

**DEPARTMENT OF HOMELAND SECURITY****8 CFR Part 208**

RIN 1615-AC57

[Docket No: USCIS 2020-0013]

**DEPARTMENT OF JUSTICE****Executive Office for Immigration Review****8 CFR Part 1208**

[Dir. Order No. 11-2021]

RIN 1125-AB08

**Security Bars and Processing**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security (“DHS”); Executive Office for Immigration Review, Department of Justice (“DOJ”)

**ACTION:** Final rule.

**SUMMARY:** On July 9, 2020, DHS and DOJ (collectively, “the Departments”) published a notice of proposed rulemaking (“NPRM”) clarifying that the danger to the security of the United States statutory bar to eligibility for asylum and withholding of removal may encompass emergency public health concerns. This final rule responds to comments received in response to the NPRM and reflects (and in some instances, modifies) intervening changes made to the regulatory framework by Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, published December 11, 2020 (“Global Asylum Final Rule”). Namely, it amends existing regulations to clarify that in certain circumstances there are “reasonable grounds for regarding [an] alien as a danger to the security of the United States” or “reasonable grounds to believe that [an] alien is a danger to the security of the United States” based on emergency public health concerns generated by a communicable disease, making the alien ineligible to be granted asylum in the United States under section 208 of the Immigration and Nationality Act (“INA”) or the protection of withholding of removal under the INA (“statutory withholding of removal”) or subsequent regulations (because of the threat of torture). The final rule further allows DHS to exercise its prosecutorial discretion regarding how to process individuals subject to expedited removal who are determined to be ineligible for asylum and withholding of removal in the United States because they are subject to the

danger to the security of the United States. Finally, the rule modifies the process in expedited removal proceedings for screening aliens for potential eligibility for deferral of removal (who are ineligible for withholding of removal as subject to the danger to the security of the United States bar).

**DATES:** This final rule is effective January 22, 2021.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

On July 9, 2020, the Departments published an NPRM entitled Security Bars and Processing. 85 FR 41201 *et seq.* (July 9, 2020). In this final rule, the Departments respond to comments received in response to the NPRM and changes made to the regulatory framework by the Global Asylum Final Rule, in order to mitigate the risk of aliens bringing a serious communicable<sup>1</sup> disease to the United States, or further spreading it within our country. Thus, the Departments make three fundamental and necessary reforms to the Nation’s immigration system: (1) Clarifying that the statutory “danger to the security of the United States” bars to eligibility for asylum and withholding of removal apply in certain contexts involving public health crises caused by communicable diseases so that aliens can be expeditiously removed, as appropriate, (2) as to aliens determined during credible fear screenings to be ineligible for asylum and withholding of removal on the basis of the danger to the security of the United States bars or ineligible for asylum for having failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States pursuant to Asylum Eligibility and Procedural Modifications, 85 FR

<sup>1</sup> The Department of Health and Human Services defines a communicable disease as “an illness due to a specific infectious agent or its toxic products which arises through transmission of that agent or its products from an infected person or animal or a reservoir to a susceptible host, either directly, or indirectly through an intermediate animal host, vector, or the inanimate environment.” 42 CFR 71.1(b).

82260 (December 17, 2020) (“Third-Country Transit Final Rule”), streamlining screening for potential eligibility for deferral of removal in the expedited removal process to similarly allow for the expeditious removal of aliens ineligible for deferral, and (3) as to aliens determined during credible fear screenings to be ineligible for asylum and withholding of removal on the basis of the danger to the security of the United States bars or ineligible for asylum for having failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States pursuant to the Third-Country Transit Final Rule, but who nevertheless establish that they are more likely than not to be tortured in the prospective country of removal, allowing DHS to utilize its prosecutorial discretion to either place the aliens into asylum-and-withholding-only removal proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1) (“asylum-and-withholding-only proceedings”)<sup>2</sup> or to remove them to third countries where they would not be more likely than not to be tortured.

The amendments made by this final rule will apply to aliens who enter the United States after the rule’s effective date, except that the amendments will not apply to aliens who had, before the date of an applicable joint Secretary of Homeland Security and Attorney General designation of an area or areas of the world as to which it is necessary for the public health that certain aliens who were present there be regarded as a danger to the security of the United States, (1) filed asylum and withholding of removal applications, or (2) indicated a fear of return in expedited removal proceedings.

**II. Background**

The preamble discussion in the NPRM is generally incorporated by reference in this final rule.<sup>3</sup> As of the date the NPRM was published on July 9, 2020, 3,239,412 persons in the United

<sup>2</sup> Asylum-and-withholding-only proceedings are adjudicated in the same manner that had applied 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 removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. 8 CFR 208.2(c)(1)(i)-(viii), 1208.2(c)(1)(i)-(viii). These proceedings generally follow the same rules of procedure that apply in section 240 proceedings, but the immigration judge’s consideration is limited solely to a determination on the alien’s eligibility for asylum, withholding of removal and deferral of removal (and, if the alien is eligible for asylum, whether he or she should receive it as a matter of discretion). 8 CFR 208.2(c)(3)(i), 1208.2(c)(3)(i).

<sup>3</sup> The preamble discussion is not incorporated to the extent specifically noted in this final rule, or in the context of proposed regulatory text that is not contained in this final rule.

States were reported to have contracted COVID-19 and 136,145 had died.<sup>4</sup> The number of persons infected has now reached 16,519,668 and the death toll has reached 302,992 (as of December 15, 2020).<sup>5</sup>

As of December 2020, the impact of the COVID-19 pandemic has been similar to that pandemic impact feared by then-Secretary of Homeland Security Michael Chertoff in 2006—“[a] severe pandemic . . . may affect the lives of millions of Americans, cause significant numbers of illnesses and fatalities, and substantially disrupt our economic and social stability.”<sup>6</sup>

On December 16, 2020, the Federal Reserve Board’s Open Market Committee (“FOMC”) projected that real gross domestic product (“GDP”) in fiscal year 2020 would fall by 2.4 percent and that the national unemployment rate would be 6.7 percent.<sup>7</sup> As a result of COVID-19, the national unemployment rate rose from 3.5 percent in February 2020 to a peak of 14.7 percent in April, before subsequently declining, most recently to 6.7 percent in November.<sup>8</sup> The FOMC also projected that GDP will rebound by 4.2 percent in fiscal year 2021 and the national unemployment rate will fall to 5.0 percent.<sup>9</sup> On December 16, 2020, the FOMC issued a statement finding that:

The COVID-19 pandemic is causing tremendous human and economic hardship across the United States and around the world. Economic activity and employment have continued to recover but remain well below their levels at the beginning of the year. . . . The path of the economy will depend significantly on the course of the virus. The ongoing public health crisis will continue to weigh on economic activity, employment, and inflation in the near term, and poses considerable risks to the economic outlook over the medium term.<sup>10</sup>

After evaluating the effects of voluntary and mandatory containment measures, the International Monetary Fund (“IMF”) reported in October that:

If lockdowns were largely responsible for the economic contraction, it would be reasonable to expect a quick economic rebound when they are lifted. But if voluntary social distancing played a predominant role, then economic activity would likely remain subdued until health risks recede.

[T]he analysis suggests that lockdowns and voluntary social distancing played a near comparable role in driving the economic recession. The contribution of voluntary distancing in reducing mobility was stronger in advanced economies, where people can work from home more easily and sustain periods of temporary unemployment because of personal savings and government benefits.

When looking at the recovery path ahead, the importance of voluntary social distancing as a contributing factor to the downturn suggests that lifting lockdowns is unlikely to rapidly bring economic activity back to potential if health risks remain. . . . These findings suggest that economies will continue to operate below potential while health risks persist, even if lockdowns are lifted.<sup>11</sup>

#### IV. Public Comments on the Proposed Rule

##### A. Summary of Public Comments

On July 9, 2020, the Departments published the NPRM (docket USCIS-2020-0013). The comment period closed on August 10, 2020. The Departments received a total of 5,044 submissions. While some of the comments expressed general support for the proposed rule or expressed a mixed opinion of the rule, the majority of commenters opposed the rule. Of the

participant’s assessment of appropriate monetary policy, with the upper end of central tendency an increase of 5.0 percent and the lower end of central tendency an increase of 3.7 percent. The 5.0 percent unemployment rate is the median projection of the average civilian unemployment rate in the 4th quarter of 2021, with the upper end of central tendency at 4.4 percent and the lower end of range at 4.7 percent.

<sup>10</sup> FOMC, Federal Reserve System, *Federal Open Market Committee Statement* (December 16, 2020).

<sup>11</sup> IMF, *World Economic Outlook: Chapter 2: The Great Lockdown: Dissecting the Economic Effects* at 65–66 (October 2020).

5,044 total submissions, 1,417 were unique, nonduplicative submissions.

Overall, and as discussed in more detail below, the Departments generally decline to adopt the recommendations of comments that misstate the NPRM, offer broad and dire hypothetical or speculative effects without any support, are contrary to facts or law or otherwise untethered to a reasoned basis, or lack an understanding of relevant law and procedures regarding the overall immigration system.

##### B. Comments Expressing General Support for the Proposed Rule

*Comment:* At least two organizations and other individual commenters expressed general support for the rule. Commenters who supported the rule considered the health and safety of American citizens as paramount and agreed that public health concerns should be a consideration in evaluating dangers to the national security and considering asylum applications. These commenters supported protecting Americans from the spread of communicable diseases and urged the U.S. government to prevent the healthcare system from becoming overburdened by aliens seeking medical care in the United States.

One commenter noted an increase in COVID-19 cases at border crossings and considered aliens infected with COVID-19 as a threat to Americans’ health and a financial burden to the country. Another commenter expressed support for the rule, stating that it was unfair for American taxpayers to pay for the healthcare of aliens.

Some commenters stated that the rule protected U.S. citizens from individuals who abuse the law and take advantage of the United States’ generosity and asylum system.

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

##### C. Comments Expressing General Opposition for the Proposed Rule

*Comment:* At least 3,570 commenters, including 2,635 submissions associated with form letter campaigns, expressed general disagreement with the proposed rule. Many commenters characterized the rule as racist, unfair, or otherwise morally wrong. Moreover, some commenters interpreted the rule as discriminatory against black, brown, indigenous persons, and immigrants. Additionally, commenters characterized the rule as an immigration or asylum ban and expressed concerns that the rule would make immigration to the United States more difficult or eliminate the availability of asylum and

<sup>4</sup> WorldMeter, COVID-19 Tracking Tool, <https://www.worldmeters.info/coronavirus/#countries> (last visited November 3, 2020).

<sup>5</sup> CDC COVID Data Tracker, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited December 17, 2020).

<sup>6</sup> DHS, *Pandemic Influenza: Preparedness, Response, and Recovery: Guide for Critical Infrastructure and Key Resources*, Introduction at 1 (2006) (Michael Chertoff, Secretary of Homeland Security), <https://www.dhs.gov/sites/default/files/publications/cikrpandemicinfluenzaguide.pdf>.

<sup>7</sup> FOMC, Federal Reserve System, *December 16, 2020: FOMC Projections Materials, Accessible Version* (table 1). The 2.4 percent fall in GDP is the median projection of Federal Reserve Board members and Federal Reserve Bank presidents from the 4th quarter of 2019 to the 4th quarter of 2020 under each participant’s assessment of appropriate monetary policy, with the upper end of central tendency (which excludes the three highest and three lowest projections) a decrease of 2.2 percent and the lower end of central tendency at drop of 2.5 percent. The 6.7 percent unemployment rate is the median projection of the average civilian unemployment rate in the 4th quarter of 2020, with the upper end of central tendency at 6.8 percent and the lower end of range at 6.7 percent.

<sup>8</sup> Bureau of Labor Statistics, U.S. Department of Labor, *The Employment Situation—June 2020* (table A-1) and *The Employment Situation—November 2020* (table A-1) (both providing the seasonally adjusted unemployment rate for the civilian noninstitutional population, persons 16 years old and over).

<sup>9</sup> *December 16, 2020: FOMC Projections Materials, Accessible Version* (table 1). The 4.2 percent rise in GDP is the median projection of Federal Reserve Board members and Federal Reserve Bank presidents from the 4th quarter of 2020 to the 4th quarter of 2021 under each

withholding of removal in the United States. Some commenters stated that asylum-seekers do not pose a security or safety threat to the United States on the basis of having traveled through other countries.

Many commenters stated that the rule conflicts with American values and the country's deeply rooted policy of welcoming immigrants and refugees, and they asserted that its implementation would damage the United States' standing and reputation in the world. Commenters believed that the United States should welcome asylum-seekers, and that immigration benefits the United States both economically and culturally. Some commenters believed the rule unlawfully infringes on aliens' rights to asylum in the United States.

Many commenters also generally asserted that the rule provides inadequate policy justification or legal analysis, which commenters asserted is evidence that it was inappropriately motivated by the Administration's personal animus against immigrants. Some commenters also rejected the public health rationale, claiming that alternative measures could be taken to protect the American public, and that the rule would do little to mitigate the spread of disease. Additionally, commenters believed that it is unreasonable for the Departments to make decisions regarding public health.

Multiple commenters wrote that the rule would be discriminatory. These commenters claimed the rule would generally contravene international laws against discrimination, including Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),<sup>12</sup> the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the United States' obligations under the 1951 Convention relating to the Status of Refugees ("Refugee Convention")<sup>13</sup> and the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol"),<sup>14</sup> and Article 7 of the

International Covenant on Civil and Political Rights. Some commenters claimed that the rule specifically discriminates on the basis of national origin because applicants could be barred from asylum eligibility on the basis of the countries through which they have travelled.

Some commenters said the rule violates guidance provided by the United Nations High Commissioner for Refugees ("UNHCR") because it denies asylum in "blanket terms" based on consideration of the prevalence of a disease in the countries through which asylum seekers have travelled and because the standard of evidence for triggering the bar is low.

*Response:* To provide an overview of the Departments' response to these comments, the Departments emphatically disagree with contentions that the rule is immoral, motivated by racial animus, or promulgated with discriminatory intent. This rulemaking applies equally to all asylum seekers. The demographics of asylum seekers are as vast and varied as the number of countries around the globe and the Departments did not promulgate this rule to impact any particular race, religion, nationality, or category of aliens who may seek asylum.

The Departments also strongly disagree that this rule illegally infringes on the right to seek asylum. Unlike statutory withholding of removal and protections under the regulations issued pursuant to the legislation implementing Article 3 of CAT ("CAT regulations"), asylum is a discretionary benefit. No one has the right to be granted asylum in the United States and this rule does not alter an alien's ability to seek asylum through the statutorily-prescribed channels, including credible fear interviews for aliens in expedited removal proceedings. Additionally, aliens subject to the bars imposed by this rule on asylum and withholding of removal may still receive protection against removal if they establish they are eligible for deferral of removal under the CAT regulations.

The United States continues to fulfill its international commitments as implemented by domestic law. This rule merely reflects the need to protect the American public during times of extraordinary threats to the public health from pandemic diseases, as permitted by those laws.

The Departments have considered and rejected alternatives to mitigate the

spread of communicable disease within U.S. Customs and Border Protection ("CBP") facilities at the border. Although CBP has policies and procedures in place to handle communicable diseases, CBP is not equipped to provide medical support sufficient to meet the unique and specialized challenges posed by particularly infectious or highly contagious illnesses or diseases brought into CBP facilities. Of the 136 CBP facilities along the land and coastal borders, only 46 facilities, all located on the southern land border with Mexico, have contracted medical support on location. Even that support is not currently designed to diagnose, treat, and manage certain infectious or highly contagious illnesses or diseases—particularly novel diseases. Moreover, many CBP facilities, particularly along the southern land border, are located in remote locations distant from hospitals and other medical care and supplies. In short, if a highly contagious illness or disease were to be transmitted within a CBP facility, CBP operations could face significant disruption.

As the Departments explain below, the U.S. government is not bound by UNHCR guidance. And the Departments disagree with the premise that the rule's standards for triggering the bars to eligibility for asylum and withholding of removal are inadequate. The Departments proposed the rule to clarify that authorities provided by Congress can be used to mitigate harms arising from the spread of communicable disease to DHS officers on the border, aliens in DHS custody, and the general public, as well as significant operational and resource strains associated with public health procedures and protocol the Departments must implement, and in the case of COVID-19, are implementing, to mitigate the spread of communicable disease. Additionally, the rule requires that the application of the security bars to asylum and withholding of removal be tailored to the specific threat posed by the relevant public health emergency.

#### D. Basis for the Rule

##### 1. Legal Authority

Several commenters generally argued that the proposed rule is contrary to international or domestic law, including the Refugee Convention and Refugee Protocol, CAT, and the INA, and is contrary to Congressional intent in enacting these laws and ratifying these treaties to provide protection to those fleeing persecution or torture.

<sup>12</sup> CAT, art. 3(1), December 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 84.

<sup>13</sup> July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

<sup>14</sup> Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268. Article 33.1 of the Refugee Convention states that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion." 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 (emphasis added). In

1968, the United States acceded to the Refugee Protocol, which bound parties to comply with the substantive provisions of Articles 2 through 34 of the Convention with respect to refugees. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

## Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)

*Comment:* Commenters argued that the proposed rule ignores or contradicts Congressional intent by not acknowledging the distinction between national security and economic concerns in AEDPA, citing legislative history and sections 413 and 421 of the legislation, which incorporated the terrorism-related removal grounds at INA 212(a)(3)(B)(i) and 237(a)(4)(B) as mandatory bars to eligibility for asylum and withholding of removal. The commenters argued that Congress intended for these provisions to limit the scope of danger to the security of the United States bars to those aliens who have engaged in violent acts or other terrorism-related activity, in marked contrast to the type of threat posed by a communicable disease.

*Response:* The Departments disagree with the commenters’ analysis of sections 413 and 421 of AEDPA. As discussed in the NPRM, with respect to aliens whom there are reasonable grounds for regarding or believing are a danger to the security of the United States and thus ineligible for asylum and withholding of removal, the scope of the term extends well beyond terrorism considerations, and national defense considerations as well. The Attorney General has previously determined that “danger to the security of the United States” in the context of the bar to eligibility for withholding of removal encompasses considerations of defense, foreign relations, and the economy, finding that:

The INA defines “national security” [in the context of the designation process for foreign terrorist organizations] to mean “the national defense, foreign relations, or economic interests of the United States.” Section 219(c)(2) of the Act, 8 U.S.C. 1189(c)(2) (2000). Read as a whole, therefore, the phrase “danger to the security of the United States” is best understood to mean a risk to the Nation’s defense, foreign relations, or economic interests.<sup>15</sup>

The INA’s definition of “national security” referred to by the Attorney General provides additional evidence that the term—along with the term “danger to the security of the United States”—should be read to encompass concerns beyond those concerning national defense and terrorism. In fact, the definition was enacted in 1996 as section 401(a) of title IV of AEDPA and was added as enacted by the House-Senate Conference Committee.<sup>16</sup> The

proposed legislation as originally passed by the Senate defined “national security” to mean “the national defense and foreign relations of the United States.”<sup>17</sup> That version of the bill may have considered economic concerns as separate from national security concerns. For example, it provided that in designating a foreign terrorist organization, the Secretary of State would have had to find that “the organization’s terrorism activities threaten the security of United States citizens, national security, foreign policy, or the economy of the United States”—listing “national security” and “the economy” as two independent considerations.<sup>18</sup> In addition, the section included a finding that also differentiated between national security concerns and those related to foreign policy and the economy. Congress found that:

(B) [T]he Nation’s security interests are gravely affected by the terrorist attacks carried out overseas against United States Government facilities and officials, and against American citizens present in foreign countries;

(C) United States foreign policy and economic interests are profoundly affected by terrorist acts overseas directed against foreign governments and their people . . . .<sup>19</sup>

But Congress then seemingly abandoned this bifurcation between security and the economy. First, the Conference Report merged economic considerations into the definition of national security. Therefore, to the extent one accepts legislative history as a relevant consideration when interpreting the meaning of statutory terms, the change in phrasing in the Conference Report suggests a conscious decision that economic considerations are subsumed within a general reference to national security. Second, the explicit reference to economic considerations in the earlier draft of the legislation, when discussing the threats posed by terroristic activities, also implies a connection between national security and economic concerns—suggesting that considerations related to security in this context are quite broad. Finally, the definition in AEDPA operated in the context of the designation of foreign terrorist organizations. When national security is considered in a much broader context beyond the risk of terrorism, as is the case in this rule, it makes even greater sense for it to encompass economic concerns (and,

consequently, public health concerns of such magnitude that they become economic concerns). A pandemic can cause immense economic damage, in addition to the human toll of the illness. Thus, the entry of aliens who may carry communicable diseases to our country or facilitate the spread of such disease within the interior of the country could pose a danger to U.S. security well within the scope of the statutory bars to eligibility for asylum and withholding of removal. The entry of such aliens could also pose a danger to national security by threatening DHS’s ability to secure our border and facilitate lawful trade and commerce.

Finally, while aliens who are described in the terrorism-related removal grounds fall under the “danger to security” bars to asylum and withholding, there is nothing in the language of those sections limiting the application of those bars to terrorism grounds. In fact, terrorism-related activity is a separate statutory bar to asylum eligibility from the danger to the security of the United States bar. And the INA specifies that an alien engaging in such activity “shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States,” INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), thus indicating such an alien represents only a subset of the larger category of aliens for whom there are reasonable grounds to believe are a danger to the security of the United States.

The Departments are not making changes to the final rule in response to these comments.

Refugee Convention, Refugee Protocol, UNHCR Guidance and Statements, the Universal Declaration of Human Rights, and the International Health Regulations

*Comment:* Several commenters claimed that the NPRM is inconsistent with U.S. obligations under the Refugee Convention and the Refugee Protocol, including the principal of nonrefoulement, and that those obligations have been implemented into domestic U.S. law through the Refugee Act of 1980. They argued that domestic statutes must be interpreted consistently with international law where possible, and cite sources relating to the U.S. role in negotiation of the Refugee Convention and in the ratification of the Refugee Protocol evincing the intent of the U.S. not to exclude refugees from protection for reasons of health.

Commenters argued that the danger to the security of the United States bars to asylum and withholding of removal derive from Articles 32 and 33(2) of the

<sup>17</sup> 142 Cong. Rec. H2268–03, at H2276 (Mar. 14, 1996) (S. 735, title VI, 401(a)).

<sup>18</sup> Section 401(a) of title IV of S. 735 (as passed the Senate on June 7, 1995), 141 Cong. Rec. S7864 (July 7, 1995).

<sup>19</sup> *Id.*

<sup>15</sup> *Matter of A–H–*, 23 I&N Dec. 774, 788 (AG 2005).

<sup>16</sup> H.R. Rep. No. 104–518, at 38 (1996) (Conf. Rep.).

Refugee Convention. They claimed that these provisions regarding national security do not encompass health concerns. Several commenters also pointed out that withholding of removal is not a discretionary benefit but instead a mandatory protection under Article 33 of the Refugee Convention as codified at section 241(b)(3) of the INA. Two commenters cited UNHCR's guidance and academic papers in arguing that the danger to the security of the United States bars must be based on individualized determinations. Another commenter specifically argued that the "reasonable person" standard proposed by the rule, and the possibility that a person could be expelled for passing through a country where COVID-19 was prevalent without proof of that person's infection (via testing), violates UNHCR guidance against refoulement without evidence of a health risk. An individual also commented that such a denial would violate Article 14 of the Universal Declaration of Human Rights, which guarantees the right to seek and enjoy asylum from persecution. A legal services provider cited to UNHCR guidance,<sup>20</sup> as well as U.S. correspondence during the formulation of the Refugee Protocol, in arguing the invalidity of security bars applying to an entire class of asylum seekers. Another commenter cited to the 2006 UNHCR guidance for the propositions that (1) the dangers to the security of the United States bars must be restrictively interpreted; (2) the danger posed to national security must be sufficient to justify refoulement; and (3) refoulement must be proportionate to the danger presented.<sup>21</sup> The commenter then concluded that the proposed rule would fail under all three considerations. Another commenter stated that not considering an asylum seeker's intent with respect to conduct that could give rise to a security bar would be contrary to the humanitarian social purpose of the Refugee Act and the Refugee Convention. Multiple commenters also cited to 2020 UNHCR guidance,<sup>22</sup> as prohibiting the closure of borders for

public health reasons without preserving asylum seekers' rights under international law, noting that the guidance recommended relying on the screening and quarantine of asylum seekers, stated that refoulement could not be justified on a public health basis and stated that a total lock-out of asylum seekers would violate rules of proportionality.

Several commenters stated that the rule breaches international health regulations that bind the United States and require it to exercise health powers with full respect for human rights. A legal services provider commented that the international health regulations provide for the humane treatment of migrants during a screening or quarantine period.

*Response:* The United States has undertaken certain obligations under the Refugee Protocol, which incorporates Articles 2–34 of the Refugee Convention. Article 33 of the Refugee Convention, as understood in U.S. law, generally precludes state parties from removing individuals to any country where their lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group. Congress made the decision to implement its non-refoulement obligations under the Refugee Protocol through the protection of statutory withholding of removal at section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and in the Foreign Affairs Reform and Restructuring Act ("FARRA"), to implement its CAT non-refoulement obligations through regulations, which resulted in withholding and deferral of removal protections under the CAT regulations.<sup>23</sup> It was Congress's deliberate decision to establish a requirement that an alien show it is more likely than not that his or her "life or freedom would be threatened" for statutory withholding of removal, the standard designed to meet U.S. obligations under the Refugee Protocol. The Supreme Court stated in *INS v. Stevic* that "it seems clear that Congress understood that refugee status alone did not require [statutory] withholding of deportation, but rather, the alien had to satisfy the [more likely than not] standard" under statutory withholding of removal.<sup>24</sup>

An alien who can demonstrate that he or she would more likely than not face

persecution on account of a protected ground or torture is entitled to withholding of removal or, if more likely than not to be tortured but subject to a mandatory bar to eligibility for withholding, is entitled to CAT deferral of removal. As the Tenth Circuit has stated, "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".<sup>25</sup> And the Ninth Circuit explained that Article 3 of the CAT was implemented in the United States by the FARRA and its implementing regulations.<sup>26</sup> The Departments also note that neither of these treaties is self-executing and therefore they are not directly enforceable in the U.S. legal context except to the extent that they have been implemented by domestic legislation.<sup>27</sup>

Article 33 of the Refugee Convention includes an exception from non-refoulement obligations, similar to the section 241(b)(3)(B)(iv) security exception, which provides that the benefit of those obligations "may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is." Rejection of withholding of removal claims from aliens who would risk bringing in or further spreading a communicable disease such as COVID-19 into the United States is therefore consistent with the non-refoulement provisions of the Refugee Convention and the Refugee Protocol, as national security concerns encompass the security risks associated with an international public health emergency like the COVID-19 pandemic, or other communicable diseases of public health significance that may arise in the future.

Asylum under the immigration laws, on the other hand, is a discretionary form of relief. Section 208 of the INA reflects the fact that Article 34 of the Refugee Convention is precatory and accordingly provides that aliens meeting the eligibility requirements for asylum "may" be granted asylum and contains various bases upon which an alien meeting the definition of a refugee is

<sup>20</sup> UNHCR, *Advisory Opinion from the UNHCR on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees* 5 (2006).

<sup>21</sup> See, e.g., Message from the President of the United States, Transmitting the Protocol Relating to the Status of Refugees, at VIII (1968); Dep't of Health, Education, and Welfare ("HEW"), *Memorandum for Ambassador Graham Martin re: Protocol Relating to the Status of Refugees* (July 22, 1968); HEW, *Letter to Ambassador Graham Martin re: Protocol Relating to the Status of Refugees* (July 16, 1968).

<sup>22</sup> UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* (Mar. 2020).

<sup>23</sup> Public Law 105–277, div. G, subd. B, title XXII, sec. 2242 (b), 112 Stat. 2681–822 (1998), codified at 8 U.S.C. 1231 note; 8 CFR 208.16(b)–(c), 208.17, 208.18; 1208.16(b)–(c), 1208.17, 1208.18.

<sup>24</sup> 467 U.S. 407, 428 (1984) (citation omitted). See *Cardoza-Fonseca*, 480 U.S. at 440–41.

<sup>25</sup> *R–S–C v. Sessions*, 869 F.3d 1176, 1188 & n.11 (10th Cir. 2017); see also *Cazun v. U.S. Att'y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017).); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016).

<sup>26</sup> *Maldonado v. Lynch*, 786 F.3d 1155, 1162 (9th Cir. 2015).

<sup>27</sup> *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").

nonetheless ineligible to apply for or receive asylum and authorizes the creation of new eligibility bars through regulation.<sup>28</sup> The federal judiciary has rejected arguments that the Refugee Protocol, as implemented in domestic law, requires that every qualified refugee receive asylum.<sup>29</sup>

The Supreme Court has ruled that while UNHCR's interpretation of (or recommendations regarding) the Refugee Convention and Refugee Protocol, such as set forth in the UNHCR Handbook, "may be a useful interpretative aid,"<sup>30</sup> it is not binding on the U.S. government, recognizing that "[i]ndeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the [Refugee] Convention and the [Refugee] Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" <sup>31</sup>

The Universal Declaration of Human Rights is a non-binding instrument, not an international agreement; thus, it does not impose obligations on the United States.<sup>32</sup> Moreover, although it 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."<sup>33</sup>

The Departments do not agree with the commenters' assertions that the rule is inconsistent with the International Health Regulations. This rule implements the immigration authorities of the Departments with respect to

eligibility for asylum and withholding of removal, rather than any public health authorities. Specifically, the rule clarifies the Departments' understanding of the bars to eligibility for asylum and withholding of removal based on their being reasonable grounds for regarding or believing an alien to be a danger to the security of the United States. The International Health Regulations do not purport to address or govern asylum eligibility, and the regulations specifically exclude "security measures" from the definition of "health measures."<sup>34</sup> Accordingly, the Departments believe the rule is sufficiently tailored to permit the U.S. government to implement recommendations stemming from the International Health Regulations in concert with the application of the danger to security of the United States bars to asylum and withholding of removal in contexts where the Secretary and Attorney General determine, in consultation with the Secretary of Health and Human Services, per the framework established by this rule, such recommendations are insufficient to ensure the security of the United States. Likewise, the Departments disagree that the International Health Regulations otherwise bind the Departments from employing this statutory authority.

The Departments are not making changes to the final rule in response to these comments.

Unaccompanied Alien Children and the Trafficking Victims Protection Reauthorization Act of 2008

*Comment:* Several commenters expressed concern about the proposal's impact on unaccompanied alien children (UAC). Some commenters noted protections provided for UAC by the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), which they argue demonstrates a general intent by Congress to protect UAC. A legal services provider described details of the TVPRA's provisions requiring UAC whom DHS seeks to remove to be placed into removal proceedings under section 240 of the INA, 8 U.S.C. 1229a ("section 240 proceedings"), rather than into expedited removal proceedings, and mandating that asylum officers within DHS exercise initial jurisdiction over asylum applications filed by UAC. The commenter wrote that the proposed rule could undermine Congress' intent and deprive UAC of access to benefits such as Special Immigrant Juvenile classification. Another commenter

argued that turning away children at the border, even if they are assessed to have been exposed to a covered disease, would be in violation of TVPRA, adding that they must be transferred to Office of Refugee Resettlement custody and offered the ability to seek protection from removal. An advocacy group commented that the proposal could deny statutorily-protected due process rights to UAC, writing that the possibility of a UAC being barred from asylum on the basis of passing through a country, despite being exempted by Congress from a bar "related to the availability of protection" in the same country, would be absurd. It stated that other immigration law provisions related to public health or medical examination do not bar eligibility for humanitarian or TVPRA protections. It further argued that while it is true that the INA exempts UAC from expedited removal proceedings, and thus that they cannot be expelled from the United States before they have the opportunity to make their case, the proposed rule would still remove UAC's due process protections and subject them to refoulement. Commenters argued that the NPRM is contrary to the best interests of children generally, contravening State child welfare laws and the Convention on the Rights of the Child. The campaign argued that the proposal would violate UAC's right to safety by returning them to abusers, persecutors, and traffickers for reasons outside of their control.

*Response:* It is certainly true that not all of the statutory bars to the right to apply for asylum are applicable to UAC (including INA section 208(a)(2)(A) regarding aliens who can be removed to a safe third country pursuant to a bilateral or multilateral agreement and INA section 208(a)(2)(B) regarding aliens who file asylum applications more than one year of their arrival). That said, nothing in this rule negates the statutory rights and protections of UAC, including under the TVPRA. For instance, UAC retain the right to apply for asylum notwithstanding section 208(a)(2)(A)–(B) of the INA. INA 208(a)(2)(E). Notably, however, Congress did not exempt UAC from any of the statutory bars to asylum eligibility. As a result, UAC seeking asylum, like all other asylum seekers, 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)—including the danger to the security of the United States bar—and if subject to any additional bars implemented pursuant to the Attorney General's and the

<sup>28</sup> Article 34 states: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings." See also *R-S-C*, 869 F.3d at 1188; *Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017), *Cazun*, 856 F.3d at 257 & n.16; *Ramirez-Mejia*, 813 F.3d at 241.

<sup>29</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1965 n.4 (2020) ("[E]ven if an applicant qualifies, an actual grant of asylum is discretionary."); See also *Cardoza-Fonseca*, 480 U.S. at 441, *Grace v. Sessions*, 856 F.3d 27, 40 (1st Cir. 2017) ("[W]ithholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood").

<sup>30</sup> *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

<sup>31</sup> *Id.*

<sup>32</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 734–35 (2004) (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 Declaration 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.")).

<sup>33</sup> Art. 14(1).

<sup>34</sup> World Health Organization, *International Health Regulations*, Art. 1 (3d ed. 2005).

Secretary's authority to establish additional limitations on asylum eligibility by regulation. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). Unfortunately, UAC are not immune from pandemic disease, and those bringing such a disease to the United States would have the same impact on the security of the United States as any other aliens seeking asylum.

The rule also does not curtail any other rights or protections to which UAC are entitled under statute. As commenters note, UAC from contiguous territories may withdraw their applications for admission and voluntarily return if it is determined that they are not at risk of trafficking or persecution and that they are capable of making an independent decision to withdraw. 8 U.S.C. 1232(a)(2). All federal agencies must transfer UAC to HHS custody within 72 hours of determining their UAC status (absent exigent circumstances). 8 U.S.C. 1232(b)(3). UAC from non-contiguous countries whom DHS seeks to remove must be placed in section 240 proceedings, 8 U.S.C. 1232(a)(5)(D), where they can pursue asylum or any other relief or protection for which they may be eligible and where immigration judges may make some modifications to ordinary courtroom proceedings to account for their status.<sup>35</sup> If UAC do apply for asylum, including after they have been placed into section 240 proceedings, USCIS has initial jurisdiction over their claims. INA 208(b)(3)(C). As UAC are not amenable to expedited removal, they will not be impacted by the reforms to the expedited removal process contained in this rule.

Thus, the Departments are not making changes to the final rule in response to these comments.

#### Public Health Service Act of 1944

*Comment:* A legal services provider argued that the proposed rule is not supported by the Public Health Service Act of 1944 ("PHSA"). The commenter wrote that, as an initial matter, the Centers for Disease Control and Prevention's reliance on that statute in ordering the expulsion of certain aliens is improper. The commenter cited articles in arguing that PHSA is a quarantine law and not an immigration law, and thus that it can only be used for the suspension of entry without regard for immigration status rather than

as an "extrajudicial deportation system."

*Response:* The authority for this rule is contained in title 8 of the U.S. Code's INA, not title 42's PHSA. The rule is intended to clarify and operationalize the Departments' understanding of INA 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv). Accordingly, arguments regarding the propriety of the use of the PHSA for expulsions is outside the context of this rule. The Departments are not making changes to the final rule in response to these comments.

The Departments would also note that when Congress created the INA a mere eight years after the enactment of the PHSA, it explicitly considered and affirmed the use of the INA to protect the nation from pandemic diseases (though in the context of a different provision, as asylum and withholding of removal in their current forms would not exist for many years). On April 25, 1952, during House floor consideration of H.R. 5678, to be enacted as the (McCarran-Walter) Immigration Act of 1952, the bill's author, Francis Walter, entered into a debate regarding Abraham Multer's amendment (which was decisively defeated) to limit the bill's grant to the President of the power to bar the entry of aliens (now found at INA section 212(f)). Mr. Multer stated that:

As the bill is presented, we find a provision . . . which provides that at any time the President finds the entry of any aliens or class of aliens would be detrimental to the interests of the United States he may by proclamation suspend the entry of those aliens. The first part of my amendment simply provides that instead of being able to do that at any time, the President may make a proclamation and effectuate such a suspension only in the event of a national emergency, or a state of war.<sup>36</sup>

Mr. Walter responded that:

I rise in opposition to the amendment . . . [T]his language "whenever the President finds that the entry of any aliens or class of aliens in the United States would be detrimental to the interests of the United States" is absolutely essential because when there is an outbreak of an epidemic in some country, whence these people are coming, it is impossible for Congress to act. People might conceivably in large numbers come to the United States and bring all sorts of communicable diseases with them. . . . In the judgment of the committee, it is advisable at such times to permit the President to say that for a certain time we are not going to aggravate that situation.<sup>37</sup>

<sup>36</sup> 98 Cong. Rec. 4423 (April 25, 1952).

<sup>37</sup> *Id.*

#### Other Comments Concerning Legal Authority

*Comment:* One commenter stated that "the danger of persecution should generally outweigh all but the most egregious of adverse factors" and that the proposal fails to operate by this principle. Another cited 2011 U.S. Immigration and Customs Enforcement ("ICE") guidance and emphasized that that guidance interpreted the public health removal priority narrowly and only when "articulable" public safety issues were present. The commenter also cited a 2014 DHS memorandum as providing that immigrant health concerns should result in the delay, rather than expedition, of removal proceedings. One commenter stated that, under the INA, asylum seekers cannot be penalized where their country is unable or unwilling to protect them from persecution. The commenter argued that the proposed rule would impute the failure of a country to contain an outbreak to an individual and thus contravene this principle.

*Response:* The principle that the danger of persecution should generally outweigh all but the most egregious of adverse factors derives from the Board of Immigration Appeals decision in *Matter of Pula*,<sup>38</sup> which addressed the exercise of discretion to grant or deny asylum to an applicant who had already established eligibility for asylum. This final rule, however, addresses a quite distinct question by clarifying the Departments' understanding of the mandatory bars to eligibility for asylum (and withholding of removal), not an asylum officer's or immigration judge's exercise of discretion once an applicant establishes such eligibility. If there are reasonable grounds for regarding or believing an applicant to be a danger to the security of the United States, he or she is statutorily ineligible for asylum and withholding of removal, and the adjudicator would not have the discretion to grant either form of protection.<sup>39</sup>

The ICE guidance concerning removal priorities and the DHS memorandum cited by the commenter are unrelated to eligibility for asylum or withholding of removal or the interpretation of the

<sup>38</sup> 19 I&N Dec. 467 (BIA 1987).

<sup>39</sup> Moreover, the Supreme Court has determined that in assessing the "serious nonpolitical crime" bar to eligibility for withholding of removal, adjudicators need not weigh the risk of persecution in determining the applicability of that bar, finding that "[a]s a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country." *INS v. Aguirre-Aguirre*, 526 U.S. at 426.

<sup>35</sup> EOIR, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>.

statutory bars for aliens for whom there are reasonable grounds for regarding or believing are dangers to the security of the United States. Finally, the rule seeks to mitigate the risk of a serious communicable disease being brought to the United States, or being further spread within the country, by clarifying that such public health threats must be considered when determining whether there are reasonable grounds for regarding or believing an alien to be a danger to the security of the United States. The rule does not seek to penalize asylum seekers for the action or inaction of another country, but is rather intended to safeguard the public health and the security of the United States. Accordingly, the Departments are not making changes to the final rule in response to these comments.

## 2. Substantive Comments on Need/Rationale for the Rule

*Comment:* Many commenters provided input on the rationale for the proposed rule or other feedback on whether the rule is necessary to serve its stated goals. Several commenters claimed that its public health claims are specious. Many commenters claimed that the rule would block asylum eligibility on the pretext of a pandemic response, and that the rule improperly assigns a public health risk to asylum-seekers.

Commenters also expressed opposition on the basis that the rule contains no objective standard for applying the proposed health measures. Some suggested that the rule should take into account the availability of effective treatments in applying the bars. One criticized the rule for not taking into account whether a disease is more prevalent in the United States than in the asylum seeker's country of origin and that this oversight undermines the rule's rationale. Another requested information about the empirical basis for the rule, including the number of asylum seekers who have brought contagious diseases into the United States, the source of that data, the effects of those diseases on the general population, and how such a disease could spread in the process of detention and deportation, and argued that limiting asylum can only be justified by compelling answers to these inquiries. Likewise, a few individual commenters stated that the Departments must prove that asylum seekers and other immigrants embody a substantial and direct threat to U.S. health and safety during a pandemic.

Multiple commenters said that the Departments' justification for the rule is at odds with the administration's

messaging regarding the severity of the COVID-19 pandemic within the United States.

Some commenters mischaracterized the rule as a travel ban rather than a clarification as to bars to asylum and withholding of removal eligibility. These commenters stated that the rationale for the rule is flawed because it limits nonessential travel across the southern border and denies entry to asylum seekers arriving by land, but grants broad exceptions for travel by U.S. citizens, lawful permanent residents, and people engaged in trade or education. The commenters believe that other individuals traveling across the border are just as likely to transmit COVID-19, and therefore questioned the Departments' logic in creating the danger to the security of the United States bars.

Many commenters claimed that the public health objectives of the proposed rule could be achieved through alternative means without affecting aliens' eligibility to receive asylum or withholding of removal. These commenters stated that the United States has existing procedures to address communicable diseases without targeting asylum eligibility. A few commenters argued that COVID-19 can be managed through sensible policies, including implementing quarantine policies, social distancing, testing, education and trainings, medical treatment, use of personal protective equipment, and contact tracing, citing the advice of public health experts. Similarly, a commenter suggested that additional legal representation and medical services at the border should be considered instead of this rule.

Many commenters suggested eliminating or altering detention policies, or improving conditions of detention, instead of implementing the rule. Some argued that the Departments' rationale that asylum seekers held in congregate settings pose a risk to staff and other detainees is pretextual because the Federal Government has the discretion and authority to release asylum seekers and unaccompanied minors from custody. These commenters proposed reducing the population of aliens in detention centers by releasing aliens on bond and encouraging them to stay with friends and family (some citing data stating that 92 percent of asylum seekers have friends and family in the United States with whom they could shelter) in lieu of the proposed rule. Commenters also claimed that communicable diseases are often designated as public health threats because they require timely diagnosis, treatment, and contact tracing, but the

rule does not include provisions for an appropriate public health response (such as testing, treatment, and contact tracing where appropriate). Other commenters argued the proposed rule is pretextual because UAC are currently being released by ICE only after they test negative for COVID-19, citing a recent news publication.

Many commenters compared the proposed rule to other countries' responses to the COVID-19 pandemic, stating that other countries have adopted immigration policies that protect against the pandemic without eliminating eligibility for asylum protection. Several commenters said these countries prove that asylum seekers can be safely processed during a pandemic by adopting enhanced health measures and quarantine requirements. Another commenter argued that the proposal cannot be justified by a lack of COVID-19 testing capacity in the United States.

Many commenters stated that COVID-19 is not a reasonable basis for the proposed restrictions on asylum because the United States has one of the highest per capita infection and mortality rates for COVID-19, belying the proposed rule's claim to protect Americans from COVID-19. Commenters cited data showing that some countries, including Canada and Mexico, have fewer COVID-19 cases than the United States, arguing that the rule is unnecessary because United States poses the greater threat of spreading COVID-19. Several commenters said that the United States' COVID-19 high infection rate makes removing asylum seekers to other countries a significant public health threat to other countries and to asylum seekers themselves.

Some commenters added that the diseases listed in the rule do not pose a risk to the general public or are not subject to U.S. quarantine laws. Other commenters argued that regulations to control the spread of disease should not apply to treatable conditions, especially the ones that do not pose a significant health risk to the public.

A commenter claimed that the fact that the rule creates a judicial review process is evidence that the proposed rule uses public health as a pretext to deny asylum and withholding of removal. This commenter argued that because asylum seekers often remain in detention for longer than the prescribed 7 to 10 days for judicial review, aliens would remain at risk to contract or spread disease during this prolonged time period. The commenter concluded the proposed rule is an ineffective protection against the spread of disease.

Another commenter stated that the proposed rule cannot be justified by the length of the adjudication process for asylum seekers. The organization asserted that the DOJ's own policies contribute to the immigration court backlog, including increasing the number of respondents in removal proceedings and changing policies for asylum seekers who are eligible for bond. The commenter concluded that the Departments should not use the consequences of their policies as the basis for banning the same asylum seekers from humanitarian relief.

*Response:* The Departments disagree that the rule lacks an objective basis for applying the danger to the security of the United States bars to asylum and withholding of removal. This rule specifically provides that aliens whose entry poses a public health danger to the United States constitute a “danger to the security of the United States” and thus are ineligible for asylum or withholding of removal protections in the United States under INA 208 and 241, 8 U.S.C. 1158 and 1231, and 8 CFR 208.16 and 1208.16. The bars apply to aliens whose entry poses a heightened risk of bringing into the United States or further spreading within our country serious contagious diseases, posing a danger to the security of the United States, during times of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States. More specifically, the bars apply in certain delineated instances after a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law. They also apply after the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly determined that the physical presence in the United States of aliens who are coming from areas of the world where a communicable disease of public health significance is or was prevalent or epidemic would cause a danger to the public health in the United States, and they consequently jointly designated the relevant areas and the period of time or circumstances under which it is necessary for the public health that aliens or classes of aliens who have come from those areas (and are still within the number of days equivalent to the longest known incubation and contagion period for the disease) be regarded as a danger to the security of the United States. The Departments note that many comments referred to factors or facts specific to the ongoing COVID-19 pandemic, but that the rule is

intended to address future pandemics and is not limited to current circumstances.

These factors are consistent with the Attorney General's determination that “danger to the security of the United States” in the context of the bar to eligibility for withholding of removal encompasses considerations of defense, foreign relations, and the economy.<sup>40</sup> In that decision, the Attorney General made clear that the “nontrivial degree of risk” standard is satisfied where there is a reasonable belief that an alien poses a danger.<sup>41</sup> In *Yusupov v. Attorney General*,<sup>42</sup> the Third Circuit determined that the Attorney General's understanding that the bar to eligibility for statutory withholding of removal “applied to any ‘nontrivial level of danger’ or ‘nontrivial degree of risk’ to U.S. security” was a reasonable interpretation of the INA, and the court deferred to the Attorney General in upholding that statutory interpretation. The court explained that the eligibility bar “does not easily accord acceptable gradations, as almost any ‘danger’ to U.S. security is serious.”<sup>43</sup> It concluded that “Congress did not announce a clear intent that the danger to U.S. security be ‘serious’ because such a modifier likely would be redundant. . . . [I]t would be illogical for us to hold that Congress clearly intended for an alien to be non-removable if he poses only a moderate danger to national security.”<sup>44</sup> As discussed in detail in the NPRM and above, epidemics and pandemics, such as the COVID-19 crisis, pose a danger to the United States.

The Departments disagree with commenters who stated that to be barred from eligibility asylum or withholding of removal under this rule, the Departments must prove that an alien poses a substantial and direct threat to the health and safety of the United States residents during a pandemic. As explained above, the Attorney General has clarified that the appropriate standard to apply is a “nontrivial degree of risk.” Pandemics such as COVID-19 can cause serious illness or death on a mass scale, and inflict serious, or even catastrophic, damage to the country's economy, and thus, to the security of the United States.

Applying the danger to the security of the United States bars to eligibility for asylum and withholding of removal is necessary to reduce health and safety

dangers to DHS personnel and to the public. On this, the Departments defer to the expertise of the CDC,<sup>45</sup> which has determined that the introduction into Border Patrol stations and POEs of those aliens traveling from Canada and Mexico who are usually held for “material lengths of time” in the congregate areas of these facilities “increases the serious danger of introducing COVID-19 to others in the facilities—including DHS personnel, U.S. citizens, U.S. nationals, and LPRs, and other aliens—and ultimately spreading COVID-19 into the interior of the United States.”<sup>46</sup> The CDC based its assessment on the fact that:

[T]here are structural and operational impediments to quarantining and isolating [such] aliens in CBP facilities that neither HHS/CDC nor CBP can overcome, especially given the large number of [such] aliens that move through the congregate areas of the facilities. Border Patrol stations and POEs were designed for short-term holding of individuals in congregate settings [and were] not designed and equipped with sufficient interior space or partitions to quarantine potentially infected persons, or isolate infected persons. They also are not equipped to provide on-site care to infected persons who present with severe disease.<sup>47</sup>

CDC laid out the consequences of placing such aliens CBP facilities:

The public health risks . . . include transmission and spread of COVID-19 to CBP personnel, U.S. citizens, lawful permanent residents, and other persons in the POEs and Border Patrol stations; further transmission and spread of COVID-19 in the interior; and the increased strain that further transmission and spread of COVID-19 would put on the United States healthcare system and supply chain during the current public health emergency.<sup>48</sup>

<sup>45</sup> Courts routinely recognize the CDC's public health expertise. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (“the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority”); *In re Approval of Judicial Emergency Declared in Eastern District of California*, 956 F.3d 1175, 1181 (9th Cir. 2020) (determining that it would not be safe to resume normal court operations until “the CDC lifts its guidance regarding travel-associated risks and congregate settings and physical distancing”); and *Hickox v. Christie*, 205 F. Supp. 3d 579, 598–99 (D.N.J. 2016) (relying on CDC recommendations to determine the legality of state-mandated quarantine in light of the risk of Ebola posed by persons entering the United States after treating Ebola patients).

<sup>46</sup> Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR 56424, 56433 (final rule) (September 11, 2020).

<sup>47</sup> *Id.*

<sup>48</sup> Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 FR 65806, 65807 (October 16, 2020) (notice).

<sup>40</sup> *Matter of A-H-*, 23 I&N Dec. at 788.

<sup>41</sup> *Id.*

<sup>42</sup> 518 F.3d 185 (3rd Cir. 2008) (as amended Mar. 27, 2008).

<sup>43</sup> *Id.* at 204.

<sup>44</sup> *Id.*

The Departments have also considered the array of alternatives commenters argued the Departments could implement to reduce the risk of aliens spreading communicable disease in the United States. The Departments disagree that the rule is unnecessary because of the availability of the alternatives posed, which include quarantines, social distancing, testing, education and trainings, medical treatment, use of personal protective equipment, and contact tracing.

In the context of COVID-19, the CDC has already determined these alternatives to not be sufficient to adequately protect the public health. The CDC has determined that “quarantine, isolation, and conditional release are still not workable options on the scale that would be needed for protecting U.S. public health from the introduction of COVID-19”<sup>49</sup> and that “Federal Orders requiring the quarantine, isolation, or conditional release of persons arriving into the United States from foreign countries may be inadequate to protect public health from the serious danger of the introduction into the United States of a quarantinable communicable disease.”<sup>50</sup>

As to quarantines, the CDC has concluded that:

Federal quarantine and isolation . . . where HHS/CDC funds and operates residential facilities with 24-hour wrap-around services for persons arriving into the United States from a foreign country may be scalable and effective for hundreds of persons, but not thousands of them. Even then, Federal quarantine and isolation require substantial resources and are not sustainable for extended periods of time.<sup>51</sup>

A Federal quarantine and isolation of covered aliens would have likely required the procurement or construction and equipping of numerous permanent or temporary facilities across the Northern and Southern land borders, in close proximity to the POEs and Border Patrol stations. The facilities would have to accommodate a rotating population of covered aliens—including family units, single adults, and children with varying countries of origin, social customs, and criminal histories—for the duration of each covered alien’s quarantine or isolation period. During that period, HHS/CDC and CBP would have to shelter, feed, and provide medical services to each covered alien onsite. The burden of undertaking such a joint public health and safety mission across thousands of miles of territory during a pandemic is impracticable.

<sup>49</sup> Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR at 56455.

<sup>50</sup> *Id.* at 56526.

<sup>51</sup> *Id.*

[T]o the knowledge of HHS/CDC, the largest Federal quarantine and isolation operation in modern U.S. history is the one that HHS/CDC and other agencies conducted in early 2020 [in response to COVID-19] for the approximately 3,200 persons who disembarked from cruise ships in U.S. ports or were repatriated from Asia. That operation would have been dwarfed by an ongoing quarantine and isolation mission for covered aliens. . . . HHS/CDC and CBP could not have . . . quarantined or isolated a daily average population of 3,292 covered aliens from March 21, 2020 to the present. The relevant agencies simply lack the personnel and resources to operate such a large and complex Federal quarantine and isolation program, spread over thousands of miles of territory, and a period of many months, during a global pandemic. This is especially true when HHS/CDC and CBP must prioritize their finite resources for the benefit of the public health and safety, respectively, of the domestic population.<sup>52</sup>

The Departments also disagree with suggestions that increased testing of aliens could serve as an adequate alternative to the rule. In many cases, it is not possible to know whether an individual is infected at the time of processing or apprehension. Where testing is available, the time frame required to obtain test results may both be operational unfeasible and expose DHS officers, other aliens, and domestic communities to possible infection while results are pending. The CDC concluded that:

HHS/CDC considered whether it could avert the serious danger of the introduction of COVID-19 into CBP facilities through COVID-19 testing. Specifically, HHS/CDC considered the asymptomatic transmission of COVID-19; the lack or limited availability of diagnostic testing for COVID-19; the time required to obtain diagnostic test results; the need to prioritize testing resources for the domestic population . . . . In any pandemic caused by a novel virus that spreads asymptotically there will be a period when diagnostic testing is not widely available due to the time necessary to create, manufacture, distribute, administer, and receive the results of diagnostic tests. Even then, it may be appropriate to prioritize diagnostic testing for some populations over others, and diagnostic testing may produce at least some false negatives.<sup>53</sup>

In congregate settings, travelers infected with a quarantinable communicable disease (whether asymptomatic or symptomatic) may spread the disease to other travelers or government personnel or private sector workers who may, in turn, spread disease to

<sup>52</sup> *Id.* at 56433. The CDC noted that “the Federal government no longer operates Public Health Service hospitals capable of acting as dedicated quarantine and isolation facilities able to house hundreds of people for multiple weeks. The securing of sites was challenging because when the agencies identified suitable facilities, local officials sometimes objected to the use of the facilities.” *Id.* at 56430.

<sup>53</sup> *Id.* at 56433–34 n.70.

the domestic population. In such a scenario, the subsequent separation of the original, infected traveler would not mitigate the spread of disease through other individuals who interacted with the traveler in the congregate setting.<sup>54</sup>

The Departments disagree with commenters’ suggestions that public health interests would be better served if the Departments eliminated detention pending proceedings. The INA requires that all aliens placed into expedited removal proceedings are subject to mandatory detention from the commencement of proceedings until their credible fear interviews, INA 235(b)(1)(B)(iii)(IV), subject to mandatory detention if found not to have a credible fear, *id.*, and also subject to mandatory detention if found to have a credible fear “for further consideration of their application for asylum” in asylum-and-withholding-only proceedings. Such aliens can be released by paroling them pursuant to section 212(d)(5) of the INA or on bond.<sup>55</sup> As explained in the NPRM, once a non-detained alien is placed into such proceedings, it can be months or years before their cases are adjudicated, as immigration courts in EOIR have a backlog of more than 1,000,000 pending cases, at least 517,000 of which include an asylum application. Of those released, many simply abscond without pursuing their asylum claims. There were 595,430 fugitive aliens at the end of fiscal year 2019.<sup>56</sup> In 2003, DOJ’s Inspector General issued a report that found that the former INS had successfully carried out removal orders with respect to only 13 percent of non-detained aliens who were subject to final removal orders—and was able to remove only three percent of non-detained aliens who had unsuccessfully

<sup>54</sup> *Id.* at 56426.

<sup>55</sup> In *Matter of X-K*, 23 I&N Dec. 731, 736 (BIA 2005), the BIA concluded that arriving aliens at POEs found to have a credible fear and placed into section 240 proceedings were subject to mandatory detention, but those apprehended between POEs were eligible for bond. The Attorney General overruled *Matter of X-K* in *Matter of M-S*, 27 I&N Dec. 509 (A.G. 2019), and determined that all aliens found to have a credible fear were subject to mandatory detention (and thus only releasable on parole). However, in *Padilla v. ICE*, 953 F.3d 1134, 1143 (9th Cir. 2020) (petition for cert. filed Aug. 24, 2020), the Ninth Circuit upheld a district court’s grant of a nationwide preliminary injunction requiring, in part, that all aliens found to have a credible fear be eligible for a bond hearing and possible release (not through parole) on bond.

<sup>56</sup> Enforcement and Removal Operations, ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* at 10. Alien fugitives are those who had failed to leave the United States based upon a final order of removal or who had failed to report to ICE after receiving notice to do so. *Id.* at 10 n.9.

sought asylum.<sup>57</sup> Recent initiatives to track family unit cases revealed that close to 82 percent of completed cases have resulted in an in absentia order of removal. It has been reported that EOIR's immigration courts have higher failure to appear rates than any other state or federal courts in the country.<sup>58</sup> In fiscal year 2017, 44 percent of never detained aliens, 41 percent of released aliens, and 49 percent of unaccompanied alien minors (who have generally been released to sponsors, 8 U.S.C. 1232(c)(2)–(3)) who received removal orders received them in absentia for failing to appear.<sup>59</sup> Even putting aside the issue of absconders, releasing aliens with a communicable disease from detention merely transfers the risk from DHS officers and other detainees to the general public.

The Departments also reject the notion of stopping or reducing the enforcement of immigration laws as a means of reducing the strain on the nation's immigration system. The solution is not to ignore the rule of law but to find ways to promote compliance with the law and to increase the efficiency of the nation's immigration system.

As to simply allowing aliens to reside with friends and family pending their asylum-and-withholding-only proceedings, this would reduce the transmission of disease within detention centers themselves. However, as the CDC concluded, such a practice would merely transfer the risk from DHS officers and other detainees to the general public and could exacerbate community spread within the interior. The CDC has also found that:

[I]t is not reasonable to assume that all . . . aliens [entering the United States illegally or without proper documents, who would need to be placed in congregate setting,] can or will comply with conditional release orders or safely self-quarantine or self-isolate after introduction into the country. That has not been HHS/CDC's experience with foreign nationals arriving in the United States on commercial flights, which require valid travel documents and clearance of customs. Even some foreign nationals who produce valid travel documents, fly internationally, and clear customs do not comply with self-quarantine or self-isolation protocols, or provide contact information to HHS/CDC for use in public health monitoring and contract tracing investigations. . . . Persons who are

unprepared to comply with U.S. legal processes and lack transportation and a permanent U.S. residence would likely encounter difficulties complying with conditional release orders or self-quarantine or self-isolation protocols. For such orders or protocols to be effective, persons who HHS/CDC temporarily apprehends and then conditionally releases with orders—or, alternatively, persons to whom HHS/CDC recommends self-quarantine or self-isolation—must be able to travel to suitable quarantine or isolation locations, and then quarantine or isolate for the time period prescribed or recommended by HHS/CDC. Many [aliens entering the United States illegally or without proper documents, who would need to be placed in congregate settings,] would have to overcome significant hurdles to meet those basic requirements. Moreover, implementation of conditional release orders for covered aliens would divert substantial HHS/CDC resources away from existing public health operations during the COVID-19 pandemic. . . .

To implement conditional release orders for covered aliens, HHS/CDC would have to open and operate new quarantine stations at numerous Border Patrol stations and POEs, surge technical support to CBP at the same locations, or do some combination of both. HHS/CDC would also have to monitor the health of tens of thousands of . . . aliens introduced into the United States, and alert public health departments about any health issues that need follow-up. HHS/CDC does not have resources and personnel available to execute those additional functions; HHS/CDC would have to reallocate personnel from existing quarantine operations, which would jeopardize the effectiveness of those operations, endanger public health, and impose additional costs on U.S. taxpayers.<sup>60</sup>

Further, the Departments strongly disagree with comments that suggested the rule is pretextual, unnecessary, or ineffective because of the high rate of COVID-19 infections in the United States. Rather, the Departments defer to the expertise of the CDC, which has concluded that the introduction of additional cases, in addition to threatening the health and safety of DHS officers and other aliens, could exacerbate the spread of disease in the general public and further strain medical providers in many communities, presenting a serious threat to the security of the United States. As the CDC has stated, “even if persons or property in the United States are already infected or contaminated with a quarantinable communicable disease, the introduction of one or more additional persons capable of disease transmission in the same or different localities can nevertheless present a

serious danger of the introduction of the disease into the United States”<sup>61</sup> and “helping to slow the community transmission of COVID-19 and the number of new COVID-19 cases in the States in the U.S.-Mexico border region . . . helps protect the domestic population from COVID-19.”<sup>62</sup> For these reasons, the Departments see no need to provide additional empirical data, as requested by commenters, regarding the number of asylum seekers who have brought contagious diseases into the United States, the source of that data, the effects of those diseases on the general population, and how such a disease could spread in the process of deportation, including while an alien is in ICE custody. In addition, “arbitrary and capricious” review is “highly deferential, presuming the agency action to be valid.”<sup>63</sup> 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.”<sup>64</sup>

The Departments also disagree with commenters who argued that the fact that other countries have not curtailed asylum eligibility because of the COVID-19 pandemic proves that the NPRM is unnecessary or pretextual. The Departments are utilizing longstanding authority under domestic law to mitigate the danger of aliens bringing into the United States or exacerbating the spread within the United States of a serious contagious disease and thereby mitigate a threat to the security of the United States. It is outside the scope of this rule to evaluate the availability of legal tools to foreign governments regarding restricting asylum eligibility based on a threat to the national security. Further, the Departments disagree with comments that state that the risk of spreading a contagious disease or illness to the alien's home country or country of removal outweighs the Federal government's interest in preventing or mitigating potentially catastrophic harm to the health and security of the United States or is even a relevant consideration in interpreting the applicability of section 208(b)(2)(A)(iv) or section 241(b)(3)(B)(iv) of the INA, which are solely focused on the danger to the security of the United States. As the CDC has concluded, the “faster a[n alien who will be placed in a congregate setting] is returned . . . the lower the

<sup>57</sup> Office of the Inspector General, Evaluation and Inspections Division, DOJ, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders* (I-2003-004) at i, ii (2003).

<sup>58</sup> Mark Metcalf, *U.S. Immigration Courts & Aliens Who Disappear Before Trial*, 2019 Center for Immigration Studies at 1, 7–8 n.1–2.

<sup>59</sup> Planning, Analysis & Statistics Division, EOIR, DOJ, *Statistics Yearbook: Fiscal Year 2017*, at 33 (figure 25).

<sup>60</sup> Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR at 56452–53.

<sup>61</sup> *Id.* at 56454.

<sup>62</sup> *Id.* at 56456.

<sup>63</sup> *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010) (citing *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>64</sup> *Id.* at 1069.

risk the alien poses of introducing transmitting, or spreading COVID–19 into POEs, Border Patrol stations, other congregate settings, and the interior [of the United States].”<sup>65</sup>

Some commenters opposed the NPRM because they believed that the diseases referred to in the NPRM do not present a significant risk to the general public or are treatable. To the contrary, the diseases are serious by any measure. The term “communicable disease of public health significance” includes any of the following diseases:

(1) Communicable diseases as listed in a Presidential Executive Order, as provided under Section 361(b) of the Public Health Service Act. . . .<sup>66</sup>

(2) Communicable diseases that may pose a public health emergency of international concern if it meets one or more of the factors listed in [42 CFR] § 34.3(d) and for which the Director has determined a threat exists for importation into the United States, and such disease may potentially affect the health of the American public. . . .

(i) Any of the communicable diseases for which a single case requires notification to the World Health Organization (WHO) as an event that may constitute a public health emergency of international concern, or

(ii) Any other communicable disease the occurrence of which requires notification to the WHO as an event that may constitute a public health emergency of international concern. . . .

(3) Gonorrhea.

(4) Hansen’s disease, infectious.

(5) Syphilis, infectious.

(6) Tuberculosis, active.<sup>67</sup>

Under section 1 of Executive Order 13295, as amended:

Based upon the recommendation of the Secretary of Health and Human Services . . . , in consultation with the Surgeon General . . . the following communicable diseases are hereby specified pursuant to section 361(b) of the [PHSA]:

(a) Cholera; Diphtheria; infectious Tuberculosis; Plague; Smallpox; Yellow Fever; and Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named).

(b) Severe acute respiratory syndromes, which are diseases [other than influenza] that are associated with . . . pneumonia or other respiratory illness, are capable of being transmitted from person to person, and that either are causing, or have the potential to cause, a pandemic, or, upon infection, are highly likely to cause mortality or serious morbidity if not properly controlled. . . .

<sup>65</sup> Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 17060, 17067 (Mar. 20, 2020).

<sup>66</sup> The current list of quarantinable communicable diseases is available at <http://www.cdc.gov> and <http://www.archives.gov/federal-register>.

<sup>67</sup> 42 CFR 34.2(b).

In addition, the bars will only apply (1) to communicable diseases that have triggered an ongoing declaration of a public health emergency under Federal law, and (2) where the Secretary and the Attorney General have, in consultation with HHS, jointly determined that, because a communicable disease of public health significance (in accordance with HHS regulations) is prevalent or epidemic in an area of the world, the physical presence in the United States of an alien or a class of aliens who have come from such area during a period in which the disease is or was prevalent or epidemic there would cause a danger to the public health in the United States, and have consequently designate the place, the period of time, or circumstances under which they deem it necessary for the public health that such alien or class of aliens be regarded as a danger to the security of the United States. The Departments believe this framework provides the Departments sufficient flexibility to apply the bars in cases of potential future pandemics or public health crises while ensuring that the bars are only applied in situations that present a public health crisis sufficient to threaten the security of the United States.

In addition, the Departments disagree that the availability of treatment is an adequate marker to determine whether a contagious disease poses a threat to the security of the United States such that the bar to asylum and withholding of removal should apply. Treatment may only, and to a partial extent at that, ameliorate symptoms without curing a disease, and may be prohibitively expensive or resource-intensive.

The Departments note that as to the “judicial review protocol,” it is prescribed by statute and is not something the Departments created through regulation. Section 235(b) of the INA, 8 U.S.C. 1225(b), provides that:

The Attorney General shall provide by regulation and upon the alien’s request for prompt review by an immigration judge of a determination . . . that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination . . . .

The Departments disagree with comments suggesting that the rule’s rationale is flawed because the United States has been allowing certain classes of individuals to travel to the United States and because the rule does not

apply to U.S. citizens, lawful permanent residents, and people engaged in trade and education. Of course, only aliens may receive asylum and withholding of removal. Aliens seeking asylum or withholding of removal, including aliens with a lawful immigration status, are subject to the bar, which the Departments have put in place to protect the United States from those who are determined to be a danger to the Nation’s security.<sup>68</sup>

Finally, the Departments disagree that protecting the security of the United States is inconsistent with the administration’s messaging regarding the COVID–19 pandemic and decline to further respond on the basis that such messaging is outside the scope of this rule.

#### E. Proposed Changes to the Rule

##### 1. Clarifying Application of “Danger to the Security of the United States” Bars to Eligibility for Asylum and Withholding of Removal

###### Categorical Nature of the Bars

*Comment:* One commenter stated that denying asylum seekers “categorically” would contravene the intent of U.S. immigration law and especially the Refugee Act. Relying on the plain language of the statute, a legal services provider argued that the proposal exceeds its statutory authority by potentially barring, without time limitation, thousands of individuals on a class-wide basis who pose no risk to the United States. Similarly, a group of commenters cited *Grace v. Whitaker*,<sup>69</sup> and an advocacy group provided citations to additional cases, in arguing that asylum determinations must be made on an individualized basis. Other commenters argued that no individualized determination would be possible under the NPRM as it instructs adjudicators that they “may consider” symptoms and travel history for a determination as to whether an alien is subject to the danger to the security of the United States bars and simultaneously instructs adjudicators that the Secretary of Homeland Security and the Attorney General have already “deem[ed]” entire classes of individuals to be regarded as a danger to the security of the United States. More specifically, commenters argued that:

<sup>68</sup> When evaluating aliens’ eligibility for asylum and withholding of removal, this rule does not apply the public health bars to those aliens who file such an application upon return from Canada pursuant to the U.S.-Canada safe third country agreement.

<sup>69</sup> 344 F. Supp.3d 96 (D.D.C. 2018), *aff’d in part and vacated in part by Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

“[p]roposed 8 CFR 208.13(c)(10) and 1208.13(c)(10) do not provide clear guidance as to whether adjudicators are required to apply an individualized or a categorical bar, and in some circumstances appears to entirely remove discretion from adjudicators and require a blanket determination that a person be subject to the bar, without an individualized determination.”

*Response:* The commenters raised a valid concern that the NPRM did not provide sufficiently clear guidance as to whether adjudicators are required to apply the proposed bars in an individualized or categorical fashion. Of course, all statutory bars to eligibility, including the danger to the security of the United States bars, for asylum and withholding of removal are “categorical,” in that any alien to whom they apply is ineligible for asylum.” As to asylum, “[p]aragraph (1) [describing which aliens may be granted asylum] shall not apply to an alien if the [Secretary or the] Attorney General determines that . . . .” INA 208(b)(2)(A), 8 U.S.C. 208(b)(2)(A) (emphasis added). As to withholding of removal, “[s]ubparagraph (A) [describing which aliens may not be removed to a country where their life or freedom would be threatened] does not apply to an alien . . . if the [Secretary or the] Attorney General decides that . . . .” INA 241(b)(3)(B), 8 U.S.C.(b)(3)(B) (emphasis added). The parameters under which an alien is considered ineligible for asylum and withholding of removal in order to protect law enforcement officers and the public during a public health crisis are ones that should be decided by the Secretary and the Attorney General, taking into consideration the advice of governmental experts, not individual officials or adjudicators on an ad hoc basis. The role of individual officials and adjudicators should be to determine whether aliens in fact meet the criteria for ineligibility that have been set forth to protect our country.

Therefore, the final rule clarifies that the bars established by the rule (implementing the Departments’ understanding of the danger to the security of the United States bars) are “categorical” in the following manner. First, if a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb–3, then an alien is ineligible for asylum and withholding of removal (on the basis of there being reasonable grounds for regarding the alien as a danger to the

security of the United States) if the alien either exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate, or has come into contact with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate.

Second, if, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly

- Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or who have embarked at a place or places where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there), would cause a danger to the public health in the United States, and

- Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in the first bullet point who were present in an impacted region within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States, including any relevant exceptions as appropriate,

Then, an alien or class of aliens are ineligible for asylum and withholding of removal (on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States) if the alien or class of aliens are described in the first bullet point and are regarded as a danger to the security of the United States as provided in the second bullet point.

While the discretionary/categorical distinction was not discussed in the NPRM, as the D.C. Circuit ruled in *Nat’l Mining Ass’n v. Mine Safety and Health Admin.*

An agency’s final rules are frequently different from the ones it published as proposals. The reason is obvious. Agencies often “adjust or abandon their proposals in light of public comments or internal agency reconsideration.” . . . Whether in such instances the agency should have issued additional notice and received additional

comment on the revised proposal “depends, according to our precedent, on whether the final rule is a ‘logical outgrowth’ of the proposed rule.” . . . While we often apply the doctrine simply by comparing the final rule to the one proposed, we have also taken into account the comments, statements and proposals made during the notice-and-comment period. . . . In *South Terminal Corp. v. EPA*, the case that gave birth to the “logical outgrowth” formulation, the court did the same. 504 F.2d 646, 659 (1st Cir. 1974). The court held that the final rule was “a logical outgrowth”—not simply of the proposed rule—but “of the hearing and related procedures” during the notice and comment period.<sup>70</sup>

As the Circuit had realized earlier in *Int’l Harvester Co. v. Ruckelshaus*,<sup>71</sup> “[a] contrary rule would lead to the absurdity that in rule-making under the [Administrative Procedure Act] the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.”

As illustrated by the thoughtful comments the Departments received highlighting the need to clarify whether the NPRM was discretionary or categorical, the clarification in the final rule meets any “logical outgrowth” requirements under the APA.

**Applicability to Aliens Who Are Applying for Asylum or Withholding of Removal in the United States Upon Return From Canada (Pursuant to 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)**

*Comment:* Several commenters cited litigation in Canada surrounding the “safe third country” agreement between the United States and Canada and noted that a Canadian federal court found the agreement to be unconstitutional. One commenter stated that if published, this final rule would further damage the reputation of the United States as a leader in providing humanitarian protection.

*Response:* The Departments note that maintenance of the United States’ reputation as a leader in providing humanitarian protection must not eclipse the importance of maintaining a strong and effective safe third country agreement with our Canadian partners. Accordingly, this rule provides for an exemption for those aliens who apply for asylum or withholding of removal upon return from Canada to the United States pursuant to the U.S.-Canada safe third country agreement.

<sup>70</sup> 512 F.3d 696, 699 (D.C. Cir. 2008) (citations omitted).

<sup>71</sup> 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

Level of Danger Required To Invoke the Danger to Security Bars to Asylum and Withholding of Removal

*Comment:* Several commenters argued, citing *Yusupov v. Att’y Gen. of U.S.*, that the danger to the security of the United States bars to eligibility for asylum and withholding of removal may only be applied to an applicant who poses an “actual” threat rather than a possible or potential threat or to one who “may” pose a danger. The commenters contend that the rule is impermissibly broad because it applies the bars to those who do not actually carry a communicable disease, contrary to the actual threat standard.

One commenter also wrote that *Yusupov* requires that security bars apply only in a narrow set of circumstances and that, given the widespread nature of the COVID-19 pandemic even within the United States, the proposal contravenes this requirement. The commenter further asked that the Departments demonstrate how border enforcement personnel face a higher risk from asylum seekers than from others those officials regularly encounter in their own communities and how finding an applicant ineligible for asylum would reduce the risk to enforcement personnel. Another legal services provider wrote that the Departments’ focus on the probable cause standard is a “distraction” and cannot allow the Departments to rely on a potential risk rather than an actual one as the grounds for a security bar. A professional association expressed worry that the proposed rule could apply an asylum bar to an applicant on the basis of a probable cause standard and using evidence that does not meet the standard of admissibility for court proceedings.

Additionally, commenters argued that the mere potential exposure of an asylum seeker to a disease or the untrained opinion of a non-expert adjudicator of a person’s symptoms could not provide a reasonable basis for barring the applicant from eligibility for asylum.

Another commenter added that the threat posed by an individual asylum applicant’s health falls below the “non-trivial” standard set forth in *Matter of A-H*,<sup>72</sup> arguing that the threat of migrants must be viewed individually.

*Response:* The Departments fully acknowledge that an alien must actually pose the requisite level of danger, noting the Ninth Circuit’s conclusion that “[t]he bottom line in *Yusupov*, which we adopt, is that . . . the alien must

‘actually pose a danger’ to United States security . . . .”<sup>73</sup> However, as the Departments stated in the NPRM, it also must be recognized that the danger posed by aliens during a pandemic is unique. In many cases it will not be possible to know whether any particular individual is infected at the time of apprehension or application. As the CDC has explained, depending on the disease at issue, many individuals who are actually infected may be asymptomatic, reliable testing may not be available, and, even where available, the time frame required to obtain test results may both be operationally unfeasible and expose DHS officers, other aliens, and domestic communities to possible infection while results are pending. In conclusion, an alien who arrives from a location in which the spread of a communicable disease already poses a serious danger and who will need to be placed in a congregate setting represents on their own a danger to the security of the United States.

Of course, this rule cannot eliminate all risk that border enforcement personnel may face in their communities related to a communicable disease of public health significance. It is not designed to do so, nor could it. The final rule is designed to ameliorate the specific risk identified by the CDC of their being placed in close personal contact in congregate settings with aliens at a heightened risk of infection.

Finally, the Departments reject that reliance on the probable cause standard is a “distraction.” It is the legal standard set forth in binding precedent and is necessary to understand the “reasonable grounds” component of the danger to the security of the United States bars to eligibility for asylum and withholding of removal. In *Matter of A-H*, the Attorney General determined that “reasonable” in the context of the danger to the security of the United States bar to withholding of removal “implied the use of a ‘reasonable person’ standard” that was “substantially less stringent than preponderance of the evidence,” and instead akin to “probable cause.”<sup>74</sup> The standard “is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security.”<sup>75</sup>

Accordingly, the Departments are not making changes to the final rule in response to these comments.

<sup>73</sup> *Malkandi v. Holder*, 576 F.3d 906, 914 (9th Cir. 2009).

<sup>74</sup> 23 I&N Dec. at 788–89.

<sup>75</sup> *Id.* at 789 (citation omitted).

Public Health Concerns as a Basis for Finding “Danger to the Security of the United States” or Otherwise Bar Eligibility for Asylum

*Comment:* Several commenters argued that public health concerns should not be a basis for denying asylum or for finding reasonable grounds for regarding an applicant to be a danger to the security of the United States. Some commenters argued that the rule exceeds the Departments’ authority, as only Congress can expand upon the “danger to security” bar or define the bounds of asylum eligibility. Commenters contended that section 208(b)(2)(C) of the INA does not give the Departments authority to add new bars to asylum eligibility and that the INA unambiguously defines “dangers to the security of the United States” without reference to public health and thus that the NPRM is an unlawful attempt to expand the statute.

Commenters also argued that section 208 of the INA intentionally omits public health concerns as a basis of denial (such as by not incorporating the INA’s health-related inadmissibility grounds, INA 212(a)(1), 8 U.S.C. 1182(a)(1), as a basis for finding an alien ineligible for asylum) and that when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) it could have defined the danger to the security of the United States bar, but chose not to do so. One commenter cited dictionary definitions of “reasonable”, “danger”, and “security” to argue that the proposed rule contravenes the INA. Another argued that the NPRM is unjust and inconsistent with the character of the INA in that it applied a bar based on a factor outside of an asylum seeker’s control.

Another commenter argued that the “*expresio unis*” canon of construction, whereby when multiple items of a category are expressly mentioned, others in the same class are excluded, leads to the conclusion that because the three statutory bars to applying for asylum, INA 208(a)(2), do not include public health concerns, such concerns should not bar an alien from being able to apply for asylum. Another commenter argued more generally that the NPRM violates section 208(a)(1) of the INA, which guarantees the right of every alien physically present in the United States to apply for asylum, by denying asylum seekers who arrive in the United States the right to seek refuge.

Other commenters argued that the danger to the security of the United

<sup>72</sup> *Matter of A-H*, 23 I&N Dec. 774, 788 (A.G. 2005).

States bars should only be read to apply to criminal and/or terrorist-related concerns, one arguing that because other mandatory bars to asylum found in INA 208(b)(2)(A) include references to crimes, the term danger to the security of the United States must be read narrowly to involve considerations of criminal threats or intentional harm to others rather than for any type of harm. The commenter cited the “*ejusdem generis*” canon of construction whereby when “a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” Several commenters argued that the bars should be limited to terrorism-related threats and that the proposed rule misinterprets *Matter of A-H-*, reasoning that “economic interests” should be understood as economic interests that could be targeted by terrorists, not those affected by public health concerns. Another group of commenters stated that nothing in the INA permits a definition of “economic interests” which includes public health concerns.

*Response:* The Departments disagree with comments stating that public health concerns cannot constitute reasonable grounds for regarding or believing an alien as a danger to the security of the United States. As then-Secretary of Homeland Security, Michael Chertoff, stated in 2006, “[a] severe pandemic . . . may affect the lives of millions of Americans, cause significant numbers of illnesses and fatalities, and substantially disrupt our economic and social stability.”<sup>76</sup> In addition, components of the U.S. military have indicated that the global spread of pandemics can impact military readiness, thus posing a direct threat to U.S. national security.<sup>77</sup> For example, the risk of further spread of COVID-19 this year has led to the cancellation or reduction of various large-scale military exercises and a 60-day stop-movement order.<sup>78</sup>

The Departments reject the argument that because the statutory bars to

eligibility for asylum and withholding of removal do not specifically reference the health-related inadmissibility grounds found at section 212(a)(1)(A) of the INA, that no public health concerns can be considered in assessing an applicant’s potential danger to the security of the United States. This rule was never designed to incorporate all these health-related grounds—which can make an alien inadmissible as a result of the lack of immunization, physical or mental disorders that may pose or have posed a threat to the property, safety, or welfare of the alien or others, and drug abuse and addiction—into the bars to eligibility for asylum and withholding. It is only in limited circumstances involving declared Federal public health emergencies or joint determinations by the Secretary of Homeland Security and Attorney General that aliens coming from areas of the world where a communicable disease of public health significance is prevalent or epidemic would constitute a danger to public health and that an asylum or withholding applicant would be considered to pose a danger to the security of the United States. Similarly, the Departments reject commenters’ arguments that because the asylum bars do not specifically mention public health concerns, that the bar regarding danger to the security of the United States should be interpreted to exclude such concerns.

Additionally, the rule does not contravene section 208(a)(1) of the INA since it does not create a bar to applying for asylum. Rather, it clarifies the Departments’ understanding of a longstanding statutory bar to asylum eligibility. Finally, the bars to applying for asylum at section 208(a)(2) and the bars to asylum eligibility at section 208(b)(2) in fact do include factors that are outside an applicant’s control or “categorical,” such as the existence of a safe third country agreement. INA 208(a)(2)(A).

The Departments are not making changes to the final rule in response to these comments.

Guidance and Training for Officers Determining Application of the Bars

2. Application of the Danger of the Security of the United States Bars in Credible Fear Screenings in the Expedited Removal Process

*Comment:* Several commenters expressed concern about applying the danger to the security of the United States bars at the credible fear stage, where previously negative credible fear determinations could not be based on

aliens being subject to such bars. Commenters argued that this would deny individuals with a well-founded fear of persecution the opportunity to establish their eligibility for humanitarian protection, that it would eliminate all exercise of judgement or discretion, and make it nearly impossible to disprove the application of the bars, which deprives asylum seekers of the opportunity to seek asylum in court before an immigration judge.

Other commenters argued that the proposed rule is *ultra vires* by creating an “infectious disease” bar to asylum and withholding of removal that would disqualify applicants at the credible fear stage, when such individuals (even if infected with COVID-19 at the time of arrival) would be unlikely to remain infectious by the time of adjudication of their applications for asylum or withholding of removal. They argued that the NPRM would not protect border security personnel from a communicable disease or prevent spread in border facilities or the community, because the period when an applicant is most likely to spread a communicable disease is during the credible fear process (including the credible fear interview and review by an immigration judge) that can take from seven to ten days. The commenters stated that this timeline was not sufficiently addressed in the proposed rule and expressed concern that CBP and ICE would continue holding individuals in “congregate settings” during the credible fear process, a practice that would put many others at risk prior to the application of the NPRM’s changes to the credible fear process. The commenters also questioned why DHS could not test each asylum seeker upon apprehension and provide results within the time required for a credible fear interview and review by an immigration judge.

An individual commenter asked several questions about the procedural steps that would be involved should asylum seekers stop exhibiting the perceived symptoms that led to a determination that they may have COVID-19. Specifically, the commenter asks whether an immigration judge could overturn a negative credible fear finding and whether the BIA could overturn a denial of asylum when the applicant has ceased exhibiting the symptoms that were the basis of the determination.

Another commenter argued that the agencies’ assertion that the NPRM’s impact on time spent making and reviewing screening decisions “would be minimal” was incorrect because

<sup>76</sup> DHS, *Pandemic Influenza: Preparedness, Response, and Recovery: Guide for Critical Infrastructure and Key Resources*, Introduction at 1 (2006) (Michael Chertoff, Secretary of Homeland Security), <https://www.dhs.gov/sites/default/files/publications/cikrpandemicinfluenzaguide.pdf>.

<sup>77</sup> Diane DiEuliis & Laura Junor, *Ready or Not: Regaining Military Readiness During COVID19*, Strategic Insights, U.S. Army Europe (Apr. 10, 2020), <https://www.eur.army.mil/COVID-19/COVID19Archive/Article/2145444/ready-or-not-regaining-military-readiness-during-covid19/> (discussing the spread within the military of twentieth-century pandemics and consequences of the spread this year of COVID-19).

<sup>78</sup> See *id.*

adding the consideration of a danger to the security of the United States bars in the screening process would “exponentially increase the length and complexity of the adjudication.” Another legal services provider expressed concern that the proposal’s anticipation of “minimal” review time indicates the review will be “cursory and not appropriately detailed.”

*Response:* The rule does not create an “infectious” or “communicable” disease bar to asylum and withholding of removal. Rather, the rule clarifies the Departments’ understanding of the existing statutory bars regarding aliens who are reasonably regarded to be dangers to the security of the United States.

The Departments acknowledge that an applicant may be most likely to spread a communicable disease upon and soon after arrival, which coincides with the period in which an alien placed into expedited removal proceedings would be going through credible fear screening. However, this is not always true. As the CDC has stated, there is an “ever-present risk that future pandemics may present new or different challenges . . . . A new virus could have a longer incubation period than . . . the virus that causes COVID–19 . . . or cause a disease that takes longer to run its course.”<sup>79</sup> By way of example, the incubation period for tuberculosis can be years in length, and that of hepatitis B can be up to 180 days.<sup>80</sup>

The Departments did consider limiting the scope of this rule, such as by only applying the bars to those aliens who are symptomatic. But as the CDC has determined in the context of COVID–19:

Identifying those infected with COVID–19 can be difficult, as asymptomatic cases are currently believed to represent roughly 40% of all COVID–19 infections. The infectiousness of asymptomatic individuals is believed to be about 75% of the infectiousness of symptomatic individuals. HHS/CDC’s current best estimate is that between 40 to 50% of infections are

transmitted prior to symptom onset (pre-symptomatic transmission).<sup>81</sup>

The Departments note that the final rule is not, as the NPRM proposed, modifying the regulatory framework to apply the danger to the security of the United States bars at the credible fear stage. In the interim between the NPRM and the final rule, the Global Asylum Final Rule did so for all of the bars to eligibility for asylum and withholding of removal. In any event, the Departments do not intend for asylum officer and immigration judge assessments of the applicability of the security bars in the credible fear process to be “cursory and not appropriately detailed.” As stated in the proposed rule, it is anticipated that asylum officers and immigration judges will need to spend additional time during the credible fear process to determine whether an alien is ineligible for asylum or withholding of removal based on the security bars. However, the Departments believe that the additional time spent making such determinations will be minimal because the issues to be explored by the asylum officer and the immigration judge will usually be fairly straightforward and not involve complex analysis, e.g., the place and time of an alien’s embarkation.

The Departments are not making changes to the final rule in response to these comments.

#### Higher Standard for Credible Fear Determinations

*Comment:* Multiple commenters argued that the rule impermissibly raises the standard for demonstrating a credible fear and imposes the burden onto the asylum seeker to “disprove the assumption that they are a danger to security due to public health.” The commenters state that asylum seekers would be ill equipped to meet the proposed higher standards in the credible fear screening process due to trauma, lack of evidence or key information when they arrive at the border, lack of legal representation, and lack of English proficiency, all of which renders them incapable of contributing meaningfully to their own defense. Another commenter added that the rule denies asylum seekers the opportunity to receive meaningful administrative or judicial review. Another noted that asylum seekers would have difficulty proving they do not have a disease at this stage in the process because they

would not have access to physicians, medical screenings, or tests while in detention. Another commenter argued that the burden of proof concerning credible fear and application of the national security bars should fall to the government, given the danger, including death, that some asylum seekers may face upon return to their home country.

*Response:* The rule does not, and could not, alter the standard for demonstrating a credible fear of persecution, which is set by statute as a “significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum . . . .” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Asylum officers and immigration judges will continue to assess credible fear for purposes of potential eligibility for asylum by determining whether there is a significant possibility that the alien can establish eligibility for asylum—which of necessity requires the alien to demonstrate a significant possibility of each element of asylum eligibility. Thus, to meet the credible fear standard, the alien need only establish a significant possibility that the danger to the security of the United States bar does not apply and a significant possibility of meeting the other relevant eligibility criteria.

The Departments do not agree that it is appropriate to place the burden on the government concerning the application of the danger to the security of the United States bars, or that they could even do so consistent with the INA. Section 235(b)(1)(B)(iii)(II) of the INA, which requires an asylum officer to prepare a written record of a negative credible fear determination analyzing why “the alien has not established a credible fear of persecution,” states that it is the alien’s responsibility to establish a credible fear of persecution. While the burden lies with the alien, the officer is charged with eliciting (in a non-adversarial manner) relevant information that bears on whether the alien has a credible fear of persecution, including whether there is a significant possibility that the danger to the security of the United States bars does or does not apply. 8 CFR 208.30(d). The Departments point out that testimony alone, if otherwise credible, can be sufficient to meet the alien’s burden of proof.<sup>82</sup>

<sup>79</sup> Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR at 56527.

<sup>80</sup> Illinois Department of Public Health, available at <https://dph.illinois.gov/sites/default/files/publications/commchartschool-032817.pdf> (last visited on October 15, 2020); Center for Acute Disease Epidemiology, Iowa Department of Public Health, *The Epidemiology of Common Communicable Diseases*, available at <https://idph.iowa.gov/Portals/1/userfiles/79/Documents/Epi%20of%20Common%20Communicable%20Diseases%20June%202013%20-%20FINAL.pdf> (last visited on October 15, 2020).

<sup>81</sup> Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR at 56429.

<sup>82</sup> INA 208(b)(1)(B)(ii) and 241(b)(3)(C), 8 U.S.C. 1158(b)(1)(B)(ii) and 1231(b)(3)(C); 8 CFR 208.13(a), 208.16, and 208.16(c)(2).

The Departments are not making changes to the final rule in response to these comments.

#### Role of Asylum Officers and Border Agents

*Comment:* Several commenters raised concerns that the rule, by placing this inquiry in the credible fear stage of the removal process, increases the decision-making authority of “low-level immigration officials,” including border agents and asylum officers, to make complex national security determinations without the proper expertise and without the “significant pre-hearing preparations” that would accompany removal proceedings before an immigration judge. Several commenters posed questions about what kind of guidance, training, or other measures would be implemented to enable CBP officers, asylum officers, and immigration judges to determine whether an asylum seeker is exhibiting symptoms consistent with a contagious disease. Others asked whether such trainings would address implicit and explicit bias in making such determinations, and how such determinations would be tracked and measured. Another commenter argued that requiring asylum officers to make determinations about withholding of removal under the CAT regulations violates 8 CFR 208.16(a), which states that asylum officers “shall not” decide withholding claims.

*Response:* As noted, the final rule is not, as the NPRM proposed, modifying the regulatory framework to apply the danger to the security of the United States bars at the credible fear stage because, in the interim between the NPRM and the final rule, the Global Asylum Final Rule did so for all of the bars to eligibility for asylum and withholding of removal. In any event, the application of asylum eligibility bars at the credible fear stage has no bearing on how asylum officers or immigration judges assess alleged trauma during the screening process. Adjudicators in both Departments are trained to make these assessments and are well versed in assessing the credibility of applicants, including accounting for trauma as relevant. Regarding commenters’ concerns about requiring asylum officers to determine whether the 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 statutory bars apply, especially in the credible fear-screening context. An asylum officer must have “had professional training in country conditions, asylum law, and

interview techniques comparable to that provided to full-time adjudicators of applications [for asylum],” and “is supervised by an officer who [has had similar training] and has had substantial experience adjudicating asylum applications.” INA 235(b)(1)(E), 8 U.S.C. 1235(b)(1)(E)); 8 CFR 208.1(b). DHS asylum officers regularly make determinations on a variety of issues surrounding eligibility in a manner consistent with their extensive and multi-faceted training and country conditions and other resources at their disposal. Asylum officers receive extensive training in all the requirements for asylum eligibility, international human rights law, non-adversarial interviewing techniques, and other national and international refugee laws and principles. 8 CFR 208.1(b). This training includes specific lessons on cross-cultural communication; interviewing survivors of torture; and working with an interpreter, all of which touch on explicit and implicit bias. With the publication of this rule, asylum officers will receive additional training on the standards and requirements set forth in this rule. The Departments also note that even before promulgation of the Global Asylum Final Rule, asylum officers already elicited testimony related to mandatory bars to asylum and/or withholding of removal in the credible fear context—they simply did not apply them under then-current regulations.<sup>83</sup>

Lastly, responding to commenters’ concerns that such determinations would be “final,” 8 CFR 208.16(a) provides that an asylum officer “shall not decide whether . . . removal of an alien . . . must be withheld.” The rule provides for the asylum officer to conduct a screening for potential eligibility for withholding and deferral of removal. Asylum officer screening for these protections is currently part of the credible fear process and do not result

<sup>83</sup> See Government Accountability Office, *Actions Needed to Strengthen USCIS’s Oversight and Data Quality of Credible and Reasonable Fear Screenings* (Feb. 2020) at 10 (“In screening non-citizens 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.”), <https://www.gao.gov/assets/710/704732.pdf>; USCIS Refugee, Asylum, and International Operations, *Lesson Plan on Credible Fear of Persecution and Torture Determinations* (Apr. 30, 2019) at 31 (“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.”), <https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf>.

in a grant or denial of withholding or deferral of removal, which can only be done by an immigration judge, 8 CFR 208.16(a), 208.17, 1208.16(a), and 1208.17. An asylum officer’s determination following a credible fear interview can be reviewed by an immigration judge, either as part of a de novo review of a negative credible fear determination, or in asylum-and-withholding-only proceedings, where the immigration judge is not bound by findings of the asylum officer. As the Supreme Court has observed, “[a]n 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.”<sup>84</sup>

The Departments have reviewed and considered the comments and are not making changes to the final rule in response to these comments.

#### Confidentiality of Health Information

*Comment:* One commenter stated that the rule violates asylum seekers’ right to privacy and confidentiality by requiring them to disclose health information to immigration officers. The commenter also faulted the rule for failing to include specifics on how asylum seekers’ personal health information, medical records, and health data would be collected, stored, and transmitted.

*Response:* Information voluntarily provided to DHS for purposes of adjudicating a requested benefit often contains sensitive personally identifiable information. In particular, health information that is collected and maintained within DHS systems of records, for example in the context of the health ground of inadmissibility, INA 212(a)(1), 8 U.S.C. 1182(a)(1); INA 237(a)(1)(A), 8 U.S.C. 1227(a)(1)(A), as it applies to applications for adjustment of status, INA 245(a)(2), 8 U.S.C. 1255(a)(2), is appropriately protected and handled in the same manner as other sensitive information possessed by DHS. Information about the safeguarding of health information and other sensitive information may be found in the various System of Records Notice and Privacy Impact Assessments that DHS and its components are statutorily required to prepare.<sup>85</sup> Moreover, asylum, credible fear, reasonable fear and by policy, refugee information, enjoy heightened

<sup>84</sup> *Thuraissigiam*, 140 S. Ct. at 1965–66.

<sup>85</sup> Available at <https://www.dhs.gov/uscis-pias-and-sorns>.

confidentiality protections provided for in accordance with 8 CFR 208.6.

#### Written Record and Immigration Judge Review of Negative Credible Fear Determinations

*Comment:* One commenter addressed the proposed provision at 8 CFR 208.30(e)(1), which calls for a written record in the credible fear proceeding “subject to (e)(5)”. The commenter stated this amendment was unclear and warned that excusing any credible fear interview from the written record requirement violates the statute at 8 U.S.C. 1225(b)(1)(B)(iii)(II).

*Response:* The Departments appreciate the comment received and acknowledge the ambiguity that may have been created from the proposed amendment to section 208.30(e)(1). The proposed language was intended to simply clarify that when an asylum officer creates a written record of his or her determination following a credible fear interview, the officer should, as applicable, include a written record of their determination as to whether the alien has demonstrated that it is more likely than not that he or she would be tortured in the country of removal. After considering the comment, the Departments have revised the language of the proposed amendment (now at section 208.30(e)(4) following the promulgation of the Global Asylum Final Rule) to make this clearer.

#### Violation of Congressional Intent for Credible Fear Screening Process

*Comment:* A joint submission argued that Congress did not grant DHS authority to create bars to credible fear that are unrelated to asylum eligibility at the time of the adjudication of an application. Multiple commenters argued that Congress intended for the credible fear process to employ a “low screening standard” in order to ensure that asylum seekers with genuine claims have access to the full asylum process and are not returned to persecution, and faulted the proposal for raising this standard.

*Response:* The NPRM did propose to modify the then-existing regulatory framework in order to apply the danger to the security of the United States bars at the credible fear stage. However, subsequent to the publication of the NPRM, the intervening Global Asylum Final Rule amended the regulatory framework to apply all bars to eligibility for asylum and withholding of removal—including the danger to the security of the United States bars—at the credible fear stage. This rule does not make additional revisions to that regulatory framework.

In any event, the final rule does not create a “bar” to credible fear unrelated to asylum eligibility. The Departments will continue to employ the “low screening standard” prescribed in statute and regulations—a significant possibility that the alien could establish eligibility for asylum. However, pursuant to the Global Asylum Final Rule, asylum officers must determine whether aliens are subject to a bar to relief as part of the significant possibility analysis. Accordingly, the Departments are not making changes to the final rule in response to these comments.

#### 3. Streamlining Screening for Deferral of Removal Eligibility in Expedited Removal

##### Ability of Asylum Seekers To Meet Higher Standard for Protection Under CAT in Credible Fear Screenings

*Comment:* The Departments received multiple comments concerning the provisions of the rule that amend the screening standard for potential eligibility for deferral of removal under the CAT regulations. Under the rule, section 208.30(e)(5)(i)(B) is amended to provide that where the asylum officer determines that the applicant is subject to the danger to the security of the United States bars to asylum and withholding of removal, the officer will screen for potential deferral of removal protection under the CAT regulations for an alien who has raised a fear of torture by determining whether the alien is able to establish that it is more likely than not that he or she would be tortured in the prospective country of removal, rather than whether there is a reasonable possibility that the alien would be tortured in the prospective country of removal. Several commenters stated that the “more likely than not” standard is unreasonable in the context of a credible fear screening and argued that this standard was only appropriate for a full immigration hearing before an immigration judge, where a “more likely than not standard” is used as the eligibility standard for deferral of removal. The commenters further argued that raising the standard of proof to the level of a full immigration hearing was inappropriate because individuals in screenings are likely to have less than the required amount of evidence at the time of their arrival and insufficient time to prove their case. Multiple commenters argued that applying the “more likely than not” standard at the expedited removal stage violates the expedited removal standard that was intentionally designed by Congress to be “generous” and “over-inclusive” to

avoid the risk of refoulement. The commenters said requiring individuals subject to a danger to the security of the United States bar to prove they are “more likely than not” to be tortured in the country of removal was an unlawful change to the credible fear standard intended by Congress and clearly articulated in the text and legislative history of IIRIRA. Other commenters noted that those seeking protection under the CAT regulations who have suffered recent trauma and psychological harm would have difficulty understanding complex legal requirements and would be unable to fully disclose everything that has happened to them in a “rushed” interview with a stranger, resulting in an undue risk that those facing torture would not be provided appropriate protection. Another commenter added that allowing removal to a third country at the early screening stage would mean that no thorough record will exist as to a person’s risk of torture in that third country, a risk the commenter argued may be very high considering the permeability of borders and ease of movement of persecutors between Mexico and Central American countries.

*Response:* The Departments first note that the expedited removal provisions of the INA do not even reference screening for withholding or deferral of removal under the CAT regulations. The rule continues to apply the credible fear standard required by statute, defined as a significant possibility that the alien can establish eligibility for asylum. INA 235(b)(1)(B)(v). It is only when the alien is determined not to meet that significant possibility standard due to the application of the danger to the security of the United States bars (subject to review by an immigration judge), and determined not to meet the screening standard for withholding of removal (a reasonable possibility of persecution on account of a protected ground and a reasonable possibility of torture), that DHS will use the “more likely than not” standard to screen for potential eligibility for deferral of removal. There is no statutory requirement to even screen for deferral of removal, putting aside the screening standard used by DHS when it voluntarily engages in screening.

The Departments note that the utilization of the “more likely than not” standard in deferral screenings only applies to aliens determined by DHS to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United States eligibility bars (or ineligible for asylum pursuant to the Third-Country Transit Final Rule). Aliens determined

by asylum officers to be ineligible for asylum or withholding of removal pursuant to the other mandatory bars will continue to be screened for deferral of removal under the reasonable possibility of torture standard, as provided by the Global Asylum Final Rule.

Sending an alien to immigration court for a deferral of removal adjudication often results in his or her release into the United States for periods of years while the aliens await decisional finality. The need to streamline and expedite screening for deferral of removal is especially great in the context of outbreaks of communicable disease to prevent infected aliens from release into the United States when they are not even ultimately eligible for deferral. As the CDC has concluded, the “faster a covered alien<sup>86</sup> is returned . . . the lower the risk the alien poses of introducing, transmitting, or spreading COVID-19 into POEs, Border Patrol stations, other congregate settings, and the interior [of the United States].”<sup>87</sup>

The Departments disagree that the “more likely than not” standard is an inappropriate screening standard for potential protection under the CAT regulations. In fact, Congress made clear that in providing protection under the CAT regulations, the government should not grant protection to aliens barred from eligibility for withholding of removal “[t]o the maximum extent consistent with the obligations of the United States under [CAT].”<sup>88</sup> The sole purpose of CAT deferral is to provide protection to such aliens (barred from eligibility for withholding of removal) in order ensure that they are not refouled to a country where it is likely that they will be tortured. The preamble to the 1999 CAT rule stated that “[d]eferral of removal will be granted . . . to an alien who is likely to be tortured in the country of removal but who is barred from withholding of removal[,]”<sup>89</sup> and the regulatory text itself states that to be eligible for deferral an alien must be “subject to the provisions for mandatory

denial of withholding of removal under § 208.16(d)(2) or (d)(3).”<sup>90</sup>

This rule fulfills Congress’s mandate that the withholding of removal eligibility bars apply to aliens seeking protection under the CAT regulations “[t]o the maximum extent consistent with the obligations of the United States under [CAT]” by requiring that aliens meet at the credible fear stage their ultimate burden to demonstrate eligibility for deferral of removal—*i.e.*, that it is more likely than not that they would be tortured in the country of removal. 8 CFR 208.16(c)(2), 208.17(a).

Regarding the commenter’s concern about the alien’s ability to meet his or her burden with respect to possible torture, as the Departments have noted, asylum officers are trained to research and consider country conditions information, and engage in non-adversarial interview techniques that are designed to elicit all relevant information.<sup>91</sup> And, as the Departments have noted, testimony alone, if otherwise credible, can be sufficient to meet the alien’s burden.<sup>92</sup> The Departments are confident that officers will be able to access and consider all relevant information that may bear on an alien’s potential risk of torture in any particular country.

Regarding commenters’ concerns that this standard is higher than the asylum standard, the “more likely than not” standard better aligns the initial screening standard of proof with the higher standard used to determine whether aliens are in fact eligible for this form of protection when applying before an immigration judge (than the ultimate standard for asylum eligibility). As noted, Congress intended the “more likely than not” standard to meet United States’ non-refoulement obligations in Article 33(1) of the Refugee Convention, not the lower asylum standard.

The Departments recognize that a higher screening standard may make it more difficult to receive a positive fear determination, though that standard is consistent with the higher burden of proof required for considerations of the merits. However, the Departments disagree with commenters that raising the screening standard for deferral of removal will require aliens to submit significantly stronger documentary evidence. Just as in screenings for asylum and withholding of removal eligibility, the testimony of the applicant, if credible, may be sufficient

to sustain the alien’s burden of proof without corroboration. 8 CFR 208.17(a). 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. Additionally, an alien who receives an adverse “more likely than not” determination by an asylum officer may seek review of such determination by an immigration judge.

**Requirement To Affirmatively Raise and Affirmatively Establish Likelihood of Torture in Prospective Country of Removal**

*Comment:* Several commenters argued that, since asylum seekers fleeing torture often experience trauma and lack of understanding of U.S. immigration law, they should not be required to make an affirmative statement in credible fear interviews that they may be tortured if returned to their home country. Some commenters opposed the requirement that an asylum seeker in the expedited removal process “affirmatively establish” that torture in the prospective country of removal is more likely than not. A group of commenters said the rule would essentially require asylum seekers to somehow “affirmatively establish” eligibility for withholding of removal or protection under the CAT regulations in an unknown third country. Another commenter said it is unclear how the Departments understand “affirmatively establish” (in the proposed regulations) in relation to “affirmatively raise” (only stated in the preamble). The commenter said the shift to “affirmatively establish” in the proposed regulations appears to suggest a heightened burden on the asylum seeker, in addition to raising the required risk of torture, signaling a burden of presenting affirmative proof of torture at the credible or reasonable fear interviews. The commenter said it is unclear and confusing as to what standard the Departments are inserting.

*Response:* The Departments appreciate the comments concerning the “affirmatively establish” language that appeared in the regulatory language of the proposed rule. The adverb was included to make clear that the alien has the burden of proof to establish that torture is more likely than not to occur in the prospective country of removal. After considering the comments, the Departments have concluded that the term “affirmatively” may cause confusion and is not necessary to clarify the burden of proof, which clearly rests with the alien. Accordingly, the term “affirmatively” has been deleted from

<sup>86</sup> In the context of the CDC Order, a “covered alien” includes those “persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in congregate settings in POEs or Border Patrol stations to facilitate immigration processing, would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and all aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs.” 85 FR at 17067.

<sup>87</sup> *Id.*

<sup>88</sup> FARRA sec. 2242(c), 8 U.S.C. 1231 note (c).

<sup>89</sup> Regulations Concerning the Convention Against Torture, 64 FR 8478, 8480 (Feb. 19, 1999).

<sup>90</sup> 8 CFR 208.17(a), 1208.17(a).

<sup>91</sup> 8 CFR 208.30(d).

<sup>92</sup> INA 208(b)(1)(B)(ii) and 241(b)(3)(C), 8 U.S.C. 1158(b)(1)(B)(ii) and 1231(b)(3)(C); 8 CFR 208.13(a), 208.16, and 208.16(c)(2).

the regulatory text in the final rule at sections 208.30(e)(5)(i)(B)(3), (e)(5)(iii)(B), (e)(5)(iii)(B)(3), and 1208.30(g)(2)(iv)(A). An alien's obligation is simply to "establish."

As to "affirmatively raises", the preamble to the NPRM stated that "[i]f the alien *affirmatively raises* fear of torture . . . the asylum officer will then assess, as appropriate, the alien's eligibility for deferral of removal under the CAT regulations" and that "[a]n alien who is found by the asylum officer to be subject to the bars and who *affirmatively raises* a fear of torture but does not establish that it is more likely than not that he or she would be tortured can obtain review of both of those determinations by an IJ."<sup>93</sup> The Departments have concluded that the phrase "affirmatively raises" could cause confusion, and thus incorporate the preceding sentences by reference in this final rule with the understanding that "affirmatively raises" should read, "has raised".

The INS and now DHS's longstanding practice has been to ask every alien subject to expedited removal about a potential fear of return. The regulatory text at 8 CFR 235.3(b)(2)(i), which is not changed by this rule, does not state this explicitly, providing that:

In every case in which the expedited removal provisions will be applied and before removing an alien from the United States pursuant to this section, the examining immigration officer shall create a record of the facts of the case and statements made by the alien. This shall be accomplished by means of a sworn statement using Form I-867AB . . . . The examining immigration officer shall read (or have read) to the alien all information contained on Form I-867A.

However, the preamble to the regulation made clear that all aliens placed into expedited removal were to be questioned about a fear of return:

Service procedures require that all expedited removal cases will be documented by creation of an official Service file, to include a complete sworn statement taken from the alien recording all the facts of the case and the reasons for a finding of inadmissibility. This sworn statement will be taken on a new Form I-867AB, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act. The form will be used in every case where it is determined that an alien is subject to the expedited removal process, and contains a statement of rights, purpose, and consequences of the process. . . . The final page of the form contains a standard question asking if the alien has any fear or concern of being removed or of being sent home.<sup>94</sup>

<sup>93</sup> Security Bars NPRM, 85 FR at 41213 (emphasis added).

<sup>94</sup> Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of

Accordingly, CBP/ICE officers ask aliens these questions during the expedited removal process:

- Why did you leave your home country or country of last residence?
- Do you have any fear or concern about being returned to your home country or being removed from the United States?
- Would you be harmed if you are returned to your home country or country of last residence?

The alien's answers to these questions are memorialized on the I-867B Form.<sup>95</sup>

Thus, all aliens receiving credible fear screening interviews will already have been asked whether they have a fear of return and have answered in the affirmative (triggering the credible fear process). Aliens with a fear of return based on torture would presumably have stated such a fear at that time.

#### Unidentified Third Country

*Comment:* Many commenters stated that the rule would eliminate even the prospect of protection under the CAT regulations because DHS officials would be permitted to send an alien to a third country unless the alien proves during a credible fear interview that they would be persecuted or tortured in that specific country—without any requirement that the person be informed of the identity of the country in advance, which one commenter argued is nonsensical, immoral, and cruel. Without notice of the country a person would be sent to, these commenters said asylum applicants would face a near-impossible burden to avoid being sent to a place where they may be tortured.

*Response:* The Departments appreciate the comments and agree that an alien should be informed of the identity of a prospective country of removal, provided with an opportunity to raise a fear of torture if removed to that country, and to have that fear assessed to determine whether he or she has established that it is more likely than not that they will be tortured in that country. That was always the Departments' intent, and the Departments accordingly include language in the final rule clarifying that aliens must be notified of the identity of the proposed country.

#### Unclear Process for Removability Determinations

*Comment:* Some commenters stated that the proposed rule is unclear as to

Removal Proceedings; Asylum Procedures, 62 FR 10312, 10319 (Mar. 6, 1997) (interim rule with request for comments) (emphasis added).

<sup>95</sup> DHS, Form I-867B (08/01/07) (Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act).

the process by which determinations about removability to a third country will be made for individuals who have shown a credible fear of persecution or torture in their home country. The commenters said that given that asylum seekers only request withholding or deferral of removal in removal proceedings before an immigration judge *after* the credible fear process is completed, it is unclear when and how asylum seekers would be advised of the potential for removal to a third country and provided an opportunity to withdraw their request in order to prevent removal to the third country. Another commenter said asylum seekers will be confused by this advisal and feel coerced into abandoning any claim for protection out of fear that they might be removed to a country that they may never have been to, and where they have no support system or means of ensuring their safety or survival. Other commenters said the rule fails to include an exception for LGBTQ persons who may not be able to survive in a third country due to on-the-ground homophobia or transphobia, as it remains illegal or fundamentally dangerous to openly identify as LGBTQ (or even be perceived as LGBTQ) in over 80 countries around the world.

*Response:* The Departments appreciate the comments concerning the rule's requirement that aliens be notified of the possibility of third country removal at the time of requesting withholding or deferral of removal and provided an opportunity to withdraw their request in order to prevent removal to the third country. However, after considering the comments, the Departments are not making changes to the final rule.

Once an asylum officer determines that an alien has not established the requisite fear with respect to potential eligibility for asylum and withholding of removal because they are subject to the danger to the security of the United States eligibility bars, if the alien had raised a fear of torture in the prospective country of removal, the asylum officer will assess whether it is more likely than not that the alien would be tortured in that country of removal, and thus potentially eligible for deferral of removal. Prior to that assessment, the alien would be notified of the possibility of removal to a third country and provided the opportunity to proceed to removal pursuant to INA 241(b), as appropriate.

The Departments do not view the process as coercive as suggested by the commenters. Rather, the process provides applicants with an opportunity to avoid an outcome that already exists.

Under current regulations, an alien who is granted withholding or deferral of removal is protected from removal only to a particular country, and remains subject to removal to other countries. 8 CFR 1208.30(f). This rule provides the alien with the option to return to his or her home country rather than to seek withholding or deferral protection, which could lead to such third country removal.

As stated previously, asylum officers are trained to research and consider country conditions information and engage in non-adversarial interview techniques designed to elicit all relevant information. Accordingly, the Departments are confident that officers will be able to access and consider all relevant information that may bear on an LGBTQ person's potential risk of torture in any particular country.

#### Similarities With the MPP Process

*Comment:* Several commenters raised concerns related to the Migrant Protection Protocols (MPP), which implement DHS's authority under INA 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C), to return certain aliens temporarily to Mexico during the pendency of their section 240 removal proceedings. They argued that the Departments failed to acknowledge and discuss adverse legal precedent issued in the MPP context and claimed that this rule broadens the "disastrous humanitarian consequences" caused by the MPP. Specifically, one commenter noted that under the MPP, individuals must "affirmatively" express a fear of return to Mexico and then prove that it is "more likely than not" that they "will face persecution or torture if returned to Mexico," the same standards used to avoid being sent to a third country under the NPRM. Further, they pointed out that in *Innovation Law Lab v. Wolf*,<sup>96</sup> the Ninth Circuit held that the MPP "does not comply with the United States' anti-refoulement obligations," and the commenter claimed that the use of the same standards in the third country removal process also does not provide sufficient protection against non-refoulement.

*Response:* This rule is in no way related to the MPP and does not constitute an expansion or modification of the MPP. The MPP implements DHS's authority under INA 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C), to return certain aliens temporarily to Mexico during the pendency of their section 240 removal proceedings. The MPP does not involve or implement any bars to eligibility for asylum or withholding of removal.

This rule, on the other hand, allows the Departments to consider emergency public health concerns when determining whether there are reasonable grounds for regarding or believing an alien to be a danger to the security of the United States" and, thus, ineligible to be granted asylum or withholding of removal. Although the Ninth Circuit held that the plaintiffs in *Innovation Law Lab* were likely to succeed on the merits of their claim that the MPP's non-refoulement screening procedures did not meet U.S. non-refoulement obligations, the Departments disagree, and the question remains in litigation. The Supreme Court granted a stay of the district court's preliminary injunction, declining to halt the use of the MPP non-refoulement screening procedures,<sup>97</sup> and the Supreme Court has granted a petition for certiorari.<sup>98</sup>

To the extent that commenters refer to country conditions in Mexico, this final rule permits removal to any third country (in which the alien has not demonstrated that he or she would be more likely than not persecuted because of a protected ground or tortured). Therefore, conditions in any specific country are no more relevant than conditions in any other country, and it is merely speculative as to which third countries DHS might consider in the future.

The Departments also point out that the Ninth Circuit concluded that "plaintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations"<sup>99</sup> presumably based upon "several features of the MPP that, in [plaintiffs'] view, provide insufficient protection against refoulement"<sup>100</sup> features that are not present in this final rule. Unlike under the expedited removal process, under the MPP (1) aliens "must volunteer, without any prompting, that they fear returning,"<sup>101</sup> (2) aliens must demonstrate that it is more likely than not that they will be persecuted,<sup>102</sup> and (3) "an asylum

seeker is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer's determination."<sup>103</sup>

Accordingly, the Departments conclude that MPP procedures and related litigation are not relevant to this rule, and the Departments are not making changes to the final rule in response to these comments.

#### 4. Restoring Prosecutorial Discretion With Regard to Third Country Removal

*Comment:* Several commenters claimed that the rule would put protection from removal from the United States, including deferral of removal under the CAT regulations, out of reach for virtually everyone at the border and force those within the United States to play a "game of roulette" in which they could be removed to virtually any country in the world unless they withdraw their application for deferral. The commenters opposed the NPRM, stating that it would leave the United States government providing essentially no protection to those fleeing persecution or torture. Other commenters similarly stated that the rule threatens to eliminate the prospect of protection under the CAT regulations by allowing removal to third countries. Another advocacy group said asylum seekers sent to third countries would be unable to challenge DHS' decision to do so, and the only option left for them would be to withdraw their application for protection altogether.

*Response:* The Departments have reviewed and considered comments that have expressed concerns regarding the exercise of discretion to remove aliens to third countries who are only potentially eligible for deferral of removal under the CAT regulations due to the security bars to eligibility for

withholding of removal. INA 235(b), 8 U.S.C. 1225(b); 8 CFR 208.30.

<sup>103</sup> *Id.* at 1089. In the expedited removal process, an alien may seek review of a negative credible fear determination by an immigration judge. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Aliens are entitled to a "consultation period" before their credible fear interview. INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv) ("An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof. . . ."). The current period is 48 hours. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10320 (1997) (interim rule with request for comments). Aliens in expedited removal proceedings know of the charges against them, as aliens are only eligible for expedited removal if they are inadmissible on the basis of section 212(a)(6)(C) or (a)(7) of the INA, 8 U.S.C. 1182(a)(6)(C) or (a)(7).

<sup>97</sup> *Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020).

<sup>98</sup> *Wolf v. Innovation Law Lab*, No. 19–1212, \_\_\_ S. Ct. \_\_\_, 2020 WL 6121563, 20 Cal. Daily Op. Serv. 10,700 (petition for cert. granted Oct. 19, 2020).

<sup>99</sup> *Id.* at 1093.

<sup>100</sup> *Id.* at 1088.

<sup>101</sup> *Id.* at 1089. As previously noted, DHS's longstanding practice has been to ask every alien subject to expedited removal about a potential fear of return.

<sup>102</sup> *Id.* at 1088–89. In credible fear screenings in the expedited removal process, aliens need to show only a significant possibility that they would be eligible for asylum or a reasonable possibility that they would be persecuted or tortured for purposes of demonstrating potential eligibility for

<sup>96</sup> 951 F.3d 1073 (9th Cir. 2020).

asylum and withholding of removal. The Departments remind commenters that third country removal is already authorized by statute and utilized in cases where the United States government has a safe third country agreement with another country. INA 208(a)(2)(A).<sup>104</sup> And, unlike asylum, statutory withholding of removal and protection under the CAT regulations provide protection from removal only to the particular country regarding which an alien has established he or she is more likely than not to be persecuted or tortured if removed there. An alien can be removed to another country where the alien has not established that he or she is more likely than not to be persecuted (and is not subject to a bar to eligibility for withholding) or tortured if removed to that particular country. INA 241(b), 8 U.S.C. 1231(b). As DOJ stated in the final rule implementing the U.S.-Canada Safe Third Country Agreement:

[I]t is essential to keep in mind that, in order to be entitled to [statutory withholding of removal or protection under the CAT regulations], an alien must demonstrate that it is more likely than not that he or she would be persecuted, or tortured, in the particular removal country. That is, withholding or deferral of removal relates only to the country as to which the alien has established a likelihood of persecution or torture—the alien may nonetheless be returned, consistent with CAT and section 241(b)(1) and (b)(2) of the Act [INA], to other countries where he or she would not face a likelihood of persecution or torture.<sup>105</sup>

The Departments note that restoring DHS's discretionary ability to remove certain aliens to third countries only applies to aliens determined to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United States eligibility bars, or ineligible for asylum pursuant to the Third-Country Transit Final Rule. Aliens determined by asylum officers to be ineligible for asylum or withholding pursuant to the other mandatory bars will continue to be screened for deferral of removal under the reasonable possibility of torture standard, as provided by the Global Asylum Final Rule, and placed in immigration court for asylum-and-withholding-only

removal proceedings should they establish such a reasonable possibility.

As noted previously, sending aliens to immigration court for a deferral adjudication often results in their release into the United States for periods of years. Restoring DHS's ability to instead remove such aliens to third countries is especially important in the context of outbreaks of communicable disease. As the Departments explained in the NPRM, this would give DHS flexibility to quickly process aliens during national health emergencies during which placing an alien into section 240 proceedings (now, pursuant to the Global Asylum Final Rule, into asylum-and-withholding-only proceedings) may pose a danger to the health and safety of other aliens with whom the alien is detained, or to DHS officials who come into close contact with the alien. The government's interest in protecting the security of the United States outweighs an alien's interest in receiving protection in the country of their choosing. UNHCR itself has concluded that "refugees do not have an unfettered right to choose their 'asylum country,'" that, even if their "intentions . . . ought to be taken into account," they and "may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find international protection."<sup>106</sup> UNHCR explained that "[t]he 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not prohibit such return or transfer."<sup>107</sup> As discussed, pandemics (e.g., COVID-19) can inflict catastrophic damage to America's, and the world's, economy and thus, to the security of the United States. To the extent that such damage has its origin with or can be exacerbated by infected aliens seeking to enter the United States illegally or without proper documents, the Departments believe the entry and presence of potentially infected aliens in certain circumstances warrant the use of discretion to remove aliens placed into expedited removal proceedings to third countries, avoiding the need for their lengthy detention or release into American communities during the pendency of their asylum-and-withholding-only proceedings. Accordingly, the Departments disagree with commenters that suggest the rule should permit aliens who are subject to the danger to the security of the United

States bars to challenge DHS's exercise of prosecutorial discretion in removing them to third countries.

The Departments remind commenters that the danger to the security of the United States bars are applicable not just during the present COVID-19 public health emergency, but for future pandemics or public health emergencies that meet the thresholds in this rule. Thus, the application of the bars to asylum and withholding of removal will be tailored to accommodate the specific circumstances of those public health emergencies. The application of these bars is designed to prevent the entry or limit the further spread of serious communicable diseases into the United States, which would be exacerbated by lengthy review processes to review claims made by recent entrants to the United States.

#### 5. Other Comments on Proposed Changes

##### Removal of the Reconsideration of a Negative Fear Determination

*Comment:* Many commenters, including legal services providers and advocacy groups, expressed concern that proposed 8 CFR 1208.30(g)(2)(iv)(A) would eliminate asylum officers' authority to reconsider negative credible fear determinations that had been affirmed on review by immigration judges, which they described as an important layer of due process for asylum seekers. Multiple commenters reasoned that the ability of the asylum officer to reconsider provides an important safeguard for unrepresented and/or traumatized asylum seekers who were unable to fully express a fear of return during an initial interview and review hearing. Several commenters argued that preventing reconsideration in no way advances the purported health objective of the proposed rule. Another commenter stated that the lack of explanation of such a major change suggests an "alarming lack of thoroughness or analysis" in the Departments' promulgation of the proposal.

*Response:* The Departments appreciate the comments received, and want to state that an inadvertent typographical omission resulted in the elimination of the existing reference to DHS's reconsideration authority at 1208.30(g)(2)(iv)(A). In any event, the Global Asylum Final Rule reinserted the relevant regulatory text at 8 CFR 208.30(g)(2)(i). DHS may continue to reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing

<sup>104</sup> See also *Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry*, 69 FR 69490, 69492 (Nov. 29, 2004); *Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims*, 84 FR 64095 (Nov. 20, 2019).

<sup>105</sup> *Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry*, 69 FR at 69492.

<sup>106</sup> UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* ¶ 2 (Apr. 2018), <https://www.refworld.org/pdfid/5acb33ad4.pdf>.

<sup>107</sup> *Id.*

notice of its reconsideration to the immigration judge.

#### Improper Reference to the Third-Country Transit Ban

*Comments:* Commenters expressed concern regarding the interplay of this rulemaking effort with the interim final rule Asylum Eligibility and Procedural Modifications<sup>108</sup> (“Third-Country Transit IFR”). Specifically, commenters were concerned that that rule had been vacated and enjoined by Federal courts. A few commenters asserted that the Departments failed to justify why a proposed rule focused on an eligibility bars based on public health would address an unrelated eligibility bar. One commenter asserted that the Departments should eliminate provisions that reference the Third-Country Transit IFR or provide additional justification for how and why the provisions remain pertinent. Another commenter argued that the reference to the IFR is improper because its legitimacy is under review in federal courts, has been vacated by at least one, and that the Departments provided no notice that the third-country transit “ban” is again being considered for incorporation as a regulation.

*Response:* The Departments recently promulgated the Third-Country Transit Final Rule, Asylum Eligibility and Procedural Modifications, 85 FR 82260 (December 17, 2020), which responded to comments received on the Third-Country Transit IFR and made minor changes for clarity and correction of typographical errors, and promulgated the Global Asylum Final Rule. As these rules supersede the Third-Country Transit IFR, this Security Bars and Processing final rule modifies the NPRM’s proposed changes to the Third-Country Transit IFR’s regulatory text to reflect the text of the now-operative Global Asylum Final Rule. This also serves to resolve any possible concerns regarding modifying the text of a regulation subject to a preliminary injunction.

#### Due Process Concerns

*Comment:* Numerous commenters expressed concern about the NPRM’s impact on due process. A religious organization alleged generally that the rule would deprive aliens of the opportunity to be heard before a judge. A legal services provider remarked that immigration proceedings must conform to the Fifth Amendment’s due process requirement and stated that legal scholars have observed that expedited removal proceedings do not afford

asylum seekers with important due process protections such as access to counsel. The commenter said the Supreme Court had previously noted its “discomfort” with the minimal due process protections, given the severe consequence of deportation, and the commenter argued the proposal would further diminish due process protections by denying asylum seekers access to the court and the BIA.

One commenter alleged, without elaboration, that the rule “circumvents mandatory procedural rights enshrined in the removal process.” Another commenter stated that the Due Process Clause requires that agencies implement procedures for access to “a statutory right to apply for asylum” fairly and consistently, and argued that the NPRM would contravene this requirement by “throw[ing] the procedures for accessing asylum protections into chaos.”

One commenter argued that constitutional due process rights extend to aliens and that they are especially important in asylum cases, where the consequences of adverse decisions are severe and could result in deportation, torture, or death. The commenter claimed further that the rule attempts to evade these protections and statutory asylum procedures and apply arbitrary, unlawful indicia of dangerousness without justification.

An advocacy group wrote that UNHCR guidance requires that asylum applicants be afforded due process. Similarly, an international agency commented that “UNHCR’s position is that it is contrary to international law to deprive asylum seekers of access to a full examination of the substance of their claim based on an exclusionary ground.” The commenter reasoned that screening interviews are inadequate to assess the factual and legal issues surrounding asylum, especially given the lack of legal assistance, translation, and time to recover from trauma that an applicant may face.

*Response:* The rule does not violate constitutional or statutory due process protections. The Supreme Court recently ruled in *United States v. Thuraissigiam*<sup>109</sup> (in the context of reversing a Ninth Circuit decision that had declared the expedited removal statute’s limitation on federal habeas review as unconstitutional for suspending the writ of habeas corpus and violating due process) that:

While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien’s lawful entry into

this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 . . . (1892). Respondent attempted to enter the country illegally and was apprehended just 25 yards from the border. He therefore has no entitlement to procedural rights other than those afforded by statute.<sup>110</sup>

[R]espondent contends that IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding. . . . The Ninth Circuit agreed, holding that respondent “had a constitutional right to expedited removal proceedings that conformed to the dictates of due process.” . . .

[T]he dissent [is in] correct in defending the Ninth Circuit’s holding. That holding is contrary to more than a century of precedent. In 1892, the Court wrote that as to “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law,” “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Nishimura Ekiu*, 142 U.S. at 660. . . . Since then, the Court has often reiterated this important rule. See, e.g., *Knauff*, 338 U.S. at 544 . . . (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”); *Mezei*, 345 U.S. at 212 . . . (same); *Landon v. Plasencia*, 459 U.S. 21, 32 . . . (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”).

Respondent argues that this rule does not apply to him because he was not taken into custody the instant he attempted to enter the country (as would have been the case had he arrived at a lawful port of entry). Because he succeeded in making it 25 yards into U.S. territory before he was caught, he claims the right to be treated more favorably. The Ninth Circuit agreed with this argument. We reject it. It disregards the reason for our century-old rule regarding the due process rights of an alien seeking initial entry. That rule rests on fundamental propositions: “[T]he power to admit or exclude aliens is a sovereign prerogative,” *id.*, at 32 . . . ; the Constitution gives “the political department of the government” plenary authority to decide which aliens to

<sup>108</sup> 84 FR 33829 (July 16, 2019).

<sup>109</sup> 140 S. Ct. at 1959.

<sup>110</sup> *Id.* at 1963–64.

admit, *Nishimura Ekiu*, 142 U.S. at 659 . . . ; and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted, see *Knauff*, 338 U.S. at 544 . . . .

This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil. When an alien arrives at a port of entry—for example, an international airport—the alien is on U.S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are “treated” for due process purposes “as if stopped at the border.” *Mezei*, 345 U.S. at 215 . . . ; see *Leng May Ma v. Barber*, 357 U.S. 185, 188–190 . . . (1958); *Kaplan v. Tod*, 267 U.S. 228, 230–231 . . . (1925). The same must be true of an alien like respondent. As previously noted, an alien who tries to enter the country illegally is treated as an “applicant for admission,” § 1225(a)(1), and an alien who is detained shortly after unlawful entry cannot be said to have “effected an entry,” *Zadvydas v. Davis*, 533 U.S. 678 . . . (2001). Like an alien detained after arriving at a port of entry, an alien like respondent is “on the threshold.” *Mezei*, 345 U.S. at 212 . . . . The rule advocated by respondent and adopted by the Ninth Circuit would undermine the “sovereign prerogative” of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location. *Plasencia*, 459 U.S. at 32 . . . .

For these reasons, an alien in respondent’s position has only those rights regarding admission that Congress has provided by statute.<sup>111</sup>

Due process most fundamentally requires notice and an opportunity to be heard.<sup>112</sup> Contrary to commenters’ assertions, this rule does not deprive aliens of a hearing before an immigration judge. As the Departments noted in the NPRM, if an alien subject to expedited removal is unable to establish during a credible fear screening the requisite possibility of eligibility for asylum or withholding of removal because of the danger to the security of the United States eligibility bars, the asylum officer’s determination is reviewable by an immigration judge, as would be the officer’s determination that the alien has not established it to be more likely than not that he or she

would be tortured in the prospective country of removal.

If, based on this review, the alien is placed in asylum-and-withholding-only proceedings, the alien will have an opportunity to raise whether he or she was correctly identified as subject to the bars, as well as other claims. If an immigration judge determines that the alien was incorrectly determined to be subject to the bars, and the alien has otherwise established the requisite fear of persecution or torture, then the alien will be able to seek asylum and withholding of removal. And the alien can appeal the immigration judge’s decision in these proceedings to the BIA and then seek review from a federal court of appeals.

As discussed above, a commenter argued that the NPRM uses public health as a pretext to deny asylum because the Departments provide for immigration judge review, which can take several days, in which time the alien may spread or contract a dangerous virus while in DHS custody. Other commenters faulted the Departments for a process they claim to be too swift. When read together, commenters faulted the Departments for providing a review process that presents significant risk of spreading a disease during a pandemic because of lengthy review, while at the same time violating due process because the review process is too short. The Departments disagree with the premise of each assertion, but note that these competing arguments illustrate the balance that the Departments are striving to achieve with this rule—mitigating risk of harm while providing due process protections.<sup>113</sup> The rule balances the interests of public safety with that of due process.

As discussed, the Departments disagree that the rule heightens the credible fear standard regarding potential eligibility for asylum. As noted, it clarifies the Departments’ understanding of danger to the security of the United States bars. It does not alter the statutory credible fear standard of “significant possibility.”

The Departments disagree that this rule will not be applied fairly and consistently, that it deprives aliens of a “statutory right to apply for asylum,” or that it will throw procedures for accessing asylum into chaos. This rule

applies equally and fairly to all aliens who enter or attempt to enter the United States, whether at the southern border, the northern border, or any of the more than 300 land, air and sea POEs.

Further, aliens’ right to apply for asylum is, where applicable, limited by the expedited removal process, which prohibits the filing of an asylum application and a full hearing on that application where the alien is unable to establish the requisite fear of persecution or torture. It is not clear from the comment how or why the asylum system would be thrown into chaos. The Departments therefore cannot address the claim.

The Departments also disagree that the rule violates due process on the basis that it does not conform to UNHCR guidance and that screening interviews are inadequate. The Departments are not bound by UNHCR guidance or supposed “international norms.” Further, the Departments have many years of combined experience in implementing the credible fear screening and review process, and believe the current infrastructure and personnel are well positioned to implement this final rule.

*Comment:* Several commenters argued that applying danger to the security of the United States bars at the credible fear screening stage would deprive asylum seekers of a full, fair and meaningful opportunity to have their asylum claims adjudicated because the credible fear screening stage does not include due process protections. Other commenters remarked that asylum seekers with meritorious claims would be denied the opportunity to testify and present their case before a judge if asylum officers determine they are a danger to national security on public health grounds, even if they are not actually infected with COVID-19 or another contagious disease.

A legal services provider described the procedural safeguards of section 240 proceedings, including increased opportunity for administrative and judicial review, and faulted the proposal for conflating threshold eligibility and questions of a claim’s ultimate merits that are more appropriate for section 240 proceedings.

Another legal services provider stated that the proposal would deny asylum seekers due process by making it easier to deport those “branded as diseased” before they can access legal counsel to help establish the merits of their claims to asylum.

One commenter remarked that the proposal would increase the evidentiary burden on asylum seekers early in the process and would increase the likelihood that vulnerable individuals

<sup>111</sup> *Id.* at 1981–83.

<sup>112</sup> *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.”).

<sup>113</sup> *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedure.”).

are returned to countries where they risk persecution or torture, and argued that asylum seekers' right to avoid being returned to countries where their lives would be in danger outweighs the administrative efficiencies cited as justification for the proposal.

A legal services provider argued that applying the danger to the security of the United States bars at the credible fear stage would lead to "tremendous due process concerns" because asylum seekers would be forced to present their cases to asylum officers without access to counsel, after arduous and traumatic journeys to the United States, and after enduring poor conditions in CBP or ICE custody. A professional association agreed and stated that expedited removal proceedings lack important procedural safeguards such as a meaningful opportunity to present evidence to a neutral factfinder, access to legal counsel, the opportunity to receive findings of fact and conclusions of law, and access to administrative or judicial review. A legal services provider stated that asylum seekers must have access to legal counsel in order to ensure an adequate review of the merits of their cases in the current process and suggested legal assistance would be even more important due to changes contained in the NPRM.

*Response:* The Departments disagree that applying the danger to the security of the United States bars at the credible fear screening violates due process on the grounds that it does not provide a full, fair and meaningful opportunity for an alien to have his or her asylum application adjudicated. As noted above, the Global Asylum Final Rule already took this step. In any event, Congress provided for the credible fear process, and many aliens seeking admission and expressing a fear of return to their home countries are removed each year on the basis that they failed to establish a credible fear.

The Departments recognize that, during a pandemic, aliens with otherwise meritorious claims may be subject to the danger to the security of the United States bars. However, it was Congress's decision to make aliens who there are reasonable grounds for regarding or believing to be a danger to the security of the United States categorically ineligible for asylum and withholding of removal. In any event, aliens who are determined not to have a credible fear of persecution or torture may seek immigration judge review of whether the security bars were properly applied. If an immigration judge finds the bars were improperly applied, and that the alien has established a credible fear, the alien will not be removed, but

rather placed into asylum-and-withholding-only proceedings.

The Departments also recognize that an alien may be subject to the danger to the security of the United States bars where he or she is not infected with the relevant communicable disease at the time the determination is made, but disagree that this violates due process or that it requires a heightened evidentiary standard. The bars do not require a positive diagnosis, only that DHS or DOJ have reasonable grounds for regarding the alien as a danger. As noted above, the Attorney General in *Matter of A-H* ruled that "reasonable" in this context "implied the use of a 'reasonable person' standard" that was "substantially less stringent than preponderance of the evidence," and instead akin to "probable cause."<sup>114</sup> The standard "is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security."<sup>115</sup> Further, "[t]he information relied on to support the . . . determination need not meet standards for admissibility of evidence in court proceedings . . . . 'It [i]s enough that the information relied upon by the Government [i]s not 'intrinsically suspect.'"<sup>116</sup> These standards that have been previously applied to interpretations of the security eligibility bars support application of the bars in instances where each individual alien is not known to be carrying a particular disease. Rather, it is enough, for example, that the prevalence of disease in the countries through which the alien has traveled to reach the United States makes it reasonable to believe that the entry of aliens from that country presents a serious danger of introduction of the disease into the United States.

The Departments reject the assertion that the rule violates due process based on the claim that it prohibits access to counsel prior to the bars' application at credible fear screenings, or that it deprives aliens of a meaningful opportunity to present evidence to a neutral factfinder, to receive findings of fact and conclusions of law, or to access administrative or judicial review. The rule does not alter the ability of aliens to consult with counsel, INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv), to present testimony to the asylum officer in an interview conducted in a non-adversarial manner, with the goal of eliciting all relevant and useful information bearing on whether

the alien can establish a credible fear of persecution, reasonable possibility of persecution, reasonable possibility of torture, or whether it is more likely than not that the alien will be tortured in the prospective country of removal, INA 235(b)(1)(B)(iii)(II), 8 U.S.C. 1225(b)(1)(B)(iii)(II), 8 CFR 208.30(d), or to request an immigration judge's de novo review of the asylum officer's determination, INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III), 8 CFR 1003.42(d)(1).

*Comment:* Some commenters emphasized that the NPRM could allow the removal of an applicant seeking deferral of removal to a third country before the adjudication of the case in immigration court by an immigration judge. Some commenters claimed that removing asylum seekers to third countries before their pending asylum claims are adjudicated would unfairly and illegally deprive them of the opportunity to establish eligibility for asylum. A legal services provider said the proposed rule's efforts to effectuate third country removals would deliberately interfere with EOIR's review of the merits of the asylum seeker's claim, who could be deported abruptly prior to their day in court.

Another commenter said the rule would deport thousands of people to likely deaths before they even have a chance to express their fear.

*Response:* The Departments disagree that the rule allows for the removal of an alien seeking protection from a third country before their asylum claims are adjudicated. The rule provides for removal to a third country only after the alien has been determined by an asylum officer to not have a credible fear of persecution or a reasonable possibility of persecution or torture due to the danger to the security of the United States bars, and only after the alien has had an opportunity for de novo review of that determination by an immigration judge. Thus, the alien's only available form of protection, should the alien be eligible, would be deferral of removal, which only protects the alien from removal to the particular country from which removal has been deferred. 8 CFR 208.17(b)(2). Thus, removal to a third country prior to a full adjudication of the deferral claim does not deprive the alien of protection that would be provided by deferral—removal to that particular country. Rather, it brings efficiency to the process by treating the alien as though he or she has received such protection without the need for a full adjudication of the deferral claim. Under this rule, DHS will provide notice to the alien of the prospective third country, and the alien will have an

<sup>114</sup> 23 I&N Dec. at 788–89 (emphasis added).

<sup>115</sup> *Id.* at 789 (citation omitted).

<sup>116</sup> *Id.* at 789–90.

opportunity to establish that he or she would be more likely than not to be tortured in such third country. Even the current deferral of removal regulations provide that an alien who is granted deferral be informed “that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.” 8 CFR 208.17(b)(2), 1208.17(b)(2).

## 6. Other Issues Related to the Rule

### 1. Requests to Extend Comment Period

*Comment:* Several commenters requested that the Departments extend the 30-day comment period, citing the APA, Executive Order 12866, and instances where rulemakings have been open longer than 60 days. Some commenters claimed that the rule is complex, sweeping, and that it would rewrite fundamental aspects of U.S. asylum law, arguing that the 30-day comment period is therefore insufficient to analyze the impact of the proposed changes and receive proper input from key stakeholders such as public health and medical experts. Several other commenters argued that the 30-day comment period is particularly inadequate given the COVID–19 crisis, which had already taxed the resources and capacity of organizations. Multiple commenters stated that the comment period was inappropriate given the concurrent proposed rule Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020) (“Global Asylum NPRM”), which closed for comments on July 15, 2020. Several commenters claimed that there was a lack of urgency in promulgating this final rule given that few asylum interviews are occurring because of the March 20, 2020 CDC order.<sup>117</sup> One commenter asserted that asylees, lawful permanent residents, and U.S. citizens who have family members with pending determinations did not provide comment on this rule due to fear of retaliation from the Administration and thus the comment period is missing critical stakeholder input.

*Response:* The Departments disagree that the comment period was insufficient and decline to extend it. The Departments also disagree with the commenters’ characterizations of the rule as complex, sweeping, or rewriting

fundamentals of asylum law. The rule is designed to be as narrow as the scope of a given public health emergency, and is only operable under a discrete set of circumstances during such an emergency. The rule merely clarifies that the Departments’ understanding of the danger to the security of the United States bars to eligibility for asylum and withholding of removal encompasses public health concerns, restores prosecutorial discretion to DHS, and streamlines the process for screening for potential eligibility for deferral of removal under the CAT regulations. The Departments also disagree that the comment period should have been longer due to the Global Asylum NPRM. This rule is separate and distinct, dealing with a much more limited set of issues.

The APA is silent as to the duration of the public comment period and does not establish a minimum duration.<sup>118</sup> Executive Order 12866 encourages, but does not require, agencies to provide at least 60 days for the public to comment on significant rules. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that “[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”<sup>119</sup> The Departments believe that the 32-day comment period for this rule provided an adequate opportunity for public input, and decline to extend the period. Contrary to commenters’ claims that this rule lacks urgency, the duration of the comment period is a reflection of the urgency with which the Departments believe they must address public health concerns given the ongoing pandemic and risk of future pandemics.

The sufficiency of the 32-day comment period for this rule is supported by the over 5,000 public comments received. The public, including attorneys, advocacy groups, religious, community, and social organizations, law firms, federal, state and local entities and elected officials provided a great number of detailed and informative comments. Given the quantity and quality of the comments received in response to the proposed rule, and other publicly available information regarding the rule, the Departments believe that the 32-day

comment period was sufficient. The Departments recognize that the comment period was open during the ongoing COVID–19 pandemic, but disagrees that it should be extended on that basis. Over 5,000 comments were successfully submitted and accepted online, not requiring in-person transmission of comments or even use of the U.S. Postal Service.

The Departments reject the assertion that some members of the public were unable to provide comments due to their immigration status. One commenter asserted, without evidence, that asylees, lawful permanent residents, and U.S. citizens who have family members with pending determinations did not provide comment on this rule due to fear of retaliation from the Administration and thus the comment period is missing critical stakeholder input. The Departments solicited comments from all interested persons as part of this rulemaking. The Departments neither solicited nor required persons to provide information about their immigration status in order to submit a comment, and the Department would have no way of knowing the status of any commenter unless volunteered. In the NPRM, the Departments cautioned commenters that “all comments received are considered part of the public record and made available for public inspection . . . . Such information includes personally identifiable information (such as a person’s name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.”<sup>120</sup>

### 2. Rulemaking Process/APA Concerns

*Comment:* Approximately 20 submissions expressed concerns that the NPRM does not comply with the APA. Multiple commenters argued that it is arbitrary and capricious because it does not meet the Departments’ statutory, non-refoulement, and constitutional mandates to protect asylum seekers’ rights or because it raises the burden of proof on asylum; fails to consider other factors that could mitigate the risk of COVID–19 infection; uses COVID–19 as a pretext to exclude applicants from countries where COVID–19 is prevalent, but less prevalent than in the United States; fails to demonstrate that the Departments engaged in reasoned, data-driven decision making; and was written in a piecemeal and duplicative fashion, which demonstrates an intent to evade comprehensive evaluation and comment.

<sup>120</sup> Security Bars and Processing, 85 FR at 41201.

<sup>117</sup> Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 17060, 17067 (Mar. 20, 2020).

<sup>118</sup> 5 U.S.C. 553(c).

<sup>119</sup> *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)).

One commenter stated that the timing of this rule merits very close scrutiny given the recent publication of the Global Asylum NPRM, asserting that this demonstrates apparent bad faith by attempting a “second bite at the apple” and that the Departments’ public health rationale should not be granted deference.

A legal services provider claimed that the rule is arbitrary and capricious because it “ignores the significant reliance interests of [the legal service provider] and organizations like it.” Namely, the organization stated that it has developed processes and educational material for asylum seekers and for its staff and volunteers based on asylum law “as it currently exists,” and that it “trains its staff, volunteers, and pro bono attorneys on asylum law using curricula that have been standardized and perfected.” It argued that the rule “would require [the organization] to expend significant resources to revise, reprint, and retrain all of this existing materials and procedures, to the detriment of [the organization] and the communities it serves.”

*Response:* 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. Each of the Departments’ rules stand on their own, include explanations of their basis and purpose, and allow for public comment, as required by the APA.<sup>121</sup>

The Departments also disagree that the promulgation of this rule is arbitrary and capricious or that it violates the APA. As discussed previously, the APA requires agencies to engage in “reasoned decision making”<sup>122</sup> and directs that agency action be set aside if it is arbitrary or capricious, 5 U.S.C. 706(2)(A). However, this is a “narrow standard of review” and “a court is not to substitute its judgment for that of the agency,”<sup>123</sup> 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.”<sup>124</sup> Arbitrary and capricious review is “highly deferential, presuming

the agency action to be valid.”<sup>125</sup> It is “reasonable for the [agency] to rely on its experience” to arrive at conclusions, even if those conclusions are not supported with “empirical research.”<sup>126</sup> Moreover, the agency need only articulate “a rational connection between the facts found and the choice made.”<sup>127</sup>

Under this deferential standard, and contrary to commenters’ claims, the Departments have provided reasoned explanations for the changes in this rule more than sufficient to satisfy the APA’s procedural requirements. The NPRM and final rule describe each provision in detail and provides an explanation for each change from current law or from the NPRM. The Departments explained that these changes are intended to mitigate the risk of a dangerous communicable disease being brought to, or further spread within, the United States.

The Departments disagree that the rule exceeds statutory authority. This rule clarifies that existing statutory limitations on asylum and withholding eligibility may include emergency public health concerns. This falls squarely within the Departments’ statutory authority.

The Departments also disagree that the rule raises the burden of proof on asylum seekers beyond the international standard. First, the rule continues to apply the statutory standard of credible fear of persecution, defined as a significant possibility that an alien could establish eligibility for asylum. Second, the ultimate standard for statutory withholding of removal and protection under the CAT regulations—intended by Congress to meet the United States’ non-refoulement obligations under the Refugee protocol and CAT—remains the same at “more likely than not.”

Contrary to commenters’ assertions, the Departments did consider and implement other factors that could mitigate risk of COVID-19 infection.

The Departments also reject as unfounded the assertion that the rule uses COVID-19 as a pretext to exclude applicants from countries where COVID-19 is prevalent, but less prevalent than in the United States. The rule is not limited to the COVID-19 pandemic, and is intended to allow the Departments to respond quickly and effectively to unknown future health emergencies that meet the criteria it defines. Additionally, the rule applies

equally to all countries or regions outside the United States where a “disease is prevalent or epidemic,” but does not require that the disease be “less prevalent” in the United States at the time the determination is made. Due to inconsistencies in reporting standards, lack of reporting, or intentional misreporting, it can be difficult to gauge at any given time whether a disease is more prevalent than in the United States. Moreover, the Departments have a duty to ensure the security of the United States without regard to whether the pandemic is more prevalent or less prevalent elsewhere.

Recently, the number of COVID-19 cases has been overwhelming in countries where a significant number of asylum seekers originate from or travel through. The vast majority of inadmissible aliens seeking asylum originate from or travel through areas where COVID-19 is widespread, such as Latin America. The World Bank recently noted that “Latin America and Caribbean is the region hardest hit by the COVID-19 Pandemic”<sup>128</sup> and it was recently reported that “Latin America and the Caribbean marked 10 million cases. . . and with more than 360,000 deaths, the region is the worst hit in terms of fatalities, according to official figures.”<sup>129</sup>

As of December 15, 2020, Mexico had 1,277,494 cumulative COVID-19 cases, including 166,733 new cases in October, 182,705 new cases in November, and 115,967 new cases in December (as of December 15).<sup>130</sup> Areas along the U.S. southwest border are also seeing a high number of positive COVID-19 cases. For example, in Sonora, Mexico, there have been 47,476 confirmed cases (and [3,759] deaths) as of December 15, 2020, including 4,075 new cases in October, 5,373 new cases in November, and 2,090 new cases in December (as of December 15).<sup>131</sup>

The Departments disagree that this rulemaking is piecemeal or duplicative, and reject the assertion that the NPRM was intended to evade comprehensive evaluation and comment, or that the

<sup>121</sup> *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 to promulgate a rule).

<sup>122</sup> *Michigan v. EPA*, 576 U.S. 743, 750 (2015), quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

<sup>123</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

<sup>124</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>125</sup> *Sacora*, 628 F.3d at 1068.

<sup>126</sup> *Id.* at 1069.

<sup>127</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>128</sup> World Bank, Press Release: *Latin America and the Caribbean Must Seek to Contain the Costs from COVID-19 While Waiting for a Vaccine*, Oct. 9, 2020, available at <https://www.worldbank.org/en/news/press-release/2020/10/09/latin-america-caribbean-contain-costs-covid19>.

<sup>129</sup> Abhaya Srivastava, *India Infections Top Seven Million* . . . , Int. Bus. Times, Oct. 11, 2020.

<sup>130</sup> Government of Mexico, COVID-19 Tracking Map, Graph of Confirmed Cases, <https://datos.covid-19.conacyt.mx/#DOView> (last visited December 17, 2020).

<sup>131</sup> Government of Mexico, COVID-19 Tracking Map <https://datos.covid-19.conacyt.mx/#COMNac> and <https://datos.covid-19.conacyt.mx/fHDMap/> (last visited December 17, 2020).

timing of this rulemaking in conjunction with the Global Asylum NPRM evidences bad faith. Though there is some overlap in function, these separate rulemakings had different goals and responded to separate emergencies. Namely, the Global Asylum NPRM sought to provide “much-needed guidance on the many critical, yet undefined, statutory terms related to asylum applications [in a manner that] not only improves the efficiency of the system as a whole, but allows adjudicators to focus resources more effectively on potentially meritorious claims rather than on meritless ones.”<sup>132</sup>

As discussed, the Security Bars NPRM sought to ensure the security of the United States during a pandemic. Further, the Covid-19 pandemic post-dates the Global Asylum NPRM. The Departments note that in November of 2019, the Global Asylum NPRM was listed in the Fall 2019 Unified Agenda, approximately 2 months before the first reported cases of Covid-19 in the United States.<sup>133</sup> Finally, as stated above, this final rule is narrowly tailored to apply under a discrete set of circumstances generally limited in duration, whereas the Global Asylum NPRM applied much more broadly and on a permanent basis (as does the Global Asylum Final Rule). The Departments provided more than sufficient notice of both rules, and the public has had ample opportunity to participate in the rulemaking process.

The Departments disagree that this final rule is arbitrary and capricious or that it “ignores the significant reliance interests of [the legal service provider] and organizations like it.” Given the narrow application of this rule to public health emergencies involving communicable diseases that necessitate a response by the federal agencies with primary jurisdiction over our immigration system, and the infrequency of such responses in the past, it cannot be said that there is a longstanding prior policy that may have engendered serious reliance interests. When an agency changes course, it must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’”<sup>134</sup>

As prior to the COVID-19 public health emergency, the Departments did not have a policy in place to guide the immigration system’s operations during public health emergencies involving communicable diseases, there are no reliance interests to consider. Rather, individuals or organizations will rely—during future public health emergencies—upon the steps the Government takes now. Given that the United States has significantly limited travel and admission during times of other emergencies, such as in response to national security threats from international terrorism,<sup>135</sup> it is predictable that it would take similar, expected measures limiting travel and admission in response to a global pandemic.

The commenter asserts, in essence, that it relied on the agency’s prior policy when it developed processes and educational material for asylum seekers and for its staff and volunteers based on asylum law “as it currently exists.” It argued that the rule “would require [it] to expend significant resources to revise, reprint, and retrain all of this existing materials and procedures, to the detriment of [the organization] and the communities it serves.” However, the United States’ asylum law is frequently in flux because it can be amended by statute, regulation, policy, adjudication and by ever-evolving case law in decisions issued by the Attorney General, the BIA, Circuit Courts of Appeals and by the U.S. Supreme Court. As just one example, as the Departments stated in Global Asylum NPRM, “[t]he definition of ‘particular social group’ has been the subject of considerable litigation and is a product of evolving case law, making it difficult for EOIR’s immigration judges and Board members, as well as DHS asylum officers, to uniformly apply the framework.”<sup>136</sup>

It is not reasonable for an organization to assume that asylum law will remain static and not change in the future when developing processes or education materials. The logical result of the commenter’s argument would be that any law firm or legal aid organization with a specialized practice would have a legally recognized reliance interest in maintaining the status quo of the law that concerns their clients. While the Departments appreciate the efforts of legal service providers to assist and educate the public, the interests raised by the commenter are not those that

may raise serious reliance interests under the APA.<sup>137</sup>

Finally, to the extent that such organizations have a reliance interest based on their processes and educational materials, it is far outweighed by the clear imperative to prevent the entry into the United States, or the further spread within the country, of a deadly contagious disease.

Reconciliation With Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (July 15, 2020)

*Comment:* Multiple commenters stated that this NPRM was not reconciled with the Global Asylum NPRM. Commenters argued that the Global Asylum NPRM proposed changes that were inconsistent with the changes outlined in the Security Bars and Processing NPRM. The commenters stated that the Security Bars NPRM acknowledged the conflict but did not indicate how the two rules would be reconciled and reasoned that without knowledge of how the rules would be reconciled; the public was not able to understand the full implications and adequately comment on the NPRM. Some commenters stated that the overlapping and inconstant language across the two notices of proposed rulemaking demonstrated resulted in a waste of government and public time and resources.

*Response:* The Departments drafted the Security Bars NPRM to reflect the regulatory framework at the time of publication. The Global Asylum Final Rule has since been promulgated. 85 FR 80274 (December 11, 2020). The Security Bars and Processing Final Rule reflects the changes made to the regulatory framework by the Global Asylum Final Rule, except to the extent that the Security Bars Final Rule further modifies that framework. Certain of the provisions of the Security Bars NPRM have been rendered moot by the Global Asylum Final Rule. For instance, the Global Asylum Final Rule provided that all mandatory bars to eligibility for asylum and withholding of removal shall be applied at the credible fear stage, so there is no longer a need to

<sup>137</sup> Some courts believe that such interests of organizational plaintiffs establish standing, but that is a separate matter. See *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265–67 (2020). Article III of the Constitution limits the federal judicial power to the adjudication of “Cases” and “Controversies.” U.S. CONST. art. III, sec. 2, cl. 1. This is effectuated through the doctrine of Article III standing. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). An organization can also have third-party standing. See *Kowalksi v. Tesmer*, 543 U.S. 125, 129–30 (2004).

<sup>132</sup> Global Asylum Final Rule, 85 FR at 80284.

<sup>133</sup> CDC, Press Release: *First Travel-related Case of 2019 Novel Coronavirus Detected in United States* (Jan 21, 2020), available at <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> (last visited Nov. 12, 2020).

<sup>134</sup> *Dept. of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1913 (2020).

<sup>135</sup> See Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, 82 FR 45161 (Sept. 24, 2017).

<sup>136</sup> Global Asylum NPRM, 85 FR at 36278.

take that action specifically for the danger to the security of the United States eligibility bar. As to the provisions of the Security Bars NPRM that were not implemented by the Global Asylum Final Rule, the Security Bars Final Rule makes appropriate modifications to the post-Global Asylum regulatory framework to implement the provisions (as modified from the NPRM in certain instances).

Additionally, as discussed, the Global Asylum Final Rule provided that aliens who establish a credible fear of persecution, a reasonable possibility of torture and accordingly receive a positive fear determination will appear before an immigration judge for “asylum-and-withholding-only” proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1). Aliens receiving positive fear determinations under the Security Bars Final Rule will be placed in such asylum-and-withholding only proceedings rather than section 240 proceedings (as they would have under the NPRM), unless they are removed to third countries.

### 3. Severability

*Comment:* One commenter appreciated the “spirit” of the Departments’ proposed severability clause, but stated that the clause was unnecessary because, in the commenter’s view, none of the rule’s provisions should be adopted.

*Response:* The relevant severability clause was added by the Global Asylum Final Rule.<sup>138</sup> A severability clause is a standard legal provision that allows Congress and the Executive Branch to sever certain provisions of a law or rule, if a court finds that they are unconstitutional or unlawful, without nullifying the entire law or rule. Those provisions that are unaffected by a legal ruling can be implemented by an agency without requiring a new round of rulemaking simply to effectuate provisions that are not subject to a court ruling. The Departments believe that each of the provisions in the final rule function sensibly independently of the other provisions, and thus, to protect the rule’s goals, the provisions are severable so that, if necessary, the regulations can continue to function without a stricken provision.

### 4. Effective Date

*Comment:* A number of submissions expressed concern about the rule’s effective date. One commenter stated that the NPRM did not indicate whether it would apply to those who submitted

asylum applications before its provisions became effective, and argued that doing so would violate the well-settled presumption against retroactivity and have serious impacts for asylum seekers. The commenter also expressed concern that retroactive application would result in removal to a third country for those who have previously filed for CAT protection based on existing laws. Another commenter stated that applying the rule to those with pending applications would unduly harm thousands of asylum seekers, especially *pro se* applicants, by creating waste and inefficiencies and by increasing asylum adjudication backlogs. Both commenters asserted that retroactive application of law is permitted only where expressly permitted by Congress, which they argue does not apply here.

*Response:* The Departments disagree that this rule is being applied retroactively. Contrary to the commenters’ claims, and as previously stated in the NPRM, the amendments made by this proposed rule would apply to aliens who enter the United States after the effective date, except that the amendments would not apply to aliens who had, before the date of an applicable joint Secretary of Homeland Security and Attorney General designation of an area or areas of the world as to which it is necessary for the public health that certain aliens who were present there be regarded as a danger to the security of the United States, (1) filed asylum and withholding applications, or (2) indicated a fear of return in expedited removal proceedings.” The final rule retains this prospective application.

### Authority of Acting Secretary

*Comment:* Several commenters commented that Chad Wolf, the Acting Secretary of Homeland Security, is serving in violation of the Federal Vacancies Reform Act (“FVRA”) and lacked the authority to issue the NPRM. A legal services provider and individual made the same argument with respect to Chad Mizelle, the Senior Official Performing the Duties of the General Counsel of DHS. An attorney quoted FVRA and commented that under any timeline Acting Secretary Wolf’s tenure has exceeded the 210-day limit in FVRA, and that no exception to the 210-limit applies here. The commenter said that ignoring FVRA is no “mere technicality,” and that doing so violates the constitutional principal that the President must appoint principal officers with the advice and consent of the Senate.

A legal services provider presented a timeline of the line of succession of Acting Secretaries, arguing that Christopher Krebs, Director of the Cybersecurity and Infrastructure Security Agency, rather than Kevin McAleenan, should have succeeded Ms. Nielsen as Acting Secretary. The commenter also argued that Mr. McAleenan exceeded the 210-day limit provided by the FVRA, and thus that Mr. Wolf has no valid claim to the office of Acting Secretary.

*Response:* As indicated in the proposed rule at section VI. 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.*

<sup>138</sup> 85 FR at 80284.

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 contention 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 former Secretary 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, 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. 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. 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>139</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 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>140</sup>

<sup>139</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). *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.

<sup>140</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. *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, 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.

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. INA 103, 8 U.S.C. 1103, and 6 U.S.C. 113(g)(2). The Homeland Security Act 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.

## VII. Provisions of the Final Rule

The Departments have considered and responded to the comments received in response to the proposed rule. The Departments are now issuing this final rule to finalize the NPRM.

This final rule makes the following changes to the regulatory provisions in the proposed rule, some of which were noted by commenters, and to certain regulatory provisions not addressed in the proposed rule as necessitated by the intervening promulgation of the Global Asylum Final Rule.

### 1. 208.13

As discussed earlier, the final rule clarifies that the bar it establishes to asylum eligibility (implementing the Departments’ understanding of the INA’s danger to the security of the United States bars) is “categorical” in the following manner.

First, if a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb–3, then an alien is ineligible for asylum on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States if the alien

(A) exhibits symptoms indicating that he or she is afflicted with the disease,

per guidance issued by the Secretary or the Attorney General, as appropriate, or

(B) has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period, per guidance issued by the Secretary or the Attorney General, as appropriate.

Second, if, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States, and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in [paragraph] (A) who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States, including any relevant exceptions as appropriate,

Then, an alien or class of aliens are ineligible for asylum on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States if the alien or class of aliens are described in (A) and are regarded as a danger to the security of the United States as provided for in (B).

Finally, the rule uses the more precise term “communicable” disease” rather than “communicable or infectious” disease.<sup>141</sup>

## 2. 208.16(d)(2)

Also as discussed earlier, the final rule clarifies that the bar it establishes to eligibility for withholding of removal is “categorical” in the following manner.

First, if a communicable disease has triggered an ongoing declaration of a

public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3, then an alien is ineligible for withholding of removal on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States if the alien

(A) exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate, or

(B) has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period, per guidance issued by the Secretary or the Attorney General, as appropriate.

Second, if, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States, and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in [paragraph] (A) who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States, including any relevant exceptions as appropriate,

Then, an alien or class of aliens are ineligible for withholding of removal on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States if the alien or class of aliens are described in (A) and are regarded as a danger to the security of the United States as provided for in (B).

## 3. 208.16(f)

As discussed, the Departments include language clarifying that aliens

must be notified of the identity of a prospective third country of removal.

## 4. 208.30(e)(1)

As the Departments explained earlier, we acknowledge the ambiguity that may have been created from the proposed amendment to section 208.30(e)(1). The proposed language was simply designed to clarify that when an asylum officer creates a written record of his or her determination following a credible fear interview, it should, as applicable, include a written record of their determination as to whether the alien has demonstrated that it is more likely than not that he or she would be tortured in the country of removal. The Departments have revised the language of the proposed amendment to section 208.30(e)(1) (now found at 208.30(e)(4) following the promulgation of the Global Asylum Final Rule) to make it clearer that the written record of determination should include, as applicable, whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal.

## 5. 208.30(e)(5)(i)

First, the final rule places the contents of 208.30(e)(5)(i)(B) into 208.30(e)(5)(iv) to reflect the fact that pursuant to the Global Asylum Final Rule, all the mandatory bars to eligibility for asylum and withholding of removal apply at the credible fear stage.

Second, under the NPRM, the introductory text to 208.30(e)(5)(i)(B) discussed the situation where an alien would be able to establish a credible fear of persecution but for the fact that he or she was subject to the mandatory bars to eligibility for asylum under section 208(b)(2)(A)(iv) of the Act and to withholding of removal under section 241(b)(3)(B)(iv) of the Act, but nevertheless establishes that it is more likely than not that he or she would be tortured in the prospective country of removal. However, 208.30(e)(5)(i)(B)(3) discussed the opposite situation, where an alien fails to establish that it is more likely than not that he or she would be tortured in the prospective country of removal. Section 208.30(e)(5)(iv)(A) as restructured in the final rule eliminates this awkward construction.

Third, as the Department explained earlier, the final rule strikes the phrase “affirmatively establish”, and replaces it with “establish”, in the context of describing what an alien needs to do to demonstrate that he or she is more likely than not to be tortured in a prospective country of removal during a screening for potential eligibility for deferral of removal. The adverb

<sup>141</sup> See footnote 1. The Departments also make this change elsewhere to the regulatory text in the NPRM.

“affirmatively” was included in the NPRM to make clear that an alien has the burden of proof to establish that he or she would be more likely than not to be tortured in a prospective third country of removal. As “affirmatively” may cause confusion and is not necessary to clarify the burden of proof, which clearly rests with the alien, the final rule deletes the word “affirmatively” from the regulatory text in the final rule.

Fourth, the Departments agree that an alien should be informed of the identity of a prospective third country of removal, provided with an opportunity to raise a fear of torture if removed to that country, and to have that fear assessed to determine whether he or she has established that they are more likely than not to be tortured in that third country of removal. That was always the Departments’ intent, and the Departments accordingly include language in the final rule making it clear.

#### 6. 208.30(e)(5)(iii)

As mentioned earlier, the Departments recently promulgated the Third-Country Transit Final Rule and the Global Asylum Final Rule. As these rules supersede the Third-Country Transit IFR, the final rule modifies the NPRM’s proposed changes to the Third-Country Transit IFR’s regulatory text to reflect the now-operative text. Also, the final rule deletes the adverb “affirmatively” as in 208.30(e)(5)(iv).

As an alien typically does not formally request withholding of removal in the context of expedited removal proceedings, the rule also clarifies that aliens should be advised of the possibility of being removed to a third country at the time they are determined to be subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture, and clarifies that such aliens should be given the opportunity to proceed to removal pursuant to section 241(b) of the Act.

Finally, the language in the NPRM relied on the definition of a “reasonable fear of persecution” found at 8 CFR 208.31(c), which did not require an alien to demonstrate, in order to establish a reasonable fear, that he or she was not subject to the bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B). However, the final rule relies on the definition of a “reasonable possibility of persecution”, as added by the Global

Asylum Final Rule. An alien is required to demonstrate, in order to establish a reasonable possibility of persecution, that he or she is not subject to these bars to eligibility for withholding of removal. 8 CFR 208.30(e)(2). The final rule makes conforming changes reflecting this fact.

#### 7. 208.30(e)(5)(iv)

As mentioned, the final rule places the contents of 208.30(e)(5)(i)(B) into 208.30(e)(5)(iv) to reflect the fact that pursuant to the Global Asylum Final Rule, all the mandatory bars to eligibility for asylum and withholding of removal apply at the credible fear stage.

As mentioned above, as an alien typically does not formally request withholding of removal in the context of expedited removal proceedings, the rule clarifies that aliens should be advised of the possibility of being removed to a third country at the time they are determined to be subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture, and clarifies that such aliens should be given the opportunity to proceed to removal pursuant to section 241(b) of the Act.

Finally, as the Departments noted earlier, the utilization of the “more likely than not” standard in deferral screenings only applies to aliens determined to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United States eligibility bars, or ineligible for asylum pursuant to the Third-Country Transit Final Rule. Aliens determined by asylum officers to be ineligible for asylum or withholding pursuant to the other mandatory bars will continue to be screened for deferral of removal under the reasonable possibility of torture standard, as provided by the Global Asylum Final Rule. Thus, for aliens determined to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United States eligibility bars, or ineligible for asylum pursuant to the Third-Country Transit Final Rule, immigration judges will review the asylum officers’ determinations on a de novo basis as to whether aliens have established they are more likely than not to be tortured, just as in reviewing credible fear of persecution and reasonable possibility of persecution and torture determinations.

#### 8. 208.30(f)

The final rule makes a clarifying change to reflect the new “more likely than not” screening standard for potential eligibility for deferral of removal.

As the Departments noted earlier, the restoration of DHS’s discretionary ability to remove certain aliens to third countries only applies to aliens determined to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United States eligibility bars, or ineligible for asylum pursuant to the Third-Country Transit Final Rule. Aliens determined by asylum officers to be ineligible for asylum or withholding pursuant to the other mandatory bars will continue to be screened for deferral of removal under the reasonable possibility of torture standard, as provided by the Global Asylum Final Rule, and placed in immigration court for asylum-and-withholding-only removal proceedings should they establish such a reasonable possibility. Aliens will not be removed to a third country without having first been provided an opportunity to demonstrate that they are more likely than not to be tortured in that country.

#### 9. 208.30(g)

The final rule makes a clarifying change to reflect the new “more likely than not” screening standard for potential eligibility for deferral of removal.

#### 10. 235.6

The final rule makes a clarifying change to reflect the new screening standard for potential eligibility for deferral of removal.

#### 11. 1003.42

The final rule makes a clarifying change to reflect the new screening standard for potential eligibility for deferral of removal.

#### 12. 1208.13

The final rule makes changes analogous to those made to 208.13.

#### 13. 1208.16

The final rule makes changes analogous to those made to 208.16.

#### 14. 1208.16(f)

The final rule makes changes analogous to those made to 208.16(f). As the Departments noted earlier, the restoration of DHS’s discretionary ability to remove certain aliens to third countries only applies to aliens determined to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United

States eligibility bars (or ineligible for asylum pursuant to the Third-Country Transit Final Rule). Aliens determined by asylum officers to be ineligible for asylum or withholding pursuant to the other mandatory bars will continue to be screened for deferral of removal under the reasonable possibility of torture standard, as provided by the Global Asylum Final Rule, and placed in immigration court for asylum-and-withholding-only removal proceedings should they establish such a reasonable possibility. Aliens will not be removed to a third country without having first been provided an opportunity to demonstrate that they are more likely than not to be tortured in that country.

#### 15. 1208.30(g)

The final rule makes clarifying changes to reflect the new screening standard for potential eligibility for deferral of removal and the ability of DHS to exercise its prosecutorial discretion to remove certain aliens to third countries.

As the Departments noted earlier, the utilization of the “more likely than not” standard in deferral screenings only applies to aliens determined to be ineligible for asylum and withholding of removal pursuant to the danger to the security of the United States eligibility bars (or ineligible for asylum pursuant to the Third-Country Transit Final Rule). Aliens determined by asylum officers to be ineligible for asylum or withholding of removal pursuant to the other mandatory bars will continue to be screened for deferral of removal under the reasonable possibility of torture standard, as provided by the Global Asylum Final Rule.

#### 16. 1235.6

The final rule makes a clarifying change to reflect the new screening standard for potential eligibility for deferral of removal.

### VIII. Regulatory Requirements

#### A. Regulatory Flexibility Act

The Departments have reviewed this rule in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule does not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum and related forms of relief, and only individuals are placed in immigration proceedings.

#### B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### C. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act, 5 U.S.C. 804. 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.

#### D. Executive Order 12866, Executive Order 13563, and Executive Order 13771

This rule amends existing regulations to clarify that the statutory “danger to the security of the United States” bars to eligibility for asylum and withholding of removal under INA sections 208 and 241 and 8 CFR 208.13 and 1208.13 and 8 CFR 208.16 and 1208.16, apply in certain contexts involving public health crises caused by communicable diseases so that aliens can be expeditiously removed, as appropriate.

The rule further allows DHS to exercise its prosecutorial discretion regarding how to process individuals subject to expedited removal who are determined to be ineligible for asylum and withholding of removal in the United States on certain grounds, including being reasonably regarded as a danger to the security of the United States, but who nevertheless establish that it is more likely than not that they will be tortured in the prospective country of removal. It provides DHS with the option to either place such aliens into asylum and withholding only proceedings, or remove them to countries with respect to which the aliens have not established that it is more likely than not that they would be tortured. Finally, the rule modifies the process for evaluating the eligibility for deferral of removal of aliens who are ineligible for withholding of removal because they are reasonably regarded as

or believed to be a danger to the security of the United States.

In some cases, asylum officers and immigration judges will need to spend additional time during the credible fear process to determine whether an alien is ineligible for asylum or withholding of removal based on being reasonably regarded as a danger to the security of the United States and whether an alien is more likely than not to be tortured in a prospective country of removal. However, the overall impact on the time spent making (and, in the case of immigration judges, reviewing) screening determinations will be minimal. Additionally, the Departments do not expect the changes to increase the adjudication time for immigration court proceedings. The Departments note that the changes may result in fewer positive credible fear determinations and fewer asylum and withholding and deferral of removal grants during periods of public health crises, but will have no effect at times public health conditions do not trigger a security bar designation under this rule.

Because cases are inherently fact-specific, and because there may be multiple bases for denying relief or protection, neither DOJ nor DHS can quantify precisely the expected decrease in positive credible fear determinations and grants of relief and protection. The full extent of the impacts on this population is unclear and will depend on the specific circumstances and personal characteristics of each alien, and neither DOJ nor DHS collects such data at such a level of granularity. Finally, the changes may also result in fewer aliens being placed in asylum-and-withholding-only proceedings to the extent that DHS exercises its discretion to remove aliens to third countries. However, as these will be discretionary decisions, it is not possible to quantify the reduction.

This rule is a significant regulatory action under Executive Order 12866, though not an economically significant regulatory action. Accordingly, the Office of Management and Budget has reviewed this regulation.

#### E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this rule will not have sufficient federalism implications to warrant the

preparation of a federalism summary impact statement.

*F. Executive Order 12988 (Civil Justice Reform)*

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

*G. Paperwork Reduction Act*

This rule does not create new, or revisions to existing, “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

*H. Signature for DHS*

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

**List of Subjects**

*8 CFR Part 208*

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

*8 CFR Part 235*

Inspection of Persons Applying for Admission.

*8 CFR Part 1003*

Executive Office for Immigration Review.

*8 CFR Part 1208*

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

*8 CFR Part 1235*

Inspection of Persons Applying for Admission.

**Regulatory Amendments**

**Department of Homeland Security**

Accordingly, for the reasons set forth in the preamble, the Acting Secretary of Homeland Security amends 8 CFR parts 208 and 235 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; Pub. L. 115–218.

■ 2. Amend § 208.13 by adding paragraph (c)(10) to read as follows:

**§ 208.13 Establishing asylum eligibility.**

\* \* \* \* \*

(c) \* \* \*

(10) *Aliens who pose a danger to the security of the United States*—(i) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb–3, then an alien is ineligible for asylum under section 208 of the Act on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act if the alien:

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate, or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guidance issued by the Secretary or the Attorney General, as appropriate.

(ii) *Danger to the public health caused by an epidemic outside of the United States.* If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly—

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (c)(10)(ii)(A) of this section who are still within the number of days equivalent to the longest known

incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for asylum under section 208 of the Act on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act if the alien or class of aliens are described in (c)(10)(ii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (c)(10)(ii)(B) of this section.

(iii) The grounds for mandatory denial described in paragraphs (c)(10)(i) and (ii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to 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.

■ 3. Amend § 208.16 by revising paragraphs (d)(2) and (f) 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.**

\* \* \* \* \*

(d) \* \* \*

(2) *Mandatory denials*—(i) *In general.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the regulations issued pursuant to the legislation implementing the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(ii) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3, then an alien is ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate, or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guidance issued by the Secretary or the Attorney General, as appropriate.

(iii) *Danger to the Public Health Caused by an Epidemic Outside of the United States.* If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States, and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (d)(2)(ii)(A) of this section who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien or class of aliens are described in paragraph (d)(2)(ii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (d)(2)(ii)(B) of this section.

(iv) The grounds for mandatory denial described in paragraphs (d)(2)(ii) and (iii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to 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.

(f) *Removal to third country.* (1) Nothing in this section or § 208.17 shall prevent the Department from removing an alien requesting protection to a third country other than a country to which removal is currently withheld or deferred.

(2) If an alien requests withholding or deferral of removal to his or her home country or another specific country, nothing in this section or § 208.17 precludes the Department from removing the alien to a third country prior to a determination or adjudication of the alien's initial request for withholding or deferral of removal if, after being notified of the identity of the prospective third country of removal and provided an opportunity to demonstrate that he or she is more likely than not to be tortured in that third country, the alien fails to establish that they are more likely than not to be tortured there. However, such a removal shall be executed only if the alien was:

(i) Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph; and

(ii) Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

■ 4. Amend § 208.30 by revising paragraph (e)(4)(e)(5)(i)(A) and (B) and (e)(5)(iii), adding paragraph (e)(5)(iv), and revising paragraphs (f) introductory text, (f)(1), and (g)(1) to read as follows:

**§ 208.30 Credible fear 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.**

\* \* \* \* \*

(e) \* \* \*  
(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, reasonable possibility of torture or that it is more likely than not that he or she would be tortured in the prospective country of removal. In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, a reasonable possibility of persecution or torture, or that it is more likely than not that he or she would be tortured in the prospective country of removal, 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 paragraphs (e)(5)(ii) through (iv) 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 1208.2(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.

\* \* \* \* \*

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

(A) Establishes, respectively, 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 torture; or

(B) Would be able to establish a reasonable possibility of persecution but for the fact that he or she is subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act, but nevertheless establishes that it is more likely than not that he or she would be tortured in the prospective country of removal, the Department of Homeland Security may, in the unreviewable discretion of the Secretary, either 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 asylum under section 208 of the Act, 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, or remove the alien to a third country.

(1) If the Department places the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1), then the immigration judge shall review all issues de novo, including whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal.

(2) If the Department decides to remove the alien to a third country, it shall do so in a manner consistent with section 241 of the Act and § 241.15, including by not removing the alien to a third country in which, after being notified of the identity of the prospective third country of removal the alien has established during an interview with an asylum officer that he

or she is more likely than not to be tortured in that country. Further, such a removal to a third country shall be executed only if the alien was:

(i) Advised at the time of being determined to be subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph, and

(ii) Provided, but did not accept, an opportunity to proceed to removal pursuant to section 241(b) of the Act, as appropriate.

(C) If an alien fails to establish a reasonable possibility of persecution or torture and is unable, during an interview with the asylum officer, to establish that it is more likely than not that he or she would be tortured in the prospective country of removal, then the asylum officer will provide the alien with a written notice of decision that will be subject to immigration judge review consistent with paragraph (g) of this section.

(iv)(A) Except as provided in paragraphs (e)(5)(ii) and (iii) or paragraph (e)(6) or (7) of this section, if an alien would be able to establish a credible fear of persecution or a reasonable possibility of persecution but for the fact that the alien is subject to the mandatory bars to being eligible for asylum contained in section 208(b)(2)(A)(iv) of the Act and to withholding of removal contained in section 241(b)(3)(B)(iv) of the Act:

(1) If the alien fails to establish, during an interview with the asylum officer, that it is more likely than not that he or she would be tortured in the prospective country of removal, then the asylum officer will provide the alien with a written notice of decision that will be subject to immigration judge review consistent with paragraph (g) of this section;

(2) If the alien establishes that it is more likely than not that he or she would be tortured in the prospective country of removal, the Department of Homeland Security may, in the unreviewable discretion of the Secretary, either 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 asylum under section 208 of the Act, 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, or remove the alien to a third country.

(i) If the Department places the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1), then the IJ shall review all issues de novo, including whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal.

(ii) If the Department decides to remove the alien to a third country, it shall do so in a manner consistent with section 241 of the Act and § 241.15, including by not removing the alien to a third country in which, after being notified of the identity of the proposed third country of removal, the alien has established that he or she would be more likely than not to be tortured. Further, such a removal shall be executed only if the alien was advised at the time of being determined to be subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph (e)(5)(iv) and provided with, but did not accept, an opportunity to proceed to removal pursuant to section 241(b) of the Act, as appropriate.

(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, a reasonable possibility of torture, or that it is more likely than not that they would be tortured in the prospective country of removal:

(1) Except as provided in paragraphs (e)(5)(iii) through (iv) of this section, DHS shall issue a Notice of Referral to Immigration Judge for asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1).

\* \* \* \* \*

(g) \* \* \*

(1) If, pursuant to paragraphs (e) and (f) of this section, an alien does not establish a credible fear of persecution, reasonable possibility of persecution, reasonable possibility of torture, or that he or she is more likely than not to be tortured in the prospective country of removal, 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.

\* \* \* \* \*

**PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION**

■ 5. 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, 2004 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 Pub. L. 108–458); Public Law 112–54; Public Law 115–218.

■ 6. Amend § 235.6 by revising paragraph (a)(2)(i) to read as follows:

**§ 235.6 Referral to immigration judge.**

- (a) \* \* \*
- (2) \* \* \*

(i) If an asylum officer determines that the alien has not established a credible fear of persecution, reasonable possibility of persecution, reasonable possibility of torture, or that it is more likely than not that the alien would be tortured in the prospective country of removal, and the alien requests a review of that determination by an immigration judge; or

\* \* \* \* \*

**Department of Justice**

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910–2020, the Department amends parts 1003, 1208, and 1235 of title 8 of the Code of Federal Regulations as follows:

**PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

■ 7. 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.

■ 8. Amend § 1003.42 by revising paragraph (d)(1) to read as follows:

**§ 1003.42 Review of credible fear determination.**

\* \* \* \* \*

- (d) \* \* \*

(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 de novo determinations as to whether there is a reasonable possibility that the alien would be tortured in the country of removal and whether it is more likely than not that the alien would be tortured in the country of removal, in both instances 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, consistent with the criteria in 8 CFR 1208.16(c), 8 CFR 1208.17, and 8 CFR 1208.18.

\* \* \* \* \*

**PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

■ 9. 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; Public Law 115–218.

■ 10. Amend § 1208.13 by adding paragraph (c)(10) to read as follows:

**§ 1208.13 Establishing asylum eligibility.**

\* \* \* \* \*

- (c) \* \* \*

(10)(i) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb–3, then an alien is ineligible for asylum under section 208 of the Act on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act if the alien—

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate, or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guidance issued by the Secretary or the Attorney General, as appropriate.

(ii) *Danger to the public health caused by an epidemic outside of the United States.* If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly—

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States, and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (c)(1)(ii)(A) of this section who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for asylum under section 208

of the Act on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act if the alien or class of aliens are described in paragraph (c)(10)(ii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (c)(10)(ii)(B) of this section.

(iii) The grounds for mandatory denial described in paragraphs (c)(10)(i) and (ii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to 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.

■ 11. Amend § 1208.16 by revising paragraphs (d)(2) and (f) 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.**

\* \* \* \* \*

(d) \* \* \*

(2) *Mandatory denials*—(i) *In general.*

Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the regulations issued pursuant to the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(ii) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb–3, then an alien

is ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien—

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate; or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guidance issued by the Secretary or the Attorney General, as appropriate.

(iii) *Danger to the public health caused by an epidemic outside of the United States.* If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly—

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (d)(2)(iii)(A) of this section who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United

States under section 241(b)(3)(B)(iv) of the Act if the alien or class of aliens are described in paragraph (d)(2)(iii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (d)(2)(iii)(B) of this section.

(iv) The grounds for mandatory denial described in paragraphs (d)(2)(ii) and (iii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to 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)

\* \* \* \* \*

(f) *Removal to third country.* (1) Nothing in this section or § 1208.17 shall prevent the Department of Homeland Security from removing an alien requesting protection to a third country other than a country to which removal is currently withheld or deferred.

(2) If an alien requests withholding or deferral of removal to the applicable home country or another specific country, nothing in this section or § 1208.17 precludes the Department of Homeland Security from removing the alien to a third country prior to a determination or adjudication of the alien's initial request for withholding or deferral of removal if, after being notified of the identity of the prospective third country of removal and provided an opportunity to demonstrate that he or she is more likely than not to be tortured in that third country, the alien fails to establish that they are more likely than not to be tortured there. However, such a removal shall be executed only if the alien was:

(i) Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph, and

(ii) Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

■ 12. Amend § 1208.30 by revising paragraphs (e), (g)(1)(ii), (g)(2)(i), and (g)(2)(iv)(A) and (B) to read as follows:

**§ 1208.30 Credible fear determinations 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.**

\* \* \* \* \*

(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 interviews to determine whether an alien has established that he or she is more likely than not to be tortured in the prospective country of removal, 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) \* \* \*  
(1) \* \* \*

(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, except as provided in 8 CFR 208.30(e)(iv), the immigration judge shall vacate the order 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) and regarding whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal, 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, and the determination that the alien has not established that he or she is more likely than not to be tortured in the prospective country of removal under the more likely than not standard, instead of the credible fear of persecution standard described in paragraph (g)(2).

(2) \* \* \*

(i) The asylum officer's negative decision regarding a credible fear of persecution, reasonable possibility of persecution, reasonable possibility of torture, and whether the alien has established that he or she is more likely than not to be tortured in the prospective country of removal 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.

\* \* \* \* \*

(iv) \* \* \*

(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, reasonable possibility of torture, or that he or she is more likely than not to be tortured in the prospective country of removal, except as provided in § 208.30(e)(5)(iii) and (iv), 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, reasonable possibility of torture, or that he or she is more likely than not to be tortured in the

prospective country of removal, the immigration judge shall, except as provided in § 208.30(e)(5)(iii) and (iv), 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.

\* \* \* \* \*

**PART 1235—INSPECTION OF PERSONS APPLYING FOR ADMISSION**

■ 13. 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 Pub. L. 108–458); Public Law 115–218.

■ 14. Amend § 1235.6 by revising paragraph (a)(2)(i) to read as follows:

**§ 1235.6 Referral to immigration judge.**

(a) \* \* \*

(2) \* \* \*

(i) If an asylum officer determines that an alien does not have a credible fear of persecution, reasonable possibility of persecution, reasonable possibility of torture, or has not established that he or she is more likely than not to be tortured in the prospective country of removal, and the alien requests a review of that determination by an immigration judge; or

\* \* \* \* \*

**Chad R. Mizelle,**

*Senior Official Performing the Duties of the General Counsel.*

**James R. McHenry III,**

*Director, Executive Office for Immigration Review, Department of Justice.*

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