Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[DHS Docket No. USCIS–2024–0005]

RIN 1615–AC91

Application of Certain Mandatory Bars in Fear Screenings

AGENCY: U.S. Citizenship and Immigration Services (''USCIS''), Department of Homeland Security (''DHS'' or ''the Department'').

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: DHS proposes to allow asylum officers (''AOs'') to consider the potential applicability of certain bars to asylum and statutory withholding of removal during certain fear screenings. Specifically, under this proposed rule, AOs would be authorized to consider certain bars during credible and reasonable fear screenings, including credible fear screenings where the Circumvention of Lawful Pathways (''CLP'') rule applies. The proposed rule is intended to enhance operational flexibility and help DHS more swiftly remove certain noncitizens who are barred from asylum and statutory withholding of removal.

DATES: Written comments on the proposed rule must be submitted on or before June 12, 2024. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit comments on the entirety of this proposed rule package, identified by DHS Docket No. USCIS–2024–0005, through the Federal eRulemaking Portal at *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 the Department's officials, will not be considered comments on the proposed rule and may not receive a response from the Department. Please note that the Department cannot accept any comments that are hand-delivered or couriered. In addition, the Department cannot accept comments contained on any form of digital media storage devices, such as CDs, DVDs, or USB drives. The Department is 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: Daniel Delgado, Director for Immigration Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security; telephone (202) 447–3459 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested parties are invited to submit comments on this action by submitting relevant written data, views, or arguments. To provide the most assistance to the Department, comments should reference a specific portion of the proposed rule; explain the reason for any recommendation; and include data, information, or authority that supports the recommended course of action. Comments submitted to DHS must be in English, or an English translation must be provided. Comments submitted in a manner other than those listed above, including emails or letters sent to the Department's officials, will not be considered comments on the proposed rule and may not receive a response from the Department.

Instructions: If you submit a comment, you must include the agency name and the DHS Docket No. USCIS–2024–0005 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 public comment submission you make to the Department. The Department may withhold information provided in comments from public viewing 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–2024–0005. You may also sign up for email alerts on the online docket to be notified when comments are posted or when the final rule is published.

II. Legal Authority and Background

A. Legal Authority

The Immigration and Nationality Act (''INA''), as amended by the Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, charges the Secretary ''with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,'' except insofar as those laws assign functions to the President or other agencies. INA 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also grants the Secretary the authority to establish regulations and take other actions ''necessary for carrying out'' the Secretary's authority to administer and enforce the immigration laws. INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *see also* 6 U.S.C. 202 (authorities of the Secretary), 271(a)(3) (conferring authority on USCIS Director to establish ''policies for performing [immigration adjudication] functions'').

Under the INA, DHS and the Department of Justice (''DOJ'') each have authority over credible fear screenings. USCIS AOs are charged with conducting initial credible fear screenings, INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The INA also provides the Secretary and Attorney General authority to publish regulatory amendments governing their respective roles regarding inspection and admission, detention and removal, withholding of removal, and deferral of removal. *See* INA 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The United States is a party to the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 19 552U.S.T. 6223, 606 U.N.T.S. 268 (''Refugee Protocol''), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status

of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (''Refugee Convention''). Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning (''refouler'') ''a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.''

Congress implemented U.S. non-refoulement obligations under the 1967 Protocol in the Refugee Act of 1980, creating the precursor to what is now known as statutory withholding of removal. The Supreme Court has long recognized that the United States implements its nonrefoulement obligations under Article 33 of the Refugee Convention (via the Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened because of one of the protected grounds listed in Article 33 of the Refugee Convention. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 1208.16; *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429–30 (1987) (discussing the statutory precursor to INA 241(b)(3), INA 243(h)); *INS* v. *Stevic,* 467 U.S. 407 (1984) (same). The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* INA 103(a)(1) and (3), (g)(1) and (2); 8 U.S.C. 1103(a)(1) and (3), (g)(1) and (2).

The Departments also have authority to implement U.S. obligations under Article 3 of the 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) (''CAT''). The Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA'') provides the Secretary with the authority to ''prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.'' Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have implemented the United States' obligations under Article 3 of the CAT in their respective immigration regulations, consistent with FARRA. *See, e.g.,* 8 CFR 208.16(c) through 208.18, 1208.16(c) through 1208.18; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999), as corrected by 64 FR 13881 (Mar. 23, 1999).

B. The Asylum and Expedited Removal Process

1. Asylum and Related Protection

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 and Secretary ''may'' grant asylum to refugees); INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) (defining ''refugee''). 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. Specifically, an applicant may also be eligible 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), or withholding or deferral of removal under the regulations implementing U.S. obligations under Article 3 of the CAT, 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 be ''more likely than not'' to face persecution or torture, meaning that the noncitizen would face a clear probability that their life or freedom would be threatened on account of a protected ground or a clear probability of torture. 8 CFR 1208.16(b)(2), (c)(2). Thus, if a noncitizen establishes 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), (B), 8 U.S.C. 1231(b)(3)(A), (B); 8 CFR 208.16, 1208.16. Likewise, a noncitizen who establishes that they 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).

The INA provides mandatory bars to applying for asylum at section 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2), to asylum eligibility at section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A), and to eligibility for withholding of removal at section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B) (referred to collectively as ''mandatory bars''). There are no bars to deferral of removal under the regulations implementing U.S. obligations under Article 3 of the CAT. Several of these mandatory bars seek to protect the public from individuals who are terrorists, have persecuted others, been convicted of significant crimes, or represent a danger to the public.

Specifically, the following statutory bars to asylum eligibility are codified at section 208(b)(2)(A)(i) through (v) of the INA, 8 U.S.C. 1158(b)(2)(A)(i) through (v), and to eligibility for withholding of removal at section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B): (1) those who ''ordered, incited, assisted, or otherwise participated in the persecution of any person'' ''on account of'' or ''because of'' a protected ground, INA 208(b)(2)(A)(i), 241(b)(3)(B)(i), 8 U.S.C. 1158(b)(2)(A)(i), 1231(b)(2)(B)(i); (2) those convicted of a ''particularly serious crime,'' INA 208(b)(2)(A)(ii), 241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(2)(B)(ii); (3) where ''there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States,'' INA 208(b)(2)(A)(iii), 241(b)(3)(B)(iii), 8 U.S.C. 1158(b)(2)(A)(iii), 1231(b)(2)(B)(iii); (4) where ''there are reasonable grounds to believe that the alien is a danger to the security of the United States,'' INA 208(b)(2)(A)(iv), 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv), 1231(b)(2)(B)(iv); and (5) those described in certain terrorism-related provisions, INA 208(b)(2)(A)(v), 241(b)(3)(B), 8 U.S.C. 1158(b)(2)(A)(v), 1231(b)(2)(B).

A sixth statutory bar to eligibility for asylum, which does not bar eligibility for statutory withholding of removal, applies to any noncitizen who ''was firmly resettled in another country prior to arriving in the United States.'' INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). And, additionally, there are statutory bars to withholding of removal eligibility for admitted noncitizens who are deportable under INA 237(a)(4)(D), 8 U.S.C. 1227(a)(4)(D), for involvement in genocide, torture, extrajudicial killing, or Nazi persecution as defined in INA 212(a)(3)(E)(i)–(iii), 8 U.S.C. 1182(a)(3)(E)(i)–(iii). *See* INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B).

2. Expedited Removal and the Credible Fear Screening Process

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 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. INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i). 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.'' [1] *Id.*

The former Immigration and Naturalization Service, 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. Any noncitizen who indicates 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 AO 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 AO determines that the noncitizen does not have a credible fear of persecution or torture, the noncitizen may request that an immigration judge 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).

Generally, if the AO determines that a noncitizen subject to expedited removal has a credible fear of persecution or torture, DHS may either retain jurisdiction over the noncitizen's application for asylum pursuant to 8 CFR 208.2(a)(1)(ii) for further consideration in an asylum merits interview (''AMI'') under 8 CFR 208.9, or refer the noncitizen to an immigration court for adjudication of the noncitizen's claims by initiating removal proceedings under section 240 of the INA, 8 U.S.C. 1229a (''section 240 removal proceedings''), through service of a notice to appear on the noncitizen and filed with EOIR. 8 CFR 208.30(f). On the other hand, if an asylum officer finds that a noncitizen does not have a credible fear, the asylum officer's determination is subject to further review by an immigration judge, as set forth in the governing regulations. *See* 8 CFR 208.30(g), 208.33(b)(2)(v); 1208.30(g)(2), 1208.33(b). Generally, if an immigration judge, upon review of the AO's negative credible fear determination, finds that the noncitizen possesses a credible fear of persecution or torture, the immigration judge vacates the expedited removal order and refers the case back to DHS for either an AMI or the initiation of section 240 removal proceedings. *See id.* 1208.30(g)(2)(iv)(B).

''The term 'credible fear of persecution' means that 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, that the alien could establish eligibility for asylum.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Pursuant to the regulations at 208.30(e)(2), credible fear of persecution in this process also encompasses whether there is 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 can establish eligibility for withholding of removal under section 241(b)(3) of the Act. 8 CFR 208.30(e)(2).[2] In addition, under 8 CFR 208.30(e)(3), a credible fear of torture in this process means a significant possibility that the noncitizen is eligible for withholding of removal or deferral of removal under CAT. 8 CFR 208.30(e)(3). As noted below, other regulations provide a different screening standard to be used in certain contexts with respect to statutory withholding of removal and CAT protection. *See, e.g.,* 8 CFR 208.31, 208.33.

C. Reasonable Fear Screening Process

The INA also provides for additional streamlined removal proceedings beyond expedited removal proceedings. First, DHS may reinstate a prior removal order for any noncitizen who ''has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal.'' INA 241(a)(5), 8 U.S.C. 1231(a)(5); *see* 8 CFR 241.8. Second, DHS may issue an administrative removal order for certain noncitizens who are not lawful permanent residents and are deportable under INA 237(a)(2)(A)(iii), 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony. INA 238(b), 8 U.S.C. 1228(b); *see* 8 CFR 238.1.

Although both streamlined proceedings preclude noncitizens from seeking discretionary relief from removal, including asylum, *see* INA 238(b)(5), 241(a)(5), 8 U.S.C. 1228(b)(5), 1231(a)(5), DHS may not remove a noncitizen to a country where they are more likely than not to be persecuted or tortured. *See* INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); 8 CFR 208.16(b)–(c), 208.31. Accordingly, if a noncitizen ordered removed under either section 241(a)(5) or 238(b) of the Act, 8 U.S.C. 1231(a)(5) or 1228(b), indicates a fear of return to the country to which he or she has been ordered removed, DHS refers the case to an AO for a determination of whether the individual has a reasonable fear of persecution or torture. 8 CFR 208.31.

The AO will find that a noncitizen who ''establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal'' has a reasonable fear of persecution or torture. 8 CFR 208.31(c). As with credible fear interviews, the regulations currently direct that the AO does not consider the statutory bars to withholding of removal as part of the reasonable fear determination. *Id.* If the AO determines that the noncitizen does not have a reasonable fear of persecution or torture, the noncitizen may request that an immigration judge review that determination. 8 CFR 208.31(g); 8 CFR 1208.31(e). If the AO finds a reasonable fear, the AO refers the noncitizen to proceedings before an immigration judge where the noncitizen may only seek withholding of removal under the Act or withholding of removal and deferral of removal under the Convention Against Torture. 8 CFR 208.31(e); *see Johnson* v. *Guzman Chavez,* 141 S. Ct. 2271, 2282–83 (2021) (describing ''withholding only'' proceedings).

[1] Unaccompanied children are not subject to expedited removal. *See* 8 U.S.C. 1232(a)(5)(D); *see also* 6 U.S.C. 279(g)(2) (defining ''unaccompanied [ ] child'').

[2] The statute requires the ''significant possibility'' standard to be used to screen for asylum eligibility, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), and the statute does not refer to statutory withholding and CAT protection. Instead, a screening standard for statutory withholding and CAT protection is set forth in regulation.

D. Past Regulatory Actions on This Topic

Historically, AOs have not considered the applicability of mandatory bars to asylum or statutory withholding of removal when determining whether a noncitizen could establish eligibility for asylum or other forms of protection during the initial screening interview. The former INS issued a rule in 2000 precluding—without explanation—consideration of the asylum bars at the credible fear stage. *See, e.g.,* Asylum Procedures, 65 FR 76121, 76129 (Dec. 6, 2000) (codifying the statement in 8 CFR 208.30 that a noncitizen who appears to be subject to one or more of the mandatory bars would nevertheless be referred to section 240 removal proceedings for full consideration of their claim and explaining that this change was done in response to comments suggesting such a referral ''regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the Act'').

In 2020, DHS, jointly with the Department of Justice (''DOJ'') (collectively, ''DHS and DOJ'' or ''the Departments''), amended the regulations to instruct adjudicators to apply the mandatory bars during credible fear interviews for the first time. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274, 80391, 80393, 80399 (Dec. 11, 2020) (''Global Asylum Rule''); *see also* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR. 36264, 36272 (June 15, 2020) (''Global Asylum NPRM''). The Departments explained that applying the mandatory bars at the credible fear screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate wasted adjudicatory resources. 85 FR at 80295–96. On January 8, 2021, before the rule became effective, the U.S. District Court for the Northern District of California preliminarily enjoined the Departments from implementing the Global Asylum Rule. *Pangea Legal Servs.* v. *DHS,* 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021).[3]

On December 23, 2020, DHS and DOJ jointly published a final rule (''Security Bars'' or ''Asylum Eligibility and Public Health'' rule) to clarify that the Departments may consider emergency public health concerns based on communicable disease (not limited to COVID–19) when determining whether an alien is subject to the existing statutory bars to asylum and withholding of removal at INA 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv), for noncitizens for whom ''there are reasonable grounds to believe'' that they are ''a danger to the security of the United States'' (commonly known as the ''security bar'').[4] The rule was scheduled to take effect on January 22, 2021, but its effective date has been delayed multiple times, now until December 31, 2024.[5]

The Security Bars rule would have made a noncitizen ineligible for asylum if, among other things, the noncitizen was physically present in a country in which a communicable disease was prevalent or epidemic, and the Secretary of Homeland Security and the Attorney General determined that the physical presence in the United States of noncitizens coming from that country would cause a danger to the public health.[6] In the credible fear context, the rule would have applied the security bar to asylum and withholding of removal to credible fear screenings such that if the bar applied, the noncitizen would receive a negative credible fear determination with respect to asylum and withholding of removal and then be screened only for deferral of removal according to whether there is a clear probability (more likely than not standard) the noncitizen would experience torture in the country of removal. The portion of the final Security Bars rule that would have applied the security bar to credible fear screenings, however, was rooted in the provision of the Global Asylum Rule that never went into effect due to being enjoined prior to its effective date as noted above.

In 2022, DHS and DOJ again amended the credible fear regulations to instruct AOs to not consider the applicability of mandatory bars during credible fear screenings, *see* 8 CFR 208.30(e)(5), and to remove from 8 CFR 1003.42 and 1208.30 the language implemented by the Global Asylum Rule instructing immigration judges to consider the mandatory bars during credible fear reviews. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078, 18219, 18221–22 (Mar. 29, 2022) (''Asylum Processing IFR''). The Departments explained that ''[r]equiring asylum officers to broadly apply the mandatory bars at credible fear screening would increase credible fear interview and decision times because asylum officers would be expected to devote time to eliciting testimony, conducting analysis, and making decisions about all applicable bars,'' and it would require a ''fact-intensive inquiry requiring complex legal analysis that would be more appropriate in a full adjudication before an asylum officer or in section 240 proceedings with the availability of judicial review than in credible fear screenings.'' Asylum Processing IFR, 87 FR at 18093. The Departments further stated that ''due process and fairness considerations counsel against applying mandatory bars during the credible fear screening process.'' *Id.* at 18134. In sum, the Departments explained that not applying mandatory bars at the credible fear screening stage both preserves the efficiency Congress intended in making credible fear screening part of the expedited removal process and helps ensure a fair process for those individuals found to have a significant possibility of establishing eligibility for asylum or statutory withholding of removal but for the potential applicability of a mandatory bar. *Id.*[7]

In May 2023, the Departments published a rule, which implemented a new condition on eligibility for asylum to be applied at the credible fear stage, but did not alter the general rule regarding the application of mandatory statutory bars at the credible fear stage. Circumvention of Lawful Pathways, 88 FR 31314 (May 16, 2023) (''Circumvention of Lawful Pathways rule'' or ''CLP rule''); *see* 8 CFR 208.33, 1208.33; *see also* Circumvention of Lawful Pathways, 88 FR 11704 (Feb. 23, 2023) (''Lawful Pathways NPRM'').

[3] In *Pangea Legal Servs.,* the U.S. District Court for the Northern District of California preliminarily enjoined the Departments from implementing the Global Asylum Rule in its entirety nationwide before it became effective. 512 F. Supp. 3d at 977. The court concluded that the plaintiffs were likely to succeed on the merits of their claim that the Global Asylum Rule ''was done without authority of law'' because the DHS official who approved it, then-Acting Secretary Chad Wolf, was not properly designated as Acting Secretary. *Id.* at 975. The court did not address any challenges to the rule's substance.

[4] Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020).

[5] *Id.;* Security Bars and Processing; Delay of Effective Date, 87 FR 79989 (Dec. 28, 2022); *see also* Security Bars and Processing; Delay of Effective Date, 86 FR 73615 (Dec. 28, 2021); Security Bars and Processing; Delay of Effective Date, 86 FR 15069 (Mar. 22, 2021); Security Bars and Processing; Delay of Effective Date, 86 FR 6847 (Jan. 25, 2021).

[6] *See* Security Bars and Processing, 85 FR 84160, 84190 (Dec. 23, 2020).

[7] A full discussion of the Departments' reasoning to return to the regulatory framework in place prior to the Global Asylum Rule and no longer apply the mandatory bars in credible fear interview is found in the Asylum Processing IFR. *See* 87 FR at 18092–94, 18134–36.

III. Need for This Proposed Rule

This proposed rule is intended to provide DHS additional operational flexibility in screening determinations by giving AOs discretion, at the earliest stage possible, to consider whether a given noncitizen is unlikely to be able to establish eligibility for asylum or statutory withholding of removal because of a mandatory bar that relates to participation in persecution, or national security, criminal, or other public safety concern,[8] and, in relevant cases, to issue a negative fear of persecution determination based on the application of such a bar. As the purpose of the screening process is to identify individuals who are ineligible for relief at the earliest stage possible in order to create systematic efficiencies while simultaneously protecting legal rights, ignoring statutory bars to such relief with serious implications, including terrorism and significant criminality, during this process runs counter to the policy goals. This discretionary flexibility would be available in credible fear determinations, including both determinations of noncitizens subject to the circumvention of lawful pathways rebuttable presumption of asylum ineligibility and noncitizens not so subject, or during reasonable fear determinations where the noncitizen is subject to reinstatement of a prior order of removal or a final administrative removal order. The rule is consistent with the Administration's demonstrated record of providing operators maximum flexibility and tools to apply consequences, including by more expeditiously removing those without a lawful basis to remain in the United States, while providing immigration relief or protection to those who merit it at the earliest point possible. This rule will allow DHS to quickly screen out certain non-meritorious protection claims and to swiftly remove those noncitizens who present a national security or public safety concern.[9]

By allowing AOs to promptly issue negative fear determinations in cases in which there is easily verifiable evidence the noncitizen could be subject to a bar and where the noncitizen is unable to establish, at the relevant standard, that the bar would not apply, and the noncitizen is not otherwise able to establish a credible or reasonable fear of torture, the Department will shorten the overall time between encounter and finality of a removal order and removal from the United States. For those noncitizens in whose cases a negative determination is made due to applicability of a bar, the regulation would prevent them from entering a potentially years-long immigration court process and would conserve those DHS and EOIR resources that would have been required to complete such process to focus on meritorious cases.[10]

The population to which this rule will apply is likely to be relatively small, as informed by the number of cases with bars that are flagged by USCIS during screenings. Given the gravity of the offenses that trigger these bars, however, it is nevertheless important that individuals who meet the criteria be identified and removed as quickly as possible. The type of credible or reasonable fear determination where this rule could be outcome determinative is limited to cases that would have otherwise been found to have a positive credible or reasonable fear of persecution, since those are cases that could be given a negative determination due to a mandatory bar under this proposed rule. For FY 2024 through April 23, 2024, USCIS records indicated that out of a total 29,751 positive credible fear of persecution determinations, AOs flagged a potential bar (without counting firm resettlement) in 733 cases (or 2.5% of total cases with a positive credible fear of persecution determination).[11] For FY 2023, USCIS records indicated that out of a total 50,117 positive credible fear of persecution determinations, AOs flagged a potential bar (without counting firm resettlement) in 1,497 cases (or 3% of total cases with a positive credible fear of persecution determination).[12] In FY 2022, AOs flagged a potential bar (without counting firm resettlement) in 626 out of 24,282 positive credible fear of persecution determinations (or 2.6% of total cases with a positive credible fear of persecution determination).[13] In FY 2021, 479 cases were flagged as having a potential mandatory bar (without counting firm resettlement) out of 24,512 positive credible fear determinations (2%), and in FY 2020, 346 cases out of a total 8,887 positive credible fear determinations (4%) had a mandatory bar (without counting firm resettlement) flagged.[14]

For reasonable fear cases, the percentage of positive reasonable fear of persecution determinations where AOs flagged a potential bar to statutory withholding of removal is significantly higher than the percentage of positive credible fear of persecution determinations where a bar was flagged. For FY 2024 through April 23, 2024, AOs flagged a potential bar to withholding of removal in 143 cases out of 1,430 positive reasonable fear of persecution determinations (or 10% of cases where a positive reasonable fear of persecution was found).[15] For FY 2023, AOs flagged a potential bar to withholding of removal in 309 cases out of 1,534 positive reasonable fear of persecution determinations (or 20% of cases where a positive reasonable fear of persecution was found).[16] In FY 2022, AOs flagged a potential bar in 236 out of 1,127 positive reasonable fear of persecution determinations (or 21% of total cases with a positive reasonable fear of persecution determination).[17] In

[8] This rule will not change current treatment of the ''firm resettlement'' bar at INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv). For further explanation of the Department's reasoning, see Section IV.A. below.

[9] The expedited removal statute requires AOs to determine whether the noncitizen ''could establish eligibility for asylum under [INA 208].'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (defining ''credible fear of persecution''). Accordingly, the statute permits consideration of the mandatory asylum bars, which constitute an element of asylum eligibility under section 208 of the Act. The statute is silent with respect to the nature of screening for potential statutory and CAT-based withholding of removal eligibility and thus affords DHS discretion in how best to implement withholding of removal obligations in the expedited removal, administrative removal, and reinstatement contexts. *See Am. Immigration Lawyers Ass'n* v. *Reno,* 18 F. Supp. 2d 38, 56 (D.D.C. 1998) (observing that because the INA is ''silent'' with respect to certain expedited removal procedures, ''the Court must defer to the [agency]'s determination as to what procedures are appropriate, so long as that determination is reasonable'' and that the court ''cannot impose upon the [agency] any obligation to afford more procedures than the governing statute explicitly requires or that [it] has chosen to afford in [its] discretion'' (citing *Vt. Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 524–25 (1978)), *aff'd,* 199 F.3d 1352 (D.C. Cir. 2000); *cf. Las Americas Immigrant Advocacy Ctr.* v. *Wolf,* 507 F. Supp. 3d 1, 32 (D.D.C. 2020) (Jackson, J.) (underscoring ''Congress's clear intent to afford noncitizens who are subject to expedited removal fewer procedural rights in order to facilitate the expeditious processing of their asylum claims'').

[10] As described above in section II.B.2 of this preamble, if the AO determines that the noncitizen does not have a credible fear of persecution or torture, the noncitizen may request that an immigration judge 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). This rulemaking does not affect a noncitizen's ability to request immigration judge review of an adverse credible fear determination.

[11] Asylum Global Case Management System (data as of Apr. 25, 2024). USCIS does not currently apply bars in credible or reasonable fear screenings but notes the possible applicability of the bar, and thereby notifies OPLA, if the case is referred to EOIR for adjudication.

[12] Asylum Global Case Management System (data as of Feb. 10, 2024).

[13] *Id.*

[14] *Id.*

[15] Asylum Global Case Management System (data as of Apr. 25, 2024).

[16] Asylum Global Case Management System (data as of Feb. 10, 2024).

[17] *Id.*

FY 2021, 80 cases were flagged as having a potential mandatory bar out of 541 positive reasonable fear determinations (15%), and in FY 2020, 56 cases out of a total 394 positive reasonable fear determinations (14%) had a mandatory bar flagged.[18]

Credible or reasonable fear cases that received a positive fear of torture determination would not be impacted by this proposed regulation, since the screening for torture encompasses screening for deferral of removal under CAT, for which there are no bars; likewise, negative credible or reasonable fear determinations based solely on a noncitizen failing to show a likelihood of persecution and torture would not be affected by this rule, since the assessment of a mandatory bar in those cases would not be outcome determinative. For the latter two categories, AOs will continue to flag bars where they may be evident in the record, even if they are not outcome determinative in a given case.

This rule has three anticipated impacts. First, this rule expands the Department's ability to more quickly remove noncitizens who fall within the Administration's highest enforcement priorities: those who present national security or public safety threats.[19] As explained further below in Section IV of this preamble, the rule would allow AOs discretion to issue negative fear findings in cases in which there are indicia of a mandatory bar, and the noncitizen is unable to establish at the relevant standard that the bar would not apply. The specific mandatory bars this rule would allow AOs to consider are those relating to public safety and/or national security threats, with the intent of allowing the Department flexibility in some cases to more quickly remove individuals who present such concerns.[20]

Second, the rule would increase operational flexibility. For example, AOs could use their judgment to apply these bars in cases in which there is evidence available to the AO that triggers an inquiry into a bar, and the AO is confident that they can address that bar efficiently at the credible fear or reasonable fear interview. Currently, when an AO elicits information during an interview indicating that a bar may apply—even when that information makes it clear a bar will apply during a full adjudication of the asylum or withholding claim—the AO is foreclosed from considering the application of a bar as part of the fear determination. Instead, the AO flags the potential bar, which may include preparing a memorandum to file related to the potential bar and the reasons for which it may apply.[21] Although not determinative, ICE may consider and further develop this information when litigating before EOIR, and EOIR may consider this information along with other relevant factors in the case in the adjudication of immigration court proceedings.[22] ICE ERO and EOIR may rely upon the potential bar in making custodial determinations.[23]

Third, this rule may provide efficiencies for ICE Office of the Principal Legal Advisor (''OPLA'') and ICE Enforcement and Removal Operations (''ERO'') and may reduce referrals to EOIR in cases in which a negative fear determination can be made at the screening stage for an individual who would otherwise need to traverse the entire immigration court process.[24] As part of OPLA's extensive responsibilities, in preparation for a removal hearing, OPLA reviews whether the noncitizen is statutorily eligible for relief or protection and if there are any statutory bars to relief or protection. Thus, for each case in which a noncitizen appears before the immigration courts, OPLA is reviewing for statutory bars. Cases involving potential bars to relief or protection such as terrorism-related inadmissibility grounds or assistance in the persecution of others, are assigned to certain designated attorneys specializing in such cases, entail special reporting requirements, and coordination with OPLA headquarters divisions. Requiring AOs to continue proceedings for a noncitizen with an otherwise positive credible or reasonable fear where the evidence would be sufficient to apply a mandatory bar at the credible or reasonable fear stage therefore introduces the possibility that OPLA resources will be unnecessarily expended in further developing the record for immigration court hearings.

Additionally, the Department is currently maximizing referrals to expedited removal, consistent with the Secretary's enforcement priorities, which include threats to border security. For instance, DHS established the Family Expedited Removal Management (FERM), which leverages alternatives to detention to process families through expedited removal, including credible fear screenings, in a non-detained setting. These efforts enhance DHS's ability, within the current statutory framework governing expedited removal, to more quickly apply consequences to those without a legal basis to remain. However, resources to administer expedited removal generally and FERM specifically are limited, and no process specifically establishes the discretionary flexibility to more quickly reach a final order of removal for the population to whom this rule would apply.

Consequently, individuals to whom mandatory bars may apply and who receive a positive credible fear determination continue to be referred to EOIR for immigration court proceedings, joining the backlog which exceeded 2,400,000 cases pending cases at the end of FY 2023, a backlog that can result, in some instances, in a lengthy process.[25] The current framework therefore unnecessarily extends adjudication of cases that correspond to the Secretary's enforcement priorities, while using needed EOIR and OPLA resources to adjudicate cases which could be more

[18] *Id.*

[19] Memorandum from Alejandro N. Mayorkas, Sec'y of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at *https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf* (last visited Feb. 9, 2024).

[20] This rule will not change current treatment of the ''firm resettlement'' bar at INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv). For further explanation of the Department's reasoning, see Section IV.A. below.

[21] USCIS, *RAIO Directorate—Officer Training: Credible Fear of Persecution and Torture Determinations* (Feb. 20, 2023).

[22] *See Matter of D–R–,* 25 I. & N. Dec. 445 (BIA 2011) (in immigration proceedings, the ''sole test for admission of evidence is whether the evidence is probative and its admission fundamentally fair.''); *Matter of Velasquez,* 19 I. & N. Dec. 377, 380 (BIA 1986) (same).

[23] *Matter of R–A–V–P–,* 27 I. & N. Dec. 803 (BIA 2020) (''The Immigration Judge may also consider the likelihood that relief from removal will be granted in determining whether [a noncitizen] warrants bond.'')

[24] OPLA serves as the DHS's representative in removal proceedings before EOIR, including cases involving national security threats, human rights violators, and criminal noncitizens. *See* 6 U.S.C. 252(c). Accordingly, OPLA is responsible for ensuring that the Department's interests are fully represented in cases filed by not only ICE but also USCIS and CBP. During removal proceedings, OPLA attorneys receive and review evidence, which may include examining databases of multiple agencies for criminal and immigration history and preparing evidence for review. OPLA attorneys present the Department's position, both by appearing in immigration court to make oral arguments and to examine witnesses and by submitting written briefs and are also responsible for representing the government in administrative appeals, including reviewing whether to appeal a case in the first instance, reviewing a noncitizen's arguments on appeal, preparing written appellate briefs and motions, and appearing for oral arguments. OPLA personnel dedicate dozens of hours in cases pending before the immigration courts, to ensure the Government's interests are dutifully represented. *See generally* U.S. Immigration and Customs Enforcement, Office of the Principal Legal Advisor, *https://www.ice.gov/about-ice/opla* (last visited Feb. 9, 2024).

[25] *See* EOIR, *Exec. Off. For Immigration Rev.: Pending Cases, New Cases, and Total Completions* (Oct. 12, 2023), available at *https://www.justice.gov/eoir/media/1344791/dl?inline* (last visited Apr. 28, 2024).

efficiently deployed in other cases. DHS believes it is appropriate to establish additional avenues through which to deliver swift decisions and consequences for irregular migration, rather than allowing clearly ineligible individuals to further tax limited resources.

Finally, the rule may reduce or eliminate the need for detention or alternatives to detention and monitoring in some cases, freeing up ICE ERO resources for high-priority cases, including those in which detention is required. Though detention is not mandated in all such cases, ICE ERO may detain some noncitizens to whom this rule might apply during the immigration court process, following a credible or reasonable fear determination. Detention comes at cost to the taxpayer and reduces availability of beds for other high-priority populations and noncitizens subject to mandatory detention, including recent border crossers placed in expedited removal proceedings and individuals who have been administratively arrested and have criminal convictions or pose a national security or public safety threat; from February 2023 through February 2024, the median monthly EOIR processing time for a detained case ranged from 44 to 69 days.[26] And in cases in which ICE ERO determines detention is not necessary, ICE ERO may still expend resources to monitor the individual via the use of alternatives to detention, check-ins, and so on. This rule would potentially conserve ICE ERO resources to the extent it precludes additional or more extended detention or monitoring of individuals in cases in which an AO has determined at the fear determination stage that a mandatory bar applies.

In practice, DHS believes the rule would likely result in AOs using discretion to issue negative fear determinations in certain cases where there is evidence that a bar applies to a noncitizen, there is a lack of evidence that the noncitizen could overcome the bar (*e.g.,* by establishing an exception or exemption), and the noncitizen is not otherwise able to establish a positive fear of torture at the applicable standard.[27] AOs will continue to retain discretion to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the applicability of the bar is limited, or where there is additional evidence that the noncitizen would not be subject to the bar because of exception or exemption. This rule also preserves the option for noncitizens to be placed in an AMI or in proceedings before an immigration judge when a possible bar needs to be further developed for assessment, as is currently the practice; likewise, ICE will retain the ability to detain or otherwise monitor the noncitizen in those cases. *See* 8 CFR 208.9; INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(1)(ii). *See also* INA 212(d)(5), 8 U.S.C. 1182(d)(5).

Notably, this rule would not *require* AOs to consider applicability of bars as part of a fear determination.[28] Such a requirement would reduce operational flexibility by potentially adding hours to interviews in which there are indicia that a bar might apply, but for which a strong case cannot be immediately established.[29] Rather this rule would create the flexibility for the AO to exercise discretion—with supervisory review of any decision—on the applicability of bars during the screening stage. Moreover, this proposed rule would not disturb the long-standing regulation establishing that in making credible fear determinations, asylum officers ''shall consider whether the [ ] case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.'' 8 CFR 208.30(e)(4).

The Department recognizes that the inclusion of mandatory bars in credible fear screenings has been a focus of many rules since 2020 that have made numerous changes in this area. As discussed above in section II.C of this preamble, the Global Asylum Rule set out to instruct adjudicators for the first time to apply the statutory mandatory bars in INA 208(b)(2)(A) and INA 241(b)(3), 8 U.S.C. 1158(b)(2)(A), 1231(b)(3), during credible fear interviews.[30] Subsequently, in 2022, the Departments rejected the consideration of all statutory mandatory bars during credible fear screenings and re-codified the prior practice of not doing so. Asylum Processing IFR, 87 FR at 18092–94, 18134–36; *see also* Asylum Processing NPRM, 86 FR at 46914–15. The Departments reasoned that applying the mandatory bars during all credible fear screening interviews would make those credible fear screenings less efficient,[31] which could jeopardize the ability to use expedited removal,[32] undermine Congress's intent that the expedited removal process be swift,[33] and undermine procedural fairness.[34] The Departments did not, however, conclude that applying the mandatory bars would lead to these potentially negative repercussions in all or even most cases. *See* 87 FR at 18093 (stating that the factual and legal inquiries required to consider the mandatory bars were ''*in general and depending on the facts,* most appropriately made in the context of a full merits interview or hearing'') (emphasis added).

Subsequently, the Departments issued the Circumvention of Lawful Pathways rule, which established a rebuttable presumption of asylum ineligibility that asylum officers apply during credible fear screenings. *See* 8 CFR 208.33(b). In the proposed rule's preamble, the Departments distinguished the lawful pathways rebuttable presumption from the statutory mandatory bars and indicated a belief that the presumption would be easier to apply because the asylum officer would have relevant information related to the applicability of the presumption of asylum ineligibility at the outset of the credible fear interview. 88 FR at 11744–45. Despite the belief that applying the presumption would generally be easier than applying other bars, the Departments stated that any costs resulting from increasing the length of

[26] Includes completed cases with a removal order, voluntary departure, relief, a termination, or a dismissal outcome. Results based on OHSS analysis of EOIR data as of April 1st, 2024. EOIR data up-to-date as of February 29, 2024.

[27] As described above in section II.B.2 of this preamble, if the AO determines that the noncitizen does not have a credible fear of persecution or torture, the noncitizen may request that an immigration judge 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). This rulemaking does not affect a noncitizen's ability to request immigration judge review of an adverse credible fear determination.

[28] The Global Asylum Rule took a different approach than this proposal, requiring that AOs consider multiple mandatory bars. *See* 85 FR at 80278 (''DHS requires asylum officers to determine . . . whether an alien is subject to one or more of the mandatory bars''). This proposed rule would not require such consideration.

[29] Because credible fear screenings are conducted at the significant possibility standard, in cases where the application of a bar is not obvious, *requiring* the AO to consider application of a bar would likely result in significantly extended interviews with no meaningful outcome because relevant information might not be available to the officer at screening even with a significantly extended interview.

[30] DHS has long applied in the expedited removal process the ''safe-third-country'' bar to eligibility to apply for asylum at INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). *See* 8 CFR 208.30(e)(6). The Department is not proposing to apply other INA 208(a)(2)(A) bars, *see, e.g.,* INA 208(a)(2)(C) (successive asylum application), in credible fear screenings at this time.

[31] *See* Asylum Processing IFR, 87 FR at 18093, 18134; Lawful Pathways NPRM, 88 FR at 11744.

[32] *See* Asylum Processing IFR, 87 FR at 18093.

[33] *See* Asylum Processing NPRM, 86 FR at 46914; Asylum Processing IFR, 87 FR at 18094, 18134–35.

[34] Asylum Processing IFR, 87 FR at 18093–94, 18097.

some credible fear interviews were outweighed by the broader interests in ensuring orderly processing and expedited rejection of unmeritorious claims at the outset in the emergent circumstance expected following the end of the Title 42 public health Order. *Id.*

Following implementation of the Circumvention of Lawful Pathways rule, the Department has refined its prior position on application of the mandatory bars in credible fear screenings for multiple reasons. First, the Department has determined that the permissive consideration of the mandatory bars in the manner proposed by this rule does not conflict with these prior rulemakings and is clearly distinguishable. Most notably, this rule does not propose to require the consideration of the mandatory bars in all interviews—as had been contemplated by the Global Asylum Rule. Instead, this rule would allow the AO flexibility to choose to consider a bar based on the individual facts and circumstances of an applicant's case and based on information available to the asylum officer. As noted previously, the Departments did not determine in the Asylum Processing IFR that applying all of the mandatory bars would always be more appropriate at the merits stage, but rather stated that the factual and legal inquiries were ''in general and depending on the facts, most appropriately made in the context of a full merits interview or hearing.'' 87 FR at 18093. Moreover, the Asylum Processing IFR did not consider one alternative to decrease the costs of applying the mandatory bars while maintaining many of the benefits—namely, conducting a factual and legal inquiry into the bars only in those cases for which doing so is likely to be an efficient and appropriate use of resources. The Department now assesses that, based on that approach, applying certain bars at the credible fear stage can be an efficient and appropriate use of resources in a larger class of cases than the Asylum Processing IFR appreciated.

Second, in contrast to the rule considered when deciding not to apply mandatory bars during credible fear screenings—the Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019) (''Third-Country-Transit Bar IFR'')—the Department has had many uninterrupted months of experience applying the rebuttable presumption, providing a more consistent baseline of determinations for evaluation about adding consideration of other mandatory bars during screening interviews. In the Asylum Processing IFR, the Departments relied extensively on their experience applying the Third-Country-Transit Bar IFR to explain why applying the mandatory bars during credible fear screenings was not the preferred approach. *See, e.g.,* 84 FR at 18092, 18135–36. But as recognized in the Lawful Pathways NPRM, ''[b]ecause of the short and tumultuous life of the . . . [Third-Country-Transit Bar] IFR, it was difficult for the Departments to gather reliable data on the efficacy of the particular process adopted under that rule.'' Lawful Pathways NPRM, 88 FR at 11746.[35] Due to litigation, the Third-Country-Transit Bar IFR was applied during credible fear screenings consistently only between approximately September 9, 2019, and March 26, 2020—just over six months—after an initial two months of abrupt starts and stops and patchwork orders. As noted in the Asylum Processing IFR, the Departments found applying the Third-Country-Transit Bar IFR not to be a prudent way to allocate resources and from that, reasoned that applying the mandatory bars would likely be imprudent as well. Now, however, the Circumvention of Lawful Pathways rule and complementary measures have been in constant effect since May 11, 2023, and the Departments have been able to implement it without interruption. This experience has helped the Department increase significantly their capacity to screen noncitizens encountered at the border under expedited removal and move them through the process quicker than ever before. Now that it is clear a rebuttable presumption of asylum ineligibility can be applied effectively during the credible fear process, the Department wishes to provide the AOs additional discretion to apply certain mandatory statutory bars that may be easily verifiable in screening interviews.

Third, the Department believes that the proposal would not be inconsistent with prior statements regarding congressional intent. In the Asylum Processing NPRM, the Departments stated that it may be inconsistent with Congress's intent for the Departments to ''creat[e] a complicated screening process that requires full evidence gathering and determinations to be made on possible bars to eligibility.'' 86 FR at 46914; *see also* Asylum Processing IFR, 87 FR at 18135 (''The Departments agree with these commenters that a complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility is incompatible with the function of the credible fear interview''). The proposal here would not create any such process as AOs would only consider a bar in those cases where there is easily verifiable evidence available to the AO that in their discretion warrants an inquiry into a bar, and the AO is confident that they can consider that bar efficiently at the credible fear stage. The Department does not believe Congress's intent that expedited removal proceedings be swift requires reading the statute to not allow application of mandatory bars during fear screenings at all, particularly where, as here, the Department proposes to apply those bars in a manner that would not increase the length of expedited removal proceedings except in those cases in which there is evidence indicating that they may apply.

Fourth, the Department believes AOs can apply mandatory bars during fear screenings while ensuring a fair process. As noted previously, there are cases where the applicability of a bar is clear and there is not a significant possibility that the applicant could show the bar does not apply by a preponderance of the evidence (in credible fear), or a reasonable possibility that the bar does not apply (in reasonable fear). The screening standards themselves ensure a fair process in that the noncitizen need only meet the significant possibility or reasonable possibility standard in order to pass through the screening process. In such cases, the Department believes it is reasonable to apply the mandatory bars during the screening and issue a negative determination. For example, if a noncitizen was convicted of murder and sentenced to ten or more years in prison in a country with a fair and independent judicial system—it may be clear that the noncitizen is barred from asylum and withholding of removal for a conviction for a particularly serious crime, INA 208(b)(2)(A)(ii),

[35] The IFR was preliminarily enjoined nationwide on July 24, 2019, six days after it went into effect. *East Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). The court denied a stay of that decision, thus halting the IFR. *East Bay Sanctuary Covenant* v. *Barr,* No. 19–CV–04073–JST, 2019 WL 11691196, at *1 (N.D. Cal. Aug. 1, 2019). After implementation of the IFR was halted nationwide for twenty-three days, on August 16, the Ninth Circuit then granted a stay of the preliminary injunction insofar as it applied outside the circuit, which meant that the IFR could be applied only outside the Ninth Circuit. *East Bay Sanctuary Covenant* v. *Barr,* 934 F.3d 1026, 1028 (9th Cir. 2019). Twenty-six days later, on September 9, the district court restored the nationwide scope of the injunction, again halting its application. *East Bay Sanctuary Covenant* v. *Barr,* 391 F. Supp. 3d 974, 976 (N.D. Cal. 2019). Two days later the Supreme Court stayed the preliminary injunction, which allowed the Departments to implement the IFR until it was vacated on June 30, 2020. *Barr* v. *East Bay Sanctuary Covenant,* 140 S. Ct. 3 (2019); *Cap. Area Immigrants' Rts. Coal.* v. *Trump,* 471 F. Supp. 3d 25, 60 (D.D.C. 2020). But even before the vacatur, the first Title 42 public health Order issued on March 26, 2020, which limited the processing of certain noncitizens under Title 8.

241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(2)(B)(ii), or because there are serious reasons to believe that the noncitizen committed a serious nonpolitical crime outside the United States, INA 208(b)(2)(A)(iii), 241(b)(3)(B)(iii), 8 U.S.C. 1158(b)(2)(A)(iii), 8 U.S.C. 1158(b)(2)(A)(iii), 1231(b)(2)(B)(iii).

IV. Discussion of the Proposed Rule

As discussed below, this proposed rule would amend 8 CFR 208.30, 208.31, and 208.33 to allow AOs to consider the mandatory bars to asylum under section 208(b)(2)(A)(i)–(v) of the Act, 8 U.S.C. 1158(b)(2)(A)(i)–(v), and to withholding of removal under section 241(b)(3)(B) of the Act, 8 U.S.C. 1231(b)(3)(B), during credible fear interviews and reasonable fear interviews.[36] This would include both credible fear interviews where the asylum officer has found that the noncitizen is subject to the lawful pathways rebuttable presumption of ineligibility for asylum (§ 208.33) and those where the lawful pathways rebuttable presumption either does not apply or the noncitizen successfully overcame the presumption at the credible fear interview by showing a significant possibility of being eligible for an exception or rebutting the presumption (§ 208.30).[37]

A. Consideration of Mandatory Bars During Credible Fear and Reasonable Fear Screenings

Consistent with section 235(b)(1)(B) of the INA, 8 U.S.C. 1225(b)(1)(B), DHS is proposing to allow for the consideration of certain mandatory bars to asylum in the determination as to whether a noncitizen has a credible fear of persecution with respect to asylum. Additionally, DHS is proposing to allow for the consideration of the mandatory bars to withholding of removal under section 241(b)(3) of the Act in the determination as to whether a noncitizen has a credible or reasonable fear of persecution with respect to statutory withholding of removal.

Specifically, this NPRM would allow AOs to consider the mandatory bars to asylum found at section 208(b)(2)(A)(i) through (v) of the Act but would not change current treatment of the mandatory bar to asylum found at section 208(b)(2)(A)(vi) of the Act (*i.e.,* the ''firm resettlement bar'') or the bars to applying for asylum found at section 208(a)(2) of the Act.[38] Recent changes made to the firm resettlement provisions in 8 CFR 208.15 and 1208.15 by the Global Asylum Rule are preliminary enjoined. *See Pangea Legal Servs.* v. *DHS,* 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). The pre-Global Asylum rule firm resettlement regulations currently in effect, 8 CFR 208.15, 1208.15 (2020), include a burden-shifting framework that requires the Department to bear the initial ''burden of presenting prima facie evidence of an offer of firm resettlement'' that can be rebutted by the noncitizen. *Matter of A–G–G–,* 25 I&N Dec 486, 501 (BIA 2011). This framework differs from the analytical framework for the security-related bars that are the subject of this rulemaking, and the *Matter of A–G–G–* framework and firm resettlement definition could make it difficult for AOs to easily verify whether a noncitizen is subject to the bar. In other words, AOs would not consider the applicability of these bars when making the credible fear determination, and noncitizens would be referred to the appropriate immigration court proceeding if they establish the requisite fear, though the AO may note the possible applicability of a bar under INA 208(a)(2) or (b)(2)(A)(vi), 8 U.S.C. 1158(a)(2) or (b)(2)(A)(vi), for further review during those proceedings. DHS may address such bars through other rulemaking but is not including them in this rule's proposed changes as they do not relate to the same serious security and other concerns as the bars to asylum eligibility at INA 208(b)(2)(A)(i)–(v).

Further, this NPRM does not propose to change how DHS considers bars to protection under the CAT, *see generally* 8 CFR 208.16(d)(2), because such bars do not apply to deferral of removal under the CAT, *see generally* 8 CFR 208.17. Moreover, while this NPRM authorizes AOs to consider certain mandatory bars to relief in credible fear determinations, including the credible fear determinations of stowaways, it is not intended to nor does it otherwise alter the special rules applicable to stowaways, such as the prohibition of issuing a notice to appear for stowaways.[39]

This NPRM contains permissive language that would allow, but not require, a USCIS AO to consider the mandatory bars to asylum (other than firm resettlement) and statutory withholding of removal in credible fear and reasonable fear interviews where there is evidence that such a mandatory bar could apply to the noncitizen. This permissive language provides operational flexibility to not consider a mandatory bar as part of the screening process if, for instance, an AO believes that inquiry into the bar's applicability could unduly delay case completion without concomitant mission benefits.

This NPRM proposes changes to screenings conducted under 8 CFR 208.30 (the general rule on credible fear determinations), § 208.31 (the rule governing certain reasonable fear determinations), and § 208.33 (special procedures under the CLP rule).

With respect to credible fear screenings conducted under § 208.30, this NPRM would allow the AO to consider the applicability of the mandatory bars to asylum (other than firm resettlement) and statutory withholding of removal. In such cases, the AO would enter a negative credible fear of persecution determination if the noncitizen fails to demonstrate a significant possibility that the noncitizen would be able to prove by a preponderance of the evidence that the given bar would not apply and if the noncitizen was otherwise unable to demonstrate a credible fear of torture pursuant to 8 CFR 208.30(e)(3). This standard—whether there is a significant possibility that the noncitizen could establish eligibility—is consistent with existing standards in § 208.30 and the statutory eligibility standard. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v).

With respect to screenings conducted under § 208.33 (*i.e.,* the CLP rule), in cases where the AO has entered a negative credible fear of persecution determination with respect to the noncitizen's asylum claim pursuant to the CLP rule's rebuttable presumption of asylum ineligibility, the NPRM would allow AOs to consider the applicability of the mandatory bars to statutory withholding of removal in making a follow-on reasonable possibility of persecution determination. In other words, under the proposed rule, if a noncitizen in the credible fear process is subject to the CLP presumption of asylum ineligibility and cannot

[36] In addition to these changes, the rule would make an unrelated non-substantive change to 8 CFR 208.31(g) and replace the last sentence of 8 CFR 208.31(g) and paragraphs (g)(1)–(2). Because those provisions describe the procedures for immigration judge review of an AO's reasonable fear finding and are duplicative with the corresponding provision governing immigration court procedures at 8 CFR 1208.31(g), they are not needed in the DHS regulations in chapter I of title 8 of the CFR. Accordingly, this rule would replace those provisions in 8 CFR 208.31(g) with a short statement that informs the reader that the immigration judge review procedures are set forth at 8 CFR 1208.31(g).

[37] The Department notes that if DHS finalizes this NPRM, DOJ may wish to clarify the procedures immigration judges will follow in reviewing DHS screenings.

[38] *See supra,* n.31.

[39] *See* INA 235(a)(2), 8 U.S.C. 1225(a)(2); *see also* 8 CFR 208.30(e)(5).

demonstrate a significant possibility of being able to establish eligibility for an exception or rebutting the presumption by a preponderance of the evidence, and there is evidence that a mandatory bar to statutory withholding of removal could apply, the AO may enter a negative reasonable possibility of persecution determination if the noncitizen fails to show a reasonable possibility the bar does not apply and if the noncitizen is otherwise unable to demonstrate a reasonable possibility of torture. The standard proposed here—a reasonable possibility that the bar does not apply—is consistent with the general approach under the CLP rule, which calls for AOs to assess whether the noncitizen has established a reasonable possibility of persecution or torture with respect to the identified country or countries of removal. *See* 8 CFR 208.33(b)(2)(i).

Finally, DHS also proposes changes with respect to reasonable fear screenings conducted under 8 CFR 208.31(c). Such screenings apply to noncitizens subject to removal pursuant to the issuance of a Final Administrative Removal Order or reinstatement of a prior removal order over whom USCIS has jurisdiction pursuant to 8 CFR 208.31(b). Under this NPRM, if there is evidence that such noncitizen could be subject to a mandatory bar to statutory withholding of removal, the AO may consider the applicability of the bar in the reasonable fear of persecution determination and if doing so, the AO would find there is no reasonable fear of persecution if the noncitizen is unable to show that there is a reasonable possibility that no mandatory bar applies. This NPRM does not propose to allow for the application of the mandatory bars to withholding of removal to reasonable fear of torture determinations under 8 CFR 208.31(c). As with the option to apply the mandatory bars to asylum (other than firm resettlement) and statutory withholding of removal in a credible fear determination, the option to apply the mandatory bars to statutory withholding of removal in a reasonable fear determination may be exercised at the discretion of USCIS, and this NPRM does not propose to mandate application of the mandatory bars across the board in either credible fear or reasonable fear screenings.

B. Screening Procedures

1. Credible Fear Interviews

This NPRM would apply to noncitizens who are subject to expedited removal under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1) and have been referred to USCIS for a credible fear screening pursuant to section 235(b)(1)(A)(ii) of the Act.

As described above, in the credible fear process, such noncitizens are subject to removal ''without further hearing or review'' unless they indicate an intention to apply for asylum or fear of persecution. INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i). Noncitizens in expedited removal who indicate an intention to apply for asylum or fear of persecution are referred to an AO for an interview to determine if they have a credible fear of persecution and should accordingly remain in proceedings for further consideration of the application. INA 235(b)(1)(A)(ii), (b)(1)(B)(i)–(ii), 8 U.S.C. 1225(b)(1)(A)(ii), (b)(1)(B)(i)–(ii). In addition, AOs consider whether a noncitizen in expedited removal may be eligible for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or for protection under the regulations implementing U.S. *non-refoulement* obligations under the CAT. 8 CFR 208.30(e)(2)–(3).

Under the existing regulations governing credible fear determinations, when an AO makes a determination as to whether a noncitizen has a credible fear of persecution, there is first a consideration of whether the noncitizen is subject to the CLP presumption of asylum ineligibility pursuant to 8 CFR 208.33(b)(1). If subject to the CLP presumption, the AO considers whether there is a significant possibility the noncitizen would be able to show an exception to or rebut the presumption by a preponderance of the evidence. If the CLP presumption of asylum ineligibility does not apply or the noncitizen establishes an exception or rebuts, then the AO will consider whether there is a significant possibility the noncitizen could show eligibility for asylum or statutory withholding of removal if given the opportunity to do so in a full hearing, without taking any mandatory bars to asylum or withholding of removal into consideration when making that determination. Nevertheless, AOs ask noncitizens questions about the mandatory bars to asylum and withholding of removal during credible fear interviews for the benefit of the record and, as appropriate, may record information related to a bar potentially applying in an adverse memorandum to the file for immigration enforcement personnel to reference where it may be relevant for their use.

Under this NPRM, the current credible fear process would remain the same. The only aspect of the determination that would change is that the USCIS AO would have the discretion to consider the potential application of mandatory bars to asylum (other than firm resettlement) and statutory withholding of removal when screening the noncitizen for a credible fear of persecution (in cases where the CLP does not apply or was rebutted) or to consider the potential application of the mandatory bars to statutory withholding of removal (in cases where the CLP does apply and is not rebutted). The AO would consider whether there is a significant possibility that the noncitizen would be able to show the relevant bar does not apply by a preponderance of the evidence. Accordingly, the use of the significant possibility screening standard for credible fear of persecution would remain the same as that in place without this NPRM. *See* 8 CFR 208.30(e)(2). Further, the preponderance standard is the standard that would ultimately apply in a merits determination in any case where evidence of a mandatory bar is present and the applicant bears the burden of showing by a preponderance of the evidence that the bar does not apply. *See* 8 CFR 208.13(c)(2)(ii), 208.16(d)(2), 1208.14(c)(ii), 1208.16(d)(2).

For a noncitizen in the credible fear process where the CLP applies and has not established an exception or rebutted the presumption of asylum ineligibility, the only change this NPRM would make is that it would allow the AO, when screening the noncitizen for statutory withholding of removal, to consider if there was any evidence a mandatory bar to withholding of removal could apply and, if so, exercise the discretion to screen that noncitizen for withholding of removal by taking into account the applicability of that bar(s). Consistent with existing standards, the screening standard to screen for statutory withholding of removal in such an instance where a mandatory bar could be considered as part of the screening would be if the noncitizen showed a reasonable possibility that they are not subject to a mandatory bar(s).

As noted above, the Department does not propose to allow for the consideration of the mandatory bars to withholding of removal in the screening for withholding of removal under CAT for any credible fear screening, whether the determination is occurring pursuant to 8 CFR 208.30(e)(3) or 8 CFR 208.33(b)(2)(i). Any determination that screens for protection under CAT, whether it is under 8 CFR 208.30(e)(3) or 8 CFR 208.33(b)(2)(i), involves screening for both withholding of removal under CAT pursuant to 8 CFR 208.16 and deferral of removal under CAT pursuant to 8 CFR 208.17. Because

there are no mandatory bars to deferral of removal under CAT, considering the mandatory bars to withholding of removal in any determination that screens for eligibility for protection under CAT would be a futile exercise.

2. Reasonable Fear Interviews

This NPRM would also apply to noncitizens who have been ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order has been reinstated under section 241(a)(5) of the Act, and who are referred to USCIS for a reasonable fear screening pursuant to 8 CFR 208.31. The purpose of the reasonable fear determination is to screen the noncitizen for any potential statutory withholding of removal, or any withholding or deferral of removal under CAT claim. The standard to screen for withholding or deferral of removal under CAT is a reasonable possibility of persecution or torture, which will remain untouched in this NPRM since, as mentioned above, there are no mandatory bars to deferral of removal under CAT.

In this NPRM, the proposed screening standard under which the AO may consider a mandatory bar to statutory withholding of removal during a reasonable fear interview in a case where the noncitizen appears subject to one or more mandatory bars is whether the noncitizen fails to show that there is a reasonable possibility that no bar applies.[40] For example, a noncitizen who is subject to administrative removal under INA 238(b), 8 U.S.C. 1228(b), because they are deportable under INA 237(a)(2)(A)(iii), 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an ''aggravated felony'' as defined in INA 101(a)(43), 8 U.S.C. 1101(a)(43), may be determined not to have a reasonable fear of persecution if they were sentenced to a term of imprisonment of more than five years. *See* INA 241(b)(3)(B)(iv), 8 U.S.C. 1231(b)(3)(B)(iv). That noncitizen, however, may nonetheless be referred to an immigration judge for ''withholding only'' proceedings if they establish a reasonable fear of torture.

C. Application in Relation to the Circumvention of Lawful Pathways Rule

The proposed rule may, in some instances, apply in a credible fear determination where the CLP presumption of asylum ineligibility has also been found to apply in a credible fear determination under 8 CFR 208.33(b)(2)(i). In such a credible fear determination, an AO will first determine whether the noncitizen can demonstrate a significant possibility of showing by a preponderance of the evidence that the noncitizen would not be subject to the presumption of asylum ineligibility, that an exception to the presumption would apply, or that the presumption could be rebutted under 8 CFR 208.33(b)(1). If there is no such significant possibility, the AO will enter a negative credible fear determination with respect to the noncitizen's asylum claim pursuant to 8 CFR 208.33(b)(1)(i). The AO then screens the noncitizen for statutory withholding of removal and protection under CAT by determining whether there is a reasonable possibility the noncitizen would suffer persecution or torture in the designated country of removal, pursuant to 8 CFR 208.33(b)(2). If there is no reasonable possibility of persecution or torture, the AO will enter a negative credible fear determination under 8 CFR 208.33(b)(2)(iii).

In some cases, the evidence in the credible fear record, including the noncitizen's testimony, may fail to show a reasonable possibility of persecution or torture in the country of removal and there will be no need to consider the mandatory bars to statutory withholding of removal for the AO to issue a legally sufficient negative credible fear determination. In other instances, however, the evidence in the record may be such that it would be more efficient to base a negative credible fear of persecution determination on a mandatory bar to statutory withholding of removal pursuant to 8 CFR 208.33 where there is evidence of a mandatory bar to withholding of removal and the noncitizen is unable to demonstrate there is a reasonable possibility that the mandatory bar does not apply.

Under the CLP rule, AOs apply the presumption of asylum ineligibility to be applied in any credible fear case where it applies. However, applying the mandatory bars to withholding of removal in a credible fear determination (regardless of whether the CLP applies) under this proposed rule would be at USCIS's discretion. If the evidence in the credible fear record before USCIS is such that a USCIS AO would be unable to apply the mandatory bars in the credible fear determination efficiently or effectively obtain sufficient information related to a bar in the time allotted for a credible fear interview, then USCIS may exercise its discretion not to apply the bars in a given case. In contrast, under the CLP rule, a USCIS AO is required to apply the CLP presumption of asylum ineligibility in a credible fear determination in any case where the noncitizen is subject to the presumption and required to explore in the credible fear record the applicability of the presumption, potential exceptions, and potential circumstances that could rebut the presumption. The CLP rule requires the AO to make a determination as to whether the noncitizen has demonstrated a significant possibility of being able to show by a preponderance of the evidence that the presumption of ineligibility does not apply, that there is an exception, or that it could be rebutted and, if so, continue with a credible fear determination under 8 CFR 208.30, but if not, screen the applicant for statutory withholding of removal and protection under CAT under 8 CFR 208.33(b)(2). The CLP rule requires the application of its presumption of asylum ineligibility in any credible fear screening where it applies (with exceptions and the possibility of being rebutted in certain circumstances) to achieve its stated goal of encouraging migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in another country through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain.

The current proposed rule may, in some instances, apply in a credible fear screening on top of the CLP rule if the evidence in the credible fear record is such that a USCIS AO could effectively and efficiently apply a mandatory bar to withholding of removal in the credible fear determination in the context of such a screening. Where it is evident that a noncitizen in the credible fear process who is subject to the CLP rule and cannot show a reasonable possibility of persecution is subject to a mandatory bar to withholding of removal that would prevent that individual from ultimately being able to receive that form of relief from an immigration judge, but the noncitizen can nonetheless potentially establish a reasonable fear of persecution, it would be ineffective, inefficient, and thwart the underlying goals of the CLP rule to still allow that individual to be placed in regular INA 240 removal proceedings.

[40] The original rule establishing the ''reasonable fear'' screening process at 8 CFR 208.31 and excluding consideration of the mandatory withholding bars was promulgated in 1999. *See* Regulations Concerning the Convention Against Torture, 64 FR 8478 (1999) (interim rule). The rule did not explain why the bars should not be considered. *See* 64 FR at 8485. Prior to 1999, if a noncitizen subject to reinstatement of removal under INA 241(a)(5), 8 U.S.C. 1231(a)(5), expressed a fear of returning to their country, the noncitizen would be referred to an AO for a determination ''whether the [noncitizen]'s removal to that country must be withheld under section 241(b)(3) of the Act,'' 8 U.S.C. 1231(b)(3), including whether any of the mandatory withholding bars applied. 8 CFR 241.8 (1998).

This proposed rule would allow USCIS to prevent that scenario from happening in cases where USCIS determines that to do so would be an effective and efficient use of USCIS resources.

D. Security Bar to Asylum and Withholding of Removal

Under the present proposed rule, USCIS may, in its discretion, consider the security bars to asylum and withholding of removal when making a credible fear or reasonable fear determination. INA 208(b)(2)(A)(iv), 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv), 1231(b)(3)(B)(iv). As discussed above in Section II.D of this preamble, DHS and DOJ jointly published the Asylum Eligibility and Public Health rule in 2020 providing that the Departments may consider emergency public health concerns based on communicable disease (not limited to COVID–19) when determining whether a noncitizen is subject to the existing statutory security bars to asylum and withholding of removal at INA 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv).[41] Should the provisions of the Asylum Eligibility and Public Health rule go into effect as currently scheduled on December 31, 2024, it would have implications as to who could constitute a security risk—as in, what is ''a danger to the security of the United States.'' Under the instant rule, AOs would be allowed to consider those provisions as part of applying the security bar in credible fear and reasonable fear screenings.

E. Severability

DHS intends for the provisions of this proposed rule to be severable from each other. In short, if a court holds that any provision in a final 8 CFR 208.30, 208.31, or 208.33 is invalid or unenforceable, DHS intends that the remaining provisions of a final 8 CFR 208.30, 208.31, or 208.33, as relevant, would continue in effect to the greatest extent possible. In addition, if a court holds that any such provision is invalid or unenforceable as to a particular person or circumstance, DHS intends that the provision would remain in effect as to any other person or circumstance.

Remaining provisions of a final rule could continue to function sensibly independent of any provision held invalid or unenforceable. For example, USCIS AOs may apply the mandatory bars to asylum or statutory withholding of removal in credible fear determinations pursuant to 8 CFR 208.30(e)(5)(ii)(A) at the standard of whether the noncitizen demonstrated a significant possibility of establishing by a preponderance of the evidence that a mandatory bar would not apply, even if a court finds that the amended regulations applying mandatory bars to statutory withholding of removal in reasonable fear determinations are facially invalid. Similarly, the proposed rule could be applied in 8 CFR 208.30 credible fear determinations even if a court finds applying the rule on top of the CLP in credible fear determinations at the ''reasonable possibility'' standard invalid.

V. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The Department is issuing this proposed rule with a 30-day comment period because it seeks to finalize the proposed rule, as appropriate, as quickly as possible to provide an additional tool to more promptly remove noncitizens who pose public safety and national security risks. DHS believes that the comment period is reasonable and appropriate because this proposed rule relates to a discrete topic that has been addressed in multiple recent notice-and-comment rulemakings, as described in section II.D of this preamble. This proposed rule is relatively short and would not dictate a widescale change in practice; instead, the rule would preserve appropriate flexibility for AOs to apply the mandatory bars as part of fear screenings when it makes sense to do so.

DHS also has an interest in swiftly finalizing this change, thereby expanding operational flexibility. DHS has taken historic measures to channel migrants into lawful pathways and processes, while imposing swift consequences, including removals, on those without a legal basis to remain in the U.S. From May 12, 2023 to March 31, 2024, DHS has removed or returned over 660,000 individuals, the vast majority of whom crossed the southwest border.[42] Total removals and returns since mid-May 2023 exceed removals and returns in every full fiscal year since 2011.[43] Overall, the number of people removed, returned, or expelled over the last three years accounts for a majority of southwest border encounters during the same time period.[44] These measures are having an impact, but DHS remains challenged by global trends of historic migration, which have led to unprecedented shifts in southwest border encounter demographics and volume. Given current encounter trends, DHS would benefit from additional tools and increased flexibility, to swiftly and predictably impose consequences on those without a legal basis to remain.

In light of the discrete nature of the change proposed, multiple recent rounds of notice-and-comment on this topic, and the need for additional operational flexibility, DHS believes that a 30-day comment period is reasonable and appropriate.

B. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 Modernizing Regulatory Review)

Executive Order 12866 (''Regulatory Planning and Review''), as amended by Executive Order 14094 (''Modernizing Regulatory Review''), and Executive Order 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize 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, reducing costs, harmonizing rules, and promoting flexibility. Although this rule has not been designated significant under section 3(f)(1) of Executive Order 12866 by the Office of Management and Budget (''OMB'') because it does not meet the specified criteria with respect to economic impacts, the OMB has designated this rule as a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. Accordingly, OMB has reviewed this rule.

The expected effects of this proposed rule are discussed above. The revised procedures described above would reduce the amount of time that some noncitizens who are subject to mandatory bars contained in section 208(b)(2)(A)(i)–(v) of the Act that prevent them from being granted

[41] Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020).

[42] OHSS analysis of UIP data as of April 2, 2024.

[43] *Compare* OHSS, *2022 Yearbook of Immigration Statistics* 89 tbl. 39 (Nov. 2023) (Noncitizen Removals, Returns, and Expulsions, Fiscal Year 1892 to 2022).

[44] *See* OHSS, *Immigration Enforcement and Legal Processes Monthly Tables, https://www.dhs.gov/ohss/topics/immigration/enforcement-and-legal-processes-monthly-tables* (last updated Apr. 5, 2024) (''CBP SW Border Encounters by Agency and Selected Citizenship'' and ''DHS Repatriations by Type'').

asylum, or the mandatory bars contained in section 241(b)(3)(B) of the Act that prevent them from being granted withholding of removal, remain in the United States.

The population to which this rule will apply is likely to be relatively small, as informed by the number of cases with bars that are flagged by USCIS during screenings. For example, in FY 2023, only 1,497 (or about 3%) of all positive credible fear decisions were flagged by the AO for a potential bar. The Department expects that AOs would choose to apply a mandatory bar to an even smaller subset of these flagged cases, because not all flagged cases have sufficient supporting evidence easily available to the AO. The benefits of the proposed rule are expected to include a modest, unquantified reduction in strains on limited national resources, specifically a reduction of the resources expended to detain noncitizens subject to the above cited mandatory bars for potentially lengthy periods of time while their cases are considered by immigration courts. Additionally, since such cases would no longer need to be heard before an immigration court, additional capacity would be available for immigration judges to decide other cases. Under the rule, noncitizens subject to the above cited bars will be quickly removed from the United States, freeing up the Departments' resources to safely, humanely, and effectively enforce and administer the immigration laws. The public safety of the United States may be enhanced as some noncitizens who have engaged in certain criminal activity, persecuted others, or have been involved in terrorist activities are quickly removed from the country. The speedy removal of these noncitizens may create disincentives for other noncitizens who would be subject to these mandatory bars when considering attempting to enter the United States.

The costs of the proposed rule would be primarily borne by noncitizens and the Department. Noncitizens to whom the above cited bars would be applied in fear screenings would lose the opportunity to contest the application of the mandatory bars in a full INA 240 merits hearing before an immigration judge, or to seek appellate review of the immigration judge's decision should the immigration judge decide to apply a mandatory bar and deny the case in such INA 240 removal proceedings. Such noncitizens would also lose the opportunity to gather additional evidence during the period of time between the fear screening and the merits immigration judge hearing to show that the mandatory bar in question should not be applied in their case given that they will be more quickly removed under the proposed rule than they would be currently. In addition, the proposed rule would, in some cases, result in AOs spending additional time, during fear screenings, to inquire into the applicability of the above cited mandatory bars, additional time writing up the required mandatory bar analysis for the credible or reasonable fear determination, and additional time spent by SAOs to review any mandatory bar analysis conducted in such determinations, although AOs would have discretion whether to consider such bars at the screening stage and could therefore minimize the government costs associated with the proposed rule in cases where the additional development of the record and analysis would not be outcome determinative or otherwise an effective use of resources.

C. Regulatory Flexibility Act

DHS has reviewed this proposed rule in accordance with the Regulatory Flexibility Act, Public Law 96–354, 94 Stat. 1164 (1980), as amended (codified at 5 U.S.C. 601 *et seq.*) and has determined that this rule would not have a significant economic impact on a substantial number of small entities. The rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum or are otherwise placed in immigration proceedings.

D. Unfunded Mandates Reform Act of 1995

This proposed rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, adjusted for inflation, and it would not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48; *see also* 2 U.S.C. 1532(a).

E. 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 rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. DHS nonetheless welcomes public comment on possible federalism implications of this proposed rule.

F. 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.

G. Family Assessment

DHS has reviewed this proposed rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,[45] enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[46] DHS has reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation. DHS has determined that this proposed rule will not negatively affect family well-being.

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

This proposed rule does not have tribal implications under Executive Order 13175 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.

I. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

Executive Order 13045 requires agencies to consider the impacts of environmental health risks or safety

[45] *See* 5 U.S.C. 601 note.

[46] Public Law 105–277, 112 Stat. 2681 (1998).

risks that may disproportionately affect children. DHS has reviewed this proposed rule and have determined that this rule is not a covered regulatory action under Executive Order 13045. The rule is not considered significant under Section 3(f)(1) of Executive Order 12866 and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. National Environmental Policy Act

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act of 1969, (42 U.S.C. 4321 *et seq.*) (''NEPA''), applies to these actions and, if so, what level of NEPA review is required. 42 U.S.C. 4336. DHS's Directive 023–01, Revision 01,[47] and Instruction Manual 023–01–001–01, Revision 01 (''Instruction Manual'')[48] establish the procedures that DHS uses to comply with NEPA and the Council on Environmental Quality (''CEQ'') regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

Federal agencies may establish categorical exclusions for categories of actions they determine normally do not significantly affect the quality of the human environment and, therefore, do not require the preparation of an Environmental Assessment or Environmental Impact Statement. 42 U.S.C. 4336e(1), 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). DHS has established its categorical exclusions through its Instruction Manual in Appendix A. Under DHS's NEPA implementing procedures, 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.[49]

The proposed rule, if finalized, would allow AOs to apply certain bars to asylum and statutory withholding of removal at the fear screening stage. DHS has determined that the promulgation of this proposed rule satisfies all three requirements for a categorical exclusion. First, the proposed rule fits clearly within categorical exclusion A3(d) of the Instruction Manual, Appendix A, for the promulgation of rules that ''interpret or amend an existing regulation without changing its environmental effect.'' The proposed rule would change the point in time at which certain statutory bars are considered but would not change any environmental effect of the bars. Second, this proposed rule is a standalone rule and is not part of any larger action. Third, DHS is not aware of any extraordinary circumstances that would cause a significant environmental impact. Therefore, this proposed rule is categorically excluded from further NEPA review.

K. Paperwork Reduction Act

This NPRM does not propose new, or revisions to existing, ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

List of Subjects in 8 CFR Part 208

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

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security proposes to amend chapter I of title 8 of the Code of Federal Regulations as set forth below.

■ 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 § 208.30 by revising the first sentence of paragraph (e)(2) and paragraph (e)(5) to read as follows:

§ 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.

* * * * *

(e) * * *

(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, that 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, including that the alien is not subject to a mandatory bar, if considered under paragraph (e)(5)(ii) of this section. * * *

* * * * *

(5) Except as provided in paragraph (e)(6) or (7) of this section:

(i) 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)(A)(vi) of the Act, the Department of Homeland Security shall nonetheless issue a Notice to Appear or retain jurisdiction over the alien's case for further consideration of the alien's claim pursuant to paragraph (f) of this section, if the alien is not a stowaway.

(ii) If an alien, who is unable to establish a credible fear of torture, is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to being granted either asylum or withholding of removal, as set forth in section 208(b)(2)(A)(i)–(v) of the Act or section 241(b)(3)(B) of the Act, respectively, the asylum officer may consider the applicability of such bar(s) as part of the asylum officer's credible fear determination.

(A) The asylum officer shall issue a negative credible fear finding with regard to the alien's eligibility for asylum or withholding of removal under the Act if the asylum officer determines there is not a significant possibility that the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

(B) The asylum officer shall issue a Notice to Appear or retain jurisdiction over the alien's case for further consideration of the alien's claim pursuant to paragraph (f) of this section, if the asylum officer finds that there is a significant possibility that the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

(iii) In all cases, if the alien is a stowaway and the Department would otherwise initiate proceedings under paragraphs (e)(5)(i) and (ii) of this section, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3) and shall not retain jurisdiction over the case for further consideration nor issue a Notice to Appear.

* * * * *

■ 3. Amend § 208.31 by revising paragraphs (c) and (g) to read as follows:

[47] DHS, Implementation of the National Environmental Policy Act, Directive 023–01, Revision 01 (Oct. 31, 2014), *https://www.dhs.gov/sites/default/files/publications/DHS_Directive%20023-01%20Rev%2001_508compliantversion.pdf.*

[48] DHS, Implementation of the National Environmental Policy Act (NEPA), Instruction Manual 023–01–001–01, Revision 01 (Nov. 6, 2014), *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.*

[49] Instruction Manual at V.B(2)(a) through (c).

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(c) *Interview and procedure.* The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. 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 officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, unless the alien appears to be subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act and the alien fails to show that there is a reasonable possibility that no mandatory bar applies, if the asylum officer considers such bars. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be tortured in the country of removal.

* * * * *

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, 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. The immigration judge's review shall proceed under the procedures set forth in 8 CFR 1208.31(g).

■ 4. Amend § 208.33 by revising paragraphs (b)(2)(i) through (iii) to read as follows:

§ 208.33 Lawful pathways condition on asylum eligibility.

* * * * *

(b) * * *

(2) * * *

(i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (b)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion) or torture, with respect to the identified country or countries of removal identified pursuant to section 241(b) of the Act. As part of this reasonable possibility determination, if there is evidence that the alien is subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act, the asylum officer may consider the applicability of such bar(s).

(ii) In cases described in paragraph (b)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution with respect to the identified country or countries of removal and, to the extent bars are considered, that there is a reasonable possibility that no mandatory bar applies, the Department will issue a Form I–862, Notice to Appear. If the alien establishes a reasonable possibility of torture with respect to the identified country or countries of removal, the Department will issue a Form I–862, Notice to Appear.

(iii) In cases described in paragraph (b)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution with respect to the identified country or countries of removal or, to the extent bars are considered, fails to establish that there is a reasonable possibility that no mandatory bar applies, and fails to establish a reasonable possibility of torture with respect to the identified country or countries of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1290; Project Identifier MCAI–2024–00078–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2023–22–13, which applies to certain Dassault Aviation Model FALCON 7X airplanes. AD 2023–22–13 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2023–22–13, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require certain actions in AD 2023–22–13 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The