

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) *Consideration of application for withholding of removal.* An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) *Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.* The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) *Past threat to life or freedom.* (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the

proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) *Future threat to life or freedom.* An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her

life or freedom would be threatened upon return to that country.

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(c) *Eligibility for withholding of removal under the Convention Against Torture.* (1) For purposes of regulations under Title II of the Act, “Convention Against Torture” shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in §208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of

Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien’s removal shall be deferred under §208.17(a).

(d) *Approval or denial of application—*
(1) *General.* Subject to paragraphs (d)(2)

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and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant’s eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) *Mandatory denials.* 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 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.

(3) *Exception to the prohibition on withholding of deportation in certain cases.* Section 243(h)(3) of the Act, as added by section 413 of Pub. L. 104–132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it ap-

peared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) [Reserved]

(f) *Removal to third country.* Nothing in this section or § 208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

[62 FR 10337, Mar. 6, 1997, as amended at 64 FR 8488, Feb. 19, 1999; 65 FR 76135, Dec. 6, 2000; 85 FR 67259, Oct. 21, 2020]

EFFECTIVE DATE NOTES: 1. At 85 FR 80388, Dec. 11, 2020, § 208.16 was amended by revising paragraphs (b)(3) introductory text and (b)(3)(i) and adding paragraphs (b)(3)(iii) and (iv), effective Jan. 11, 2021. For the convenience of the user, the added and revised text is set forth as follows:

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(b)(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for withholding of removal.

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(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including

but not limited to persecutors who are gang members, public officials who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

2. At 85 FR 84193, Dec. 23, 2020, §208.16 was amended by revising paragraphs (d)(2) and (f), effective Jan. 22, 2021. For the convenience of the user, the revised text is set forth as follows:

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(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.

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(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.

§ 208.17 Deferral of removal under the Convention Against Torture.

(a) *Grant of deferral of removal.* An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

(b) *Notice to alien.* (1) After an immigration judge orders an alien described in paragraph (a) of this section removed, the immigration judge shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The immigration judge shall inform the alien that deferral of removal:

(i) Does not confer upon the alien any lawful or permanent immigration status in the United States;

(ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;

(iii) Is effective only until terminated; and

(iv) Is subject to review and termination if the immigration judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The immigration judge shall also inform the alien 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.

(c) *Detention of an alien granted deferral of removal under this section.* Nothing in this section shall alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) *Termination of deferral of removal.*

(1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 3.11 of this chapter to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in §§ 3.2 and 3.23 of this chapter.

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of