



**Homeland
Security**

RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

To: Dr. Emilio Gonzalez, Director, USCIS
cc: Michael Jackson, Deputy Secretary

From: Prakash Khatri, CIS Ombudsman

Date: March 20, 2006

Re: Recommendation to USCIS to limit its adjudication of I-589 applications for asylum and withholding of removal to those submitted from individuals who are in valid non-immigrant status in the United States. (See attached proposal and regulations.)

I. RECOMMENDATION

Recommendation to USCIS to limit its adjudication of I-589 applications for asylum and withholding of removal to those submitted from individuals who are in valid non-immigrant status in the United States. (See attached proposal and regulations.)

II. BACKGROUND

For the past several years, USCIS has received approximately 30,000 asylum applications per annum; adjudicating approximately the same number of cases, whether approvals, denials, or referrals to the Immigration Court each year.

More specifically, statistics of adjudicated asylum applications reveal an approximately 70% 'referral' rate to the Immigration Court for removal proceedings. In essence, this 'referral' is actually a denial of asylum because Immigration Court is a *de novo* proceeding for violation of immigration status where asylum may be raised in defense to removal from the US. Such a high referral/denial rate appears to indicate an inherently flawed system, as well as one prone to fraud and/or abuse. Whether it is indiscriminate filings, vague applications, or the intrinsic benefit of filing for asylum (i.e. a tactic to delay removal because of a pending immigration application) with minimal chance for approval, the system necessitates change so that it is quicker and more equitable for those applicants truly deserving of asylum.

Currently, USCIS accepts asylum applications from individuals who are either in lawful immigration status ('in-status') or not in lawful immigration status ('non-status' or 'out-of-status'). When USCIS approves an asylum application from a non-status or out-of-status applicant, USCIS is in effect granting relief from removal, since any non-status or out-of-status applicant is *de facto* removable. Thus USCIS is technically conducting an enforcement activity that is really within the purview of ICE and the Immigration Court, not USCIS.

In addition, no fee is charged for processing an asylum application, despite the fact there is statutory authority for the government to charge such a fee. As a result, the asylum processing system is funded by levying an indirect 'tax' upon all other fee-paid immigration petitions/applications received by USCIS.

III. JUSTIFICATION

This recommended asylum process is based on existing statutes which adhere to both the Immigration and Nationality Act (INA as amended) and the Homeland Security Act of 2002 (HSA as amended). The Immigration and Naturalization Service (INS) was dissolved by the HSA and replaced with three distinct entities:

1. U.S. Citizenship and Immigration Service (USCIS): This agency was chartered to adjudicate applications for immigration benefits.
2. Immigration and Customs Enforcement (ICE): This agency was chartered for interior enforcement of immigration laws.
3. Customs and Border Protection (CBP): This agency was chartered with border enforcement of all immigration laws, including the administration of US-VISIT (US Visitor and Immigrant Status Indicator Technology).

The recommended asylum process results in the assignment to USCIS the processing responsibilities commensurate with the current immigration status (or lack thereof) of the applicant. In-status applicants would have their asylum applications adjudicated by USCIS, and out-of-status/non-status applicants would have their applications decided by the Immigration Court and ICE. Thus, USCIS concerns itself with individuals seeking "benefits," and ICE and the Immigration Court concern themselves with individuals seeking "relief from removal."

IV. BENEFITS

A. *Customer Service*

The benefit to asylum applicants and other immigrants includes an asylum system that is more fair and timely, and thus for

1. *In-status applicants* - Individual cases will be scheduled, interviewed, and adjudicated more promptly as USCIS has fewer cases to process.
2. *Out of status/non-status applicants* - Individual cases will be scheduled, interviewed, and adjudicated more promptly by the Immigration Court, and in an arena that provides more options to avert removal (i.e. withholding of removal, voluntary departure, Convention Against Torture, etc). In addition, this category of applicant may have a more thorough and efficient resolution of his/her

circumstance, thus reducing the applicant's overall costs and stress associated with a tandem series of actions involving multiple federal agencies.

3. *All fee-paying immigrants* – Reduces the burden on all other fee paying immigrants as the current asylum system is funded by levying an indirect 'tax' upon their USCIS petitions/applications.

B. *USCIS Efficiency*

The benefits to USCIS include:

1. *Eliminating an unfunded mandate* – USCIS will be provided with an additional source of revenue that is permitted by statute while still ensuring that all applicants' cases are adjudicated regardless of income. In addition, the asylum division will be less of a financial drain on USCIS revenue derived from other immigration petitions/applications.
2. *Adhering to the appropriate roles/responsibilities from the bifurcation of INS* – When USCIS adjudicates an out-of-status/non-status applicant, it is technically conducting an enforcement activity that is really within the purview of ICE and EOIR, not USCIS. [See INA section 237 (a)(1) and 240 (a)(1)]
3. *Improved use of labor resources* – A reduced USCIS caseload will allow a reallocation of asylum labor resources to assume other responsibilities/adjudications, and/or eliminate the backlog.

C. *National Security*

This recommendation may enhance national security as US-VISIT will receive more timely notice of changes to an individuals' immigration status and authorized duration of stay which is currently not provided to CBP, whereby reducing the 'haystack' that may necessitate an ICE investigation for suspected immigration violators and/or terrorists.

CIS Ombudsman RECOMMENDED ASYLUM PROCESS

Version 0.1
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Purpose

The Citizenship and Immigration Services Ombudsman has examined the existing process by which asylum applications are processed by the U.S. Citizenship and Immigration Service (USCIS), the Immigration and Customs Enforcement Agency (ICE), and the Immigration Court. This examination has resulted in a recommended change to processing asylum applications dependent upon the immigration status (or lack thereof) of the applicant. The recommended process appears to be more cost-efficient to the Department of Homeland Security as a whole and to USCIS in particular, and in compliance with direction by Congress as delineated in the Homeland Security Act of 2002 (as amended).

Current Environment

For the past several years, USCIS has received approximately 30,000 asylum applications per annum; adjudicating approximately the same number of cases, whether approvals, denials, or referrals to the Immigration Court each year.

More specifically, statistics of adjudicated asylum applications reveal an approximately 70% 'referral' rate to the Immigration Court for removal proceedings. In essence, this 'referral' is actually a denial of asylum because Immigration Court is a *de novo* proceeding for violation of immigration status where asylum may be raised in defense to removal from the US. Such a high referral/denial rate appears to indicate an inherently flawed system, as well as one prone to fraud and/or abuse. Whether it is indiscriminate filings, vague applications, or the intrinsic benefit of filing for asylum (i.e. a tactic to delay removal because of a pending immigration application) with minimal chance for approval, the system necessitates change so that it is quicker and more equitable for those applicants truly deserving of asylum.

Currently, USCIS accepts asylum applications from individuals who are either in lawful immigration status ('in-status') or not in lawful immigration status ('non-status' or 'out-of-status'). When USCIS approves an asylum application from a non-status or out-of-status applicant, USCIS is in effect granting relief from removal, since any non-status or out-of-status applicant is *de facto* removable. Thus USCIS is technically conducting an enforcement activity that is really within the purview of ICE and the Immigration Court, not USCIS.

In addition, no fee is charged for processing an asylum application, despite the fact there is statutory authority for the government to charge such a fee. As a result, the asylum processing system is funded by levying an indirect 'tax' upon all other fee-paid immigration petitions/applications received by USCIS.

Proposed Process

What must be done to accomplish the mission?

To ensure asylum processing is more efficient, while safeguarding all *due process* considerations, the following concerns must be satisfied:

1. Immigration advocates and their organizations -
 - must believe any reformation of the asylum process safeguards the applicant's access to seeking asylum, and
 - must be assured that the applicant's financial status has no bearing on his/her ability to apply for asylum.
2. Immigration opponents and their organizations –
 - must be satisfied that any reformation of the asylum process will reduce illegal immigration and fraud,
 - must be guaranteed that the national borders will be secured, and
 - must be assured that a reformed asylum process does not result in taxpayers paying for the program.
3. Federal Government agencies –
 - must not be saddled with more unfunded mandates,
 - must believe reformation of the asylum process will reduce fraud and abuse inherent in the current system,
 - will receive additional funds for currently provided services, and
 - will not have to create a new/expanded enforcement system.
4. Individuals (potential asylum applicants and their families) –
 - must perceive any reformed asylum processing system as being fair and timely.

It should be recognized that various individuals and immigration groups, advocates and opponents alike, have a pecuniary interest in not changing the current asylum processing system. As a result, all commentary from these individuals and groups should be viewed as being potentially biased by the pecuniary (conflicting) interest of the asylum applicant.

Table 1.1 - The Current Asylum Process

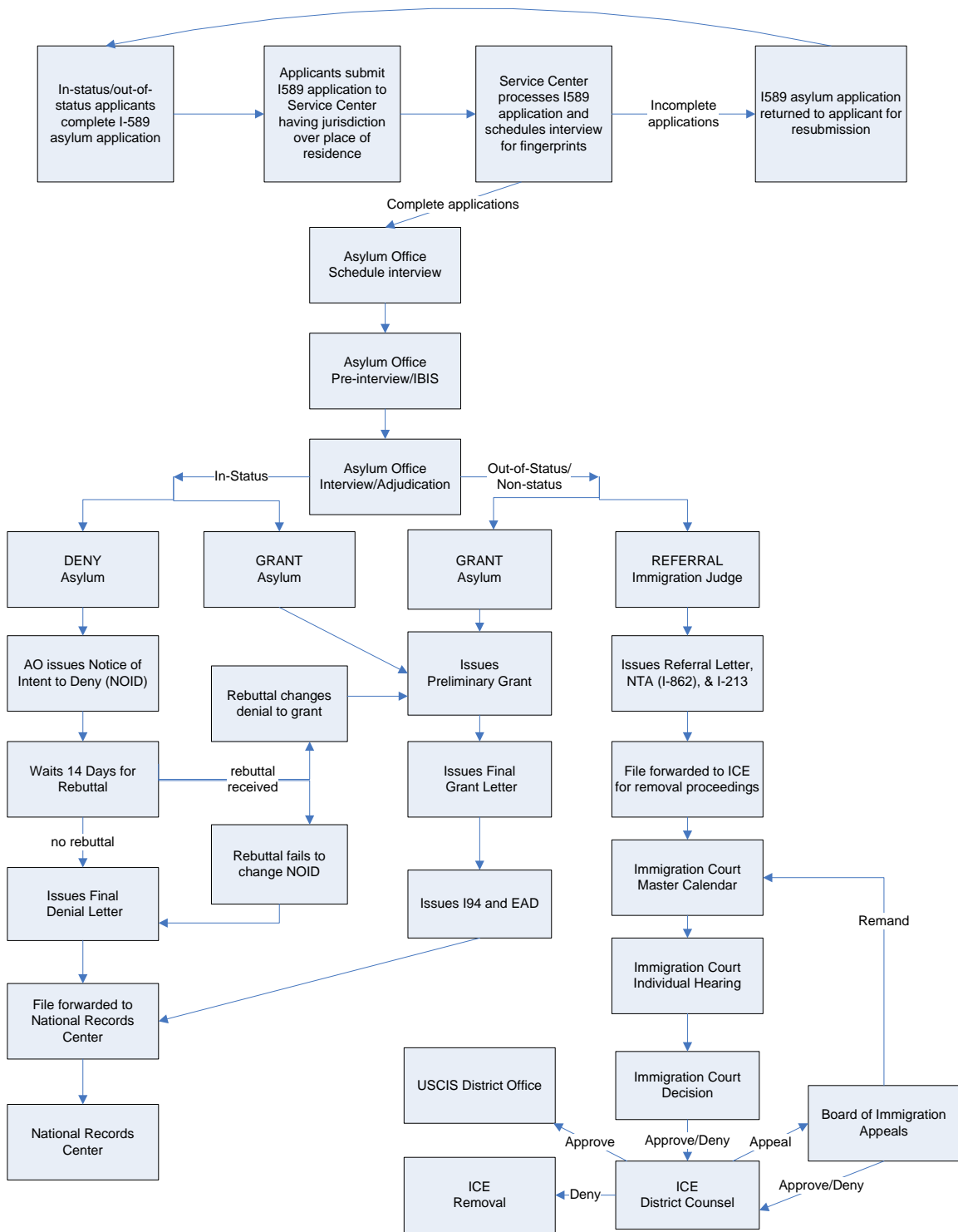
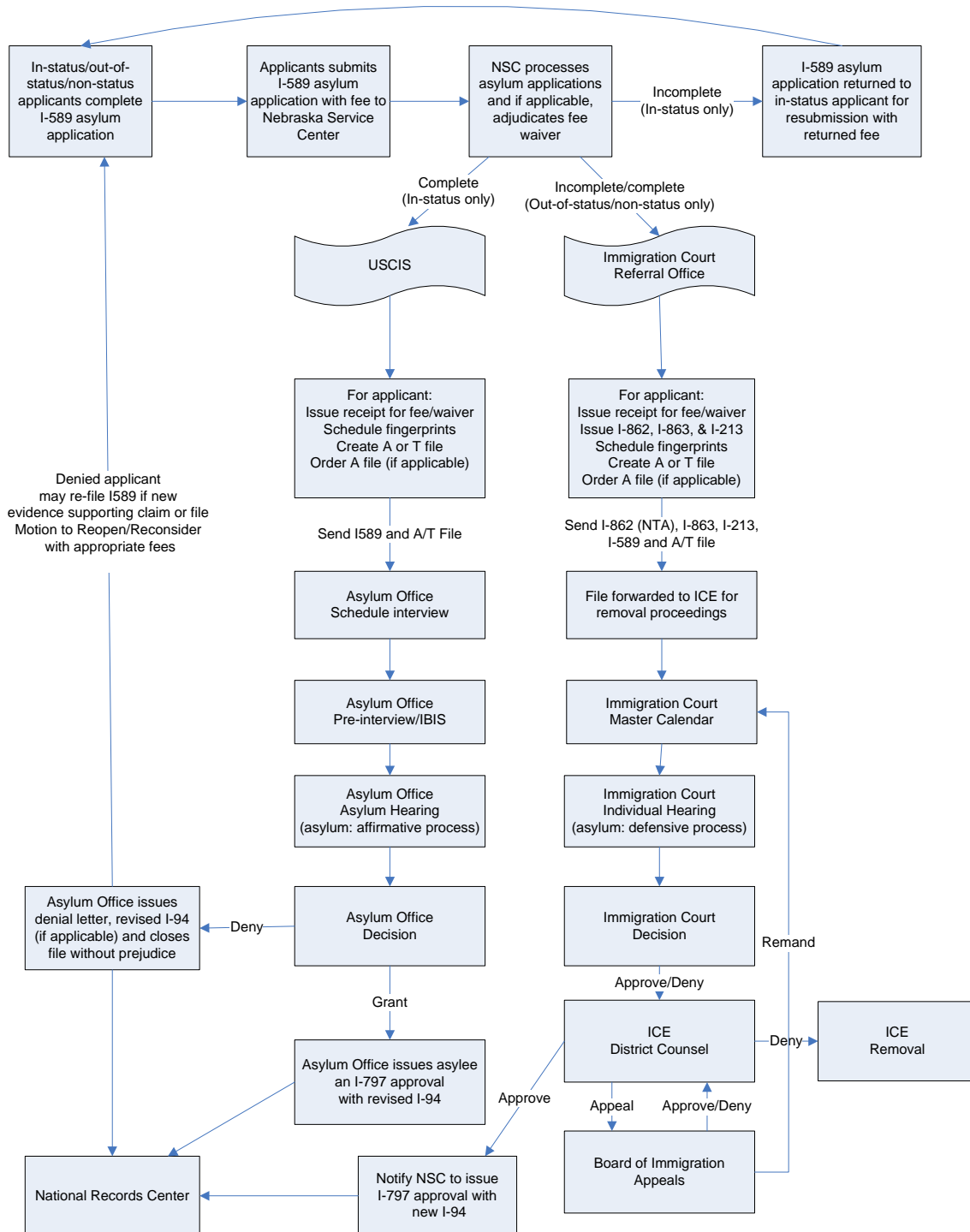


Table 1.2 - The Recommended Asylum Process



For all individuals:

- 1) Individual applies for asylum via mail to USCIS at a designated facility which receives all asylum applications.
- 2) At the designated facility, the application is reviewed for:
 - a. Type of application – in-status v. out-of-status/non-status
 - b. Completeness
 - i. Complete (in-status applicants) – continued USCIS processing.
 - ii. Incomplete (in-status applicants) – returned to applicant with identified reason.
 - iii. Complete/Incomplete (out-of-status/non-status applicants) – forwarded to the Immigration Court Referral Office within the USCIS facility for EOIR processing.
 - c. Fees
 - i. Fee accepted and receipt issued, or
 - ii. Fee waiver adjudicated – approved (and receipt issued) or denied
- 3) Application is then processed:

For individuals in lawful immigration status (USCIS processing):

- 4) At the designated USCIS facility:
 - a. Applicant is sent a notice by mail for a scheduled appointment with the Application Support Center (ASC) to collect required biometric information for commencement of required security checks.
 - b. The 'A' file or 'T' file (with an initiated electronic NFTS transfer of an existing 'A' file) is forwarded to the USCIS asylum office having jurisdiction over the applicant's place of residence.
- 5) Upon receipt of the asylum application, the USCIS Asylum Office in-processes the 'A' file and the applicant is sent a notice by mail for a scheduled asylum interview.
- 6) On the day of interview, the applicant proceeds with the
 - a. pre-interview process: verification of identity; IBIS checks, et al,
 - b. asylum interview, and
 - c. is informed that the decision will be mailed within two-three weeks.
- 7) USCIS renders a decision and mails it to the applicant:

- a. *Approved applications*: Applicant is issued an I-797 Notice of Action with an amended I-94 Arrival Document indicating change of status to an asylee and instructions regarding asylee status.
 - b. *Denied applications*: Applicant is issued an I-797 Notice of Action indicating the reasons for the denial and if necessary, an amended I-94 Arrival Document that extends the applicant's lawful presence according to the tolled time period authorized by statute to allow for the processing of the asylum application.
- 8) The USCIS asylum office out-processes and closes the application by:
- a. Updating the RAPS (asylum) database,
 - b. Notifying CBP to amend the applicant's status in US-VISIT according to the amended I-94 Arrival Document, and
 - c. Forwarding the 'A' file to the USCIS National Records Center.

For individuals not in lawful status and parolees (EOIR processing):

- 4) The designated USCIS facility's Immigration Court Referral Office:
- a. Verifies the applicant has no lawful status.
 - b. Issues an I-862 Notice to Appear, I-213 Order of Deportable Alien and I-863 Notice of Referral to Immigration Judge for the applicant and any derivatives.
 - c. Schedules Master Calendar Hearing at the Immigration Court having jurisdiction over the applicant's place of residence, and serves the I-862 Notice to Appear and I-863 Notice of Referral on the Immigration Court.
 - d. By mail (first class, certified, etc.) effectively serves the applicant with the I-862 Notice to Appear and a copy of an I-863 Notice of Referral to the Immigration Judge notifying him/her of the identified Immigration Court for a Master Calendar Hearing and information regarding the effect of pursuing a 'frivolous' application.
 - e. Forwards the 'A' file or 'T' file (with initiated electronic NFTS transfer of an existing 'A' file) including the asylum application, I-862, I-863, and I-213 to the Immigration and Customs Enforcement (ICE) unit responsible for representing the government at the identified Immigration Court.
- 5) At the Master Calendar Hearing:
- a. Applicant can seek relief from removal from the Immigration Judge's discretionary grant of asylum based upon the application presented to the Immigration Court.
 - b. If the applicant informs the court of the desire to seek asylum as relief from removal, the Immigration Judge shall accept the referred asylum application, determine whether it is complete, and if so, receive it formally into the Record of Proceedings.

- 6) At the Individual Hearing:
 - a. The Immigration Judge will preside over an Individual Hearing on the asylum application according to the Rules of the Court.
 - b. The Immigration Judge renders a decision on the application. This decision can be appealed to the Board of Immigration Appeals (BIA) by either the applicant or ICE.
- 7) Once the decision is final (see BIA Practice Manual):
 - a. *Asylum grants*: The Immigration Court (or BIA) informs ICE who notifies NSC/USCIS to issue an I-797 Notice of Action with a new I-94 Arrival Document indicating change of status to an asylee and instructions regarding asylee status. NSC/USCIS will also notify CBP to amend the applicant's status in US-VISIT.
 - b. *Asylum denials*: The decision of the Immigration Court (or BIA) regarding removal or other form of relief from removal becomes effective. The applicant must comply with the court order or face legal/enforcement action.

Employment authorization: The applicant can apply for employment authorization no earlier than 150 days, and is eligible to receive employment authorization if no final decision (either by USCIS or the Immigration Judge) has been made on his/her asylum application within 180 days after either of the following:

1. USCIS has issued a receipt for the asylum application, or
2. The Immigration Judge has received a complete application during removal proceedings.

Implementation

This recommended asylum process is based on existing statutes.

From the Department of Homeland Security's (DHS) position, the recommended asylum approach adheres to both the Immigration and Nationality Act (INA as amended) and the Homeland Security Act of 2002 (HSA as amended). The Immigration and Naturalization Service (INS) was dissolved by the HSA and replaced with three distinct entities:

U.S. Citizenship and Immigration Service (USCIS): This agency was chartered to adjudicate applications for immigration benefits.

Immigration and Customs Enforcement (ICE): This agency was chartered for interior enforcement of immigration laws.

Customs and Border Protection (CBP): This agency was chartered with border enforcement of all immigration laws, including the administration of US-VISIT (US Visitor and Immigrant Status Indicator Technology).

The recommended asylum process results in the assignment to USCIS the processing responsibilities commensurate with the current immigration status (or lack thereof) of the applicant. In-status applicants would have their asylum

applications adjudicated by USCIS, and out-of-status/non-status applicants would have their applications decided by the Immigration Court and ICE. Thus, USCIS concerns itself with individuals seeking “benefits,” and ICE and the Immigration Court concern themselves with individuals seeking “relief from removal.”

From the Attorney General’s position, the recommended asylum approach does not impact its operations. The Immigration Court and the Board of Immigration Appeals continue to function in its prescribed manner.

This recommended asylum program is self-supporting instead of the current indirect “tax” upon all other fee-paid immigration petitions/applications. Section 208 of 8 CFR allows for the generation of revenue from lawfully-allowed fees while still providing services to those individuals without the financial means to pay (i.e. waiver). The fee for an asylum application will be determined by the Office of Management and Budget [OMB].

Due Process

The recommended asylum process recognizes one irrefutable fact – individuals who are out-of-status and apply for asylum are inadmissible or deportable (removable) by virtue of being out-of-status [INA § 237 (a)(1)].

INA § 240(a)(1) specifically states, “*An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.*” INA § 239 governs the issuance of Notices to Appear (NTA), which are required to place an individual in proceedings before an Immigration Judge. This cite does not provide for any discretion or delay in the issuance of a NTA by any government official due to the filing at USCIS of any petition or application for any immigration benefit.

Therefore the recommended asylum process, like the INA, recognizes the Immigration Court not USCIS as having the requisite statutory authority to decide whether an out-of-status asylum applicant shall be granted asylum as a discretionary relief from removal.

The Pros and Cons for implementation of the recommended asylum process are summarized in Table 1.3.

Table 1.3 - Recommended Asylum Process Proposal: Pros and Cons

Issue	Individual		USCIS		ICE		CBP (US-VISIT)		Immigration Court	
	Pro	Con	Pro	Con	Pro	Con	Pro	Con	Pro	Con
Asylum Applications from In-Status Applicants	Individual cases will be scheduled, interviewed and adjudicated more promptly as USCIS has fewer cases to process.	None	USCIS reduces the amount of direct labor (unfunded) needed for asylum processing by 50% or greater.	May require retraining asylum officers to adjudicate other types of petitions and applications.	None	None	Receives timely notice of changes to individuals' immigration status and authorized duration of stay which is currently not provided.	None	None	None
Asylum Applications from Out-Of-Status and Non-Status Applicants	Individual cases will be scheduled, interviewed and adjudicated more promptly. Reduced cost of time and expense because potentially one less interview.	None	USCIS' workload will be dramatically reduced since out-of-status cases are referred to Immigration Court. (Currently, 70+% of interviewed cases are referrals.)	None	None. The total number of asylum referrals to ICE is estimated to be the same. However, it may reduce the number of fraudulent or frivolous applications.	None. The total number of asylum referrals to ICE is estimated to be the same.	None	None	None. The total number of asylum referrals to Immigration Court is estimated to be the same. However, it may reduce the number of fraudulent or frivolous applications.	None. The total number of asylum referrals to Immigration Court is estimated to be the same.

Issues

The Ombudsman has identified a number of issues that impact the development, acceptance by stakeholders, and subsequent operation of a reformed asylum process. The following is a synopsis of the issues/requirements and the corresponding answers/solutions:

A) **FEDERAL ISSUES**

1. **Legislation**

- No new legislation is required for implementation of the recommended asylum process.

2. **Regulations**

- Sections 103.7 and 208 will require minimal modification for implementation of the recommended asylum process. Appendix 1 is a detailed synopsis of the necessary regulatory changes.

3. **Resources**

- **USCIS Service Center**: Need to designate a specific Service Center as the initial recipient of all asylum applications mailed to USCIS, and for the processing of I-797 Notice of Actions for Immigration Court cases. Recommend that the Nebraska Service Center be designated, as all other asylum-related actions (I-730 Refugee Travel Document and employment authorization processing) occur at this facility.
- **Immigration Court Referral Office**: Need to establish an Immigration Court Referral Office within the designated USCIS facility to review asylum applications from out-of-status/non-status applicants and issue referral documents (i.e. I-862 (Notice to Appear), I-213 (Order of Deportable Alien), and I-863 (Notice of Referral to the Immigration Judge)).

4. **Information Technology [IT]**

- **USCIS Asylum Offices**: Need to provide technical capacity to:
 - Electronically interface the USCIS systems' CLAIMS and RAPS to process Form I-797 Notice of Actions for asylum approvals and denials.
 - Electronically inform US-VISIT of changes to an applicant's immigration status and authorized period of stay based upon either a grant of asylum or a denial with equitable tolling adjustment to lawful status.
 - Update all existing USCIS databases which record an individual's immigration status and authorized duration of stay.

5. **Federal Agency Coordination**

None.

B) COMMUNICATIONS AND MARKETING ISSUES

1. Key Communication

- What key messages will convince all parties that the recommended asylum process is appropriate and what communications and marketing vehicles will be used to accomplish this?
- How do we persuade all parties to carry out the plan with energy and intelligence?
- How do we win the confidence of others that the mission is being accomplished?
 - For those with a “revenue” interest, the potential of revenue is the motivator,
 - For those with an “ideological” interest, the protection of the asylum applicant is the motivator, and
 - For those with a “personal” interest, the desire to timely present his/her asylum application and for a fair review are the motivators.

2. Key Messages for Key Players:

1. Federal Government agencies – will want:
 - a. guaranteed funding for new or expanded work,
 - b. specific authority over specific actions, and
 - c. a system that reduces fraud and makes more accurate asylum determinations.
2. Individuals (potential asylum applicants and their families) – will want:
 - a. the recommended asylum process to be as or more fair than the current system,
 - b. asylum applications to be timely processed, and
 - c. rules for employment authorization to not effectively change.
3. Immigration advocates and their organizations – will want:
 - a. assurances that any changes to asylum processing do not negatively affect an applicant’s *due process* abilities,
 - b. assurances that asylum applicants are not held to more stringent standards than current criterion, and
 - c. an affordable program for applicants.
4. Immigration opponents and their organizations – will want:
 - a. a system which is less likely or susceptible to applicant abuse and fraud, and
 - b. that no appropriated funds are used for asylum processing.
5. All Stakeholders – will want:
 - a. most if not all issues of their particular interest satisfied, and
 - b. issues of interest not satisfied, are reasonable trade-offs to gains achieved.

To effectively disseminate key messages, executive leadership and their communications staff must:

- Endorse the recommended asylum process
- Initiate the regulatory change process

- Establish a timetable to implement the program
- Identify and allocate resources
- Train staff
- Create a strategic communications and marketing plan to publicize
- Implement the program

C) PERFORMANCE MEASUREMENT ISSUE

To demonstrate the recommended asylum process/program works and is a success, it must be measured by reliable and verifiable criteria. The indicators must be accepted as valid by all parties and show the recommended asylum process operates under established baselines for:

- Backlog reduction
- Reduction in USCIS direct costs for asylum processing
- Reduction in *denial versus approval* ratio at USCIS
- Reduction in the ratio of fraud and frivolous claims
- Reduction (short and long term) in number of asylum applications referred to the Immigration Court from USCIS
- Monitoring comments and obtaining feedback on the program through surveys and/or focus groups.

D) THE LEARNING ISSUE (BEST PRACTICES)

The question of “What must be done this year to get better next year?” will be addressed through the proper analysis of relevant performance measurements.

Appendix 1: Recommended Revision to 8 CFR 103

Recommended revision:

103.7(b)(1)

Insert between “Form I-570” and “Form “I-600” the following:
“Form I-589. For filing an application for asylum and withholding of removal --
\$325.”

103.7(c)(5)

“Fees for applications for asylum may be waived pursuant to 8 CFR
208.4(d).”

Appendix 2: Recommended Revision to 8 CFR 208.

Recommended Revision:

Within this Appendix, the *left-hand column* contains 8 CFR 208 as it is currently written.

The *right-hand column* which appears in **red** contains recommended changes to 8 CFR 208, and also notes where “no change” is needed.

Sec. 208.1 General. (Revised effective 3/22/99; 64 FR 8478)

a) Applicability. Unless otherwise provided in this chapter, this subpart shall apply to all applications for asylum under section 208 of the Act or for withholding of deportation or withholding of removal under section 241(b)(3) of the Act, or under the Convention Against Torture, whether before an asylum officer or an immigration judge, regardless of the date of filing. For purposes of this chapter, withholding of removal shall also mean withholding of deportation under section 243(h) of the Act, as it appeared prior to April 1, 1997, except as provided in § 208.16(d). Such applications are hereinafter referred to as "asylum applications." The provisions of this part shall not affect the finality or validity of any decision made by a district director, an immigration judge, or the Board of Immigration Appeals in any such case prior to April 1, 1997. No asylum application that was filed with a district director, asylum officer, or immigration judge prior to April 1, 1997, may be reopened or otherwise reconsidered under the provisions of this part except by motion granted in the exercise of discretion by the Board of Immigration Appeals, an immigration judge, or an asylum officer for proper cause shown. Motions to reopen or reconsider must meet the requirements of sections 240(c)(5) and (c)(6) of the Act, and 8 CFR parts 3 and 103, where applicable.

No Change

(b) Training of asylum officers. The Director of International Affairs shall ensure that asylum officers receive special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles. The Director of International Affairs shall also, in cooperation with the Department of State and other appropriate sources, compile and disseminate to asylum officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations, and shall maintain a documentation center with information on human rights conditions.

Delete in entirety

Sec. 208.2 Jurisdiction (Revised effective 12/21/01; 65 FR 76121)

(a) Office of International Affairs. Except as provided in paragraph (b) or (c) of this section, the Office of International Affairs shall have initial jurisdiction over an asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry. The Office of International Affairs shall also have initial jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31.

Delete in entirety.

Replace with: “(a) Department of Homeland Security.

- 1) USCIS. Except as provided in paragraph (b) or (c) of this section, USCIS shall have jurisdiction over an asylum application filed by an alien who is physically present in the United States and in valid nonimmigrant status at the time of the submission of the asylum application to USCIS. Any asylum application received by USCIS from an alien not in valid nonimmigrant status shall be referred to the Immigration Court concurrent with the service of a Form I-862 Notice to Appear.
- 2) ICE. Except as provided in paragraph (b) or (c) of this section, ICE shall have jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31 for any alien seeking admission at a port-of-entry. “

(b) Jurisdiction of Immigration Court in general. Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crewmembers who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, and by aliens who have been admitted to the United States under the Visa Waiver Pilot Program. Immigration judges shall also have the authority to review reasonable fear determinations referred to the Immigration Court under § 208.31, and credible fear determinations referred to the Immigration Court under § 208.30.

No Change

(c) Certain aliens not entitled to proceedings under section 240 of the Act.

No Change

(1) Asylum applications and withholding of removal applications only. After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any asylum application filed on or after April 1, 1997, by:

No Change

(i) An alien crewmember who:

No Change

(A) Is an applicant for a landing permit;

No Change

(B) Has been refused permission to land under section 252 of the Act; or

No Change

(C) On or after April 1, 1997, was granted permission to land under section 252 of the Act, regardless of whether the alien has remained in the United States longer than authorized; No Change

(ii) An alien stowaway who has been found to have a credible fear of persecution or torture pursuant to the procedures set forth in subpart B of this part; No Change

(iii) An alien who is an applicant for admission pursuant to the Visa Waiver Pilot Program under section 217 of the Act; No Change

(iv) An alien who was admitted to the United States pursuant to the Visa Waiver Pilot Program under section 217 of the Act and has remained longer than authorized or has otherwise violated his or her immigration status; No Change

(v) An alien who has been ordered removed under § 235(c) of the Act, as described in § 235.8(a) of this chapter (applicable only in the event that the alien is referred for proceedings under this paragraph by the Regional Director pursuant to section 235.8(b)(2)(ii) of this chapter); or No Change

(vi) An alien who is an applicant for admission, or has been admitted, as an alien classified under section 101(a)(15)(S) of the Act (applicable only in the event that the alien is referred for proceedings under this paragraph by the district director). No Change

(2) Withholding of removal applications only. After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any application for withholding of removal filed by: No Change

(i) An alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act; or No Change

(ii) An alien who has been issued an administrative removal order pursuant to section 238 of the Act as an alien convicted of committing an aggravated felony. No Change

(3) Rules of procedure. No Change

(i) General. Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (c)(2) of this section shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 240, subpart A. The scope of review in proceedings conducted pursuant to paragraph (c)(1) of this section shall be limited to a determination of whether the alien is eligible for asylum or withholding or deferral of removal, and whether asylum shall be No Change

granted in the exercise of discretion. The scope of review in proceedings conducted pursuant to paragraph (c)(2) of this section shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal. During such proceedings, all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.

(ii) Notice of hearing procedures and in-absentia decisions. The alien will be provided with notice of the time and place of the proceeding. The request for asylum and withholding of removal submitted by an alien who fails to appear for the hearing shall be denied. The denial of asylum and withholding of removal for failure to appear may be reopened only upon a motion filed with the immigration judge with jurisdiction over the case. Only one motion to reopen may be filed, and it must be filed within 90 days, unless the alien establishes that he or she did not receive notice of the hearing date or was in Federal or State custody on the date directed to appear. The motion must include documentary evidence, which demonstrates that:

(A) The alien did not receive the notice;

(B) The alien was in Federal or State custody and the failure to appear was through no fault of the alien; or

(C) "Exceptional circumstances," as defined in section 240(e)(1) of the Act, caused the failure to appear.

(iii) Relief. The filing of a motion to reopen shall not stay removal of the alien unless the immigration judge issues an order granting a stay pending disposition of the motion. An alien who fails to appear for a proceeding under this section shall not be eligible for relief under section 240A, 240B, 245, 248, or 249 of the Act for a period of 10 years after the date of the denial, unless the applicant can show exceptional circumstances resulted in his or her failure to appear.

(b) Training of asylum officers. The Director of International Affairs shall ensure that asylum officers receive special training in international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles. The Director of International Affairs shall also, in cooperation with the Department of State and other appropriate sources, compile and disseminate to asylum officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations, and shall maintain a documentation center with information on human rights conditions.

No Change

No Change

No Change

No Change

No Change

Delete: "Director of International Affairs"
Replace with: "Director, USCIS and the Assistance Secretary, ICE"

Add before "shall maintain a documentation center" the following: "The Director, USCIS"

Add after "information on human rights conditions" the following: which shall be made available to the Assistant Secretary, ICE"

Sec. 208.3 Form of application.

(a) An asylum applicant must file Form I-589, Application for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form. The applicant's spouse and children shall be listed on the application and may be included in the request for asylum if they are in the United States. One additional copy of the principal applicant's Form I-589 must be submitted for each dependent included in the principal's application. (Revised effective 1/5/01; 65 FR 76121)

No Change

(b) An asylum application shall be deemed to constitute at the same time an application for withholding of removal, unless adjudicated in deportation or exclusion proceedings commenced prior to April 1, 1997. In such instances, the asylum application shall be deemed to constitute an application for withholding of deportation under section 243(h) of the Act, as that section existed prior to April 1, 1997. Where a determination is made that an applicant is ineligible to apply for asylum under section 208(a)(2) of the Act, an asylum application shall be construed as an application for withholding of removal.

No Change

(c) Form I-589 shall be filed under the following conditions and shall have the following consequences:

No Change

(1) If the application was filed on or after January 4, 1995, information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings;

No Change

(2) The applicant and anyone other than a spouse, parent, son, or daughter of the applicant who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant's signature establishes a presumption that the applicant is aware of the contents of the application. A person other than a relative specified in this paragraph who assists the applicant in preparing the application also must provide his or her full mailing address;

No Change

(3) An asylum application that does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section is incomplete. The filing of an incomplete

Delete: "the Service"
Replace with: "USCIS"

Add after "it shall be deemed complete." the following: "Any application received by USCIS which

application shall not commence the 150-day period after which the applicant may file an application for employment authorization in accordance with § 208.7. An application that is incomplete shall be returned by mail to the applicant within 30 days of the receipt of the application by the Service. If the Service has not mailed the incomplete application back to the applicant within 30 days, it shall be deemed complete. An application returned to the applicant as incomplete shall be resubmitted by the applicant with the additional information if he or she wishes to have the application considered;

has been presented by an applicant not in valid nonimmigrant status shall be referred to the Immigration Court regardless of whether the application is complete or not.”

(4) Knowing placement of false information on the application may subject the person placing that information on the application to criminal penalties under title 18 of the United States Code and to civil or criminal penalties under section 274C of the Act; and (revised effective 1/5/01; 65 FR 76121)

No Change

(5) Knowingly filing a frivolous application on or after April 1, 1997, so long as the applicant has received the notice required by section 208(d)(4) of the Act, shall render the applicant permanently ineligible for any benefits under the Act pursuant to § 208.20. (Revised effective 1/5/01; 65 FR 76121)

No Change

Sec. 208.4 Filing the application.

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

No Change

(a) Prohibitions on filing. Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate to the satisfaction of the Attorney General that one of the exceptions in section 208(a)(2)(D) of the Act applies. Such prohibition applies only to asylum applications under section 208 of the Act and not to applications for withholding of removal under § 208.16. If an applicant files an asylum application and it appears that one or more of the prohibitions contained in section 208(a)(2) of the Act apply, an asylum officer, in an interview, or an immigration judge, in a hearing, shall review the application and give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing to determine if the application should be rejected. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply: (Paragraph (a) revised effective 1/5/01; 65 FR 76121)

Delete: "Attorney General"

Replace with: "Director, USCIS (for applications from aliens in valid nonimmigrant status) or the Director, Executive Office for Immigration Review (for applications from aliens in removal proceedings)"

(1) Authority. Only an asylum officer, an immigration judge, or the Board of Immigration Appeals is authorized to make determinations regarding the prohibitions contained in section 208(a)(2)(B) or (C) of the Act.

No Change

(2) One-year filing deadline.

No Change

(i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

No Change

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

No Change

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

No Change

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. For the purpose of making determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of this chapter. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 3.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline.

Delete: "the Service"
Replace with: "USCIS"

Add after "whichever is later." the following: "The alien's last arrival shall be the date the alien last entered with or without inspection into the United States. The alien has the burden of providing clear and convincing documentary evidence as to the date of last arrival."

Add after "date it is received by the Board." the following: "The only exception to the 1 year filing requirement is when there are changed circumstances as described in paragraph (4) of this section. The alien has the burden of providing clear and convincing documentary evidence of the existence of changed circumstances."

(3) Prior denial of application. For purposes of section 208(a)(2)(C) of the Act, an asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals.

Delete: "has not been"
Replace with: "is considered"
Delete: "unless"
Replace with: "if"
Add after immigration judge the following: ", USCIS"

(4) Changed circumstances.

No Change

(i) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

No Change

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

No Change

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

No Change

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

No Change

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

Add after "determining what constitutes a "reasonable period." the following: A "reasonable period" shall not exceed one year from the commencement of the event which caused the circumstances affecting the alien."

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

Add after "was reasonable under the circumstances." the following: A "reasonable period" shall not exceed one year from the commencement of the event which caused the circumstances affecting the alien."

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

No Change

(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

No Change

(iii) Ineffective assistance of counsel, provided that:

No Change

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

No Change

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

No Change

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

No Change

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

Delete in entirety

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not

Delete: "the Service"
Replace with: "USCIS"

properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period thereafter; and

Delete: "within a reasonable period thereafter"
Replace with: "within 90 days after the incomplete application was returned by USCIS to the applicant."

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

No Change

(6) Safe Third Country Agreement. Asylum officers have authority to apply section 208(a)(2)(A) of the Act, relating to the determination that the alien may be removed to a safe country pursuant to a bilateral or multilateral agreement, only as provided in 8 CFR 208.30(e). For provisions relating to the authority of immigration judges with respect to section 208(a)(2)(A), see 8 CFR 1240.11(g). (Added effective 12-29-04; 69 FR 69480)

No Change

(b) Filing location. (1) With the service center by mail. Except as provided in paragraphs (b)(2), (b)(3), (b)(4) and (b)(5) of this section, asylum applications shall be filed directly by mail with the service center servicing the asylum office with jurisdiction over the place of the applicant's residence or, in the case of an alien without a United States residence, the applicant's current lodging or the land border port-of-entry through which the alien seeks admission to the United States.

Delete in entirety
Replace with: "Filing location. (1) With USCIS by mail. Except as provided in paragraphs (b)(2), (b)(3), (b)(4) and (b)(5) of this section, asylum applications shall be filed with the USCIS facility designated to receive all asylum applications."

(2) With the asylum office. An asylum application shall be filed directly with the asylum office having jurisdiction over the matter in the case of an alien who:

No Change

(i) Has received the express consent of the asylum office director or the Director of Asylum to do so, or

No Change

(ii) Previously was included in a spouse's or parent's pending application but is no longer eligible to be included as a derivative. In such cases, the derivative should include a cover letter referencing the previous application and explaining that he or she is now independently filing for asylum. (Paragraph (b)(2) revised effective 1/5/01; 65 FR 76121) (Revised effective 3/22/99; 64 FR 8478) (Corrected effective 3/22/99; 64 FR 13881)

No Change

(3) With the Immigration Court. Asylum applications shall be filed directly with the Immigration Court having jurisdiction over the case in the following circumstances: (Revised effective 1/5/01; 65 FR 76121)

No Change

(i) During exclusion, deportation, or removal proceedings, with the Immigration Court having jurisdiction over the underlying proceeding.

No Change

(ii) After completion of exclusion, deportation, or removal proceedings, and in conjunction with a motion to reopen pursuant to 8 CFR part 3 where applicable, with the Immigration Court having jurisdiction over the prior proceeding. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

No Change

(iii) In asylum proceedings pursuant to § 208.2(c)(1) and after the Form I-863, Notice of Referral to Immigration Judge, has been served on the alien and filed with the Immigration Court having jurisdiction over the case.

No Change

(4) With the Board of Immigration Appeals. In conjunction with a motion to remand or reopen pursuant to §§ 3.2 and 3.8 of this chapter where applicable, an initial asylum application shall be filed with the Board of Immigration Appeals if jurisdiction over the proceedings is vested in the Board of Immigration Appeals under 8 CFR part 3. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

No Change

(5) With the district director. In the case of any alien described in § 208.2(c)(1) and prior to the service on the alien of Form I-863, any asylum application shall be submitted to the district director having jurisdiction pursuant to 8 CFR part 103. If the district director elects to issue the Form I-863, the district director shall forward such asylum application to the appropriate Immigration Court with the Form I-863 being filed with that Immigration Court. (Revised effective 1/5/01; 65 FR 76121)

Delete in entirety

(c) Amending an application after filing. Upon request of the alien and as a matter of discretion, the asylum officer or immigration judge having jurisdiction may permit an asylum applicant to amend or supplement the application, but any delay caused by such request shall extend the period within which the applicant may not apply for employment authorization in accordance with § 208.7(a).

No Change

Add:

(d) Fees.

(1) *Remittance.* A fee as prescribed in 8 CFR 103.7(b) (1) shall apply to the filing of an application or asylum.

(2) *Waiver of Fees.*

(A) *USCIS.* For applications to be adjudicated by USCIS, a waiver of fees may be granted as a matter of discretion by the Director, USCIS, following the procedures as described within 8 CFR 103.7(c)(1) for the Immigration Judge.

(B) *Immigration Judge.* The procedures detailed in 8 CFR 103.7(c)(1) shall apply.

Sec. 208.5 Special duties toward aliens in custody of the Service.

(a) General. When an alien in the custody of the Service 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, the Service shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, 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. Although the Service does not have a duty in the case of an alien who is in custody pending a credible fear or reasonable fear determination under either § 208.30 or § 208.31, the Service may provide the appropriate forms, upon request. Where possible, expedited consideration shall be given to applications of detained aliens. Except as provided in paragraph (c) of this section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application. (Amended effective 1/5/01; 65 FR 76121)

Delete: "the Service"

Replace with: "ICE"

Delete the sentence starting with: "Although the Service does not have a duty"

Delete the sentence starting with: "Where possible, expedited consideration shall be given"

(b) Certain aliens aboard vessels. (1) If an alien crewmember or alien stowaway on board a vessel or other conveyance alleges, claims, or otherwise makes known to an immigration inspector or other official making an examination on the conveyance that he or she is unable or unwilling to return to his or her country of nationality or last habitual residence (if not a national of any country) because of persecution or a fear of persecution in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, or if the alien expresses a fear of torture upon return to that country, the alien shall be promptly removed from the conveyance. If the alien makes such fear known to an official while off such conveyance, the alien shall not be returned to the conveyance but shall be retained in or transferred to the custody of the Service. (Introductory text revised effective 3/22/99; 64 FR 8478)

Delete: "the Service"

Replace with: "ICE"

(i) An alien stowaway will be referred to an asylum officer for a credible fear determination under § 208.30.

No Change

(ii) An alien crewmember shall be provided the appropriate application forms and information required by section **208(d)(4)** of the Act and may then have 10 days within which to submit an asylum application to the district director having jurisdiction over the port-of-entry. The district director may extend the 10-day filing period for good cause. Once the application has been filed, the district director, pursuant to **§ 208.4(b)**, shall serve Form I-863 on the alien and immediately forward any such application to the appropriate Immigration Court with a copy of the Form I-863 being filed with that court. (Revised effective 1/5/01; **65 FR 76121**)

(2) Pending adjudication of the application, and, in the case of a stowaway the credible fear determination and any review thereof, the alien may be detained by the Service or otherwise paroled in accordance with **§ 212.5** of this chapter. However, pending the credible fear determination, parole of an alien stowaway may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(c) Exception to prohibition on removal. A motion to reopen or an order to remand accompanied by an asylum application pursuant to **§ 208.4(b)(3)(iii)** shall not stay execution of a final exclusion, deportation, or removal order unless such stay is specifically granted by the Board of Immigration Appeals or the immigration judge having jurisdiction over the motion.

Delete in entirety

Replace with: "An alien crewmember shall be provided the appropriate application forms and information required by section **208(d)(4)** of the Act. Upon a credible fear of persecution or torture determination, an asylum officer, ICE shall serve Form I-863 on the alien and immediately forward any such application to the appropriate Immigration Court with a copy of the Form I-863 being filed with that court. (Revised effective 1/5/01; **65 FR 76121**)."

Delete: Pending adjudication of the application and, in the"

Replace with: "In the"

Delete: "the Service"

Replace with: "ICE"

Delete: "Attorney General"

Replace with: "Assistant Secretary, ICE"

No Change

Sec. 208.6 Disclosure to third parties. (Revised effective 1/5/01; 65 FR 76121)

(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 Attorney General.

Add after “at the discretion of” the following:
“the Secretary of the Department of Homeland Security (for cases within the jurisdiction of USCIS and ICE) or”

Add after “the Attorney General” the following:
(for cases within the jurisdiction of EOIR)

(b) The confidentiality of other records kept by the Service 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. The Service 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.

Delete the first usage of: “the Service”
Replace with: “USCIS, ICE”

Delete the second usage of: “the Service”
Replace with: “The Secretary of the Department of Homeland Security or the Attorney General”

(c) This section shall not apply to any disclosure to:

No Change

(1) Any United States Government official or contractor having a need to examine information in connection with:

No Change

(i) The adjudication of asylum applications;

No Change

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

No Change

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under [§ 208.30](#) or [§ 208.31](#);

No Change

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

No Change

(v) Any United States Government investigation concerning any criminal or civil matter; or

No Change

(2) Any Federal, State, or local court in the

United States considering any legal action: **No Change**

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under **§ 208.30** or **§ 208.31**; or **No Change**

(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part. **No Change**

Sec. 208.7 Employment authorization

(a) Application and approval. (1) Subject to the restrictions contained in sections [208\(d\)](#) and [236\(a\)](#) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible pursuant to §§ [274a.12\(c\)\(8\)](#) and [274a.13\(a\)](#) of this chapter to submit a Form I-765, Application for Employment Authorization. Except in the case of an alien whose asylum application has been recommended for approval, or in the case of an alien who filed an asylum application prior to January 4, 1995, the application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§ [208.3](#) and [208.4](#) has been received. In the case of an applicant whose asylum application has been recommended for approval, the applicant may apply for employment authorization when he or she receives notice of the recommended approval. If an asylum application has been returned as incomplete in accordance with § [208.3\(c\)\(3\)](#), the 150-day period will commence upon receipt by the Service of a complete asylum application. An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization. If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied. If the asylum application is not so denied, the Service shall have 30 days from the date of filing of the Form I-765 to grant or deny that application, except that no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application filed on or after April 1, 1997.

Delete the first usage of: “the Service”
Replace with: “USCIS or the Immigration Court”

Delete the second usage of: “the Service”
Replace with: “USCIS”

(2) The time periods within which the alien may not apply for employment authorization and within which the Service must respond to

Delete: “the Service”
Replace with: “USCIS”

any such application and within which the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with §§ 208.3 and 208.4. Any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing. Such time periods shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request. (Revised effective 3/29/98; 63 FR 12979)

(3) The provisions of paragraphs (a)(1) and (a)(2) of this section apply to applications for asylum filed on or after January 4, 1995.

No Change

(4) Employment authorization pursuant to § 274a.12(c)(8) of this chapter may not be granted to an alien who fails to appear for a scheduled interview before an asylum officer or a hearing before an immigration judge, unless the applicant demonstrates that the failure to appear was the result of exceptional circumstances.

No Change

(b) Renewal and termination. Employment authorization shall be renewable, in increments to be determined by the Commissioner, for the continuous period of time necessary for the asylum officer or immigration judge to decide the asylum application and, if necessary, for completion of any administrative or judicial review.

Delete: "the Commissioner"
Replace with: "Director, USCIS"

(1) If the asylum application is denied by the asylum officer, the employment authorization shall terminate at the expiration of the employment authorization document or 60 days after the denial of asylum, whichever is longer.

Delete: "longer."
Replace with: "earlier."

(2) If the application is denied by the immigration judge, the Board of Immigration Appeals, or a Federal court, the employment authorization terminates upon the expiration of the employment authorization document,

No Change

unless the applicant has filed an appropriate request for administrative or judicial review.

(c) Supporting evidence for renewal of employment authorization. In order for employment authorization to be renewed under this section, the alien must provide the Service (in accordance with the instructions on or attached to the employment authorization application) with a Form I-765, the required fee (unless waived in accordance with § 103.7(c) of this chapter), and (if applicable) proof that he or she has continued to pursue his or her asylum application before an immigration judge or sought administrative or judicial review. For purposes of employment authorization, pursuit of an asylum application is established by presenting to the Service one of the following, depending on the stage of the alien's immigration proceedings:

Delete: "the Service"
Replace with: "USCIS"

(1) If the alien's case is pending in proceedings before the immigration judge, and the alien wishes to continue to pursue his or her asylum application, a copy of any asylum denial, referral notice, or charging document placing the alien in such proceedings;

No Change

(2) If the immigration judge has denied asylum, a copy of the document issued by the Board of Immigration Appeals to show that a timely appeal has been filed from a denial of the asylum application by the immigration judge; or

No Change

(3) If the Board of Immigration Appeals has dismissed the alien's appeal of a denial of asylum, or sustained an appeal by the Service of a grant of asylum, a copy of the petition for judicial review or for habeas corpus pursuant to section 242 of the Act, date stamped by the appropriate court.

Delete: "the Service"
Replace with: "ICE"

(d) In order for employment authorization to be renewed before its expiration, the application for renewal must be received by the Service 90 days prior to expiration of the employment authorization.

Delete: "the Service"
Replace with: "USCIS"

Sec. 208.8 Limitations on travel outside the United States

(a) An applicant who leaves the United States without first obtaining advance parole under [§ 212.5\(f\)](#) of this chapter shall be presumed to have abandoned his or her application under this section. (Amended effective 1/29/01; [65 FR 82254](#))

No Change

(b) An applicant who leaves the United States pursuant to advance parole under [§ 212.5\(f\)](#) of this chapter and returns to the country of claimed persecution shall be presumed to have abandoned his or her application, unless the applicant is able to establish compelling reasons for such return. (Amended effective 1/29/01; [65 FR 82254](#))

Add after "reasons for such return." The following: "For cases within their respective jurisdictions, The Director, USCIS and the Director, EOIR shall have the discretion as to determining what constitutes "compelling reasons" and shall provide guidelines to asylum officers and immigration judges who shall exercise that discretion on their behalf."

Sec. 208.9 Procedure for interview before an asylum officer

(a) The Service shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3) and is within the jurisdiction of the Service.

Delete: "the Service"
Replace with: "USCIS"

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

Delete: "the Attorney General"
Replace with: "Secretary of the Department of Homeland Security"

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

No Change

(d) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require its submission in writing. Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision shall be treated as delay caused by the applicant for purposes of § 208.7(a)(3) and shall extend the period within which the applicant may not apply for employment authorization by the number of days until the applicant does appear to receive and acknowledge receipt of the decision or until the applicant appears before an immigration judge in response to the issuance

Delete all after: "interview,"
Replace with: the applicant shall be notified that he/she shall be informed of the decision by mail.

of a charging document under § 208.14(c).
(Amended effective 1/5/01; 65 FR 76121)

(e) The asylum officer shall consider evidence submitted by the applicant together with his or her asylum application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview during which the applicant may submit additional evidence. Any such extension shall extend by an equivalent time the periods specified by § 208.7 for the filing and adjudication of any employment authorization application.

No Change

(f) The asylum application, all supporting information provided by the applicant, any comments submitted by the Department of State or by the Service, and any other information specific to the applicant's case and considered by the asylum officer shall comprise the record.

Delete: "the Service"

Replace with: "USCIS, ICE or CBP"

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

Delete: "the Service"

Replace with: "USCIS"

Sec. 208.10 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprint processing. (Section 208.10 revised effective 3/29/98; 63 FR 12979)

Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an interview. Failure to comply with fingerprint processing requirements without good cause may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of mailing in accordance with section **265** of the Act and regulations promulgated thereunder, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment. Failure to appear at the interview or fingerprint appointment will be excused if the applicant demonstrates that such failure was the result of exceptional circumstances.

Delete: "Office of International Affairs"

Replace with: "USCIS"

Sec. 208.11 Comments from the Department of State

(a) The Service shall forward to the Department of State a copy of each completed application it receives. At its option, the Department of State may provide detailed country conditions information relevant to eligibility for asylum or withholding of removal.

Delete: "the Service"

Replace with: "USCIS and the Immigration Court"

(b) At its option, the Department of State may also provide:

No Change

(1) An assessment of the accuracy of the applicant's assertions about conditions in his or her country of nationality or habitual residence and his or her particular situation;

No Change

(2) Information about whether persons who are similarly situated to the applicant are persecuted or tortured in his or her country of nationality or habitual residence and the frequency of such persecution or torture; or (Revised effective 3/22/99; [64 FR 8478](#))

No Change

(3) Such other information as it deems relevant.

No Change

(c) Asylum officers and immigration judges may request specific comments from the Department of State regarding individual cases or types of claims under consideration, or such other information as they deem appropriate.

No Change

(d) Any such comments received pursuant to paragraphs (b) and (c) of this section shall be made part of the record. Unless the comments are classified under the applicable Executive Order, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application.

No Change

Sec. 208.12 Reliance on information compiled by other sources

(a) In deciding an asylum application, or in deciding whether the alien has a credible fear of persecution or torture pursuant to [§ 208.30](#) of this part, or a reasonable fear of persecution or torture pursuant to [§ 208.31](#), the asylum officer may rely on material provided by the Department of State, the Office of International Affairs, other Service offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.

(Revised effective 3/22/99; [64 FR 8478](#))

(b) Nothing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State. Persons may continue to seek documents available through a Freedom of Information Act (FOIA) request pursuant to 8 CFR part [103](#). (Revised effective 1/5/01; [65 FR 76121](#))

Add after “the asylum officer” the following: “or the immigration judge”

Delete: “the Office of International Affairs”

Delete: “the Service”

Replace with: “USCIS”

Delete: “the Service”

Add after “employees of the” the following: “Department of Homeland Security”

Sec. 208.13 Establishing asylum eligibility

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section **101(a)(42)** of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section **235(b)(1)(B)** of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum. **No Change**

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution. (Amended effective 1/5/01; **65 FR 76121**) **No Change**

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded. **No Change**

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence: **Delete in entirety**
Replace with: Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer or immigration judge shall deny, in the exercise of his or her discretion, the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no **No Change**

longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

No Change

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

Delete: "the Service"
Replace with: "USCIS or ICE (for cases before the Immigration Court)"

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

No Change

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

No Change

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

No Change

(2) Well-founded fear of persecution. (i) An applicant has a well-founded fear of persecution if: (Revised effective 1/5/01; 65 FR 76121)

No Change

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

No Change

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

No Change

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear. No Change

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so. No Change

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: No Change

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and No Change

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable. No Change

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, No Change

economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate. (Added effective 1/5/01; [65 FR 76121](#))

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

No Change

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

No Change

(c) Mandatory denials. (1) Applications filed on or after April 1, 1997. For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section [208\(a\)\(2\)](#) or [208\(b\)\(2\)](#) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section [208\(a\)\(2\)](#) or [208\(b\)\(2\)](#) of the Act, the applicant shall be considered for eligibility for withholding of removal under section [241\(b\)\(3\)](#) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. (Revised effective 3/22/99; [64 FR 8478](#))

No Change

(2) Applications filed before April 1, 1997. (i) An immigration judge or asylum officer shall not grant asylum to any applicant who filed his or her application before April 1, 1997, if the alien:

No Change

(A) Having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community;

No Change

(B) Has been firmly resettled within the meaning of § [208.15](#); No Change

(C) Can reasonably be regarded as a danger to the security of the United States; No Change

(D) Has been convicted of an aggravated felony, as defined in section [101\(a\)\(43\)](#) of the Act; or No Change

(E) Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. No Change

(F) Is described within section 212(a)(3)(B)(i)(I),(II), and (III) of the Act as it existed prior to April 1, 1997, and as amended by the Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), unless it is determined that there are no reasonable grounds to believe that the individual is a danger to the security of the United States. (Added effective 1/5/01; [65 FR 76121](#)) No Change

(ii) If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act. No Change

(d) (Removed effective 1/5/01; [65 FR 76121](#)) No Change

**Sec. 208.14 Approval, denial, referral, or dismissal of application.
(Heading revised 6/21/99; 64 FR 27856)**

(a) By an immigration judge. Unless otherwise prohibited in [§ 208.13\(c\)](#), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section [101\(a\)\(42\)](#) of the Act.

No Change

(b) Approval by an asylum officer. In any case within the jurisdiction of the Office of International Affairs, unless otherwise prohibited in [§ 208.13\(c\)](#), an asylum officer may grant, in the exercise of his or her discretion, asylum to an applicant who qualifies as a refugee under section [101\(a\)\(42\)](#) of the Act, and whose identity has been checked pursuant to section [208\(d\)\(5\)\(A\)\(i\)](#) of the Act. (Revised effective 1/5/01; [65 FR 76121](#))

Delete: "Office of International Affairs"
Replace with: "USCIS"

(c) Denial, referral, or dismissal by an asylum officer. If the asylum officer does not grant asylum to an applicant after an interview conducted in accordance with [§ 208.9](#), or if, as provided in [§ 208.10](#), the applicant is deemed to have waived his or her right to an interview or an adjudication by an asylum officer, the asylum officer shall deny, refer, or dismiss the application, as follows: (Paragraph (c) added effective 1/5/01; [65 FR 76121](#))

Delete in entirety
Replace with: "Denial, referral, or dismissal by USCIS. All asylum applications received by USCIS shall be initially reviewed to determine which applications have been submitted by persons in valid nonimmigrant status and which applications have been submitted by persons in other than a valid nonimmigrant status. All applications submitted by persons in valid nonimmigrant status shall be adjudicated by a USCIS asylum officer. All other asylum applications shall be referred by USCIS to the Immigration Court."

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

Delete in entirety

(2) Alien in valid status. In the case of an applicant who is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status

Delete in entirety
Replace with: *Alien in valid status.*

at the time the application is decided, the asylum officer shall deny the application for asylum.

- (a) *Nonimmigrant or Temporary Protected Status.* In the case of an applicant who possessed valid nonimmigrant or Temporary Protected Status at the time of application, such valid status shall be tolled pursuant to section 212(a)(9)(B)(iv) of the Act, and the applicant shall retain the authorities pursuant to the valid status during the pending tolling period. Upon an issuance of a denial of the asylum application by USCIS, the applicant's nonimmigrant or Temporary Protected Status shall be extended for the number of days of the tolling period, and the asylum denial document shall indicate the number of days of the extended period.
- (b) *Immigrant Status.* USCIS shall not accept an asylum application from an alien who is currently in lawful immigration status.

3) Alien with valid parole. If an applicant has been paroled into the United States and the parole has not expired or been terminated by the Service, the asylum officer shall deny the application for asylum.

Delete in entirety

(4) Alien paroled into the United States whose parole has expired or is terminated.

Delete in entirety

Replace with: If an applicant has been paroled into the United States, whether or not the parole is still valid, expired or has been terminated, USCIS shall refer the application to the Immigration Court.”

(i) Alien paroled prior to April 1, 1997, or with advance authorization for parole. In the case of an applicant who was paroled into the United States prior to April 1, 1997, or who, prior to departure from the United States, had received an advance authorization for parole, the asylum officer shall refer the application, together with the appropriate charging documents, to an immigration judge for adjudication in removal proceedings if the parole has expired, the Service has terminated parole, or the Service is terminating parole through issuance of the charging documents, pursuant to § 212.5(d)(2)(i) of this chapter.

Delete in entirety

(ii) Alien paroled on or after April 1, 1997, without advance authorization for parole. In the case of an applicant who is an arriving alien or is otherwise subject to removal under **§ 235.3(b)** of this chapter, and was paroled into

Delete in entirety

the United States on or after April 1, 1997, without advance authorization for parole prior to departure from the United States, the asylum officer will take the following actions, if the parole has expired or been terminated:

(A) Inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act. If the applicant appears inadmissible to the United States under section 212(a)(6)(C) or 212(a)(7) of the Act and the asylum officer does not intend to lodge any additional charges of inadmissibility, the asylum officer shall proceed in accordance with § 235.3(b) of this chapter. If such applicant is found to have a credible fear of persecution or torture based on information elicited from the asylum interview, an asylum officer may refer the applicant directly to an immigration judge in removal proceedings under section 240 of the Act, without conducting a separate credible fear interview pursuant to § 208.30. If such applicant is not found to have a credible fear based on information elicited at the asylum interview, an asylum officer will conduct a credible fear interview and the applicant will be subject to the credible fear process specified at § 208.30(b).

Delete in entirety

Replace with: "Inadmissible or Removable under sections 212 and 237 of the Act. If the during an asylum interview conducted by a USCIS asylum officer, the asylum officer determines the applicant to be inadmissible or removable or appears inadmissible to or removable from the United States under section(s) 212 or 237 of the Act, the asylum officer shall refer the asylum application to the Immigration Court."

(B) Inadmissible on other grounds. In the case of an applicant who was paroled into the United States on or after April 1, 1997, and will be charged as inadmissible to the United States under provisions of the Act other than, or in addition to, sections 212(a)(6)(C) or 212(a)(7), the asylum officer shall refer the application to an immigration judge for adjudication in removal proceedings.

Delete in entirety

(d) Applicability of § 103.2(b) of this chapter. No application for asylum or withholding of deportation shall be subject to denial pursuant to § 103.2(b) of this chapter. (Redesignated as paragraph (d), previously paragraph (c), effective 1/5/01; 65 FR 76121)

No Change

(e) Duration. If the applicant is granted asylum, the grant will be effective for an indefinite period, subject to termination as provided in § 208.24. (Redesignated as paragraph (e) and revised, previously paragraph (d), effective 1/5/01; 65 FR 76121)

No Change

(f) Effect of denial of principal's application on separate applications by dependents. The denial of an asylum application filed by a principal applicant for asylum shall also result in the denial of asylum status to any dependents of that principal applicant who are included in that same application. Such denial shall not preclude a grant of asylum for an otherwise eligible dependent who has filed a separate asylum application, nor shall such denial result in an otherwise eligible dependent becoming ineligible to apply for asylum due to the provisions of section 208(a)(2)(C) of the Act. (Redesignated as paragraph (f), previously paragraph (e), effective 1/5/01; 65 FR 76121)

No Change

(g) Applicants granted lawful permanent residence status. If an asylum applicant is granted adjustment of status to lawful permanent resident, the Service may provide written notice to the applicant that his or her asylum application will be presumed abandoned and dismissed without prejudice, unless the applicant submits a written request within 30 days of the notice, that the asylum application be adjudicated. If an applicant does not respond within 30 days of the date the written notice was sent or served, the Service may presume the asylum application abandoned and dismiss it without prejudice. (Redesignated as paragraph (g) and amended, previously paragraph (f), effective 1/5/01; 65 FR 76121) (Added effective 6/21/99; 64 FR 27856)

Delete in entirety

Sec. 208.15 Definition of "firm resettlement." (Revised effective 1/5/01; 65 FR 76121)

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

No Change

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

No Change

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

No Change

Sec. 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture. (Heading revised 3/22/99; 64 FR 8478)

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted. (Revised effective 3/22/99; 64 FR 8478) No Change

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows: (Introductory text revised effective 3/22/99; 64 FR 8478) No Change

(1) Past threat to life or freedom. (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence: (Revised effective 1/5/01; 65 FR 76121) No Change

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or No Change

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to No Change

another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

Delete: "the Service"
Replace with: "USCIS or ICE (for cases before the Immigration Court)"

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

No Change

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish 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 upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if: (Revised effective 1/5/01; **65 FR 76121**)

No Change

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

No Change

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be

No Change

threatened upon return to that country.

(3) Reasonableness of internal relocation. No Change
For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate. (Revised effective 1/5/01; [65 FR 76121](#))

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored. No Change

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.
Delete: "the Service"
Replace with: "USCIS or ICE (for cases before the Immigration Court)"

(c) Eligibility for withholding of removal under the Convention Against Torture. (Added effective 3/22/99; [64 FR 8478](#)) No Change

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, No Change

and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section [2242](#) of the Foreign Affairs Reform and Restructuring Act of 1998 ([Pub. L. 105-277](#), 112 Stat. 2681, 2681-821). The definition of torture contained in [§ 208.18\(a\)](#) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

No Change

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

No Change

(i) Evidence of past torture inflicted upon the applicant;

No Change

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

No Change

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

No Change

(iv) Other relevant information regarding conditions in the country of removal.

No Change

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is

No Change

entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under [§ 208.17\(a\)](#).

(d) Approval or denial of application. (1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section. (Redesignated as paragraph (d) and revised effective 3/22/99; [64 FR 8478](#))

No Change

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section [241\(b\)\(3\)](#) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section [241\(b\)\(3\)\(B\)](#) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section [243\(h\)\(2\)](#) of the Act as it appeared prior to that date. For purposes of section [241\(b\)\(3\)\(B\)\(ii\)](#) of the Act, or section

No Change

243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub. L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

No Change

(e) Reconsideration of discretionary denial of asylum. In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country. (Redesignated as paragraph (e) and revised effective 3/22/99; 64

No Change

FR 8478)

(f) Removal to third country. Nothing in this section or **§ 208.17** shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred. (Added effective 3/22/99; **64 FR 8478)**

Delete: "the Service"
Replace with: "ICE"

Sec. 208.17 Deferral of removal under the Convention Against Torture. (Revised effective 3/22/99; [64 FR 8478](#))

(a) Grant of deferral of removal. An alien who: No Change
has been ordered removed; has been found
under [§ 208.16\(c\)\(3\)](#) to be entitled to protection
under the Convention Against Torture; and is
subject to the provisions for mandatory denial
of withholding of removal under [§ 208.16\(d\)\(2\)](#)
or [\(d\)\(3\)](#), shall be granted deferral of removal
to the country where he or she is more likely
than not to be tortured.

(b) Notice to Alien. (1) After an immigration
judge orders an alien described in paragraph
(a) of this section removed, the immigration
judge shall inform the alien that his or her
removal to the country where he or she is more
likely than not to be tortured shall be deferred
until such time as the deferral is terminated
under this section. The immigration judge shall
inform the alien that deferral of removal: No Change

(i) Does not confer upon the alien any lawful
or permanent immigration status in the United
States; No Change

(ii) Will not necessarily result in the alien
being released from the custody of the Service
if the alien is subject to such custody; Delete: "the Service"
Replace with: "ICE"

(iii) Is effective only until terminated; and No Change

(iv) Is subject to review and termination if
the immigration judge determines that it is not
likely that the alien would be tortured in the
country to which removal has been deferred, or
if the alien requests that deferral be
terminated. No Change

(2) The immigration judge shall also inform
the alien that removal has been deferred only
to the country in which it has been determined
that the alien is likely to be tortured, and that
the alien may be removed at any time to
another country where he or she is not likely to
be tortured. No Change

(c) Detention of an alien granted deferral of
removal under this section. Nothing in this
section shall alter the authority of the Service to Delete: "the Service"
Replace with: "ICE "

detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) Termination of deferral of removal.

No Change

(1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 3.11 of this chapter to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter.

Delete: “, the INS District Counsel for the District with jurisdiction”

Add after “paragraph (a) of this section” the following: “ICE”

Delete: “The Service”

Replace with: “The ICE”

Add after would: “not”

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of § 208.11 of this part.

Delete: “the Service”

Replace with: “ICE”

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

Delete: “the Service”

Replace with: “ICE”

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

(4) If the immigration judge determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the immigration judge determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the immigration judge's decision shall lie to the Board.

No Change

(e) Termination at the request of the alien.

(1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to § 3.11 of this chapter to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration judge shall terminate the order of deferral and the alien may be removed.

No Change

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

No Change

(f) Termination pursuant to [§ 208.18\(c\)](#). At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in [§ 208.18\(c\)](#).

Delete: "Attorney General"
Replace with: "Secretary of the Department of Homeland Security"

**Sec. 208.18 Implementation of the Convention Against Torture.
(Added effective 3/22/99; previous § 208.18 now § 208.19 [64 FR 8478](#))**

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention. **No Change**

(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 or other person acting in an official capacity. **No Change**

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. **No Change**

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture. **No Change**

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from: **No Change**

(i) The intentional infliction or threatened infliction of severe physical pain or suffering; **No Change**

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; **No Change**

(iii) The threat of imminent death; or **No Change**

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality. No Change

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture. No Change

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control. No Change

(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. No Change

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture. No Change

(b) Applicability of §§ 208.16(c) and 208.17(a). No Change

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a). No Change

(2) Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999. An alien under a final order of deportation, exclusion, or removal that became No Change

final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under [§ 208.16\(c\)](#). Such motions shall be governed by §§ 3.23 and 3.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless: (Introductory text corrected effective 3/22/99; [64 FR 13881](#))

(i) The motion is filed within June 21, 1999; and

No Change

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under [§§ 208.16\(c\)](#) or [208.17\(a\)](#).

No Change

(3) Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.

Delete: "the Service"
Replace with: "USCIS"

(i) Except as otherwise provided, after March 22, 1999, the Service will not:

Delete: "the Service"
Replace with: "USCIS or ICE, as indicated"

Add after "will not" the following: "exercise its authority as otherwise delegated to"

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

No Change

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

Delete: "the Service"
Replace with: "USCIS or the legacy INS"

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

Delete: "the Service"
Replace with: "USCIS or the legacy INS"

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under [§§ 208.16\(c\)](#) or [208.17\(a\)](#), such an alien must file a motion to reopen with the immigration

No Change

court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 208.16(c) or 208.17(a) shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 208.16(c) or deferral of removal under § 208.17(a) will be considered under § 208.31.

Delete: "the Service"

Replace with: "ICE or the legacy INS"

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 208.18(d) and 235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

Delete: "the Service"

Replace with: "ICE or the legacy INS"

(4) Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999. Sections § 208.16(c) and § 208.17(a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the

Delete: "the Service"

Replace with: "USCIS or the legacy INS"

applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under § 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 208.16(c) and deferral of removal under § 208.17(a).

(c) Diplomatic assurances against torture obtained by the Secretary of State.

No Change

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

Add after "may forward to the" the following:
"Secretary of the Department of Homeland Security and the"

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this

Add after "assurances that the Secretary" the following: "of State"

Add after "of this section to the" the following:
"Secretary of the Department of Homeland Security and the"

paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

Add after “for consideration by the” the following: “Secretary of the Department of Homeland Security or the”

Add after “this paragraph, the” the following: “Secretary of the Department of Homeland Security or”

Add after “Convention Against Torture.” the following: “The Secretary of the Department of Homeland Security authority under this paragraph may be exercised by the Deputy Secretary; the Director, USCIS or the Assistant Secretary, ICE, but may not be further delegated.”

Delete: “Commissioner, Immigration and Naturalization Service”

Replace with: “Director, Executive Officer for Immigration Review”

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

No Change

(d) Cases involving aliens ordered removed under section 235(c) of the Act. With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of **Part 208** relating to consideration or review by an immigration judge, the Board of

Delete: “the Service”

Replace with: “ICE”

Immigration Appeals, or an asylum officer shall not apply.

(e) Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture. No Change

(1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provide however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act. No Change

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief. No Change

Sec. 208.19 Decisions. (Added effective 1/5/01; 65 FR 76121)

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

Delete all after 'to the applicant.'

Replace with: A letter communicating denial of asylum shall state the basis for the denial and include an assessment of the applicant's credibility. The applicant shall be informed of the decision of his or her asylum application by mail.

**Sec. 208.20 Determining if an asylum application is frivolous.
(Redesignated as § 208.20, previously § 208.19, effective 1/5/01; 65
FR 76121)(Redesignated as § 208.19 and revised effective 3/22/99; 64
FR 8478)**

For applications filed on or after April 1, 1997, **No Change**
an applicant is subject to the provisions of
section **208(d)(6)** of the Act only if a final order
by an immigration judge or the Board of
Immigration Appeals specifically finds that the
alien knowingly filed a frivolous asylum
application. For purposes of this section, an
asylum application is frivolous if any of its
material elements is deliberately fabricated.
Such finding shall only be made if the
immigration judge or the Board 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. For purposes of this
section, a finding that an alien filed a frivolous
asylum application shall not preclude the alien
from seeking withholding of removal.

Sec. 208.21 Admission of the asylee's spouse and children.
(Redesignated as § 208.21, previously § 208.20, effective 1/5/01; 65 FR 76121)(Redesignated as § 208.20 effective 3/22/99; 64 FR 8478)

(a) Eligibility. In accordance with section 208(b)(3) of the Act, a spouse, as defined in section 101(a)(35) of the Act, 8 U.S.C. 1101(a)(35), or child, as defined in section 101(b)(1) of the Act, also may be granted asylum if accompanying, or following to join, the principal alien who was granted asylum, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997. (Revised effective 1/5/01; 65 FR 76121)

No Change

(b) Relationship. The relationship of spouse and child as defined in sections 101(a)(35) and 101(b)(1) of the Act must have existed at the time the principal alien's asylum application was approved and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States. If the asylee proves that the asylee is the parent of a child who was born after asylum was granted, but who was in utero on the date of the asylum grant, the child shall be eligible to accompany or follow-to-join the asylee. The child's mother, if not the principal asylee, shall not be eligible to accompany or follow-to-join the principal asylee unless the child's mother was the principal asylee's spouse on the date the principal asylee was granted asylum. (Revised effective 2/26/98; 63 FR 3792)

No Change

(c) Spouse or child in the United States. When a spouse or child of an alien granted asylum is in the United States, but was not included in the asylee's application, the asylee may request accompanying or following-to-join benefits for his/her spouse or child by filing for each qualifying family member a separate Form I-730, Refugee/Asylee Relative Petition, and supporting evidence, with the designated Service office, regardless of the status of that spouse or child in the United States. A recent photograph of each derivative must accompany the Form I-730. The photograph must clearly identify the derivative, and will be made part of the derivative's immigration record for identification purposes. Additionally, a separate Form I-730 must be filed by the asylee for each qualifying family member before February 28, 2000, or within 2 years of the date in which he/she was granted asylum status, whichever is later, unless it is determined by the Service that this period should be extended for humanitarian reasons. Upon approval of the Form I-730, the Service will notify the asylee of such approval on Form I-797, Notice of Action. Employment will be authorized incident to status. To demonstrate employment authorization, the Service will issue a Form I-94, Arrival-Departure Record, which also reflects the derivative's current status as an asylee, or the derivative may apply under § 274a.12(a) of this chapter, using Form I-765, Application for Employment Authorization, and a copy of the Form I-797. The approval of the Form I-730 shall remain valid for the duration of the relationship to the asylee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal's status has not been revoked. However, the approved Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of an asylee. (Revised effective 2/26/98; [63 FR 3792](#))

Delete: "the Service"
Replace with: "USCIS"

Delete: "a Form I-94, Arrival-departure Record, which also reflects the derivative's current status as an asylee, or the."
Replace with: "The"

Add after "Employment Authorization, and a copy of the Form I-797" the following: "to receive an employment authorization document which attests the derivative's authority for employment."

(d) Spouse or child outside the United States. When a spouse or child of an alien granted asylum is outside the United States,

Delete: "the Service"
Replace with: "USCIS"

the asylee may request accompanying or following-to-join benefits for his/her spouse or child(ren) by filing a separate Form I-730 for each qualifying family member with the designated Service office, setting forth the full name, relationship, date and place of birth, and current location of each such person. A recent photograph of each derivative must accompany the Form I-730. The photograph must clearly identify the derivative, and will be made part of the derivative's immigration record for identification purposes. A separate Form I-730 for each qualifying family member must be filed before February 28, 2000, or within 2 years of the date in which the asylee was granted asylum status, whichever is later, unless the Service determines that the filing period should be extended for humanitarian reasons. When the Form I-730 is approved, the Service will notify the asylee of such approval on Form I-797. The approved Form I-730 shall be forwarded by the Service to the Department of State for delivery to the American Embassy or Consulate having jurisdiction over the area in which the asylee's spouse or child is located. The approval of the Form I-730 shall remain valid for the duration of the relationship to the asylee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal's status has not been revoked. However, the approved Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of an asylee. (Revised effective 2/26/98; **63 FR 3792**)

(e) Denial. If the spouse or child is found to be ineligible for the status accorded under section **208(c)** of the Act, a written notice stating the basis for denial shall be forwarded to the principal alien. No appeal shall lie from this decision.

No Change

(f) Burden of proof. To establish the claimed relationship of spouse or child as defined in sections **101(a)(35)** and **101(b)(1)** of the Act, evidence must be submitted with the request as set forth in part **204** of this chapter. Where

No Change

possible this will consist of the documents specified in § 204.2(a)(1)(i)(B), (a)(1)(iii)(B), (a)(2), (d)(2), and (d)(5) of this chapter. The burden of proof is on the principal alien to establish by a preponderance of the evidence that any person on whose behalf he or she is making a request under this section is an eligible spouse or child. (Revised effective 2/26/98; 63 FR 3792)

(g) Duration. The spouse or child qualifying under section 208(c) of the Act shall be granted asylum for an indefinite period unless the principal's status is revoked.

No Change

Sec. 208.22 Effect on exclusion, deportation, and removal proceedings. (Redesignated as § 208.22 and revised, previously § 208.21, effective 1/5/01; [65 FR 76121](#)) (Redesignated as § 208.21 and revised effective 3/22/99; [64 FR 8478](#))

An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to [§ 208.24](#). An alien in exclusion, deportation, or removal proceedings who is granted withholding of removal or deportation, or deferral of removal, may not be deported or removed to the country to which his or her deportation or removal is ordered withheld or deferred unless the withholding order is terminated pursuant to § 208.24 or deferral is terminated pursuant to [§ 208.17\(d\)](#) or [\(e\)](#). No Change

Sec. 208.23 Restoration of status. (Redesignated as § 208.23, previously § 208.22, effective 1/5/01; 65 FR 76121) (Redesignated as § 208.22 effective 3/22/99; 64 FR 8478)

An alien who was maintaining his or her nonimmigrant status at the time of filing an asylum application and has such application denied may continue in or be restored to that status, if it has not expired. **No Change**

Sec. 208.24 Termination of asylum or withholding of removal or deportation. (Redesignated as § 208.24, previously § 208.23, effective 1/5/01; 65 FR 76121) (Redesignated as § 208.23 effective 3/22/99; 64 FR 8478)

(a) Termination of asylum by the Service. Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of asylum made under the jurisdiction of an asylum officer or a district director if following an interview, the asylum officer determines that:

Delete: "the Service"
Replace with: "USCIS"

Delete: "or a district director"

(1) There is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted;

No Change

(2) As to applications filed on or after April 1, 1997, one or more of the conditions described in section 208(c)(2) of the Act exist; or

No Change

(3) As to applications filed before April 1, 1997, the alien no longer has a well-founded fear of persecution upon return due to a change of country conditions in the alien's country of nationality or habitual residence or the alien has committed any act that would have been grounds for denial of asylum under § 208.13(c)(2).

No Change

(b) Termination of withholding of deportation or removal by the Service. Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of withholding of deportation or removal made under the jurisdiction of an asylum officer or a district director if the asylum officer determines, following an interview, that:

Delete: "the Service"
Replace with: "USCIS"

Delete: "or a district director"

(1) The alien is no longer entitled to withholding of deportation or removal because, owing to a fundamental change in circumstances relating to the original claim, the alien's life or freedom no longer would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion in the country from which deportation or removal was withheld. (Revised effective 1/5/01; 65 FR 76121)

No Change

(2) There is a showing of fraud in the alien's application such that the alien was not eligible

No Change

for withholding of removal at the time it was granted;

(3) The alien has committed any other act that would have been grounds for denial of withholding of removal under section 241(b)(3)(B) of the Act had it occurred prior to the grant of withholding of removal; or

No Change

(4) For applications filed in proceedings commenced before April 1, 1997, the alien has committed any act that would have been grounds for denial of withholding of deportation under section 243(h)(2) of the Act.

No Change

(c) Procedure. Prior to the termination of a grant of asylum or withholding of deportation or removal, the alien shall be given notice of intent to terminate, with the reasons therefore, at least 30 days prior to the interview specified in paragraph (a) of this section before an asylum officer. The alien shall be provided the opportunity to present evidence showing that he or she is still eligible for asylum or withholding of deportation or removal. If the asylum officer determines that the alien is no longer eligible for asylum or withholding of deportation or removal, the alien shall be given written notice that asylum status or withholding of deportation or removal and any employment authorization issued pursuant thereto, are terminated.

No Change

(d) Termination of derivative status. The termination of asylum status for a person who was the principal applicant shall result in termination of the asylum status of a spouse or child whose status was based on the asylum application of the principal. Such termination shall not preclude the spouse or child of such alien from separately asserting an asylum or withholding of deportation or removal claim.

No Change

(e) Removal proceedings. When an alien's asylum status or withholding of removal or deportation is terminated under this section, the Service shall initiate removal proceedings, as appropriate, if the alien is not already in exclusion, deportation, or removal proceedings. Removal proceedings may take place in conjunction with a termination hearing scheduled under § 208.24(f). (Added effective 1/5/01; 65 FR 76121)

Delete: "the Service"
Replace with: "USCIS"

(f) Termination of asylum, or withholding of deportation or removal, by an immigration judge or the Board of Immigration Appeals. An immigration judge or the Board of Immigration

Delete: "reopened proceeding, the Service"
Replace with: "reopened proceeding, ICE"

Delete: "jurisdiction of the Service"
Replace with: "jurisdiction of USCIS"

Appeals may reopen a case pursuant to § 3.2 or § 3.23 of this chapter for the purpose of terminating a grant of asylum, or a withholding of deportation or removal. In such a reopened proceeding, the Service must establish, by a preponderance of evidence, one or more of the grounds set forth in paragraphs (a) or (b) of this section. In addition, an immigration judge may terminate a grant of asylum, or a withholding of deportation or removal, made under the jurisdiction of the Service at any time after the alien has been provided a notice of intent to terminate by the Service. Any termination under this paragraph may occur in conjunction with an exclusion, deportation, or removal proceeding. (Redesignated as paragraph (f) and revised; previously paragraph (e); effective 1/5/01; [65 FR 76121](#))

(g) Termination of asylum for arriving aliens. If the Service determines that an applicant for admission who had previously been granted asylum in the United States falls within conditions set forth in [§ 208.24](#) and is inadmissible, the Service shall issue a notice of intent to terminate asylum and initiate removal proceedings under section [240](#) of the Act. The alien shall present his or her response to the intent to terminate during proceedings before the immigration judge. (Redesignated as paragraph (g) and revised; previously paragraph (f); effective 1/5/01; [65 FR 76121](#))

Delete: "terminate by the Service"
Replace with: "terminate by USCIS"

Delete in entirety:
Replace with: "If CBP determines that an applicant for admission who had previously been granted asylum in the United States falls within conditions set forth in [§ 208.24](#) and is inadmissible, CBP shall place the applicant in removal proceedings before the Immigration Court under section [240](#) of the Act. (Redesignated as paragraph (g) and revised; previously paragraph (f); effective 1/5/01; [65 FR 76121](#))"

Sec. 208.25 - 208.29 [Reserved]

Subpart B--Credible Fear of Persecution

No Change

Sec. 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act. (Revised effective 1/5/01; 65 FR 76121)

(a) Jurisdiction. The provisions of this subpart apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, the Service has exclusive jurisdiction to make credible fear determinations, and the Executive Office for Immigration Review has exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart, paragraphs (b) through (g) of this section are the exclusive procedures applicable to credible fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act.

Delete: "the Service"

Replace with: "ICE"

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

No Change

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

No Change

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

No Change

(c) Authority. Asylum officers conducting credible fear interviews shall have the authorities described in § 208.9(c).

Add the following as the second and third sentences: "ICE has the authority to augment its staff of asylum officers with those from USCIS upon mutual agreement of USCIS and ICE. In those circumstances, ICE maintains overall decision authority for credible fear interviews."

(d) Interview. The asylum officer, as defined in section 235(b)(1)(E) of the Act, will conduct the interview in a non-adversarial 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 applicant has a credible fear of persecution or torture, and shall conduct the interview as follows:

No Change

(1) If the officer conducting the credible fear interview determines that the alien is unable to

No Change

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 Form M-444, Information about Credible Fear Interview in Expedited Removal Cases. The officer shall also determine that the alien has an understanding of the credible fear determination process.

No Change

(3) The alien may be required to register his or her identity electronically or through any other means designated by the Attorney General.

Delete: "Attorney General"
Replace with: "Secretary of the Department of Homeland Security"

(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.

No Change

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

No Change

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

No Change

(e) Determination. (1) The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any

No Change

additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture.

(2) An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act. (Added effective 12-29-04; 69 FR 69480)

No Change

(3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 CFR 208.16 or 208.17. (Added effective 12-29-04; 69 FR 69480)

No Change

(4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge. (Redesignated as paragraph (e)(4) and revised, previously (e)(2), effective 12-29-04; 69 FR 69480)

No Change

(5) Except as provided in paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of

No Change

removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to 8 CFR 208.2(c)(3). (Redesignated as paragraph (e)(5) and revised, previously (e)(3), effective 12-29-04; 69 FR 69480)

(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 or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph. 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. (Added effective 12/29/04; 69 FR 69480)

No Change

(i) If the asylum officer, with concurrence from a supervisory asylum officer, determines that an alien does not qualify for an exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After the asylum officer's documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that he or she will be

No Change

removed to Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

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

No Change

(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

No Change

(A) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

No Change

(B) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

No Change

(C) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

No Change

(D) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

No Change

(E) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

No Change

(F) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

Delete: "Director of USCIS"
Replace with: "Deputy Secretary of the Department of Homeland Security"

Delete: "Director's"
Replace with: "Deputy Secretary's"

(iv) As used in [8 CFR 208.30\(e\)\(6\)\(iii\)\(B\)](#), [\(C\)](#) and [\(D\)](#) 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.

No Change

(7) An asylum officer's determination shall not become final until reviewed by a supervisory asylum officer. (Redesignated as paragraph (e)(7), previously (e)(4), effective 12-29-04; [69 FR 69480](#))

No Change

(f) Procedures for a positive credible fear finding. If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section [240](#) of the Act. If an alien stowaway is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the

No Change

withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter.

(g) Procedures for a negative credible fear finding. (1) If an alien is found not to have a credible fear of persecution or torture, the asylum officer shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge. The alien shall indicate whether he or she desires such review on Form I-869. A refusal by the alien to make such indication shall be considered a request for review.

No Change

(i) If the alien requests such review, or refuses to either request or decline such review, the asylum officer shall arrange for detention of the alien and serve him or her with a Form I-863, Notice of Referral to Immigration Judge, for review of the credible fear determination in accordance with paragraph (f)(2) of this section.

Delete: "arrange for detention of the alien and"

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

No Change

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

Delete: "the district director"
Replace with: "ICE"

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

No Change

(i) The asylum officer's negative decision regarding credible fear shall be subject to review by an immigration judge upon the applicant's request, or upon the applicant's refusal either to request or to decline the review after being given such opportunity, in accordance with section 235(b)(1)(B)(iii)(III) of the Act.

No Change

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

No Change

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

(iii) A credible fear hearing shall be closed to the public unless the alien states for the record or submits a written statement that the alien is waiving that requirement; in that event the hearing shall be open to the public, subject to the immigration judge's discretion as provided in § 3.27.

No Change

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

No Change

(A) If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to the Service for removal of the alien. The immigration judge's decision is final and may not be appealed. The Service, however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.

Delete: "the Service"
Replace with: "ICE"

Delete: "The Service, however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge."

(B) If the immigration judge finds that the alien, other than an alien stowaway, possesses a credible fear of persecution or torture, the immigration judge shall vacate the order of the asylum officer issued on Form I-860 and the Service may commence removal proceedings under section 240 of the Act, during which time the alien may file an application for asylum and withholding of removal in accordance with § 208.4(b)(3)(i).

Delete: "the Service"
Replace with: "ICE"

(C) If the immigration judge finds that an alien stowaway possesses a credible fear of persecution or torture, the alien shall be allowed to file an application for asylum and withholding of removal before the immigration judge in accordance with § 208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such decision may be appealed by either the stowaway or the Service to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum or for withholding of removal becomes final, the Service shall terminate removal proceedings

Delete: "the Service"
Replace with: "ICE"

under section [235\(a\)\(2\)](#) of the Act.

§ 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. (Added effective 3/22/99; 64 FR 8478)

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

Delete: "the Service"

Replace with: "ICE"

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

No Change

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

Add after Interview and Procedure the following: "(i)"

Add after persecution or torture the following: "(ii)"

Add after country of removal the following: "(iii)"

(d) Authority. Asylum officers conducting screening determinations under this section shall have the authority described in § 208.9(c).

Add the following as the second and third sentences: "ICE has the authority to augment its staff of asylum officers with those from USCIS upon mutual agreement of USCIS and

ICE. In those circumstances, ICE maintains overall decision authority for credible fear interviews.”

(e) Referral to Immigration Judge. If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals. (Corrected effective 3/22/99; 64 FR 13881)

Delete: “the Service”

Replace with: “ICE”

(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 Form I-898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien shall indicate whether he or she desires such review.

No Change

(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 Form I-863. The record of determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Form I-863 with the immigration court. Upon review of the asylum officer's negative reasonable fear determination: (Introductory text corrected effective 3/22/99; 64 FR 13881)

Add after “requests such review.”: “or refuses to either request or decline such review,”

(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 the Service for removal of the alien. No appeal

No Change

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

No Change

(i) The immigration judge shall consider only the alien's application for withholding of removal under § 208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

No Change

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies to the Board of Immigration Appeals. If the alien or the Service 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 § 208.16.

Delete: "the Service"
Replace with: "ICE"