CAPITAL AREA IMMIGRANTS' RIGHTS COALITION

www.caircoalition.org

1025 Connecticut Avenue NW, Suite 701
Washington, DC 20036

T 202 / 331.3320
F 202 / 331.3341

Guide to Interim Final Rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers

Created July 11, 2022, by Capital Area Immigrants' Rights (CAIR) Coalition Coordinating Legal Council (CLC) (Ana Dionne-Lanier, Nitin Goyal, and Sam Hsieh) and Austin Rose, Jennie Kneedler, Jenny Kim, and Khatia Mikadze

I. Main Takeaways

- On March 29, 2022, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) issued their interim final rule on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers ("the IFR"). 87 Fed. Reg. 18,078-18,226 (March 29, 2022).
- These procedures generally apply to individuals subject to expedited removal and are effective May 31, 2022, but implementation will be done in stages, with the initial phase having a very limited scope. As of a June 21, 2022, stakeholder call, there are no current designated expansion sites due to limited resources.
- Under the IFR, rather than having immigration court proceedings, individuals who pass their credible fear interview (CFI) will instead have a non-adversarial asylum merits interview (AMI) before a USCIS asylum officer (AO), like procedures for affirmative asylum applications. If they pass their AMI, they are granted asylum without further proceedings.
- Individuals who pass their CFI but who are not granted asylum during their AMI are referred to immigration court, for streamlined INA § 240 proceedings, with shorter deadlines.
- Procedures remain generally the same as before for individuals in expedited removal who (1) do not indicate fear of return and thus do not receive a CFI and (2) do not pass their CFI. The latter can still seek review by an immigration judge (IJ).
- While the new procedures are beneficial in that they provide individuals who pass their CFI with an additional chance to receive asylum, they impose tight mandatory deadlines, which will make it more difficult for individuals to hire counsel, submit filings, and prepare for hearings.
- These procedures do not apply to certain groups, including unaccompanied children and individuals who show indicia of mental incompetency.

II. Credible Fear Screenings

Pgs. 18091-95, 18107[1]

- Noncitizens encountered at or near the border or ports of entry and determined to be inadmissible pursuant to INA § 212(a)(6)(C) [seeking to procure visa via fraud] or (a)(7) [lacking a valid entry document], 8 U.S.C. § 1182(a)(6)(C) or (a)(7), can be placed into

[1] All page citations are to the Federal Register.

AILA Doc. No. 22071302. (Posted 7/13/22)

expedited removal and provided with a credible fear screening if they indicate a fear of return to their home countries or an intention to seek fear-based relief. *See* INA § 235(b)(1)(A)(ii), (B), 8 U.S.C. § 1225(b)(1)(A)(ii), (B). Pg. 18091.

- **Revival of the "significant possibility" standard for CFIs.** This rule returns to the pre-2018 practice of applying the "significant possibility" standard across all forms of protection screened for in the credible fear process (asylum, WHH, and CAT). Pg. 18107; 8 C.F.R. §§ 208.9(b); 208.30(e)(2), (3), 1003.42(d)(1).
    - INA definition of standard: "[A] significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen's] claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum." INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v).
- **AOs will no longer apply mandatory bars to relief during the CFI process**, a departure from the previous "death to asylum" rule. Pgs. 18092-93, 18107.
- **Refusals or failure to elect IJ review of negative CFIs will now be treated as a request for IJ review**. Pg. 18094; 8 C.F.R. § 1208.30(g)(2)(i).
    - The IJ does not have authority to remand the case to the AO. 8 C.F.R. § 1208.30(g)(2)(i).
    - A noncitizen who genuinely wishes to decline review may withdraw the request for review before the IJ. In such a case, the IJ will return the noncitizen's case to DHS for execution of the expedited removal order. Pg. 18094; *see* 8 C.F.R. § 1208.30(g)(2).
    - If the IJ vacates the negative CFI, the case can either be sent back to USCIS for an AMI or DHS can commence regular INA § 240 proceedings. 8 C.F.R. § 1208.30(g)(2)(iv)(B).
- **Request for Reconsideration:** While an IJ's concurrence with an AO's negative determination is final and non-appealable, the noncitizen has a right to request the AO's reconsideration of a negative CFI determination that an IJ has upheld. Pg. 18094; 8 C.F.R. § 208.30(g)(1)(i).
    - However, USCIS's power to grant reconsideration is discretionary, each noncitizen is limited to one request, and the request must be made within 7 days after the concurrence by the IJ, or prior to the noncitizen's removal, whichever date comes first. *Id.*

III. Asylum Applications and Asylum Merits Interviews (AMIs) before USCIS

Pgs. 18095-98

- Under the IFR, if an individual is found to have a credible fear, they are referred to a non-adversarial AMI before an AO. USCIS also retains the discretion to refer them to an IJ for regular adversarial § 240 removal proceeding. Pg. 18095; 8 C.F.R. §§ 208.2(a)(ii), 208.30(f).
- These AMIs will be adjudicated in a separate queue from affirmative applications filed with USCIS. Pg. 18096.
- At the AMI, the AO will consider eligibility for asylum, and if they do not grant asylum, they will also consider eligibility for withholding and CAT relief without issuing a final decision on these latter two forms of relief. Pg. 18097; 8 C.F.R. §§ 208.9(b), 208.16(a), (c)(4).

- **The Application:**
  - An I-589 is not required to apply for relief for those subject to this process. Rather, the credible fear decision and the written record of the credible fear process (including the AO's notes, summary of material facts, and other materials upon which the decision was based) constitutes the asylum application. Pgs. 18095-96, 18107; 8 C.F.R. § 208.3(a)(2).
  - Derivatives on the Asylum Application:
    - Only a spouse or child who was part of the credible fear process or who has a pending asylum application with USCIS after a separate CFI can be included as a dependent on the asylum application. Pg. 18095; 8 C.F.R. § 208.3(a)(2).
    - Even if the spouse/child are included as dependents, they can request to file their own asylum application at any time while the principal's application is pending with USCIS. Pgs. 18095-96; 8 C.F.R. § 208.3(a)(2).
- **Deadlines/Timeline:**
  - The AMI must be scheduled between 21 to 45 days after service of the positive credible fear determination. Pg. 18096; 8 C.F.R. § 208.9(a)(1).
    - The applicant can request in writing that the interview be scheduled sooner than 21 days after service. *Id.*
    - In the case of exceptional circumstances, such as AO or interpreter unavailability, applicant illness, or closure of asylum office, the AMI can be rescheduled past the 45-day mark. *Id.*
  - The date that the positive credible fear determination is served on the noncitizen is the date the asylum application is filed for purposes of the one-year asylum filing deadline and for starting the EAD clock. Pg. 18095; 8 C.F.R. § 208.3(a)(2), (c)(3).
    - Practice Note: This could lead to problems if there is an extended delay between the date of the applicant's arrival in the U.S. and the CFI or CFI adjudication.
  - If the applicant wants to amend or correct their credible fear filing, they must do so no later than 7 days prior to the interview, or for documents submitted by mail, postmarked no later than 10 days prior, unless they show good cause for an extension. Pg. 18096; 8 C.F.R. § 208.4(b)(2).
  - Regardless of extensions, the AO must issue a decision within 60 days of service of the positive credible fear determination absent "exigent circumstances." Pg. 18096; 8 C.F.R. § 208.9(e)(2).
- **Interview Procedures:**
  - The AMI procedures are essentially the same as those for affirmative asylum.
  - The applicant may have counsel or a representative present and may present witnesses and submit witness affidavits and other evidence. Pg. 18096; 8 C.F.R. § 208.9(b).
    - Practice Note: The IFR is silent on virtual appearances via telephone or video.
  - The applicant or representative will have an opportunity to make a statement or comment on evidence, as well as ask witnesses follow-up questions. Pg. 18096; 8 C.F.R. § 208.9(d)(1).

AILA Doc. No. 22071302. (Posted 7/13/22)

        - The AO may limit the length of such statement or require its submission in writing. 8 C.F.R. § 208.9(d)(1).
    - The interview is recorded, and the transcript will be included in the record and provided to the applicant if the case is referred to an IJ. Pg. 18096; 8 C.F.R. §§ 208.9(f)(2); 1240.17(c).
    - An interpreter will be provided. Pg. 18096; 8 C.F.R. § 208.9(g)(2).
        - If the interview is rescheduled because of interpreter unavailability, the delay will be attributed to USCIS for EAD clock purposes. *Id.*
- **Decisions Following the Interview:**
    - If the AO grants asylum, the relief is final, and the applicant is not subject to additional proceedings. Pg. 18097; 8 C.F.R. § 208.14(b).
    - If the AO does not grant asylum, the case is referred to the IJ for § 240 removal proceedings and the AO will issue an NTA. Pgs. 18096-97; 8 C.F.R. §§ 208.14(c)(1), 1240.17(a).
        - This includes situations where the AO determines that the applicant is eligible for withholding or CAT. 8 C.F.R. § 208.16(a).
        - Unlike asylum, the AO's positive withholding or CAT determination is not a final decision, but instead needs to be finalized by the IJ who will, subject to certain exceptions, give effect to the AO's decision. 8 C.F.R. §§ 208.16(a), (c)(4), 1240.17(f)(2)(i)(B).
        - Only an IJ and not the AO can issue a removal order. Pg. 18098.
    - If the AO does not grant asylum, the AO must determine whether there's a significant possibility that dependents are independently eligible for relief and inform them of this determination. Pgs. 18097-98; 8 C.F.R. § 208.9(b), (i).
        - Dependents do not need to submit a separate application to be considered independently for relief if they were included in the credible fear determination. *See* 8 C.F.R. §§ 208.3(a)(2), 1208.3(a)(2).
        - AOs will not make final decisions on relief for these dependents but will instead determine eligibility so that the dependents can pursue such relief before the IJ. Pg. 18098; 8 C.F.R. § 208.9(i).
        - If a dependent wants to be adjudicated as a principal applicant, they can file a separate affirmative asylum application with USCIS prior to referral to the IJ. If this occurs, referral of the principal applicant's case to the IJ won't occur until the dependent's affirmative application is adjudicated. Pg. 18098; 8 C.F.R. § 208.9(i).
- **Failure to appear at the AMI** may result in referral to § 240 removal proceedings or dismissal of the asylum application. Pg. 18096; 8 C.F.R. § 208.10(a)(1)(iii). USCIS has discretion to excuse failure to appear for "exceptional circumstances." Pg. 18096; 8 C.F.R. § 208.10(b)(1).
- <u>Practice Notes:</u>
    - Possible detention during the duration of AO proceedings creates multiple access concerns.

AILA Doc. No. 22071302. (Posted 7/13/22)

- The IFR will prioritize new cases, which could cause further delay at the Asylum Office and EOIR for pending asylum claims.

IV. Streamlined § 240 Removal Proceedings

Pgs. 18098-107; 8 C.F.R. § 1240.17

- Noncitizens who are not granted asylum during their AMIs (and any dependents included in their application) are placed in streamlined § 240 proceedings. *Id.*
  - Except as otherwise provided in 8 C.F.R. § 1240.17, these streamlined removal proceedings are governed by the same rules and procedures as outlined in the regulations governing regular removal proceedings. Pg. 18098; 8 C.F.R. § 1240.17(a).
    - IJs must conduct proceedings in accordance with INA § 208, 8 U.S.C. § 1158. 8 C.F.R. § 1240.17(a).
    - If any part of the USCIS process governed by the IFR is enjoined or vacated, EOIR has the discretion to adjudicate any case referred to it under those procedures in the regulations governing § 240 proceedings. 8 C.F.R. § 1240.17(a).
- **Commencement of Streamlined § 240 Proceedings:**
  - Streamlined § 240 proceedings are commenced when DHS files an NTA and schedules the master calendar hearing (MCH). Pg. 18098; 8 C.F.R. § 1240.17(b).
  - When serving the NTA, DHS must inform the respondent of their right to be represented by counsel and identify for the court and the respondent that the case is subject to streamlined proceedings. 8 C.F.R. § 1240.17(b).
    - Personal service is preferred where practicable. *Id.*
      - Practice Note: It is unclear how personal service will be practicable unless the respondent is detained.
    - Where served by mail, the date of service of the NTA is the date of mailing. *Id.*
      - Practice Note: If most service is done by mail, this will give respondents and any counsel even less notice and time to prepare for the MCH. There is no discussion of whether there could be a streamlined process for serving counsel who represented the respondent during the AMI and/or CFI, such as ECAS.
- **The record of proceedings (ROP)** includes the record for the AMI, the respondent's I-213, and the AO's written decision—will be served on respondent and the immigration court no later than the date of the MCH. Pg. 18099 n.31; 8 C.F.R. § 1240.17(c).
  - The record of the positive credible fear determination is treated as the noncitizen and their dependents' asylum application. Pg. 18099; 8 C.F.R. §§ 1208.3(a)(2), 1208.4, 1240.17(e).
  - Like the AMI, the noncitizen and any dependents do not have to file an I-589 but can instead amend, correct, or supplement the record from USCIS before the IJ. Pg. 18099; 8 C.F.R. §§ 1208.3(a)(2), 1208.4.

- If the ROP is not served in time for the MCH, then the schedule of proceedings will be delayed until service is effectuated. Pg. 18099 n.31.
  - Practice Note: This timeline may mean service of the ROP on respondent and/or counsel is likely to occur in person at the MCH, which could make it difficult for respondents to secure new counsel, meaningfully prepare for the MCH, and have time to submit evidence by the status conference. Unclear but likely that documents will be on ECAS to potentially allow for counsel to gain access prior to the MCH. If the ROP is instead mailed, respondent also likely won't have received it in time for the MCH.

- **Schedule of Streamlined Proceedings**
  - **Master calendar hearing** (30-35 days after service of NTA)
    Pg. 18100; 8 C.F.R. § 1240.17(f)(1)
    - IJ must provide traditional advisals and advise as to nature of streamlined proceedings, as well as schedule a status conference within 30-35 days and inform respondents about the requirements of the status conference.
  - **Status Conference** (30-35 days after MCH)
    Pgs. 18100-01; 8 C.F.R. § 1240.17(f)(2)
    - Purpose is to take pleadings, identify and narrow the issues, determine whether the case can be decided on the documentary record, and prepare the case for the merits hearing. Pg. 18100.
    - If the IJ determines that further proceedings are warranted, the IJ shall schedule the merits hearing to take place within 60-65 days from MCH. Pg. 18101.
    - The IJ can schedule additional status conferences before the merits hearing. Pg. 18101.
    - If the respondent does not contest removal or seek protections for which the AO found them ineligible, the IJ shall order removal and not conduct further proceedings. Pg. 18101; 8 CFR § 1240.17(f)(2)(i)(B).
      - If the AO determined that the respondent was eligible for WOR or CAT, the IJ must give effect to the decision unless DHS makes a prima facie showing, using evidence that specifically pertains to the respondent and was not in the ROP for the AMI, that the respondent is ineligible. *Id.*
    - Respondent's Obligations at the Status Conference
      Pgs. 18100-01; 8 C.F.R. § 1240.17(f)(2)(i)
      - Plead to the NTA.
      - Indicate (orally or in writing) whether they intend to seek any protections for which the AO did not find them eligible.
      - If the respondent intends to contest removal or seek protections, they must (orally or in writing):
        - Indicate whether they plan to testify,
        - Identify any witnesses they plan to call,

AILA Doc. No. 22071302. (Posted 7/13/22)

- Provide any additional documentation in support of the application(s),
- *Describe any alleged errors or omissions in the asylum officer's decision or ROP,*
- *Articulate or confirm any additional bases for asylum or related protection (whether or not presented to the AO), and*
- *State any additional requested forms of protection.*
- Unrepresented respondents are not required to provide the items in *italics*

▪ DHS's Obligations at Status Conference
Pg. 18101; 8 C.F.R. § 1240.17(f)(2)(ii)

- Must indicate orally or in writing whether it intends to:
  - Rest on the record,
  - Waive cross-examination of the respondent,
  - Otherwise participate in the case, or
  - Waive appeal. 8 C.F.R. § 1240.17(f)(2)(ii)(A).
- DHS may only retract any of these positions if it seeks consideration of evidence that could not reasonably have been obtained and presented through the exercise of due diligence or if the exclusion would violate a statute or the Constitution. 8 C.F.R. § 1240.17(f)(2)(ii)(C), (g)(2).
- If DHS intends to participate, it must, at the status conference or in writing (no later than 15 days before the merits hearing, or 15 days after the status conference if the IJ determines no merits hearing is required):
  - State its position on each of the respondent's claimed grounds for relief,
  - State which elements it is contesting, which facts it is disputing, and explain its position,
  - Identify any witnesses it plans to call,
  - Provide any additional non-rebuttal or non-impeachment evidence,
  - State whether any investigations or examinations required by INA § 208 and the regs have been completed. 8 C.F.R. § 1240.17(f)(2)(ii)(B), (3)(i).
- If DHS does not timely provide its position on these grounds, the IJ can deem the arguments or claims unopposed (except for arguments or claimed bases for relief advanced after the status conference). 8 C.F.R. § 1240.17(f)(3)(i).

- **Respondent's Submission of Supplemental Filings** (No later than 5 days prior to merits hearing or 25 days after status conference if no merits hearing)
Pg. 18101; 8 C.F.R. § 1240.17(f)(3)(ii)

- This includes evidence that supplements statements or submissions made at the status conference, replies to any statement submitted by DHS, identifies any additional witnesses, and provides any additional documentation in support of respondent's claims.
- Practice Note: While the IFR would allow for a supplemental filing up to 5 days before the merits hearing, its language suggests that most additional supporting evidence must be filed by the status conference (or 30-35 days after the first MCH). The IFR does not address whether a separate deadline exists for briefing or whether IJs have the discretion to set different deadlines. This provides respondents and counsel with very little time to develop additional evidence.

- **Individual Merits Hearing** (60-65 days from MCH)
  Pgs. 18101-02; 8 C.F.R. § 1240.17(f)(4), (g)
  - The IJ shall decide the case on the documentary record without an individual hearing if:
    - DHS has indicated that it waives cross-examination, neither party has asked to present testimony, and the IJ determines a hearing is not necessary to fully develop the record, 8 C.F.R. § 1240.17(f)(4)(i), or
    - The respondent has asked to present testimony, DHS has waived cross-examination and does not intend to present testimony or produce evidence, and the IJ concludes that the application can be granted without further testimony, 8 C.F.R. § 1240.17(f)(4)(ii). Pg. 18101.
    - In all other situations, the IJ must conduct a hearing. Pg. 18101; 8 C.F.R. § 1240.17(f)(iii).
  - Any continued merits hearing(s) must occur within 30 days of the initial merits hearing. Pg. 18102; 8 C.F.R. § 1240.17(f)(4)(iii)(B).
  - Consideration of evidence and testimony – generally the same standards as for regular § 240 proceedings. Pg. 18102.
    - The IJ shall exclude documentary evidence or witness testimony only if it is not relevant or probative; if its use would be fundamentally unfair; or if the evidence is not submitted or the testimony is not requested by the applicable deadline (absent a timely request for a continuance or filing extension that is granted). 8 C.F.R. § 1240.17(g)(1), (2).
    - The IJ may consider evidence or testimony submitted after the deadline only if the evidence could not reasonably have been obtained and presented before the applicable deadline through the exercise of due diligence or if the exclusion of the evidence would violate a statute or the Constitution. 8 C.F.R. § 1240.17(g)(2).
- **Issuance of Decision** (No later than 45 days after merits hearing or 75 days after status conference if no merits hearing)

Pg. 18100; 8 C.F.R. § 1240.17(f)(5)

- Whenever practicable, the IJ shall issue an oral decision on the date of the final merits hearing or no more than 30 days after the status conference if there is no merits hearing.
  - But the IJ must give respondent 10-30 days to respond to any new evidence produced by DHS not in the ROP for the AMI that the respondent is not eligible for WOR or CAT.
- If that timeline is not practicable, the IJ shall issue an oral or written decision no more than 45 days after the merits hearing or 75 days after the status conference.
- Practice Note: The IFR states a preference for oral decisions, which will make filing notices of appeal more challenging, particularly for pro se respondents, and will likely lead IJs to use more stock language and analysis in their opinions.

- **Changes of Venue**
  8 C.F.R. § 1240.17(j)
  - If an IJ grants a change of venue, the schedule of proceedings under § 1240.17(f) restarts with the MCH at the new immigration court.
  - Practice Note: If individuals subjected to the IFR are later transferred to a detention center in our area, or an individual is released from detention or otherwise relocates to our area, this means the clock would start over with the first MCH.
- **Failure to Appear**
  8 C.F.R. § 1240.17(d).
  - If the respondent fails to appear at any hearing, the IJ shall issue an in absentia removal order, if the requirements under INA § 240(b)(5) (failure to appear in § 240 proceedings) and 8 C.F.R. § 1003.26 have been met, unless the IJ waives the respondent's presence.
  - However, a respondent who is ordered removed in absentia will still receive the benefit of WOR or CAT, if the AO found them eligible for such relief, unless DHS presents new qualifying evidence of ineligibility. Pg. 18105 n.42.

- **Continuances and Filing Extensions**
  - **Continuances for Respondents:** The applicable standard for determining continuances requested by respondents is based on the amount of delay they would cause to the merits hearing. Pgs. 18103-05; 8 C.F.R. § 1240.17(h)(2).
    - Where the aggregate length of all continuances requested by the respondent does not cause the merits hearing to be more than 90 days after the MCH, the **good cause standard** applies. Pg. 18103; 8 C.F.R. § 1240.17(h)(2)(i); *see* 8 C.F.R. § 1003.29; *Matter of L-A-B-R-*, 27 I&N Dec. 405, 413-19 (AG 2018).

- No individual continuances for good cause may exceed 10 days unless the IJ determines a longer continuance would be more efficient. 8 C.F.R. § 1240.17(h)(2)(i).
- Practice Note: DHS recognizes that a longer continuance may be necessary to "achieve its intended purpose," e.g., gather evidence that takes time to obtain or secure the availability of a witness. Pg. 18104.

- If the requested continuance would result in a delay between 91-135 days:
  - The respondent must demonstrate that it is necessary to ensure a fair proceeding and the need for it exists despite their exercise of due diligence. Pg. 18103; 8 C.F.R. § 1240.17(h)(2)(ii).
  - The length of any such continuance or extension is limited to the time necessary to ensure a fair proceeding. *Id.*
- If the requested continuance would result in a more than 135-day delay:
  - The respondent must demonstrate that failure to grant would be contrary to statute or the Constitution. Pg. 18103; 8 C.F.R. § 1240.17(h)(2)(iii).
- When applying these standards, IJs should consider whether the request is related to the noncitizen's ability to reasonably present his or her case or implicates any rights found at INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B). Pg. 18104.
  - Noncitizens also have a Fifth Amendment due process "right to a full and fair hearing." *Cinapian v Holder*, 567 F.3d 1067, 1074 (9th Cir. 2009) (collecting cases).
- Sufficient reasons for an extension may include, on a case-by-case basis, a respondent's ability to:
  - Present testimony,
  - Present and rebut evidence,
  - Cross-examine witnesses, and
  - Seek counsel. Pg. 18104.
- Calculating Delay:
  - Time for purposes of considering extensions does not begin to run until the day after the MCH. Pg. 18104; 8 C.F.R. § 1240.17(f)(1).
  - Calculations only pertain to the delay of hearings and deadlines specifically included in the regulation: status conference or merits hearings and any filing deadline that, if extended, would delay these hearings. Pg. 18104.
  - Delay due to DHS-requested extensions and exigent circumstances is not counted. Pgs. 18103-05; 8 C.F.R. § 1240.17(h)(2)(iv).

- **DHS Continuances: "Significant Government Need" Standard**
  - IJs may grant DHS continuances and extend filing deadlines based on significant government need. Pg. 18105; 8 C.F.R. § 1240.17(h)(3).
    - "Significant government need" will only arise in exceptional cases that may include, but are not limited to:
      - Confirming domestic or foreign law enforcement interest in the respondent and
      - Conducting forensic analysis of documents submitted in support of relief application or other fraud-related investigation.
  - Practice Note: The IFR recognizes that requiring DHS to show "significant" need for continuances is proper due to natural advantages DHS has over respondents, such as subject-matter expertise, not bearing the burden of proof for relief, and lack of access to counsel issues. Pg. 18105.

- **Continuances due to Exigent Circumstances**
  - Continuances due to court and DHS office closures, illness of a party, unavailability of the IJ, and other exigent circumstances may be granted as the IJ sees fit and do not count against aggregate limits on continuances. Pg. 18105; 8 C.F.R. § 1240.17(h)(4).
  - Such continuances should be limited to the shortest time necessary, and each must be justified. *Id.*

- **Consideration of WOR and CAT Protection**
  - If the AO finds that the noncitizen is not eligible for any relief, the IJ will review *de novo* all aspects of the application, including eligibility for asylum, and if necessary, WHH or CAT. Pg. 18105; 8 C.F.R. § 1240.17(i)(1).
  - If the AO does not grant asylum but determines the noncitizen is eligible for withholding or CAT, there are two options:
    1. The noncitizen does NOT contest the denial of asylum. 8 C.F.R. § 1240.17(f)(2)(i)(B).
       - The matter goes to the IJ, who will issue a removal order.
       - The IJ will further give effect to any protections (WHH and/or CAT) the AO determined the noncitizen was eligible for (unless DHS shows via new evidence that the noncitizen is ineligible) and there are no further proceedings unless a party appeals.
    2. The noncitizen contests the decision to deny asylum. 8 C.F.R. § 1240.17(i)(2).
       - The IJ will adjudicate the asylum claim *de novo*.
       - If the IJ denies asylum, they will enter an order of removal but still give effect to any protections (WHH and/or CAT) the AO determined the noncitizen was eligible for (unless DHS shows via new evidence that the

noncitizen is ineligible) and there are no further proceedings unless a party appeals.

- In this situation, DHS's evidence on ineligibility for WHH and/or CAT before the IJ must (1) specifically pertain to the noncitizen and (2) not have been in the ROP before the AO. Pg. 18105; 8 C.F.R. § 1240.17(f)(2)(i)(B), (i)(2).
  - Practice Note: This suggests that a general country conditions argument is insufficient.
  - For example, DHS could raise information arising from background checks conducted after the AMI.

- A noncitizen who failed to appear and was ordered removed *in absentia* will still receive the benefit of any protections from removal that the AO found, unless DHS provides new evidence of ineligibility. Pg. 18105 n.42; 8 C.F.R. § 1240.17(d).
  - Practice Note: The IFR does not explain the procedure for this, such as whether the respondent would need to file a motion to reopen.
- DHS cannot appeal to the BIA the IJ's grant of WHH or CAT if the AO determined the respondent was eligible, except to argue that the IJ should have denied the application(s) based on the new evidence DHS submitted before the IJ. 8 C.F.R. § 1240.17(i)(2).
  - Practice Note: DHS can still fully appeal the IJ's grant of asylum and, if the AO *did not* previously find the respondent eligible, the IJ's grant of WHH or CAT.

V. Exceptions to Streamlined Procedures

Pgs. 18106-07; 8 C.F.R. § 1240.17(k)

- The IFR's new procedures on expedited removal do not apply:
  - If the noncitizen produces evidence of prima facie eligibility for relief or protection other than asylum, WHH, CAT, or VD, and is seeking to apply for or has applied for such relief. Pgs. 18106-07; 8 C.F.R. § 1240.17(k)(2).
    - For example, a noncitizen seeking adjustment of status under Section 245.
  - Where the noncitizen has produced prima facie evidence that they are not subject to removal as charged and the IJ, under § 1240.10(d), determines that the issue of removability cannot be resolved simultaneously with the noncitizen's applications for asylum, WHH, or CAT. Pg. 18106; 8 C.F.R. § 1240.17(k)(3).
  - Where the IJ finds the noncitizen subject to removal to a different country from the country or countries that they claimed fear from before the AO and the noncitizen claims a fear with respect to the alternative country. Pg. 18107; 8 C.F.R. § 1240.17(k)(4).
  - To cases that have been reopened or remanded after an IJ's order. Pg. 18107; 8 C.F.R. § 1240.17(k)(5).
  - To vulnerable populations:

- Noncitizens under the age of 18 on the date the NTA was issued (except for those in 240 proceedings with an adult family member). Pg. 18107; 8 C.F.R. § 1240.17(k)(1).
- Noncitizens who exhibit indicia of mental incompetency. Pg. 18107; 8 C.F.R. § 1240.17(k)(6).

VI. Parole

Pgs. 18107-09; 8 C.F.R. § 212.5

- Individuals who are subject to expedited removal pending their CFI and those who are determined to have a credible fear are eligible for parole on a case-by-case basis but not bond.
- The IFR provides for the same five categories of parole eligibility for both groups of people:
  (1) Noncitizens with serious medical conditions such that continued detention would not be appropriate;
  (2) Pregnant women;
  (3) Certain juveniles;
  (4) Noncitizens who will be witnesses in proceedings conducted by judicial, administrative, or legislative bodies in the United States; and
  (5) Noncitizens whose continued detention is not in the public interest. Pg. 18108; 8 C.F.R. § 212.5(b).
    - This is a catch-all category commonly used by DHS.
    - Current DHS Guidance says: ''[W]hen an arriving alien found to have a credible fear establishes to the satisfaction of DHS his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors, parole the alien on the basis that his or her continued detention is not in the public interest.'' ICE Policy No. 11002.1 ¶ 6.2, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009); pg. 18109.
    - DHS can and should prioritize based on space constraints: "DHS views detention as not being in the public interest where, in light of available detention resources, and considered on a case-by-case basis, detention of any particular noncitizen would limit the agency's ability to detain other noncitizens whose release may pose a greater risk of flight or danger to the community." Pg. 18108.
    - DHS says it will promulgate further guidance on how officers should apply parole differently, if at all, for individuals pending CFIs versus individuals with positive CFIs. Pg. 18109.
- These five categories are the same as before for individuals who have been found to have a credible fear. However, prior to the IFR, noncitizens in expedited removal pending their CFI could be released on parole only when they had a ''medical emergency'' or ''a legitimate law enforcement objective." Pg. 18108.

- Practice Note: Expanding parole authority for noncitizens in expedited removal will likely lead to more people in expedited removal being released pending their CFI. But more people will likely also be placed in expedited removal than before, so it's unclear whether detention will overall increase or decrease.