



**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

Chief Immigration Judge

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December 28, 2004

**MEMORANDUM**

TO: All Immigration Court Personnel

FROM: The Office of the Chief Immigration Judge

SUBJECT: Interim Operating Policies and Procedures Memorandum 2004 - 09:  
U.S. - Canada Agreement Regarding Cooperation in the  
Examination of Refugee Status Claims - "Safe Third Country"

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## I. Introduction

**A. Summary.** The United States and Canada have entered into an Agreement for cooperation in the examination of refugee status claims for nationals of third countries. The protocol is known as the “Safe Third Country Agreement,” and becomes effective on December 29, 2004. This interim OPPM sets forth the role of the immigration judge in examining the claims of refugees under the agreement. The Office of the Chief Immigration Judge (OCIJ) has created a new case identifier of ‘TC’ to track these cases. Also, OCIJ has created an Information Sheet to be completed by immigration judges when such claims arise in proceedings under section 240 of the Immigration and Nationality Act (the Act).

**B. Background.** On November 29, 2004, the Department of Justice and the Department of Homeland Security (DHS) amended 8 CFR *Aliens and Nationality* as follows:

8 CFR 1003.42 *Review of credible fear determinations* was amended by the addition of section (h),

8 CFR 1208.04 (a) *Filing the Application* was amended by the addition of subsection (6),

8 CFR 1240.11 *Ancillary matters, applications* was amended by the addition of section (g).

These rules implemented the December 5, 2002 Safe Third Country Agreement (Agreement) between the U. S. and Canada providing for cooperation between these two countries in the examination of refugee status claims from nationals of third countries. The Agreement bars certain aliens who are arriving from Canada, or an alien in transit during removal from Canada, from applying for asylum, withholding of removal or protection under the Convention Against Torture (CAT).

In the context of expedited removal proceedings under Section 235 of the I&N Act, DHS will conduct a threshold screening interview to determine whether the Agreement applies to an alien. This determination may not be reviewed by an immigration judge.

When placed in proceedings under Section 240 of the Act, the final rule provides the Executive Office for Immigration Review with the authority to determine if the Agreement applies to aliens whom DHS has placed in removal proceedings.

This Agreement, which becomes effective on December 29, 2004, covers certain aliens who are arriving in the U.S. from Canadian land borders and ports of entry, or arriving in transit through the U. S. during removal by the Canadian government and who express a fear of persecution. Subject to several specific exceptions, the Agreement provides for the U. S. to return such arriving aliens to Canada, the country of last presence, to seek protection under Canadian law, rather than applying in the U. S. for asylum, withholding of removal, or protection under the CAT. In sum, aliens covered by the Agreement will be allowed to seek asylum and related protections in one country or the other, but not in both.

The Agreement recognizes that Canada offers a generous system of refugee protection, and thus asylum seekers returned to Canada will have access to a full and fair procedure for determining their protection before they can be removed to a third country.

The Agreement, as implemented in the U. S. will operate as follows:

## **II. Implementation of the Agreement**

### **A. Department of Homeland Security**

#### **1. Threshold Screening Interview**

A U.S. Citizenship and Immigration Services (USCIS) Asylum Officer will conduct a threshold screening interview in the context of expedited removal proceedings to determine whether an arriving alien or alien in transit is subject to the Agreement. If so, the Asylum Officer will determine whether the arriving alien or alien in transit meets one of the exceptions to the Agreement, or whether the alien should be returned to Canada for consideration of his/her protection claims in that country.

If the asylum officer determines that the alien qualifies for an exception to the Agreement, the asylum officer will then proceed immediately to a consideration of whether the alien has a credible fear of persecution or torture if returned to his/her country. The existing credible fear process of Section 235(b) of the Act will apply to those aliens, including the potential for review by an immigration judge.

#### **2. Jurisdiction To Review DHS Credible Fear Determinations**

An immigration judge does not have jurisdiction or authority in a Credible Fear proceeding to review DHS's determination that an alien qualifies for an exception to the Agreement or should be returned to Canada for consideration of his/her claim under Canadian law. However, if DHS determines that an arriving alien qualifies for an exception to the Agreement, an immigration judge only has jurisdiction to review a negative credible fear finding as provided in 8 CFR 1003.42 (See Section 208(a)(2)(A) of the Act).

## **B. Removal Proceedings**

- 1. Citizens of Canada.** The Agreement does not apply to refugee status claimants who are citizens of Canada or who, not having a country of nationality are habitual residents of Canada or the U.S.
- 2. Jurisdiction in Removal Proceedings.** Under the Agreement, if DHS places an alien in removal proceedings under section 240 of the Act, immigration judges must determine whether the arriving alien or alien in transit should be returned to Canada to pursue his/her asylum, withholding of removal or CAT claim, or be allowed to remain in the U.S. to pursue these claims. In making this determination immigration judges must first determine if the arriving alien or alien in transit is subject to the Agreement, and if so, whether the alien qualifies for one of the exceptions to the Agreement.
- 3. Exceptions.** An alien determined by the immigration judge to be subject to the Agreement is ineligible to apply for asylum, withholding of removal or CAT claims in the U.S. and must be returned to Canada to pursue his/her claims unless the immigration judge determines by a preponderance of evidence that the alien falls within one of the following exceptions:

### **a. Family Unity -**

- (1) The alien has in the U. S. 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 U.S. (except for non-immigrant visitor status, or visitor status based on admission to U.S. pursuant to VWP).
- (2) The alien 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 application for asylum pending in the U.S.

**b. Unaccompanied Minor -** The alien is unmarried, under 18 years of age, and does not have a parent or legal guardian in the U.S. or Canada.

### **c. Valid Visa -**

- (1) The alien arrived in the U.S. with a validly issued visa or other valid admission document, other than for transit, issued by the U.S. to the alien.
- (2) The alien was not required to obtain a visa to enter the U.S.

**d. Public Interest Determinations Reserved to DHS -** An alien in removal proceedings who is otherwise ineligible to apply for asylum under the Agreement may pursue their claims in the U.S. if DHS files a written notice in the proceedings before the immigration judge that it has decided in the public interest to allow the alien to pursue his/her claims.

**4. Eligibility for Other Forms of Relief in Removal Proceedings.** An alien in removal proceedings who is found to be ineligible to apply for asylum withholding of removal or CAT under the Agreement may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to the agreement is ordered removed, the alien shall be ordered removed to Canada and will be able to pursue his/her claims for asylum or protection against persecution or torture under the laws of that country.


### **III. Administrative Procedure**

#### **A. New Case Identifier Code**

A new case identifier code 'TC' (Third Country) has been created and added to the Case Adjournment, Call-Up and Case Identifier Edit Table. This identifier must be assigned to all cases identified by the immigration judge as being considered under the U.S. - Canada "Safe Third Country" Agreement. This new identifier will allow the court to run automated reports and compile statistical information on these cases.

#### **B. New Information Sheet**

December 29, 2004, is the mandated implementation date to review cases considered under the U.S.- Canada "Safe Third Country" Agreement, and a new Information Sheet has been created for the immigration judge's use (*see Appendix*). The December implementation date has not provided sufficient time to have this Information Sheet encoded in the ANSIR System, but OCIJ will request that it be added to the automated system. Until then, court administrators should provide copies of this form in each courtroom. Completed Information Sheets will be included in the Record of Proceeding file as part of the case record.



Michael J. Creppy  
Chief Immigration Judge

Attachment

