



## **DEPARTMENT OF HOMELAND SECURITY**

### **8 CFR Parts 208 and 235**

**RIN 1615-AC42**

## **DEPARTMENT OF JUSTICE**

### **Executive Office for Immigration Review**

### **8 CFR Parts 1003, 1208, and 1235**

**EOIR Docket No. 18-0102; A.G. Order No. 4922-2020**

**RIN 1125-AA94**

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

**AGENCY:** Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** On June 15, 2020, the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) (collectively “the Departments”) published a notice of proposed rulemaking (“NPRM” or “proposed rule”) that would amend the regulations governing credible fear determinations. The proposed rule would make it so that individuals found to have a credible fear will have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (“INA” or “the Act”) (“statutory withholding of removal”), or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), adjudicated by an immigration judge within the Executive Office for Immigration Review (“EOIR”) in streamlined proceedings (rather than under section 240 of the Act), and to specify what standard of review applies in such streamlined proceedings. The Departments further proposed changes to the regulations regarding asylum, statutory withholding

of removal, and withholding and deferral of removal under the Convention Against Torture (“CAT”) regulations. The Departments also proposed amendments related to the standards for adjudication of applications for asylum and statutory withholding. This final rule (“rule” or “final rule”) responds to comments received in response to the NPRM and generally adopts the NPRM with few substantive changes.

**DATES:** This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary of the Final Rule**

On June 15, 2020, the Departments published an NPRM that would amend the regulations governing credible fear determinations to establish streamlined proceedings under a clarified standard of review. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020). The proposed rule would also amend regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the regulations. *Id.*

The following discussion describes the provisions of the final rule, which is substantially the same as the NPRM, and summarizes the changes made in the final rule.

*A. Authority and Legal Framework*

The Departments are publishing this final rule pursuant to their respective authorities under the Immigration and Nationality Act (“INA”) as amended by the Homeland Security Act of 2002 (“HSA”), Public Law 107-296, 116 Stat. 2135.

The INA, as amended by the HSA, charges the Secretary “with the administration and enforcement of this chapter [titled “Immigration and Nationality”] and all other laws relating to

the immigration and naturalization of aliens” and granted the Secretary the power to take all actions “necessary for carrying out” the provisions of the immigration and nationality laws. INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *See* HSA, sec. 1102, 116 Stat. at 2273–74; Consolidated Appropriations Resolution of 2003, Public Law 108-7, sec. 105, 117 Stat. 11, 531.

The HSA charges the Attorney General with “such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by [EOIR], or by the Attorney General with respect to [EOIR] . . . .” INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see* 6 U.S.C. 521; HSA, sec. 1102, 116 Stat. at 2274.

Furthermore, the Attorney General is authorized to “establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” INA 103(g)(2), 8 U.S.C. 1103(g)(2); HSA, sec. 1102, 116 Stat. 2135, 2274.

#### *B. Changes in the Final Rule*

Through the NPRM, the Departments sought to satisfy a basic tenet of asylum law: to assert a “government’s right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm.” 85 FR at 36265 (citations omitted). To achieve this dual aim, the Departments proposed numerous amendments to the DHS and DOJ regulations.<sup>1</sup> After carefully reviewing all of the comments received on the NPRM, the Departments are making the following changes to the final rule.

This final rule makes thirteen non-substantive changes to the regulatory provisions in the proposed rule, some of which were noted by commenters. First, the final rule corrects a typographical error—i.e. “part” rather than “party”—in 8 CFR 208.30(e)(2)(ii), which was

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<sup>1</sup> In addition to the amendments outlined in more detail herein, the Departments also proposed additional minor amendments for clarity, such as replacing references to the former Immigration and Naturalization Service with references to DHS where appropriate (*see, e.g.*, 8 CFR 208.13(b)(3)(ii)) or replacing forms listed by form number with the form’s name (*see, e.g.*, 8 CFR 1003.42(e)). The Departments also further reiterate the full explanation and justifications for the proposed changes set out in the preamble to the NPRM. 85 FR at 36265-88.

proposed to read, “Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another *party* of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so” (emphasis added). Second, the Departments added the word “for” to correct the form name “Application for Asylum and for Withholding of Removal” at 8 CFR 208.31(g)(2), 1208.30(g)(2)(iv)(B), and 1208.31(g)(2). Third, the Departments are replacing the word “essential” with the word “material” in 8 CFR 208.20(c)(1) and 1208.20(c)(1), consistent with the stated intent of the NPRM.

Fourth, the Departments are making stylistic revisions to 8 CFR 208.15(a)(1) and 1208.15(a)(1), including breaking them into three subparagraphs, to make them easier to follow and to reduce the risk of confusion. Fifth, the Departments are editing the temporal language in 8 CFR 208.15(a)(3)(i) and (ii) and 1208.15(a)(3)(i) for clarity and consistency with similar language in 8 CFR 208.15(a)(2) and 1208.15(a)(2). The edited language clarifies the relevant temporal scope to read “after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States” in lieu of the language in the NPRM. Sixth, the Departments are striking the parenthetical phrase “(“rogue official”)” in 8 CFR 208.18(a)(1) and 1208.18(a)(1). Relatedly, they are replacing the remaining uses of the phrase “rogue official” in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with its definition, “public official who is not acting under color of law.”<sup>2</sup> Seventh, the Departments are adding the clarifying phrase “as defined in section 212(a)(9)(B)(ii) and (iii) of the Act” to 8 CFR 208.13(d)(2)(i)(D) and 1208.13(d)(2)(i)(D) consistent with the intent of the NPRM. Eighth, the Departments are clarifying the language in 8 CFR 208.1(g) and 1208.1(g) to alleviate apparent confusion and improve consistency with the intent of the NPRM regarding the use of stereotypes as evidence

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<sup>2</sup> The NPRM did not use the term “rogue official” in 8 CFR 1208.16(b)(3)(iv); rather it referred to “officials acting outside their official capacity.” The discrepancy regarding this phrasing between 8 CFR 208.16(b)(3)(iv) 8 CFR 1208.16(b)(3)(iv) in the NPRM was inadvertent, and the Departments are correcting it accordingly in both regulations in the final rule.

for an asylum claim. A bald statement that a country or its denizens have a particular cultural trait that causes citizens, nationals, or residents of that country to engage in persecution is evidence lacking in probative value and has no place in an adjudication.

Ninth, the Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(a) and (b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT<sup>3</sup>, and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d), (e) and 1208.6(d), (e), and the Departments see no reason not to conform the other paragraphs in that section for consistency. Tenth, and relatedly, the Departments are making edits to 8 CFR 208.6(a), (b), (d) and (e) and 8 CFR 1208.6(a) and (b), (d), and (e) to make clear that applications for refugee admission pursuant to INA 207(c)(1), 8 U.S.C. 1157(c)(1), and 8 CFR part 207 are subject to the same information disclosure provisions as similar applications for asylum, withholding of removal under the INA, and protection under the regulations implementing the CAT. The Departments already apply the disclosure provisions to such applications as a matter of policy and see no basis to treat such applications differently than those for protection filed by aliens already in or arriving in the United States. Eleventh, the Departments are amending 8 CFR 208.13(d)(2)(ii) to reflect that, operationally, DHS may refer or deny an asylum application, depending on the circumstances of the applicant. *See* 8 CFR 208.14. Twelfth, the Departments are correcting 8 CFR 1208.30(g)(1)(i), (ii) to reflect that asylum officers issue determinations, not orders. *See* 8 CFR 208.30(e).

Thirteenth, EOIR is making a conforming change to 8 CFR 1244.4(b) to align it with the both the appropriate statutory citation and the corresponding language in 8 CFR 244.4(b). Aliens described in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), including those subject to the firm resettlement bar contained in INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), are ineligible

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<sup>3</sup> *See* UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

for Temporary Protected Status. That statutory ineligibility ground is incorporated into regulations in both chapter I and chapter V of title 8; however, while the title I provision, 8 CFR 244.4(b), cites the correct statutory provision—INA 208(b)(2)(A)(vi), 8 U.S.C.

1158(b)(2)(A)(vi)—the title V provision, 8 CFR 1244.4(b), maintains an outdated reference to an incorrect statutory provision. *Compare* 8 CFR 244.4(b) (referencing INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A)), *with* 8 CFR 1244.4(b) (referencing former INA 243(h)(2), 8 U.S.C. 1253(h)(2)).

The Departments are also making four non-substantive changes in the final rule to correct regulatory provisions that were inadvertently changed or deleted in the proposed rule or that introduced an unnecessary redundancy. First, the final rule reinserts language relating to DHS’s ability to 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, which was inadvertently removed from 8 CFR 1208.30(g)(2)(iv)(A) in the NPRM. The final rule reinserts that language in 8 CFR 208.30(g)(2)(i); it pertains to a DHS procedure and, thus, appropriately belongs in chapter I, rather than chapter V, of title 8.

Second, the final rule strikes the regulatory text changes proposed to 8 CFR 103.5. Those changes were not discussed in the preamble to the NPRM and were inadvertently included in the NPRM’s proposed regulatory text.

Third, the final rule reinserts the consideration-of-novel-or-unique-issues language in 8 CFR 208.30(e)(4) that was inadvertently proposed to be removed in the NPRM, with modifications to account for changes in terminology adopted via this final rule (specifically, “[i]n determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or 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.”).

Fourth, this final rule removes the following sentence from the proposed 8 CFR 208.30(e)(4): “An asylum officer’s determination will not become final until reviewed by a

supervisory asylum officer.” Nearly identical text already exists in 8 CFR 208.30(e)(8) and would be repetitive to include in 8 CFR 208.30(e)(4).

In response to issues raised by commenters or to eliminate potential confusion caused by the drafting in the NPRM, the Departments are making five additional changes to the NPRM in the final rule. First, the Departments are amending the waiver provision in 8 CFR 208.1(c) and 1208.1(c) related to claims of ineffective assistance of counsel to provide an exception for egregious conduct on the part of counsel. As discussed, *infra*, the Departments believe that cognizable ineffective assistance of counsel claims in the context of failing to assert a particular social group should be extremely rare. If a particular social group is not asserted because the alien did not tell his or her counsel about it, then there has been no ineffective assistance on the part of counsel. If the alien did provide his or her counsel with a particular social group and counsel elected not to present it as a strategic choice, then there is no basis to reopen the proceedings. *See Matter of B-B-*, 22 I&N Dec. at 310 (“subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen”). Nevertheless, the Departments recognize there may be *sui generis* situations in which “egregious circumstances” may warrant reopening due to ineffective assistance of counsel in this context, provided that appropriate procedural requirements for such a claim are observed. Thus, the Departments are adding such an exception to the final rule, consistent with existing case law. *See id.* (“The respondents opted for a particular strategy and form of relief, and although they might wish to fault their former attorney and recant that decision, they are nonetheless bound by it, unless they can show egregious conduct on counsel’s part.”); *see also Matter of Velasquez*, 19 I&N Dec. 377, 377 (BIA 1986) (concession of attorney is binding on an alien absent egregious circumstances).

Second, the Departments are amending the language in 8 CFR 208.1(e) and 1208.1(e) regarding when threats may constitute persecution to clarify that particularized threats of severe harm of an immediate and menacing nature made by an identified entity or person may constitute persecution, though the Departments expect that such cases will be rare. This revision, as

discussed *infra*, is consistent with existing case law. See *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (“death threats alone can constitute persecution” but “they constitute ‘persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm’” (citation omitted)). As noted, threats “combined with confrontation or other mistreatment” are likely to be persecution; however, “cases with threats *alone*, particularly anonymous or vague ones, rarely constitute persecution.” *Id.* (citation omitted) (emphasis added); see also *Juan Antonio v. Barr*, 959 F.3d 778, 794 (6th Cir. 2020) (threats alone amount to persecution only when they are “of the most immediate and menacing nature” (citation omitted)).

Third, in recognition of commenters’ concerns and the reality that aliens under the age of 18, especially very young children, may not have decisional independence regarding an illegal entry into the United States, the Departments are amending 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. The Departments do not believe that a similar exception is warranted in 8 CFR 208.13(d)(1)(ii) and (iii), and 1208.13(d)(1)(ii) and (iii), however. For (d)(1)(ii) to apply to an alien under the age of 18, that alien must have filed an asylum application in the United States, notwithstanding any language barriers or other impediments; thus, there is no reason to assume categorically that such an alien could not have filed an application for protection in another country. Consequently, the Departments find that no age exemption is warranted in 8 CFR 208.13(d)(1)(ii) and 1208.13(d)(1)(ii). Further, as discussed, *infra*, there is no reason that an alien of any age would need to use fraudulent documents to enter the United States in order to seek asylum. Accordingly, no age exemption is warranted in 8 CFR 208.13(d)(1)(iii) and 1208.13(d)(1)(iii). Even without age exemptions, the Departments note that these discretionary factors do not



constitute bars to asylum and that adjudicators may appropriately consider an applicant's age in assessing whether a particular application warrants being granted as a matter of discretion.

Fourth, in response to commenters' concerns about the applicable effective date of the frivolousness provisions in 8 CFR 208.20 and 1208.20, the Departments have clarified the language in those provisions. The amendments to those provisions provided in this rule apply only to asylum applications filed on or after the effective date of the rule. The current definition of "frivolousness" will continue to apply to asylum applications filed between April 1, 1997, and the effective date of the rule.

Fifth, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), the Departments are deleting language in the former regarding an alien's opportunity to account for issues with a claim. The intent of the NPRM, expressed unequivocally in the proposed addition of 8 CFR 208.20(d) and 1208.20(d), was clear that adjudicators would not be required to provide "multiple opportunities for an alien to disavow or explain a knowingly frivolous application." 85 FR at 36276. The Departments inadvertently retained language from the current rule in the proposed additions of 8 CFR 208.20(b) and 1208.20(b), however, that was in tension with that intent. *Compare, e.g.,* 8 CFR 208.20(b) (proposed) ("Such finding [of frivolousness] will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim."), *with* 8 CFR 208.20(d) (proposed) ("If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding."). Accordingly, in the final rule, the Departments are deleting the sentence from 8 CFR 208.20(b) and 1208.20(b) regarding an alien's opportunity to address issues with his or her claim after receiving the statutory warning regarding the knowing filing of a frivolous asylum application to avoid any residual confusion on the point.

The following discussion describes the provisions of the final rule, which are substantially the same as the NPRM, and also incorporates the changes made in the final rule summarized above.

### *C. Provisions of the Final Rule*

#### 1. Expedited Removal and Screenings in the Credible Fear Process

##### 1.1. Asylum-and-Withholding-Only Proceedings for Aliens with Credible Fear

DOJ is amending 8 CFR 1003.1, 8 CFR 1003.42(f), 8 CFR 1208.2, 8 CFR 1208.30, and 8 CFR 1235.6—and DHS is amending 8 CFR 208.2(c), 8 CFR 208.30(e)(5) and (f), and 8 CFR 235.6(a)(1)—so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture and accordingly receive a positive fear determination would appear before an immigration judge for “asylum-and-withholding-only” proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1). Such proceedings would be adjudicated in the same manner that currently applies to certain alien crewmembers, stowaways, and applicants for admission under the Visa Waiver Program, among other categories of aliens who are not entitled by statute to proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* 8 CFR 208.2(c)(1)(i)–(viii), 1208.2(c)(1)(i)–(viii).<sup>4</sup> Additionally, to ensure that these claims receive the most expeditious consideration possible, the Departments are amending 8 CFR 208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination. The Departments believe that this change would bring the proceedings in line with the statutory objective that the expedited removal process be streamlined and efficient.

##### 1.2. Consideration of Precedent in Credible Fear Determinations

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<sup>4</sup> In addition, DOJ proposed a technical correction to 8 CFR 1003.1(b), which establishes the jurisdiction of the BIA, to correct the reference to 8 CFR 1208.2 in paragraph (b)(9) and ensure that the regulations accurately authorize BIA review in “asylum-and-withholding-only” proceedings.

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

### 1.3. Remove and Reserve DHS-Specific Procedures from DOJ Regulations

DOJ is removing and reserving the following provisions in chapter V of 8 CFR: 8 CFR 1235.1, 8 CFR 1235.2, 8 CFR 1235.3, and 8 CFR 1235.5. When the Department first incorporated part 235 into 1235, it stated that "nearly all of the provisions \* \* \* affect bond hearings before immigration judges." Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9823, 9826 (Feb. 28, 2003). Upon further review, the Department determined that these sections regard procedures that are specific to DHS's examinations of applicants for admission as set forth in 8 CFR 235.1, 8 CFR 235.2, 8 CFR 235.3, and 8 CFR 235.5, and do not need to be duplicated in the regulations for EOIR in Chapter V, except for the provisions in 8 CFR 1235.4, relating to the withdrawal of an application for admission, and 8 CFR 1235.6, relating to the referral of cases to an immigration judge.

In comparison to the NPRM, this final rule is making an additional technical amendment by updating the outdated reference to "the Service" in 8 CFR 1235.6(a)(1)(ii) to read "DHS."

### 1.4. Reasonable Possibility Standard for Statutory Withholding of Removal and Torture-Related Fear Determinations

The Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to clarify and raise the statutory withholding of removal screening standard and the torture-related screening standard

under the CAT regulations for aliens in expedited removal proceedings and stowaways. Specifically, the Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof in credible fear screenings from a significant possibility that the alien can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 CFR 208.16, 208.30(e)(2), 1208.16. Similarly, for aliens expressing a fear of torture, the Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof from a significant possibility that the alien is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the alien would be tortured in the country of removal. *See* 8 CFR 208.18(a), 208.30(e)(3), 1208.18(a); 85 FR at 36268. Consistent with INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the asylum eligibility screening standard (a significant possibility that the alien could establish eligibility for asylum) currently applied in credible fear screenings remains unchanged. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). By clarifying and applying the “reasonable possibility” standard to the statutory withholding of removal screening and the torture-related screening under the CAT regulations, the alien’s screening burdens would become adequately analogous to the merits burdens, where the alien’s burdens for statutory withholding of removal and protections under the CAT regulations are higher than the burden for asylum.

The Departments are also amending 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to refer to the screenings of aliens in expedited removal proceedings and of stowaways for statutory withholding of removal as “reasonable possibility of persecution” determinations and the screening for withholding and deferral of removal under the CAT regulations as “reasonable possibility of torture” determinations, in order to avoid confusion between the different standards of proof.

In conjunction with the edits to DHS’s regulation in 8 CFR 208.30, DOJ is amending 8 CFR 1208.30. Currently, after an asylum officer determines that an alien lacks a credible fear of

persecution or torture, the regulation provides that an immigration judge in EOIR reviews that determination under the credible fear (“significant possibility”) standard. 8 CFR 208.30(g), 1208.30(g). DHS’s “reasonable possibility” screening standard for statutory withholding of removal and CAT protection claims is a mismatch with EOIR’s current regulation, which does not provide for a reasonable possibility review process in the expedited removal context. Therefore, DOJ is modifying 8 CFR 1208.30(g) to clarify that credible fear of persecution determinations (i.e., screening for asylum eligibility) would continue to be reviewed under a “credible fear” (significant possibility) standard, but screening determinations for eligibility for statutory withholding of removal and protection under the CAT regulations would be reviewed under a “reasonable possibility” standard.

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

DHS is also revising the language in 8 CFR 208.30(e)(1) to interpret the “significant possibility” standard that Congress established in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v).

In comparison to the NPRM, this final rule is correcting a typographical error—i.e. “part” rather than “party”—in 8 CFR 208.30(e)(2)(ii). The sentence now reads: “Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so[.]” In addition, this final rule adds the word “for” to correct the form name “Application for Asylum and for Withholding of Removal” at 8 CFR 1208.30(g)(2)(iv)(B). This final rule also reinserts language allowing DHS to 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, which was inadvertently removed from 8 CFR 1208.30(g)(2)(iv)(A) in the NPRM. The final rule reinserts that language in 8 CFR 208.30(g)(2)(i) because it pertains to a DHS procedure and, thus, appropriately belongs in chapter I, rather than chapter V, of title 8.

#### 1.5. Amendments to the Credible Fear Screening Process

The Departments further amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to make several additional technical and substantive amendments regarding fear interviews, determinations, and reviews of determinations. The Departments amend 8 CFR 208.30(a) and 8 CFR 1208.30(a) to clearly state that the respective sections describe the exclusive procedures applicable to applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), and receive “credible fear” interviews, determinations, and reviews under section 235(b)(1)(B) of the Act, 8 U.S.C. 1225(b)(1)(B).

DHS is clarifying the existing “credible fear” screening process in 8 CFR 208.30(b), which states that if an alien subject to expedited removal indicates an intention to apply for asylum or expresses a fear of persecution or torture, or a fear of return, an inspecting officer shall not proceed further with removal until the alien has been referred for an interview with an asylum officer, as provided in section 235(b)(1)(A)(ii) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii). The rule also states that the asylum officer would screen the alien for a credible fear of persecution and, as appropriate, a reasonable possibility of persecution and a reasonable possibility of torture, and conduct an evaluation and determination in accordance with 8 CFR 208.9(c), which is consistent with current policy and practice. These proposals aim to provide greater transparency and clarity with regard to fear screenings.

DHS is also including consideration of internal relocation in the context of 8 CFR 208.30(e)(1)–(3), which outline the procedures for determining whether aliens have a credible fear of persecution, a reasonable possibility of persecution, and a reasonable possibility of

torture. Considering internal relocation in the “credible fear” screening context is consistent with existing policy and practice, and the regulations addressing internal relocation at 8 CFR 208.16(c)(3)(ii) and 8 CFR 1208.16(c)(3)(ii) (protection under the CAT regulations); 8 CFR 208.13(b)(1)(i)(B) and 8 CFR 1208.13(b)(1)(i)(B) (asylum); and 8 CFR 208.16(b)(1)(i)(B) and 8 CFR 1208.16(b)(1)(i)(B) (statutory withholding). The regulatory standard that governs consideration of internal relocation in the context of asylum and statutory withholding of removal adjudications is different from the standard that considers internal relocation in the context of protection under the CAT regulations. *See generally Maldonado v. Lynch*, 786 F.3d 1155, 1163 (9th Cir. 2015) (noting the marked difference between the asylum and CAT regulations concerning internal relocation).

In addition, the Departments are adding asylum and statutory withholding eligibility bar considerations in 8 CFR 208.30(e)(1)(iii) and (e)(2)(iii), and 8 CFR 1003.42(d). Currently, 8 CFR 208.30(e)(5)(i) provides that if an alien, other than a stowaway, is able to establish a credible fear of persecution or torture but also appears to be subject to one or more of the mandatory eligibility bars to asylum or statutory withholding of removal, then the alien will be placed in section 240 proceedings. The Departments are amending 8 CFR 208.30 to apply mandatory bars to applying for or being granted asylum at the credible fear screening stage for aliens in expedited removal proceedings and for stowaways, such that if a mandatory bar to applying for or being granted asylum applies, the alien would be unable to show a significant possibility of establishing eligibility for asylum. In 8 CFR 208.30(e)(5), DHS requires asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), or the bars to asylum eligibility under section 208(b)(2) of the Act, 8 U.S.C. 1158(b)(2), including any eligibility bars established by regulation under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations. If a mandatory

bar to asylum applies, the alien will then be screened only for statutory withholding of removal or withholding or deferral of removal under the CAT regulations. If the alien is subject to a mandatory bar to asylum that is also a mandatory bar to statutory withholding of removal, then the alien will be screened only for deferral of removal under the CAT regulations. An alien who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal would receive a negative fear determination, unless the alien could establish a reasonable possibility of torture, in which case he or she would be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

Additionally, under 8 CFR 208.30(e)(5), DHS has used a “reasonable fear” standard (identical to the “reasonable possibility” standard enunciated in this rule) in procedures related to aliens barred from asylum under two interim final rules issued by the Departments,<sup>5</sup> as described

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<sup>5</sup> On July 16, 2019, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(4) or 1208.13(c)(4) who enter, attempt to enter, or arrive in the United States across the southern land border on or after such date, after transiting through at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence en route to the United States, will be found ineligible for asylum (and, because they are subject to this bar, not be able to establish a credible fear of persecution) unless they qualify for certain exceptions. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). On July 24, 2019, the U.S. District Court for the Northern District of California enjoined the Departments “from taking any action continuing to implement the Rule” and ordered the Departments “to return to the pre-Rule practices for processing asylum applications.” *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). On August 16, 2019, the U.S. Court of Appeals for the Ninth Circuit issued a partial stay of the preliminary injunction so that the injunction remained in force only in the Ninth Circuit. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court then reinstated the nationwide scope of the injunction. *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019). Two days later, the Supreme Court stayed the district court’s injunction. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). On July 6, 2020, the Ninth Circuit affirmed the district court’s injunction. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). Additionally, on June 30, 2020, the interim final rule was vacated by the D.C. District Court in *Capital Area Immigrants’ Rights (“CAIR”) Coalition, et al. v. Trump*, 19-cv-02117 (D.D.C. 2020) and *I.A., et al. v. Barr*, 19-cv-2530 (D.D.C. 2020).

On November 9, 2018, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) who entered the United States in contravention of a covered Presidential proclamation or order are barred from eligibility for asylum. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018). On December 19, 2018, the U.S. District Court for the Northern District of California enjoined the Departments “from



in 8 CFR 208.13(c)(3)–(4). The Departments include technical edits in 8 CFR 208.30(e)(5), to change “reasonable fear” to “reasonable possibility” to align the terminology with the other proposed changes in this rule. Similarly, DOJ makes technical edits in 8 CFR 1208.30(g)(1) and 8 CFR 1003.42(d)—both of which refer to the “reasonable fear” standard in the current version of 8 CFR 208.30(e)(5)—to change the “reasonable fear” language to “reasonable possibility.” These edits are purely technical and would not amend, alter, or impact the standard of proof applicable to the fear screening process and determinations, or review of such determinations, associated with the aforementioned bars.

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

The Departments further amend 8 CFR 208.30(g) and 8 CFR 1208.30(g)(2), which address procedures for negative fear determinations for aliens in the expedited removal process. In 8 CFR 208.30(g)(1), the Departments treat an alien’s refusal to indicate whether he or she desires review by an immigration judge as declining to request such review. Also, in 8 CFR 208.31, the Departments treat a refusal as declining to request review within the context of reasonable fear determinations.

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

In comparison to the NPRM, this final rule adds the word “for” to correct the form name to “Application for Asylum and for Withholding of Removal” at 8 CFR 208.31(g)(2) and 1208.31(g)(2). This final rule also reinserts language concerning novel or unique issues in 8 CFR 208.30(e)(4) that was inadvertently proposed to be removed in the NPRM, with modifications to account for changes in terminology adopted via this final rule. The language now reads: “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 reasonable possibility of persecution or 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.” Also, this final rule removes one sentence from the proposed 8 CFR 208.30(e)(4)—“An asylum officer’s determination will not become final until reviewed by a supervisory asylum officer”—because similar text already exists in 8 CFR 208.30(e)(8) and it would be repetitive to include it in 8 CFR 208.30(e)(4).

## 2. Amendments Related to the Filing Requirements and Elements for Consideration of Form I-589, Application for Asylum and for Withholding of Removal

### 2.1. Frivolous Applications

The Departments amend both 8 CFR 208.20 and 1208.20 regarding determinations that an asylum application is frivolous. *See* INA 208(d)(6), 8 U.S.C. 1158(d)(6) (providing that an alien found to have “knowingly made a frivolous application for asylum” is “permanently ineligible for any benefits” under the Act). The Departments propose the new standards in order to ensure that manifestly unfounded or otherwise abusive claims are rooted out and to ensure that meritorious claims are adjudicated more efficiently so that deserving applicants receive benefits in a timely fashion.

The Departments clarify the meaning of “knowingly” by providing that “knowingly” requires either actual knowledge of the frivolousness or willful blindness toward it. 8 CFR 208.20(a)(2), 1208.20(a)(2). The Departments also amend the definition of “frivolous.” 8 CFR 208.20, 208.20(c)(1)–(4), 1208.20, 1208.20(c)(1)–(4). Under the new definition, if knowingly

made, an asylum application would be properly considered frivolous if the adjudicator were to determine that it included a fabricated material element; that it was premised on false or fabricated evidence; that it was filed without regard to the merits of the claim; or that it was clearly foreclosed by applicable law. The definition aligns with the Departments' prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and the Departments believe the definition would better effectuate the intent of section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims.

In addition, the Departments allow asylum officers adjudicating affirmative asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status). 8 CFR 208.20(b), 1208.20(b). For an alien not in lawful status, a finding by an asylum officer that an asylum application is frivolous would not render an alien permanently ineligible for immigration benefits unless an immigration judge or the BIA subsequently makes a finding of frivolousness upon de novo review of the application. Asylum officers would apply the same definition used by immigration judges and the BIA under this rule. *Id.* This change would allow U.S. Citizenship and Immigration Services ("USCIS") to more efficiently root out frivolous applications, deter frivolous filings, and reduce the number of frivolous applications in the asylum system. Additionally, an asylum officer who makes a finding of frivolousness would produce a record on that issue for an immigration judge to review. Further, the proposed change is consistent with congressional intent to "reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods." S. Rep. No. 104-249, at 2 (1996).

The Departments clarify that, as long as the alien has been given the notice of the consequences of filing a frivolous application, as required by section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A), the adjudicator need not give the alien any additional or further

opportunity to account for any issues prior to the entry of a frivolousness finding. 8 CFR 208.20(d), 1208.20(d). The Departments have determined that this provision is sufficient to comply with the Act's requirements, and that there is no legal or operational justification for providing additional opportunities to address aspects of a claim that may warrant a frivolousness finding. The Departments believe the current regulatory framework, which provides that an EOIR adjudicator may only make a frivolous finding if he or she "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," has not successfully achieved the Departments' goal of preventing knowingly frivolous applications that delay the adjudication of other asylum applications that may merit relief.

As this rule would overrule *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), and revise the definition of "frivolous," adjudicators would not be required to provide opportunities for applicants to address discrepancies or implausible aspects of their claims if an applicant had been provided the warning required by INA 208(d)(4)(A) (8 U.S.C. 1158(d)(4)(A)).

In order to ameliorate the consequences of knowingly filing a frivolous application in appropriate cases, however, the Departments include a mechanism that would allow certain aliens in removal proceedings to withdraw, with prejudice, their applications by disclaiming the applications; accepting an order of voluntary departure for a period of no more than 30 days; withdrawing, also with prejudice, all other applications for relief or protection; and waiving any rights to file an appeal, motion to reopen, and motion to reconsider. 8 CFR 208.20(f), 1208.20(f). In such instances, the aliens would not be subject to a frivolousness finding and could avoid the penalties associated with such a finding. In addition, the regulation does not change current regulatory language that makes clear that a frivolousness finding does not bar an alien from seeking statutory withholding of removal or protection under the CAT regulations. Finally, the Departments clarify that an application may be found frivolous even if the application was untimely. 8 CFR 208.20(e), 1208.20(e).

In comparison to the NPRM, this final rule updates the frivolousness language in 8 CFR 208.20 and 8 CFR 1208.20 to further clarify that the new frivolousness standards only apply prospectively to applications filed on or after the effective date of this final rule. This final rule also replaces the word “essential” with the word “material” in 8 CFR 208.20(c)(1) and 1208.20(c)(1), consistent with the stated intent of the NPRM. Finally, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), this final rule deletes the following sentence from proposed 8 CFR 208.20(b) and 1208.20(b): “Such finding will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.”

## 2.2. Pretermission of Applications

DOJ adds a new paragraph (e) to 8 CFR 1208.13 to clarify that immigration judges may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations if the alien has not established a prima facie claim for relief or protection under the applicable laws and regulations. *See Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018); *see also Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (“Of course, if an alien’s asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group \* \* \*—an immigration judge or the Board need not examine the remaining elements of the asylum claim.”). Other immigration applications are subject to pretermission when legally insufficient, and the INA and current regulations do not require asylum to be treated any differently. Such a decision would be based on the Form I-589 application itself and any supporting evidence. Under this rule, an immigration judge may pretermit an asylum application in two circumstances: (1) following an oral or written motion by DHS, and (2) sua sponte upon the immigration judge’s own authority. Provided the alien has had an opportunity to respond, and the immigration judge considers any such response, a hearing would not be required for the immigration judge to make a decision to pretermit and deny the

application. In the case of the immigration judge's exercise of his or her own authority, parties would have at least ten days' notice before the immigration judge would enter such an order. A similar timeframe would apply if DHS moves to prepermit, under current practice. *See* EOIR, *Immigration Court Practice Manual* at D-1 (Aug. 2, 2018), <https://www.justice.gov/eoir/page/file/1084851/download>.

### 2.3. Particular Social Group

The Departments adopt amendments to codify long-standing standards from case law regarding the cognizability of particular social groups and to provide clarity, allow for uniform application, and reduce the time necessary to evaluate claims involving particular social groups. These requirements would aid efficient litigation and avoid gamesmanship and piecemeal litigation.

Specifically, the Departments codify the requirements that (1) a particular social group must be (a) composed of members who share a common immutable characteristic, (b) defined with particularity, and (c) socially distinct in the society in question; (2) the group must exist independently of the alleged persecutory acts; and (3) the group must not be defined exclusively by the alleged harm. 8 CFR 208.1(c), 1208.1(c). Additionally, the Departments list nine, non-exhaustive circumstances that, if a particular social group consisted of or was defined by, would not generally result in a favorable adjudication. *Id.* Further, the Departments adopt several procedural requirements regarding the alien's responsibility to define the particular social group. *Id.*

In comparison to the NPRM, this final rule amends the waiver provision in 8 CFR 208.1(c) and 1208.1(c) related to claims of ineffective assistance of counsel based on a failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge to provide an exception for egregious conduct on the part of counsel. The Departments believe that cognizable ineffective assistance of counsel claims in the context of failing to assert a particular social group should be extremely rare. Nevertheless, the

Departments recognize there may be unique situations in which “egregious conduct” on the part of counsel may warrant reopening in this context, provided that appropriate procedural requirements for such a claim are observed.

#### 2.4. Political Opinion

The Departments adopt amendments to define “political opinion” and provide other guidance for adjudicators regarding applications for asylum or statutory withholding of removal premised on the applicant’s political opinion. These amendments would provide additional clarity for adjudicators and better align the regulations with statutory requirements and general understanding that a political opinion is intended to advance or further a discrete cause related to political control of the state.

Specifically, the Departments define “political opinion” for the purposes of applications for asylum or for statutory withholding of removal as an opinion expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. 8 CFR 208.1(d), 1208.1(d). Additionally, the Departments adopt a list of potential definitional bases for a political opinion that would not, in general, support a favorable adjudication: a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. *Id.* Finally, consistent with section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), the Departments provide that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, would be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or be

subject to persecution for such failure, refusal, or resistance would be deemed to have a well-founded fear of persecution on account of political opinion. *Id.*

## 2.5. Persecution Definition

Given the wide range of cases interpreting “persecution” for the purposes of the asylum laws, the Departments are adding a new paragraph to 8 CFR 208.1 and 1208.1 to define “persecution” and to better clarify what does and does not constitute persecution given the extreme and severe nature of harm required. The Departments believe that these changes would better align the relevant regulations with the high standard Congress intended for the term “persecution.” *See Fatin v. INS*, 12 F.3d 1233, 1240 n.10, 1243 (3d Cir. 1993).

Specifically, this rule provides that persecution requires “an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control.” 8 CFR 208.1(e), 1208.1(e). The Departments further clarify that persecution does not include, for example: (1) every instance of harm that arises generally out of civil, criminal, or military strife in a country; (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (3) intermittent harassment, including brief detentions; (4) threats with no actions taken to carry out the threats; (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or likely would be applied to an applicant personally. *See id.*

In comparison to the NPRM, this final rule amends the language in 8 CFR 208.1(e) and 1208.1(e) regarding when threats alone may constitute persecution to clarify that particularized threats of severe harm of an immediate and menacing nature made by an identified entity may constitute persecution. The Departments expect that such cases will be rare. *See, e.g., Duran-Rodriguez v. Barr*, 918 F.3d at 1028 (explaining that “death threats alone can constitute persecution” but “constitute persecution in only a small category of cases, and only when the



threats are so menacing as to cause significant actual suffering or harm” (quotation marks and citation omitted)).

## 2.6. Nexus

The Departments add paragraph (f) to both 8 CFR 208.1 and 1208.1 to provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five protected grounds. This proposal would further the expeditious consideration of asylum and statutory withholding claims by bringing clarity and uniformity to this issue.

Specifically, the Departments are adopting the following eight non-exhaustive circumstances, each of which is rooted in case law, that would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant’s inability to demonstrate persecution on account of a protected ground: (1) interpersonal animus or retribution; (2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue; (3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state; (4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations; (5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence; (6) criminal activity; (7) perceived, past or present, gang affiliation; and (8) gender. 8 CFR 208.1(f)(1)–(8), 1208.1(f)(1)–(8). At the same time, the regulation would not foreclose that, at least in rare cases, such circumstances could be the basis for finding nexus, given the fact-specific nature of this determination.

## 2.7. Stereotype Evidence

In order to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim, the Departments bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes are offered in support of an alien's claim. 8 CFR 208.1(g), 1208.1(g).

In comparison to the NPRM, the final rule clarifies the language in 8 CFR 208.1(g) and 1208.1(g) to alleviate apparent confusion and improve consistency with the intent of the NPRM regarding the use of stereotypes as an evidentiary basis for an asylum claim. In the final rule, bald statements that a country or its denizens have a particular cultural trait that causes citizens, nationals, or residents of that country to engage in persecution is evidence lacking in probative value and has no place in an adjudication.

## 2.8. Internal Relocation

The Departments are adopting amendments to 8 CFR 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), and 1208.16(b)(3) regarding the reasonableness of internal relocation because the Departments determined that the current regulations inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate. The Departments adopt a more streamlined presentation in the regulations of the most relevant factors for adjudicators to consider in determining whether internal relocation is a reasonable option. This clarification would assist adjudicators in making more efficient adjudications and would bring the regulatory burdens of proof in line with baseline assessments of whether types of persecution generally occur nationwide.

Specifically, the Departments amend the general guidelines regarding determinations of the reasonableness of internal relocation to specify that adjudicators should consider the totality of the circumstances. 8 CFR 208.13(b)(3), 1208.13(b)(3). In addition, the Departments amend

the list of considerations for adjudicators including, inter alia, an instruction that adjudicators consider “the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.” *Id.* The Departments also adopt a presumption that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be. 8 CFR 208.13(b)(3)(iii), 1208.13(b)(3)(iii). This presumption would apply regardless of whether an applicant has established past persecution. For ease of administering these provisions, the Departments also provide examples of the types of individuals or entities who are private actors. 8 CFR 208.13(b)(3)(iv), 1208.13(b)(3)(iv).<sup>6</sup>

## 2.9. Discretionary Factors

Asylum is a discretionary form of relief, and the Departments provide general guidelines on factors for adjudicators to consider when determining whether or not an alien merits the relief of asylum as a matter of discretion. 8 CFR 208.13(d), 1208.13(d). Specifically, the Departments provide three factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion: (1) an alien’s unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country; (2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and (3) an alien’s use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant’s home country without transiting through any other country. 8 CFR 208.13(d)(1), 1208.13(d)(1). The adjudicator must consider all three factors, if relevant, during every asylum adjudication. If one or more of these factors were found to apply

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<sup>6</sup> Because the issue of internal relocation arises in the context of applications for both asylum and statutory withholding of removal, the Departments are amending the relevant regulations related to applications for statutory withholding of removal for the same reasons discussed herein they are amending the regulations related to asylum applications. *See* 8 CFR 208.16(b)(3) and 1208.16(b)(3).

to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.

In addition, the Departments provide nine additional adverse factors that, if applicable, would ordinarily result in the denial of asylum as a matter of discretion. 8 CFR 208.13(d)(2)(i), 1208.13(d)(2)(i). Specifically, the Departments list the following factors for the adjudicator to consider: (1) whether an alien has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States, 8 CFR 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A)<sup>7</sup>; (2) whether the alien transited through more than one country prior to arrival in the United States, 8 CFR 208.13(d)(2)(i)(B), 1208.13(d)(2)(i)(B)<sup>8</sup>; (3) whether the applicant would be subject to a mandatory asylum application denial under 8 CFR 208.13(c), 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty, 8 CFR 208.13(d)(2)(i)(C) 1208.13(d)(2)(i)(C); (4) whether the applicant has accrued more than one year of unlawful presence in the United States prior to filing an application for asylum, 8 CFR 208.13(d)(2)(i)(D), 1208.13(d)(2)(i)(D); (5) whether the applicant, at the time he or she filed the asylum application, had failed to timely file or to timely file an extension request of any required Federal, state, or local tax returns; failed to satisfy any outstanding Federal, state, or local tax obligations; or has income that would generate tax liability but that has not been reported to the Internal Revenue Service, 8 CFR 208.13(d)(2)(i)(E), 1208.13(d)(2)(i)(E); (6) whether the applicant has had two or more prior asylum applications denied for any reason, 8 CFR

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<sup>7</sup> The Departments, however, provided exceptions for aliens who demonstrate that (1) they applied for and were denied protection in such country, (2) they are a trafficking victim as set out as 8 CFR 214.11, or (3) such country was at the time the alien transited not a party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 8 CFR 208.13(d)(2)(i)(A)(1)–(3), 1208.13(d)(2)(i)(A)(1)–(3).

<sup>8</sup> The Departments, however, provided the same exceptions described above. *See* 8 CFR 208.13(d)(2)(i)(B)(1)–(3), 1208.13(d)(2)(i)(B)(1)–(3).

208.13(d)(2)(i)(F), 1208.13(d)(2)(i)(F); (7) whether the applicant has previously withdrawn an asylum application with prejudice or been found to have abandoned an asylum application, 8 CFR 208.13(d)(2)(i)(G), 1208.13(d)(2)(i)(G); (8) whether the applicant previously failed to attend an interview with DHS regarding his or her application, 8 CFR 208.13(d)(2)(i)(H), 1208.13(d)(2)(i)(H)<sup>9</sup>; and (9) whether the applicant was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen within one year of the change in country conditions, 8 CFR 208.13(d)(2)(i)(I), 1208.13(d)(2)(i)(I); *see also* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i).

This rule provides that if the adjudicator were to determine that any of these nine circumstances applied during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial or referral of asylum would result in an exceptional and extremely unusual hardship to the alien. 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii).

In comparison to the NPRM, this final rule adds the clarifying phrase “as defined in section 212(a)(9)(B)(ii) and (iii) of the Act” to 8 CFR 208.13(d)(2)(i)(D) and 1208.13(d)(2)(i)(D) consistent with the intent of the NPRM. In addition, this final rule amends 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. Further, the final rule amends 8 CFR 208.13(d)(2)(ii) to reflect that, operationally, DHS may refer or deny an asylum application, depending on the circumstances of the applicant. *See* 8 CFR 208.14.

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<sup>9</sup> The Departments included exceptions if the alien shows by the preponderance of the evidence that either exceptional circumstances prevented the alien from attending the interview or that the interview notice was not mailed to the last address provided by the alien or the alien’s representative and neither the alien nor the alien’s representative received notice of the interview. 8 CFR 208.13(d)(2)(i)(H)(1)–(2), 1208.13(d)(2)(i)(H)(1)–(2).

## 2.10. Firm Resettlement

Due to the increased availability of resettlement opportunities and the interest of those genuinely in fear of persecution in attaining safety as soon as possible, the Departments revise the definition of firm resettlement that applies to asylum adjudications at 8 CFR 208.15 and 1208.15.<sup>10</sup> These changes recognize the increased availability of resettlement opportunities and that an alien fleeing persecution would ordinarily be expected to seek refuge at the first available opportunity where there is no fear of persecution or torture. Further, the changes would ensure that the asylum system is used by those in need of immediate protection rather than those who chose the United States as their destination for other reasons and then relied on the asylum system to reach that destination.

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<sup>10</sup> As the Departments noted in the proposed rule, 85 FR at 36286 n.41, 43 countries have signed the Refugee Convention since 1990. In particular, resettlement opportunities in Mexico, one of the most common transit countries for aliens coming to the United States, have increased significantly in recent years. For example, the UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID-19 pandemic—which strongly suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g.,* Shabia Mantoo, *Despite pandemic restrictions, people fleeing violence and persecution continue to seek asylum in Mexico*, U.N. High Commissioner for Refugees (Apr. 28, 2020), <https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html> (“While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.”). Asylum and refugee claims filed in Mexico increased 33 percent in the first three months of 2020 compared to the same period in 2019, averaging almost 6000 per month. *Id.* Asylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year. U.N. High Commissioner for Refugees, *Fact Sheet* (Apr. 2019), <https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf>. Overall, “[a]sylum requests have doubled in Mexico each year since 2015.” Congressional Research Serv., *Mexico’s Immigration Control Efforts* (Feb. 19, 2020), <https://fas.org/sgp/crs/row/IF10215.pdf>. Moreover, some private organizations acknowledge that asylum claims in Mexico have recently “skyrocket[ed],” that “Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,” and that “Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,” including for those “who are deciding where to seek asylum [i.e. between Mexico and the United States].” Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* (Nov. 2019), <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf>. Moreover, the Mexican Constitution was amended in 2011 to include the specific right to asylum and further amended in 2016 to expand that right. *See* Mex. Const. Art. 11 (“Every person has the right to seek and receive asylum. Recognition of refugee status and the granting of political asylum will be carried out in accordance with international treaties. The law will regulate their origins and exceptions.”). In fact, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under U.S. law. As in the United States, individuals in Mexico may seek refugee status as a result of persecution in their home countries on the basis of race, religion, nationality, gender, membership in a social group, or political opinion. *Compare* 2011 Law for Refugees, Complementary Protection, and Political Asylum (“LRCPPA”), Art. 13(I), *with* INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i). However, individuals in Mexico may also seek refugee status based on “generalized violence” and “massive violation of human rights.” *See* 2011 LRCPPA, Art. 13(II). In short, resettlement opportunities are unquestionably greater now than when the regulatory definition of “firm resettlement” was first implemented, and those changes warrant revisions to that definition accordingly.

Specifically, the Departments identify three circumstances under which an alien would be considered firmly resettled: (1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and (i) received or was eligible for any permanent legal immigration status in that country, (ii) resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist), or (iii) resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country; (2) the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or (3) (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States. 8 CFR 208.15(a)(1)–(3), 1208.15(a)(1)–(3).

The Departments further provide that the issue of whether the firm resettlement bar applies arises “when the evidence of record indicates that the firm resettlement bar may apply,” and specifically allows both DHS and the immigration judge to first raise the issue based on the record evidence. 8 CFR 208.15(b), 1208.15(b). Finally, the Departments specify that the firm resettlement of an alien’s parent(s) would be imputed to the alien if the resettlement was prior to the alien turning 18 and the alien resided with the parents at the time of the firm resettlement unless the alien could not have derived any legal immigration status or any nonpermanent legal immigration status that was potentially indefinitely renewable from the parent. *Id.*

In comparison to the NPRM, this final rule analyzes the components of 8 CFR 208.15(a)(1) and 1208.15(a)(1), breaks it into three subparagraphs, and changes the syntax, all

for easier readability and to avoid confusion. The changes in the final rule are stylistic and do not reflect an intent to make a substantive change from the NPRM. This final rule also changes the temporal language in 8 CFR 208.15(a)(3)(i) and (ii) and 1208.15(a)(3)(i) and (ii) for clarity and consistency with similar language in 8 CFR 208.15(a)(2) and 1208.15(a)(2). The changes clarify the relevant temporal scope to read “after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States” in lieu of the language in the NPRM. Finally, as discussed above, the rule corrects a related outdated statutory cross-reference in 8 CFR 1244.4(b).

#### 2.11. “Public Officials”

The Departments are revising 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) to provide further guidance for determining what sorts of officials constitute “public officials,” including whether an official such as a police officer is a public official for the purposes of the CAT regulations if he or she acts in violation of official policy or his or her official status. Specifically, in comparison to the NPRM, this final rule strikes the parenthetical phrase (““rogue official””) in 8 CFR 208.18(a)(1) and 1208.18(a)(1). Relatedly, this final rule replaces the remaining uses of the phrase “rogue official” in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with the definition, “public official who is not acting under color of law.” As recently noted by the Attorney General in *Matter of O-F-A-S-*, 28 I&N Dec. 35, 38 (A.G. 2020), “continued use of the ‘rogue official’ language by the immigration courts going forward risks confusion, not only because it suggests a different standard from the ‘under color of law’ standard, but also because ‘rogue official’ has been interpreted to have multiple meanings.”

In addition, the Departments clarify (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under “color of law”) and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law does not constitute a “pain or suffering inflicted by



or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” even if such actions cause pain and suffering that could rise to the severity of torture. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1). This amendment clarifies that the requirement that the individual be acting in an official capacity applies to both a “public official,” such as a police officer, and an “other person,” such as an individual deputized to act on the government’s behalf. *Id.*

The Departments also clarify the definition of “acquiescence of a public official” so that, as several courts of appeals and the BIA have recognized, “awareness”—as used in the CAT “acquiescence” definition—requires a finding of either actual knowledge or willful blindness. 8 CFR 208.18(a)(7), 1208.18(a)(7). The Departments further clarify in this rule that, for purposes of the CAT regulations, “willful blindness” means that “the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.” *Id.*

Additionally, the Departments clarify that acquiescence is not established by prior awareness of the activity alone, but requires an omission of an act that the official had a duty to do and was able to do. 8 CFR 208.18(a)(7), 1208.18(a)(7).

## 2.12. Information Disclosure

The Departments are making changes to 8 CFR 208.6 and 8 CFR 1208.6 to clarify that information may be disclosed in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claims. Specifically, the Departments provide that to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General’s or Secretary’s discretion under sections 1208.6(a) and 208.6(a), respectively, the Government may disclose all relevant and applicable information in or pertaining to the

application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a Federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien’s immigration or custody status; during an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or Federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse. 8 CFR 208.6(d)(1)(i)–(iv), 1208.6(d)(1)(i)–(vi). Finally, the Departments provide that nothing in 8 CFR 208.6 or 1208.6 should be construed to prohibit the disclosure of information in or relating to an application for asylum, statutory withholding of removal, and protection under the CAT regulations among specified government employees or where a government employee or contractor has a “good faith and reasonable” belief that the disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime. 8 CFR 208.6(e), 1208.6(e).

The Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT, and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d) and 1208.6(d), and the Departments see no reason not to conform the other paragraphs in that section for consistency.

### 2.13. Severability

Given the numerous and varied changes proposed in the NPRM, the Departments are adding severability provisions in 8 CFR parts 208, 235, 1003, 1208, 1212, and 1235. *See* 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). Because the Departments believe that the provisions of each part would function sensibly independent of other provisions, the Departments make clear that the provisions are severable so that, if necessary, the regulations can continue to function without a stricken provision.

### 3. Other

In comparison to the NPRM, this final rule strikes the regulatory text changes proposed at 103.5 because those changes were inadvertently included in the NPRM's proposed regulatory text.

## **II. Public Comments on the Proposed Rule**

### *A. Summary of Public Comments*

The comment period for the NPRM closed on July 15, 2020, with more than 87,000 comments received. Organizations, including non-government organizations, legal advocacy groups, non-profit organizations, religious organizations, unions, congressional committees, and groups of members of Congress, submitted 311 comments, and individual commenters submitted the rest. Most individual comments opposed the NPRM.

Many if not most comments opposing the NPRM either misstate its contents, provide no evidence (other than isolated or distinguishable anecdotes) to support broad speculative effects, are contrary to facts or law, or lack an understanding of relevant immigration law and procedures. As the vast majority of comments in opposition fall within one of these categories, the Departments offer the following general responses to them, supplemented by more detailed, comment-specific responses in Section II.C of this preamble.

Many comments oppose the NPRM because they misstate, in hyperbolic terms, that it ends or destroys the asylum system or eliminates the availability of humanitarian protection in the United States. The NPRM does nothing of the kind. The availability of asylum is established by statute, INA 208, 8 U.S.C. 1158, and an NPRM cannot alter a statute.<sup>11</sup> Rather, the NPRM, consistent with the statutory authority of the Secretary and the Attorney General, adds much-needed guidance on the many critical, yet undefined, statutory terms related to asylum applications. Such guidance not only improves the efficiency of the system as a whole,

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<sup>11</sup> For similar reasons, the NPRM cannot—and does not—alter the general availability of withholding of removal under the Act or protection under the CAT.

but allows adjudicators to focus resources more effectively on potentially meritorious claims rather than on meritless ones. In short, the NPRM enhances rather than degrades the asylum system.

Many comments misstate that the NPRM creates a blanket rule denying asylum based on its addition of certain definitions—e.g., particular social group, political opinion, nexus, and persecution. Although the rule provides definitions for these terms and examples of situations that generally will not meet those definitions, the rule also makes clear that the examples are generalizations, and it does not categorically rule out types of claims based on those definitions. In short, the rule does not contain the blanket prohibitions that some commenters ascribe to it.

Many comments assert that the NPRM targets certain nationalities, groups, or types of claims and is motivated by a nefarious or conspiratorial animus, particularly an alleged racial animus. The Departments categorically deny an improper motive in promulgating the NPRM. Rather, the animating principles of the NPRM were to provide clearer guidance to adjudicators regarding a number of thorny issues that have created confusion and inconsistency; to improve the efficiency and integrity of the overall system; to correct procedures that were not working well, including the identification of meritless or fraudulent claims; and to reset the overall asylum adjudicatory framework in light of numerous—and often contradictory or confusing—decisions from the Board and circuit courts. The Departments’ positions are rooted in law, as explained in the NPRM. In short, the Departments have not targeted any particular groups or nationalities in the NPRM or in the provisions of this final rule.<sup>12</sup> Rather, the Departments are appropriately using rulemaking to provide guidance in order to streamline determinations consistent with their statutory authorities. *See Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (“The Court has recognized that even where an agency’s enabling statute expressly requires it to

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<sup>12</sup> Asylum claims are unevenly distributed among the world’s countries. *See* EOIR, *Asylum Decision Rates by Nationality* (July 14, 2020), <https://www.justice.gov/eoir/page/file/1107366/download>. Thus, to the extent that the NPRM affects certain groups of aliens more than others, those effects are a by-product of the inherent distribution of claims, rather than any alleged targeting by the Departments. *See also DHS v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1915-16 (2020) (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of racial animus, invidious discrimination, or an equal protection violation).

hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. . . . A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.”) (citation omitted); *see also Lopez v. Davis*, 531 U.S. 230, 243–44 (2001) (“[E]ven if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. . . . The approach pressed by Lopez—case-by-case decision-making in thousands of cases each year—could invite favoritism, disunity, and inconsistency.”) (citations and internal quotations omitted).

Many, if not most, commenters asserted that the rule was “arbitrary and capricious,” though nearly all of those assertions were ultimately rooted in the fact that the rule did not adopt the commenters’ policy preferences rather than specific legal deficiencies. The Departments have considered all comments and looked at alternatives. The Departments understand that many, if not most, commenters opposing the rule believe that most asylum applications are meritorious and, thus, would prefer that more applications for asylum be granted; that border restrictions should be loosened; and that the Departments, as a matter of forbearance or discretion, should decline to enforce the law when doing so would be beneficial to aliens. For all of the reasons discussed in the NPRM, and reiterated herein, the Departments decline to adopt those positions.

The Departments further understand that many if not most commenters have a policy preference for the status quo over the proposed rule changes. The Departments have been forthright in acknowledging the changes, but have also explained the reasoning behind those changes, including the lack of clarity in key statutory language and the resulting cacophony of case law that leads to confusion and inconsistency in adjudication. The Departments acknowledge changes in positions, where applicable have provided good reasons for the changes; they believe the changes better implement the law; and they have provided a “reasoned

analysis” for the changes, which is contained in the NPRM and reiterated herein in response to the comments received. In short, the rule is not “arbitrary and capricious” under existing law. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Finally, many commenters assert that various provisions of the NPRM are inconsistent with either Board or circuit-court precedents. The Departments may engage in rulemaking that overrules prior Board precedent, and as noted in the NPRM, 85 FR at 36265 n.1, to the extent that some circuits have disagreed with the Departments’ interpretations of ambiguous statutory terms in the past, the Departments’ new rule would warrant reevaluation in appropriate cases under well-established principles of administrative law. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (hereinafter “*Brand X*”); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–844 (1984). Moreover, “‘judicial deference to the Executive Branch is especially appropriate in the immigration context,’ where decisions about a complex statutory scheme often implicate foreign relations.” *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56–57 (2014) (plurality op.) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

Consequently, for the reasons explained in the NPRM and herein, prior Board and circuit court decisions do not restrict the Departments to the extent asserted by most commenters. Further, as also discussed, *infra*, and recognized by commenters, much of the relevant circuit court case law points in different directions and offers multiple views on the issues in the NPRM. There is nothing inappropriate about the Departments seeking to improve the consistency, clarity, and efficiency of asylum adjudications, and to bring some reasonable order to the dissonant views on several important-but-contested statutory issues. *See, e.g., Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 403 (2008) (“We find no reason in this case to depart from our usual rule: Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives.”).

Overall, and as discussed in more detail below, the Departments generally decline to adopt the recommendations of comments that misinterpret the NPRM, offer dire and speculative predictions that lack support, are contrary to facts or law, or otherwise lack an understanding of relevant law and procedures.

*B. Comments Expressing Support for the Proposed Rule*

*Comment:* At least two organizations and other individual commenters expressed general support for the rule. Some commenters noted the need for regulatory reform given the current delays in asylum adjudication and said the rule is a move in the right direction. Other commenters indicated a range of reasons for their support, including a desire to limit overall levels of immigration, a belief that many individuals who claim asylum are instead simply seeking better economic opportunities, or a belief that asylum seekers or immigration representatives abuse the asylum system.

Commenters stated that the rule will aid both adjudicators and applicants. For example, one individual and organization explained that:

[T]hese proposals will give aliens applying for protection ample notice and motivation to file complete and adequately reasoned asylum applications in advance of the merits hearing, which will protect the rights of the alien, assist the IJ in completing the case in a timely manner, and aid the ICE attorney in representing the interests of the government.

*Response:* The Departments note and appreciate these commenters' support for the rule.

*C. Comments Expressing Opposition to the Proposed Rule*

1. General Opposition

1.1. General Immigration Policy Concerns

*Comment:* Many commenters expressed a general opposition to the rule, and noted that, although they may not be commenting on every aspect of the rule, a failure to comment on a specific provision does not mean that the commenter agrees with a provision. Commenters stated that the rule would “destroy” the U.S. asylum system and would result in the denial of virtually all asylum applications. Instead, commenters recommended that the current regulations remain in place. Moreover, commenters stated that the rule conflicts with America’s values and

deeply rooted policy of welcoming immigrants and refugees. Commenters asserted that the rule would damage the United States' standing in the world. Commenters explained that the United States should be promoting values of freedom and human rights, and that immigration benefits the United States both economically and culturally. Commenters asserted that the rule provides inadequate legal reasoning and is inappropriately motivated by the administration's animus against immigrants.

*Response:* The rule is not immoral, motivated by racial animus, or promulgated with discriminatory intent. Instead, the rule is intended to help the Departments better allocate limited resources in order to more expeditiously adjudicate meritorious asylum, statutory withholding of removal, and CAT protection claims. For example, placing aliens who receive a positive credible fear screening into asylum-and-withholding-only proceedings will lessen the strain on the immigration courts by limiting the focus of such proceedings and thereby streamlining the process. Similarly, applying certain asylum bars and raising the standards for statutory withholding of removal and CAT protection will help screen out non-meritorious claims during the credible fear screening, which will allow the Departments to devote their limited resources to adjudicating claims that are more likely to be meritorious. Likewise, allowing immigration judges to prepermit asylum applications that are not prima facie eligible for relief will allow judges to use limited hearing time to focus on cases with a higher chance of being meritorious. The rule's expanded definition of frivolousness will also help to deter specious claims that would otherwise require the use of limited judicial resources. The rule's additional guidance regarding certain definitions (such as particular social groups, political opinion, persecution, and acquiescence, among others), as well as enumerated negative discretionary factors, will provide clarity to adjudicators and the parties and make the adjudicatory process more efficient and consistent.

These changes do not "destroy" the U.S. asylum system, prevent aliens from applying for asylum, or prevent the granting of meritorious claims, contrary to commenters' claims. The



asylum system remains enshrined in both statute and regulation. Rather, the changes are intended to harmonize the process between the relevant Departments, provide more clarity to adjudicators, and allow the immigration system to more efficiently focus its resources on adjudicating claims that are more likely to be meritorious. In doing so, the rule will help the Departments ensure that the asylum system is available to those who truly have “nowhere else to turn.” *Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013) (internal citations omitted).

## 1.2. Issuance of Joint Regulations

*Comment:* At least one commenter expressed a belief that it is inappropriate for DHS (characterized by the commenter as the immigration prosecutors) and DOJ (characterized by the commenter as the immigration adjudicators) to issue rules jointly because the agencies serve different roles and missions within the immigration system. The commenter stated that the issuance of joint regulations calls into question the agencies’ independence from each other.

*Response:* The HSA divided, between DHS and DOJ, some immigration adjudicatory and enforcement functions that had previously been housed within DOJ. *See* INA 103, 8 U.S.C. 1103 (setting out the powers of the Secretary and Under Secretary of DHS and of the Attorney General); *see also* HSA, sec. 101, 116 Stat. at 2142 (“There is established a Department of Homeland Security, as an executive department of the United States . . .”). However, the Departments disagree that issuing joint regulations violates the agencies’ independence in the manner suggested by commenters. Instead, the DHS and DOJ regulations are inextricably intertwined, and the Departments’ roles are often complementary. *See, e.g.*, INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (providing for immigration judge review of asylum officers’ determinations regarding certain aliens’ credible fear claims); *see also* 8 CFR 208.30 and 1208.30 (setting out the credible fear procedures, which involve actions before both DHS/USCIS and DOJ/EOIR). Because officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum, it is appropriate for

the Departments to coordinate on regulations like the proposed rule that affect both agencies' equities in order to ensure consistent application of the immigration laws.

### 1.3. Impact on Particular Populations

*Comment:* Commenters asserted that the proposed regulation is in conflict with American values and that it would deny due process to specific populations—including women, LGBTQ asylum seekers, and children. Commenters similarly expressed concerns that the proposed regulation would lead to the denial of virtually all applications from those populations, which, commenters asserted, would place them in harm's way.

Commenters asserted that the elimination of gender-based claims would be particularly detrimental to women and LGBTQ asylum-seekers. Commenters asserted that the proposed rule would “all but ban” domestic-violence-based and gang-based claims. Commenters noted that courts have found that such claims can be meritorious.

*Response:* The Departments disagree that the rule is contrary to American values. The United States continues to fulfill its international commitments in accordance with the Refugee Act of 1980,<sup>13</sup> evidenced by United Nations High Commissioner for Refugees (“UNHCR”) data on refugee resettlement confirming that the United States was the top country for refugee resettlement in 2019, as well as 2017 and 2018. *See* UNHCR, *Resettlement at a Glance (January-December 2019)*,

<https://www.unhcr.org/protection/resettlement/5e31448a4/resettlement-fact-sheet-2019.html>.

Further, since the Refugee Act was passed, the United States has admitted more than three million refugees and granted asylum to more than 721,000 individuals. *See* UNHCR, *Refugee Admissions*, <https://www.state.gov/refugee-admissions/>. In Fiscal Year (“FY”) 2019 alone, the Departments approved nearly 39,000 asylum applications. EOIR, *Asylum Decision Rates*, (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1248491/download> (listing 18,836 grants); USCIS, *Number of Service-wide Forms Fiscal Year To- Date*,

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<sup>13</sup> *See infra* Section II.C.6.8 for further discussion on this point.

[https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY19Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY19Q4.pdf)

(listing 19,945 grants). This rule does not affect the United States' long-standing commitment to assisting refugees and asylees from around the world.

The rule does not deny due process to any alien. As an initial matter, courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin v. Mukasey*, 538 F.3d 143, 156–57 (2d Cir. 2008); *Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006) (citing *DaCosta v. Gonzales*, 449 F.3d 45, 49–50 (1st Cir. 2006)). Still, the statute and regulations provide for certain basic procedural protections—such as notice and an opportunity to be heard—and the rule does not alter those basic protections. *See LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (“The core of due process is the right to notice and a meaningful opportunity to be heard.”); *see also Lapaix v. U.S. Att’y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010) (“Due process requires that aliens be given notice and an opportunity to be heard in their removal proceedings.”). Aliens in removal proceedings will continue to be provided a notice of the charges of removability, INA 239(a)(1), 8 U.S.C. 1229(a)(1), have an opportunity to present the case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), and have an opportunity to appeal, 8 CFR 1003.38. Aliens in asylum-and-withholding-only proceedings will continue to be provided notice of referral for a hearing before an immigration judge, 8 CFR 1003.13 (defining “charging document” used by DHS to initiate non-removal, immigration proceedings before an immigration judge), to have an opportunity to be heard by an immigration judge, 8 CFR 1208.2(c), and have an opportunity to appeal, 8 CFR 1003.1(b)(9). Nothing in the proposed regulations alters those well-established procedural requirements.

The generalized concern that the rule will categorically deny asylum to classes of persons, such as women or LGBTQ asylum-seekers—and thus put those persons in harm's way—is unsupported, speculative, and overlooks the case-by-case nature of the asylum process. The rule provides more clarity to adjudicators regarding a number of difficult issues—*e.g.* persecution, particular social group, and nexus—in order to improve the consistency and quality

of adjudications, but it establishes no categorical bars to domestic-violence-based or gang-based claims, and no categorical bars based on the class or status of the person claiming asylum; instead, asylum cases turn on the nature of the individual's claim. Moreover, in accordance with its non-refoulement obligations, the United States continues to offer statutory withholding of removal and CAT protection. Although this rule amends those forms of relief, the amended relief continues to align with the provisions of the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, and the CAT, such that eligible aliens will not be returned to places where they may be subjected to persecution or torture.

The portion of the rule that draws the objection above does not categorically ban or eliminate any types of claims, including those posited by the commenters. In relevant part, the rule codifies a long-standing test for determining the cognizability of particular social groups and sets forth a list of common fact patterns involving particular-social-group claims that generally will not meet those long-standing requirements. *See* 85 FR at 36278–79; *see also* 8 CFR 208.1(f)(1), 1208.1(f)(1). At the same time, the Departments recognized in the NPRM that “in rare circumstances,” items from the list of common fact patterns “could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination.” 85 FR at 36279. Thus, the NPRM explicitly stated that the rule did not “foreclose” any claims; the inquiry remains case-by-case.

## 2. Expedited Removal and Screenings in the Credible Fear Process

### 2.1. Asylum-and-Withholding-Only Proceedings for Aliens with Credible Fear

*Comment:* One organization stated that the rule would deprive individuals who have established a credible fear from being placed into full removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. Another organization claimed that the rule, “effectively destroys due process rights of asylum seekers” as it would prevent these individuals from contesting removability where there are “egregious due process violations,” defects in the Notice to Appear, or competency concerns.

One organization stated that the rule is contrary to congressional intent because there is no statutory prohibition against placing arriving asylum seekers into complete section 240 proceedings, and at least one organization claimed that this intent is supported by the legislative history. One organization expressed its disagreement with the rule's citation to *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), 85 FR at 36267 n.9, contending that if Congress intended to "strip asylum-seekers of their due process rights, it would have expressly said so." Another organization stated that the rule is "[a]rbitrary and capricious," noting that the proposed policy is a "dramatic change" from decades of practice but claiming the Departments offer "no discussion" as to why it is necessary.

One organization emphasized that "asylum-only proceedings," are limited in scope and both parties are prohibited from raising "any other issues." The organization alleged that the NPRM did not include any data regarding the number of asylum seekers who are placed in section 240 proceedings after passing a credible fear interview, or the number of respondents in these proceedings who are granted some form of relief besides asylum or withholding of removal. Because of this, the organization claimed that the rule "does not provide adequate justification" for the proposed change.

Another organization claimed the rule "pre-supposes" that asylum seekers would not be eligible for other forms of immigration relief. The organization noted that many individuals who are apprehended at the border as asylum applicants may also be victims of human trafficking or serious crimes committed within the United States. The organization stated that Congress has recognized the unique assistance that victims of human trafficking and victims of crimes potentially eligible for U visas are able to provide to Federal law enforcement, claiming this is the reason the S visa, T visa, and U visa programs were created. The organization asserted that if the Departments "cut off" access to a complete section 240 proceeding, they will essentially "tie the hands" of law enforcement. Another organization expressed concern that the rule would prevent survivors of gender-based and LGBTQ-related violence in expedited removal

proceedings from applying for protection under the Violence Against Women Act (“VAWA”) or the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”).

One organization contended that there is little efficiency in abandoning removability determinations in removal proceedings, arguing that “[i]n the overwhelming majority of cases, the pleadings required to establish removability take 30 seconds.” The organization argued that Congress would not have chosen to sacrifice competency and accuracy to save such a short amount of time. Another organization criticized the rule’s statement that “referring aliens who pass a credible fear for section 240 proceedings runs counter to [the] legislative aims” of a quick expedited removal process, 85 FR at 36267, arguing that this justification is “faulty at best and baseless at worst.” One organization claimed that administrative efficiency is aided by the availability of a broad range of reliefs because respondents placed in full removal proceedings often qualify for a simpler form of relief, allowing courts to omit many of these complexities.

One organization noted that, in the expedited removal context, decisions are made by Customs and Border Protection (“CBP”) officers. The organization expressed concern about the risk of error in permitting an enforcement officer to act as both “prosecutor and judge,” particularly when the officer’s decisions are not subject to appellate review. The organization also noted the rule’s reference to the “prosecutorial discretion” of DHS in removal proceedings and argued that this discretion does not include the authority to create new types of proceedings. Instead, the organization contended that this discretion is confined to decisions surrounding the determination of whether to pursue charges. Another organization emphasized that, while DHS has the discretion to place an individual without documentation directly into section 240 proceedings instead of expedited removal, this discretion is “initial,” and does not continue once the individual has established fear (as the individual must then be referred for full consideration of his or her claims). The organization disagreed with the rule’s assertion, 85 FR at 36266, that

the current practice of placing applicants with credible fear into section 240 proceedings “effectively negat[es]” DHS’s prosecutorial discretion.

The organization further disagreed with the Departments’ claim that “[b]y deciding that the [individual] was amenable to expedited removal, DHS already determined removability,” 85 FR at 36266, contending this “overreaches.” The organization noted that, pursuant to section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), a DHS inspector does have initial discretion to place an applicant into expedited removal proceedings if it is determined that the person “is inadmissible under section 1182(a)(6)(C) or 1182(a)(7);” however, the organization emphasized that this is not the ultimate determination for applicants who establish credible fear, as DHS cannot continue to seek expedited removal at this point.

One organization stated that, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104-208, Div. C, 110 Stat. 3009, 3009-546, it created two specific removal procedures: expedited removal proceedings in section 235 of the Act, 8 U.S.C. 1225, and regular removal proceedings in section 240 of the Act, 8 U.S.C. 1229a. The organization asserted that section 240 proceedings are the “exclusive” admission and removal proceedings “unless otherwise specified” in the Act, 8 U.S.C. 1229a(a)(3). The organization also noted Congress’s specification that certain classes of citizens should not be placed in full removal proceedings, noting the exclusion of persons convicted of particular crimes (INA 240(a)(3), 8 U.S.C. 1229a(a)(3)); INA 238(a)(1), 8 U.S.C. 1228(a)(1)) as well as the prohibition of visa waiver program participants from contesting inadmissibility or removal except on the basis of asylum (INA 217(b), 8 U.S.C. 1187(b)). The organization also noted that, within the expedited removal statute itself, Congress specifically excluded stowaways from section 240 proceedings (INA 235(a)(1), 8 U.S.C. 1225(a)(2)); in contrast, Congress considered asylum seekers to be applicants for admission under section 235(a)(1) of the Act, 8 U.S.C. 1225(a)(1), and did not similarly exclude them (*see* INA 235(b), 8 U.S.C. 1225(b)). The organization concluded that the plain text of the INA “precludes the agencies’ claim that they are

free to make up new procedures to apply to arriving asylees” (*citing Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1723 (2017)). The organization claimed that IIRIRA’s legislative history “unanimously confirms” this conclusion, citing the conference report by the Joint Committee from the House and the Senate in support of its assertion. *See* H.R. Rep. No. 104-828 at 209 (1996). The organization also emphasized that, after twenty-three years of placing applicants with credible fear into section 240 proceedings, “Congress has never suggested that the agencies got that wrong.”

Another organization emphasized that Congress only authorized expedited removal for a specific category of noncitizens and that, at the time this determination was made, the class was confined to individuals arriving at ports of entry. The organization argued that Congress did not intend to deter individuals who have “cleared the hurdle of establishing a credible fear of persecution.” Another organization argued that the credible fear screening “creates an exit” from expedited removal proceedings, emphasizing that those who establish credible fear are effectively “screened out” of expedited removal proceedings (INA 235(b)(1)(B)(ii)–(iii), 8 U.S.C. 1225(b)(1)(B)(ii)–(iii)). One organization expressed particular concern that “the president has announced an intention to expand expedited removal to the interior of the United States,” noting that noncitizens who have been in the United States for up to two years are more likely to have other forms of relief to pursue.

*Response:* The Departments disagree with commenters that the INA requires aliens who are found to have a credible fear to be placed in full removal proceedings pursuant to section 240 of the Act, 8 U.S.C. 1229(a). The expedited removal statute states only that “the alien shall be detained for further consideration of the application for asylum,” but is silent on the type of proceeding. INA 235(b)(1)(B)(ii) 8 U.S.C. 1225(b)(1)(B)(ii). This silence is notable as Congress expressly required or prohibited the use of full removal proceedings elsewhere in the same expedited removal provisions. *Compare* INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A) (explicitly requiring certain aliens not eligible for expedited removal to be placed in section 240



removal proceedings), *with* INA 235(a)(2), 8 U.S.C. 1225(a)(2) (explicitly prohibiting stowaways from being placed in section 240 removal proceedings).<sup>14</sup> As explained in the NPRM, the former Immigration and Naturalization Service (“INS”) interpreted this ambiguous section to place aliens with positive credible fear determinations into section 240 removal proceedings. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312 (Mar. 6, 1997). However, it is the Departments’ view that the better interpretation is to place aliens with positive credible fear determinations into limited asylum-and-withholding-only proceedings. This is consistent with the statutory language that the alien is entitled to a further proceeding related to the alien’s “application for asylum,” and not a full proceeding to also determine whether the alien should be admitted or is otherwise entitled to various immigration benefits. INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii).

This interpretation also best aligns with the overall purpose of the expedited removal statute to provide a streamlined and efficient removal process for certain aliens designated by Congress.<sup>15</sup> *See generally* INA 235, 8 U.S.C. 1225; *cf. DHS v. Thuraissigiam*, 140 S.Ct. 1959, 1966 (2020) (“As a practical matter . . . the great majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.”). Further, contrary to commenters’ claims, placing aliens into asylum-and-withholding-only proceedings is not inconsistent with the purposes of the credible fear statute. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The credible fear process was designed to ensure that aliens subject to expedited removal are not summarily removed to a country where they may face persecution on account of a protected ground or torture. This rule

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<sup>14</sup> The Departments note that section 240(a)(3) of the Act (8 U.S.C. 1229a(a)(3)), which makes removal proceedings the “exclusive” procedure for inadmissibility and removability determinations, is inapplicable here because DHS has already determined inadmissibility as part of the expedited removal process. *See* INA 235(b)(1)(A)(i) (8 U.S.C. 1225(b)(1)(A)(i)).

<sup>15</sup> The Departments note that any comments regarding the potential expansion of expedited removal is outside the scope of this rule. *Cf. Designating Aliens for Expedited Removal*, 84 FR 35409 (July 23, 2019).

maintains those protections by ensuring that an alien with a positive credible fear finding receives a full adjudication of their claim in asylum-and-withholding-only proceedings.

Regarding commenters' concerns about due process in asylum-and-withholding-only proceedings, the Departments note that the rule provides the same general procedural protections as section 240 removal proceedings. *See* 85 FR at 36267 (“These ‘asylum-and-withholding-only’ proceedings generally follow the same rules of procedure that apply in section 240 proceedings . . . .”); *accord* 8 CFR 1208.2(c)(3)(i) (“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 [i.e. asylum-and-withholding-only proceedings] shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 1240, subpart A [i.e. removal proceedings].”). Moreover, just as in removal proceedings, aliens will be able to appeal their case to the BIA and Federal circuit courts, as necessary. Finally, DOJ has conducted asylum-and-withholding-only proceedings for multiple categories of aliens for years already, 8 CFR 1208.2(c)(1) and (2), with no alleged systemic concerns documented about the due process provided in those proceedings.

The Departments agree with the commenter who noted that removability determinations are typically brief for those aliens subject to expedited removal who subsequently establish a credible fear and are placed in removal proceedings. The Departments believe that comment further supports the placement of such aliens in asylum-and-withholding-only proceedings since “in the overwhelming majority of cases,” there is no need for a new removability determination that would otherwise be called for in removal proceedings.

The Departments disagree with commenters that section 240 removal proceedings are more efficient than asylum-and-withholding-only proceedings or that more data is required to align asylum-and-withholding-only proceedings with the statutory language of INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), especially when there was little analysis—and no data offered—to support placing aliens with positive credible fear determinations in removal

proceedings in the first instance. *See* 85 FR at 36266 (stating that the 1997 decision to place such aliens in removal proceedings was made with limited analysis, other than to note that the statute was silent on the type of proceeding that could be used). Most aliens subject to the expedited removal process are, by definition, less likely to be eligible for certain other forms of relief due to their relatively brief presence in the United States. *See, e.g.*, INA 240A(b)(1), 8 U.S.C. 1229b(b)(1) (cancellation of removal for certain non-permanent residents requires ten years of continuous physical presence); INA 240B(b)(1)(A), 8 U.S.C. 1229c(b)(1)(A) (voluntary departure at the conclusion of proceedings requires an alien to have been physically present in the United States for at least one year prior to the service of a notice to appear). In particular, they are less likely to be eligible for the simplest form of relief, voluntary departure, because either they are arriving aliens, INA 240B(a)(4), 8 U.S.C. 1229c(a)(4), or they are seeking asylum, 8 CFR 1240.26(b)(1)(i)(B) (requiring the withdrawal of claims for relief in order to obtain pre-hearing voluntary departure), or they have not been physically present in the United States for at least one year prior to being placed in proceedings, INA 240B(b)(1)(A), 8 U.S.C. 1229c(b)(1)(A). Further, immigration judges often adjudicate multiple forms of relief in a single removal proceeding—in addition to asylum, withholding of removal, or CAT claims—and those additional issues generally only serve to increase the length of the proceedings. Although there may be rare scenarios in which aliens subject to expedited removal are eligible for a form of relief other than asylum, the Departments believe that interpreting the statute to place aliens with positive credible-fear determinations into more limited asylum-and-withholding-only proceedings properly balances the need to prevent aliens from being removed to countries where they may face persecution or torture with ensuring the efficiency of the overall adjudicatory process.

The Departments also disagree with comments that the placement of aliens who have passed a credible fear review in asylum-and-withholding-only proceedings will somehow “tie the hands” of law enforcement regarding an alien’s eligibility for certain visas. The rule has no

bearing on an alien's ability to provide assistance to law enforcement, and the adjudication of applications for S-, T-, and U-visas occurs outside of any immigration court proceedings.<sup>16</sup> *See generally* 8 CFR 214.2(t) (S-visa adjudication process), 214.11 (T-visa adjudication process), 214.14 (U-visa adjudication process).

Commenters also mischaracterize the Departments' policy reliance on DHS's prosecutorial discretion authority, claiming that the Departments are relying on this discretion as the legal authority for placing aliens with positive credible fear determinations into asylum-and-withholding-only proceedings. However, it is the expedited removal statute that provides the authority, *see* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), not DHS's prosecutorial discretion. In the NPRM, the Departments noted that it made better policy sense to place aliens with positive credible fear determinations into asylum-and-withholding-only proceedings; placing aliens in section 240 proceedings after a credible fear determination "effectively negates DHS's original discretionary decision." 85 FR at 36266.

The Departments acknowledge commenters' concerns about CBP processing aliens for expedited removal and the exercise of prosecutorial discretion, but those issues are beyond the scope of the rule. Moreover, the rule does not affect DHS's use of prosecutorial discretion, nor does it alter any other statutory authority of CBP.

## 2.2. Consideration of Precedent When Making Credible Fear Determinations in the "Credible Fear" Process

*Comment:* One organization stated that the rule would "unnecessarily narrow" the law that immigration judges must consider in the context of a credible fear review, restricting them to the circuit court law in their own jurisdiction. The organization alleged that this "makes little sense" because individuals seeking a credible fear review will often have their asylum claim adjudicated in a jurisdiction with different case law than the jurisdiction where their credible fear

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<sup>16</sup> The Departments note that S-visa recipients are already subject to withholding-only proceedings. INA 214(k)(3)(C), 8 U.S.C. 1184(k)(3)(C); 8 CFR 236.4(d), (e) and 1208.2(c)(2)(vi).

claim is reviewed. As an example, one organization suggested that an asylum seeker apprehended in Brownsville, Texas, in the Fifth Circuit, could subsequently have his or her asylum claim heard in an immigration court located within another circuit's jurisdiction. Because of this, the organization urged asylum officers and immigration judges to consider all case law when determining the possibility of succeeding on the claim, "[r]egardless of the location of the credible fear determination."

One organization claimed the rule could require asylum officers to order the expedited removal of an applicant who has shown an ability to establish asylum eligibility under section 208 of the Act, 8 U.S.C. 1158, in another circuit or district, which the organization alleged is contrary to section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v). The organization also claimed this portion of the rule is "flatly contrary" to the decision in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (hereinafter "*Grace I*"), *overruled in part*, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020), holding that the same provision in USCIS guidance was contrary to the INA. The organization quoted *Grace I*, 344 F. Supp. 3d 96 in which the court stated that "[t]he government's reading would allow for an [individual's] deportation, following a negative credible fear determination, even if the [individual] would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress." *Id.* at 140. The organization also claimed the rule violates *Brand X* because it exceeds the Departments' "limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference" (citing *Grace I*, 344 F. Supp. 3d at 136). Another organization alleged that the Departments offer no explanation for the policy change, claiming there is "no discernable reason" for it other than to "limit the possibility of favorable case law in another jurisdiction."

One organization noted that well-settled USCIS policy holds that, in the case of a conflict or question of law, "generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard" regardless of where the

credible fear interview is held. The organization claimed that this policy is in line with congressional intent, quoting a statement from Representative Smith that “[I]legal uncertainty must, in the credible fear context, adhere to the applicant’s benefit.” The organization alleged that the NPRM fails to note or explain this departure from practice.

*Response:* The Departments decline to respond to comments centering on an asylum officer’s consideration of precedent as that issue was not addressed in this rule, and further disagree with commenters that immigration judges are currently required to consider legal precedent from all Federal circuit courts in credible fear proceedings. DOJ has not issued any regulations or guidance requiring immigration judges to use a “most favorable” choice of law standard in credible fear review proceedings. *See, e.g.*, 8 CFR 1003.42.

Moreover, the statute is silent as to this choice of law question. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Due to this ambiguity, the Departments are interpreting the statute to require immigration judges to apply the law of the circuit in which the credible fear review proceeding is located. This better comports with long-standing precedent affirming the use of the “law of the circuit” standard in immigration proceedings. *See Jama v. ICE*, 543 U.S. 335, 351 n.10 (2005) (“With rare exceptions, the BIA follows the law of the circuit in which an individual case arises . . . .” (citations omitted)); *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157 (10th Cir. 2006) (explaining that an immigration judge “should analyze removability and relief issues using only the decisions of the circuit in which he or she sits . . . since it is to that circuit that any appeal from a final order of removal must be taken”). It will also provide clarity to immigration judges conducting credible fear reviews, particularly on issues in which there is conflicting circuit court precedent.

Further, contrary to commenters’ assertions, in most cases the immigration judge conducting the credible fear review in person will be in the same circuit in which the full asylum application in asylum-and-withholding only proceedings would be adjudicated if the judge finds

the alien has a credible fear.<sup>17</sup> Aliens in this posture are subject to detention by DHS. *Thuraissigiam*, 140 S.Ct. at 1966 (“Whether an applicant [subject to expedited removal] who raises an asylum claim receives full or only expedited review, the applicant is not entitled to immediate release.”). As a result, unless DHS moves the alien to a detention facility in a different circuit, the case would likely remain in the same jurisdiction. Requiring the immigration judge to review nationwide circuit case law would only create inefficiencies in a credible fear review process that Congress intended to be streamlined. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (requiring immigration judge review to be completed “as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days” after the asylum officer’s determination).

Moreover, the Departments have reviewed the statutory mandate in the credible fear context and note that a rule requiring evaluation of a claim using law beyond that of a particular circuit could produce perverse outcomes contrary to the statute. For example, an alien could be found to have a “significant possibility” of establishing eligibility for asylum under section 208 of the Act even though binding law of the circuit in which the application would be adjudicated precludes the alien from any possibility of establishing eligibility for asylum. Such an absurd result would be both contrary to the statutory definition of a credible fear, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), and would further burden the system with claims that were known to be unmeritorious at the outset. The Departments decline to adopt a course of action that would lead to results inconsistent with the statute.

Moreover, adopting the uniform rule proposed by the Departments would ameliorate otherwise significant operational burdens—burdens that would be inconsistent with Congress’s goal of establishing an efficient expedited removal system. Without it, asylum officers and immigration judges around the country would potentially have to consider and apply a shifting

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<sup>17</sup> Even in situations in which an immigration judge conducts the review from a different location—*e.g.* by telephone or by video teleconferencing—in a different circuit, the rule provides a clear choice of law principle to apply.

patchwork of law from across the country, and this obligation would undermine the stated statutory aim of expedited removal: to remove aliens expeditiously.

The Departments' choice-of-law rule in this context is reasonable. The most natural choice-of-law principle is the rule that the law of the circuit where the interview is conducted governs. That is the principle embraced by DOJ in adjudicating the merits of asylum claims, *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) ("We are not required to accept an adverse determination by one circuit . . . as binding throughout the United States."), as well as by circuit courts. For example, where the law governing an agency's adjudication is unsettled, an agency generally is required to acquiesce only in the law of the circuit where its actions will be reviewed; while "intracircuit acquiescence" is generally required, "intercircuit acquiescence" is not. *See Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). Because the circuits may disagree on the law, requiring acquiescence with every circuit would charge the Departments with an impossible task of following contradictory judicial precedents. *See Nat'l Env'tl. Dev. Ass'n Clean Air Project v. EPA*, 891 F.3d 1041, 1051 (D.C. Cir. 2018); *see also Grant Med. Ctr. v. Hargan*, 875 F.3d 701, 709 (D.C. Cir. 2017).

Intercircuit nonacquiescence principles are especially important where there is "venue uncertainty," meaning the agency cannot know at the time it issues its decision in which circuit that decision will be reviewed. In those situations, an agency has discretion in its choice of law, though it must be candid about its nonacquiescence. *See Grant Med. Ctr.*, 875 F.3d at 707. The rule's choice-of-law provision in this context is fully consistent with the Board's long-standing approach and the administrative-law principles embraced by circuit courts. At the time of the credible-fear screenings by an asylum officer, the only circuit with a definite connection to the proceedings is the circuit where the screening of the alien takes place. The location of the alien at the time of the credible fear determination will be the determinative factor as to which circuit's law applies. Applying that circuit's law is an objective, reasonable, administrable, and fair approach to credible-fear screening.



In *Grace v. Barr*, the D.C. Circuit affirmed an injunction of USCIS’s implementation of a “law of the circuit” policy in credible fear proceedings. 965 F.3d 883 (D.C. Cir. 2020) (hereinafter “*Grace II*”). However, in that case, the court affirmed an injunction based on USCIS’s failure to explain the basis of its “law of the circuit” policy and expressly declined to decide whether the substance of such a policy—if explained more fully—would be contrary to law. *Id.* at 903. Here, as detailed above, the Departments have explained the necessity of codifying a law of the circuit policy in credible fear proceedings before immigration judges and, to that end, are interpreting an ambiguous statutory provision, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (defining “credible fear of persecution” by reference to eligibility for asylum), in which the Departments are entitled deference. *See Chevron, U.S.A., Inc.*, 467 U.S. at 844 (holding that, when interpreting an ambiguous statute, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

### 2.3. Remove and Reserve DHS-Specific Procedures from DOJ Regulations

*Comment:* In the context of discussing the DOJ’s removal of DHS-specific provisions from 8 CFR part 1235, at least one commenter expressed concern that the rule would eliminate or make more difficult the parole authority at 8 CFR 235.3(c).

*Response:* Following the enactment of the HSA, EOIR’s regulations were transferred to or duplicated in a newly created chapter V of 8 CFR, with related redesignations. *See Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 FR 9824, 9830, 9834 (Feb. 28, 2003); *see also Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 FR 10349 (Mar. 5, 2003). DOJ transferred parts of the Code of Federal Regulations that pertained exclusively to EOIR from chapter I to chapter V; duplicated parts of the Code of Federal Regulations that related to both the INS and EOIR, which were included in both chapters I and V; and made technical amendments to both chapters I and V. For example, DOJ duplicated all of part 235 in the newly created 8 CFR part 1235 because the Department determined that

“nearly all of the provisions of this part affect bond hearings before immigration judges.” 68 FR at 9826. The Departments anticipated further future adjustments and refinements to the regulations in the future “to further refine the adjudicatory process.” 68 FR at 9825.

Upon further review, however, DOJ has determined that 8 CFR 1235.1, 1235.2, 1235.3, and 1235.5 are not needed in 8 CFR chapter V because they concern procedures specific to DHS’s examination of applicants for admission and are outside the purview of DOJ’s immigration adjudicators. *See* 85 FR at 36267. In order to prevent confusion and reduce the chance of future inconsistencies with 8 CFR 235.1, 235.2, 235.3, and 235.5, which are not amended, the rule removes and reserves 8 CFR 1235.1, 1235.2, 1235.3, and 1235.5. Finally, in response to the commenter’s particular concern, the Departments note that DOJ does not make parole determinations, and DHS’s parole authority in 8 CFR 235.3(c) is both unaffected by this rule and outside the scope of the rulemaking generally.

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

*Comment:* One organization noted that the rule would require that those applying for withholding of removal to prove a “reasonable fear” of persecution, which is a higher standard than that required for asylum. The organization suggested that the drafters of the rule were targeting individuals who are ineligible for asylum and are thus applying for withholding of removal only. The organization noted that a large number of refugees may meet this criteria due to the administration’s “unsuccessful attempts” to impose additional asylum restrictions on individuals entering the United States outside a port of entry, as well as those arriving at the southern border after passing through third countries, if they did not apply for asylum and have their application(s) rejected in one of those countries.

One commenter alleged that the rule would “greatly increase the burden” of individuals eligible only for withholding of removal or protection under CAT to succeed in initial interviews

and present their cases before an immigration judge. The commenter noted that the rule would require asylum seekers who would be subject to a bar on asylum, including those subject to the “transit ban” found at 8 CFR 208.13(c)(4)(ii), to meet the heightened standard in order to have their cases heard before an immigration judge. The commenter alleged that the rule would “essentially eliminate” the “significant possibility” standard set forth by Congress in the INA and replace it with a “reasonable possibility” standard which is much harder for asylum seekers to meet. One organization claimed that, as a result, “[m]eritorious asylum seekers will be screened out of the asylum system—a reality Congress expressly prohibited.”

One organization claimed that Congress intended to set a low screening standard for the credible fear process in order to aid eligible asylum seekers and alleged that the NPRM fails to provide justification for raising this standard. The organization expressed concern that asylum officers lack the resources to “jump” from applying the “significant possibility” standard to the “reasonable possibility” standard during a brief interview and also emphasized that noncitizens are more likely to obtain counsel in immigration court than in the initial screening process. One commenter stated that the rule, “[u]nrealistically and unconscionably” heightens the standard individuals must meet upon arrival at the border and limits the protections for individuals who “have or would be tortured.”

One organization emphasized that the “reasonable possibility” standard is essentially the same burden of proof used when adjudicating an asylum application in a full immigration hearing. The organization claimed, however, that individuals seeking a fear determination will almost always have less evidence and less time to present their case than individuals in court. As a result, the organization alleged that the standard of proof in fear determinations should be lower than that used in immigration court hearings. Another organization criticized the Departments’ assertion that raising the screening bar is necessary to “align” the screening with the burden of proof in the merits proceeding for each type of relief. The organization disagreed, noting that asylum officers must already consider the merits burden of proof when screening for

fear under existing law, as they must determine whether there is a “significant possibility” that an applicant “could be eligible” for each type of potential relief. The commenter asserted that this necessarily entailed a consideration of the burden of proof to establish eligibility for those forms of relief. As a result, the higher screening burden “serves only to require more and stronger evidence before the merits stage, and at a moment when applicants are least likely to be able to amass it.”

One organization noted that many credible fear applicants are “profoundly traumatized, exhausted, terrified,” and unfamiliar with the legal process, and emphasized that these individuals will not have time to gather their thoughts or collect evidence to support “highly fact-specific inquiries” at an interview screening. Another organization stated that asylum-seekers are screened in “exceedingly challenging circumstances,” as well as in cursory interviews over the telephone. One organization specifically alleged that the Departments failed to consider how trauma affects the fear screening process, emphasizing research showing that trauma affects demeanor in ways that could “easily affect credibility” (nervousness, inability to make eye contact, etc.). At least one organization expressed particular concern for LGBTQ asylum seekers, and another organization emphasized that arriving applicants are unrepresented, unlikely to understand U.S. legal standards, and may be fearful or reluctant to discuss their persecution with authorities.

One organization claimed the Departments have offered no evidence that the current procedure of using one standard to screen for any claim for relief complicates or delays the expedited removal process, alleging that this argument is not supported by government data. The organization noted that the number of individuals removed through expedited removal has increased fairly steadily over the years, stating that 43 percent of removals during 2018 were through the expedited removal process and that this proportion has not changed over the past decade. The organization also asserted there is no evidence that “requiring asylum officers to

evaluate varying claims relating to the same group of facts with three different screens would be simpler,” claiming this would actually make the determination more complicated.

The organization also disagreed with the Departments’ suggestion that DOJ’s language in a previous rule “imposing the higher burden to a particular group in a previous rule supports their rationale” (citing 85 FR at 36270). The organization emphasized that, in the previous rule, DOJ applied a higher screening standard strictly to individuals “subject to streamlined administrative removal processes for aggravated felons under section 238(b) of the Act and for [people] subject to reinstatement of a previous removal order under section 241(a)(5) of the Act.” Regulation Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999). The organization claimed DOJ specifically distinguished that group as different from the “broad class” of arriving individuals subject to expedited removal, stating that the Departments offer no explanation for why this “broad class” can now be treated as a “narrowly defined class whose members can raise only one claim.” The organization also accused the Departments of failing to explain what authority they used to add to and raise the statutory burden of proof in Congress’s “carefully described credible fear procedures.” INA 235(b), 8 U.S.C. 1225(b).

One organization noted that a U.S. district court vacated the “third country asylum ban regulations” on June 30, 2020, *see Capital Area Immigrants’ Rights Coalition v. Trump*, --- F.Supp.3d---, 2020 WL 3542481 (D.D.C. 2020) and also noted that the Ninth Circuit upheld a previous injunction against the rule on July 6, 2020, *see E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). The organization also referred to a separate rule that it claimed attempted to ban asylum for individuals entering the United States without inspection and noted that this rule was “blocked” by two separate district courts. *See E. Bay Sanctuary Covenant v. Trump*, 354 F.Supp.3d 1094 (N.D. Cal 2018); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019). The organization noted that, based on these cases, it is unclear who would be eligible for withholding of removal or CAT only. The organization concluded by emphasizing that Congress

created the credible fear standard as a safeguard due to “the life or death nature of asylum,” and described the proposed higher evidentiary standard as “cruelly irresponsible.”

*Response:* In general, commenters appear to have confused multiple rulemakings, as well as the existing legal differences between and among asylum, statutory withholding of removal, and protection under the CAT regulations. The Departments decline to adopt the commenters’ positions to the extent they are based on inaccurate or confused understandings of the proposed rule and of the legal distinctions between and among asylum, statutory withholding of removal, and protection under the CAT regulations.

Contrary to commenters’ claims, the change of the credible fear standards for statutory withholding and protection under the CAT regulations are unrelated to the Departments’ other asylum-related regulatory efforts, which are outside the scope of this rule, and the current change is not intended to “target” aliens that are not subject to those previous asylum regulations. *See, e.g.,* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018). Further, the change in standards has no bearing on how any alleged trauma is assessed during the screening process by either asylum officers or immigration judges. Adjudicators in both Departments have conducted these assessments for many years and are trained and well-versed in assessing the credibility of applicants, including accounting for any alleged trauma that may be relevant.

As discussed in the NPRM, Congress did not require the same eligibility standards for asylum, statutory withholding of removal, and protection under the CAT in the “credible fear” screening process. *See* 85 FR at 36268–71. In fact, the INA does not include any references to statutory withholding of removal or protection under the CAT regulations when explaining the “credible fear” screening process. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* The Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. No. 105-277, 112 Stat. 2681–822.

Instead, the Departments have the authority to establish procedures and standards for statutory withholding of removal and protection under the CAT. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens \* \* \* .”); INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); FARRA, Pub. L. No. 105-277, sec. 2242(b), 112 Stat. at 2681–822 (providing that “the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3” of CAT).

Using this authority, the Departments believe that, rather than being “unrealistic[.]” or “unconscionabl[e]” as commenters claim, raising the standards of proof to a “reasonable possibility” during screening for statutory withholding of removal and protection under the CAT regulations better aligns the initial screening standards of proof with the higher standards used to determine whether aliens are in fact eligible for these forms of protection when applying before an immigration judge. Further, as explained in the NPRM, this higher standard will also serve to screen out more cases that are unlikely to be meritorious at a full hearing, which will allow the overburdened immigration system to focus on cases more likely to be granted. And, contrary to commenters’ claims, the NPRM did not claim that the use of a single “significant possibility” standard complicates or delays the expedited removal process.

The Departments recognize that a higher screening standard may make it more difficult to receive a positive fear determination. However, the Departments disagree with commenters that raising the screening standard for statutory withholding of removal and CAT protection will require aliens to submit significantly stronger documentary evidence. At the credible fear interview stage, these claims rest largely on the applicant’s testimony, which does not require any additional evidence-gathering on the applicant’s part. *See, e.g.*, 8 CFR 208.30(d), 208.30(e)(2) (describing the interview and explicitly requiring the asylum officer to make a credible fear determination after “taking into account the credibility of the statements made by the alien in support of the alien’s claim”).

In addition, the Departments have long used the “reasonable possibility” standard for reasonable fear determinations made under 8 CFR 208.31 and 8 CFR 1208.31, which cover certain classes of aliens who are ineligible for asylum but who are eligible for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 208.31(a), 208.31(c), 1208.31(a), 1208.31(c).<sup>18</sup> By changing the standard in credible fear interviews for statutory withholding and CAT protection, asylum officers will process such claims under the same standard, providing additional consistency. Moreover, asylum officers receive significant training and the Departments have no concerns that they will be able to properly apply the standards set forth in this rule. *See* 8 CFR 208.1(b) (ensuring training of asylum officers).

In short, it is both illogical and inefficient to screen for three potential forms of protection under the same standard when two of those forms have an ultimately higher burden of proof. The Departments’ rule harmonizes the screening of the various applications consistent with their respective ultimate burdens and ensures that non-meritorious claims are more quickly weeded out, allowing the Departments to focus more of their resources on claims likely to have merit.

#### 2.4.1. Specific Concerns With “Significant Possibility” Standard

*Comment:* One commenter claimed the rule would make it much harder for asylum seekers subject to expedited removal to have their asylum requests “fully considered” by an immigration judge. The commenter noted that Congress intentionally set a low standard—“significant possibility”—for the credible fear interview in order to prevent legitimate refugees from being deported; one organization noted that this standard was designed to “filter out economic migrants from asylum seekers.” Commenters argued that the rule’s redefinition of the “significant possibility” standard as “a substantial and realistic possibility of succeeding”

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<sup>18</sup> Commenters raised concerns about analogizing the use of the “reasonable possibility” screening standard in 8 CFR 208.31 and 1208.31, which applies only to certain categories of aliens. However, the Departments referenced those regulations here and in the NPRM merely to show that the “reasonable possibility” standard has long existed in other contexts. *See, e.g.*, 85 FR at 36270.



contradicts the language Congress set forth in section 235(b)(1)(B)(v) of the Act, 8 U.S.C.

1225(b)(1)(B)(v) and is thus “ultra vires.”

One organization argued that the legislative history confirms Congress’s intent to protect “bona fide” asylum seekers. The organization cited the Judiciary Committee report to the House version of the bill that stated that “[u]nder this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution” and that “the asylum officer should attempt to elicit all facts relevant to the applicant’s claim.” The organization included a statement from Senator Orrin Hatch noting that “[t]he conference report struck a compromise” and the standard adopted was “intended to be a low screening standard for admission into the usual full asylum process.”

Finally, one organization stated that there is no “sliding scale for legal standards based on the volume of cases,” emphasizing that national security is irrelevant to the appropriate legal standard for credible fear. The organization claimed that raising the standard in order to “better secure the homeland” contradicts the clear meaning of the statute and is “ultra vires.”

*Response:* Again, commenters appear to have confused the existing legal differences between and among asylum, statutory withholding of removal, and CAT protection, and the Department declines to adopt the commenters’ positions to the extent they are based on inaccuracies or misstatements of law.

The rule does not change the “significant possibility” standard in credible fear interviews for asylum claims, which is set by statute. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As a result, asylum claims will continue to be processed under the “significant possibility” standard in credible fear interviews. Instead, the rule only changes the standard to a “reasonable possibility” for statutory withholding of removal and CAT protection claims. Congress did not address the standards for these claims in credible fear interviews and instead explicitly focused on asylum claims. *See generally* INA 235(b), 8 U.S.C. 1225(b)(1)(B) (describing asylum interviews). Therefore, the Departments are within their authority to change these standards, as

the use of a “reasonable possibility” standard does not contradict the “significant possibility” language in the statute, which only applies to asylum claims. *See generally* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . .”); INA 103(g)(2), 8 U.S.C. 1103(g)(2) (“The Attorney General shall establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.”).

Moreover, in response to commenters’ concerns about the “significant possibility” asylum standard in credible fear proceedings, the Departments note that this change does not raise the standard; instead, it merely codifies existing policy and practice in order to provide greater clarity and transparency to adjudicators and affected parties. USCIS already uses the “significant possibility” definition in screening whether an asylum-seeker has established a credible fear of persecution. *See* Memorandum from John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations 2 (Feb. 28, 2014).

This definition is also consistent with Congress’s intent to create “a low screening standard for admission into the usual full asylum process,” 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch), and with the statutory text. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). For example, the “significant possibility” standard does not require a showing that it is more likely than not that the applicant can meet their asylum burden in immigration court. Instead, the standard merely requires the applicant establish “a substantial and realistic possibility of succeeding” on their asylum claim, which in turn requires a showing of as little as a 10 percent chance of persecution on account of a protected ground. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987).

This additional language will help adjudicators and affected parties to ensure that the proper screening standard is used in the credible fear process.

## 2.5. Proposed Amendments to the Credible Fear Screening Process

*Comment:* One organization claimed that the rule would essentially combine the credible fear interview with the merits hearing and require an asylum officer to do both simultaneously. The organization contended that this would leave applicants who turn themselves in to CBP with no time to prepare and “essentially no chance of success.” The organization emphasized that individuals arriving at the border are often “exhausted, stressed out, or ill,” noting the high probability that an individual will be physically, emotionally, or mentally unfit for an interview that “may determine whether he and his family lives or dies.” The organization claimed this situation has been aggravated by the COVID-19 pandemic.

One organization stated that some individuals fleeing persecution and torture “bypass CBP” because they lack knowledge about asylum or believe they will be treated unfairly. The organization noted that some of these individuals prepare asylum applications on their own (either prior or subsequent to apprehension by ICE) and emphasized that these cases, which fall “outside the established procedures,” are far more difficult to regulate. The organization contended that, if the credible fear and merits interviews are combined, poor asylum or CAT protection seekers will be incentivized to evade CBP in order to try and obtain help preparing an application. The organization emphasized that if the Departments replace the existing procedure with one that is “essentially impossible for many deserving people to use,” their jobs will become more difficult and their efforts less efficient.

One organization expressed concern regarding the specific language in proposed 8 CFR 208.30(d)(1), claiming that it “does not pass either simple humanity or due process.” The organization conceded that the language of existing 8 CFR 208.30(d)(1) is identical, but claimed this “does not excuse the proposed provision.” Instead, the organization claimed the language should read as follows: “[i]f the [asylum] officer conducting the interview determines that the

alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer shall reschedule the interview.”

One organization also emphasized that the rule would require asylum officers to consider bars to asylum, including the internal relocation bar,<sup>19</sup> during initial fear screenings. The organization alleged that the rule seems to build off the “Asylum and Internal Relocation Guidance” issued by USCIS, which the organization claimed was posted last summer “without going through an NPRM.” Another organization claimed that this portion of the rule is “contrary to law and existing practice,” noting that section 235(b) of the Act, 8 U.S.C. 1225(b), requires asylum officers to determine whether there is a “significant possibility” that an applicant could establish eligibility for asylum in some future proceeding. One organization emphasized that most credible fear applicants are unrepresented and have difficulty understanding the complex internal relocation analysis, noting that asylum seekers would likely need to include detailed country conditions materials in support of their claims. In addition, the organization claimed that adding “an additional research burden” on asylum officers would be inefficient.

One organization noted that the rule would require asylum officers to determine whether an applicant is subject to one of the mandatory bars under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), and, if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under CAT. The organization emphasized that each of the mandatory bars involves intensive legal analysis and claimed that requiring asylum officers to conduct this analysis during a screening interview would result in “the return of many asylum seekers to harm’s way.”

Another organization claimed this portion of the rule is “unworkable,” noting that the mandatory bars are heavily litigated and often apply differently from circuit to circuit. The

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<sup>19</sup> The Departments note that the possibility of internal relocation is not a mandatory bar to asylum. Rather, it is part of the underlying asylum eligibility determination and could rebut a presumption of a well-founded fear after a finding of past persecution, or be a reason to find that the applicant does not have a well-founded fear of persecution. As it is still a consideration during the credible fear screening, the Departments address the comment in the response below.

organization alleged that the new credible-fear analysis would require asylum officers to exceed their statutory authority and would violate due process by mandating fact-finding in a procedure that does not provide applicants with notice or the opportunity to respond with evidence. One organization claimed that “countless asylum-seekers could be erroneously knocked out of the process based on hasty decisions, misunderstandings, and limited information,” noting that the existing rule “errs in favor of review.”

The organization also expressed concern that the rule would require asylum officers to treat an individual’s silence as a reason to deny an immigration judge’s review of a negative credible fear interview. The organization emphasized that many asylum seekers do not understand what is happening when they receive a negative credible fear determination from an asylum officer and do not know what it means to seek review by an immigration judge; as a result, many asylum seekers “will simply not answer the question.” The organization noted that many of these individuals are still “tired and traumatized” from their journey, and some have been separated from their families.

The organization noted that, historically, asylum officers have been required to request immigration judge review on behalf of individuals who remain silent; however, the organization alleged that the rule would “reverse existing policy” and require officers to indicate that unresponsive individuals do not want review. The organization noted that the NPRM does not include data on how many asylum seekers succeed in their credible fear claims before an immigration judge without specifically making a request to an asylum officer; nor does the rule contain data on how many immigration judge reviews are “expeditiously” resolved after the judge explains the asylum seeker’s rights and the individual chooses not to pursue review. The organization claimed that its concerns are enhanced by the decision to allow CBP officers, rather than fully trained USCIS asylum officers, to conduct credible fear interviews. One organization emphasized that it is unreasonable to assume that asylum seekers who decline to expressly request further review are declining review by an independent agency. The organization stated

that “[a]bsent a clear waiver of the opportunity for review by an independent agency, it is reasonable to assume that asylum seekers arriving at our borders wish to pursue all available avenues of relief.”

One organization noted a statement from Senator Patrick Leahy, which introduced a newspaper article that expressed concern that an unenacted early version of IIRIRA “gives virtually final authority to immigration officers at 300 ports of entry to this country.” 142 Cong. Rec. S4461 (daily ed. May 1, 1996) (statement of Senator Patrick Leahy). The organization also alleged that “[g]iving one agency unfettered power to decide whether an asylum seeker ever has a day in court goes against the intent of Congress.”

*Response:* In general, most of the commenters’ concerns are speculative and fail to account for the fact-specific and case-by-case nature of the interviews and reviews in question. Moreover, their concerns tacitly question the competence, integrity, and professionalism of the adjudicators conducting interviews and reviews—professionals who are well-trained and experienced in applying the relevant law in the context of these screenings and reviews.

The suggestion that aliens genuinely seeking refuge regularly evade officials of the very government from whom they seek refuge is unsupported by evidence. Nothing in the rule restricts or prohibits any organization from providing assistance to any alien; instead, the rule’s focus is on assisting adjudicators with clearer guidance and more efficient processes.

Additionally, many of the commenters failed to acknowledge the multiple layers of review inherent in the screening process, which reduces the likelihood of any errors related to consideration of the facts of the claim or application of relevant law. *See Thuraissigiam*, 140 S.Ct. at 1965–66 (“An alien subject to expedited removal thus has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.”). To the extent that commenters mischaracterized the rule, provided comments that are speculative or unfounded, suggested that the Departments should not follow the law, or ignored

relevant procedural protections that already address their concerns, the Departments decline to adopt such comments.

The Departments disagree that this rule combines the credible fear interview with a full hearing on an asylum application, or that the credible fear interview represents the “final” adjudication of an asylum application. This rule maintains the same “significant possibility” standard for asylum officers in conducting a credible fear interview with respect to screening the alien for eligibility for asylum, and any alien who is found to have a credible fear is referred to an immigration judge for asylum-and-withholding-only proceedings for consideration of the relief application. *See* 8 CFR 208.30(g). This rule does not change the fundamental structure of the credible fear process. Instead, during the credible fear interview, the rule additionally requires the asylum officer to consider internal relocation and relevant asylum bars as part of his or her determination, and separately to treat the alien’s failure to request a review of a negative fear determination as declining the request.

Regarding commenters’ concerns about unrepresented aliens having difficulty with the internal relocation analysis in the credible fear process, the Departments note that aliens are able to consult with a person of their choosing prior to their credible fear interview and have that person present during the interview. *See* 8 CFR 208.30(d)(4). Considering internal relocation in the credible fear screening context is consistent with existing policy and practice. *See* 85 FR 36272. Moreover, there is no reason to believe that an alien, in the course of providing testimony regarding the facts of his or her claim, cannot also provide testimony about his or her ability to internally relocate; in fact, in many cases, an alien’s relocation is already part of the narrative provided in support of the alien’s overall claim. In addition, the Departments disagree that requiring asylum officers to consider internal relocation is inefficient. To the contrary, as current practice requires such issues to be adjudicated in section 240 removal proceedings, screening out cases subject to internal relocation before requiring a lengthier proceeding before an immigration judge is inherently more efficient. It also has a further salutary effect of

increasing the ability of adjudicators to address meritorious claims in a more timely manner.

Lastly, contrary to commenters' assertions, this rule is unrelated to USCIS guidance on internal relocation, and any issues relating to such guidance are outside the scope of this rule.

Regarding commenters' concerns about requiring asylum officers to determine whether certain asylum bars apply during the credible fear interview, the Departments note that asylum officers are well trained in asylum law and are more than capable of determining whether long-standing statutory bars apply, especially in the credible fear screening context. INA 235(b)(1)(E), 8 U.S.C. 1235(b)(1)(E) (defining an asylum officer as one who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under [INA 208, 8 U.S.C. 1158], and . . . is supervised by an officer who [has had similar training] and has had substantial experience adjudicating asylum applications."); *see generally* 8 CFR 208.1(b) (covering training of asylum officers).

Moreover, the statute requires asylum officers to determine whether "the alien could establish eligibility for asylum under section 1158 of this title," which would by extension include the application of the bars listed in section 1158 that are a part of this rule. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Further, asylum officers already assess whether certain bars may apply to applications in the credible fear context—they simply do not apply them under current regulations. *See* Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* at 10 (Feb. 2020), <https://www.gao.gov/assets/710/704732.pdf> ("In screening noncitizens for credible or reasonable fear . . . [a] USCIS asylum officer is to determine if the individual has any bars to asylum or withholding of removal that will be pertinent if the individual is referred to immigration court for full removal proceedings."); U.S. Citizenship and Immigr. Serv., *Lesson Plan on Credible Fear of Persecution and Torture Determinations* at 31 (2019), <https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20>



for%20asylum%20screenings.pdf (“Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.”). Lastly, responding to commenters’ concerns that such determinations would be “final,” this rule does not change the existing process allowing for an immigration judge to review any negative fear determination, which would include any bar-related negative fear determination. 8 CFR 208.30(g); *see also Thuraissigiam*, 140 S.Ct. at 1965–66 (“An alien subject to expedited removal . . . has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.”).

Regarding commenters’ concerns that aliens do not understand the credible fear process and, therefore, will refuse to indicate whether they want an immigration judge to review their negative fear finding, the Departments first note that if an alien requests asylum or expresses a fear of return, the alien is given an M-444 notice, Information about Credible Fear Interview, which explains the credible fear process and the right to an attorney at no cost to the U.S. Government. It would be unusual for an alien who has already undergone an interview, relayed a claim of fear, answered questions from an asylum officer about his or her claim, and continued to maintain that he or she has a genuine fear of being returned to his or her country of nationality to then—at the next step—be unaware of the nature of the process when asked whether he or she wishes to have someone else review the claim. The Departments further note that regulations require the asylum officer to ask aliens whether they wish to have an immigration judge review the negative credible fear decision. *See* 8 CFR 208.30(g) (requiring the asylum officer to “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”). And the relevant form states, “You may request that an Immigration Judge review this decision.” *See* Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge.

These procedures provide explicit informational protections to individuals in the credible fear process, and treating refusals as affirmative requests only serves to create unnecessary and undue burdens on the immigration courts. Although the Departments do not maintain data on how many individuals refuse to request immigration judge review of a negative fear finding, the Departments believe it is reasonable to require an individual to answer affirmatively when being asked by an asylum officer if the individual wishes to have their negative fear finding reviewed.

In response to a commenter's concern about 8 CFR 208.30(d)(1), which allows an asylum officer to reschedule a credible fear interview under certain circumstances, the Departments note that this rule does not change any language in that subparagraph and, therefore, any comments regarding that subparagraph are outside the scope of this rule.

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

#### 3.1. Frivolous Applications

##### 3.1.1. Allowing Asylum Officers to Make Frivolousness Findings

*Comment:* Commenters expressed a range of concerns regarding the proposed changes to allow DHS asylum officers to make frivolousness findings and deny applications or refer applications to an immigration judge on that basis. 85 FR at 36274-75.

Commenters expressed concerns about asylum officers' training and qualifications to make frivolousness findings. For example, at least one commenter noted that these DHS officers are not required to earn law degrees. Another organization disagreed with the NPRM's assertion that asylum officers are qualified to make frivolousness determinations because of their current experience making credibility determinations, emphasizing that "credibility and frivolous determinations differ significantly." At least one organization noted that the applicant has the burden of proof in a credibility determination while the government bears the burden of proof in a frivolousness determination.

At least one organization emphasized that this authority is currently only vested in immigration judges and the BIA, and commenters expressed concern that allowing asylum officers to make frivolousness findings improperly changes the role of asylum officers in the asylum system. For example, one organization claimed that allowing asylum officers to make frivolousness determinations “improperly changes their role from considering humanitarian relief, to being an enforcement agent.” Commenters noted a law professor’s statement that “allowing asylum officers to deny applications conflicts with a mandate that those asylum screenings not be adversarial.” Suzanne Monyak, *Planned Asylum Overhaul Threatens Migrants’ Due Process*, LAW 360 (June 12, 2020), <https://www.law360.com/access-to-justice/articles/1282494/planned-asylum-overhaul-threatens-migrants-due-process> (quoting Professor Lenni B. Benson).

Commenters suggested that the rule would not require USCIS to allow asylum applicants to address inconsistencies in their claims, alleging that individuals appearing in non-adversarial proceedings before a DHS officer would not be granted important procedural protections. One organization cited both the U.S. Court of Appeals for the Second Circuit and the BIA to support its claim that a comprehensive opportunity to be heard makes sense in the frivolousness context, noting that immigration enforcement is not limited to initiating and conducting prompt proceedings that lead to removals at any cost. *Liu v. U.S. Dep’t of Justice.*, 455 F.3d 106, 114 n.3 (2d Cir. 2006); *Matter of S–M–J–*, 21 I&N Dec. 722, 727, 743 (BIA 1997).

One organization stated that, although immigration judges would have de novo review of findings by asylum officers, an adverse finding is “always part of the DHS toolbox” in immigration court and is considered by immigration judges.

*Response:* As stated in the proposed rule, the Departments find that allowing asylum officers to make frivolousness findings in the manner set out in the proposed rule and adopted as final in this rule will provide many benefits to the asylum process, including “strengthen[ing] USCIS’s ability to root out frivolous applications more efficiently, deter[ing] frivolous filings,

and ultimately reduc[ing] the number of frivolous applications in the asylum system.” 85 FR at 36275.

The Departments disagree with commenters’ allegations that asylum officers are not qualified or trained to make frivolousness findings. Instead, all asylum officers receive significant specialized “training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles” and also receive “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.” 8 CFR 208.1(b). Moreover, there is no doubt that asylum officers are qualified to make significant determinations regarding asylum claims, including the most important determination—an adjudication on the merits regarding whether or not an alien has demonstrated eligibility for asylum. *See, e.g.*, 8 CFR 208.14(c) (“If the asylum officer does not grant asylum to an applicant after an interview . . . the asylum officer shall deny, refer, or dismiss the application . . .”). Given asylum officers’ authority and qualifications to make determinations on the underlying merits of asylum applications, the Departments find that they are clearly qualified to make subsidiary determinations such as frivolousness findings.<sup>20</sup>

Commenters are incorrect that the Departments analogized credibility determinations to frivolousness findings. *See* 85 FR at 36275. Instead, the Departments discussed asylum officers’ credibility findings as background regarding the mechanisms currently used by asylum officers to approach questions similar to those involving frivolousness. *Id.* Nevertheless, the Departments disagree with commenters’ implication that asylum officers should not be permitted to make frivolousness findings because the government bears the burden of proof. Not only does

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<sup>20</sup> Although not strictly applicable to asylum officers who adjudicate asylum applications under section 208 of the Act, the Departments note that the definition of an asylum officer in other contexts as one who “has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications” under section 208 and is supervised by someone who has had “substantial experience” adjudication asylum applications further supports the determination that asylum officers are well-qualified to make frivolousness determinations. INA 235(b)(1)(E) (8 U.S.C. 1225(b)(1)(E)).

the statute not assign a burden of proof to the Departments regarding frivolousness findings, INA 208(d)(6), 8 U.S.C. 1158(d)(6), but for those not in lawful status, asylum officers' frivolousness findings are subject to de novo review by an immigration judge, and must simply be sufficiently supported.

Commenters are further incorrect that allowing asylum officers to make frivolousness findings improperly converts the USCIS affirmative application process from non-adversarial to adversarial. The purpose of the non-adversarial interview is to “elicit all relevant and useful information bearing on the applicant's *eligibility for asylum*.” 8 CFR 208.9(b) (emphasis added). There is nothing inherently contradictory—or adversarial—in eliciting all relevant and useful information regarding an applicant's eligibility for asylum and then determining, based on that information, that the applicant is ineligible for asylum because the applicant knowingly filed a frivolous application. Moreover, a nonadversarial process does not mean that the asylum officer simply has to accept all claims made by an alien as true; if that were the case, an asylum officer could never refer an application based on an adverse credibility determination. Further, equating the nonadversarial asylum interview process with a prohibition on finding an application to be frivolous is in tension with statutory provisions allowing adjudicators of asylum applications to consider, inter alia, “candor” and “falsehoods” in assessing an applicant's credibility. INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii).

In short, the Departments find that allowing asylum officers to make frivolousness findings does not conflict with the requirement that asylum officers conduct asylum interviews “in a nonadversarial manner.” 8 CFR 208.9(b). Instead, asylum officers will consider questions of frivolousness in the same manner that they consider other questions of the applicant's eligibility for asylum, such as whether the applicant has suffered past persecution or whether the applicant fears harm on account of a protected ground. Just as interview questions about these eligibility factors are appropriate topics for asylum officers in the current interview process, questions and consideration of frivolousness are similarly appropriate.

Regarding commenters' concerns about procedural protections for aliens who appear before an asylum officer for an interview, the Departments emphasize that both the proposed rule and this final rule prohibit a frivolousness finding unless the alien has been provided the notice required by section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A) of the consequences under section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), of filing a frivolous asylum application. *See* 8 CFR 208.20(d), 1208.20(d). This requirement complies with the Act, which does not require any further warning or colloquy in advance of a frivolousness finding. Accordingly, while commenters are correct that the rule does not require USCIS to allow asylum applicants to address inconsistencies prior to a frivolousness finding or follow any other delineated procedures, the Departments reiterate that, as stated in the proposed rule, the procedural requirements provided by the rule for a frivolousness finding comply with the Act's requirements. 85 FR at 36276–77.

Further, the Departments emphasize that, for aliens who lack legal status and who are referred to an immigration judge because the asylum officer did not grant asylum to the alien, *see* 8 CFR 208.14(c)(1), USCIS asylum officers' frivolousness findings are not given effect and are subject to an immigration judge's *de novo* review. 8 CFR 208.20(b). Accordingly, for most, if not all, aliens who may be subject to a frivolousness finding by an asylum officer, this further review is effectively the procedural protection called for by commenters, as the alien will be on notice regarding the possible frivolousness finding and should be prepared to and expect to explain the issues surrounding it.

The Departments agree with commenters that DHS trial attorneys in immigration court may provide arguments regarding frivolousness in any appropriate case. However, as also stated in the proposed rule, the possibility of frivolousness findings in immigration court alone has been insufficient to deter frivolous filings consistent with the congressional intent behind section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6). 85 FR at 36275. Allowing asylum officers to also consider and make determinations regarding whether an affirmative asylum applicant's

application is frivolous provides efficiencies not available from consideration of questions of frivolousness by an immigration judge alone, including providing immigration judges with a more robust and developed written record regarding frivolousness. *Id.*

Finally, to the extent that commenters suggested the proposed changes should not be implemented because they would make it easier to detect asylum fraud and would harm aliens who submit fraudulent asylum applications, the Departments do not find such suggestions compelling enough to warrant deleting such changes. *See Angov v. Lynch*, 788 F.3d 893, 901, 902 (9th Cir. 2015) (noting “an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated”). Cases involving asylum fraud are “distressingly common,” *id.* at 902, and the Departments are committed to ensuring the integrity of immigration proceedings by using all available statutory tools to root out such fraud.

### 3.1.2. Changes to the Definition of “Frivolous”

*Comment:* Commenters expressed a range of concerns with the rule’s changes to the definition of “frivolous” and the expanded scope of applications that could qualify as such. One commenter claimed the rule would make it easier for immigration judges and asylum officers to “throw out” asylum requests as frivolous.

At least one commenter noted that, prior to the enactment of section 208(d)(6) of the Act 8 U.S.C. 1158(d)(6), a frivolous asylum application was defined in the employment context as “manifestly unfounded or abusive” and “patently without substance.” 85 FR at 36274. The commenter concluded that lowering this standard is “ultra vires and an abuse of discretion.”

Commenters noted that, to be considered frivolous, an application must have been “knowingly made,” and the individual must have been given notice at the time of filing pursuant to section 208(d)(4)(A) of the Act 8 U.S.C. 1158(d)(4)(A). Commenters expressed concern that the NPRM seeks to redefine the term “knowingly” to include “willful blindness” toward frivolousness. At least one organization expressed concern that the NPRM relies on *Global-Tech*

*Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) to support its definition for “knowingly,” emphasizing that this case “involved sophisticated litigants represented by attorneys familiar with the intricacies of American patent law” and contending that it would be inappropriate to hold asylum seekers to this standard. Commenters stated that the NPRM does not adequately explain how “willful blindness” differs from recklessness or negligence.

At least one organization expressed concern that the rule removes the requirements that (1) a fabrication be deliberate; and (2) the deliberate fabrication be related to a material element of the case. The organization claimed the rule suggests that asylum seekers who are unaware that an “essential element” is fabricated would be permanently barred from immigration benefits. The organization noted that the NPRM does not define “essential” but instead focuses on “fabricated material evidence,” emphasizing that, given the variance of standards, courts have held that “fabrication of material evidence does not necessarily constitute fabrication of a material element,” quoting *Khadka v. Holder*, 618 F.3d 996, 1004 (9th Cir. 2010).

Another organization stated that while “[f]alse and fabricated evidence is inappropriate,” poor language skills and faulty memory can “produce honest mistakes that look like falsification,” emphasizing that the rule’s definition of “frivolous” provides the Departments with “numerous opportunities to pressure applicants.”

Commenters expressed particular concerns with the rule’s changes so that an application that lacks merit or is foreclosed by existing law could result in a frivolousness finding, particularly because case law involving asylum is constantly changing. For example, at least one organization contended that the rule contradicts existing regulations regarding a representative’s duty to advocate for his or her client, emphasizing that representatives are allowed to put forth “a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.” *See* 8 CFR 1003.102(j)(1). Similarly, commenters alleged that the imposition of a permanent bar on applicants who raise claims challenging existing law “deters representatives from putting forth nuanced arguments,” contending that a representative’s ethical



duty to make every argument on a client's behalf could potentially subject the client to the permanent bar. In addition, commenters argued that the ability of attorneys to make good faith arguments has been "crucial to modifying and expanding the law," emphasizing that good faith arguments by representatives allow asylum seekers to pursue "a claim to the full extent of the law." One organization stated that, by imposing penalties on individuals who make good faith attempts to seek protection "in light of contrary law based on different jurisdictions," the rule "undoes years of jurisprudence in this field."

Commenters also emphasized that the rule would expand when the penalties for a frivolous filing may attach and would require individuals who wish to challenge a denial of asylum in Federal court to risk a finding that would bar any future immigration relief. One commenter alleged that, should an immigration judge find an application to be frivolous under the rule, the applicant would be ineligible for all forms of immigration relief simply for "making a weak asylum claim." One organization expressed concern that, as a result, asylum seekers would not seek relief for fear of losing their case and being accused of submitting a frivolous application. One organization claimed that the rule's frivolousness procedure is designed to "instill fear in applicants to keep them from applying." Another organization emphasized that expediency is "inappropriate" in the context of a determination that would "subject the applicant to one of the harshest penalties in immigration law." Commenters otherwise emphasized the seriousness for applicants of frivolousness findings.

At least one organization called the rule "exceptionally unfair," emphasizing that many asylum seekers are unrepresented and do not speak English, making it difficult for them to understand the complexities of "the ever-evolving law." The organization noted that many asylum seekers fall prey to unscrupulous attorneys or notarios who file asylum applications for improper purposes, arguing that it is entirely unfair to penalize applicants in these types of situations.

Finally, at least one organization claimed that the rule would increase the workload of immigration judges, as they would be forced to determine whether the legal arguments presented sought to “extend, modify, or reverse the law” or were merely foreclosed by existing law. The organization argued that, because of the burdens already placed on immigration judges, this expectation is unrealistic and “adds another layer to the litigation of referred asylum cases” in immigration court.

*Response:* In general, commenters on this point either mischaracterized or misstated the proposed rule or relied solely on a hypothetical and speculative “parade of horrors” that ignores the actual text and basis of the rule. Contrary to commenters’ concerns, the Departments do not believe that the proposed rule allows immigration judges or asylum officers to treat legitimate asylum requests as frivolous. Instead, the rule establishes four limited grounds for a frivolousness finding: applications that (1) contain a fabricated essential element; (2) are premised on false or fabricated evidence unless the application would have been granted absent such evidence; (3) are filed without regard to the merits of the claim; or (4) are clearly foreclosed by applicable law. 8 CFR 208.20(c)(1)–(4), 1208.20(c)(1)–(4). In addition, the rule provides that an alien “knowingly files a frivolous asylum application if . . . [t]he alien filed the application with either actual knowledge, or willful blindness, of the fact that the application” was one of those four types. 8 CFR 208.20(a)(2), 1208.20(a)(2).

These changes are not ultra vires or an abuse of discretion. The Departments emphasize that the regulations interpret and apply the INA itself, the relevant provisions of which postdate the regulation defining frivolous as “manifestly unfounded or abusive.” In addition, the INA does not define the term “frivolous,” *see* INA 208(d)(6), 8 U.S.C. 1158(d)(6), and the Departments possess the authority to interpret such undefined terms. *See* INA 103(a)(3), (g)(2), 8 U.S.C. 1103(a)(3), (g)(2); *see also Chevron*, 467 U.S. at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress,

the challenge must fail.”). The Departments believe that the prior regulatory definition artificially limited the applicability of the frivolous asylum bar because it did not fully address the different types of frivolousness, such as abusive filings, filings for an improper purpose, or patently unfounded filings.

Regarding the inclusion of willful blindness in determining what applications will be considered knowingly frivolous, the Departments reiterate that the inclusion of a willful blindness standard as part of a “knowing” action is consistent with long-standing legal doctrine:

The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. . . . It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts. . . .

*Global-Tech Appliances, Inc.*, 563 U.S. at 766 (internal citations omitted);<sup>21</sup> *see also, e.g., United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) (noting that “knowledge” can be demonstrated by actual knowledge or willful blindness.); *United States v. Perez-Melendez*, 599 F.3d 31, 41 (1st Cir. 2010) (“Willful blindness serves as an alternate theory on which the government may prove knowledge.”).

The doctrine of willful blindness applies in many civil proceedings as well. *See Global-Tech Appliances*, 563 U.S. at 768 (“Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).”). Given this background, if Congress did not wish to allow for willfully blind actions to satisfy the “knowing” requirement of section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), Congress could have expressly provided a definition of “knowingly” in the Act. *Cf. Perrin v. United States*, 444 U.S. 37, 42

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<sup>21</sup> The Departments disagree with commenters’ concerns that *Global-Tech* is an inappropriate case to cite given the complexity of the underlying dispute. Instead, this case provides a clear and concise summary of the willful blindness standard, which is separate and apart from the underlying facts or adjudication.

(1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”) (citations omitted). Due to Congress’s silence, however, the Departments find that the inclusion of willful blindness, as it is generally interpreted, is a reasonable interpretation that better aligns the regulations with congressional intent to limit and deter frivolous applications.

Regarding the four grounds for finding an asylum application frivolous at 8 CFR 208.20(c) and 1208.20(c), the Departments emphasize that an application will not be found to be frivolous unless the alien knew, or was willfully blind to the fact, that the application met one of the four grounds. Accordingly, commenters are incorrect that an alien who does not know that an essential element is fabricated will be at risk of an immigration judge finding that his or her application is frivolous. Similarly, an alien who submits a claim that is clearly foreclosed by the applicable law but who, as noted by commenters, does not know that the claim is so clearly foreclosed, would not have his or her claim found frivolous on that basis.<sup>22</sup>

The Departments disagree that the rule will enable the Departments to “pressure” applicants who make mistakes of fact in the context of their application. Two of the bases related to fabricated elements or evidence, neither of which can be characterized appropriately as a mistake of fact. The other two bases go to the merits of the case or to applicable law, and neither of those turn on a mistake of fact.

One commenter expressed concern about the NPRM’s proposed change, in the context of the definition of frivolous, from a fabricated “material” element to a fabricated “essential” element. The existing regulatory text provides that “an asylum application is frivolous if any of its material elements is deliberately fabricated”; under the NPRM, an application that contained a fabricated “essential element” might have been found frivolous. The Departments acknowledge that the NPRM indicated that it was maintaining the prior definition of “frivolous,” which was

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<sup>22</sup> As 85 percent of asylum applicants in immigration proceedings have representation, the likelihood of an alien alone knowingly making an argument that is foreclosed by law is relatively low as both a factual and legal matter. See EOIR, *Current Representation Rates* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>.

premised on a fabricated “material” element, 85 FR at 36275, but then used the word “essential” in lieu of “material” in the proposed regulatory text itself. Although the Departments do not perceive a relevant difference between the two phrasings, they are reverting to the use of “material” in this context in the final rule to avoid any confusion.

Finally, commenters were particularly concerned about the frivolousness grounds covering claims that lack merit or are foreclosed by existing law. However, commenters’ concerns are not based on the actual rule. As explained in the NPRM, an unsuccessful claim does not mean that the claim is frivolous. *See* 85 FR at 36273–77. For example, arguments to extend, modify, or reverse existing precedent are not a basis for a frivolousness finding under the “clearly foreclosed by applicable law” ground. 85 FR at 36276. Similarly, as discussed *supra*, both the relatively low numbers of pro se asylum applicants in immigration court proceedings and the requirement that a frivolous asylum application be “knowingly” filed will likely make frivolousness findings uncommon for pro se aliens under the “clearly foreclosed by applicable law” ground. Moreover, the proposed definition is fully consistent with the long-standing definition of “frivolous” behavior as applied in the context of practitioner discipline. *See* 8 CFR 1003.102(j)(1) (“A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay.”). In other words, the bases for finding an asylum application frivolous do not limit ethical attorneys’ conduct in the manner described by commenters.

As some commenters noted, however, some aliens may hire unscrupulous representatives or notarios who file applications for improper purposes. While the Departments are sympathetic to aliens who are victims of these unethical practices, the Departments note that, as described below in Section II.C.3.2 of this preamble, aliens must sign each asylum application attesting to the application’s accuracy and acknowledging the consequences of filing a frivolous application; moreover, “[t]he applicant’s signature establishes a presumption that the applicant is aware of the

contents of the application.” 8 CFR 208.3(c)(2), 1208.3(c)(2). An alien may later file a motion to reopen premised on ineffective assistance of counsel<sup>23</sup> or pursue other subsequent avenues of redress against unscrupulous individuals, but the Departments find that an alien should not automatically be immune from the consequences of an asylum application he or she held out as accurate.<sup>24</sup> To offer such immunity would create moral hazard. It would encourage aliens not to read or familiarize themselves with the contents of their applications, thereby subverting both the efficiency and accuracy of asylum adjudications. Moreover, the requirement that a frivolous asylum application be “knowingly” filed also ensures that only genuinely culpable—or co-conspirator—aliens will face the full consequences associated with these unethical practices. *Cf. United States v. Phillips*, 731 F.3d 649, 656 (7th Cir. 2013) (“It is careless to sign a document without reading it, but it is a knowing adoption of its contents only if the signer is playing the ostrich game (‘willful blindness’), that is, not reading it *because* of what she knows or suspects is in it.”).

The Departments disagree that the changes, including consideration of legal arguments regarding whether an asylum application was premised on a claim that was foreclosed by existing law, will increase the workload of immigration judges. As an initial point, immigration judges are already accustomed to both making frivolousness determinations and to assessing whether claims are foreclosed by applicable law; indeed, immigration judges are already required to apply precedent in asylum cases, even when a frivolousness finding is not at issue. Thus, the intersection of those two streams of decision making does not represent any additional adjudicatory burden. Further, the rule does not mandate that immigration judges make a

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<sup>23</sup> See *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (setting out requirements for motions to reopen due to ineffective assistance of counsel allegations).

<sup>24</sup> The Departments further note that purposefully filing meritless asylum applications, including for the purposes of causing DHS to initiate removal proceedings, violates the EOIR rules of professional conduct and constitutes behavior that may result in professional sanctions. See *In re Bracamonte*, No. D2016-0070 (July 1, 2020), <https://www.justice.gov/eoir/page/file/1292646/download> (entering into a settlement agreement with a practitioner who “acknowledges that it was improper to file asylum applications without an indicated basis for asylum or an indication as to any asylum claim, to cancel or otherwise advise clients to fail to appear for asylum interviews, and to not demonstrate a clear intention to pursue an asylum claim, in order to cause DHS to issue a Notice to Appear to his clients”).

determination in all cases, and many cases will not factually or legally lend themselves to a need to wrestle with close calls and complex determinations of whether an application was “clearly foreclosed by applicable law” due to the rest of the context of the application or the case. Finally, commenters also failed to consider that the direct inclusion of applications that are clearly foreclosed by applicable law as a possible basis for frivolousness findings may cause secondary efficiencies by disincentivizing the filing of meritless asylum applications in the first instance—applications that already take up significant immigration court resources.

### 3.1.3. Other Concerns with Regulations Regarding Frivolous Applications

*Comment:* Commenters expressed concern with the rule’s changes to the procedural requirements that must be satisfied before an immigration judge may make a frivolousness finding. For example, commenters noted that the rule would allow immigration judges to make frivolousness findings without providing an applicant with additional opportunities to account for perceived issues with his or her claim. Similarly, an organization alleged that immigration judges would not have to provide an opportunity for applicants to meaningfully address the frivolousness indicators found by an asylum officer. Commenters stated that the rule conflicts with *Matter of Y-L-*, 24 I&N Dec. at 155, emphasizing that the NPRM only requires that applicants be provided notice of the consequences of filing a frivolous application. At least one organization claimed the rule, by not requiring immigration judges to first provide an opportunity to explain, assumes that “applicants know what a judge would consider ‘meritless’ or implausible.” The organization contested the NPRM’s assertion that an asylum applicant “already . . . knows whether the application is . . . meritless and is aware of the potential ramifications,” claiming instead that applicants often lack a sophisticated knowledge of immigration law. *See* 85 FR at 36276.

*Response:* As stated in the proposed rule, the only procedural requirement Congress included in the Act for a frivolousness finding is the notice requirement at section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A). 85 FR at 36276. In addition, the asylum application itself

provides notice that an application may be found frivolous and that a frivolousness finding results in significant consequences. *Id.* The law is clear on this point. *See, e.g., Niang v. Holder*, 762 F.3d 251, 254–55 (2d Cir. 2014) (“Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. § 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.”). Thus, every alien who signs and files an asylum application has received the notice required by section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A).

Accordingly, commenters are correct that the rule’s changes allow immigration judges to make frivolousness findings without the procedural requirements required by the current regulation and attendant case law. But the regulation and case law are not required by the Act, and have not been successful in preventing the filing of frivolous applications. To the extent commenters are correct that the rule conflicts with *Matter of Y-L-*, that decision is premised on the existing regulatory language that the Departments are revising. Thus, as the Departments noted in the proposed rule, this rule would overrule *Matter of Y-L-* and any other cases that rely on the same reasoning or now-revised regulatory language. 85 FR at 36277.

*Comment:* At least one organization expressed its belief that DHS could institute frivolousness procedures more directly related to DHS’s adjudication of employment authorization requests (“EADs”). For example, the commenter noted that there is “no explanation” for why DHS cannot simply conduct a prima facie review of an I-589 filing prior to granting an EAD application or scheduling the I-589 interview. The organization claimed that, if the concern is the time and expense dedicated to “clearly fraudulent” applications, DHS could devise a policy to screen for indicators that the application itself lacks merit or supporting documentation. The organization contended that DHS does this with other benefit applications and is not prohibited from issuing Requests for Evidence or Notices of Intent to Deny to affirmative asylum applicants prior to an interview.



*Response:* Although the Departments appreciate this comment and DHS may evaluate it further as an additional avenue to protect the integrity of the asylum adjudication process, the Departments find that the changes set out in the proposed rule better align with congressional intent and are more efficient than a secondary process tied to the adjudication of EADS. Divorcing the question of frivolousness from the underlying adjudication of the application itself would potentially undermine Congress's clear direction that aliens face consequences for filing frivolous asylum applications. INA 208(d)(6), 8 U.S.C. 1158(d)(6). Moreover, asylum officers and immigration judges, the officials in the asylum system who are trained to review and adjudicate applications for asylum, are best positioned to make the sorts of determinations that the commenter suggests should instead be made by the DHS officials adjudicating EAD requests.

*Comment:* At least one organization alleged that the rule, "perhaps recognizing its own harshness," claims to "ameliorate the consequences" by allowing applicants to withdraw their application(s) before the court with prejudice, accept a voluntary departure order, and leave the country within 30 days. The organization contended that, rather than ameliorating the consequences of a frivolous filing, these measures essentially replicate them in severity and permanence.

*Response:* Despite commenters' concerns, the Departments emphasize that this option to avoid the consequences of a frivolousness finding is a new addition to the regulations and provides applicants with a safe harbor not previously available. The Departments believe that the conditions are strict but reasonable and fair when compared with the alternative: the severe penalty for filing a frivolous application, as recognized by Congress at section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6). Further, the Departments disagree that the consequences of withdrawing an application are of the same severity as a frivolousness finding because an alien who withdraws an application will be able to leave the United States without a removal order and seek immigration benefits from abroad, while an alien who is found to have submitted a

frivolous application is “permanently ineligible for any benefits” under the Act. INA 208(d)(6), 8 U.S.C. 1158(d)(6).

*Comment:* One organization emphasized that, although the NPRM claims that broadening the definition of frivolous would root out “unfounded or otherwise abusive claims,” the NPRM does not include any evidence of large numbers of pending frivolous applications.

*Response:* Congress laid out consequences for filing a frivolous asylum application at section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), demonstrating the importance of the issue. There is no precise data threshold for a regulation that implements a clear statutory priority. Moreover, Federal courts have recognized both the extent of asylum fraud and the fact that the Government does not catch all of it. *Angov*, 788 F.3d at 902 (“Cases involving fraudulent asylum claims are distressingly common. . . . And for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn’t have the resources to expose the lie.”). Indeed, as the Departments noted in the NPRM, the prior definition did not adequately capture the full spectrum of claims that would ordinarily be deemed frivolous, 85 FR at 36274, making statistics based on the prior definition either misleading or of minimal probative value.

The Departments note the record numbers of asylum applications filed in recent years, including 213,798 in Fiscal Year 2019, up from the then-previous record of 82,765 in Fiscal Year 2016. EOIR, *Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. Given this significant increase in applications—which almost certainly means an increase in frivolous applications—and the corresponding increase in adjudications, the Departments believe it is important to ensure the regulations best reflect congressional intent and deter the submission of frivolous applications that delay the adjudication of meritorious cases.

*Comment:* Another organization expressed particular concern for children seeking asylum, noting that, although the TVPRA requires unaccompanied children’s claims to be heard

by asylum officers, the rule's expansion of a "frivolous" claim would result in the denial of meritorious claims for children who are unrepresented and "unable to decipher complex immigration law." The organization contended that, because the rule would permit asylum officers who determine that a child's claim is "frivolous" to refer the case to immigration court without examining the merits of the claim, unaccompanied children "would be forced into adversarial proceedings before an immigration judge in clear violation of the TVPRA and in a manner that would subject them to all of the harms attendant to adversarial hearings where there is no guarantee of representation."

Similarly, at least one organization emphasized that the "safety valve" of allowing children to accept withdrawal conditions to avoid the consequences of a frivolousness finding is illusory, and may pressure children to waive valuable rights.

*Response:* Again, the Departments note that these concerns generally are not rooted in any substantive evidence and either mischaracterize or misstate the proposed rule. The Departments find the safeguards in place for allowing asylum officers to make a finding that an asylum application is frivolous are sufficient to protect unaccompanied alien children ("UAC") in the application process. Even if an asylum officer finds an application is frivolous, the application is referred to an immigration judge who provides review of the determination. The asylum officer's determination does not render the applicant permanently ineligible for immigration benefits unless the immigration judge or the BIA also make a finding of frivolousness. *Id.* Further, asylum officers and immigration judges continue to use child-appropriate procedures taking into account age, stage of language development, background, and level of sophistication.<sup>25</sup> Finally, to be found frivolous, an application must be knowingly filed as such, and the Departments anticipate that very young UACs will typically not have the requisite mental state to warrant a frivolousness finding.

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<sup>25</sup> For further discussion of the intersection of the rule and the TVPRA, see section II.C.6.10.

*Comment:* At least one commenter appeared to express concern that the rule includes all applications submitted after April 1, 1997, as those which could potentially be deemed frivolous.

*Response:* To the extent the commenter is concerned about frivolous applications in general dating back to April 1, 1997, the Departments note that DOJ first implemented regulations regarding frivolous asylum applications on March 6, 1997, effective April 1, 1997. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997). The April 1, 1997 effective date was enacted by Congress in 1996 through IIRIRA. *See* IIRIRA, Pub. L. 104-208, sec. 604(a), 110 Stat. 3009, 3009-693. Thus, all asylum applications filed on or after April 1, 1997, have been subject to a potential penalty for frivolousness for many years.

The NPRM made clear, however, that the new regulatory definition of frivolous applies only to applications filed<sup>26</sup> on or after the effective date of the final rule. To provide further clarification on this point, the Departments made several non-substantive edits to the regulatory text at 8 CFR 208.20 and 8 CFR 1208.20 in the final rule to clarify the temporal applicability of the existing definition of frivolousness and the prospective application of the definition contained in the rule. Thus, the commenters apparent retroactivity concerns about the definition of a frivolous application have been addressed. For further discussion of the rule's retroactive applicability, *see* Section II.C.7 of this preamble.

### 3.2. Pretermission of Legally Insufficient Applications

#### 3.2.1. Pretermission and the INA

*Comment:* Commenters stated that allowing immigration judges to pretermit applications conflicts with multiple sections of the INA and is not a "reasonable" interpretation of the INA.

Commenters cited section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), alleging that the phrase "may apply for asylum" should be broadly construed. Commenters also noted that the

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<sup>26</sup> This includes applications filed in connection with a motion to reopen on or after the effective date of the rule or applications filed on or after the effective date of the rule after proceedings have been reopened or recalendared.

statute requires the establishment of a procedure for considering asylum applications. INA 208(d)(1), 8 U.S.C. 1158(d)(1). Commenters claimed that allowing for the pretermission of asylum applications does not satisfy this required procedure and is an “unreasonable interpretation” of the statute.

Commenters stated that the rule violates section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which states that “[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.” Commenters stated that the rule violates this requirement by “requiring immigration judges to abandon their essential function of examining the noncitizen about their application for relief.”

Similarly, commenters stated that the rule violates section 240(b)(4)(B) of the Act, 8 U.S.C. 1229a(b)(4)(B), which states that “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government.” Commenters believe the rule violates this provision because it denies aliens the ability to present and examine evidence on their own behalf, including their own credible testimony.

Finally, commenters stated that the rule violates section 240(c)(4) of the Act, 8 U.S.C. 1229a(c)(4), which states that, inter alia, “the immigration judge shall weigh the credible testimony along with other evidence of record” when determining whether an alien has met his or her burden of proof on an application for relief. INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B).

Commenters also disagreed with the Departments that allowing pretermission of applications would not conflict with the legislative history of IIRIRA. *See* 85 FR at 36277 n.26 (noting statements in H.R. Rep. No. 104-469, part 1 (1996) regarding balancing the need for the alien to provide sufficient information on the application with the need for the alien’s application to be timely). Commenters stated that the rule creates additional burdens for aliens with regard to submission and preparation of the Form I-589.

*Response:* Allowing pretermission of asylum applications in the manner set out in this rule does not violate the INA. As an initial point, the regulations have long allowed immigration judges to pretermit asylum applications when certain grounds for denial exist. *See* 8 CFR 1240.11(c)(3).<sup>27</sup> Additionally, courts have affirmed the pretermission of legally deficient asylum applications. *See, e.g., Zhu v. Gonzales*, 218 F. App'x 21, 23 (2d Cir. 2007) (“Here, the IJ alerted Zhu early in the proceedings that his asylum claim might be pretermitted if he failed to illustrate a nexus to a protected ground, and granted him a 30-day continuance in which to submit a brief addressing the nexus requirement. When Zhu had neither submitted a brief, nor requested an extension of the deadline, after nearly 60 days, the IJ acted within his discretion in pretermitting the asylum claim.”). As discussed further below, the pretermission of legally deficient asylum applications is consistent with existing law, and immigration judges already possess authority to take any action consistent with their authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, *id.* 1240.1(a)(1)(iv), and to regulate the course of a hearing, *id.* 1240.1(c). Accordingly, the authority of an immigration judge to pretermit an asylum application is well-established even prior to the proposed rule.<sup>28</sup>

Further, regarding sections 208(a)(1) and 208(d)(1) of the Act, 8 U.S.C. 1158(a)(1) and (d)(1), nothing in the rule regarding the pretermission of applications affects the ability of aliens to apply for asylum, and this rule adds to the already robust procedures in place for the consideration and adjudication of applications for asylum. Instead, pretermission establishes an

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<sup>27</sup> The text of 8 CFR 1240.11(c)(3) references, *inter alia*, the mandatory denial of an asylum application pursuant to 8 CFR 1208.14. In turn, 8 CFR 1208.14(a) references 8 CFR 1208.13(c), which lists the specific grounds for the mandatory denial of an asylum application, including those listed in INA 208(a)(2) and (b)(2) (8 U.S.C. 1158(a)(2) and (b)(2)). Some of those grounds may require a hearing to address disputed factual issues, but some involve purely legal questions—*e.g.* INA 208(b)(2)(A)(ii) and (B)(i) (8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i)) (an alien convicted of an aggravated felony is ineligible for asylum)—and, thus, may be pretermitted without a hearing.

<sup>28</sup> The National Association of Immigration Judges (“NAIJ”), the union which formerly represented non-supervisory immigration judges, opposed the rule on general grounds but did not take a position on this specific provision. A. Ashley Tabadorr, *Comment by the National Association of Immigration Judges*, (July 15, 2020), <https://www.naij-usa.org/images/uploads/newsroom/2020.07.15.00.pdf> (“NAIJ’s comment to the proposed rulemaking takes no position on what the law should be or how it is to be interpreted.”). Nevertheless, individual immigration judges have, on occasion, pretermitted legally-deficient asylum applications even prior to the issuance of the proposed rule.

efficiency for the adjudication of applications for asylum that have been submitted for consideration and is utilized in a similar fashion as summary decision is used in other DOJ immigration-related proceedings, *see* 28 CFR 68.38, and as summary judgment is used in Federal court proceedings, *see* Fed. R. Civ. P. 56.

Similarly, pretermission of asylum applications in the manner set out in this rule does not violate any provision of section 240 of the Act, 8 U.S.C. 1229a. First, section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), authorizes immigration judges to “interrogate, examine, and cross-examine the alien and any witnesses” but does not establish a mandatory requirement for them to do so in every case on every application or issue. Further, it is settled law that immigration judges may pretermit applications for relief in other contexts. *See, e.g., Matter of J-G-P-*, 27 I&N Dec. 642, 643 (BIA 2019) (explaining that the immigration judge granted DHS’s motion and pretermitted the respondent’s application for cancellation of removal due to the respondent’s disqualifying criminal conviction); *Matter of Moreno-Escobosa*, 25 I&N Dec. 114 (BIA 2009) (reviewing questions of eligibility for a waiver of inadmissibility under former section 212(c) of the Act (8 U.S.C. 1182(c) (1994)) following an immigration judge’s pretermission of the respondent’s application). Second, the rule allows the applicant a “reasonable opportunity” to present evidence on his or her own behalf before pretermission as an immigration judge would not pretermit an application without either the time expiring for the alien to respond to DHS’s motion or the judge’s notice. Similarly, the alien would be afforded the opportunity to present evidence, including written testimony, on their own behalf prior to an immigration judge’s decision to pretermit an application, in accordance with section 240(b)(4)(B) and (c)(4) of the Act, 8 U.S.C. 1229a(b)(4)(B) and (c)(4).

Regarding the legislative history of IIRIRA, the Departments find that allowing pretermission in the manner set out in the proposed rule and this final rule does not conflict with the legislative history of IIRIRA. First, regarding the statement in the House report cited in the proposed rule, the Departments note that at that point, the House legislation would have imposed

a 30-day filing deadline for asylum applications. *See* H.R. Rep. No. 104-469, pt.1, at 259 (1996). Accordingly, the Departments find that congressional statements suggesting lower requirements for specificity in an asylum application were based on a concomitant suggestion that an application should be filed within 30 days and were correspondingly obviated by the longer one-year filing deadline ultimately enacted by IIRIRA. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Second, there is no discussion in the IIRIRA conference report that similarly encourages a condensed application for the sake of expediency. *See generally* H.R. Rep. No. 104-828 (1996) (conference report). Finally, the Departments reiterate that, as stated in the proposed rule, the alien would only be expected to provide “enough information to determine the basis of the alien’s claim for relief and if such a claim could be sufficient to demonstrate eligibility.” 85 FR at 36277 n.26. Indeed, the Departments expect that aliens who complete the Form I-589, Application for Asylum and for Withholding of Removal, in accordance with the instructions and provide all information requested by the form would provide sufficient information for the prima facie determination, just as it does in the context of a motion to reopen. *See INS v. Abudu*, 485 U.S. 94, 104 (1988) (“There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought.”) Further, an alien would be able to provide additional information as desired in response to the DHS motion or immigration judge notice regarding possible pretermission. In short, a requisite prima facie showing for an asylum application is not an onerous burden, and the Departments disagree with the commenter that allowing pretermission presents any additional mandatory burden on the alien beyond that which is already required by the asylum application itself.

### 3.2.2. Pretermission and the Regulations

*Comment:* Commenters stated that allowing pretermission of applications in the manner set out in the proposed rule violates the other regulatory provisions, including 8 CFR 1240.1(c), 8 CFR 1240.11(c)(3), and 8 CFR 1240.11(c)(3)(iii). Regarding 8 CFR 1240.1(c) (“The



immigration judge shall receive and consider material and relevant evidence . . . .”), commenters noted that pretermission would foreclose consideration of an asylum seeker’s testimony, which is often one of the most important pieces of evidence, as well as witness testimony. Regarding 8 CFR 1240.11(c)(3) (“Applications for asylum and withholding of removal so filed will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute.”), commenters emphasized the regulation’s requirement that an immigration judge’s decision be made “after an evidentiary hearing” and noted that the factual and legal issues in an asylum claim are often interconnected. Regarding 8 CFR 1240.11(c)(3)(iii) (“During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf”), commenters stated that pretermission would deprive the alien of the opportunity to meet his or her burden of proof through testimony, which may be sufficient for the alien to sustain the burden of proof without corroboration.

Commenters stated that allowing pretermission would make into surplusage the provisions of the regulations regarding the authority of the immigration judge to consider evidence (8 CFR 1240.11(c) and control the scope of the hearing (c)(3)(ii)).

*Response:* Allowing pretermission of asylum applications that fail to demonstrate a prima facie claim for relief or protection in the manner set out in the proposed rule and this final rule does not violate other provisions of the Departments’ regulations. As stated in the proposed rule, “[n]o existing regulation requires a hearing when an asylum application is legally deficient.” 85 FR at 36277. Commenters’ arguments to the contrary misconstrue the regulatory framework. The Departments agree that an alien’s testimony may be important evidence for a case. *See, e.g., Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (“The alien’s own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for

his fear.”).<sup>29</sup> But in cases where it is clear from the fundamental bases of the alien’s claim that the claim is legally deficient and the alien will not be able to meet his or her burden of proof, regardless of the additional detail or specificity that the alien’s testimony may provide, such testimony is not material or relevant and is not needed for the judge to be able to make a determination that the application is legally insufficient.<sup>30</sup>

Further, the rule does not conflict with the specific regulatory sections cited by the commenters. To the contrary, as discussed, *supra*, the rule is fully consistent with an immigration judge’s existing authority to take any action consistent with their authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, *id.* 1240.1(a)(1)(iv), and to regulate the course of a hearing, *id.* 1240.1(c). Further, the rule does not affect the instruction at 8 CFR 1240.1(c) for immigration judges to consider material and relevant evidence. If a case presents a prima facie claim, the case will proceed through the adjudicatory process consistent with current practice, including the submission and consideration of whatever material and relevant evidence is included in the record. Similarly, in that adjudication, the alien would be examined and allowed to present evidence and witnesses, consistent with 8 CFR 1240.11(c)(3)(iii). Finally, those applications that present a prima facie claim will proceed to an evidentiary hearing to resolve those factual and legal issues presented by the alien’s claim. *See* 8 CFR 1240.11(c)(3). Accordingly, pretermission works to supplement the existing regulations; it does not conflict with them, nor does it render them surplusage.

### 3.2.3. Pretermission and BIA Case Law

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<sup>29</sup> Nevertheless, despite commenters’ statements, the Departments emphasize that while an alien’s testimony *may* be sufficient to meet his or her burden of proof on its own, such testimony must be “credible,” “persuasive,” and refer to sufficient specific facts.” INA 240(c)(4)(B) (8 U.S.C. 1229(c)(4)(B)). Otherwise, the immigration judge may determine that the alien should provide corroborative evidence unless the alien can demonstrate that he or she does not have and cannot reasonably obtain the evidence. *Id.*; *see also Matter of E-P-*, 21 I&N Dec. 860, 862 (BIA 1997) (a finding of credible testimony is not dispositive as to whether asylum should be granted).

<sup>30</sup> The Departments also note that an alien may proffer written testimony as part of his or her response to either the DHS motion or judge’s notice regarding pretermission.

*Comment:* Commenters stated that allowing immigration judges to pretermite and deny asylum applications violates *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), and *Matter of Ruiz*, 20 I&N Dec. 91 (BIA 1989). Commenters disagreed with the Departments’ distinguishing *Matter of Fefe* in the proposed rule by noting that the underlying regulations interpreted by the BIA in *Matter of Fefe* are no longer in effect. *See* 85 FR at 36277. Instead, commenters stated that both the BIA and the Federal courts have noted that the current regulations at 8 CFR 1240.11 are substantially similar to the regulations at issue in *Matter of Fefe*. *See Matter of E-F-H-L-*, 26 I&N Dec. 319, 323 (BIA 2014) (noting that the current regulatory “language does not differ in any material respect from that in the prior regulations”), *vacated by* 27 I&N Dec. 226, 226 (A.G. 2018); *Oshodi v. Holder*, 729 F.3d 883, 898 (9th Cir. 2013) (“We reaffirm our holding, and the BIA’s own rule, that an applicant’s oral testimony is ‘an essential aspect of the asylum adjudication process’ and the refusal to hear that testimony is a violation of due process.”) (citing *Matter of Fefe*, 20 I&N Dec. at 118).

*Response:* As stated in the proposed rule, the Departments find that intervening changes to the regulations since its publication and the Attorney General’s vacatur of *Matter of E-F-H-L-* have superseded the BIA’s holding in *Matter of Fefe*. 85 FR at 36277. The BIA’s statement in *Matter of E-F-H-L-* that the current regulations “do not differ in any material respect” from those in effect in 1989 was simply not accurate, and the Departments find that the regulations today create a substantively different framework for adjudications than the regulations in 1989. Notably, the earlier regulations contained a general requirement that all applicants be examined in person by an immigration judge or asylum officer prior to the application’s adjudication. 8 CFR 208.6 (1988). Today, however, the regulations provide direct examples of times when no hearing on an asylum application is required: if no factual issues are in dispute and once the immigration judge has determined that the application must be denied pursuant to the mandatory criteria in 8 CFR 1208.14 or 1208.16. *See* 8 CFR 1240.11(c)(3) (“An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to

§ 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.”).

The procedures at 8 CFR part 208 at issue in *Matter of Fefe* were first amended in 1990. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674 (July 27, 1990) (final rule); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 FR 11300 (Apr. 6, 1988) (proposed rule). At that time, the Department clearly indicated that the purpose of the amendments<sup>31</sup> was to allow immigration judges and the BIA greater flexibility to “limit the scope of evidentiary hearings . . . to matters that are dispositive of the application for relief.” 53 FR at 11301. The Department of Justice explained that, “[i]f it is apparent upon the record developed during a proceeding that the alien is clearly ineligible for asylum or withholding of deportation, the Immigration Judge will be permitted to forego a further evidentiary hearing on questions extraneous to the decision, thus avoiding unnecessary and time consuming factual hearings on nondispositive issues.” *Id.*

Despite the BIA’s statements opining on the similarity of 8 CFR 1240.11(c) and 8 CFR 236.3 and 242.17 (1988)—which, as stated elsewhere have been vacated by the Attorney General—the Departments find that there are clear procedural differences between a general requirement to conduct a hearing and regulations that establish clear exceptions to a hearing requirement. In short, the Board’s decisions in *Matter of Fefe* and *Matter of E-F-H-L-*, in light of subsequent legal developments, simply do not stand for the propositions advanced by some commenters. *See Ramirez v. Sessions*, 902 F.3d 764, 771 n.1 (8th Cir. 2018) (“The current relevance of [*Matter of Fefe* and *Matter of E-F-H-L-*] is questionable. The regulations applied in *Matter of Fefe* were later rescinded and replaced. Further, *Matter of E-F-H-L-*, which reaffirmed

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<sup>31</sup> The amended regulatory provisions at 8 CFR 236.3, which regarded exclusion proceedings, and 8 CFR 242.17, which regarded deportation proceedings, are the precursors to current regulatory sections 8 CFR 1240.33 and 8 CFR 1240.49. *Cf.* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 450 (Jan. 3, 1997) (discussing the relocation of “old regulations which are still applicable to proceedings commenced prior to April 1, 1997 . . . to new parts of the regulations as separate subtopics”). Current 8 CFR 1240.11(c)(3) in turn follows this approach for the consideration of asylum applications during removal proceedings under section 240 of the Act (8 U.S.C. 1229a).

*Matter of Fefe*, was vacated [by the Attorney General] after the petitioner withdrew his application.”).

Further, even if the regulation conflicted with a prior interpretation by the BIA, the Attorney General, consistent with his authority to interpret the INA, may still issue the rule. INA 103(g), 8 U.S.C. 1103(g). The Departments are not bound by prior judicial interpretations of the Departments’ own regulations, as such interpretations are not interpretations of the INA’s statutory requirements.

*Matter of Ruiz*, is also distinguishable. There, the BIA held that an immigration judge could not require an alien who sought to reopen proceedings conducted in absentia to demonstrate a prima facie eligibility for asylum in conjunction with the motion to reopen. *Matter of Ruiz*, 20 I&N Dec. at 93. Instead, the BIA held that the alien must demonstrate a “reasonable cause for his failure to appear.” *Id.* But the change in the rule here—which allows immigration judges to pretermite and deny asylum applications that fail to demonstrate a prima facie claim for relief or protection—has no connection to what aliens must demonstrate in order to reopen a hearing conducted in absentia. The in absentia requirements are separately set out by the Act and regulations. *See* INA 240(b)(5)(C)(i)–(ii), 8 U.S.C. 1229a(b)(5)(C)(i)–(ii) (providing conditions for rescinding an in absentia removal order based on a motion to reopen); 8 CFR 1003.23(b)(4)(ii). There is no separate requirement to demonstrate further eligibility for any application for relief, consistent with *Matter of Ruiz*. Further, the equivalent statutory right to former section 236(a) of the Act, 8 U.S.C. 1226(a), which was at issue in *Matter of Ruiz*, is the alien’s rights in a proceeding under section 240(b)(4) of the Act, 8 U.S.C. 1229(b)(4), which, as discussed above, are not violated by allowing an immigration judge to pretermite and deny applications that fail to demonstrate a prima facie claim for relief or protection.

#### 3.2.4. Additional Concerns Regarding Pretermission

*Comment:* Multiple commenters expressed concern that the rule would allow immigration judges to dismiss asylum claims without a hearing, denying applicants the opportunity to appear

in court and offer testimony. Commenters emphasized that the rule is “extremely problematic” from a due process perspective and violates aliens’ Fifth Amendment due process rights. In support, commenters cited to case law discussing the right to testify and finding due process violations when that right is curtailed or limited. *See, e.g., Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (holding that there was a due process violation where the immigration judge deprived an asylum applicant of the opportunity to testify on remand). Commenters emphasized a quote from the chair of the American Immigration Lawyers Association’s asylum committee stating that “the pretermission authority was the most striking attack on due process in the proposal,” and noting that some immigration judges already have denial rates of 90 percent or higher.

*Response:* The commenters appear to misconstrue both the nature of the rule and the difference between issues of fact and issues of law. None of the examples provided by commenters involved situations in which an immigration judge pretermitted an application as legally deficient; rather, they involve situations in which an immigration judge initially allowed testimony but then cut-off questioning—or, in one case, disallowed testimony altogether—following a remand. In other words, the posture of the examples cited by commenters is one in which an alien had already demonstrated a prima facie case, making those examples inapposite to the rule. Commenters did not provide any examples where a properly supported legal pretermission—by itself—was found to be a due process violation, nor did commenters explain how analogous summary-decision or summary-judgment provisions in other contexts—*e.g.* 28 CFR 68.38 or Fed. R. Civ. P. 56—remain legally valid even though they, too, curtail an individual’s ability to testify or introduce evidence in proceedings. In short, the commenters’ concerns appear unconnected to the actual text of the rule and the applicable law.

The Departments disagree that allowing immigration judges to pretermit and deny asylum applications that do not show a prima facie claim for relief would violate applicants’ due process rights. The essence of due process is notice and an opportunity to be heard. *See*

*LaChance*, 522 U.S. at 266. Nothing in the rule eliminates notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38.

In addition, the rule would not require or expect aliens to meet their ultimate burden of proof to avoid pretermission; instead, the alien must only (per one common definition of “prima facie”) “establish a fact or raise a presumption, unless disproved or rebutted.” *Black’s Law Dictionary* (11th ed. 2019); *cf. Tilija v. Att’y Gen.*, 930 F.3d 165, 171 (3d Cir. 2019) (“To establish a prima facie claim, the movant ‘must produce objective evidence that, when considered together with the evidence of record, shows a reasonable likelihood that he is entitled to [asylum] relief.’” (citation omitted)). Further, the rule ensures the alien has an opportunity to respond to either the DHS motion or the judge’s notice regarding pretermission and provide the court with additional argument or evidence, including proffered written testimony, in support of the alien’s application.

*Comment:* Commenters emphasized that asylum seekers are vulnerable and often unrepresented and noted the low rates of representation for aliens in the Migrant Protection Protocols (“MPP”) in particular. Because many asylum seekers do not speak English, it is often difficult for them to navigate the complexities of the immigration system. Commenters specifically noted that it is hard for detained, unrepresented individuals to complete asylum applications because they are often required to use “unofficial translators” with whom they are not comfortable sharing personal information. Commenters stated that the immigration judge’s consideration of an alien’s response to the judge’s notice or DHS motion regarding pretermission does not alleviate the commenters’ concerns. Commenters argued that the same language barriers and other vulnerabilities would apply to both the response and the underlying Form I-589 application; thus, they contend, a response alone does not provide a “meaningful opportunity” to address misunderstandings or fully engage with the judge or DHS.

*Response:* As an initial point, the commenters’ assertion of a low rate of representation is inaccurate. The Departments note that a large majority (85 percent at the end of FY2020) of those asylum seekers who are in proceedings before DOJ—and who, in turn, could have an immigration judge pretermite their asylum applications—are represented in proceedings. EOIR, *Adjudication Statistics: Representation Rates* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>. Second, while the Departments agree with commenters that many asylum seekers’ first or preferred language is a language other than English, the Departments find that it is reasonable to expect aliens to utilize translators or other resources in order to complete the Form I-589 application in accordance with the regulations and instructions, which require that the form be completed in English. *See* 8 CFR 208.3(a), 1208.3(a) (noting that an applicant must file an I-589 “in accordance with the instructions on the form”); Form I-589, Application for Asylum and for Withholding of Removal, Instructions, 5 (Sept. 10, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> (“Your answers must be completed in English.”). Moreover, existing regulations already require that foreign-language submissions be translated into English, *see* 8 CFR 103.2(b)(3), 1003.33, so it is unclear how a non-English-speaking alien could submit evidence without a translator in any case.

The Departments thus disagree that aliens would be unable to answer the questions on the Form I-589 with enough specificity to make a prima facie claim for relief or protection. The Departments further note that aliens whose applications are deficient will be able to provide additional argument or evidence in response to either DHS’s motion to pretermite or the judge’s sua sponte notice. *See* 8 CFR 1208.13(e) (as amended). Despite commenters’ concerns that this process is insufficient, this is the same process that is regularly used in immigration court, including other times when an alien’s ability to seek a particular form of relief may be foreclosed by DHS filing a motion to pretermite. 85 FR at 36277.



*Comment:* Commenters stated that allowing immigration judges to pretermite applications would violate the duty of the immigration judge under the Act and the regulations to develop the record, particularly for cases where the alien appears pro se and for cases involving UACs. *See, e.g., Jacinto v. I.N.S.*, 208 F.3d 725, 734 (9th Cir. 2000) (“[U]nder the statute and regulations previously cited, and for the reasons we have stated here, immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel . . .”).

*Response:* Allowing immigration judges to pretermite and deny asylum applications that do not demonstrate a prima facie claim for relief or protection does not violate the immigration judge’s responsibility to develop the record. Instead, the rule comports with this duty by requiring immigration judges to provide notice and an opportunity to respond before pretermiting any application. Such notice should provide the parties with information regarding the judge’s concerns, and should elicit relevant information in response. Similarly, in the context of DHS motions to pretermite, the immigration judge would consider the alien’s response to the motion and may solicit additional information, if needed, for review.

*Comment:* Commenters stated that pretermission conflicts with adjudication guidance in UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status*, which provides that, “while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.” UNHCR, *Handbook On Procedures and Criteria for Determining Refugee Status*, ¶ 196 (1979) (reissued Feb. 2019), <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>. As a result, commenters stated that allowing immigration judges to pretermite and deny applications that do not demonstrate a prima facie claim does not meet the United States’ international obligations and does not align with congressional intent to follow the Refugee Convention.

*Response:* Commenters' reliance on guidance from UNHCR is misguided. UNHCR's interpretations of (or recommendations regarding) the Refugee Convention and Protocol, including the UNHCR Handbook, are "not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). "Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Id.* at 427–28 (citation and internal quotations omitted). Further, to the extent such guidance "may be a useful interpretative aid," *id.* at 427, it would apply only to statutory withholding of removal, which is the protection that implements Article 33 of the Convention. *Cf. R-S-C v. Sessions*, 869 F.3d 1176, 1188, n.11 (10th Cir. 2017) (explaining that "the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule"). And although the rule would allow pretermission of Form I-589 applications submitted for withholding of removal or CAT protection, such pretermission does not necessarily constrict or limit the population of aliens that may qualify for such protection. Instead, it simply provides an efficiency for the adjudication of those claims that do not demonstrate a baseline prima facie eligibility for relief.

*Comment:* Commenters emphasized that the rule forces the entire eligibility decision to be based on the Form I-589 and supporting documents, noting that this could be problematic if the applicant does not initially possess all of the necessary documentation. Commenters also claimed that premitting an application while the individual is still working to gather paperwork would be "grossly unfair" and contended that, if the rule is adopted, it must provide a "working period" after submission during which an application cannot be premitted. Commenters also noted that unrepresented individuals may have their applications terminated prior to finding representation who could help them supplement an application that was originally lacking or insufficient.

Other commenters noted that there are many cases that initially appear to lack eligibility but later qualify for asylum after testimony is taken and additional facts are uncovered. Commenters referenced *Matter of Fefe*, 20 I&N Dec. 116, and *Matter of Mogharrabi*, 19 I&N Dec. 443, noting that there are often discrepancies between the written and oral statements in an asylum application that can only be resolved through direct examination.

*Response:* Commenters again appear to misstate the rule, to misunderstand the difference between issues of fact and issues of law, and to misunderstand the difference between a prima facie legal showing and a full consideration of the merits of a case. The rule requires simply a prima facie case for relief; it does not require that every factual assertion be supported by additional corroborative evidence. If the alien’s application for relief states sufficient facts that could support his or her claim for relief or protection, the immigration judge would not pretermitt the application solely because some additional documentation is still being gathered.<sup>32</sup> Accordingly, the Departments disagree that a minimum “working period” before which an application may not be pretermitted is needed.

Regarding applications that at first appear insufficient but are later bolstered through additional information, the Departments again emphasize that the rule provides the alien with the opportunity to respond to either the DHS motion or the judge’s notice regarding pretermisssion. The Departments expect that such a response would be used to provide additional information, which the immigration judge would consider prior to making any final determination regarding pretermisssion. Moreover, in both *Matter of Fefe* and *Matter of Mogharrabi*, there was no question about whether the alien had stated a prima facie claim. In the former, the immigration

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<sup>32</sup> Many commenters raised this issue specifically for particular social group asylum claims, noting the fact-intensive nature of the social distinction element—i.e. that it be recognized by the society in question—required for such groups. See *S.E.R.L.*, 894 F.3d at 556 (“And that must naturally be so, once it is given that social distinction involves proof of societal views. What those views are and how they may differ from one society to another are questions of fact”). The Departments recognize that situations in which particular social group asylum claims may be pretermitted due to a failure to make a prima facie showing of the social distinction element are likely to be rare. Nevertheless, the immutability and particularity requirements are not necessarily factbound—though they may be in discrete cases—and the failure of an alien to make a prima facie showing that a proposed particular social group consists of a characteristic that is immutable (or fundamental) or is defined with particularity may warrant pretermisssion of the claim in appropriate cases.

judge raised doubts over the alien’s credibility—not over the legal basis of the claim—that were not resolved because the alien did not testify. In the latter, the Departments see no indication that the alien could not have stated a prima facie claim.

Finally, an immigration judge may only pretermit an application that is legally deficient. Thus, the gathering of additional facts that do not bear on the legal cognizability of the claim—for example, gathering the specific names of every speaker at a political rally—is not required by the rule to avoid pretermission.

*Comment:* Commenters also criticized the 10-day notice period, claiming it is “unreasonably short,” especially considering the COVID-19 pandemic.

*Response:* The 10-day period is consistent with current EOIR practice, where it has worked well. See EOIR, *Immigration Court Practice Manual* at D–1 (July 2, 2020), <https://www.justice.gov/eoir/page/file/1258536/download>. The Departments disagree that the current COVID-19 situation affects the reasonableness of the 10-day deadline as filings can be submitted by mail and, in some locations, online. See EOIR, *Welcome to the EOIR Courts & Appeals System (ECAS) Information Page*, <https://www.justice.gov/eoir/ECAS>. Further, if an immigration court location is unexpectedly closed on the day of the deadline, the deadline is extended until the immigration court reopens. See EOIR, *PM 20-07: Case Management and Docketing Practices*, 2 n.1 (Jan. 31, 2020), <https://www.justice.gov/eoir/page/file/1242501/download>. Moreover, many non-detained hearings continue to be postponed due to COVID-19 rendering deadlines largely malleable until hearings resume.

*Comment:* Commenters alleged that the rule would result in a higher rate of pretermission for unrepresented individuals because these applicants would be unfamiliar with the “magic language” needed to survive a motion to pretermit. As a result, commenters claimed that the rule

violates the Fifth and Sixth Amendments, and concurrently violates section 240(b)(4)(A) and (B) of the Act, 8 U.S.C. 1229a(b)(4)(A) and (B).<sup>33</sup>

*Response:* Commenters are incorrect that the rule violates an alien’s right to counsel under section 240(b)(4)(A) of the Act, 8 U.S.C. 1229a(b)(4)(A), and the Sixth Amendment. First, section 240(b)(4)(A) of the Act, 8 U.S.C. 1229a(b)(4)(A), provides that aliens “shall have the privilege of being represented, at no expense to the government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.” No provision of this rule would limit an alien’s ability to obtain representation as provided by the INA. Second, the Sixth Amendment right to counsel does not apply in immigration proceedings, which are civil, not criminal, proceedings. *See, e.g., Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).<sup>34</sup>

Commenters are similarly incorrect that the rule violates the equal protection component of the Fifth Amendment’s Due Process Clause because unrepresented aliens will be more likely to have asylum applications pretermitted than similarly situated represented aliens. First, commenters’ concerns that the rule will have a disparate impact are speculative. Second, similar procedures in other civil proceedings—such as the summary decision procedures of 28 CFR 68.38 or summary judgment under the Federal Rules of Civil Procedure— do not violate the Fifth Amendment. Third, even if the commenters were correct that the rule has a discriminatory impact, the Departments find it would not violate the Fifth Amendment’s equal protection

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<sup>33</sup> Commenters did not provide further explanation regarding how the rule allegedly violates section 240(b)(4)(B) of the Act (8 U.S.C. 1229a(b)(4)(B)), which provides that:

the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief under this chapter.

This rule does not affect any procedures that relate to aliens’ rights under this provision of the INA, and, accordingly, the Departments need not respond further to this point.

<sup>34</sup> Although the Sixth Amendment’s right to counsel does not apply in immigration proceedings, some courts have held that a constitutional right to counsel in immigration proceedings applies as part of the Fifth Amendment’s due process clause. *See, e.g., Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019) (“Both Congress and our court have recognized the right to retained counsel as being among the rights that due process guarantees to petitioners in immigration proceedings.”). Nevertheless, neither the proposed rule nor this final rule violates such a right to counsel as the rule does not amend any procedures related to an alien’s right to obtain counsel of his or her choosing at no government expense.

guarantee because the rule does not involve a suspect classification or burden any fundamental right. *See Heller v. Doe*, 509 U.S. 312, 319 (1993) (holding that “a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity”).

Allowing the pretermission of applications would enhance judicial efficiency by no longer requiring a full hearing for applications that are legally deficient on their face. There continue to be record numbers of both pending cases before EOIR<sup>35</sup> and asylum applications<sup>36</sup> filed annually. Accordingly, the Departments seek to most efficiently allocate EOIR’s limited adjudicatory capacity in order to decide cases in a timely manner, including granting relief to aliens with meritorious cases as soon as possible. Accordingly, there is at least a rational basis for allowing pretermission of asylum applications in this manner. *Cf. DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1995) (“[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. . . . Under this minimal standard of review, a classification is accorded ‘a strong presumption of validity’ and the government has no obligation to produce evidence to sustain its rationality.” (internal citations omitted)).

*Comment:* Commenters also alleged that the pretermission of asylum applications is incompatible with federally established pleading standards and “would be an abrupt change from decades of precedent and practice before the immigration court.” Commenters provided a hypothetical chain of events to illustrate this alleged violation of pleading standards and cited to *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007)).

*Response:* The Federal Rules of Civil Procedure do not apply in immigration court. *See* Fed. R. Civ. P. 81 (setting out the applicability of the rules); *see also* 8 CFR Part 1003, Subpart C

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<sup>35</sup> EOIR, *Adjudication Statistics: Pending Cases* (Apr. 15, 2020), <https://www.justice.gov/eoir/page/file/1242166/download> (1,122,697 pending cases as of the second quarter of FY2020)

<sup>36</sup> EOIR, *Adjudication Statistics: Total Asylum Applications* (Apr. 15, 2020), <https://www.justice.gov/eoir/page/file/1106366/download> (120,495 asylum applications filed as of the second quarter of FY2020)

(setting out the immigration court rules of procedure). Accordingly, commenters' reliance on cases that interpret Rule 8(a) of the Federal Rules of Civil Procedure are not applicable to immigration court. Moreover, the commenters' comparisons to a pleading standard are inaccurate as the decision to pretermite an application is akin to a summary judgment decision, not a pleading determination. *Cf.* F. R. Civ. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). In order to ensure the immigration judge has as much information as possible about the underlying claim, the rule ensures the applicant has the opportunity to respond to the possible pretermission of his or her application, either as a response to a DHS motion to pretermite or a response to the immigration judge's notice of possible pretermission.

*Comment:* Commenters contended that the rule, in combination with the Immigration Court Performance Metrics, incentivizes immigration judges to pretermite asylum applications in order to fulfill case completion requirements.

*Response:* The Departments strongly disagree with the commenters' underlying premise, namely that immigration judges are unethical or unprofessional and decide cases based on factors other than the law and the facts of the cases. Immigration judges exercise "independent judgment and discretion" in deciding cases, 8 CFR 1003.10, and are expected to "observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities," EOIR, *Ethics and Professionalism Guide for Immigration Judges* at 1 (2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>. Further, it is well-established that "[t]he administrative process is entitled to a presumption of regularity," *Int'l Long Term Care, Inc. v. Shalala*, 947 F. Supp. 15, 21 (D.D.C. 1996), and commenters provide no evidence for the bald assertion that immigration judges will ignore applicable law and the evidence in each case simply in order to pretermite the case. *See*

also *United States v. Chemical Found.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”). To the contrary, in FY 2019, the first full FY after immigration judge performance measures went into effect, not only did most non-supervisory immigration judges working the full year meet the case completion measure without any difficulty, *see* EOIR, *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019>, but complaints of immigration judge misconduct actually declined slightly from the prior FY, *see* EOIR, *Adjudication Statistics: Immigration Judge Complaints*, <https://www.justice.gov/eoir/page/file/1104851/download>, even though the total number of immigration judges increased 12 percent, *see* EOIR, *Adjudication Statistics: Immigration Judge Hiring*, <https://www.justice.gov/eoir/page/file/1242156/download>.

Allowing pretermission of Form I-589 applications that do not establish a prima facie claim for relief or protection under the law provides immigration judges with a mechanism to improve court efficiency by clarifying that there need not be a full merits hearing on those cases that present no legal questions for review, allowing them to devote more time to cases in which facts are at issue. There is no basis for the assumption that the rule would inappropriately incentivize immigration judges to pretermitt applications solely to fulfill case-completion goals. As noted, *supra*, some immigration judges already pretermitt legally deficient applications, and the Departments are unaware of any link between that action and performance metrics; in fact, immigration judges have pretermitted legally deficient asylum applications since at least 2012, *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014), which was several years before performance measures were implemented.

Moreover, assuming, *arguendo*, there were such an incentive, it would be counter-balanced by the performance measure for an immigration judge’s remand rate. In other words,



an immigration judge who improperly pretermitted applications in violation of the law solely in order to complete more cases would have those cases remanded by the Board on appeal which, in turn, would cause the immigration judge's remand rate to exceed the level set by the performance measures. In short, there is no legal, factual, or logical reason to believe that codifying an immigration judge's authority to pretermite legally deficient applications and the existence of immigration judge performance evaluations will incentivize immigration judges to violate the law in their decision making.

*Comment:* Commenters emphasized that asylum applications are governed by the law at the time of adjudication rather than the time of filing and expressed concern that the pretermission of applications for lack of a prima facie showing of eligibility forces immigration judges and asylum officers to become "soothsayers."

*Response:* Allowing immigration judges to pretermite and deny applications that do not present a prima facie claim for relief or protection does not conflict with this point. If the judge determines that pretermission is appropriate, that decision would be based on the law and regulations in place at that point, and the decision to pretermite is the adjudication of the application.

*Comment:* Commenters questioned the effect the rule will have on the asylum clock, especially if a decision affecting eligibility is abrogated by a higher court after an application was filed and pretermitted; one commenter expressed concern that the rule does not specify "when in the process DHS or the judge can move." One commenter emphasized that "[a]ny final rule which is eventually published should consider how the asylum clock will operate, and should provide clear instructions which attorneys and their clients can rely on."

*Response:* The Departments note that USCIS recently published a final rule, Asylum Application, Interview, and Employment Authorization for Applicants, that eliminates the asylum clock.<sup>37</sup> However that rule is currently the subject of ongoing litigation and portions of

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<sup>37</sup> 85 FR 38532, 39547.

the rule are subject to a preliminary injunction, as applied to two plaintiff organizations.<sup>38</sup>

Regardless, as stated in the proposed rule, an immigration judge who determines that an asylum application that fails to demonstrate prima facie eligibility for relief or protection under applicable law may “pretermite and deny” such application. *See* 8 CFR 1208.13(e). Accordingly, a decision to pretermite and deny would have the same asylum clock effects as any other denial of an asylum application by the immigration judge.

*Comment:* Commenters alleged that the rule would greatly decrease efficiency in the asylum process, as the number of cases in which a hearing is denied would “skyrocket” and the majority of these respondents would appeal to the BIA. Commenters noted the BIA’s current backlog and the increased delay in issuing briefing schedules and decisions.

*Response:* Allowing immigration judges to pretermite and deny asylum applications that do not demonstrate a prima facie claim for relief or protection will increase, not decrease, efficiencies for DOJ. Commenters’ predictions of how many cases will be premitted under these changes are speculation, as the Departments do not have data on the underlying bases for denials currently, which would be required to accurately predict how many might be premitted in the future. Moreover, as fewer than 20 percent of asylum applications are granted even with a full hearing, *see* EOIR, *Asylum Decision Rates*, <https://www.justice.gov/eoir/page/file/1248491/download>, and many of the ones not granted are appealed already, there is likely to be little operational impact on the BIA.<sup>39</sup> In contrast, premitting legally deficient claims will improve efficiency for immigration courts by allowing immigration judges to screen out cases that do not demonstrate prima facie eligibility and, thus, allowing potentially meritorious applications to progress more expeditiously to individual hearings.

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<sup>38</sup> *Casa de Maryland v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165, (D. Md. Sept. 11, 2020) (order granting preliminary injunction).

<sup>39</sup> The Departments note that DOJ has also recently taken steps to improve adjudicatory efficiency at the BIA. *See* EOIR, *Case Processing at the Board of Immigration Appeals* (Oct. 1, 2019), <https://www.justice.gov/eoir/page/file/1206316/download>.

*Comment:* One commenter noted that there are particular signatures on the asylum application which can only be signed by the applicant at the final hearing and claimed that pretermission is “non-sensical” because the application will not yet be complete.

*Response:* The Departments disagree with commenters’ concerns that asylum applications may not be pretermitted because a signature is required by the applicant at the final hearing. The Departments believe that the commenters are referring to the signature in Part G of the Form I-589, which is most often signed by the alien at the beginning of the merits hearing on the alien’s asylum application and in which the alien swears that the application’s contents are true and acknowledges the consequences of submitting a frivolous application. Accordingly, the signature in Part G of the Form I-589 is related to a possible frivolousness finding and the attendant consequences.

Moreover, for the purposes of determining whether to pretermite an application, whether or not the immigration judge has had the applicant sign in Part G, the applicant signs in Part D at the time the application is completed. The signature in Part D is the alien’s certification under penalty of perjury that the application and any evidence submitted with it are “true and correct,” in addition to another notice of the consequences of filing a frivolous application and other activities. Given the alien’s signature in Part D that the application is “true and correct,” the Departments believe that the application is sufficient for the purposes of possible pretermission even without a signature in Part G.

*Comment:* Commenters stated that allowing pretermission will inevitably violate the confidentiality obligations for asylum applicants, speculating that the immigration judge, alien, and DHS counsel will engage in inappropriate conversations regarding the specifics of an asylum application in front of other people during master calendar hearings.

*Response:* With few exceptions, most immigration hearings are open to the public. 8 CFR 1003.27. Regulations further note that “[e]videntiary hearings on applications for asylum or withholding of removal will be open to the public unless the alien expressly requests that the

hearing be closed.” 8 CFR 1240.11(c)(3)(i). A master calendar hearing is not an evidentiary hearing. *See Immigration Court Practice Manual*, ch. 4.15(a), <https://www.justice.gov/eoir/page/file/1258536/download> (“Master calendar hearings are held for pleadings, scheduling, and other similar matters.”). Further, an evidentiary hearing is designed to “resolve factual matters in dispute,” 8 CFR 1204.11(c)(3), which would necessarily exclude such a hearing from the ambit of pretermission. Accordingly, there is no reason that the specifics of an asylum application would be discussed at a master calendar hearing, and even if they were, an immigration judge may close the courtroom as appropriate to protect the parties. 8 CFR 1003.27(b).

*Comment:* Commenters noted that the Departments are required to comply with Executive Orders 12866 and 13653, which together direct agencies to evaluate the costs and benefits of alternative methods and to select the approach that maximizes net benefits. Commenters contended that the rule is “wholly unconcerned” with calculating the costs and benefits of the pretermission of asylum applications or reducing costs to Federal government agencies.

In particular, commenters expressed concern about costs of the rule possibly eliminating what the commenters referred to as the current, more flexible “redlining” procedure in favor of pretermission. The commenters explained that “redlining” allows the alien to update and edit the asylum application after it is filed “up until the point of decision.”

Commenters disagreed that the rule will create efficiencies, arguing instead that the rule will “increase administrative burden, expense, and processing time by effectively creating two distinct opportunities for appeals to the BIA, including: (1) appeal from the IJ’s decision to pretermit; and (2) appeal on the merits after the IJ’s decision to pretermit is overturned.”

*Response:* The Office of Information and Regulatory Affairs, in conducting its review of the proposed rule, concluded that the Departments complied with Executive Orders 12866 and 13653, as set out in section V.D of the proposed rule. 85 FR at 36289–90. The Departments’

consideration included all provisions of the proposed rule, including the changes to 8 CFR 1208.13 regarding pretermission of applications.

Further, as stated above, the Departments emphasize that allowing pretermission of applications will increase efficiencies by allowing immigration judges to complete the adjudication of certain legally insufficient asylum applications earlier in the process, which in turn leaves additional in-court adjudication time available for those applications that may be meritorious. This change would not prevent aliens from amending or updating applications that are pending a decision by the immigration judge, including a decision on pretermission. In addition, the Departments dispute the commenters' assumption that immigration judge decisions to pretermit an application will be overturned. Immigration judges apply the immigration laws and would only pretermit applications that fail to demonstrate a prima facie case for eligibility for relief—in other words, that the application could be sufficient to establish eligibility for relief. Applications that are facially deficient in this manner would not comply with the applicable law and regulations, and, as such, the Departments would not expect such decisions to be overturned on appeal.

#### 4. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal<sup>40</sup>

##### 4.1. Membership in a Particular Social Group

*Comment:* One organization noted generally that the rule denies asylum to individuals fleeing violence and persecution. Commenters noted that the inclusion of “particular social group” in the statute was designed to create flexibility in the refugee definition so as to capture individuals who do not fall within the other characteristics enumerated in section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), and to ensure that the United States provides protection in accordance with its treaty obligations. Commenters argued that the rule's narrowing of

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<sup>40</sup> As an initial matter, the Departments note that commenters' discussion on these points often referred solely to asylum claims. Where relevant, however, the Departments have also considered the comments in regards to statutory withholding of removal.

particular social group has been rejected by the Federal courts as contrary to congressional intent to align U.S. refugee law with the Convention relating to the Status of Refugees and its 1967 Protocol. *See Flynn v. Sec’y of Health, Ed. & Welfare*, 344 F. Supp. 94, 96 (E.D. Wis. 1972). Another organization stated that, by denying the most common grounds of particular social group membership, the rule “abridges U.S. obligations under the Refugee Convention . . . which affords asylum seekers the opportunity to explain why they fit into a protected group.” The organization also claimed that the rule breaches the United States’ commitment to nonrefoulement, noting that the United States has committed itself to this principle as a party to the Refugee Protocol, the CAT, and customary international law. Commenters emphasized a quote from the UNHCR stating that “[t]he term membership of a particular social group should be read in an evolutionary manner.”

Another organization noted that while the phrase “particular social group” in the Refugee Convention does not apply to every person facing persecution, the Convention requires only that a social group not be “defined exclusively by the fact that it is targeted for persecution.” According to the Convention, “the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.” As a result, the organization contended that the Convention allows particular social groups that do not exist independently of the persecution.

The organization claimed the NPRM takes the opposite approach, defining “circular” not only as particular social groups exclusively defined by persecution but also as those that do not exist independently of the persecution claim. The organization noted that, in doing so, the NPRM seeks to adopt the circularity analysis in *Matter of A-B-*, 27 I&N Dec. 316, which treats any group partially defined by the persecution of its members as circular. The organization alleged that this interpretation of circularity is a “dramatic departure” from longstanding precedent, noting that the courts of appeals have held that a particular social group is not circular unless it is defined “entirely” by persecution. The organization claimed that the Departments do not acknowledge or justify this “departure,” which makes the rule arbitrary. The organization

also claimed that the Federal appellate cases cited in the rule have the same effect. In addition, the organization emphasized that the BIA has long accepted particular social groups with references to the persecution bringing asylum seekers to the United States.

One organization claimed the rule's requirement that the cognizable group must exist independently from the persecution abrogates the following specific particular social groups already recognized by circuit courts: former gang members, *Arrazabal v. Lynch*, 822 F.3d 961 (7th Cir. 2016); former members of the Kenyan Mungiki, *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); defected KGB agents, *Koudriachova v. Gonzales*, 490 F.3d 255 (2d Cir. 2007); young Albanian women targeted for prostitution, *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc); former child guerilla soldiers in Uganda, *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003); individuals targeted by Pakistani terrorist groups, *Rehman v. Att'y Gen. of U.S.*, 178 F. App'x 126 (3d Cir. 2006), and the Taliban, *Khattak v. Holder*, 704 F.3d 197 (1st Cir. 2013); and Ghanaians returning from the United States, *Turkson v. Holder*, 667 F.3d 523 (4th Cir. 2012).

Another organization claimed that, under international guidelines, the "common characteristic" and "socially visible" elements of a particular social group are meant to be "disjunctive," requiring proof of either one or the other. The organization also alleged that the "particularity" requirement is unfounded, noting that, according to UNHCR, the size of the group is irrelevant in determining whether a particular social group exists.

Similarly, one organization noted that the rule would require a particular social group to be "defined with particularity" and "recognized as socially distinct in the society at question," claiming that the NPRM fails to provide any reason for codifying these standards. The organization alleged that the particularity and social distinction requirements "cut across" each other, noting the BIA's interpretation that an asylum seeker "identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity" and claiming that this has caused the BIA to essentially end asylum grants based on particular social groups that have not been previously approved.

Multiple commenters called the rule “unwise and discriminatory.” Commenters alleged that the rule is designed to prevent individuals from Central America from receiving asylum and claimed that the rule evidences the Departments’ intent to prevent “whole classes of persons” from claiming asylum based simply on “the macro-level characteristics of their country of origin.” One organization representing DHS employees criticized the Departments for creating a rule based on the belief that asylum seekers are engaging in “gamesmanship” within the United States legal system, a premise, the organization claimed, that is “contrary to our experiences as adjudicators.” The organization stated that several of the social groups “slated for dismissal” in the rule “encompass a wide cross-section of potentially successful asylum claims.” The organization also alleged that the rule creates a “rebuttable presumption” that asylum claims based on any of the “broadly enumerated particular social groups” are insufficient unless “more” is provided, but claimed the rule fails to define what is actually needed for a successful claim.

Another organization alleged that the NPRM’s proposal would violate due process, claiming that the private interest at stake—preventing the violence or torture that would occur due to refoulement—is “the most weighty interest conceivable.” The organization contended that the government’s countervailing interest is “nonexistent” due to the NPRM’s silence, also alleging that “working with pro se asylum seekers” imposes a minimal burden on the government.

One organization claimed that the adjudication of asylum applications has become “increasingly politicized” over the past three years through the Attorney General’s self-certification of cases. The commenter noted that the Attorney General has issued nine decisions in the past three years that restrict eligibility of relief for noncitizens (with four additional self-certified decisions pending), while only four precedential decisions were issued during the eight years of the previous administration. The organization stated that, rather than clarifying existing definitions, the rule “virtually eliminates particular social group as a basis for asylum.”



One organization emphasized that if the Departments choose to codify the prerequisites to particular social groups as stated in the rule, they must “consider all reasonable alternatives presented to” them. Multiple organizations suggested the Departments adopt the *Matter of Acosta* standard for the analysis of particular social group claims, meaning that “particular social group” should be interpreted consistently with the other four protected characteristics laid out in the INA. 19 I&N Dec. 211, 233 (BIA 1985), *abrogated in part on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). One organization emphasized that this definition is simple, straightforward, and could be understood by pro se asylum seekers.

Another organization alleged that the Departments failed to consider adopting the UNHCR definition of particular social group, which includes both immutability and the basic requirement that the group “be perceived as a group by society.” The organization contended that this standard, like the *Matter of Acosta* definition, is reasonable, emphasizing that it remains “significantly closer to the other grounds for asylum in the INA” than the Departments’ proposal.

One organization expressed concern that the rule would codify the “restrictive definition” of particular social group announced in *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014), noting that the rule shortens the definition set forth in *Matter of Acosta*. The organization also contended that the rule misconstrues the concept of particular social group by inserting unrelated legal issues into the definition, which the organization believes would lead to greater confusion for all parties involved. The organization emphasized that each particular social group claim should be evaluated on a “case-by-case basis” instead of being subjected to general rules that would result in “blanket denials.” Another organization stated that the Attorney General’s own decision in *Matter of A-B-*, 27 I&N Dec. 316, is based on the necessity of a “detailed, case-specific analysis of asylum claims” and highlights the BIA’s previous errors in “assessing the cognizability of a social group without proper legal analysis.” One organization asserted that the rule appears to codify the wrongly-decided *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), and “takes those restrictions even further.”

Another organization emphasized that the circuit courts have disagreed on “at least a portion” of the definition of particular social group. One organization noted that elements of the rule’s proposed definition have met an “uneven fate” in the courts of appeals, with many courts finding at least one of the provisions inconsistent with the statutory text. Another organization contended that the circuit courts cannot be “overruled” by either this rule or “the Attorney General’s attempt to devise a new definition of ‘particular social group’ that intends to cut off certain claims” that have been previously recognized by the circuit courts and the BIA. One organization noted that, while the NPRM states in its first footnote that agencies have the authority to re-interpret ambiguous statutory phrases, it fails to explain how the definitions at issue arise from an ambiguous term. Another organization claimed that until the Supreme Court resolves the disagreements surrounding the particular social group definition, the Departments have no authority to “overrule” the circuit courts’ interpretation of this term.

Another organization alleged that the rule would “carve out” a laundry list of particular social groups toward which the administration has shown “pervasive, unlawful hostility” without any effort to ground these exceptions in the Departments’ statutory authority, claiming this is a violation of the Administrative Procedure Act (“APA”). One organization contended that “[t]he use of such brazen ipse dixit without more renders each entry on the list arbitrary,” also claiming that this impedes the Departments’ goal of consistency. The organization claimed the Departments failed to consider whether their “laundry list” of generally-barred particular social groups would result in the erroneous denial of meritorious claims.

Commenters claimed that one of the “most unfair” aspects of the rule is that it would require asylum seekers to state every element of a particular social group with exactness before the immigration judge. Commenters expressed particular concern with the portion of the rule stating that a failure to define a formulation of a particular social group before a judge constitutes a waiver of any such claim under the Act, including on appeal. One organization noted that this portion of the rule would disproportionately impact unrepresented asylum seekers, particularly

those subjected to MPP, and would “forever punish asylum seekers who were the victims of ineffective assistance of counsel.”

Another organization alleged that the combination of performance goals and interminable dockets will result in “the demise of due process in Immigration Court for pro se litigants.” The organization noted the importance of the “motions practice” in a legal system that is committed to due process, emphasizing the long-standing practice of allowing motions to reopen in the context of ineffective assistance of counsel. Another organization stated that, over the past five years, between 15 percent and 24 percent of all asylum seekers have been unrepresented by counsel, emphasizing that these individuals do not have training in United States asylum law, often speak little to no English, and are unfamiliar with the intricate rules surrounding particular social groups. One organization expressed specific concern for refugees. Another organization claimed that the rule provides no reasoning for its “expansion of the punitive effect of waiver to encompass ineffective assistance claims,” claiming this is against public policy and is also arbitrary and capricious; at least one other organization emphasized this point as well.

One organization expressed particular concern for members of the LGBTQ community, emphasizing that, due to the nature of the “coming out and transitioning process,” the formulation of a particular social group may change over time, also noting that a refugee may not know right away that he or she is HIV positive. The organization claimed that the rule, “disregards the reality of LGBTQ lives” and will cause LGBTQ asylum seekers to be sent back to danger merely because they were unable to “come up with the right verbiage to describe the complicated process of coming out and transitioning.” The organization claimed this issue is exacerbated by the fact that many of these individuals are unrepresented and do not speak English. Another organization noted that the INA requires exceptions to the one-year filing deadline for “changed and extraordinary circumstances,” INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), emphasizing that this is particularly important for this category of asylum seekers.

One organization claimed the rule would make it especially difficult for African asylum seekers to qualify for asylum based on particular social group membership. The organization also expressed concern for women survivors of female genital cutting (“FGC”), alleging that these individuals would not know to include this fact as part of a gender-based particular social group claim. The organization claimed it would be “a miscarriage of justice” to preclude these women from presenting claims.

One organization alleged that the rule would make it “almost impossible” for children, particularly those from Central America or Mexico, to obtain asylum protection based on membership in a particular social group. The organization alleged that the rule’s barring of a particular social group claim that was not initially raised in the asylum application (or in the “record” before an immigration judge) raises “serious due process concerns” for children, as many of the children arriving in the United States have suffered immense trauma and may not be able to discuss their experiences for quite some time. The organization expressed particular concern for unaccompanied children, noting they are often unable to discuss the harm they experienced in their home country until they have spent time with a trusted adult. The organization noted that, for many children, the asylum process is the first time they ever discuss their experiences, claiming the rule “is unrealistic and an untenable burden for most children.”

Commenters also stated that an asylum seeker’s life should not depend on his or her “ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements.” One organization stated that “[a]pplying for asylum is not a word game; asylum seekers’ lives are on the line with every application that an adjudicator decides.” Multiple commenters claimed that asylum officers and immigration judges have a duty to help develop the record. One organization stated that the Departments should rely on the decisions of EOIR and Article III courts rather than on the expertise of asylum seekers. Finally, one organization expressed concern that this portion of the rule contains no exceptions for minors or individuals who are mentally ill or otherwise incompetent, stating that holding these respondents

to this kind of legal standard violates their rights under the Rehabilitation Act. *See* 29 U.S.C. 794; *see also Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

*Response:* The Departments disagree with general comments that the rule would deny asylum to all individuals fleeing violence and persecution. The Departments note that asylum protection is not available to every applicant who is fleeing difficult or dangerous conditions in his or her home country. To qualify for asylum, an applicant must demonstrate, among other things, that the feared persecution would be inflicted “on account of” a protected ground, such as membership in a particular social group. *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42) (defining “refugee” as a person who, inter alia, has suffered “persecution or a well-founded fear of persecution on account of . . . membership in a particular social group”). Even accepting that the term “particular social group” was intended to create flexibility in the refugee definition, the contours of that flexible term are clearly ambiguous and within the purview of the Departments to decide. *See, e.g., Matter of A-B-*, 27 I&N Dec. at 326 (“As the Board and the Federal courts have repeatedly recognized, the phrase ‘membership in a particular social group’ is ambiguous.” (collecting cases)). Accordingly, the Departments are establishing clear guidelines for adjudicators and parties regarding the parameters of particular-social-group claims. The Departments believe that such guidelines will promote a more uniform approach towards adjudicating such claims. This will not only aid adjudicators in applying a more uniform standard, but will also aid parties such that they may have a clearer understanding of how they may prevail on a particular social group claim as they develop their applications.

The Departments disagree that the proposed changes to particular-social-group claims violate the Act, case law, or the due process rights of immigrants. As noted in the NPRM, Congress has not defined the term “membership in a particular social group.” *See* 85 FR at 36278; *see also Grace II*, 965 F.3d at 888 (“The INA nowhere defines ‘particular social

group.”).<sup>41</sup> Additionally, despite commenters’ contentions that the Convention Relating to the Status of Refugees (“Refugee Convention”), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol offers guidance on the matter, the term is not defined in either of those instruments. 85 FR at 36278; *see also Matter of A-B-*, 27 I&N Dec. at 326, n.5 (“The Protocol offers little insight into the definition of ‘particular social group,’ which was added to the Protocol ‘as an afterthought.’”) (quoting *Matter of Acosta*, 19 I&N Dec. at 232)) .

The Board has noted that the term “particular social group” is both ambiguous and difficult to define. *Matter of M-E-V-G-*, 26 I&N Dec. at 230 (“The phrase ‘membership in a particular social group,’ which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define.”). Moreover, the Board has also recognized that prior approaches to defining the term have led to confusion and inconsistency, warranting further evaluation. As the Board stated in *M-E-V-G-*:

Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. . . . In *Matter of R-A-*, 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.”

*Id.* at 231 (footnote omitted). Consequently, the inherently case-by-case nature of assessing the cognizability of a particular social group, the lack of a clear definition of the term and its consideration through an open-ended and largely subjective lens by adjudicators, and the

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<sup>41</sup> One commenter questioned the accuracy of the Departments’ citation to and characterization of *Grace II*’s underlying case, *Grace I*, 344 F. Supp. 3d at 146, because, according to the commenter, the case stated that the Attorney General could “not propose a general rule that a particular social group will not qualify for asylum” and did “not reach the question of whether the Attorney General could propose a general rule that a particular group does qualify for asylum.” Irrespective of the commenter’s characterization of the Departments’ citation, the D.C. Circuit recently reversed the district court regarding its statements that the agency action contested in that litigation improperly established a categorical bar against recognizing a specified particular social group. *Grace II*, 965 F.3d at 906. Specifically, the court determined that the Departments’ use of the term “generally” demonstrated that the Departments had not imposed a categorical rule against finding the particular social group at issue in that litigation. *Id.* Similarly, the Departments here have set forth a list of particular social groups that “generally, without more” will not be cognizable, but have specifically recognized that the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.” 85 FR at 36279.

potential for confusion and inconsistent application—particularly with conflicting circuit court interpretations of similar groups—all make the definition of a particular social group ripe for rulemaking. *See Lopez v. Davis*, 531 U.S. 230, 244 (2001) (observing that “a single rulemaking proceeding” may allow an agency to more “fairly and efficiently” address an issue than would “case-by-case decisionmaking” (quotation marks omitted)).

Furthermore, courts have also expressly held that the term is ambiguous. *See, e.g., Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013) (“We have recognized that the phrase ‘particular social group’ is ambiguous.”); *Fatin*, 12 F.3d at 1238 (“Both courts and commentators have struggled to define ‘particular social group.’ Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a ‘particular social group.’ Thus, the statutory language standing alone is not very instructive.”).<sup>42</sup>

As noted in the NPRM, ambiguities in the Act should “be resolved, first and foremost, by the agency.” 85 FR at 36265 (quoting *Matter of R-A-*, 24 I&N Dec. at 631 (quoting *Brand X*, 545 U.S. at 982 (internal quotation and citations omitted))). Further, the Supreme Court has clearly indicated that administrative agencies, rather than circuit courts, are the most appropriate entities to make determinations about asylum eligibility in the first instance. The Supreme Court, in *INS v. Ventura*, 537 U.S. 12 (2002), noted:

Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. . . . In such circumstances a judicial judgment cannot be made to do service for an administrative judgment. . . . Nor can an appellate court. . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency. . . . A court of appeals is not

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<sup>42</sup> One commenter also suggests that the Departments cited *Cordoba*, 726 F.3d 1106, with a “glaring omission.” The commenter suggests that *Cordoba* acknowledges that the term “particular social group” is ambiguous, but asserts that the Departments fail to recognize that the case goes on to “clear up that ambiguity.” The Departments need not delve further into this analysis, which is refutable for various reasons, other than to state that the case plainly supports the proposition that the term “particular social group” is ambiguous and that such ambiguities are left to the Departments to clarify pursuant to agency authority. *Chevron*, 467 U.S. at 845 (“Once [the court] determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is ‘inappropriate’ in the general context of a program designed to improve air quality, but whether the [agency’s] view that it is appropriate in the context of this particular program is a reasonable one.”).

generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

*Id.* at 16 (cleaned up)); *cf. Gonzales v. Thomas*, 547 U.S. 183, 185–87 (2006) (applying *Ventura* to require a remand from the circuit court to the agency to determine a question of the meaning of “particular social group). “Indeed, ‘judicial deference to the Executive Branch is especially appropriate in the immigration context,’ where decisions about a complex statutory scheme often implicate foreign relations.” *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56–57 (2014) (plurality op.) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)). Accordingly, the Departments are acting within their well-established authority to define the term “particular social group.”

Furthermore, the Departments’ regulations regarding the adjudication of claims pertaining to “membership in a particular social group” are reasonable interpretations of the term, as evidenced by a long history of agency and circuit court decisions to have interpreted the terms consistently with the Departments’ guidelines. *See Matter of W-G-R-*, 26 I&N Dec. 208, 222–23 (BIA 2014) (pertaining to past or present criminal activity or associations); *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013) (same); *Gonzalez v. U.S. Att’y Gen.*, 820 F.3d 399, 405 (11th Cir. 2016) (same); *Matter of A-B-*, 27 I&N Dec. at 320 (pertaining to presence in a country with generalized violence or a high crime rate and private criminal acts of which governmental authorities were unaware or uninvolved); *Matter of S-E-G-*, 24 I&N Dec. 579, 585–86 (BIA 2008) (pertaining to attempted recruitment of the applicant by criminal, terrorist, or persecutory groups); *Matter of E-A-G-*, 24 I&N Dec. 591, 594–95 (BIA 2008) (same); *Matter of A-M-E- & J-G-U-*, 24 I&N, Dec. 69, 75 (BIA 2007) (same); *Matter of Pierre*, 15 I&N Dec. 461, 462–63 (BIA 1975) (pertaining to interpersonal disputes of which governmental authorities were unaware or uninvolved); *Gonzalez-Posadas v. Att’y Gen. of U.S.*, 781 F.3d 677, 685 (3d Cir. 2015) (same); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 230–31 (5th Cir. 2019) (pertaining to private criminal acts of which governmental authorities were unaware or uninvolved); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010) (“We conclude that Petitioners’



proposed social group, ‘returning Mexicans from the United States,’ . . . is too broad to qualify as a cognizable social group.”); *Sam v. Holder*, 752 F.3d 97, 100 (1st Cir. 2014) (Guatemalans returning after a lengthy residence in the United States is not a cognizable particular social group).

The Departments agree with commenters that circuit court interpretations of the phrase “particular social group” have been uneven, and the inconsistency with which that phrase has been evaluated strongly militates in favor of the agencies adopting a clearer, more uniform definition. Further, the Departments have considered all relevant circuit court law on the issue and note that significant conflicts exist among the various interpretations. *See, e.g., Paloka v. Holder*, 762 F.3d 191, 197 (2d Cir. 2014) (highlighting conflicting circuit court decisions regarding whether young Albanian women are a particular social group and collecting cases showing differing circuit court decisions regarding cognizability of other particular social groups). Nevertheless, the Departments believe that the rule reflects an appropriate and reasonable synthesis of legal principles consistent with the Departments’ respective policy positions. Additionally, as noted in the NPRM, 85 FR at 36265 n.1, to the extent that some circuits have disagreed with the Departments’ reasonable interpretation, the Departments’ proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X*, 545 U.S. at 982; *cf. Ventura*, 537 U.S. at 16–17 (within broad limits, the INA entrusts agencies, not circuit courts, to make basic asylum eligibility determinations).

The Departments disagree with commenters’ assertions that the rule would render it “virtually impossible” to prevail on asylum claim involving membership in a particular social group or undermine the concept of “case-by-case” adjudication of particular-social-group claims, as described in *Matter of A-B-*, 27 I&N Dec. 316. Assuming the formulation of the proposed particular social group would, if supported, meet the definition of such a group in the first instance—i.e., assuming the proposed particular social group sets forth a prima facie case that the group is based on an immutable or fundamental characteristic, is defined with particularity,

and is recognized as socially distinct—the rule does not alter an adjudicator’s responsibility to determine whether the facts and evidence of each individual case ultimately establish that the proposed particular social group is cognizable. Thus, whether a proposed group has—*see, e.g., Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (designated as precedent by Attorney General Order No. 1895-94 (June 12, 1994)) (homosexuals in Cuba may be a particular social group)—or has not—*see, e.g., Matter of Vigil*, 19 I&N Dec. 572, 575 (BIA 1988) (young, male, urban, unenlisted Salvadorans do not constitute a particular social group)—been recognized in other cases is not dispositive of whether the proposed particular social group in an individual case is cognizable. *See S.E.R.L. v. Att’y Gen.*, 894 F.3d 535, 556 (3d Cir. 2018) (“Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group.”). Adjudicators should not assume that a particular social group that has been found cognizable in one case is cognizable in every other case in which it is asserted or is cognizable in perpetuity, nor should they assume the opposite. *Id.* Rather, if the proposed particular social group would be legally cognizable if sufficiently supported by evidence, adjudicators should continue to adjudicate particular social group claims on a case-by-case basis.

Further, as the Departments have specified, while the listed groups would be “generally insufficient to establish a particular social group” because they do not meet the definition of such a group, the Departments do not entirely foreclose the possibility of establishing an asylum claim on those bases. Rather, the rule simply lists social groups that, “without more,” generally will not meet the particularity and social distinction requirements for particular social group. 85 FR at 36279.

Such general guidelines are an appropriate use of agency authority that comports with the Attorney General’s decision in *Matter of A-B-*. *Cf.* 8 CFR 208.4(a)(4),(5), 1208.4(a)(4),(5) (providing general categories of circumstances that may qualify as changed circumstances or extraordinary circumstances for purposes of INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D)); 8 CFR

212.7(d), 1212.7(d) (“The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . . with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances[.]”); *Matter of Y-L-*, 23 I&N Dec. at 274–76 (establishing a general presumption that aggravated felony drug trafficking crimes are “particularly serious crimes” for purposes of INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B)). The Departments are providing clarity on this issue through rulemaking, rather than through other forms of sub-regulatory guidance or through the development of case law in individual adjudications, in order to promote much needed uniformity and clarity on the particular-social-group issue. *See also* Memorandum from Jefferson B. Sessions, III, Attorney General, re: *Prohibition on Improper Guidance Documents* 1 (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> (in contrast with issuing informal “guidance documents,” “notice-and-comment rulemaking . . . has the benefit of availing agencies of more complete information about a proposed rule’s effects than the agency could ascertain on its own, and therefore results in better decision making”). The Department applies the same response to address commenters’ concerns with respect to the “broad wording” of the groups that the rule describes as generally not cognizable for asylum claims.

The Departments also disagree with commenters that the rule is unwise or discriminatory, or that the purpose of this rule is to exclude certain groups of applicants or target individuals from Central America and Mexico. As stated above, the rule is not “immoral,” motivated by racial animus or promulgated with discriminatory intent. Rather, it is rooted in case law from the BIA, multiple circuits, and the Supreme Court, none of which have evinced a racial or discriminatory animus. Further, the rule is intended to help the Departments better allocate limited resources in order to more expeditiously adjudicate meritorious asylum, statutory withholding of removal, and CAT protection claims. Relatedly, with respect to commenters’ concerns about this rule’s potential effect on certain, discrete groups—e.g., LGBTQ individuals,

minors, and other specific nationalities—the Departments note that they have codified a long-standing test for determining cognizability of particular social groups and have set forth a list of common fact patterns involving particular-social-group claims that generally will not meet those well-established requirements. The Departments did not first determine which groups should or should not be cognizable and craft a rule around that determination, and the rule does not single out any discretely-labeled groups in the manner suggested by commenters. Moreover, as the rule makes clear, it applies “in general” and does not categorically rule out specific claims depending on the claim’s evidentiary support. Further, because each asylum application is adjudicated based on its own facts and evidentiary support and because the rule does not categorically rule out specific claims, commenters’ concerns about the effects of the rule on broad, undifferentiated categories without reference to specific claims are conclusory, conjectural, unfounded, and wholly and inherently speculative.

With respect to commenters’ claims that the social groups that would be dismissed under the rule would historically encompass a large number of potentially successful asylum claims, the Departments reiterate that they are setting forth, by regulation, a reasonable interpretation of the statutory term “particular social group” that will ameliorate stressors upon the healthy functioning of our immigration system and encourage uniformity of adjudications. Even assuming, without deciding, that there are other, broader interpretations of the term “particular social group” that might encompass a larger number of asylum applicants, the relevant inquiry is not whether the Departments’ interpretation is the preferred interpretation or even the best interpretation. Rather the relevant inquiry is whether the Departments’ interpretation is reasonable. *See Chevron*, 467 U.S. at 845; *see also Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012) (observing that the agency’s “position prevails if it is a reasonable construction of the [INA], whether or not it is the only possible interpretation or even the one a court might think best”). The regulations indeed set forth a reasonable interpretation of the term “particular social group,” for the reasons described above. The Departments also note again that the rule will not

categorically exclude the listed groups, rather it issues guidance that such groups will “generally” not meet the requirements of a cognizable particular social group “without more.”

Relatedly, commenters’ statements that the rule would result in denial of meritorious claims are circular. A claim is meritorious if it meets all of the statutory requirements for asylum, including, where appropriate, the ambiguous statutory requirement of demonstrating “membership in a particular social group.” The Departments note the commenters’ position that the term should be defined more broadly than what the Departments proposed, and, to be sure, a broader definition would result in more groups being recognized as cognizable. However, for the reasons explained in the NPRM, 85 FR at 36277–79, and throughout this rulemaking, the Departments have set forth a reasonable definition of the term as part of their well-established authority to do so. To the extent that applicants are unable to meet the statutory requirements, including “membership in a particular social group” as that term is reasonably defined by the Departments, their claims are not meritorious.

The Departments believe that commenter assertions that parties will need to prove that they do not belong in or are distinct from a listed particular social group misconstrue the particular social group analysis. People may, and are likely to, belong to multiple groups, which might or might not include cognizable particular social groups. An applicant need not prove that he or she does not belong to a non-cognizable group, only that he or she belongs to a cognizable group and was persecuted on account of that membership. Membership in a non-cognizable group does not negate one’s membership in a cognizable group. Thus, an asylum applicant who has membership in one of the listed groups, which will generally not be cognizable without more, does not preclude an applicant from prevailing on a separate cognizable claim.

The Departments disagree with commenter assertions that the rule impermissibly creates a negative presumption against cognizability of the listed groups. As an initial point, the listed groups, as discussed in the NPRM, 85 FR at 36279, are generally rooted in case law, and commenters neither allege that the circuit court case law underlying the listing of these groups

establishes a “negative presumption” against groups that have not been recognized in that case law, nor urge the Departments to abandon their longstanding policy to treat circuit court case law as binding—including decisions regarding the cognizability of alleged particular social groups—in the circuit in which it arises. Thus, to the extent that commenters disagree with the Departments’ codification of existing case law, that disagreement lies with the case law itself. Additionally, in the Departments’ experience, many advocates treat the recognition of a particular social group—either by the Board or a circuit court—as establishing a positive presumption, if not a categorical rule, that the group is cognizable in every case, yet commenters expressed no concern with that type of presumption. *Cf. S.E.R.L.*, 894 F.3d at 556 (“S.E.R.L. relies heavily on [*Matter of A-R-C-G-*], in which the Board considered a group consisting of married female victims of domestic violence.”); *Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337, 1344 (11th Cir. 2019) (discussing similar proposed particular social groups across multiple circuits that closely tracked the group recognized by the BIA in *Matter of A-R-C-G-*); *Del Carmen Amaya-De Sicaran v. Barr*, ---F.3d---, 2020 WL 6373124 (4th Cir. 2020) (noting decisions from other circuits addressing similar proposed particular social groups that closely tracked the group recognized by the BIA in *Matter of A-R-C-G-*). As the Departments discussed, *supra*, the rule does not depart from longstanding principles regarding the case-by-case nature of asylum adjudications. Thus, adjudicators do not apply a positive presumption that a particular social group that has been found cognizable in one case is cognizable in every other case in which it is asserted or is cognizable in perpetuity, nor do they apply a categorical negative presumption that a group listed in the rule is always and in every case not cognizable. Nothing in the rule creates categorical presumptions, either positive or negative.

It is always the applicant’s burden to demonstrate that he or she belongs to a cognizable particular social group and must set forth the facts and evidence to establish that claim, regardless of whether or not the proposed group is described in this rule. INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B). This rulemaking highlights common proposed groups that generally,

without more, will not meet an applicant’s burden to demonstrate membership in a “particular social group,” and the burden remains on the applicant, as it always has, to demonstrate that he or she is a member of a cognizable particular social group. *Id.* This rulemaking puts applicants on notice that such groups, generally, without more, will not be cognizable. To the extent that an applicant believes that his or her membership in one of the listed groups should nevertheless be recognized, he or she may present his or her claim stating why the proposed group is cognizable and, as appropriate, appeal it to the BIA and a Federal circuit court.

The commenters’ statements about the Attorney General’s authority to certify cases and issue precedential decisions relate to powers delegated to the Attorney General by Congress that have existed for decades and are far outside of the scope of this rulemaking. INA 103(a)(1),(g), 8 U.S.C. 1103(a)(1),(g); 8 CFR 1003.1(h). All decisions in the immigration system are made in accordance with the evidence and applicable law and policy. In particular, EOIR’s mission remains the same—to adjudicate cases in a fair, expeditious, and uniform manner. *See* EOIR, About the Office, <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018); *see also* 8 CFR 1003.1(d)(1)(ii) (“Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board[.]”); 8 CFR 1003.1(e)(8)(ii) (“[T]he Director shall exercise delegated authority from the Attorney General identical to that of the Board[.]”); 8 CFR 1003.10(b) (“immigration judges shall exercise their independent judgment and discretion”).

The Departments decline to incorporate the commenter recommendation to codify either the *Matter of Acosta* standard for particular social group, which required only that a group be immutable, or the alleged UNHCR standard, which commenters stated requires immutability and that the group “be perceived as a group by society” in lieu of the *Matter of M-E-V-G-* standard, which requires immutability, particularity, and social distinction. To do so would be to shirk decades of development in particular social group claims in favor of a standard set forth shortly after enactment of the Refugee Act of 1980, when “relatively few particular social group claims

had been presented” to immigration adjudicators, and which “led to confusion and a lack of consistency” in subsequent years as adjudicators struggled with “numerous and varied” proposed groups. *See Matter of M-E-V-G-*, 26 I&N Dec. at 231. Moreover, “immutability, while important, has never been the last or only word on the definition of a social group,” because “[m]any social groups are labile in nature.” *Ahmed v. Ashcroft*, 348 F.3d 611, 617 (7th Cir. 2003). Further, notwithstanding the commenter’s statement that the *M-E-V-G-* standard is confusing, the Departments note that the nearly all of the circuits have applied the *M-E-V-G-* test and the Third and Ninth Circuits have expressly accorded *Chevron* deference to that framework. *See, e.g., S.E.R.L.*, 894 F.3d at 554 n.20 (collecting cases). As the commenter notes, the Seventh Circuit has neither rejected nor endorsed the framework.

Relatedly, the Departments will not incorporate commenter suggestions to expand the regulatory language with respect to the requirement of immutability to include characteristics that are “so fundamental to individual identity or conscience that it ought not be required to be changed[,]” as stated in *Matter of Acosta*. 19 I&N Dec. at 233. Contrary to the commenter’s assertion, the Departments clearly noted in the NPRM that this rulemaking codifies the “longstanding requirements” of immutability, particularity, and social distinction, recognizing that “[i]mmutability entails a common characteristic: A trait that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” 85 FR at 36278 (internal quotations omitted) (citing *Matter of Acosta*, 19 I&N Dec. at 233). Accordingly, the Departments believe that this language adequately addresses the commenter concerns without further expanding the definition in the regulatory language.

The Departments disagree with commenters’ concerns that the rule’s requirement that the particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm is arbitrary. 85 FR at 36278. This codifies the Attorney General’s analysis for determining whether a social group has been defined



“circularly,” as laid out in *Matter of A-B-*, 27 I&N Dec. at 334 (“To be cognizable, a particular social group must ‘exist independently’ of the harm asserted in an application for asylum or statutory withholding of removal.”); *see generally* *Matter of M-E-V-G-*, 26 I&N Dec. at 243 (“The act of persecution by the government may be the catalyst that causes the society to distinguish [a collection of individuals] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.”). In response to commenters’ assertions that the Convention allows for particular social groups that do not exist independently of the persecution, and that this rule reflects a “departure” from the current particular-social-group adjudication, the Departments reiterate that “[t]he ‘independent existence’ formulation” has existed for some time and “has been accepted by many courts.” 85 FR at 36278; *see, e.g.,* *Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018) (“A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began.”); *Lukwago*, 329 F.3d at 172 (“We agree that under the statute a ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.”); *accord* *Amaya-De Sicaran*, 2020 WL 6373124 at \*5 (“The proposition that a cognizable particular social group cannot be defined by the underlying persecution is hardly controversial. The anti-circularity principle—and the *Chevron* deference to which it is entitled—has won wide acceptance among the circuit courts . . . . Even prior to the Attorney General’s decision, we have applied the anti-circularity principle . . . . And a broader examination of caselaw pre-*Matter of A-B-* confirms that this is no new proposition.”).

In recent litigation, asylum seekers did “not challenge *A-B-*’s description of the circularity rule” and, the court determined, *A-B-*’s test sets forth “exactly the analysis required to determine whether a particular claim is or is not circular.” *Grace II*, 965 F.3d at 905. For courts that have rejected this “independent existence” requirement, *see, e.g.,* *Cece*, 733 F.3d at 671–72, both subsequent decisions recognizing the requirement, *see, e.g.,* *Matter of A-B-*, 27 I&N Dec.

316, and *Matter of M-E-V-G-*, 26 I&N Dec. 227, and the Departments’ proposed rule codifying it would warrant re-evaluation under well-established principles, *see Brand X*, 545 U.S. at 982; *see also Amaya-De Sicaran*, 2020 WL 6373124 at \*5 (“The Attorney General’s [anti-circularity formulation] in *Matter of A-B-* is not arbitrary and capricious.”).

The Departments disagree with commenters’ concerns about due process violations with respect to the rule’s requirement that, while in proceedings before an immigration judge, an applicant must “first define the proposed particular social group as part of the asylum application or otherwise in the record” or “waive any claim based on a particular social group formulation that was not advanced.” To the extent that this requirement allegedly “goes further than” *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, as the commenter alleges, this requirement is merely a codification of the longstanding principle that arguments not made in front of an immigration judge are deemed waived for purposes of further review. *See, e.g., In re J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (claim not raised below is not appropriate to consider on appeal).

Contrary to commenters’ concerns, the rule does not violate notions of fairness or due process.<sup>43</sup> Nothing in the rule eliminates an alien’s right to notice and an opportunity to be heard, which are the foundational principles of due process. *See Matthews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (“The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.” (cleaned up)). Aliens remains subject to specified procedures regarding claims of a fear of return to an alien’s country of nationality, including the ability to have a claim reviewed or heard by an immigration judge. Moreover, the fact that applicable law may limit the types of claims an alien may bring—

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<sup>43</sup> Asylum is a discretionary benefit demonstrated by the text of the statute that states the Departments “may grant asylum,” INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (emphasis added); *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 n.4 (2020) (“A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.”), and provides authority to the Attorney General and Secretary of Homeland Security to limit and condition, by regulation, asylum eligibility under INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). Courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin*, 538 F.3d at 156-57; *Ticoalu*, 472 F.3d at 11 (citing *DaCosta*, 449 F.3d at 49–50). In other words, “there is no constitutional right to asylum per se.” *Mudric v. Att’y Gen. of U.S.*, 469 F.3d 94, 98 (3d Cir. 2006). Thus, how the Departments choose to exercise their authority to limit or condition asylum eligibility and an adjudicator’s consideration of an applicant’s conduct in relation to asylum eligibility do not implicate due process claims.

e.g., an asylum claim based on a fear of persecution unrelated to one of the five statutory grounds in INA 101(a)(42), 8 U.S.C. 1101(a)(42)—or the ability of an alien to bring an asylum or statutory withholding claim at all—e.g., an alien convicted of an aggravated felony for which the alien was sentenced to an aggregate term of imprisonment of at least five years, INA 208(b)(2)(A)(ii), (B)(i) and 241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(i) and 1231(b)(3)(B)(ii)—does not mean that an alien has been deprived of due process. As explained in the NPRM and reiterated herein, this rule is rooted in well-established law and does not violate an alien’s due process right regarding an application for relief or protection from removal.

Some commenters objected to the procedural requirement that an alien must initially define the proposed particular social group as either part of the record or with the application. The INA directs the Attorney General to establish procedures for the consideration of asylum applications, INA 208(d)(1), 8 U.S.C. 1158(d)(1), and regulations already require both an application for an alien to seek asylum, 8 CFR 208.3(a) and 1208.3(a), and that the application be completed in full to be filed, *id.* 208.3(c)(3) and 1208.3(c)(3). To the extent that some commenters’ concerns regarded the exactness with which an alien must define the particular social group, the Departments note that most asylum applicants, 87 percent, have representation, EOIR, *Current Representation Rates* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>, and that aliens, if of limited English proficiency, are able to avail themselves of the resources provided to them by the government that detail pro bono or low cost alternatives.

One commenter worried that an alien would have to “expertly craft arguments in the English language in a way that satisfies highly technical legal requirements.” The Department disagrees that this is what the regulations require. As an initial point, nothing in the rule requires an alien to craft arguments when applying for asylum. Aliens, with or without representation, have filled out asylum applications for decades, including by stating particular social groups as a

basis for the asylum claim. Commenters have not submitted any evidence or alleged any change in an alien's ability to complete the application over the preceding 40 years, and the Departments are unaware of any reasons or allegations that aliens are now less capable of filling out an application—including stating a particular social group, if appropriate—that has been used for years. An alien simply has to state in the application why the alien is afraid. As noted in the NPRM, the specific form of the delineation will not be considered over and above the substance of the alleged particular social group. Further, if there are deficiencies, the alien will be provided an opportunity to correct them. Nothing in the rule requires aliens to “craft arguments” meeting “highly technical legal requirements,” and commenters’ suggestions to the contrary are simply not consistent with either the rule and the longstanding practice.

One commenter indicated that it was the asylum officer's or immigration judge's duty to assist in developing the record, citing section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1); *Jacinto*, 208 F.3d at 734 (an immigration judge has the duty to fully develop the record where a respondent appears pro se); and *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (an immigration judge must adequately explain the procedures to the respondent, including what he must prove to prevail at the hearing). Even accepting the immigration judge's duty as described by the cited case law, this is not in conflict with the rule, as the rule clearly explains by regulation what an applicant must do to demonstrate a cognizable particular social group, a concept which was previously articulated in disparate BIA decisions that have been interpreted differently by the various circuits. Additionally, even if, as stated in *Jacinto*, an immigration judge has a duty to fully develop the record, this does not obviate the applicant's burden of demonstrating at least prima facie eligibility for the relief which he or she is seeking prior to proceeding to a more intensive hearing.

Regarding commenters' concerns focused on the ability for aliens to seek redress after an improper particular social group was presented based on ineffective assistance of counsel, the Departments note that the rule is consistent with both practice and applicable law. If a particular

social group is not presented because the alien did not tell his or her counsel about it, then there has been no ineffective assistance on the part of counsel. If the alien did provide his or her counsel with a particular social group and counsel elected not to present it as a strategic choice, then there is no basis to reopen the proceedings. *See In re B-B-*, 22 I&N Dec. 309, 310 (BIA 1998) (“subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen”); *cf. Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986) (concession of attorney is binding on an alien absent egregious circumstances). Nevertheless, the Departments recognize there may be unique “egregious circumstances” in which reopening based on ineffective assistance of counsel may be warranted, provided that the appropriate procedural requirements for such a claim are observed. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Thus, the Departments are revising the final rule to account for such a scenario, though they expect such claims to be rare.

The Departments disagree with the commenters’ fairness concerns with respect to the rule’s requirement that applicants define the proposed particular social group as part of the asylum claim. As an initial point, asylum applicants have provided definitions of alleged particular social groups in asylum applications for many years, and there is no evidence of any recent change that would preclude them from doing so. The commenters’ concerns may be based on an inaccurate belief that the rule requires legal precision of a particular social group, but as discussed above, that is simply not the case. Adjudicators are experienced with addressing the substance rather than the form of a claim, and articulation deficiencies will have an opportunity for correction before an immigration judge renders a decision.

The Departments also acknowledge commenters’ concerns about the “ever changing landscape” of particular-social-group law and the due process concerns associated with that. The “ever-changing landscape” is, in fact, a principal animating factor behind this rulemaking, as the Departments believe the rule will function as a “hard reset” on the divergent—and sometimes contradictory—case law regarding particular social groups over the past several years in lieu of

clearer guidelines that are both reasonable and easier for adjudicators and applicants alike to follow. In particular, the current state of case law may make it confusing for applicants to appreciate what is or is not a cognizable group, and the rule directly addresses that concern by providing clear definitions that should allow for more effective consideration of meritorious claims. In short, providing clearer guidance should reduce due process concerns, rather than increase them.

Similarly, the Departments disagree that this rulemaking will be harmful to pro se respondents. Although there are comparatively few pro se asylum applicants as an initial matter, EOIR, *Current Representation Rates* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>, the Departments believe that this regulation will provide clarity to all respondents, including those who are pro se. That clarity will also allow immigration judges to better consider pro se claims and ensure that the record is developed appropriately consistent with the law.

The Departments believe that this clarity will also assist immigration judges in their adjudications, contrary to commenters' assertions. The Departments also disagree with commenters' statements that reducing the amount of time that adjudicators must spend evaluating claims is an improper purpose for the rule. The Departments contest allegations that they may not take regulatory action to help improve efficiencies with immigration adjudications. Regardless, as noted in the NPRM, reducing the amount of time that adjudicators must spend evaluating claims and more uniform application of the law are two additional benefits to "providing clarity to [the particular social group] issue." 85 FR at 36279.

The Departments note commenter concerns that the rule does not create a regulatory requirement for immigration judges to clarify the particular social group for the record and instead allows for immigration judges to pretermite without holding an evidentiary hearing. The Departments note that the asylum application itself, which the applicant must sign attesting to the application's accuracy, and in which the applicant has had the opportunity to list his or her

particular social group, is already part of the record without any further need for the immigration judge to clarify. Because the burden is always on the asylum applicant to establish eligibility, INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B), and because the immigration judge must remain a neutral arbiter of the claim, EOIR, *Ethics and Professionalism Guide for Immigration Judges 2* (Jan. 26, 2011),

<https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf> (“An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.”), it would not be appropriate for the immigration judge to assist the alien in crafting his or her claim.

Nevertheless, immigration judges are experienced and well-trained adjudicators who are adept at understanding the substance of a claim even if it is not perfectly articulated. Moreover, an alien will have 10 days to respond to any attempt to pretermite an application as legally insufficient, and there is no expectation that immigration judges will fail to follow the rule’s requirements on that issue. In short, the Departments do not expect immigration judges to abdicate their duties to the law in considering an applicant’s asylum claim.

The Departments disagree with commenters’ concerns that the rule, in their estimation, violates the Rehabilitation Act of 1973, 29 U.S.C. 794, because it does not provide exceptions for minors, mentally ill persons, or individuals otherwise lacking competency.<sup>44</sup> The Departments note that no alien is excluded from applying for asylum—nor excluded from participating in processes to adjudicate such an application—on account of a disability. Further, all applicants for asylum are adjudicated under the same body of law, regardless of any particular individual characteristics, and nothing in the rule changes that. The Departments are unaware of any law requiring all asylum claims from minors, mentally ill persons, or incompetent aliens to be granted or establishing a categorical rule that each of those groups, regardless of any other characteristics, necessarily states a

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<sup>44</sup> The Departments note that the Rehabilitation Act applies to individuals with disabilities, and the status of being a minor does not automatically qualify someone as an “individual with a disability” under the statutory definition of that term. 29 U.S.C. 705(2).

cognizable particular social group. The Departments are also unaware of any blanket exceptions to statutory eligibility for asylum for these identified groups. The rule does not change any established law regarding minors, *e.g.*, INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), or those who lack mental competency, *e.g.*, *Matter of M-A-M-*, 25 I&N Dec. at 480, 481–83 (holding that immigration judges should “consider indicia of incompetency throughout the course of proceedings” and implement appropriate safeguards, where necessary). In short, the rule provides clarity for asylum claims relevant to all aliens and does not alter any existing accommodations generally made for the identified groups. Further, because each asylum application is adjudicated based on its own facts and evidentiary support and because the rule does not categorically rule out specific claims, commenters’ concerns about the effects of the rule on broad, undifferentiated categories without reference to specific claims are conclusory, conjectural, unfounded, and wholly and inherently speculative.

#### 4.1.1. Past or Present Criminal Activity or Association (Including Gang Membership)

*Comment:* One organization noted that at least one court has recognized asylum claims from former child soldiers forced to commit bad acts, citing *Lukwago*, 329 F.3d at 178–180. The organization also stated that the United States has enacted the Child Soldiers Accountability Act, Pub. L. 110-340, imposing criminal and immigration penalties for those who use child soldiers. *See* 18 U.S.C. 2442. The organization emphasized that children recruited into other types of criminal acts, like gang activity, “are not materially different from the children who fight on the front lines of conflicts in other parts of the world.” The organization concluded by encouraging the government to extend its opposition to the use of child soldiers to “a willingness to protect children fleeing from all types of forced criminal activity.”

Another organization emphasized that past activity is an immutable characteristic that “cannot be undone,” noting that an individual’s personal biographical history cannot be changed. The organization noted that if a gang maintains that a child forcibly recruited is a member for



life, the child would be regarded as a traitor for trying to leave the gang at a later time and would have a reasonable basis to fear for his or her life.

One organization alleged that the rule would change the law “without explanation or justification” by overturning the decisions of multiple Federal courts of appeals. The organization specifically referenced *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) and *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). The organization claimed this would be contrary to the stated goal of the “laundry list,” which is legal consistency. *See* 85 FR at 36278. The organization also contended that the rule would be contrary to the intent behind the asylum bars, which preclude asylum based on a range of criminal conduct but “pointedly” do not preclude relief on account of previous gang membership. INA 208(b)(2)(A)–(B), 8 U.S.C. 1158(b)(2)(A)–(B). The organization also claimed the rule is contrary to congressional intent, claiming it makes no attempt to explain “why the statutory bars” on particular former persecutors “should be extended by administrative interpretation to former members of gangs.” *Benitez Ramos*, 589 F.3d at 430.

*Response:* The Departments note that the case cited by the commenter, *Lukwago*, 329 F.3d 157, which the commenter alleges recognized the likelihood of a cognizable particular social group involving former child soldiers, was published in 2003, well before the now-codified test for cognizability had been developed in *Matter of S-E-G-*, 24 I&N Dec. at 585–86 and *Matter of E-A-G-*, 24 I&N Dec. at 594–95. *See Matter of M-E-V-G-*, 26 I&N Dec. at 236–37 & n.11. Accordingly, this decision does not lend support to the commenter’s claim. The Departments further note, however, that the court in *Lukwago* acknowledged that “given the ambiguity of the [term “particular social group], [the court’s] role is limited to reviewing the BIA’s interpretation, using *Chevron* deference to determine if it is a “permissible construction of the statute.” *Lukwago*, 329 F.3d at 171. Additionally, the Child Soldiers Accountability Act is unrelated to this rulemaking.

Although past activity is an immutable characteristic, immutability alone is not sufficient to establish a cognizable particular social group; particularity and social distinction are also required. *See Matter of S-E-G-*, 24 I&N Dec. at 585–86; *Matter of E-A-G-*, 24 I&N Dec. at 594–95; *Matter of M-E-V-G-*, 26 I&N Dec. at 237.

The Departments disagree with commenters that the rule would undermine establishing legal consistency and uniformity in the immigration laws, as it should encourage such consistency across all circuits by providing much-needed guidance on an ambiguous term in the Act. In fact, the circuits are themselves split on the issue of whether former gang membership is cognizable as a particular social group. *Compare Martinez v. Holder*, 740 F.3d 902, 910–12 (4th Cir. 2014) (former member of a criminal street gang may be a particular social group) *and*, *Benitez-Ramos v. Holder*, 589 F.3d 426, 430–31 (7th Cir. 2009) (same), *with Gonzalez v. U.S. Att’y Gen.*, 820 F.3d 399, 405 (11th Cir. 2016) (agreeing with First Circuit that former gang members do not constitute a cognizable “particular social group”); *Cantarero v. Holder*, 734 F.3d 82, 85–86 (1st Cir. 2013) (“The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger. . . . Such recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status.”); *and Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007) (“We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.”). *See also* Cong. Research Serv., *Asylum and Gang Violence: Legal Overview* 20 (Sept. 5, 2014) (“Granting asylum to aliens based on their membership in groups made up of former gang members is more complicated in that several Federal courts of appeals have evidenced at least some willingness to view former gang members as a particular social group, while others have suggested that granting asylum to those who

belong to organizations that have perpetrated acts of violence or other crimes in their home countries is contrary to the humanitarian purposes of asylum.”). To the extent that commenters assert that circuit case law conflicts with the Departments’ rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X*, 545 U.S. at 982.

#### 4.1.2. Presence in a Country with Generalized Violence or a High Crime Rate

*Comment:* One commenter objected generally to the fact that the rule excludes asylum seekers coming from “a country with generalized violence or a high crime rate,” as the commenter believes this to be irrelevant. The commenter stated that the restriction appears designed to target individuals from specific countries and runs contrary to the purpose of asylum. The commenter stated that “[i]t is natural” for people to flee countries with violence that the governments are unable to control. One organization claimed the restriction will have a prejudicial impact on asylum seekers from Central America. Another organization specifically referenced the high crime rate in many African countries, claiming that violence is “rampant” due to “national security forces” and “copycat violators.” Another commenter stated generally that “[t]he choice for them was to be killed and/or raped or to risk the hardships of seeking asylum in the U.S.,” alleging that the frequency of these types of abuses does not make it reasonable to exclude them from eligibility for asylum claims. One organization claimed the restriction would unfairly impact LBGTQ+ individuals who are “disproportionately victimized” by violent crime and gender-based violence.

One organization noted that it would be “difficult if not impossible” to meet the three-prong test found in *Matter of M-E-V-G-*, 26 I&N Dec. at 237, using a claim in which the particular social group is based on “presence in a county with generalized violence or a high crime rate.” However, the organization expressed concern that this restrictive language (which it claims is not directly related to the particular social group definition at issue) would likely cause adjudicators to deny asylum applications solely because the applicant came from a country with

a high crime rate, even if the applicant were to articulate a particular social group unrelated to the crime rate.

One organization claimed the rule is contrary to established case law recognizing that presence in a country with generalized violence or a high crime rate is “irrelevant” to evaluating an asylum seeker’s claim. The organization noted that the Fourth Circuit has explained in at least three published opinions that criminal activities of a gang affecting the population as a whole are “beside the point” in evaluating an asylum seeker’s particular claim. *See Alvarez-Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017); *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011).

Another organization alleged that the “social distinction” requirement makes it nearly impossible to develop a cognizable particular social group that does not reference the asylum seeker’s country of origin. As a result, the organization claimed the rule would “upend” section 208 of the Act, 8 U.S.C. 1158, by preventing individuals fleeing “the most violent countries in the world” from receiving asylum or withholding of removal. The organization also contended that the “generalized violence” category is arbitrary to the extent it attempts to codify the statement in *Matter of A-B-* that particular claims are unlikely to satisfy the statutory grounds for demonstrating government inability or unwillingness to control the persecutors. *Matter of A-B-*, 27 I&N Dec. at 320. The organization claimed that attempting to codify that statement conflates two distinct elements of the asylum test, as the question of whether the government can control persecutors is distinct from whether a particular social group is cognizable. The organization also alleged that the Departments do not acknowledge or justify this conflation.

*Response:* The Departments acknowledge commenters’ points that generalized violence may be a driving force behind many people fleeing their home countries. Although the suffering caused by such conditions is regrettable, the Departments note that asylum was never intended to protect individuals from generalized violence; instead, it was designed to protect those from violence perpetrated upon them on the basis of a protected ground, as well as other qualifying

requirements. *See Harmon v. Holder*, 758 F.3d 728, 735 (6th Cir. 2014) (“General conditions of rampant violence alone are insufficient to establish eligibility.”).

Although circuit courts may not have been clear whether asylum claims based on fear of generalized violence or high crime rates are not cognizable on particular social group grounds or on nexus grounds (or on both grounds)<sup>45</sup>, *see, e.g., Melgar de Torres v. Reno*, 191 F.3d 307, 314 (2d Cir. 1999) (“The increase in general crime that has been documented in the record does not lend support to an asylum claim since a well-founded fear of persecution must be on account of an enumerated ground set forth in the Act, and general crime conditions are not a stated ground.”); *Umana-Ramos v. Holder*, 724 F.3d 667, 670 (6th Cir. 2013) (“General conditions of rampant gang violence alone are insufficient to support a claim for asylum.”), they have been consistent that such fears are not a cognizable basis for asylum, even, contrary to one commenter, in the Fourth Circuit. *See, e.g., D.M. v. Holder*, 396 F. App’x 12, 14 (4th Cir. 2010) (“As found by the Board, the Petitioners have failed to show that they are at a greater risk of being victims of violent acts at the hands of criminal gangs than any other member of the general population in El Salvador. We have clearly held that a fear of general violence and unrest is inadequate to establish persecution on a protected ground.”).

The Departments believe that this rule—which establishes that particular-social-group claims grounded in an applicant’s presence in a country with general violence or high crime rates, without more, will generally not be cognizable—is consistent with the Act, international law, and case law, particularly in connection to the definition of particular social group discussed, *supra*, which requires that the group exist independently of the alleged harm. Relatedly, commenters’ allegations that the rule was crafted in response to the frequency of types of harm suffered are misguided. With respect to establishing a nexus to a protected ground, such as particular social group, it is not the frequency or severity of abuses that would render such

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<sup>45</sup> Although the Departments have placed this category under the definition of “particular social group,” it may also be appropriately considered under the definition of “nexus” as well, as the lists under both definitions are nonexhaustive.

claims insufficient, but rather the reasons for the abuse. Asylum is intended to protect individuals who have suffered abuses for a specific reason, on account of a protected ground. *Cf. Delgado-Ortiz*, 600 F.3d at 1151 (“Asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground.”).

The Departments further note that an alien coming from a country with generalized violence or high crime rates is not precluded from asylum on that basis alone; the rule merely establishes that a particular-social-group claim premised upon general violence or high crime rates will not, without more, prevail. To succeed on a particular-social-group claim, an applicant must demonstrate that he or she has been or will be targeted on the basis of immutable, particular, and socially distinct characteristics, and the Departments believe that groups defined by general violence or high crime rates generally do not meet this threshold.

The Departments do not disagree with commenters who suggested that it would be natural for individuals to flee countries where their governments could not control violence. Indeed there are myriad reasons that would encourage or compel an individual to leave his or her home country. However, a government’s inability or unwillingness to control violence is but one factor for asylum eligibility with respect to claims of persecution by non-state actors. Applicants must meet all eligibility factors and merit a positive exercise of discretion to warrant relief.

The Departments agree with commenters who stated that it would be difficult for applicants whose particular social group is predicated upon general violence or high crime rates in the country of origin to demonstrate that their proposed group meets all three requirements of immutability, particularity, and social distinction. However, the Departments do not believe that a regulatory standard stating so would lead adjudicators to deny applications where the applicant has articulated a particular social group unrelated to the crime rate. Rather, the Departments believe that this rulemaking offers clear guidance to adjudicators and parties that such proposed groups, without more, will not be cognizable. *See* 85 FR at 36278 (“The proposed rule would further build on the BIA’s standards and provide clearer guidance to adjudicators regarding

whether an alleged group exists and, if so, whether it is cognizable as a particular social group in order to ensure the consistent consideration of asylum and statutory withholding claims.”). Furthermore, immigration judges and asylum officers undergo training in which they learn to adjudicate asylum claims, including the cognizability of particular social groups. The Departments are confident that adjudicators are aptly prepared, through training and experience, to adjudicate asylum claims without confusing the particular-social-group analysis with other facets of asylum eligibility requiring a separate analysis.

With respect to commenter statements that this rule is contrary to established case law which, the commenter stated, established that a country’s generalized violence and high crime rates were “irrelevant” to the applicant’s claim, the commenter appears to have conflated relevance for sufficiency. The Fourth Circuit, in the cited cases, determined that generalized violence or high crime rate did not undermine claims where the court determined there was sufficient evidence to establish a nexus to a protected ground. However, these cases do not endorse a position that claims rooted in generally violent conditions or high crime rates, without more, would be sufficient to warrant a grant of asylum. *See Alvarez-Lagos*, 927 F.3d at 251; *Zavaleta-Policiano*, 873 F.3d at 248; *Crespin-Valladares*, 632 F.3d at 127.

#### 4.1.3. Being the Subject of a Recruitment Effort by Criminal, Terrorist, or Persecutory Groups

*Comment:* One organization noted that the rule narrows the definition of credible fear by “eliminating claims to protection from fear of gangs or terrorists.” Another organization claimed there is no support in the cases cited by the NPRM for making gang recruitment-related particular social groups generally non-cognizable, emphasizing that the NPRM does not provide any evidence as to why the courts should not continue to consider recruitment-based particular social groups on a case-by-case basis.

One organization noted that the U.S. government recognizes that children are often targets for gang recruitment and gang violence in their home countries. The organization

expressed concern regarding the rule's presumption that "attempted recruitment" or "private criminal acts" are not sufficient for asylum, contending this ignores the reality that many child asylum seekers flee their home countries "precisely because the government is unable or unwilling to control non-state actors like terrorist or gang organizations who would recruit or harm children and families."

One organization noted that UNHCR has emphasized the importance of recognizing claims based on resistance to and desertion from non-state armed groups, explaining that gangs may try to harm individuals who have resisted gang activity, are opposed to gang practices, or attempt to desert a gang.

*Response:* The Departments disagree with the commenter's assertion that the rule eliminates any claims to protection. As stated above, the rule will not eliminate any particular-social-group claims. Rather, it sets forth a list of social group claims that will generally not be, without more, cognizable. This does not foreclose the possibility that an applicant could pursue or prevail on a claim in which they were the subject of a recruitment effort by a criminal, terrorist, or persecutory group. As noted by the NPRM, "such facts could be the basis for finding a particular social group, given the fact- and society- specific nature of this determination." 85 FR at 36279; *see also Grace II*, 965 F.3d at 906 ("[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence."). However, as a general rule, such groups will not be cognizable, consistent with existing Attorney General and BIA precedent. *Matter of A-B-*, 27 I&N Dec. at 335 ("Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group"); *Matter of S-E-G-*, 24 I&N Dec. at 584 ("[Y]outh who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum



purposes.”); *Matter of E-A-G-*, 24 I&N Dec. at 594–95 (determining that “persons resistant to gang membership” is not cognizable); *see also Constanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011); *see also Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011); *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010); *Lushaj v. Holder*, 380 F. App’x 41, 43 (2d Cir. 2010); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009). The Departments do not dispute that children may be targets for gangs, gang recruitment, and gang violence in their countries of origin. However, whether such applicants for asylum have been harmed or fear harm from the gangs is only one part of the overall asylum inquiry. Even a further showing that the government is unwilling or unable to protect the applicant would not be enough to merit a grant of asylum without meeting the other eligibility requirements. As discussed above, an applicant must also demonstrate that the harm he or she suffered or fears is on account of protected ground, such as membership in a particular social group.

#### 4.1.4. The Targeting of the Applicant for Criminal Activity for Financial Gain Based on Perceptions of Wealth or Affluence

*Comment:* Another organization claimed that history is full of examples of persecution of classes of people on the basis of perceived wealth or influence. The organization stated that, under the proposed rule, the members of the kulak class who were killed after the Russian Revolution or the many wealthy and middle class Cubans who fled the Cuban Revolution would not have been recognized as persecuted social groups.

Another organization contended that there is no legal basis or support in the NPRM for precluding courts from analyzing particular social groups involving wealth on a case-by-case basis. The organization referenced the BIA’s decision in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), *aff’d Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) (cited at 85 FR at 36279), stating the fact that the BIA held thirteen years ago that “affluent Guatemalans” is not a cognizable particular social group “does not even begin to support the NPRM’s sweeping proposal to bar all PSGs that mention wealth.”

*Response:* As noted in the NPRM, a social group which is founded upon being targeted for criminal activity for financial gain or for perceptions of wealth or affluence are generally, without more, unable to meet the well-established requirements for cognizability. 85 FR at 36279; *see Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 75.

With respect to commenters who presented specific examples that they alleged illustrated persecution of classes of people on the basis of perceived wealth or influence, as well as comments suggesting that the Departments are doing away with individualized analysis, the Departments note again that there may exist examples of social groups based on wealth that are cognizable, and that the listed social groups have been identified as generally not cognizable, without more. However, “the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.” 85 FR at 36279; *see Grace II*, 965 F.3d at 906 (“[T]he record in this case does not support the asylum seekers’ argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.”).

#### 4.1.5. Interpersonal Disputes of Which Governmental Authorities were Unaware or Uninvolved

*Comment:* One organization noted that the rule would limit particular social groups based on both “interpersonal disputes of which governmental authorities were unaware or uninvolved” and “private criminal acts of which governmental authorities were unaware or uninvolved.” The organization emphasized that it is unlikely that a particular social group framed in this way would be cognizable; however, because the fact pattern is included in the rule as a “limiting concept,” the organization expressed concern that adjudicators would likely deny asylum based on this language, even though the rule specifies that it applies “in the context of analyzing a particular social group.”

Another organization expressed concern that governments could attempt to remove U.S. or international sanctions by demonstrating that “private actors” were carrying out persecution

against political dissidents and religious minorities. The organization noted that these governments could use propaganda to “inflare local residents against a particular group,” using the decimation of the Tutsis population in Rwanda as an example. According to the organization, governments could claim this was not a human rights violation because “government soldiers themselves took no part in the attack.” Another organization emphasized that violence is sometimes outside the state’s reach, noting that violent activity can occur where weak governments use allied armed groups to provide security.

*Response:* As discussed above with respect to particular social groups defined by general violence or high crime rates, the Departments agree with commenters that it would be difficult to demonstrate that particular social groups defined by interpersonal disputes of which governmental authorities were unaware or uninvolved, without more, are cognizable. However, immigration judges and asylum officers undergo rigorous training on how to adjudicate asylum claims, including the cognizability of particular social groups. The Departments are confident that adjudicators are aptly prepared to adjudicate asylum claims without confusing the particular social group analysis with other facets of asylum eligibility requiring a separate analysis. The Departments fail to see how setting forth a social group that the commenter believes is unlikely to be presented is grounds for the commenter’s objection to the rule.

The Departments do not address comments raising concerns about international sanctions or holding international governments accountable for alleged human rights violations, as the Departments’ implementing statutes and regulations are unrelated to such matters, which are more properly handled by the Department of State.

Comments raising concerns about non-governmental violence that occurs “outside the state’s reach” or in cases where “weak governments use allied armed groups to provide security” do not alter the Departments’ determination that particular social groups predicated upon interpersonal disputes of which governmental authorities were unaware or uninvolved, without more, are generally not cognizable. The commenter’s statement about non-governmental

violence that occurs “outside the state’s reach” is not sufficiently specific for the Departments to draw any conclusion about its relevancy to such social groups. Although the Departments must be explicit that they are not endorsing the cognizability of such groups, the commenter’s proposed scenario regarding weak governments using allied armed groups clearly would not involve governmental unawareness and is unlikely to involve personal disputes.<sup>46</sup>

#### 4.1.6. Private Criminal Acts of which Governmental Authorities were Unaware or Uninvolved

*Comment:* One organization noted generally that the rule would remove protections for individuals fleeing violence from non-state actors. Another organization claimed that the rule’s exclusion of acts “of which governmental authorities are unaware or uninvolved” disproportionately affects the ability of children to seek asylum. The organization noted that the ability of many children to access state protection in their home country is dependent upon the adults in their lives, emphasizing that not all children have an adult to help them obtain protection. The organization also noted that some children who go directly to government officials for protection may be dismissed. One organization noted generally that it has “long been determined” that the government does not actually need to be aware of the threats and that there is no requirement to report the persecution to the government if doing so “would be futile or place the applicant at greater risk of harm,” citing *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062–72 (9th Cir. 2017) (en banc) and *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007). Another organization claimed that the rule disregards the “well-documented fact” that oppressive governments utilize irregular forces for the purpose of denying their actions. The organization emphasized that chronic violence arises when a government is unwilling or unable to protect the life and liberty of its citizens, claiming that this government inaction puts people at

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<sup>46</sup> Regarding the commenters’ specific example, the Departments note that claims from Tutsis in Rwanda may also be framed in terms of race or nationality which are not defined in the rule and are separate from claims based on a particular social group.

risk of death. The organization concluded by alleging that the rule would send these individuals back “into mortal danger.”

Another organization claimed this portion of the rule would violate the APA in at least six different ways. First, the organization alleged that the rule is contrary to law, as the INA does not state or imply that interpersonal or “private” acts cannot give rise to asylum. Instead, the statute makes clear that such acts can do so if they “rise to the level of persecution, are taken on account of a protected ground, and are inflicted by actors the government is unable or unwilling to control.” Second, the organization claimed that it is “manifestly unreasonable” to use the particular social group analysis to “place entire groups of persecutors outside the asylum laws,” noting that the particular social group analysis is dependent on the nature of the group to which the survivor belongs rather than the identity of the persecutor. Third, the organization alleged that a general prohibition of asylum in all situations where the government is “uninvolved” in the persecution is “arbitrary and contrary to law,” claiming that the substitution of “uninvolved” for “unable or unwilling” would render large categories of previously meritorious claims ineligible. The organization also emphasized that the rule would require survivors of persecution by non-state actors to report persecution to authorities “even where laws against gender-based violence are limited or non-existent.” The organization noted that current asylum law allows applicants to submit evidence as to why reporting this type of violence was impossible or dangerous, claiming there is no legitimate justification for the prohibition of such evidence.

Fourth, the organization claimed that the NPRM’s use of the word “private” implicitly raises the “unable or unwilling” standard on some claims. Fifth, the organization contended that the “interpersonal” category is “even more sweeping” and therefore contrary to the INA, claiming that the plain meaning of the “interpersonal” violence category would bar *all* asylum claims. Sixth, the organization claimed the “interpersonal” and “private” categories violate the INA to the extent that, in the Departments’ view, they apply to domestic or other gender-based

violence. The organization claimed this is “at odds” with the evidence, which clearly shows that this type of violence is “not simply a private matter based on personal animosity.” The organization also claimed that the application of the “interpersonal” and “private” categories to domestic and other gender-based violence would violate constitutional equal protection principles because the presumption created by these categories would have a disproportionate effect on women (as women are much more likely to experience violence by an intimate partner).

Similarly, another organization noted that this portion of the rule is especially damaging to gender and LGBTQ+ related claims because “many are rooted in intimate partner or family violence that government actors choose to ignore as private or family matters.” The organization emphasized the BIA’s decision in *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), holding that a Guatemalan woman should be granted asylum on the basis of abuse by her former spouse, noting that this precedent has allowed many female asylum seekers from Central America to win cases. One organization stated that “the very indifference” of governmental authorities to the plight of survivors of gender-based violence proves that persecution exists, emphasizing there is “no good reason” for denying the claims of survivors who can show their government’s failure to protect them.

Another organization claimed the rule “condemns women to endure various forms of domestic- and gender-based violence, stripping them of the humanitarian protection of the United States.” The organization contended that this “upends” the longstanding recognition and protection of particular social groups, across circuits, on the following grounds: femicide, *Perdomo v. Holder*, 611 F.3d 662, 662 (9th Cir. 2010); honor killings, *Sarhan v. Holder*, 658 F.3d 649, 649 (7th Cir. 2011); female genital mutilation, *Mohammed v. Gonzales*, 400 F.3d 785, 785 (9th Cir. 2005); arranged or inescapable marriages, *Acosta Cervantes v. Barr*, 795 F. App’x 995, 995 (9th Cir. 2020); and “other forms of domestic violence,” *Muñoz-Ventura v. Barr*, 799 F. App’x 977, 977 (9th Cir. 2020). One organization contended that, by dismissing violence against women or LGBTQ+ individuals as an “interpersonal dispute,” the rule fails to recognize

that gender-based violence is a “social means to subordinate rather than an individual problem” and requires comprehensive responses.

*Response:* The Departments disagree that the rule is contrary to law. At the outset, the Departments acknowledge that the INA does not specify whether interpersonal or “private” acts can give rise to an asylum claim. While the actions of private actors are also discussed elsewhere in this rulemaking<sup>47</sup>, the Departments will now address concerns as they were raised specifically in the context of establishing a particular social group. As the commenters contend, acts can give rise to asylum claims only if they are taken on account of a protected ground, such as “particular social group.” And, as discussed above, the term “particular social group” is ambiguous. As the Departments have set forth a reasonable determination that the term would generally not include, without more, social groups predicated upon private criminal acts of which governmental authorities were unaware or uninvolved, such private acts would generally not be sufficient grounds for asylum. *See Matter of A-B-*, 27 I&N Dec. at 335 (“groups defined by their vulnerability to private criminal activity likely lack the particularity” required for cognizability).

The commenter’s allegations that the rule violates the APA are predicated on presumptions that the rule categorically excludes certain types of social group claims. As stated above, “the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.” 85 FR at 36279; *see Grace II*, 965 F.3d at 906 (“[T]he record in this case does not support the asylum seekers’ argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.”). The Departments

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<sup>47</sup> The Departments note that longstanding law has precluded private acts of violence as a basis for asylum or similar protection for many years. *See, e.g., Matter of Pierre*, 15 I&N Dec. 461, 462–63 (BIA 1975) (strictly personal dispute between a husband and wife does not state a claim on account of race, religion, political opinion or membership in a particular social group). Further, circuit courts have also held that private acts of violence are not a cognizable basis for asylum, though their decisions are sometimes rooted in other bases. *See, e.g., Prado v. U.S. Att’y Gen.*, 315 F. App’x 184, 188 (11th Cir. 2008) (“Ordinary criminal activity and acts of private violence are generally not ‘persecution’ within the meaning of 8 U.S.C. 1101(a)(42)(A).”). The Departments’ consideration of private violence under the definition of particular social group in no way precludes its consideration in connection with the other requirements necessary for asylum, including nexus and persecution.

believe that the listed social groups generally fail to meet the requirements for cognizability, not because, as the commenter alleged, of the identity of the persecutor, but rather because such groups are generally defined by the group members' vulnerability to private criminal activity. *See Matter of A-B-*, 27 I&N Dec. at 335.

The Departments note that social groups predicated on domestic or other gender-based violence, insofar as the group is defined by private criminal acts of which governmental authorities were unaware or uninvolved, will generally not be cognizable, as they, like all social groups defined by such acts, likely lack the requisite particularity due to the "broad swaths of society [that] may be susceptible to victimization" or social distinction to be cognizable. *Matter of A-B-*, 27 I&N Dec. at 335–36. Similarly, the Departments disagree with commenter's assertions that the rule would implicitly raise the "unwilling or unable" standard, as the Departments believe that social groups defined by private criminal acts of which governmental authorities were unaware or uninvolved are not cognizable under the particular social group analysis of immutability, particularity, and social distinction, irrespective of the government's inability or unwillingness to help, which is an independent factor in considering asylum eligibility.

With respect to commenters' concerns about this rule's potential effect on LGBTQ and gender-based-violence related claims, the Departments note again that they have codified a long-standing test for determining cognizability of particular social groups and have set forth a list of common fact patterns involving particular-social-group claims that generally will not meet those well-established requirements. The Departments did not first determine a set of groups that should or should not be cognizable and craft a rule around that determination.

To the extent that commenters assert that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X*, 545 U.S. at 982.

#### 4.1.7. Past or Present Terrorist Activity or Association



*Comment:* At least one commenter raised concerns with the “past or present terrorist activity or association” base for not favorably adjudicating a particular social group. The commenter asserted that the terms “terrorist activity” and “terrorist association” were overbroad and, as a result, would result in unnecessary denials of asylum claims. Moreover, the commenter stated that the Departments did not provide “empirical research” to support the provision’s inclusion, but rather relied on the “unproven” statement that allowing particular social groups defined by terrorist activity or association would reward membership in organizations that cause harm to society and create a perverse incentive to engage in reprehensible or illicit behavior as a means of avoiding removal.

*Response:* The Departments disagree that the terms “terrorist activity” or “terrorist association” are overbroad. The Departments are using the “terrorist activity” language that Congress clearly defined in the INA. *See* INA 212(a)(3)(B)(iii), 8 U.S.C. 1182(a)(3)(B)(iii). To the extent the commenter alleges that the statutory definition itself is overbroad, such arguments are outside the scope of this rule. Moreover, the Departments do not believe the phrase “terrorist association” is overly broad. The Departments intend for this provision to apply to those who voluntarily associate, or have previously voluntarily associated, with a terrorist organization. The Departments believe the ordinary meaning of the term provides sufficient definition for adjudicators to apply. *See, e.g.*, “Associate” Definition, Merriam-Webster, <https://www.merriam-webster.com/dictionary/associate> (defined as “join[ing] as a partner, friend, or companion” with an example of “They were closely associated with each other during the war”).

Although the Departments do not maintain data on the number of prior asylum grants based on a terrorism-related particular social group, the Departments believe it is reasonable that, as a general matter, persons applying for asylum in the United States cannot claim asylum based on their participation in, or association with, terrorism. For example, Congress included certain terrorism-related activities as a categorical bar from asylum eligibility. *See* INA

208(b)(2)(A)(v), 8 U.S.C. 1158(b)(2)(A)(v).<sup>48</sup> Similarly, although this is not a categorical bar to terrorism-based particular social groups, generally disfavoring such groups is consistent with this Congressional intent.

Finally, the Departments note that association with past or current terrorist activity is at least as “anti-social” as association with criminal gang activity, if not more so, and the latter has been rejected as a basis for a particular social group by multiple courts. *Cf. Arteaga*, 511 F.3d at 945–46 (“We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.”); *Cantarero*, 734 F.3d at 85–86 (“The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger. . . . Such recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status. . . . Accordingly, the BIA’s interpretation merits our deference under *Chevron*.”); *Elien*, 364 F.3d at 397 (“Such recognition unquestionably would create a perverse incentive for [aliens] coming to or residing in the United States to commit crimes, thereby immunizing themselves from deportation. . . . Moreover, the BIA has never extended the term ‘social group’ to encompass persons who voluntarily engaged in illicit activities.”). Consequently, the Departments decline to follow a suggestion that terrorist association should generally be considered a cognizable particular social group.

#### 4.1.8. Past or Present Persecutory Activity or Association

*Comment:* One organization claimed that the NPRM’s proposed bar on “past persecutory activity,” 85 FR at 36279, is contrary to the APA in the same manner as the proposed bar on past

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<sup>48</sup> The Departments note that certain activities or associations that trigger terrorism-related inadmissibility grounds may potentially be the subject of discretionary group-based, situational, or individual exemptions. In such cases, they would not constitute bars to asylum eligibility.

criminal conduct. The organization alleged that listing a scenario involving past persecutory activity as generally non-cognizable would create even greater uncertainty, however, because “past persecutory activity” is not defined in the NPRM.

*Response:* Although the commenter’s broad and unspecified allegations make a response difficult, the Departments do not believe this rulemaking is in violation of the APA for reasons given in both the NPRM and this final rule, and they reiterate that this rulemaking does not impose any categorical bar as suggested by the commenter. The Departments have provided descriptions and reasons for all the provisions and have established a reasonable basis for the rule. With respect to the commenter’s concerns about what conduct falls under the term “past persecutory activity,” the Departments note that this rulemaking, including the NPRM, sets forth clear guidelines about what conduct constitutes persecutory activity, 85 FR at 36280–81, and thus, that this should serve as a guide for conduct involving past persecutory activity.

#### 4.1.9. Status as an Alien Returning from the United States

*Comment:* One organization noted that the rule would generally not find a particular social group to be cognizable if based on “status as an alien returning from the United States.” The organization expressed concern about this, noting that there have been circumstances where “Westernized Iraqi citizens have faced persecution and potential torture based on their perceived ties to the United States.” The organization emphasized that each proposed particular social group should be evaluated on a case-by-case basis instead of being subjected to general rules that would result in “blanket denials.”

Another organization claimed that “status as an alien returning from the United States” is on its face an “immutable, socially distinct, and particular” characteristic. The organization emphasized that past association as a former resident of the United States is similar to one’s membership in a family or one’s specific history because it is a particular characteristic that cannot be changed. The organization alleged that this portion of the rule could result in the

denial of asylum to individuals persecuted due to their real or imputed association with the United States by “a regime that is hostile to this country, or its culture and values.”

One organization disagreed with the claim that any group based on individuals returning from the United States will be “too broad” to qualify as a particular social group, 85 FR at 36279, claiming this is “factually and legally erroneous.” The organization alleged that, as a factual matter, the number of individuals returning to some countries from the United States is small. As a legal matter, the organization claimed that whether a group is potentially large would not, by itself, mandate the conclusion that the group is not particular.

*Response:* The Departments reiterate once again that this rule does not foreclose the possibility of pursuing and prevailing upon a particular social group claim defined by the applicant’s status as an alien returning from the United States. “[T]he regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.” 85 FR at 36279; *see Grace II*, 965 F.3d at 906 (“[T]he record in this case does not support the asylum seekers’ argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.”). If applicants believe that their proposed group as an alien returning from the United States meets one of the exceptions to the general rule based on, as commenter’s proposed, the group meeting the particularity requirement, the applicants may propose such a group.

The Department disagrees with comments that individuals returning from the United States can, generally, demonstrate that their group is sufficiently particular or socially distinct. *See, e.g., Reyes v. Lynch*, 842 F.3d 1125, 1139 (9th Cir. 2016) (upholding BIA’s determination that a proposed social group of deportees “was too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal”); *Lizama*, 629 F.3d at 446 (rejecting proposed group of “young, Americanized, well-off Salvadoran male deportees

with criminal histories who oppose gangs” as “clearly fail[ing] to meet the required criteria” (internal quotations omitted)). However, to the extent that commenters believe there may be exceptions to this general rule, “the rule does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.” 85 FR at 36279; *see Grace II*, 965 F.3d at 905.

#### 4.2. Political Opinion

*Comment:* Commenters argued that the proposed definition of political opinion is inconsistent with legislative intent and international law, which, commenters asserted, require the term to be construed broadly. Specifically, commenters asserted that Congress, in passing the Refugee Act of 1980, aimed to align the United States definition of “refugee” with the United States’ obligations under the 1967 Protocol relating to the Status of Refugees. Commenters provided excerpts from the House Report for the Refugee Act of 1980 and UNHCR guidance stating the term should be construed broadly. Commenters also argued that Congress is the branch that holds the plenary power and that the proposed edits to 8 CFR 208.1(d) are an attempt “to do an end run around the legislative intent” of section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42).

Commenters expressed concern that the proposed definition of political opinion is inconsistent with Federal court and BIA precedent. Commenters cited *Cardoza-Fonseca*, 480 U.S. 421, to argue that the proposed definition of “political opinion” is too narrow. One commenter also cited cases from the United States Courts of Appeals for the Second, Third, and Ninth Circuits, which the commenter argued evidence that the term political opinion should be construed broadly. Another commenter noted that Federal courts have recognized political opinions based on feminist beliefs, labor organizing, environmental beliefs, support of student organizations, and gangs. With respect to BIA precedent, one commenter asserted that the NPRM incorrectly interpreted *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), and that the case actually instructs that the term political opinion should be construed broadly. The commenter

similarly asserted that the BIA decisions in *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1993), and *Matter of N-M-*, 21 I&N Dec. 526 (BIA 2011), support a broad reading of political opinion. One commenter cited the third edition of the Webster's New World College Dictionary (1997) to argue that the definition of the word "political" is unambiguously understood to include more than just opposition to a particular regime. Accordingly, the commenter argued, the proposed definition of political opinion contradicts the plain meaning of the INA.

Commenters expressed concern that political opinions not directly related to regime change would be considered invalid under the proposed definition. As an example, one commenter asserted that Wang Quanzhang (who the commenter stated is a human rights defender in China) and Ivan Safronov (a Russian journalist who, the commenter stated, was charged with treason for contributing to a prominent business newspaper) would not have valid political opinions under the proposed definition. Commenters asserted that individuals could hold valid political opinions unrelated to regime change such as LGBTQ rights advocacy, voter registration advocacy, and opinions on the publication of data about COVID-19 in countries that seek to hide the pandemic's impact. One commenter noted that in some nations the geopolitical landscape renders a distinction between opposition to a specific regime indistinguishable from political opinions about cultural issues.

Commenters similarly expressed concern that gang-based claims would be rejected under the proposed definition. Commenters asserted that gangs can have substantial political power and that some nations are unable to control gang violence and influence. One commenter stated that the United States Department of State recognized this reality in its 2019 Country Reports on Human Rights Practices. Other commenters cited provisions of the UNHCR Guidelines on International Protection noting that gang-based and gender-based claims can be valid.

Commenters also expressed concern with the "absent expressive behavior" language in proposed 8 CFR 208.1(d) and 8 CFR 1208.1(d), asserting that section 208(b) of the Act, 8 U.S.C. 1158(b), does not require protected grounds to be expressed in a particular way and that

“political opinion,” not “political activity” is the protected ground. Commenters asserted that the proposed definition contradicts UNHCR Guidance on expressing opinions. Commenters argued that “absent expressive behavior” is “antithetical to the concept of an imputed political opinion against a non-state organization” and that it is inconsistent with Federal case law that has recognized imputed political opinions against gangs that fall outside of the proposed definition of expressive behavior.

One commenter expressed concern that the proposed definition of political opinion “frustrates the reliance interests” of “thousands” of individuals whose asylum claims are based on political opinions under the current understanding of the concept. The commenter expressed concern that individuals with pending applications would “have a much lower likelihood of obtaining relief under the proposed rule.”

*Response:* In regards to commenters’ concerns that the final rule contravenes various Federal circuit court decisions, the Departments note that the disparity in interpretations of the term political opinion is a partial motive for the amendment. As discussed in the NPRM, this rule will provide clarity in an area of conflicting case law that has made uniform application challenging for adjudicators.

One commenter suggested that the Departments were “seek[ing] to erase all precedent that is favorable to asylum seekers.” The Departments deny this purported motive. As mentioned in the NPRM, the purpose behind the amendments surrounding political opinion is to provide clarity to adjudicators, avoid further strain on the INA’s definition of “refugee,” and to acknowledge that the statutory requirements and general understanding of political opinion is intended to advance or further a discrete cause related to political control of a state.

A commenter expressed concern that the Departments failed to recognize that many asylum seekers flee their homelands because their governments are unable or unwilling to control non-state actors, including international criminal organizations. The Departments do not disagree that this may be the motivation for some aliens to flee their homelands. However, that

fact alone does not create a basis for protection under the immigration laws. Asylum and statutory withholding of removal are narrowly tailored—allowing for the discretionary grant of protection from removal in the case of asylum and granting protection from removal in the case of withholding—to aliens who demonstrate that they meet specific eligibility criteria. The asylum laws were not created to address any misfortune that may befall an alien. Rather, asylum generally is available to individuals who are able to establish, among other things, that the harm they experienced or fear was (or there is a well-founded basis to believe would be) inflicted on account of a protected ground. The rule will improve the system by creating a clearer definition of political opinion, which, in turn, will assist in the expeditious processing of meritorious claims.

Several commenters listed various opinions which, commenters’ opined, would no longer fit within the political opinion category. The Departments acknowledge that the rule codifies a specific definition for articulating political opinion claims, though it also incorporates existing case law principles.<sup>49</sup> As explained in the NPRM, the Departments seek to provide clear standards for adjudicators to determine political opinion claims. For example, if political opinion were expanded to include opposition to international criminal organizations, it would “interfere with the other branches’ primacy in foreign relations,” and “strain the language of” INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). *See Saladarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005) (holding that an individual’s cooperation with the DEA, even if it stemmed from disapproval of a drug cartel, did not constitute a political opinion). Although the Departments agree that international criminal organizations threaten both their fellow countrymen and the international community, the appropriate redress for such concerns is not to broadly grant asylum on the basis of political opinion.

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<sup>49</sup> As discussed herein, the rule itself applies prospectively to applications filed on or after its effective date; accordingly, it will have no effect on pending applications, contrary to commenters’ concerns. However, the rule also codifies many principles that are already applicable through binding case law. Thus, although the rule itself may not apply to pending applications, applicable case law that is reflected in the rule may nevertheless still apply to pending applications.



A commenter stated, without more, that the rule does not meet the materiality standard as outlined in the UNHCR guidance. The Departments decline to respond to commenters' general assertions that the rule violates U.S. international treaty obligations.

The Departments do not share a commenter's concern that the NPRM defines "political opinion" narrowly to the extent that it runs afoul of congressional intent to define "refugee" broadly. The NPRM notes that since the enactment of the statute, the definition of "refugee" has been strained in various contexts. *See Saladarriaga*, 402 F.3d at 467. Thus, one aspect of the motive behind the NPRM is to reduce the strain on the statute and return the statute to its original meaning.

Additionally, the commenter claimed that the expansive definition was meant to mirror the 1967 Protocol relating to the Status of Refugees, the 1951 Convention relating to the Status of Refugees, and UNHCR guidelines, which the commenter claims are now violated by the new definition. The Departments reject this conclusion. While UNHCR guidelines are informative, they are not prescriptive and thus not binding. *See Aguirre-Aguirre*, 526 U.S. at 427 ("The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts."); *Cardoza-Fonseca*, 480 U.S. at 439, n.22 ("Indeed, the Handbook itself disclaims such force[.]").

In regards to the meaning of "political," the Departments note that, according to the Merriam-Webster Dictionary, "political" does have numerous definitions. *See* "Political" Definition, Merriam-Webster, <https://www.merriam-webster.com/dictionary/political>. However, all but one of those definitions relates specifically, and often solely, to governments. Moreover, the first definition refers only to the government. Similarly, the Departments reject commenters' assertions that "expressive behavior" is solely "political action" and therefore distinct from political opinion. First, the Departments note that the definition of political opinion has been highly debated. *See, e.g., Catherine Dauvergne, Toward a New Framework for Understanding Political Opinion*, 37 Mich. J. Int'l L. 243, 246–47 (2016) ("The tension between [differing

interpretations of political opinion] raises the overarching question of whether political opinion should be defined at all. It is evident that existing definitions have not provided sufficient guidance, and that there is no definition in the adjacent area of human rights law that can be logically imported . . . . [A] broadly agreed-upon definition of political opinion would advance the jurisprudence by providing a consistent standard.”). The NPRM aims to clarify this definition for adjudicators. The Departments’ use of “expressive behavior” is directly related to the NPRM’s definition of political opinion as “intended to advance or further a discrete cause related to political control of a state.” 85 FR at 36280. Moreover, the Departments are unaware of any claim rooted in political opinion that did not contain some type of expressive behavior, and it is not clear how an opinion never uttered or conveyed could be recognized as a political opinion.

Another commenter expressed concern that a particular state’s geopolitical landscape that would leave political opinions indistinguishable from cultural issues. First, BIA case law clearly holds that political opinion involves a cause against a state or political entity rather than against a culture. *Matter of S-P-*, 21 I&N Dec. at 494. However, the Departments also acknowledge that there may be rare circumstances that will amount to exceptions to the general guiding principles laid out in the NPRM. For this reason, the rule uses “in general” to guide adjudicators in their determinations.

#### 4.3. Persecution

*Comment:* Commenters expressed a wide range of concerns with the rule’s definitional standard for “persecution.” *See* 85 FR at 36280–81; 8 CFR 208.1(e), 1208.1(e). Overall, commenters asserted that the Departments’ justification was generally flawed and inappropriately relied on case law to support its position.

Commenters asserted that the proposed definition of persecution is inconsistent with the statutory meaning of the word. For example, commenters argued that the new definition impermissibly alters the definition of refugee so that it does not conform with the United Nations

Convention and Protocol Relating to the Status of Refugees. Commenters said this violates the “fixed-meaning canon” of construction, which “holds that words must be given the meaning they had when the text was adopted.” Commenters considered the meaning of “refugee,” which incorporates persecution, in the Refugee Act and argued that legislators intended for persecution to have a broad meaning in order to align the INA with U.S. international obligations.

Commenters expressed concern that the proposed definition of persecution would exclude claims based on threats with no accompanying effort to carry out the threat or non-exigent threats. Commenters cited and discussed numerous Federal cases, including, *Cardoza-Fonseca*, 480 U.S. 421, and argued that Federal case precedent suggests that threats alone can be the basis of asylum claims. One commenter provided the example of death threats and noted that the United States Court of Appeals for the Sixth Circuit reasoned that an applicant need not wait for an actual attempt on his or her life before having a valid claim for asylum. *Juan Antonio*, 959 F.3d at 794. Another commenter similarly argued that a teenage girl who rebuffed inappropriate advances from a corrupt official would not be able to prevail on a persecution claim unless the official assaulted her. Commenters asserted that through the focus on severe and exigent threats, the proposed definition and the accompanying non-exhaustive list of factors would unlawfully lead to denials of asylum claims where applicants suffer significant harms that fall short of an immediate threat to life or property. At least one commenter asserted that this requirement of action would inappropriately eliminate claims based on a well-founded fear of future persecution.

Commenters expressed concern that the proposed definition of persecution wrongfully fails to account for the possibility of cumulative harms rising to the level of persecution and argued that Federal case law instructs that adjudicators must consider cumulative harm. *See, e.g., Herrera-Reyes v. Att’y Gen. of U.S.*, 952 F.3d 101, 109 (3d Cir. 2020); *Tairou v. Whitaker*, 909 F.3d 702, 707 (4th Cir. 2018); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998).

Commenters expressed concern that the rule would prevent applicants who have suffered

multiple distinct harms from prevailing on an asylum claim if each instance is deemed to be not severe or to be minor. To illustrate these concerns, one commenter discussed persecution suffered by the Rohingya and another detailed the case of one of his clients whose application, the commenter argued, would be granted under the current regulations and case law but denied under the persecution definition established by the rule.

One commenter argued that because factors suggesting a lack of persecution are overrepresented, adjudicators would not be engaging in case-by-case analysis and that the scales are inappropriately tipped towards finding a lack of persecution.

Commenters expressed concern that the proposed definition inappropriately fails to consider how children and adults experience harm differently. Specifically, commenters argued that children may experience harm because of affiliation with family members and caregivers and that harm suffered by children may rise to the level of persecution even though the same harm would not rise to such a level for adults. Other commenters noted that it is not reasonable to expect children to seek protection from official sources.

Commenters expressed concern that the proposed rule would require asylum seekers to demonstrate that persecutory laws would likely be enforced against them. As an example, commenters noted that asylum seekers coming from countries where same sex relationships carry the death penalty would not be able to secure asylum unless they could also establish that the law would likely be applied to them. In many cases, one commenter argued, such a penalty is not enforced frequently because sexual minorities are not likely to break the law given the risk of death. The commenter noted that the United States Court of Appeals for the Ninth Circuit has suggested that applicants with these types of claims should prevail. *See Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005). Commenters also noted that even if laws such as the above are not enforced, they are still persecutory in nature because of the fear and vulnerability that they create in those that could be subjected to the laws.

*Response:* As stated in the proposed rule, the Departments added new paragraphs in 8 CFR 208.1 and 1208.1 “to define persecution and better clarify what does and does not constitute persecution.” 85 FR at 36280. These changes clarify that persecution is an extreme concept that requires severe harm and specify different examples of conduct that, consistent with case law, do not rise to the level of persecution. *See* 85 FR at 36280–81. They are not unduly restrictive, and it is well-established that not every harm that befalls an alien, even if it is unfair, offensive, unjust, or even unlawful, constitutes persecution. *See Gjetani v. Barr*, 968 F.3d 393, 397 (5th Cir. 2020) (“Persecution is often described in the negative: It is *not* harassment, intimidation, threats, or even assault. Persecution is a specific term that does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.” (quotation omitted)); *see also Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003) (discrimination against stateless Palestinians in Saudi Arabia did not amount to persecution).

Commenters are correct that the definition of “refugee” in the Act, first codified by the Refugee Act, incorporates “persecution” and that Congress enacted the Refugee Act in order to conform the Act with the United States’ obligations under the 1967 Protocol relating to the Status of Refugees. *See Matter of Acosta*, 19 I&N Dec. at 219. However, commenters are incorrect that Congress intended for the Refugee Act to import any specific international or extrinsic definition of “persecution.” Instead, as explained by the BIA, Congress used the term persecution prior to the Refugee Act, and, accordingly, it is presumed that Congress intended for that pre-Refugee Act construction to continue to apply. *Id.* at 222.<sup>50</sup> That prior construction of the term included the notions that “harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome . . . and either by the government of a country or by persons or an organization that the government was unable or unwilling to control.” *Id.* The standards for persecution contained in the proposed

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<sup>50</sup> Moreover, as also noted by the BIA, the Protocol itself leaves the determination of who should be considered a refugee, which inherently includes a determination of who is at risk of persecution, to each state party itself. *Matter of Acosta*, 19 I&N Dec. at 220.

rule and this final rule align with this understanding of “persecution,” and the rule is not incompatible with the Act or the United States’ international treaty obligations.

Some of the standards implemented by this rule involve matters that the Federal courts have adjudicated inconsistently. For example, the rule establishes that repeated threats would not constitute persecution absent “actual effort to carry out the threats.” 8 CFR 208.1(e), 1208.1(e). Courts have held that threats, even with accompanying action, do not necessarily rise to the level of persecution. *See, e.g., Gjetani*, 968 F.3d at 398 (collecting cases and explaining that “[E]ven those subject to brutal physical attack are not necessarily victims of ‘persecution.’ Courts have condemned all manner of egregious and even violent behavior while concluding they do not amount to persecution.”); *see also Quijano-Rodriguez v. Gonzales*, 139 F. App’x 910, 910-11 (9th Cir. 2005) (collecting cases).

The Departments note that Federal courts have also held that threats without attempts to carry out the threat may at times constitute persecution. *See, e.g., Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (explaining that “death threats alone can constitute persecution” but “they constitute ‘persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm’” (citation omitted)). Threats “combined with confrontation or other mistreatment” are likely to be persecution; however, “cases with threats *alone*, particularly anonymous or vague ones, rarely constitute persecution.” *Id.* (internal citation omitted) (emphasis added); *see also Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (“In certain extreme cases, we have held that repeated and especially menacing death threats can constitute a primary part of a past persecution claim, particularly where those threats are combined with confrontation or other mistreatment. . . . Threats standing alone, however, constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual ‘suffering or harm.’”). Even the case cited by commenters, *Juan Antonio*, 959 F.3d at 794, noted that threats alone amount to persecution only when they are “of a most immediate and menacing nature”; moreover, the respondent in that case

experienced beatings and rape in addition to threats, rendering that case inapposite to the rule, *id.* at 793.

The Departments believe that the rule reflects appropriate and reasonable lines drawn from the relevant case law regarding persecution, particularly due to the difficulty associated with assessing the credibility of an alleged threat, especially in situations in which the threat was made anonymously and without witnesses or the existence of other corroborating evidence. *See Lim*, 224 F.3d at 936 (“Furthermore, claims of threats are hard to disprove. A finding of past persecution raises a regulatory presumption of future persecution and flips the burden of proof . . . to show that conditions have changed to such a degree that the inference is invalid . . . . Flipping the burden of proof every time an asylum applicant claimed that he had been threatened would unduly handcuff the [government].”). To the extent that the standards implemented by this rule conflict with case law interpreting what sorts of conduct rise to the level of persecution, the Departments invoke their authority to interpret the ambiguities of what constitutes persecution—an undefined term in the Act—outside the bounds of such prior judicial constructions. *See Brand X*, 545 U.S. at 982; *see also Grace II*, 965 F.3d at 889 (noting that the term “persecution” is “undefined in the INA”); *cf. Fernandez v. Keisler*, 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X* to affirm the BIA’s rejection of the Fourth Circuit’s prior interpretation of section 101(a)(22) of the Act, 8 U.S.C. 1101(a)(22), where the court’s prior interpretation did not rest on a determination that the statute was “unambiguous”). Moreover, in response to the commenters’ concerns, the final rule more clearly specifies the types of threats included within the definition such that menacing and immediate ones may still come within the definition consistent with the case law noted above.

To the extent that aspects of persecution adjudications are not covered by the rule, the Departments expect adjudicators to conduct all determinations consistent with the law, regulations, and precedent. Accordingly, the rule does not conflict with case law explaining that harms must be considered cumulatively and in the aggregate, *see, e.g., Matter of Z-Z-O-*, 26 I&N

Dec. 586, 589 (BIA 2015) (holding that applicant’s experiences did not amount to persecution “when considered either individually or cumulatively”); *Matter of O-Z- & I-Z-*, 22 I&N Dec. at 25–26 (considering incidents of harm “[i]n the aggregate”), because it does not in any way direct adjudicators to blindly only consider harm suffered individually. In other words, adjudicators will still consider harms suffered by applicants in the aggregate.

Similarly, the rule does not end case-by-case adjudications of whether conduct constitutes persecution. The Departments disagree with commenters that the Departments’ choice to frame persecution in the context of conduct that does not rise to the level of persecution while leaving open further adjudication of what conduct constitutes persecution in any way “tips the scales.” “Persecution is often described in the negative . . . .” *Gjetani*, 968 F.3d at 397.

As noted by commenters, Federal courts have held that an applicant’s age is relevant for determining whether the applicant suffered persecution. *See, e.g., Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) (“[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution.”). Commenters are incorrect, however, that the rule’s persecution standard conflicts with this instruction. Instead, the rule provides a general standard for persecution that is built around the severity of the harm. 8 CFR 208.1(e), 1208.1(e). This focus on severity does not foreclose arguments or an adjudicator’s finding that harms suffered by an applicant are severe in their particular context given the applicant’s age or particular circumstances, even if such harms may not generally be considered severe for the average applicant.

Regarding commenters’ concerns with the rule’s instruction that “[t]he existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally,” the Departments note this standard is consistent with well-established law that “an asylum applicant can establish a well-founded fear of



persecution by proving either a pattern or practice of persecution of a social group, of which the applicant has proven she is a member, or by proving the applicant will be singled out personally.” *Ayele v. Holder*, 564 F.3d 862, 870 (7th Cir. 2009). Laws that are unenforced or enforced infrequently cannot demonstrate a pattern or practice of persecution, 8 CFR 208.13(b)(2)(iii), 1208.13(b)(2)(iii), and without credible evidence that such laws would be applied to the applicant, the alien cannot demonstrate that he or she would be singled out individually for persecution, *id.* The rule does not alter these well-established precepts. Further, this requirement that the mere existence of a law, without more, is insufficient to rise to the level of persecution is in keeping with prior interpretations of persecution. For example, the BIA has explained that evidence of the enactment of a new law is not evidence of changed country conditions for the purposes of a motion to reopen “without convincing evidence that the prior version of the law was different, or was differently enforced, in some relevant and material way.” *Matter of S-Y-G-*, 24 I&N Dec. 247, 257 (BIA 2007).

This definition does not foreclose an applicant from citing to the existence of such laws as a part of his or her evidence to demonstrate past persecution or risk of future persecution. Nor does this requirement require an applicant to live in secret in order to avoid future harm. Further, the Departments expect that in many cases there may be credible evidence of the enforcement of such laws. For example, in the Ninth Circuit case cited by commenters, the government conceded at oral argument that the Lebanese government arrested individuals for homosexual acts and enforced the law at issue. *Karouni*, 399 F.3d at 1172.

Finally, the rule’s persecution standard does not in any way foreclose claims based solely on a well-founded fear of future persecution. Instead, the adjudicator will consider whether the future harm feared by the applicant would constitute persecution under the rule’s standards. In other words, the adjudicator would consider whether the feared harm would be carried out by an individual with the intent to target the applicant’s belief or characteristic, would be severe, and

would be inflicted by the government or by persons or organizations that the government is unable or unwilling to control.<sup>51</sup>

#### 4.4. Nexus

*Comment:* Numerous commenters expressed general disagreement regarding the rule's nexus provisions, including referring to the list as an "anti-asylum wish list." Commenters claimed that it directed adjudicators to deny most claims.

Some commenters alleged that the Departments were attempting to accelerate asylum hearings at the expense of due process; the commenters construed the rule as creating a checklist that bypasses careful consideration that due process requires. Others opined that the rule prioritized efficiency and expediency over fairness, due process, and "basic humanity." Commenters stated the rule allowed "blanket denials."

Another commenter opined that the rule was arbitrary because the Departments failed to consider the real-world implications of the proposal. Commenters expressed concern that, after the enactment of the rule, many asylum seekers would not have favorable adjudication of their claims, including those based on violence from non-state actors. Others claimed the rule's nexus components were "completely incapable of supporting a meritorious asylum claim."

Commenters expressed concern that the rule precludes a mixed-motive analysis, reasoning that if an actor had any one, potential motive listed in the rule, it would be fatal to the claim, and that it violates the "one central reason" standard. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i).

Some of the commenters' disagreement surrounded *Matter of A-B-*, 27 I&N Dec. 316. One commenter opined that the rule is contrary to *Matter of A-B-*'s requirement of case-by-case

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<sup>51</sup> Specifically regarding commenters' concerns that the rule's standard that threats without accompanying action do not constitute persecution would undermine claims based on fear of future persecution, the Departments believe that the commenters are conflating past harms and determinations of past persecution with fear of future harm and determinations of a well-founded fear of future persecution. Indeed, it is difficult to understand how anyone could predict whether future threats will occur and difficult to conceive of a claim in which an alien alleges a fear of future threats but not a fear of future physical, mental, or economic harm. The real issue is the likelihood of future harm based on past threats, and the rule does not alter an alien's ability to argue that past threats are evidence of either past persecution or a likelihood of future persecution.

rigorous analysis, and another commenter worried that the NPRM codified *Matter of A-B-*, despite, as the commenter characterized, its unfavorable treatment in various Federal courts.

Other commenters argued that the nexus provisions conflated “categories of people” with requirements of the perpetrator’s mental state.

Another commenter expressed concern that the rule included “substantive changes to the law disguised in procedural attire.”

*Response:* As an initial point, to the extent commenters’ points misstate the rule, address issues not raised by the rule, are rooted in erroneous reasoning, are contrary to facts or law, or reflect unsubstantiated and exaggerated melodramatic views of the rule, the Departments decline to adopt those points. The Departments do not wish to enact some “anti-asylum wish list” in this rule. In codifying the circumstances that are generally insufficient to support a nexus finding, the Departments are simply specifying common circumstances, consistent with case law, in order to provide clarity and efficiency for adjudicators. The Departments proposed these amendments in order to assist aliens with meritorious claims, as well as the entire immigration system. As with all regulations or policy changes, the Departments considered the effect this rule will have; accordingly, the Departments reject commenters’ allegations that such implications were not considered.

The rule’s inclusion of these general guidelines for nexus determinations will not result in due process violations from adjudicators failing to engage in an individualized analysis. The rule provides a nonexhaustive list of eight circumstances that generally will not warrant favorable adjudication, but the rule does not prohibit a favorable adjudication depending on the specific facts and circumstances of the applicant’s particular claim. *See* 8 CFR 208.1(f), 1208.1(f) (“For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances”); *see also Grace II*, 965 F.3d at 906 (holding that the inclusion of

qualifying terms like “in general” and “generally” demonstrated that the government had not enacted a rule that all gang-based asylum claims would fail to demonstrate eligibility for asylum). In other words, the rule implicitly allows for those rare circumstances in which the specified circumstances could in fact be the basis for finding nexus given the fact-intensive nature of nexus determinations. *See* 85 FR at 36279. The amended regulations do not remove that fact-intensive nature from the nexus inquiry; rather, the amended regulations provide clarity in order to reduce the amount of time that adjudicators must spend evaluating claims. While the Departments did consider expediency and fairness, the Departments disagree that expediency is prioritized over and above due process.

The Departments disagree with commenters’ concerns that the nexus provisions eliminate the mixed motive analysis or violate the “one central reason” standard. As discussed above in Section II.C.4.3 of this preamble, to the extent that aspects of persecution adjudications are not covered by the rule, the Departments expect adjudicators to conduct all determinations consistent with the law, regulations, and precedent. Here, the rule provides guidance on harms that would not be considered on account of one of the five protected grounds; the rule did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to one of the listed circumstances that would generally not be harm on account of a protected ground. Further, the preamble to the NPRM acknowledges mixed motive claims by quoting the REAL ID Act of 2005, which defined the nexus element as requiring that one of the five protected grounds to be “at least one central reason for persecuting the applicant.” 85 FR at 36281.

As to the concerns surrounding *Matter of A-B-*, the Departments reiterate the above discussion that adjudicators should continue to engage in individualized, fact-based adjudications as the rule provides only a list of circumstances that do not constitute harm on account of a protected ground in most, but not all, cases. Accordingly, the rule is consistent with the Attorney General’s admonishment, in *Matter of A-B-*, of the BIA for failing to engage in an individualized

analysis and instead accepting the Government's concessions as true. 27 I&N Dec. at 339.

Regarding commenters' further concerns that the rule should not codify *Matter of A-B-* given its varied treatment by the Federal courts, the Departments note that the United States Court of Appeals for the District of Columbia Circuit recently affirmed that *Matter of A-B-* holds that decision makers must make individual determinations on a case-by-case basis. *Grace II*, 965 F.3d at 905. The Departments also note that every circuit court addressing *Matter of A-B-* on its merits so far, as opposed to the unusual procedural challenge at issue in *Grace II*, has found it to be a valid exercise of the Attorney General's authority. *See, e.g., Gonzales-Veliz v. Barr*, 938 F.3d at 234 ("In sum, because *A-B-* did not change any policy relating to asylum and withholding of removal claims, we reject *Gonzales-Veliz* argument that *A-B-* constituted an arbitrary and capricious change in policy."); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1080 (9th Cir. 2020) ("Accordingly, we decline to hold that the Attorney General's decision in *Matter of A-B-* was arbitrary or capricious.").

The Departments disagree with the commenters' allegation that the Departments conflated nexus with other asylum requirements by not solely focusing on the perpetrator's state of mind. The NPRM provides a list of situations that would not ordinarily be on account of a protected ground. 85 FR at 36281. The listed situations are attenuated from protected grounds to the extent that they do not meet the necessary nexus requirement. While some of the listed situations, particularly those related to the rationale for the harm, are closely related to other elements of asylum, including particular social group, a nexus analysis has often required an examination of the persecutor's views. *See Sharma v. Holder*, 729 F.3d 407, 412–13 (5th Cir. 2013); *Caal-Tiul v. Holder*, 582 F.3d 92, 95 (1st Cir. 2009). Thus, the inclusion of the situations related to rationale for the harm are consistent with case law.

Finally, the Departments reiterate that the NPRM does not re-write asylum law as some commenters suggested. As noted in the NPRM and herein, the provisions of the rule related to the substance of asylum claims flows from well-established statutory authority and relevant case

law; thus, it does not “re-write” substantive asylum law. The NPRM falls squarely within the Departments’ authority, which is discussed more fully in Section 6.5 of this preamble.

#### 4.4.1. Interpersonal Animus or Retribution

*Comment:* Commenters expressed particular concerns regarding the specification that claims based on “interpersonal animus or retribution” generally will not be favorably adjudicated. 8 CFR 208.1(f)(1), 1208.1(f)(1). One commenter opined that it was arbitrary and irrational for the Departments to rely on *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008), in support of this change because that case’s facts were “unusual.”

Commenters expressed confusion as to whether interpersonal modified both animus and retribution. If it did not modify retribution, commenters expressed concern that retribution, which they defined as punishment, encompasses all asylum claims.

Other commenters remarked that all harm between people is interpersonal.

Commenters also expressed concern that the inclusion of this situation would result in the erasure of mixed motive analysis as some “may engage in persecution for pretextual reasons to hide their bias.”

*Response:* The inclusion of claims based on “interpersonal animus and retribution” as examples of claims that will generally not result in a favorable adjudication because the harm is not on account of a protected ground is consistent with longstanding precedent. The Departments cited to just one case, *Zoarab*, 524 F.3d at 781, to illustrate this point in the NPRM, but there are numerous other examples. *See, e.g., Martinez-Galarza v. Holder*, 782 F.3d 990, 993 (8th Cir. 2015) (finding that harm “motivated by purely personal retribution” is not a valid basis for an asylum claim); *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (explaining that “mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim”); *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (holding that “[f]ear of retribution over personal matters is not a basis for asylum under the Immigration and Nationality Act”); *Jun Ying Wang v. Gonzales*, 445 F.3d 993, 998 (7th Cir. 2006) (acknowledging that the

Seventh Circuit has “repeatedly held that a personal dispute cannot give rise to a claim for asylum”); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000), and reiterating that “[p]urely personal retribution is, of course, not” a protected ground, specifically, imputed political opinion); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 284 (4th Cir. 2004) (finding that “[f]ears of ‘retribution over purely personal matters . . .’ do[es] not constitute [a] cognizable bas[is] for granting asylum”) (quoting *Huaman–Cornelio v. BIA*, 979 F.2d 995, 1000 (4th Cir. 1992)). The Departments disagree that *Zoarab* is not an accurate example of this basic proposition despite commenters’ characterizations of the case’s particular facts. Furthermore, after the NPRM was promulgated, the Attorney General made the point more explicitly that interpersonal animus or retribution will generally not support a nexus finding required under the INA. *See Matter of A-C-A-A-*, 28 I&N Dec. 84, 92 (A.G. 2020) (“An alien’s membership in a particular social group cannot be incidental, tangential, or subordinate to the persecutor’s motivation for why the persecutor sought to inflict harm. . . . Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus.” (cleaned up)). “The reasoning for this is straightforward: When private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be ‘one central reason’ for the abuse.” *Id.* (internal quotation marks omitted).

To the extent commenters argue that any harm between two people is “interpersonal,” commenters misinterpret both the cases supporting this provision and the rule itself. Instead, the point here is that a personal dispute between two people—for example a property dispute that causes some sort of altercation or a personal altercation because of one person’s involvement with a criminal investigation and prosecution—is not generally a valid basis for an asylum claim because it is not harm on account of a protected ground. Further, as set out in the rule, the qualifier “interpersonal” applies to both animus and retribution. Accordingly, commenters are

incorrect that this provision states that any claim based on “retribution” would generally be insufficient and that all or most claims would fail as a result.

Finally, the Departments reiterate the discussion above in Section II.C.4.4 of this preamble that the inclusion of these examples does not foreclose a mixed motive analysis. Accordingly, to the extent an applicant’s fear is based on harm partially motivated by an interpersonal dispute and partially motivated by another potentially protected ground, the adjudicator will consider those particular facts and circumstances to determine the applicant’s eligibility for asylum or statutory withholding of removal.

4.4.2. Interpersonal Animus in which the Alleged Persecutor has not Targeted, or Manifested an Animus Against, Other Members of an Alleged Particular Social Group in Addition to the Member Who Has Raised the Claim at Issue

*Comment:* Commenters also raised concerns regarding this change in the NPRM described in this heading. One commenter argued that it was a “clear attempt to bar women from obtaining asylum based on domestic violence,” a claim that the commenter noted was an “uncontroversial basis for asylum in many of our courtrooms until the Attorney General issued *Matter of A-B-*.” One commenter asserted that this amendment gives the persecutor a “free pass” to persecute someone because that person will be unable to establish that another person suffered under this persecutor. Further, the commenter argued that asking an alien to investigate, while attempting to flee for safety, whether the persecutor had persecuted others was impossible, absurd, and arbitrary. Another commenter claimed that it violated the INA to require an alien to demonstrate that the persecutor “manifested animus against others.” One commenter claimed that the amendment was irrational because it held aliens seeking asylum through membership in a particular social group to a different and higher evidentiary standard than aliens seeking asylum through the other four protected grounds. The commenter asserted that this reading was supported by the BIA’s use of *eiusdem generis* in *Matter of Acosta*, 19 I&N Dec. 211, and the



Attorney General's favorable citation of the rule in *Matter of L-E-A-*, 27 I&N Dec. 581. Another commenter insisted that "interpersonal" was a meaningless modifier.

*Response:* The Departments, based on prior case law, decided that demonstration of animus against other members of the particular social group is generally necessary to establish nexus. 85 FR at 36281; *see also Matter of A-C-A-A-*, 28 I&N Dec. 84, 92 (A.G. 2020) ("Furthermore, if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, then the applicant may not satisfy the nexus requirement."). The focus of the nexus requirement is membership in the group, INA 101(a)(42), 8 U.S.C. 1101(a)(42), and by definition, a "group" encompasses more than one individual. Thus, an alleged persecutor who has no interest in harming other individuals ostensibly in that group is generally not seeking to persecute one individual on account of his or her membership in that alleged particular social group. Without such animus against other group members, the motivation would appear to be personal, rather than on account of membership in the group, and a personal dispute, as discussed above, is generally insufficient on its own to qualify the applicant for the relief of asylum. *See Madrigal*, 716 F.3d at 506.

Asylum law is not meant to provide redress for every victim of crime no matter how sympathetic those victims may be. Accordingly, in order to demonstrate that an alien was persecuted "on account of" a particular social group based on interpersonal animus, the alien will ordinarily need to demonstrate that the persecutor has targeted or manifested an animus against someone else in that particular social group. Because an alien will necessarily articulate a particular social group that is socially distinct in order for the group to be cognizable in the first instance, it is reasonable to expect the alien to be able to articulate whether the alleged persecutor has sought to harm other members of that group. The rule does not require aliens to investigate or ask their alleged persecutors anything; rather, the aliens should already have evidence about the persecutor's motives in order to advance a valid asylum claim in the first instance, especially in cases where the alleged persecutor is the government.

Despite the inclusion of this ground as a statement of one type of claim that is generally incapable of supporting an application for relief, the Departments reject commenters' interpretation of this provision as a bar. Rather, as the Departments have detailed above, the rule itself allows for circumstances where a listed situation, based on the specific facts, will support a nexus finding. For example, as noted by commenters, an applicant who is a persecutor's initial victim may argue that despite the persecutor's lack of action against other group members, the applicant's dispute with the persecutor is in fact on account of the protected ground and not on account of a non-protected personal concern.<sup>52</sup> Accordingly, commenters' suggestion that each persecutor will have a "free pass" is also incorrect.<sup>53</sup>

Additionally, the Departments disagree that this provision evidences discriminatory intent against a particular class of asylum applicants. The rule is designed to provide expedited adjudication of meritorious claims as well as increased clarity and uniformity—a problem that commenters highlighted by noting that "many," but not all, courts held a particular standard regarding applications premised on domestic violence.

The Departments do not believe that this requirement violates the INA, and without a more specific comment, they are unable to respond.

This provision is not irrational and does not hold aliens relying on membership in a particular social group to a higher evidentiary standard. Although particular social group is a more amorphous category than race, religion, nationality, or political opinion—and, thus, more in need of definitional clarity—each protected ground requires demonstration of the same base elements: persecution or a well-founded fear of persecution on account of a protected ground.

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<sup>52</sup> The Departments also note that the commenters' example of an "initial victim" necessarily presumes both that there are other victims and that the alien knows or will know of them. Consequently, that example would fall outside of the rule's purview in any event.

<sup>53</sup> Further, persecutors are not brought to justice under U.S. asylum law nor should it be viewed that way. The Departments are not giving persecutors "one free pass" because they are often not dealing with the persecutors themselves.

Further, “interpersonal” is not a meaningless modifier. The Departments use the term “interpersonal” to differentiate instances of animus and dispute between two private parties from instances of animus and dispute between a private individual and a government official.

4.4.3. Generalized Disapproval of, Disagreement with, or Opposition to Criminal, Terrorist, Gang, Guerilla, or Other Non-State Organizations Absent Expressive Behavior in Furtherance of a Discrete Cause Against such Organizations Related to Control of a State or Expressive Behavior that is Antithetical to the State or a Legal Unit of the State

*Comment:* Commenters expressed concerns regarding the required analysis, the underlying intent, and the necessary elements of the inclusion of “generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state” in the list of circumstances that will generally not support a nexus finding. Specifically, some commenters argued that this provision undermines a rigorous fact-based analysis as it “categorically state[s] that certain opinions can never be political.” The commenters urged that this type of labeling is incorrect and improper. Additionally, commenters asserted that the provision “evidences a clear discriminatory intention to utterly annihilate the entire genres of asylum cases where opposition to gangs constitutes a political opinion.” Another commenter claimed that the rule was “clearly designed” to eliminate asylum for those fleeing the “Northern Triangle” (El Salvador, Guatemala, and Honduras) of Central America. One commenter asserted that because the international criminal organizations function as quasi-governments, there is often no reason for an alien to engage in expressive behavior that is antithetical to the state because “the state has no real authority.”

*Response:* First, commenters are incorrect that this provision prohibits certain opinions from being considered “political.” Instead, as discussed above, adjudicators should continue to engage in fact-based analysis of the particular facts and circumstances of an individual

applicant's claim, and the rule expressly allows for rare circumstances in which the facts of a listed situation could be the basis for finding nexus. This provision does not remove that fact-intensive nature from the nexus inquiry.

Additionally, the Departments disagree that this provision evidences a discriminatory intent. Again, the rule is designed to allow a more expeditious adjudication of meritorious asylum claims so that applicants do not have to wait a lengthy amount of time before receiving relief. The Departments' inclusion in this section of the rule of a certain category of claims that is frequently raised but is generally insufficient to establish nexus is not the product of a desire to harm or inhibit a particular people, nationality, or group.

As to a commenter's suggestion that aliens may be unlikely to engage in expressive behavior that is antithetical to the state because the state has no real authority due to international criminal organizations functioning as quasi-governments, the Departments interpret this comment to refer to organizations such as drug cartels whom the commenter believes function as de facto governments in some countries. Although the Departments question the factual accuracy of the commenter's point and otherwise believe the comment is either hypothetical or speculative, especially due to the fact-intensive, case-by-case nature of asylum application adjudications, they nevertheless note that the rule does not preclude claims based on opposition to non-state organizations related to efforts by the state to control such organizations. 8 CFR 208.1(d), 1208.1(d). And if an applicant establishes that the organization is the de facto government or otherwise functions in concert with the government, then the rule does not preclude a claim based on the applicant's opposition to that organization or the government. In other words, whether the country has "real authority" or not, nothing in the rule precludes a claim based on opposition to non-state organizations in the circumstances outlined in the rule, though the Departments note that, in general, aliens who do not engage in expressive behavior regarding such organizations or the government are unlikely to establish a nexus based on political opinion for purposes of an asylum application.

#### 4.4.4. Resistance to Recruitment or Coercion by Guerilla, Criminal, Gang, Terrorist, or Other Non-State Organizations

*Comment:* Commenters asserted that the inclusion of “resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations” as a particular circumstance that generally does not support a nexus finding does not take in to account the significant power yielded by transnational criminal organizations, which often function as de facto governments.

*Response:* The Departments appreciate commenters’ concerns about the expansive power of transnational criminal organizations. The Departments agree with commenters that such organizations may pose significant dangers. If an alien asserts that the government is unable or unwilling to control the transnational criminal organization, the alien may present evidence to establish that. As the Departments have previously mentioned, the NPRM explicitly acknowledges the fact-intensive nature of the nexus inquiry and further acknowledges that rare circumstances defined by the listed situations may warrant a favorable nexus determination.

#### 4.4.5. The Targeting of the Applicant for Criminal Activity for Financial Gain Based on Wealth or Affluence or Perceptions of Wealth or Affluence

*Comment:* Regarding “the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence,” one commenter expressed concern about the Departments’ citation to *Aldana-Ramos v. Holder*, 757 F.3d 9, 18 (1st Cir. 2014), as support. The commenter stated that the case’s primary holding was “even if a persecutor seeks to harm an asylum seeker for financial gain, the BIA must engage in a mixed motive analysis to determine whether the protected characteristic was also a central reason for the persecution.” The commenter alleged that the Departments were relying on *Aldana-Ramos* to “implement a blanket rule against asylum seekers who may be targeted, in part, based on wealth or perceived wealth, with no regulatory requirement that adjudicators engage in mixed motive analysis, as is required under the Real ID Act as codified in the INA.”

*Response:* As discussed above, the nexus provisions do not eliminate the mixed-motive analysis. The NPRM explicitly detailed that it was providing guidance on what generally would not be considered one of the five protected grounds; the NPRM did not state, nor was it meant to be construed, that it precluded mixed-motive analysis if the situation involved one of the five protected grounds in addition to a situation on the list that was not adjudicated to be a protected ground. Thus, the NPRM is consistent with mixed-motive analysis precedent, and an applicant may provide argument, like the respondent in *Aldana-Ramos*, that his or her alleged persecutor is motivated by a protected ground in addition to the non-protected ground stated in the exception.

#### 4.4.6. Criminal Activity

*Comment:* Commenters expressed concern about the rule's inclusion of "criminal activity" as the basis of claims that will generally not support a favorable adjudication due to the breadth of the provision and the underlying precedent. Numerous commenters opined that "virtually all harm" that satisfies the persecution requirement could be characterized as "criminal activity" because "in virtually every country, beatings, rape, and threatened murder" are criminalized. Another commenter realized that this broad definition may not be what the Departments intended, but without providing boundaries on the term, the Departments invited "mass denials of claims by those who have bona fide asylum claims." A commenter expressed concern that the category would include aliens who were forced or coerced into committing crimes. Additionally, a commenter expressed reservations about the Departments' reliance on *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010), explaining that the "alien was detained and unrepresented before the immigration court and the BIA" and "it was not until he had filed a pro se petition for review that he obtained counsel, and most of his appeal centered on procedural defects in the proceedings below."

*Response:* The inclusion of "criminal activity" is not overly expansive. Rather, as demonstrated by the explanatory case citation provided by the Departments, this provision is meant to capture cases that are premised on generalized criminal activity. *See Zetino*, 622 F.3d

at 1016 (discussing the “desire to be free from harassment by criminals motivated by theft or random violence by gang members”).

The Departments find that these generalized claims are distinct from the commenters’ concerns that persecutory acts in general may be “criminal.” To the extent commenters are nevertheless concerned that this provision would prohibit a broader swath of claims, the Departments again reiterate that these categories of cases are not categorical bans. Instead, the rule explicitly noted that there may be exceptions, and an applicant may present argument to the adjudicator as to why their individual case meets the nexus requirement. For example, aliens who were forced and coerced into crime may be an exception based upon the specific facts of the situation.

Further, the citation to *Zetino* remains an accurate example of the Departments’ proposition despite commenters’ concerns, which involved procedural issues unrelated to the relevant points in the case.

#### 4.4.7. Perceived, Past or Present, Gang Affiliation

*Comment:* Regarding the inclusion of “perceived, past or present, gang affiliation” as the basis of claims that will generally not support a favorable adjudication, commenters objected to a perceived double standard and the implications for aliens, especially children. Several commenters argued that this provision was arbitrary and capricious because it would make individuals who were incorrectly imputed to be gang members ineligible for asylum while allowing incorrect imputation of other characteristics, for example, homosexuality, to be grounds for asylum. Another commenter noted that this change would twice victimize aliens because imputed gang membership occurs at no fault of their own. One commenter also expressed concern that children who are forced into prostitution or drug smuggling would lose their right to asylum.

*Response:* The Departments acknowledge commenters’ concerns and have sympathy for aliens who incorrectly have gang membership imputed onto them by no fault of their own.

These concerns, however, do not result in a viable asylum claim. “[T]he asylum statute does not provide redress for every misfortune.” *Matter of A-B-*, 27 I&N Dec. at 318.

Regarding commenters’ concerns that the rule provides an inconsistent approach to immutability, commenters compare dissimilar claims. While gang affiliation and homosexuality are traits that may both be imputed, accurately or not, to an applicant, the underlying ground of the latter may be a protected ground while the former is not. Thus, the Departments’ approach toward immutability is consistently based on the protected nature of the underlying ground.

Commenters are incorrect that this provision would cause children, such as those forced into prostitution or drug smuggling by criminal gangs, to lose their eligibility for asylum.<sup>54</sup> Indeed, as noted in the preamble, claims premised on these sorts of gang affiliations had already been found in case law to not support a finding of asylum eligibility prior to the proposed rule’s publication. *See, e.g., Reyes*, 842 F.3d at 1137–38 (holding that “former members of the Mara 18 gang in El Salvador who have renounced their membership” was not a cognizable particular social group); *Matter of A-B-*, 27 I&N Dec. at 320 (“Generally, claims by aliens pertaining to . . . gang violence perpetrated by non-governmental actors will not qualify for asylum.”). Because these gang-based claims are not related to a protected ground, it reasonably follows that they would further not succeed on nexus because the harms would not be on account of a protected ground. Nevertheless, the Departments again reiterate that, as discussed above, the rule explicitly provides for rare exceptions; children who were forced into prostitution or drug smuggling may present argument that their case sufficiently meets the nexus requirements based upon the specific facts in their application.

#### 4.4.8. Gender

*Comment:* Some commenters expressed strong objections to the NPRM’s inclusion of gender in the list of circumstances that would not ordinarily result in a favorable adjudication,

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<sup>54</sup> The Departments note that aliens who are victims of criminal activities, including human trafficking, may be eligible for other immigration benefits beyond asylum based on that victimization. INA 101(a)(15)(T),(U), 8 U.S.C. 1101(a)(15)(T),(U).



including allegations that the provision is arbitrary and capricious as well as “cruel and contrary to the purposes underlying Congress’ desire to provide protection to refugees.” Some commenters also argued that the amendments took a new and capricious position and would result in substantial and irreparable harm to aliens. One commenter opined that this provision was really about a desire to reduce the amount of aliens who could seek asylum.

Commenters asserted that gender has been one of the bedrock bases for asylum claims and that, as a result, the rule overturns decades of contrary legal precedent. In support, commenters cited to multiple cases “in which immigration judges, the BIA, and the courts of appeals have held that gender-based persecution provides a valid ground for asylum.”<sup>55</sup> One commenter claimed that the proposed rule “runs counter to every case to have considered it.” According to commenters, this includes the precedent cited in support of the rule, *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005), which they assert in fact holds that gender can provide an adequate basis for establishing membership in a particular social group. *Id.* at 1199–1200. Some commenters asserted that the Departments should have included a larger quotation in the NPRM preamble, including:

the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted “on account of” their membership. 8 U.S.C. § 1101(a)(42)(A). It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group.

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<sup>55</sup> For example, one commenter cited to the following cases: *De Pena-Paniagua v. Barr*, 957 F.3d 88, 93–94 (1st Cir. 2020); *Cece*, 733 F.3d 671–72; *Sarhan v. Holder*, 658 F.3d 649, 654–57 (7th Cir. 2011); *Perdomo*, 611 F.3d at 662; *Agbor v. Gonzales*, 487 F.3d 499, 503 (7th Cir. 2007); *Hassan v. Gonzales*, 484 F.3d 513, 517–18 (8th Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006); *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2004), *vac’d on other grounds sub nom. Keisler v. Gao*, 552 U.S. 801 (2007); *Niang*, 422 F.3d at 1999–1200; *Mohammed v. Gonzales*, 400 F.3d 785, 795–98 (9th Cir. 2005); *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 639–42 (6th Cir. 2004); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603–04 (7th Cir. 2002); *Fatin*, 12 F.3d at 1241; *In re Kasinga*, 21 I&N Dec. 357, 375 (BIA 1996); *cf., e.g., Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (“Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group.”); *Karouni v. Gonzales*, 399 F.3d at 1171–72 (reaching the same conclusion).

*Niang*, 422 F.3d at 1199. One commenter expressed a belief that the Departments' choice of language to cite in *Niang* was designed to deceive the public and to reduce the notice and comment burden.

Commenters asserted that the inclusion of gender conflicts with the international obligations and international norms of the United States. For example, a commenter noted that the UNHCR, which oversees the Refugee Convention, has confirmed that people fleeing persecution based on gender, gender-identity, and sexual orientation do qualify for asylum under the Convention's definition of a refugee. In regards to numerosity, the commenter pointed to UNHCR guidance which explained, "[t]he size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size." Commenters stated that because the inclusion of gender would exclude meritorious claims for relief, the rule against gender-based asylum claims would violate the government's duty of non-refoulement as codified in statutory withholding of removal at section 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A). Commenters stated that the rule against gender-based asylum would aid and abet violations of the law of nations in contravention of the Alien Tort Claims Act ("ATCA") because there is a specific and universal obligation to prevent domestic violence and other violence against women in international law.

One commenter argued that it is improper to disfavor gender-based claims in the nexus section. In support of that position, the commenter asserted that to support a general bar on gender-based claims within the nexus analysis, the agencies would need to show that gender is not generally a central reason for persecution throughout the world, and further, the proposed regulation changes do nothing to establish any empirical claims about causation.

Commenters also expressed concern that the amendment would prevent adjudicators from evaluating claims on a case-by-case basis.

Another commenter noted that levels of gender-based violence have risen during the coronavirus pandemic and stated that, as a result, it is not appropriate for the Departments to take action to restrict asylum claims based on gender.

A commenter requested that the Departments not eliminate one of the few protections for gender-based violence.

Another commenter noted the Department of State's work to reduce and eliminate gender-based violence, including emphasizing in the refugee protection context that the "empowerment and protection of women and girls has been a central part of U.S. foreign policy and national security" and that "gender-based violence[ ] is a critical issue" that is "intricately linked to" the Department's strategic goals.

Finally, a commenter made numerous unsupported claims, including that the inclusion of gender violates the constitutional guarantee of equal protection; that the inclusion of gender in the laundry list is contrary to the evidence; and that the NPRM's failure to include a rationale for listing gender as failing the nexus requirement is, without more, sufficient to render that inclusion arbitrary.

*Response:* Regarding commenters' concerns that gender and "private criminal acts" would no longer be recognized as a viable claim, the Departments again note that the rule, after listing the eight situations that will generally not result in favorable adjudication, also notes that in rare circumstances, given the fact-specific nature of such determinations, such facts could be the basis for finding nexus. Although the nexus requirement for an asylum claim requires scrutiny when an asserted particular social group encompasses "millions" of individuals, *Matter of A-C-A-A-*, 28 I&N Dec. 92, the rule does not categorically bar all gender-based asylum claims contrary to the assertions of commenters. In other words, the rule does not completely prohibit applications with a nexus related to issues of gender from being granted, and the inclusion of gender in the list of circumstances that generally does not constitute harm on account of a protected ground does not conflict with the requirement that adjudicators consider each

application on a case-by-case basis. Further, a purpose for the amendments was to allow for increased clarity and more uniform adjudication than the prior scheme which was shaped through case law. Thus, the Departments do not believe that the inclusion of gender in the listed situations generally resulting in unfavorable adjudication is cruel, novel, capricious, or contrary to congressional intent.

The Departments acknowledge commenters' discussion of a wide range of case law involving issues surrounding gender and applications for asylum or for statutory withholding of removal. To the extent that the Departments' inclusion of "gender" as an example of a nexus basis that generally will not support a favorable adjudication conflicts with the provided case law, the Departments reiterate the discussion in Section II.C.4.3 of this preamble regarding *Brand X*. The Departments invoke their authority to interpret the ambiguities in the Act, including what constitutes harm on account of a protected ground, outside the bounds of any prior judicial constructions. *See Brand X*, 545 U.S. at 982 (explaining that agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations because there is a presumption that Congress left statutory ambiguity for the agencies to resolve).

Regarding commenters' specific objections to the Departments' use of *Niang*, the Departments agree that the section following the quote in the NPRM stated that the issue surrounding gender is the nexus determination. This does not undermine, but enhances, the inclusion of gender in the listed circumstances that, without more, will not generally result in favorable adjudication based on nexus. *Niang* goes on to place more limits on a specific gender-based particular social group: "It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group." *Niang*, 422 F.3d at 1200. This tracks with the rule: harm on account of gender alone will generally result in unfavorable adjudication.

Another commenter pointed to the UNHCR's approach toward gender and numerosity. While the Departments appreciate the comment, they note that they are not bound by the

UNHCR, and commenters' reliance on guidance from UNHCR is misplaced. UNHCR's interpretations of or recommendations regarding the Refugee Convention and Protocol, such as set forth in the UNHCR Handbook, are "not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. at 427. "Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Id.* at 427–28. Further, to the extent such guidance "may be a useful interpretative aid," *id.* at 427, it would apply only to statutory withholding of removal, which is the protection that implements Article 33 of the Convention, *cf. R-S-C- v. Sessions*, 869 F.3d 1176, 1188, n.11 (10th Cir. 2017) (explaining that "the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule"). In the withholding of removal context, the Departments disagree with commenters that the rule will violate the United States' non-refoulement obligations because such claims are not, without more, meritorious.

In addition, the Departments note that commenters asserted that violating a so-called "specific and universal obligation to prevent domestic violence and other violence against women" was a viable claim under the ATCA. The Departments further note, however, that the "aiding and abetting" violations of the law of nations is not currently recognized as within the scope of the ATCA. *Doe v. Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom. Nestle USA, Inc. v. Doe I*, No. 19-416, 2020 WL 3578678 (July 2, 2020), and *cert. granted sub nom. Cargill, Inc. v. Doe I*, No. 19-453, 2020 WL 3578679 (July 2, 2020). Moreover, the commenters failed to demonstrate that such a claim would "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," such as violation of safe conducts, infringement of the

rights of ambassadors, or piracy, that the Court has recognized. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004).

Much of the commenters' concern regarding the inclusion of gender arises from a misunderstanding of the complexity of particular social groups and the role of mixed-motive analysis. The Departments explain that the inclusion of gender indicates that, generally, a claim based on gender, without additional evidence, will not be favorably adjudicated in regards to the nexus claim. However, it does not read, nor should it be interpreted to mean, that the inclusion of gender in the claim is fatal. Rather, a claim based on gender alone will generally be insufficient. As to the role of mixed motive analysis, the text of the NPRM acknowledges mixed motive claims by quoting the REAL ID Act of 2005 that defined the nexus element as requiring that one of the five protected grounds be "at least one central reason for persecuting the applicant." 85 FR at 36281. Further, the NPRM explicitly detailed that it was providing guidance on what would not be considered one of the five protected grounds; the NPRM did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to a situation on the list that was not adjudicated to be a protected ground.<sup>56</sup>

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<sup>56</sup> The Departments note that gender was not included among other broad categories, such as race or nationality, as a basis for refugee status in either the 1951 Refugee Convention or the 1980 Refugee Act. Further, no precedential decision has unequivocally recognized gender, standing alone, as a basis for asylum. *See, e.g., Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) ("Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act."). The Departments further note that gender has frequently been analyzed by circuit courts in the context of the definition of a particular social group, rather than under the rubric of nexus, though the courts themselves are in disagreement over the issue. *See Matter of A-C-A-A-*, 28 I&N at 91 ("Although I do not decide the matter in this case, I note that there has been disagreement among the courts of appeals about whether gender-based groups may constitute a particular social group within the meaning of the INA."). At least three circuits have concluded that gender is too broad or sweeping to constitute a particular social group itself. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) ("We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender."); *Da Silva v. U.S. Att'y Gen.*, 459 F. App'x 838, 841 (11th Cir. 2012) ("The BIA determined that 'women' was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a 'social group' under the INA."). Another circuit has quoted the language in *Gomez* approvingly. *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). Still another has rejected "generalized sweeping classifications for asylum," while noting that the Board "has never held that an entire gender can constitute a social group under the INA." *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th

The Departments disagree with commenters that the rule must show that gender is not the cause of harm around the world in order to include gender in the list of circumstances that generally does not constitute harm on account of a protected ground. Indeed, these comments miss the purpose of this discussion in the rule. The Departments do not make any statement about the question or prevalence of gender-based harm in other countries, but instead the point is that such harm is not on account of a protected ground and accordingly generally fails to support a valid claim to asylum or to statutory withholding of removal. As noted elsewhere, asylum is not designed to provide relief from all manners of harm that may befall a person. *See, e.g., Gjetani*, 968 F.3d at 397–98.

The Departments further disagree with commenters' statements that the inclusion of gender violates the constitutional guarantee of equal protection. The rule does not provide any benefits or discriminate on the basis of one gender over another.

Other commenters noted the severe problem of gender-based violence, especially in the global coronavirus pandemic, and the extensive work the Department of State is undertaking to reduce and eliminate gender-based violence. The Departments agree with commenters regarding the severity of the problem and the good work being done across the Federal government to address the problem. As previously mentioned, however, the narrow asylum statutes are not

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Cir. 2005). One circuit has intimated that gender alone could suffice to constitute a particular social group, though it remanded the case to the Board to address that issue in the first instance. *Perdomo*, 611 F.3d at 667; *but see Rreshpja*, 420 F.3d at 555 (“We do not necessarily agree with the Ninth Circuit’s determination that virtually all of the women in Somalia are entitled to asylum in the United States.”). Further, although gender is generally regarded as an immutable characteristic, *see e.g., Kauzoniaite v. Holder*, 351 F. App’x 529, 531 (2d Cir. 2009) (“However, although gender is an immutable characteristic. . . gender alone is insufficient to identify a particular social group.”), modern notions of gender fluidity may raise questions about that assumption in individual cases. *Cf. e.g., Bostock v. Clayton*, 140 S.Ct. 1731, 1779 & n.45 (2020) (“while the Court does not define what it means by a transgender person, the term may apply to individuals who are ‘gender fluid,’ that is, individuals whose gender identity is mixed or changes over time.” (Alito, J. dissenting)). Further, because every alien has a gender of some classification, gender may not carry sufficient particularity to warrant classification as a particular social group. *Cf. Matter of L-E-A-*, 27 I&N Dec. at 593 (“Further, as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group. There is no evidence that Congress intended the term ‘particular social group’ to cast so wide a net.”). In short, although the rule considers gender under the category of nexus, it may also be appropriately considered under the definition of “particular social group” as well, as the lists under both definitions are nonexhaustive.

drafted to provide redress for every problem. The Departments must act within the legal framework set out by Congress.

#### 4.5. Evidence Based on Stereotypes

*Comment:* Commenters expressed numerous reservations and disagreements with the Departments' regulation regarding the admissibility of evidence based on or promoting stereotypes to support the basis of an applicant's fear of harm. 8 CFR 208.1(g), 1208.1(g).

Some commenters alleged that the NPRM created a vague new evidentiary bar. Other commenters opined that the provision excludes necessary and critical evidence; some alleged that the NPRM was “part of [the Departments'] efforts to make it harder for asylum seekers to present their cases,” including claims based on particular social groups. Commenters also worried that the changes would unfairly advantage the government and violate due process. Other commenters expressed concern that the amendments would place a larger burden on adjudicators as they would be presented with difficult and time-consuming factual and legal issues. Regarding well-founded fear, a commenter alleged that the distinction between widespread, systemic laws or policies—evidence used to support a well-founded fear of persecution—and cultural stereotypes is so narrow that it will result in a “quagmire of confusion” and “countless hours and resources of litigation.”

Other commenters claimed that cultural stereotypes were necessary for well-founded fear of persecution claims and were utilized in country condition reports. For example, a commenter argued that the Department of State's country reports contain cultural stereotypes. As evidence of this claim, the commenter included three quotes from the Human Rights Report for Guatemala: “[a] culture of indifference to detainee rights put the welfare of detainees at risk”; “[t]raditional and cultural practices, in addition to discrimination and institutional bias, however, limited the political participation of women and members of indigenous groups”; and “[i]ndigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream.” Further, the commenter



asserted that this was evidence that “it would be impossible to discuss conditions in any country without discussing its culture and without engaging in at least some stereotyping.” The commenter extrapolated this onto several other elements of an asylum claim, including a subjectively genuine and objectively reasonable fear of harm and a socially distinct, particular social group.

A commenter opined that this provision was evidence that the Departments “fail[ed] to engage in reasoned decision making”; the commenter continued by claiming that the NPRM “raises doubts about whether the agency appreciates the scope of its discretion or exercised that discretion in a reasonable manner.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (internal quotation marks omitted)).<sup>57</sup> Finally, commenters asserted that the provision’s purported application only to aliens and not to DHS represented an unfair asymmetry because there was no prohibition of DHS filing evidence promoting stereotypes in opposition to asylum applications.

*Response:* The Departments reject the characterization of the rule regarding admissibility of evidence based on stereotypes as a new evidentiary bar. Numerous courts, and the BIA, have made clear that the Federal rules of evidence do not apply in immigration proceedings, but the evidence must be probative and its admission may not be fundamentally unfair. *See, e.g., Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1088 (7th Cir. 1994); *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983); *Tashnizi v. INS*, 585 F.2d 781, 782–83 (5th Cir. 1978); *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975); *Marlowe v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168, 170 (BIA 1972). As the rule makes clear, “conclusory assertions of countrywide negative cultural stereotypes” are not probative of any of the eligibility grounds for asylum. *Matter of A-B-*, 27 I&N Dec. at 336 n.9.

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<sup>57</sup> The Departments respond to allegations of failure to engage in reasoned decision making below in section II.C.6.2.

For example, in *Matter of A-B-*, the Attorney General determined that the evidence submitted in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), “an unsourced partial quotation from a news article eight years earlier,” was not appropriate evidence to support the “broad charge” that Guatemala had a “culture of machismo and family violence.” *Matter of A-B-*, 27 I&N Dec. at 336 n.9 (quoting *Matter of A-R-C-G-*, 26 I&N Dec. at 394). Similarly, the rule establishes that such unsupported stereotypes are not admissible as probative evidence. 85 FR at 36282 (“pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim”); *see also Matter of A-C-A-A-*, 28 I&N Dec. at 91 n.4 (“Furthermore, the Board should remember on remand that ‘conclusory assertions of countrywide negative cultural stereotypes . . . neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.’” (quoting *Matter of A-B-*, 27 I&N Dec. at 336 n.9)).

Reliance on stereotypes about a country, race, religion, nationality, or gender is inconsistent with the individualized consideration asylum claims require. Further, by definition, stereotypes are not subject to verification and have little intrinsic probative value; to the contrary, they frequently undermine credibility considerations that are important to an asylum claim. *Cf. Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (“The concept of ‘stereotyping’ includes not only simple beliefs such as ‘women are not aggressive’ but also a host of more subtle cognitive phenomena which can skew perceptions and judgments.”). Instead, they reflect “a frame of mind resulting from irrational or uncritical analysis.” *Nguyen v. INS*, 533 U.S. 53, 68 (2001). Thus, even “benevolent” stereotypes are generally disfavored in law. *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991) (stating, in rejecting employer policy related to female fertility due to potential exposure to fetal hazards, that the “beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination”). In short, stereotypes about another individual or country have little place in

American law as evidence supporting any type of claim. See *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1078 (9th Cir. 2005) (“Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion.”).

To be sure, asylum claims are generally rooted in hearsay, frequently cannot be confronted or rebutted, and are typically uncorroborated except by other hearsay evidence. See, e.g., *Angov*, 788 F.3d at 901 (“The specific facts supporting a petitioner’s asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner’s grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for the [DHS] to present evidence “refuting or in any way contradicting” petitioner’s testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.” (quoting *Abovian v. INS*, 257 F.3d 971, 976 (9th Cir. 2001) (Kozinski, J., dissenting from denial of pet’n for reh’g en banc))); *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008) (“Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien’s oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials.”). Thus, adjudicators are certainly seasoned in assessing evidence that is not subject to verification and has minimal probative value in the context of asylum claims.

Nevertheless, the Departments believe that the harms associated with the use of evidence rooted in stereotypes far outweigh what little, if any, probative value such evidence may have in an asylum claim. Accordingly, the rule does not represent a wholly new evidentiary bar per se, but rather a codification of the point that such stereotypes will not meet the existing admissibility standards because they are inherently not probative. Contrary to commenters’ suggestions, such evidence should not be necessary to an asylum application. Even if such stereotypes were

admitted into evidence, they would be given little to no weight for the reasons stated above. Further, to the extent that an applicant's claim is supported only by the applicant's personal stereotypes about a country or the alleged persecutor, that claim is likely unmeritorious in the first instance.

Further, the Departments disagree with commenter assertions that the term "cultural stereotypes" is vague. As alluded to above, the concept of stereotyping is well-established in American jurisprudence, and legal questions regarding stereotypes, especially stereotypes about foreign countries, arise in a variety of settings. *See, e.g., United States v. Ramirez*, 383 F.Supp.2d 1179, 1180 (D. Neb. 2005) (collecting cases excluding testimony based on cultural stereotypes of different foreign countries); *United States v. Velasquez*, No. CR 08-0730 WHA, 2011 WL 5573243, at \*3 (N.D. Cal. 2011) (not permitting a "cultural defense" expert witness to testify "as his opinions are based on cultural stereotypes and generalizations that have no probative value in this case" and permitting a "mental condition expert" to testify on the condition that he "refrain from offering testimony based on stereotypes and/or generalizations of Guatemalan, Mayan, Mam or any other culture"); *see also Bahena-Cardenas*, 411 F.3d at 1078 ("Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion."). Moreover, existing Department policies forbid the use of generalized stereotypes in law enforcement activities. *See* U.S. Dep't of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity 4 (2014) ("Reliance upon generalized stereotypes involving the listed characteristics is absolutely forbidden."), <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>. Thus, the Departments do not believe that adjudicators will have difficulty understanding the rule's reference to "cultural stereotypes."

The Departments also disagree with commenter assertions that it will be difficult to distinguish between widespread, systemic laws or policies—a form of accepted evidence to

establish a well-founded fear—and cultural stereotypes. The Departments are seeking to bar admissibility of non-probative evidence of the kind described in *Matter of A-B-*, broad cultural stereotypes that have no place in an impartial adjudication. Evidence of systemic laws or policies is more probative and concrete than unsupported assertions of reductive cultural stereotypes. For example, bald statements that a country, as a whole, has a particular cultural trait that causes certain members of that country to engage in persecution is evidence that has no place in an adjudication. In contrast, evidence that a country’s leader has instituted a program to carry out systematic persecution against certain groups would be highly probative evidence. General assertions of cultural stereotypes are inherently conclusory, reductive, and unhelpful to the adjudicator or trier of fact—in addition to being harmful in and of themselves—and should not be admissible.

In support of the claim that cultural stereotypes are necessary for many asylum claims, one commenter presented three excerpts from a Department of State Human Rights Report on Guatemala. The Departments appreciate the commenter’s examples, but they do not reflect assertions of pernicious cultural stereotypes described in this rulemaking.

The first alleged stereotype was that “[a] culture of indifference to detainee rights put the welfare of detainees at risk.” However, the report goes on to state: “On August 22, Ronald Estuardo Fuentes Cabrera was held in confinement while awaiting trial for personal injury charges after a car accident. Fuentes died from internal thoracic injury hours before his scheduled trial and without having received a medical exam, while his wife and the passenger of the other vehicle were taken for medical care.” U.S. Dep’t of State, 2019 Country Reports on Human Rights Practices: Guatemala 6 (2019), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/guatemala>. Further, the report nowhere alleges that Guatemalans are indifferent to detainee rights because of some cultural trait peculiar to Guatemalans. Thus, not only do these statements not promote any particular cultural stereotype

about Guatemalans based on race, religion, nationality, gender or similar characteristic, but they are supported by some facts. In short, this statement reflects verifiable facts, not a stereotype.

The second alleged stereotype was that “[t]raditional and cultural practices, in addition to discrimination and institutional bias, . . . limited the political participation of women and members of indigenous groups.” Once again, the report went on to detail the low numbers of women and indigenous people in the government to support its conclusion. *Id.* at 12–13. Elsewhere in the report, the State Department included specific information about sexual harassment: “No single law, including laws against sexual violence, deals directly with sexual harassment, although several laws refer to it. Human rights organizations reported sexual harassment was widespread.” *Id.* at 17. Similarly, the report contained specific information about discrimination: “Although the law establishes the principle of gender equality and criminalizes discrimination, women, and particularly indigenous women, faced discrimination and were less likely to hold management positions.” *Id.* The Departments do not see how this broad statement suggests a stereotype about an alleged persecutor for purposes of supporting an asylum claim such that it would fall within the ambit of the rule. Moreover, it is, again, based on evidence rather than a stereotype.

The final alleged stereotype contained in the report was that “[i]ndigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream.” This quote was also followed by supporting statements, including details regarding indigenous leaders who were killed. *Id.* at 20–21. Again, the Departments do not see how this broad statement suggests a stereotype such that it would fall under the rule. Further, it does not suggest that indigenous individuals possess some inherent trait—as opposed to larger structural factors in the country—that causes them to be underrepresented in national politics. Thus, it is also based on evidence rather than a stereotype.

Other commenters expressed concern that this portion of the rule would place a larger burden on adjudicators. The Departments appreciate both the comment and the underlying

concern. But, as noted above, adjudicators at both Departments are experienced in assessing evidence of little-to-no probative value, and immigration judges at DOJ are already experienced at ruling on evidentiary objections as a matter of course in immigration proceedings. Thus, the Departments do not believe that this portion of the rule will increase any burden beyond what adjudicators already face. The definition of “cultural stereotypes” is straightforward; the Departments have confidence that adjudicators will be able to apply such a definition in a timely and fair manner. Nevertheless, in response to some of the apparent confusion by some commenters, the Departments have modified the language in the final rule to make it clearer. The change does not reflect a substantive modification from what was intended in the NPRM.

The Departments reject the commenters’ assertions that this rule was passed with bad intent. One aim of this rule is to allow a more expeditious adjudication of meritorious asylum claims so that applicants do not have to wait a lengthy amount of time before receiving relief. The Departments agree with the commenter who stated that many asylum applications require at least some discussion of the culture of the country to which the applicant fears return. However, the Departments disagree with the commenter’s assertions that some level of stereotyping would be helpful to the applicant’s claim. Stereotypes are inherently unsupported generalizations. Such conclusory statements are not probative and can indeed be harmful, as discussed above.

Further, the Departments disagree with the commenter who asserted that the rule would disadvantage the applicant and violate due process. As discussed above, an applicant’s inability to submit nonprobative evidence neither disadvantages the applicant nor violates due process.

Finally, in response to commenters’ concerns about the perceived asymmetry of the rule, the Departments note that DHS is already bound by policy to treat stakeholders, including aliens, in a non-discriminatory manner. DHS therefore may not rely on stereotype evidence to oppose an asylum application. *See* U.S. Immigration and Customs Enforcement, Office of Diversity and Civil Rights, <https://www.ice.gov/leadership/dcr> (“It is U.S. Immigration and Customs Enforcement’s (ICE) policy to ensure that employees, applicants for employment and all stake

holders are treated in a non-discriminatory manner in compliance with established laws, regulations and Executive Orders.”); *cf. Doe v. Att’y Gen.*, 956 F.3d 135, 155 n.10 (3d Cir. 2020) (“The applicant’s specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about ‘what he or she does in bed’ is never appropriate.” (quoting USCIS, *RAIO Directorate – Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* 34 (Dec. 28, 2011))). Further, although Federal case law is clear that stereotypes have no place as a basis to deny asylum applications, *e.g., Doe*, 956 F.3d at 155 n.10 (collecting cases), there is no similar Federal case law regarding the use of stereotypes as a basis for granting asylum applications, and the issue of the reliance on stereotypes to support an asylum application has arisen only recently, *Matter of A-B-*, 27 I&N Dec. at 336 n. 9. Consequently, as both immigration judges and DHS are already bound by policy, if not also law, not to rely on stereotypes as a basis to oppose or deny an asylum application, the rule does not create any asymmetry regarding evidence of stereotypes. To the contrary, it corrects an existing asymmetry to ensure that asylum applications are not granted based on inappropriate evidence of stereotypes.

#### 4.6. Internal Relocation

*Comment:* Commenters generally expressed concern that the NPRM would create a standard for the analyzing the reasonableness of internal relocation that almost no applicant for asylum, withholding of removal, or protection under the CAT regulations would be able to meet.<sup>58</sup>

Commenters expressed several concerns with the proposed list of factors pertaining to the internal relocation analysis in proposed 8 CFR 208.13(b)(3) and 1208.13(b)(3). First, commenters expressed concern that the list places too much weight on the identity and reach of

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<sup>58</sup> The Departments note that consideration of internal relocation in the context of an application for withholding of removal under the CAT regulations is different than the consideration of internal relocation in the context of an application for asylum and statutory withholding of removal. *Compare, e.g.,* 8 CFR 1208.13(b)(3), 1208.16(b)(3) (assessing the reasonableness of internal relocation), *with* 1208.16(c)(3)(ii) (assessing internal relocation without reference to reasonableness).



the persecutor, and that it lacks factors pertaining to the asylum seeker and factors unrelated to the asylum application (such as country conditions).

Second, commenters asserted that the proposed list inappropriately implies that asylum seekers coming from large countries or who are subjected to persecution from a single source can reasonably relocate internally. Some commenters argued that persecution does not end at the limits of political jurisdictions and that persecutors could have contacts throughout a country or region. One commenter noted that UNHCR guidance does not require an asylum seeker to prove that his or her entire home country is unsafe before seeking asylum. Similarly, one commenter expressed concern with the proposed definition of the term “safety,” arguing that there has been no judicial disagreement or confusion pertaining to the current regulation and that the proposed definition would limit adjudicators’ ability to perform case-by-case analyses.

Third, commenters argued that the proposed rule inappropriately focuses on an asylum seeker’s ability to travel to the United States. Commenters noted a lack of jurisprudence discussing ability to travel and alleged that since asylum seekers had to first travel to the United States to make a claim, the factor would lead to the denial of most applications.

Fourth, commenters similarly expressed concern that the proposed rule would eliminate the reasonableness analysis, thus forcing adjudicators to ignore the overall context of an asylum applicant’s plight. One commenter argued that many cases have been sent to the BIA from Federal courts so that adjudicators could apply the current reasonableness test to internal relocation determinations.

Finally, commenters took issue with the NPRM’s assertion that 8 CFR 208.13(b) and 1208.13(b) include “unhelpful” language that undermines the need for the entire section. Commenters noted that Federal courts and the BIA have almost unanimously endorsed the current language and have not raised such concerns.

Commenters also expressed concern with the proposed regulation’s change to the burden of proof for asylum seekers who establish they were subjected to past persecution by a non-

governmental entity. Commenters argued that, contrary to the NPRM's assertion, the current regulations are preferable. Specifically, increasing the burden would be inappropriate, commenters argued, because asylum seekers would have already established past persecution and that the government is unable or unwilling to protect them.

One commenter noted that the proposed change to the burden of proof is unnecessary because DHS could offer information evidencing that internal relocation is reasonable, and then the applicant could respond to such information.

One commenter argued that the proposed change to the burden of proof in the case of non-state actors unfairly targets asylum seekers from Central American countries and Mexico because the types of individuals and groups that would be considered non-state actors under the proposed rule are commonly cited persecutors in asylum cases pertaining to these countries.

*Response:* To respond to commenters' concerns that "almost no applicant . . . would be able to meet" the revised standard for reasonableness of internal relocation, the Departments reject that concern as speculative. The Departments also reject a commenter's allegation that the factors in this section were "justifications to deny applications of *bona fide* asylum seekers." These factors are relevant and material to an alien's asylum eligibility, as discussed in further detail below.

The Departments emphasize that the rule requires adjudicators to consider "the totality of the relevant circumstances" (as stated in 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal)) when determining the reasonableness of internal relocation. The Departments note that the proposed list identifies the "most relevant" circumstances for consideration and provides a streamlined presentation of those factors. *See* 85 FR at 36282. The list of factors in paragraph (b)(3) is not exhaustive, however, so the regulatory amendments do not foreclose consideration of factors mentioned by commenters, such as factors related to the particular asylum seeker or factors unrelated to the asylum application. This approach is not a one-size-fits-all analysis, as one commenter alleged.

Rather, the totality of the relevant circumstances test allows adjudicators to consider each case individually.

Relatedly, the Departments disagree that the list of factors afford inordinate weight to the identity and reach of the persecutor or that adjudicators must make determinations in a vacuum. As a baseline matter, asylum is a form of discretionary relief for which an applicant must demonstrate to the Secretary or Attorney General that he or she, inter alia, is a refugee as defined in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), and warrants a favorable exercise of discretion. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *Cardoza-Fonseca*, 480 U.S. at 428 n.5; 8 CFR 208.14(a), (b), 1208.14(a), (b). To determine whether the applicant is a refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), the Departments assess the applicant's "fear of persecution," which includes whether the applicant could relocate to avoid future persecution and whether it would be reasonable to do so. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003) (requiring a finding that an alien could relocate to avoid persecution and that it "must be reasonable to expect them to do so" (citing *Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002)); *see also Singh v. Ilchert*, 63 F.3d 1501, 1511 (9th Cir. 1995) (permitting the Attorney General to assess an alien's ability to relocate to a safer part of the country). The Act does not require consideration of internal relocation. *See generally* INA 208, 8 U.S.C. 1158. Rather, this analysis was implemented by regulation to address whether "an [asylum] applicant may be able to avoid persecution in a particular country by relocating to another area of that country." Asylum Procedures, 65 FR 76121 (Dec. 6, 2000). This rule would refine those regulations, which agencies may do so long as they give a reasoned explanation for the change. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." (citing *Brand X*, 545 U.S. at 981–82)).

As the Departments explained in the NPRM, the changes are necessary for numerous reasons. First, the Departments believe the "current regulations regarding internal relocation

inadequately assess the relevant considerations.” 85 FR at 36282. Second, the Departments changed the regulatory burdens of proof because the Departments determined that the burdens should generally align with those “baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions.” *Id.* Third, the Departments made amendments to facilitate “ease of administering these provisions.” *Id.* The Departments believe that the rulemaking will better serve the needs of adjudicators who will benefit from the addition of factors that more adequately assess relevant considerations for internal relocation and the elimination of less relevant factors. Despite commenters’ disagreements with the new list of factors, the Departments believe that the regulations must clearly and accurately guide adjudicators in assessing the reasonableness of internal relocation. The Departments anticipate that the new regulations will facilitate more accurate and timely determinations, given that adjudicators will spend most of their time considering the most relevant factors and less time considering less relevant factors or trying to determine whether certain factors are relevant. This is especially significant considering the unprecedented pending caseload and the need for efficient adjudication. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. Given these revisions to the regulations, adjudicators are not left to make determinations “in a vacuum,” as commenters suggested.

Accordingly, the Departments determined that the following factors were most relevant to an adjudicator’s analysis: “the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.” 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). The Departments do not imply that this list compels the conclusion that asylum seekers who come from large countries or who were subjected to

persecution from a single source can reasonably relocate internally, as commenters alleged. Instead, the Departments find those factors “most relevant” for adjudicators to consider in determining whether internal relocation is reasonable—not that those factors absolutely indicate that internal relocation is reasonable. 85 FR at 36282. Furthermore, as noted above, the listed relevant factors are not exhaustive and adjudicators may consider other factors that may be relevant to a particular case.

As commenters pointed out, the Departments recognize that persecutors may not be confined to political jurisdictions, which is already reflected in the factor assessing the “size, reach, or numerosity of the alleged persecutor.” 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). Moreover, the Departments disagree with a commenter’s allegation that the rule redefines safety—neither the proposed rule nor this final rule redefines “safety.”

The Departments disagree that the factor assessing the alien’s ability to travel to the United States is inappropriate. First, this factor is considered under the totality of the circumstances; thus, this factor’s presence will not automatically result in one determination or another. The Departments added this factor so that adjudicators would fully consider whether an alien had already traveled a great distance to relocate to the United States, and whether the alien’s ability to do so reflected a similar ability to relocate within the country from which the alien is seeking protection. Second, in contrast to commenters, the Departments believe that a lack of jurisprudence on this factor counsels in favor of including it in the regulation. Nor do the Departments find the lack of directly relevant jurisprudence surprising. Because the current regulations do not highlight an alien’s ability to travel to the United States as one of the most relevant factors, courts would have had little reason to consider this factor unless a party raised it. *See, e.g., Garcia-Cruz v. Sessions*, 858 F.3d 1, 8–9 (1st Cir. 2017) (remanding the case to the BIA to consider the reasonableness factors specifically provided in the regulations); *Khattak*, 704 F.3d at 203–04 (same). Nevertheless, case law has considered travel-related factors such as an

alien's return trips or previous relocations. *See, e.g., Ullah v. Barr*, No. 18-28912020 WL 6265858, at \*1–2 (2d Cir. Oct. 26, 2020) (holding that country's lack of restriction on internal movement or relocation and alien's ability to work and move around the country without incident supported the BIA's finding that the alien could safely relocate to avoid future persecution); *Gambashidze v. Ashcroft*, 381 F.3d 187, 193 (3d Cir. 2004) (considering, in part, that the alien and his family relocated to a city that "is not a great distance" from the city where they faced persecution before the alien relocated again to the United States); *Belayneh v. I.N.S.*, 213 F.3d 488, 491 (9th Cir. 2000) (holding that the alien had not established a reasonable fear of future persecution in part because she had "traveled to the United States and returned to Ethiopia three times without incident"). These cases provide examples in which courts recognized that the ability and willingness to travel and the distance traveled are all relevant to the reasonableness inquiry because they may indicate the extent to which an alien is physically or financially able to travel. In that same vein, the Departments have determined that an alien's ability to travel to the United States is clearly relevant and appropriate to the reasonableness inquiry.

The rule does not eliminate the reasonableness analysis, as commenters alleged. First, the heading of each regulatory section is "Reasonableness of internal relocation." 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). The heading indicates the content of the section. What follows is a list of factors and the requisite burdens of proof to aid an adjudicator's assessment of the reasonableness of internal relocation. For example, the regulations state, in the case of a governmental persecutor, "it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, *it would be reasonable for the applicant to relocate*" and, in the case of a non-governmental persecutor, "there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that *it would be*

*unreasonable to relocate.*” 8 CFR 208.13(b)(3)(ii), (b)(3)(iii), 1208.13(b)(3)(ii), (b)(3)(iii) (emphases added). The reasonableness inquiry continues to be an active prong of the internal relocation assessment. In addition, under the new regulations, adjudicators must not disregard other factors, as commenters alleged; rather, the regulations instruct adjudicators to consider “the totality of the relevant circumstances.” 8 CFR 208.13(b)(3), 1208.13(b)(3). Application of the previous regulations by courts and the BIA are irrelevant and unpersuasive as evidence that the rules cannot be changed. As previously explained, it is properly within the Departments’ authority to revise their regulations. *See, e.g., Encino Motorcars, LCC*, 136 S. Ct. at 2125.

The Departments maintain that the language in the previous regulations was unhelpful. 85 FR at 36282. Equivocal phrases in the prior regulation—that factors “may, or may not, be relevant”—are almost paradigmatically unhelpful. The Departments believe the revised regulations, including review under the totality of the circumstances and the nonexhaustive list of factors provided, will continue to allow adjudicators to assess internal relocation on a case-by-case basis.

Although commenters alleged that Federal courts and the BIA have “nearly unanimously endorsed” the previous regulations, the cases referenced in support of their allegations merely apply the previous regulations. Judicial application of regulations cannot be construed as “endorsing” the regulations except to the extent that a court finds the regulations to be a reasonable interpretation of the statute. *See Chevron*, 467 U.S. at 844 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

Finally, the Departments disagree that changing the burden of proof is inappropriate. As explained in the NPRM, the Departments believe the realigned burden of proof follows the “baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions.” 85 FR at 36282. Contrary to the

commenters' assertion, when an adjudicator is determining reasonableness of internal relocation, an applicant may not have already established past persecution or that the government was unable or unwilling to protect the alien. For example, an applicant may be claiming a fear of future persecution pursuant to 8 CFR 208.13(b)(2), 1208.13(b)(2). Although showing past persecution raised a rebuttable presumption that internal relocation would be unreasonable under the prior regulation, the Departments have concluded, upon fresh review, that applying a blanket presumption independent of the identity of the persecutor is inconsistent with assessments of how widespread persecution is likely to be based on the identity of the alleged persecutor. Whereas government or government-sponsored actors would generally be expected to have nationwide influence, a private individual or organization would not ordinarily have such reach. Placing the burden on the government to show that the alien's fear of future persecution is *not* well-founded where he was previously persecuted by a non-governmental actor therefore inverts the usual burden of proof—which lies with the applicant—without good reason. *See* 85 FR at 36282 (explaining this rationale).

In the final rule, DHS still bears the burden to demonstrate that the applicant could relocate to avoid future persecution and that it would be reasonable for the applicant to do so in the case of a governmental persecutor (8 CFR 208.13(b)(3)(ii), 1208.13(b)(3)(ii) (asylum); 208.16(b)(3)(ii), 1208.16(b)(3)(ii) (statutory withholding of removal)), and the alien bears the burden to demonstrate that it would be reasonable to relocate in the case of a non-governmental persecutor (8 CFR 208.13(b)(3)(iii), 1208.13(b)(3)(iii)). These burdens reflect the Departments' belief that aliens who claim past persecution by non-state actors should bear the burden to rebut the presumption that internal relocation is reasonable.

The different burdens of proof do not unfairly target or discriminate against asylum seekers from Central American countries and Mexico, as commenters alleged. The new burden of proof applies to all asylum seekers, regardless of the country of origin. The Departments note that, contrary to the commenters' allegations, the examples of private-actor persecutors provided



by the regulations exist in many countries, not just Central American countries and Mexico. *See, e.g., Mashiri v. Ashcroft*, 383 F.3d 1112, 1115–16 (9th Cir. 2004) (detailing facts in which a German citizen of Afghan descent was persecuted by non-state actors in Germany, some of whom were part of a Neo-Nazi mob); *Doe v. Att’y Gen. of the U.S.*, 956 F.3d 135, 139–40 (3d Cir. 2020) (detailing facts in which a Ghanaian citizen was persecuted by family members and neighbors in Ghana).

#### 4.7. Factors for Consideration in Discretionary Determinations

*Comment:* Commenters generally expressed concern that the Departments did not provide a sufficient justification for the proposed changes and did not consider the practical consequence of the proposed rule. Commenters similarly expressed general concerns that the proposed changes are in conflict with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), are contrary to case precedent, are immoral, and would negatively impact children seeking asylum. The true purpose of the rule, some commenters asserted, is to lead to the denial of virtually all asylum applications.

Commenters expressed concern that the Departments seek to depart from the BIA’s approach in *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). One commenter stated that it was inappropriate to use language from the case to justify the proposed new factors while also superseding the case’s central holding. Commenters stated that *Matter of Pula* instructs that danger of persecution should outweigh all but the most egregious factors. Commenters similarly stated that *Matter of Pula* requires adjudicators to consider the totality of the circumstances and to not give any particular factor such significant weight that it would outweigh all the others.

Citing *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020), one commenter expressed concern that the proposed rule conflicts with recent Federal court precedent that the creation of “eligibility bars” to asylum is constrained by statute. The commenter asserted that as some of the discretionary factors would require denial of applications as a matter of discretion, they are, in actuality, unlawful eligibility bars.

Commenters stated that the proposed negative factors that adjudicators would be required to consider are not related to the merits of an asylum claim and are unavoidable in many cases. As a result, commenters argued, adjudicators would be required to deny most asylum cases as a matter of discretion. One commenter asserted that the Departments did not consider alternative policy options, and one commenter stated that the rule should be amended to require adjudicators to consider positive factors in their discretionary determinations. Commenters argued that inappropriately cabining discretion in this way is in conflict with making asylum determinations on a case-by-case basis.

Commenters expressed concern that the only way for applicants to overcome the presence of nine of the proposed adverse factors would be to show “extraordinary circumstances” or “exceptional and extremely unusual hardship.” One commenter stated that a demonstration of past persecution or a well-founded fear of future persecution is “per se” exceptional and extremely unusual hardship. Therefore, the commenter argued that by meeting the legal standard for asylum, applicants necessarily would meet the proposed new standard of exceptional and extremely unusual hardship. The commenter similarly stated that past persecution is “exceptional hardship.” Another commenter stated that application of the “exceptional and extremely unusual hardship” standard in exercising discretion for asylum applications contravenes the INA because Congress did not expressly provide for that heightened standard. Instead, the commenter noted that in section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A), Congress stated that the Attorney General “may” grant asylum. The commenter asserted that if Congress intended the use of a heightened standard, it would have expressly done so, as it did in section 240A(b)(1)(D) of the Act, 8 U.S.C. 1229b(b)(1)(D), for non-LPR cancellation of removal. The commenter cited the Supreme Court’s decision in *Cardoza-Fonseca* for support. *See* 480 U.S. at 432 (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

Accordingly, consistent with *Matter of Marin*, 16 I&N Dec. 581, 584–85 (BIA 1978), the commenter asserted that the totality of the circumstances approach should be applied in the exercise of discretion for asylum applications.

Commenters disagreed with the Departments’ position that creating a list of proposed factors would save adjudicators time. Specifically, commenters noted that since a finding of “extraordinary circumstances” or an exceptional and extremely unusual hardship would require a separate hearing, the proposed factors would not save time.

*Response:* The Departments disagree that they failed to provide sufficient justification for this proposed change in the NPRM, evidenced by the three-page discussion of this section alone. *See* 85 FR at 36282–85. Nevertheless, the Departments provide further explanation in this final rule.

Asylum is a discretionary benefit. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (providing that the Departments “*may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section” (emphasis added)); *see also Cardoza-Fonseca*, 480 U.S. at 443 (“[A]n alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it.” (emphases in original)). Accordingly, “with respect to any form of relief that is granted in the exercise of discretion,” an alien must satisfy the eligibility requirements for asylum and establish that the application “merits a favorable exercise of discretion.” INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); *see also Matter of A-B-*, 27 I&N Dec. at 345 n.12 (explaining that the “favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA” and providing relevant discretionary factors to consider in the exercise of such discretion), *abrogated on other grounds, Grace II*, 965 F.3d at 897–900.

In its broadest sense, legal discretion is defined as the “exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.” *Discretion*, Black’s Law Dictionary (11th ed. 2019); *see also Discretion*, Merriam-Webster (last updated July 6, 2020), <https://www.merriam-webster.com/dictionary/discretion> (defining “discretion” as the “power of free decision or latitude of choice within certain legal bounds”). While the statute and case law are clear that a grant of asylum is subject to discretion, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984), the statute and regulations are silent as to guidance that may direct such exercise of discretion.

The BIA has explained that the exercise of discretion requires consideration of the relevant factors in the totality of the circumstances, based on the facts offered by the alien to support the application in each case. *See Matter of Pula*, 19 I&N Dec. at 473 (noting that “a number of factors . . . should be balanced in exercising discretion”). Further, the BIA has provided factors that may be relevant to the inquiry, including humanitarian considerations, such as the alien’s age or health; any countries through which the alien passed en route to the United States and those countries’ available refugee procedures; personal ties to the United States; and the alien’s use of fraudulent documents. *See id.* at 473–74 (“Each of the factors . . . will not, of course, be found in every case. . . . In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion.”).

In building upon the BIA’s guidance and evaluating all policy options, the Departments have determined that it is appropriate to codify discretionary factors for adjudicators to consider. 85 FR at 36283. The statute and regulations currently contain discretionary factors for consideration in regard to other forms of relief. *See, e.g.*, 8 CFR 212.7(d), 1212.7(d) (authorizing the Attorney General to consent to an application for visa, admission to the United States, or adjustment of status, for certain criminal aliens when declining to favorably exercise discretion “would result in exceptional and extremely unusual hardship”); *see also Matter of*

*Y-L-*, 23 I&N Dec. 270, 276–77 (A.G. 2002) (providing various factors that may indicate extraordinary and compelling circumstances that the Attorney General may consider to determine whether certain aggravated felonies are “particularly serious crimes” under section 241(b)(3)(B) of the INA for purposes of withholding of removal); *Matter of Jean*, 23 I&N Dec. 373, 383–84 (A.G. 2002) (explaining that discretionary relief requires a balancing of the equities, including, if any, extraordinary circumstances, the gravity of an alien’s underlying criminal offense, or unusual hardships). The Departments have similar authority to promulgate discretionary factors for asylum relief. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see* 85 FR at 36283.

Contrary to commenters’ concerns that the proposed rule effectively creates bars (or “eligibility bars”) to asylum and inappropriately cabins adjudicators’ discretion, the Departments reiterate that this rulemaking identifies various factors for consideration in making a discretionary determination on an asylum application. These factors are not bars; accordingly, concerns that the rule would result in the denial of all asylum claims are misguided. Rather, in regard to the three significantly adverse factors, the proposed rule clearly stated that “the adjudicator *should also consider any other relevant facts and circumstances* to determine whether the applicant merits asylum as a matter of discretion.” *Id.* (emphasis added). And in regard to the nine adverse factors, the proposed rule stated that “the *adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances . . . or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in exceptional and extremely unusual hardship to the alien.*” *Id.* (emphasis added). Thus, a finding that any of the factors applies does not foreclose consideration of other relevant facts and circumstances, which a true asylum “bar” would require.

Commenters asserted that this rule is inconsistent with the BIA’s approach in *Matter of Pula* and subsequent related case law in which past persecution or a strong likelihood of future persecution “should generally outweigh all but the most egregious of adverse factors.” 19 I&N

Dec. at 474. The Departments clearly stated in the NPRM that the rule “supersede[d]” the BIA’s approach in *Matter of Pula*, 85 FR at 36285, which is squarely within their authority. “Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars, LLC*, 136 S. Ct. at 2125 (citing *Brand X*, 545 U.S. at 981–82). The Court has further explained what a “reasoned explanation” should entail: awareness in its decision making process that it is changing positions; demonstration that the new policy is permissible under the implementing statute, and not just the APA; statement and belief that the new policy is better; and provision of “good reasons” for the new policy. *See Organized Village of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (summarizing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). In the NPRM, the Departments provided such information: awareness of changed position, 85 FR at 36285; demonstration that the policy is permissible under the INA and APA, *see generally* 85 FR at 36282–85; statement that the new policy is better, 85 FR at 36283; and good reasons for the new policy, 85 FR at 36283, 36285. Accordingly, the Departments properly and permissibly changed their policy from *Matter of Pula*.

Significantly, the rule does not preclude consideration of positive factors. Further, the NPRM instructed adjudicators to “consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.” 85 FR at 36283. Accordingly, the rule allows for consideration of positive equities as part of an adjudicator’s discretionary analysis. The Departments have determined that the factors provided in the NPRM are appropriate and relevant to such analysis.

Moreover, the rule does not “categorically limit” adjudicators’ discretion or make certain outcomes “practically mandatory”; rather, the rule guides the exercise of discretion by providing various factors for consideration. The NPRM clearly stated, and the Departments reiterate, that the proposed factors were “nonexhaustive.” 85 FR at 36283. Further, the NPRM stated that “any other relevant facts and circumstances” should be considered and provided exceptions to

one of the significantly adverse factors. *See id.* Accordingly, although the Departments proposed significantly adverse and adverse factors, an adjudicator must continue to consider positive factors in the discretionary analysis.

The Departments disagree with commenters that past or future persecution should be considered “per se” exceptional and extremely unusual hardship. Rather, the Departments have determined that the approach described in the NPRM—providing criteria for an adjudicator’s consideration in the exercise of discretion, in addition to consideration of whether extraordinary circumstances or exceptional and extremely unusual hardship exists—is appropriate. Moreover, the Departments disagree that consideration of extraordinary circumstances or exceptional and extremely unusual hardship conflicts with the Act. Congress authorized the Attorney General to make discretionary asylum determinations, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), and that authority permits him to deny asylum even if an applicant can establish past or future persecution.

The Departments “believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.” 85 FR at 36283, 36285. In this way, the list of factors to consider, including consideration of extraordinary circumstances or exceptional and extremely unusual hardship, would take place in one streamlined adjudication. Accordingly, the Departments disagree with commenters that the list of factors would not save time, is “unworkable” or “cumbersome,” or limits adjudicatory discretion.

The Departments also disagree that this section of the rule is immoral or would negatively impact children seeking asylum. Adjudicators consider these factors, as relevant, to all asylum cases. As it may relate specifically to children, if extraordinary circumstances exist or exceptional and extremely unusual hardships would arise if the application was denied, the

adjudicator should consider such circumstances. *See* Section II.C.1.3 of this preamble for further discussion on this point.

#### 4.7.1. Unlawful Entry or Unlawful Attempted Entry into the United States

*Comment:* Commenters expressed general concern that the proposed regulation would improperly lead adjudicators to deny “virtually all” applications for asylum seekers who enter the United States between ports of entry. One commenter stated that the “immediate flight” exception is too narrow.

Commenters averred that the proposed regulation is contrary to section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), which instructs that individuals are eligible to apply for asylum regardless of where they enter the United States.

Commenters expressed concern that the proposed regulation is inconsistent with case law. Commenters argued that contrary to the NPRM’s argument, *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), does not support the Departments’ position that an unlawful entry should be a significant adverse factor. Instead, one commenter asserted that in *Matter of Pula* the BIA reversed *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982), to the extent that *Matter of Salim* suggested that “the most unusual showing of countervailing equities” was needed to overcome a “circumvention of orderly procedures.” Citing, for example, *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008), commenters similarly argued that Federal courts of appeals have given the manner of an asylum seeker’s entry into the United States very little weight (and sometimes no weight) in discretionary determinations and have noted that place of entry reveals little about the merits of the case. And, citing *Huang v. INS*, 436 F.3d 89, 100 (2d Cir. 2006), one commenter noted that the Second Circuit Court of Appeals reasoned that if an illegal manner of entry were afforded significant weight, then virtually no asylum applicant would prevail.

Commenters expressed concern that codification of unlawful entry as a significantly adverse factor in discretionary determinations contradicts recent Federal court decisions from the Ninth Circuit Court of Appeals and the District Court for the District of Columbia that struck



down November 2018 regulations by the Departments. Commenters argued that the NPRM is similar to a 2018 Interim Final Rule (IFR) that, when coupled with a presidential proclamation issued the same day, made any individual who arrived between designated ports of entry ineligible for asylum. Commenters noted that the Ninth Circuit Court of Appeals found that the 2018 IFR was arbitrary and capricious and that it infringed upon treaty commitments (*E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020)). Commenters noted that the District Court for the District of Columbia held that the bar was inconsistent with the INA and congressional intent (*O.A. v. Trump*, 404 F. Supp. 3d 109, 147 (D.D.C. 2019)). Commenters expressed concern that the present rulemaking is intended to circumvent the courts' decisions on the 2018 IFR.

Commenters disagreed with the NPRM's reasoning that the proposed rule is necessary to address the strained resources used to adjudicate the growing number of asylum cases. One commenter asserted that "expediency" is not an appropriate consideration in determining the relief available to asylum seekers. The commenter also noted that in *Gulla v. Gonzales*, 498 F.3d 911, 919 n.2 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that "hypothetical numbers" of potential asylum seekers is not a basis to deny relief to an applicant who has demonstrated a valid claim. The commenter similarly argued that limiting asylum to those who traveled from contiguous countries and those who flew directly to the United States is in conflict with case precedent and obligations under the 1967 Refugee Protocol.

Commenters expressed concern with the impact of the proposed rule in light of the CBP's practice of "metering." Commenters asserted that, under the practice, applicants are required to wait for months in "dangerous conditions" in Mexico before they are able to apply for asylum. Commenters stated that some applicants are motivated to enter the United States between ports of entry in order to avoid the dangerous conditions.

One commenter expressed concern that codifying unlawful entry as a significant adverse discretionary factor would particularly burden children. The commenter argued that children

often arrive with adults (such as parents, smugglers, or traffickers) who choose the manner and place of entry. The commenter argued further that children who travel to the United States on their own may not comprehend the importance of arriving at a port of entry.

*Response:* The Departments disagree that this factor will result in the denial of “virtually all” asylum applications. This factor is but one factor that an adjudicator must consider in light of all other relevant factors and circumstances. 85 FR at 36283. Likewise, the Departments disagree that the exception for aliens who enter or attempt entry “made in immediate flight,” 8 CFR 208.13(d)(1)(i), 1208.13(d)(1)(i), is too narrow. The Departments believe this exception properly balances the need for orderly processing of aliens with urgent humanitarian considerations.

As described throughout this rule, asylum is a discretionary benefit. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). The Departments have a legitimate interest in maintaining order and security on U.S. borders through the administration of lawful admissions procedures and, as stated in the proposed rule, the Departments remain concerned by the immense strain on resources needed to process aliens who illegally enter the United States. 85 FR at 36283 (citing *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 FR 55934 (Nov. 9, 2018)). Aliens who unlawfully enter the United States circumvent the requirement that all applicants for admission be inspected, *see* INA 235(a)(3), 8 U.S.C. 1225(a)(3); break U.S. law, *see* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A); INA 275(a)(1), 8 U.S.C. 1325(a)(1); and contribute to the ever-increasing strain on the government’s limited resources. Given such limited resources, and subject to a full discretionary analysis of all relevant factors as described in the NPRM, the Departments have determined that failure to lawfully apply for admission, in other words, unlawful entry or attempted unlawful entry, should generally be considered a significant adverse factor in an asylum adjudication.

The Departments disagree with commenters’ allegations that DHS procedures at the border have “virtually shut down the processing of asylum applications” and prevented asylum

seekers from lawfully presenting themselves at the border. At various times since 2016, CBP has engaged in metering to regulate the flow of aliens present at land ports of entry on the southern border in order to “address safety and health hazards that resulted from overcrowding at ports of entry.” See DHS, OIG 18-84, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5–6 & n.11 (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>. Individuals who are subject to metering are not prevented from presenting at the port of entry.<sup>59</sup>

Claims that refugees who are unable to get a visa will have to overcome the significant negative discretionary factor are unfounded. The rule does not require any alien to obtain a visa in order to apply for asylum. Under the law, “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien’s status, may apply for asylum,” INA 208(a)(1), 8 U.S.C. 1158(a)(1), and nothing in the rule changes that statutory framework. Moreover, nothing in the rule changes the longstanding principle that the Secretary and the Attorney General may deny asylum as a matter of discretion, even to aliens who otherwise meet the statutory definition of a refugee. See *INS v. Cardoza-Fonseca*, 480 U.S. at 428 n.5, 444–45 (“It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that ‘the alien *may* be granted asylum *in the discretion of the Attorney General*.’ . . . [Congress] chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.” (emphasis in original) (citation omitted)). Rather, consistent with the relevant authority, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), the Secretary

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<sup>59</sup> The permissibility of this practice is the subject of ongoing litigation, and the Departments decline to further comment on the legality or propriety of the practice in this rulemaking. See *Al Otro Lado, Inc. v. McAleenan*, No. 17-cv-02366-BAS-KSC, 2020 WL 4015669 (S.D. Cal. July 16, 2020).

and Attorney General are simply providing additional clarity and guidance to adjudicators to aid their consideration of asylum claims as a matter of discretion.

The Departments disagree with commenters' assertion that *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), is "fundamentally incompatible" with this rule. As a threshold matter, the Departments reiterate that the rule incorporates as a discretionary factor consideration of whether an alien unlawfully entered or attempted to unlawfully enter the United States. 85 FR at 36283. *Matter of Pula* similarly allows for consideration of this factor as part of the discretionary analysis:

Yet while we find that an alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications, we agree with the applicant that *Matter of Salim, supra*, places too much emphasis on the circumvention of orderly refugee procedures. *This circumvention can be a serious adverse factor*, but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. *This factor is only one of a number of factors which should be balanced in exercising discretion*, and the weight accorded to this factor may vary depending on the facts of a particular case.

19 I&N Dec. at 473 (emphases added).

The rule is consistent with *Matter of Pula* inasmuch as that factor must not be considered in a way that practically denies relief in all cases. The rule clearly states that the factor is one of many discretionary factors for an adjudicator to consider, consistent with *Matter of Pula's* holding that the totality of the circumstances should be examined. 85 FR at 36283 ("If one or more of these factors applies to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion."); 8 CFR 208.13(d), (d)(2)(ii), 1208.13(d), (d)(2)(ii). Like *Matter of Pula*, the rule would not treat this factor as an absolute bar. See 8 CFR 1208.13(d) ("Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.").

Similarly, the Departments disagree with commenters' assertions that this rule contravenes section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1). As explained, this rule does not

bar individuals from applying for asylum. The rule merely articulates that unlawful entry or attempted unlawful entry are significant adverse factors when considering whether to grant asylum as a matter of discretion.

Commenters cited various Federal circuit court treatment that allegedly forecloses consideration of this factor as significantly adverse. Cases cited by the commenters, however, prohibit the use of this factor as a bar to asylum,<sup>60</sup> and the Departments reiterate that the articulated discretionary factors do not equate to asylum bars. Commenters also selectively quoted from cases for support, thus mischaracterizing several cases as foreclosing provisions of the NPRM.<sup>61</sup> Insofar as commenters cited to *Matter of Pula*'s approach that considers persecution or strong likelihood of future persecution as factors that "generally outweigh all but the most egregious adverse factors," 19 I&N Dec. at 474, the Departments reiterate that the rule supersedes *Matter of Pula* in that regard. See 85 FR at 36285. Given that non-discretionary statutory withholding of removal and CAT protection are available, the Departments believe the rule's revised approach that considers the enumerated discretionary factors under the totality of the circumstances is appropriate in all cases, including those in which the applicant has otherwise demonstrated asylum eligibility. See *id.*

Commenters also contend that this rule contradicts Federal precedents striking down the Departments' previous rule, Aliens Subject to a Bar on Entry Under Certain Presidential

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<sup>60</sup> Commenters cited *Gulla*, 498 F.3d at 917, which states that "it would be anomalous for an asylum seeker's means of entry to render him ineligible for a favorable exercise of discretion," *id.* (emphasis added), and *Huang*, 436 F.3d at 100, which contemplates whether "illegal manner of flight and entry were enough independently to support a denial of asylum," *id.* (emphasis added). The Departments understand those cases to state that manner of entry cannot, on its own, bar an applicant from asylum relief. Further, the Departments note that in regards to manner of entry, *Gulla* found that the petitioner did not unlawfully enter or attempt to enter the United States, 498 F.3d at 919; thus, that case is not particularly relevant for purposes of the factor at issue in 8 CFR 208.13(d)(1)(i), 1208.13(d)(1)(i).

<sup>61</sup> For example, commenters stated that Federal circuit courts have given "manner of entry" "little to no weight" in discretionary determinations. Commenters quoted from *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008). In context, however, the court first referenced *Matter of Pula*'s totality of the circumstances analysis and then stated that the "use of fraudulent documents to escape imminent capture or further persecution" should be afforded "little to no weight." *Id.* at 511 n.4 (emphasis added). *Zuh* does not stand for the proposition that this factor should never be afforded greater weight.

Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018).<sup>62</sup> Unlike the rule struck down in those cases, however, consideration of unlawful entry or attempted unlawful entry as a significantly adverse factor in a discretionary analysis is not an asylum bar. This factor is one of many factors that an adjudicator must consider in the totality of the circumstances. *See* 8 CFR 208.13(d), 1208.13(d) (“Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.”).

Further, commenters alleged that the Departments “appear to seek a way around the courts’ decisions” by “injecting” the previous rule barring asylum into the NPRM as a discretionary analysis and that the NPRM failed to “address how the purpose of INA 208(a) is effectuated by inclusion of unlawful entry as a significant adverse discretionary factor.” The Departments reject the contention that the rule is merely “injecting” one rule into another. The rule struck down in *East Bay Sanctuary Covenant* and *O.A.* established a bar to asylum eligibility, and the courts in those cases held that the rule exceeded the Attorney General’s authority under INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), to establish additional limitations on asylum eligibility. But both courts have acknowledged that the Attorney General has broader authority to deny asylum as a matter of discretion to otherwise eligible applicants under INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). *See E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 849 (9th Cir. 2020) (explaining in the context of a different eligibility bar that “the Attorney General’s discretion to deny asylum under § 1158(b)(1)(A)” is broader than “his discretion to prescribe criteria for eligibility for asylum” under § 1158(b)(2)(C)); *O.A.*, 404 F. Supp. 3d at 151 (“[T]here is a vast difference between considering how the alien entered the United States as one, among many, factors in the exercise of a discretionary authority, and a categorical rule that disqualifies any alien who enters across the southern border outside a designated port of entry.”). Consistent with those decisions, this rule simply clarifies that unlawful entry or attempted

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<sup>62</sup> Commenters cited *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020), and *O.A. v. Trump*, 404 F. Supp. 3d 109, 147 (D.D.C. 2019).

unlawful entry is a significant adverse factor in a discretionary analysis. Further, the

Departments point to their explanation at 85 FR at 36283:

the Secretary and Attorney General have not provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion. Nevertheless, the Departments have issued regulations on discretionary considerations for other forms of relief, e.g., 8 CFR 212.7(d), 1212.7(d) (discretionary decisions to consent to visa applications, admission to the United States, or adjustment of status, for certain criminal aliens), and the Departments believe it is similarly appropriate to establish criteria for considering discretionary asylum claims.

The Departments acknowledge that while that explanation does not specifically reference section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A), the explanation clearly states that the purpose of this section of the rule is to establish criteria to guide the exercise of discretion required in considering asylum claims. As explained in the NPRM and this final rule, asylum is a discretionary form of relief under section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A). Accordingly, this rule enables efficient and proper exercise of the discretion required by section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A).

Although the Departments agree with commenters that expediency is not the only relevant “consideration when making a determination that would dictate the relief available to an asylum seeker,” it is also true that “the public has an interest in relieving burdens on the asylum system and the efficient conduct of foreign affairs.” *See E. Bay Sanctuary Covenant*, 964 F.3d at 855. By disfavoring (though, not barring) asylum applicants who unlawfully enter the United States and by deterring meritless asylum claims, the Departments seek to ensure that those who need relief most urgently are better able to obtain it. As stated in the proposed rule, the Departments “believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.” 85 FR at 36283. Adjudicators exercise independent judgment in each case before them, 8 CFR 1003.10(b), and this rule facilitates efficient adjudication of asylum applications, consistent with such exercise of independent judgment. Contrary to the suggestions

of commenters, the rule does not codify expediency as the sole—or even one—factor to consider in determining asylum relief.

Commenters unpersuasively contend that the rule directly conflicts with Federal circuit case law. The commenters confuse the requirements for a grant of asylum by misconstruing a finding of eligibility as sufficient to grant asylum. Asylum eligibility is separate from the necessary discretionary analysis, as reflected in the statute: “with respect to any form of relief that is granted in the exercise of discretion,” an alien must establish satisfaction of the eligibility requirements for asylum and that the alien “merits a favorable exercise of discretion.” INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); *see also Cardoza-Fonseca*, 480 U.S. at 428 n.5 (explaining that “a finding that an alien is a refugee does no more than establish that ‘the alien may be granted asylum *in the discretion of the Attorney General*’” (quoting INA 208(a)) (emphases in original)); *Matter of A-B-*, 27 I&N Dec. at 345 n.12, (stating that the “favorable exercise of discretion is a discrete requirement” in granting asylum and should not be disregarded “solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA”), *abrogated on other grounds, Grace II*, 965 F.3d at 897–900. The rule does not predicate asylum eligibility on unlawful entry or attempted unlawful entry. Instead, the rule makes such factor a consideration in the discretionary analysis.

In response to commenters’ other quoted excerpts from case law, the Departments considered that responding to unlawful entry or attempted unlawful entry require expenditure of valuable government resources. 85 FR at 36283. Not all aliens who unlawfully enter or attempt to unlawfully enter intend to apply for asylum, and apprehension and processing of these aliens continues to strain resources. Accordingly, the Departments codify this factor as part of the discretionary analysis, to be considered in the totality of the circumstances, to determine whether an applicant warrants a favorable exercise of discretion.

The Departments disagree with commenters’ assertions that the rule, in practice, will deny relief to “virtually all asylum cases” or that the rule will limit asylum relief to applicants



from contiguous nations or applicants who arrive by air. The Departments reiterate the independent judgment exercised by adjudicators in applying immigration law, and this rulemaking does not dictate particular outcomes. Adjudicators examine the unique factors in each case before them, in accordance with applicable law and regulations. Accordingly, the Departments find these assertions to be purely speculative.

The Departments also disagree that the rule particularly burdens children. As discussed elsewhere in this final rule, adjudicators may consider whether extraordinary circumstances exist or whether exceptional and extremely unusual hardships would arise if the application was denied. In the case of a child's unlawful entry or attempted unlawful entry, an adjudicator could consider an alien's juvenile status and other related factors stemming from the alien's age, as relevant to and presented in the case. *See* Section II.C.1.3 of this preamble for further discussion on this point. Nevertheless, the Departments recognize that aliens under the age of 18 often have no say in determining their manner of entry into the United States. Accordingly, the Departments have modified the language in the final rule to reflect that the unlawful entry of an alien under age 18 would not necessarily be a significant adverse discretionary factor.<sup>63</sup>

#### 4.7.2. Failure of an Alien to Apply for Protection From Persecution or Torture in at Least One Country Outside the Alien's Country of Citizenship, Nationality, or Last Lawful Habitual Residence Through Which the Alien Transited Before Entering the United States

*Comment:* Commenters expressed general opposition to the proposed rule's requirement that adjudicators consider failure to apply for asylum in third countries through which applicants traveled to reach the United States to be a significant adverse factor. Commenters argued that placing great negative weight on the applicant's route to the United States is inconsistent with discretionary determinations, which, commenters argued, should be based on a consideration of all the equities.

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<sup>63</sup> Such entry would remain a significant adverse discretionary factor for any adults traveling with the minor, however.

Commenters asserted that, contrary to the NPRM’s reasoning, failure to apply for asylum protection in a third country is often not evidence of misuse of the asylum system. Commenters asserted that there are numerous reasons that applicants would not apply for asylum in such countries, including lack of knowledge on how to apply and language barriers. Additionally, commenters cited violence and a fear of persecution as a reason that applicants may not apply for asylum in third countries. One commenter noted that the U.S. government has issued travel advisories urging Americans to reconsider travel plans to El Salvador, Honduras, Guatemala, and eleven Mexican states because of violence. Furthermore, the commenter noted that the U.S. government urges travelers to “exercise caution” when travelling to sixteen other Mexican states, and that the United States has issued its highest travel warning—“Do Not Travel”—for the remaining five Mexican states. The commenter asserted that these warnings indicate that the conditions in some Mexican states are as dangerous as those in Syria and Iraq, which also have the highest travel warning. Given these various warnings, the commenter asserted, it is not reasonable to expect individuals to apply for asylum in Mexico.

Commenters asserted that the NPRM’s reasoning failed to adequately consider the realities of the asylum systems in Mexico, Guatemala, Honduras, and El Salvador. In the case of Mexico, the commenter argued that the asylum system there is restrictive, underfunded, and underdeveloped. Commenters similarly asserted that the asylum systems in Guatemala, Honduras, and El Salvador are rudimentary.

Commenters argued that the requirement to apply for asylum in a third country en route to the United States inappropriately advantaged asylum seekers coming from contiguous countries, as well as those who have the means to fly non-stop to the United States. With respect to asylum seekers who reached the United States by air travel, commenters asserted that the NPRM lacked a rationale as to why asylum seekers who had even a brief layover in another country would be required to apply for asylum in that country. Commenters noted that such a requirement is particularly harmful for those coming from countries where direct flights to the

United States are not possible. Commenters asserted that this difference in treatment violated the Fifth Amendment of the United States Constitution. Commenters asserted that the exceptions outlined in the proposed regulation are identical to language in the Departments' July 16, 2019, IFR. In considering the legality of the IFR, commenters stated that the Ninth Circuit Court of Appeals found the rule to be arbitrary and capricious and inconsistent with the INA.

One commenter asserted that the proposed provision conflicts with two statutory provisions concerning when asylum seekers must apply for asylum in another country: sections 208(a)(2)(A) and 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi). Specifically, the commenter asserted that the proposed provision is not consistent with these statutory sections because it would exclude large classes of individuals from asylum, it does not require adjudicators to consider the safety of the third countries, and it does not require adjudicators to consider the fairness of third country asylum procedures.

*Response:* This factor was promulgated as a way to ensure that aliens in need of protection apply at the first available opportunity. As stated in the proposed rule, the Departments believe that there is a higher likelihood that aliens who fail to apply for protection in a country through which they transit en route to the United States are misusing the asylum system. 85 FR at 36283; *see also* Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33831 (July 16, 2019). Because the Departments recognize that this may not always be the case, the rule provides exceptions for situations in which an alien was denied protection in the country at issue, the alien was a victim of a severe form of trafficking in persons, or the relevant country was not a party to certain humanitarian conventions, as provided in 8 CFR 208.13(d)(1)(ii), 1208.13(d)(1)(ii). In addition, the adjudicator may consider whether exceptional circumstances exist or whether denial of asylum would result in exceptional and extremely unusual hardship to the alien. 85 FR at 36285.

Further, because this factor is race-neutral on its face and applies equally to all aliens, it does not violate the Fifth Amendment's due process guarantee. *See Washington v. Davis*, 426

U.S. 229, 242 (1976) (“[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. . . . Standing alone, [disproportionate impact] does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” (citation omitted)). This factor was not motivated by discriminatory intent. The rule and this factor in particular apply equally to all asylum applicants. To the extent that any one group is disproportionately affected by the rule, such outcome was not based on discriminatory intent, but rather on the demographics of the affected population and the Departments’ aim to ensure that asylum protection in the United States is available and timely granted to applicants who genuinely need it most. *See generally* 85 FR at 36283; *see also Regents of Univ. of Cal.*, 140 S. Ct. at 1915–16 (rejecting the claim that revoking an immigration policy that primarily benefitted Latinos supported an inference of invidious discrimination against Latinos, because any disparate impact could be explained by the demographic fact that “Latinos make up a large share of the unauthorized alien population”). The Departments have determined that aliens who do not apply for protection in a country through which they transit are less likely to merit relief as a matter of discretion; thus, the Departments proposed such factor to be considered while also providing the opportunity for aliens to present evidence to the contrary. *See id.*

Moreover, this factor is not arbitrary. The rule requires adjudicators to consider, as part of their discretionary analysis, whether an alien transited through a country en route to the United States but did not apply for asylum there. If an alien did not apply for protection, regardless of whether transit was effectuated by foot, flight layover, or sea, the alien forwent the immediate opportunity to apply for protection in the transited country for the future opportunity to apply for protection in the United States. The Departments believe this choice is relevant to an adjudicator’s discretionary analysis because it may indicate the urgency or legitimacy of an

applicant's claim. Thus, adjudicators should consider, as relevant, whether an alien failed to apply for protection in a country through which the alien transited en route to the United States, in the totality of the circumstances, to determine whether the alien merits relief as a matter of discretion. Moreover, nothing in the rule categorically prohibits an adjudicator from concluding that, under the circumstances, an applicant's brief layover in transit is less probative of the urgency of the applicant's claim than a longer stay. Nor does anything in the rule categorically prohibit an adjudicator from concluding that, under the circumstances, an applicant's layover in transit in a country known for human rights abuses is less probative of the urgency of the applicant's claim than a layover in a country with a well-recognized system for providing humanitarian protection. In any event, promulgating this factor in the rule ensures that adjudicators at least account for it in the exercise of discretion, even though its probative value may vary from case to case.

The Departments also disagree with commenters who claim the Departments "merely refer[] back to its earlier rulemaking on the third country transit bar." The NPRM's citation to Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33831 (July 16, 2019), was meant to clearly reiterate, while avoiding redundancy, the Departments' continued belief that, generally, aliens who do not apply for protection in a country through which they transit en route to the United States are more likely to have a non-meritorious asylum claim. As evidenced by the clause in the NPRM that states, "as previously explained," the Departments explained this factor earlier in the proposed rule. 85 FR at 36282--83. The Departments provided extensive explanation of the BIA's decision in *Matter of Pula* in which the BIA held that "whether the alien passed through any other countries or arrived in the United States directly from his country" was a factor to consider in determining whether a favorable exercise of discretion is warranted. 19 I&N Dec. at 473-74. The Departments chose to codify that factor in the regulations. The Departments disagree with commenters who alleged that this factor "ignores" the fact that countries through which an alien may transit may be as dangerous as the country of

origin and is based on an incorrect premise that there is a “real opportunity” to seek asylum in all countries party to the Convention. By becoming party to those treaties, the third countries through which an alien may have travelled are obligated, based on the treaties they have joined, to provide protection from removal to individuals who are likely to face persecution on account of a protected ground or torture. Accordingly, the Departments understand this factor to be consistent with the provisions of section 208 of the Act, 8 U.S.C. 1158.

For similar reasons, the Departments find commenters’ assertion that there are numerous reasons that applicants would not apply for asylum in such countries, including lack of knowledge on how to apply and language barriers, as well as violence and a fear of persecution, as unpersuasive. As an initial point, aliens who apply for asylum in the United States do so despite the possibility of language barriers and lack of knowledge of application procedures, and commenters did not explain—and the Departments cannot ascertain—why these barriers would affect only other countries, but not the United States.

Additionally, the alleged failure to apply in other countries due to violence or a fear of persecution is based principally on anecdotes and speculation and is neither borne out by evidence nor distinguished from similar conditions in the United States. For example, the UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID-19 pandemic—which strongly suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g.,* Summary of Statement by UNHCR Spokesperson Shabia Mantoo, *Despite Pandemic Restrictions, People Fleeing Violence and Persecution Continue to Seek Asylum in Mexico*, UNHCR (Apr. 28, 2020), <https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html> (“While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.”).

Asylum and refugee claims filed in Mexico increased 33 percent in the first three months of 2020 compared to the same period in 2019, with nearly 17,800 claims in 2020. *Id.* Asylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year. UNHCR, Mexico Fact Sheet (Apr. 2019), <https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf>. Overall, “[a]sylum requests have doubled in Mexico each year since 2015.” Clare Ribando Seelke, Cong. Rsch. Serv., IF10215, *Mexico’s Immigration Control Efforts 2* (2020), <https://fas.org/sgp/crs/row/IF10215.pdf>.

Moreover, some private organizations acknowledge that asylum claims in Mexico have recently “skyrocket[ed],” that “Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,” and that “Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,” including for those “who are deciding where to seek asylum [i.e., between Mexico and the United States].” Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* 1, 7 (Nov. 2019), <https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf>. If aliens coming to the United States through Mexico feared living in Mexico, it would be irrational for them to seek refuge there in large numbers; yet, that is precisely what the available data suggests.

Additionally, commenters do not indicate why violence in part of one country is different from violence existing in a part of the United States. Just as violence may occur in parts of the United States but individuals fleeing persecution consider the country “safe” and want to live here, localized episodes of violence in other countries do not mean the country, as a whole, is unsafe for individuals fleeing persecution. In other words, the presence of local or regional violence, particularly criminal violence, exists in *all* countries, even those generally considered “safe,” but such presence of local or regional violence does not render those countries too dangerous that individuals fleeing persecution could not take refuge anywhere in the country.

*Cf. Cece*, 733 F.3d at 679 (Easterbrook, dissenting) (“Crime may be rampant in Albania, but it is common in the United States too. People are forced into prostitution in Chicago. . . . Must Canada grant asylum to young women who fear prostitution in the United States, or who dread the risk of violence in or near public-housing projects?”). For instance, per the United Nations Office on Drugs and Crime Chart on Victim of Intentional Homicide, the murder rate in Mexico of 29.1/100,000 in 2018, *see* United Nations Office on Drugs and Crime, *Mexico, Victims of Intentional Homicide, 1990-2018*, <https://dataunodc.un.org/content/data/homicide/homicide-rate>, was lower than that in American cities such as St. Louis, Baltimore, Detroit, New Orleans and Baton Rouge. *See, e.g.*, Missouri, FBI:UCR (2018); Maryland, FBI: UCR (2018); Michigan, FBI: UCR (2018); Louisiana, FBI: UCR (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/offenses-known-to-law-enforcement> (Table 8). The murder rate in Baltimore, America’s deadliest big city, is twice that of Mexico. Sean Kennedy, ‘*The Wire*’ is Finished, but Baltimore Still Bleeds, Wall St. J. (Feb. 7, 2020), <https://www.wsj.com/articles/the-wire-is-finished-but-baltimore-still-bleeds-11581119104>. In short, although the Departments acknowledge commenters’ concerns, they are supported by little evidence, do not explain why their concerns do not also apply to the United States, and are ultimately outweighed by the overall need to ensure appropriate and consistent consideration of probative discretionary factors that the rule provides.

Furthermore, this factor does not conflict with sections 208(a)(2)(A) and 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi), as one commenter alleged. Those provisions pose bars to asylum eligibility, but this factor merely guides adjudicators’ discretion to grant or deny asylum to otherwise eligible applicants. Generally, the safe third country provision, INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A), bars an alien from applying for asylum if the Attorney General determines that the alien could be removed to a country in which the alien’s life or freedom would not be threatened and where the alien has access to a process for determining asylum claims or equivalent protection. The firm resettlement provision, INA 208(b)(2)(A)(vi),



8 U.S.C. 1158(b)(2)(a)(vi), bars asylum eligibility for an alien who firmly resettled in another country before arriving in the United States.

In contrast to those two provisions, this factor—regarding whether an alien failed to apply for protection from persecution or torture in at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States—is considered by an adjudicator in making a discretionary determination on the alien’s asylum application. Whether an application warrants a favorable exercise of discretion is distinct from whether an alien is barred altogether from applying for asylum, as is the case with the safe third country provision, or from establishing eligibility for asylum, as is the case with the firm resettlement provision. To the extent that the commenter’s concerns about the safety of a third country and availability of asylum procedures in that third country specifically refer to the safe third country provision in section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), those are irrelevant to this distinct factor considered in discretionary determinations. To the extent that the commenter suggests specifically incorporating those considerations—the safety of a third country and availability of asylum procedures in that third country—into this factor, the Departments reiterate that an adjudicator may consider, as relevant, extraordinary circumstances and exceptional or extremely unusual hardship that may result if asylum is denied. *See* 85 FR at 36285.

Regardless, the Attorney General’s discretion to deny asylum to otherwise eligible applicants is not limited by the safe third country or firm resettlement bars. *East Bay Sanctuary* and *O.A.* both presented the question whether the eligibility bar there conflicted with the statute’s other eligibility bars, because the Attorney General’s authority to “by regulation establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum” must be “consistent with this section.” INA 208(b)(2)(C), 8 U.S.C. 1108(b)(2)(C). Here, by contrast, the Attorney General would be acting under his authority under INA 208(b)(1)(A), which includes no similar “consistent with” requirement. Simply, the Secretary of Homeland

Security or the Attorney General “may” deny asylum in their discretion. *Id.*; *see E. Bay Sanctuary Covenant*, 964 F.3d at 849 (“Unlike the broad discretion to deny asylum to aliens who are eligible for asylum, the discretion to prescribe criteria for eligibility is constrained by § 1158(b)(2)(C), which allows the Attorney General to ‘establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum’ only so long as those limitations and conditions are ‘consistent with’ § 1158.”).

#### 4.7.3. Use of Fraudulent Documents to Enter the United States

*Comment:* Commenters expressed several general concerns regarding the regulatory provisions on fraudulent documents. First, commenters argued that the provisions would result in the denial of most asylum applications. Second, commenters argued that it is sometimes impossible for asylum seekers to obtain valid documents and that in some instances pursuing such documents could put them in greater danger. Third, commenters asserted that it is particularly difficult for women to obtain valid travel documents in some countries because they need to first obtain the approval of a male relative. Fourth, commenters asserted that the NPRM lacked a valid rationale as to why those travelling through multiple countries would be punished under the proposed rule and those who came directly to the United States from a contiguous country or a direct flight would be excused. Finally, one commenter argued that the proposed provisions are ultra vires because “the law at INA 208 and 209 provide for specific waivers of the use of [fraudulent documents].”

Commenters argued that the NPRM’s assertion that the use of fraudulent documents makes enforcement of immigration laws difficult and requires significant resources is not supported by evidence and is false. One commenter noted that under section 208(d)(5)(A)(i) of the Act (8 U.S.C. 1158(d)(5)(A)(i)) an individual cannot be granted asylum until he or she has completed a background check and his or her identity “has been checked against all appropriate records or databases.” The commenter noted that the statute’s requirements are applicable to every person seeking asylum regardless of whether fraudulent documents were used. Thus, the

commenter argued, making the use of fraudulent documents a significant adverse factor would not reduce the amount of resources needed to adjudicate asylum cases.

One commenter argued that the proposed fraudulent document provisions are contrary to congressional intent. Specifically, the commenter noted that on May 1, 1996, the Senate debated an immigration bill that would have summarily deported, among others, asylum seekers who used false documents to enter the United States. The commenter noted that Senator Patrick Leahy introduced an amendment to the bill that would remove the use of “summary exclusion procedures for asylum applicants.” The commenter quoted some of Senator Leahy’s remarks in support of the amendment, in which he noted that people fleeing persecution will probably get fraudulent passports. The commenter noted there was bipartisan support of the amendment.

Commenters asserted that Federal courts have recognized that false documents may be needed to flee persecution. Citing *Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007), one commenter noted that Mr. Gulla, an Iraqi asylum seeker, used forged passports to flee government persecution on account of his religion and that the court concluded that reasoned use of false documentation in that case supported Mr. Gulla’s asylum claim rather than detracted from it.

One commenter argued that the NPRM’s rationale for the fraudulent document provisions distorted the BIA’s reasoning in *Matter of Pula*. Specifically, the commenter argued that even though the BIA delineated a difference between the use of fraudulent documents to escape persecution and falsifying a United States passport to assume the identity of a United States citizen, the BIA noted that an adjudicator would still be required to consider the totality of the circumstances in both cases. Accordingly, the commenter argued that the case does not provide justification for making the use of a fraudulent document a significantly adverse factor.

*Response:* As an initial point, commenters failed to explain why an alien genuinely seeking asylum would need to use false documents to enter the United States in the first instance, as distinguished from using false documents only to leave the alien’s country of nationality. An

alien need not necessarily have entered the United States to apply for asylum; rather, an alien “arriv[ing] in the United States” may apply for asylum. INA 208(a)(1), 8 U.S.C. 1158(a)(1). Thus, an alien may seek asylum at a port of entry without using or attempting to use any documents whatsoever. Moreover, large numbers of aliens enter the United States without presenting any documents at all, including those who subsequently seek asylum after turning themselves in or are otherwise apprehended by DHS. *See* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A) (rendering inadmissible an alien who enters the United States without being admitted or paroled); *see also* Perla Trevizo, *How Do You ‘Secure’ the Border When Most Migrants Are Just Turning Themselves In?*, Tuscon.com (Dec. 15, 2018), [https://tucson.com/news/state-and-regional/how-do-you-secure-the-border-when-most-migrants-are-just-turning-themselves-in/article\\_deed8d48-fa50-11e8-837c-0b4b3be5a42a.html](https://tucson.com/news/state-and-regional/how-do-you-secure-the-border-when-most-migrants-are-just-turning-themselves-in/article_deed8d48-fa50-11e8-837c-0b4b3be5a42a.html) (noting that “large groups” of aliens simply “cross illegally to turn themselves in,” with no mention of any entry documents, false or otherwise). The use of fraudulent documents undermines the integrity of the immigration system and is unnecessary for an alien to apply for asylum. In other words, because neither fraudulent documents nor even entry into the United States are requirements to make an asylum application, the use of such documents to enter or attempt to enter the United States strongly suggests that the motive of an alien using such documents is to enter the United States for reasons other than a genuine fear of persecution or a need for protection. Consequently, the Departments find it reasonable to consider that factor as a significantly adverse discretionary one for purposes of adjudicating an asylum application, and the commenters did not persuasively explain why that should not be the case.

Even if entry documents were a prerequisite to the ability to apply for asylum, the Departments nevertheless would find that this factor would deter the use of false documents, which create burdensome administrative costs in filtering valid from invalid documentation and dissipate human resources that could be used to ensure that meritorious claims are addressed

efficiently. Those benefits, in the Departments' view, would also ultimately outweigh any costs associated with the denial of asylum applications due to the use of such documents.

Further, the Departments disagree that this factor would result in denial of most applications. Regardless of what documents aliens may use to depart their countries of nationality, there is no evidence that most asylum applicants use false documents to enter the United States; rather, most aliens seeking asylum either appear at a port of entry and request asylum without seeking to enter with any particular documents or enter the United States without inspection, i.e., without presenting any documents at all.

Commenters' concerns are also speculative, and the Departments reiterate that this factor is one of many factors considered under the adjudicator's discretionary analysis—not a bar to asylum.

85 FR at 36283 (“[T]he adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.”). Further, an alien may introduce relevant evidence of extraordinary circumstances, including challenges described by the commenters, for the adjudicator to consider. *See* 85 FR at 36283. The Departments also emphasize that an alien's use of fraudulent documents to enter the United States is a ground that renders the alien inadmissible. INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C). This clear, negative consequence underscores congressional disapproval of the use of fraudulent documents to enter the United States.

In the NPRM, the Departments explained why this factor considers use of fraudulent documents for aliens traveling through more than one country but not aliens arriving from a contiguous country. 85 FR at 36283 n.35. For aliens arriving from a contiguous country, an alien may simply be carrying the documents he or she used to depart that country, particularly in situations in which the exit control for the contiguous country is located in close physical proximity to the port of entry into the United States or the embarkation point for a trip by air or sea to the United States; thus the Departments will not consider this a significant adverse factor

for such aliens. As further explained in the NPRM, the rule aligns with *Lin v. Gonzales*, 445 F.3d 127, 133 (2d Cir. 2006), and *Matter of Pula*, 19 I&N Dec. at 474, cases that draw a distinction between presentation of a fraudulent document to an immigration court and the use of a fraudulent document to escape immediate danger. 85 FR at 36283 n.35. To the extent other BIA cases reject such a distinction, the rule supersedes conflicting case law. Accordingly, aliens are not “punished,” as commenters alleged, if they travel through more than one country. Rather, the line drawn in *Lin* and *Pula* supports differential treatment. If an alien arrives directly (such as by air), there is an innocuous explanation for his carrying of fraudulent documents: He still has them because he used them to escape immediate danger. But if an alien travels through more than one such country, that justification for carrying fraudulent documents—escaping persecution—becomes far more attenuated. As explained elsewhere in the NPRM and this final rule, the Departments believe that if aliens who travel through more than one country, subject to some exceptions, are escaping persecution, they have an opportunity to seek protection in any of the countries through which they transit en route to the United States. If aliens arriving from a contiguous country are escaping persecution, the first place to seek protection would be the United States, and so the Departments will not consider such aliens’ use of fraudulent documents in pursuit of protection as a significant adverse factor.

Contrary to commenters’ assertions, section 208 of the Act, 8 U.S.C. 1158, does not provide a waiver for the use of fraudulent documents to enter the United States, and section 209 of the Act, 8 U.S.C. 1159, only waives a ground of inadmissibility related to the use of fraudulent documents, INA 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i), in conjunction with an application for adjustment of status for an alien who has already been granted asylum. Consequently, neither provision applies to the rule, which addresses solely discretionary determinations in connection with an asylum application. Moreover, the potential availability of a waiver of a ground of inadmissibility, which is itself discretionary, for an alien who has already been granted asylum and is seeking lawful permanent resident status does not suggest that the

basis for the ground of inadmissibility is not also a relevant discretionary consideration in the first instance.

Because this factor would discourage use of fraudulent documents and streamline the discretionary analysis regarding the use of fraudulent documents, the Departments believe the factor would reduce the overall time expended to address the issue of fraudulent documents on a systemwide basis because fewer aliens would use fraudulent documents and adjudicators would consider their use more consistently. Although the use of fraudulent documents to enter the United States is difficult to track in general and the Departments do not track the number of asylum applicants who present such documents, the Departments nevertheless expect less time to be expended overall. To the extent that this provision deters the use of fraudulent documents, the provision will conserve enforcement resources that may otherwise be spent ferreting out fraud and will support the overall integrity of the immigration systems and ensure that benefits are not inappropriately granted. The Departments find those benefits outweigh the various concerns raised by commenters.

The Departments follow applicable law and regulations. If the proposed amendments cited by commenters were not included in the version of the bill that became law, then the Departments do not follow or consider legislative history regarding such amendments. *See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”).

The Departments again note the NPRM, which explains how the rule interacts with case law regarding this factor. 85 FR at 36283 n.35. Further, this rule supersedes previous regulations that case law may have interpreted in reaching decisions prior to promulgation of the rule at hand. To the extent that other circuits have disagreed with the Departments’ reasonable interpretation, the Departments’ proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X*, 545 U.S. at 982.

The rule requires adjudicators to consider this factor, like all the factors outlined in the NPRM, in light of all relevant factors. *See* 85 FR at 36283, 36285. In this regard, the rule aligns with the approach in *Matter of Pula*, contrary to the commenters' assertions. The Departments note, however, that the rule also supersedes *Matter of Pula* in some regards, as explicitly provided in the NPRM. 85 FR at 36285.

#### 4.7.4. Spent More than 14 Days in Any One Country

*Comment:* Commenters expressed general concerns with the proposed regulation's introduction of a bar that would make any person who spent more than 14 days in any country en route to the United States ineligible for asylum. Specifically, commenters asserted the new bar is cruel and arbitrary and capricious, and that it is designed to make most aliens who enter from the southern border ineligible for asylum.

Commenters asserted that the NPRM's reasoning as to the necessity for a 14-day bar is inadequate and that the policy would be contrary to the concept of firm resettlement. One commenter argued that the NPRM failed to explain how a 14-day stay in a country equates to an offer of firm resettlement, and another asserted that the length of stay in a country is irrelevant to the merits of an LGBTQ asylum seeker's claim. Additionally, one commenter stated that being given an application to seek protection in another country does not equate to an offer of firm resettlement. The same commenter argued the NPRM's use of a single Federal case to support the proposed provision—*Yang v. INS*, 79 F.3d 932 (9th Cir. 1996)—is not persuasive. The commenter stated that in *Yang*, refugees from Laos who spent 14 years in France with refugee status were denied asylum in the United States. The commenter asserted that using this case to support the position that denying asylum applications for anyone who spent 14 days in another country with no kind of lawful status is “irrational.”

Commenters argued that the proposed 14-day bar would punish those who seek to comply with U.S. policies. Specifically, commenters noted that under the CBP “metering” policy, asylum seekers sometimes are required to wait more than 14 days (one commenter stated



that the wait could span months) in order to make their asylum claims. Commenters also asserted that asylum seekers subject to MPP are often required to spend more than 14 days (up to weeks or months) in Mexico. Commenters expressed concern that asylum seekers subject to metering and MPP would be barred from asylum under the proposed rule. One commenter similarly argued that the United States has used COVID-19 as a “pretext” to close the Mexican border to all asylum seekers. The commenter implied that these policies could likewise cause an individual to be in a third country for longer than 14 days.

Commenters asserted that many asylum seekers travel to the United States by foot, bus, or train, which, commenters assert, often takes longer than 14 days. Commenters asserted that the length of an asylum seeker’s journey is often extended due to the need to avoid detection from government officials and non-government actors trying to return the asylum seeker back to the country from which the individual is fleeing. Additionally, commenters noted that there could be other reasons that an asylum seeker’s journey could be extended beyond 14 days, including robbery, kidnap, or rape. One commenter asserted that those who travel through southern Mexico face additional hurdles, asserting that the Mexican government refuses to issue travel documents and that the government threatens to fine transportation companies that sell tickets to those without travel documents.

One commenter expressed concern that the proposed regulation did not include an exception for children and other discrete populations, who, the commenter stated, might not have control over the amount of time spent in third countries en route to the United States.

*Response:* This factor is not a bar to asylum, as commenters alleged. This factor is considered, along with all the other factors outlined in the rule, as part of an adjudicator’s discretionary analysis. Further, the NPRM clearly recognized that “individual circumstances of an alien’s presence in a third country or transit to the United States may not necessarily warrant adverse discretionary consideration in all instances,” and subsequently provided various exceptions. 85 FR at 36284.

Consideration of this factor is not cruel or arbitrary and capricious. This factor is considered adverse only when an alien spends more than 14 days in a country that permits applications for asylum, refugee status, or similar protections. The Departments believe that an alien should apply for protection at the first available opportunity, but the Departments would not hold an alien responsible for failure to apply for protection that does not, in fact, exist. Asylum is a form of relief intended for aliens who legitimately need urgent protection. If any alien stays in one country for more than 14 days and that country permits applications for various forms of protection but the alien fails to apply for such protections, then the Departments consider that failure to be indicative of a lack of urgency on the alien's part. This factor thus screens for urgency, an important consideration in light of the growing number of asylum applications the Departments receive: the Departments have seen record numbers of asylum applications, along with record numbers of asylum denials, in the past decade. For comparison, in FY 2008, 42,836 asylum applications were filed while, in FY 2019, 213,798 asylum applications were filed. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. These record numbers have slowed the adjudication process for all asylum seekers, including those who urgently need protection. Thus, the Departments expect that considering this factor will assist the efficient adjudication of asylum claims.

The NPRM does not equate either a 14-day stay in one country or the offer to seek protection, on their own, as firm resettlement, contrary to commenters' assertions. For amendments to the firm resettlement bar, commenters should refer to Section II.C.7 of the preamble to the NPRM, 85 FR at 36285–86, and Section II.C.4.8 of the preamble to this final rule, revised at 8 CFR 208.15, 1208.15.

Contrary to commenters' allegations, the proposed treatment of an alien who spends more than 14 days in a country en route to the United States as a significant adverse factor does not conflict with firm resettlement. First, an alien found to have firmly resettled is barred from

asylum relief. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The provision at hand, however, is not a mandatory bar but a discretionary factor to be considered by the adjudicator, subject to exceptions in cases where the alien's application for protection in the third country was denied, the alien is a victim of a severe form of human trafficking defined in 8 CFR 214.11, or the alien was present in or transited through only countries that were not parties to the Refugee Convention, Refugee Protocol, or CAT at the relevant time. 8 CFR 208.13(d)(2)(i)(A)(1)–(3), (d)(2)(i)(B)(1)–(3); *see also* 85 FR at 36824. Second, as proposed by the NPRM, the firm resettlement bar would apply “when the evidence of record indicates” that it would apply. 85 FR at 36286. Then, the alien bears the burden of proof to demonstrate that the bar does not apply, consistent with 8 CFR 1240.8(d). *See id.* Accordingly, the discretionary factor of whether an alien spent more than 14 days in any one country that provides applications for refugee, asylee, or other protections prior to entering or arriving in the United States is different from but related to the firm resettlement bar: if an alien successfully demonstrates that the firm resettlement bar does not apply, then an adjudicator would consider that factor as part of a discretionary analysis regarding the asylum application.

The Departments disagree that the reference to *Yang*, 79 F.3d at 935–39, is irrational. That case clearly demonstrates why the Departments are promulgating this factor for consideration. As stated in the NPRM, that case “uph[eld] a discretionary firm resettlement bar, and reject[ed] the premise that such evaluation is arbitrary and capricious or that it prevents adjudicators from exercising discretion.” 85 FR at 36284 (citing *Yang*, 79 F.3d at 935–39). Such reasoning is relevant to all cases in which this factor is considered, whether the alien spent 14 days or 14 years in another country. Further, contrary to the commenters' assertion, even if the alien spent 14 days or more in another country, this factor is not a bar to asylum; rather, it is considered in light of all other relevant factors and various exceptions. *See id.*

For aliens subject to MPP, those aliens who have entered the United States and were processed under MPP are no longer en route to the United States and have already applied for

admission to the United States, whereas, this factor considers whether an alien stayed for more than 14 days in one country “[i]mmediately prior to his arrival in the United States or en route to the United States.” 8 CFR 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A). If an alien claims that he was subject to metering and waited more than 14 days in Mexico, he or she may introduce such evidence as an extraordinary circumstance. Moreover, such aliens may apply for protection in Mexico; if that application is denied, then the factor would not apply. In addition, the Departments reject any contention that COVID-19 has been used as a pretext to close the southern border. The government has taken steps at the Canadian and Mexican border to curb the introduction and spread of the virus, which continues to affect the United States and the entire world. *See DHS, Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (updated Oct. 22, 2020), <https://www.dhs.gov/news/2020/06/16/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>; Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR 16559 (Mar. 24, 2020); Security Bars and Processing, 85 FR 41201 (July 9, 2020) (proposed rule).

For discrete populations, if circumstances exist that extend an alien’s stay in one country to surpass 14 days, an adjudicator will consider such circumstances to determine whether they constitute extraordinary circumstances. Further, an adjudicator will evaluate whether such alien falls into one of the three exceptions to this factor.

#### 4.7.5. Transits Through More Than One Country Between His Country of Citizenship, Nationality, or Last Habitual Residence and the United States

*Comment:* Commenters asserted that the proposed provision pertaining to transit through more than one country en route to the United States is arbitrary and capricious and contrary to congressional intent. They stated that the rule would inappropriately advantage asylum seekers coming from Mexico and Canada. Commenters similarly asserted that the proposed rule would advantage those coming from countries where direct flights to the United States are available and

those who could afford to purchase tickets on such flights. They asserted that there was no rationale as to why asylum seekers travelling by air with one or more layovers in another country should be treated differently from those who took a direct flight. And they further expressed concern that the proposed factor would be particularly onerous on women and LGBTQ asylum seekers.

Commenters averred that the proposed factor of transit through more than one country conflicts with Federal court precedent. Specifically, commenters noted that a Federal district court invalidated a prior regulation concerning a third country transit ban. Commenters expressed concern that the Departments are trying to implement the ban a second time by making it a factor in discretionary determinations and asserted that the proposed provision would likewise be struck down by the courts.

Commenters expressed concern with two of the NPRM's proposed exceptions to the proposed third country transit factor. First, one commenter contended that exempting travel through countries that are not party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment is overly narrow. Specifically, the commenter argued that since 146 countries are party to the 1951 convention and 147 countries are party to the Protocol, the exception would be inapplicable to many asylum seekers' journeys. Second, commenters expressed concern that the proposed exception of applying for asylum in countries visited en route to the United States is not reasonable. Commenters asserted that the asylum systems of many nations through which asylum seekers commonly travel (such as Guatemala, Honduras, and El Salvador) are not well developed and that the countries are sometimes just as dangerous as the ones from which they are fleeing.

*Response:* The Departments disagree that this factor is arbitrary and capricious or contrary to congressional intent. Although not a bar, this discretionary factor is consistent with case law regarding firm resettlement and safe third countries. *See* 85 FR at 36284. Further,

taken together with the exceptions, the factor is consistent with section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).

Similar to the aforementioned factors that consider whether an alien stayed in one country for more than 14 days and whether an alien failed to seek protection in a country through which the alien transited en route to the United States, this factor aims to ensure that asylum is available for those who have an urgent need for protection. The Departments generally believe that aliens with legitimate asylum claims would not forego the opportunity to seek protection in countries through which they traveled if they had an urgent need. However, the Departments acknowledge that circumstances may exist in which an alien did, in fact, travel through more than one country and has an urgent need for asylum; accordingly, the Departments outlined three exceptions to this factor, *see* 85 FR at 36284; 8 CFR 208.13(d)(2)(i)(A)(1)–(3), (B)(1)–(3), 1208.13(d)(2)(i)(A)(1)–(3), (B)(1)–(3), in addition to the general consideration of extraordinary circumstances or exceptional and extremely unusual hardship that may result if the application is denied. *See* 85 FR at 36283–84. For these reasons, the Departments did not promulgate this factor in an arbitrary and capricious manner.

Relatedly, this factor does not improperly advantage asylum seekers from Canada, Mexico, or countries with direct flights to the United States. As background, asylum and refugee provisions were incorporated into U.S. law based on the United States’ international obligations, in part, from the 1951 Convention relating to the Status of Refugees and 1967 Protocol. Signatories to those agreements comprise an “international regime of refugee protection.” UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: II. Background*, ¶ 3, EC/SCP/54 (July 7, 1989), <https://www.unhcr.org/en-us/excom/scip/3ae68cbe4/implementation-1951-convention-1967-protocol-relating-status-refugees.html>. To that end, the Departments believe this system operates to ensure aliens may apply for protection as soon as possible, not to ensure that aliens receive protection specifically from the United States. Congress has authorized the Departments to bar an alien from applying for

asylum in the United States if the alien may be removed to a third country that affords a full and fair process for determining asylum claims or equivalent temporary protections, pursuant to a bilateral or multilateral agreement. INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The United States shares the burden of processing asylum claims with other countries pursuant to various agreements. *See, e.g.*, 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, Dec. 5, 2002, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html>; DHS, *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador*, [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf). Thus, asylum seekers from countries in closer proximity to the United States or with direct flights to the United States are not “advantaged,” and asylum seekers from countries that are farther away from the United States or without direct flights to the United States are not “punished.” If anything, aliens from countries farther away may have more opportunities to seek protection than those whose closest—or potentially only—option is the United States. In an “international regime of refugee protection,” it makes sense that aliens closer to the United States may obtain asylum more easily in the United States, just as aliens closer to other countries may obtain asylum more easily in those countries. Including this factor will encourage aliens to seek asylum in countries that are closest to them and encourage all treaty signatories to do their fair share in providing safe harbor for refugees.

For discussion of this rule’s effect on women and LGBTQ asylum seekers, *see* Section II.C.1.3 of this preamble. The Departments note here, however, that the rule applies to all asylum seekers regardless of gender or sexual orientation.

Moreover, this factor is not an eligibility bar for asylum; it is merely one factor to be considered as relevant, along with various other factors outlined in the rule. The previous

rulemaking cited by commenters, Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019), barred asylum relief to aliens who failed to apply for protection in a third country through which they traveled en route to the United States. While that rule encompasses similar considerations, it is fundamentally different because the 2019 rule constituted a mandatory bar to asylum. This rule considers this factor as part of an adjudicator’s discretionary analysis. Adverse judicial treatment of the 2019 rule does not directly apply to this rulemaking, which the Departments propose to issue under a different statutory authority. *See E. Bay Sanctuary Covenant*, 964 F.3d at 849 (distinguishing “the broad discretion to deny asylum to aliens who are eligible for asylum” from the narrower “discretion to prescribe criteria for eligibility”).

The Departments disagree with commenters that the exception for aliens who were present in or transited through countries that were, at the relevant time, not parties to the Refugee Convention, Refugee Protocol, or CAT is too narrow. That exception is fashioned to ensure that aliens have an opportunity to apply for protection—whether that be in the United States or in a country through which they transit. If a country does not offer such protection, then an alien would not be held to that standard and could avail themselves of the third exception. Regarding comments that the exceptions to this factor are insufficient due to danger in and underdevelopment of most countries through which aliens travel en route to the United States, the Departments note that, by becoming party to those treaties, the third countries through which an alien may have transited are obligated by treaty to provide protection from removal to individuals who are likely to face persecution on account of a protected ground or torture. *See also* Section III.C.4.7.2 of this preamble, *supra* (discussing the availability of protection in countries outside the United States through which an alien may transit). Accordingly, the Departments believe the rule is consistent with section 208 of the Act (8 U.S.C. 1158). The Departments note that regardless of whether an alien claims any of the exceptions, an alien may



still assert that denial of their asylum application would result in extraordinary circumstances or produce exceptional and extremely unusual hardship.

#### 4.7.6. Subject to § 1208.13(c) but for the Reversal, Vacatur, Expungement, or Modification of a Conviction or Sentence

*Comment:* Commenters expressed general concerns with the provision of the proposed regulation relating to reversed or vacated criminal convictions, asserting that it would lead to many asylum applications being inappropriately denied.

One commenter asserted that the proposed regulation would inappropriately create a categorical approach to considering vacated convictions in discretionary determinations. The commenter asserted that adjudicators should consider vacated convictions on a case-by-case basis and argued that a vacated conviction could provide positive equities that should be considered.

Commenters asserted that the proposed regulation is inconsistent with due process. Specifically, one commenter asserted that the proposed regulation would bar from asylum relief individuals who had criminal sentences that were vacated, reversed, expunged, or modified unless there was an express finding that the person is not guilty. The commenter asserted that there could be instances where a prosecutor decides to decline to pursue a case further after learning of an underlying error in the criminal proceedings without first making a determination as to the defendant's innocence or guilt. The commenter asserted that the proposed regulation could cause some individuals in this position with otherwise meritorious claims to be barred from asylum. The commenter cited *Nelson v. Colorado*, 137 S. Ct. 1249, 1255–56 (2017), and argued that such an outcome would violate due process principles.

One commenter expressed concern that the proposed regulation is inconsistent with the INA and the BIA decision, *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). The commenter asserted that the Act and precedent establish that juvenile charges and convictions are not criminal convictions and thus should not be considered under the proposed regulation. Similarly,

the commenter cited research suggesting that a child's comprehension of the consequences for engaging in criminal activity varies based on age. Accordingly, the commenter asserted, individuals should not be subjected to excessive punishments for actions that they took when they were young.

*Response:* As an initial point, the Departments note that this provision is fully consistent with long-standing case law allowing adjudicators to appropriately consider as an adverse discretionary factor "criminal conduct which has not culminated in a final conviction for purposes of the Act." *Matter of Thomas*, 21 I&N Dec. 20, 23–24 (BIA 1995) (collecting cases); *cf. Villanueva-Franco v. INS*, 802 F.2d 327, 329–30 (9th Cir. 1986) (finding that the Board could consider alien's extensive criminal record, which included an expunged felony conviction for assaulting a police officer, in weighing whether voluntary departure was merited as a matter of discretion); *Parcham v. INS*, 769 F.2d 1001, 1005 (4th Cir. 1985) ("Evidence of an alien's conduct, without a conviction, may be considered in denying the discretionary relief of voluntary departure."); *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980) (noting that "a plea of guilty [that] results in something less than a conviction" is "a significant adverse factor to be considered in whether a favorable exercise of discretion is warranted" for voluntary departure), *overruled on other grounds by Matter of Ozkok*, 19 I&N Dec. 546, 552 (BIA 1988).

Commenters did not persuasively explain why the Departments should abandon this long-standing principle in considering all conduct in making a discretionary determination, especially conduct that initially led to a criminal conviction.

Additionally, commenters' concerns that this factor will result in improper denials of asylum applications are speculative. This factor is not a bar to asylum. *Compare* Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640, 69654–56 (Dec. 19, 2019) (proposing additional bars to asylum eligibility based on criminal convictions and clarifying when an order vacating or modifying a conviction or sentence will preclude the application of the proposed bars). Considered relative to all the other factors proposed in NPRM, outcomes will vary on a

case-by-case basis, given consideration of extraordinary circumstances or exceptional and unusual hardship resulting from a denial of asylum. 85 FR at 36283.

The Departments disagree that this factor creates a “categorical approach,” as commenters alleged. A categorical approach often applies when determining whether a particular conviction qualifies as an offense that would render the alien ineligible for discretionary relief. 8 CFR 208.13(c), 1208.13(c); *see Kawashima v. Holder*, 565 U.S. 478, 483 (2012). This factor merely counsels adjudicators that *if* a conviction qualifies, it should be considered an adverse factor notwithstanding any subsequent vacatur or reversal of that sentence (unless the alien was found not guilty). But this rule takes no position on what approach should apply—categorical or circumstance-specific—in determining whether a conviction would so qualify. Moreover, this factor does not affect existing case law allowing the consideration of criminal activity as a discretionary factor, even when that activity has not resulted in a conviction. The rule, as proposed and in this final iteration, however, considers this factor as relevant to each case, along with consideration of extraordinary circumstances or exceptional and extremely unusual hardship that may befall an alien if asylum is denied. In this way, the rule is consistent with the commenter’s suggestion that criminal activity must be considered on a case-by-case basis.

The rule does not violate due process. Consistent with long-standing case law, the rule requires adjudicators to consider, as part of the discretionary analysis, convictions that remain valid for immigration purposes. *See* 85 FR at 36284. Due process requires that an alien receive a full and fair hearing that provides a meaningful opportunity to be heard. *See Kerciku v. INS*, 314 F.3d 913, 917 (7th Cir. 2003). This rule does not violate due process because it does not deprive aliens of their right to a hearing before an immigration judge, 8 CFR 1240.10, or their right to appeal to the BIA, 8 CFR 1003.1(b).

Moreover, because asylum is a discretionary form of relief, aliens have no constitutionally protected interest in a grant of asylum. *See Nativi-Gomez v. Ashcroft*, 344 F.3d

805, 807–09 (8th Cir. 2003) (explaining that an alien has no expectation that discretionary relief will be granted and, consequently, no protected liberty interest in such relief (citing *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000)). Accordingly, this rule presents distinct issues from *Nelson*, 137 S. Ct. at 1255–56, cited by a commenter. *Nelson* holds only that a state may not continue to deprive a person of his property—there, thousands of dollars in costs, fees, and restitution—after his conviction has been reversed or vacated. The case applied the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which balances the private interest affected, the risk of erroneous deprivation of such interest through procedures used, and the governmental interest at stake. Because, unlike the monetary exactions at issue in *Nelson*, the rule affects no constitutionally protected liberty or property interest, that case and the *Mathews* balancing test do not apply.

The Departments will continue to apply *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000), as relevant; however, the commenter misunderstands the holding in that case. In that case, as referenced by a commenter, the BIA held that an adjudication as a “youthful offender” constituted a determination of juvenile delinquency rather than a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). *Matter of Devison*, 22 I&N Dec. at 1366. “In its reasoning, the Board drew a critical distinction between a finding of delinquency, which involves ‘status’ rather than guilt or innocence, and deferred adjudication or expungement. Deferred adjudications constitute convictions under the INA while findings of delinquency do not.” *Uritsky v. Gonzales*, 399 F.3d 728, 730 (6th Cir. 2005) (describing the BIA’s holding in *Matter of Devison*) (internal citation omitted). Accordingly, juvenile adjudications of delinquency will continue to be evaluated in accordance with applicable statutes and regulations. But, because *Matter of Devison* does not hold that juvenile convictions cannot qualify as criminal convictions under the Act, the Departments decline to apply it as suggested by the commenter. The rule does not change or reinterpret the definition or disturb case law regarding criminal convictions; in fact, the rule codifies long-standing case law through promulgation of

this factor. *See* 85 FR at 36284. To the extent commenters expressed disagreement with the definition of “conviction” under the Act, that issue is outside the scope of this rulemaking.

Finally, to the extent commenters queried whether particular types of cases with specific facts would necessarily be denied, the Departments find such queries speculative or hypothetical. Moreover, the Departments do not generally provide advisory opinions on asylum applications, especially in a rulemaking. Rather, the Departments expect that their adjudicators will address each case based on its own particular facts and the applicable law.

#### 4.7.7. More Than One Year of Unlawful Presence in the United States Prior to Filing an Application for Asylum

*Comment:* Commenters generally expressed concern that consideration of unlawful presence in discretionary determinations would lead to the denial of most asylum applications. One commenter expressed concern that the proposed provision fails to account for practical realities such as official ports of entry being “effectively closed” to asylum seekers for years and that it could take more than a year to recover from the trauma that led an individual to flee his or her country.

Commenters asserted that inclusion of the proposed unlawful presence factor in discretionary determination is *ultra vires*. Specifically, commenters noted that section 208(a)(2)(d) of the Act (8 U.S.C. 1158(a)(2)(d)) provides two instances in which an asylum application can be filed outside of the one-year deadline: (1) changed circumstances that affect eligibility for asylum, and (2) extraordinary circumstances relating to the delay of filing the application within one year. Commenters asserted that the proposed regulation would frustrate this statutory framework because a person who filed more than one year after his or her last entry into the United States but meets one of the above-identified exceptions could still see their application denied under the proposed rule as a matter of discretion. Commenters also noted that there could be instances where the exceptions would not be applicable until after the one-year deadline has expired. Commenters stated that deadline exceptions are especially important for

LGBTQ asylum seekers. Commenters stated that the process to understanding one's identity as an LGBTQ individual can take more than one year and requires safety, security, and a support system that is often not available during flight from their home countries. Similarly, commenters asserted that it could take over a year to detect an HIV infection because of the need for "culturally competent and clinically appropriate" medical care that is often not available to asylum seekers outside of the United States.

Commenters argued that the proposed regulation conflicts with congressional intent. One commenter detailed the legislative history surrounding the one-year filing deadline. Specifically, the commenter noted that the Senate version of the bill in which the deadline was debated raised the deadline from 30 days to one year and that an amendment to the House version changed the wording of one of the exceptions from "changed country conditions" to "personal circumstances" in order to broaden the exception for applications that would be accepted after the statutory deadline. The commenter also highlighted a floor speech that the commenter argued evidenced congressional intent to create broad exceptions to the one-year deadline in order to reduce the chance of arbitrary denials.

One commenter argued that the proposed regulation conflicts with agency policy. Specifically, the commenter argued that in *Matter of Y-C-*, 23 I&N Dec. 286, 287 (BIA 2002), the BIA stated that a failure to file within the one-year deadline does not result in an absolute bar to filing an asylum application. The commenter also asserted that the proposed regulation is in conflict with 8 CFR 208.4(a)(4)–(5) and 8 CFR 1208(a)(4)–(5), which, the commenter asserted, provide broad definitions for the changed and extraordinary circumstances exceptions. The commenter similarly asserted that the proposed regulation is in conflict with 8 CFR 208.4(a)(2)(B) and 8 CFR 1208.4(a)(2)(B), which require applicants to establish the exceptions "to the satisfaction" of the adjudicator. The commenter noted that USCIS guidance states the standard is one of "reasonableness," which, the commenter asserted, is lower than that of "clear and convincing evidence." The commenter asserted that USCIS's articulation of the standard

evidences agency acknowledgement of congressional intent to have the exceptions be broadly available.

One commenter asserted that the proposed regulation is inconsistent with the United States' obligations under the 1967 Protocol. Specifically, the commenter asserted that the UNHCR Executive Committee opposed the one-year filing deadline when it was under consideration because it was concerned with the impact it would have on the ability of the United States to offer protection to those fleeing persecution. The commenter similarly asserted that President Clinton opposed the one-year filing deadline out of a concern for it being inconsistent with international treaty obligations.

*Response:* This factor, like the other factors, is not a bar to asylum. The Departments proposed this factor as one of many that an adjudicator must consider when determining whether an asylum application warrants a favorable exercise of discretion. 85 FR at 36283. Commenters' concerns that consideration of this factor would result in the denial of most asylum applications are speculative, untethered to the inherent case-by-case nature of asylum adjudications, and based on the erroneous underlying premise that this factor functions as an eligibility bar..

Moreover, this factor would, of its own force, result in the denial of only a small number, if any, of asylum claims. For aliens who entered the United States unlawfully and who accrue at least one year of unlawful presence, the statutory one-year bar in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), would likely apply independently, regardless of this provision. And aliens who arrive in the United States lawfully and maintain lawful status do not accrue unlawful presence and, thus, would not be subject to this provision. INA 212(a)(9)(B)(ii), 8 U.S.C. 1182(a)(9)(B)(ii). Even if such aliens fell out of status, their previous status may demonstrate extraordinary circumstances, 8 CFR 208.4(a)(5)(iv), 1208.4(a)(5)(iv), which would excuse the statutory one-year filing deadline for a "reasonable period," and that "reasonable period" is likely to be less than the one year of unlawful presence required to trigger this provision. *See* Asylum

Procedures, 65 FR 76121, 76123–24 (Dec. 6, 2000) (“Generally, the Department expects an asylum-seeker to apply as soon as possible after expiration of his or her valid status, and failure to do so will result in rejection of the asylum application. Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.”). Commenters’ concerns also do not account for the exceptions to the accrual of unlawful presence, INA 212(a)(9)(B)(iii), 8 U.S.C. 1182(a)(9)(B)(iii), or for situations in which the Attorney General or Secretary may grant an asylum application notwithstanding this factor. In short, commenters’ concerns that this provision will result in the denial of most asylum application is wholly unfounded.

This factor is consistent with the Act. The rule preserves consideration of the two statutory provisions, cited by commenters, in which aliens may file an asylum application outside of the one-year deadline—changed circumstances and extraordinary circumstances. *See* 85 FR at 36285. Further, the rule provides consideration of whether exceptional and extremely unusual hardship may befall an alien if asylum was denied. For the discrete populations referenced by the commenters who file outside of the one-year deadline, adjudicators may consider those circumstances in accordance with the rule.<sup>64</sup> Accordingly, the rule does not frustrate the statutory framework.

The Departments disagree that the rule conflicts with congressional intent and agency policy. First, the Departments note that legislative history is secondary to the text of the statute itself. *See Park ‘N Fly, Inc.*, 469 U.S. at 194 (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”). The Supreme Court has explained the difficulty in examining legislative history because, oftentimes, both support and opposition may be found, thereby “creat[ing] more confusion than clarity.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 539 (2004); *see also Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011) (“We will not take the

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<sup>64</sup> *See supra* Section II.C.1.3 for further discussion on vulnerable populations.



opposite tack of allowing ambiguous legislative history to muddy clear statutory language.”).

The Departments read the plain language of the statute conferring discretionary authority to the Attorney General to adjudicate asylum applications in promulgating this section of the rule, which guides the exercise of such discretion through consideration of various factors.

Accordingly, in regard to this particular regulatory provision, the Departments rely on the text of the statute rather than the legislative history.

Second, the rule does not conflict with agency policy. This factor, as previously explained, does not function as an absolute bar to asylum; therefore, it does not conflict with case law holding that extraordinary circumstances may excuse untimely filing. Moreover, this factor does not conflict with current regulations, as alleged by a commenter. The rule does not change the definitions for changed circumstances or extraordinary circumstances in 8 CFR 208.4(a)(4)–(5), 1208.4(a)(4)–(5), and the rule repeatedly stated that the adjudicator will consider this factor, along with all of the factors, as part of the discretionary analysis. Thus, it does not offend 8 CFR 208.4(a)(2)(B), 1208.4(a)(2)(B).

In regard to one commenter’s concern that the rule’s “clear and convincing evidence” standard would displace USCIS’s current “reasonableness standard” for excusing a late-filed application, the commenter conflates the burden for showing extraordinary circumstances excusing the general one-year filing deadline with the burden for showing exceptional and extremely unusual hardship warranting an exercise of discretion by the Secretary or Attorney General. *Compare* 8 CFR 208.4(a)(5), 1208.4(a)(5) (“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 delay was reasonable under the circumstances”), *with* 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii) (Secretary or Attorney General may favorably exercise discretion where one or more adverse discretionary factors are present in “cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien”). The two

standards do not conflict because they apply in different contexts and serve different purposes.<sup>65</sup> The “to the satisfaction of the asylum officer” standard reflects the statutory requirement that an alien must demonstrate extraordinary circumstances “to the satisfaction of the Attorney General” to excuse a late-filed asylum application. INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). It reflects a showing to be made by the alien in order to receive initial consideration of the asylum application, irrespective of its merits. The “clear and convincing evidence” standard reflects the showing necessary to warrant the Secretary’s or Attorney General’s favorable exercise of discretion when any significantly adverse factor—whether an unpaid tax obligation, or the denial of two previous applications—is present. This standard is consistent with prior standards set for the application of that discretion to immigration benefits. *See* 8 CFR 212.7(d), 1212.7(d). It represents a concluding consideration to determine whether a grant of asylum is ultimately appropriate and goes directly to the merits of the asylum application. The two standards therefore do not conflict.

The rule does not circumvent the United States’ obligations under the 1967 Protocol. In accordance with its non-refoulement obligations under the 1967 Protocol, the United States continues to offer statutory withholding of removal and protection under the CAT regulations.<sup>66</sup> The Departments also find commenters’ assertions unpersuasive that the UNHCR Executive Committee and former-President Clinton opposed the one-year deadline. As an initial matter, concerns regarding solely the one-year deadline are outside the scope of this regulation because the rule does not amend the deadline, nor could it. And, in any event, the Departments are not

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<sup>65</sup> For example, an alien may establish ineffective assistance of counsel as an extraordinary circumstance to excuse a failure to meet the one-year asylum application filing deadline. 8 CFR 208.4(a)(5)(iii), 1208.4(a)(5)(iii). That showing, however, simply allows the application to be filed and says little about whether the application should ultimately be granted as a matter of discretion, particularly if there are unrelated adverse factors to be considered, such as unpaid tax obligations. 8 CFR 208.13(d)(2)(i)(E)(2), 1208.13(d)(2)(i)(E)(2).

<sup>66</sup> *See R-S-C- v. Sessions*, 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that “the Refugee Convention’s non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun v. Att’y Gen. U.S.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (similar); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016) (similar); *Maldonado*, 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by the FARRA and its implementing regulations). For further discussion on international law principles as they relate to this rulemaking, see section II.C.6.8 *infra*.

aware that any court has endorsed the UNHCR Executive Committee's and President Clinton's theory that the existing one-year time bar on asylum applications violates international law.

#### 4.7.8. Tax Violations

*Comment:* Commenters asserted that tax violations are not related to the merits of an asylum application and that the proposed regulation would punish asylum seekers for not understanding tax law. Commenters asserted that another result of EAD regulations is that many asylum seekers work in the informal economy and are paid "off the books" to support themselves while their applications are pending. Commenters argued that it is not reasonable to expect asylum seekers (some of whom, one commenter noted, do not speak English) to navigate the complexities of tax law to determine if they are required to file taxes. Another commenter asserted that even if an asylum seeker determined that he or she was not required to file, it would be difficult to prove in court due to employment in the informal economy. The commenter also noted that in seeking to comply with the proposed rule, asylum seekers may turn to, and be defrauded by, notarios.

One commenter asserted that, contrary to the NPRM's reasoning, consideration of this factor would require more adjudicative time. Specifically, the commenter asserted that longer asylum interviews and hearings would be required to determine whether an asylum seeker was required to file taxes.

Commenters further asserted that immigration judges are not qualified to make determinations as to whether an individual is required to file taxes and that by granting them such power the proposed rule would infringe upon the province of the Department of the Treasury. Commenters asserted that the proposed rule would open the DOJ to numerous and costly lawsuits under the APA where plaintiffs would allege that an immigration judge's misapplication of the tax code led to denials of asylum applications. Moreover, commenters argued that such lawsuits would "effectively bankrupt" the United States.

Commenters asserted that the proposed provisions relating to tax violations would violate the U.S. Constitution in two ways. First, commenters argued that the proposed provisions conflict with the Eighth Amendment's proscription against cruel and unusual punishment. Specifically, commenters asserted that if an applicant presents a meritorious claim, it would be cruel and unusual punishment to consider the "minor civil error" of not filing taxes on time a "strict liability offense" that completely bars the applicant from asylum protection. Second, commenters argued that the proposed regulation would violate the Equal Protection Clause because the proposed rule would create harsher penalties for asylum seekers who do not file than for citizens and LPRs. Specifically, commenters asserted that by barring individuals from eligibility for asylum protection, the proposed rule would create harsher penalties for asylum seekers for tax non-compliance than for citizens and LPRs who would not face such severe consequences.

Commenters also asserted that many asylum seekers would not be able to comply with the proposed tax provisions due to USCIS's rules pertaining to Employment Authorization Documents ("EAD"). Commenters asserted that under the EAD rules, it is not possible for asylum seekers to receive a social security number ("SSN") prior to obtaining an EAD. One commenter asserted that the IRS website is unclear on whether asylum seekers without EADs would be eligible to receive Individual Taxpayer Identification Numbers ("ITIN"). The commenter asserted that even if an asylum seeker is eligible for an SSN or an ITIN, it could still be difficult for the applicant to obtain the identity documents needed to apply for an SSN or an ITIN from his or her home country.

*Response:* In general, the comments on this provision suggest either that aliens seeking asylum should be excused from filing Federal, state, or local income tax returns or that the Departments should ignore clear violations of law when aliens fail to do so. Neither suggestion is well-taken by the Departments, as either countenancing or ignoring violations of the law is inconsistent with each's mission. Moreover, the comments fail to acknowledge clear case law

that income tax violations are a significant adverse discretionary factor in the immigration adjudication context. *See, e.g., Matter of A-H-*, 23 I&N Dec. 774, 782–83 (A.G. 2005) (noting that tax violations “weigh against asylum” because they exhibit “disrespect for the rule of law”); *cf. In re Jean Gilmert Leal*, 2014 WL 4966499, \*2 (BIA Sept. 9, 2014) (noting in the context of an application for adjustment of status that it is “well settled” that “failure [to file tax returns] is a negative discretionary factor because it reflects poorly on the applicant’s respect for the rule of law and his sense of obligation to his community”).

The Departments also note that consideration of tax returns filed by aliens are already enshrined in multiple places in immigration law. *See, e.g.,* 8 CFR 210.3(c)(3) (alien applicant for legalization program may establish proof of employment through, inter alia, Federal or state income tax returns); *id.* 214.2(a)(4) (alien dependents of certain visa holders who obtain employment authorization “are responsible for payment of all Federal, state and local income, employment and related taxes and Social Security contributions on any remuneration received”); *id.* 214.2(5)(ii)(E) (restricting employment eligibility for certain visa dependents when the proposed employment is contrary to the interest of the United States, defined as, inter alia, employment of visa holders or dependents “who cannot establish that they have paid taxes and social security on income from current or previous United States employment”); *id.* 214.2(g)(4), (5)(ii)(E) (same, but for a different visa category); *id.* 244.9(a)(2)(i), 1244.9(a)(2)(i) (income tax returns may serve as proof of residence for purposes of an application for Temporary Protected Status (“TPS”)); *id.* 1244.20(f)(1) (adjudicator may require proof of filing an income tax return before granting a fee waiver for a TPS application); *id.* 1245.13(e)(3)(iii)(E) (alien applicant for adjustment of status may establish proof of physical presence in the United States through, inter alia, income tax records). To the extent that commenters raised concerns about an alien’s ability to navigate existing tax systems in the United States—a question that is beyond the scope of this rule—they neither acknowledged the many existing provisions linking aliens, benefits, and

income tax returns nor persuasively explained why adherence to tax laws is an inappropriate discretionary factor to consider in the context of the rule.

The Departments disagree with commenters regarding the relation of tax violations to the statutory discretionary analysis. As the proposed rule explained, the Departments see no concern with treating an asylum applicant's failure to file tax forms, when required by law, as a negative factor in an asylum adjudication when all other individuals required to file tax returns in the United States are subject to negative consequences for failure to file required tax forms. *See* 85 FR at 36284. The Departments believe that adherence to U.S. tax law is applicable to a favorable exercise of discretion, and this factor evaluates such adherence as part of an adjudicator's discretionary analysis.

The Departments find commenters' concerns associated with working in the "informal economy" to be unpersuasive. Aside from the fact that working without authorization is unlawful, the Departments emphasize the potential dangers of working without authorization, including exploitation, and, thus, strongly discourage aliens from doing so. Although not the purpose of this regulation, if the rule deters aliens from working without authorization, then the Departments find that to be a positive unintended consequence. Further, to the extent that commenters assert this rule will have negative consequences on aliens who are violating the law—either by working without authorization or by failing to file tax returns—the Departments find continuing illegal activity to be an insufficiently persuasive basis to alter the rule.

To the extent that commenters are opposed to the EAD regulations or expressed concern in regard to notario fraud, such concerns are outside the scope of this rulemaking. Moreover, aliens who require an EAD but do not possess one should not be engaged in employment, and aliens who have not engaged in employment will—unless they have another source of taxable income—generally not be required to file income tax returns that are the subject of the rule. Further, the Departments recognize that notario fraud exists, but it exists independently of the rule and has existed for many years. To the extent that notario fraud exists in tax preparation

services, again, that fraud exists outside of this rule and flows from long-standing state and Federal tax obligations, not any provision proposed in the rule. To the extent that commenters oppose this portion of the rule because they believe it will lead aliens to engage in unlawful behavior (i.e., working without an EAD), the Departments note that nothing in the rule requires any individual to engage in unlawful behavior. Similarly, to the extent that commenters oppose the rule because they believe it will cause aliens to fulfill an existing legal obligation (i.e., filing income tax returns) by utilizing individuals who themselves may engage in unlawful behavior (i.e., notarios), the Departments also note that nothing in the rule requires aliens to hire individuals who engage in illegal behavior. Further, even if aliens turn to notarios to prepare and file tax returns, they would do so not in response to the rule, but in response to the myriad laws documented above that already incentivize or require aliens to file income tax returns. Moreover, under *Matter of A-H-*, 23 I&N at 782–83, immigration judges may already consider tax violations as a significantly adverse factor, and commenters point to no evidence of their predicted dire consequences from that decision. The Departments therefore believe any such speculative harm is outweighed by the policy benefits of codifying this factor by rule and providing clear guidance to adjudicators about how to weigh this factor when exercising discretion to grant or deny asylum. In short, commenters’ concerns minimize personal responsibility and agency, are outside the scope of the rulemaking, and are outweighed by the policy benefits of the rule.

Commenters’ concerns about tax law are similarly outside the scope of this rulemaking. Everyone, U.S. citizens and non-citizens alike, are required to comply with the tax laws. *See* 85 FR at 36284 (citing 26 U.S.C. 6012, 7701(b); 26 CFR 1.6012–1(a)(1)(ii), (b)). This rule does not change tax law, which, as relevant to this rulemaking, requires certain aliens to file tax forms without regard to their primary language or the complexity of the tax code. Nevertheless, the IRS has assistance available in multiple languages, *see* Internal Revenue Serv., *Help Available at IRS.gov in Different Languages and Formats* (last updated Apr. 3, 2020), <https://www.irs.gov/>

newsroom/help-available-at-irsgov-in-different-languages-and-formats, and there are numerous legitimate agencies, clinics, and nonprofits that can also be solicited for assistance with tax law compliance, *see, e.g.*, Internal Revenue Serv., *Free Tax Return Preparation for Qualifying Taxpayers* (last updated Nov. 9, 2020), <https://www.irs.gov/individuals/free-tax-return-preparation-for-qualifying-taxpayers> (discussing the IRS’s Volunteer Income Tax Assistance (“VITA”) program); *see also* Internal Revenue Serv., *IRS Publication 3676-B*, <https://www.irs.gov/pub/irs-pdf/p3676bsp.pdf> (explaining the types of tax returns prepared under the VITA program). This rule requires consideration of an asylum applicant’s compliance with tax laws as part of the adjudicator’s discretionary analysis and merely provides direction to adjudicators regarding how to assess, as a discretionary factor, an alien’s failure to adhere to the law. It does not substantively change tax law in any way.

The Departments disagree with commenters’ concerns that evaluating this factor will require more adjudicative time. As discussed above, consideration of a failure to file income tax returns is already an adverse factor for purposes of asylum adjudications. *See Matter of A-H-*, 23 I&N at 783. Thus, its further codification in applicable regulations will not appreciably require additional adjudicatory time. Further, even if it did, the benefit of clarity and guidance provided by this rule to the discretionary analysis outweighs any minimal, additional adjudicatory time.

The Departments are confident that asylum officers and immigration judges possess the competence and professionalism necessary to timely interpret and apply the relevant regulations and statutes when considering this factor. *See* 8 CFR 1003.10(b) (“immigration judges shall exercise their independent judgment and discretion”). Immigration judges have undergone extensive training; further, immigration judges already interpret and apply complex criminal law as it affects an alien’s immigration status. In light of this, the Departments disagree with commenters who claim that immigration judges are not qualified to make determinations based on this factor. Relatedly, the Department declines to address commenters’ speculative assertions that misapplication of the tax code by immigration judges will open up the Departments to



litigation, which will, in turn, bankrupt the Departments. As discussed, *supra*, the Departments have already been considering the failure to file income tax returns as a discretionary factor for many years, and such considerations have not led to the dire consequences predicted by commenters.

Likewise, the Departments disagree that this factor improperly infringes on the purview of the Treasury Department. This factor evaluates the tax status of aliens only as it applies to their immigration status, which is clearly within the jurisdiction of the Departments. 8 CFR 208.2, 208.9(a), 1208.2, 1003.10(b). This factor does not determine tax-related responsibilities or consequences for such aliens.

Commenters misapply the Eighth Amendment's protection against cruel and unusual punishment. The Eighth Amendment applies in the context of criminal punishments, protecting against disproportional punishments as they relate to the offense. *See Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense.” (cleaned up)).

Denial of an asylum application, however, is not a criminal punishment. As an initial matter, immigration proceedings are civil in nature. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984) (“A deportation proceeding is a purely civil action[.]”). Courts have held the Eighth Amendment inapplicable to deportation because, as a civil proceeding, it is not a criminal punishment. *See Sunday v. Att’y Gen. U.S.*, 832 F.3d 211, 219 n.8 (3d Cir. 2016) (collecting cases); *Elia v. Gonzales*, 431 F.3d 268, 276 (6th Cir. 2005); *Bassett v. U.S. Immigration and Naturalization Serv.*, 581 F.2d 1385, 1387–88 (10th Cir. 1978); *cf. Lopez-Mendoza*, 468 U.S. at 1038–39. The underlying principle of these cases is that the power to exclude aliens through deportation constitutes an “exercise of the sovereign’s power to determine the conditions upon which an alien may reside in this country,” rather than an exercise of penal power. *Trop v. Dulles*, 356 U.S. 86, 98, 101 (1958) (holding that Congress cannot strip citizenship as a

punishment under the Eighth Amendment, but distinguishing denaturalization of a citizen from deportation of an alien); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (noting that the power to exclude aliens is an inherent function of sovereignty).

Accordingly, denial of asylum, regardless of the reasoning underlying such denial, cannot be construed as a criminal punishment subject to the Eighth Amendment because it is adjudicated in a civil proceeding as a form of discretionary relief. Further, this factor is not a “strict liability offense,” as asserted by the commenters, because it is only a factor to consider as part of the discretionary component of asylum eligibility under the Act. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see* 85 FR at 36283.

Commenters also misapply the Equal Protection Clause. This rule applies to all aliens and does not impose any classifications that would trigger heightened scrutiny under the clause. Thus, this factor does not offend principles of equal protection under the Constitution.

Finally, to the extent that commenters are concerned certain aliens may have difficulties meeting their tax obligations due to DHS’s EAD rules, the Departments again note that these discretionary factors are not bars to eligibility. The Departments note, however, that asylum seekers who lack an EAD should generally not have a tax liability as they are prohibited from engaging in employment. Any other comments regarding specific IRS requirements for the issuance of SSNs or ITINs are outside the scope of this rule.

#### 4.7.9. Two or More Prior Asylum Applications Denied for Any Reason

*Comment:* One commenter noted that there are many reasons that an asylum applicant may have had two or more prior asylum applications denied, including ineffective assistance of counsel, mental disability that prevented the applicant from properly articulating the claim, and pursuing the claim pro se. The commenter asserted that it would be inappropriate in such circumstances to deny future bona fide asylum applications.

One commenter asserted that it was inappropriate to include the proposed provision concerning denial of two or more asylum applications as a factor in discretionary determinations.

Instead, the commenter argued, the presence of such a factor should be considered on a case-by-case basis and together with all of the circumstances.

*Response:* This factor, like the other factors, is considered under the totality of the circumstances. Further, it is not a bar to asylum; it is one of various factors that adjudicators should consider in determining whether an application merits a favorable exercise of discretion.

The Departments reiterate that consideration of this factor, as well as the other factors, does not affect the adjudicator's ability to consider whether extraordinary circumstances exist or whether denial of asylum would result in exceptional and extremely unusual hardship to the alien. 85 FR at 36285; 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii). Accordingly, an adjudicator may consider the circumstances referenced by the commenter—ineffective assistance of counsel, mental disability, lack of counsel—and determine whether they constitute extraordinary circumstances. Further, the Departments reiterate that such aliens may still apply for other forms of relief, such as non-discretionary withholding of removal and protection under the CAT.

#### 4.7.10. Withdrawn a Prior Asylum Application with Prejudice or Been Found to Have Abandoned a Prior Asylum Application

*Comment:* One commenter asserted that the proposed provisions concerning withdrawn and abandoned asylum applications are in conflict with a true discretionary determination. Specifically, the commenter asserted that discretionary determinations require consideration of the factor in light of the totality of circumstances, as opposed to the proposed “strict liability” standard.

Commenters asserted that, contrary to the NPRM's reasoning, there could be many valid reasons that an applicant would choose to withdraw or abandon an asylum application. One commenter noted that pursuing a family-based visa or Special Immigrant Juvenile (“SIJ”) status are two such examples. Another commenter noted that asylum seekers could be forced to abandon applications for reasons beyond their control, including a failure by the government to inform the asylum seeker of a court date, governmental notice that did not correctly state the

time and place of a hearing, or a proceeding occurring in a language a respondent did not understand. Another commenter asserted that MPP has caused some asylum seekers at the southern border to abandon their applications. Specifically, the commenter asserted that some asylum seekers who had been returned to Mexico under MPP were subsequently kidnapped, which caused them to miss their hearings. The commenter asserted that immigration judges have been instructed to enter an order of removal in such instances, even when the judge has serious concerns that the asylum seeker did not appear as a result of kidnapping or violence.

One commenter acknowledged the existence of notarios and other bad actors who seek to abuse the asylum system by filing asylum applications without their clients' knowledge or consent and by engaging in "ten year visa" schemes. Rather than addressing abuse, the commenter argued that the proposed regulation would punish asylum seekers who have been victims of such fraud because it could result in future applications being rejected on discretionary grounds.

One commenter asserted that asylum offices have "piloted projects" encouraging representatives to waive the asylum interview and have the matter referred directly to an immigration court. The commenter asserted that applicants may have relied on such action by asylum offices to assume the government did not have an objection to filing an asylum application for the purpose of being placed in removal proceedings. The commenter asserted that ICE should initiate removal proceedings in such situations if the individual has "compelling reasons" to pursue cancellation of removal.

*Response:* The Departments reiterate that this factor, along with all the other factors, is considered as part of the discretionary analysis. The rule does not propose a "strict liability standard," as alleged by commenters, and this factor's presence does not bar asylum. The NPRM stated clearly that "[i]f the adjudicator determines that any of these nine circumstances apply during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or

foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.” See 85 FR at 36283–84. Accordingly, while the presence of this factor constitutes an adverse factor, adjudicators will consider extraordinary circumstances or exceptional and extremely unusual hardship—of which commenters referenced numerous examples—that may have led an applicant to withdraw or abandon a prior application.

This rule does not “punish” asylum seekers for the conduct of their attorneys. Although the actions of an attorney may bind an alien absent egregious circumstances, *Matter of Velasquez*, 19 I&N at 377, nothing in the rule prohibits an alien from either alleging such circumstances to avoid the withdrawal or raising a claim of ineffective assistance of counsel.<sup>67</sup> If an alien has concerns about the conduct of his or her representative, the alien should file an ineffective assistance of counsel claim or immigration fraud claim. See, e.g., *Sow v. U.S. Att’y Gen.*, 949 F.3d 1312, 1318–19 (11th Cir. 2020) (ineffective assistance of counsel); see also *Viridiana v. Holder*, 646 F.3d 1230, 1238–39 (9th Cir. 2011) (distinguishing between an ineffective assistance of counsel claim and immigration consultant fraud and explaining that fraud by an immigration consultant may constitute an extraordinary circumstance). Overall, however, concerns about the impact of unscrupulous attorneys are largely speculative and remain capable of appropriate redress. Thus, the Departments decline to preemptively attempt to resolve speculative or hypothetical concerns.

Further, should unusual circumstances warrant, applicants may present evidence so that adjudicators may consider whether it constitutes an extraordinary circumstance or exceptional and extremely unusual hardship, as previously described. *Viridiana*, 646 F.3d at 1238–39.

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<sup>67</sup> An alien may also file a claim with DOJ’s Fraud and Abuse Prevention Program (Program), which investigates complaints of fraud, scams, and unauthorized practitioners and addresses these issues within EOIR. See EOIR, *Fraud and Abuse Prevention Program* (last updated Mar. 4, 2020), <https://www.justice.gov/eoir/fraud-and-abuse-prevention-program>. The Program also supports investigations into fraud and unauthorized practice, prosecutions, and disciplinary proceedings initiated by local, state, and Federal law enforcement and disciplinary authorities. *Id.* From the efforts of this Program, and others, the Departments seek to ensure that aliens in proceedings before them are not victims to unscrupulous behavior by their representatives.

Accordingly, the Departments disagree that consideration of this factor punishes asylum seekers who are victims of fraud.

Finally, regarding commenters' notation that asylum seekers may have relied on previous USCIS pilot programs to assume the government did not have an objection to filing an asylum application for the purpose of being placed in removal proceedings, the Departments disagree that it would ever have been appropriate or authorized to file an asylum application without an actual fear of persecution or torture and an intent to seek such relief or protection. Indeed, the I-589 form itself requires the alien's attestation as to the truth of the information provided and an acknowledgement of the consequences of filing a frivolous application.

#### 4.7.11. Failed to Attend an Interview Regarding His or Her Asylum Application

*Comment:* Commenters asserted that the proposed provision concerning failure to attend an interview regarding his or her asylum application is unfair, and that presence of the proposed factor should be one factor considered in context with the totality of the circumstances.

Commenters asserted that the proposed "extraordinary circumstances" exception is unfair because it would not recognize valid explanations that, as one commenter noted, do meet the current "good cause" standard. For example, one commenter asserted that valid exceptions that may not rise to the level of extraordinary circumstances include lack of child care on the day of the interview, issues with public transportation, medical issues, or an interpreter cancelling at the last minute. One commenter asserted that the NPRM does not clarify what explanations would rise to the level of extraordinary circumstances.

One commenter asserted that the proposed regulation would increase the court backlog and that USCIS factors in the possibility that applicants may not appear for interviews to ensure that no interview slot is wasted. Specifically, the commenter asserted that under current USCIS policy, USCIS will typically wait 46 days before turning over a case to an immigration court, so as to give the applicant time to establish good cause and reschedule a missed interview. By not

giving USCIS such flexibility, the commenter argued, more cases would be referred to the immigration courts, thereby increasing the backlog.

One commenter expressed concern with the proposed exception regarding the mailing of notices. The commenter argued that it is unfair to require applicants to prove that the government sent the notice to the correct address. The commenter also asserted that it is important for USCIS to send the notice to both the applicant and the applicant's representative. By just sending the notice to a representative, the commenter argued, a representative who had a falling out with his or her client (as a result of, the commenter highlighted, ineffective assistance of counsel or dispute over payment) may not inform the applicant of an upcoming interview, which could cause the applicant to miss the interview. The commenter noted that in the current COVID-19 environment, a representative may not be able to go to the office to receive mail in a timely fashion, which means that some applicants may not learn of the interview until it is too late. Conversely, the commenter argued, sending the notice only to applicants could lead to missed interviews because applicants who do not understand English may disregard the notice due to a misunderstanding of its importance.

*Response:* This factor is not an absolute bar to asylum; instead, this factor is considered as part of the adjudicator's discretionary analysis. The proposed rule clearly stated that presence of this factor constitutes an adverse factor, 85 FR at 36283, not an asylum bar. Further, the alien may argue that (1) exceptional circumstances prevented the alien from attending the interview or (2) the interview notice was not mailed to the last address provided by the alien or the alien's representative and that neither received notice of the interview. *See* 8 CFR 208.13(d)(2)(i)(H)(1)–(2), 1208.13(d)(2)(i)(H)(1)–(2) (proposed). Such exceptions are evidence that this factor does not constitute a bar to asylum.

The exceptions provided in proposed 8 CFR 208.13(d)(2)(i)(H)(1), 1208.13(d)(2)(i)(H)(1) broadly allow for “exceptional circumstances.” If the rule identified exact circumstances sufficient to negate this factor—departing the United States or withdrawing

the application for another reason, as suggested by the commenter—it would unnecessarily limit aliens to a narrow set of permissible reasons for why an alien might have missed an interview. The Departments recognize that a number of reasons may cause an alien’s absence at an interview, including unanticipated circumstances by the Departments, and the broad language allows for such possibility. Contrary to the commenter’s allegations, the Departments included language specifically referencing failure to receive the notice. *See* 8 CFR 208.13(d)(2)(i)(H)(2), 1208.13(d)(2)(i)(H)(2) (proposed).

This factor is not arbitrary or unfair. The current administrative process required after an alien misses an interview demonstrates the necessity of this factor’s inclusion in a discretionary analysis. While asylum officers may currently follow a process for missed interviews, as commenters described, missed interviews increase overall inefficiencies because a case does not timely progress as the Departments intend. Commenters’ reasoning that the rule increases inefficiencies at the hearing stage in place of rescheduling the interview in the first instance is nonsensical. If a missed interview is rescheduled, the case is prolonged at the outset, thereby increasing overall time to adjudicate the application. Moreover, the application may still be adjudicated in a hearing at a later date, adding even more time overall for adjudication. If a missed interview triggers scheduling of a hearing, as outlined in this rule, the case efficiently proceeds to the hearing stage where an adjudicator will balance all factors, including the missed interview, in a discretionary analysis. At bottom, the rule encourages aliens to attend their interviews after filing an asylum application, which increases the likelihood of being granted asylum and, thus, reduces the likelihood of cases being referred to an immigration judge. Accordingly, the Departments disagree that this factor is arbitrary or unfair or would increase the backlog. Rather, the current system allows aliens to prolong adjudication of their applications at the expense of slowing the entire system, such that other aliens fail to receive timely adjudication of their applications. The Departments believe this current system is unfair and seek to resolve these inefficiencies through this rulemaking.



As commenters aptly pointed out, these cases may involve significant issues that must be determined and further explored in an interview. The interview is a vital step in adjudication of an asylum application. *See* DHS, *Establishing Good Cause or Exceptional Circumstances* (last updated Aug. 25, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/establishing-good-cause-or-exceptional-circumstances> (“You must attend your scheduled asylum interview or the asylum office will treat your case as a missed interview (failure to appear).”). Other regulatory provisions already attest to the importance of this interview through imposition of blunt consequences. *See, e.g.*, 8 CFR 208.7(a)(iv)(D), 1208.7(a)(4) (providing that an alien will be denied an EAD upon failure to appear for an interview, absent extraordinary circumstances); *see also* 8 CFR 208.10(b)(1), 1208.10 (providing that failure to attend an interview may result in “dismissal of the application”). In addition, aliens who are inadmissible or deportable and fail to attend their interview risk being deemed to have waived their right to an interview, the dismissal of their application, and being placed in removal proceedings where they may ultimately be ordered removed by an immigration judge. 8 CFR 208.14(c)(1). The NPRM’s consideration of this factor further reflects the urgency and importance of attending such interviews but for the most exceptional reasons. For that reason, and not, as commenters alleged, to punish asylum seekers, the Departments include it as a factor for consideration.

Commenters’ concerns about problems that may arise between an alien and his or her representative are speculative. Regardless of the rulemaking, such concerns are not without redress: an alien could file an ineffective assistance of counsel claim, *see, e.g., Sow*, 949 F.3d at 1318–19, or an alien could claim that immigration consultant fraud (or the like) is an extraordinary circumstance, *see Viridiana*, 646 F.3d at 1238–39.

Commenters’ concerns about aliens providing a correct address to the Departments are also beyond the scope of this rulemaking. Aliens are already required to notify DHS of changes of address, INA 265, 8 U.S.C. 1305, and may face criminal, INA 266(b), 8 U.S.C. 1306(b), or civil, INA 237(a)(3)(A), 8 U.S.C. 1227(a)(3)(A), repercussions for not doing so. The rule does

not alter the long-standing requirement that aliens notify the Government of their current address.

This exception employs a lower standard of preponderance of the evidence. Meeting such burden varies depending on the case; therefore, the Departments decline to expand on the exact method of proof or documents necessary to meet that burden.

4.7.12. Subject to a Final Order of Removal, Deportation, or Exclusion and Did Not File a Motion to Reopen to Seek Asylum Based on Changed Country Conditions Within One Year of the Changes in Country Conditions

*Comment:* Commenters expressed concern that the proposed discretionary factor pertaining to failure to file a motion to reopen after a final order had been entered and within one year since changed country conditions emerged would lead to the denial of most asylum applications. As with other proposed discretionary factors, commenters asserted that the proposed rule was not creating a true discretionary determination as a result of the weight given to the presence of this proposed factor. One commenter asserted that by giving this and other proposed factors significant negative weight, the Departments would be inappropriately deviating from *Matter of Pula*, which, the commenter argued, is well-established precedent. Commenters asserted that the proposed discretionary factor should be considered on a case-by-case basis and in context with all the circumstances.

One commenter asserted that the proposed factor is ultra vires and conflicts with congressional intent because it “directly contradicts” section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), which states circumstances for which there are no time limits for filing a motion to reopen. The commenter argued that the one case cited by the NPRM in support of the proposed provision, *Wang v. BIA*, 508 F.3d 710, 715–16 (2d Cir. 2007), concerned a different provision of the INA. Specifically, the commenter asserted that the asylum seeker in *Wang* was subject to a 90-day limit on filing a motion to reopen and was arguing for equitable tolling in

light of ineffective assistance of counsel. The commenter thus argued it is “irrational” for the government to use the case to justify the regulation.

Another commenter expressed opposition to the rule because it presumes that the exact date of a country condition change can be precisely determined, which in turn presumes that country conditions “turn on a dime.” Because, the commenter alleged, the NPRM did not provide guidance on determining when a change exactly occurs, the commenter predicted “protracted disputes” over when a change occurs, which would be “antithetical to judicial economy.” One commenter expressed disagreement with the NPRM’s reasoning that the proposed provision would increase “efficiency in processing.” Specifically, the commenter asserted that the NPRM failed to explain why adjudicating a motion to reopen filed 13 months after the presence of changed country conditions would be less efficient than adjudicating a similar motion filed 11 months after the change.

*Response:* This factor, like all other factors discussed herein, is part of the adjudicator’s discretionary analysis. 85 FR at 36285. This factor’s presence does not bar asylum; an alien who files a motion to reopen based on changed country conditions more than one year following such changed conditions may still show that extraordinary circumstances exist or that denial of asylum would result in an exceptional and extremely unusual hardship to the alien. 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii) (proposed). Accordingly, applications are indeed considered on a case-by-case basis, and concerns that this factor would result in denial of most asylum applications is speculative.

Further, commenters did not engage the Departments’ animating thrust behind this provision—to discourage dilatory claims, encourage the timely adjudication of new claims, and improve overall efficiency. Those benefits far outweigh any alleged concerns raised by commenters, especially since the presence of “changed country conditions” is a clear statutory basis for filing a motion to reopen. INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii). Both the Departments and aliens have a clear interest in raising and adjudicating claims for asylum in a

timely fashion. To that end, there is nothing unreasonable or inappropriate about considering a lengthy delay in raising a claim as an adverse discretionary factor because such delays undermine the efficiency of the overall system and may, as a secondary effect, delay consideration of other meritorious claims.

Consideration of this factor does not impermissibly deviate from *Matter of Pula*. As explicitly stated in the NPRM, the rule's approach supersedes *Matter of Pula*. 85 FR at 36285. Because “[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change,” *Encino Motorcars, LLC*, 136 S. Ct. at 2125, the Departments permissibly superseded *Matter of Pula*'s approach. See Section II.C.4.7 of this preamble for further discussion regarding the permissibility of superseding that case.

This factor also aligns with the statute. As commenters correctly stated, section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), provides “there is no time limit” to file a motion to reopen to apply for relief under section 208 of the Act, 8 U.S.C. 1158, or section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), based on changed country conditions. The rule does not institute a time limit in contravention of the statute.

Nor was the Departments' reference to *Wang*, 508 F.3d at 715–16, irrational. That case demonstrated the importance of aliens exercising due diligence in their cases. The citation was not meant to illustrate an identical fact pattern justifying the entire regulation, as one commenter alleged.

Although the Departments acknowledge it may be difficult to ascertain the precise date on which country conditions changed, the Departments also do not believe that ascertaining one specific day is necessarily required in most cases or that an inability to ascertain the precise date undermines the rule's efficacy. Even if country circumstances do not “change on a dime” and adjudicators can project only a range of dates, many cases would fall clearly inside or outside the one-year window. For example, if evidence showed that country conditions changed over a three-month period and the applicant filed two years outside the period, an adjudicator would be

able to find this adverse factor notwithstanding difficulty in ascertaining a single day on which country conditions changed. In the Departments' view, the one-year window provides ample time for aliens to file a claim. And, in any event, the Departments doubt that it will be so difficult to ascertain a precise date in many cases. When a discrete event—e.g., a ceasefire in a civil war—changes a country's conditions, determining a precise date will be straightforward. Accordingly, the rule would not produce “protracted disputes” about the date country conditions changed.

Moreover, commenters did not plausibly or persuasively explain why an alien with a genuine well-founded fear of persecution would delay in filing an asylum application for a significant length of time, and it strains credulity that such an alien would wait more than a year to seek asylum, absent some extraordinary circumstance. The rule requires that the alien exercise due diligence with regard to the case. 85 FR at 36285. If, for some reason, the alien is unable to meet that one-year deadline for reasons related to commenters' concerns that pinpointing the exact date a country condition changed will be problematic, an alien may present such an event as an extraordinary circumstance in accordance with the rule. *See id.*

The Departments have a significant interest in expedient, efficient adjudication of asylum cases. *See Talamantes-Penalver v. INS*, 51 F.3d 133, 137 (8th Cir. 1995) (“Enforcement of this nation's immigration laws is enhanced by the speedy adjudication of cases and the prompt deportation of offenders.”). Establishing this factor strongly encourages and underscores the importance of expedient resolution of asylum cases; however, the Departments note that expediency and efficiency do not trump extraordinary circumstances that may exist or exceptional or extremely unusual hardship that may result if asylum is denied.

The Departments have determined that the appropriate timeframe within which an alien should be able to file a motion to reopen based on changed country conditions is one year from a changed country condition. Currently, the regulation at 8 CFR 1208.4(a)(4)(ii) provides that an alien should 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.”

Case law broadly applies this “reasonable period” standard. *See Pradhan v. Holder*, 352 F. App’x. 205, 207 (9th Cir. 2009) (explaining that, based on the record, the immigration judge properly denied an asylum application filed 11 months after the applicant learned of changed country conditions and his family kept him apprised of the political climate in the country); *cf. Ljucovic v. Barr*, 796 F. App’x. 898, 899 (6th Cir. 2020) (dismissing for lack of jurisdiction a petition challenging the BIA’s denial of a motion to reopen asylum proceedings four years following awareness of a changed condition because the petitioner did not exercise due diligence and file within a reasonable period of time). This factor would be no more difficult to apply than 8 CFR 1208.4’s “reasonable period” standard, and, for purposes of the discretionary analysis, this rule determines that a reasonable period of time is one year within the date of the changed country condition. Further, just as 8 CFR 1208.4 allows adjudicators to consider “delayed awareness” in evaluating “what constitutes a reasonable period” when determining whether an alien may apply for asylum, this factor similarly allows adjudicators to consider whether extraordinary circumstances or exceptional or extremely unusual hardship would arise when determining whether to exercise discretion to grant or deny asylum.

Because Congress determined it reasonable for aliens to file an initial application within one year of arrival, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), the Departments similarly find it reasonable to use a one-year timeline, rather than 11 months or 13 months as suggested by commenters, in evaluating this factor as part of a larger discretionary analysis, subject to the exceptions previously described. The Departments recognize that any specific deadline is inherently both over- and under-inclusive to some extent, but the benefits of a clear deadline that is both familiar to applicants and adjudicators and straightforward to administer outweigh any purported benefits attributable to an unfamiliar and uncommon deadline—e.g., 13 months—or

one that is more difficult to apply—e.g., a “reasonable period”—particularly in the context of a discretionary analysis.

#### 4.8. Firm Resettlement

*Comment:* Commenters asserted that the proposed firm resettlement provisions conflict with international law. Commenters stated that Congress considered the language in section 208(b)(A)(vi) of the Act, 8 U.S.C. 1158(b)(A)(vi), to be equivalent to Article 1E of the Refugee Convention, which only considered refugees to be resettled when they permanently took up residence in a third country or were afforded rights comparable to third country nationals. One commenter stated that the permanent residency requirement is further evidenced in the 1950 amendments of the Displaced Persons Act. *See An Act to Amend the Displaced Persons Act of 1948, Pub. L. 81–555, 64 Stat. 219 (1950).* The commenter asserted that the amendments were designed to ensure that those who temporarily resided in parts of Europe following their flight from Nazi persecution would remain eligible for protection in the United States. Under the proposed rules, the commenter argued, these same individuals would be inappropriately barred from asylum.

Commenters expressed concern that, under proposed 8 CFR 208.15(a)(1), individuals unaware of third country resettlement laws in countries through which they fleetingly passed could be punished and that those attempting to firmly resettle in a third country could face a number of challenges incompatible with the congressional intent of the concept of firm resettlement. Commenters argued, for example, that those attempting to firmly resettle could face restrictions on freedom of movement, unfair immigration procedures, government corruption, violence, and the practical inability to obtain legally guaranteed documents permitting asylees the right to live and work in the country while an application is pending. Commenters similarly asserted that, contrary to the NPRM’s reasoning, the number of resettlement opportunities has not grown in recent years, and that considering whether a third country is a signatory to the Refugee Convention is not sufficient to determine whether firm

resettlement is possible. A firm resettlement inquiry, commenters argued, requires a case-by-case consideration of the facts and circumstances.

Commenters asserted that proposed 8 CFR 208.15(a)(1) would replace a clear standard that is well-established in Federal case law and international law with an ambiguous standard that would require adjudicators to speculate in regard to what applicants could have done in third countries through which they transited. Accordingly, commenters argued, the proposed provision would result in lengthy litigation. One commenter asserted that the proposed provision is not legally defensible, as evidenced by the recent transit bar litigation invalidating a similar provision.

Commenters also stated opposition to proposed 8 CFR 208.15(a)(2). Commenters expressed concern that the proposed one-year bar would apply even if there is no possibility of ever obtaining a permanent or indefinitely renewable status in the country. Commenters also asserted that the proposed provision would inappropriately exclude most asylum seekers who were returned to Mexico under MPP because MPP often requires aliens to wait in Mexico for more than a year. Another commenter stated that UNHCR estimates that approximately 16 million refugees have spent five years in countries where they could not be considered firmly resettled and that they would be inappropriately barred from asylum under the proposed provision. Commenters expressed concerns that the proposed provision does not include exceptions for individuals who are victims of trafficking, lack the financial means to leave a third country, or fear persecution in the third country.

Commenters asserted that examples in the United States demonstrate the problems with proposed 8 CFR 208.15(a)(2). Commenters asserted that recipients of Deferred Action for Childhood Arrivals—who commenters noted are granted permission to stay in the United States in two-year increments—would be considered firmly resettled under the proposed rule even though their status could be rescinded at any time. Second, commenters similarly asserted that many undocumented individuals in the United States have lived here for decades, but that they



cannot be considered firmly resettled because they are denied the opportunity to fully and meaningfully participate in public life and they live and work under the fear of removal.

Commenters opposed proposed 8 CFR 208.15(a)(3). One commenter stated that the proposed provision is unclear as to when presence in a country of citizenship occurred. The commenter asked, “[d]oes it mean that the applicant must have been present there *sometime* before coming to the United States, anytime in their whole lives?” The commenter asserted that it is unfair and unreasonable to consider someone firmly resettled in a country of citizenship without also considering factors such as whether such individual has the right to reside in the country and could be reasonably expected to do so. Commenters asserted that proposed 8 CFR 208.15(b) conflicts with *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), which commenters asserted requires DHS to present evidence that a mandatory bar applies. Commenters stated that, under the proposed provision, if DHS or an immigration judge raises the issue that the firm resettlement bar might apply, then the burden of proof shifts to the respondent. This burden shifting, commenters argued, would increase the number of unjust asylum application denials because pro se asylum seekers—especially non-English speakers and detainees—lack access to the knowledge or resources necessary to satisfy their burden of proof. Moreover, one commenter stated that if the proposed provision grants authority to DHS counsel to determine that firm resettlement applies, even if an immigration judge disagrees, then the subsection would inappropriately usurp immigration judges’ authority.

One commenter asserted that the proposed rule would inappropriately permit the firm resettlement circumstances of a parent to be imputed to children and that a child’s case must be considered separately from his or her parents’ cases. Commenters similarly asserted that it is unreasonable to expect children to comport their movements and behavior in accordance with the proposed regulation.

Commenters noted that refugees—in addition to asylum applicants—are subject to a statutory bar based on firm resettlement. *See* INA 207(c)(1), 8 U.S.C. 1157(c)(1). At least one

commenter suggested that refugee admission applicants and asylum applicants should be subject to the same standards. Commenters noted that, because Congress enacted laws to protect refugees and intended the firm resettlement bar to exclude refugees from protection only in narrow circumstances, the proposed standard for firm resettlement was an “affront to Congressional intent.”

*Response:* Despite a lengthy history of international law, regulatory enactments, and circuit court interpretations, *see Matter of A-G-G-*, 25 I&N Dec. at 489–501 (explaining firm resettlement history), Congress ultimately codified the firm resettlement bar to asylum in IIRIRA without including any specific firm resettlement requirements, just as it had previously codified a firm resettlement bar to refugee admission without any specific requirements, INA 207(c)(1), 8 U.S.C. 1157(c)(1). Rather, the statutory language only states that asylum shall not be granted to an alien who “was firmly resettled in another country prior to arriving in the United States.” INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). Accordingly, the Departments are using their regulatory authority to interpret this ambiguous statutory language.<sup>68</sup> *See Matter of R-A-*, 24 I&N Dec. at 631 (explaining that agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations because there is a presumption that Congress left statutory ambiguity for the agencies to resolve). A clearer interpretation will help adjudicators in making firm resettlement determinations. Circuit courts have previously provided diverging interpretations of the firm resettlement requirements. *See Matter of A-G-G-*, 25 I&N Dec. at 495–500 (explaining differing circuit court approaches under the prior firm resettlement regulations).

In addition, as discussed further herein, efforts by the Board to provide clarity have not been fully successful, as its four-step framework reflects an unwieldy amalgamation of two competing approaches offered by Federal courts: the “direct offer approach” and the “totality of

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<sup>68</sup> The Departments acknowledge that the concept of firm resettlement is a statutory bar to both refugee admission, INA 207(c)(1), 8 U.S.C. 1157(c)(1), and the granting of asylum, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The two separate bars were enacted 16 years apart.

the circumstances approach.” *Id.* at 496–98, 501. Further, as described more fully below, its framework is not directed by any applicable statute or regulation,<sup>69</sup> contains internal tension, is in tension with other regulations regarding the parties’ burdens, introduces ambiguous concepts such as indirect evidence of an offer of firm resettlement of “a sufficient level of clarity and force,” *id.* at 502, and relies principally on the concepts of an “offer”<sup>70</sup> and of “acceptance” of firm resettlement, even though the INA does not require an offer or acceptance for the provisions of INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(ii), to apply. *See Matter of A-G-G-*, 25 I&N Dec. at 501–03 (discussing the various aspects of its four-step framework). Ultimately, the best reading of the Board’s cases is that the availability of some type of permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status—regardless of whether the alien applies for such status or has such status offered—is sufficient to raise the possibility of the firm resettlement bar, and that reading is incorporated into the rule.<sup>71</sup> *See id.* at

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<sup>69</sup> Although the Board in *Matter of A-G-G-*, 25 I&N Dec. at 501, asserted that its framework follows the language of 8 CFR 1208.15, nothing in the text of that regulation actually outlines a particular framework to follow when considering issues of firm resettlement, and the regulation certainly does not delineate the four steps put forth by the Board. Further, the Board’s reading of 8 CFR 1240.8(d) to suggest that DHS bears the initial burden at step one of its framework of establishing evidence that the firm resettlement bar applies, *Matter of A-G-G-*, 25 I&N Dec. at 502, is likewise atextual, and is further called into significant doubt by a recent decision of the Attorney General, *see Matter of Negusie*, 28 I&N Dec. 120, 154–55 (A.G. 2020) (“Consistent with the clear statutory mandate that an alien has the burden of proving eligibility for immigration relief or protection, the regulations make plain that if evidence in the record indicates that [a] bar may apply, then the applicant bears the additional burden of proving by a preponderance of the evidence that it does not. Although the evidence in the record must raise the possibility that the bar ‘may apply,’ *id.* § 1240.8(d), neither the statutory nor the regulatory scheme requires an extensive or particularized showing of the bar’s potential applicability, and evidence suggesting the bar’s applicability may come from either party. While the immigration judge must determine whether the evidence indicates that the . . . bar may apply—and, thus, whether the alien bears the burden of proving its inapplicability—that determination is an evidentiary one that does not stem from any burden on DHS. This conclusion is underscored by other statutory and regulatory provisions that specify when DHS is required to assume an evidentiary burden. Placing an initial burden on DHS to establish the applicability of the . . . bar would be contrary to the relevant statutory and regulatory scheme, and would unnecessarily tax its limited resources.” (footnote, citations, and internal quotations omitted)).

<sup>70</sup> The Board’s efforts to refine the concept of an “offer” have not improved the clarity of the application of the firm resettlement bar, as adjudicators may understandably be confused about how to consider whether an alien accepted an offer that was “available,” but not necessarily made. *Matter of A-G-G-*, 25 I&N Dec. at 502–03. Similarly, the Board adopted a “totality of the evidence” standard, *id.* at 503, but did not explain if that standard was intended to encompass the Federal courts’ “totality of the circumstances” approach or to constitute something different.

<sup>71</sup> As discussed herein, the Departments recognize that other parts of *Matter of A-G-G-* are superseded by this rule because, inter alia, they are unwieldy to apply, in tension with other regulations or with other parts of the decision itself, do not represent the best implementation of the statute, do not appreciate the actual availability of firm resettlement in many countries, and are outweighed by the benefits of the rule as a policy matter. Thus, the Departments have provided “reasoned explanation[s]” for their departures from *Matter of A-G-G-* to the extent that there are actual departures. *See Encino Motorcars, LLC*, 136 S. Ct. at 2125 (citing *Brand X*, 545 U.S. at 981–82).

503 (“The regulations only require that an offer of firm resettlement was available, not that the alien accepted the offer.”). Based on these considerations and others, as described more fully below, the Departments have concluded that the current framework—with its case-by-case development and four-step framework that is divorced from any statute or regulation—invites confusion and inconsistent results because of immigration judges’ potentially subjective judgments about how the framework should apply to the particular evidence in any given case. The Departments accordingly believe that the rule-based approach contained in this final regulation is more appropriate. *See Lopez v. Davis*, 531 U.S. 230, 244 (2001) (observing that “a single rulemaking proceeding” may allow an agency to more “fairly and efficiently” address an issue than would “case-by-case decisionmaking” (quotation marks omitted)).

In interpreting the statutory language, the Departments considered the history of the firm resettlement concept and determined that prior interpretations do not fully address the need for clarity and specific delineation of the meaning of firm resettlement. Moreover, prior adjudicatory interpretations do not effectively appreciate the availability of firm resettlement in many countries. Thus, the Departments believe that a broader interpretation of firm resettlement is necessary to ensure that the United States’ overburdened asylum system is available to those with a genuine need for protection, and not those who want to live in the United States for other reasons and simply use the asylum process as a way to achieve those goals. *See* 85 FR at 36285–86. The Departments’ interpretation also comports with the overall purpose of the asylum statute, which is “not to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn.” *Matter of B-R-*, 26 I&N Dec. at 122 (quotation marks omitted).

The Departments' definition creates three grounds for a finding of firm resettlement.<sup>72</sup>

The first ground captures aliens who have resided, or could have resided, permanently or indefinitely in a country but who have chosen not to pursue such opportunities. The Departments have determined that the firm resettlement bar should apply regardless of whether the alien received a direct offer of resettlement from the third country. The Departments believe that aliens should reasonably be required to pursue settlement opportunities when fleeing persecution and entering a new country, rather than forum shopping for their destination. *See Matter of A-G-G-*, 25 I&N Dec. at 503 (explaining the purpose of the firm resettlement bar “is to limit refugee protection to those with nowhere else to turn”). This requirement is also supported by the fact that, as discussed in the NPRM, 43 additional countries have signed the Refugee Convention since 1990, evincing an increasing ability of an alien to find safe haven outside his or her home country. *See* 85 FR at 36285–86 & n.41. Contrary to commenters' claims, this first ground does not apply to aliens if the third country grants only temporary or unstable statuses. For the first ground of the firm resettlement bar to apply, the alien must be able to reside permanently or indefinitely in the third country, and temporary or unstable statuses would not meet that definition. Similarly, in order for this first ground to apply to aliens who “could have” resided in a permanent or indefinite status, the immigration judge must make a finding that the alien was eligible for, and otherwise would be granted, permanent or indefinite status under the laws of the third country. Moreover, the Departments disagree with commenters that the rule should retain the exception for aliens who reside in a third country but have the conditions of their stay “substantially and consciously restricted.” *See* 8 CFR 1208.15(b) (current). The Departments note that the language of the current regulation is more apt to cause confusion because it is not clear why—or perhaps even how—a country would offer citizenship or

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<sup>72</sup> In comparison to the NPRM, this final rule expands the language in 8 CFR 208.15(a)(1) and 1208.15(a)(1) by breaking the first ground into three subparagraphs and changing the syntax to improve readability and clarity and to avoid confusion. The changes in the final rule are stylistic and do not reflect an intent to make a substantive change from the NPRM regarding 8 CFR 208.15(a)(1) and 1208.15(a)(1).

permanent legal residence to someone yet “substantially and consciously” restrict that person’s residence. Further, the Departments believe that interpreting the firm resettlement bar to apply to any type of permanent or indefinite status advances the goal of limiting asylum forum shopping by persons who have the ability to live in a third country.

The second ground captures aliens who are living for an extended period of more than one year in a third country without suffering persecution. By living safely in a third country for more than a year without suffering persecution, the alien has evinced the ability to live long term in that country and is thereby “firmly” resettled as interpreted by the Departments. The dictionary definition of “firm” is “securely or solidly fixed in place,” not “uncertain,” and “not subject to change or revision.” *Firm*, Merriam Webster, <https://www.merriam-webster.com/dictionary/firm>. The Departments believe that this ground reasonably meets this definition, as an alien who is living in a third country for more than a year can be considered to be “fixed in place” and not thought to be present in the third country only temporarily.

Consistent with the purpose of the asylum statute, the Departments believe that asylum should not be made available to persons who “have long since abandoned” traveling to the United States in their flight from persecution. *See Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 57 n.6 (1971). Rather, travel to the United States should be “reasonably proximate” to the flight from persecution and not be interrupted by “intervening residence in a third country.” *Id.*<sup>73</sup> In including this ground, the Departments do not believe that legal presence should be a requirement of firm resettlement, as persons can live indefinitely without status in a country. For example, according to a 2017 study, the median duration of residence for the United States’ undocumented population is approximately 15 years. *See* Pew Research Center, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time* (June 12,

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<sup>73</sup> By requiring that an alien live in any “one” third country for more than a year before triggering this ground, the Departments also recognize that it would not necessarily exclude aliens who make their flight in stages, *Yee Chien Woo*, 402 U.S. at 57 n.6, as aliens who remain in multiple countries over multiple years before coming to the United States are unlikely to have their travel to the United States viewed as “reasonably proximate” to their flight.

2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/>. It is reasonable to conclude that such persons should be considered “firmly resettled” in the United States and do not intend to live in the United States only temporarily, and by the same reasoning, aliens who have resided for long periods in other countries—even without legal presence or status—can similarly be considered “firmly resettled.” Further, spending more than a year in a third country shows that the alien can support himself or herself or has the ability to receive necessary support. Separately, the Departments note that, contrary to commenters’ concerns, the second ground would not apply to physical residence in Mexico after an alien was returned to Mexico under the MPP, because such aliens would already be considered to have arrived in the United States. Thus, time spent in Mexico solely as a direct result of returns to Mexico after being placed in MPP will not be considered for purposes of that specific element of the firm resettlement bar.<sup>74</sup>

The Departments also recognize that this second ground does not follow the language of the Refugee Convention or the Refugee Protocol, which require the alien to be recognized by the third country as possessing the same rights and obligations as citizens of that country. *See* 1951 Convention Relating to the Status of Refugees, Art. 1(E). In codifying the statutory firm resettlement bar as part of IIRIRA, however, Congress did not include such a requirement, and, as a result, the Departments have chosen to interpret this ambiguous statutory language as not requiring the third country to provide the alien with rights comparable to that of citizens. *See Matter of R-A-*, 24 I&N Dec. at 631 (explaining presumption that Congress left statutory ambiguity for the agencies to resolve (citing *Brand X*, 545 U.S. at 982)).

The third ground captures aliens who maintain, or maintained and then later renounced, citizenship in a third country and were present in that country after fleeing their home country.

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<sup>74</sup> An alien who physically resided voluntarily, and without continuing to suffer persecution, in Mexico for one year or more after departing the alien’s country of nationality or last habitual residence and prior to arrival in or entry into the United States would potentially be subject to the bar, regardless of whether the alien was placed in MPP upon arrival in the United States.

By possessing citizenship in a third country and being physically present in that country, the alien has established that he or she has the ability to live with full citizenship rights in a third country, negating his or her need to apply for asylum in the United States. In response to a commenter's concerns about the timing of the alien's presence in the third country, the Departments clarify that the physical presence in the third country must occur after the alien leaves the home country where the alleged persecution occurred or where the well-founded fear of persecution would occur and before arriving in the United States.

Regarding commenters' concerns about the burden of proof, the Departments note that the existing burden framework outlined by the BIA is, at the least, not required by statute and appears to be in significant tension with existing regulations.<sup>75</sup> The burden associated with the firm resettlement bar as applied in removal proceedings is clarified in the existing language of 8 CFR 1240.8(d), which provides that the respondent has the burden of establishing eligibility for any requested benefit or privilege. That regulation then states that, if "the evidence indicates that one or more of the grounds for mandatory denial" of relief may apply, the alien has the burden of proving that such grounds do not apply. 8 CFR 1240.8(d). The existing regulation is thus clear that, if the evidence indicates that the firm resettlement bar may apply, then an applicant has the burden of proving that it does not. Although the evidence in the record must itself support the applicability of a bar, the regulations do not specify who must introduce that evidence, and relevant evidence may come from either party. Moreover, 8 CFR 1240.8(d) does not specify who may raise an issue of eligibility, only that the issue may be raised when the evidence

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<sup>75</sup> The Board's framework also contains internal tension that has resulted in confusion on this point. In *Matter of A-G-G-*, the Board indicated that DHS bears the burden of making a prima facie showing that an offer for firm resettlement exists and will typically do so through the submission of documentary evidence. *Matter of A-G-G-*, 25 I&N Dec. at 501 ("DHS should first secure and produce direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely."). It then went on to say, however, that prima facie evidence may already be part of the record as evidence, including testimony, which is typically offered by a respondent, not DHS. *Id.* at 502 n.17. Consequently, immigration judges may become confused about how to apply the firm resettlement bar in cases in which the evidence of record submitted by a respondent, including the respondent's testimony, indicates that the bar may apply but in which DHS has not affirmatively produced its own evidence of firm resettlement. This rule resolves that tension, reaffirms that immigration judges should follow the requirements of 8 CFR 1240.8 as appropriate, and reiterates that evidence in the record may raise the applicability of 8 CFR 1240.8 regardless of who submitted the evidence.



indicates that a ground should apply. Because it is illogical to expect an alien applying for asylum to raise the issue that he or she is barred from receiving asylum, the rule appropriately acknowledges the reality that either DHS or the immigration judge may raise the issue based on the evidence, regardless of who submitted the evidence.

Similarly, although the immigration judge must determine whether the evidence indicates that the firm resettlement bar may apply—and, thus, whether the alien bears the burden of proving that it does not apply—that determination is simply an evidentiary one and does not place any burden on DHS. As noted, evidence that “indicates that one or more of the grounds for mandatory denial of the application for relief may apply [e.g., the firm resettlement bar],” 8 CFR 1240.8(d), may be in the record based upon submissions made by either party; the regulation requires only that evidence be in the record, not that it be submitted by DHS. Put more simply, the regulations do not place an independent burden on DHS to establish a prima facie case. This conclusion is underscored by other regulations that, in contrast, specify when DHS is required to assume an evidentiary burden. *See, e.g.*, 8 CFR 208.13(b)(1)(ii) (“Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, [DHS] 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.”). Placing a prima facie burden on DHS would be contrary to the relevant regulatory scheme and would unnecessarily tax the agency’s limited resources without any statutory or regulatory justification, especially when “[t]he specific facts supporting a petitioner’s asylum claim . . . are peculiarly within the petitioner’s grasp.” *Angov*, 788 F.3d at 901. To the extent that commenters asserted that circuit case law conflicts with the Departments’ rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X*, 545 U.S. at 982. Further, as noted in the NPRM, 85 FR at 36286, the rule overrules prior BIA decisions that are inconsistent, in accordance with well-established principles. *See Encino Motorcars, LLC*, 136 S. Ct. at 2125

“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” (citing *Brand X*, 545 U.S. at 981–82)).

In response to one commenter’s concerns, the burden of proof provision does not allow DHS to make the final determination on whether the firm resettlement bar applies in EOIR proceedings; that authority continues to reside with DOJ for aliens whose asylum applications are referred for review by an immigration judge. *See* 8 CFR 208.14(c)(1), 1003.10(b), 1240.1(a)(1)(ii).

In response to concerns about imputing parents’ firm resettlement to their minor children, the Departments note that the BIA has imputed parental attributes to children under other INA provisions on multiple occasions. *See, e.g., Holder*, 566 U.S. at 595–96 (2012) (describing various provisions of the Act in which parental attributes are imputed to children). Moreover, as noted in the NPRM, 85 FR at 36286, although the Departments have not previously established a settled policy regarding the imputation of the firm resettlement of parents to a child, the imputation in this rule is consistent with both case law and recognition of the practical reality that a child generally cannot form a legal intent to remain in one place. *See, e.g., Matter of Ng*, 12 I&N Dec. 411, 412 (Reg’l Comm’r 1967) (firm resettlement of father is imputed to a child who resided with his resettled family); *see also Vang v. INS*, 146 F.3d 1114, 1116–17 (9th Cir. 1998) (“We follow the same principle in determining whether a minor has firmly resettled in another country, i.e., we look to whether the minor’s parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute the parents’ status to the minor.”).

Here, it is reasonable to assume that minor children who are traveling with their parents would remain with their parents in any third country and, therefore, should also be subject to the firm resettlement bar. Moreover, the rule provides an exception when the alien child can establish that he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable temporary legal immigration status (such as asylee,

refugee, or similar status) from his or her parent.<sup>76</sup> See 85 FR at 36294; 8 CFR 208.15(b), 1208.15(b).

The Departments acknowledge comments noting that the NPRM altered the definition of “firm resettlement” applicable to asylum applicants, but did not alter the definition applicable to refugee admission applicants, which is a distinction the Departments noted in the NPRM. 85 FR at 36285 n.40. The Departments did not propose to change 8 CFR 207.1(b) in the NPRM, *see id.*, and they do not believe such a change is warranted in this final rule, notwithstanding commenters’ concerns regarding the two definitions.

Although the statutory provisions applying the firm resettlement bar in the refugee and asylum contexts are virtually identical, “[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). The United States Refugee Admissions Program (“USRAP”) and the asylum system serve distinct missions and populations and, thus, warrant different approaches. The asylum statute is not designed “to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn.” *Matter of B-R-*, 26 I&N Dec. at 122 (quotation marks omitted). In contrast, the USRAP has long focused on resolving protracted refugee situations and providing relief to refugees who have not been able to find a durable solution to their need for protection in the country of first flight. Moreover, due to the lengthy referral, vetting, and application process in the refugee resettlement program, *see generally* USCIS, *Refugee Processing and Security Screening* (June 3, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-processing-and-security-screening>, time spent in a third country or

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<sup>76</sup> The Department’s experience in administering the firm resettlement bar indicates that cases in which a parent’s firm resettlement would not be imputed to a minor child would be rare. Even in those rare cases, however, the Departments’ use of child-appropriate procedures, as discussed elsewhere in the rule, which take into account age, stage of language development, background, and level of sophistication, would assist the child in ensuring that the child’s claim is appropriately considered. See, e.g., USCIS, *Interviewing Procedures for Minor Applicants* (Aug. 6, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves>.

otherwise awaiting overseas resettlement may not necessarily indicate that an alien was firmly resettled in the country hosting such populations.

Further, as a program explicitly addressing persons in foreign countries—rather than a form of relief available to aliens who arrive at or are inside the United States—the USRAP implicates issues of foreign relations and diplomacy in ways different than the asylum program. Additionally, although the current regulatory definitions of “firm resettlement” are similar, *compare* 8 CFR 207.1(b), *with* 8 CFR 208.15 *and* 1208.15, they are not identical. Rather, the definition applicable to refugee admission applicants requires that the alien entered the country of putative resettlement “as a consequence of his or her flight from persecution,” 8 CFR 207.1(b), whereas the definition applicable to asylum applicants indicates that entry into a country that was a necessary consequence of flight from persecution is one element of a potential exception to the general definition of “firm resettlement.” In other words, existing regulations already recognize distinctions in the definitions applicable to the two programs.

In short, although the Departments acknowledge commenters’ concerns about the two different definitions, they do not believe changes to 8 CFR 207.1(b) are warranted at the present time. Nevertheless, the Departments do expect to study the issue closely and, if appropriate, may propose changes at a future date.

Finally, the Departments are noting two additional changes that the final rule makes regarding the issue of firm resettlement. First, consistent with the Departments’ understanding that time spent in Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of that specific element of the firm resettlement bar, that point is being clarified explicitly in this final rule. Second, EOIR is making a conforming change to 8 CFR 1244.4(b) to align it with the both the appropriate statutory citation and the corresponding language in 8 CFR 244.4(b). Aliens described in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), including those subject to the firm resettlement bar contained in INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), are ineligible

for TPS. That statutory ineligibility ground is incorporated into regulations in both chapter I and chapter V of title 8; however, while the title I provision, 8 CFR 244.4(b), cites the correct statutory provision, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), the title V provision, 8 CFR 1244.4(b), maintains an outdated reference to an incorrect statutory provision. The final rule corrects that outdated reference.

#### 4.9. “Rogue Officials”/“Color of Law”

*Comment:* As an initial matter, commenters asserted that the terms “color of law” and “official acting in his or her official capacity” are not ambiguous and therefore are not open to agency interpretation. Commenters asserted that the rule seeks to codify the BIA’s decision in *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019), *vacated by* 28 I&N Dec. 35, but that the standard set out in *Matter of O-F-A-S-* is an impossible burden. Specifically, commenters averred that “if an official claims to be acting in an official capacity, is wearing an official uniform, or otherwise makes it known to the applicant that [he or she is] a government official, a CAT applicant would have no reason to know whether the official is acting lawfully or as a ‘rogue’ official.” Commenters argued that to meet his or her burden, an applicant would have to obtain detailed information from a government official who has tortured or threatened him or her in order to establish that the actor was not acting in a rogue capacity.

Commenters also argued that the phrase “under color of law” calls for a more nuanced determination than the analysis required by the proposed regulation or the BIA’s decision in *Matter of O-F-A-S-* would indicate. Quoting *Screws v. United States*, 325 U.S. 91, 111 (1945), commenters stated that “[i]t is clear that under ‘color’ of law means under ‘pretense’ of law . . . . If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words ‘under color of any law’ were hardly apt words to express the idea.” Following this analysis, commenters asserted that any proposed rule must emphasize that acting “under color of law” does not require the government official to be on duty, following orders, or to be acting on a matter of official government business.

Commenters similarly claimed that the proposed definition of “rogue official” is contrary to Federal and state jurisprudence because the proposed rule dismisses and invalidates the entire concept of “color of law” as being synonymous with “acting in his or her official capacity.” Commenters asserted that the Supreme Court views the terms as interchangeable because the “traditional definition of acting under color of state law requires that the defendant . . . have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

Commenters explained that, in alignment with the Supreme Court’s interpretation, some circuits have defined “color of law” to mean the “misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” See *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812–13 (5th Cir. 2017) (finding that the public official in question need not be high-level or follow “an officially sanctioned state action”); *Garcia v. Holder*, 756 F.3d 885, 891–92 (5th Cir. 2014); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900–01 (8th Cir. 2009). Citing the Eighth Circuit, commenters asserted that this means that “the focus is whether the official uses their position of authority to further their actions, even if for ‘personal’ motives.” *Ramirez-Peyro*, 574 F.3d at 900–01. Commenters further asserted that the color-of-law analysis should be one of “nexus”—i.e., “does the conduct relate to the offender’s official duties?”

Commenters further quoted *Ramirez-Peyro*, 574 F.3d at 901, stating that “it is not contrary to the purposes of the [Convention] and the under-color-of-law standard to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation’s will and despite the fact that the actions may take place in circumstances where the officials should be acting on behalf of the state in another, legitimate, way.” Quoting *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004), commenters asserted that, “when it is a public official who inflicts severe pain or suffering, it is only in exceptional

cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.” Commenters also cited a recent decision from the Ninth Circuit Court of Appeals, in which the court held that even a rogue official is still a public official for purposes of the CAT. *See Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1184 (9th Cir. 2020) (“We rejected BIA’s ‘rogue official’ exception as inconsistent with *Madrigal*[, 716 F.3d at 506.]”).

Ultimately, commenters argued that the CAT requires protection for those that have suffered any act of torture at the hands of state officials, even “rogue officials,” as such evidence demonstrates that the foreign state cannot or will not protect the applicant from torture. Moreover, the commenter asserted that it does not matter that some countries cannot control large numbers of rogue officials. *See, e.g., Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) (“It’s simply not enough to bar removal if the [Mexican] government may be trying, but without much success, to prevent police from torturing citizens at the behest of drug gangs.”). Commenters averred that the correct inquiry in CAT claims is whether a government official committed torture, not whether the applicant can demonstrate that the official was not acting in a “rogue capacity.”

Commenters stated that the proposed changes to the “rogue official” standard also conflict with the standard established by the Attorney General in *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020), which was issued subsequent to the proposed rule’s publication. For example, at least one commenter stated that the Attorney General “rejected” the use of the term “rogue official,” while the proposed rule would codify the use of the same term. Commenters further stated that the Attorney General’s decision in *Matter of O-F-A-S-* created difficulty in providing comment on the proposed rule because it changed the state of the law that the rule would affect.<sup>77</sup>

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<sup>77</sup> To the extent commenters’ concerns with the ability to comment may relate to the period of time provided for comment, the Departments responses are set forth below in Section II.C.6.3 of this preamble.

Commenters argued that exempting public officials from the concept of acquiescence in instances in which the public official “recklessly disregarded the truth, or negligently failed to inquire” seems indistinguishable from “willful blindness,” a term recognized by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits in the CAT analysis context. *See, e.g., Khouzam*, 361 F.3d at 170–71; *Myrie v. Att’y Gen. of U.S.*, 855 F.3d 509, 517 (3rd Cir. 2017), *Romero-Donado v. Sessions*, 720 Fed. App’x 693, 698 (4th Cir. 2018); *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812 (5th Cir. 2017); *Torres v. Sessions*, 728 Fed. App’x 584, 588 (6th Cir. 2018); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 831 (7th Cir. 2016); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194–95 (9th Cir. 2003); *Medina-Velasquez v. Sessions*, 680 Fed. App’x 744, 750 (10th Cir. 2017). Commenters asserted that the rule should instead codify this “near-universal standard.” Further, commenters recommended codifying court decisions that have found government acquiescence even where parts of government have taken preventive measures. *See, e.g., Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015) (noting it is not required to find the entire Mexican government complicit); *De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010).

In addition, some commenters argued that the standard to demonstrate acquiescence is unreasonable because applicants would be required to demonstrate the legal duties of a government official who failed to act and also demonstrate whether the official was charged with preventing those actions but failed to act. Commenters asserted this would be an impossible standard to meet. Commenters also contended that the proposed rule’s reliance on the Model Penal Code is irrelevant to what might occur in a foreign country.

Commenters argued that the proposed rule’s amendments to 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) will prevent many individuals from meeting the burden to establish eligibility for protection under the regulations issued pursuant to the legislation implementing the CAT. Commenters were concerned that an individual would be unable to determine that an officer is a rogue officer when “every discernable fact (including but not limited to uniforms, weapons,



badges, police cars, etc.) indicates the officer is legitimate.” Therefore, commenters asserted, requiring this kind of detailed information would be unreasonable or impossible. Commenters similarly asserted that the requirement that an applicant demonstrate that the government official who has inflicted torture did so under color of law and is not a rogue official ignores the actual circumstances under which people flee.

Commenters also expressed concern that individuals who were tortured would have no recourse because they would be unable to report the rogue official to other potentially rogue officials. For example, commenters stated that, in many countries (such as the Democratic Republic of the Congo), members of the police or military are intentionally organized into paramilitary groups so that the government can deny responsibility for human rights violations. Commenters asserted that, in such circumstances, individuals who are subjected to harm or in danger of such harm would face an insurmountable burden of proof. Commenters asserted that it is extremely rare for a government to openly acknowledge that it condones torture. Rather, when evidence of torture occurs, the government will claim the perpetrator was a “bad apple” who acted on his or her own. Commenters asserted that this rule would accept the “bad apple” excuse on its face, preventing torture victims from receiving protection. Similarly, commenters asserted that most governments would not publicly admit that they torture their citizens and that, without such admissions, it would be difficult for victims of torture to prove that the injury was caused by a government official acting in an official capacity as opposed to on the official’s private initiative. Commenters also asserted that the proposed changes appear specifically to restrict typical claims from Central America, where individuals are “tortured at the hands of non-state actors such as gangs and cartels and where government actors are frequently complicit in these actions.” Finally, one commenter asserted that, if an agency is going to demand such a high burden to establish torture, the agency should be the one to take on the burden of demonstrating the difference because the agency has more capacity to obtain the required information than the individual requesting the relief.

*Response:* The Departments disagree with commenters' assertions that the term "acting in an official capacity" is unambiguous and thus not subject to agency interpretation, as multiple decisions from the BIA, the Attorney General, and circuit courts attest. As demonstrated most recently by the Attorney General's decision in *Matter of O-F-A-S-*, 28 I&N Dec. at 36–37, the term "acting in an official capacity" is a term that has been subject to different interpretations since it was implemented in the regulations. See Regulations Concerning the Convention Against Torture, 64 FR 8490 (Feb. 19, 1999). As explained by the Attorney General subsequent to the NPRM, whether an individual acted in an official capacity has been the subject of multiple inaccurate or imprecise formulations. *Matter of O-F-A-S-*, 28 I&N Dec. at 36–37. On the one hand, then-Attorney General Ashcroft first articulated that the official capacity requirement means torture "inflicted under color of law." *Id.* at 36. Subsequently, every Federal court of appeals to consider the questions has read the standard in the same manner. *Id.* at 37 (citing *Garcia*, 756 F.3d at 891; *United States v. Belfast*, 611 F.3d 783, 808–09 (11th Cir. 2010); *Ramirez-Peyro*, 574 F.3d at 900). However, at the same time, some Federal courts have viewed immigration judges as applying an amorphous, different concept of "rogue official," which has not been accepted by circuit courts. *Id.* (citing Federal court of appeals decisions reviewing immigration court decisions applying an alleged "rogue official" analysis).

As the NPRM made clear, there is not a "rogue official" exception *per se* for CAT protection. 85 FR at 36286. Rather, "rogue official" is simply a shorthand label for an official who is not acting under color of law, and the actions of such an official are not a basis for CAT protection because the individual is not acting in an official capacity. The Attorney General confirmed this view that a "rogue official" is one who is not acting under color of law. *Matter of O-F-A-S-*, 28 I&N Dec. at 38 ("To the extent the Board used 'rogue official' as shorthand for someone not acting in an official capacity, it accurately stated the law. By definition, the actions of such officials would not form the basis for a cognizable claim under the CAT."). Thus, there

is no longer any confusion regarding the definition of a “rogue official,” and, consistent with the rule, such an official is one who is not acting under color of law.

Nevertheless, as the Attorney General also noted, “continued use of the ‘rogue official’ language by the immigration courts going forward risks confusion . . . because ‘rogue official’ has been interpreted to have multiple meanings.” *Id.* Accordingly, the Departments are removing that term from the final rule to avoid any further confusion. Its removal, however, does not result in any substantive change to the rule. Regardless of whether an official who is not acting in an official capacity is described as a “rogue official,” the actions of such an official are not performed under color of law and, thus, do not form the basis of a cognizable claim under the CAT.

Regarding commenters’ concerns about the Attorney General’s decision in *Matter of O-F-A-S-*, the Attorney General determined that it was necessary to provide a clarification of the ambiguous term “acting in an official capacity” without waiting for the Departments’ NPRM to be finalized. That he issued his decision does not prevent the Departments from codifying that definition subsequently.

Moreover, the Departments disagree that the Attorney General’s decision in *Matter of O-F-A-S-*, 28 I&N Dec. at 35, conflicts with the language of this rule. In *Matter of O-F-A-S-*, the Attorney General explained that “acting in an official capacity” means actions performed “under color of law.” *Id.* This rule amends the current regulatory language to clarify that the conduct supporting a CAT claim must be carried out under color of law, which is fully consistent with the Attorney General’s decision. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1) (expressly using the phrase “under color of law”).<sup>78</sup> Therefore, the regulatory text articulates that the test for determining

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<sup>78</sup> In clarifying this definition of a public official as one acting under color of law, the rule also makes clear that, for purposes of the CAT regulations, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless the act is done while the official is “acting in his or her official capacity.” 85 FR at 36287; 8 CFR 208.18(a)(1) and 1208.18(a)(1). The Departments recognize that this change departs from the language considered in *Barajas-Romero v. Lynch*, 846 F.3d 351, 362–63 (9th Cir. 2017), which allowed for the consideration of a CAT claim even when the alleged torture was carried out by a public official not

whether an individual acted in an official capacity is whether the official acted under color of law. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1).

This amendment aligns the regulatory language with congressional intent and circuit case law finding that “in an official capacity” means “under color of law.” The Senate, in recommending that the United States ratify the CAT, explicitly stated that “the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted ‘under color of law.’” S. Exec. Rep. No. 101-30, at 14 (1990). Further, as stated by the Attorney General in *Matter of O-F-A-S-*, every Federal court of appeals to consider the question has held that action “in an official capacity” means action “under color of law.” 28 I&N Dec. at 37 (citing *Garcia*, 756 F.3d at 891; *Belfast*, 611 F.3d at 808–09; *Ramirez-Peyro*, 574 F.3d at 900); *see also Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001) (adopting the “under color of law” standard in an opinion preceding *Matter of Y-L-*, 24 I&N Dec. 151).

The Senate’s understanding of “acquiescence” for purposes of the CAT was that a finding of acquiescence requires a showing that the public official was aware of the act and that the public official had a legal duty to intervene to prevent the act but failed to do so. *See* S. Exec. Rep. No. 101-30, at 14 (“In addition, in our view, a public official may be deemed to ‘acquiesce’ in a private act of torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity.”). As noted in the NPRM, however, the term “awareness” has led to some confusion. *See* 85 FR at 36287 (citing *Scarlett v. Barr*, 957 F.3d 316 (2d Cir. 2020)). Commenters asserted that the Departments, rather than creating a new definition for awareness, should instead codify the “willful blindness” standard as articulated by the circuit courts of appeals. But the final rule does just that: as noted in the

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acting in an official capacity. Nevertheless, the Departments have provided reasoned explanations for this regulatory change and, thus, can implement that change in accordance with well-established principles. *See Encino Motorcars, LLC*, 136 S. Ct. at 2125 (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”).

NPRM, the Departments proposed to clarify that, in accordance with decisions from several courts of appeals and the BIA, “‘awareness’—as used in the CAT ‘acquiescence’ definition—requires a finding of either actual knowledge or willful blindness.” 85 FR at 36287; *see also* 8 CFR 208.18(a)(1), 1208.18(a)(1). The Departments, however, seeking to avoid further ambiguity, further define the term “willful blindness” to mean that the public official or other person acting in an official capacity was “aware of a high probability of activity constituting torture and deliberately avoided learning the truth.” 85 FR at 36287. The Departments further clarify that it is not enough that such a public official acting in an official capacity or other person acting in an official capacity was “mistaken, recklessly disregarded the truth, or negligently failed to inquire.” *Id.*

As explained in the NPRM, the Departments’ definition of “acquiescence” aligns with congressional intent to require both an actus reus and a mens rea. *Id.* The Senate, during ratification of the CAT, included in its list of understandings the two elements required for a finding of acquiescence: actus reus and mens rea. *See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Treaty Doc. 100-20: Hearing Before the S. Comm. on Foreign Relations, S. Hrg. No. 101-718, 101st Cong., 2d Sess. 14 (1990)* (“[T]o be culpable under the [CAT] . . . the public official must have had prior awareness of [the activity constituting torture] and must have breached his legal responsibility to intervene to prevent the activity.” (statement of Mark Richard, Deputy Assist Att’y Gen., Criminal Division, Department of Justice)); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36198 (1990). The definition further aligns with subsequent understandings that reduced the requirement from knowledge to mere awareness. *See Zheng*, 332 F.3d at 1193 (“The [Senate Committee on Foreign Relations] stated that the purpose of requiring awareness, and not knowledge, ‘is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence.’”).

Regarding commenters' assertions that the proposed rule would create a burden that would be impossible for an applicant to meet, the Departments note that, currently, applicants must still demonstrate a legal duty and that this requirement does not change with this final rule. Even when applying the "willful blindness" standard articulated by various circuit courts of appeals, the applicant must demonstrate a legal duty and that the government official breached that legal duty. *See, e.g., Khouzam*, 361 F.3d at 171 ("From all of this we discern a clear expression of Congressional purpose. In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.").

Regarding commenters' concerns about the burden applicants would have in establishing that an official was not a rogue official, the Departments reiterate that this rule codifies the analysis that, for an individual to be acting in an official capacity, he or she must be acting under color of law. As stated above, this standard aligns with the standard required by the Attorney General in *Matter of O-F-A-S-*, as well as the various circuit courts of appeals to have considered the issue. Therefore, the burden continues to require that an applicant demonstrate that an individual acted under color of law to demonstrate eligibility. The final rule does not raise or change the burden on the applicant, but merely provides clarity on the analysis. Moreover, the NPRM lists the main issues to consider in determining whether an official was acting under the color of law: whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information; whether the officer was on duty and in uniform at the time of his conduct; and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities. 85 FR at 36287. The Departments believe these issues would be known by the alien, who could at least provide evidence in the form of his or her personal testimony if other witnesses or documents were unavailable. *See* 8 CFR 1208.16(c)(2) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [for a claim for protection under the CAT] without corroboration.").

## 5. Information Disclosure

*Comment:* Commenters raised concerns that the rule's confidentiality provisions violate asylum seekers' right to privacy in their asylum proceedings, are "expansive and highly concerning," and would put asylum seekers at "grave risk of harm." Commenters were particularly concerned about cases involving gender-based violence. Commenters explained that broad disclosure language would deter asylum seekers from pursuing relief or revealing details of their alleged persecution for fear that their persecutor would learn about their asylum claim and subject them or their families to further harm. This fear, according to commenters, would be compounded by the fact that persecutors could potentially learn such information online without needing to be physically present in the United States. For example, commenters were concerned that disclosures in Federal litigation could be accessed by anyone because the litigation is public record.

One commenter noted that the exception for state or Federal mandatory reporting requirements at 8 CFR 208.6(d)(1)(iii) and 1208.6(d)(1)(iii) is "completely open ended and provides no safeguards against publication" to the public. Another commenter raised concerns about the exception allowing for an asylum application to be filed in an unrelated case as evidence of fraud. The commenter explained that, in practice, this would mean that information from one applicant's case would be accessible to another applicant, potentially putting the asylum applicant in danger.

*Response:* The Departments are fully cognizant of the need to protect asylum seekers, as well as their relatives and associates in their home countries, by preventing the disclosure of information contained in or pertaining to their applications. There are specific situations, however, in which the disclosure of relevant information is necessary to protect the integrity of the system, to ensure that those engaged in fraud do not obtain benefits to which they are not entitled, and to ensure that unlawful behavior is not inadvertently and needlessly protected. The existing confidentiality provisions do not provide for an absolute bar on disclosure, but even

their exceptions may encourage fraud or criminal behavior. *See Angov*, 788 F.3d at 901 (“This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated.”). Ultimately, there is no utility in protecting a false or fraudulent asylum claim, in restricting access to evidence of child abuse, or in restricting access to evidence that may prevent a crime, and the rule properly calibrates those concerns as outweighing the blunt shield of confidentiality for an assortment of unlawful behaviors that exists under the current regulations.

Here, the Departments have determined that additional, limited disclosure exceptions are necessary to protect the integrity of proceedings, to ensure that other types of criminal activity are not shielded by the confidentiality provisions, and to ensure that the government can properly defend itself in relevant proceedings. By their text, these additional disclosure exceptions are limited to specific circumstances in which the disclosure of such information is necessary and the need for the disclosure outweighs countervailing concerns. This rule includes clarifying exceptions explicitly allowing release of information as it relates to any immigration proceeding under the INA or legal action relating to the alien’s immigration or custody status. This will ensure that the government can provide a full and accurate record in litigating such proceedings.

The rule also includes provisions for protecting the integrity of proceedings and public safety. These include provisions aimed at detecting fraud by allowing the Departments to submit similar asylum applications in unrelated proceedings; pursuing state or Federal criminal investigations, proceedings, or prosecutions; and protecting against child abuse. For example, the fraud exception will allow the Departments to consider potentially fraudulent similar applications or evidence in an immigration proceeding in order to root out non-meritorious claims, which will in turn allow the Departments to focus limited resources on adjudicating cases with a higher chance of being meritorious. *See, e.g., Angov*, 788 at 901–02 (“[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely



tolerated. . . . [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. . . . Consequently, immigration fraud is rampant.”).

Regarding commenters’ concerns with the exception to allow disclosure as required by any state or Federal mandatory reporting requirements, the Departments note that the exception simply makes clear that government officials must abide by such laws. This provision is designed to prevent any inconsistencies and ensure that government officials comply with any mandatory reporting requirements. Accordingly, despite commenters’ concerns with the breadth of this provision, the Departments disagree that any limiting language would be appropriate.

The Departments have considered commenters’ concerns that an applicant’s application will be submitted in another proceeding and thereby be made available to the other applicant, though they note that existing exceptions already cover “[t]he adjudication of asylum applications” and “[a]ny United States Government investigation concerning any . . . civil matter,” which, arguably, already encompass the use of applications across proceedings. 8 CFR 208.6(c)(1)(i), (v), 1208.6(c)(1)(i),(v). The Departments are maintaining the exceptions in the NPRM to ensure clarity on this point and to ensure that existing regulations are not inappropriately used to shield unlawful behavior. Because cases involving asylum fraud are “distressingly common,” *Angov*, 788 at 902, the need to root out fraudulent asylum claims greatly outweighs the concerns raised by commenters. Moreover, legitimate asylum seekers generally should be unaffected by this exception. Finally, the Departments reiterate that only “relevant and applicable” information is subject to disclosure under that exception; thus, rather than an open-ended exception, this exception ensures that only a limited amount of information is subject to disclosure under that exception.

Finally, as noted above, the Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT, and not solely to asylum applications. That point is

already clear in 8 CFR 208.6(d) and 1208.6(d), and the Departments see no reason not to conform the other paragraphs in those sections for consistency. Relatedly, the Departments are also making edits to 8 CFR 208.6(a), (b), (d), and (e) and 8 CFR 1208.6(b), (d), and (e) to make clear that applications for refugee admission pursuant to INA 207(c)(1), 8 U.S.C. 1157(c)(1), and 8 CFR part 207 are subject to the same information disclosure provisions as similar applications for asylum, withholding of removal under the INA, and protection under the regulations implementing the CAT. The Departments already apply the disclosure provisions to such applications as a matter of policy and see no basis to treat such applications differently than those for protection filed by aliens already in or arriving in the United States.

## 6. Violates Domestic or International Law

### 6.1. Violates Immigration and Nationality Act

*Comment:* Commenters expressed a general belief that the rule violates the INA, such as by rendering it “impossible” or “near impossible” to obtain refugee status.

Multiple commenters stated that it appears the proposed rule is an “unreasonable interpretation” of sections 208 and 240 of the INA, 8 U.S.C. 1158 and 1229a, because two members of Congress have issued a statement in opposition to the rule.

*Response:* This rule implements numerous changes to the Departments’ regulations regarding asylum and related procedures, including amendments to the expedited removal and credible fear screening process, changes to the standards for frivolous asylum application findings, a provision to allow immigration judges to prepermit applications in certain situations, codification of standards for consideration during the review of applications for asylum and for statutory withholding of removal, and amendments to the provisions regarding information disclosure. Each of these changes, as discussed with more specificity elsewhere in Section II.C of this preamble, is designed to better align the Departments’ regulations with the Act and congressional intent. As also discussed, *supra*, the rule does not end asylum or refugee procedures, nor does it make it impossible for aliens to obtain such statuses. To the contrary, by

providing clearer guidance to adjudicators and allowing them to more effectively consider all applications, the rule should allow adjudicators to more efficiently reach meritorious claims.

The Departments disagree that the statements of certain members of Congress about their personal opinion regarding the rule are sufficient to demonstrate that the rule is an “unreasonable interpretation” of the Act. Indeed, the statements of certain members of Congress in 2020 is not clear evidence of the legislative intent behind the 1996 enactment of IIRIRA, which established the key statutory provisions related to this rule.

## 6.2. Violates Administrative Procedure Act

*Comment:* Commenters raised concerns that the rule does not comply with the APA. Commenters alleged that the rule is arbitrary and capricious under the APA because it does not offer “reasoned analysis” for the proposed changes. Commenters explained that “reasoned analysis” requires the Departments to display awareness that they are changing positions on a policy, to provide a legitimate rationale for departing from prior policy, and to identify the reasons for the change and why the change is a better solution to the issue.

In alleging this failure, commenters argued that the Departments did not analyze or rely on data or other evidence in formulating these changes. Moreover, commenters also claimed that the Departments did not consider possible alternatives to the changes and failed to consider important aspects of the various changes, including the impacts on the applicants and their communities. Commenters claimed that this rule is nothing more than a pretext for enshrining anti-asylum seeker sentiments, as evidenced by the thin or complete lack of justification for the various changes.

In addition, commenters claimed that this rule overlaps with other recent rules promulgated by the Departments, including rules involving asylum and adjusting fee amounts. Commenters claimed that it is arbitrary and capricious for the Departments to “carve up [their] regulatory activity to evade comprehensive evaluation and comment.” For example, one commenting organization stated that the rule treats domestic violence differently from another

recent rule, in that the other rule bars relief for persons who have committed gender-based violence, while this rule bars relief from persons who have survived gender-based violence.

One commenting organization stated that the Departments are implementing this rule to enhance their litigating positions before EOIR and the Federal courts, which the commenter alleged is arbitrary and capricious where “there is no legitimate basis for the regulation other than to enhance the litigating position” of the Departments, particularly when the Departments are parties to the litigation.

*Response:* The Departments disagree that the promulgation of this rule is arbitrary and capricious under the APA. The APA requires agencies to engage in “reasoned decisionmaking,” *Michigan*, 576 U.S. at 750, and directs that agency actions be set aside if they are arbitrary or capricious, 5 U.S.C. 706(2)(A). This, however, is a “narrow standard of review” and “a court is not to substitute its judgment for that of the agency,” *Fox Television*, 556 U.S. at 513 (quotation marks omitted), but is instead to assess only whether the decision was “based on a consideration of the relevant factors and whether there has been a clear error of judgment,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Arbitrary and capricious review is “highly deferential, presuming the agency action to be valid.” *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010). It is “reasonable for the [agency] to rely on its experience” to arrive at its conclusions, even if those conclusions are not supported with “empirical research.” *Id.* at 1069. Moreover, the agency need only articulate “satisfactory explanation” for its decision, including “a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (“We may not substitute our judgment for that of the Secretary, but instead must confine ourselves to ensuring that he remained within the bounds of reasoned decisionmaking.” (citation and quotation marks omitted)).

Under this deferential standard, and contrary to commenters' claims, the Departments have provided reasoned explanations for the changes in this rule sufficient to rebut any APA-related concerns. The NPRM describes each provision in detail and provides an explanation for each change. *See* 85 FR at 36265–88. The Departments explained that these various changes will, among other things, maintain a streamlined and efficient adjudication process for asylum, withholding of removal, and CAT protection; provide clarity in the adjudication of such claims; and protect the integrity of such proceedings. *Id.* As noted in Section II.A of this preamble, the animating principles of the NPRM were to provide clearer guidance to adjudicators regarding a number of thorny issues that have caused confusion and inconsistency and even bedeviled circuit courts; to improve the efficiency and integrity of the overall system in light of the overwhelming number of cases pending; to correct procedures that were not working well, including procedures for the identification of meritless or fraudulent claims; and to provide a consistent approach for the overall asylum adjudicatory framework in light of numerous—and often contradictory or confusing—decisions from the Board and circuit courts regarding multiple important terms that are not defined in the statute.

For example, the Departments explained that the changes to use asylum-and-withholding-only proceedings for positive credible fear findings, to increase the credible fear standard for withholding of removal and CAT protection claims, to apply certain bars and the internal relocation analysis in credible fear interviews, to pretermite legally insufficient asylum applications, and to expand the grounds for a frivolous asylum finding are all intended to create a more streamlined and efficient process for adjudicating asylum, withholding of removal, and CAT protection applications. *See* 85 FR at 36266–67 (explaining that asylum-and-withholding-only proceedings will ensure a “streamlined, efficient, and truly ‘expedited’” removal process); *id.* at 36277 (explaining that the pretermission of legally insufficient asylum applications will eliminate the need for a hearing); *id.* at 36273–76 (explaining that frivolous applications are a “costly detriment, resulting in wasted resources and increased processing times,” and that the

new grounds for a finding of frivolousness will “ensure that meritorious claims are adjudicated more efficiently” and will prevent “needless expense and delay”); *id.* at 36268–71 (explaining that raising the credible fear standard for withholding and CAT applications will allow the Departments to more “efficiently and promptly” distinguish between aliens whose claims are more or less likely to ultimately be meritorious); *id.* at 36272 (explaining that applying certain eligibility bars in credible fear interviews will help to eliminate unnecessary removal delays in section 240 proceedings and eliminate the “waste of adjudicatory resources currently expended in vain”).

Similarly, the Departments also explained in the NPRM that many of the changes are intended to provide clarity to adjudicators and the parties, including the addition of definitions and standards for terms such as “particular social group,” “political opinion,” “persecution,” “nexus,” and “internal relocation;” the delineation of discretionary factors in adjudicating asylum applications; the addition of guidance on the meaning of “acquiescence” and the circumstances in which officials are not acting under color of law in the CAT protection context; and the clarification of the use of precedent in credible fear review proceedings. *See* 85 FR at 36278 (explaining that the rule’s definition of “particular social group” will provide “clearer guidance” to adjudicators regarding whether an alleged group exists and, if so, whether the group is cognizable); *id.* at 36278–79 (explaining that the rule’s definition of “political opinion” will provide “additional clarity for adjudicators”); *id.* at 36280 (explaining that the rule’s definition of “persecution” will “better clarify what does and does not constitute persecution”); *id.* at 36281 (explaining that the rule’s definition of “nexus” will provide “clearer guidance” for adjudicators to “uniformly apply”); *id.* at 36282 (explaining that the rule’s definition of “internal relocation” will help create a more “streamlined presentation” to overcome the current lack of “practical guidance”); *id.* at 36283 (explaining that, for asylum discretionary determinations, the Departments have not previously provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion); *id.* at

36286–87 (explaining that guidance for CAT acquiescence and for the circumstances in which an official is not acting under color of law standards is meant to provide clarity because current regulations “do not provide further guidance”); *id.* at 36267 (explaining that the inclusion of language regarding the consideration of precedent in credible fear review proceedings is intended to provide a “clear requirement”).

The Departments also explained that many of the changes are intended to protect the integrity of proceedings. *See* 85 FR at 36288 (explaining the expansion of information disclosure is necessary to protect against “suspected fraud or improper duplication of applications or claims”); *id.* at 36283 (explaining that the inclusion of a discretionary factor for use of fraudulent documents is necessary due to concerns that the use of fraudulent documents makes the proper enforcement of the immigration laws “difficult” and “requires an immense amount of resources”); *id.* (explaining that the inclusion of a discretionary factor for failure to seek asylum or protection in a transit country “may reflect an increased likelihood that the alien is misusing the asylum system”); *id.* at 36284 (explaining that making applications that were previously abandoned or withdrawn with prejudice a negative discretionary factor would “minimize abuse of the system”).

The Departments also disagree with commenters that the rule does not provide support for the specific grounds that would be insufficient to qualify as a particular social group or to establish a nexus.<sup>79</sup> The Departments provided numerous citations to BIA and Federal court precedent that the Departments relied on in deciding to add these specific grounds. *See* 85 FR at 36279 (list of cases supporting the grounds that generally will not qualify as a particular social group); *id.* at 36281 (list of cases supporting the grounds that generally will not establish nexus).

In addition to the explicit purposes detailed in the NPRM, the Departments also considered, contrary to commenters’ claims, the effects that such changes may have on

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<sup>79</sup> For further discussion regarding the changes related to particular social groups, see Section II.C.4.1 of this preamble, and for further discussion regarding the changes related to nexus, see Section II.C.4.4.

applicants. The Departments noted that the proposed changes “are likely to result in fewer asylum grants annually.” 85 FR at 36289. Moreover, the Departments recognized that any direct impacts would fall on these applicants. *Id.* at 36290. The Departments acknowledge that these impacts are viewed as “harsh” or “severe” by commenters, but the Departments also note, as discussed, *supra*, that many of the commenters’ overall assertions about the effects of this rule are unfounded or speculative.<sup>80</sup> In addition, the Departments made the decision to include the various changes in this rule because, after weighing the costs and benefits, the Departments determined that the need to provide additional clarity to adjudicators; to enhance adjudicatory efficiencies; and to ensure the integrity of proceedings outweighed the potential costs to applicants, especially since the changes, particularly those rooted in existing law, would naturally fall more on applicants with non-meritorious claims. In fact, the enhanced adjudicatory efficiencies would be expected to allow adjudicators to focus more expediently on meritorious claims, which would be a benefit offsetting any costs to those applicants filing non-meritorious applications. Overall, as shown in the NPRM and the final rule, the Departments engaged in “reasoned decision making” sufficient to mitigate any APA concerns.

The Departments also disagree with commenters’ claim that the Departments purposefully separated their asylum-related policy goals into separate regulations in order to prevent the public from being able to meaningfully review and provide comment. The Departments reject any assertions that they are proposing multiple rules for any sort of nefarious purpose. Each of the Departments’ rules stand on its own, includes an explanation of its basis and purpose, and allows for public comment, as required by the APA. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020) (explaining that the APA provides the “maximum procedural requirements” that an agency must follow in order

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<sup>80</sup> The Departments also note that aliens with otherwise meritorious claims who are denied asylum under genuinely new principles in the rule—e.g., the new definition of “firm resettlement”—may remain eligible for other forms of protection from removal, such as statutory withholding of removal or protection under the CAT. Thus, contrary to the assertions of many commenters, the rule would not result in the “harsh” or “severe” consequence of an alien being removed to a country where his or her life would be in danger.



to promulgate a rule). To the extent commenters noted some overlap or joint impacts, however, the Departments regularly consider the existing legal framework when a specific rule is proposed or implemented. For example, with respect to the potential impacts of DHS fee changes, DHS conducts a biennial review of USCIS fees and publishes a Fee Rule that impacts all populations before USCIS. *See, e.g.*, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 62280, 62282 (Nov. 14, 2019) (explaining that, in accordance with 31 U.S.C. 901–03, USCIS conducts “biennial reviews of the non-statutory fees deposited into the [Immigration Examinations Fee Account]”). It is natural that there would be some impact on aliens who intend to seek asylum, but any such change to those fees must be considered with respect to USCIS’s overall fee structure. Thus, any such changes were properly outside the scope of this rule. Moreover, nothing in any rule proposed by the Departments, including the NPRM underlying this final rule, precludes the public from meaningfully reviewing and commenting on that rule.

Finally, commenters are incorrect that the rule is related to enhancing the government’s litigating positions. As explained in the NPRM and this response section, the Departments detailed a number of reasons for promulgating this rule, including to increase efficiency, to provide clarity to adjudicators, and to protect the integrity of proceedings. To the extent the rule corresponds with interpretations of the Act and case law that the Departments have set forth in other contexts, the Departments disagree that such correspondence violates the APA. Instead, it shows the Departments’ consistent interpretation and the Departments’ intent to better align the regulations with the Act through this rulemaking.

### 6.3. 30-Day Comment Period

*Comment:* Commenters raised concerns with the 30-day comment period, arguing that the Departments should extend the comment period to at least 60 days or should reissue the rule with a new 60-day comment period. Due to the complex nature of the rule and its length, commenters requested additional time to comment, asserting that such time is needed to meet APA

requirements that agencies provide the public with a “meaningful opportunity” to comment. Commenters also claimed that the 30-day comment period was particularly problematic due to the COVID-19 pandemic, which caused disruption and limited staff capacity for some commenters. Moreover, commenters stated that there should be no urgency to publish the rule due to the southern border being “blocked” due to COVID-19. Finally, commenters referenced the companion data collection under the Paperwork Reduction Act, which allowed for a 60-day comment period.

*Response:* The Departments believe the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the almost 89,000 public comments received, including numerous detailed comments from interested organizations. The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866, 58 FR 51735 (Sept. 30, 1993), and 13563, 76 FR 3821 (Jan. 18, 2011), recommend a comment period of at least 60 days, a 60-day period is not required. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that, although a 30-day period is often the “shortest” period that will satisfy the APA, such a period is generally “sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,” even when “substantial rule changes” are proposed. *Nat’l Lifeline Ass’n v. Fed. Commc’ns Comm’n*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). In addition, the Departments are not aware of any case law holding that a 30-day comment period was insufficient, and the significant number of detailed

public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor*, 140 S. Ct. at 2385 (“The object [of notice and comment], in short, is one of fair notice.” (citation and quotation marks omitted)).

One commenter noted that the comment period in the rule regarding the edits to the Form I-589, Application for Asylum and for Withholding of Removal, was 60 days, while the comment period for the substantive portions of the rule was only 30 days. In most cases, by statute, the Paperwork Reduction Act requires a 60-day comment period for proposed information collections, such as the Form I-589. 44 U.S.C. 3506(c)(2)(A). Although the statute allows an exception for proposed collections of information contained in a proposed rule that will be reviewed by the Director of the Office of Management and Budget under 44 U.S.C. 3507, *see* 44 U.S.C. 3506(c)(2)(B), the Departments sought a 60-day comment period to provide the public with additional time to comment on the form changes. In contrast, as explained above, there is no similar statutory requirement for the proposed rule itself.

#### 6.4. Agency is Acting Beyond Authority

*Comment:* At least one organization emphasized the Departments’ reliance on *Brand X*, 545 U.S. at 982, as a justification for the portions of the rule overruling circuit court decisions relating to asylum. *See* 85 FR at 36265, n.1. One organization claimed the Departments “ignore[d]” the Supreme Court’s decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which “follows the recent trend towards limiting deference to an agency’s interpretation of its own rules.” According to the organization, *Brand X* can be interpreted to mean that, where statutory or regulatory terms are generally ambiguous and the agency has not ruled on a particular issue, circuit court law addressing the issue in question governs only until “the agency has issued a dispositive interpretation concerning the meaning of a genuinely ambiguous statute or regulation.” The organization also noted that *Chevron* deference requires a Federal court to accept an agency’s “reasonable construction of an ambiguous statute,” emphasizing that the

distinction between “genuinely ambiguous language” and “plain language” is crucial. *See Chevron*, 467 U.S. at 843–44, n.11.

The organization then alleged that the Departments’ reliance on *Brand X* “to entirely eviscerate Federal court caselaw” is misplaced and contrary to controlling law. According to the organization, the Departments failed to demonstrate that each instance of the statutory language they seek to overrule is “genuinely ambiguous,” and the organization cited *Kisor*, 139 S. Ct. 2400, to support its claim that deference to “agency regulations should not be afforded automatically.” The organization claimed that *Kisor* limits the ability to afford deference unless (1) a regulation is genuinely ambiguous; (2) the agency’s interpretation is reasonable regarding text, structure, and history; (3) the interpretation is the agency’s official position; (4) the regulation implicates the agency’s expertise; and (5) the regulation reflects the agency’s “fair and considered judgment.” The organization contended that the Departments failed to meet these criteria, alleging that the proposed rule attempts to “re-write asylum law rather than interpret the statute.”

Multiple commenters claimed that the rule is in opposition to the asylum criteria established by Congress and expressed concern that the rule was drafted without congressional input.

*Response:* The Departments did not ignore *Kisor*, 139 S. Ct. 2400. *Kisor* examined the scope of *Auer* deference, which affords deference to an agency’s “reasonable readings of genuinely ambiguous regulations.” *Id.* at 2408 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). Here, ambiguous regulations are not at issue; instead, the Departments amended the regulations based on their reading of ambiguities in the statute, in accordance with Congress’s presumed intent for the Departments to resolve these ambiguities. *See* 85 FR at 36265 n.1 (citing *Brand X*, 545 U.S. at 982).

The Departments disagree that the rulemaking “eviscerates” case law. As explained in the NPRM, “administrative agencies are not bound by prior judicial interpretations of ambiguous

statutory interpretations, because there is ‘a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.’” *Matter of R-A-*, 24 I&N Dec. at 631 (quoting *Brand X*, 545 U.S. at 982) (quotation marks and citations omitted); *see also* 85 FR at 36265 n.1; *Ventura*, 537 U.S. at 16 (“Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. In such circumstances a judicial judgment cannot be made to do service for an administrative judgment. Nor can an appellate court intrude upon the domain which Congress has exclusively entrusted to an administrative agency. A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” (alteration, citations, and quotation marks omitted)). Moreover, “‘judicial deference to the Executive Branch is especially appropriate in the immigration context,’ where decisions about a complex statutory scheme often implicate foreign relations.” *Cuellar de Osorio*, 573 U.S. at 56–57 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

Further, the Departments disagree that the rulemaking rewrites asylum law or that it conflicts with the asylum criteria established by Congress. Congress statutorily authorized the Attorney General to, consistent with the statute, make discretionary asylum determinations, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), establish additional limitations and conditions on asylum eligibility, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), and establish other conditions and limitations on consideration of asylum applications, INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). The changes made by this rulemaking are consistent with those congressional directives. Regarding commenters’ concerns that the rule was drafted without congressional input, the Departments once again point to Congress’s statutory delegation of authority to the Attorney General. *See* INA 103(g)(1), (2), 8 U.S.C. 1103(g)(1), (2) (granting the Attorney General the “authorities and functions under this chapter and all other laws relating to the immigration and

naturalization of aliens,” and directing the Attorney General to “establish such regulations . . . and perform such other acts as the Attorney General determines to be necessary for carrying out this section”). Congress, in other words, has already delegated to the Attorney General the power to promulgate rules such as this one, and no further congressional input is required.

#### 6.5. Violates Separation of Powers

One organization emphasized that the Departments only have authority to “faithfully interpret” a statute, not to rewrite it. The organization contended that “[r]ulemaking is not an opportunity for an agency to engage in an unauthorized writing exercise that duplicates the legislative role assigned to Congress.” Another commenter claimed there is an “urgent need” for checks and balances on the “power” of immigration authorities in the asylum process, alleging that the U.S. government is allowing ICE and CBP to put lives in danger due to “lack of oversight.” One commenter contended that revising asylum law “is not an executive branch function.”

*Response:* The Departments are not rewriting statutes. As explained throughout this final rule in various sections, the Departments are statutorily authorized to promulgate this rule under section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A) (authority to make discretionary asylum determinations), section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C) (authority to establish additional limitations and conditions on asylum eligibility), and section 208(d)(5)(B) of the Act, 8 U.S.C. 1158(d)(5)(B) (authority to establish other conditions and limitations on consideration of asylum applications). In section 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), Congress has conferred upon the Secretary broad authority to administer and enforce the immigration laws and to “establish such regulations . . . as he deems necessary for carrying out his authority” under the immigration laws. Under section 103(g)(1), (2) of the Act, 8 U.S.C. 1103(g)(1), (2), Congress provided the Attorney General with the “authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens,” and directed the Attorney General to “establish such regulations . . . and perform such other acts as

the Attorney General determines to be necessary for carrying out this section.” Thus, the Departments derive authority to promulgate this rule from the statute and issued this rule consistent with the statute, not in contravention of it. Moreover, the Departments have promulgated this rule in accordance with the APA’s rulemaking process. *See* 5 U.S.C. 553; *see also* Sections II.C.6.2, 6.3 of this preamble.

The Departments also note that, although an agency “must give effect to the unambiguously expressed intent of Congress,” if Congress “has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 843–44; *see also Aguirre-Aguirre*, 526 U.S. at 424–25 (“It is clear that principles of *Chevron* deference are applicable to [the INA]. The INA provides that ‘[t]he Attorney General shall be charged with the administration and enforcement’ of the statute and that the ‘determination and ruling by the Attorney General with respect to all questions of law shall be controlling.’ . . . In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’” (citations omitted)). Congress has clearly spoken in the Act, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B); and INA 103(g)(1), (2), 8 U.S.C. 1103(g)(1), (2), and the Departments properly engaged in this rulemaking, consistent with 5 U.S.C. 553, to effectuate that statutory scheme. To the extent that comments disagree with provisions of the INA, such comments are properly directed to Congress, not the Departments.

#### 6.6. Congress Should Act

*Comment:* Some commenters stated that Congress, not the Departments, must make the sorts of changes to the asylum procedures set out in the proposed rule. Commenters cited a variety of reasons why these changes are most appropriately the providence of Congress,

including commenters' belief that the rule would effectively end or eliminate asylum availability and limit how many asylum seekers would receive relief annually, the breadth of the changes in the proposed rule, and alleged inconsistencies between the Act and the rule. Commenters expressed a belief that changes as significant as those proposed should be undertaken only by Congress.

Other commenters suggested that Congress should separately enact other legislation to protect asylum seekers.

*Response:* As stated above, the Departments issued the proposed rule, and in turn are issuing this final rule, pursuant to the authorities provided by Congress through the HSA and the Act. INA. *See, e.g.*, INA 103(a)(1) and (3), (g)(2), 208, 8 U.S.C. 1101(a)(1) and (3), (g)(2), 1158.<sup>81</sup> Despite commenters' statements, the provisions of the rule are consistent with these authorities and the Act, as discussed above. *See, e.g.*, Sections II.C.2, II.C.3, II.C.4, and II.C.6.1 of this preamble.

Should Congress enact legislation that amends the provisions of the Act that are interpreted and affected by this rule, the Departments will engage in future rulemaking as needed. Commenters' discussion of specific possible legislative proposals or initiatives, however, is outside of the scope of this rule.

#### 6.7. Violates Constitutional Rights

*Comment:* One organization contended that the application of the "interpersonal" and "private" categories to domestic and gender-based violence would violate the Equal Protection Clause. The organization claimed the presumption created by these categories would have a disproportionate effect on women, who are much more likely than men to experience violence by an intimate partner.

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<sup>81</sup> In addition, Congress has authorized the Department to "provide by regulation for any other conditions or limitations on the consideration of an application for asylum" consistent with the other provisions of the Act. INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B).



Another organization alleged that the rule would essentially prevent women, children, LGBTQ individuals, people of color, survivors of violence, and torture escapees from obtaining asylum protection, claiming this violates the “spirit and letter” of both the Fifth Amendment and the Refugee Act of 1980. According to the organization, the rule is designed to “eliminate due process” and create “impossible new legal standards” to prevent refugees from obtaining asylum. One organization emphasized generally that asylum seekers should not be treated like criminals but should instead be shown dignity and respect; the organization noted that these individuals should also be given judicial due process.

*Response:* The rule makes no classifications prohibited by the Equal Protection Clause; thus, the commenter’s allegation that the rule will disproportionately affect various groups—women, children, LGBTQ individuals, people of color, and survivors of violence and torture—is unfounded. The Departments do not track the factual bases for each asylum application, and each application is adjudicated on a case-by-case basis in accordance with the evidence and applicable law. Moreover, the changes alleged by commenters to have a disparate impact on discrete groups are ones rooted in existing law as noted in the NPRM, and commenters provided no evidence that existing law has caused an unconstitutional disparate impact. For allegations of disparate impact based on gender, a “significantly discriminatory pattern” must first be demonstrated. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The Departments are unaware of such a pattern, and commenters did not provide persuasive evidence of one, relying principally on anecdotes and isolated statistics, news articles, and reports.<sup>82</sup> Moreover, to the extent that the NPRM may affect certain groups of aliens more than others, those effects are a by-product of the intrinsic demographic distribution of claims, and a plausible equal protection claim will not lie in such circumstances. *See Regents of Univ. of Cal.*, 140 S. Ct. at 1915–16

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<sup>82</sup> The Departments also note that accepting the commenters’ assertion that the likelihood of women being subject to intimate-partner violence being greater than that of men necessarily demonstrates an equal protection violation would, in turn, mean that other immigration regulations regarding victims of domestic violence, *e.g.*, 8 CFR 204.2(c), are also unconstitutional because of their putative disparate impact.

(impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of animus, invidious discrimination, or an equal protection violation).

For allegations of disparate impact based on race, case law has “not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact. . . . [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.” *Washington*, 426 U.S. at 239, 242. No discriminatory motive or purpose underlies this rulemaking; it does not address race in any way;<sup>83</sup> and commenters have not explained—logically, legally, or otherwise—how the rule would even affect asylum claims based on persecution because of race.

In regard to allegations that the rule would discriminate against LGBTQ individuals, children, and survivors of violence or torture, the Departments reiterate that the rule applies equally to all asylum seekers. Further, as noted elsewhere, to the extent that the NPRM may affect certain groups of aliens more than others based on the innate characteristics of those who file asylum applications, those effects are a by-product of the intrinsic demographic distribution of claims, and a plausible equal protection claim will not lie in such circumstances. *See Regents of Univ. of Cal.*, 140 S. Ct. at 1915–16 (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of animus, invidious discrimination, or an equal protection violation).

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<sup>83</sup> The NPRM did not mention race at all, except when quoting the five statutory bases for asylum—race, religion, nationality, political opinion, and membership in a particular social group.

Relatedly, this rule does not eliminate statutory withholding of removal or protection under the CAT regulations, through which the United States continues to fulfill its commitments under the 1967 Refugee Protocol, consistent with the Refugee Act of 1980 and subsequent amendments to the INA, and the CAT, consistent with FARRA. *See R-S-C*, 869 F.3d at 1188, n.11 (explaining that “the Refugee Convention’s non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun v. Att’y Gen. U.S.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado*, 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by the FARRA and its implementing regulations).

The rule does not eliminate due process. As explained previously in this rule, due process in an immigration proceeding requires notice and an opportunity to be heard. *See LaChance*, 522 U.S. at 266 (“The core of due process is the right to notice and a meaningful opportunity to be heard.”). The rule does not eliminate the notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38. Moreover, asylum is a discretionary benefit. *See* INA 208 (b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (stating that the Departments “may” grant asylum”); *see also Thuraissigiam*, 140 S. Ct. at 1965 n.4 (“A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.”). The Attorney General and the Secretary are statutorily authorized to limit and condition asylum eligibility under section 208(b)(2)(C), (d)(5)(B) of the Act, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), by regulation and consistent with the Act, and courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin*, 538 F.3d at 156–57; *Ticoalu*, 472 F.3d at 11 (citing *DaCosta*, 449 F.3d at 50). The Departments properly exercised that authority in this

rulemaking, and that exercise does not implicate due process claims. Finally, the rule does not treat aliens “like criminals,” as commenters alleged. Aliens retain all due process rights to which they are entitled under law, and the rule does not change that situation.

#### 6.8. Violates International Law

*Comment:* Commenters asserted that the proposed rule violates the Convention on the Rights of the Child (“CRC”) because the United States, as a signatory, is obligated to “refrain from acts that would defeat the object and purpose of the Convention.” Commenters averred that the CRC protects the rights of children to seek asylum; therefore, commenters argued, the United States must protect the right of children to seek asylum. Commenters also asserted that the proposed rule violates the Refugee Convention and the CRC by requiring adjudicators to presume that many child-specific forms of persecution do not warrant a grant of asylum. Commenters alleged that this will result in children being returned to danger in violation of the language and spirit of the Refugee Convention and the CRC.

One commenter cited Article 14 of the Universal Declaration of Human Rights (“UDHR”), G.A. Res. 217A (III), U.N. Doc. A/810 (1948), which states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” That commenter asserted that the proposed revisions unnecessarily hinder access to asylum in contradiction of that right. Commenters also asserted that, under Article 34 of the Refugee Convention, the United States has an obligation to extend grants of asylum “as far as possible” to eligible refugees. These commenters asserted that this requires adjudicators to, at the very least, exercise a general presumption in favor of individuals who meet the definition of refugee. To do otherwise would not meet the United States’ obligation to facilitate “as far as possible” the assimilation and naturalization of individuals who qualify as refugees.

Commenters criticized the Departments’ statements that the continued viability of statutory withholding of removal, as referenced in the preamble to the NPRM, meets the United States’ non-refoulement obligations. Commenters asserted that this is a misreading of the scope

of both domestic and international obligations. As an initial matter, commenters averred that the Refugee Act of 1980, as implemented, was designed to give full force to the United States' obligations under the Refugee Convention, to the extent applicable by incorporation in the 1967 Protocol. Commenters argued that these obligations are not limited to one article of the Refugee Convention and are not limited to not returning an individual to a country where he or she would face persecution or other severe harm. Rather, commenters asserted, the obligations also require the United States to ensure that refugees are treated fairly and with dignity, and are guaranteed freedom of movement and rights to employment, education, and other basic needs. Commenters also cited the Refugee Convention's provision to provide a pathway to permanent status for refugees, which the commenters asserted is reflected in the asylum scheme implemented by the Refugee Act, not the statutory withholding of removal provisions. Commenters argued that narrowing the opportunity to receive asylum through the implementation of numerous regulatory obstacles makes asylum—and therefore permanent status—unattainable, which is inconsistent with the United States' obligations under U.S. and international law. Commenters also generally asserted that allowing immigration judges to pretermitt applications for asylum violates the principle of non-refoulement.

Commenters generally asserted that the culmination of the proposed rule's procedural and substantive changes subvert the purpose of the Refugee Act, which was to implement the United States' commitments made through ratification of the 1967 Protocol. Further, one organizational commenter argued that the proposed rule "re-orientes the U.S. asylum process away from a principled, humanitarian approach focused on identifying individuals with international protection needs towards one that establishes a set of obstacles which must be overcome by individuals seeking international protection." Commenters also criticized the Departments' statements that the continued viability of statutory withholding of removal ensures continued compliance with international obligations. Specifically, commenters noted that many of the provisions of the proposed rule also affect eligibility for protection under statutory

withholding of removal. Commenters argued that the proposed changes that affect statutory withholding of removal would not adequately meet the United States' obligations under the non-refoulement provisions of Article 33.

*Response:* This rule is consistent with the United States' obligations as a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention.<sup>84</sup> This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation.

Regarding the CRC, as an initial point, although the United States has signed the instrument, the United States has not ratified it; thus, it cannot establish any binding obligations. *See Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006) (“The United States has not ratified the CRC, and, accordingly, the treaty cannot give rise to an individually enforceable right.”). Moreover, contrary to commenters' assertions, nothing in the rule is inconsistent with the CRC. Under the CRC, states are obligated to “take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.” Convention on the Rights of the Child, art. 22, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1448. Because this rule is consistent with the Refugee Act and the United States' obligations under the Refugee Convention and Article 3 of the CAT, it is consistent with the CRC.

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<sup>84</sup> The Departments also note that neither of these treaties is self-executing, and that, therefore, neither is directly enforceable in the U.S. legal context except to the extent that they have been implemented by domestic legislation. *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (“The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.”); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (“CAT was not self-executing”); *see also Stevic*, 467 U.S. at 428 n.22 (“Article 34 merely called on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 was precatory and not self-executing.”).

Similarly, the Departments disagree with commenters' assertions that the rule violates the CRC by creating a presumption against "child-specific forms of persecution." As an initial point, nothing in the rule singles out children or "child-specific" claims; rather, the rule applies to all types of claims regardless of the demographic characteristics of the applicant. Moreover, although certain types of children are afforded more protections by statute than similarly-situated non-child asylum applicants, *see e.g.*, INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), this rule does not affect those protections. Further, generally applicable legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents. *See EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* 7 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>.

The UDHR is a non-binding human rights instrument, not an international agreement; thus it does not impose legal obligations on the United States. *Alvarez-Machain*, 542 U.S. at 728, 734–35 (citing John P. Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights*, in *The International Protection of Human Rights* 39, 50 (Evan Luard ed., 1967) (quoting Eleanor Roosevelt as stating that the UDHR is "a statement of principles . . . setting up a common standard of achievement for all peoples and all nations' and 'not a treaty or international agreement . . . impos[ing] legal obligations.'")). Moreover, although article 14(1) of the UDHR proclaims the right of "everyone" to "seek and to enjoy" asylum, it does not purport to state specific standards for establishing asylum eligibility, and it certainly cannot be read to impose an obligation on the United States to grant asylum to "everyone," *see id.*, or to prevent the Attorney General and Secretary from exercising the discretion granted by the INA, consistent with U.S. obligations under international law, *see UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* 3 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf> ("The principle of *non-refoulement* as provided for in

Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.”).

Similarly, the Departments disagree with commenters’ unsupported assertions that the United States’ obligation to “as far as possible facilitate the assimilation and naturalization of refugees” requires a general presumption in favor of granting asylum to all individuals who apply. Rather, as the Supreme Court has noted, Article 34 “is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.” *Cardoza-Fonseca*, 480 U.S. at 441.

Moreover, the United States implemented the non-refoulement provision of Article 33(1) of the Refugee Convention through the withholding of removal provision at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and the non-refoulement provision of Article 3 of the CAT through the CAT regulations, rather than through the asylum provisions at section 208 of the Act, 8 U.S.C. 1158. *See Cardoza-Fonseca*, 480 U.S. at 429, 440–41 & n.25; *Matter of O-F-A-S-*, 27 I&N Dec. at 712; FARRA; 8 CFR 208.16(b), (c), 208.17 through 208.18; 1208.16(b), (c); 1208.17 through 1208.18. This rule’s limitations on asylum, including the ability of immigration judges to prepermit applications, do not violate the United States’ non-refoulement obligations.

At the same time, the changes to statutory withholding of removal and CAT protection do not misalign the rule with the non-refoulement provisions of the 1951 Refugee Convention, the 1967 Protocol, and the CAT. As explained above, the Departments have properly asserted additional standards and clarification for immigration judges to follow when evaluating claims for statutory withholding of removal and protection under the CAT.

#### 6.9. Executive Order 12866 and Costs and Benefits of the Rule; Regulatory Flexibility Act

*Comment:* At least one commenter alleged that the rule creates “serious inconsistencies” with sections 208(a) and 240(b) of the Act, 8 U.S.C. 1158(a), 1229a(b), and the Constitution; as a result, commenters stated, the rule constitutes a “significant regulatory action” under Executive



Order 12866 and the Departments must comply with the order's analysis requirements, specifically sections 6(a)(3)(B) and (C).

Multiple organizations claimed that the costs and benefits section of the rule fails to address the cost to the "reputation" of the United States, as well as the cost of losing the "talent, diversity, and innovation" brought by asylees.

Another organization emphasized that it is difficult to evaluate whether the Departments' "multiple overlapping proposals to amend the same asylum provisions" comply with Executive Order 12866's mandate that "[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies." Citing *CSX Transportation, Inc. v. Surface Transportation Board*, 754 F.3d 1056, 1065–66 (D.C. Cir. 2014), the organization claimed it would be "arbitrary and capricious" for the Departments to account for costs and benefits in favor of this proposal that are identical to the costs and benefits "already priced into the other revisions of the same provision."<sup>85</sup> The organization contended that there is no indication in the rule that the Departments have attempted to identify such overlap.

Commenters disagreed with the Department's assertion, pursuant to the Regulatory Flexibility Act ("RFA") requirements, that the rule would "not have a significant economic impact on a substantial number of small entities" and that the rule only regulates individuals and not small entities. 85 FR at 36288–89. For example, commenters argued that the combined effect of the rule's provisions would, inter alia, affect how practitioners accept cases, manage dockets, or assess fees. Commenters asserted that these effects would, in turn, impact the overall ability of practitioners to provide services and affect aliens' access to representation. In addition, commenters stated that these changes demonstrate the rule would in fact regulate small entities, namely the law firms or other organizations who appear before the Departments.

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<sup>85</sup> The Departments note that reliance on *CSX Transportation* is misplaced because that case involved the agency's consideration of costs to determine a maximum relief penalty amount and was not related to the consideration of costs in the context of an agency's required cost-benefit analysis.

*Response:* The Departments agree with commenters that the rule is a “significant regulatory action.” As stated in the proposed rule at section V.D, the rule was considered a “significant regulatory action.” 85 FR at 36289. As a result, the rule was submitted to the Office of Management and Budget for review, and the Departments included the required analysis of the rule’s costs and benefits. *Id.* at 36289–90.

Regarding commenters’ concerns that the analysis failed to consider intangible costs like alleged costs to the United States’ reputation or the lost “talent, diversity, and innovation” from asylees, the Departments note that such alleged costs are, in fact, the nonquantifiable opinions of the commenters. The Departments are not required to analyze opinions. Even if commenters’ opinions about intangible concepts without clear definitions could be translated into measurable or qualitatively discrete considerations the Departments are unaware of any standard or metric to evaluate the cost of concepts such a country’s reputation or “innovation.” Moreover, the fact-specific nature of asylum applications and the lack of granular data on the facts of every asylum application prevent the Departments from quantifying particular costs. Further, although Executive Order 12866 observes that nonquantifiable costs are important to consider, the order requires their consideration only to the extent that they can be usefully estimated, and the Departments properly assessed the rules using appropriate qualitative considerations. *See* 85 FR at 36289–90.

As stated above in Section II.C.6.9 of this preamble, each of the Departments’ regulations stands on its own. This regulation is not “inconsistent, incompatible, or duplicative” with other proposed or final rules published by the Departments, and the Departments disagree with the implication that all rules that would affect one underlying area of the Act, such as asylum eligibility, must be issued in one single rulemaking to comply with Executive Order 12866. *Cf. Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 410 (D.C. Cir. 2013) (agencies have discretion to address an issue through different rulemakings over time).

As noted in the NPRM, the Departments believe that the rule will provide a significant net benefit by allowing for the expeditious and efficient resolution of asylum cases by reducing the number of meritless claims before the immigration courts, thereby providing the Departments with “the ability to more promptly grant relief or protection to qualifying aliens.” 85 FR at 36290. These benefits will ensure that the Departments’ case volumes do not increase to an insurmountable degree, which in turn will leave additional resources available for a greater number of asylum seekers. Contrary to commenters’ claims, the rule will not prevent aliens from submitting asylum applications or receiving relief or protection in appropriate cases. Moreover, the rule is not imposing any new costs on asylum seekers. Additionally, any costs imposed on attorneys or representatives for asylum seekers will be minimal and limited to the time it will take to become familiar with the rule. Immigration practitioners are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and are already accustomed to changes in asylum law based on the issuance of new precedential decisions from the BIA or the courts of appeals.

Also, although becoming familiar with such a decision or with this rule may require a certain, albeit small, amount of time, any time spent on this process will likely be offset by the future benefits of the rule. Indeed, one purpose of the rule is to encourage clearer and more efficient adjudications, *see e.g.*, 85 FR at 36290, thus reducing the need for practitioners to become familiar with the inefficient, case-by-case approach that is currently employed for adjudicating issues such as firm resettlement. In addition, the Departments note that the prospective application of the rule will further diminish the effect of the rule on practitioners, as no practitioners will be required to reevaluate any cases or arguments that they are currently pursuing.

The Departments also reject the assertion that the rule would have a significant impact on small entities. The rule applies to asylum applicants, who are individuals, not entities. *See* 5 U.S.C. 601(6). The rule does not limit in any way the ability of practitioners to accept cases,

manage dockets, or assess fees. Indeed, nothing in the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Departments are unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of "small entities" to which the rule "will apply"). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985) ("[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter."); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.' . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." (citing *Mid-Tex*, 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) ("The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA

analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.”).

Further, DOJ reached a similar conclusion in 1997 involving a broader rulemaking regarding asylum adjudications. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it “affects only Federal government operations” by revising the procedures for the “examination, detention, and removal of aliens”). That conclusion was reiterated in the interim rule, 62 FR 10312, 10328 (Mar. 6, 1997), which was adopted with no noted challenge or dispute. This final rule is similar, in that it, too, affects only the operations of the Federal government by amending a subset of the procedures the government uses to process certain aliens. The Departments thus believe that the experience of implementing the prior rule supports their conclusion that there is no evidence that the current rule will have a significant impact on small entities as contemplated by the RFA or an applicable executive order.

#### 6.10. Trafficking Victims Protection Reauthorization Act

*Comment:* Commenters argued that the proposed rule violates the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), Pub. L. 110–457, 122 Stat. 5044, by failing to consider its impact on applications for relief submitted by UAC. Specifically, commenters cited the TVPRA’s instruction that “[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.” 8 U.S.C. 1232(d)(8). Commenters averred that the rule fails to consider how UAC are subjected to and affected by persecution and other harm as well as the particular vulnerabilities of UAC.

Moreover, commenters argued that the proposed rule violates both the text and the spirit of the TVPRA by creating additional hurdles that increase the risk that UAC will be unable to meaningfully participate in the adjudication of their claims for relief. Specifically, commenters averred that it was unlikely that Congress would have provided protections to UAC from the bars to asylum related to the one-year filing deadline and the safe third country, only to then allow immigration judges to prepermit applications for asylum without a hearing.

One organizational commenter criticized the proposed rule's lack of "meaningful discussion" regarding how the new procedures would interact with USCIS's initial jurisdiction over applications for asylum from UAC. Commenters also stated that the proposed rule may result in confusion if an immigration judge exercises jurisdiction over a UAC's application that is pending before USCIS. If this were to occur, commenters alleged, the UAC may be required to submit two applications for asylum and also be required to demonstrate an exception to the one-year filing deadline that would not have been applicable to the application before USCIS.

Commenters also asserted that the new discretionary factor regarding accrual of one year or more of unlawful presence would act as a bar to asylum in direct contradiction of Congress's recognition of the need to exempt UACs from the one-year filing deadline. Although commenters acknowledged that this is a discretionary factor and not an outright bar, commenters asserted that even including this as a discretionary factor is contrary to Congress's intent.

Commenters stated that, based on the proposed regulatory language and accompanying preamble language, it is unclear whether asylum officers would be permitted to render a determination that an asylum application is frivolous for UAC who file defensive applications before USCIS in the first instance. By permitting the asylum officer to focus on matters that may be frivolous if the asylum officer identifies indicators of frivolousness, commenters asserted, the interview would become adversarial, in contradiction of Congress's purpose of granting UAC the non-adversarial, child-appropriate setting of an asylum interview for initial review of the asylum application.

*Response:* As recognized in the proposed rule, UAC<sup>86</sup> are not subjected to expedited removal. *See* 8 U.S.C. 1232(a)(5)(D)(i). Regarding the remainder of the rule, the rule does not violate the TVPRA. The TVPRA enacted multiple procedures and protections specific to UAC that do not apply to other similarly-situated asylum applicants. Although UAC are not subject to either the safe third country exception or the requirement to file an application within one year following the alien's arrival in the United States, INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E), Congress did not exempt UAC from all bars to asylum eligibility. As a result, UAC, like all asylum seekers, (1) may not apply for asylum if they previously applied for asylum and their application was denied, INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C), and (2) are ineligible for asylum if they are subject to any of the mandatory bars at section 208(b)(2)(A)(i)–(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(i)–(vi), or if they are subject to any additional bars implemented pursuant to the Attorney General's and Secretary's authority to establish additional limitations on asylum eligibility by regulation, *see* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). That Congress did not exempt UAC from all bars indicates congressional intent to hold UAC to the same standards to establish eligibility for asylum as other similarly situated applicants unless specifically exempted.

Contrary to commenters' suggestion, this rule does not alter asylum officers' jurisdiction over asylum applications from UAC. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). If UAC are placed in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, and raise asylum claims, immigration judges will continue to refer the claims to asylum officers pursuant to the TVPRA, consistent with the asylum statute and procedures in place prior to the promulgation of this rule. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). Those asylum officers will determine whether the UAC are eligible for asylum on the basis of this rule. This rule does not affect any other procedure or protection implemented by the TVPRA.

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<sup>86</sup> UAC are children who (1) have no lawful immigration status in the United States, (2) are under the age of 18, and (3) do not have a parent or legal guardian in the United States or, if in the United States, available to provide care and physical custody. 6 U.S.C. 279(g)(2).

The Departments disagree that the rule undermines the spirit of the TVPRA by adding accrual of unlawful presence for one year or more as a negative discretionary factor. Although the NPRM may have been unclear on the point, its citation to INA 212(a)(9)(B) and (C), 8 U.S.C. 1182(a)(9)(B) and (C), 85 FR at 36284, indicated that its intent was for the phrase “unlawful presence” to have the same meaning as in INA 212(a)(9)(B)(ii) and (iii), 8 U.S.C. 1182(a)(9)(B)(ii) and (iii). Under INA 212(a)(9)(B)(iii)(I), 8 U.S.C. 1182(a)(9)(B)(iii)(I), aliens under the age of 18, such as UAC, do not accrue unlawful presence. Thus, commenters’ concerns are unfounded, and the Departments are clarifying that point in the final rule.

Further, the Departments have concluded that the safeguards in place for allowing asylum officers to make a finding that an asylum application is frivolous are sufficient to protect UAC in the application process.<sup>87</sup> Even if an asylum officer finds an application is frivolous, the application is referred to an immigration judge, who provides review of the determination. The asylum officer’s determination does not render the applicant permanently ineligible for immigration benefits unless the immigration judge or the BIA also makes a finding of frivolousness. 8 CFR 208.20(b), 1208.20(b). Further, asylum officers continue to conduct child appropriate interviews by taking into account age, stage of language development, background, and level of sophistication. *See* USCIS, Interviewing Procedures for Minor Applicants (Aug. 6, 2020), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves>.

Finally, the Departments note that, for UAC who are not eligible for asylum under this rule but who may still be eligible for withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the CAT regulations, DOJ is cognizant of the “special circumstances” often presented by juvenile respondents in immigration proceedings. DOJ’s immigration judges may make certain modifications to ordinary courtroom proceedings to

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<sup>87</sup> As a practical matter, the Departments note that the statutory mens rea requirement that a frivolous asylum application be “knowingly” filed will likely preclude a frivolousness finding against very young UAC.



account for juvenile respondents that would not be made for adult respondents. *See* EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children 4–6 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>; *see also id.* at 7 (directing immigration judges to take “special care” in cases involving UAC by, for example, expediting the consideration of requests for voluntary departure).

In short, the Departments have fully considered whether the rule will have any particular impacts on UAC that are not already accounted for in existing law or are not addressed in the rule itself. The Departments have also fully considered commenters’ concerns. Thus, for the reasons given above, the Departments believe that the rule does not have an unlawful impact on minors in general or on UAC in particular.

#### 7. Retroactive Applicability

*Comment:* One organization stated generally that nearly all of the NPRM’s provisions are illegally retroactive in effect. Multiple commenters noted that, although the NPRM seeks to make its frivolous definition prospective only in application, *see* 85 FR at 36304, it is silent as to whether its other provisions would apply retroactively. As a result, one organization claimed, the inference is that the Departments intend each of the NPRM’s remaining provisions to apply to applications that are pending at the time the rule becomes effective. The organization alleged that this would violate the presumption against retroactivity, noting that a regulation cannot be applied retroactively unless Congress has provided a clear statement that the agencies may promulgate regulations with that effect. *See INS v. St. Cyr*, 533 U.S. 289, 316–17 (2001). The organization also claimed there is no statute authorizing the Departments to promulgate regulatory changes to asylum that have retroactive effect, contending the provisions of the NPRM would either impair rights concerning, or place new disabilities on, asylum applications already filed. The organization alleged that the proposed changes in the NPRM would harm asylum seekers.

At least one organization claimed that the NPRM's substantive standards would have an impermissible retroactive effect on pending applications. One organization alleged that each standard, including the list of bars to the favorable exercise of discretion, would overrule BIA precedent, attempt to overrule Federal appellate court precedent, shift burdens of proof, or otherwise change settled law. Another organization noted that there are currently more than 300,000 asylum cases pending before the asylum office and almost 1.2 million cases pending before the U.S. immigration courts, many of which include asylum applications. The organization argued that, if the rule is finalized, the Departments "must clarify" that its provisions will not be applied retroactively.

One commenter claimed that if the rule is enacted with the retroactive provisions intact, it will immediately be enjoined.

At least one commenter expressed concern that, if the NPRM is applied retroactively, there will be "mass denials which violate due process," and the Departments will be "tied up in Federal court for the next decade." At least one commenter contended that Congress will cease to fund the Departments because it will recognize that the money will be used to fund the attorney fees of litigants pursuant to the Equal Access to Justice Act "after countless litigants prevail in their suits against [the Departments]."

At least one commenter claimed that, because the Supreme Court is currently attempting to "reign in the administrative state" and Congress is "fed up" with agency waste, the Departments are "signing their own death warrants" by seeking to enact the proposed rule. At least one commenter suggested the Departments' goal is to "[s]hut down legal immigration by convincing Congress to defund the only agencies capable of adjudicating immigration petitions," suggesting this is "treasonous" and claiming that those who want to end legal immigration are in the extreme minority. At least one commenter emphasized that legal immigration is beneficial to the national economy but suggested this does not matter if those who care "are not in a position to stop the train before it drives off a cliff."

At least one organization claimed that the hundreds of thousands of pending asylum applications implicate a reliance interest in “the state of the law as it stands.” At least one organization alleged that this reliance interest is “further prejudiced” by the 30-day comment period allowed by the Departments, contending that “in one swoop, previously eligible applicants may find themselves ineligible without any warning.”

Another organization expressed particular concern for LGBTQ applicants, claiming that applying the rule’s standards to over 800,000 pending applications violates Fifth Amendment due process rights that apply “equally to all people in the United States.” One organization emphasized that the rule would apply to individuals, many of whom have U.S.-born children, who have already applied for asylum and are waiting on a hearing or interview.

*Response:* Although the Departments believe that substantial portions of the rule are most appropriately classified as a clarification of existing law rather than an alteration of prior substantive law, *see Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506 (3d Cir. 2008) (“Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.” (emphasis in original)), they nevertheless recognize that the potential retroactivity of the rule was not clear in the NPRM. Accordingly, to the extent that the rule changes any existing law, the Departments are electing to make the rule prospective to apply to all asylum applications—including applications for statutory withholding of removal and protection under the CAT regulations—filed on or after its effective date and, for purposes of the changes to the credible fear and related screening procedures, and reasonable fear review procedures, to all aliens apprehended or otherwise encountered by DHS on or after

the effective date.<sup>88</sup> Nevertheless, to the extent that the rule merely codifies existing law or authority, nothing in the rule precludes adjudicators from applying that existing authority to pending cases independently of the prospective application of the rule.<sup>89</sup>

The Departments decline to respond to commenters' assertions about potential implications that the rule's application to pending cases may have, such as "mass denials" of asylum applications and impact on future appropriations, as such comments are both unmoored from a reasonable basis in fact and wholly speculative due to the case-by-case and fact-intensive nature of many asylum-application adjudications. Further, as noted, the Departments are applying the rule prospectively, so the underlying factual premise of the commenters' concern is erroneous.

## 8. Miscellaneous/Other Points

### 8.1. Likelihood of Litigation

*Comment:* Commenters opposed the rule because it would "create a flurry of litigation" causing "fundamental aspects of immigration law [to] remain uncertain for many years."

*Response:* The Departments recognize that litigation, including the potential for an initial nationwide injunction, has become almost inevitable regarding any immigration policy or regulation that does not provide a perceived benefit to aliens, and they are aware that litigation

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<sup>88</sup> In addition to serving as a bar to refugee admission and the granting of asylum, the concept of firm resettlement also operates as a bar to the adjustment of status of an asylee. INA 209(b)(4), 8 U.S.C. 1159(b)(4); 8 CFR 209.2(a)(1)(iv) and 1209.2(a)(1)(iv). Consistent with the prospective nature of the rule, the Departments will apply the new regulatory definitions of "firm resettlement" in 8 CFR 208.15 and 1208.15 for purposes of INA 209(b)(4), 8 U.S.C. 1159(b)(4), only to aliens who apply for asylum, are granted asylum, and then subsequently apply for adjustment of status, where all of these events occur on or after the effective date of this rule.

<sup>89</sup> For example, the rule states that the Secretary or Attorney General, subject to an exception, will not favorably exercise discretion in adjudicating an asylum application for an alien who has failed to satisfy certain tax obligations. 8 CFR 208.13(d)(2)(i)(E) and 1208.13(d)(2)(i)(E). That provision applies only to asylum applications filed on or after the effective date of the rule. However, the rule does not preclude the consideration of unfulfilled tax obligations as a discretionary consideration in adjudicating a pending asylum application based on established case law that may be applied to pending applications. *See, e.g., Matter of A-H-*, 23 I&N Dec. at 782–83 ("Moreover, certain additional factors weigh against asylum for respondent: Specifically, respondent testified that he received money from overseas for his political work, yet he never filed income tax returns in the United States and his children nevertheless received financial assistance from the Commonwealth of Virginia. Respondent's apparent tax violations and his abuse of a system designed to provide relief to the needy exhibit both a disrespect for the rule of law and a willingness to gain advantage at the expense of those who are more deserving." (footnote omitted)). In short, existing law will continue to apply to asylum applications filed prior to the effective date of this rule, regardless of whether that law is altered or incorporated into the rule.

will likely follow this rule, just as it has others of similar scope. *Cf. DHS v. New York*, 140 S. Ct. 599, 599 (2020) (Gorsuch, J. concurring in the grant of a stay) (“On October 10, 2018, the Department of Homeland Security began a rulemaking process to define the term ‘public charge,’ as it is used in the Nation’s immigration laws. Approximately 10 months and 266,000 comments later, the agency issued a final rule. Litigation swiftly followed, with a number of States, organizations, and individual plaintiffs variously alleging that the new definition violates the Constitution, the Administrative Procedure Act, and the immigration laws themselves. These plaintiffs have urged courts to enjoin the rule’s enforcement not only as it applies to them, or even to some definable group having something to do with their claimed injury, but as it applies to *anyone*.”). The Departments are also aware of the pernicious effects of nationwide injunctions. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J. concurring) (“Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called ‘universal’ or ‘nationwide’ injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the Federal court system—preventing legal questions from percolating through the Federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.” (footnote omitted)). The Departments do not believe, however, that the inevitability of litigation over contested issues is a sufficient basis to stop them from exercising statutory and regulatory prerogatives in furtherance of the law and the policies of the Executive Branch. Accordingly, the Departments decline the invitation to withdraw the rule due to the threat of litigation.

## 8.2. DHS Officials

*Comment:* Commenters also argued that the proposed rule is procedurally invalid due to concerns with the authority of multiple DHS officials. Commenters stated that the rule is invalid because of the service of Ken Cuccinelli at USCIS. For example, commenters cited *L.M.-M. v.*

*Cuccinelli*, 442 F. Supp. 3d 1 (D.D.C. 2020), in support of the argument that “Mr. Cuccinelli’s unlawful appointment invalidates any regulations that might be put into effect, implemented, or adopted during his tenure at USCIS.” Commenters further noted that Mr. Cuccinelli began serving as the head of USCIS over one year ago, on June 10, 2019, despite the 210-day limitation for temporary appointments to senate-confirmed positions implemented by the Federal Vacancies Reform Act of 1998 (“FVRA”), Pub. L. 105–277, sec. 151, 112 Stat. 2681, 2681–612 through 2618–13 (codified at 5 U.S.C. 3346).

Similarly, commenters stated that Acting Secretary Chad Wolf and Chad Mizelle, the Senior Official Performing the Duties of the General Counsel, both are serving in violation of the FVRA and, accordingly, both lack signature authority that has force or effect. *See* 5 U.S.C. 3348(d)(1).

*Response:* Neither the NPRM nor this final rule was signed by Mr. Cuccinelli. Thus, the status of Mr. Cuccinelli’s service within the Department is immaterial to the lawfulness of this rule. The NPRM and this final rule were signed by Chad Mizelle, the Senior Official Performing the Duties of the General Counsel for DHS, and not by Ken Cuccinelli. As indicated in the proposed rule at Section V.H, Chad Wolf, the Acting Secretary of Homeland Security, reviewed and approved the proposed rule and delegated the signature authority to Mr. Mizelle.

Secretary Wolf is validly acting as Secretary of Homeland Security. On April 9, 2019, then-Secretary Nielsen, who was Senate confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security. This change to the order of succession applied to any vacancy. This exercise of the authority to establish an order of succession for DHS pursuant to 6 U.S.C. 113(g)(2) superseded the FVRA and the order of succession found in Executive Order 13753, 81 FR 90667 (Dec. 9, 2016). As a result of this change, and pursuant to 6 U.S.C. 113(g)(2), Kevin K. McAleenan, who was Senate-confirmed as the Commissioner of CBP, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan subsequently amended the

Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession, below the positions of the Deputy Secretary and Under Secretary for Management. Because the Deputy Secretary and Under Secretary for Management positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

Further, because he has been serving as the Acting Secretary pursuant to an order of succession established under 6 U.S.C. 113(g)(2), the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and Mr. Wolf remains the Acting Secretary notwithstanding President Trump's September 10 transmission to the Senate of Mr. Wolf's nomination to serve as DHS Secretary. *Compare* 6 U.S.C. 113(a)(1)(A) (cross-referencing the FVRA without the "notwithstanding" caveat), *with id.* 113(g)(1)–(2) (noting the FVRA provisions and specifying, in contrast, that section 113(g) provides for acting secretary service "notwithstanding" those provisions); *see also* 5 U.S.C. 3345(b)(1)(B) (restricting acting officer service under section 3345(a), in particular, by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges to whether Mr. Wolf's service is invalid, resting on the erroneous contentions that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. The Departments believe those challenges are not based on an accurate view of the law. But even if those contentions are legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan issued a valid order of succession under 6 U.S.C. 113(g)(2)—then the FVRA would have applied, and Executive Order 13753 would have governed the order of succession for the Secretary of Homeland Security from the date of Nielsen's resignation.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the

authority of the FVRA, Mr. Wolf would have been ineligible to serve as the Acting Secretary of DHS after his nomination was submitted to the Senate, *see* 5 U.S.C. 3345(b)(1)(B), and Peter Gaynor, the Administrator of the Federal Emergency Management Agency (“FEMA”), would have—by operation of Executive Order 13753—become eligible to exercise the functions and duties of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President’s succession order for DHS when the FVRA applies. Mr. Gaynor would have been the most senior official eligible to exercise the functions and duties of the Secretary under that succession order, and thus would have become the official eligible to act as Secretary once Mr. Wolf’s nomination was submitted to the Senate. *See* 5 U.S.C. 3346(a)(2). Then, in this alternate scenario in which, as assumed above, there was no valid succession order under 6 U.S.C. 113(g)(2), the submission of Mr. Wolf’s nomination to the Senate would have restarted the FVRA’s time limits. *See* 5 U.S.C. 3346(a)(2).

Out of an abundance of caution, and to minimize any disruption to DHS and to the Administration’s goal of maintaining homeland security, on November 14, 2020, with Mr. Wolf’s nomination still pending in the Senate, Mr. Gaynor exercised the authority of Acting Secretary that he would have had (in the absence of any governing succession order under 6 U.S.C. 113(g)(2)) to designate a new order of succession under 6 U.S.C. 113(g)(2) (the “Gaynor Order”).<sup>90</sup> In particular, Mr. Gaynor issued an order of succession with the same ordering of positions listed in former Acting Secretary McAleenan’s November 2019 order. The Gaynor Order thus placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded

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<sup>90</sup> Mr. Gaynor signed an order that established an identical order of succession on September 10, 2020, the day Mr. Wolf’s nomination was submitted, but it appears he signed that order before the nomination was received by the Senate. To resolve any concern that his September 10 order was ineffective, Mr. Gaynor signed a new order on November 14, 2020. Prior to Mr. Gaynor’s new order, the U.S. District Court for the District of New York issued an opinion concluding that Mr. Gaynor did not have authority to act as Secretary, relying in part on the fact that DHS did not notify Congress of Administrator Gaynor’s service, as required under 5 U.S.C. § 3349(a). *See Batalla Vidal v. Wolf*, No. 16CV4756NGGVMS, 2020 WL 6695076, at \*9 (E.D.N.Y. Nov. 14, 2020). The Departments disagree that the FVRA’s notice requirement affects the validity of an acting officer’s service; nowhere does section 3349 indicate that agency reporting obligations are tied to an acting officer’s ability to serve.



any authority Mr. Gaynor may have had under the FVRA and confirmed Mr. Wolf’s authority to continue to serve as the Acting Secretary. Hence, regardless of whether Mr. Wolf already possessed authority pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan (as the Departments have previously concluded), the Gaynor Order provides an alternative basis for concluding that Mr. Wolf currently serves as the Acting Secretary.<sup>91</sup>

On November 16, 2020, Acting Secretary Wolf ratified any and all actions involving delegable duties that he took between November 13, 2019, through November 16 2020, including the NPRM that is the subject of this rulemaking.

Under section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1), the Secretary is charged with the administration and enforcement of the INA and all other immigration laws (except for the powers, functions, and duties of the President, the Attorney General, and certain consular, diplomatic, and Department of State officials). The Secretary is also authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary. *See* INA 103, 8 U.S.C. 1103, and 6 U.S.C. 113(g)(2). The HSA further provides that every officer of the Department “shall perform the functions specified by law for the official’s office or prescribed by the Secretary.” 6 U.S.C. 113(f). Thus, the designation of the signature authority from Acting Secretary Wolf to Mr. Mizelle is validly within the Acting Secretary’s authority.

### 8.3. Article I Immigration Courts

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<sup>91</sup> On October 9, 2020, the U.S. District Court for the District of Columbia issued an opinion indicating that it is likely that section 113(g)(2) orders can be issued by only Senate-confirmed secretaries of DHS and, thus, that Mr. Gaynor likely had no authority to issue a section 113(g)(2) succession order. *See Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs.*, No. CV 19-3283 (RDM), 2020 WL 5995206, at \*24 (D.D.C. Oct. 8, 2020). This decision is incorrect because the authority in section 113(g)(2) allows “the Secretary” to designate an order of succession, *see* 6 U.S.C. 113(g)(2), and an “acting officer is vested with the same authority that could be exercised by the officer for whom he acts.” *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019). The Acting Secretary of DHS is accordingly empowered to exercise the authority of “the Secretary” of DHS to “designate [an] order of succession.” 6 U.S.C. 113(g)(2). In addition, this is the only district court opinion to have reached such a conclusion about the authority of the Acting Secretary, and the Departments are contesting that determination.

*Comment:* At least one commenter, the former union representing immigration judges, expressed a belief that the immigration courts and the BIA should be moved from within DOJ in the Executive Branch into an independent article I court system.<sup>92</sup> The commenter indicated that such a move would address “political influence” and ensure “neutral decision making.”

*Response:* Immigration judges are required to adjudicate cases in an “impartial manner,” 8 CFR 1003.10(b); they exercise “independent judgment and discretion,” *id.*; and they “should not be swayed by partisan interests or public clamor,” EOIR, *Ethics and Professionalism Guide for Immigration Judges*, sec. VIII (Jan. 26, 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>. To the extent that a union which represented immigration judges suggests that the members of its former bargaining unit do not engage in “neutral decision making” or are currently swayed by partisan influence in derogation of their ethical obligations, the Departments respectfully disagree, and note that the issue is one to be resolved between the former union and the members of its former bargaining unit, rather than through a rulemaking. The Departments are also unaware of any complaints filed by the former union regarding any specific immigration judges who have failed to engage in neutral decision making. In short, the commenter’s premise is unfounded in either fact or law.

Otherwise, the recommendation is both beyond the scope of this rulemaking and the Departments’ authority. Congress has the sole authority to create an article I court. *E.g.* 26 U.S.C 7441 (“There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”). Despite this authority, Congress has provided for a system of administrative hearings for immigration cases, *see, e.g.*, INA 240, 8 U.S.C. 1229a (laying out administrative procedures for removal proceedings), which the

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<sup>92</sup> On November 2, 2020, the Federal Labor Relations Authority ruled that immigration judges are management officials for purposes of 5 U.S.C. 7103(a)(11), and, thus, excluded from a bargaining unit pursuant to 5 U.S.C. 7112(b)(1). *U.S. Dept. of Justice, Exec. Office for Immigration Review and National Association of Immigration Judges, Int’l Fed. of Prof. and Tech. Engineers Judicial Council 2*, 71 FLRA No. 207 (2020). That decision effectively decertified the union that previously represented a bargaining unit of non-supervisory immigration judges.

Departments believe should be maintained. *Cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary*, 115th Cong. (2018) (written response to Questions for the Record of James McHenry, Director, EOIR) (“The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further.”).

#### 9. Severability

*Comment:* Some commenters disagreed with the Departments’ inclusion of severability provisions in the rule. *See* 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). For example, at least one commenter stated that the severability provisions conflict with the premise that all the provisions in the rule are related. Another commenter disagreed with the severability provisions, stating that the rule should instead be struck in its entirety.

*Response:* The changes made by the rule function sensibly independent of the other provisions. As a result, the Departments included severability language for each affected part of title 8 CFR. 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). In other words, the Departments included these severability provisions to clearly illustrate the Departments’ belief that the severance of any affected sections “will not impair the function of the statute as a whole” and that the Departments would have enacted the remaining regulatory provisions even without any others. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) (discussing whether an agency’s regulatory provision is severable). The Departments disagree that this severability analysis is impacted by the interrelatedness of either the provisions of this rule or the affected parts more generally. Indeed, it is reasonable for agencies, when practical, to make multiple related changes in a single rulemaking in order to best inform the public and facilitate notice and comment.

### **III. Regulatory Requirements**

#### *A. Administrative Procedure Act*

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

*B. Regulatory Flexibility Act*

The Departments have reviewed this regulation in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. 601 *et seq.*, and, as explained more fully above, have determined that this rule will not have a significant economic impact on a substantial number of small entities, *see* 5 U.S.C. 605(b). This regulation affects only individual aliens and the Federal government. Individuals do not constitute small entities under the Regulatory Flexibility Act. *See* 5 U.S.C. 601(6).

*C. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*D. Congressional Review Act*

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

*E. Executive Orders 12866, 13563, and 13771*

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits; reducing costs; harmonizing rules; and promoting flexibility.

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

Immigration judges and asylum officers are already trained to consider all relevant legal issues in assessing a credible fear claim or asylum application, and the final rule does not implement any changes that would make adjudications more challenging than those that are already conducted. For example, immigration judges already consider issues of persecution, nexus, particular social group, frivolousness, firm resettlement, and discretion in assessing the merit of an asylum application, and the provision of clearer standards for considering those issues in this rule does not add any operational burden or increase the level of operational

analysis required for adjudication. Accordingly, the Departments do not expect the changes to increase the adjudication time for immigration court proceedings involving asylum applications or for reviews of negative fear determinations.

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

The Departments are implementing changes that may affect any alien subject to expedited removal who makes a fear claim and any alien who applies for asylum, statutory withholding of removal, or protection under the CAT regulations. The Departments note that these changes are likely to result in fewer asylum grants annually due to clarifications regarding the significance of discretionary considerations and changes to the definition of "firm resettlement." However, because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. As of September 30, 2020, EOIR had 589,276 cases pending with an asylum application. EOIR, *Workload and Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. In FY 2019, at the immigration court level, EOIR granted 18,816 asylum applications and denied 45,285 asylum applications. *See* 85 FR at 36289. An additional 27,112 asylum applications were abandoned, withdrawn, or otherwise not adjudicated. *Id.* As of January 1, 2020, USCIS had 338,931 applications for asylum and for withholding of removal pending. *Id.* at 36289 & n.44. In FY 2019, USCIS received 96,861 asylum applications, and approved 19,945 such applications. *Id.* at 36289 & n.45.

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

An alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of the CAT. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 208.17 through 208.18, 1208.16, and 1208.17 through 1208.18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule). To the extent there are any direct impacts of this rule, they would almost exclusively fall on that population. Further, the full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity.

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

*F. Executive Order 12988: Criminal Justice Reform*

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*G. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, 44 U.S.C 3501--3512, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The changes made in this final rule required DHS to revise USCIS Form I-589, Application for Asylum and for Withholding of Removal, OMB Control Number 1615-0067. DOJ and DHS invited public comments on the impact to the proposed collection of information for 60 days. *See* 85 FR at 36290.

DOJ and DHS received multiple comments on the information collection impacts of the proposed rule. Commenters expressed concern that the proposed revisions significantly increase the time and cost burdens for aliens seeking protection from persecution and torture, as well as adding to the burden of immigration lawyers, asylum officers, advocacy organizations, and immigration judges. DHS and DOJ have summarized all of the comments related to information collection and have provided responses in a document titled "Form I-589 Public Comments and Response Matrix," which is posted in the rulemaking docket EOIR-2020-0003 at <https://www.regulations.gov/>. As a result of the public comments, DHS has increased the burden estimate for the Form I-589 and has updated the supporting statement submitted to OMB accordingly. The supporting statement can be found at <https://www.reginfo.gov/>. The updated abstract is as follows:

*USCIS FORM I-589*

OVERVIEW OF INFORMATION COLLECTION

(1) Type of Information Collection: Revision of a Currently Approved Collection.



(2) Title of the Form/Collection: Application for Asylum and for Withholding of Removal.

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

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

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-589 is approximately 114,000, and the estimated hourly burden per response is 18.5<sup>93</sup> hours. The estimated number of respondents providing biometrics is 110,000, and the estimated hourly burden per response is 1.17 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual burden associated with this collection of information in hours is 2,237,700.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$70,406,400.<sup>94</sup>

#### *H. Signature*

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad

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<sup>93</sup> This estimate is higher than the estimate provided in the NPRM because USCIS reevaluated its projections and determined that the hourly burden per response was likely to be higher than USCIS had initially estimated, which also increased the total estimated public burden (in hours).

<sup>94</sup> This estimate is higher than the estimate provided in the NPRM because USCIS reevaluated its projections in response to public comments suggesting that the monetary cost was likely to be higher than USCIS had initially estimated.

R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the *Federal Register*.

## **List of Subjects**

### **8 CFR Part 208**

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

### **8 CFR Part 235**

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

### **8 CFR Part 1003**

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

### **8 CFR Part 1208**

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

### **8 CFR Part 1235**

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

### **8 CFR Part 1244**

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

## **DEPARTMENT OF HOMELAND SECURITY**

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 208 and 235 are amended as follows:

### **PART 208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

1. The authority citation for part 208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229; 8 CFR part 2.

2. Amend § 208.1 by adding paragraphs (c) through (g) to read as follows:

**§ 208.1 General.**

\* \* \* \* \*

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a

basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.

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

(e) *Persecution.* For purposes of screening or adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section

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

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

- (1) Interpersonal animus or retribution;
- (2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;
- (3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a

discrete cause against such organizations related to control of a State or expressive behavior that is antithetical to the State or a legal unit of the State;

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

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

(6) Criminal activity;

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

(8) Gender.

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application, provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

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

**§ 208.2 Jurisdiction.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

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

**§ 208.5 Special duties toward aliens in custody of DHS.**

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

\* \* \* \* \*

5. Amend § 208.6 by revising paragraphs (a) and (b) and adding paragraphs (d) and (e) to read as follows:

**§ 208.6 Disclosure to third parties.**

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture’s implementing legislation, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Secretary.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture’s implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate

with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

\* \* \* \* \*

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

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

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

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

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

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, information supporting that application, information



regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

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

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

6. Amend § 208.13 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) and (d) to read as follows:

**§ 208.13 Establishing asylum eligibility.**

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

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

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

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

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

(2) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

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

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

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

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

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

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

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

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

7. Revise § 208.15 to read as follows:

**§ 208.15 Definition of “firm resettlement.”**

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

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

8. Amend § 208.16 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) to read as follows:

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

**§ 208.18 Implementation of the Convention Against Torture.**

(a) \* \* \*

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

\* \* \* \* \*

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



torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

\* \* \* \* \*

10. Revise § 208.20 to read as follows:

**§ 208.20 Determining if an asylum application is frivolous.**

(a) For applications filed on or after April 1, 1997, and before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and 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.

(2) Paragraphs (b) through (f) of this section shall only apply to applications filed on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(b) For applications filed on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For any application referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently

ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph 1208.20(c).

(c) For applications filed on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an asylum application is frivolous if it:

(1) Contains a fabricated material element;

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

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

(4) Is clearly foreclosed by applicable law.

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

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

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

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

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

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

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

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

11. Add § 208.25 to read as follows:

## **§ 208.25 Severability.**

The provisions of part 208 are separate and severable from one another. In the event that any provision in part 208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

12. Amend § 208.30 by:

a. Revising the section heading; and

b. Revising paragraphs (a), (b), (c), (d) introductory text, (d)(1) and (2), (d)(5) and (6), (e) introductory text, (e)(1) through (5), (e)(6) introductory text, (e)(6)(ii), (e)(6)(iii) introductory text, (e)(6)(iv), the first sentence of paragraph (e)(7) introductory text, and paragraphs (e)(7)(ii), (f), and (g).

The revisions read as follows:

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

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, DHS has exclusive jurisdiction to make the determinations described in this subpart B. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is

ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Process and Authority.* If an alien subject to section 235(a)(2) or 235(b)(1) of the Act indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with this section. An asylum officer shall then screen the alien for a credible fear of persecution, and as necessary, a reasonable possibility of persecution and reasonable possibility of torture. An asylum officer, as defined in section 235(b)(1)(E) of the Act, has the authorities described in 8 CFR 208.9(c) and must conduct an evaluation and make a determination consistent with this section.

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

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

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

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

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

\* \* \* \* \*

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

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

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

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

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

(ii) Such other facts as are known to the officer, including whether the alien could avoid any future harm by relocating to another part of his or her country, if under all the circumstances it would be reasonable to expect the alien to do so; and

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

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

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

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

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

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

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

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

(4) In all cases, the asylum officer will create a written record of his or her determination, including a summary of the material facts as stated by the alien, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. 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 reasonable possibility of persecution or

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.

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

(B) If an alien described in paragraph (e)(5)(i)(A) of this section is able to establish either a reasonable possibility of persecution (including by establishing that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, then the asylum officer will enter a positive reasonable possibility of persecution or torture determination, as applicable. The Department of Homeland Security shall place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture.

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

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

(iii) If the alien is found to be an alien described in 8 CFR 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding of deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).



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

\* \* \* \* \*

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

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

\* \* \* \* \*

(iv) As used in paragraphs (e)(6)(iii)(B), (C), and (D) of this section only, “legal guardian” means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien’s behalf, provided that such an alien is both unmarried and less

than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with that provision, prior to any determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country ("receiving country") that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. \* \* \*

\* \* \* \* \*

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

\* \* \* \* \*

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

(1) DHS shall issue a Notice of Referral to Immigration Judge for asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1).

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

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

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

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

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

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

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

(ii) DHS shall provide the record of any negative fear determinations being reviewed, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based, to the immigration judge with the negative fear determination.

13. Amend § 208.31 by revising paragraphs (f) and (g) to read as follows:

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

\* \* \* \* \*

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

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge

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

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

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

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

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

## **PART 235 – INSPECTION OF PERSONS APPLYING FOR ADMISSION**

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

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

15. Amend § 235.6 by revising paragraphs (a)(1)(ii) and (a)(2)(i) and (iii) and adding paragraph (c) to read as follows:

### **§ 235.6 Referral to immigration judge.**

(a) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

(2) \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

(c) The provisions of part 235 are separate and severable from one another. In the event that any provision in part 235 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

## **DEPARTMENT OF JUSTICE**

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 1003, 1208, 1212, 1235, and 1244 are amended as follows:

### **PART 1003 - EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

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

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

Stat. 1527-29, 1531-32; section 1505 of Public Law 106-554, 114 Stat. 2763A-326 to - 328.

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

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

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

18. Amend § 1003.42 by revising the section heading and paragraphs (a), (b), (d) through (g), (h)(1), and the last sentence in paragraph (h)(3) and adding paragraph (i) to read as follows:

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

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

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

\* \* \* \* \*

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)–(D) and

(b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal, consistent with the criteria in 8 CFR 1208.16(b). The immigration judge shall also make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 1208.16(c), 8 CFR 1208.17, and 8 CFR 1208.18.

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

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

(e) *Timing.* The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum



officer has approved the asylum officer's negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.

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

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

(3) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in 8 CFR 1003.1(f). Such decision by the Attorney General may be designated as precedent as provided in 8 CFR 1003.1(g).

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

(h) \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

(i) *Severability*. The provisions of part 1003 are separate and severable from one another. In the event that any provision in part 1003 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

## **PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

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

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

20. Amend § 1208.1 by adding paragraphs (c) through (g) to read as follows:

### **§ 1208.1 General.**

\* \* \* \* \*

(c) *Particular social group*. For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the claim. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or

present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group was both not a strategic choice and constituted egregious conduct.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a State or a unit thereof. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion

defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the State to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the State or a legal sub-unit of the State. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

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

enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

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

(1) Interpersonal animus or retribution;

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

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

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

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

(6) Criminal activity;

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

(8) Gender.

(g) *Evidence based on stereotypes*. For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application,

provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

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

**§ 1208.2 Jurisdiction.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

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

**§ 1208.5 Special duties toward aliens in custody of DHS.**

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

\* \* \* \* \*

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

**§ 1208.6 Disclosure to third parties.**

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, 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.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

\* \* \* \* \*

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

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws;

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

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

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

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

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

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

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

24. Section 1208.13 is amended by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv), (d), and (e) to read as follows:

**§ 1208.13 Establishing asylum eligibility.**

\* \* \* \* \*

(b) \* \* \*



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

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

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

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Would otherwise be subject to § 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

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

(I) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(2) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

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

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

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

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

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

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

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

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

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

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

#### **§ 1208.14 [Amended]**

25. Amend § 1208.14 by

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

b. Removing the citations “§ 1208.30” and “§ 1208.30(b)” in paragraph (c)(4)(ii)(A) and adding in their place the words “§ 208.30 of chapter I”.

26. Revise § 1208.15 to read as follows:

#### **§ 1208.15 Definition of “firm resettlement.”**

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, or

(ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the

application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

27. Amend § 1208.16 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

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

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

applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

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

\* \* \* \* \*

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

**§ 1208.18 Implementation of the Convention Against Torture.**

(a) \* \* \*

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

\* \* \* \* \*



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

\* \* \* \* \*

29. Revise § 1208.20 to read as follows:

**§ 1208.20 Determining if an asylum application is frivolous.**

(a) For applications filed on or after April 1, 1997, and before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and 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.

(2) Paragraphs (b) through (f) shall only apply to applications filed on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(b) For applications filed on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For applications referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph (c) of this section.

(c) For applications filed on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an asylum application is frivolous if it:

(1) Contains a fabricated material element;

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

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

(4) Is clearly foreclosed by applicable law.

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

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

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

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

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

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

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

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

30. Add § 1208.25 to read as follows:

**§ 1208.25 Severability.**

The provisions of part 1208 are separate and severable from one another. In the event that any provision in part 1208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

31. Amend § 1208.30 by revising the section heading and paragraphs (a), (b) introductory text, (b)(2), (e), and (g) to read as follows:

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

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) and 8 CFR 208.30, DHS has exclusive jurisdiction to make fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations. Except as otherwise provided in this

subpart B, paragraphs (b) through (g) of this section and 8 CFR 208.30 are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act and 8 CFR 208.30. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

(g) *Procedures for negative fear determinations—(1) Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a credible fear of persecution or a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the immigration

judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), the immigration judge will then review the asylum officer's negative determinations regarding credible fear and regarding reasonable possibility, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear (“significant possibility”) standard described in paragraph (g)(2).

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

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

(ii) The record of the negative fear determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative fear determination.

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

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

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

(B) If the immigration judge finds that the alien, other than an alien stowaway, establishes a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the immigration judge shall vacate the Notice and Order of Expedited Removal, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1), during which time the alien may file an application for asylum and for withholding of removal in accordance with 8 CFR 1208.4(b)(3)(i). Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(C) If the immigration judge finds that an alien stowaway establishes a credible fear of persecution, reasonable possibility of torture, or reasonable possibility of torture, the alien shall be allowed to file an application for asylum and for withholding of removal before the immigration judge in accordance with 8 CFR 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph. Such decision on that application may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, and deferral of removal has not otherwise been granted pursuant to 8 CFR 1208.17(a), the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum, withholding of removal, or, as pertinent, deferral of removal becomes final, DHS shall terminate removal proceedings under section 235(a)(2) of the Act.

32. Amend § 1208.31 by revising paragraphs (f) and (g) to read as follows:

**§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.**

\* \* \* \* \*

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

(g) *Review by Immigration Judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

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

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

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

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

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



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

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

34. Add § 1212.13 to read as follows:

**§ 1212.13 Severability.**

The provisions of part 1212 are separate and severable from one another. In the event that any provision in part 1212 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

**§ 1212.14 [Amended]**

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

**PART 1235 – INSPECTION OF PERSONS APPLYING FOR ADMISSION**

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

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

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

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

38. Amend § 1235.6 by:

- a. Removing paragraphs (a)(1)(ii) and (iii);
- b. Redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(ii) and revising it;
- c. Revising paragraphs (a)(2)(ii) and (iii); and
- d. Adding paragraph (c).

The revisions and addition read as follows:

**§ 1235.6 Referral to immigration judge.**

(a) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

(2) \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

(c) The provisions of part 1235 are separate and severable from one another. In the event that any provision in part 1235 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

## **PART 1244 – TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES**

39. The authority citation for part 1244 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1254, 1254a note, 8 CFR part 2.

40. Amend § 1244.4 by revising paragraph (b) to read as follows:

**§ 1244.4 Ineligible aliens.**

\* \* \* \* \*

(b) Is an alien described in section 208(b)(2)(A) of the Act.

Chad R. Mizelle,  
Senior Official Performing the Duties of the  
General Counsel,  
U.S. Department of Homeland Security

Dated: December 2, 2020.

William P. Barr  
Attorney General

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