V. United States Chapter

This chapter reviews the first year of the Agreement's implementation and impact in the U.S. Although the Agreement applies both to individuals arriving at land border POE and to individuals transiting through the U.S., no individuals transiting through the U.S. requested asylum during the first year. Therefore, this chapter addresses implementation of the Agreement only with regard to individuals arriving at U.S./Canada land border POEs. This chapter provides an overview of how the process works in the U.S., including how each U.S. government component has implemented the Agreement. The chapter also provides a statistical overview, and summarizes the impact of the Agreement during the first year of implementation. Various concerns raised by the UNHCR and NGOs, and the U.S.'s responses to those concerns, are also addressed.

A. Implementation Authority and Guidelines

As noted in the section on Legislative Authorities, the INA permits any alien who is physically present in or who arrives at the United States to apply for asylum.[24] However, INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A), specifically states that this provision shall not apply where "the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country … in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General [now deemed to be the Secretary of Homeland Security for purposes of this provision by operation of section 1512(d) of the *Homeland Security Act* of 2002, Pub. L. 107-296, 116 Stat. 2135, 2310] finds that it is in the public interest for the alien to receive asylum in the United States." The Safe Third Country Agreement with Canada is the only such agreement the U.S. has entered into, to date.

To implement the Agreement, DHS and EOIR worked in coordination to publish in the *Federal Register* proposed rules respectively entitled *Implementation of the Agreement between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry* and *Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry*, on Monday, March 8, 2004.[25] After the public was given an opportunity to comment on the proposed rules, the final rules were published in the *Federal Register* on Monday, November 29, 2004, and became effective on December 29, 2004.[26]

Prior to implementation of the Agreement, USCIS conducted a train-the-trainer session in Washington, which was attended by representatives from each Asylum Office, regarding the substantive and procedural requirements of the Agreement. The representatives then provided training to all Asylum Officers in their respective offices who would be involved in making determinations under the Agreement. HQASM amended its *Credible Fear Procedures Manual* to include comprehensive guidance on Agreement procedures.[27] CBP conducted a training session on December 14, 2004, for designated representatives from all affected field offices. The representatives were selected by the

field offices to serve as resource personnel for the ports under their jurisdiction. On December 22, 2004, CBP issued guidance to field offices, including the material discussed during the training session.

B. Overview of How the Process Works in the U.S.

In the U.S., both Asylum Officers within USCIS (DHS) and Immigration Judges within the DOJ's EOIR have authority to determine whether an asylum seeker should be returned to Canada pursuant to the Agreement, or whether an exception to the Agreement applies that would allow the applicant to access the U.S. asylum process.

1. Overview of Expedited Removal/Credible Fear Process

CBP Officers are stationed at U.S. POEs and are responsible for determining whether arriving individuals may be admitted into the U.S. CBP Officers also determine whether arriving individuals are subject to the expedited removal process. Under U.S. law, certain individuals arriving at a POE, and certain designated individuals who have not been admitted or paroled into the U.S., may be subject to expedited removal if they do not have documents or have improper documents.[28] This means that they may be removed from the United States upon concurrence of a supervisory CBP Officer.

Any individual subject to expedited removal who indicates an intention to apply for asylum or indicates a fear of return to his or her home country is referred to Asylum Officers to determine whether the individual has a credible fear of persecution or torture.[29] If the Asylum Officer determines that the individual does have a credible fear, the Asylum Officer refers the alien for removal proceedings before an Immigration Judge where the alien may apply for asylum and other protection from removal. Those who do not establish a credible fear of persecution or torture may request review of the Asylum Officer's determination by an Immigration Judge. Those found not to have a credible fear of persecution or torture may be removed.

Because almost all asylum seekers subject to the Agreement are also subject to expedited removal, the expedited removal process was selected as the principal implementation vehicle for the Agreement.

2. Threshold Screening Process to Determine Applicability of Agreement

i. Process at the POE

If a CBP Officer determines that the arriving individual is subject to expedited removal, the CBP Officer is required by procedure to notify the individual about the expedited removal process, and take a sworn statement concerning the individual's admissibility. When taking the sworn statement, the CBP Officer is required by procedure to read a statement[30] explaining the right to seek protection in the United States and is also required by procedure to ask the individual a set of questions[31] to determine whether the

individual fears return to his or her country and is seeking protection in the United States. The CBP Officer records the answer to each question on the form.

CBP Officers are required by procedure to refer any individual who expresses an intention to apply for asylum, or a fear of return to his or her home country, to an Asylum Officer for a threshold screening determination under the Safe Third Agreement and, if it is determined that the Agreement does not preclude an asylum application in the United States, a Credible Fear Interview.[32] The CBP Officer provides the individual with the Information about Threshold Screening Interview notice, and the Form M-444, *Information about a Credible Fear Interview*, as well as a list of free legal services providers.[33] The Information about Threshold Screening Interview notice describes the threshold screening process, and identifies the exceptions to the Agreement.

ii. Threshold Screening Interview

Prior to any determination concerning whether an applicant arriving at the U.S. at a U.S.-Canada land border POE has a credible fear of persecution or torture, the Asylum Officer conducts a TSI to determine whether the applicant is eligible for a credible fear screening or is subject to removal to Canada under the Agreement. The Asylum Officer conducts a non-adversarial interview to elicit information to determine whether an exception to the Agreement applies, or whether the asylum seeker should be returned to Canada to pursue his or her protection claim.[34]

When conducting a TSI, an Asylum Officer must first confirm that the applicant received the Information about Threshold Screening Interview notice from CBP, and understood its contents. If the applicant did not receive, or did not understand, the notice, the Asylum Officer must ensure that he or she understands the threshold screening and credible fear processes before conducting the interview.[35]

During the TSI, the Asylum Officer questions the applicant with regard to any potential exception to the Agreement, and records the applicant’s testimony in a question-and-answer format to create a sworn statement. In conducting the TSI, Asylum Officers use all available evidence, including the individual's testimony, affidavits and other documentation, as well as available records and databases, to determine whether an exception to the Agreement applies. Credible testimony alone may be sufficient to establish that an exception applies.[36]

In establishing the threshold screening process, the U.S. adopted existing procedures and protections from the credible fear process—such as the right to a consultation with other persons prior to the credible fear interview and any review thereof at no expense to the U.S. Government—to allow for seamless transition to the credible fear process if an exception to the Agreement is found.

iii. Threshold Screening Determination

Asylum Officers record threshold screening determinations on a *Safe-Third Country Agreement Case Threshold Screening Adjudication Worksheet* that ensures all potential exceptions to the Agreement are considered and the Asylum Officer's findings are justified and recorded.

In the interest of family unity, if the Asylum Officer is able to find an exception for one member of a family group, consisting of spouses and any unmarried children under age 21, that determination will constitute an exception for the other family group members arriving concurrently. If one family member is found not to meet an exception, the Asylum Officer determines if any of the other immediate family group members qualify for an exception. If any member of the immediate family is found to qualify for an exception to the Agreement, the exception applies to the remaining family members as well.[37]

iv. Review of Determination

All threshold screening determinations are subject to review by both a Supervisory Asylum Officer (SAO) and HQASM. This provides three layers of independent consideration of each decision.

v. Post-Decision Processing

If the Asylum Officer finds that an exception to the Agreement does not apply, and both the SAO and HQASM concur with the decision, the applicant is advised that he or she will be removed to Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law.[38] The SAO notifies ICE that the individual must be returned to Canada under the terms of the Agreement.

If the Asylum Officer finds that an exception to the Agreement applies, the Officer proceeds with a Credible Fear Interview to determine whether the applicant should be permitted to apply for asylum or other relief during removal proceedings. The determination that an exception applies must also be concurred with by the SAO and HQASM.

3. Safeguards and Oversight Mechanisms

i. Supervisory and Management Review

All threshold screening determinations are conducted by an Asylum Officer who has received specific training regarding the Agreement. If any questions or concerns regarding procedural or substantive issues arise during the interview, a member of HQASM is available to provide guidance. In general, guidance is provided within 24 hours to the Asylum Officer and SAO. Additionally, independent supervisory review and HQASM review is required for all threshold screening determinations. This provides three layers of independent consideration of each decision. HQASM review of all threshold screening determinations enables HQASM to identify trends or any areas that

may require additional training or oversight. The threshold screening determination is not subject to further review.[39]

ii. UNHCR Monitoring

As noted in the Canada chapter of this report, the UNHCR has played an integral role during the first year of implementation and will continue to play an integral role in providing oversight of the Parties' implementation of the Agreement. The ongoing dialogue with the UNHCR will assist the U.S. government in identifying and appropriately addressing any implementation issues as they arise.

iii. The NGO Community

Input from the NGO community provides a client-based perspective that is invaluable to ensuring effective implementation of the Agreement. The U.S. government continues to welcome NGO input and suggestions for improvement in implementing the Agreement.

4. Agreement Determinations before the Executive Office for Immigration Review

EOIR is responsible for adjudicating immigration cases for individuals in defensive immigration proceedings. Specifically, under delegated authority from the Attorney General, EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews and administrative hearings. EOIR consists of three components: the Office of the Chief Immigration Judge (OCIJ), which is responsible for managing the numerous immigration courts located throughout the United States where immigration judges adjudicate individual cases for individuals who are placed in removal proceedings by DHS; the Board of Immigration Appeals (BIA), which primarily conducts appellate reviews of immigration judge decisions; and the Office of the Chief Administrative Hearing Officer, which adjudicates immigration-related employment cases. Immigration judge decisions are administratively final unless the case is appealed to the BIA. BIA decisions are binding unless modified or overruled by the Attorney General or a federal court.

An asylum seeker arriving from Canada at a land border POE who is not subject to expedited removal procedures is placed by DHS in removal proceedings under INA § 240, 8 U.S.C. § 1229a. The Agreement is applied to these applicants in the first instance by EOIR Immigration Judges, who determine whether such asylum seekers can establish an exception to the Agreement.[40] Individuals not subject to expedited removal include unaccompanied minors and nationals of Cuba.[41]

5. Removal of Individuals to Canada

If an exception to the Agreement does not apply, the ICE Office of Detention and Removal Operations (DRO) returns the individual to Canada. The U.S. Embassy in Ottawa is notified five days before an individual is returned to Canada. DRO personnel notify the embassy of the applicant's current immigration status, any serious criminal

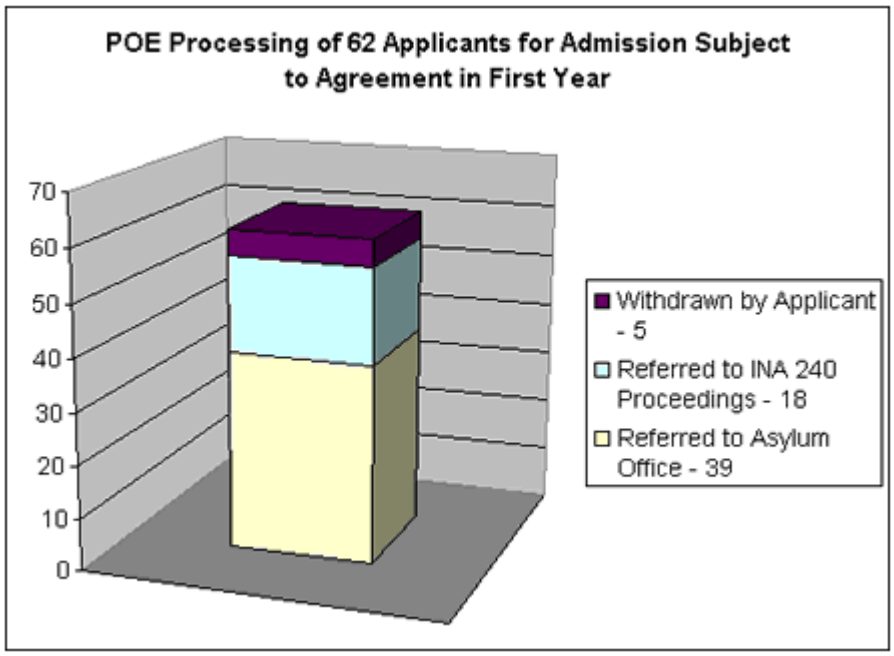
convictions, and any physical or mental health issues. Individuals are returned to Canada only after approval is received from the embassy in Ottawa.[42]

6. Processing of Individuals Returned from Canada

If Canada determines that an individual claimant is ineligible and an exception to the Agreement does not apply, the individual is returned to the U.S.[43] The CBSA provides advance notification to CBP of applicants being returned to the United States under the Agreement. Individuals returned from Canada placed are not placed in expedited removal proceedings. They are processed as if encountered within the interior of the United States. If they are found to be illegally present in the United States, or without valid immigrant or non-immigrant status, they may be processed for INA § 240 proceedings, where they may seek protection from removal. If they have outstanding removal orders, they may be removed.[44]

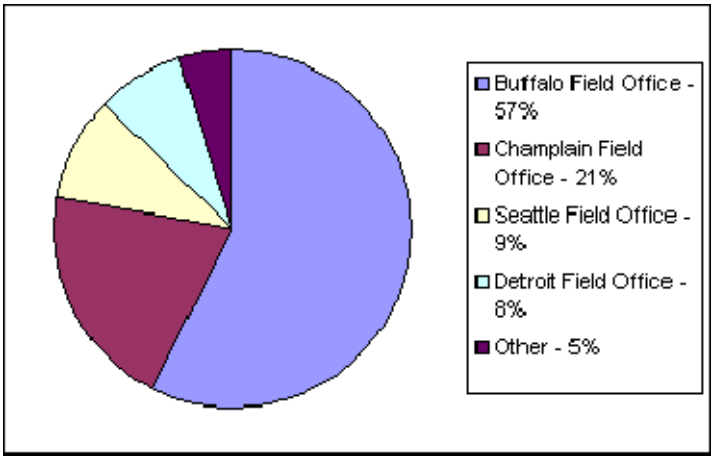
C. Statistical Overview and Impact of First Year Implementation

The Agreement overall has had relatively little impact at POEs to the U.S. Between 2000 and 2004, there have been an average of 58 asylum claims from individuals arriving at a Canada and U.S. land border POE each year.[45] During the first year of implementation, there were 66 such claims, which is consistent with the number of claims made over the past years. Of those 66 claimants, 62 were subject to the Agreement. The other four claimants were Canadian citizens, who are not subject to the Agreement. The chart below depicts how CBP processed these 62 claims during the first year of the Agreement's implementation.



In five claims, individuals in the threshold screening process indicated that they wanted to withdraw their protection claims.[46] Cuban nationals constituted 17 of the 18 cases referred for INA § 240 proceedings.[47] Many of these applicants have hearings pending with EOIR. The remaining 39 cases were referred to the appropriate Asylum Office, and a TSI was conducted.[48]

The majority of the claimants arrived at POEs under the jurisdiction of the Buffalo Field Office, which processed 36 claims. The Champlain Field Office handled 14 of the claims. Other individuals arrived at various POEs, including those under the jurisdiction of the Detroit and Seattle offices. The percentage of claims at the various field offices are given in the chart below.[49]



There were 39 cases in which USCIS determined that the applicant was subject to the Agreement. In 38 of the cases in which USCIS determined that an asylum seeker was subject to the Agreement, Asylum Officers found that an exception applied in 23 cases (60 percent).[50] In 16 cases, there was a determination that an exception to the Agreement did not apply. In the 23 cases in which the applicant established an exception, all 23 were determined to have a family-based exception.[51]

D. Implementation Issues by Theme

Pursuant to its monitoring role, the UNHCR notified the U.S. of any concerns regarding the implementation of the Agreement during the first year. UNHCR's concerns, and the U.S.'s responses, are discussed below.

1. Use of Restraints at Ports of Entry

The UNHCR expressed concern about the use of restraints at *U.S.* ports of entry, and recommends that applicants should only be restrained if deemed necessary after an individualized risk assessment.

CBP agrees that applicants should only be restrained if deemed necessary after an individualized risk assessment. All POEs follow existing policy on the use of restraints and detention. Existing policy states that t he use of restraints on persons in CBP custody shall be conducted in a manner that is safe, secure, humane and professional. When restraints are used, the officer must have reasonable articulable facts to support the decision. Officers employ only the amount of restraint reasonably necessary to ensure the safety of the detainee or others, and to prevent escape. Officers take into consideration known criminal activity, observed dangerous or violent behavior, verbal threats, or the nature of the inadmissibility of the individual in determining whether to use restraints, continue their use or remove the restraints.[52]

Depending on the actual facilities available at the POE, individuals may be held temporarily in hold rooms, or in designated search or interview rooms or other secondary inspection areas if such hold rooms are not available. On rare occasions in some remote locations where the port lacks detention facilities and the DRO staff was not readily available to respond, CBP has had to request overnight detention by local law enforcement agencies. These local agencies follow their normal restraint procedures while detaining an individual. DHS policy does provide that individuals may be restrained as appropriate when being transported.

At some locations, it has not been necessary to isolate asylum seekers in holding cells or to use restraints. However, the use of restraints may be necessary in some cases where dedicated detention space is not available. Such assessments are made by supervisory personnel on a case-by-case basis, which is consistent with the UNHCR's recommendation that applicants only be restrained if deemed necessary after an individualized risk assessment. The use or lack of use of restraints can be determined by a number of factors. These can include the risk that the individuals pose, the number of other individuals referred for secondary processing, the configuration of the port, or the lack of suitable detention spaces. When an asylum applicant is encountered, the CBP Officer transfers the applicant to a secure, attended or unattended area as appropriate. Asylum applicants are kept separate from other detainees to the extent possible and not placed in detention cells unless their behavior warrants it. Officers are trained to identify signs of trauma, anxiety or other factors relating to the case in determining the level of detention required.[53]

2. Detention

The ICE Office of Detention and Removal coordinates the detention of applicants who are subject to expedited removal. U.S. law requires the detention of an individual whose inadmissibility is being considered, or who has been ordered removed.[54] DRO allows the monitoring of detention conditions by the UNHCR through site visits and coordinates any additional meetings necessary with the UNHCR.

i. Medical Evaluation

 The UNHCR recommends that the U.S. not detain individuals with mental health issues. In the alternative, the UNHCR recommends that persons with mental health issues only be detained if a qualified medical practitioner certified that the detention would not adversely affect the health and well-being of the individual. Also, the UNHCR recommends that the individual receive regular follow-up care by skilled professionals, and access to mental health services, hospitalization and medication counseling if necessary.

An assessment of mental and physical health is required for all detainees arriving at an ICE detention facility. ICE requires that all facilities employ, at a minimum, a medical staff large enough to perform basic exams and treatments for all detainees. Every facility provides its detainee population with initial medical screening, primary medical care and access to emergency care. The head of the local ICE office, with the cooperation of the Clinical Director, coordinates with nearby medical facilities or health-care providers to provide the required health care not available within the facility.

Specialized health care, mental heath care and hospitalization within the local community may be arranged by ICE staff if necessary. The medical care provider for each facility provides written notice to the head of the local ICE office when a detainee has been diagnosed as having a medical or psychiatric condition requiring special attention. Health-care specialists determine any medical treatment necessary. When a disagreement occurs regarding the type or extent of treatment, ICE consults with the Chief of Medical Staff and arranges for the appropriate medical treatment in accordance with the medical policies of the U.S. Public Health Service's Division of Immigration Health Services. Therefore, although individuals with mental health issues are detained, the detention of these individuals appears to be consistent with the UNHCR's alternative recommendations and concerns regarding the availability of appropriate medical care.

ii. Communications

The UNHCR expressed concern regarding the ability of asylum seekers in detention to communicate with various Canadian and U.S. officials, legal providers and the UNHCR.

 The UNHCR recommends that ICE 1) provide adequate telephone access to detained asylum seekers; 2) ensure that the individuals have free telephone access to local CBP and USCIS officials, and Canadian officials; 3) ensure free telephone calls to legal services providers and the UNHCR; and 4) post telephone instructions and contact information. The UNHCR also recommends that ICE issue guidance that all detention facilities have access to ICE interpreter services and advise detention staff to use the service to communicate with detainees.

While in detention, telephone calls between asylum seekers and third parties are facilitated by ICE. ICE has contracted with Public Communications Services Inc. (PCS)

to provide telephone services to detained individuals pending removal from the United States. Free telephone access to designated entities is guaranteed by ICE National Detention Standards, which were approved and implemented in September 2000. The ICE-designated entities include foreign embassies, consulates and approved pro bono and community-based free immigration legal services providers.

For ICE and Inter-Governmental Service Agreement facilities that house ICE detainees longer than 72 hours, PCS updates relevant contact information and telephone use instructions. The National Detention Standards on Telephone Access requires that telephone use instructions and relevant contact information be posted at or near all telephones. ICE National Detention Standards require annual review of all facilities that house ICE detainees longer than 72 hours to ensure compliance. Issues regarding detainee telephone access are routinely assessed and corrected. In order to further asylum seekers' communication, I CE utilizes the services of the DHS interpreter pool. ICE recently sent a reminder to all its field offices of the availability of those services and instructions regarding how to access them. The reminder included a toll-free telephone number that is provided to all detention facilities for use in accessing translation services.


The UNHCR recommends that Asylum Officers facilitate telephone calls by detained individuals to establish eligibility under the Agreement.

USCIS agrees with this recommendation. The UNHRC observed an incident when the Agreement was first being implemented and the Asylum Officer was unsure whether she could use CBP's telephones to facilitate the call. In other incidents, the UNHRC noted that Asylum Officers were unsure how to proceed after asylum seekers told them that they could not make calls to obtain evidence due to a lack of telephone access at their detention centers. The USCIS Asylum Division has advised and continues to advise Asylum Officers to facilitate telephone calls between asylum seekers and third parties during the TSI process, as appropriate, and has clarified that this includes using CBP or ICE telephones during the TSI.

iii. Access to Detention Officers


The UNHCR recommends that ICE Detention and Removal Officers ensure that applicants have meaningful access to ICE Detention and Removal Officers. The UNHCR also recommends that the staffing level at the Detroit Field Office be increased.

ICE detention standards afford detainees the opportunity to have informal access to and interaction with key detention facility staff on a regular basis. Therefore, the U.S. believes its existing policies are consistent with the UNHCR's recommendations.

With regard to staffing issues, the Detroit Field Office Director has developed and implemented written schedules and procedures for regular visits by ICE Detention and

Removal staff. ICE Officers visit general population housing units and special housing units, interview detainees, monitor housing conditions and review records. ICE monitors its staffing levels based on workload and other relevant factors, and adjusts staffing accordingly.

3. Direct Back Policy

The UNHCR discussed the use of direct backs with the U.S. and Canada as one of its primary concerns with the implementation of the Agreement during the first year. An individual not admitted to the U.S. at a POE but directed to return to Canada temporarily with a scheduled interview regarding his or her asylum claim is referred to as a "direct back."

 The UNHCR recommends that the U.S. discontinue direct backs.

The U.S. declines to adopt this recommendation. In the U.S., the direct back mechanism is not exercised often. A very small number of individuals were directed back from the Buffalo POEs to Canada to await their TSIs with an Asylum Officer or their removal proceedings before an Immigration Judge. Applicants were directed back to Canada from the U.S. primarily because of a determination that no detention space was available. In some cases, the individual was returned to Canada as a convenience so that he or she could stay with family or friends. The U.S. declines to adopt this recommendation in order to retain the flexibility to use direct backs depending on the detention space availability at the POEs, and the specific circumstances of the individual asylum seekers. The U.S. has exercised its discretion to use direct backs in a limited fashion, and will continue to do so appropriately.

 In the alternative, the UNHCR recommends that the *U.S.* confirm both the applicant's valid legal status in the country to which he or she is directed back, and the ability of the individual to appear for his or her scheduled interview.

This recommendation is consistent with how direct back cases are handled. All asylum seekers directed back to Canada were able to return to a U.S. POE and meet with U.S. officials when required. Direct backs from the U.S. occurred only with CBSA assurances that the individual would not be removed from Canada prior to the TSI.

Generally, the practice has been to detain individuals in the United States or parole individuals, in accordance with existing DHS policies. Although CBP cannot ensure that an asylum seeker directed back to Canada will be able to return to the U.S., CBP can and does request assurances from the Canadian government that the asylum seeker will be permitted to return for the hearing or interview. Generally, whenever CBP returns an individual to Canada, CBP notifies the CBSA port of the person's identity, nationality and reason for the return to Canada. If a person's status in Canada is not clear, specifically in

the case of an asylum applicant, CBP asks that the CBSA provide the individual's status in Canada so that CBP can make the most appropriate decision.

 The UNHCR recommends that the U.S. not detain individuals who were directed back from Canada, absent a security or risk concern, in order to ensure that applicants could return to Canada for their interviews.

The U.S. has declined to adopt this recommendation, but notes that the Government of Canada has advised that the CBSA has phased out the use of the direct back policy for refugee claimants as of August 31, 2006. After this date, the direct back policy is to be limited to exceptional circumstances.

During the first year of implementation, many of those directed back to the U.S. from Canada under the Agreement were already in removal proceedings in the U.S., and most were allowed to proceed into the U.S. to await their hearings. Those that were determined to be not legally present or in violation of status were served a Notice to Appear. A small number were detained. Those with criminal records and those with outstanding removal orders were turned over to ICE for removal from the United States. Any individual with a removal order necessarily had access to the U.S. protection regime prior to issuance of that removal order. In the case of changed circumstances, the individual is permitted to file a motion to reopen prior proceedings. The decision whether to detain these individuals takes into consideration factors such as security concerns, criminality, mandatory detention requirements and detention bed space availability.

As explained above, the U.S. may detain and remove an individual who has been directed back from Canada if the individual has an outstanding order of removal in the U.S. However, after discussions with Canadian colleagues and the UNHCR, and taking into account the fact that Canada may want to admit the individual, ICE amended its DDFM to require U.S. officials to notify the Supervisor of the Refugee Processing Unit at the Canadian POE of the intent to remove an individual who has been directed back five business days before effecting that removal.[55]

4. Reconsideration Mechanism

 The UNHCR recommends the institution of a reconsideration mechanism to allow an asylum seeker to request timely reconsideration of an adverse decision directly from the government that made the decision.

The U.S. has carefully considered all UNHCR recommendations regarding a reconsideration mechanism and, for reasons similar to those explained in the Canada chapter, declines to adopt the UNHCR recommendation to institute a formal reconsideration mechanism.

Article 8 of the Agreement establishes the foundation of a dispute resolution mechanism for resolving differences between the Canadian and U.S. governments respecting the interpretation and implementation of the terms of this Agreement. The Statement of Principles to the Agreement provides that "[e]ach Party will have the discretion to request reconsideration of a decision by either Party to deny an applicant's request for an exception under the Agreement should new information, or information that has not previously been considered, come to light."[56] The provision was intended to allow each Party oversight of the Agreement, and the ability to request the other government to reconsider a decision if there were a basis for doing so. This provision is not intended to accord any individual rights and does not constitute a formal review process for individual claimants.

The Parties do not believe that an individual request for reconsideration of a threshold screening determination is necessary, because there are sufficient safeguards and oversight mechanisms in place to ensure that the Agreement is appropriately applied to each individual case. Neither the Agreement nor the Statement of Principles provides a right to request reconsideration of a determination that an asylum seeker should pursue his claim for protection in Canada or the U.S. pursuant to the Agreement.

Canadian and U.S. immigration officers resolve issues concerning the application of the Agreement at the local level through operational guidance whenever possible.[57] However, in the event that a problem appears to be systemic and cannot be resolved at the local level, a DHS manager (USCIS, CBP or ICE) may notify the Asylum Division Director, who will investigate the matter with the Canadian Asylum Division Director. During the first year of implementation, no such dispute resolution was required.

 In the alternative, the UNHCR recommends that the U.S. amend existing procedures that require CBP Officers to process individual requests for reconsideration of Canadian government determinations. Instead, the UNHCR recommends that the USCIS Asylum Division, as opposed to CBP Officers, review such requests, given USCIS's expertise in making determinations under the Agreement.

The U.S. declines to adopt this recommendation. CBP procedures to process individual requests were not intended as a formal review mechanism, but as local guidance for appropriate processing of claims if CBP Officials encounter applicants who believed that they had improperly received an adverse determination.[58] CBP Officers are the most likely to encounter asylum seekers returned under the Agreement who have concerns about the Canadian government's application of the Agreement. As such, it is appropriate for the U.S. government to provide guidance to CBP on how to handle any such concerns.[59] As noted above, the governments did not intend to and decline to establish an individual appeal or reconsider the mechanism in light of the sufficiency of safeguards in place.

The UNHCR recommends that the parties stay deportation, pending the final decision, of an applicant's request for reconsideration, and facilitate the return of the detained asylum seeker to the border if the reconsideration request is granted.

The U.S. declines to adopt this recommendation. As noted above, there is no formal mechanism for individuals to request reconsideration. However, if the CBP Port Director and the CBSA Officer receive a request for assistance and determine that there is new evidence or previously unavailable evidence, the Port Director may coordinate the most effective and efficient means for the applicant to return to Canada, according to each country's existing procedures.[60]

5. Threshold Screening Interview

i. Communicating the Threshold Screening Process

The UNHCR expressed concerns with applicants' comprehension of the threshold screening process. The UNHCR indicated that applicants did not appear to fully understand the TSI notice, and did not understand their rights under the Agreement. The UNHCR recommends simplification of the TSI notice, and translation of the notice into multiple languages to facilitate understanding by applicants. The UNHCR also recommends distribution of a flow chart to applicants to illustrate the threshold screening and credible fear processes. Furthermore, during its review of applicants' files, the UNHCR noted that some files did not contain a copy of the TSI notice. The UNHCR recommends that Asylum Officers ensure that the form was received, and place a signed copy of the notice in the applicants' files.

The U.S. agrees with these recommendations and is taking steps to implement them.

The existing Information about Threshold Screening Interview notice explains the rights of applicants and the exceptions to the Agreement in plain English. Asylum Officers review the TSI notice with the asylum seekers, and verify that the asylum seeker understands his or her rights, and the exceptions to the Agreement. Asylum Officers are given specialized training in effective communication with asylum seekers, and communication through an interpreter. Asylum Officers also receive guidance from their respective field offices, and HQASM, regarding how to clearly explain the difference, process and purpose of the TSI and the Credible Fear Interview. In addition, the Credible Fear Procedures Manual requires that Asylum Officers confirm understanding of the TSI notice before the Asylum Officer begins the TSI.

However, USCIS recognizes the difficulty in explaining a complex process to asylum seekers in a way that is both technically accurate and easy to understand. Although the TSI notice endeavours to explain the process in simple language, USCIS is reviewing the notice to determine whether the language may be simplified further. USCIS will seek

input from the UNHCR and the advocacy community in efforts to simplify the TSI notice. Also, USCIS will create a flow chart for distribution to applicants at POEs.

With regard to the UNHCR finding that some applicants' files did not contain a signed TSI notice, and recommendation that Asylum Officers place a copy of the signed TSI notice in the file in order to indicate that applicants received the notice and understood its contents, current procedures require that Asylum Officers confirm that asylum seekers received the TSI notice and understood its contents before beginning the TSI. There is no requirement in the current procedures that Asylum Officers place a signed copy of the TSI notice in the file to indicate that applicants received and understood the TSI notice. However, in response to the UNHCR's recommendation, USCIS will add a procedural requirement that Asylum Officers place a signed copy of the TSI notice in applicants' files. USCIS agrees that an understanding of the threshold screening process is necessary for an asylum seeker's understanding of his or her rights under the Agreement.

ii. Credible Testimony

The UNHCR recommended that the Credible Fear Procedures Manual be amended to indicate that credible testimony alone may be sufficient for an applicant to establish an exception to the Agreement.

The U.S. agrees with this recommendation. The Safe Third Country Threshold Screening Lesson Plan and other asylum training materials make clear that credible testimony may be sufficient to establish the existence of an exception.[61] Because the Procedures Manual addresses operational guidance, as opposed to substantive guidance, which is addressed in training materials, the Procedures Manual does not address burden of proof. However, this portion of the training materials will be incorporated into operational guidance to ensure that all Asylum Officers are aware of the existing guidance.

iii. Timeliness Standards

One of the UNHCR's primary concerns of UNHCR was USCIS's case processing time. The UNHCR noted that almost one-half of the applicants waited over a month for their threshold screening determinations during the first year of implementation.[62] The UNHCR recommends that the U.S. establish timelines for the threshold screening process, with more time allowed for any public interest applications. The UNHCR also recommends that credible testimony alone be sufficient to establish eligibility under the Agreement, especially if efforts to obtain documentary proof would unnecessarily prolong detention.

USCIS shares the UNHCR's concern that a high percentage of threshold screening determinations were taking too long. In response, HQASM began more closely monitoring the time taken to process cases referred for a threshold screening process and

established timeliness targets. USCIS has established a target of completing 80 percent of all threshold screening determinations within 14 days from the date the case is referred to USCIS. USCIS does not require one hundred percent completion within that time period, because some cases may take more time. For example, if an asylum seeker requests time to gather evidence that may be required in a particular case when there are questions about the testimony and it, alone, fails to establish that the applicant is eligible for an exception, then the determination may take longer than 14 days. Consideration of whether the U.S. will exercise discretion to allow an asylum seeker to apply for asylum in the U.S., because it is in the U.S. public interest to do so, may also take more time.

HQASM recognizes that applicants who arrive at a POE may not have documentation in their possession to support a claim that an exception applies. The 14-day timeline provides applicants with sufficient time and opportunity to obtain additional documents to support their claim that they qualify for an exception, but also has built in flexibility for those who may require more time. The 14-day timeline also ensures that applicants are not unduly burdened with prolonged detentions caused by delays in completing the threshold screening process.

6. Public Interest Exception

Article 6 of the Agreement provides that “[n]otwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.” During the TSI, if the Asylum Officer determines that no other exception applies, the Asylum Officer asks the applicant for any other reasons that he or she wishes to pursue an asylum claim in the U.S., instead of Canada, and considers whether a public interest exception applies to the individual case. The U.S. has not established formal categories to which the public interest exception applies. In the U.S., a determination of a public interest exception is made on a case-by-case basis. The U.S. acknowledges that “humanitarian concern" is an important consideration to factor into a public interest determination. Also, issues of minor anchor relatives, past torture and health needs are some of the factors that may be considered under the Agreement's public interest exception, along with all other relevant circumstances, on a case-by-case basis. If an Asylum Officer believes a public interest exception applies, he or she makes a recommendation to the Director of the Office of Refugee, Asylum and International Operations. HQASM coordinates the final determination of the exception.[63] During the first year of implementation, no individual was determined to qualify for a public interest exception to the Agreement.

 The UNHCR recommended that the U.S. consider family unity principles in exercising the public interest exception, including “de facto” family members, family members without pending legal status and same-sex partners.[64]

The U.S. declines to adopt this recommendation. Before the Agreement was implemented, the Parties were involved in many discussions to address the definition of family. The reality that different cultures define family membership in different manners

was taken into account when drafting the Agreement. Under the Agreement the family exception is defined in a much broader manner than in other U.S. immigration contexts.[65] "De facto" family memberships, family members without pending legal status and same-sex partnerships were all considered when the Parties were negotiating the Agreement[66], and the Parties determined not to include them as exceptions to the Agreement. The Parties clearly articulated those family relationships that would form the basis of an exception. Similarly, the Agreement made clear that, for an exception to apply based on family relationship, the family member had to have either valid legal status or a pending asylum or refugee claim. As stated previously, the Parties were involved in many discussions to address the exceptions to the Agreement. Since the requirement that anchor relatives hold lawful non-visitor immigration status derives from the negotiated Agreement terms, the intent of the Parties would be undermined if the public interest exception applied to this broad category of relationship, without considering other relevant circumstances. With regard to using the public interest exception to recognize common-law or same-sex partnerships without other relevant public interest considerations, U.S. federal law precludes the use of the term "spouse" to refer to same-sex partnerships[67].

Since these issues were carefully considered and negotiated between the Parties before the Agreement's implementation, the U.S. will not apply the public interest exception to create exceptions that were discussed and not included in the Agreement. However, the U.S. recognizes the importance of the UNHCR's concerns that all relationships be considered. The U.S. does consider family unity principles in exercising the public interest exception. Although these relationships could not alone form the basis of a public interest exception, they are taken into account as one factor when considering whether a public interest exception applies.

7. Immigration Court Proceedings


The UNHCR recommended that EOIR adopt additional procedures for processing individuals who are subject to the Agreement, and ensuring the applicant's comprehension of the process.

On December 28, 2004, concurrent with the publication of the implementing regulations and the effective date of these regulations, EOIR (OCIJ) issued *Interim Operating Policies and Procedures Memorandum (OPPM) 2004–09: U.S.-Canada Agreement Regarding Cooperation in the Examination of Refugee Status Claims– "Safe Third Country."* OPPM 2004–09 provides Immigration Judges, working in Immigration Courts under the jurisdiction of OCIJ, background and procedural information regarding the Agreement. The BIA issued a memorandum to its legal staff on the rule upon publication of the DOJ proposed rule. The memorandum addressed key elements of the rule, and the implications for cases on appeal after the final rule's effective date. OCIJ plans to issue a revised Final OPPM updating and replacing the existing Interim OPPM. The Final OPPM will provide additional guidance and information to Immigration Court personnel on the

Agreement. The UNHCR recommendations will be considered before the Final OPPM is drafted.

In reviewing implementation of the Agreement, EOIR identified a need for improved DHS notification procedures to inform EOIR when a person subject to the Agreement is placed in § 240 removal proceedings. To date, EOIR has only learned of these cases as a result of the UNHCR request to observe removal proceedings of individuals subject to the Agreement. EOIR recommends that DHS, in advance of the Master Calendar Hearing, clearly identify cases subject to the Agreement to EOIR Immigration Judges and Court Administrators via either 1) a notation on the Notice to Appear, DHS Form I-862, or 2) a motion filed by DHS in the removal proceeding. The relevant DHS components will continue to work with EOIR representatives to establish a uniform protocol to identify safe third cases under EOIR jurisdiction.

The EOIR BIA is not aware of any appeals involving the Agreement.

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[24] INA § 208(a)(1).
[25] See DHS and U.S. DOJ rules at 69 Fed. Reg. 10620-10633 (Monday, March 8, 2004).
[26] See DHS and DOJ rules at 69 Fed. Reg. 69480-69498 (November 29, 2004).
[27] Asylum Officers who conduct TSIs also receive additional training from their respective field offices. Furthermore, HQASM is available for any additional guidance for issues that may arise during a TSI. All TSI determinations are reviewed by HQASM.
[28] Section 235(*b*) of the INA, 8 U.S.C. § 1225(b), provides that any alien arriving at a designated POE or present in the United States without being admitted or paroled, who is inadmissible under INA section 212(*a*)(6)(C) or INA section 212(*a*)(7), may be subject to expedited removal.
[29] "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, 8 C.F.R. § 208.30(e)(2). "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." 8 C.F.R. § 208.30(e)(3).
[30] U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear." Form I-867A.
[31] "Why did you leave your home country or country of last residence?" "Do you have any fear or concern about being returned to your home country or being removed from the United States?" "Would you be harmed if you are returned to your home country or country of last residence?" "Do you have any questions or is there anything else you would like to add?" Form I-867B.
[32] CBP notifies the Asylum Office that has jurisdiction over the POE so that a TSI and a subsequent Credible Fear Interview, if necessary, may be scheduled.
[33] Applicants applying for admission under the Visa Waiver Program are not subject to expedited removal, but are referred to an Asylum Officer for a TSI using the same notice.
[34] See 8 C.F.R. § 208.30(e)(6).
[35] Draft Credible Fear Procedures Manual: (J) Safe Third-Country Cases (2)(a). Amendment to section IV.
[36] See Asylum Officer Basic Training Course Safe Third Lesson Plan at 6-7 (November 14, 2005). Also see Interviewing Part I: Overview of Nonadversarial Asylum Interview, updated January 9, 2006.

[37] Draft Credible Fear Procedures Manual: (J) Safe Third-Country Cases (10). Amendment to section IV (December 2004).
[38] See 8 C.F.R. § 208.30(e)(6)(i).
[39] See 8 C.F.R. §§ 208.30(e)(6)(i), 1003.42(h).
[40] See 8 C.F.R. §§ 1208.4(a)(6), 1240.11(g).
[41] In June 2005, CBP amended its policy regarding Cubans seeking asylum at land border POEs to provide that such individuals will be placed in INA § 240 proceedings rather than the expedited removal process. Other persons who are not subject to the expedited removal include persons for whom additional charges are lodged, such as charges relating to alien smuggling, drug trafficking, or other serious violations.
[42] ICE Memorandum, *Detention and Deportation Officers' Field Manual (DDFM) Updates*. (January 26, 2006)
[43] Pursuant to the Statement of Principles, both Canada and the U.S. endeavour to return an individual within 90 days "after the original refugee status claim is made." The Statement of Principles is a non-binding declaration of the Parties' intentions under the Agreement.
[44] All individuals have a right to seek protection from return to a country of persecution or torture, prior to entry of a removal order. As such, those with removal orders necessarily already had access to the U.S. protection regime. There are also mechanisms for requesting a motion to reopen to seek protection based on changed conditions.
[45] Data received from APSS. Asylum claims from individuals arriving at a Canada and U.S. land border port of entry during fiscal years 2000 to 2004 were as follows: 2000 (72), 2001 (68), 2002 (64), 2003 (32), and 2004 (54). The 66 cases during the first year of implementation are from calendar year 2005 rather than fiscal year.
[46] Four of the claims were from one family group consisting of four individuals.
[47] All of the Cuban nationals arrived at POEs under the jurisdiction of the Buffalo Field Office. See Office of Field Operations, *Treatment of Cuban Asylum Seekers at Land Border Ports of Entry* (June 10, 2005). In one case, USCIS determined that it was appropriate to remove the asylum seeker from the expedited removal process, and therefore the individual was placed in removal proceedings without a threshold screening determination.
[48] The data were taken from the USCIS Asylum Pre-Screening System and HQASM records.
[49] Percentages in charts reflect approximate values.
[50] As stated previously, in one case, USCIS determined that it was appropriate to remove the asylum seeker from the expedited removal process, and therefore the individual was placed in removal proceedings without a threshold screening determination.
[51] Of the family relatives that were anchors for the asylum seekers, 11 were legal permanent residents of the U.S., and 8 were U.S. citizens. Three anchor relatives were refugees or asylees. The remaining anchor relative had been granted temporary protective status. Temporary protective status is granted to eligible asylum seekers from foreign states designated under section 244(b) of the INA. Persons granted temporary protective status receive (i) a temporary stay of deportation and (ii) temporary employment authorization. See 8 C.F.R. section 244.
[52] See Inspector's Field Manual (M-450), pp. Chapter 17.8: Detention of Aliens at Ports-of-Entry, Restraints Procedures (9.13), updated March 2006.
[53] See Inspector's Field Manual (M-450), pp. Chapter 17.8: Detention of Aliens at Ports-of-Entry, Asylees (9.5), updated March 2006.
[54] INA § 235(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(2)(iii). Detention is mandatory unless parole of an individual is required to meet a medical emergency or is necessary for legitimate law enforcement objectives. Once a CBP inspector places an individual into the expedited removal process, the responsibility for the individual's detention lies with DRO staff.
[55] ICE Memorandum, *DDFM Updates* (June 26, 2006).
[56] Procedural Issues Associated with Implementing the Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. Statement of Principles (6).
[57] See Inspector's Field Manual (M-450), Chapter 17.11: Asylum Claims/Safe Third Country Agreement with Canada , Dispute Resolution Under the Safe Third Country Agreement (e), updated March 2006.
[58] At the local level, CBP Officers may encounter applicants who do not believe that their case was determined appropriately. There may be situations in which the applicant claims that there is new material evidence, or evidence that was not previously available to Canadian officials. Procedures to address

requests for reconsideration have been implemented at the local level because, according to CBP, requests for reconsideration have originated after individuals are returned to the country of last presence. CBP procedures provide that the CBP Port Director may contact the CBSA Manager in writing, providing the name of the applicant and a summary of new evidence and supporting documentation. The CBSA Officer reviews the case and determines whether the evidence was considered at the time of the interview. If the evidence was already considered, the information is provided to the CBP Port Director, with confirmation that the case will not be redetermined. If it is determined that the applicant is eligible to make a refugee claim in Canada, the CBSA Manager requests a return of the applicant. Any further disputes that cannot be solved at the local level are referred to the USCIS Asylum Division Director for resolution. See Inspector's Field Manual (M-450), Chapter 17.11: Asylum Claims/Safe Third Country Agreement with Canada, Dispute Resolution Under the Safe Third Country Agreement (e), updated March 2006.

[59] During the first year of implementation, CBP field offices reported a very small number of cases involving requests for reconsideration. CBP Headquarters was advised of three requests received in the port of Buffalo, and one request in Detroit. There was some initial confusion at certain ports of entry as to how to process requests for reconsideration. However, staff at the ports of entry have now been made aware that they may forward information to the CBSA, if appropriate.

[60] See Inspector's Field Manual (M-450), Chapter 17.11: Asylum Claims/Safe Third Country Agreement with Canada, Returnees – Aliens who entered the United States either legally or illegally and are returned from Canada pursuant to the Safe Third Agreement, updated March 2006.

[61] See Safe Third Lesson Plan at 6-7, 9, 10; Asylum Officer Basic Training Course. Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence, updated January 27, 2006.

[62] Applicants who are subject to the Agreement may be detained when they arrive at a land border POE. During the first year, the time varied among field offices from when the asylum seeker first arrived at the POE to when his or her threshold screening determination was completed.

[63] Any decision regarding the public interest exception is determined by the USCIS Director or his or her designee. On March 8, 2005 , the USCIS Director delegated the authority to the Director of the Office of Refugee, Asylum and International Operations.

[64] During the first year of implementation, the UNHCR disagreed with the U.S.'s decision not to exercise the public interest exception in two cases. One case involved same-sex partners and one case involved a close family member who did not have the required legal status in the U.S. to qualify as an anchor relative.

[65] "Family member" is defined under the Agreement as "the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews." *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries,* Article 1.

[66] See DHS and DOJ rules at 69 Fed. Reg. 69479-69490 (November 29, 2004).

[67] *See* Defense of Marriage Act § 3, 1 U.S.C. § 7 (providing that, for the purposes of federal law, 'spouse' refers only to a person of the opposite sex who is a husband or a wife). "Family member" under the Agreement is defined as "spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews." Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. Article 1(1)(b). Also, Article 1(2) provides "[e]ach Party shall apply this Agreement in respect of family members and unaccompanied minors consistent with its national law."