

# Rules and Regulations

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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 208

[Docket No: USCIS 2020–0013]

RIN 1615–AC57

## DEPARTMENT OF JUSTICE

### Executive Office for Immigration Review

### 8 CFR Part 1208

[A.G. Order No. 5004–2021]

RIN 1125–AB08

### Security Bars and Processing; Delay of Effective Date

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** On December 23, 2020, the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) (collectively, “the Departments”) published a final rule (“Security Bars rule”) to clarify that the “danger to the security of the United States” standard in the statutory bar to eligibility for asylum and withholding of removal encompasses certain emergency public health concerns and to make certain other changes; that rule was scheduled to take effect on January 22, 2021. As of January 21, 2021, the Departments delayed the rule’s effective date for 60 days to March 22, 2021. In this rule, the Departments are further extending and delaying the rule’s effective date to December 31, 2021. In addition, in light of evolving information regarding the best approaches to mitigating the spread of communicable disease, the Departments are also considering action to rescind or

revise the Security Bars rule. The Departments are seeking public comment on whether that rule represents an effective way to protect public health while reducing barriers for noncitizens seeking forms of protection in the United States, or whether the Security Bars rule should be revised or revoked.

**DATES:** As of March 22, 2021, the effective date of the final rule published at 85 FR 84160 (Dec. 23, 2020), which was delayed by the rule published at 86 FR 6847 (Jan. 25, 2021), is further delayed by this interim final rule until December 31, 2021.

*Submission of public comments:* Comments must be submitted on or before April 21, 2021.

**ADDRESSES:** You may submit comments, identified by DHS Docket No. USCIS–2020–0013, by any one of the following methods:

- *Federal eRulemaking Portal (strongly preferred):* <http://www.regulations.gov>. Follow the website instructions for submitting comments. If you submit comments using the eRulemaking portal, please do not submit a duplicate written comment via postal mail.

- *Mail:* If you wish to submit a paper comment in lieu of an electronic submission, please direct the mail/shipment to: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041. To ensure proper handling, please reference DHS Docket No. USCIS–2020–0013 in your correspondence. Mail must be postmarked by the comment submission deadline. Please note that the Departments cannot accept any comments that are hand-delivered or couriered. In addition, the Departments cannot accept mailed comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. If you submit a written comment via postal mail, please do not submit a duplicate comment using the eRulemaking portal.

Comments submitted in a manner other than those listed above, including emails or letters sent to DHS or U.S. Citizenship and Immigration Services officials, or DOJ or Executive Office for Immigration Review officials, will not be considered comments on this final

rule and may not receive a response from the Departments.

**FOR FURTHER INFORMATION CONTACT:**

*For USCIS:* Andrew Davidson, Asylum Division Chief, Refugee, Asylum and International Affairs Directorate, U.S. Citizenship and Immigration Services, DHS; telephone 240–721–3000 (not a toll-free call).

*For EOIR:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, telephone (703) 305–0289 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

#### I. Public Participation

Interested persons are invited to submit comments on any aspect of this action, as well as a potential future rulemaking rescinding or amending the Security Bars rule, by submitting relevant written data, views, or arguments. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommendation; and include data, information, or authority that supports the recommended change or rescission.

All comments submitted should include the agency name (U.S. Citizenship and Immigration Services) and Docket No. USCIS 2020–0013. Please note that all comments received are considered part of the public record and made available for public inspection at [www.regulations.gov](http://www.regulations.gov). 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. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission that you make to DHS. DHS may withhold information provided in comments from public viewing if it determines that it may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice, which is available at <http://www.regulations.gov>.

#### II. Background and Basis for Delay

On December 23, 2020, the Departments published the Security Bars rule to amend 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 or the protection of withholding of removal under that Act or subsequent regulations (because of the threat of torture). *See* Security Bars and Processing, 85 FR 84160 *et seq.* (Dec. 23, 2020). The rule was scheduled to take effect on January 22, 2021.

On January 20, 2021, the White House Chief of Staff issued a memorandum asking agencies to consider delaying, consistent with applicable law, the effective dates of any rules that have published and not yet gone into effect, for the purpose of allowing the President’s appointees and designees to review questions of fact, law, and policy raised by those regulations. *See* Memorandum for the Heads of Executive Departments and Agencies from Ronald A. Klain, Assistant to the President and Chief of Staff, *Re: Regulatory Freeze Pending Review* (Jan. 20, 2021). As of January 21, 2021, the Departments delayed the effective date of the Security Bars rule to March 22, 2021, consistent with that memorandum and a preliminary injunction in place with respect to a related rule, as discussed below. *See* Security Bars and Processing; Delay of Effective Date, 86 FR 6847 (Jan. 25, 2021).

The Departments have good cause to delay this rule’s effective date further without advance notice and comment because implementation of this rule is not feasible due to a preliminary injunction against a related rule. The provisions of the Security Bars rule are premised upon, and reliant upon, the revisions to the Departments’ asylum rules previously made by a separate joint rule that became effective before the Security Bars rule was scheduled to take effect. The Departments issued the “Global Asylum” rule, entitled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, on December 11, 2020.<sup>1</sup> On January 8, 2021, in the case of *Pangea Legal Services v. Department of Homeland Security*, a district court preliminarily enjoined the Departments “from implementing, enforcing, or applying the [Global Asylum final] rule . . . or any related

policies or procedures.”<sup>2</sup> The preliminary injunction remains in place.

As the Departments noted in their previous rule delaying the January 22, 2021, effective date for the Security Bars rule, because of the preliminary injunction in effect against implementation of the Global Asylum final rule, implementing the Security Bars rule is not viable at this time, as the two rules are intertwined.<sup>3</sup> Specifically, the Security Bars rule relies upon the regulatory framework for applying bars to asylum during credible fear processing that was established in the Global Asylum final rule.<sup>4</sup> The Notice of Proposed Rulemaking (NPRM) for the Security Bars rule, which was published on July 9, 2020, included proposed regulatory text instructing adjudicators to apply the bar during credible and reasonable fear screenings.<sup>5</sup> This proposal would have created an exception to the then-existing rule that the statutory bars to asylum and withholding of removal, including the “danger to the security of the United States” bars underlying the Security Bars rule, were not to be considered during the credible and reasonable fear screening processes.<sup>6</sup> The proposed rule justified this exception as necessary to allow DHS to quickly remove individuals covered by the bars, rather than sending them to full removal

proceedings for adjudication of their asylum and withholding of removal claims, which can take months or even years.<sup>7</sup> The NPRM explained that applying the bars during credible fear and reasonable fear screenings was necessary to reduce health and safety dangers to both the public at large and DHS officials.<sup>8</sup> Indeed, applying these bars only after the affected individuals have been present in the United States for an extended period of time would do little, if anything, to prevent the spread of such diseases, significantly undercutting the justification for the Security Bars rule.

While DHS and DOJ were reviewing the comments submitted in response to the Security Bars NPRM, the Global Asylum final rule was published on December 11, 2020.<sup>9</sup> The Global Asylum final rule changed the general practice described above to apply all statutory bars to asylum and withholding of removal during credible and reasonable fear screenings.<sup>10</sup> The Security Bars final rule, which was published on December 23, 2020, therefore revised the proposed text explicitly to rely on the changes made by the Global Asylum final rule.<sup>11</sup> As a result, the regulatory text of significant portions of the Security Bars rule relies upon and repeats broader regulatory text that was established by the Global Asylum final rule, applying all bars to asylum and withholding of removal during credible and reasonable fear screenings.<sup>12</sup> The Security Bars final rule assumed that the Global Asylum rule would be in effect and therefore the Security Bars final rule did not change the credible fear and reasonable fear framework.<sup>13</sup> As a result, the overlap between the two rules now has created a situation in which the Departments would risk violating the injunction against the Global Asylum final rule if they were to implement the identical portions of the Security Bars final rule, and the Departments could not implement the narrower change to the credible fear and reasonable fear framework proposed in

<sup>2</sup> Nos. 20–09253–JD & 20–09258–JD, 2021 WL 75756, at \*7 (N.D. Cal. Jan. 8, 2021). The U.S. District Court for the Northern District of California held that the plaintiffs, who had brought two related actions, had shown a likelihood that Chad F. Wolf, who approved the Global Asylum final rule in his capacity as Acting Secretary of Homeland Security, did not have valid authority to act in that capacity. *See id.* at \*6. The District Court did not reach any other ground for issuing the injunction. *See id.* Following the court’s ruling, Acting Secretary of Homeland Security Peter T. Gaynor and Mr. Wolf took steps to ratify the Global Asylum final rule. *See* DHS Delegation No. 23028, Delegation to the Under Secretary for Strategy, Policy, and Plans to Act on Final Rules, Regulations, and Other Matters (Jan. 12, 2021); Chad F. Wolf, Ratification (Jan. 14, 2021). By issuing this rule delaying the effective date of the Security Bars rule, the Departments are not indicating their position on Mr. Gaynor or Mr. Wolf’s actions or authority, or on the outcome thus far in *Pangea*.

<sup>3</sup> *See* 86 FR at 6847.

<sup>4</sup> *See, e.g.*, 85 FR at 84176 (“As noted, the [Security Bars] 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.”); *id.* at 84189 (describing changes made in the Security Bars rule “to certain regulatory provisions not addressed in the proposed rule as necessitated by the intervening promulgation of the [Global Asylum final] Rule”).

<sup>5</sup> Security Bars and Processing, 85 FR 41201, 41216–2012:17, 41218 (July 9, 2020).

<sup>6</sup> *See id.* at 41207.

<sup>7</sup> *Id.* at 41210–12.

<sup>8</sup> *Id.* at 41210.

<sup>9</sup> 85 FR 80274 (Dec. 11, 2020).

<sup>10</sup> *Id.* at 80391.

<sup>11</sup> 85 FR 84160, 84174–77.

<sup>12</sup> *See, e.g., id.* at 84194–98 (revising 8 CFR 208.30, 235.6, 1208.30, and 1235.6, among other provisions) accord 85 FR at 80390–80401 (same).

<sup>13</sup> *See id.* at 84175 (“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.”).

<sup>1</sup> *See* 85 FR 80274 (Dec. 11, 2020).

the Security Bars NPRM without additional rulemaking.

Moreover, the framework established by the Global Asylum final rule is critical to the justification for the Security Bars rule, because it would permit the Departments to remove individuals who are subject to the bars expeditiously. On the other hand, if the Departments were to implement only the remaining portions of the Security Bars rule that do not overlap with the enjoined Global Asylum final rule, the result would be the very situation that the Security Bars rule was created to remedy—namely, that possibly infectious individuals would be detained or released inside the United States, potentially for a lengthy period, while awaiting their removal hearings.<sup>14</sup> Such an outcome would frustrate the purpose of the Security Bars rule.

Additionally, to implement the full Security Bars rule—and effectively reinsert or rely upon regulatory provisions that the *Pangea* court has enjoined—might run afoul of the court's injunction. Because it is impracticable and unnecessary to engage in notice and comment procedures in the limited time available while the Departments are subject to the court's injunction, the Departments are publishing this interim final rule to extend and delay the Security Bars rule's effective date until December 31, 2021. Additionally, in light of the complex relationship between the Global Asylum final rule and the Security Bars rule and the implications of the *Pangea* litigation to the Security Bars rule, the Departments need additional time to analyze the consequences of the overlapping and embedded text and consider whether

<sup>14</sup> Specifically, the Security Bars rule's regulatory provisions at §§ 208.13(c)(10), 208.16(d)(2), 1208.13(c)(10), and 1208.16(d)(2) clarify that the "danger to the security of the United States" statutory bars to eligibility for asylum and withholding of removal may encompass emergency public health concerns, and do not overlap with the enjoined Global Asylum final rule. By contrast, the provisions at § 208.30(e)(5) restate and amend provisions newly adopted in the Global Asylum final rule that have been enjoined. These latter provisions would require an asylum officer to enter a negative credible fear of persecution determination with respect to an arriving alien's eligibility for asylum, allowing most aliens to whom the danger to security bar applies to be quickly removed under an order of expedited removal. While the Departments could implement the danger to security bars to asylum and withholding of removal determinations without running afoul of the injunction of the Global Asylum final rule, they could only do so after the individual has moved past the credible fear stage of the process and has been placed into removal proceedings before an immigration judge under section 240 of the Act. The individual would need to be either detained in a congregate setting or released inside the United States while awaiting his or her removal proceeding. This is the very situation that the Security Bars rule intended to avoid.

policy changes are advisable and viable in light of the litigation.

If the injunction against implementation of the Global Asylum rule is lifted before December 31, the Departments will revise the effective date of the Security Bars rule as soon as possible thereafter. Similarly, if the injunction remains in effect on December 31, the Departments may delay the effective date of the Security Bars rule further. The Departments have chosen this time-limited delay, rather than an indefinite delay, due to the preliminary nature of the injunction.

### III. Request for Comment on Amending or Rescinding the Security Bars Rule

The Departments are further considering amending or rescinding the Security Bars rule. In particular, the Departments are considering whether to publish a new rule that would remove or revise the regulatory changes promulgated in the Security Bars rule. In connection with that consideration, the Departments welcome data, views, and information on the best approaches for mitigating the spread of communicable disease in the operational context implicated by the Security Bars rule. The Departments are interested in information the public may have on more effective alternative approaches than that taken by the Security Bars rule, particularly in light of new or more comprehensive data. The Departments are also reviewing the Security Bars rule in light of the Administration's policy of expanding pathways for noncitizens seeking forms of protection in the United States and removing barriers that impede access to immigration benefits, and are seeking comment on alternative approaches that may achieve the best public health outcome while remaining more consistent with that policy goal.<sup>15</sup> Finally, the Departments welcome comment on the portions of the Global Asylum final rule that establish the framework for applying bars to asylum during credible fear processing, insofar as such comment is relevant to potential removal of or revisions to the Security Bars rule.

<sup>15</sup> See, e.g., Executive Order 14010 of February 2, 2021, Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 FR 8267 (Feb. 5, 2021); Executive Order 14012 of February 2, 2021, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 FR 8277 (Feb. 5, 2021).

## IV. Regulatory Requirements

### A. Executive Order 12866 and Executive Order 13563

Executive Orders (E.O.) 12866 (Regulatory Planning and Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs, benefits, and transfers of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Pursuant to E.O. 12866, the Office of Information and Regulatory Affairs of the Office of Management and Budget determined that this rule is "significant" under E.O. 12866 and has reviewed this regulation.

### B. 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 further delaying the effective date of the Security Bars rule (85 FR 84160) will not have a significant economic impact on a substantial number of small entities. Neither the final Security Bars rule, nor this rule delaying its effective date, 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.

### C. Unfunded Mandates Reform Act of 1995

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

### D. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act ("CRA"). 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. The Departments have complied with the CRA's reporting requirements and have sent this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

#### *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 E.O. 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 E.O. 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. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This rule does not have "tribal implications" because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), requires no further agency action or analysis.

**Alejandro N. Mayorkas,**

*Secretary, U.S. Department of Homeland Security.*

Dated: March 17, 2021.

**Merrick B. Garland,**

*Attorney General, Department of Justice.*

[FR Doc. 2021-05931 Filed 3-19-21; 8:45 am]

**BILLING CODE 9111-97-P; 4410-30-P**

## **DEPARTMENT OF HOMELAND SECURITY**

### **8 CFR Part 208**

[CIS No. 2671-20; DHS Docket No. USCIS-2020-0017]

RIN 1615-AC59

### **Asylum Interview Interpreter Requirement Modification Due to COVID-19**

**AGENCY:** U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

**ACTION:** Final rule and temporary final rule; extension.

**SUMMARY:** The Department of Homeland Security (DHS) is extending the effective date (for 180 days) of its temporary final rule which modified certain regulatory requirements to help ensure that USCIS may continue with affirmative asylum adjudications during the COVID-19 pandemic.

**DATES:** This final rule is effective March 22, 2021. The expiration date of the temporary final rule published at 85 FR 59655 on September 23, 2020, is extended from March 22, 2021, to September 20, 2021.

**FOR FURTHER INFORMATION CONTACT:** Maureen Dunn, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588-0009; telephone 240-721-3000 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Legal Authority To Issue This Rule and Other Background**

##### *A. Legal Authority*

The Secretary of Homeland Security (Secretary) publishes this extension of the temporary final rule pursuant to his authorities concerning asylum determinations. The Homeland Security Act of 2002 (HSA), Public Law 107-296, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA amended the Immigration and Nationality Act (INA or the Act), charging the Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of

aliens," INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granted the Secretary the power to take all actions "necessary for carrying out" the immigration laws, including the INA, *id.* 1103(a)(3). The HSA also transferred to DHS responsibility for affirmative asylum applications, *i.e.*, applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). That authority has been delegated within DHS to U.S. Citizenship and Immigration Services (USCIS). USCIS asylum officers determine, in the first instance, whether a noncitizen's affirmative asylum application should be granted. *See* 8 CFR 208.4(b), 208.9. With limited exception, the Department of Justice Executive Office for Immigration Review has exclusive authority to adjudicate asylum applications filed by noncitizens who are in removal proceedings. *See* INA 103(g), 240; 8 U.S.C. 1103(g), 1229a. This broad division of functions and authorities informs the background of this rule.

##### *B. Legal Framework for Asylum*

Asylum is a discretionary benefit that generally can be granted to eligible noncitizens who are physically present or who arrive in the United States, irrespective of their status, subject to the requirements in section 208 of the INA, 8 U.S.C. 1158, and implementing regulations, *see* 8 CFR parts 208, 1208.

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), imposes several mandates and procedural requirements for the consideration of asylum applications. Congress also specified that the Attorney General and Secretary of Homeland Security "may provide by regulation for any other conditions or limitations on the consideration of an application for asylum," so long as those limitations are "not inconsistent with this chapter." INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). In sum, the current statutory framework leaves the Attorney General (and, after the HSA, also the Secretary) significant discretion to regulate consideration of asylum applications. USCIS regulations promulgated under this authority set agency procedures for asylum interviews, and require that applicants unable to proceed in English "must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent." 8 CFR 208.9(g). This requirement means that all asylum applicants who cannot proceed in English must bring an interpreter to their interview, posing a serious health risk in the current climate.