Asylum is a discretionary benefit that can be granted by the Attorney General or the Secretary if a noncitizen establishes, among other things, that they have experienced past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA 208(b)(1), 8 U.S.C. 1158(b)(1) (providing that the Attorney General “may” grant asylum to refugees); INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) (defining “refugee”). As long as they retain their asylee status, noncitizens who are granted asylum (1) cannot be removed or returned to their country of nationality or last habitual residence, (2) receive employment authorization incident to their status, and (3) may be permitted to apply for readmission after travel outside of the United States with prior consent from the Secretary. INA 208(c)(1), 8 U.S.C. 1158(c)(1); *see Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2286 (2021) (“[A] grant of asylum permits an alien to remain in the United States and to apply for permanent residency after one year[.]” (internal quotation marks and citation omitted) (emphases omitted)); 8 CFR 274a.12(a)(5) (employment authorization incident to asylum status); *id.* § 223.1(b) (readmission after travel for a “person who holds . . . asylum status pursuant to section 208 of the Act”).

Asylum applications are presently classified based on the agency with jurisdiction over the noncitizen’s case. If a noncitizen is physically present in the United States, not detained, and not in removal proceedings, the noncitizen may file an asylum application with USCIS. These applications are known as “affirmative” filings. If the noncitizen is in removal proceedings before an IJ, the noncitizen instead may file an application for asylum with the IJ as a defense to removal. Such “defensive” filings are currently the only route by which noncitizens referred to an IJ by a USCIS asylum officer after receiving a positive credible fear determination can

obtain an adjudication of the merits of their asylum claims.

Noncitizens who are ineligible for a grant of asylum, or who are denied asylum based on the Attorney General’s or the Secretary’s discretion, nonetheless may qualify for other forms of protection. An application for asylum submitted by a noncitizen in removal proceedings is also considered an application for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* 8 CFR 1208.3(b), 1208.13(c)(1). An IJ also may consider a noncitizen’s eligibility for withholding and deferral of removal under regulations issued pursuant to the implementing legislation regarding U.S. obligations under Article 3 of the CAT. Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681–761, 2681–822 (codified at 8 U.S.C. 1231 note (1999)); 8 CFR 1208.3(b), 1208.13(c)(1); *see also id.* §§ 1208.16(c), 1208.17.

Withholding and deferral of removal bar a noncitizen’s removal to any country where the noncitizen would “more likely than not” face persecution or torture, meaning that the noncitizen would face a clear probability that their life or freedom would be threatened because of a protected ground or a clear probability of torture. 8 CFR 1208.16(b)(2), (c)(2). Thus, if a noncitizen proves that it is more likely than not that the noncitizen’s life or freedom would be threatened on account of a protected ground, but is denied asylum for some other reason—for instance, because of a statutory exception, an eligibility bar adopted by regulation, or a discretionary denial of asylum—the noncitizen nonetheless may be entitled to statutory withholding of removal if not otherwise barred from that form of protection. INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); 8 CFR 208.16, 1208.16. Likewise, a noncitizen who establishes that he or she more likely than not will face torture in the country of removal will qualify for CAT protection. *See* 8 CFR 208.16(c), 208.17(a), 1208.16(c), 1208.17(a). In contrast to the more generous benefits available through asylum, statutory withholding and CAT protection do not: (1) Prohibit the Government from removing the noncitizen to a third country where the noncitizen would not face the requisite likelihood of persecution or torture (even in the absence of an agreement with that third country); (2) create a path to lawful permanent resident status; or (3) afford the same ancillary benefits, such as derivative protection for family members. *See, e.g., Guzman*

*Chavez*, 141 S. Ct. at 2286 (“distinguish[ing] withholding-only relief from asylum” on the ground that withholding does not preclude the Government from removing the noncitizen to a third country and does not provide the noncitizen any permanent right to remain in the United States); *Matter of A–K–*, 24 I&N Dec. 275, 279 (BIA 2007) (stating that “the Act does not permit derivative withholding of removal under any circumstances”); INA 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A) (statutory provision allowing asylum status to be granted to accompanying or following-to-join spouse or children of a noncitizen granted asylum; no equivalent statutory or regulatory provision for individuals granted withholding or deferral of removal).

## 2. Expedited Removal and Screenings in the Credible Fear Process

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Public Law 104–208, div. C, 110 Stat. 3009, 3009–546, Congress established the expedited removal process. The process is applicable to noncitizens arriving in the United States (and, in the discretion of the Secretary, certain other designated classes of noncitizens) who are found to be inadmissible under either section 212(a)(6)(C) of the INA, 8 U.S.C. 1182(a)(6)(C), regarding material misrepresentations, or section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7), regarding documentation requirements for admission. Under expedited removal, such noncitizens may be “removed from the United States without further hearing or review unless the [noncitizen] indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.” INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).

The former INS and, later, DHS implemented a screening process, known as the “credible fear” screening, to identify potentially valid claims for asylum, statutory withholding of removal, and CAT protection, or, more specifically, to prevent noncitizens placed in expedited removal from being removed to a country in which they would face persecution or torture. Currently, with regulatory changes made from 2018 through 2020 either vacated, enjoined, or delayed, any noncitizen who expresses a fear of persecution or torture, a fear of return, or an intention to apply for asylum during the course of the expedited removal process is referred to a USCIS asylum officer for an interview to determine whether the noncitizen has a

credible fear of persecution or torture in the country of return. INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); *see also* 8 CFR 235.3(b)(4), 1235.3(b)(4)(i). If the asylum officer determines that the noncitizen does not have a credible fear of persecution or torture, the noncitizen may request that an IJ review that determination. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); 8 CFR 208.30(g), 1208.30(g).

Under the regulatory framework prior to November 2018 and currently in effect,<sup>31</sup> if the asylum officer determines that a noncitizen subject to expedited removal has a credible fear of persecution or torture, DHS refers the noncitizen to an immigration court for adjudication of the noncitizen’s claims by initiating section 240 removal proceedings through service of an NTA on the noncitizen and with the court. *See* 8 CFR 208.30(f), 235.6(a)(1)(ii), 1235.6(a)(1)(ii) (2018). Similarly, if an IJ, upon review of the asylum officer’s negative credible fear determination, finds that the noncitizen possesses a credible fear of persecution or torture, the IJ vacates the expedited removal order and DHS initiates section 240 removal proceedings. *See id.* 1208.30(g)(2)(iv)(B). If the noncitizen subsequently decides to file for asylum, the asylum application is filed with the court during the section 240 removal proceedings, is considered a “defensively filed” application, and is subject to the one-year filing deadline. *See* INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). There is no requirement that the noncitizen file an asylum application, however, once placed into section 240 removal proceedings.

### III. Discussion of the Proposed Rule

As noted in the summary above, this proposed rule would make several changes to the adjudication process of protection claims presented by noncitizens in expedited removal who both make fear claims and are determined to have a credible fear of persecution or torture. A more detailed explanation of the proposed changes, the reasons for these changes, and their alignment with the relevant statutes, as well as a brief outline of certain other changes proposed by this rule, follows.

#### A. Parole—Proposed 8 CFR 235.3(b)(2)(iii) and (b)(4)(ii)

The expedited removal statute provides for detention throughout the expedited removal process, including

during the credible fear screening process and during the process for further consideration of the protection claims on their merits. The statute does not, however, limit DHS’s general parole authority under section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), and 8 CFR 212.5(b), and the Departments have not understood the language providing for detention in expedited removal to limit this parole authority. Instead, parole authority in the context of expedited removal has been specifically provided for in the relevant regulations covering expedited removal and the credible fear screening process since they were first implemented in 1997. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10356 (Mar. 6, 1997) (interim final rule). And the U.S. Supreme Court recently acknowledged in *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018), that DHS may exercise its authority to temporarily parole persons subject to expedited removal, while also acknowledging that the relevant statutory language in section 235(b)(1) and (b)(2) of the INA, 8 U.S.C. 1225(b)(1), (b)(2), “unequivocally mandate that aliens falling within their scope ‘shall’ be detained,” *id.* at 844.

Since expedited removal’s implementation regulations were first promulgated, parole consideration has been limited to a narrow category of circumstances for individuals awaiting a credible fear determination—when necessary “to meet a medical emergency or . . . for a legitimate law enforcement objective.” *See* 8 CFR 235.3(b)(2)(iii), (b)(4)(ii) (current). This proposed rule change would add to those grounds, allowing parole when “detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities).” 8 CFR 235.3(b)(2)(iii), (b)(4)(ii) (proposed). This change would allow DHS to prioritize use of its limited detention bed space to detain those noncitizens who pose the greatest threats to national security and public safety, while avoiding unnecessary operational limitations on DHS’s authority to place noncitizens into expedited removal. Under the proposed rule, when detention space is unavailable or its use is otherwise impracticable, DHS would have the option of using parole rather than placing nearly all families arriving at the border directly into section 240 removal proceedings. The proposed rule also makes clear that a grant of parole only

<sup>31</sup> *See supra* note 24 (discussing the status of more recent regulatory changes).



authorizes release from custody and cannot serve as an independent basis for employment authorization under 8 CFR 274a.12(c)(11).<sup>32</sup> See 8 CFR 235.3(b)(4)(ii) (proposed). The Departments are seeking public comment on this change in the circumstances under which parole may be considered in the expedited removal context, as well as the use of (c)(11) employment authorization documents (“EADs”) for those in expedited removal who have been paroled from custody.

*B. Credible Fear Screening Process—Proposed 8 CFR 208.30*

As noted earlier, there were several rules published by the Departments from the end of 2018 through the end of 2020 that attempted to change the credible fear screening process that had been in place for approximately 20 years, but these rules are not in effect.<sup>33</sup> The Global Asylum rule, which, as explained above, has been enjoined, attempted to change the pre-2018 practice of not applying the mandatory bars to asylum and statutory withholding in the credible fear screening process, instead requiring a final determination on the applicability of a significantly expanded list of mandatory bars during credible fear screenings and mandating a negative credible fear finding should any of the bars be determined to apply to the noncitizen at that initial stage. 85 FR at 80278. In addition, the Global Asylum rule attempted to alter the longstanding practice for screening claims for statutory withholding of removal and CAT protection. Prior to the rule, the statutory standard for screening asylum claims (*i.e.*, a “significant possibility” of establishing eligibility for asylum) was also used to screen withholding of removal and CAT claims. The Global

<sup>32</sup> As noted elsewhere in this preamble, this proposed rule is not intended to rescind previously enjoined or vacated rules. Accordingly, the Departments are proposing that those in the credible fear process who have been paroled from custody would be ineligible for a (c)(11) employment authorization document (“EAD”), similar to what was implemented with the final rule entitled Asylum Application, Interview, and Employment Authorization for Applicants, 85 FR 38532, 38582 (June 26, 2020). A Federal district court preliminarily enjoined certain provisions of the rule but only as applied to the plaintiffs in that case, and the EAD-parole provision similar to the one proposed here was not challenged in that litigation. See *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 935 (D. Md. 2020) (“preliminarily enjoin[ing] Defendants from enforcing a subset of the rule changes as applied to the individual members of Plaintiffs Casa de Maryland, Inc. (‘CASA’) and Asylum Seeker Advocacy Project (‘ASAP’). The Departments are seeking public comment on the use of (c)(11) EADs for those in expedited removal who have been paroled from custody.”

<sup>33</sup> See *supra* note 24.

Asylum rule attempted to create a more complicated two-step, two-standard screening by requiring a higher screening standard for such claims (*i.e.*, a “reasonable possibility” of persecution or torture). *Id.* The Security Bars rule, issued less than 2 weeks after the Global Asylum rule, further expanded the list of mandatory bars to asylum that would apply in the credible fear screening process, 85 FR at 84160, but its implementation has been delayed until the end of 2021, 86 FR at 15069.

With this proposed rule, the Departments generally seek to return the credible fear screening process regulations to the simpler screening process that was in place for expedited removal’s first two decades of implementation. Given the injunctions, delays, and vacatur referenced above, this rule proposes to recodify in the Code of Federal Regulations the standard of “significant possibility” that has remained in effect since the rule changing that standard has been enjoined. *Pangea Legal Servs. v. DHS*, No. 20–cv–09253, 2021 WL 75756, at \*7 (N.D. Cal. Jan. 8, 2021) (preliminarily enjoining the Global Asylum rule). The Departments believe that this change will make for a more efficient and effective credible fear screening process and is also necessary to make that screening process consistent with congressional intent.

The 104th Congress chose a screening standard “intended to be a low screening standard for admission into the usual full asylum process.”<sup>34</sup> Originally, the Senate bill had proposed a “determination of whether the asylum claim was ‘manifestly unfounded,’ while the House bill applied a ‘significant possibility’ standard coupled with an inquiry into whether there was a substantial likelihood that the alien’s statements were true.”<sup>35</sup> In IIRIRA, Congress then “struck a

<sup>34</sup> 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch).

<sup>35</sup> *Id.* The chairman of the conference committee assigned to reconcile the two bills, Rep. Henry Hyde, stated that “[t]he credible fear standard is redrafted in the conference document to address fully concerns that the ‘more probable than not’ language in the original House version was too restrictive.” 142 Cong. Rec. H11081 (daily ed. Sept. 25, 1996) (statement of House Judiciary Committee Chairman Henry Hyde). The exact language in section 302 of the House bill, H.R. 2202, 104th Cong. (1995), was as follows: “the term ‘credible fear of persecution’ means (I) that it is more probable than not that the statements made by the alien in support of the alien’s claim are true, and (II) that there is a significant possibility, in light of such statements and of such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.” The conference committee compromise stuck subsection (I) from the definition of credible fear.

compromise by rejecting the higher standard of credibility included in the House bill.”<sup>36</sup> This proposed regulation would now return the screening standard to the “low screening standard” intended by the compromise reflected in the text that Congress ultimately passed. Rather than creating a complicated screening process that requires full evidence gathering and determinations to be made on possible bars to eligibility, this proposed rule aims to return to allowing protection claims with a “significant possibility” of success to be fully heard and adjudicated, but in a process that more quickly reaches a final decision on the merits than the current process.

To accomplish this, the proposed rule would replace all the references throughout 8 CFR 208.30 to a “credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture” with “credible fear,” acknowledging that the statutory “significant possibility” standard, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), would be applied in considering all three types of protection claims— asylum, statutory withholding, and protection under the CAT.<sup>37</sup> Consistent with that change, the proposed rule would revise 8 CFR 208.30 to return the definition of the “credible fear” standard to the “significant possibility” definition provided in the statute (paragraph (e)(2)), replace the “reasonable possibility” standard with the same “significant possibility” screening standard for statutory withholding of removal and CAT withholding or deferral of removal (paragraphs (e)(2) and (3)), return the language in the regulation to reflect the existing and two-decade long practice of not applying the mandatory bars to the credible fear screening determination (paragraph (e)(5)),<sup>38</sup> maintain the

<sup>36</sup> 142 Cong. Rec. S11491 (statement of Sen. Hatch).

<sup>37</sup> These proposed changes would not alter reasonable fear of persecution or torture determinations involving noncitizens ordered removed under section 238(b) of the INA, 8 U.S.C. 1228(b), and noncitizens whose removal is reinstated under section 241(a)(5) of the INA, 8 U.S.C. 1251(a)(5), pursuant to 8 CFR 208.31.

<sup>38</sup> This proposed rule does not, and is not intended to, rescind prior rulemakings, including Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 FR 63994 (Nov. 19, 2019); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018); and Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020). To that end, the Departments have proposed to change 8 CFR 208.30 only to the extent necessary to implement the changes proposed in this rule and left the remaining provisions of the aforementioned rules to be

threshold screening under the safe third country agreement with Canada (paragraph (e)(6)), and continue to require supervisory review of all credible fear determinations before they can become final (paragraph (e)(8)). The Departments seek comment on these changes and also request comment on whether any additional changes to the provisions of the Global Asylum and Security Bar rules are necessary or appropriate to accomplish the objectives outlined in this section.

As part of the proposed restructuring of the credible fear determination framework, the proposed rule would also remove the current language at 8 CFR 208.30(g)(2)(i) providing that DHS may reconsider a negative credible fear finding that has been reviewed and upheld by an IJ.<sup>39</sup> Section 208.30(g)(1)(i) would be revised to provide that once the asylum officer has made a negative credible fear determination, the individual either requests IJ review or declines to request review and that declination is treated as a request for review and the individual is served with a Form I–863. At that point, under the proposed rule, the IJ has sole jurisdiction to review whether the individual has established a credible fear of persecution or torture, and an asylum officer may not reconsider or reopen the determination.

These proposed changes reflect an intention to return to the statutory scheme of INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B), under which it is the IJ review of the credible fear determination that serves as the check to ensure that individuals who have a credible fear are not returned based on an erroneous screening determination by USCIS. Section 208.30(g)(1)(i) is amended to provide that, when DHS inquires whether an individual wishes to have an IJ review a negative credible

fear determination, DHS will inform the individual that the IJ review will include an opportunity for the individual to be heard and questioned by the IJ. *See* 8 CFR 208.30(g)(1) (proposed). This opportunity will allow such individuals to present any additional evidence or arguments they may wish to make to the IJ, who will consider them in making a *de novo* determination about whether the individual has a credible fear of persecution or torture.

The clarification that the IJ has sole jurisdiction to review the individual's negative credible fear determination and that asylum officers may not reconsider or reopen a determination that already has passed to the jurisdiction of the IJ is necessary to ensure that requests for reconsideration to USCIS do not obstruct the streamlined process that Congress intended in creating expedited removal. Further, this clarification ensures that the necessary efficiencies implemented in this proposed rule are not undermined.

The expedited removal statute and its implementing regulations generally prohibit any further administrative review or appeal of an IJ's decision made after review of a negative credible fear determination. *See* INA 235(b)(1)(B)(iii)(III), (C), 8 U.S.C. 1225(b)(1)(B)(iii)(III), (C); 8 CFR 1003.42(f)(2), 1208.30(g)(2)(iv)(A). Congress similarly has made clear its intent that expedited removal should remain a streamlined, efficient process by limiting judicial review of many determinations in expedited removal. *See* INA 242(a)(2)(A), (e), 8 U.S.C. 1252(a)(2)(A), (e). These provisions limiting administrative and judicial review and directing expeditious determinations reflect clear congressional intent that expedited removal be a truly expedited process. Removal of the current language at 8 CFR 208.30(g)(2)(i) allowing DHS to reconsider negative credible fear determinations after the IJ concurs is consistent with that congressional intent and with the purpose of the current regulation.

In recent years, USCIS has received growing numbers of meritless reconsideration requests, which have strained agency resources and resulted in significant delays to the expedited removal process. The total time to review a reconsideration request varies widely, but if an office recommends a follow-up interview, then the complete review process could take more than 5 hours per request. The Departments believe that these resources could be far better spent, including in training and supervisory efforts, to ensure the high

quality of USCIS initial screening determinations. In many cases, reconsideration requests that previously were considered are resubmitted numerous times without additional information, resulting in additional delays in removal processes that Congress explicitly intended to be conducted through streamlined, efficient procedures.

These developments have highlighted the need to ensure that the IJ review process, rather than reconsideration by USCIS, serves as the safeguard against erroneous negative screening determinations by an asylum officer. These changes will ensure that DOJ and DHS implementation of the expedited removal provisions is consistent with statutory intent. The Departments believe these changes will help accomplish the purpose of the present rule to make the framework of the screening process, including the process following USCIS's fear determination, more efficient and streamlined, while ensuring due process is accorded to all individuals in expedited removal. The Departments seek comments on these proposed changes, including on other options short of eliminating reconsideration entirely—such as imposing restrictions on, or modifications to, reconsideration requests made to USCIS—to address the problems outlined above, while also ensuring efficiency and the opportunity to have one's protection claim properly screened.

### *C. Applications for Asylum—Proposed 8 CFR 208.3(a) and 208.9(a)*

The expedited removal statute specifically provides for an exception to the mandate that a noncitizen be “removed from the United States without further hearing or review” when the noncitizen expresses an intention to apply for asylum, a fear of persecution or torture, or a fear of return to the country of removal. Such a person instead is referred to USCIS for a credible fear screening. INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). If the noncitizen is found to have a credible fear of removal, the noncitizen's claim is referred for “further consideration of the application for asylum.” INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). This statutory language, however, does not specify the nature of such “further consideration.”

Under current regulations, an individual who establishes a credible fear is placed into removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. Under this process, the individual is not required to officially request asylum or file the Form I–589,

modified or rescinded by the Departments at a later date. *See, e.g.,* OMB, *Agenda Rule List—Spring 2021: Department of Homeland Security*, [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600). The Departments, however, do seek comment on whether the changes proposed in this rule would require any other rescissions or modifications of the provisions adopted in recent prior rulemakings.

<sup>39</sup>The proposed versions of the Global Asylum rule and the Security Bars rule both dropped the regulatory provision previously in 8 CFR 1208.30(g)(2) that acknowledged USCIS's ability to reconsider a negative credible fear finding that had already received IJ concurrence, but the Departments responded to comments received about this change by reinserting the provision into 8 CFR 208.30(g) in the final rules, stating that the provision had been omitted from the proposed rule inadvertently. 85 FR at 80275, 84181. This proposed rule again proposes this change but does so for the reasons provided herein.

Application for Asylum and for Withholding of Removal (“Form I–589”), until *after* being placed into removal proceedings. In many cases, the application may be filed many months after removal proceedings are initiated, thus potentially delaying adjudication. In many other cases, an application is never filed. EOIR has reported that, for individuals who were referred to USCIS for the credible fear screening process and then placed into proceedings before EOIR between FY 2008 and the third quarter of FY 2020, only 62 percent have filed an asylum application with EOIR as of July 2020.<sup>40</sup>

Under this proposed rule, an individual who passes the initial credible fear screening would have his claim reviewed by an asylum officer in USCIS in the first instance, rather than by an IJ in a removal hearing under section 240 of the INA. As part of this new procedure for “further consideration,” and to eliminate delays between a positive credible fear determination and the filing of an application for asylum, the Departments propose that the written record of the credible fear determination created by USCIS during the credible fear process, and subsequently served on the individual together with the service of the credible fear decision itself, would be treated as an “application for asylum,” with the date of service on the individual considered the date of filing. 8 CFR 208.3(a)(2) (proposed). Every individual who receives a positive credible fear determination would be considered to have filed an application for asylum at the time the determination is served on him or her. The application would be considered filed or received as of the service date for purposes of the 1-year filing deadline for asylum, *see* INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), and for starting the clock for eligibility to file for work authorization on the basis of a pending asylum application, 8 CFR 208.3(c)(3) (current). The Departments propose that this application for asylum would not be subject to the completeness requirement of 8 CFR 208.3(c) and 208.9(a) in order to qualify for hearing and adjudication, but it would be subject to the other conditions and consequences provided for in 8 CFR 208.3(c) once the noncitizen signs the documentation under penalty of perjury and with notice of the consequences of the filing

of a frivolous asylum application at the time of the asylum officer hearing.<sup>41</sup>

The Departments plan to implement these changes to the credible fear process by having the trained USCIS asylum officer conducting the credible fear interview advise the noncitizen of the consequences of filing a frivolous asylum application and capture the noncitizen’s relevant information through testimony provided under oath. During this process, the asylum officer would “elicit all relevant and useful information” for the credible fear determination, *id.* § 208.30(d), create a summary of the material facts presented by the noncitizen during the interview, read the summary back to the noncitizen, and allow the noncitizen to correct any errors, *id.* § 208.30(d)(6). The record created would contain the necessary biographical information and sufficient information related to the noncitizen’s fear claim to be considered an application. The information captured by the asylum officer during the credible fear interview will contain information about the noncitizen’s spouse and children, including those who were not part of the credible fear determination—but under this proposed rule only a spouse or children who were included in the credible fear determination issued pursuant to proposed 8 CFR 208.30(c) or have a pending asylum application with USCIS pursuant to § 208.2(a)(1)(ii) can be included on the request for asylum.<sup>42</sup> *See id.* § 208.3(a)(2). A copy of

<sup>41</sup> In addition, the Departments are proposing to amend 8 CFR 1208.3 and 1208.4 to account for changes made by this proposed rule, including the proposed provisions that would treat the credible fear interviews as an application for asylum in the circumstances addressed by the proposed rule. The amendment at 8 CFR 1208.3(c)(3) affects language that was enacted by DOJ in 2020. *See* Procedures for Asylum and Withholding of Removal, 85 FR 81698 (Dec. 16, 2020). The December 16, 2020 rulemaking made various changes to DOJ regulations, including 8 CFR 1208.3(c)(3). *Id.* Those changes remain enjoined. *See National Immigrant Justice Center, et. al., v. Exec. Office for Immigration Review, et. al.*, No. 21–CV–00056 (D.D.C.). As noted above, the proposed rule would make changes to the regulations only as necessary to effectuate its goals. The Departments anticipate that additional changes to the relevant regulations, including rescission of or revision to the language added by the enjoined regulation, will be made through later rulemakings.

<sup>42</sup> While only a spouse or dependent included on the credible fear determination or who presently has an asylum application pending with USCIS after a positive credible fear determination can be included on the subsequent asylum application under this proposed process, the noncitizen granted asylum remains eligible to apply for accompanying or follow-to-join benefits for any qualified spouse or child not included on the asylum application, as provided for in 8 CFR 208.21. The Departments believe that it is procedurally impractical to attempt to include a spouse or child on the application when the spouse or child has not previously been

this application for asylum, including the officer’s notes from the interview and basis for the determination, would be provided to the noncitizen at the time that the credible fear determination is served. *See id.* § 208.30(f), (g)(1). As proposed in this rule, the noncitizen would be allowed to supplement or request modifications or corrections to this application up until 7 days prior to the scheduled asylum hearing before a USCIS asylum officer, or for documents submitted by mail, postmarked no later than 10 days before the scheduled asylum hearing. *Id.* § 208.3(a)(2).

The information required to be gathered during the credible fear screening process is based on the noncitizen’s own testimony under oath in response to questions from a trained USCIS asylum officer. Thus, the Departments believe that the screening would provide sufficient information upon which to conduct a full asylum interview. Under this proposed rule, all noncitizens who receive a positive credible fear determination would have an asylum application on file with the Government within days of their credible fear screenings, thereby meeting the one-year asylum filing deadline, avoiding the risk of filing delays, and immediately beginning the waiting period for work authorization eligibility. Understanding that noncitizens may want to modify, correct, or supplement the initial presentation of their protection claims, this proposed rule would allow the noncitizen to do so in advance of the hearing before the asylum officer. The Departments seek comments on all aspects of this proposed change.

*D. Proceedings for Further Consideration of the Application for Asylum by USCIS Asylum Officer in Asylum and Withholding Merits Hearing for Noncitizens With Credible Fear—Proposed 8 CFR 208.2(a) and (c); 208.9(a), (f), and (g); 208.14(c)(5); 208.30(e) and (f); 235.6(a)(1); 1003.42; and 1208.30(g)*

As noted earlier in the preamble, under the current regulatory framework, if an asylum officer determines that a noncitizen subject to expedited removal has a credible fear of persecution or

placed into expedited removal and subsequently referred to USCIS after a positive credible fear determination. This is similar to the inability to include a spouse or child not in removal proceedings under section 240 of the INA on the asylum application of a principal asylum application who is in such removal proceedings. Under such circumstances, there is no clear basis for issuing a final order of removal against such an individual spouse or child should the asylum application be denied. The Departments seek comments on this proposed approach.

<sup>40</sup> EOIR, *Executive Office for Immigration Review Adjudication Statistics: Rates of Asylum Filings in Cases Originating with a Credible Fear Claim* (July 2020), <https://www.justice.gov/eoir/page/file/1062971/download>.

torture, DHS places the noncitizen before an immigration court for adjudication of the noncitizen's claims by initiating section 240 removal proceedings.<sup>43</sup> Similarly, if an IJ, upon review of the asylum officer's negative credible fear determination, finds that the noncitizen possesses a credible fear of persecution or torture, the IJ vacates the expedited removal order, and DHS initiates section 240 removal proceedings. 8 CFR 1208.30(g)(2)(iv)(B). Section 240 removal proceedings, which are used to determine removability as well as eligibility for any relief or protection from removal, currently provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings under section 235 of the Act. Compare INA 235(b)(1), 8 U.S.C. 1225(b)(1), with INA 240, 8 U.S.C. 1229a.

As noted previously, however, the expedited removal statute provides only that a noncitizen who is found to have a credible fear "shall be detained for further consideration of the application for asylum." INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). The statute mandates neither that the noncitizen be placed in removal proceedings generally nor placed in section 240 removal proceedings specifically. *Id.*

The regulations regarding the credible fear process, and the interplay between expedited removal and section 240 removal proceedings, were first adopted in 1997.<sup>44</sup> At the time, the former INS explicitly recognized that "the statute is silent as to the procedures for those who do demonstrate a credible fear of persecution."<sup>45</sup> Faced with this ambiguity, the INS opted at the time to have the further consideration take place in pre-existing section 240 removal proceedings rather than create new proceedings for this purpose.<sup>46</sup> But the INS's contemporaneous analysis was very limited.

The Departments believe that section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), authorizes a procedure for "further consideration of [an] application for

asylum" that is separate from section 240 removal proceedings. By its terms, the phrase "further consideration" is open-ended and does not mandate any particular procedure. It is thus naturally read as giving DHS flexibility to determine the appropriate procedure for consideration of noncitizens' asylum claims after establishing a credible fear in the expedited removal process. Moreover, while section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), mandates that a noncitizen with a positive credible fear determination receive "further consideration of [the noncitizen's] application for asylum," section 235(b)(2) of the INA, 8 U.S.C. 1225(b)(2), mandates that other classes of noncitizens receive "a proceeding under section 1229a of this title," *i.e.*, section 240 of the INA. Compare INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), with INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). The difference in language suggests that section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), does not require use of section 240 removal proceedings, in contrast to section 235(b)(2), 8 U.S.C. 1225(b)(2), which does. The Supreme Court has observed that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citation omitted). More recently, the D.C. Circuit stated that it has "consistently recognized that a congressional mandate in one section and silence in another often suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.*, to leave the question to agency discretion." *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (emphasis in original) (internal quotation marks and citation omitted).<sup>47</sup> The inference that Congress's silence intentionally permits agency discretion is reinforced by the fact that the noncitizens whom DHS has elected to process into the United States using the expedited removal procedure are expressly excluded from the class of noncitizens who are statutorily guaranteed section 240 removal proceedings under section 235(b)(2)(A) of the INA, 8 U.S.C. 1225(b)(2)(A). See INA 235(b)(2)(B)(ii), 8 U.S.C. 1225(b)(2)(B)(ii).

<sup>47</sup> See also *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[U]sually at least, . . . we presume differences in language . . . convey differences in meaning.").

Second, a noncitizen with a positive credible fear determination is entitled only to a further proceeding related to their "application for asylum," or for withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1251(b)(3), or withholding or deferral of removal under the regulations implementing U.S. obligations under Article 3 of the CAT. INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii); 8 CFR 208.30(e). An asylum application's purpose is to determine whether the noncitizen is entitled to relief or protection from removal, not whether the noncitizen should be admitted or granted other immigration benefits. See *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1813 (2021) ("[A] foreign national can be in lawful status but not admitted—think of someone who entered the country unlawfully, but then received asylum."); *Matter of V-X-*, 26 I&N Dec. 147, 150 (BIA 2013) (holding that, "although [a noncitizen's] grant of asylum confer[s] a lawful status upon him, it [does] not entail an 'admission'"). By contrast, the purpose of a section 240 removal proceeding is to "determin[e] whether [a noncitizen] may be admitted to the United States." INA 240(a)(3), 8 U.S.C. 1229a(a)(3). In section 240 removal proceedings, both removability and entitlement to various forms of relief or protection are determined. Compare INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), with INA 240(c)(2)–(4), 8 U.S.C. 1229a(c)(2)–(4).<sup>48</sup> Moreover, the Departments believe that it is better policy to place noncitizens with a positive credible fear determination initially in nonadversarial proceedings in which their asylum claims can be adjudicated by asylum officers.

The idea of allowing USCIS asylum officers to fully adjudicate the

<sup>48</sup> The Departments acknowledge that there is some legislative history suggesting that some Members of Congress believed that individuals found to have a credible fear would be referred to section 240 removal proceedings. See, e.g., H.R. Rep. No. 104–828, at 209 (1996) (suggesting that noncitizens who received positive credible fear determinations would be placed in "normal non-expedited removal proceedings"). But the Departments are not convinced that the legislative history is sufficiently clear to foreclose an option the text itself does not "unambiguously forbid." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). Indeed, other Members of Congress took a different view. See Letter for Richard A. Sloan, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, from Lamar Smith, Chairman, Subcommittee on Immigration and Claims, *Re: INS 1788–96, RIN 1115–AE47* (Feb. 3, 1997), in *Implementation to Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 21–22 (1997) ("Section 235(b)(1)(B)(ii) [was] drafted deliberately to leave flexibility regarding how the asylum adjudication would take place.").

<sup>43</sup> See 8 CFR 208.30(f) (2018); *supra* note 24 (explaining that various changes to these procedures have been enjoined).

<sup>44</sup> Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312 (Mar. 6, 1997) (*interim final rule*).

<sup>45</sup> *Id.* at 10320; see Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 447 (Jan. 3, 1997) (proposed rule) (noting that although the statute calls for further consideration of the noncitizen's asylum application, it "does not specify how or by whom this further consideration should be conducted").

<sup>46</sup> 62 FR at 10320.

protection claims made by noncitizens who receive a positive credible fear determination is not new. In its congressionally mandated 2005 report on the expedited removal process, the U.S. Commission on International Religious Freedom (“USCIRF”) recommended that asylum officers be allowed to grant asylum to ease “the burden on the detention system, the immigration courts, and bona fide asylum seekers in Expedited Removal.”<sup>49</sup> The USCIRF repeated this recommendation when it conducted a follow-up study and issued an updated report in 2016, stating as follows:

One solution to reduce the immigration courts’ caseload and backlog is to allow asylum officers to adjudicate defensive asylum claims, as USCIRF recommended in the 2005 Study. Asylum officers have the legal background and training to adjudicate asylum claims, and do so for affirmative asylum cases. Further, having an asylum officer review a credible fear claim and then having an immigration judge review an asylum claim creates significant redundancy without necessarily adding value.<sup>50</sup>

In 2012, the Administrative Conference of the United States studied the removal process and also issued recommendations that regulations be changed to allow for asylum officers to adjudicate protection claims for noncitizens determined to have a credible fear as part of a package of proposals to improve the operations of the immigration courts.<sup>51</sup> More recently, experts from the Migration Policy Institute (“MPI”) reached a similar conclusion in a 2018 report on the state of the U.S. asylum system. MPI concluded as follows:

Allowing cases with positive credible-fear findings to instead remain with the Asylum Division for the full asylum merits adjudication would capitalize on the investment of time and expertise the division has already made. It would also enable meritorious cases to be resolved more quickly, reducing the overall asylum system backlogs and using limited asylum officer and IJ resources more efficiently.<sup>52</sup>

<sup>49</sup> USCIRF, *Report on Asylum Seekers in Expedited Removal, Volume I: Findings & Recommendations* 66 (Feb. 2005), [https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf).

<sup>50</sup> USCIRF, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 54 (Aug. 2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

<sup>51</sup> Administrative Conference of the United States, *Administrative Conference Recommendation 2012-3: Immigration Removal Adjudication* 15 (June 15, 2012), <https://www.acus.gov/sites/default/files/documents/2012-3.pdf>.

<sup>52</sup> Doris Meissner, Faye Hipsman, & T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward* 3, Migration Policy Institute (Sept. 2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf>.

In reaching this conclusion, these experts noted that moving the cases to the USCIS Asylum Division for adjudication plays to its strengths, including its experience in handling asylum and asylum-related adjudications; its regular trainings on asylum-related country conditions and legal issues, as well as nonadversarial interviewing techniques; and its ready access to country conditions experts. Additionally, the MPI experts concluded that nonadversarial proceedings are well suited for this process because they are “considerably less resource-intensive than immigration court proceedings” and “lend themselves to a fuller understanding of the strengths and weaknesses of an applicant’s case.”<sup>53</sup> The DHS Homeland Security Advisory Council’s (“HSAC”) bipartisan CBP Families and Children Care Panel also included this recommendation in its final report to the Secretary.<sup>54</sup> This panel of the HSAC was created at the request of the Secretary in October 2018 to study “the burgeoning humanitarian crisis resulting from a surge in migration of families, primarily from Guatemala and Honduras, overwhelming the DHS resources at the border to address the crisis.”<sup>55</sup>

The Departments acknowledge that the above recommendations assumed that individuals denied asylum by a USCIS asylum officer would be issued an NTA and placed into section 240 removal proceedings before an IJ, where the noncitizen would have a second, full evidentiary hearing on the asylum application with a different decision-maker. This proposed rule would not adopt that approach, as the Departments determined it was unnecessary, duplicative, and inefficient. Instead, as noted in the previous section, this proposed rule would establish a new process that would require the IJ to conduct a de novo review of a denied application for protection when such review is requested, but it would not provide the noncitizen with a second full evidentiary hearing to present the claim. The Departments believe that an approach requiring a full evidentiary hearing before an IJ after an asylum officer’s denial would lead to inefficiencies without adding additional value or procedural protections. Under this proposal, the asylum officer will have developed and considered the

<sup>53</sup> *Id.* at 26.

<sup>54</sup> HSAC, *CBP Families and Children Care Panel Final Report* 24 (Nov. 14, 2019), [https://www.dhs.gov/sites/default/files/publications/fccp\\_final\\_report\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/fccp_final_report_1.pdf).

<sup>55</sup> *Id.* at 4.

noncitizen’s claim fully, including by taking testimony and accepting evidence, during the nonadversarial proceeding. If a noncitizen seeks review of an asylum officer’s denial, the IJ would have a complete record for review developed by the asylum officer (including a transcript of the hearing and any evidence offered by the applicant or otherwise considered by the officer) and the written decision of the asylum officer. The noncitizen would have a full opportunity to challenge the asylum officer’s denial during this review process and would not need to present their claim at a second full hearing. Instead, to the extent that a noncitizen seeks to introduce additional non-duplicative testimony or evidence, a provision of the proposed rule would allow them to do so if certain requirements are met. See 8 CFR 1003.48(e) (proposed). Accordingly, the Departments believe that a second full evidentiary hearing before an IJ is unnecessary and inefficient. A further description of the proposed review process follows in the next section.

This proposed rule would change current procedures to allow a noncitizen who is found to have a credible fear to have a full adjudication of the noncitizen’s protection claims by an asylum officer. 8 CFR 208.2(a) (proposed) (revising jurisdiction over asylum applications in order to provide USCIS jurisdiction to hear asylum claims after a positive credible fear determination), *id.* § 208.30(f) (retention of a positive credible fear determination with USCIS for an asylum hearing); *id.* §§ 1003.42, 1208.30(g) (referral of negative credible fear determinations vacated by an IJ to USCIS for an asylum hearing). This would supplant the process in place prior to this proposed rule whereby DHS referred such an individual directly to an IJ for an adversarial hearing in a section 240 removal proceeding. Proposed 8 CFR 1003.42 and 1208.30(g) of the EOIR regulations reflect similar changes, enabling an IJ who vacates an asylum officer’s negative credible fear determination to refer the case back to USCIS for an asylum hearing.

The Departments propose to make corresponding amendments to 8 CFR 208.2(c), 8 CFR 208.30(e)(5) and (f), and 8 CFR 235.6(a)(1) to provide that the cases of individuals who receive a positive credible fear determination may be retained by USCIS for a nonadversarial hearing before a USCIS asylum officer under the jurisdiction of 8 CFR 208.2(a)(1)(ii) to determine eligibility for asylum, statutory withholding of removal, and

withholding of deferral or removal under CAT. The Departments also propose to amend 8 CFR 1003.1, 8 CFR 1003.12, 8 CFR 1208.2, and 8 CFR 1208.30 of the EOIR regulations, and to add a new section 8 CFR 1003.48, to make corresponding changes regarding how and when cases involving individuals found to have a credible fear would be referred by DHS to EOIR.

The proposed nonadversarial proceedings for further consideration of asylum applications by asylum officers would provide protections similar to those provided in section 240 removal proceedings. The asylum officer's consideration under this proposal, however, would be limited solely to claims for asylum, statutory withholding of removal, and withholding or deferral of removal under the CAT regulations. 8 CFR 208.2(a)(2) (proposed). Under this proposed rule, if the asylum officer denies the noncitizen asylum, statutory withholding of removal, and protection under the CAT regulations, the noncitizen would be ordered removed based upon the immigration officer's earlier inadmissibility determination under section 235(b)(1)(A)(i) of the INA, 8 U.S.C. 1225(b)(1)(A)(i). The noncitizen, may, however appeal an adverse decision to an IJ, and if necessary, to the BIA. 8 CFR 208.14(c)(5), 1003.1(b)(15), 1208.2(b).

To allow asylum officers to carry out this new responsibility fully, additional changes to the regulations have been proposed. First, the Departments propose that under 8 CFR 208.9(f), asylum officers would be required to record the asylum hearing and that a transcript of that recording would be made part of the record whenever a noncitizen denied protection seeks review of a denial. USCIS would transcribe the asylum hearing recording and a copy of the transcript and the record developed at the hearing would be served on the applicant and filed with the immigration court. The hearing would be transcribed prior to the record being referred for review. Second, the Departments propose that USCIS be required to provide an interpreter for any hearing, just as EOIR is required to do for a removal hearing. 8 CFR 208.9(g) (proposed). Third, as in section 240 removal proceedings, the Departments propose that the noncitizen would be entitled to be represented, at no expense to the Government, by counsel of the noncitizen's choosing who is authorized to practice in such proceedings. *See id.* § 1003.12 (proposed), 1003.16 (current); *cf.* 8 U.S.C. 1229a(b)(4).

The Departments propose that the "failure to appear" rule at 8 CFR 208.10

be revised to allow for an order of removal to be issued when the noncitizen fails to appear for the scheduled hearing with the asylum officer. Changes to 8 CFR 208.16 through 208.19 also are proposed in order to provide asylum officers authority to adjudicate claims for withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and withholding and deferral of removal under the regulations implementing the CAT. Existing 8 CFR 208.14(b) already provides USCIS the authority to grant an asylum application properly within USCIS's jurisdiction, including the jurisdiction given USCIS by this proposed rule over asylum applications from noncitizens determined to have a credible fear. Similar authority is provided for immigration judges in existing 8 CFR 1208.14. Finally, the Departments propose that 8 CFR 208.14(c)(5) be added to provide the process for USCIS to deny an application for asylum, including the issuance of a decision on withholding and deferral of removal if asylum is denied; the issuance of an order of removal by the asylum officer after the merits hearing; and the process for the applicant to seek review of an asylum denial before an IJ. Review of these decisions would be governed by proposed 8 CFR 1003.48. The Departments also propose technical edits to 8 CFR 208.22 to include references to corresponding sections of both 8 CFR part 208 and 8 CFR part 1208. The Departments seek comments on all aspects of these proposed changes, including whether different or additional decision and review procedures should apply to applications considered under this proposed process.

The authority of asylum officers to enter an order of removal after denying a noncitizen's asylum claim follows from the relevant provisions of the INA. By definition, noncitizens who are placed into expedited removal already have been determined to be inadmissible and are protected from immediate removal only because their credible fear of persecution entitled them to further consideration of their asylum claim. *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1). If, after that further consideration, an asylum officer concludes that a noncitizen is not entitled to asylum, that determination removes the only remaining legal barrier to removal. That determination qualifies as an order of removal under the relevant statutory definition, which provides that an "order of deportation" includes not only an order "ordering deportation," but also an order

"concluding that [a noncitizen] is deportable." INA 101(a)(47)(A), 8 U.S.C. 1101(47)(A). The Seventh Circuit reached the same conclusion in addressing another class of noncitizens whose only defense to removal is a potential asylum claim: Those who entered under the visa-waiver program, INA 217(b)(2), 8 U.S.C. 1187(b)(2). The court explained that an order denying such a noncitizen's asylum claim is an order of removal because "an order that is proper only if the [noncitizen] is removable implies an order of removal." *Mitondo v. Mukasey*, 523 F.3d 784, 787 (7th Cir. 2008). This proposed rule therefore would provide that if the noncitizen is not granted asylum at the conclusion of the asylum hearing, the asylum officer is authorized to issue an order of removal.

*E. Application Review Proceedings Before the Immigration Judge—Proposed 8 CFR 1208.2(c), 1003.48*

The Departments propose to amend 8 CFR 1208.2(c) and add 8 CFR 1003.48 to establish new IJ review proceedings for those noncitizens who establish a credible fear of persecution or torture but (1) were found by USCIS not to merit asylum, statutory withholding of removal, or protection under the CAT and its implementing regulations; and (2) affirmatively request further review of their applications by an IJ. The Departments propose that upon a referral of the case from USCIS, the IJ would conduct a de novo review of USCIS's denial of the claims.

Under these proposed limited review proceedings, unlike under section 240 of the INA, 8 U.S.C. 1229a, the IJ would not have authority to consider issues related to a noncitizen's removability or a noncitizen's eligibility for any other relief from removal. Moreover, an IJ ordinarily would not conduct an evidentiary hearing on the noncitizen's asylum application. Rather, the IJ would determine, after de novo review of the full record of proceedings created during asylum officer hearings and consideration of any additional testimony or evidence permitted under the proposed process described below, whether a noncitizen is eligible for asylum or withholding of removal under the Act or withholding or deferral of removal under the CAT. Although the Departments intend these proceedings to be more streamlined than section 240 removal proceedings, asylum officer and IJ review, together, would provide significant protections to ensure that these noncitizens continue to receive full and fair adjudication of their applications.



For noncitizens who affirmatively request further review by an IJ, the Departments propose that DHS would initiate the review proceedings through the service of a Form I-863, Notice of Referral to Immigration Judge, on the noncitizen. As proposed in 8 CFR 1003.48(b), DHS would file the following items with the immigration court: (1) A copy of the Notice of Referral; (2) a copy of the record of proceedings before the asylum officer, as outlined in 8 CFR 208.9(f); (3) the asylum officer's written decision, including the removal order issued under 8 CFR 208.14(c)(5) by the asylum officer; and (4) proof that DHS served the Notice of Referral, the record of proceedings, and the asylum officer's written decision, including the removal order, on the noncitizen. Unlike in credible fear determination reviews, where the IJ is provided only asylum officers' notes from the interview, the summary of the material facts, and other limited records, *see, e.g.*, 8 CFR 208.30(e)(4), the proposed requirements in 8 CFR 1003.48(b) would ensure that cases would only be referred to the immigration courts following asylum officers' full nonadversarial adjudication of the noncitizens' applications, and that IJs and noncitizens would have asylum officers' decisions and complete records of the hearings in advance of the IJ review. This would allow the noncitizen to have notice of the reasons for the asylum officer's denial in advance of the immigration court review process, and it would allow the IJ to conduct a thorough review of the asylum officer's decision based on the application and complete record developed before the asylum officer. Accordingly, because the IJ would be provided the complete record of proceedings from the asylum officer hearing, the Departments expect that the IJ generally would be able to complete the *de novo* review solely on the basis of the record before the asylum officer, taking into consideration any arguments raised by the noncitizen, or the noncitizen's counsel, and DHS.

That said, the proposed rule recognizes that the factual record as elicited by the asylum officer sometimes will need to be further developed before the IJ. The rule proposes at 8 CFR 1003.48(e) that an IJ does not have the authority to remand a case to an asylum officer because the Departments believe that this would be unnecessary and inefficient. Instead, the rule proposes that a party may seek to introduce additional testimony or documentation so long as the party demonstrates to the IJ that the testimony or documentation

is not duplicative of the testimony or documentation considered by the asylum officer and that it is necessary to develop the factual record to allow the IJ to issue a reasoned decision in the case. The Departments expect that an IJ may, in appropriate cases, require parties to submit prehearing statements or briefs concerning whether they will seek to introduce additional testimony or documentation and, if so, explaining why this testimony or documentation meets the standard at 8 CFR 1003.48(e). The Departments further expect that, where necessary, for example in cases involving *pro se* applicants, IJs will, before proceeding with the case, explain in court the standards for submitting additional testimony and documentation. This proposed provision would ensure a full and fair evaluation of the applicant's application for asylum, withholding of removal under the Act, or withholding or deferral of removal under the CAT.

The Departments believe that this proposed regulatory scheme—under which IJs typically would rely on the record created at the asylum officer hearing but could allow additional testimony and evidence if a party establishes that doing so is necessary—is the best way to balance efficiency and fairness considerations appropriately.<sup>56</sup> The Departments believe that these proceedings, as proposed, will be more streamlined than removal proceedings but will still provide the parties with a fair opportunity to present their cases. Nevertheless, the Departments understand that there are alternative threshold standards for the introduction of evidence or the reopening of proceedings.<sup>57</sup> Accordingly, the Departments request the public's comments on the proposed evidentiary threshold requirements, including any suggestions for alternatives that balance efficiency and fairness considerations, particularly taking into account challenges *pro se* applicants for asylum and related protection sometimes face in developing their claims.

To ensure that noncitizens have a full and fair opportunity to prepare for and receive review of their claims, the Departments propose that many of the procedural safeguards that apply in

<sup>56</sup> *See, e.g., INS v. Abudu*, 485 U.S. 94, 107 (1988) (“There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.”).

<sup>57</sup> *See, e.g., Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (providing that the moving party generally must demonstrate that “new evidence offered would likely change the result in the case” in order for the BIA to consider granting a discretionary motion to remand).

section 240 removal proceedings would apply to the IJ review proceedings as well. Unless specifically indicated in 8 CFR 1003.48 of the EOIR proposed rules, the general rules of procedure that apply in removal proceedings before the immigration courts also would apply to these proceedings. This would include a noncitizen's rights (1) to obtain representation by an attorney or other representative authorized to appear before the immigration court, at no cost to the Government, *see* 8 CFR 1003.16(b); (2) to seek a change of venue, *see id.* § 1003.20(b); and (3) to seek a continuance for good cause shown, *see id.* § 1003.29. Moreover, the provisions of 8 CFR 1003.2 and 1003.23 governing motions to reopen and reconsider generally would be applicable to decisions rendered by IJs or the BIA in these proceedings. The Departments also propose to add a cross-reference in 8 CFR 1003.12 to the new proceedings under 8 CFR 1003.48 to codify these procedural protections.

The rule further proposes at 8 CFR 1003.48(d) that the IJ would have the discretion, pursuant to a motion filed by an applicant, to vacate the asylum officer's order of removal. For the motion to be granted, the applicant would have to show that he or she is *prima facie* eligible for a form of relief that cannot be granted in proceedings under 8 CFR 1003.48. With the motion granted, DHS would have the discretion to place the applicant in removal proceedings. An applicant would be permitted to file only one such motion, the motion would have to be filed before the IJ issues a decision on the applications for asylum and related protection, and motions to apply for voluntary departure would not be granted. The Departments believe these limitations are appropriate given the goal of meaningfully streamlining these proceedings as compared with removal proceedings. That said, the Departments seek the public's comments on whether the provisions relating to motions to vacate removal orders appropriately balance fairness and efficiency considerations.

In these proposed proceedings, the IJ would have the authority to review all decisions issued by the asylum officer, upon request by the applicant. *See* 8 CFR 1003.48(a) (proposed). For example, if the asylum officer denies an applicant's application for asylum but grants the applicant's application for withholding of removal under the Act, and the applicant requests review by an IJ, the IJ would have the authority to review not only the denial of asylum but also the grant of withholding of removal as well. In these mixed cases, the

Departments believe it is appropriate, where the applicant has requested review of an asylum officer's decision, to permit IJs to review not only the denial but also the grant, because DHS could present documentation or testimony before the IJ that is admissible under 8 CFR 1003.48(e) and that indicates that the applicant does not qualify for any of the relief or protection at issue. The Departments seek comment on whether the IJ should have the authority to review all decisions of the asylum officer in this manner.

As proposed at 8 CFR 1003.48(e), if the IJ determines that the noncitizen is eligible for and merits asylum as a matter of discretion, the IJ would issue a decision vacating the order of removal issued by the asylum officer based upon the immigration officer's initial inadmissibility determination under section 235(b)(1)(A)(i) of the Act, 8 U.S.C. 1225(b)(1)(A)(i), and granting the noncitizen asylum. If the IJ determines that the noncitizen is eligible for withholding of removal under the Act or withholding or deferral of removal under the CAT, the IJ would issue a decision granting the appropriate protection, but the IJ would not vacate the removal order issued by the asylum officer.<sup>58</sup>

The Departments propose that either party may appeal the IJ's decision rendered in the new proceedings under 8 CFR 1003.48 to the BIA in accordance with the standard EOIR appeal procedures that currently apply to removal proceedings, including the submission of a Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge. *See generally* 8 CFR 1003.3, 1003.38. The Departments also propose to amend 8 CFR 1003.1(b) to make clear that a noncitizen may appeal the IJ's decision to the BIA and that the review of these decisions is within the BIA's jurisdiction. And, as with BIA decisions in removal proceedings, the noncitizen may seek judicial review before the appropriate circuit court of appeals. *See* INA 242, 8 U.S.C. 1252(a)(1).<sup>59</sup> Accordingly, noncitizens

under the proposed regulations would have opportunities at four levels to have their claims for asylum, withholding of removal, or deferral of removal considered: First during a nonadversarial hearing before an asylum officer and then, if necessary, on review by an IJ, the BIA, and the appropriate circuit court of appeals.

#### F. Severability

Upon the completion of the notice and comment period provided for herein and subsequent issuance of a final rule, to the extent that any portion of the resulting final rule is stayed, enjoined, not implemented, or otherwise held invalid by a court, the Departments intend for all other parts of the final rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a judicial decision invalidating a portion of the final rule results in a partial reversion to the current regulations or to the statutory language itself, the Departments intend that the rest of the final rule continue to operate in tandem with the reverted provisions, if at all possible. The Departments seek comment on whether (and which of) the regulatory provisions proposed herein should be severable from one another.

#### G. Discretion/Phased Implementation

The Departments believe that the proposed changes in this rule are necessary to establish a more

streamlined and timely adjudication process for individuals who establish a credible fear of persecution or torture, while simultaneously ensuring fundamental fairness. The Departments emphasize, however, that this proposed rule would provide DHS the discretion to continue placing such individuals directly into section 240 removal proceedings before an IJ. This discretion may be exercised, for example, when a noncitizen with a positive credible fear determination may have committed significant criminal activity, have engaged in past acts of harm to others, or pose a public safety or national security threat. In some cases, DHS may determine that it is more appropriate for such noncitizens' protection claims to be heard and considered in the adversarial process before an IJ.

Additionally, if the Departments decide to issue a final rule implementing this new process during FY 2022, DHS would also need to continue to place many noncitizens receiving a positive credible fear determination into section 240 removal proceedings, while USCIS takes the steps needed to allow it to fully implement this new process for all cases. As discussed below in greater detail in the costs and benefits analysis of this proposal and its impacts on USCIS, as required under Executive Orders 12866 and 13563, USCIS has estimated that it will need to hire approximately 800 new employees and spend approximately \$180 million to fully implement the proposed asylum officer hearing and adjudication process to handle approximately 75,000 cases annually. If the number of noncitizens placed into expedited removal and making successful fear claims increases significantly above that estimate, the cost to implement this proposed rule with staffing levels sufficient to handle the additional cases in a timely fashion would be substantially higher.<sup>60</sup> Until USCIS is able to support full implementation, USCIS would need to continue to place a large percentage of individuals receiving a positive credible fear determination into section 240 removal proceedings. This exercise of discretion is similar to and in line with DHS's recognized prosecutorial discretion to issue an NTA to a covered

<sup>58</sup> A grant of withholding of removal "does not afford [a noncitizen] any permanent right to remain in the United States" and "does not prevent the DHS from removing [a noncitizen] to a country other than the one to which removal has been withheld." *Guzman Chavez*, 141 S. Ct. at 2286 (quoting *Matter of I-S- & C-S-*, 24 I&N Dec. 432, 434 (BIA 2008)). That presupposes the issuance of a removal order to preserve DHS's discretion to remove the noncitizen to a third country. *See id.* at 2287–88 (noting that "it is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld" (internal quotation marks and citation omitted)).

<sup>59</sup> The courts of appeals have jurisdiction to review "a final order of removal." INA 242(a)(1), 8 U.S.C. 1252(a)(1). As several courts of appeals have

held, that grant of jurisdiction includes the authority to review a conclusion that an otherwise-removable noncitizen is ineligible for asylum, even where—unlike under the present rule—"no formal order of removal has been entered." *Mitondo*, 523 F.3d at 787; *see Shehu v. Att'y Gen.*, 482 F.3d 652, 656 (3d Cir. 2007); *Kanacevic v. INS*, 448 F.3d 129, 134–35 (2d Cir. 2006); *Nreka v. Att'y Gen.*, 408 F.3d 1361, 1366–67 (11th Cir. 2005). The courts of appeals do not have jurisdiction to review "an order of removal without a hearing pursuant to [8 U.S.C.] 1225(b)(1)." INA 242(a)(1), 8 U.S.C. 1252(a)(1); *see* INA 242(a)(2)(A), 8 U.S.C. 1252(a)(2)(A) (additional limits on review of matters related to removal orders issued pursuant to INA 235(b)(1), 8 U.S.C. 1225(b)(1)). That limitation does not apply here. An order of removal entered after an asylum officer conducts a full hearing on a noncitizen's asylum application is not "an order or removal without a hearing." And, in the context of INA 242's limits on judicial review, the references to an order of removal issued "pursuant to" INA 242(b)(1), 8 U.S.C. 1225(b)(1), most naturally is read to encompass only the orders expressly described in that provision: An order issued when a noncitizen subject to expedited removal does not indicate an intention to apply for asylum or a fear of persecution, INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i), or an order issued when a noncitizen is found not to have a credible fear of persecution, INA 235(b)(1)(B)(iii)(I), 8 U.S.C. 1225(b)(1)(B)(iii)(I). *Cf. Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (applying "the presumption favoring judicial review of administrative action" in construing another limit on judicial review in INA 242, 8 U.S.C. 1252).

<sup>60</sup> USCIS presently has over 400,000 pending affirmative asylum applications awaiting interview or adjudication. In proposing this rule, the Departments seek to avoid simply shifting work from a resource-challenged EOIR to a similarly resource-challenged USCIS Asylum Division. DHS seeks to fully resource the USCIS Asylum Division to handle their present workloads and this new workload prior to the USCIS full takeover of the adjudication of protection claims that follow a positive credible fear determination.

noncitizen in expedited removal proceedings at any time after the covered citizen is referred to USCIS for a credible fear determination. *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. at 523.

USCIS is primarily funded by immigration and naturalization benefit request fees charged to applicants and petitioners. Fees collected from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (“IEFA”). These fee collections fund the costs of adjudicating immigration benefit requests, including those provided without charge to refugee, asylum, and certain other applicants. The authority for establishing fees is found in section 286(m) of the INA, 8 U.S.C. 1356(m), which authorizes DHS to charge fees for adjudication and naturalization services at a level to “ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.”

The Chief Financial Officers Act of 1990 (“CFO Act”), 31 U.S.C. 901–03, requires each agency’s chief financial officer to “review, on a biennial basis, the fees, royalties, rents, and other charges imposed by the agency for services and things of value it provides, and make recommendations on revising those charges to reflect costs incurred by it in providing those services and things of value.” 31 U.S.C. 902(a)(8). USCIS conducted a FY 2019 and 2020 IEFA fee review, as required under the CFO Act, and, as a result of that review, DHS published an updated final fee rule on August 3, 2020, with an effective date of October 2, 2020. *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788 (Aug. 3, 2020). Implementation of that new fee rule was enjoined before its effective date, and USCIS has notified the public that it intends to continue to comply with the court injunctions.<sup>61</sup> DHS intends to rescind and replace the changes made by the August 3, 2020 fee

rule and establish new USCIS fees to recover USCIS operating costs.<sup>62</sup>

Current resource constraints would prevent the Departments from immediately achieving their ultimate goal of having the protection claims of nearly all individuals who receive a positive credible fear determination adjudicated by an asylum officer. The Departments believe that to fully implement the proposed rule, additional resources would be required. The Departments therefore propose that the new process be implemented in phases, as the necessary staffing and resources are put into place.

A phased implementation would allow the Departments to begin employing the proposed process in an orderly and controlled manner and for a limited number of cases, giving USCIS the opportunity to work through operational challenges and ensure that each noncitizen placed into the process is given a full and fair opportunity to have any protection claim presented, heard, and properly adjudicated in full conformance with the law. Phased implementation would also have an immediately positive impact in reducing the number of individuals arriving at the southwest border who are placed into backlogged immigration court dockets, thus allowing the Departments to more quickly adjudicate some cases.

Given limited agency resources, the Departments anticipate first implementing this new process for certain non-detained family units. The Departments believe this is necessary as USCIS capacity is currently insufficient to handle all family unit referrals under this new proposed process. The Departments also anticipate limiting referrals under the initial implementation of this proposed rule to families apprehended in certain southwest border sectors or stations, as well as based on the family unit’s final intended destination (*e.g.*, if the family unit is within a predetermined distance from the potential interview location). As the USCIS Asylum Division gains resources and builds capacity, the Departments anticipate that additional family unit cases and then single adult cases could be considered for processing pursuant to this phased implementation. Under this approach, it is likely that single adult cases would not be handled under the new process

until a later phase of implementation. The Departments are seeking comments on what might be the appropriate factors for DHS to consider when determining which individuals to place into the new process during this period prior to full implementation.

### Statutory and Regulatory Requirements

*H. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives. If a regulation is necessary, these Executive orders direct that, to the extent permitted by law, agencies ensure that the benefits of a regulation justify its costs and select the regulatory approach that maximizes net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It explicitly draws attention to “equity, human dignity, fairness, and distributive impacts,” values that are difficult or impossible to quantify. All of these considerations are relevant here. This proposed rule has been designated as a “significant regulatory action,” and it is economically significant since it meets the \$100 million threshold under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget (“OMB”) has reviewed this regulation.

#### 1. Summary

This proposed rule would change and streamline the overall adjudicatory process for asylum applications arising out of the expedited removal process. By reducing undue delays in the system, and by providing a variety of procedural safeguards, the rule protects equity, human dignity, and fairness.

A central feature of the regulation changes the respective roles of an IJ and an asylum officer during proceedings for consideration of asylum applications after a positive credible fear determination. Notably, IJs will retain their existing authority to review *de novo* the negative determinations made by asylum officers in a credible fear proceeding. In making credible fear determinations, asylum officers will return to evaluating whether there is a significant possibility that the noncitizen could establish eligibility for asylum, withholding of removal, or CAT

<sup>61</sup> *See Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 526 (N.D. Cal. 2020) (enjoining the rule); *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 41 (D.D.C. 2020) (same). On January 29, 2021, USCIS published a **Federal Register** notice indicating that the agency was continuing to comply with these court orders. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 86 FR 7493, 7493 (Jan. 29, 2021).

<sup>62</sup> DHS lists a notice of proposed rulemaking for new fees on the Spring 2021 Unified Regulatory Agenda with a proposed publication date of November 2021. Office of Management and Budget, *Spring 2021 Unified Regulatory Agenda* (June 11, 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202104&RIN=1615-AC68>.

protection for possible referral to a full hearing of the claim and the noncitizen will still be able to seek review of that negative credible fear determination before the IJ.

Asylum officers will take on a new role of fully adjudicating all protection claims made by some noncitizens who have received a positive credible fear determination, a role previously carried out only by IJs as part of a proceeding under section 240 of the INA. Under the rule, IJs will take on a new authority to review de novo an asylum officer's denial of these claims.

The population of individuals likely to be affected by this proposed rule's provisions are individuals for whom USCIS completes a credible fear screening. The average annual number of credible fear screenings for FY 2016 through 2020 completed by USCIS is broken out as 59,280 positive credible fear determinations and 12,083 negative credible fear determinations, for a total of 71,363 individuals with credible fear determinations. DHS expects that this population will be affected by the rule in a number of ways, which may vary from person to person depending on (1) whether the individual receives a positive credible fear determination, and (2) whether the individual's asylum claim is granted or denied by the asylum officer. In addition, because of data constraints and conceptual and empirical challenges, we can provide only a partial monetization of the impacts to individuals. For example, asylum seekers who establish credible fear may benefit from having their asylum claims adjudicated potentially much sooner than they otherwise

would. Those who are granted asylum sooner may have a possible path to citizenship in the United States. This is obviously a benefit in terms of human dignity and equity, but it is a benefit that is not readily monetized. Asylum seekers who establish credible fear may also benefit from filing cost savings and earlier labor force entry. DHS has estimated this impact on a per-person workday basis.

As it relates to the Government and USCIS costs, the planned human resource and information-related expenditures required to implement this proposed rule are monetized as real resource costs. These estimates are developed along three population bounds, ranging from 75,000 to 300,000 credible fear screenings to account for possible variations in future years. Furthermore, the possibility of parole for more individuals—applied on a case-by-case basis—could lower the cost to the Government per person processed. DHS has also estimated potential employment tax impacts germane to earlier labor force entry, likewise on a per-person workday basis. Such estimates made on a per-person basis reflect a range of wages that the impacted individuals could earn. The per-person, per-work day estimates are not extended to broader monetized impacts due to data constraints.

An important caveat to the possible benefits to asylum applicants who establish a credible fear introduced above and discussed more thoroughly in the analysis is that it is expected to take time to implement this rule. Foremost, DHS expects the resourcing of this proposed rule to be implemented in a

phased approach. Further, while up-front expenditures to support the changes from this proposed rule based on planning models are high, the logistical and operational requirements of this proposed rule may take time to fully implement. For instance, once USCIS meets its staffing requirements, time will be required for the new asylum staff to be trained for their positions, which may occur over several months. As a result, the benefits to applicants and the Government may not be realized immediately.

To develop the monetized costs of the proposed rule, DHS relied on a low, midrange, and high population bound to reflect future uncertainty in the population. In addition, resources are partially phased in over FYs 2022 and 2023, as a full phasing in of resources, potentially up to 2026, is not possible at this time. The average annualized cost of this proposed rule ranges from \$180.4 million to \$1.0 billion, at a 3 percent discount rate, and from \$179.5 million to \$995.8 million, at a 7 percent discount rate. At a 3 percent discount rate the total 10-year costs could range from \$1.5 billion to \$8.6 billion, with a midpoint of \$3.9 billion. At a 7 percent discount rate, the total 10-year costs could range from \$1.3 billion to \$7.0 billion, with a midpoint of \$3.2 billion.

A summary of the potential impacts of this proposed rule are presented in Table 1 and are detailed more in the ensuing analysis. Where quantitative estimates are provided, they apply to the midpoint figure (applicable to the wage range or the population range).

TABLE 1—SUMMARY OF THE POTENTIAL IMPACTS OF THIS PROPOSED RULE

Entities impacted	Annual population estimate	Potential impacts
Individuals who receive a positive credible fear determination.	USCIS provides a range from 75,000 to 300,000 total individuals who receive credible fear determinations. In recent years (see Table 3), approximately 83.1% of individuals screened have received a positive credible fear determination.	<ul style="list-style-type: none"> <li>• Maximum potential cost-savings to applicants of Form I-589 of \$364.86 per person.</li> <li>• Potential cost-savings to applicants of Form I-765 of \$370.28 per person.</li> <li>• Potential early labor earnings to asylum applicants who obtain an employment authorization document ("EAD") of \$225.44 per person per workday; this impact could potentially constitute a transfer from workers in the U.S. labor force to certain asylum applicants. We identified three factors that could drive this impact of early entry to the labor force: (i) More expeditious grants of asylum, thereby authorizing work incident to status; and (ii) a change in timing apropos to the "start" time for filing for work authorization—the "EAD-clock" duration is not impacted, but it "shifts" to an earlier starting point. On the other hand, some individuals who would have reached the "EAD-clock" duration for a pending asylum application and obtained work authorization under the current regulations may not obtain work authorization if their asylum claim is promptly denied.</li> <li>• Individuals could not have to wait lengthy times for a decision on their protection claims. This is a benefit in terms of equity, human dignity, and fairness.</li> <li>• Some individuals could benefit from de novo review by an IJ of the asylum officer's denial of their asylum claim.</li> </ul>

TABLE 1—SUMMARY OF THE POTENTIAL IMPACTS OF THIS PROPOSED RULE—Continued

Entities impacted	Annual population estimate	Potential impacts
Individuals who receive a negative credible fear determination.	USCIS provides a range from 75,000 to 300,000 total individuals who receive credible fear determinations. In recent years (see Table 3), approximately 16.9% of individuals screened have received a negative credible fear determination.	<ul style="list-style-type: none"> <li>Beneficiaries of the new process may benefit in terms of human dignity if paroled from detention while awaiting their credible fear interview and determination.</li> </ul>
DHS—USCIS .....	N/A .....	<ul style="list-style-type: none"> <li>Parole may result in more individuals failing to appear for hearings.</li> <li>At a 7 percent discount rate, the resource costs could be \$451.2 million annually, based on up-front and continuing expenditures.</li> <li>It is reasonable to assume that there could be a reduction in Form I-765 filings due to more expeditious adjudication of asylum claims, but there could also be countervailing influences; hence, the volume of Form I-765 filings (writ large or for specific classes related to asylum) could decrease, remain the same, or increase—these reasons are elucidated in the analysis.</li> <li>A net change in Form I-765 volumes overall could impact the incumbent volume of biometrics and biometrics services fees collected; however, based on the structure of the USCIS Application Support Center (“ASC”) biometrics processing contract, it would take a significant change in such volumes for a particular service district to generate marginal cost increases or savings per biometrics submission.</li> </ul>
EOIR .....	555 current IJs as well as support staff and other personnel.	<ul style="list-style-type: none"> <li>EOIR only reviews on appeal and will no longer adjudicate asylum claims raised in expedited removal in the first instance.</li> <li>Allows EOIR to focus efforts on other priority work and reduce its substantial current backlog.</li> <li>There could be non-budget related cost-savings if the actual time worked on a credible fear case decreases in the transfer of credible fear cases to USCIS.</li> </ul>
Support networks for asylum applicants who receive a positive credible fear determination.	Unknown .....	<ul style="list-style-type: none"> <li>To the extent that some applicants may be able to earn income earlier than they otherwise could currently, burdens to the support network of the applicant may be lessened. This network could include public and private entities and family and personal friends, legal services providers and advisors, religious and charity organizations, State and local public institutions, educational providers, and non-governmental organizations (“NGOs”).</li> </ul>
Other .....	Unknown .....	<ul style="list-style-type: none"> <li>There could be familiarization costs associated with this proposed rule; for example, if attorneys representing the asylum client reviewed the rule, the cost would be about \$69.05 per hour.</li> <li>There may be some labor market impacts as some asylum seekers that currently enter the labor market with a pending asylum application would no longer be entering the labor market under this proposed rule if they get a negative decision on their asylum claim sooner. Applicants with a positive credible fear determination may enter the labor market sooner under this proposed rule than they would currently.</li> <li>Tax impacts could accrue to the earlier entry of some individuals into the labor market; we estimate employment tax impacts could be \$34.49 per person on a workday basis.</li> </ul>

In addition to the impacts summarized above, and as required by OMB Circular A-4, Table 2 presents the costs and benefits associated with this regulation.<sup>63</sup>

TABLE 2—OMB A-4 ACCOUNTING STATEMENT  
[\$ millions, 2020]

Time Period: 2022–2031				
Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
<b>Benefits</b>				
Monetized benefits .....	Not estimated	Not estimated	Not estimated	
Annualized quantified, but un-monetized, benefits .....	N/A	N/A	N/A	
Unquantified benefits .....	Some individuals may benefit from filing cost-savings related to Forms I-589 and I-765. Early labor market entry would be beneficial in terms of labor earnings to the applicant, but also because it could reduce burdens on the applicants’ support networks. Benefits driven by increased efficiency would enable some asylum-seeking individuals to move through the asylum process more expeditiously than through the current process, with timelines potentially decreasing significantly, thus promoting both human dignity and equity. Adjudicative efficiency gains and expanded parole could lead to individuals spending less time in detention, which would benefit the Government and the affected individuals.			Regulatory Impact Analysis (“RIA”).

<sup>63</sup> OMB, Circular A-4 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/>

[omb/circulars/A4/a-4.pdf](https://omb/circulars/A4/a-4.pdf) (last viewed June 1, 2021).

TABLE 2—OMB A–4 ACCOUNTING STATEMENT—Continued  
[\$ millions, 2020]

Time Period: 2022–2031				
Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
	<p>Another benefit is that EOIR would not see the cases in which USCIS grants asylum, which we estimate as at least a 15 percent reduction in their overall credible fear workload. This stands to mitigate the backlog of cases pending in immigration courts. Additionally, this benefit would extend to individuals granted or denied asylum faster than if they were to go through the current process with EOIR.</p> <p>Depending on the individual case circumstances, this proposed rule would mean that such noncitizens would likely not remain in the United States—for years, potentially—pending resolution of their claims, and those who qualify for asylum would be granted asylum several years earlier than they are under the present process.</p> <p>The anticipated operational efficiencies from this proposed rule may provide for prompt grant of relief or protection to qualifying noncitizens and ensure that those who do not qualify for relief or protection are removed more efficiently than they are under current rules.</p>			
<b>Costs</b>				
Annualized monetized costs for 10-year period between 2021 and 2030 (discount rate in parenthesis).	(3%) \$453.8	\$180.4	\$1,002.4	RIA.
	(7%) \$451.2	179.5	995.8	RIA.
Annualized quantified, but un-monetized, costs .....	<ul style="list-style-type: none"> <li>• Potential cost-savings applicable to Form I–589 of \$338.86 per person.</li> <li>• Potential cost-savings applicable to Form I–765 of \$377.32 per person.</li> <li>• Potential early labor earnings of \$225.44 per person per workday.</li> <li>• The transfer of cases from EOIR to USCIS would allow resources at EOIR to be directed to other work, and there is a potential for cost-savings to be realized as it relates to credible fear processing specifically, if the average cost of work-time spent on cases by USCIS asylum officers would be lower than at EOIR currently. These would not be budgetary cost-savings, and USCIS has not made a one-to-one time- and cost-specific comparison between worktime actually spent on a case at EOIR and USCIS.</li> </ul>			RIA.
Qualitative (unquantified) costs .....	N/A			
<b>Transfers</b>				
Annualized transfers: .....	Potential labor earnings that would accrue to credible fear asylum applicants that enter the labor market earlier than they would currently.			
From whom to whom? .....	Potentially a distributional economic impact in the form of a transfer to asylum applicants who enter earlier than they would currently from others in the U.S. workforce.			
Miscellaneous analyses/category .....	N/A			RIA.
Effects on State, local, or Tribal governments .....	N/A			
Effects on small businesses .....	This proposed rule does not directly regulate small entities, but rather individuals.			RFA.
Effects on wages .....	None			
Effects on growth .....	None			

2. Background and Purpose of the Rule

The purpose of this proposed rule is to address the rising number of apprehensions at or near the southwest

border and the ability of the U.S. asylum system to fairly and efficiently handle protection claims made by those encountered. The proposed rule

streamlines and simplifies the adjudication process for certain individuals who are encountered at or near the border, placed into expedited



removal, and determined to have a credible fear of persecution or torture, with the aim of adjudicating applications for asylum, statutory withholding of removal, and CAT protection in a timelier fashion and in conformity with procedural protections against erroneous denial of relief or protection. The principal facet of the rule is to transfer the initial responsibility for adjudicating asylum, statutory withholding of removal, and CAT protection applications from IJs to USCIS asylum officers for individuals within expedited removal proceedings who receive a positive credible fear determination.

The proposed rule also would broaden the circumstances in which individuals making a fear claim during the expedited removal process could be considered for parole on a case-by-case basis prior to a positive credible fear determination being made. For such individuals, parole could be granted as an exercise of discretion not only where

required to meet a medical emergency or for a legitimate law enforcement objective, but also where detention is unavailable or impracticable.

DHS intends to apply this proposed rule only to recently-arrived individuals who are subject to expedited removal—*i.e.*, adults and families. The proposed rule does not apply to unaccompanied children, as they are statutorily exempt from being placed into expedited removal. It also does not apply to individuals already residing in the United States and whose presence in the United States is outside the coverage of noncitizens designated by the Secretary as subject to expedited removal. The proposed rule also does not apply to (1) stowaways or (2) noncitizens who are present in or arriving in the Commonwealth of the Northern Mariana Islands who are determined to have a credible fear. They will continue to be referred to asylum/withholding-only hearings before an IJ under 8 CFR 208.2(c). Finally, it is not legally

required that a noncitizen amenable to expedited removal after the effective date of the rule be placed in the non-adversarial review process described in this proposed rule. Rather, DHS generally, and USCIS in particular, retains discretion to issue an NTA to a covered noncitizen in expedited removal proceedings to instead place them in section 240 removal proceedings at any time after they are referred to USCIS for a credible fear determination. *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. at 523; *see also* 8 CFR 1208.2(c).

In this section we provide some data and information relevant to the ensuing discussion and analysis of the potential impacts of the rule. We first present USCIS data followed by EOIR data. Table 3 shows USCIS data for the Form I-589 and credible fear cases for the five-year span from FY 2016 through FY 2020.

TABLE 3—USCIS FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, AND CREDIBLE FEAR DATA

[FY 2016–2020]<sup>64</sup>

FY	Form I-589 receipts		Credible fear completions			Total credible fear cases <sup>65</sup>
	Initial receipts	Pending receipts	Positive screen	Negative screen	All completions	
2016 .....	115,888	194,986	73,081	9,697	82,778	94,048
2017 .....	142,760	289,835	60,566	8,245	68,811	79,842
2018 .....	106,041	319,202	74,677	9,659	84,336	99,035
2019 .....	96,861	349,158	75,252	16,679	91,931	102,204
2020 .....	93,134	386,014	12,824	16,134	28,958	30,839
Total .....	554,684	N/A	296,400	60,414	356,814	405,968
5-year Average .....	110,937	307,839	59,280	12,083	71,363	81,194

Source: USCIS Office of Performance and Quality (OPQ), and USCIS Refugee, Asylum, and International Operations (RAIO) Directorate, CLAIMS 3 database, Global received May 11, 2021.

<sup>64</sup>In FY 2020, the credible fear filings are captured in the Form I-870, “Record of Determination/Credible Fear Worksheet.” As part of the credible fear screening adjudication, USCIS Asylum Officers prepare Form I-870, Record of Determination/Credible Fear Worksheet. This worksheet includes biographical information about the applicant, including the applicant’s name, date of birth, gender, country of birth, nationality, ethnicity, religion, language, and information about the applicant’s entry into the United States and place of detention. Additionally, Form I-870 collects sufficient information about the applicant’s marital status, spouse, and children to determine whether they may be included in the determination. Form I-870 also documents the interpreter identification number of the interpreter used during the credible fear interview and collects information about a relative or sponsor in the United States, including their relationship to the applicant and contact information. In previous years credible fear filings included the Form I-867, “Credible Fear Referral.” Prior to FY 2020, the USCIS Asylum Division electronically received information about credible fear determinations through referral documentation provided by U.S. Customs and Border Protection. The referral documentation includes a form containing information about the applicant: Form I-867, Credible Fear Referral.

<sup>65</sup>The credible fear total receipts are larger than the sum of positive and negative determinations because the latter apply to “completions,” referring to cases forwarded to EOIR, and thus exclude cases that were administratively closed.

As can be seen from Table 3, the Form I-589 pending case number has grown steadily since 2016, and as of May 11, 2021, was 400,200, which is well above the five-year average of 307,839. Over that same period, the majority, 83.1 percent, of completed credible fear screenings were positive, while 16.9 percent were negative.<sup>66</sup>

In addition to the credible fear case data presented in Table 3, USCIS data and analysis can provide some insight concerning how long it has taken for the credible fear screening process to be completed. As detailed in this preamble, while this proposed rule’s primary

concern is the length of time before incoming asylum claims are expected to be adjudicated by EOIR, changes to USCIS processes enabled by this proposed rule (including, for example, improved systems for conducting credible fear interviews for individuals who are not in detention facilities) are also expected to reduce processing times for credible fear cases. Table 4

$296,400/356,814 = 0.831 \times 100 = 83.1$  percent (rounded); negative completions total 60,414/total completions (356,814) =  $0.169 \times 100 = 16.9$  percent (rounded).

<sup>66</sup>Calculation: Positive completions total 296,400/total completions (296,400 + 60,414) =

provides credible fear processing durations at USCIS.

TABLE 4—CREDIBLE FEAR TIME DURATIONS FOR DETAINED AND NON-DETAINED CASES  
[In average and median days, FY 2016–2021]

FY	Screen	Detained		Non-detained	
		Average	Median	Average	Median
2016	Positive	23.3	13	290.6	163.0
	Negative	34	26	197.1	80.5
2017	Positive	23.3	13	570.1	407.0
	Negative	34.2	25	496.1	354.0
2018	Positive	22.6	16	816.2	671.0
	Negative	32.3	25	811.7	668.0
2019	Positive	35.6	24	1230.9	1082.0
	Negative	44.7	33	1067.3	959.0
2020	Positive	37.2	20	1252.7	1065.0
	Negative	30.3	16	1311.2	1247.0
2021	Positive	25.6	15	955.3	919.0
	Negative	29.8	17	1174.0	1109.0

Source: Data and analysis provided by USCIS, RAO Directorate, SAS PME and data-bricks databases, received May 11, 2021.  
\* FY 2021 includes partial fiscal year data as of May 2021.

Table 4 reports the “durations,” defined as the elapsed days from date of apprehension to forwarding of the credible fear screening process at USCIS, in both averages and medians. USCIS has included the most recent figure, which is applicable to May 11, 2021. The total time for cases from apprehension to adjudication by EOIR can be found by summing the times in Table 4 with the times in Table 6, below.

The data in Table 4 are not utilized to develop quantitative impacts, but rather are intended to build context and situational awareness. There are several key observations from the information presented. Foremost, there is a substantial difference between durations for the detained and the non-detained populations. The existence of a gap is expected because USCIS can interface with detained individuals rapidly. However, the gap has grown over time;

in 2016 the duration for positive-screened processing was 12.5 times greater, but by 2021 it had grown to a factor of nearly 40.<sup>67</sup> Second, and relatedly, there was a substantial duration rise through 2019 for both detained and non-detained screenings, although there has been a recent pullback. Furthermore, the duration for negative screenings is lower across the board than for positive screenings—as of the most recent data point the duration was about 19 percent lower for negative screened cases.<sup>68</sup> It is also seen that the 2021 average durations for detained cases are relatively close to 2016–2018 levels, with this series witnessing a spike in 2019.

Since some of the EOIR data are presented in medians, we note that the median durations are lower than the means for both screened types. This indicates that a small number of cases take an exceptionally long time to

resolve, resulting in large outlier data points that skew the mean upwards. It is noted that for non-detained cases, the gap between median and mean duration is relatively consistent up to 2021, but the mean and median converge toward the end of the period; this feature of the data could indicate that fewer outlier durations were represented in the data.

It is possible that the proposed rule may impact employment authorization applications and approvals in terms of volume and timing. While we cannot predict the net change in filings for the Form I–765 categories, we present data on initial filings and approvals for three asylum-related categories (Table 5). As a result of the rule, there could be substitutions in Form I–765 categories from the (c)(8), Applicant for Asylum/Pending Asylum, into the (a)(5), Granted Asylum Under Section 208, and (a)(10) Granted Withholding of Removal/243 (H) categories, in Table 5.

TABLE 5—USCIS FORM I–765 APPLICATION FOR EMPLOYMENT AUTHORIZATION INITIAL RECEIPTS AND APPROVALS RELATED TO ASYLEE CATEGORIES  
[FY 2016–2020]

FY	EAD category (a)(5) Granted Asylum Under Section 208		EAD category (c)(8) Applicant for Asylum/Pending Asylum		EAD category (a)(10) Granted Withholding of Removal/243 (H)	
	Initial receipts	Approvals	Initial receipts	Approvals	Initial receipts	Approvals
2016	29,887	27,139	169,970	152,269	2,008	1,621
2017	32,673	29,648	261,782	234,053	1,936	1,076
2018	38,743	39,598	262,965	246,525	1,733	1,556
2019	47,761	41,288	216,038	177,520	2,402	2,101

<sup>67</sup> Calculations: For 2016, 290.6 average days/23.3 average days = 12.5; for 2021, 1174.0 average days/25.6 average days = 39.4.

<sup>68</sup> Calculation:  $[1 - (955.3 \text{ days} / 1174.0 \text{ days})] = .186$ , rounded to .19.

TABLE 5—USCIS FORM I-765 APPLICATION FOR EMPLOYMENT AUTHORIZATION INITIAL RECEIPTS AND APPROVALS RELATED TO ASYLEE CATEGORIES—Continued  
[FY 2016–2020]

FY	EAD category (a)(5) Granted Asylum Under Section 208		EAD category (c)(8) Applicant for Asylum/Pending Asylum		EAD category (a)(10) Granted Withholding of Removal/243 (H)	
	Initial receipts	Approvals	Initial receipts	Approvals	Initial receipts	Approvals
2020 .....	31,931	36,334	233,864	183,820	3,318	2,554
5-year total .....	180,995	174,007	1,144,619	994,187	11,397	8,908
Average .....	36,199	34,801	228,924	198,837	2,279	1,782

Source: USCIS, Office of Performance and Quality (OPQ), CLAIMS 3, data obtained May 11, 2021, [https://www.uscis.gov/sites/default/files/document/reports/I-765\\_Application\\_for\\_Employment\\_FY03-20.pdf](https://www.uscis.gov/sites/default/files/document/reports/I-765_Application_for_Employment_FY03-20.pdf) (last visited August 9, 2021).

Across the three relevant employment authorization categories, the total of the averages is 267,402 initial EADs, with a total of 235,420 approved EADs.

Having presented information and data applicable to USCIS specifically, we now turn to EOIR data and information. Table 6 presents average and median processing times for EOIR to complete credible fear cases originating from the credible fear

screening process, positive and negative, and detained and non-detained (the processing time represents that time between when a case is lodged in EOIR systems and a final decision). Note that the “initial case completions” are not directly comparable to USCIS completions (Table 3) in terms of annual volumes for two primary reasons. First, there can be timing differences in terms of when a credible fear case is sent to

EOIR and when it is lodged in their processing systems. Second, not all individuals determined to have a credible fear follow up with their case with EOIR, and some cases filed are administratively closed. Therefore, as a general rule, case completions by EOIR would be necessarily lower than “completions” at USCIS.

TABLE 6—EOIR TIME DURATION METRICS, DAYS, AND COMPLETIONS FOR CASES WITH A CREDIBLE FEAR ORIGIN

FY	Average processing time	Median processing time	Initial case completions
<b>6A. Average and Median Processing Times (in Days) for Form I-862 Initial Case Completions With a Credible Fear Origin</b>			
2016 .....	413	214	16,794
2017 .....	447	252	26,531
2018 .....	648	512	33,634
2019 .....	669	455	55,404
2020 .....	712	502	33,517
2021–March 31, 2021 (years) * .....	1,078 (2.95)	857 (2.35)	6,646
<b>6B. Average and Median Processing Times (in Days) for Form I-862 Initial Case Completions With a Credible Fear Origin and Only an Application for Asylum, Statutory Withholding of Removal, and Withholding and Deferral of Removal Under the CAT</b>			
2016 .....	514	300	7,519
2017 .....	551	378	13,463
2018 .....	787	690	19,293
2019 .....	822	792	30,052
2020 .....	828	678	21,058
2021–March 31, 2021 (years) * .....	1,283 (3.52)	1,316 (3.61)	3,730

Source: EOIR, Planning, Analysis, and Statistics Division (“PASD”), data obtained April 19, 2021.

\* Current through March 31, 2021.

The FY 2021 data point reflects data through the start of FY 2021 to March 31, 2021, and we have included the current processing times in years for situational awareness. As Table 6 shows, there was an across-the-board jump in processing times in 2018, followed by a leveling off until 2021, when the processing times surged again.

3. Population

The population expected to be affected by this rule is the total number of credible fear completions processed annually by USCIS (71,363, see Table 3), split between an average of 59,280 positive-screen cases and 12,083 negative-screen cases. This can be considered the maximum, “encompassing,” population that could be impacted. However, we take into consideration larger populations to

account for variations and uncertainty in the future population.

4. Impacts of the Rule

This section is divided into three modules. The first (A) focuses on impacts to asylum seekers, presented on a per-person basis. The second (B) discusses costs to the Federal Government, and the third (C) discusses other, possible impacts, including benefits.

### i. Impacts to the Credible Fear Asylum Population

Under the change in procedures of this proposed rule, asylum applicants who have established a credible fear of persecution or torture would not be required to file Form I-589 with USCIS. Individuals in this population could accrue cost-savings relevant to this change. There is no filing fee for Form I-589, and the time burden is currently estimated at 12.0 hours per response, including the time for reviewing instructions, and completing and submitting the form.<sup>69</sup> With regard to cost-savings, DHS believes the minimum wage is appropriate to rely on as a lower bound, as the applicants would be new to the U.S. labor market. The Federal minimum wage is \$7.25 per hour; however, in this proposed rule, we rely on the “effective” minimum wage of \$11.80. As *The New York Times* reported, “[t]wenty-nine states and the District of Columbia have state-level minimum hourly wages higher than the federal [minimum wage],” as do many city and county governments. This *New York Times* report estimates that “the effective minimum wage in the United States [was] \$11.80 an hour in 2019.”<sup>70</sup> Therefore, USCIS uses the “effective” minimum hourly wage rate of \$11.80 to estimate a lower bound. USCIS uses a national average wage rate across occupations of \$27.07<sup>71</sup> to take into consideration the variance in average wages across States as an upper bound.

DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent Bureau of Labor Statistics (“BLS”) report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS relies on a benefits-to-wage multiplier of 1.45 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of

benefits such as paid leave, insurance, retirement, and other benefits.<sup>72</sup> The total rate of compensation for the effective minimum hourly wage is \$17.11 (\$11.80 × benefits burden of 1.45), which is 62.8 percent higher than the Federal minimum wage.<sup>73</sup> The total rate of compensation for the average wage is \$39.25 (\$27.07 × benefits burden of 1.45).

For applicants who have established a credible fear, the opportunity cost of 12 hours to file Form I-589 at the lower and upper bound wage rates is \$205.32 (12 hours × \$17.11) and \$471.00 (12 hours × \$39.25), respectively, with a midrange average of \$338.16. In addition, form instructions require a passport-style photograph for each family member associated with the Form I-589 filing. The Departments obtain an estimate of the number of additional family members applicable via data on biometrics collections for the Form I-589. Biometrics information is collected on every individual associated with a Form I-589 filing, and the tracking of collections is captured in the USCIS Customer Profile Management System (“CPMS”) database. A query of this system reveals that for the five-year period of FY 2016 through FY 2020, an average of 296,072 biometrics collections accrued for the Form I-589 annually. Dividing this figure by the same five-year period average of 110,937 initial filings (Table 3) yields a multiplier of 2.67 (rounded).<sup>74</sup> Under the supposition that each photo incurs costs to applicants of \$10,<sup>75</sup> there could be \$26.70 in additional cost-savings at either wage

bound.<sup>76</sup> The resulting cost savings per applicant from no longer having to file Form I-589 could range from \$232.02 to \$497.70, with a midrange of \$364.86.<sup>77</sup>

Though these applicants would no longer be required to file Form I-589, DHS recognizes that applicants would likely expend some time and effort to prepare for their asylum interviews and provide documentation for their asylum claim under this rule as well. DHS does not know exactly how long, on average, an individual may spend preparing for their credible fear interviews under the proposed rule, and how that amount of time and effort would compare to the time individuals currently spend preparing for the credible fear interview. If the increased time were substantial—*i.e.*, above and beyond that currently earmarked for the asylum application process—lower cost-savings could result.

Additionally, asylum applicants with a positive credible fear determination would still submit biometrics to USCIS. Hence, for applicants that file a Form I-589, photos would be collected via this biometrics process for the credible fear determination as well as for the Form I-589 application. Under this proposed rule, there would be a change in process such that applicants would submit biometrics at an asylum office as opposed to an USCIS Application Support Center (“ASC”). As a result, there could be time- and travel-associated impacts driven by this change, but because the requirements remain largely the same, we do not attempt to quantify them. Specifically, the average distance and travel time is likely to differ between asylum offices and ASCs, thereby possibly impacting the direct travel (mileage) cost as well as the travel-time related opportunity costs. However, the Departments assume these differences would be negligible, and therefore we do not quantify them.

Under the proposed rule, asylum applicants who established a credible fear would be able to file for work authorization via the Form I-765, Application for Employment Authorization (“EAD”), while their asylum application is being adjudicated. We cannot say, however, whether the volume of Form I-765 EADs filed would increase or decrease in upcoming years due to this proposed rule. Currently, asylum applicants can file for an EAD under the asylum (c)(8) category while

<sup>69</sup> See Instructions for Form I-589, Application for Asylum and for Withholding of Removal, OMB No. 1615-0067 (expires July 31, 2022), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> (last visited May 12, 2021).

<sup>70</sup> Ernie Tedeschi, *Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)*, *The New York Times* (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html>. We note that with the wage level dated to 2019, we do not make an inflationary adjustment because the Federal minimum wage has not changed since then.

<sup>71</sup> For the average wage for all occupations, the Departments rely on statistics of the U.S. Department of Labor. See U.S. Dep’t of Labor, Bureau of Labor Statistics (“BLS”), May 2020 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#00-0000) (last visited May 13, 2021).

<sup>72</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) (\$38.60 Total Employee Compensation per hour)/(\$26.53 Wages and Salaries per hour) = 1.454957 = 1.45 (rounded). See U.S. Department of Labor, BLS, Economic News Release, *Employer Cost for Employee Compensation (December 2020)*, Table 1. *Employer Costs for Employee Compensation by Ownership* (Dec. 2020), [https://www.bls.gov/news.release/archives/eccec\\_03182021.pdf](https://www.bls.gov/news.release/archives/eccec_03182021.pdf) (last visited Mar. 31, 2021).

<sup>73</sup> The Federal minimum wage is \$7.25 hourly, which burdened at 1.45 yields \$10.51. It follows that: ((\$17.11 wage – \$10.51 wage)/\$10.51) wage = 0.628, which rounded and multiplied by 100 = 62.8 percent.

<sup>74</sup> Calculation: Average I-589 biometrics collections 296,072/110,937 average initial I-589 filings = 2.67 (rounded). Data were obtained from the USCIS Immigration Records and Identity Services (“IRIS”) Directorate, via the CPMS database (data obtained May 7, 2021).

<sup>75</sup> The U.S. Department of State estimates an average cost of \$10 per passport photo in their supporting statement for their Paperwork Reduction Act (PRA) submission for the *Application for a U.S. Passport*, OMB #1405-0004 (DS-11) (Feb. 8, 2011), [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201102-1405-001](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001) (see question #13 of the Supporting Statement).

<sup>76</sup> Calculation: \$10 per photo cost × 2.67 photos per I-589 application = \$26.70.

<sup>77</sup> Calculation: \$205.32 + \$26.70 = \$232.02; \$338.16 + \$26.70 = \$364.86; \$471.00 + \$26.70 = \$497.70.

their asylum application is pending. Such applications are subject to a 365-day waiting period that commences when their completed Form I-589 is filed. Asylum applicants who establish a credible fear would still be subject to the 365-day waiting period.<sup>78</sup>

Applicants would still be able to file for their EADs under the (c)(8) category. We analyze the impacts regarding the EAD filing in two steps, explaining first why filing volumes might decline and related impacts, and then why countervailing factors might mitigate such a decline.

A result of this proposed rule is that asylum applications for some individuals pursuant to this proposed rule could be granted asylum earlier than they would be under current conditions. Since an asylum approval grants work authorization incident to status and USCIS automatically provides an asylum-granted EAD ((a)(5)) after a grant of asylum by USCIS, some applicants may choose not to file for an EAD based on the pending asylum application under the expectation that asylum would be granted earlier than the EAD approval. This could result in cost savings to some applicants.

There is currently no filing fee for the initial (c)(8) EAD Form I-765 application, and the time burden is currently estimated at 4.75 hours, which includes the time associated with submitting two passport-style photos along with the application.<sup>79</sup> As stated earlier, the Department of State estimates that each passport photo costs about \$10 each. Submitting two passport photos resulting in an estimated cost of \$20 per Form I-765 application.

Because the (c)(8) EAD does not include or require, at the initial or renewal stage, any data on employment, and since it does not involve an associated labor condition application, we have no information on wages, occupations, industries, or businesses that may employ such workers. Hence, we continue to rely on the wage bounds (effective minimum and national average) developed earlier. At the wage bounds relied upon, the opportunity cost-savings are \$81.27 (4.75 hours × \$17.11 per hour), and \$186.44 (4.75 hours × \$39.25). When the \$20 photo cost is included, the cost-savings would

be \$101.27 and \$206.44 per applicant, respectively. However, some might choose to file for an EAD after being granted asylum, or even if they expect asylum to be granted earlier than the EAD approval, they may want to have documentation that reflects that they are employment authorized.

In the discussion of the possible file volume decline for the Form I-589, above, we noted that applicants and family members would continue to submit biometrics as part of their asylum claim, and that, as a result, there would not be costs or cost-savings changes germane to biometrics. For the Form I-765(c)(8) category, USCIS started collecting biometrics, and the associated \$85 biometrics service fee, in October 2020.<sup>80</sup>

The submission of biometrics involves travel to an ASC for the biometric services appointment. In past rulemakings, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.<sup>81</sup> The cost of travel also includes a mileage charge based on the estimated 50-mile round trip at the 2021 General Services Administration (“GSA”) rate of \$0.56 per mile.<sup>82</sup> Because an individual would spend an average of 1 hour and 10 minutes (1.17 hours) at an ASC to submit biometrics,<sup>83</sup> summing the ASC time and travel time yields 3.67 hours. At the low- and high-wage bounds, the opportunity costs of time are \$62.79 and \$144.05.<sup>84</sup> The travel cost is \$28, which is the per mileage reimbursement rate of 0.56 multiplied by 50-mile travel distance. Summing the time-related and travel costs generates a per-person biometrics submission cost of \$90.79, at the low-wage bound and \$172.05 at the high-wage bound.<sup>85</sup> While the

biometrics collection includes the \$85 service fee, fee waivers and exemptions are granted on a case-by-case basis (across all forms) that are immaterial to this proposed rule. Accordingly, not all individuals pay the fee. When the opportunity costs of time for filing Form I-765 (\$101.27 and \$206.44, respectively) are added to the opportunity costs of time and travel for biometrics submissions (\$90.79 and 172.05), the total opportunity cost of time to file Form I-765 and submitting biometrics are \$192.07 and \$378.49, respectively. For those who pay the biometrics service fee, the total costs are \$277.07 and \$463.49, respectively, with a midpoint of \$370.28.<sup>86</sup> These figures represent the maximum per-person cost savings for those who choose not to file for an EAD.<sup>87</sup>

Having developed the cost-savings for applicants who do not file for an EAD, we now turn to countervailing factors against the potential decline in Form I-765 volumes. First, applicants will benefit from a timing change relevant to the “filing date” of their asylum application that will allow an EAD to be filed earlier than it could be currently. USCIS allows for an EAD to be filed under 8 CFR 208.7 when an asylum application is pending and certain other conditions are met. Here, an asylum application would be pending when the credible fear determination is served on the individual as opposed to current practice under which the asylum application is lodged in immigration court. This change in timing could allow some EADs to be approved earlier for those who file for an EAD with a pending asylum application. In this

Opportunity cost of time, average wage \$144.05 + travel cost \$28 = \$172.05.

<sup>86</sup> Calculations: \$192.07 + biometrics services fee \$85 = \$277.07; \$378.49 + biometrics services fee \$85 = \$463.49. While we have the overall count for biometrics for the period from October 1, 2020 through May 1, 2021, we do not know how many biometrics service fees were collected with these biometrics submissions; the fee data are retained by the USCIS Office of the Chief Financial Officer (“OCFO”), but the Form I-765 fee payments are not captured by eligibility class.

<sup>87</sup> There is a scenario that the Departments account for, though it is not likely to occur often. Currently, an asylum applicant might file for an EAD and have the EAD approved prior to the grant of asylum. It is possible that, under this proposed rule, asylum may be approved more expeditiously. At the time of the asylum grant, the individual will automatically receive a category (a)(5) EAD based on the grant of asylum; if they did file for an EAD, technically the filing costs associated with the EAD would be accounted for as sunk costs, since the (c)(8) EAD does not actually provide any benefit over the (a)(5) EAD. This would only apply if the proposed rule itself was responsible for the more expeditious asylum grant, and again, we only account for this possibility since it cannot be ruled out.

<sup>78</sup> A preliminary injunction in *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 935 (D. Md. 2020), currently exempts members of certain organizations from this 365-day waiting period. Such members are subject to the 180-day Asylum EAD Clock.

<sup>79</sup> See Instructions for Form I-765, Application for Employment Authorization, OMB No. 1615-0040 (expires July 31, 2022), <https://www.uscis.gov/i-765> (last visited May 12, 2021).

<sup>80</sup> USCIS collects biometrics for Form I-765 (c)(8) submissions, but a preliminary injunction in *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 935 (D. Md. 2020), currently exempts members of certain organizations from this biometrics collection.

<sup>81</sup> See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR 535 (Jan. 3, 2013).

<sup>82</sup> GSA mileage rate of \$0.56. See GSA, *Privately Owned Vehicle Mileage Reimbursement Rates* (effective January 1, 2021), <https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates> (last visited Aug. 4, 2021).

<sup>83</sup> See Instructions for Form I-765, Application for Employment Authorization, OMB No. 1615-0040 (expires July 31, 2022), <https://www.uscis.gov/i-765> (last visited May 12, 2021).

<sup>84</sup> Calculations: Total time burden 3.67 hours × total rate of compensation for the effective wage \$17.11 = \$62.79; total time burden 3.67 hours × total rate of compensation for the average wage \$39.25 = \$144.05.

<sup>85</sup> Calculations: Opportunity cost of time, effective wage \$62.79 + travel cost \$28 = \$90.79;

sense, the EAD remains the same in duration, but the starting point shifts to an earlier position for asylum applicants who will file for an initial EAD under the (c)(8) category.

DHS would begin to consider for parole on a case-by-case basis all noncitizens who have been referred to USCIS for a credible fear screening under the slightly expanded set of factors provided for in the proposed rule during the relatively short period between being referred to USCIS for a credible fear screening interview and the issuance of a credible fear determination. A parole grant does not constitute work authorization, however, and currently there are two Form I-765 classes, (a)(5), "Granted Asylum Sec. 208," and (a)(10), "Granted Withholding of Removal/243 (H)," that could apply to applicants filing for asylum pursuant to the parole process under this proposed rule. In the past, some parolees under these categories have been able to obtain EADs sooner than they would if they were explicitly subject to the filing clock that applies to a pending Form I-589 application.

Given the two changes discussed above related to the EAD filings—(i) the change in timing under when an EAD can be filed; and (ii) the somewhat expanded set of circumstances under which certain credible fear cases may be considered for parole—some applicants may file for an EAD, even under the expectation that their asylum could be granted earlier, if they expect to receive an (a)(5) asylum granted EAD even sooner. In this sense, the potential for more rapid approvals of an EAD claim may be expected to provide a net pecuniary benefit even in light of a more expeditious asylum claim. Coupled with the expectation that some individuals may seek an EAD for the non-pecuniary benefit associated with its documentary value, we cannot determine if these countervailing influences might limit, or even completely absorb, any reductions in EAD filing for credible fear asylum applicants.

Regardless of whether, under the proposed rule, it is the more expeditious asylum or EAD approval that is binding for purposes of work authorization, individuals who enter the labor force earlier are able to earn income earlier. The assessments of possible impacts rely on the implicit assumption that credible fear asylum seekers who receive employment authorization will enter and be embedded in the U.S. labor force at the time of the proposed rule being effective. This assumption is justifiable for those whose labor force entry was effectuated by the EAD approval, as opposed to the grant of

asylum. We believe this assumption is justifiable because applicants would generally not have expended the direct and opportunity costs of applying for an EAD if they did not expect to recoup an economic benefit. We also take the extra step of assuming these entrants to the labor force are employed. It is possible that some applicants who are eventually denied asylum are currently able to obtain work authorizations—approved while their asylum application was pending. We do not know what the annual or current scale of this population is, but it is an expected consequence of this proposed rule that such individuals would not obtain work authorizations in the future.

The impact is attributable to the difference in days between when asylum would be granted under the proposed rule and the current baseline. USCIS describes this distributional impact in more detail. Since a typical workweek is 5 days, the total day difference ("D") can be scaled by 0.714 (5 days/7 days) and then multiplied by the average wage ("W") and the number of hours in a typical work day (8) to obtain the impact, as in the formula:  $D \times 0.714 \times W \times 8$ . In terms of each actual workday, the daily distributional impact at the wage bounds are \$136.88 (\$17.11  $\times$  8 hours) and \$314.00 (\$39.25  $\times$  8 hours), respectively, on a per-person basis, with a midrange average of \$225.44.

USCIS cannot expand the per-person per-day quantified impacts to a broader monetized estimate. Foremost, while Table 5 provides filing volumes for the asylum relevant EADs, we cannot determine how many individuals within this population would be affected. In addition, we cannot determine what the average day difference would be for any individual that could be impacted. To quantify the day difference, the Departments would need to simultaneously analyze the current and future interaction between the asylum grant and EAD approvals. Doing so for the current system is conceptually possible with a significant devotion of time and resources, but it is not possible to conduct a similar analysis for future cases without relying on a number of assumptions that may not be tractable. As a result, we cannot extend the per-person cost (in terms of earnings) basis to an aggregate monetized cost, even if USCIS knew either the population impacted or the day-difference average because an estimate of the costs would require both data points. The impact accruing to labor earnings developed above has the potential to include both distributional effects (which are transfers) and indirect benefits to

employers.<sup>88</sup> The distributional impacts would accrue to asylum applicants who enter the U.S. labor force earlier than under current regulations, in the form of increased compensation (wages and benefits). A portion of this compensation gain might be transferred to asylum applicants from others that are currently in the U.S. labor force or eligible to work lawfully. Alternatively, employers that need workers in the U.S. labor market may benefit from those asylum applicants that receive their employment authorization earlier as a result of the proposed rule, gaining productivity and potential profits that the asylum applicant's earlier start would provide. Companies may also benefit by not incurring opportunity costs associated with the next-best alternative to the immediate labor the asylum applicant would provide, such as having to pay existing workers to work overtime hours, if in fact it was necessary or they were requested to work overtime.

We do not know what this next-best alternative may be for those companies. As a result, the Departments do not know the portion of overall impacts of this proposed rule that are transfers or benefits, but the Departments estimate the maximum monetized impact of this proposed rule in terms of a daily, per-person basis compensation. The extent to which the portion of impacts would accrue to benefits or transfers is difficult to discern and would depend on multiple labor market factors. However, we think it is reasonable to posit that the portion of impacts attributable to transfers would mainly be benefits, for the following reason: If there are both workers who obtain employment authorization under this rule and other workers who are available for a specific position, an employer would be expected to consider any two candidates to be substitutable to a high degree. There is an important caveat, however. There could be costs involved in hiring asylum seekers that are not captured in this discussion. As the U.S. economy recovers from the effects of the COVID-19 pandemic, there may be structural changes to the general labor market and to specific job positions that could impact the next-best alternatives that employers face. The Departments cannot speculate on how such changes in relation to the earlier labor market entry of some asylum applicants could

<sup>88</sup> Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB, Circular A-4 at 14, 38 (Sept. 17, 2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (further discussion of transfer payments and distributional effects).



mitigate the beneficial impacts to employers.

The early possible entry into the labor force of some positive-screened credible fear asylum applicants is not expected to change the composition of the labor market, as it would affect only the timing, not the scale of the labor force. However, there may be some labor market impacts from asylum seekers who currently enter the labor market with a pending asylum application and who may no longer be entering the labor market under this proposed rule if they get a decision sooner on their asylum claim. As we cannot predict how many people would be impacted in such a way, we are not able to quantify this impact.

Furthermore, there may be tax impacts for the Government. It is difficult to quantify income tax impacts of earlier employment in the tight labor market scenario because individual tax situations vary widely, but the Departments estimate the potential contributory effects on employment taxes, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).<sup>89</sup> With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated accretion in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent.<sup>90</sup> The Departments will rely on this total tax rate where applicable. The Departments are unable to quantify other tax transfer payments, such as for Federal income taxes and State and local taxes. As noted above, the Departments do not know how many individuals with a positive credible fear determination will be affected, and what the average day-difference would be, and therefore the Departments cannot make an informed monetized estimate of the potential impact. It therefore follows that the Departments cannot monetize the potential tax impacts of the proposed rule. However, the Departments can provide partial quantitative information by focusing on the workday earnings presented earlier. At the wage bounds, the workday

<sup>89</sup> See Internal Revenue Service Publication 15, Circular E, *Employer's Tax Guide for Specific Information on Employment Tax Rates* (Feb. 4, 2021), <https://www.irs.gov/pub/irs-pdf/p15.pdf>; see also Market Watch, *More Than 44 Percent of Americans Pay No Federal Income Tax* (Sept. 16, 2018), <https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16>.

<sup>90</sup> Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax loss to Government.

earnings, at \$136.88 and \$314.00, are multiplied by 0.153 to obtain \$20.94 and \$48.04, respectively, with a midpoint of \$34.49, which are the daily employment tax impacts per individual. The tax impacts per person would accrue to the total day-difference in earnings scaled by 0.714, to reflect a five-day workweek.

Having developed partial (based on an individual basis) monetized impacts of this proposed rule, there are two important caveats applicable to the population of asylum applicants who have received a positive credible fear determination. Foremost, as we detail extensively in the following module, there will be resource requirements and associated costs needed to make this proposed rule operational and effective. These changes will not occur instantaneously and may require months or even a year or more to fully implement. While existing USCIS resources will be able to effectuate changes for some individuals rather quickly, others (and thus the entire population from an average perspective) will face a time horizon in realizing the impacts—generally the impacts are beneficial as they include earlier asylum determinations, income gains, and possible filing cost-savings. While the time horizon would not be accounted as a cost to applicants, some may face a delay in realizing such benefits. Second, despite the possibility that some baseline EAD filers may choose not to file in the future, there could be mitigating effects to concomitant volume declines for Form I-765(c)(8) submissions.

In closing, we have noted that the impacts developed in this section apply to the population that receives a positive credible fear determination. Additionally, for the subset of this population that receives a negative asylum determination from USCIS, the possibility of de novo review of their claim by an IJ may benefit some applicants by affording another opportunity for review and approval of their asylum claims.

## ii. Impacts to USCIS

### a. Total Quantified Estimated Costs of Regulatory Changes

In this section, DHS discusses impacts to the Federal Government. Where possible, cost estimates have been quantified, otherwise they are discussed qualitatively. The total annual costs are provided only for those quantified costs that can be applied to a population.

## Costs of Staffing to USCIS

USCIS will need additional staffing to implement the provisions presented in this proposed rule. The staffing requirement will largely depend on the anticipated volume of credible fear referrals. In addition to asylum officers, USCIS will require additional supervisory staff, operational personnel, and organizational structures commensurate with the number of asylum officers needed. USCIS anticipates an increased need for higher-graded field adjudicators and supervisors to implement the provisions of this proposed rule. Approximately 92 percent of the field asylum officers are currently employed at the GS-12 pay level or lower.<sup>91</sup> Under this model, USCIS will be assuming work normally performed by an IJ. EOIR data indicate the weighted average salary of \$155,089 in FY 2021 for IJs, \$71,925 for Judicial Law Clerks (“JLC”s), \$58,394 for Legal Assistants, \$132,132 for DHS Attorneys, and \$98.51 per hour for interpreters.<sup>92</sup> Notably, entry-level IJs are required to adjudicate a wider array of immigration applications than asylum officers, and their decisions are not subject to 100 percent supervisory review, unlike current USCIS asylum officers. As such, under this proposed rule, USCIS asylum officers making final decisions on statutory withholding of removal and CAT protection cases would be at a GS-13 minimum, considering they will be conducting adjudications traditionally performed only by IJs.<sup>93</sup> In addition, first-line Supervisory Asylum Officers (“SAO”s) reviewing these decisions would be graded at a GS-14.<sup>94</sup> Currently, not all SAOs are at a grade GS-14. However, aligning all first-line SAOs to a GS-14 ensures operational flexibility and makes this position consistent with the similar work processes and functions performed by the first-line Supervisory Refugee Officer position.

Currently, USCIS refers all credible fear determinations to IJs at EOIR. This

<sup>91</sup> In 2021, the base salary for a GS-12 ranges from \$66,829, at step 1, up to \$86,881, at step 10. See Office of Personnel Mgmt., *Salary Table 2021—GS Incorporating the 1% General Schedule Increase Effective January 2021*, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/GS.pdf> (last visited May 17, 2021).

<sup>92</sup> Weighted average base salaries across position, FY, and location are drawn from DOJ EOIR PASD analysis. Interpreter wages are presented hourly here, as these positions are paid differently and not always on an annual basis. In 2021, the base salary for a GS-15 step 3 is \$117,824 and step 4 is \$121,506. See *id.*

<sup>93</sup> In 2021, the base salary for a GS-13 step 1 is \$79,468. See *id.*

<sup>94</sup> In 2021, the base salary for a GS-14 step 1 is \$93,907. See *id.*

proposed rule continues to provide for the possibility that individuals who receive a negative credible fear determination may request review of the negative determination by an IJ at EOIR. Reviewing historical EOIR data on the amount of time required to complete a typical hearing with a credible fear origin and only an application for asylum, the median duration for credible fear merit plus master hearings from FY 2016 through FY 2020 is about 97 minutes, or 1.6 hours. Factoring in the EOIR weighted average salaries for the IJs, JLCs, DHS Attorneys, and interpreters required for EOIR to complete these hearings, we estimate the median cost to be \$470.62<sup>95</sup> per hearing over the same time period.

USCIS analyzes a range of credible fear cases to estimate staffing requirement costs. At a lower bound volume of 75,000 credible fear cases, USCIS assumes it would receive fewer credible fear cases compared to prior years (with the exception of FY 2020, which had a lower number of credible fear cases due to the COVID-19 pandemic and resulting border closures). A volume of 300,000 credible fear cases is an upper bound, based on the assumption that nearly all individuals apprehended will be placed into expedited removal for USCIS to process. As shown in Table 3, the lowest number of credible fear cases received within the last five years was 79,842 in FY 2017, while the highest was 102,204 in FY 2019. DHS recognizes that the estimated volume of 300,000 is nearly three times the highest annual number of credible fear cases received, but DHS presents this as an upper bound estimate to reflect the uncertainty concerning an operational

limit to how many credible fear cases could be handled by the agency in the future. Inclusion of this unlikely upper bound scenario is intended only to present information concerning the potential costs should the agency consider an intervention at the highest end of the range. USCIS expects volumes to fall within the lower and upper bounds and therefore we also provide a primary estimate of 150,000 credible fear cases.<sup>96</sup>

USCIS has estimated the staffing resources it will need to implement this proposed rule. At the three volume levels of credible fear cases, USCIS plans to hire between 794 and 4,647 total new positions, with a primary estimate of 2,035 total new positions.<sup>97</sup> The estimated costs associated with payroll, non-payroll, and other general expenses including interpreter services, transcription services, facilities, physical security, information technology (“IT”) case management, and other contract, supplies, and equipment are anticipated to begin in FY 2022.

In developing the quantified costs of this proposed rule, there are likely to be initial costs associated with the hiring and training of staff, and those payroll and other costs associated with the additional personnel would continue in future years. Additionally, as was explained in Section G of this preamble, DHS expects a phased approach to implementation due to budgetary and logistical factors. The cost estimates developed below focus on three volume bands and are based on initial data and staffing models that captured initial implementation costs accruing to FY 2022 and FY 2023. It therefore partially captures the likely phasing of resourcing and costs, but not the full phasing that

could extend into further years. As of the final drafting of this proposed rule, DHS does not have the appropriate data to integrate a full phasing of the implementation in terms of quantified resource costs. However, we do not believe a partial implementation significantly skews the expected costs of this proposed rule. We offer some additional comments concerning this phasing of implementation as it relates to costs at the conclusion of this analysis.

The Departments recognize that initial costs are likely to spill into future years depending on the pace of hiring, employee retention, obtaining and signing contracts (for interpreters, transcription, facilities), training, etc. For the remainder of FY 2021, DHS will finalize job descriptions, post new positions, and begin the hiring process to onboard some new Federal employees, and DHS will work to procure new contracts for interpreters, transcription, facilities, and security staff as its current fiscal situation allows. In FY 2022, the implementation costs are expected to range between \$179.8 million and \$952.4 million with a primary cost estimate of \$438.2 million, assuming all staff is hired and corresponding equipment needs are purchased in the fiscal year. DHS recognizes that, operationally, it may take more time to attain the staffing postures described. However, we are not able to reliably predict those timelines due to the uncertain nature of the recruitment and onboarding processes. Any delay in hiring would reduce the first-year costs of implementation, as explained further below. The itemized planned resources are presented in Table 7.

TABLE 7—ESTIMATED USCIS FY 2022 FUNDING REQUIREMENTS BY VOLUME OF CREDIBLE FEAR REFERRALS  
[\$ in thousands]

	75k cases	150k cases	300k cases
(A) Staffing .....	\$140,507	\$355,175	\$806,697
Payroll .....	113,602	285,983	648,257
Non-Payroll .....	26,905	69,192	158,440
(B) General Expenses .....	39,313	83,025	145,682
Interpreter Services .....	6,615	19,136	44,179
Transcription Services .....	9,366	26,697	37,362

<sup>95</sup> Estimate based on analysis provided by EOIR on May 19, 2021, of median digital audio recording (“DAR”) length data from all merit and master asylum hearings between FY 2016 and FY 2020. The five-year average estimated cost of hearings is based on 2,087 assumed hours per year for the IJ, JLC, and DHS attorneys’ at the annual salaries shown, plus the hourly cost per interpreter. These annual values were multiplied by the respective sums of the annual median lengths of master and merit hearings for corresponding years to produce the five-year average cost per hearing of \$470.62.

<sup>96</sup> Note that the primary estimate of 150,000 is not equal to the average of the lower volume of 75,000 credible fear cases and the upper volume of 300,000 credible fear cases. Rather, this primary estimate, based on OCFO modeling, represents the number of cases that the agency may reasonably expect. The OCFO volume levels were developed as a guide for several possible ranges that could be realized in the future, taking into account variations in the populations. The actual volume levels could be above or below these levels.

<sup>97</sup> Note that the primary estimate of 2,035 total new positions is not equal to the average of the

lower 794 and upper bound 4,647 estimates. Rather, this primary estimate, based on a staffing allocation model, represents the number of staff in a mix of occupations at a mix of grade levels that the agency may need to hire to handle the volume of credible fear cases. The staffing is commensurate with OCFO model volume levels, which were developed as a guide for several possible ranges that could be realized in the future, taking into account variations in the populations. The actual volume levels and hence staffing could be above or below these levels.

TABLE 7—ESTIMATED USCIS FY 2022 FUNDING REQUIREMENTS BY VOLUME OF CREDIBLE FEAR REFERRALS—  
Continued  
[\$ in thousands]

	75k cases	150k cases	300k cases
Facilities .....	6,635	17,606	40,865
Physical Security .....	623	1,654	3,839
IT Case Management .....	12,500	12,500	12,500
Other Contract/Supplies/Equipment .....	3,574	5,432	6,937
<b>Total .....</b>	<b>179,820</b>	<b>438,200</b>	<b>952,379</b>

Source: USCIS Analysis from RAIO and OCFO, May 19, 2021.

In FY 2023, USCIS estimates costs between \$164.7 million and \$907.4 million, with a primary estimate of \$413.6 million, as shown in Table 8. The reductions are mostly attributable to non-recurring, one-time costs for new staff and upgrades to IT case

management systems, although a decline in costs pertaining to other contracts/supplies/equipment is also expected. The largest expected cost decrease is for IT case management, which is estimated to decline from \$12.5 million in FY 2022 down to

\$4.375 million in FY 2023. Meanwhile, costs for interpreter and transcription services, facilities, and physical security are expected to rise in FY 2023 to factor in resource cost increases. For FY 2024 through FY 2031 of implementation, DHS expects resource costs to stabilize.

TABLE 8—ESTIMATED USCIS FY 2023 FUNDING REQUIREMENTS BY VOLUME OF CREDIBLE FEAR REFERRALS  
[\$ in thousands]

	75k cases	150k cases	300k cases
(A) Staffing .....	\$133,427	\$337,047	\$766,159
Payroll .....	122,753	309,758	703,852
Non-Payroll .....	10,674	27,289	62,307
(B) General Expenses .....	31,267	76,554	141,249
Interpreter Services .....	6,813	19,710	45,504
Transcription Services .....	9,647	27,498	38,483
Facilities .....	6,834	18,134	42,091
Physical Security .....	642	1,704	3,954
IT Case Management .....	4,375	4,375	4,375
Other Contract/Supplies/Equipment .....	2,956	5,133	6,842
<b>Total .....</b>	<b>164,694</b>	<b>413,601</b>	<b>907,408</b>

Source: USCIS Analysis from RAIO and OCFO, May 19, 2021.

To estimate the costs for each category itemized in Tables 7 and 8, USCIS considered the inputs for each. On average, USCIS expects to hire the majority of new staff at the GS-13, step 1 level, and most of those hired will serve as asylum officers. As stated, these officers will be adjudicating statutory withholding of removal and withholding and deferral of removal under the CAT, so their pay will be higher than the current asylum officer pay, which is at a GS-12 level. Additionally, USCIS assumes step 1 because these employees are expected to be new to the position. Payroll costs also include Government contributions to non-pay benefits, such as healthcare and retirement. While payroll is the greatest estimated cost to hiring staff, non-payroll costs include training, equipping, and setting staff up with resources such as laptops, cell phones, office supplies, etc. For example, asylum officers are required to attend and successfully complete a multi-week residential training at a Federal Law

Enforcement Training Center (“FLETC”) as a condition of their continued employment. The estimated cost per student (including FLETC enrollment costs, travel, etc.) is approximately \$7,000. The cost of training would apply to any new asylum staff with “officer” in their title. To fully furnish and equip new employees, USCIS estimates a cost of \$3,319 per asylum employee. Costs for new equipment would be largely commensurate with the increase in staffing levels.

In addition to costs associated with hiring new staff, DHS anticipates that it will need to both increase funding on existing contracts and procure new ones. As a result of this proposed rule, the need for interpretation services will increase as the number of asylum interviews USCIS performs rises. Current interpreter contracts cannot absorb this expected increase. Using current contracts, USCIS applied the current cost model to the estimated increase in case volumes in order to estimate costs. The facilities and

physical security estimates were similarly based on current cost models that were expanded to account for additional employees. Additional contract support will also be needed for transcription services to create a written record of the asylum hearing, which staff are not currently employed by USCIS. To create transcription service estimates, USCIS applied EOIR’s current cost model to the estimated increase in case volumes. DHS also anticipates costs associated with general expenses associated with miscellaneous contract, supplies, equipment, etc. commensurate with the increase in staff.

The timing of these costs will depend on the hiring timeline but are expected to commence in the first year. DHS recognizes that if it takes more than one year to hire and equip asylum employees, costs may instead be experienced in later years.

Costs to Information Technology Typology to USCIS

DHS is planning upgrades to internal management systems and databases as a requirement to implement this proposed rule. The estimated cost of these upgrades in FY 2022 is a one-time cost of \$12.5 million that will impact virtually all processing and record-keeping systems at USCIS. The cost embodies funds for enhancements and refurbishment to the USCIS Global case management system that would support features such as: Ensuring transition of positive credible fear screening cases to the hearing process currently provided for affirmative asylum cases, support for withholding of removal and CAT adjudication features, non-detained scheduling enhancements, and capabilities to accept and provide review for electronic documents. The one-time cost also includes funds earmarked for teams that support integrations with other internal and external-facing systems, such as record-keeping, identity management and matching, reporting and analytics, applicant-facing interfaces, and other key USCIS systems, as well as external systems at Immigration and Customs Enforcement (“ICE”), CBP, or DOJ.<sup>98</sup>

Included in these \$12.5 million costs are the costs to pay staff to make these upgrades. DHS estimates between 30 and 40 individuals, with a little over half contract personnel and the rest being Federal employees, would be involved (either part- or full-time) in the implementation of these enhancements through FY 2022. The Federal personnel would mainly comprise GS-14 and GS-15 level personnel and supervisory and management staff.

IT costs are expected to decline in FY 2023 and remain flat into the future at \$4.375 million, which accounts for ongoing operations and maintenance costs. New features or upgrades are not expected at this time, but if they were to be needed in the future, those enhancements would result in additional costs not included here.

At present, DHS does not envision new facilities or additional structures being required from an IT perspective to implement this rule.

Importantly, this effort is expected to coincide with the first electronic processing of the Form I-589. Since this will be a significant change for processing asylum applications, unexpected errors or system changes could have impacts on this project as well. Additional dependencies rely on the availability of ICE, CBP, and DOJ systems to integrate with USCIS systems to provide for streamlined implementation. However, since this trajectory was enabled outside the scope of this rule, we do not attribute costs to it.

As described earlier in this analysis, we expect no net change regarding biometrics collection germane to asylum applications for individuals with a positive credible fear determination. We also detailed how factors concomitant to more expeditious EAD approvals make it impossible to estimate the magnitude or even direction in the net change in Form I-765 filing volumes (related to asylum or withholding of removal), and hence, commensurate biometrics collections (and fee payments).

However, given the parameters of this proposed rule, any net change in biometrics would not impose new costs to the Federal Government. The

maximum monthly volume of biometrics submissions allowed by the current ASC contract is 1,633,968 and the maximum annual volume is 19,607,616.<sup>99</sup> The average number of individuals that submitted biometrics annually across all USCIS forms for the period FY 2016 through FY 2020 was 3,911,857.<sup>100</sup> Given that the average positive-screened credible fear population is 59,280 (Table 3), which is 1.52 percent of the biometrics volume, a volume change would not encroach on these bounds.

One scenario that we do account for relates to costs for a particular USCIS-ASC district. The DHS-ASC contract was designed to be flexible to reflect variations in benefit request volumes. The pricing mechanism within this contract embodies such flexibility. Specifically, the ASC contract is aggregated by USCIS district, and each district has five volume bands with its pricing mechanism. The incumbent pricing strategy takes advantage of economies of scale because larger biometrics processing volumes have smaller corresponding biometrics processing prices.<sup>101</sup> For example, Table 9 provides an example of the pricing mechanism for a particular USCIS district. This district incurs a monthly fixed cost of \$25,477.79, which will cover all biometrics submissions under a volume of 8,564. However, the price per biometrics submission decreases from an average cost of \$6.66 for volumes between a range of 8,565 and 20,524 to an average of \$5.19 once the total monthly volume exceeds 63,503. In other words, the average cost decreases when the biometrics submissions volume increases (jumps to a higher volume band).

TABLE 9—EXAMPLE OF PRICING MECHANISM FOR A USCIS DISTRICT PROCESSING BIOMETRICS APPOINTMENTS, FY 2021

District X	Volume band	Minimum volume	Maximum volume	Costs
Baseline: Fixed price per month	AA	0	8,564	\$25,477.79
Fixed price per person processed	AB	8,565	20,524	6.66
Fixed price per person processed	AC	20,525	31,752	5.94
Fixed price per person processed	AD	31,753	63,504	5.53
Fixed price per person processed	AE	63,505	95,256	5.19

Source: USCIS, IRIS Directorate, received May 10, 2021.

At the district level, since there are small marginal changes to costs in terms

of volumes, it would take a substantial change in volumes for a particular

district to mount a significant change in costs for that district. If biometrics

<sup>98</sup> While this plan tracks the FY 2022 time frame, variations in the pace of Federal and contractor hiring and retention during the performance period, unforeseen legal or other policy challenges to any electronic process, and the ability of relevant offices to truly operationalize minimal functionality give their own staffing constraints to handle manually

any additional process automations, could delay some implementation into FY 2023.

<sup>99</sup> Data and information provided by the USCIS IRIS Directorate. The average annual biometrics volumes were obtained through the CPMS database. The cost contract reflects the most recent contract update, dated June 18, 2020.

<sup>100</sup> Data and information provided by USCIS IRIS Directorate, utilizing the CPMS database.

<sup>101</sup> Economies of scale is a technical term that is used to describe the process whereby the greater the quantity of output produced (in this case more biometric service appointments), the lower the per-unit fixed cost or per-unit variable costs to produce that output.

volumes increase on net, there could be small marginal, and hence, average, cost declines; in contrast, if volumes decline, some of those marginal costs could not be realized.

Having developed the costs to USCIS to implement the proposed rule, this section brings the total costs together as annual inputs that are discounted over a 10-year horizon. At the three

population bounds, the inputs are captured in Table 10. The FY 2022 and FY 2023 costs are from Tables 7 and 8. For FY 2024 through FY 2031, human resources cost increases. As stated earlier, USCIS expects positions to be filled at step 1 for each GS level, so in years where employees remain at the same step for more than one year, these estimates account only for human

resource cost increases (FYs 2026, 2028 and 2030). The general non-IT cost increases account for expected contract pricing increases. Finally, IT costs are expected to remain flat at \$4.375 million into the future, which accounts for ongoing operations and maintenance costs.

TABLE 10—MONETIZED COSTS OF THE PROPOSED RULE TO USCIS  
[In undiscounted 2020 dollars]

Time Period: FYs 2022–2031				
FY	Human resources	General (non-IT) cost	IT expenditure	Annual total
<b>10A. Lower Population Bound (75k Annual Cases)</b>				
2022	\$140,507,000	\$26,813,000	\$12,500,000	\$179,820,000
2023	133,427,000	26,892,000	4,375,000	164,694,000
2024	137,429,810	27,698,760	4,375,000	169,503,570
2025	141,552,704	28,529,723	4,375,000	174,457,427
2026	142,968,231	29,385,614	4,375,000	176,728,846
2027	147,257,278	30,267,183	4,375,000	181,899,461
2028	148,729,851	31,175,198	4,375,000	184,280,049
2029	153,191,747	32,110,454	4,375,000	189,677,201
2030	154,723,664	33,073,768	4,375,000	192,172,432
2031	159,365,374	34,065,981	4,375,000	197,806,355
10-year total	1,459,152,660	300,011,682	51,875,000	1,811,039,342
<b>10B. Primary Population Bound (150k Annual Cases)</b>				
2022	355,175,000	70,525,000	12,500,000	438,200,000
2023	337,047,000	72,179,000	4,375,000	413,601,000
2024	347,832,504	74,344,370	4,375,000	426,551,874
2025	358,963,144	76,574,701	4,375,000	439,912,845
2026	362,552,776	78,871,942	4,375,000	445,799,718
2027	374,154,464	81,238,100	4,375,000	459,767,565
2028	377,896,009	83,675,243	4,375,000	465,946,252
2029	389,988,681	86,185,501	4,375,000	480,549,182
2030	393,888,568	88,771,066	4,375,000	487,034,634
2031	406,493,002	91,434,198	4,375,000	502,302,200
10-year total	3,703,991,149	803,799,121	51,875,000	4,559,665,270
<b>10C. High Population Bound (300k Annual Cases)</b>				
2022	806,697,000	133,182,000	12,500,000	952,379,000
2023	766,159,000	136,874,000	4,375,000	907,408,000
2024	793,740,724	140,980,220	4,375,000	939,095,944
2025	822,315,390	145,209,627	4,375,000	971,900,017
2026	830,538,544	149,565,915	4,375,000	984,479,459
2027	860,437,932	154,052,893	4,375,000	1,018,865,824
2028	869,042,311	158,674,480	4,375,000	1,032,091,791
2029	900,327,834	163,434,714	4,375,000	1,068,137,548
2030	909,331,112	168,337,755	4,375,000	1,082,043,868
2031	942,067,032	173,387,888	4,375,000	1,119,829,921
10-year total	8,500,656,879	1,523,699,492	51,875,000	10,076,231,371

The totals reported in Table 10 are collated in Table 11, with the 10-year discounted present values, each at a

percent and 7 percent discount rate. It is noted that since the cost inputs differ yearly, the average annualized

equivalence costs are not uniform across discount rates.

TABLE 11—MONETIZED COSTS OF THE PROPOSED RULE  
[In millions, 2020 dollars]

Population Level	Undiscounted	3-Percent		7-Percent	
	10-Year cost	10-Year cost	Annualized cost	10-Year cost	Annualized cost
Low .....	\$1,811.0	\$1,538.8	\$180.4	\$1,260.8	\$179.5
Primary .....	4,559.7	3,871.3	453.8	3,168.9	451.2
High .....	10,076.2	8,550.3	1,002.4	6,993.7	995.8

As discussed in Section G of this preamble, and alluded to above, DHS expects this proposed rule to be implemented in phases. Our quantitative cost estimates are based on the assumption that the funding for the proposed rule is essentially available when the proposed rule takes effect, and that implementation costs are spread out over several years due to timing effects related to operational and hiring impacts. In reality, the effect of budgeting constraints and variations is expected to play a prominent role in the phasing in of the program. Our estimates thus account partially but not fully for such phasing. Incorporating additional phasing into resource allocation models is complex because of the interaction between initial and recurring costs, and DHS is not prepared at this time to attempt to fully phase in the costs quantitatively. Despite this limitation, we do not believe that the true costs would be significantly different than those presented above. A phased implementation would not skew the actual costs, but rather allocate them to different timing sequences. In fact, from a discounting perspective the present value of the costs would actually be lower if they were allocated to future years. DHS will continue to evaluate all pertinent data and information related to the phasing approach, and if tractable, may include refined estimates of the resource-related costs in the final rule.

DHS welcomes public comment on the phasing of costs and provides some additional, preliminary information here to supplement the cost data presented above. As of the final drafting of this proposed rule, DHS believes that through FY 2022 new staff positions can be funded with existing resources, which would support a minimum processing level of 50,000 annual family-unit cases. For the medium and high-volume bands of 150,000 and 300,000 annual cases, respectfully, DHS does not believe it can meet the full staffing requirements with current funding. Based on preliminary modelling, it could take up to three years to fully staff the medium-volume

band and up to five years to staff the high-volume band.

If the medium- and high-volume bands of 150,000 and 300,000 were to be funded through a future fee rule, it would increase fees by an estimated weighted average of 13 percent and 26 percent respectively. This estimated increase would be attributable to the implementation of the asylum officer portions of the proposed rule only, and it is provided to show the magnitude of the impact that implementation of this proposed rule would have in addition to other increases in a future fee rule. The 13 percent or 26 percent estimated weighted average increase would be in addition to any changes in the IEFA non-premium budget.

#### b. Intra-Federal Government Sector Impacts

This proposed rule is expected to shift the initial case processing of some asylum and protection claims from EOIR to USCIS. We present this shift in case processing as new resource costs to USCIS since new staff would be employed, new IT expenditures acquired, etc. There will be new resource costs to the economy. The IJs at EOIR will continue to remain at DOJ and work on other priority matters not related to the high volume of asylum and protection claims processed through expedited removal. Some IJs are expected to continue to work on these claims through the do novo review process for appeals from the denial of asylum claims. Cases in which USCIS grants all relief under the proposed rule, however, would not receive further administrative review. Accordingly, every case granted relief or protection by USCIS would constitute a direct reduction in new cases that EOIR would have to adjudicate. Given EOIR's significant pending caseload of approximately 1.3 million cases, reducing the number of cases referred to EOIR by 11,250 to 45,000 will enable EOIR to focus its resources on addressing existing pending cases and reducing the growth of the overall pending caseload. A reduction in the pending case load may reduce the overall time required for adjudications

since dockets would not have to be set as far into the future. This in turn will better enable EOIR to meet its mission of fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws, including granting relief or protection to noncitizens who qualify.

#### iii. Familiarization Costs, Benefits, and Transfers of Possible Early Labor Market Entry

It is likely that there will be familiarization costs associated with this proposed rule. It is expected that applicants and their support network will incur costs to read and develop an understanding of this proposed rule and the associated changes in process. If, for example, attorneys are utilized, the cost could be \$101.07<sup>102</sup> per hour, which is the average hourly wage for lawyers including the full cost of benefits.

The proposed rule offers other benefits to asylum applicants and the Government. Although we cannot parse out the transfer and costs portions explicitly, we believe that most of the distributional effects will comprise transfers that are beneficial to the asylum seekers (which we calculated on a per-person, workday basis), as opposed to costs. These transfers may impact the support network of the applicants. This network could include public and private entities, and it may comprise family and personal friends, legal services providers and advisors, religious and charity organizations, State and local public institutions, educational providers, and non-governmental organizations. To the extent that some applicants may be able to earn income earlier, burdens to this support network may be lessened. However, as described above, it will take time for USCIS to make the requisite resourcing and staffing changes needed to fully effectuate the changes under which the impacts could

<sup>102</sup> The average wage for lawyers is provided by the Department of Labor. See U.S. Dep't of Labor BLS, May 2021 National Occupational Employment and Wage Estimates, [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#00-0000) (last visited May 13, 2021). Calculation: Average hourly wage for lawyers \$69.70 × benefits burden of 1.45 = \$101.07 (rounded).



be realized. In other words, there is likely to be a time horizon ranging from several months to more than a year for a sizeable portion of the impacts to begin to be realized. As a result, resources and efforts related to the applicants' support network can be expected to be maintained in the short to medium term.

In addition to the likely pecuniary benefits associated with early labor force entry, there could be other benefits as well. As a result of this proposed rule, DHS will begin to consider parole on a case-by-case basis for noncitizens who have been referred to USCIS for a credible fear screening under an expanded set of factors. Allowing for parole to be considered for more individuals in government custody could also provide resource redistribution to DHS in terms of shifting resources otherwise dedicated to the transportation and detention of these individuals and families. This will allow DHS to prioritize use of its limited detention bed space to detain those noncitizens who pose the greatest threats to national security and public safety, while facilitating the expanded use of the expedited removal process to order the removal of those who make no fear claim or who express a fear but subsequently fail to meet the credible fear screening standard after interview by an asylum officer (or, if applicable, by an IJ). However, DHS does not know how many future referrals for a credible fear screening will be eligible for parole; therefore, DHS cannot make an informed monetized estimate of the potential impact.

This proposed rule presents substantial costs for USCIS, especially as costs are expended to upgrade IT systems and begin hiring and training new staff. However, there are several expected qualitative benefits associated with the increased efficiency that would enable some asylum-seeking individuals claiming credible fear to move through the asylum process more expeditiously than through the current process. Under current timelines, it takes anywhere from eight months to five years for individuals claiming credible fear to reach a final asylum determination, whereas this proposed rule is expected to take 90 days in most cases for the initial determination, assuming no further review is sought. Greater efficiencies in the adjudicative process could lead to individuals spending less time in detention, which is a benefit to both the individuals and the Federal Government. Another benefit is that EOIR will not see the cases in which USCIS grants asylum, which we estimate as at least a 15 percent

reduction in their overall credible fear workload.<sup>103</sup> DHS anticipates this will help to mitigate the number of cases pending in immigration court. Additionally, this benefit will extend to individuals granted or denied asylum faster than if they were to go through the current process with EOIR. For those credible fear cases that receive a positive screen but a denial of their asylum claim, USCIS recognizes that only certain cases seeking further review will reach EOIR. Therefore, the benefit to EOIR through this process could be greater than we are able to currently quantify.

Given EOIR's significant pending caseload, the reduction of credible fear cases it would process would enable EOIR to focus its resources on addressing existing pending cases and reducing the growth of the overall pending caseload. It would also allow EOIR to shift some resources to other work. We cannot currently make a one-to-one comparison between the work-time actually spent on a credible fear case between EOIR judges and USCIS asylum officers, but if there is a reduction in average work-times spent on cases, there could be cost savings to EOIR, though it is emphasized that these cost-savings would not be budgetary. The Departments welcome public comment on this topic and will integrate additional information into the final rule, as appropriate.

Further, this proposed rule may stop adding to the existing volumes for Form I-765 for pending asylum applicants. As explained above, if some individuals are granted asylum earlier than they would under current conditions, some applicants in this process may choose not to file for an EAD. This could result in cost savings to applicants, as discussed, and it would also reduce USCIS's adjudication burden.

Assuming DHS places those noncitizens into expedited removal proceedings, the Departments assess that it will be more likely that they would receive a more prompt adjudication of their claims for asylum, withholding of removal, or CAT protection than they would under the existing regulations. Depending on the individual circumstances of each case, this proposed rule could mean that such noncitizens would likely not remain in

the United States—for years, potentially—pending resolution of their claims, and those who qualify for asylum will be granted asylum several years earlier than they are under the present process.

Overall, the anticipated operational efficiencies from this proposed rule may provide for a more prompt grant of protection to qualifying noncitizens and ensure that those who do not qualify for relief or protection are removed more efficiently than they are under current rules. Considering both quantifiable and unquantifiable benefits and costs, the Departments believe that the aggregate benefits of the rule would amply justify the aggregate costs.

### *I. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. Rather, this proposed rule regulates individuals, and individuals are not defined as “small entities” by the RFA.<sup>104</sup> While some employers could experience costs or transfer effects, these impacts would be indirect. Based on the evidence presented in this analysis and throughout this preamble, DHS certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. DHS nonetheless welcomes comments regarding potential impacts on small entities, which DHS may consider as appropriate in a final rule.

### *J. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (“UMRA”) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal

<sup>103</sup> Based on the five-year (FY 2016 through FY 2020) average, an estimated 15 percent of EOIR asylum claims were granted asylum in cases originating with a credible fear claim. See *EOIR Adjudications Statistics: Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim* (Apr. 19, 2021), <https://www.justice.gov/eoir/page/file/1062976/download> (last visited Aug. 4, 2021).

<sup>104</sup> See Public Law 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note). A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act. See 15 U.S.C. 632(a)(1).

agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.

While this proposed rule is expected to exceed the \$100 million expenditure in any 1 year when adjusted for inflation (\$169.8 million in 2020 dollars based on the Consumer Price Index for All Urban Consumers (“CPI-U”)),<sup>105</sup> the Departments do not believe this proposed rule would impose any unfunded Federal mandates on State, local, and Tribal governments, in the aggregate, or on the private sector. The impacts are likely to apply to individuals, potentially in the form of beneficial distributional effects and cost savings. There could be tax impacts related to the distributional effects. However, these do not constitute mandates. Further, the real resource costs quantified in this analysis apply to the Federal Government and also are not mandates. Therefore, the Departments have not prepared a written statement.

#### K. Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs has determined that this proposed rule is a “major rule” within the meaning of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act), 5 U.S.C. 804(2). Accordingly, it is expected that this rule, if enacted as a final rule, would be effective 60 days after the final rule’s publication.

#### L. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or

on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### M. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### N. Family Assessment

The Departments have assessed this proposed action in accordance with section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277, Div. A. With respect to the criteria specified in section 654(c), the Departments determined that the proposed rule would not have any adverse impacts on family safety or stability. The proposed rule would allow families seeking asylum the possibility of parole from custody, thereby helping preserve family unity and safety given the COVID–19 pandemic. Additionally, this proposed rule would result in greater efficiencies in the expedited removal and asylum processes, providing speedier resolution of meritorious cases, and reducing the overall asylum system backlogs.

#### O. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule would not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

#### P. National Environmental Policy Act

The Departments analyze actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (“NEPA”), applies to them and, if so, what degree of analysis is required. See DHS, *Implementing the National Environmental Policy Act* (Directive 023–01, issued Oct. 31, 2014, and Instruction Manual, issued Nov. 6, 2014), <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>. Both the DHS Directive 023–01

and the Instruction Manual establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (“CEQ”) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) that experience has shown do not have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1501.4, 1507.3(e)(2)(ii). The DHS categorical exclusions are listed in Appendix A of the Instruction Manual. For an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.<sup>106</sup>

As discussed in more detail throughout this proposed rule, the Departments are proposing to modify the expedited removal process, specifically for those who are found to have a positive credible fear. The proposed rule could result in an increase in the number of noncitizens in expedited removal paroled out of custody, thereby possibly allowing for efficient processing or prioritizing use of DHS’s limited detention bed space to detain those noncitizens who pose the greatest threats to national security and public safety.

Generally, the Departments believe NEPA does not apply to a rule intended to change a discrete aspect of an immigration program because any attempt to analyze its potential impacts would be largely, if not completely, speculative. This proposed rule would not alter any eligibility criteria, but rather would change certain procedures, specifically, which Federal agency adjudicates certain asylum claims. The proposed rule also would not make any changes to detention facilities. Rather, the detention facilities are already in existence and to attempt to calculate how many noncitizens would be paroled—a highly discretionary benefit—and how many would proceed to the detention centers would be near impossible to determine. The Departments have no reason to believe that these amendments would change

<sup>105</sup> See BLS, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf> (last visited May 5, 2021).

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the most recent current year available (2020); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2020 – Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] \* 100 = [(258.811 – 152.383)/152.383] \* 100 = (106.428/152.383) \* 100 = 0.6984 \* 100 = 69.84 percent = 69.8 percent (rounded).

Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.698 = \$169.8 million in 2020 dollars.

<sup>106</sup> Instruction Manual section V.B(2)(a)–(c).

the environmental effect, if any, of the existing regulations.

Therefore, the Departments have determined that, even if NEPA applied to this action, this proposed rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for “promulgation of rules . . . that amend an existing regulation without changing its environmental effect.” Furthermore, the Departments have determined that this proposed rule clearly fits within the categorical exclusion A3(a) in the Instruction Manual because the proposed rule is of a strictly administrative or procedural nature. This proposed rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this proposed rule is categorically excluded and no further NEPA analysis is required.

#### Q. Paperwork Reduction Act

USCIS Form I-765

Under the Paperwork Reduction Act (“PRA”), Public Law 104–13, 109 Stat. 163 (1995), all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of IT (e.g., permitting electronic submission of responses).

#### Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I-765; I-765WS; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses Form I-765 to collect information needed to determine if a noncitizen is eligible for an initial EAD, a new replacement EAD, or a subsequent EAD upon the expiration of a previous EAD under the same eligibility category. Noncitizens in many immigration statuses are required to possess an EAD as evidence of employment authorization. USCIS is proposing to revise the form instructions to correspond with revisions related to information about the asylum application and USCIS grants of withholding of removal.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I-765 paper filing is 2,179,494, and the estimated hour burden per response is 4.5 hours; the estimated total number of respondents for the information collection I-765 online filing is 106,506, and the estimated hour burden per response is 4 hours; the estimated total number of respondents for the information collection I-765WS is 302,000, and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the information collection biometrics submission is 302,535, and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection passport photos is 2,286,000, and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual

hour burden associated with this collection of information is 11,881,713 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$400,895,820.

#### List of Subjects

##### 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

##### 8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

##### 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

##### 8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

##### 8 CFR Part 1235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

#### Regulatory Amendments

##### DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security proposes to amend 8 CFR parts 208 and 235 as follows:

#### PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 208.2 by:

- a. Revising paragraphs (a) and (b);
- b. Removing the word “or” at the end of paragraph (c)(1)(vii);
- c. Removing the period at the end of paragraph (c)(1)(viii) and adding “; or” in its place;
- d. Removing and reserving paragraph (c)(1)(ix);
- e. Adding paragraph (c)(1)(x); and

- f. In paragraph (c)(3)(i):
- i. Adding the words “and in 8 CFR 1003.48” after the words “Except as provided in this section”; and
- ii. Removing “paragraph (c)(1) or (c)(2)” and adding “paragraph (c)(1) or (2)” in its place.

The revisions and addition read as follows:

#### § 208.2 Jurisdiction.

(a) *Jurisdiction of U.S. Citizenship and Immigration Services (USCIS)*. (1) Except as provided in paragraph (b) or (c) of this section, USCIS shall have initial jurisdiction over:

(i) An asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry; and

(ii) Hearings provided in accordance with section 235(b)(1)(B)(ii) of the Act to further consider the application for asylum of an alien, other than a stowaway, found to have a credible fear of persecution or torture in accordance with § 208.30(f) and retained by USCIS, or referred to USCIS by an immigration judge pursuant to 8 CFR 1003.42 and 1208.30 after the immigration judge has vacated a negative credible fear determination. Hearings to further consider applications for asylum under this paragraph (a)(1)(ii) are governed by the procedures provided for under § 208.9. Further consideration of an asylum application filed by a stowaway who has received a positive credible fear determination will be under the jurisdiction of an immigration judge pursuant to paragraph (c) of this section.

(2) USCIS shall also have initial jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31.

(b) *Jurisdiction of Immigration Court in general*. Immigration judges shall have exclusive jurisdiction over asylum applications filed by aliens who have been served a Form I–221, Order to Show Cause; Form I–122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I–862, Notice to Appear, after the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crewmembers who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, and by aliens who have been admitted to the United States under the Visa Waiver Pilot Program. Immigration judges shall also have the authority to review credible fear determinations referred to the

Immigration Court under § 208.30, reasonable fear determinations referred to the Immigration Court under § 208.31, and asylum officers’ denials of applications, under § 208.14(c)(5), referred to the Immigration Court for review under 8 CFR 1003.48.

(c) \* \* \*

(1) \* \* \*

(x) An alien referred for proceedings under 8 CFR 1003.48 on or after [effective date of final rule].

\* \* \* \* \*

■ 3. Amend § 208.3 by revising paragraphs (a) and (c)(3) to read as follows:

#### § 208.3 Form of application.

(a)(1) Except for applicants described in paragraph (a)(2) of this section, an asylum applicant must file Form I–589, Application for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form. The applicant’s spouse and children shall be listed on the application and may be included in the request for asylum if they are in the United States. One additional copy of the principal applicant’s Form I–589 must be submitted for each dependent included in the principal’s application.

(2) For asylum applicants, other than stowaways, who are awaiting further consideration of an asylum application pursuant to section 235(b)(1)(B)(ii) of the Act following a positive credible fear determination, the written record of a positive credible fear finding issued in accordance with § 208.30(f) or 8 CFR 1003.42 or 1208.30 satisfies the application filing requirements in paragraph (a)(1) of this section and § 208.4(b) for purposes of consideration by USCIS pursuant to the jurisdiction provided at § 208.2(a)(1)(ii). The written record of the positive credible fear determination shall be considered a complete asylum application for purposes of §§ 208.4(a), 208.7, and 208.9(a); shall not be subject to the requirements of 8 CFR 103.2; and shall be subject to the conditions and consequences in paragraph (c) of this section upon signature at the asylum hearing. The date that the positive credible fear determination is served on the alien shall be considered the date of filing and receipt. Application information collected electronically will be preserved in its native format. The applicant’s spouse and children may be included in the request for asylum only if they were included in the credible fear determination pursuant to § 208.30(c), or also presently have an application for asylum pending adjudication with USCIS pursuant to

§ 208.2(a)(1)(ii). The asylum applicant may subsequently amend, correct, or supplement the information collected during the expedited removal process, including the process that concluded with a positive credible fear determination, provided the information is submitted directly to the asylum office no later than 7 calendar days prior to the scheduled asylum hearing, or for documents submitted by mail, postmarked no later than 10 days prior to the scheduled asylum hearing. As a matter of discretion, the asylum officer may consider amendments or supplements submitted after the 7- or 10-day (depending on the method of submission) deadline or may grant the applicant a brief extension of time during which the applicant may submit additional evidence. The biometrics captured during expedited removal for the principal applicant and any dependents may be used to verify identity and for criminal and other background checks for purposes of an asylum application under the jurisdiction of USCIS pursuant to § 208.2(a)(1) and any subsequent immigration benefit.

\* \* \* \* \*

(c) \* \* \*

(3) An asylum application under paragraph (a)(1) of this section must be properly filed in accordance with 8 CFR part 103 and the filing instructions. Receipt of a properly filed asylum application under paragraph (a) of this section will commence the period after which the applicant may file an application for employment authorization in accordance with § 208.7 and 8 CFR 274a.12 and 274a.13.

\* \* \* \* \*

■ 4. Amend § 208.4 by revising paragraph (c) to read as follows:

#### § 208.4 Filing the application.

\* \* \* \* \*

(c) *Amending an application after filing*. Upon the request of the alien, and as a matter of discretion, the asylum officer or immigration judge with jurisdiction may permit an asylum applicant to amend or supplement the application filed under § 208.3(a)(1). Any delay in adjudication or in proceedings caused by a request to amend or supplement the application will be treated as a delay caused by the applicant for purposes of § 208.7 and 8 CFR 274a.12(c)(8).

■ 5. Amend § 208.9 by revising and republishing the section heading and paragraphs (a) through (g) to read as follows:

**§ 208.9 Procedure for interview or hearing before an asylum officer.**

(a) *Claims adjudicated.* USCIS shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(a)(2) or (c)(3), when applicable, and is within the jurisdiction of USCIS pursuant to § 208.2(a).

(b) *Conduct and purpose of interview or hearing.* The asylum officer shall conduct the interview or hearing in a nonadversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview or hearing shall be to elicit all relevant and useful information bearing on the applicant's eligibility for asylum. At the time of the interview or hearing, the applicant must provide complete information regarding his or her identity, including name, date and place of birth, and nationality, and may be required to register this identity. The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(c) *Authority of asylum officer.* The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present evidence, receive evidence, and question the applicant and any witnesses.

(d) *Completion of the interview or hearing.* Upon completion of the interview or hearing before an asylum officer:

(1) The applicant or the applicant's representative will have an opportunity to make a statement or comment on the evidence presented. The representative will also have the opportunity to ask follow-up questions.

(2) USCIS will inform the applicant that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision will be treated as delay caused by the applicant for purposes of § 208.7.

(e) *Extensions.* The asylum officer will consider evidence submitted by the applicant together with his or her asylum application. For applications being considered under § 208.2(a)(1)(i), the applicant must submit any documentary evidence at least 14 calendar days in advance of the interview date. As a matter of discretion, the asylum officer may consider evidence submitted within the

14-day period prior to the interview date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence. Any such extension will be treated as a delay caused by the applicant for purposes of § 208.7.

(f) *Record.* (1) The asylum application, all supporting information provided by the applicant, any comments submitted by the Department of State or by DHS, and any other information considered by the asylum officer in the written decision shall comprise the record.

(2) For hearings on asylum applications within the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), the record shall also include a verbatim audio or video recording of the hearing, except for statements made off the record with the permission of the asylum officer. A transcript of the interview will be included in the referral package to the immigration judge as described in § 208.14(c)(5).

(g) *Interpreters.* (1) Except as provided in paragraph (g)(2) of this section, an applicant unable to proceed with the interview in English must provide, at no expense to USCIS, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, nor a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may serve as the applicant's interpreter. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 208.10.

(2) Notwithstanding paragraph (h) of this section, for asylum applications retained by USCIS for further consideration pursuant to § 208.30(f) or 8 CFR 1003.42 or 1208.30, if the applicant is unable to proceed effectively in English, the asylum officer shall arrange for the assistance of an interpreter in conducting the hearing. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, nor a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may serve as the applicant's interpreter.

\* \* \* \* \*

■ 6. Revise § 208.10 to read as follows:

**§ 208.10 Failure to appear for an interview or hearing before an asylum officer or for a biometrics services appointment for the asylum application.**

(a) *Failure to appear for an asylum interview or hearing, or for a biometrics services appointment.* (1) The failure to appear for an asylum interview or hearing, or for a biometrics services appointment, may result in one or more of the following actions:

(i) Waiver of the right to an interview or adjudication by an asylum officer;

(ii) Dismissal of the application for asylum;

(iii) Referral of the applicant to the Immigration Court;

(iv) Denial of employment authorization; or

(v) For individuals whose case is retained by USCIS for consideration of their application for asylum after a positive credible fear determination pursuant to § 208.30(f) or 8 CFR 1003.42 or 1208.30, issuance of an order of removal based on the inadmissibility determination of the immigration officer under section 235(b)(1)(A)(i) of the Act.

(2) There is no requirement for USCIS to send a notice to an applicant that he or she failed to appear for his or her asylum interview or hearing, or for a biometrics services appointment prior to issuing a decision on the application. Any rescheduling request for the asylum interview or hearing that has not yet been fulfilled on the date the application for employment authorization is filed under 8 CFR 274a.12(c)(8) will be treated as an applicant-caused delay for purposes of § 208.7.

(b) *Rescheduling missed appointments.* USCIS, in its sole discretion, may excuse the failure to appear for an asylum interview or hearing, or biometrics services appointment and reschedule the missed appointment as follows:

(1) *Asylum interview or hearing.* If the applicant demonstrates that he or she was unable to make the appointment due to exceptional circumstances.

(2) *Biometrics services appointment.* USCIS may reschedule the biometrics services appointment as provided in 8 CFR part 103.

■ 7. Amend § 208.14 by:

■ a. Removing "RAIO" and adding in its place "USCIS" in paragraph (b);

■ b. Revising paragraphs (c) introductory text and (c)(1); and

■ c. Adding paragraph (c)(5).

The revisions and addition read as follows:

**§ 208.14 Approval, denial, referral, or dismissal of application.**

\* \* \* \* \*

(c) *Denial, referral, or dismissal by an asylum officer.* If the asylum officer does not grant asylum to an applicant after an interview or hearing conducted in accordance with § 208.9, or if, as provided in § 208.10, the applicant is deemed to have waived his or her right to an interview, a hearing, or an adjudication by an asylum officer, the asylum officer shall deny, refer, or dismiss the application as follows:

(1) *Inadmissible or deportable aliens.* Except as provided in paragraph (c)(4) or (5) of this section, in the case of an applicant who appears to be inadmissible or deportable under section 212(a) or 237(a) of the Act, the asylum officer shall refer the application to an immigration judge, together with the appropriate charging document, for adjudication in removal proceedings (or, where charging documents may not be issued, shall dismiss the application).

(5) *Alien referred for consideration of asylum application in a hearing before an asylum officer after positive credible fear finding.* In the case of an application within the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), the asylum officer shall deny the application for asylum. The applicant will be provided a written notice of the decision. The decision will also include an order of removal based on the immigration officer's inadmissibility determination under section 235(b)(1)(A)(i) of the Act and a decision on any request for withholding of removal under § 208.16(d) and deferral of removal under § 208.17, where applicable. The notice shall explain that the alien may seek to have an immigration judge review the decision, in accordance with 8 CFR 1003.48. The alien shall have 30 days to affirmatively request such review as directed on the decision notice. The failure to timely request further review will be processed as the alien's decision not to request review.

(i) If the alien requests such immigration judge review, USCIS will serve the alien with a notice of referral to an immigration judge for review of the asylum application. USCIS shall provide the record of the proceedings before the asylum officer, as outlined in § 208.9(f), to the immigration judge and the alien, along with the written notice of decision, including the order of removal issued by the asylum officer, and the alien's request for review.

(ii) If the alien does not request a review by an immigration judge, the decision and order of removal will be final and the alien shall be subject to removal from the United States.

(iii) Once USCIS has commenced proceedings under 8 CFR 1003.48 by filing the notice of referral, the immigration judge has sole jurisdiction to review the application and an asylum officer may not reopen or reconsider the application once it has been referred to the immigration judge.

\* \* \* \* \*  
8. Amend § 208.16 by revising paragraphs (a) and (c)(4) to read as follows:

**§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.**

(a) *Consideration of application for withholding of removal.* An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is determined to be an applicant for admission under section 235(b)(1) of the Act, is found to have a credible fear of persecution or torture, and whose case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at § 208.2(a)(1)(ii) to consider the application for asylum, and that application for asylum is denied.

\* \* \* \* \*

(c) \* \* \*  
(4) In considering an application for withholding of removal under the Convention Against Torture, the asylum officer shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the asylum officer determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraph (d)(2) or (3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraph (d)(2) or (3) of this section, the alien's removal shall be deferred under § 208.17(a).

\* \* \* \* \*

■ 9. Amend § 208.17 by revising paragraph (b), (d), and (e) to read as follows:

**§ 208.17 Deferral of removal under the Convention Against Torture.**

\* \* \* \* \*

(b) *Notice to alien.* (1) After an asylum officer orders an alien described in paragraph (a) of this section removed, the asylum officer shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section or under 8 CFR 1208.17. The asylum officer shall inform the alien that deferral of removal:

(i) Does not confer upon the alien any lawful or permanent immigration status in the United States;

(ii) Will not necessarily result in the alien being released from the custody of DHS if the alien is subject to such custody;

(iii) Is effective only until terminated; and

(iv) Is subject to review and termination pursuant to this section or 8 CFR 1208.17 if the asylum officer determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The asylum officer shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

\* \* \* \* \*

(d) *Termination of deferral of removal.* (1) At any time while deferral of removal is in effect, the Asylum Office with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may schedule a hearing to consider whether deferral of removal should be terminated.

(2) The Asylum Office shall provide notice to the alien of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail).

(3) The asylum officer shall conduct a hearing and make a de novo determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been

deferred. This determination shall be made under the standards for eligibility set out in § 208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.

(4) If the asylum officer determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the asylum officer determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the asylum officer's decision shall lie to the immigration judge under the process provided for at § 208.14(c)(5) and 8 CFR 1003.48.

(e) *Termination at the request of the alien.* (1) At any time while deferral of removal is in effect, the alien may make a written request to the Asylum Office with jurisdiction over the initial determination to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the asylum officer shall terminate the order of deferral and the alien may be removed.

(2) If necessary, the Asylum Office may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the asylum officer determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the asylum officer determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

\* \* \* \* \*

■ 10. Amend § 208.18 by revising paragraph (b)(1) to read as follows:

**§ 208.18 Implementation of the Convention Against Torture.**

\* \* \* \* \*

(b) \* \* \*

(1) *Aliens in proceedings on or after March 22, 1999.* (i) An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under 8 CFR 1208.16(c), and, if applicable, may be considered for deferral of removal under 8 CFR 1208.17(a).

(ii) In addition, an alien may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under

§ 208.17(a), in the following situation: the alien is determined to be an applicant for admission under section 235(b)(1) of the Act, the alien is found to have a credible fear of persecution or torture and the alien's case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at § 208.2(a)(1)(ii) for consideration of the application for asylum, and that application is denied.

\* \* \* \* \*

■ 11. Revise § 208.19 to read as follows:

**§ 208.19 Decisions.**

The decision of an asylum officer issued in accordance with § 208.14(b) or (c) shall be communicated in writing to the applicant in-person, by mail, or electronically. Pursuant to § 208.9(d), an applicant must appear in person to receive and to acknowledge receipt of the decision unless, in the discretion of the asylum office director, service by mail or electronic service is appropriate. A letter communicating denial or referral of the application shall state the basis for denial or referral and include an assessment of the applicant's credibility.

■ 12. Revise § 208.22 to read as follows:

**§ 208.22 Effect on exclusion, deportation, and removal proceedings.**

An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to § 208.24 or 8 CFR 1208.24. An alien who is granted withholding of removal or deportation, or deferral of removal, may not be deported or removed to the country to which his or her deportation or removal is ordered withheld or deferred unless the withholding order is terminated pursuant to § 208.24 or 8 CFR 1208.24, or deferral is terminated pursuant to § 208.17(d) or (e) or 8 CFR 1208.17.

■ 13. Amend § 208.30 by:

■ a. Revising the section heading and paragraphs (b), (c), and (d) introductory text;

■ b. Adding a heading for paragraph (e);

■ c. Removing the introductory text of paragraph (e); and

■ d. Revising paragraphs (e)(1) through (4), (e)(5)(i)(A), (e)(6) introductory text, (e)(6)(ii), (f), and (g).

**§ 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.**

\* \* \* \* \*

(b) *Process and authority.* If an alien subject to section 235(a)(2) or 235(b)(1) of the Act indicates an intention to

apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by a USCIS asylum officer in accordance with this section. A USCIS asylum officer shall then screen the alien for a credible fear of persecution or torture. An asylum officer, as defined in section 235(b)(1)(E) of the Act, has the authorities described in § 208.9(c). If the asylum officer in his or her discretion determines that circumstances so warrant, the asylum officer, after supervisory concurrence, may refer the alien for proceedings under section 240 of the Act without making a credible fear determination.

(c) *Treatment of family units.*(1) A spouse or child of a principal alien who arrived in the United States concurrently with the principal alien shall be included in that alien's positive fear evaluation and determination, unless the principal alien declines such inclusion. However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

(2) The asylum officer in his or her discretion may also include other accompanying family members who arrived in the United States concurrently with a principal alien in that alien's positive fear evaluation and determination for purposes of family unity.

(3) For purposes of family units in credible fear determinations, the definition of "child" means an unmarried person under 21 years of age.

(d) *Interview.* A USCIS asylum officer will conduct the credible fear interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution or torture. The information provided during the interview may form the basis of an asylum application pursuant to paragraph (f) of this section and § 208.3(a)(2). The asylum officer shall conduct the interview as follows:

\* \* \* \* \*

(e) *Determination.* (1) The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture.

(2) An alien will be found to have a credible fear of persecution if there is a



significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act. However, prior to January 1, 2030, in the case of an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands, the officer may only find a credible fear of persecution if there is a significant possibility that the alien can establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act.

(3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to § 208.16 or § 208.17.

(4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit a positive credible fear finding pursuant to paragraph (f) of this section in order to receive further consideration of the application for asylum and withholding of removal.

(5)(i)(A) Except as provided in paragraphs (e)(5)(ii) through (iv) or paragraph (e)(6) or (7) of this section, if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and (b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless retain or refer the alien for further consideration of the alien's claim pursuant to paragraph (f) of this section, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3).

\* \* \* \* \*

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the United States during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section

208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph (e)(6). The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

\* \* \* \* \*

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

\* \* \* \* \*

(f) *Procedures for a positive credible fear finding.* If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue the alien a record of the positive credible fear determination, including copies of the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based. The documents may be served in-person, by mail, or electronically. USCIS will retain jurisdiction over the application for asylum pursuant to § 208.2(a)(1)(ii) for further consideration in a hearing pursuant to § 208.9 or refer for consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act. If an alien stowaway is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and 8 CFR 212.5.

(g) *Procedures for a negative credible fear finding.* (1) If an alien is found not to have a credible fear of persecution or torture, the asylum officer shall provide the alien with a written notice of

decision and issue the alien a record of the credible fear determination, including copies of the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based. The documents may be served in-person, by mail, or electronically. The asylum officer shall inquire whether the alien wishes to have an immigration judge review the negative decision, which shall include an opportunity for the alien to be heard and questioned by the immigration judge as provided for under section 235(b)(1)(B)(iii)(III) of the Act, using Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge. The alien shall indicate whether he or she desires such review on Form I-869. A refusal by the alien to make such indication shall be considered a request for review.

(i) If the alien requests such review, or refuses to either request or decline such review, the asylum officer shall serve him or her with a Form I-863, Notice of Referral to Immigration Judge, for review of the credible fear determination in accordance with paragraph (g)(2) of this section. Once the asylum officer has served the alien with Form I-863, the immigration judge shall have sole jurisdiction to review whether the alien has established a credible fear of persecution or torture, and an asylum officer may not reconsider or reopen the determination.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, the officer shall order the alien removed and issue a Form I-860, Notice and Order of Expedited Removal, after review by a supervisory asylum officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, the asylum officer shall refer the alien to the district director for completion of removal proceedings in accordance with section 235(a)(2) of the Act.

(2)(i) Immigration judges will review negative credible fear findings as provided in 8 CFR 1003.42 and 1208.30(g).

(ii) The record of the negative credible fear determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination.

#### **PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION**

■ 14. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731–32; 48 U.S.C. 1806, 1807, and 1808 and 48 U.S.C. 1806 notes (Title VII of Pub. L. 110–229, 122 Stat. 754); 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458, 118 Stat. 3638 and Pub. L. 112–54, 125 Stat. 550).

■ 15. Amend § 235.3 by revising paragraphs (b)(2)(iii) and (b)(4)(ii) to read as follows:

§ 235.3 Inadmissible aliens and expedited removal.

\* \* \* \* \*

(b) \* \* \*
(2) \* \* \*

(iii) Detention and parole of alien in expedited removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal. Parole of such alien, in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter, may be permitted only when DHS determines, in the exercise of discretion, that parole is required to meet a medical emergency, for a legitimate law enforcement objective, or because detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities).

\* \* \* \* \*

(4) \* \* \*

(ii) Detention pending credible fear interview. Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained. Parole of such alien, in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter, may be permitted only when DHS determines, in the exercise of discretion, that parole is required to meet a medical emergency, for a legitimate law enforcement objective, or because detention is unavailable or impracticable (including situations in which continued detention would unduly impact the health or safety of individuals with special vulnerabilities). A grant of parole would be for the limited purpose of parole out of custody and cannot serve as an independent basis for employment authorization under § 274a.12(c)(11) of this chapter. Prior to the interview, the alien shall be given time to contact and consult with any person or persons of his or her choosing. If the alien is detained, such consultation shall be made available in accordance with the

policies and procedures of the detention facility where the alien is detained, shall be at no expense to the Government, and shall not unreasonably delay the process.

\* \* \* \* \*

- 16. Amend § 235.6 by:
■ a. Removing and reserving paragraphs (a)(1)(iii) and (iv); and
■ b. Revising paragraph (a)(2)(i);
■ c. Removing the period at the end of paragraph (c)(2)(ii) and adding “; or” in its place; and
■ d. Revising paragraph (a)(2)(iii).

The revisions read as follows:

§ 235.6 Referral to immigration judge.

(a) \* \* \*
(2) \* \* \*

(i) If an asylum officer determines that the alien does not have a credible fear of persecution or torture, and the alien requests a review of that determination by an immigration judge;

\* \* \* \* \*

(iii) If an immigration officer refers an applicant in accordance with the provisions of § 208.2(c)(1) or (2) of this chapter to an immigration judge for an asylum- or withholding-only hearing.

\* \* \* \* \*

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General proposes to amend 8 CFR parts 1003, 1208, and 1235 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 17. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 18. Amend § 1003.1 by adding paragraph (b)(15) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

\* \* \* \* \*

(b) \* \* \*

(15) Decisions of immigration judges in proceedings pursuant to § 1003.48, including immigration judges’ decisions on motions under § 1003.48(d) to vacate removal orders. Immigration judges’ decisions denying applications because the applicant failed to appear cannot be appealed, but immigration judges’

decisions on motions to reopen and motions to reconsider can be appealed.

\* \* \* \* \*

■ 19. Amend § 1003.12 by revising the second sentence to read as follows:

§ 1003.12 Scope of rules.

\* \* \* Except where specifically stated, the rules in this subpart apply to matters before immigration judges, including, but not limited to: Deportation, exclusion, removal, bond, rescission, departure control, asylum proceedings (including application review proceedings under § 1003.48), and disciplinary proceedings. \* \* \*

■ 20. Add § 1003.48 to read as follows:

§ 1003.48 Review of applications denied after a positive credible fear determination.

(a) Scope. In proceedings conducted under this section, immigration judges shall have the authority, upon the request of an applicant under 8 CFR 208.14(c)(5), to review asylum officers’ decisions on applications for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, and withholding or deferral of removal under the Convention Against Torture. Where an asylum officer grants one application but denies another, the immigration judge has the authority to review both the denial and the grant. An immigration judge shall not have the authority in these proceedings to consider an application for a form of relief and protection other than those listed in the first sentence of this paragraph (a), or to review an asylum officer’s inadmissibility determination under section 235(b)(1)(A)(i) of the Act. However, an applicant can file a motion to vacate a removal order as specified in paragraph (d) of this section.

(b) Commencement of proceedings.

Proceedings under this section shall commence when DHS files with the Immigration Court the documents identified in paragraphs (b)(1) through (4) of this section:

- (1) A Notice of Referral to the immigration judge;
(2) A copy of the record of proceedings before the asylum officer, as outlined in 8 CFR 208.9(f);
(3) The asylum officer’s written decision, including the removal order issued under 8 CFR 208.14(c)(5) by the asylum officer; and
(4) Proof that the Notice of Referral, the record of proceedings, and the written decision, including the removal order, have been served on the applicant, which may consist of service via mail.

(c) Proceedings before the immigration judge. After a Notice of

Referral is filed with the immigration court, the case shall be scheduled for a hearing, and a hearing notice shall be served on the parties.

(d) *Motion to vacate removal order.* The applicant may file a motion with the immigration judge to vacate the asylum officer's order of removal. For the motion to be granted, the applicant must show that he or she is prima facie eligible for a form of relief or protection under the Act that cannot be considered in proceedings under this section. If the applicant makes such a showing, the immigration judge may, in the exercise of his or her discretion, grant the motion. If the immigration judge grants the motion, DHS may, in the exercise of its discretion, place the applicant in removal proceedings, by issuing a Notice to Appear and filing it with the immigration court. An applicant may file only one such a motion, and the motion must be filed before the immigration judge issues a decision under paragraph (e) of this section. A motion to vacate to apply for voluntary departure under section 240B of the Act shall be denied.

(e) *Immigration judge review.* (1) The immigration judge shall determine, de novo, whether the applicant qualifies for the relief or protection at issue and, if applicable, whether the applicant merits relief in the exercise of discretion. In reaching a decision in proceedings under this section, the immigration judge shall review the record created before the asylum officer, as well as the asylum officer's decision. Either party may provide additional testimony and documentation, but the party must establish that the testimony or documentation is not duplicative of testimony or documentation already presented to the asylum officer, and that the testimony or documentation is necessary to ensure a sufficient factual record upon which to base a reasoned decision on the application or applications. The immigration judge shall not have the authority to remand the case to the asylum officer.

(2) If the immigration judge grants the applicant asylum under section 208 of the Act, the immigration judge shall issue orders granting the application and vacating the removal order issued by an asylum officer under 8 CFR 208.14(c)(5). If the immigration judge grants the application for withholding of removal under section 241(b)(3) of the Act, or withholding or deferral of removal under the Convention Against Torture, the immigration judge shall issue an order granting the application at issue, but shall not vacate the removal order issued by the asylum officer under 8 CFR 208.14(c)(5).

(f) *Failure to appear.* (1) If the applicant fails to appear at a hearing in proceedings conducted under this section, and DHS establishes by clear, unequivocal, and convincing evidence that written notice of the hearing was served on the applicant, the immigration judge shall deny the application or applications under review. There is no appeal from an immigration judge's decision denying an application or applications for failure to appear. However, following such a decision, the applicant may file a motion to reopen with the immigration judge. In the motion, the applicant must establish that:

(i) The failure to appear was because of exceptional circumstances (such as battery or extreme cruelty to the applicant or any child or parent of the applicant, serious illness of the applicant, or serious illness or death of the spouse, child, or parent of the applicant, but not including less compelling circumstances) beyond the control of the applicant;

(ii) The applicant did not receive notice of the hearing; or

(iii) The applicant was in Federal or State custody at the time of the hearing, and the failure to appear was through no fault of the applicant.

(2) A motion filed under paragraph (f)(1)(i) of this section must be filed within 180 days of the hearing. A motion filed under paragraph (f)(1)(ii) or (iii) of this section may be filed at any time. When a motion under this paragraph (f) is granted, the applicant's proceedings under this section are reopened. The granting of such a motion does not entitle the applicant to be placed in removal proceedings.

#### **PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

■ 21. The authority section for part 1208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110–229; Pub. L. 115–218.

■ 22. Amend § 1208.2 by:

■ a. Revising paragraph (a);

■ b. Revising the last sentence of paragraph (b);

■ c. Removing the word “or” at the end of paragraph (c)(1)(vii);

■ d. Removing the period at the end of paragraph (c)(1)(viii) and adding “; or” in its place;

■ e. Removing and reserving paragraph (c)(1)(ix);

■ f. Adding paragraph (c)(1)(x); and

■ g. In paragraph (c)(3)(i):

■ i. Adding the words “and in 8 CFR 1003.48” after the words “Except as provided in this section”; and

■ ii. Removing “paragraph (c)(1) or (c)(2)” and adding “paragraph (c)(1) or (2)” in its place.

The revisions and addition read as follows:

#### **§ 1208.2 Jurisdiction.**

(a) *U.S. Citizenship and Immigration Services (USCIS).* (1) Except as provided in paragraph (b) or (c) of this section, USCIS shall have initial jurisdiction over:

(i) An asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry; and

(ii) Hearings provided in accordance with section 235(b)(1)(B)(ii) of the Act to further consider the application for asylum of an alien, other than a stowaway, found to have a credible fear of persecution or torture in accordance with 8 CFR 208.30(f) and retained by USCIS, or referred to USCIS by an immigration judge pursuant to §§ 1003.42 of this chapter and 1208.30 after the immigration judge has vacated a negative credible fear determination. Hearings to further consider applications for asylum under this paragraph (a)(1)(ii) are governed by the procedures provided for under 8 CFR 208.9. Further consideration of an asylum application filed by a stowaway who has received a positive credible fear determination will be under the jurisdiction of an immigration judge pursuant to paragraph (c) of this section.

(2) USCIS shall also have initial jurisdiction over credible fear determinations under 8 CFR 208.30 and reasonable fear determinations under 8 CFR 208.31.

(b) \* \* \* Immigration judges shall also have the authority to review credible fear determinations referred to the Immigration Court under § 1208.30, reasonable fear determinations referred to the Immigration Court under § 1208.31, and asylum officers' decisions on applications, under 8 CFR 208.14(c)(5), referred to the Immigration Court for review under § 1003.48 of this chapter.

(c) \* \* \*

(1) \* \* \*

(x) An alien referred for proceedings under § 1003.48 of this chapter on or after [effective date of the final rule].

\* \* \* \* \*

■ 23. Amend § 1208.3 by revising paragraphs (a) and (c)(3) to read as follows:

**§ 1208.3 Form of application.**

(a)(1) Except for applicants described in paragraph (a)(2) of this section, an asylum applicant must file Form I-589, Application for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form. The applicant's spouse and children shall be listed on the application and may be included in the request for asylum if they are in the United States. One additional copy of the principal applicant's Form I-589 must be submitted for each dependent included in the principal's application.

(2) In proceedings under § 1003.48 of this chapter, the written record of a positive credible fear finding issued in accordance with 8 CFR 208.30(f), § 1003.42 of this chapter, or § 1208.30 shall be construed as the asylum application and satisfies the application filing requirements in paragraph (a)(1) of this section and § 1208.4(b). The written record of the positive credible fear determination shall be considered a complete asylum application for purposes of § 1208.4(a), with the date of service of the positive credible fear determination on the alien considered the date of filing and receipt, and shall be subject to the conditions and consequences provided for in paragraph (c) of this section following the applicant's signature at the asylum hearing before the USCIS asylum officer. The applicant's spouse and children may be included in the request for asylum only if they were included in the credible fear determination pursuant to 8 CFR 208.30(c). The asylum applicant may subsequently seek to amend, correct, or supplement the record of proceedings created before the asylum officer or during the credible fear review process, but must otherwise meet the requirements of § 1003.48(e) of this chapter concerning new documentation or testimony.

\* \* \* \* \*

(c) \* \* \*

(3) An asylum application under paragraph (a)(1) of this section must be properly filed in accordance with the form instructions and with §§ 1003.24, 1003.31(b), and 1103.7(a)(3) of this chapter, including payment of a fee, if any, as explained in the instructions to the application. For purposes of filing with an immigration court, an asylum application is incomplete if it does not include a response to each of the required questions contained in the form, is unsigned, is unaccompanied by the required materials specified in paragraph (a) of this section, is not completed and submitted in accordance

with the form instructions, or is unaccompanied by any required fee receipt or other proof of payment as provided in § 1208.4(d)(3). The filing of an incomplete application shall not commence the period after which the applicant may file an application for employment authorization. An application that is incomplete shall be rejected by the Immigration Court. If an applicant wishes to have his or her application for asylum considered, he or she shall correct the deficiencies in the incomplete application and refile it within 30 days of rejection. Failure to correct the deficiencies in an incomplete application or failure to timely refile the application with the deficiencies corrected, absent exceptional circumstances as defined in § 1003.10(b) of this chapter, shall result in a finding that the alien has abandoned that application and waived the opportunity to file such an application;

\* \* \* \* \*

**§ 1208.4 [Amended]**

■ 24. Amend § 1208.4 by adding the words “, except that an alien in a review proceeding under § 1003.48 of this chapter is not required to file the Form I-589” after the word “case” in paragraph (b)(3)(iii).

**§ 1208.5 [Amended]**

■ 25. Amend § 1208.5(b)(2) by removing the reference “§ 1212.5 of this chapter” and adding “8 CFR 212.5” in its place.

■ 26. Amend § 1208.14 by:

■ a. Removing “the Office of International Affairs” and adding in its place “USCIS” in paragraph (b);

■ b. Revising paragraphs (c) introductory text and (c)(1); and

■ c. Adding paragraph (c)(5).

The revisions and addition read as follows:

**§ 1208.14 Approval, denial, referral, or dismissal of application.**

\* \* \* \* \*

(c) *Denial, referral, or dismissal by an asylum officer.* If the asylum officer does not grant asylum to an applicant after an interview or hearing conducted in accordance with 8 CFR 208.9, or if, as provided in 8 CFR 208.10, the applicant is deemed to have waived his or her right to an interview, a hearing, or an adjudication by an asylum officer, the asylum officer shall deny, refer, or dismiss the application, as follows:

(1) *Inadmissible or deportable aliens.* Except as provided in paragraph (c)(4) or (5) of this section, in the case of an applicant who appears to be inadmissible or deportable under section 212(a) or 237(a) of the Act, the

asylum officer shall refer the application to an immigration judge, together with the appropriate charging document, for adjudication in removal proceedings (or, where charging documents may not be issued, shall dismiss the application).

\* \* \* \* \*

(5) *Alien referred for consideration of asylum application in a hearing before an asylum officer after positive credible fear finding.* In the case of an application within the jurisdiction of USCIS pursuant to 8 CFR 208.2(a)(1)(ii), the asylum officer shall deny the application for asylum. The applicant will be provided a written notice of the decision. The decision will also include an order of removal based on the immigration officer's inadmissibility determination under section 235(b)(1)(A)(i) of the Act and a decision on any request for withholding of removal under 8 CFR 208.16(d) and deferral of removal under 8 CFR 208.17, where applicable. The notice shall explain that the alien may seek to have an immigration judge review the decision, in accordance with § 1003.48 of this chapter. The alien shall have 30 days to affirmatively request such review as directed on the decision notice. The failure to timely request further review will be processed as the alien's decision not to request review.

(i) If the alien requests such immigration judge review, USCIS will serve the alien with a notice of referral to an immigration judge for review of the asylum application. USCIS shall provide the record of the proceedings before the asylum officer, as outlined in 8 CFR 208.9(f), to the immigration judge and the alien, along with the written notice of decision, including the order of removal issued by the asylum officer, and the alien's request for review.

(ii) If the alien does not request a review by an immigration judge, the decision and order of removal will be final and the alien shall be subject to removal from the United States.

(iii) Once USCIS has commenced proceedings under § 1003.48 of this chapter by filing the notice of referral on the alien, the immigration judge has sole jurisdiction to review the application, and an asylum officer may not reopen or reconsider the application once it has been referred to the immigration judge.

\* \* \* \* \*

■ 27. Amend § 1208.16 by revising paragraph (a) to read as follows:

**§ 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.**

(a) *Consideration of application for withholding of removal.* An asylum

officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is determined to be an applicant for admission under section 235(b)(1) of the Act, is found to have a credible fear of persecution or torture, and whose case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at 8 CFR 208.2(a)(1)(ii) to consider the application for asylum, and that application for asylum is denied. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal, whether or not asylum is granted.

\* \* \* \* \*

■ 28. Amend § 1208.18 by revising paragraph (b)(1) to read as follows:

**§ 1208.18 Implementation of the Convention Against Torture.**

\* \* \* \* \*

(b) \* \* \*

(1) *Aliens in proceedings on or after March 22, 1999.* (i) An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under § 1208.16(c), and, if applicable, may be considered for deferral of removal under § 1208.17(a).

(ii) In addition, an alien may apply for withholding of removal under 8 CFR 208.16(c), and, if applicable, may be considered for deferral of removal under 8 CFR 208.17(a), in the following situation: the alien is determined to be an applicant for admission under section 235(b)(1) of the Act, the alien is found to have a credible fear of persecution or torture, and the alien's case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at 8 CFR 208.2(a)(1)(ii) to consider the application for asylum, and that application for asylum is denied.

\* \* \* \* \*

**§ 1208.19 [Removed and Reserved]**

■ 29. Remove and reserve § 1208.19.

■ 30. Revise § 1208.22 to read as follows:

**§ 1208.22 Effect on exclusion, deportation, and removal proceedings.**

An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to 8 CFR 208.24 or § 1208.24. An alien who is granted withholding of removal or deportation, or deferral of removal, may not be deported or removed to the country to which his or her deportation or removal

is ordered withheld or deferred unless the withholding order is terminated pursuant to 8 CFR 208.24 or § 1208.24 or deferral is terminated pursuant to 8 CFR 208.17 or § 1208.17(d) or (e).

■ 31. Amend § 1208.30 by revising the section heading and paragraphs (a), (e), and (g)(2) to read as follows:

**§ 1208.30 Credible fear of persecution or torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.**

(a) *Jurisdiction.* The provisions of this subpart apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, DHS has exclusive jurisdiction to make the determinations described in this subpart. Except as otherwise provided in this subpart, paragraphs (b) through (g) of this section are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations in §§ 1208.16(c) through (f), 1208.17, and 1208.18 issued pursuant to the Convention Against Torture's implementing legislation.

\* \* \* \* \*

(e) *Determination.* For the standards and procedures for asylum officers in conducting credible fear interviews and hearings, and in making positive and negative credible fear determinations, see 8 CFR 208.30. The immigration judges will review such determinations as provided in paragraph (g) of this section and 8 CFR 1003.42 and 1003.48.

\* \* \* \* \*

(g) \* \* \*

(2) *Review by immigration judge of a negative credible fear finding.* (i) The asylum officer's negative decision regarding credible fear shall be subject to review by an immigration judge upon the applicant's request, or upon the applicant's refusal either to request or to decline the review after being given such opportunity, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. The immigration judge shall not have the authority to remand the case to the asylum officer.

(ii) The record of the negative credible fear determination, including copies of

the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination.

(iii) A credible fear hearing shall be closed to the public unless the alien states for the record or submits a written statement that the alien is waiving that requirement; in that event the hearing shall be open to the public, subject to the immigration judge's discretion as provided in 8 CFR 1003.27.

(iv) Upon review of the asylum officer's negative credible fear determination:

(A) If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to DHS for removal of the alien. The immigration judge's decision is final and may not be appealed.

(B) If the immigration judge finds that the alien, other than an alien stowaway, possesses a credible fear of persecution or torture, the immigration judge shall vacate the Notice and Order of Expedited Removal and refer the case back to DHS for further proceedings consistent with § 1208.2(a)(1)(ii). Alternatively, DHS may commence removal proceedings under section 240 of the Act, during which time the alien may file an application for asylum and withholding of removal in accordance with § 1208.4(b)(3)(i).

(C) If the immigration judge finds that an alien stowaway possesses a credible fear of persecution or torture, the alien shall be allowed to file an application for asylum and withholding of removal before the immigration judge in accordance with § 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such decision may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum or for withholding of removal becomes final, DHS shall terminate removal proceedings under section 235(a)(2) of the Act.

**PART 1235—INSPECTION OF PERSONS APPLYING FOR ADMISSION**

■ 32. The authority citation for part 1235 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR

241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32; Title VII of Pub. L. 110–229; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); Public Law 115–218.

- 33. Amend § 1235.6 by:
  - a. Revising paragraph (a)(2)(i);
  - b. Removing the period at the end of paragraph (a)(2)(ii) and adding “; or” in its place; and
  - c. Revising paragraph (a)(2)(iii).  
The revisions read as follows:

**§ 1235.6 Referral to immigration judge.**

(a) \* \* \*

(2) \* \* \*

(i) If an asylum officer determines that the alien does not have a credible fear of persecution or torture, and the alien requests a review of that determination by an immigration judge;

\* \* \* \* \*

(iii) If an immigration officer refers an applicant in accordance with the

provisions of 8 CFR 208.2(b) to an immigration judge.

\* \* \* \* \*

**Alejandro N. Mayorkas,**  
*Secretary of Homeland Security.*

Dated: August 13, 2021.

**Merrick B. Garland,**  
*Attorney General.*

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