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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 235

RIN 1615-AC42

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1235

[EOIR Docket No. 18-0002; A.G. Order No. 4714-2020]

RIN 1125-AA94

Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

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

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Department of Justice and the Department of Homeland Security (collectively, “the Departments”) propose to amend the regulations governing credible fear determinations so that individuals found to have such a fear will have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (“INA” or “the Act”) (“statutory withholding of removal”), or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), adjudicated by an immigration judge within the Executive Office for Immigration Review (“EOIR”) in streamlined proceedings

(rather than in proceedings under section 240 of the Act), and to specify what standard of review applies in such streamlined proceedings. The Departments further propose changes to the regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the CAT regulations. The Departments also propose amendments related to the standards for adjudication of applications for asylum and statutory withholding.

DATES: Written or electronic comments on the notice of proposed rulemaking must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day. Comments specific to the proposed collection of information will be accepted until [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All such submissions received must include the OMB Control Number 1615-0067 in the body of the submission. NOTE: Comments received on the information collection that are intended as comments on the proposed rulemaking rather than those specific to the collection of information will be rejected.

ADDRESSES: If you wish to provide comments regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1125-AA94 or EOIR Docket No. 18-0002, by one of the two methods below.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration

Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041. To ensure proper handling, please reference the agency name and RIN 1125-AA94 or EOIR Docket No. 18-0002 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

Collection of information. You must submit comments on the collection of information discussed in this notice of proposed rulemaking to both the rulemaking docket and the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). All such submissions received must include the OMB Control Number 1615-0067 in the body of the submission. OIRA submissions can be sent using any of the following methods.

- Email (preferred): DHSDeskOfficer@omb.eop.gov (include the docket number and “Attention: Desk Officer for U.S. Citizenship and Immigration Services, DHS” in the subject line of the email).
- Fax: 202-395-6566.
- Mail: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503; Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave. NW., Washington, DC 20529; telephone (202) 272–8377.

SUPPLEMENTARY INFORMATION:

I. Public Participation

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

Please note that all comments received are considered part of the public record and made available for public inspection at <http://www.regulations.gov>. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFIABLE INFORMATION” in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personally identifying information located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. The Departments may withhold from public viewing information provided in comments that they determine may affect the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>. To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the "For Further Information Contact" paragraph above for agency contact information.

II. Discussion¹

Since World War II, the United States has sought a comprehensive solution to the issues surrounding the admission of refugees into the country and the protection of refugees from return to persecution. As an expression of a nation's foreign policy, the laws and policies surrounding asylum are an assertion of a government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) ("In accord with ancient principles of the international law of nation-states, * * * the power to exclude aliens is inherent in sovereignty, [and] necessary for

¹ As a prefatory matter, the Departments note that portions of this rule, in accordance with well-established administrative law principles, would supersede certain interpretations of the immigration laws by federal courts of appeals: The Supreme Court has "also made clear that administrative agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations, because there is 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Matter of R-A-*, 24 I&N Dec. 629, 631 (A.G. 2008) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (internal quotation and citations omitted)). "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982.

Matter of A-B-, 27 I&N Dec. 316, 327 (A.G. 2018).

maintaining normal international relations and defending the country against foreign encroachments and dangers * * * .” (internal citations and quotation marks omitted)).

In the Refugee Act of 1980 (“Refugee Act”), Pub. L. 96-212, 94 Stat. 102, Congress furthered implementation of the United Nations Protocol Relating to the Status of Refugees (“Refugee Protocol”), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268, providing for a permanent procedure for the admission and protection of refugees, generally defined in domestic law as:

any person who is outside of any country of such person’s nationality * * * and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Refugee Act, sec. 201(a), 94 Stat. at 102 (codified at section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42)). Those five grounds are the sole grounds for asylum and refugee status.

A. Expedited Removal and Screenings in the Credible Fear Process

1. Asylum-and-Withholding-Only Proceedings² for Aliens with Credible Fear

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, 110 Stat. 3009, 3009-546 (“IIRIRA”), Congress established the expedited removal process, thus establishing two primary types of proceedings for determining the removability of an alien from the United States: (1) expedited removal proceedings under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), and (2) removal proceedings under section 240 of the INA, 8 U.S.C. 1229a (“section 240 proceedings”).

² These proceedings have also been referred to as “asylum-only” proceedings in other contexts. *See, e.g., Matter of D-M-C-P-*, 26 I&N Dec. 644, 645 (BIA 2015) (“The applicant expressed a fear of returning to Argentina, and on June 23, 2011, his case was referred to the Immigration Court for asylum-only proceedings * * * .”). This NPRM uses the phrase “asylum-and-withholding-only proceedings” to ensure that the forms of relief and protection available are more accurately described.

First, section 235 of the INA, 8 U.S.C. 1225, contains the procedures for expedited removal. Under expedited removal, aliens arriving in the United States—and, in the discretion of the Secretary of Homeland Security (“Secretary”),³ certain other designated classes of aliens⁴—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, may be “removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section [208 of the INA, 8 U.S.C. 1158,] or a fear of persecution.” INA

³ The Homeland Security Act of 2002 (“HSA”), Pub. L. 107-296, 116 Stat. 2135, as amended, charged the Secretary “with the administration and enforcement of this chapter [titled, ‘Immigration and Nationality’] and all other laws relating to the immigration and naturalization of aliens” and granted the Secretary the power to take all actions “necessary for carrying out” the provisions of the immigration and nationality laws. *See* HSA, sec. 1102, 116 Stat. at 2273–74; Consolidated Appropriations Resolution of 2003, Pub. L. 108-7, div. L, sec. 105, 117 Stat. 11, 531 (codified at INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3)). The HSA states that the Attorney General “shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by [EOIR], or by the Attorney General with respect to [EOIR] * * * .” HSA, sec. 1102, 116 Stat. at 2274 (codified at INA 103(g)(1), 8 U.S.C. 1103(g)(1)); *see* 6 U.S.C. 521. Furthermore, the Attorney General is authorized to “establish such regulations, prescribe such forms of bonds, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” HSA, sec. 1102, 116 Stat. at 2274 (codified at INA 103(g)(2), 8 U.S.C. 1103(g)(2)).

⁴ DHS has designated the following additional categories of aliens, if inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), as subject to expedited removal: (1) aliens who are apprehended in the United States within 100 air miles of the border, who have not been admitted or paroled, and who cannot affirmatively show that they have been continuously physically present in the United States for the 14-day period prior to apprehension, *see* Designating Aliens For Expedited Removal, 69 FR 48877 (Aug. 11, 2004); and (2) aliens who arrived in the United States between ports of entry by sea, who have not been admitted or paroled, and who cannot affirmatively show that they have been continuously physically present in the United States for the two-year period prior to the determination of inadmissibility, *see* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 FR 68924 (Nov. 13, 2002). On July 23, 2019, DHS announced it would expand the application of expedited removal to aliens (not included in the additional categories established in 2002 and 2004) who are inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), who are apprehended anywhere in the United States, who have not been admitted or paroled, and who cannot affirmatively show that they have been continuously physically present for the two-year period prior to the determination of inadmissibility. *See* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019). The U.S. District Court for the District of Columbia issued an injunction against the July 2019 designation. *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019).

235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).⁵ Among other things, expedited removal is an administrative process that allows for the fair and efficient removal of aliens who have made no claims regarding asylum or a fear of return or, if they have, have not established a fear of persecution or torture, without requiring lengthy and resource-intensive removal proceedings in immigration court.

Pursuant to statute and regulations, DHS implements a screening process, known as “credible fear” screening, to identify potentially valid claims for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to the legislation implementing CAT, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113,⁶ to prevent aliens placed in expedited removal from being removed to a country in which they would face persecution or torture.⁷ Currently, any alien who expresses a fear of persecution or torture, a fear of return, or an intention to apply for asylum during the course of the expedited removal process is referred to a DHS asylum officer for an interview to determine if the alien has a credible fear of persecution or torture in the country of return. INA 235(b)(1)(A)(ii), (B), 8 U.S.C. 1225(b)(1)(A)(ii), (B); *see also* 8 CFR 235.3(b)(4), 1235.3(b)(4)(i). If the asylum officer determines that the alien does not have a credible fear of persecution or torture (or, in certain instances, a reasonable possibility of persecution or torture), the alien 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).

⁵ Unaccompanied alien children, as defined in 6 U.S.C. 279(g)(2), are exempt from expedited removal. *See* 8 U.S.C. 1232(a)(5)(D)(i).

⁶ Because CAT is a non-self-executing treaty, *see, e.g., Hui Zheng v. Holder*, 562 F.3d 647, 655–56 (4th Cir. 2009), adjudicators do not apply CAT itself, but rather the regulations issued pursuant to the implementing legislation, principally 8 CFR 1208.16(c)–1208.18. *See* Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. 105-277, sec. 2242(b), 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. 1231 note).

⁷ Screening for fear of torture in the designated country of removal is conducted not under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), but instead under the CAT regulations.

Under the current regulatory framework, if the asylum officer determines that an alien subject to expedited removal proceedings has a credible fear of persecution or torture (or, in certain instances, a reasonable possibility of persecution or torture), DHS places the alien before an immigration court for adjudication of the alien's claims by initiating section 240 proceedings. *See* 8 CFR 208.30(f), 235.6(a)(1)(ii), 1235.6(a)(1)(i). Section 240 proceedings are often more detailed and provide additional procedural protections, including greater administrative and judicial review, than expedited removal proceedings under section 235 of the Act. *Compare* INA 235(b)(1), 8 U.S.C. 1225(b)(1), *with* INA 240, 8 U.S.C. 1229a. Similarly, if an immigration judge, upon review of the asylum officer's negative determination, finds that the alien possesses a credible fear of persecution or torture (or, in certain instances, a reasonable possibility of persecution or torture), the immigration judge will vacate the expedited removal order, and DHS will initiate section 240 proceedings for the alien. 8 CFR 1208.30(g)(2)(iv)(B).

The INA, however, instructs only that an alien who is found to have a credible fear "shall be detained for further consideration of the application for asylum," and neither mandates that an alien who demonstrates a credible fear be placed in removal proceedings in general nor in section 240 proceedings specifically. INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii).

The relevant regulations regarding the credible fear process, and the interplay between expedited removal and section 240 proceedings, were first implemented in 1997. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312 (Mar. 6, 1997).⁸ At the time, the former Immigration and Naturalization Service ("INS") explained that it was choosing to initiate section

⁸ The 1997 rule amended, inter alia, part 208 of title 8 of the CFR. Following the creation of DHS in 2003 after the passage of the HSA, EOIR's regulations were moved from Chapter I of Title 8 to Chapter V. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003). Part 208 was subsequently duplicated for EOIR at part 1208. *Id.*

240 proceedings in this context because the remaining provisions of section 235(b) of the Act, beyond those governing credible fear review, were specific to aliens who do not have a credible fear and because the statute was silent as to procedures for those who demonstrated such a fear. *Id.* at 10320. The INS’s analysis at the time was very limited.

For several reasons, the Departments believe that section 235(b)(1), 8 U.S.C. 1225(b)(1), when compared with section 235(b)(2), 8 U.S.C. 1225(b)(2), **may also be read as permitting a procedure for “further consideration of [an] application for asylum” that is separate from section 240 proceedings.** First, while section 235(b)(1), 8 U.S.C. 1225(b)(1), mandates that an alien with a positive credible fear determination receive “further consideration of [his or her] application for asylum,” section 235(b)(2), 8 U.S.C. 1225(b)(2), mandates that other classes of aliens receive “a proceeding under section 1229a of this title”—i.e., section 240 of the INA, 8 U.S.C. 1229a. *Compare* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), *with* INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). **The difference in language suggests that section 235(b)(1), 8 U.S.C. 1225(b)(1), does not require use of section 240 proceedings,** in contrast to section 235(b)(2), 8 U.S.C. 1225(b)(2), which does so require. *See Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1723 (2017) (“differences in language [generally] convey differences in meaning”). That negative inference is reinforced by the fact that aliens in expedited removal are expressly excluded from the class of aliens entitled to section 240 proceedings under section 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A). *See* INA 235(b)(2)(B)(ii), 8 U.S.C. 1225(b)(2)(B)(ii).

Second, an alien with a positive credible fear determination is entitled only to a further proceeding related to his or her “application for asylum.” INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). An asylum application’s purpose is to determine whether the alien is entitled

to relief or protection from removal, not whether the alien should be admitted or is otherwise entitled to immigration benefits. *See Matter of V-X-*, 26 I&N Dec. 147, 150 (BIA 2013) (holding that, “although [an alien’s] grant of asylum confer[s] a lawful status upon him, it [does] not entail an ‘admission’”). By contrast, in section 240 proceedings, aliens generally may raise their admissibility and their entitlement to various forms of relief or protection. *Compare* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), *with* INA 240(c)(2)–(4), 8 U.S.C. 1229a(c)(2)–(4).

Moreover, the Departments believe, for the reasons described in this rule, that it is better policy to place aliens with a positive credible fear determination in asylum-and-withholding-only proceedings rather than section 240 proceedings.

DHS has prosecutorial discretion at the outset to place an alien **amenable** to expedited removal instead in section 240 proceedings. *See Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 170 (BIA 2017) (“The DHS’s decision to commence removal proceedings involves the exercise of prosecutorial discretion, and neither the Immigration Judges nor the Board may review a decision by the DHS to forgo expedited removal proceedings or initiate removal proceedings in a particular case.”); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011). If DHS has exercised its discretion by initially commencing expedited removal proceedings against an alien, placing that alien in section 240 proceedings following the establishment of a credible fear effectively negates DHS’s original discretionary decision. By deciding that the alien was **amenable** to expedited removal, DHS already determined removability, leaving only a determination as to whether the individual is eligible for relief or entitled to protection from removal in the form of asylum, statutory withholding of removal, or protection under the CAT regulations. Further, it is evident that Congress intended the expedited removal process to be streamlined, efficient, and truly “expedited” based on the statutory limits it placed on

administrative review of expedited removal orders, INA 235(b)(1)(C), 8 U.S.C. 1225(b)(1)(C); the temporal limits it placed on review of negative credible fear determinations by immigration judges, INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III); and the limitations placed on judicial review of determinations made during the expedited removal process, INA 242(e), 8 U.S.C. 1252(e). **The current policy of referring aliens who have established a credible fear for section 240 proceedings runs counter to those legislative aims.**⁹

Accordingly, DOJ proposes to amend 8 CFR 1003.1, 8 CFR 1003.42(f), 8 CFR 1208.2, 8 CFR 1208.30, and 8 CFR 1235.6—and DHS proposes to amend 8 CFR 208.2(c), 8 CFR 208.30(e)(5) and (f), and 8 CFR 235.6(a)(1)—so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture and accordingly receive a positive fear determination will appear before an immigration judge for “asylum-and-withholding-only” proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1).¹⁰ Such proceedings will be adjudicated in the same manner that currently applies to certain alien crewmembers, stowaways, and applicants for admission under the Visa Waiver Program, among other categories of aliens who are not entitled by statute to section 240 proceedings. *See* 8 CFR 208.2(c)(1)(i)–(viii), 1208.2(c)(1)(i)–(viii). Additionally, to ensure that these claims receive the most expeditious consideration reasonably possible, the Departments propose to amend 8 CFR

⁹ In *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005)—which the Attorney General recently overruled in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019)—the Board of Immigration Appeals noted in dicta that although the INA “does not require that such aliens be placed in full section 240 removal proceedings * * *, there is legislative history suggesting that this comports with the intent of Congress.” 23 I&N Dec. at 734 (citing H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.) (“If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings.”)). Although the notation in the House Conference Report may be read as supporting an interpretation of section 235(b) that allows for the current policy, the statute certainly does not compel the current policy. Indeed, we presume that Congress speaks most directly through its adopted statutory language, and, as explained above, that language actually clearly permits the use of asylum-and-withholding-only proceedings, rather than section 240 proceedings.

¹⁰ Under existing regulations, in proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1), aliens may pursue not only claims for asylum, but also claims for “withholding or deferral of removal”—which encompasses both statutory withholding of removal, and withholding and deferral of removal under the CAT regulations. 8 CFR 208.2(c)(3)(i), 1208.2(c)(3)(i). This rule makes no change to that aspect of the existing regulations.

208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination.

These “asylum-and-withholding-only” proceedings generally follow the same rules of procedure that apply in section 240 proceedings, but the immigration judge’s consideration is limited solely to a determination on the alien’s eligibility for asylum, statutory withholding of removal, and withholding or deferral of removal under the CAT regulations (and, if the alien is eligible for asylum, whether he or she should receive it as a matter of discretion). 8 CFR 208.2(c)(3)(i), 1208.2(c)(3)(i). If the immigration judge does not grant the alien asylum, statutory withholding of removal, or protection under the CAT regulations, the alien will be removed, although the alien may submit an appeal of a denied application for asylum, statutory withholding of removal, or protection under the CAT regulations to the Board of Immigration Appeals (“BIA”).¹¹

¹¹ DOJ proposes a technical correction to 8 CFR 1003.1(b), which establishes the jurisdiction of the BIA, to correct the reference to 8 CFR 1208.2 in paragraph (b)(9) and ensure that the regulations accurately authorize BIA review in “asylum-and-withholding-only” proceedings. EOIR and the INS amended 8 CFR part 208 in 1997 following the enactment of IIRIRA. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR 444 (Jan. 3, 1997). Two of the many changes made at the time were (1) amending 8 CFR 208.2(b) to set out immigration judges’ jurisdiction over asylum applications filed by aliens not entitled to proceedings under section 240 of the INA, 8 U.S.C. 1229a, and aliens who have been served, among other charging documents, a Notice to Appear; and (2) amending 8 CFR 3.1(b)(9) to specifically state that the BIA has jurisdiction over asylum applications described at 8 CFR 208.2(b). *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR at 455, 462. In 2000, EOIR and the INS redesignated then-existing 8 CFR 208.2(b) into separate paragraphs 8 CFR 208.2(b) (regarding immigration judges’ jurisdiction over aliens served, among other charging documents, a Notice to Appear) and 8 CFR 208.2(c) (regarding immigration judges’ jurisdiction over asylum applications filed by aliens not entitled to removal proceedings under section 240 of the INA). *Asylum Procedures*, 65 FR 76121, 76122 (Dec. 6, 2000). EOIR and the INS, however, failed to make a corresponding update to 8 CFR 3.1(b)(9) to account for the change to the cross-referenced paragraph 8 CFR 208.2(b). There is no indication that the Departments intended to remove appeals from “asylum-and-withholding-only” proceedings from the BIA’s jurisdiction. In 2003, following the creation of DHS, EOIR’s regulations were transferred from chapter I to chapter V of 8 CFR and redesignated. *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 FR 9824, 9830, 9834 (Feb. 28, 2003). Since EOIR and the INS amended 8 CFR 208.2(b) in 2000, the BIA has continued to exercise jurisdiction over appeals from asylum-and-withholding-only proceedings. *See, e.g., Kanacevic v. I.N.S.*, 448 F.3d 129, 133 (2d Cir. 2006) (noting that the BIA summarily affirmed an immigration judge’s decision in a proceeding under 8 CFR

2. **Consideration of Precedent When Making Credible Fear Determinations in the “Credible Fear” Process**

DOJ proposes to add language to 8 CFR 1003.42(f) to specify that an immigration judge will consider applicable legal precedent when reviewing a negative fear determination. This instruction is in addition to those currently in 8 CFR 1003.42 to consider the credibility of the alien’s statements and other facts of which the immigration judge is aware. These changes codify in the regulations the current practice and provide a clear requirement to immigration judges that they must consider and apply all applicable law, including administrative precedent from the BIA, decisions of the Attorney General, decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits, and decisions of the Supreme Court.

3. **Remove and Reserve DHS-Specific Procedures from DOJ Regulations**

The Department of Justice proposes to remove and reserve 8 CFR 1235.1, 8 CFR 1235.2, 8 CFR 1235.3, and 8 CFR 1235.5. When the Department first incorporated part 235 into 1235, it stated that “nearly all of the provisions * * * affect bond hearings before immigration judges.” Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9826 (Feb. 28, 2003). Upon further review, the Department has determined that these sections regard procedures that are specific to DHS’s examinations of applicants for admission as set forth in 8 CFR 235.1, 8 CFR 235.2, 8 CFR 235.3, and 8 CFR 235.5, and do not need to be duplicated in the regulations for EOIR in Chapter V, except for the provisions in 8 CFR 1235.4 relating to the

208.2(c)(iii)); *Matter of D-M-C-P-*, 26 I&N Dec. at 647 (holding that neither an immigration judge nor the BIA has jurisdiction to consider whether asylum-and-withholding-only proceedings were improvidently instituted). Accordingly, the Departments are now correcting the reference at 8 CFR 1003.1(b)(9) to prevent ambiguity regarding the BIA’s jurisdiction over appeals from immigration judges’ decisions in proceedings under 8 CFR 1208.2(c), including decisions in “asylum-and-withholding-only” proceedings involving aliens found to have a credible fear of persecution or reasonable possibility of persecution or torture under the proposed rule.

withdrawal of an application for admission and 8 CFR 1235.6 relating to the referral of cases to an immigration judge.

4. **Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Aliens in Expedited Removal Proceedings and Stowaways**

This rule also proposes clarifying and raising the statutory withholding of removal screening standard and the torture-related screening standard under the CAT regulations for stowaways and aliens in expedited removal.¹² Currently, fear screenings for aliens in expedited removal proceedings and stowaways generally involve considering whether there is a significant possibility that the alien can establish, in a hearing on the merits, eligibility for asylum, statutory withholding of removal, or withholding or deferral of removal under the CAT regulations. *See* 8 CFR 208.30(e)(2)–(3). Screening for protection under statutory withholding of removal generally involves considering whether there is a significant possibility that the alien could establish in a hearing that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion, if removed to the proposed country of removal. *See* 8 CFR 208.16(b), 208.30(e)(2), 1208.16(b). Currently, screening for protection under the CAT regulations generally involves considering

¹² A stowaway is defined in section 101(a)(49) of the INA, 8 U.S.C. 1101(a)(49), as “any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft.” Further, “[a] passenger who boards with a valid ticket is not to be considered a stowaway.” *Id.* The rules that apply to stowaways relating to referrals for credible fear determinations and review by an immigration judge are found in section 235(a)(2) of the INA, 8 U.S.C. 1225(a)(2), which provides that:

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

whether the alien can establish that there is a significant possibility that he or she could establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. *See* 8 CFR 208.16(c), 208.30(e)(3), 1208.16(c). The “significant possibility” standard has been interpreted by DHS as requiring that the alien “demonstrate a substantial and realistic possibility of succeeding” in immigration court. *See* Memorandum from John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., *Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations 2* (Feb. 28, 2014); *see also* *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 297 (D.C. Cir. 1999) (stating in a non-immigration context that establishing a significant possibility involves demonstrating “a substantial and realistic possibility of succeeding” (quoting *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846, 852 (D.C. 1998))). The Departments propose amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof in “credible fear” screenings for aliens in expedited removal proceedings and for stowaways from a significant possibility that the alien can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 CFR 208.16, 208.30(e)(2), 1208.16. Similarly, for aliens expressing a fear of torture, the Departments propose amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof from a significant possibility that the alien is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the alien would be tortured in the country of removal. *See* 8 CFR 208.18(a), 208.30(e)(3), 1208.18(a).

Congress has not required that consideration of eligibility for asylum, statutory withholding of removal, and protection under the CAT regulations in the “credible fear”

screening process be considered in the same manner. In fact, the “credible fear” screening process as set forth in the INA makes no mention whatsoever of statutory withholding of removal or protection under the CAT regulations. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* FARRA, 112 Stat. at 2681–822; INA 103(a)(1), 8 U.S.C. 1103(a)(1) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens * * * .”); INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section * * * .”); INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); Regulations Concerning the Convention Against Torture, 64 FR 8478, 8478 (Feb. 19, 1999), as corrected by Regulations Concerning the Convention Against Torture, 64 FR 13881 (Mar. 23, 1999) (“Under Article 3 [of CAT], the United States had agreed not to ‘expel, return (‘refouler’) or extradite’ a person to another state where he or she would be tortured * * * . The United States currently implements Article 33 of the Refugee Convention through the withholding of removal provision in section 241(b)(3) * * * of the [INA] * * * .”). FARRA provides that “the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3” of CAT, “subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of [CAT].” FARRA, sec. 2242(b), 112 Stat. at 2681–822.

Recently, DHS began to apply the “reasonable possibility” standard of proof to determinations regarding potential eligibility for statutory withholding of removal and protection under the CAT regulations in “credible fear” screenings for aliens in expedited removal

proceedings where an alien is found barred from asylum pursuant to 8 CFR 208.13(c)(3)–(4). On November 9, 2018, the Departments issued an Interim Final Rule (“IFR”) to provide that certain aliens described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) who entered the United States in contravention of a covered Presidential proclamation or order are barred from eligibility for asylum (hereinafter referred to as the “Presidential Proclamation Asylum Bar IFR”). Under that rule, claims for statutory withholding and protection under the CAT regulations are analyzed under this “reasonable possibility” standard. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 FR 55934 (Nov. 9, 2018).¹³ In addition, on July 16, 2019, the Departments issued an IFR providing that certain aliens described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) who enter, attempt to enter, or arrive in the United States across the southern land border on or after such date, after transiting through at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence en route to the United States, will be found ineligible for asylum unless they qualify for certain exceptions (hereinafter referred to as the “Third Country Transit Asylum Bar IFR”). *See Asylum Eligibility and Procedural Modifications*, 84 FR 33829 (July 16, 2019). That IFR provides that if an alien is found ineligible for asylum pursuant to the bar, asylum officers will similarly apply the “reasonable possibility” standard to any statutory withholding of removal or CAT regulation claims in the “credible fear” screening context. *See id.* at 33837.¹⁴

¹³ On December 19, 2018, the U.S. District Court for the Northern District of California enjoined the Departments “from taking any action continuing to implement the Rule” and ordered the Departments “to return to the pre-Rule practices for processing asylum applications.” *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). On February 28, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the injunction. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1284 (9th Cir. 2020). The Departments in this rule do not propose to make any amendments that would implement the rule at issue in *East Bay Sanctuary*.

¹⁴ On July 24, 2019, the U.S. District Court for the Northern District of California enjoined the Departments “from taking any action continuing to implement the Rule” and ordered the Departments “to return to the pre-Rule practices for processing asylum applications.” *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). On August 16, 2019, the U.S. Court of Appeals for the Ninth Circuit issued a partial stay of the

This proposed rule would expand the Departments' application of the "reasonable possibility" standard of proof. Specifically, the standard of proof in the "credible fear" screening process for statutory withholding of removal and protection under the CAT regulations would be raised from a significant possibility that the alien can establish eligibility for such relief or protection to a reasonable possibility that the alien would be persecuted or tortured. See 8 CFR 208.16, 208.30(e)(2), 1208.16; see also 8 CFR 208.30(e)(3) (currently employing a "significant possibility" standard), 8 CFR 208.18(a) and 1208.18(a) (defining torture). For aliens expressing a fear of persecution, the standard of proof in the screening remains unchanged regarding asylum eligibility, i.e., a significant possibility that the alien could establish eligibility for asylum. See INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v).

Under this rule, during "credible fear" screening interviews,¹⁵ asylum officers would consider whether aliens could establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture. Assessing a "credible fear of persecution" for purposes of asylum claims would continue to involve considering whether there is a significant possibility that the alien could establish eligibility for asylum under section 208 of the INA, 8 U.S.C. 1158, as is currently provided in the regulations. See 8 CFR 208.30(e)(2). However, under the proposed regulations, assessing a "reasonable possibility of persecution" would

preliminary injunction so that the injunction remained in force only in the Ninth Circuit. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court then reinstated the nationwide scope of the injunction. 391 F.Supp.3d 974. Two days later, the Supreme Court stayed the district court's injunction. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). The Departments do not propose to make any amendments in this rule that would modify the substance of the rule at issue in that litigation.

¹⁵ The Departments recognize that, as a linguistic matter, it may seem strange to refer to a proceeding in which a reasonable possibility standard is applied as a "credible fear" screening. But the Departments have elected to retain the "credible fear" nomenclature because the relevant statutory provision is titled "removal without further review if no credible fear of persecution," INA 235(b)(1)(B)(iii), 8 U.S.C. 1225(b)(1)(B)(iii), and for continuity and for ease of distinguishing proceedings conducted under 8 CFR 208.30 from those conducted under 8 CFR 208.31. Moreover, this change is consistent with the Departments' IFR in 2018 that employed a reasonable possibility standard in the context of a credible fear screening for aliens subject to certain Presidential proclamations. See Presidential Proclamation Asylum Bar IFR, 83 FR at 55943.

involve considering whether there is a reasonable possibility that the alien would be persecuted such that the alien should be referred to a hearing in immigration court to adjudicate eligibility for statutory withholding of removal. *See* 8 CFR 208.16(b), 1208.16(b).

Meanwhile, under this proposed rule, assessing a reasonable possibility of torture would involve considering whether there is a reasonable possibility that the alien would be tortured such that the alien should be referred for a hearing in immigration court to adjudicate potential eligibility for protection under the CAT regulations. *See* 8 CFR 208.16(c), 1208.16(c).

Consistent with existing regulations, if the alien is referred to immigration court after receiving a positive fear determination, the immigration judge applies a “more likely than not” standard to the claims for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 1208.16–1208.17.

To be eligible for asylum under section 208 of the INA, 8 U.S.C. 1158, an alien must ultimately prove a “reasonable possibility” of persecution upon return to his or her country. *See, e.g., Y.C. v. Holder*, 741 F.3d 324, 332 (2d Cir. 2013); *see also* 8 CFR 208.13(b)(2)(i)(B), 1208.13(b)(2)(i)(B). On the other hand, to be eligible for either statutory withholding of removal or protection under the CAT regulations, an alien must ultimately prove a “clear probability” of the relevant type of harm—i.e., that the harm is more likely than not to occur—upon return to his or her country. *See Y.C.*, 741 F.3d at 333; 8 CFR 208.16(b)(2) and (c)(2), 1208.16(b)(2) and (c)(2); *see also E. Bay Sanctuary*, 950 F.3d at 1277 (“A ‘clear probability’ of persecution or torture means that it is ‘more likely than not’ that applicants will be persecuted upon their removal.”). Because an alien’s merits burden with respect to claims for CAT protection and statutory withholding of removal is higher than that for a claim to asylum, it is reasonable for an alien’s associated screening burden to be correspondingly higher than for an asylum claim.

However, under the current regulations, an asylum officer conducting an interview under 8 CFR 208.30 determines whether there is a “significant possibility” that the alien would be eligible for statutory withholding of removal or protection under the CAT regulations. 8 CFR 208.30(e)(2)–(3). In other words, the asylum officer applies the same screening standard for fear of persecution under asylum and statutory withholding of removal and fear of torture under the CAT regulations, despite the fact that ultimate success on the merits requires differing standards of proof.

The decision to adopt such a regulatory scheme was made on the assumption that it would not “disrupt[] the streamlined process established by Congress to circumvent meritless claims.” Regulations Concerning the Convention Against Torture, 64 FR at 8485.

But while the INA and the CAT regulations authorize the Attorney General and Secretary to provide for consideration of statutory withholding of removal claims and claims for CAT protection together with asylum claims or other matters that may be considered in removal proceedings, the INA does not mandate that approach, *see, e.g.*, 8 U.S.C. 1103(a)(1) and 1225(b)(1); *cf. Foti v. INS*, 375 U.S. 217, 229–30 & n.16 (1963) (emphasizing that administrative regulations and procedure may broaden or narrow the subject matter within a court’s scope of review, including review of orders denying voluntary departure or withholding or removal), or that they be considered in the same manner. **This rule would end the current approach and require asylum officers conducting interviews under 8 CFR 208.30 to assess whether the interviewed aliens can establish a credible fear of persecution in asylum claims, a reasonable possibility of persecution in statutory withholding of removal claims, and a reasonable possibility of torture in claims under the CAT regulations.**

The Departments' proposal to raise the standards of proof for assessing potential eligibility for statutory withholding of removal and withholding or deferral of removal under the CAT regulations in the "credible fear" screening context falls within the scope of the authority that Congress has granted to the Secretary and the Attorney General to carry out immigration and nationality laws. *See* HSA; FARRA; INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A) (allowing the Attorney General to "decide[]" whether an "alien's life or freedom would be threatened" before directing removal of the alien); Regulations Concerning the Convention Against Torture, 64 FR at 8478, as corrected by Regulations Concerning the Convention Against Torture, 64 FR 13881 (Mar. 23, 1999). Moreover, raising the standards of proof to a "reasonable possibility" during screening for statutory withholding of removal and withholding and deferral of removal under the CAT regulations better aligns the initial screening standards of proof with the higher standards used to determine whether aliens are in fact eligible for these forms of protection before immigration judges. Unlike in the context of asylum determinations, in which the "well-founded fear" standard is used, both in the statutory withholding and CAT withholding or deferral of removal contexts, immigration judges apply the higher "more likely than not" standard. *See* 8 CFR 1208.16–1208.17.

The "reasonable possibility" standard has long been used for fear determinations made under 8 CFR 208.31 and 8 CFR 1208.31, which cover certain classes of aliens who are ineligible for asylum but who are eligible for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 208.31(a) and (c), 1208.31(a) and (c); *see also* INA 238(b)(5), 8 U.S.C. 1228(b)(5); INA 241(a)(5), 8 U.S.C. 1231(a)(5). "This * * * screening process is modeled on the credible-fear screening process, but requires the alien to meet a higher screening standard." Regulations Concerning the Convention Against Torture, 64 FR at 8485; *see also*

Garcia v. Johnson, No. 14–CV–01775, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing “fair and efficient procedures” in reasonable fear screening that would comport with U.S. international obligations).

Significantly, when establishing the “reasonable fear” screening process, DOJ explained that the two affected categories of aliens should be screened based on the higher reasonable fear standard because, “[u]nlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are ineligible for asylum,” and may be entitled only to statutory withholding of removal or protection under the CAT regulations. Regulations Concerning the Convention Against Torture, 64 FR at 8485. “Because the standard for establishing the likelihood of harm related to these forms of protection (a clear probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.” *Id.*

The standard’s long use evidences that it is consistent with the United States’ non-refoulement obligations and would not prevent aliens entitled to protection under the CAT regulations from receiving it. Drawing on the established framework for considering whether to grant statutory withholding of removal or CAT protection in the reasonable fear context, this rule would establish a bifurcated screening process in which aliens subject to expedited removal will be screened for asylum under the “significant possibility” standard, and screened for statutory withholding of removal or CAT protection under the “reasonable possibility” standard.

The Departments also propose to amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to refer to the screenings of aliens in expedited removal proceedings and of stowaways for statutory withholding of removal as “reasonable possibility of persecution” determinations

and the screening for withholding and deferral of removal under the CAT regulations as “reasonable possibility of torture” determinations, in order to avoid confusion between the different standards of proof. By proposing these amendments, the Departments seek to maintain operational efficiency by differentiating between screenings for forms of relief, including asylum under 8 CFR 208.30, and screenings for only statutory withholding of removal and withholding and deferral of removal under the CAT regulations under 8 CFR 208.31, because, as noted above, the two screenings apply to different populations of aliens. Currently, DHS asylum officers conduct screenings under a “credible fear” standard for, *inter alia*, stowaways and aliens in expedited removal proceedings who express a fear of persecution or torture, a fear of return, or an intention to apply for asylum. *See* 8 CFR 208.30(a), 1208.30(a). DHS asylum officers conduct screenings under a “reasonable fear” standard for aliens who express a fear of persecution or torture and who have been issued an administrative removal order under section 238 of the INA, 8 U.S.C. 1228, due to an aggravated felony conviction or who are subject to a reinstated removal order under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5). *See* 8 CFR 208.31(a), 1208.31(a). Accordingly, the Departments seek to make technical edits by using the term “reasonable possibility” as the legal standard and using “reasonable fear” only to refer to proceedings under 8 CFR 208.31 and 8 CFR 1208.31. Use of the term “reasonable possibility” rather than the term “reasonable fear” when discussing statutory withholding of removal and CAT protection screening determinations under 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 will prevent confusion over which type of analysis is at issue.

In conjunction with the edits proposed to DHS’s regulation in 8 CFR 208.30, DOJ proposes edits to 8 CFR 1208.30 related to the legal standard of review. Currently, after an asylum officer determines that an alien lacks a credible fear of persecution or torture, the

regulation provides that an immigration judge in EOIR then reviews that determination under the credible fear standard. 8 CFR 208.30(g), 1208.30(g). DHS's proposed "reasonable possibility" screening standard for statutory withholding of removal and CAT protection claims is a mismatch for EOIR's current regulation, which does not provide for a reasonable possibility review process in the expedited removal context. Therefore, DOJ proposes to modify 8 CFR 1208.30(g) to clarify that credible fear of persecution determinations will continue to be reviewed under a "credible fear" standard, but screening determinations for eligibility for statutory withholding of removal and protection under the CAT regulations will be reviewed under a "reasonable possibility" standard.

Additionally, to clarify terminology in 8 CFR 208.30(d)(2), mention of the Form M-444, Information about Credible Fear Interview in Expedited Removal Cases, would be replaced with mention of relevant information regarding the "credible fear" screening process. This change would clarify that DHS may relay information regarding screening for a reasonable possibility of persecution and a reasonable possibility of torture, in addition to a credible fear of persecution.

Under the proposed rule, the burden is on the alien to show that there is a reasonable possibility that he or she would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion if removed to the country of removal. Similarly, the burden is on the alien to show there is a reasonable possibility that he or she would be tortured in the country of removal. As a result, the alien must demonstrate a reasonable possibility that he or she will suffer severe pain or suffering, whether physical or mental, in the country of removal and a reasonable possibility that the feared harm would fall within the definition of torture set forth in 8 CFR 208.18(a)(1)–(8) and 8 CFR 1208.18(a)(1)–(8).

A “reasonable possibility” standard is equivalent to the “well-founded fear” standard in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), which is used to determine ultimate eligibility for asylum. *See I.N.S. v. Stevic*, 467 U.S. 407, 424–25 (1984); 8 CFR 208.13(b)(2)(i)(B), 1208.13(b)(2)(i)(B). The “well-founded fear” standard is lower than the “more likely than not” standard ultimately required to establish the likelihood of future harm for statutory withholding of removal and protection under the CAT regulations. Indeed: “[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

While lower than the “clear probability” standard governing the merits determination for statutory withholding of removal and withholding and deferral of removal under the CAT regulations, the “reasonable possibility” standard is a well-established standard of proof that is an appropriate screening standard to identify those who have meaningful claims to such protection. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 440–46 (BIA 1987) (distinguishing the “reasonable possibility” and “more likely than not” standards). Determining a reasonable possibility of persecution does not rest on the statistical possibility of persecution, but rather on whether the applicant’s fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution. *See id.* at 445.

For a number of reasons, the Departments do not believe that this change would implicate reliance interests. First, the ultimate eligibility standards remain the same. Second, it is exceedingly unlikely that aliens seek statutory withholding of removal or protection under the CAT regulations based on the applicable standard of proof. Third, the proposed change would provide numerous benefits. Raising the standards of proof to a “reasonable possibility” for the screening of aliens seeking statutory withholding of removal and CAT protection would allow

the Departments to better screen out non-meritorious claims and focus limited resources on claims much more likely to be determined to be meritorious by an immigration judge. Adopting a higher standard for statutory withholding and CAT screenings would not hinder the streamlined process envisioned for expedited removal. Asylum officers already receive extensive training and guidance on applying the “reasonable possibility” standard in other contexts because they are determining whether a reasonable possibility of persecution or torture exists in reasonable fear determinations pursuant to 8 CFR 208.31. In some cases, asylum officers would need to spend additional time eliciting more detailed testimony from aliens to account for the higher standard of proof; however, the overall impact on the time asylum officers spend making screening determinations would be minimal. The procedural aspects of making screening determinations regarding fear of persecution and of torture would remain largely the same. Moreover, using a higher standard of proof in the screening context for those seeking statutory withholding of removal or protection under the CAT regulations in the immigration courts allows the Departments to more efficiently and promptly distinguish between aliens whose claims are more likely or less likely to ultimately be meritorious.

DHS also proposes in 8 CFR 208.30(e)(1) to interpret the “significant possibility” standard that Congress established in section 235(b)(1)(B)(v) of the INA, 8 U.S.C. 1225(b)(1)(B)(v). DHS’s proposal would serve to promote greater clarity and transparency in credible fear of persecution determinations.

As stated in proposed in 8 CFR 208.30(e)(1), “significant possibility” means a substantial and realistic possibility of succeeding. As discussed above, this proposed definition of “significant possibility” is consistent with both case law and existing policy and practice, and allows relevant parties, including aliens, consultants, and legal representatives, to better

understand the standard of proof that applies to credible fear of persecution claims. This definition is also consistent with congressional intent. The 104th Congress chose a screening standard “intended to be a low screening standard for admission into the usual full asylum process.” 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch). Originally, the Senate bill had proposed a “determination of whether the asylum claim was ‘manifestly unfounded,’ while the House bill applied a ‘significant possibility’ standard coupled with an inquiry into whether there was a substantial likelihood that the alien’s statements were true.” *Id.* In IIRIRA, Congress then “struck a compromise by rejecting the higher standard of credibility included in the House bill.” *Id.* The House’s “significant possibility” standard is lower than the “more probable than not” language in the original House version. 142 Cong. Rec. H11081 (daily ed. Sept. 25, 1996) (statement of House Judiciary Committee Chairman Henry Hyde). The proposed regulation is thus consistent with congressional intent because it defines “significant possibility” in a way that ensures that the standard does not reach the level of more likely than not. Overall, DHS’s effort will contribute to ensuring consistency in making credible fear of persecution determinations.

5. **Proposed Amendments to the Credible Fear Screening Process**

The Departments further propose to amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to make several additional technical and substantive amendments regarding fear interviews, determinations, and reviews of determinations. The Departments propose to amend 8 CFR 208.30(a) and 8 CFR 1208.30(a) to clearly state that the respective sections describe the exclusive procedures applicable to applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), and

receive “credible fear” interviews, determinations, and reviews under section 235(b)(1)(B) of the Act, 8 U.S.C. 1225(b)(1)(B).

DHS proposes to clarify the existing “credible fear” screening process in proposed 8 CFR 208.30(b), which states that if an alien subject to expedited removal indicates an intention to apply for asylum or expresses a fear of persecution or torture, or a fear of return, an inspecting officer shall not proceed further with removal until the alien has been referred for an interview with an asylum officer, as provided in section 235(b)(1)(A)(ii) of the Act, 8 U.S.C.

1225(b)(1)(A)(ii). The proposed rule also states that the asylum officer would screen the alien for a credible fear of persecution and, as appropriate, a reasonable possibility of persecution or a reasonable possibility of torture, and conduct an evaluation and determination in accordance with 8 CFR 208.9(c), which is consistent with current policy and practice. These proposals aim to provide greater transparency and clarity with regard to fear screenings.

DHS also proposes to include consideration of internal relocation in the context of proposed 8 CFR 208.30(e)(1)–(3), which outline the procedures for determining whether aliens have a credible fear of persecution, a reasonable possibility of persecution, and a reasonable possibility of torture. Considering internal relocation in the “credible fear” screening context is consistent with existing policy and practice, and the regulations addressing internal relocation at 8 CFR 208.16(c)(3)(ii) and 8 CFR 1208.16(c)(3)(ii) (protection under the CAT regulations); 8 CFR 208.13(b)(1)(i)(B) and 8 CFR 1208.13(b)(1)(i)(B) (asylum); and 8 CFR 208.16(b)(1)(i)(B) and 8 CFR 1208.16(b)(1)(i)(B) (statutory withholding). The regulatory standard that governs consideration of internal relocation in the context of asylum and statutory withholding of removal adjudications is different from the standard that considers internal relocation in the context of protection under the CAT regulations. *See generally Maldonado v. Lynch*, 786 F.3d

1155, 1163 (9th Cir. 2015) (noting the marked difference between the asylum and CAT regulations concerning internal relocation).

In addition, the Departments propose to add asylum and statutory withholding eligibility bar considerations in proposed 8 CFR 208.30(e)(1)(iii) and (e)(2)(iii), and 8 CFR 1003.42(d). Currently, 8 CFR 208.30(e)(5)(i) provides that if an alien, other than a stowaway, is able to establish a credible fear of persecution or torture but also appears to be subject to one or more of the mandatory eligibility bars to asylum or statutory withholding of removal, then the alien will be placed in section 240 proceedings. In proposed 8 CFR 208.30(e)(5), DHS would require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), or the bars to asylum eligibility under section 208(b)(2) of the Act, 8 U.S.C. 1158(b)(2), including any eligibility bars established by regulation under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C);¹⁶ and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations.¹⁷ An alien who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal would receive a negative fear determination, unless the alien could establish a reasonable possibility of torture, in which case he or she would be referred to the

¹⁶ The following classes of aliens are ineligible for asylum: aliens who (1) participated in certain types of persecution; (2) have been convicted of a particularly serious crime; (3) have committed (or are reasonably believed to have committed) a serious nonpolitical crime outside the United States; (4) are a danger to the security of the United States; (5) are removable on terrorism-related grounds; or (6) were firmly resettled in another country prior to arrival in the United States. INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi). The Secretary and the Attorney General may also by regulation establish additional ineligibilities. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Together, the bars in these two subparagraphs are commonly referred to as the mandatory bars to a grant of asylum.

¹⁷ The following classes of aliens are ineligible for statutory withholding of removal: aliens who (1) participated in certain types of persecution; (2) have been convicted of a particularly serious crime; (3) have committed (or are reasonably believed to have committed) a serious nonpolitical crime outside the United States; or (4) are a danger to the security of the United States. INA 241(b)(3)(B)(i)–(iv), 8 U.S.C. 1231(b)(3)(B)(i)–(iv).

immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

Under the current regulations at 8 CFR 208.30(e)(5), aliens who establish a credible fear of persecution or torture but appear to be subject to one or more of the mandatory bars are referred for section 240 proceedings. From an administrative standpoint, it is pointless and inefficient to adjudicate claims for relief in section 240 proceedings when it is determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage. Accordingly, applying those mandatory bars to aliens at the “credible fear” screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain.

If an asylum officer determines, at the “credible fear” screening stage, that an alien is subject to one or more mandatory bars, the alien would, under this rule, be permitted to request review of that determination by an immigration judge. *See* 8 CFR 208.30(g) (current), 8 CFR 208.30(g) (proposed); *see also* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (“The Attorney General shall provide by regulation and upon the alien’s request for prompt review by an immigration judge of a determination * * * that the alien does not have a credible fear of persecution.”).

The bars to asylum eligibility are not identical to the bars to statutory withholding eligibility. *Compare* 8 U.S.C. 1158(b)(2)(A)(i)–(vi) (bars to asylum eligibility), *with* 8 U.S.C. 1231(b)(3)(B)(i)–(iv) (bars to withholding of removal eligibility). Under the proposed regulations, an alien who is barred from asylum eligibility could be found to have a reasonable

possibility of persecution in instances in which the alien is barred from asylum, but not likewise barred from statutory withholding. For instance, if an alien is subject to the firm resettlement bar, the alien is barred from asylum eligibility, but not barred from statutory withholding eligibility. In such a case, if the alien demonstrated a reasonable possibility of persecution, the alien would be referred to the immigration judge for asylum-and-withholding-only proceedings. The proposed rule would ensure that if an alien has established a significant possibility of eligibility for asylum or a reasonable possibility of persecution and is not barred from statutory withholding eligibility, the alien can appear before an immigration judge for consideration of the asylum, statutory withholding, and CAT claims. Moreover, this process would retain a mechanism for immigration judge review of the determination that the alien is not eligible for asylum, as required in section 235(b)(1)(B)(iii) of the Act, 8 U.S.C. 1225(b)(1)(B)(iii). Thus, the proposed rule would reasonably balance the various interests at stake. It would promote efficiency by avoiding duplicative administrative efforts while ensuring that those who are subject to a mandatory bar receive an opportunity to have the asylum officer's finding reviewed by an immigration judge.

Additionally, under 8 CFR 208.30(e)(5), DHS currently uses (or potentially would use, pending the resolution of litigation), a "reasonable fear" standard (identical to the "reasonable possibility" standard enunciated in this rule) in procedures related to aliens barred from asylum under the two previously mentioned IFRs, as described in 8 CFR 208.13(c)(3)–(4). The Departments seek to make technical edits in proposed 8 CFR 208.30(e)(5), to change "reasonable fear" to "reasonable possibility" to align the terminology with the proposed changes in this rule. Similarly, DOJ proposes to make technical edits in 8 CFR 1208.30(g)(1) and 8 CFR 1003.42(d)—both of which refer to the "reasonable fear" standard in the current version of 8

CFR 208.30(e)(5)—to change the “reasonable fear” language to “reasonable possibility.” These edits are purely technical and would not amend, alter, or impact the standard of proof applicable to the fear screening process and determinations, or review of such determinations, associated with the aforementioned bars.

Additionally, in proposed 8 CFR 208.2(c)(1), 8 CFR 1208.2(c)(1), 8 CFR 235.6(a)(2), and 8 CFR 1235.6(a)(2), the Departments are making technical edits to replace the term “credible fear of persecution or torture” with “a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture” to mirror the terminology used in proposed 8 CFR 208.30 and 8 CFR 1208.30. Moreover, in proposed 8 CFR 1208.30(g)(2)(iv)(C), DOJ is making a technical edit to clarify that stowaways barred from asylum and both statutory and CAT withholding of removal may still be eligible for deferral of removal under the CAT regulations.

The Departments further propose to amend 8 CFR 208.30(g) and 8 CFR 1208.30(g)(2), which address procedures for negative fear determinations for aliens in the expedited removal process. Currently, 8 CFR 208.30(g) provides that when an alien receives notice of a negative determination, the asylum officer inquires whether the alien wishes to have an immigration judge review the decision. If that alien refuses to indicate whether he or she desires such review, DHS treats this as a request for review by an immigration judge. *See also* 8 CFR 1208.30(g)(2). In proposed 8 CFR 208.30(g)(1), the Departments seek to treat an alien’s refusal to indicate whether he or she desires review by an immigration judge as declining to request such review. Also, in proposed 8 CFR 208.31, the Departments will treat a refusal as declining to request review within the context of reasonable fear determinations. This proposal aligns with the Departments’ interest in the expeditious resolution of fear claims, with a focus on those claims

that are most likely to be meritorious. Given that the alien has been informed of his or her right to seek further review and given an opportunity to exercise that right, referring an alien to an immigration judge based on a refusal to indicate his or her desire places unnecessary and undue burdens on the immigration courts.

The Departments welcome comments on all aspects of these proposals, including the use of asylum-and-withholding-only proceedings, the definition of “significant possibility,” and the raising of the standard for statutory withholding of removal and torture-related determinations to “reasonable possibility.”

B. Form I-589, Application for Asylum and for Withholding of Removal, Filing Requirements

1. **Frivolous Applications**

Frivolous asylum applications are a costly detriment, resulting in wasted resources and increased processing times for an already overloaded immigration system. *See Angov v. Lynch*, 788 F.3d 893, 901–02 (9th Cir. 2015) (“[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. * * * [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. * * * Consequently, immigration fraud is rampant.”). Under section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), “[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received [the notice of privilege of counsel and the consequences of knowingly filing a frivolous application], the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.” By current regulation, such frivolousness determinations may only be made by an immigration judge or the BIA. 8 CFR 208.20, 1208.20.

For the penalty in section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), to apply, there must be a finding that an alien “knowingly made a frivolous application for asylum” after receiving the notice required by section 208(d)(4)(A), 8 U.S.C. 1158(d)(4)(A). In other words, the alien’s asylum application must be frivolous, the application must have been knowingly made—i.e., knowing of its frivolous nature—and the alien must have received the notice required by section 208(d)(4)(A), 8 U.S.C. 1158(d)(4)(A), at the time of filing.¹⁸ No penalty under this section will be imposed unless all three requirements are met. The term “knowingly” is not defined in either the statute or the current regulations. Consequently, the Departments propose to clarify that “knowingly” requires either actual knowledge of the frivolousness or willful blindness toward it. Willful blindness means the alien was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise. This standard is higher than mere recklessness or negligence and is consistent with well-established legal principles. *See, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769–70 (2011). The term “frivolous” is not defined in the INA.¹⁹ Prior to the enactment of section 208(d)(6) of the INA, 8 U.S.C.

¹⁸ The asylum application, Form I-589, contains a written notice of the consequences of making a frivolous asylum application pursuant to section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A), and that notice is sufficient to satisfy the third requirement of section 208(d)(6), 8 U.S.C. 1158(d)(6). *See, e.g., Niang v. Holder*, 762 F.3d 251, 254–55 (2d Cir. 2014) (“Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.”). Thus, every alien who signs and files an asylum application has received the notice required by section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A).

¹⁹ Depending on context, frivolous may mean, inter alia, “[l]acking in high purpose; trifling, trivial, and silly” or “[l]acking a legal basis or legal merit; manifestly insufficient as a matter of law.” *Black’s Law Dictionary* (11th ed. 2019). Frivolous filings abuse the judicial process. *See Des Vignes v. Dep’t of Transp., FAA*, 791 F.2d 142, 146 (Fed. Cir. 1986) (holding that frivolous filings abuse the judicial process by wasting the time and limited resources of adjudicators, unnecessarily expend taxpayer resources, and deny the availability of adjudicatory resources to deserving litigants). The Departments accordingly believe that “frivolous” is a term that is broad enough to encompass not only applications that are fraudulent, but also those that are plainly without legal merits. Both kinds of applications seriously undermine the adjudicatory process, yet although none of these conceptions of frivolousness is precluded by INA 208(d)(6), 8 U.S.C. 1158(d)(6), not all of them are captured by the current regulatory definition of frivolousness. There is no indication that Congress intended a narrow construction of 8 U.S.C. 1158(d)(6), and a narrow view of a frivolous asylum application is at odds with its intent to discourage improper applications. As discussed, *infra*, the proposed rule broadens the regulatory definition of a frivolous

1158(d)(6), a frivolous asylum application was defined for purposes of granting employment authorization as one that was “manifestly unfounded or abusive.” 8 CFR 208.7 (1995).

Additional guidance interpreted “frivolous” in this context to mean “patently without substance.” See *Grijalva v. Illchert*, 815 F. Supp. 328, 331 (N.D. Cal. 1993) (summarizing prior regulatory and policy definitions of frivolousness before the current definition was promulgated in 1997).

Subsequent to the enactment of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), DOJ proposed defining a frivolous asylum application for purposes of that provision as one that “is fabricated or is brought for an improper purpose” before settling on the current definition of an application in which “any of its material elements is deliberately fabricated.” *Compare*

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 468 (Jan. 3, 1997) (proposed rule), *with* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997) (final rule).

Although the final rule did not explain why DOJ altered its proposed definition of “frivolous,” the proposed rulemaking noted that the purpose of a definition of “frivolous” was “to discourage applicants from making patently false claims.” Inspection and Expedited Removal of Aliens;

Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447. In light of this regulatory definition, subsequent case law has noted that “the term

‘fraudulent’ may be more appropriate than the term ‘frivolous’ when applied to a questionable asylum application.” *Matter of Y-L-*, 24 I&N Dec. 151, 155 n.1 (BIA 2007) (citing *Barreto-*

Claro v. U.S. Att’y Gen., 275 F.3d 1334, 1339 n.11 (11th Cir. 2001), which observed that

“Fraudulent” would be a more appropriate modifier than “Frivolous” in the statutory heading of

asylum application, provided the application was knowingly filed and the applicant received the appropriate notice, to more fully and accurately capture a broader spectrum of behavior that abuses the judicial process.

section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6)). In short, the concept of a frivolous asylum application as understood by the Departments has encompassed a number of different, related concerns over the years—i.e., applications that are unfounded, abusive, improperly brought, fabricated, or fraudulent—but not all of those are necessarily represented in the current regulatory definition premised solely on fabricated material elements.

The statutory text does not provide a definition of “frivolous,” expressly restrict how it may be defined, or compel a narrow definition limited solely to the deliberate fabrication of material elements, though the penalty in section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), only applies if a frivolous application is knowingly made—i.e., with knowledge or willful blindness of its frivolousness—after an alien has received notice of the consequences of filing a frivolous application. The current regulatory definition of “frivolous” related to asylum applications, which limits the concept of frivolousness to deliberate fabrication of material elements, was promulgated in 1997 with the intent “to discourage applicants from making patently false claims,” but it did not address other types of frivolousness, such as abusive filings, filings for an improper purpose, or patently unfounded filings, or explain why these considerations of frivolousness were either no longer necessary or undesirable. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 468 (proposing to define a frivolous application as one that “is fabricated or is brought for an improper purpose”); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 10344 (ultimately defining an asylum application as frivolous if “any of its material elements is deliberately fabricated,” but not explaining the basis for the change).

Consequently, the current, narrowly-drawn definition does not appear sufficient to capture the full spectrum of claims that would ordinarily be deemed “frivolous,” nor has it been fully successful in its stated intent of discouraging knowingly and patently false claims. This result can be seen in several cases where applications that one may ordinarily understand as “frivolous” are nonetheless not captured by the current narrow regulatory definition. *See, e.g., Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311, 1317–18 & n.10 (11th Cir. 2006) (reversing a frivolousness finding regarding a claim based on alleged fear of persecution due to the applicant’s belief that the Holocaust did not occur); *L-T-M- v. Whitaker*, 760 F. App’x 498, 501 (9th Cir. 2019) (fabricated material evidence, including fraudulent documentation, does not make an asylum application frivolous because the regulatory definition of frivolousness requires the fabrication of an element and evidence is not an element).

L-T-M-, in particular, demonstrates the limitations of the current definition in discouraging false claims. Not only does it run contrary to numerous other federal court decisions upholding frivolousness findings based on fabricated evidence—*see, e.g., Selami v. Gonzales*, 423 F.3d 621, 626–27 (6th Cir. 2005) (affirming a frivolousness finding based on the submission of a fraudulent newspaper article); *Ursini v. Gonzales*, 205 F. App’x 496, 497–98 (9th Cir. 2006) (affirming a frivolousness finding based on the submission of false documents); *Diallo v. Mukasey*, 263 F. App’x 146, 150 (2d Cir. 2008) (affirming a frivolousness finding based on the submission of a fraudulent vaccination card); *Shllaku v. Gonzales*, 139 F. App’x 700, 702–03 (6th Cir. 2005) (affirming a frivolousness finding based on the submission of counterfeit documents)—but its potential to lead to absurd results by allowing claims supported by knowingly fabricated material evidence to escape the penalty called for in INA 208(d)(6), 8 U.S.C. 1158(d)(6), undermines the intent of that provision to discourage false claims. The

proposed rule would revise the current definition of “frivolous” to broaden it and bring it more in line with prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and better effectuate the intent of section 208(d)(6) of the INA, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims.

Accordingly, the Departments propose to amend the definition of “frivolous” to ensure that manifestly unfounded or otherwise abusive claims are rooted out and to ensure that meritorious claims are adjudicated more efficiently so that deserving applicants receive benefits in a timely fashion. The revised regulation also reflects Congress’s concern with applications that are knowingly frivolous at the time of filing, regardless of whether an alien subsequently retracts or withdraws the application. *See* INA 208(d)(4) and (6), 8 U.S.C. 1158(d)(4) and (6); *Matter of X-M-C-*, 25 I&N Dec. 322, 325–27 (BIA 2010) (withdrawal of asylum application does not preclude finding that the application is knowingly frivolous); *see also Kulakchyan v. Holder*, 730 F.3d 993, 996 (9th Cir. 2013) (approving of *Matter of X-M-C-*); *Mei Juan Zheng v. Holder*, 672 F.3d 178, 184 (2d Cir. 2012) (same).

Existing regulations provide that immigration judges and the BIA may make findings that an alien has knowingly filed a frivolous asylum application. *See* 8 CFR 208.20, 8 CFR 1208.20. The Departments propose to amend these regulations to allow asylum officers adjudicating affirmative asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status). For an alien not in lawful status, a finding by an asylum officer that an asylum application is frivolous would not render an alien permanently ineligible for immigration benefits unless an immigration judge

or the BIA subsequently makes a finding of frivolousness upon de novo review of the application as stated in the current and proposed 8 CFR 208.20 and 8 CFR 1208.20. Asylum officers would apply the same definition used by immigration judges and the BIA as proposed by this rule. *Id.* As this proposed rule would overrule *Matter of Y-L-*, and revise the definition of “frivolous,” USCIS would not be required to provide opportunities for applicants to address discrepancies or implausible aspects of their claims in all cases when the asylum officer determines that sufficient opportunity was afforded to the alien. As with any other affirmative asylum case referred to the immigration judge by an asylum officer, the immigration judge would review the asylum application de novo.

By allowing asylum officers to find asylum applications to be frivolous, the Departments seek to enhance the officers’ ability to identify and efficiently root out frivolous applications, and to deter the filing of such applications in the first place. The current practice for handling frivolous asylum applications at the affirmative asylum application stage generally involves asylum officers making negative credibility determinations. Asylum officers may refer asylum applications to the immigration courts based on negative credibility findings, but not solely based on frivolousness.

Making a credibility determination, positive or negative, involves conducting an asylum interview. If the asylum officer identifies credibility concerns, such as inconsistencies or lack of detail, the asylum officer confronts the applicant with these concerns during the interview and gives the applicant an opportunity to explain. If the asylum officer decides to make a negative credibility determination, the officer prepares a written assessment that explains the credibility concerns, such as inconsistencies, lack of detail, or both, and discusses the reasonableness of the applicant’s explanations and the relevancy of the credibility concerns to the claim. *See* INA

208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii); *Matter of B-Y-*, 25 I&N Dec. 236, 242 (BIA 2010) (“In making an adverse credibility determination, the opportunity for explanation requires that an Immigration Judge not rely on inconsistencies that take a respondent by surprise. *See Ming Shi Xue v. BIA*, 439 F.3d 111 (2d Cir. 2006) * * * . If an inconsistency is obvious or glaring or has been brought to the attention of the respondent during the course of the hearing, however, there is no requirement that a separate opportunity for explanation be provided prior to making the adverse credibility determination. *See Ye v. Dep’t of Homeland Sec.*, 446 F.3d 289 (2d Cir. 2006).”).

The proposed amendments to the regulations would give asylum officers a valuable and more targeted mechanism for handling frivolous asylum applications. As noted above, when referring cases to the immigration courts based on negative credibility determinations, asylum officers may flag issues related to frivolousness for immigration judges to consider, but they cannot refer frivolous cases or deny applications solely on that basis. Allowing asylum officers to refer or deny frivolous cases solely on that basis would strengthen USCIS’s ability to root out frivolous applications more efficiently, deter frivolous filings, and ultimately reduce the number of frivolous applications in the asylum system. These amendments would help the Departments better allocate limited resources and time and more expeditiously adjudicate meritorious asylum claims.

Moreover, under this proposed rule, if an asylum officer identifies indicators of frivolousness in an asylum application, the asylum officer would focus more during the interview on matters that may be frivolous. And an immigration judge who receives an asylum application with a frivolousness finding by an asylum officer would have a more robust and developed written record focused on frivolous material elements to help inform his or her

ultimate decision. Thus, an asylum officer's finding that an application is frivolous would help improve the efficiency and integrity of the overall adjudicatory process.

Asylum officers are well prepared to put the proposed regulatory changes into operation. They receive extensive training on spotting indicators of frivolousness, fraud, and credibility concerns, including on reviewing and assessing written materials that may raise such concerns. In addition, asylum officers receive training on how to appropriately identify, raise, and address credibility and frivolousness concerns during interviews with asylum applicants. Thus, asylum officers are well equipped to adjudicate frivolousness in the affirmative asylum context.

Furthermore, the Departments' proposed regulatory changes are consistent with congressional intent. When the 104th Congress amended the procedures used to consider asylum applications through IIRIRA, it sought "to reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods." S. Rept. No. 104-249, at 2 (1996). Allowing asylum officers, in addition to immigration judges and the BIA, to find filings frivolous would help deter aliens from filing frivolous asylum applications and reduce the likelihood that aliens with frivolous applications will be released into the United States for substantial periods of time, usually with work authorization.

The Departments also propose changes to 8 CFR 208.20 and 8 CFR 1208.20 to expand and clarify what circumstances would require an immigration judge or the BIA (and now asylum officers) to find an asylum application to be knowingly frivolous.²⁰ The proposed rule maintains

²⁰ For purposes of 8 CFR 208.20 and 8 CFR 1208.20, an alien knowingly files a frivolous asylum application if the alien filed the application knowing that it was frivolous intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness, or the alien filed the application deliberately ignoring the fact that the application was frivolous. It is the alien's duty to read the asylum application before signing it. If an alien acts through an agent, the alien will be deemed responsible for actions of the agent if the agent acts with apparent authority. If the alien has signed the asylum application, he or she

the current definition of “frivolous” such that if knowingly made, an asylum application would be properly considered frivolous if the adjudicator determines that it includes a fabricated material element. The proposed rule also would provide, consistent with case law, that if knowingly made, an asylum application premised on false or fabricated evidence, unless it would be granted without the fabricated evidence, may also be found frivolous.²¹ *See, e.g., Selami*, 423 F.3d at 626–27; *Ursini*, 205 F. App’x at 497–98; *Diallo*, 263 F. App’x at 150; *Shllaku*, 139 F. App’x at 702–03.

Consistent with the concept of frivolousness as encompassing claims that are patently without substance or merit, an application, if knowingly made, would also be considered frivolous if applicable law clearly prohibits the grant of asylum. Of course, simply because an argument or claim is unsuccessful does not mean that it can be considered frivolous. *Matter of Cheung*, 16 I&N Dec. 244, 245 (BIA 1977). Neither could reasonable arguments to extend, modify, or reverse the law as it stands. *Cf.* Fed. R. Civ. P. 11(b)(2) (“By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances * * * the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”). Finally, if knowingly made, an application filed without regard to the merits of the claim would be considered frivolous. *See Cooter & Gell v. Hartmax, Corp.*, 496 U.S. 384, 398

shall be presumed to have knowledge of its contents regardless of his or her failure to read and understand its contents. 8 CFR 208.3(c)(2), 1208.3(c)(2).

²¹ The submission of fabricated evidence may still be sufficient to deny the application, *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998), but it will not warrant a frivolousness finding if the application without the evidence is also approvable.

(1990) (“The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. * * * Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.”). Such a sanction is fully consistent with the abusive nature of such applications, which are often filed for an ulterior purpose, such as being placed in removal proceedings, without regard to the merits of the application itself. *Cf. Matter of Jaso and Ayala*, 27 I&N Dec. 557, 558 (BIA 2019) (affirming the dismissal of immigration proceedings where a respondent filed an asylum application solely for the purpose of being placed in immigration proceedings to seek some other form of relief, recognizing that “it is an abuse of the asylum process to file a meritless asylum application with the USCIS for the sole purpose of seeking cancellation of removal in the Immigration Court”);²² Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR at 447 (proposing to define an application as “frivolous” if, inter alia, it is “brought for an improper purpose” in order to discourage applicants from making false asylum claims).²³

Further, section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A), requires that aliens receive notice of the consequences of knowingly filing a frivolous application. Under the proposed regulation, an immigration judge would not need to provide an additional opportunity

²² Although the Board’s decision affirmed an immigration judge’s authority to dismiss such a case upon motion by DHS, such abusive filings for an improper purpose also warrant sanctioning as frivolous if the proceedings go forward.

²³ A leading immigration advocacy group has also noted the risk of a frivolousness finding in situations in which an alien makes a false claim to asylum solely to obtain a Notice to Appear and be placed in removal proceedings in order to seek another form of relief. *See* American Immigration Lawyers Association, *Ethical Considerations Related to Affirmatively Filing an Application for Asylum for the Purpose of Applying for Cancellation of Removal and Adjustment of Status for a Nonpermanent Resident* at 4 (2016), <https://www.aila.org/practice/ethics/ethics-resources/2016-2019/submitting-an-affirmative-asylum-app-ethical-qs> (describing as a “classic instance” of asylum frivolousness a situation in which an alien willfully creates false facts for an asylum application in order to be placed in removal proceedings to apply for another type of relief).

to an alien to account for issues of frivolousness with the claim before determining that the application is frivolous, as long as the required notice was provided. The statute is clear on its face that the only procedural requirement for finding a frivolous asylum application to be knowingly made is the provision of notice under section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A). *See* INA 208(d)(6), 8 U.S.C. 1158(d)(6) (“If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter * * * .”); *see also* *Ndibu v. Lynch*, 823 F.3d 229, 235 (4th Cir. 2016) (describing the statute as “clear and unambiguous”). Furthermore, an alien is on notice at the time of filing the application that it may be deemed frivolous. *Niang*, 762 F.3d at 254–55 (“Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.”). Thus, an alien is already aware of the potential ramifications of filing a frivolous application. Moreover, an alien—who presumably knows whether his or her application is fraudulent or meritless—will naturally have an opportunity to account for any issues during the alien’s removal proceeding if the alien so chooses. Consequently, there is no legal or operational reason to require a second warning and a third or fourth opportunity to address problematic aspects of the claim that may warrant a sanction for frivolousness.

The Departments note that the BIA has previously explained that “it would be a good practice for an Immigration Judge who believes that an applicant may have submitted a frivolous asylum application to bring this concern to the attention of the applicant prior to the conclusion of proceedings.” *Matter of Y-L-*, 24 I&N Dec. at 159–60. In *Matter of Y-L-*, however, the BIA

interpreted the regulatory provision at 8 CFR 1208.20, which provides that an EOIR adjudicator may only make this finding if he “is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.” *Id.* at 159. There is no indication that the BIA’s decision was meant to elaborate on any statutory procedural requirements. *Cf. Matter of B-Y-*, 25 I&N Dec. at 242 (“When the required frivolousness warnings have been given to the respondent prior to the start of a merits hearing, the Immigration Judge is not required to afford additional warnings or seek further explanation in regard to inconsistencies that have become obvious to the respondent during the course of the hearing.”). The proposed regulation does not contain the 8 CFR 208.20 or 8 CFR 1208.20 provision because the Departments believe the current regulatory framework has not successfully achieved the Departments’ goal of preventing knowingly frivolous applications that delay the adjudication of other asylum applications that may merit relief. Moreover, an alien who files an asylum application already both knows whether the application is fraudulent or meritless and is aware of the potential ramifications of knowingly filing a frivolous application. The alien is therefore already on notice and has an opportunity to account for any issues with the claim without the immigration judge having to bring the issues to the alien’s attention. Thus, there is no reason to require multiple opportunities for an alien to disavow or explain a knowingly frivolous application, and the current requirement, in essence, creates a moral hazard that encourages aliens to pursue false asylum applications because no penalty can attach until the alien is caught and given an opportunity to retract the claim. *See Angov*, 788 F.3d at 901–02 (“[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. * * * [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. * * * Consequently, immigration fraud is

rampant.”). Accordingly, the proposed rule would overrule *Matter of Y-L-* to the extent that the two may conflict.²⁴

Finally, in order to ameliorate the consequences of knowingly filing a frivolous application in appropriate cases, the Departments propose a mechanism that would allow certain aliens to withdraw, with prejudice, their applications by disclaiming the applications; accepting an order of voluntary departure for a period of no more than 30 days; withdrawing, also with prejudice, all other applications for relief or protection; and waiving any rights to file an appeal, motion to reopen, and motion to reconsider. In such instances the aliens would not be subject to a frivolousness finding and could avoid the penalties associated with such a finding.²⁵ Finally, the proposed regulation does not change current regulatory language that makes clear that a frivolousness finding does not bar an alien from seeking statutory withholding of removal or protection under the CAT regulations.

2. **Pretermission of Legally Insufficient Applications**

Additionally, DOJ proposes to add a new paragraph (e) to 8 CFR 1208.13 to clarify that immigration judges may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations if the alien has not established a prima facie claim for relief or protection under the applicable laws and regulations. *See Matter of E-F-H-L-*, 27 I&N Dec. 226, 226 (A.G. 2018); *see also Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (“Of course, if an alien’s asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group * * * —an immigration judge or the

²⁴ The proposed rule would also overrule any other cases that rely on the same reasoning as *Matter of Y-L-*, to the extent that there is a conflict between the proposed rule and case law regarding frivolousness findings. *See, e.g., Matter of B-Y-*, 25 I&N Dec. at 241 (requiring explicit deliberateness/materiality findings).

²⁵ This safety-valve provision would modify *Matter of X-M-C-* by providing a limited exception to the general rule that an asylum application may still be deemed frivolous even if it is withdrawn.

Board need not examine the remaining elements of the asylum claim.”). Such a decision would be based on the Form I-589 application itself and any supporting evidence.

The BIA previously addressed the issue of adjudicating applications for asylum without testimony in *Matter of Fefe*. 20 I&N Dec. 116 (BIA 1989). In *Matter of Fefe*, the BIA stated “[a]t a minimum, we find that the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct.” *Id.* at 118. But the regulations at issue in *Matter of Fefe* are no longer in effect. The only other prior BIA decision to address the matter was subsequently vacated by the Attorney General, and no longer has any precedential effect. See *Matter of E-F-H-L-*, 26 I&N Dec. 319, 322 (BIA 2014), *vacated on other grounds by* 27 I&N Dec. 226 (A.G. 2018).

Current regulations require a hearing on an asylum application only “to resolve *factual* issues in dispute.” 8 CFR 1240.11(c)(3) (emphasis added). No existing regulation requires a hearing when an asylum application is legally deficient. To the contrary, current regulations expressly note that no further hearing is necessary once an immigration judge determines that an asylum application is subject to certain grounds for mandatory denial. *Id.*

Moreover, other immigration applications are subject to pretermission without a hearing when they are not legally sufficient, and there is no reason to treat asylum applications differently. See *Zhu v. Gonzales*, 218 F. App’x 21, 23 (2d Cir. 2007) (finding that pretermission of an asylum application due to a lack of a legal nexus to a protected ground was not a due process violation when the alien was given an opportunity to address the issue). Further, pretermission due to a failure to establish prima facie legal eligibility for asylum is akin to a decision by an immigration judge or the BIA denying a motion to reopen to apply for asylum on

the same basis, and both immigration judges and the BIA have routinely made such determinations for many years. *See INS v. Abudu*, 485 U.S. 94, 104 (1988) (holding that the BIA may deny a motion to reopen to file an asylum application if the alien has not made a prima facie case for that relief).

In short, neither the INA nor current regulations require holding a full merits hearing on purely legal issues, such as prima facie legal eligibility for relief.²⁶ Further, allowing the pretermission of legally deficient asylum applications is consistent with current practice, applicable law, and due process. As explained below, an immigration judge would only be able to pretermit an asylum application after first allowing the alien an opportunity to respond. The alien would be able to address any inconsistencies or legal weaknesses in the asylum application in the response to the judge's notice of possible pretermission.

Under the proposed regulation, an immigration judge may pretermit an asylum application in two circumstances: (1) following an oral or written motion by DHS, and (2) sua sponte upon the immigration judge's own authority. Provided the alien has had an opportunity to respond, and the immigration judge considers any such response, a hearing would not be required for the immigration judge to make a decision to pretermit and deny the application. In the case of the immigration judge's exercise of his or her own authority, parties would have at least ten days' notice before the immigration judge would enter such an order. A similar timeframe would apply if DHS moves to pretermit, under current practice. *See* EOIR,

²⁶ The Departments are not aware of anything in IIRIRA or related legislative history that would conflict with an immigration judge's ability to pretermit an asylum application that does not demonstrate prima facie eligibility for relief. For example, the Departments do not believe that requiring a sufficient level of detail to determine whether or not an alien has a prima facie case for asylum, statutory withholding of removal, or protection under the CAT regulations would necessarily require a voluminous application. *See* H.R. Rep. No. 104-469, part 1, at 175-76 (1996). The point instead is enough information to determine the basis of the alien's claim for relief and if such a claim could be sufficient to demonstrate eligibility.

Immigration Court Practice Manual at D-1 (Aug. 2, 2018),

<https://www.justice.gov/eoir/page/file/1084851/download> (last visited May 20, 2020).

C. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal

1. Membership in a Particular Social Group

To establish eligibility for asylum under the INA, as amended by the Refugee Act of 1980, or statutory withholding of removal, the applicant must demonstrate, among other things, that she or he was persecuted, or has a well-founded fear of future persecution, on account of a protected ground: “race, religion, nationality, membership in a particular social group, or political opinion.” *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42); *see also* INA 208(b)(1)(A) and 241(b)(3)(A), 8 U.S.C. 1158(b)(1)(A) and 1231(b)(3)(A). Congress, however, has not defined the phrase “membership in a particular social group.” Nor is the term defined in the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol. Further, the term lacks the benefit of clear legislative intent. *See Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (Alito, J.) (“Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase ‘particular social group.’”); *cf. Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985) (“Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol”), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

When Congress passed the Refugee Act of 1980, further implementing U.S. obligations under the Refugee Protocol, it included “membership in a particular social group” in its

definition of “refugee” at section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42). Just a few years later, the BIA established that a particular social group is “a group of persons all of whom share a common, immutable characteristic,” and that the characteristic “either is beyond the power of an individual to change or that it is so fundamental to his identity or conscience that it ought not be required to be changed.” *Matter of Acosta*, 19 I&N Dec. at 233–34.

Although the Board did not significantly refine the formulation further until years later, *see, e.g., Matter of C-A-*, 23 I&N Dec. 951, 956, 959–60 (BIA 2006), it routinely issued decisions delineating which groups did and did not qualify as particular social groups in the context of the relevant societies for purposes of asylum protection, *see, e.g., Matter of H-*, 21 I&N Dec. 337, 342–43 (BIA 1996) (membership in a Somali subclan may constitute membership in a particular social group); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (BIA 1990) (designated for publication by the Attorney General in 1994) (homosexuals in Cuba may constitute a particular social group).²⁷ Starting in the late 2000s, the BIA began to build on the *Acosta* definition in a series of cases, and subsequently settled on a three-part test for a particular social group, holding that the group must be “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Matter of M-E-V-G-*, 26 I&N Dec. at 237; *see also Matter of W-G-R-*, 26 I&N Dec. at 212–18.

Immutability entails a common characteristic: a trait “that the members of the group either cannot change, or should not be required to change because it is fundamental to their

²⁷ Federal courts have raised questions about whether the Board or the Attorney General can recognize or reject particular social groups in this manner, *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014), and a recent federal district court decision has more clearly called into question the validity of this approach of announcing general rules of particular social group definitions. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (finding that general rules of particular social group definitions, at least as applied to credible fear claims, run “contrary to the individualized analysis required by the INA”), *appeal docketed*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019).

individual identities or consciences.” *Matter of Acosta* 19 I&N Dec. at 233. Particularity requires that the group “must be defined by characteristics that provide a clear benchmark for determining who falls within the group” and that “the terms used to describe the group have commonly accepted definitions in the society of which the group is a part.” *Matter of M-E-V-G-*, 26 I&N Dec. at 239. Further, the group must not be “amorphous, overbroad, diffuse, or subjective.” *Id.* To be considered “socially distinct,” the group must be a meaningfully discrete group as the relevant society perceives it. The term is not dependent on literal or “ocular” visibility. *Id.* at 238, 240–41.

The definition of “particular social group” has been the subject of considerable litigation and is a product of evolving case law, making it difficult for EOIR’s immigration judges and Board members, as well as DHS asylum officers, to uniformly apply the framework. *See Matter of A-B-*, 27 I&N Dec. at 331 (“Although the Board has articulated a consistent understanding of the term ‘particular social group,’ not all of its opinions have properly applied that framework.”); *see also, e.g., Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013) (“We have recognized that the phrase ‘particular social group’ is ambiguous.” (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc))); *Fatin*, 12 F.3d at 1238 (“Both courts and commentators have struggled to define ‘particular social group.’ Read in its broadest literal sense, the phrase is almost completely open-ended.”); *see also Velasquez v. Sessions*, 866 F.3d 188, 198 (4th Cir. 2017) (Wilkinson, J. concurring) (noting that the legal “analysis of ‘particular social group’ in the asylum statute is at risk of lacking rigor,” that Congress did not intend “‘membership in a particular social group’ to be some omnibus catch-all,” and that “judicial interpretations of th[e] statute may outstrip anything Congress intended”). Accordingly, this regulation would provide clear parameters for evaluating cognizable “particular social groups.”

The proposed rule would codify the longstanding requirements, as discussed above, that a particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct in the society in question. In addition, the particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm.²⁸ *See Matter of A-B-*, 27 I&N Dec. at 334 (“To be cognizable, a particular social group must ‘exist independently’ of the harm asserted in an application for asylum or statutory withholding of removal.”); *see generally Matter of M-E-V-G-*, 26 I&N Dec. at 243 (“The act of persecution by the government may be the catalyst that causes the society to distinguish [a collection of individuals] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.”).

The proposed rule would further build on the BIA’s standards and provide clearer guidance to adjudicators regarding whether an alleged group exists and, if so, whether it is cognizable as a particular social group in order to ensure the consistent consideration of asylum and statutory withholding claims. For example, the proposed rule would outline several nonexhaustive bases that would generally be insufficient to establish a particular social group. Without more, the Secretary of Homeland Security and the Attorney General, in general, would

²⁸ The Departments recognize the existence of confusion over this standard because the independent existence of a particular social group is not precisely the same concept as noting the group cannot be defined *exclusively* by the alleged harm. Thus, the proposed rule clarifies that a valid particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm. Otherwise, “[i]f a group is defined by the persecution of its members, the definition of the group moots the need to establish actual persecution” *Matter of A-B-*, 27 I&N Dec. at 335. The “independent existence” formulation has been accepted by many courts. *See, e.g., Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018) (“A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began.”); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (“We agree that under the statute a ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.”). For courts that have rejected this “independent existence” requirement, *see, e.g., Cece v. Holder*, 733 F.3d 662, 671–72 (7th Cir. 2013) (en banc), both subsequent decisions recognizing the requirement, *see, e.g., Matter of A-B-* and *Matter of M-E-V-G-*, *supra*, and the Departments’ proposed rule codifying it would warrant re-evaluation under well-established principles. *See Brand X*, 545 U.S. at 982.

not favorably adjudicate claims of aliens who claim membership in a purported particular social group consisting of or defined, in substance, by the following circumstances:

- 1) past or present criminal activity or associations, *Matter of W-G-R-*, 26 I&N Dec. at 222–23; *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013); *Gonzalez v. U.S. Att’y Gen.*, 820 F.3d 399, 405 (11th Cir. 2016);
- 2) past or present terrorist activity or association;²⁹
- 3) past or present persecutory activity or association;
- 4) presence in a country with generalized violence or a high crime rate, *Matter of A-B-*, 27 I&N Dec. at 320;
- 5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups, *Matter of S-E-G-*, 24 I&N Dec. 579, 585–86 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591, 594–95 (BIA 2008);
- 6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence, *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 75 (BIA 2007);
- 7) interpersonal disputes of which governmental authorities were unaware or uninvolved, *Matter of Pierre*, 15 I&N Dec. 461, 462–63 (BIA 1975); *see also Gonzalez-Posadas v. Att’y Gen. of U.S.*, 781 F.3d 677, 685 (3d Cir. 2015);

²⁹ Just as past criminal associations cannot establish a particular social group, neither past association with terrorists or past association with persecutors warrants recognition as a particular social group. To do so would reward membership in organizations that cause harm to society and create a perverse incentive to engage in reprehensible or illicit behavior as a means of avoiding removal. *Cf. Cantarero*, 734 F.3d at 86.

- 8) private criminal acts of which governmental authorities were unaware or uninvolved, *Matter of A-B-*, 27 I&N Dec. at 343–44; *see also Gonzales-Veliz v. Barr*, 938 F.3d 219, 230–31 (5th Cir. 2019);
- 9) status as an alien returning from the United States, *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010) (“We conclude that Petitioners’ proposed social group, ‘returning Mexicans from the United States,’ * * * is too broad to qualify as a cognizable social group.”); *Sam v. Holder*, 752 F.3d 97, 100 (1st Cir. 2014) (Guatemalans returning after a lengthy residence in the United States is not a cognizable particular social group).

This list is nonexhaustive, and the substance of the alleged particular social group, rather than the specific form of its delineation, will be considered by adjudicators in determining whether the group falls within one of the categories on the list. Without additional evidence, these circumstances are generally insufficient to demonstrate a particular social group that is cognizable because it is immutable, socially distinct, and particular, that is cognizable because the group does not exist independently of the harm asserted, or that is cognizable because the group is defined exclusively by the alleged harm. At the same time, the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination. In addition to resulting in more uniform application, providing clarity to this issue will reduce the amount of time the adjudicators must spend evaluating such claims.

The proposed regulation also specifies procedural requirements specific to asylum and statutory withholding claims premised on a particular social group. While in proceedings before an immigration judge, the alien must first define the proposed particular social group as part of

the asylum application or otherwise in the record. If the alien fails to do so while before an immigration judge, the alien will waive any claim based on a particular social group formulation that was not advanced. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190–91 (BIA 2018). Further, to encourage the efficient litigation of all claims in front of the immigration court at the same time—and to avoid gamesmanship and piecemeal analyses of claims in separate proceedings when all claims could have been brought at once—the alien will also waive the ability to file any motion to reopen or reconsider an asylum application related to the alien’s membership in a particular social group that could have been brought at the prior hearing, including based on allegations related to the strategic choices made by an alien’s counsel in defining the alleged particular social group. This limitation is consistent with current requirements for motions to reopen that preclude the raising of claims that could have been brought in a prior proceeding. *See* 8 CFR 1003.23(b)(3) (“A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien’s right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.”). These regulations will enable the immigration judge to adjudicate the alien’s particular claim for relief or protection timely and efficiently, including deciding whether or not pretermission of the alien’s application may be appropriate.

2. Political Opinion

The definition of “political opinion” has also been the subject of considerable litigation and is a product of evolving case law, making it difficult for EOIR’s immigration judges and Board members, as well as DHS asylum officers, to uniformly apply the framework. *Compare,*

e.g., Hernandez-Chacon v. Barr, 948 F.3d 94, 102–03 (2d Cir. 2020) (refusal to submit to the violent advances of gang members may be akin to a political opinion taking a stance against a culture of male-domination), *with Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005) (disapproval of a drug cartel is not a political opinion—“Indeed, to credit such disapproval as grounds for asylum would enlarge the category of political opinions to include almost any quarrel with the activities of almost any organization. Not only would the proliferation of asylum grants under this expansive reading interfere with the other branches’ primacy in foreign relations, it would also strain the language of § 1101(a)(42)(A). The statute requires persecution to be on a discrete basis and to fall within one of the enumerated categories.” (citations omitted)).

BIA case law makes clear that a political opinion involves a cause against a state or a political entity, rather than against a culture. *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996) (“Here we must examine the record for direct or circumstantial evidence from which it is reasonable to believe that those who harmed the applicant were in part motivated by an assumption that his political views were antithetical to those of the *government*.” (emphasis added)). For purposes of interpreting the Refugee Convention and subsequent Protocol, the United Nations High Commissioner for Refugees (“UNHCR”) also analyzes “political opinion” in terms of holding an opinion different from the Government or not tolerated by the relevant governmental authorities. *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, ch. II(B)(3)(f), ¶¶ 80–82 (Feb. 2019) (discussing political opinion refugee claims in terms of opinions not tolerated by governmental the authorities or ruling powers).

Nevertheless, to avoid further strain on the INA's definition of refugee, INA 1101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), *see Saldarriaga*, 402 F.3d at 467, to provide additional clarity for adjudicators, and in recognition of both statutory requirements and the general understanding that a political opinion is intended to advance or further a discrete cause related to political control of a state, *id.* at 466–67, the Departments propose to define political opinion as one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. Moreover, in recognition of that definition, the Secretary or Attorney General, in general, will not favorably adjudicate claims of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior³⁰ in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. Finally, consistent with INA 101(a)(42), 8 U.S.C. 1101(a)(42), a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal,

³⁰ Expressive behavior includes public behavior commonly associated with political activism, such as attending rallies, organizing collective actions such as strikes or demonstrations, speaking at public meetings, printing or distributing political materials, putting up political signs, or similar activities in which an individual's political views are a salient feature of the behavior and communicated to others at the time the behavior occurs. Expressive behavior is not generally thought to encompass acts of personal civic responsibility such as voting, reporting a crime, or assisting law enforcement in an investigation, and those activities, by themselves, would not support a claim based on an alleged fear of harm due to a political opinion.

or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

3. Persecution

For purposes of eligibility for asylum and withholding of removal, persecution is defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I&N Dec. at 222; *see also Fatin*, 12 F.3d at 1240 (“Thus, we interpret *Acosta* as recognizing that the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.”). It encompasses two aspects: “harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome * * * [and] harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.” *Matter of Acosta*, 19 I&N Dec. at 222. Put differently, persecution requires an intent to target a belief, characteristic or group, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government is unable or unwilling to control. *Matter of A-B-*, 27 I&N Dec. at 337. For purposes of evaluating the severity of the level of harm, persecution connotes an extreme level of harm and does not encompass all possible forms of mistreatment. *See Shi v. U.S. Att’y Gen.*, 707 F.3d 1231, 1235 (11th Cir. 2013) (explaining that persecution is “an extreme concept that does not include every sort of treatment [that] our society regards as offensive” (quotation marks and citations omitted)); *Gormley v. Ashcroft*, 364 F.3d 1172, 1176 (9th Cir. 2004) (same).

It is thus well-established that not all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional constitutes persecution under the INA.³¹ Further, intermittent harassment, including brief detentions, repeated threats with no effort to carry out the threats, or non-severe economic harm or property damage, do not typically constitute persecution. *See, e.g., de Zea v. Holder*, 761 F.3d 75, 80 (1st Cir. 2014) (persecution requires more than “unpleasantness, harassment, and even basic suffering”); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160 (9th Cir. 2002) (noting that “unfulfilled threats alone generally do not constitute past persecution”); *Djonda v. U.S. Att’y Gen.*, 514 F.3d 1168, 1174 (11th Cir. 2008) (threats and a minor beating do not constitute past persecution); *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1353 (11th Cir. 2009) (“Minor physical abuse and brief detentions do not amount to persecution.”); *Matter of T-Z-*, 24 I&N Dec. 163, 170 (BIA 2007) (explaining that economic harm must be “severe” to qualify as persecution).

Absent credible evidence that Government laws or policies have been or would be applied to an applicant personally, infrequent application of those laws and policies cannot constitute a well-founded fear of persecution. In other words, the mere existence of potentially persecutory laws or policies is not enough to establish a well-founded fear of persecution. Rather, there must be evidence these laws or policies were widespread and systemic, or evidence that persecutory laws or policies were, or would be, applied to an applicant personally. *Cf. Wakkary v. Holder*, 558 F.3d 1049, 1061 (9th Cir. 2009) (an applicant is not required to establish that his or her government would personally persecute the alien upon return if he or she can

³¹ “Persecution * * * does not include discrimination.” *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (*en banc*) (internal quotation marks and authority omitted); *see also Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003) (discrimination against stateless Palestinians in Saudi Arabia did not amount to persecution). Nor does harassment constitute persecution. *See, e.g., Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009) (alleged incidents constituted harassment, not persecution); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000) (distinguishing persecution from harassment or annoyance); *Matter of V-F-D-*, 23 I&N Dec. 859, 863863 (BIA 2006) (determining harassment and discrimination based on religion did not constitute persecution).

establish a pattern or practice of persecution against a protected group to which they belong. However, the governmental conduct must be “systematic” and “sufficiently widespread” and not merely infrequent).

Given the wide range of cases interpreting “persecution” for the purposes of the asylum laws, the Departments propose adding a new paragraph to 8 CFR 208.1 and 1208.1 to define persecution and to better clarify what does and does not constitute persecution. It would provide that persecution is an extreme concept of a severe level of harm. Under the proposed amendment, persecution would not include, for example: (1) every instance of harm that arises generally out of civil, criminal, or military strife in a country, *see, e.g., Matter of Sanchez and Escobar*, 19 I&N Dec. 276, 284–85 (BIA 1985); (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional, *see Fatin*, 12 F.3d at 1240; *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997); (3) intermittent harassment, including brief detentions; (4) repeated threats with no actions taken to carry out the threats;³² (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or

³² The Departments note that courts have been inconsistent in their treatment of threats as persecution. *See Lim v. INS*, 224 F.3d at 929, 936–37 (9th Cir. 2000) (explaining that threats are generally not past “persecution,” but are “within that category of conduct indicative of a danger of future persecution.”); *Li v. Attorney Gen. of U.S.*, 400 F.3d 157, 164–65 (3d Cir. 2005) (same). *See also Guan Shan Liao v. United States Dep’t of Justice*, 293 F.3d 61, 70 (2d Cir.2002); *Boykov v. INS*, 109 F.3d 413, 416–17 (7th Cir.1997); *Ang v. Gonzales*, 430 F.3d 50, 56 (1st Cir. 2005) (“[H]ollow threats, * * * without more, certainly do not compel a finding of past persecution.”); *but see Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (“Persecution involves the infliction or threat of death, torture, or injury to one’s person or freedom on account of one of the enumerated grounds in the refugee definition.”); *Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) (“Contrary to the BIA’s reasoning, the threat of death alone constitutes persecution, and [an applicant] [is] not required to [show] * * * physical or mental harm to establish past persecution.”); *id.* (holding Board erred in reasoning that several death threats did not constitute past persecution where applicant “suffered no major physical injuries and * * * did not claim to have suffered any long-term mental harm or problems”); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (“[W]e have expressly held that the threat of death qualifies as persecution.” (internal quotation marks and citation omitted)). The Departments’ proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X*, 545 U.S. at 982.

would be applied to an applicant personally. The Departments believe that these changes better align the relevant regulations with the high standard Congress intended for the term “persecution.” *See Fatin*, 12 F.3d at 1240 n.10.

4. Nexus

To establish eligibility for asylum under the INA, as amended by the Refugee Act of 1980 and the REAL ID Act of 2005, Pub. L. 109-13, sec. 101 (found at INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i)), the applicant must demonstrate, among other things, that at least one central reason for his or her persecution or well-founded fear of persecution was on account of a protected ground: race, religion, nationality, membership in a particular social group, or political opinion. *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42); INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). The requirement that the fear be on account of one of the five grounds is commonly called the “nexus requirement.”

The REAL ID Act of 2005 refined the nexus requirement by requiring that one of the five protected grounds “was or will be at least one central reason for persecuting the applicant.” “Reasons incidental, tangential, or subordinate to the persecutor's motivation will not suffice.” *Matter of A-B-*, 27 I&N Dec. at 338. As with the definitions of particular social group and persecution, the contours of the nexus requirement have further been shaped through case law rather than rulemaking, making it difficult for EOIR’s immigration judges and Board members, as well as DHS asylum officers, to uniformly apply it.

Accordingly, the proposed rule would provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five protected grounds. This proposal would further the expeditious consideration of asylum and statutory withholding claims. For example, the proposed rule would outline the following eight nonexhaustive situations, each

of which is rooted in case law, in which the Secretary of Homeland Security and the Attorney General, in general, will not favorably adjudicate asylum or statutory withholding of removal claims based on persecution:

(1) personal animus or retribution, *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008) (“Asylum is not available to an alien who fears retribution solely over personal matters.”);

(2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue, *Matter of A-B-*, 27 I&N Dec. at 339 (“the record does not reflect that [the applicant’s] husband bore any particular animosity toward women who were intimate with abusive partners, women who had previously suffered abuse, or women who happened to have been born in, or were actually living in, Guatemala” and “[w]hen the alleged persecutor is not even aware of the group’s existence, it becomes harder to understand how the persecutor may have been motivated by the victim’s ‘membership’ in the group to inflict the harm on the victim.”) (quoting *Matter of R-A-*, 22 I&N Dec. 906, 919–21 (BIA 1999) (en banc));

(3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state, *Saldarriaga*, 402 F.3d at 468 (“For the inscrutability of the political opinion he claims implies that any persecution he faces is due to the fact of his cooperation with the government, rather than the content of any opinion motivating that cooperation * * * . But when, as here, the applicant has not taken sides in such manner—much less under duress—and the conflict, though ubiquitous, is not aimed at controlling the

organs of state, an applicant cannot merely describe his involvement with one side or the other to establish a political opinion * * * .”);

(4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations, *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (“[T]he mere existence of a generalized ‘political’ motive underlying the guerrillas’ forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that [the respondent] fears persecution *on account of* political opinion, as § 101(a)(42) requires.” (emphasis in original));

(5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence, *Aldana-Ramos v. Holder*, 757 F.3d 9, 18 (1st Cir. 2014) (“criminal targeting based on wealth does not qualify as persecution ‘on account of’ membership in a particular group”); or

(6) criminal activity, *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010) (“An alien’s desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground * * * .”);

(7) perceived, past or present, gang affiliation, *Matter of E-A-G-*, 24 I. & N. Dec. 591, 596 (BIA 2008) (“[In *Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007)] the Ninth Circuit held that membership in a gang would not constitute membership in a particular social group. We agree.” Furthermore, “because we agree that membership in a criminal gang cannot constitute a particular social group, the respondent cannot establish particular social group status based on the incorrect perception by others that he is such a gang member.”); or

(8) gender, *Niang v. Gonzales*, 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (“There may be understandable concern in using gender as a group-defining characteristic. One may be

reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there * * * .”)

Without additional evidence, these circumstances will generally be insufficient to demonstrate persecution on account of a protected ground. At the same time, the regulation does not foreclose that, at least in rare circumstances, such facts could be the basis for finding nexus, given the fact-specific nature of this determination. In addition to resulting in more uniform application of the law, providing clarity to this issue will reduce the amount of time the adjudicators must spend evaluating such claims.

Finally, the Departments propose to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim. *See Matter of A-B-*, 27 I&N Dec. at 336 n. 9 (“On this point, I note that conclusory assertions of countrywide negative cultural stereotypes, such as *A-R-C-G-*'s broad charge that Guatemala has a ‘culture of machismo and family violence’ based on an unsourced partial quotation from a news article eight years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.”). Accordingly, the proposed rule would bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes were offered in support of an alien's claim to show that a persecutor conformed to a cultural stereotype.

5. Internal Relocation

Under current regulations, an applicant for asylum or statutory withholding of removal who could avoid persecution by internally relocating to another part of his or her country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and

who can reasonably be expected to do so, may not be granted these forms of protection.³³ 8 CFR 208.13(b)(1)(i)(B), (2)(ii), 1208.13(b)(1)(i)(B), (2)(ii) (asylum); 8 CFR 208.16(b)(1)(i)(B), (2), 1208.16(b)(1)(i)(B), (2) (statutory withholding). The regulations further prescribe a nonexhaustive list of factors for adjudicators to consider in making internal relocation determinations and delineate burdens of proof in various related situations. 8 CFR 208.13(b)(1)(ii), (3), 1208.13(b)(1)(ii), (3); 8 CFR 208.16(b)(1)(ii), (3), 1208.16(b)(i)(ii), (3).

The Departments have determined that the current regulations regarding internal relocation inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate. For instance, the utility of the catch-all list of factors in 8 CFR 208.13(b)(3) and 1208.13(b)(3) is undermined by its unhelpful concluding caveats that the factors “may, or may not” be relevant to an internal relocation determination and that the factors “are not necessarily determinative of whether it would be reasonable for the applicant to relocate.” Such caveats provide little practical guidance for adjudicators considering issues of internal relocation raised by asylum claims. Moreover, some factors—e.g., administrative, economic, or judicial infrastructure—do not have a clear relevance in assessing the reasonableness of internal relocation in many cases, while others insufficiently appreciate as a general matter that asylum applicants have often already relocated hundreds or thousands of miles to the United States regardless of such factors. Accordingly, the Departments propose a more streamlined

³³ In limited instances, asylum can be granted without the need to establish a well-founded fear of persecution. An alien who has suffered past persecution but does not warrant being granted asylum due either to a fundamental change in circumstances such that the alien no longer has a well-founded fear of persecution or the alien’s reasonable ability to internally relocate to avoid future persecution may nevertheless be granted asylum in the discretion of the decisionmaker if the alien is not barred from asylum pursuant to 8 CFR 208.13(c) and 1208.13(c) and if the applicant has demonstrated compelling reasons for being unwilling or unable to return arising out of the severity of the past persecution or the applicant has established a reasonable possibility of other serious harm upon removal. 8 CFR 208.13(b)(1)(iii), 1208.13(b)(1)(iii). This regulatory exception is frequently labeled “humanitarian asylum.”

presentation in the regulations of the most relevant factors for adjudicators to consider in determining whether internal relocation is a reasonable option.

The current regulations also outline different scenarios for assessing who bears the burden of proof in establishing or refuting the reasonableness of internal relocation. In situations in which the persecutor is the government or a government-sponsored actor, it is presumed that relocation would not be reasonable (as the persecution is presumed to be nationwide). In situations in which a private actor is the persecutor, however, there is no apparent reason why the same presumption should apply, as a private individual or organization would not ordinarily be expected to have influence everywhere in a country. Moreover, as an asylum applicant generally bears the burden of proving eligibility for asylum, it is even more anomalous to shift that burden in situations in which there is no rational presumption that the threat of persecution would occur nationwide. Consequently, the Departments have determined that the regulatory burdens of proof regarding internal relocation should be assigned more in line with these baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions. Thus, the Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be. This presumption would apply regardless of whether an applicant has established past persecution. For ease of administering these provisions, the Departments would also provide examples of the types of individuals or entities who are private actors.

6. Factors for Consideration in Discretionary Determinations

Asylum is a discretionary relief, and an alien who demonstrates that he or she qualifies as a refugee must also demonstrate that he or she deserves asylum as a matter of discretion. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures [they establish] * * * if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee * * * .” (emphasis added)); *Stevic*, 467 U.S. at 423 n.18 (“Meeting the definition of ‘refugee,’ however, does not entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a).”). Eligibility for asylum is not an automatic entitlement. Rather, after demonstrating statutory and regulatory eligibility, aliens must further meet their burden of showing that the Attorney General or the Secretary of Homeland Security should exercise his discretion to grant asylum. *See Matter of A-B-*, 27 I&N Dec. at 345 n.12; *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

The BIA in *Matter of Pula* examined the sorts of factors immigration judges should consider when determining whether asylum applicants merit the relief of asylum as a matter of discretion. The BIA ultimately directed that that discretionary determination should be based on the totality of the circumstances and provided a lengthy list of possibly relevant factors for consideration, such as, whether the alien passed through any other countries en route to the United States, the living conditions and level of safety in the countries through which the alien passed, and general humanitarian considerations. *Matter of Pula*, 19 I&N Dec. at 473–75.

To date, the Secretary and Attorney General have not provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum

as a matter of discretion. Nevertheless, the Departments have issued regulations on discretionary considerations for other forms of relief, e.g., 8 CFR 212.7(d), 1212.7(d) (discretionary decisions to consent to visa applications, admission to the United States, or adjustment of status, for certain criminal aliens), and the Departments believe it is similarly appropriate to establish criteria for considering discretionary asylum claims. This proposed regulation would build on the BIA's guidance regarding discretionary asylum determinations and codify specific factors in the regulations for the first time.

Accordingly, the Departments propose three specific but nonexhaustive factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion:

(1) an alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country;

(2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and

(3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

The adjudicator must consider all three factors, if relevant, during every asylum adjudication. If one or more of these factors applies to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and

circumstances to determine whether the applicant merits asylum as a matter of discretion. The Departments believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.

First, an alien’s unlawful entry, or attempted unlawful entry, has been a longstanding factor that adjudicators may consider as a matter of discretion. *Matter of Pula*, 19 I&N Dec. at 473 (“[A]n alien’s manner of entry or attempted entry is a proper and relevant discretionary factor to consider” as “one of a number of factors * * * balanced in exercising discretion”). In addition to rendering an alien inadmissible in general, it is a federal criminal offense to enter or attempt to enter the United States other than at a time and place designated by immigration officers. *See* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A); INA 275(a)(1), 8 U.S.C. 1325(a)(1). The Departments remain concerned by the significant strain on their resources required to apprehend, process, and adjudicate the cases of the growing number of aliens who illegally enter the United States putatively in order to seek asylum. *See, e.g.*, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934; *see also United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78 (1957) (observing that where the statute “does not state what standards are to guide the Attorney General in the exercise of his discretion” in adjudicating a discretionary benefit request, “[s]urely it is not unreasonable for him to take cognizance of present-day conditions” and relevant congressional enactments).³⁴

³⁴ The Departments note that this adverse factor does not conflict with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1), which provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival * * *), irrespective of such alien’s status, may apply for asylum.” The consideration of the alien’s unlawful manner of entry as a discretionary negative factor does not limit the alien’s right or ability to apply for asylum. Instead, an alien who has unlawfully entered the United States is at risk of the same discretionary denial of asylum as any other applicant. The related issue of whether a regulatory bar

Second, as previously explained, the Departments believe that the failure to seek asylum or refugee protection in at least one country through which an alien transited while en route to the United States may reflect an increased likelihood that the alien is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection. *See Asylum Eligibility and Procedural Modifications*, 84 FR at 33831. As a result, the Departments would consider the failure to seek protection in such a third country to be a significant adverse factor. The applicant may, however, present evidence regarding the basis for the failure to seek such relief for the adjudicator’s consideration as outlined in 8 CFR 208.13(c)(4), 1208.13(c)(4).

Third, an alien who uses fraudulent documents to effect entry to the United States is inadmissible, INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C), and the Departments are concerned that the use of fraudulent documents makes the proper enforcement of the immigration laws difficult and requires an immense amount of resources. The Departments accordingly propose to consider such use of fraudulent documents a significant adverse discretionary factor for the purposes of asylum unless an applicant arrived in the U.S. directly from the applicant’s home country.³⁵

to asylum eligibility based on manner of entry is “consistent” with section 208(a)(1)’s “irrespective” clause is currently being litigated. *See supra* note 14.

³⁵ For aliens from countries contiguous to the United States or who arrive directly (such as by air) from their home country—i.e., countries in which the use of fraudulent documents to escape persecution may be coterminous with the use of such documents to enter the United States—this factor does not impact case law that the use of fraudulent documents to escape the country of persecution should not itself be a significant adverse factor. *See Lin v. Gonzales*, 445 F.3d 127, 133 (2d Cir. 2006) (noting a distinction “between the presentation of a fraudulent document in immigration court in support of an asylum application and the use of a fraudulent document to escape immediate danger or imminent persecution”); *Matter of Pula*, 19 I&N Dec. at 474 (noting a difference between “[t]he use of fraudulent documents to escape the country of persecution” and “entry under the assumed identity of a United States citizen, with a United States passport, which was fraudulently obtained”). For all other aliens, however, the use of fraudulent documents would be a significant adverse factor. To the extent that this provision may conflict with any prior holdings by the Board of Immigration Appeals, this rule would supersede such decisions if it is finalized as drafted.

Furthermore, the Departments propose nine adverse factors, the applicability of any of which would ordinarily result in the denial of asylum as a matter of discretion, similar to how discretion is considered for other applications. *See, e.g.*, 8 CFR 212.7(d), 1212.7(d) (waiver of certain grounds of inadmissibility). If the adjudicator determines that any of these nine circumstances apply during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien. *Cf. id.* These factors build on prior precedent from the Attorney General. *See Matter of Jean*, 23 I&N Dec. 373, 385 (A.G. 2002) (providing that aliens who have committed violent or dangerous offenses will not be granted asylum as a matter of discretion absent extraordinary circumstances or a showing of exceptional and extremely unusual hardship); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 670–71 (A.G. 2019) (noting that aliens with multiple driving-under-the-influence convictions would likely be denied cancellation of removal as a matter of discretion due to the seriousness and repeated nature of the offenses).

Each of the nine factors addresses issues that the adjudicators might otherwise spend significant time evaluating and adjudicating. First, this rule would require a decision-maker to consider whether an alien has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States. Second, this rule would make transit through more than one country prior to arrival in the United States a significant adverse factor. Both of these factors are supported by existing law surrounding firm resettlement and aliens who can be removed to a safe third country. *See* INA 208(a)(2)(A), (b)(2)(A)(vi), 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi); *see also Yang v. INS*, 79 F.3d

932, 935–39 (9th Cir. 1996) (upholding a discretionary firm resettlement bar, and rejecting the premise that such evaluation is arbitrary and capricious or that it prevents adjudicators from exercising discretion). Recognizing that individual circumstances of an alien’s presence in a third country or transit to the United States may not necessarily warrant adverse discretionary consideration in all instances, the proposed rule does acknowledge exceptions to these two considerations where an alien’s application for protection in the relevant third country has been denied, where the alien is a victim of a severe form of human trafficking as defined in 8 CFR 214.11, or where the alien was present in or transited through only countries that were, at the relevant time, not parties to the Refugee Convention, Refugee Protocol, or CAT.

Third, adjudicators should consider criminal convictions that remain valid for immigration purposes as significant adverse factors. A conviction remains valid for immigration purposes despite a reversal, vacatur, expungement, or modification of conviction or sentence if the alteration is not related to a procedural or substantive defect in the underlying criminal proceedings. *See Matter of Thomas & Thompson*, 27 I&N Dec. 674, 674–75 (A.G. 2019) (holding that state court orders unrelated to the merits of an underlying criminal proceeding have no effect on the validity of the conviction for immigration purposes); *see also Matter of Pickering*, 23 I&N Dec. 621, 624–25 (BIA 2003) (holding that a conviction that is vacated for reasons solely related to rehabilitation or immigration hardships is not eliminated for immigration purposes), *rev’d on other grounds, Pickering v. Gonzales*, 465 F.3d 263, 267–70 (6th Cir. 2006).³⁶ Circuit courts of appeals have consistently accepted this principle, deeming *Pickering* reasonable and consistent with congressional intent. *See, e.g., Saleh v. Gonzales*, 495

³⁶ The Departments published a joint rule on December 19, 2019, that, inter alia, would provide regulatory guidance regarding the immigration consequences of criminal convictions that have been vacated, expunged, or modified. *See Procedures for Asylum and Bars to Asylum Eligibility*, 84 FR 69640 (Dec. 19, 2019) (proposed amendments to 8 CFR 208.13 and 1208.13).

F.3d 17, 23–25 (2d Cir. 2007) (collecting cases). As the Attorney General has explained, giving effect to judicial decisions that modified sentences in some manner for the sole purpose of mitigating immigration consequences would frustrate Congress’s intent in setting forth those consequences for aliens convicted of certain crimes. *See Matter of Thomas & Thompson*, 27 I&N Dec. at 682 (explaining that by enacting the definition of “conviction” at section 101(a)(48) of the INA, 8 U.S.C. 1101(a)(48), “Congress made clear that immigration consequences should flow from the original determination of guilt. In addition, Congress ensured uniformity in the immigration laws by avoiding the need for immigration judges to examine the post-conviction procedures of each State”); *see also Saleh*, 495 F.3d at 25 (“When a conviction is amended nunc pro tunc solely to enable a defendant to avoid immigration consequences, in contrast to an amendment or vacatur on the merits, there is no reason to conclude that the alien is any less suitable for removal.”).

Fourth, unlawful presence of more than one year’s cumulative duration prior to filing an application for asylum would be considered a significant adverse factor, consistent with the unlawful presence bar, INA 212(a)(9)(B)(i)(II), 8 U.S.C. 1182(a)(9)(B)(i)(II), and the permanent bar under section 212(a)(9)(C) of the INA, 8 U.S.C. 1182(a)(9)(C). *See also Matter of Diaz & Lopez*, 25 I&N Dec. 188, 189 (BIA 2010).

Fifth, failure to file taxes or fulfill related obligations would be another adverse factor. Subject to some exceptions, aliens are generally required to file federal income tax returns, as either a resident or nonresident alien. 26 U.S.C. 6012, 7701(b); 26 CFR 1.6012-1(a)(1)(ii), (b).³⁷

³⁷ The Internal Revenue Service (“IRS”) uses two tests to determine whether an alien is considered a resident alien of the United States for tax purposes: the “green card” test and the “substantial presence” test. An alien meets the “green card” test if USCIS has issued the alien a registration card, Form I-551, designating the alien as a lawful permanent resident. IRS, *Alien Residency – Green Card Test*, <https://www.irs.gov/individuals/international-taxpayers/alien-residency-green-card-test> (last updated Feb. 20, 2020). An alien meets the “substantial presence”

This rule would hold all asylum applicants to the same standards as most individuals in the United States who are required to file federal, state, and local taxes, as individuals who are required to file taxes are subject to negative consequences should said filings and associated obligations not be met. *See, e.g.*, Md. Code, Tax-Gen. 10-804, 10-805(a) (2013) (subject to exclusion of certain types of income, a Maryland resident required to file a federal income tax return is also required to file a state income tax return); Ind. Code, 6-3-4-1 (2019) (persons whose income meets federal filing threshold are required to file a state return).

Sixth, this rule would consider as an adverse factor having had two or more prior asylum applications denied for any reason.

Seventh, the rule would also consider as an adverse factor having withdrawn with prejudice or abandoned an asylum application. This rule would thereby disfavor abusive prior or multiple applications. Asylum applications take a significant portion of processing time and already constitute half of the docket in immigration court. This rule would minimize abuse of the system—and allow for meritorious claims to be heard more efficiently—by disfavoring repeated applications when prior applications have been abandoned or withdrawn.

Eighth, DHS already may dismiss the case of an alien who fails to attend his or her asylum interview, without prior authorization or in the absence of exceptional circumstances.

INA 208(d)(5)(A)(v), 8 U.S.C. 1158(d)(5)(A)(v). Such an applicant may also “be otherwise sanctioned for such failure.” *Id.* The Departments’ consideration of an alien’s failure to attend

test if he or she has been physically present in the United States for 31 days of the current year *and* 183 days during the three-year period that includes the current year and the two years immediately prior, including all of the following: (1) all days an alien was present in the current year, (2) one-third of the days the alien was present in the first year before the current year, and (3) one-sixth of the days the alien was present in the second year before the current year. IRS, *Substantial Presence Test*, <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test> (last updated Jan. 15, 2020). There are certain exceptions to this rule. *Id.* Non-resident aliens who pass the “substantial presence” test are treated as resident aliens for tax purposes.

the asylum interview,³⁸ unless the alien demonstrates by a preponderance of the evidence the existence of exceptional circumstances or that the interview notice was not mailed to the last address provided by the alien or the alien's representative (and neither the alien nor the alien's representative received notice of the interview), as an adverse discretionary factor is a reasonable additional sanction under section 208(d)(5)(A)(v) of the INA, 8 U.S.C. 1158(d)(5)(A)(v). As with the failure to appear in immigration court, failure to appear for an asylum interview before DHS wastes government resources that could have been used to adjudicate other applications. *See DHS, Affirmative Asylum Application Statistics and Decisions Annual Report 3* (June 20, 2016) (reporting 2,439 cases that USCIS referred to immigration judges because asylum applicants failed to appear for interviews or withdrew their applications and were not in lawful immigration status during Fiscal Year 2015).

Ninth, aliens who are subject to a final order of removal may file a motion to reopen their proceedings before an immigration judge to seek asylum if there is a change in country conditions and the underlying evidence of changed conditions is material and was not available or could not have been discovered at the time of the prior hearing. INA 240(c)(7), 8 U.S.C. 1229a(c)(7). In such situations, adjudicators should consider as a significant adverse factor the failure to file such a motion within one year of the change in country conditions. *See* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i). The Departments believe that such a factor would appropriately incentivize aliens to exercise due diligence with regard to their cases, as is otherwise required for motions to reopen, and aid in the efficient processing of asylum applications before EOIR. *Cf.* INA 208(a)(2)(B), 8 USC

³⁸ On November 14, 2019, DHS proposed modifications to the asylum process, including changes to the provisions related to failing to appear for an asylum interview. *See* Asylum Application, Interview, and Employment Authorization for Applicants, 86 FR 62374 (Nov. 14, 2019). The Departments do not believe the proposals conflict, but welcome public comment.

1158(a)(2)(B); *Wang v. BIA*, 508 F.3d 710, 715–16 (2d Cir. 2007) (discussing the requirement of acting with due diligence in order to establish equitable tolling of the filing deadline for motions to reopen asylum proceedings premised upon an allegation of ineffective assistance of counsel).

The factors set forth in this rule do not affect the adjudicator’s ability to consider whether there exist extraordinary circumstances, such as those involving national security or foreign policy considerations, or whether the denial of asylum would result in an exceptional and extremely unusual hardship to the alien. *Cf. Matter of Jean*, 23 I&N Dec. at 385 (“I am highly disinclined to exercise my discretion—except, again, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of relief would result in exceptional and extremely unusual hardship—on behalf of dangerous or violent felons seeking asylum.”). This approach supersedes the Board’s previous approach in *Matter of Pula* that past persecution or a strong likelihood of future persecution “should generally outweigh all but the most egregious adverse factors.” 19 I&N Dec. at 474. Especially given that an applicant may still seek non-discretionary statutory withholding of removal and protection under the CAT regulations, the Departments believe that the inclusion of the proposed adverse discretionary factors in the rule will ensure that immigration judges and asylum officers properly consider, in all cases, whether every applicant merits a grant of asylum as a matter of discretion, even if the applicant has otherwise demonstrated asylum eligibility.

7. Firm Resettlement

By statute, an alien who “was firmly resettled in another country prior to arriving in the United States” is ineligible for asylum. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). This bar to asylum was first included in the asylum laws by IIRIRA in 1996, but Congress added it as

a prohibition to entry as a refugee from abroad in 1980. Refugee Act of 1980, sec. 201(b), 94 Stat. 103 (adding INA 207(c)(1), 8 U.S.C. 1157(c)(1)).³⁹ Before IIRIRA’s enactment, the Attorney General also included firm resettlement as a bar to asylum under section 208 of the INA, 8 U.S.C. 1158, by regulation. *See Aliens and Nationality; Refugee and Asylum Procedures*, 45 FR 37392, 37394 (June 2, 1980) (adding part 208 to chapter I of 8 CFR, including the instruction at 8 CFR 208.8(f)(1)(ii) that a request for asylum would be denied if the alien “has been firmly resettled in a foreign country”);⁴⁰ *see also Yang*, 79 F.3d at 935–39 (according *Chevron* deference to the inclusion of firm resettlement as a bar to asylum in the regulations).

DOJ first defined “firm resettlement” in the context of asylum applications in 1990. *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 FR 30674, 30683–84 (July 27, 1990) (adding 8 CFR 208.15 to part 208 of chapter 1 of 8 CFR). At the time, DOJ did not provide an explanation for the chosen definition, although it was similar to the existing definition of firm resettlement for refugees. *Id.* at 30678. Aside from technical edits, and minor updates to ensure gender neutrality and change references from “nation” to “country,” the definition of firm resettlement has remained the same for nearly 30 years. *See* 8 CFR 208.15, 1208.15.

³⁹ The firm resettlement concept has an even longer history in the immigration laws. *See Rosenberg v. Woo*, 402 U.S. 49, 54–55 (1971) (discussing the inclusion of firm resettlement considerations in the Displaced Persons Act of 1948 and Refugee Relief Act of 1953, and the subsequent history).

⁴⁰ DOJ also included a definition of “firm resettlement” in the context of refugee status determinations under section 207 of the INA, 8 U.S.C. 1157, in 1980, providing generally that a refugee is considered to be “firmly resettled” if he had been offered resident status, citizenship, or some other type of permanent resettlement by another nation and has travelled to and entered that nation as a consequence of his flight from persecution. A refugee will not be considered “firmly resettled,” however, if he establishes, to the satisfaction of the federal official reviewing the case, that the conditions of his residence in that nation have been so substantially and consciously restricted by the authorities of that nation that he has not in fact been resettled. *See Aliens and Nationality; Refugee and Asylum Procedures*, 45 FR at 37394. This definition continues to apply in substantially similar form to DHS determinations regarding the admission of refugees. 8 CFR 207.1(b). The Departments do not propose any changes to the definition or application of the firm resettlement bar for refugees in this rule.

Due to the increased availability of resettlement opportunities⁴¹ and the interest of those genuinely in fear of persecution in attaining safety as soon as possible, the Departments now propose to revise the definition of firm resettlement that applies to asylum adjudications at 8 CFR 208.15 and 1208.15. Specifically, the Departments propose to specify three circumstances under which an alien would be considered firmly resettled:

(1) the alien either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status, *cf. Matter of K-S-E-*, 27 I&N Dec. 818, 819 (BIA 2020) (“Permanent resettlement exists where there is an available offer that realistically permits an individual’s indefinite presence in the country.”); *Matter of A-G-G-*, 25 I&N Dec. 486, 502 (BIA 2011) (“The existence of a legal mechanism in the country by which an alien can obtain permanent residence *may* be sufficient to make a prima facie showing of an offer of firm resettlement * * * . Moreover, a determination of firm resettlement is not contingent on whether the alien applies for that status.” (citations and footnote omitted));

(2) the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

⁴¹ Forty-three countries have signed the Refugee Convention since 1990. *See* United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (last visited May 20, 2020).

(3) (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States.

These proposed changes would expand the firm resettlement bar to include forms of relief that were available to an alien in a country in which he or she resided before traveling to the United States, even if the alien did not affirmatively apply for or accept such relief. If an alien was legally “entitled to permanent refuge in another country” in which the alien resided, that entitlement may result in the alien being firmly resettled there, even if the alien “fail[ed] to take advantage of [that country’s] procedures for obtaining [such] relief.” *Matter of A-G-G-*, 25 I&N Dec. at 502 (quoting *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)). It follows *a fortiori*, then, that an alien to whom an offer of permanent legal status was actually made may be considered to have firmly resettled, *Matter of K-S-E-*, 27 I&N Dec. at 819–20, and that such an offer may not be “negated by the alien’s unwillingness or reluctance to satisfy the [reasonable] terms for acceptance,” *id.* at 821. Not only do these changes recognize that an alien fleeing persecution would ordinarily be expected to seek refuge at the first available opportunity in another country where they would not have a reasonable fear of persecution or torture, but they will also ensure that the asylum system is used by those in genuine need of immediate protection, not by those who have chosen the United States as a destination for other reasons and then rely on the asylum system to reach that destination. *See Matter of A-G-G-*, 25 I&N Dec. at 503 (clarifying that the purpose of the firm settlement bar is to “limit refugee protection to those with nowhere else to turn”).

The Departments further propose to specify that the firm resettlement bar applies “when the evidence of record indicates that the firm resettlement bar may apply,” and to specifically allow both DHS and the immigration judge to first raise the issue based on the record evidence. This proposal would make clear that the alien would continue to bear the burden to demonstrate that the firm resettlement bar does not apply, consistent with 8 CFR 1240.8(d). Finally, the Departments propose that the firm resettlement of a parent or parents with whom a child was residing at the time shall be imputed to the child. Although the Departments have had no prior settled policy necessarily imputing the firm resettlement of parents to a child, *Holder v. Martinez Gutierrez*, 566 U.S. 583, 596 n.4 (2012), the imputation proposed in this rule is consistent with both case law and recognition of the practical reality that a child generally cannot form a legal intent to remain in one place. *See, e.g., Matter of Ng*, 12 I&N Dec. 411 (Reg. Comm’r 1967) (firm resettlement of father is imputed to a child who resided with his resettled family); *Vang v. INS*, 146 F.3d 1114, 1116–17 (9th Cir. 1998) (“We follow the same principle in determining whether a minor has firmly resettled in another country, i.e., we look to whether the minor’s parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute the parents’ status to the minor.”).

To the extent any BIA decisions relied on prior regulatory language and remain inconsistent with the proposed new regulatory language, the proposed changes would expressly overrule those BIA decisions.

8. Rogue Officials

In order to demonstrate eligibility for withholding of removal or deferral of removal under the CAT regulations, an alien must demonstrate that it is more likely than not that he or

she will be tortured in the country of removal. *See* 8 CFR 1208.16(c)(2). Torture is defined as causing “severe pain or suffering, whether physical or mental,” and it must be intentionally inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” among other requirements. 8 CFR 1208.18(a)(1). The regulations do not provide further guidance for determining what sorts of officials constitute “public officials,” including whether an official such as a police officer is a public official for the purposes of the CAT regulations if he or she acts in violation of official policy or his or her official status—in other words, a “rogue” police official.

When faced with questions of such “rogue” officials, the federal courts have generally implied from the lack of further explanation regarding the definition of “public official” that no exception excluding “rogue” officials from the definition exists. The Ninth Circuit Court of Appeals recently provided a particularly detailed explanation of this point:

The statute and regulations do not establish a “rogue official” exception to CAT relief. The regulations say that torture, for purposes of relief, has to be “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The four policemen were “public officials,” even though they were local police and state or federal authorities might not similarly acquiesce. Since the officers were apparently off-duty when they tortured Barajas-Romero, they were evidently not acting “in an official capacity,” but the regulation does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts. The regulation uses the word “or” between the phrases “inflicted by * * * a public official” and “acting in an official capacity.” The word “or” can only mean that either one suffices, so the torture need not be both by a public official and also that the official is acting in his official capacity. An “and” construction would require that the conjunction be “and.” The record leaves no room for doubt that the four policemen were public officials who themselves inflicted the torture.

Barajas-Romero v. Lynch, 846 F.3d 351, 362–63 (9th Cir. 2017); *see also Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015) (“Nor is the issue, as the immigration judge opined, whether the police officers who tortured the petitioner ‘were rogue officers individually

compensated by Jose to engage in isolated incidents of retaliatory brutality, rather than evidence of a broader pattern of governmental acquiescence in torture.’ It is irrelevant whether the police were rogue (in the sense of not serving the interests of the Mexican government) or not.”). *But see Suarez-Valenzuela v. Holder*, 714 F.3d 241, 248 (4th Cir. 2013) (upholding the BIA’s finding that a rogue police officer who harmed the respondent “acted out of fear that the government would punish him and not with any form of government approval”); *Wang v. Ashcroft*, 320 F.3d 130, 144 (2d Cir. 2003) (“Moreover, although the BIA was bound to consider any past torture inflicted upon Wang by Chinese officials, 8 CFR 208.16(c)(3), Wang failed to establish that his alleged previous beating was anything more than a deviant practice carried out by one rogue military official.”).

The Departments propose revising 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) to clarify (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under “color of law”) and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law (i.e., a “rogue official”) does not constitute a “pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” even if such actions cause pain and suffering that could rise to the severity of torture. Nothing in CAT or the CAT regulations issued pursuant to the implementing legislation indicates that any violent action of someone who happens to be employed by a government entity always constitutes inflicting, instigating, consenting to, or acquiescing in severe harm or suffering by a public official even when that employee is off-duty or not acting in any official governmental capacity. Indeed, the U.S. ratification history of the CAT specifically approves of

a “color of law” analysis. *See, e.g.*, S. Exec. Rep. No. 101-30, at 14 (1990) (“Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted ‘under color of law.’”). Further, the Federal statute partially implementing CAT in the criminal law context uses a color of law descriptor as well. *See* 18 U.S.C. 2340(1) (“[T]orture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”). As the BIA has explained, “the key consideration in determining if a public official was acting under color of law is whether he was able to engage in torturous conduct because of his government position or if he could have done so without any connection to the government. Issues to consider in making this determination include whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information; whether the officer was on duty and in uniform at the time of his conduct; and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities.” *Matter of O-F-A-S*, 27 I&N Dec. 709, 718 (BIA 2019). This proposed amendment to 8 CFR 208.18 and 1208.18 clarifies that the requirement that the individual be acting in an official capacity applies to both a “public official,” such as a police officer, and an “other person,” such as an individual deputized to act on the government’s behalf.

The Departments also propose to clarify the definition of “acquiescence of a public official” at 8 CFR 208.18(a)(7) and 1208.18(a)(7). *See Scarlett v. Barr*, ___ F.3d ___, 2020 WL 2046544, *13–14 (2d Cir. April 28, 2020) (discussing the need for further agency guidance concerning certain aspects of the “acquiescence” standard). The current definition provides that

the “official acquiescence” standard “requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 CFR 208.18(a)(7), 1208.18(a)(7). The Departments propose to clarify that, as several courts of appeals and the BIA have recognized, “awareness”—as used in the CAT “acquiescence” definition—requires a finding of either actual knowledge or willful blindness. *See, e.g., Silva-Rengifo v. Att’y Gen. of U.S.*, 473 F.3d 58, 70 (3d Cir. 2007); *Matter of J-G-D-F-*, 27 I&N Dec. 82, 90 (BIA 2017); *see also* S. Exec. Rep. No. 101-30, at 9. The Departments further propose to clarify in this rule that, for purposes of the CAT regulations, “willful blindness” means that “the public official or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.” Proposed 8 CFR 208.18(a)(7), 1208.18(a)(7). This proposed definition is drawn from well-established legal principles. *See, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769–70 (2011); *United States v. Hansen*, 791 F.3d 863, 868 (8th Cir. 2015); *United States v. Heredia*, 483 F.3d 913, 918 n.4, 924 (9th Cir. 2007) (en banc); *Roye v. Att’y Gen. of U.S.*, 693 F.3d 333, 343 n.13 (3d Cir. 2012).

Additionally, the rule clarifies the second part of the two-part test for acquiescence set out in the Senate’s understanding in the CAT ratification documents. *See* 136 Cong. Rec. S17486-01, 1990 WL 168442 (Oct. 27, 1990). In the ratification process, the United States government was concerned that the definition of torture needed to be clear enough to give officials due process notice of what conduct was criminal. *See Convention Against Torture: Hearing Before the S. Foreign Relations Comm.*, S. Hrg. No. 101-718, 101st Cong., 2d

Sess. 14 (1990) (testimony of Mark Richard, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice). The two steps of the acquiescence requirement, corresponding to a mens rea and an actus reus requirement, were included in the list of understandings to clarify that “to be culpable under the [CAT] * * * the public official must have had prior awareness of [the activity constituting torture] and must have breached his legal responsibility to intervene to prevent the activity.” *Id.* The rule clarifies that acquiescence is not established by prior awareness of the activity alone, but requires an omission of an act that the official had a duty to do and was able to do. *Cf.* Model Penal Code sec. 2.01(1) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”). First, the official or other person in question must have been charged with preventing the activity as part of his or her duties. So, for instance, an official who is not charged with preventing crime or who is outside his or her jurisdiction would not have a legal responsibility to prevent activity constituting torture, even if that person was aware of the activity. *See, e.g., Ramirez-Peyro v. Holder*, 574 F.3d 893, 905 (8th Cir. 2009) (remanding for further analysis by the Board on whether police officers breached their legal duty to intervene when they declined to arrest themselves, their co-workers, and other individuals who assaulted the applicant). Second, such a person does not breach a legal duty to intervene if the person is unable to intervene, or if the person intervenes, but is nevertheless unable to prevent the activity. *See, e.g., Martinez Manzanares v. Barr*, 925 F.3d 222, 229 (5th Cir. 2019); *Zaldana Menijar v. Lynch*, 812 F.3d 491, 502 (6th Cir. 2015); *Garcia v. Holder*, 746 F.3d 869, 873–74 (8th Cir. 2014); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014); *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006); *Reyes-Sanchez v. U.S. Att’y Gen.*, 369 F.3d 1239, 1243 (11th Cir. 2004). This aspect of the rule is meant to supersede any judicial decisions

that could be read to hold that an official actor could acquiesce in torturous activities that he or she is unable to prevent. *See, e.g., Pieschacon-Villegas v. Att’y Gen.*, 671 F.3d 303, 311–12 (3d Cir. 2011); *Sarhan v. Holder*, 658 F.3d 649, 657–60 (7th Cir. 2011) (holding that the government’s ineffectiveness at protecting women from honor killings showed governmental acquiescence); *see generally Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

D. Information Disclosure

The regulations at 8 CFR 208.6 and 1208.6 govern the disclosure of information contained in or pertaining to an asylum application, credible fear records, and reasonable fear records. The nondisclosure provisions in 8 CFR 208.6(a)–(b) and 1208.6(a)–(b) cover “[i]nformation contained in or pertaining to any asylum application,” records pertaining to any credible fear or reasonable fear determination, and other records kept by the Departments that indicate that a specific alien has applied for asylum or received a credible fear or reasonable fear interview or review thereof. The “asylum application” includes information pertaining to statutory withholding of removal, 8 U.S.C. 1231(b)(3), and protection under the CAT regulations. *See* 8 CFR 208.3(b), 1208.3(b). The regulations prohibit disclosing protected information to unauthorized “third parties” but are silent, save by exception, as to who constitutes an unauthorized third party. Under the exceptions for nondisclosure contained in 8 CFR 208.6(c) and 1208.6(c), certain limited categories of persons and entities may receive otherwise-confidential asylum-related or other pertinent information for certain purposes. This includes a disclosure to any U.S. government official or contractor having a need to examine information in connection with the adjudication of an asylum application or consideration of a credible fear or reasonable fear claim. 8 CFR 208.6(c)(1)(i)–(ii) and 1208.6(c)(1)(i)–(ii).

Accordingly, DHS and EOIR employees, and aliens' representatives of record, are not considered unauthorized third parties for purposes of the existing regulation.⁴² Further, the Attorney General and Secretary of Homeland Security have the discretion to disclose any such information to any party. 8 CFR 208.6(a), 1208.6(a).

The Departments propose changes to 8 CFR 208.6 and 8 CFR 1208.6 to clarify that information may be disclosed in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claims. An alien's decision to apply for asylum necessarily entails the alien's decision to provide the Government with information necessary to determine whether the person deserves refuge in the United States. Within the immigration system in the United States, such information does not exist in a vacuum, and there is a clear need to ensure that the confidentiality provisions are not being used to shield fraud and abuse that can only be uncovered by comparing applications and information across proceedings. Further, there is need to ensure that other types of criminal activity are not shielded from investigation and prosecution due to the confidentiality provisions. Furthermore, the proposed changes allow the information to be disclosed where it is necessary to the Government's defense of any legal action relating to the alien's immigration or custody status. Aliens routinely file suit in both district courts and courts of appeals raising an assortment of challenges to their immigration and custody status. Although the current regulation allows disclosure where the suit arises from the adjudication of an asylum application or of which the asylum application "is a part," there is no clear exception

⁴² Further, the sharing of information between the Departments regarding an alien in immigration proceedings does not constitute a disclosure under these regulations and is otherwise excepted pursuant to 8 CFR 208.6(c) and 1208.6(c). As DHS is a party to all proceedings before EOIR, any records related to an aliens in such proceedings possessed by EOIR are also necessarily already possessed by DHS.

covering disclosures in other civil immigration litigation in which it is necessary for the Government to disclose this information in order to fully defend the Government's position.

As such, the Department proposes to amend 8 CFR 208.6 and 8 CFR 1208.6 to specify that to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General's or Secretary's discretion under paragraphs 208.6(a) and 1208.6(a), respectively, the Government may disclose⁴³ all relevant and applicable information in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.

E. Severability

The Departments are proposing severability provisions in each of the new 8 CFR parts. The Departments believe that the provisions of each new part function sensibly independent of other provisions. However, to protect the goals for which this rule is being proposed, the Departments are codifying their intent that the provisions be severable so that, if necessary, the regulations can continue to function without a stricken provision.

V. Regulatory Requirements

A. Regulatory Flexibility Act

⁴³ Nothing in the proposed rule would prohibit agencies from placing additional restrictions on the disclosure of information consistent with internal policies as long as those policies do not conflict with the proposed regulatory language.

The Departments have reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. This regulation affects only individual aliens and the Federal Government. Individuals do not constitute small entities under the Regulatory Flexibility Act.

B. Unfunded Mandates Reform Act of 1995

This rule will 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, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Congressional Review Act

This proposed rule is anticipated not to be a major rule as defined by section 804 of the Congressional Review Act. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804(2).

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The proposed rule is considered by the Departments to be a “significant regulatory action” under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Accordingly, the regulation has been submitted to the Office of Management and Budget (“OMB”) for review.

Executive Orders 12866 and 13563 direct agencies to assess all 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 using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility

The proposed rule would change or provide additional clarity for adjudicators across many issues commonly raised by asylum applications and would potentially streamline the overall adjudicatory process for asylum applications. Although the proposed regulation would provide clarity to asylum law and operational streamlining to the credible fear review process, the proposed regulation does not change the nature of the role of an immigration judge or an asylum officer during proceedings for consideration of credible fear claims or asylum applications. Notably, immigration judges will retain their existing authority to review *de novo* the determinations made by asylum officers in a credible fear proceedings, and will continue to control immigration court proceedings. In credible fear proceedings, asylum officers will continue to evaluate the merits of claims for asylum, withholding of removal, and CAT protection for possible referral to the immigration judge. While this rule expands the bases on which an asylum officer may determine that a claim does not merit referral (and, as a consequence, make a negative fear determination), the alien will still be able to seek review of that negative fear determination before the immigration judge.

Immigration judges and asylum officers are already trained to consider all relevant legal issues in assessing a credible fear claim or asylum application, and the proposed rule does not propose any changes that would make adjudications more challenging than those that are

already conducted. For example, immigration judges already consider issues of persecution, nexus, particular social group, frivolousness, firm resettlement, and discretion in assessing the merit of an asylum application, and the provision of clearer standards for considering those issues in the proposed regulation does not add any operational burden or increase the level of operational analysis required for adjudication. Accordingly, the Departments do not expect the proposed changes to increase the adjudication time for immigration court proceedings involving asylum applications or for reviews of negative fear determinations.

Depending on the manner in which DHS exercises its prosecutorial discretion for aliens potentially subject to expedited removal, the facts and circumstances of each individual alien's situation, and the Departments' interpretation and implementation of the relevant regulations by individual adjudicators, the proposed changes may decrease the number of cases of aliens subject to expedited removal that result in a full hearing on an application for asylum. In all cases, however, an alien will retain the opportunity to request immigration judge review of DHS's initial fear determination.

The Departments propose changes that may affect any alien subject to expedited removal who makes a fear claim and any alien who applies for asylum, statutory withholding of removal, or protection under the CAT regulations. The Departments note that the proposed changes are likely to result in fewer asylum grants annually due to clarifications regarding the significance of discretionary considerations and changes to the definition of firm resettlement. However; because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. As of April 24, 2020, EOIR had 527,927 cases pending with an asylum application. In FY 2019, at the immigration court level, EOIR granted 18,816 asylum

applications and denied 45,285 asylum applications. An additional 27,112 asylum applications were abandoned, withdrawn, or otherwise not adjudicated. As of January 1, 2020, USCIS had 338,931 applications for asylum and for withholding of removal pending.⁴⁴ In FY 2019, USCIS received 96,861 asylum applications, and approved 19,945 such applications.⁴⁵

The Departments expect that the aliens most likely to be impacted by this rule's provisions are those who are already unlikely to receive a grant of asylum under existing law. Assuming DHS places those aliens into expedited removal proceedings, the Departments assess that it will be more likely that they would receive a more prompt adjudication of their claims for asylum or withholding of removal than they would under the existing regulations. Depending on the individual circumstances of each case, this rule would mean that such aliens would likely not remain in the United States—for years, potentially—pending resolution of their claims.

An alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the INA or withholding of removal under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of CAT. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 208.17 through 18, 1208.16, and 1208.17 through 18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided

⁴⁴ *See* USCIS, *Number of Service-wide Forms Fiscal Year to Date, by Quarter and Form Status, Fiscal Year 2020*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY2020Q1.pdf (last visited May 28, 2020).

⁴⁵ *See* USCIS, *Number of Service-wide Forms Fiscal Year to Date, by Quarter, and Form Status, Fiscal Year 2019*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q4.pdf (last visited May 28, 2020).

The data in this report only include approvals or denials (i.e., asylum applicants otherwise in lawful status who were not found eligible for asylum by USCIS). Denials do not include out-of-status cases that were not found eligible for asylum and then were referred by USCIS to immigration court.

a bar to withholding did not apply separate and apart from this rule). To the extent there are any direct impacts of this rule, they would almost exclusively fall on that population.⁴⁶ Further, the full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity.

Overall, the Departments assess that operational efficiencies will likely result from these proposed changes, which could, *inter alia*, reduce the number of meritless claims before the immigration courts, provide the Departments with the ability to more promptly grant relief or protection to qualifying aliens, and ensure that those who do not qualify for relief or protection are removed more efficiently than they are under current rules.

E. Executive Order 13132 (Federalism)

This rule will 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 does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

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

⁴⁶ Because statutory withholding of removal has a higher burden of proof, an alien granted such protection would necessarily also meet the statutory burden of proof for asylum, but would not be otherwise eligible for asylum due to a statutory bar or as a matter of discretion. Because asylum applications may be denied for multiple reasons and because the factual bases relevant for application of the proposed changes are not tracked at a granular level, there is no precise data on how many otherwise grantable asylum applications may be denied under this rule and, thus, there is no way to calculate precisely how many aliens will nevertheless be granted withholding. Further, because the immigration judge would have to adjudicate the application in either case, there is no cost to DOJ.

G. Paperwork Reduction Act

DOJ and DHS invite comment on the impact to the proposed collection of information. In accordance with the Paperwork Reduction Act, the information collection notice is published in the *Federal Register* to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted until [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All submissions received must include the OMB Control Number 1615-0067 in the body of the submission. Comments on this information collection should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of information collection:

- (1) Type of Information Collection: Revision of a Currently Approved Collection.
- (2) Title of the Form/Collection: Application for Asylum and for Withholding of Removal.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-589; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. Form I-589 is necessary to determine whether an alien applying for asylum or withholding of removal in the United States is classified as refugee, and is eligible to remain in the United States.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-589 is approximately 114,000, and the estimated hour burden per response is 18 hours per response. The estimated number of respondents providing biometrics is 110,000, and the estimated hour burden per response is 1.17 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information in hours is 2,180,700.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$46,968,000.

H. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the Federal Register.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Freedom of Information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 208

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

8 CFR Part 235

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

8 CFR Part 1003

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

8 CFR Part 1208

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

8 CFR Part 1235

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

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Department of Homeland Security proposes to amend 8 CFR parts 103, 208, and 235 as follows:

PART 103 – IMMIGRATION BENEFITS; BIOMETRIC REQUIRMENTS;

AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1356b, 1372; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 et seq.); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Public Law 112–54, 125 Stat 550.

2. Amend § 103.5 by

- a. Revising paragraph (a) introductory text;
- b. Revising the first full sentence of paragraph (a)(1)(i); and
- c. Adding paragraph (d).

The revisions and addition read as follows:

§ 103.5 Reopening or reconsideration.

(a) Motions to reopen or reconsider proceedings or decisions on benefit requests in other than special agricultural worker and legalization cases-

(1) * * *

(i) *General.* Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 3, 210, 242, and 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision regarding the benefit request. * * *

* * * * *

(d) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

PART 208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

3. 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 Public Law 110-229; 8 CFR part 2.

4. Amend § 208.1 by adding paragraphs (c), (d), (e), (f), and (g) to read as follows:

§ 208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This

list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be

deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of screening or adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus--(1) General.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application or withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(i) Interpersonal animus or retribution;

(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;

(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(vi) Criminal activity;

(vii) Perceived, past or present, gang affiliation; or,

(viii) Gender.

(2) [Reserved]

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application.

5. Amend § 208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30, and §§ 1003.42 or 1208.30 of this title.

* * * * *

6. Amend § 208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear or reasonable fear determination under §§ 208.30 or 208.31, and except in the case of an alien who is in custody pending a credible fear determination under § 208.30 or a reasonable fear determination pursuant to § 208.31. * * *

7. Amend § 208.6 by –

- a. Revising paragraphs (a) and (b); and
- b. Adding paragraphs (d), (e), and (f).

The revisions and additions read as follows:

§ 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Secretary.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * *

(d)(1) Any information contained in an application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

- (i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,
- (ii) As part of any state or federal criminal investigation, proceeding, or prosecution;
- (iii) Pursuant to any state or federal mandatory reporting requirement;
- (iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status including petitions for review filed in accordance with 8 USC 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees and officers of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States Government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

8. Amend § 208.13 by:

- a. Revising paragraph (b)(3) introductory text;
- b. Revising paragraph (b)(3)(ii);

c. Adding paragraphs (b)(3)(iii) and (iv), and (d).

The revisions and additions read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i), (ii), and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, persecutors who are private actors—including persecutors who are gang members, rogue

officials, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) *Significant adverse discretionary factors.* The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien’s unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of “victim of a severe form of trafficking in persons” provided in 8 CFR 214.11; or

(C) Such country or all such countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Secretary, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(1) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(2) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(3) Such country was, at the time of the transit, not a party to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(1) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and received a final judgment denying the alien protection in that country;

(2) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(3) All such countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ;

(C) Would otherwise be subject to § 208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States prior to filing an application for asylum;

(E) At the time the asylum application is filed with DHS has:

(1) Failed to timely file (or timely file a request for an extension of time to file) any required federal, state, or local income tax returns;

(2) Failed to satisfy any outstanding federal, state, or local tax obligations; or

(3) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(1) Exceptional circumstances prevented the alien from attending the interview; or

(2) The interview notice was not mailed to the last address provided by the alien or his or her representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of those changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Secretary, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i) of this section. Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i) of this section, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

9. Revise § 208.15 to read as follows:

§ 208.15 Definition of “firm resettlement.”

(a) An alien is considered to be firmly resettled if:

(1) The alien either resided or could have resided in any permanent legal immigration status or any non-permanent, potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless the alien establishes that he or she could not have derived any permanent legal immigration status or any potentially indefinitely renewable temporary legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

10. Amend § 208.16 by:

- a. Revising paragraph (b)(3) introductory text;
- b. Revising paragraph (b)(3)(ii);
- c. Adding paragraphs (b)(3)(iii) and (iv).

The revisions and additions read as follows:

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

* * * *

(b)(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including but not limited to persecutors who are gang members, rogue officials, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

11. Amend § 208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law (“rogue official”) shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the rogue official.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that

such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

12. Revise § 208.20 to read as follows:

§ 208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An alien knowingly files a frivolous asylum application if:

(1) The application is described in paragraph (c) of this section; and

(2) The alien filed the application with either actual knowledge, or willful blindness, of the fact that the application was described in paragraph (c) in this section.

(b) For applications filed on or after [EFFECTIVE DATE OF FINAL RULE], an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. Such finding will be made only if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any

discrepancies or implausible aspects of the claim. For any application referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph 1208.20(c).

(c) For purposes of this section, beginning on [effective date of final rule], an asylum application is frivolous if it:

(1) Contains a fabricated essential element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may also be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien knowingly filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

13. Add § 208.25 to read as follows:

§ 208.25 Severability.

The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

14. Amend § 208.30 by:

- a. Revising the section heading;
- b. Revising paragraphs (a), (b), (c), and (d);
- c. Revising (e) introductory text, (e)(1) through (5), (e)(6) introductory text, (e)(6)(ii), (e)(6)(iii) introductory text, (e)(6)(iv), the first sentence of the introductory text of paragraph (e)(7), (e)(7)(ii); and
- d. Revising paragraphs (f) and (g).

The revisions read as follows:

§ 208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to

apply for protection from persecution in a third country where potential relief is available while en route to the United States.

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

(b) *Process and authority.* If an alien subject to section 235(a)(2) or 235(b)(1) of the Act indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with this section. An asylum officer shall then screen the alien for a credible fear of persecution, and as necessary, a reasonable possibility of persecution and reasonable possibility of torture. An asylum officer, as defined in section 235(b)(1)(E) of the Act, has the authorities described in § 208.9(c) and must conduct an evaluation and make a determination consistent with this section.

(c) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

(1) Arrived in the United States concurrently with the principal alien; and

(2) Desires to be included in the principal alien's determination. However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

(d) *Interview.* The asylum officer will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. The asylum officer shall conduct the interview as follows:

(1) If the officer conducting the interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.

(2) At the time of the interview, the asylum officer shall verify that the alien has received in writing the relevant information regarding the fear determination process. The officer shall also determine that the alien has an understanding of the fear determination process.

(3) The alien may be required to register his or her identity.

(4) The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, and may present other evidence, if available. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process. Any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to 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 on the length of the statement.

(5) If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language the alien speaks and understands, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter must be at least 18 years of age and may not be the alien's attorney or representative of record, a witness testifying on the alien's behalf, a representative or employee of the alien's country of nationality, or, if the alien is stateless, the alien's country of last habitual residence.

(6) The asylum officer shall create a summary of the material facts as stated by the alien. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct any errors therein.

(e) Procedures for determining credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture.

(1) An alien establishes a credible fear of persecution if there is a significant possibility the alien can establish eligibility for asylum under section 208 of the Act. "Significant possibility" means a substantial and realistic possibility of succeeding. When making such a determination, the asylum officer shall take into account:

- (i) The credibility of the statements made by the alien in support of the alien's claim;
- (ii) Such other facts as are known to the officer, including whether the alien could avoid any future harm by relocating to another part of his or her country, if under all the circumstances it would be reasonable to expect the alien to do so; and

(iii) The applicability of any bars to being able to apply for asylum or to eligibility for asylum set forth at section 208(a)(2)(B)–(C) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act.

(2) An alien establishes a reasonable possibility of persecution if there is a reasonable possibility that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal. When making such determination, the officer will take into account:

(i) The credibility of the statements made by the alien in support of the alien’s claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another party of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so; and

(iii) The applicability of any bars at section 241(b)(3)(B) of the Act.

(3) An alien establishes a reasonable possibility of torture if there is a reasonable possibility that the alien would be tortured in the country of removal, consistent with the criteria in §§ 208.16(c), 208.17, and 208.18. The alien must demonstrate a reasonable possibility that he or she will suffer severe pain or suffering in the country of removal, and that the feared harm would comport with the other requirements of § 208.18(a)(1) through (8). When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by alien in support of the alien’s claim, and

(ii) Such other facts as are known to the officer, including whether the alien could relocate to a part of the country of removal where he or she is not likely to be tortured.

(4) In all cases, the asylum officer will create a written record of his or her determination, including a summary of the material facts as stated by the alien, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. An asylum officer's determination will not become final until reviewed by a supervisory asylum officer.

(5)(i)(A) Except as provided in paragraphs (e)(5)(ii) through(iii), (e)(6), or (e)(7) of this section, if an alien would be able to establish a credible fear of persecution but for the fact that the alien is subject to one or more of the mandatory bars to applying for asylum or being eligible for asylum contained in section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, then the asylum officer will enter a negative credible fear of persecution determination with respect to the alien's eligibility for asylum.

(B) If an alien described in paragraph (e)(5)(i)(A) of this section is able to establish either a reasonable possibility of persecution (including by establishing that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, then the asylum officer will enter a positive reasonable possibility of persecution or torture determination, as applicable. The Department of Homeland Security shall place the alien in asylum-and-withholding-only proceedings under § 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture.

(C) If an alien described in paragraph (e)(5)(i)(A) of this section fails to establish either a reasonable possibility of persecution (including by failing to establish that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(ii) If the alien is found to be an alien described in 8 CFR 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under § 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture, if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(iii) If the alien is found to be an alien described in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for

asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under § 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding of deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph (e)(6). The asylum officer shall advise the alien of the

Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

* * * * *

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

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and:

* * * * *

(iv) As used in paragraphs (e)(6)(iii)(B), (C) and (D) of this section only, "legal guardian" means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with that provision, prior to any determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply

for asylum in the United States and is subject to removal to a country (“receiving country”) that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. * * *

*** * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the applicable agreement, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in the receiving country, the asylum officer shall make a written notation to that effect, and may then proceed to determine whether any other agreement is applicable to the alien under the procedures set forth in this paragraph (e)(7). If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of each of the applicable agreements, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in each of the prospective receiving countries, the asylum officer shall make a written notation to that effect, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, under paragraph (d) of this section.

* * * * *

(f) *Procedures for a positive fear determination.* If, pursuant to paragraph (e) of this section, an alien stowaway or an alien subject to expedited removal establishes either a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture:

(1) DHS shall issue a Notice of Referral to Immigration Judge for asylum-and-withholding-only proceedings under § 208.2(c)(1).

(2) Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and 8 CFR 212.5 of this chapter.

(g) *Procedures for a negative fear determination.* (1) If, pursuant to paragraphs (e) and (f) of this section, an alien stowaway or an alien subject to expedited removal does not establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, DHS shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative determination, in accordance with section 235(b)(1)(B)(iii)(III) of the Act and this § 208.30. The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(i) If the alien requests such review, DHS shall arrange for detention of the alien and serve him or her with a Notice of Referral to Immigration Judge, for review of the negative fear determination in accordance with paragraph (g)(2) of this section.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, DHS shall order the alien removed with a Notice and Order of Expedited Removal, after review by a supervisory officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, DHS shall complete removal proceedings in accordance with section 235(a)(2) of the Act.

(2) Review by immigration judge of a negative fear determination.

(i) Immigration judges shall review negative fear determinations as provided in 8 CFR 1208.30(g).

(ii) DHS shall provide the record of any negative fear determinations being reviewed, 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, to the immigration judge with the negative fear determination.

15. Amend § 208.31 by revising paragraph (f), the introductory text of paragraph (g), and paragraphs (g)(1) and (2) to read as follows:

§ 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.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(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. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

PART 235 – INSPECTION OF PERSONS APPLYING FOR ADMISSION

16. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731-32; Title VII of Public Law 110-229; 8 U.S.C. 1185 note (section 7209 of Public Law 108-458); Public Law 112-54.

17. Amend § 235.6 by

a. Revising paragraphs (a)(1)(ii), (a)(2)(i), and (iii); and

b. Adding paragraph (c).

The revisions and addition read as follows:

§ 235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv), an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and the Service initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

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

** * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of 8 CFR 208.30 or 8 CFR 208.31.

* * * * *

(c) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

DEPARTMENT OF JUSTICE

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

PART 1003 - EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

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

19. Amend § 1003.1 by revising paragraph (b)(9) to read as follows:

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

* * * * *

(b) * * *

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 1208.2(b) and (c) of this chapter.

* * * * *

20. Amend § 1003.42 by:

- a. Revising the section heading;
- b. Revising paragraphs (a), (b), (d) through (g), and (h)(1), and the third sentence of paragraph (h)(3); and
- c. Adding paragraph (i).

The revisions and addition read as follows:

§ 1003.42 Review of credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations.

(a) *Referral.* Jurisdiction for an immigration judge to review a negative fear determination by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by DHS of the Notice of Referral to Immigration Judge. DHS shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of a negative fear determination. This record shall not be merged with any later proceeding involving the same alien.

* * * * *

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in

a particular social group, or political opinion in the country of removal, consistent with the criteria in 8 CFR 1208.16(b). The immigration judge shall also make a de novo determination as to whether there is a reasonable 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 immigration judge, that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 1208.16(c), 8 CFR 1208.17, and 8 CFR 1208.18.

(2) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the Immigration Judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) prior to any further review of the asylum officer's negative fear determination.

(3) If the alien is determined to be an alien described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(iii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) prior to any further review of the asylum officer's negative fear determination.

(e) *Timing.* The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.

(f) *Decision.* (1) The decision of the immigration judge shall be rendered in accordance with the provisions of 8 CFR 1208.30(g)(2). In reviewing the negative fear determination by DHS, the immigration judge shall apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court.

(2) No appeal shall lie from a review of a negative fear determination made by an Immigration Judge, but the Attorney General, in the Attorney General's sole and unreviewable discretion, may direct that the Immigration Judge refer a case for the Attorney General's review following the Immigration Judge's review of a negative fear determination.

(3) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in § 1003.1(f). Such decision by the Attorney General may be designated as precedent as provided in § 1003.1(g).

(g) *Custody.* An immigration judge shall have no authority to review an alien's custody status in the course of a review of a negative fear determination made by DHS.

(h) * * *

(1) *Arriving alien.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to the 2002 U.S.-Canada Agreement formed under section 208(a)(2)(A) of the Act and should be returned to Canada to pursue his or her claims for asylum or other protection under the laws of Canada. *See* 8 CFR 208.30(e)(6). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to that Agreement, an immigration judge does have

jurisdiction to review a negative fear finding made thereafter by the asylum officer as provided in this section. * * * * *

(3) * * * However, if the asylum officer has determined that the alien may not or should not be removed to a third country under section 208(a)(2)(A) of the Act and subsequently makes a negative fear determination, an immigration judge has jurisdiction to review the negative fear finding as provided in this section.

* * * * *

(i) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

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

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229.

22. Amend § 1208.1 by adding paragraphs (c), (d), (e), and (f) to read as follows:

§ 1208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at

question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the claim. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of

harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus--(1) General.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(i) Interpersonal animus or retribution;

(ii) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(iii) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;

(iv) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(v) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(vi) Criminal activity;

(vii) Perceived, past or present, gang affiliation; or,

(viii) Gender.

(2) [Reserved]

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence promoting cultural stereotypes about an individual or a country, including stereotypes based on race, religion, nationality, or gender, and offered to support the basis of an alleged fear of harm from the individual or country shall not be admissible in adjudicating that application.

23. Amend § 1208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 1208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30 of this title, § 1003.42 of this chapter or § 1208.30.

* * * * *

24. Amend § 1208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 1208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. * * *

* * * * *

25. Amend § 1208.6 by revising paragraph (b) and adding paragraphs (d) and (e) to read as follows:

§ 1208.6 Disclosure to third parties.

* * * * *

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for asylum, withholding of removal under section 241(b)(3) the Act, or protection under regulations issued pursuant to the Convention Against Torture’s implementing legislation, any relevant and applicable information

supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

- (i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,
- (ii) As part of any state or federal criminal investigation, proceeding, or prosecution;
- (iii) Pursuant to any state or federal mandatory reporting requirement;
- (iv) To deter, prevent, or ameliorate the effects of child abuse;
- (v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and
- (vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the

Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

26. Section 1208.13 is amended by:

- a. Revising paragraph (b)(3) introductory text;
- b. Revising paragraph (b)(3)(ii);
- c. Adding paragraphs (b)(3)(iii) and (b)(3)(iv); and
- d. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i), (ii), and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department of

Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) *Significant adverse discretionary factors.* The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(C) Such country or countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Attorney General, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(1) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(2) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(3) Such country was, at the time of the transit, not a party to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(1) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;

(2) The alien demonstrates that he or she satisfies the definition of “victim of a severe form of trafficking in persons” provided in 8 CFR 214.11; or

(3) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to paragraph (c) of this section but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States prior to filing an application for asylum;

(E) At the time the asylum application is filed with the immigration court or is referred from DHS has:

(1) Failed to timely file (or timely file a request for an extension of time to file) any required federal, state, or local income tax returns;

(2) Failed to satisfy any outstanding federal, state, or local tax obligations; or

(3) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(1) Exceptional circumstances prevented the alien from attending the interview; or

(2) The interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Attorney General, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i) of this section. Depending on the gravity of the circumstances underlying the application of

paragraph (d)(2)(i) of this section, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

(e) *Prima facie eligibility*. (1) Notwithstanding any other provision of this part, upon oral or written motion by the Department of Homeland Security, an immigration judge shall, if warranted by the record, pretermite and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law. An immigration judge need not conduct a hearing prior to premitting and denying an application under this paragraph (e)(1) but must consider any response to the motion before making a decision.

(2) Notwithstanding any other provision of this part, upon his or her own authority, an immigration judge shall, if warranted by the record, pretermite and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law, provided that the immigration judge shall give the parties at least 10 days' notice prior to entering such an order. An immigration judge need not conduct a hearing prior to premitting and denying an application under this paragraph (e)(2) but must consider any filings by the parties within the 10-day period before making a decision.

27. Amend § 1208.14 by

a. In paragraphs (c)(4)(ii) introductory text and (c)(4)(ii)(A), removing the words “§ 1235.3(b) of this chapter” and adding, in their place, the words “§ 235.3(b) of this title”; and

b. In paragraph (c)(4)(ii)(A), removing the citations “§ 1208.30” and “§ 1208.30(b)” and adding, in their place, the words “§ 208.30 of this title”.

28. Section 1208.15 is revised to read as follows:

§ 1208.15 Definition of “firm resettlement.”

(a) An alien is considered to be firmly resettled if:

(1) The alien either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States; or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either the Department of Homeland Security or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien’s parent(s) shall be imputed to the alien if

the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent legal immigration status potentially indefinitely renewable (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

29. Amend § 1208.16 by;

- a. Revising paragraph (b)(3) introductory text;
- b. Revising paragraph (b)(3)(ii); and
- c. Adding paragraphs (b)(3)(iii) and (b)(3)(iv).

The revisions and addition read as follows:

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

* * * * *

(b)***

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a

preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, persecutors who are private actors, including persecutors who are gang members, officials acting outside their official capacity, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

30. Amend § 1208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 1208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public

official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law (“rogue official”) shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the rogue official.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

31. Revise § 1208.20 to read as follows:

§ 1208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An alien knowingly files a frivolous asylum application if:

- (1) The application is described in paragraph (b) of this section; and
- (2) The alien filed the application with either actual knowledge, or willful blindness, of the fact that the application was described in paragraph (b).

(b) For applications filed on or after [INSERT EFFECTIVE DATE OF FINAL RULE], an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. Such finding will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For applications referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph (a) of this section.

(c) For purposes of this section, beginning on [INSERT EFFECTIVE DATE OF FINAL RULE], an asylum application is frivolous if it:

- (1) Contains a fabricated essential element;
- (2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

- (3) Is filed without regard to the merits of the claim; or
- (4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may be found frivolous unless:

- (1) The alien wholly disclaims the application and withdraws it with prejudice;
- (2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

32. Add § 1208.25 to read as follows:

§ 1208.25 Severability.

The provisions of part 1208 are separate and severable from one another. In the event that any provision in part 1208 is stayed, enjoined, not implemented, or otherwise held invalid,

the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

33. Amend § 1208.30 by:

- a. Revising the section heading; and
- b. Revising paragraphs (a), (b) introductory text, (b)(2), (e), and (g).

The revisions read as follows:

§ 1208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) and 8 CFR 208.30, DHS has exclusive jurisdiction to make fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section and 8 CFR 208.30 are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act and 8 CFR 208.30. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of

removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

* * * * *

(2) *Desires to be included in the principal alien's determination.* However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

* * * * *

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

(g) *Procedures for negative fear determinations--(1) Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3) and is determined to lack a credible fear of persecution or a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under §

1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described in 8 CFR 208.13(c)(3) or § 1208.13(c)(3), the immigration judge will then review the asylum officer's negative determinations regarding credible fear and regarding reasonable possibility made under 8 CFR 208.30(e)(5)(iv) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g)(2) of this section.

(ii) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(v), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4). If the immigration judge finds that the alien is not described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under § 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or § 1208.13(c)(4), the immigration judge will then review the asylum officer's negative decision regarding reasonable possibility made under 8 CFR 208.30(e)(5)(v) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g)(2) of this section.

(2) *Review by immigration judge of a negative fear finding.* (i) The asylum officer's negative decision regarding a credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture shall be subject to review by an immigration judge upon the applicant's request, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. If the alien refuses to make an indication, DHS will consider such a response as a decision to decline review.

(ii) The record of the negative fear 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 fear determination.

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

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

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

(B) If the immigration judge finds that the alien, other than an alien stowaway, establishes a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the immigration judge shall vacate the Notice and Order of Expedited Removal, and DHS may commence asylum-and-withholding-only proceedings under § 1208.2(c)(1), during which time the alien may file an application for asylum and withholding of

removal in accordance with § 1208.4(b)(3)(i). Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(C) If the immigration judge finds that an alien stowaway establishes a credible fear of persecution, reasonable possibility of torture, or reasonable possibility of torture, the alien shall be allowed to file an application for asylum and for withholding of removal before the immigration judge in accordance with § 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph. Such decision on that application may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, and deferral of removal has not otherwise been granted pursuant to § 1208.17(a), the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum, withholding of removal, or, as pertinent, deferral of removal becomes final, DHS shall terminate removal proceedings under section 235(a)(2) of the Act.

34. Amend § 1208.31 by revising paragraph (f), (g) introductory text, (g)(1) and (2) to read as follows:

§ 1208.31 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.

* * * * *

(f) Removal of aliens with no reasonable fear of persecution or torture. If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture,

the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(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 the Immigration Judge. The record of determination, including copies of the Notice of Referral to the 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. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under § 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under § 1208.16.

PART 1212 – DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

35. The authority citation for part 1212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255; 8 U.S.C. 1185 note (section 7209 of Public Law 108-458); Title VII of Public Law 110-229.

36. Add § 1212.13 to read as follows:

§ 1212.13 Severability.

The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

37. Amend § 1212.14(a)(1)(vii), by removing the words “§ 1235.3 of this chapter” and adding, in their place, the words “§ 235.3 of this title”.

PART 1235 – INSPECTION OF PERSONS APPLYING FOR ADMISSION

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

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731-32; Title VII of Public Law 110-229; 8 U.S.C. 1185 note (section 7209 of Public Law 108-458).

§§ 1235.1, 1235.2, 1235.3 and 1235.5 [Removed]

39. Remove and reserve §§ 1235.1, 1235.2, 1235.3, and 1235.5.

40. Amend § 1235.6 by:

a. Removing paragraphs (a)(1)(ii) and (iii);

b. Redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(ii);

c. Revising newly redesignated paragraph (a)(1)(ii), and paragraphs (a)(2)(i), and (iii);

and

d. Adding paragraph (c).

The revisions and addition read as follows:

§ 1235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv) of this title, an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and the Service initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

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

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of § 208.30 or § 208.31.

* * * * *

(c) The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

* * * * *

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Dated: June 4, 2020.

William P. Barr,
Attorney General.

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