

which may be waived in the case of an otherwise qualified refugee and the conditions under which such waivers may be approved. Officers in charge of overseas offices are delegated authority to initiate the necessary investigations to establish the facts in each waiver application pending before them and to approve or deny such waivers.

(b) *Filing requirements.* The applicant for a waiver must submit Form I-602, Application by Refugee for Waiver of Grounds of Inadmissibility, with the Service office processing his or her case. The burden is on the applicant to show that the waiver should be granted based upon humanitarian grounds, family unity, or the public interest. The applicant shall be notified in writing of the decision, including the reasons for denial, if the application is denied. There is no appeal from such decision.

[62 FR 10336, Mar. 6, 1997. Duplicated from §207.3 at 68 FR 9833, Feb. 28, 2003]

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

Subpart A—Asylum and Withholding of Removal

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Subpart A—Asylum and Withholding of Removal

§ 1208.1 General.

(a) *Applicability—(1) In general.* Unless otherwise provided in this chapter V, this subpart A shall apply to all applications for asylum under section 208 of the Act or for withholding of deportation or withholding of removal under section 241(b)(3) of the Act, or under the Convention Against Torture, whether before an asylum officer or an immigration judge, regardless of the date of filing. For purposes of this chapter V, withholding of removal

shall also mean withholding of deportation under section 243(h) of the Act, as it appeared prior to April 1, 1997, except as provided in §1208.16(d). Such applications are hereinafter referred to as "asylum applications." The provisions of this part shall not affect the finality or validity of any decision made by a district director, an immigration judge, or the Board of Immigration Appeals in any such case prior to April 1, 1997. No asylum application that was filed with a district director, asylum officer, or immigration judge prior to April 1, 1997, may be reopened or otherwise reconsidered under the provisions of this part except by motion granted in the exercise of discretion by the Board of Immigration Appeals, an immigration judge, or an asylum officer for proper cause shown. Motions to reopen or reconsider must meet the requirements of sections 240(c)(6) and (c)(7) of the Act, and 8 CFR parts 1003 and 1103, where applicable.

(2) *Commonwealth of the Northern Mariana Islands.* The provisions of this subpart A shall not apply prior to January 1, 2030, to an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands seeking to apply for asylum. No application for asylum may be filed prior to January 1, 2030, pursuant to section 208 of the Act by an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands. Effective on the transition program effective date, the provisions of this subpart A shall apply to aliens physically present in or arriving in the CNMI with respect to withholding of removal under section 241(b)(3) of the Act and withholding and deferral of removal under the Convention Against Torture.

(b) *Training of asylum officers.* The Director of International Affairs shall ensure that asylum officers receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles. The Director of International Affairs shall also, in cooperation with the Department of State and other appropriate sources, compile and disseminate to asylum officers information concerning the persecution of persons in other countries on account

of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations, and shall maintain a documentation center with information on human rights conditions.

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the claim. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person

first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group was both not a strategic choice and constituted egregious conduct.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a State or a unit thereof. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the State to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the State or a legal sub-unit of the State. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or

resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats, except that particularized threats of a severe harm of immediate and menacing nature made by an identified entity may constitute persecution; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

- (1) Interpersonal animus or retribution;
- (2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other

members of an alleged particular social group in addition to the member who has raised the claim at issue;

(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a State or expressive behavior that is antithetical to the State or a legal unit of the State;

(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(6) Criminal activity;

(7) Perceived, past or present, gang affiliation; or,

(8) Gender.

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application, provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

[64 FR 8487, Feb. 19, 1999, as amended at 74 FR 55741, Oct. 28, 2009; 85 FR 23904, Apr. 30, 2020; 85 FR 80394, Dec. 11, 2020]

§ 1208.2 Jurisdiction.

(a) *Office of International Affairs.* Except as provided in paragraph (b) or (c) of this section, the Office of International Affairs shall have initial jurisdiction over an asylum application filed by an alien physically present in the United States or seeking admission at a port-of-entry. The Office of International Affairs shall also have initial jurisdiction over credible fear determinations under §1208.30 and reasonable fear determinations under §1208.31.

(b) *Jurisdiction of Immigration Court in general.* Immigration judges shall have

exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crewmembers who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, and by aliens who have been admitted to the United States under the Visa Waiver Pilot Program. Immigration judges shall also have the authority to review reasonable fear determinations referred to the Immigration Court under §1208.31, and credible fear determinations referred to the Immigration Court under §1208.30.

(c) *Certain aliens not entitled to proceedings under section 240 of the Act—(1) Asylum applications and withholding of removal applications only.* After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any asylum application filed on or after April 1, 1997, by:

(i) An alien crewmember who:

(A) Is an applicant for a landing permit;

(B) Has been refused permission to land under section 252 of the Act; or

(C) On or after April 1, 1997, was granted permission to land under section 252 of the Act, regardless of whether the alien has remained in the United States longer than authorized;

(ii) An alien stowaway who has been found to have a credible fear of persecution or torture pursuant to the procedures set forth in subpart B of this part;

(iii) An alien who is an applicant for admission pursuant to the Visa Waiver Program under section 217 of the Act, except that if such an alien is an applicant for admission to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum prior to January 1, 2030;

(iv) An alien who was admitted to the United States pursuant to the Visa Waiver Program under section 217 of the Act and has remained longer than authorized or has otherwise violated his or her immigration status, except that if such an alien was admitted to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum in the Commonwealth of the Northern Mariana Islands prior to January 1, 2030;

(v) An alien who has been ordered removed under §235(c) of the Act, as described in §235.8(a) of this chapter (applicable only in the event that the alien is referred for proceedings under this paragraph by the Regional Director pursuant to section 235.8(b)(2)(ii) of this chapter);

(vi) An alien who is an applicant for admission, or has been admitted, as an alien classified under section 101(a)(15)(S) of the Act (applicable only in the event that the alien is referred for proceedings under this paragraph by the district director);

(vii) An alien who is an applicant for admission to Guam or the Commonwealth of the Northern Mariana Islands pursuant to the Guam-CNMI Visa Waiver Program under section 212(l) of the Act, except that if such an alien is an applicant for admission to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum prior to January 1, 2030; or

(viii) An alien who was admitted to Guam or the Commonwealth of the Northern Mariana Islands pursuant to the Guam-CNMI Visa Waiver Program under section 212(l) of the Act and has remained longer than authorized or has otherwise violated his or her immigration status, except that if such an alien was admitted to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum in the Commonwealth of the Northern Mariana Islands prior to January 1, 2030.

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30, § 1003.42, or § 1208.30.

(2) *Withholding of removal applications only.* After Form I-863, Notice of Refer-

ral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any application for withholding of removal filed by:

(i) An alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act; or

(ii) An alien who has been issued an administrative removal order pursuant to section 238 of the Act as an alien convicted of committing an aggravated felony.

(3) *Rules of procedure*—(i) *General.* Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (c)(2) of this section shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 1240, subpart A. The scope of review in proceedings conducted pursuant to paragraph (c)(1) of this section shall be limited to a determination of whether the alien is eligible for asylum or withholding or deferral of removal, and whether asylum shall be granted in the exercise of discretion. The scope of review in proceedings conducted pursuant to paragraph (c)(2) of this section shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal. During such proceedings, all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.

(ii) *Notice of hearing procedures and in-absentia decisions.* The alien will be provided with notice of the time and place of the proceeding. The request for asylum and withholding of removal submitted by an alien who fails to appear for the hearing shall be denied. The denial of asylum and withholding of removal for failure to appear may be reopened only upon a motion filed with the immigration judge with jurisdiction over the case. Only one motion to reopen may be filed, and it must be filed within 90 days, unless the alien establishes that he or she did not receive notice of the hearing date or was in Federal or State custody on the date directed to appear. The motion must

include documentary evidence, which demonstrates that:

(A) The alien did not receive the notice;

(B) The alien was in Federal or State custody and the failure to appear was through no fault of the alien; or

(C) “Exceptional circumstances,” as defined in section 240(e)(1) of the Act, caused the failure to appear.

(iii) *Relief*. The filing of a motion to reopen shall not stay removal of the alien unless the immigration judge issues an order granting a stay pending disposition of the motion. An alien who fails to appear for a proceeding under this section shall not be eligible for relief under section 240A, 240B, 245, 248, or 249 of the Act for a period of 10 years after the date of the denial, unless the applicant can show exceptional circumstances resulted in his or her failure to appear.

[65 FR 76130, Dec. 6, 2000, as amended at 74 FR 55741, Oct. 28, 2009; 85 FR 23904, Apr. 30, 2020; 85 FR 80395, Dec. 11, 2020]

§ 1208.3 Form of application.

(a) An asylum applicant must file Form I-589, Application for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form. The applicant’s spouse and children shall be listed on the application and may be included in the request for asylum if they are in the United States. One additional copy of the principal applicant’s Form I-589 must be submitted for each dependent included in the principal’s application.

(b) An asylum application shall be deemed to constitute at the same time an application for withholding of removal, unless adjudicated in deportation or exclusion proceedings commenced prior to April 1, 1997. In such instances, the asylum application shall be deemed to constitute an application for withholding of deportation under section 243(h) of the Act, as that section existed prior to April 1, 1997. Where a determination is made that an applicant is ineligible to apply for asylum under section 208(a)(2) of the Act, an asylum application shall be construed as an application for withholding of removal.

(c) Form I-589 shall be filed under the following conditions and shall have the following consequences:

(1) If the application was filed on or after January 4, 1995, information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings;

(2) The applicant and anyone other than a spouse, parent, son, or daughter of the applicant who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant’s signature establishes a presumption that the applicant is aware of the contents of the application. A person other than a relative specified in this paragraph who assists the applicant in preparing the application also must provide his or her full mailing address;

(3) An asylum application must be properly filed in accordance with the form instructions and with §§1003.24, 1003.31(b), and 1103.7(a)(3) of this chapter, including payment of a fee, if any, as explained in the instructions to the application. For purposes of filing with an immigration court, an asylum application is incomplete if it does not include a response to each of the required questions contained in the form, is unsigned, is unaccompanied by the required materials specified in paragraph (a) of this section, is not completed and submitted in accordance with the form instructions, or is unaccompanied by any required fee receipt or other proof of payment as provided in §1208.4(d)(3). The filing of an incomplete application shall not commence the period after which the applicant may file an application for employment authorization. An application that is incomplete shall be rejected by the immigration court. If an applicant wishes to have his or her application for asylum considered, he or she shall correct the deficiencies in the incomplete application and refile it within 30 days of rejection. Failure to correct the deficiencies in an incomplete application or failure to timely refile the application with the deficiencies corrected, absent exceptional circumstances as defined in §1003.10(b) of this chapter, shall result

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in a finding that the alien has abandoned that application and waived the opportunity to file such an application;

(4) Knowing placement of false information on the application may subject the person placing that information on the application to criminal penalties under title 18 of the United States Code and to civil or criminal penalties under section 274C of the Act; and

(5) Knowingly filing a frivolous application on or after April 1, 1997, so long as the applicant has received the notice required by section 208(d)(4) of the Act, shall render the applicant permanently ineligible for any benefits under the Act pursuant to § 1208.20.

[62 FR 10337, Mar. 6, 1997, as amended at 65 FR 76131, Dec. 6, 2000; 85 FR 81750, Dec. 16, 2020]

§ 1208.4 Filing the application.

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

(a) *Prohibitions on filing.* Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate to the satisfaction of the Attorney General that one of the exceptions in section 208(a)(2)(D) of the Act applies. Such prohibition applies only to asylum applications under section 208 of the Act and not to applications for withholding of removal under § 1208.16. If an applicant files an asylum application and it appears that one or more of the prohibitions contained in section 208(a)(2) of the Act apply, an asylum officer, in an interview, or an immigration judge, in a hearing, shall review the application and give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing to determine if the application should be rejected. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply:

(1) *Authority.* Only an asylum officer, an immigration judge, or the Board of Immigration Appeals is authorized to make determinations regarding the prohibitions contained in section 208(a)(2)(B) or (C) of the Act.

(2) *One-year filing deadline.* (i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. For the purpose of making determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of 8 CFR chapter I. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 1003.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline. The failure to have provided required biometrics and other biographical information does not prevent the "filing" of an asylum application for purposes of the one-year filing rule of section 208(a)(2)(B) of the Act. See 8 CFR 1003.47. For aliens present in or arriving in the Commonwealth of the Northern Mariana Islands, the 1-

year period shall be calculated from January 1, 2030, or from the date of the alien's last arrival in the United States (including the Commonwealth of the Northern Mariana Islands), whichever is later. No period of physical presence in the Commonwealth of the Northern Mariana Islands prior to January 1, 2030, shall count toward the 1-year period. After November 28, 2009, any travel to the Commonwealth of the Northern Mariana Islands from any other State shall not re-start the calculation of the 1-year period.

(3) *Prior denial of application.* For purposes of section 208(a)(2)(C) of the Act, an asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals.

(4) *Changed circumstances.* (i) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors

directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not

properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

(6) *Asylum cooperative agreements.* Immigration judges have authority to consider issues under section 208(a)(2)(A) of the Act, relating to the determination of whether an alien is ineligible to apply for asylum and should be removed to a third country pursuant to a bilateral or multilateral agreement, only with respect to aliens whom DHS has chosen to place in removal proceedings under section 240 of the Act, as provided in 8 CFR 1240.11(g) and (h). For DHS regulations relating to determinations by immigration officers on this subject, see 8 CFR 208.30(e)(6) and (7).

(b) *Filing location*—(1) *With the service center by mail.* Except as provided in paragraphs (b)(2), (b)(3), (b)(4) and (b)(5) of this section, asylum applications shall be filed directly by mail with the service center servicing the asylum office with jurisdiction over the place of the applicant's residence or, in the case of an alien without a United States residence, the applicant's current lodging or the land border port-of-entry through which the alien seeks admission to the United States.

(2) *With the asylum office.* An asylum application shall be filed directly with the asylum office having jurisdiction over the matter in the case of an alien who:

(i) Has received the express consent of the asylum office director or the Director of Asylum to do so, or

(ii) Previously was included in a spouse's or parent's pending application but is no longer eligible to be included as a derivative. In such cases, the derivative should include a cover letter referencing the previous application and explaining that he or she is now independently filing for asylum.

(3) *With the Immigration Court.* Asylum applications shall be filed directly with the Immigration Court having jurisdiction over the case in the following circumstances:

(i) During exclusion, deportation, or removal proceedings, with the Immigration Court having jurisdiction over the underlying proceeding.

(ii) After completion of exclusion, deportation, or removal proceedings, and in conjunction with a motion to reopen pursuant to 8 CFR part 1003 where applicable, with the Immigration Court having jurisdiction over the prior proceeding. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

(iii) In asylum proceedings pursuant to §1208.2(c)(1) and after the Form I-863, Notice of Referral to Immigration Judge, has been served on the alien and filed with the Immigration Court having jurisdiction over the case.

(4) *With the Board of Immigration Appeals.* In conjunction with a motion to remand or reopen pursuant to §§1003.2 and 1003.8 of this chapter where applicable, an initial asylum application shall be filed with the Board of Immigration Appeals if jurisdiction over the proceedings is vested in the Board of Immigration Appeals under 8 CFR part 1003. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

(5) *With the district director.* In the case of any alien described in §1208.2(c)(1) and prior to the service on the alien of Form I-863, any asylum application shall be submitted to the district director having jurisdiction pursuant to 8 CFR part 103. If the district director elects to issue the Form I-863, the district director shall forward such asylum application to the appropriate Immigration Court with the Form

(c) *Amending an application after filing.* Upon request of the alien and as a matter of discretion, the asylum officer or immigration judge having jurisdiction may permit an asylum applicant to amend or supplement the application, but any delay caused by such request shall extend the period within which the applicant may not apply for employment authorization in accordance with §1208.7(a).

(d) *Filing deadline.* (1) For any alien in asylum-and-withholding-only proceedings pursuant to §1208.2(c)(1) and paragraph (b)(3)(iii) of this section, the

immigration judge shall comply with the requirements of §1240.11(c)(1)(i) through (iii) of this chapter and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an asylum application, which includes an application for withholding of removal under section 241(b)(3) of the Act and protection under §§1208.16 through 1208.18. The immigration judge may extend the deadline for good cause. If the alien does not file an asylum application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security. For any alien in proceedings pursuant to §1208.2(c)(2), the immigration judge shall comply with the requirements of §1240.11(c)(1)(i) through (iii) and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an application for withholding of removal under section 241(b)(3) of the Act, which includes an application for protection under §§1208.16 through 1208.18. The immigration judge may extend the deadline for good cause. If the alien does not file an application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security.

(2) If the alien must pay a fee for submission of the asylum application, the alien must submit the DHS-issued fee receipt together with the application by the deadline set by the immigration judge in paragraph (d)(1) of this section.

(3) If the alien has paid any required fee but has not received the fee receipt from DHS by the deadline set by the immigration judge, the alien must instead provide to the immigration court a copy of proof of the payment to DHS with the asylum application. The alien must then submit a copy of the fee receipt by a new deadline set by the immigration judge. If the immigration judge does not set a deadline, the alien must submit the fee receipt no later

than 45 days after the date of filing of the application.

[62 FR 10337, Mar. 6, 1997, as amended at 64 FR 8488, Feb. 19, 1999; 64 FR 13881, Mar. 23, 1999; 65 FR 76131, Dec. 6, 2000; 69 FR 69497, Nov. 29, 2004; 70 FR 4754, Jan. 31, 2005; 74 FR 55741, Oct. 28, 2009; 84 FR 64010, Nov. 19, 2019; 85 FR 23904, Apr. 30, 2020; 85 FR 81751, Dec. 16, 2020]

EFFECTIVE DATE NOTE: At 86 FR 70724, Dec. 13, 2021, §1208.4 was amended by revising the fifth sentence of paragraph (a)(2)(ii), effective Feb. 11, 2022. For the convenience of the user, the revised text is set forth as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *
 (2) * * *
 (ii) * * * For cases before the immigration court, the application is considered to have been filed on the date it is received by the immigration court. * * *

* * * * *

§ 1208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. Although DHS does not have a duty in the case of an alien who is in custody pending a credible fear or reasonable fear determination under either 8 CFR 1208.30 or 8 CFR 1208.31, DHS may provide the appropriate forms, upon request. Where possible, expedited consideration shall be given to applications of detained aliens. Except as provided in paragraph (c) of this section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her

asylum application. Furthermore, except as provided in paragraph (c) of this section, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands shall not be excluded, deported, or removed before a decision is rendered on his or her application for withholding of removal pursuant to section 241(b)(3) of the Act and withholding of removal under the Convention Against Torture. No application for asylum may be filed prior to January 1, 2030, pursuant to section 208 of the Act by an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands.

(b) *Certain aliens aboard vessels.* (1) If an alien crewmember or alien stowaway on board a vessel or other conveyance alleges, claims, or otherwise makes known to an immigration inspector or other official making an examination on the conveyance that he or she is unable or unwilling to return to his or her country of nationality or last habitual residence (if not a national of any country) because of persecution or a fear of persecution in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, or if the alien expresses a fear of torture upon return to that country, the alien shall be promptly removed from the conveyance. If the alien makes such fear known to an official while off such conveyance, the alien shall not be returned to the conveyance but shall be retained in or transferred to the custody of the Service.

(i) An alien stowaway will be referred to an asylum officer for a credible fear determination under §1208.30.

(ii) An alien crewmember shall be provided the appropriate application forms and information required by section 208(d)(4) of the Act and may then have 10 days within which to submit an asylum application to the district director having jurisdiction over the port-of-entry. The district director may extend the 10-day filing period for good cause. Once the application has been filed, the district director, pursuant to §1208.4(b), shall serve Form I-863 on the alien and immediately forward any such application to the appropriate

Immigration Court with a copy of the Form I-863 being filed with that court.

(iii) An alien crewmember physically present in or arriving in the Commonwealth of the Northern Mariana Islands can request withholding of removal pursuant to section 241(b)(3) of the Act and withholding of removal under the Convention Against Torture. However, such an alien crewmember is not eligible to request asylum pursuant to section 208 of the Act prior to January 1, 2030.

(2) Pending adjudication of the application, and, in the case of a stowaway the credible fear determination and any review thereof, the alien may be detained by the Service or otherwise paroled in accordance with §1212.5 of this chapter. However, pending the credible fear determination, parole of an alien stowaway may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

(c) *Exception to prohibition on removal.* A motion to reopen or an order to remand accompanied by an asylum application pursuant to §1208.4(b)(3)(iii) shall not stay execution of a final exclusion, deportation, or removal order unless such stay is specifically granted by the Board of Immigration Appeals or the immigration judge having jurisdiction over the motion.

[62 FR 10337, Mar. 6, 1997, as amended at 64 FR 8488, Feb. 19, 1999; 65 FR 76132, Dec. 6, 2000; 73 FR 55741, Oct. 28, 2009; 85 FR 23904, Apr. 30, 2020; 85 FR 80395, Dec. 11, 2020]

§ 1208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, records pertaining to any credible fear determination conducted pursuant to §208.30, and records pertaining to any reasonable fear determination conducted pursuant to §208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 1208.30 or § 1208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(v) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, State, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 1208.30 or § 1208.31; or

(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

(d)(1) Any information contained in an application for refugee admission,

asylum, withholding of removal under section 241(b)(3) the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws;

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security

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agency having a need to examine the information for an official purpose; or

(2) Where a United States government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

[65 FR 76133, Dec. 6, 2000, as amended at 85 FR 80395, Dec. 11, 2020]

§ 1208.7 [Reserved]

§ 1208.8 Limitations on travel outside the United States.

(a) An applicant who leaves the United States without first obtaining advance parole under §212.5(f) of this chapter shall be presumed to have abandoned his or her application under this section.

(b) An applicant who leaves the United States pursuant to advance parole under §1212.5(f) of this chapter and returns to the country of claimed persecution shall be presumed to have abandoned his or her application, unless the applicant is able to establish compelling reasons for such return.

[62 FR 10337, Mar. 6, 1997, as amended at 65 FR 82255, Dec. 28, 2000]

§ 1208.9 [Reserved]

§ 1208.10 Failure to appear at a scheduled hearing before an immigration judge; failure to follow requirements for biometrics and other biographical information processing.

Failure to appear for a scheduled immigration hearing without prior authorization may result in dismissal of the application and the entry of an order of deportation or removal *in absentia*. Failure to comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause. DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in custody.

[70 FR 4754, Jan. 31, 2005]

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§ 1208.11 Comments from the Department of State.

(a) The immigration judge may request, in his or her discretion, specific comments from the Department of State regarding individual cases or types of claims under consideration, or other information the immigration judge deems appropriate.

(b) With respect to any asylum application, the Department of State may provide, at its discretion, to the Immigration Court:

(1) Detailed country conditions information relevant to eligibility for asylum, withholding of removal under section 241(b)(3) of the Act, and withholding of removal under the Convention Against Torture;

(2) An assessment of the accuracy of the applicant's assertions about conditions in the applicant's country of nationality or habitual residence and the applicant's particular situation;

(3) Information about whether persons who are similarly situated to the applicant are persecuted or tortured in the applicant's country of nationality or habitual residence and the frequency of such persecution or torture; or

(4) Such other information as it deems relevant.

(c) Any comments received pursuant to paragraph (b) of this section shall be made part of the record. Unless the comments are classified under an applicable Executive Order, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application.

[78 FR 19079, Mar. 29, 2013]

§ 1208.12 Reliance on information compiled by other sources.

(a) In deciding an asylum application, which includes an application for withholding of removal under 241(b)(3) of the Act and protection under §§1208.16 through 1208.18, or in deciding whether the alien has a credible fear of persecution or torture pursuant to §1208.30, or a reasonable fear of persecution or torture pursuant to §1208.31, an immigration judge may rely on material provided by the Department of

State, other Department of Justice offices, the Department of Homeland Security, or other U.S. Government agencies, and may rely on foreign government and non-governmental sources if those sources are determined by the judge to be credible and the material is probative. On his or her own authority, an immigration judge may submit relevant evidence into the record, if the source is credible and the evidence is probative, and may consider it in deciding an asylum application, which includes an application for withholding of removal under section 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18, provided that a copy of the evidence has been provided to both parties and both parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision.

(b) Nothing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State. Persons may continue to seek documents available through a Freedom of Information Act (FOIA) request pursuant to 28 CFR part 16.

[62 FR 10337, Mar. 6, 1997, as amended at 64 FR 8488, Feb. 19, 1999; 65 FR 76133, Dec. 6, 2000; 85 FR 81751, Dec. 16, 2020]

§ 1208.13 Establishing asylum eligibility.

(a) *Burden of proof.* The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) *Eligibility.* The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) *Past persecution.* An applicant shall be found to be a refugee on the basis of past persecution if the appli-

cant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) *Discretionary referral or denial.* Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) *Burden of proof.* In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements

of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) *Grant in the absence of well-founded fear of persecution.* An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) *Well-founded fear of persecution.* (i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habit-

ual residence, 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

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

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

(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 persecution is by a government or is government-sponsored.

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

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

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family

members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) *Mandatory denials*—(1) *Applications filed on or after April 1, 1997.* For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.

(2) *Applications filed before April 1, 1997.* (i) An immigration judge or asylum officer shall not grant asylum to any applicant who filed his or her application before April 1, 1997, if the alien:

(A) Having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community;

(B) Has been firmly resettled within the meaning of § 1208.15;

(C) Can reasonably be regarded as a danger to the security of the United States;

(D) Has been convicted of an aggravated felony, as defined in section 101(a)(43) of the Act; or

(E) Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

(F) Is described within section 212(a)(3)(B)(i)(I),(II), and (III) of the Act as it existed prior to April 1, 1997, and as amended by the Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), unless it is determined that there are no reasonable grounds to be-

lieve that the individual is a danger to the security of the United States.

(ii) If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act.

(3) *Additional limitation on eligibility for asylum.* For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of 8 CFR 208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:

(i) The alien demonstrates that he or she applied for protection from persecution in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final judgment denying the alien protection in such country.

(ii) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(iii) The only country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the

1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(5) *Non-binding determinations.* Determinations made with respect to paragraph (c)(4)(ii) of this section are not binding on Federal departments or agencies in subsequent determinations of eligibility for T or U nonimmigrant status under section 101(a)(15)(T) or (U) of the Act or for benefits or services under 22 U.S.C. 7105 or 8 U.S.C. 1641(c)(4).

(6) *Additional limitations on eligibility for asylum.* For applications filed on or after November 20, 2020, an alien shall be found ineligible for asylum if:

(i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;

(ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the immigration judge knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;

(iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;

(iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

(B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the immigration judge to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The immigration judge need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).

(v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:

(1) An alien who is a current or former spouse of the person;

(2) An alien with whom the person shares a child in common;

(3) An alien who is cohabiting with or has cohabited with the person as a spouse;

(4) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(5) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.

(B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the

alien and the victim, the underlying conduct of the crime may be considered and the immigration judge is not limited to facts found by the criminal court or provided in the underlying record of conviction.

(C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.

(vi) The alien has been convicted on or after such date of—

(A) Any felony under Federal, State, tribal, or local law;

(B) Any misdemeanor offense under Federal, State, tribal, or local law involving:

(1) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

(2) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or

(3) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

(vii) The immigration judge knows or has reason to believe that the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:

(A) An alien who is a current or former spouse of the person;

(B) An alien with whom the person shares a child in common;

(C) An alien who is cohabiting with or has cohabited with the person as a spouse;

(D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or

(E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government, even if the acts did not result in a criminal conviction;

(F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)–(ii) of the Act.

(7) For purposes of paragraph (c)(6) of this section:

(i) The term “felony” means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.

(ii) The term “misdemeanor” means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.

(iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.

(iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the immigration judge determines that—

(A) The court issuing the order had jurisdiction and authority to do so; and

(B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:

(i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or

(ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An immigration judge is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of "victim

of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(C) Such country or countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Attorney General, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(1) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(2) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(3) Such country was, at the time of the transit, not a party to the 1951 Convention relating to the Status of Refugees the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(1) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;

(2) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11; or

(3) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to § 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

(E) At the time the asylum application is filed with the immigration court or is referred from DHS has:

(1) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(2) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

(3) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(1) Exceptional circumstances prevented the alien from attending the interview; or

(2) The interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Attorney General, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i). Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i), a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

(e) *Prima facie eligibility.* (1) Notwithstanding any other provision of this part, upon oral or written motion by the Department of Homeland Security, an immigration judge shall, if warranted by the record, pretermitt and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law. An immigration judge need not conduct a hearing prior to premitting and denying an application under this paragraph (e)(1) but must consider any response to the motion before making a decision.

(2) Notwithstanding any other provision of this part, upon his or her own authority, an immigration judge shall, if warranted by the record, pretermitt and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law, provided that the immigration judge shall give the parties at least 10 days' notice prior to entering such an order. An immigration judge need not conduct a hearing prior to premitting

and denying an application under this paragraph (e)(2) but must consider any filings by the parties within the 10-day period before making a decision.

[62 FR 10337, Mar. 6, 1997, as amended at 64 FR 8488, Feb. 19, 1999; 65 FR 76133, Dec. 6, 2000; 83 FR 55952, Nov. 9, 2018; 84 FR 33844, July 16, 2019; 85 FR 67259, Oct. 21, 2020; 85 FR 80396, Dec. 11, 2020; 85 FR 82289, Dec. 17, 2020]

EDITORIAL NOTE: At 85 FR 82289, Dec. 17, 2020, §1208.13 was amended; however, a portion of the amendment could not be incorporated due to inaccurate amendatory instruction.

EFFECTIVE DATE NOTE: At 85 FR 84196, Dec. 23, 2020, §1208.13 was amended by adding paragraph (c)(10), effective Jan. 22, 2021. The amendment was delayed to Mar. 22, 2021 at 86 FR 6847, Jan. 25, 2021. The amendment was further delayed to Dec. 31, 2021 at 86 FR 15076, Mar. 22, 2021. The amendment was further delayed to Dec. 31, 2022, at 86 FR 73615, Dec. 28, 2021. For the convenience of the user, the added text is set forth 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.

(i) *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.

§ 1208.14 Approval, denial, referral, or dismissal of application.

(a) *By an immigration judge.* Unless otherwise prohibited in §1208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. In no case shall an immigration judge grant asylum without compliance with the requirements of §1003.47 concerning identity, law enforcement, or security investigations or examinations.

(b) *Approval by an asylum officer.* In any case within the jurisdiction of the Office of International Affairs, unless otherwise prohibited in §1208.13(c), an asylum officer may grant, in the exercise of his or her discretion, asylum to an applicant who qualifies as a refugee

under section 101(a)(42) of the Act, and whose identity has been checked pursuant to section 208(d)(5)(A)(i) of the Act.

(c) *Denial, referral, or dismissal by an asylum officer.* If the asylum officer does not grant asylum to an applicant after an interview conducted in accordance with §1208.9, or if, as provided in §1208.10, the applicant is deemed to have waived his or her right to an interview or an adjudication by an asylum officer, the asylum officer shall deny, refer, or dismiss the application, as follows:

(1) *Inadmissible or deportable aliens.* Except as provided in paragraph (c)(4) of this section, in the case of an applicant who appears to be inadmissible or deportable under section 212(a) or 237(a) of the Act, the asylum officer shall refer the application to an immigration judge, together with the appropriate charging document, for adjudication in removal proceedings (or, where charging documents may not be issued, shall dismiss the application).

(2) *Alien in valid status.* In the case of an applicant who is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status at the time the application is decided, the asylum officer shall deny the application for asylum.

(3) *Alien with valid parole.* If an applicant has been paroled into the United States and the parole has not expired or been terminated by the Service, the asylum officer shall deny the application for asylum.

(4) *Alien paroled into the United States whose parole has expired or is terminated—*(i) *Alien paroled prior to April 1, 1997, or with advance authorization for parole.* In the case of an applicant who was paroled into the United States prior to April 1, 1997, or who, prior to departure from the United States, had received an advance authorization for parole, the asylum officer shall refer the application, together with the appropriate charging documents, to an immigration judge for adjudication in removal proceedings if the parole has expired, the Service has terminated parole, or the Service is terminating parole through issuance of the charging documents, pursuant to §1212.5(d)(2)(i) of this chapter.

(ii) *Alien paroled on or after April 1, 1997, without advance authorization for parole.* In the case of an applicant who is an arriving alien or is otherwise subject to removal under §235.3(b) of chapter I, and was paroled into the United States on or after April 1, 1997, without advance authorization for parole prior to departure from the United States, the asylum officer will take the following actions, if the parole has expired or been terminated:

(A) *Inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act.* If the applicant appears inadmissible to the United States under section 212(a)(6)(C) or 212(a)(7) of the Act and the asylum officer does not intend to lodge any additional charges of inadmissibility, the asylum officer shall proceed in accordance with §235.3(b) of chapter I. If such applicant is found to have a credible fear of persecution or torture based on information elicited from the asylum interview, an asylum officer may refer the applicant directly to an immigration judge in removal proceedings under section 240 of the Act, without conducting a separate credible fear interview pursuant to §1208.30. If such applicant is not found to have a credible fear based on information elicited at the asylum interview, an asylum officer will conduct a credible fear interview and the applicant will be subject to the credible fear process specified at §1208.30(b).

(B) *Inadmissible on other grounds.* In the case of an applicant who was paroled into the United States on or after April 1, 1997, and will be charged as inadmissible to the United States under provisions of the Act other than, or in addition to, sections 212(a)(6)(C) or 212(a)(7), the asylum officer shall refer the application to an immigration judge for adjudication in removal proceedings.

(d) *Applicability of §103.2(b) of this chapter.* No application for asylum or withholding of deportation shall be subject to denial pursuant to §103.2(b) of this chapter.

(e) *Duration.* If the applicant is granted asylum, the grant will be effective for an indefinite period, subject to termination as provided in §1208.24.

(f) *Effect of denial of principal's application on separate applications by dependents.* The denial of an asylum application filed by a principal applicant for asylum shall also result in the denial of asylum status to any dependents of that principal applicant who are included in that same application. Such denial shall not preclude a grant of asylum for an otherwise eligible dependent who has filed a separate asylum application, nor shall such denial result in an otherwise eligible dependent becoming ineligible to apply for asylum due to the provisions of section 208(a)(2)(C) of the Act.

(g) *Applicants granted lawful permanent residence status.* If an asylum applicant is granted adjustment of status to lawful permanent resident, the Service may provide written notice to the applicant that his or her asylum application will be presumed abandoned and dismissed without prejudice, unless the applicant submits a written request within 30 days of the notice, that the asylum application be adjudicated. If an applicant does not respond within 30 days of the date the written notice was sent or served, the Service may presume the asylum application abandoned and dismiss it without prejudice.

[62 FR 10337, Mar. 6, 1997, as amended at 63 FR 12986, Mar. 17, 1998; 64 FR 27875, May 21, 1999; 65 FR 76134, Dec. 6, 2000; 70 FR 4754, Jan. 31, 2005; 85 FR 80397, Dec. 11, 2020]

§ 1208.15 Definition of “firm resettlement.”

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely re-

newable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, or

(ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

[85 FR 80397, Dec. 11, 2020]

§ 1208.16 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 (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.

(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, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

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

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including persecutors who are gang members, public official who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) *Eligibility for withholding of removal under the Convention Against Tor-*

ture. (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 §1208.18(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 § 1208.17(a).

(d) *Approval or denial of application—*

(1) *General.* Subject to paragraphs (d)(2) 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 appeared 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 § 1208.17 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 67260, Oct. 21, 2020; 85 FR 80398, Dec. 11, 2020]

EFFECTIVE DATE NOTE: At 85 FR 84197, Dec. 23, 2020, § 1208.16 was amended by revising paragraphs (d)(2) and (f), effective Jan. 22, 2021. The amendment was delayed to Mar. 22, 2021 at 86 FR 6847, Jan. 25, 2021. The amendment was further delayed to Dec. 31, 2021 at 86 FR 15076, Mar. 22, 2021. The amendment was further delayed to Dec. 31, 2022, at 86 FR 73615, Dec. 28, 2021. For the convenience of the user, the revised text is set forth 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 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.

(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 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.

§ 1208.17 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 §1208.16(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 §1208.16(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 §1003.11 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 removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of §1208.11 of this part.

(3) The immigration judge shall conduct a hearing and make a *de novo* determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely

than not to be tortured in the country to which removal has been deferred. This determination shall be made under the standards for eligibility set out in §1208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.

(4) If the immigration judge determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the immigration judge determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the immigration judge's decision shall lie to the Board.

(e) *Termination at the request of the alien.* (1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to §1003.11 of this chapter to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration judge shall terminate the order of deferral and the alien may be removed.

(2) If necessary the immigration judge may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the immigration judge determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the immigration judge determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

(f) *Termination pursuant to §1208.18(c).* At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in §1208.18(c).

[64 FR 8489, Feb. 19, 1999]

§1208.18 Implementation of the Convention Against Torture.

(a) *Definitions.* The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility

to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(b) *Applicability of §§1208.16(c) and 1208.17(a)*—(1) *Aliens in proceedings on or after March 22, 1999.* An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under §1208.16(c), and, if applicable, may be considered for deferral of removal under §1208.17(a).

(2) *Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999.* An alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under §1208.16(c). Such motions shall be governed by §§1003.23 and 1003.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under §§1208.16(c) or 1208.17(a).

(3) *Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.* (i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the

Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under §§ 1208.16(c) or 1208.17(a), such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 1208.16(c) or 1208.17(a) shall not be subject to the requirements for reopening in §§ 1003.2 and 1003.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 1208.16(c) or deferral of removal under § 1208.17(a) will be considered under § 1208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 1208.18(d) and 1235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the

Board of Immigration Appeals, or an asylum officer.

(4) *Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999.* Sections 208.16(c) and 208.17 (a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 1208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 1208.16(c) and deferral of removal under § 1208.17(a).

(c) *Diplomatic assurances against torture obtained by the Secretary of State.*

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy

Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) *Cases involving aliens ordered removed under section 235(c) of the Act.* With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(e) *Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.* (1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

[64 FR 8490, Feb. 19, 1999; 64 FR 13881, Mar. 23, 1999, as amended at 85 FR 80398, Dec. 11, 2020]

§ 1208.19 Decisions.

The decision of an asylum officer to grant or to deny asylum or to refer an asylum application, in accordance with §1208.14(b) or (c), shall be communicated in writing to the applicant. Pursuant to §1208.9(d), an applicant must appear in person to receive and to acknowledge receipt of the decision to grant or deny asylum, or to refer an asylum application unless, in the discretion of the asylum office director, service by mail is appropriate. A letter communicating denial of asylum or referral of the application shall state the basis for denial or referral and include an assessment of the applicant's credibility.

[65 FR 76136, Dec. 6, 2000]

§ 1208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, and before January 11, 2021, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

(2) Paragraphs (b) through (f) shall only apply to applications filed on or after January 11, 2021.

(b) For applications filed on or after January 11, 2021, an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For applications referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration

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judge or the Board makes a finding of frivolousness as described in paragraph (c) of this section.

(c) For applications filed on or after January 11, 2021, an asylum application is frivolous if it:

(1) Contains a fabricated material element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

[85 FR 80398, Dec. 11, 2020]

§ 1208.21 Admission of the asylee's spouse and children.

(a) *Eligibility.* In accordance with section 208(b)(3) of the Act, a spouse, as defined in section 101(a)(35) of the Act, 8 U.S.C. 1101(a)(35), or child, as defined in section 101(b)(1) of the Act, also may

be granted asylum if accompanying, or following to join, the principal alien who was granted asylum, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under § 1208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.

(b) *Relationship.* The relationship of spouse and child as defined in sections 101(a)(35) and 101(b)(1) of the Act must have existed at the time the principal alien's asylum application was approved and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States. If the asylee proves that the asylee is the parent of a child who was born after asylum was granted, but who was *in utero* on the date of the asylum grant, the child shall be eligible to accompany or follow-to-join the asylee. The child's mother, if not the principal asylee, shall not be eligible to accompany or follow-to-join the principal asylee unless the child's mother was the principal asylee's spouse on the date the principal asylee was granted asylum.

(c) *Spouse or child in the United States.* When a spouse or child of an alien granted asylum is in the United States, but was not included in the asylee's application, the asylee may request accompanying or following-to-join benefits for his/her spouse or child by filing for each qualifying family member a separate Form I-730, Refugee/Asylee Relative Petition, and supporting evidence, with the designated Service office, regardless of the status of that spouse or child in the United States. A recent photograph of each derivative must accompany the Form I-730. The photograph must clearly identify the derivative, and will be made part of the derivative's immigration record for identification purposes. Additionally, a separate Form I-730 must be filed by the asylee for each qualifying family member before February 28, 2000, or within 2 years of the date in which he/she was granted asylum status, whichever is later, unless it is determined by

the Service that this period should be extended for humanitarian reasons. Upon approval of the Form I-730, the Service will notify the asylee of such approval on Form I-797, Notice of Action. Employment will be authorized incident to status. To demonstrate employment authorization, the Service will issue a Form I-94, Arrival-Departure Record, which also reflects the derivative's current status as an asylee, or the derivative may apply under §274a.12(a) of this chapter, using Form I-765, Application for Employment Authorization, and a copy of the Form I-797. The approval of the Form I-730 shall remain valid for the duration of the relationship to the asylee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal's status has not been revoked. However, the approved Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of an asylee.

(d) *Spouse or child outside the United States.* When a spouse or child of an alien granted asylum is outside the United States, the asylee may request accompanying or following-to-join benefits for his/her spouse or child(ren) by filing a separate Form I-730 for each qualifying family member with the designated Service office, setting forth the full name, relationship, date and place of birth, and current location of each such person. A recent photograph of each derivative must accompany the Form I-730. The photograph must clearly identify the derivative, and will be made part of the derivative's immigration record for identification purposes. A separate Form I-730 for each qualifying family member must be filed before February 28, 2000, or within 2 years of the date in which the asylee was granted asylum status, whichever is later, unless the Service determines that the filing period should be extended for humanitarian reasons. When the Form I-730 is approved, the Service will notify the asylee of such approval on Form I-797. The approved Form I-730 shall be forwarded by the Service to the Department of State for delivery to the American Embassy or Consulate having jurisdiction over the area in

which the asylee's spouse or child is located. The approval of the Form I-730 shall remain valid for the duration of the relationship to the asylee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal's status has not been revoked. However, the approved Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of an asylee.

(e) *Denial.* If the spouse or child is found to be ineligible for the status accorded under section 208(c) of the Act, a written notice stating the basis for denial shall be forwarded to the principal alien. No appeal shall lie from this decision.

(f) *Burden of proof.* To establish the claimed relationship of spouse or child as defined in sections 101(a)(35) and 101(b)(1) of the Act, evidence must be submitted with the request as set forth in part 204 of this chapter. Where possible this will consist of the documents specified in §204.2 (a)(1)(i)(B), (a)(1)(iii)(B), (a)(2), (d)(2), and (d)(5) of 8 CFR chapter I. The burden of proof is on the principal alien to establish by a preponderance of the evidence that any person on whose behalf he or she is making a request under this section is an eligible spouse or child.

(g) *Duration.* The spouse or child qualifying under section 208(c) of the Act shall be granted asylum for an indefinite period unless the principal's status is revoked.

[62 FR 10337, Mar. 6, 1997, as amended at 63 FR 3796, Jan. 27, 1998. Redesignated at 64 FR 8490, Feb. 19, 1999 and further redesignated and amended at 65 FR 76136, Dec. 6, 2000]

§ 1208.22 Effect on exclusion, deportation, and removal proceedings.

An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to §1208.24. An alien in exclusion, deportation, or removal proceedings who is granted withholding of removal or deportation, or deferral of removal, may not be deported or removed to the country to which his or her deportation or removal is ordered withheld or deferred unless the withholding order is terminated pursuant

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to §1208.24 or deferral is terminated pursuant to §1208.17(d) or (e).

[64 FR 8492, Feb. 19, 1999. Revised at 65 FR 76136, Dec. 6, 2000]

§ 1208.23 Restoration of status.

An alien who was maintaining his or her nonimmigrant status at the time of filing an asylum application and has such application denied may continue in or be restored to that status, if it has not expired.

[62 FR 10337, Mar. 6, 1997. Redesignated at 64 FR 8490, Feb. 19, 1999 and further redesignated at 65 FR 76136, Dec. 6, 2000]

§ 1208.24 Termination of asylum or withholding of removal or deportation.

(a) *Termination of asylum by the Service.* Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of asylum made under the jurisdiction of an asylum officer or a district director if following an interview, the asylum officer determines that:

(1) There is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted;

(2) As to applications filed on or after April 1, 1997, one or more of the conditions described in section 208(c)(2) of the Act exist; or

(3) As to applications filed before April 1, 1997, the alien no longer has a well-founded fear of persecution upon return due to a change of country conditions in the alien's country of nationality or habitual residence or the alien has committed any act that would have been grounds for denial of asylum under §1208.13(c)(2).

(b) *Termination of withholding of deportation or removal by the Service.* Except as provided in paragraph (e) of this section, an asylum officer may terminate a grant of withholding of deportation or removal made under the jurisdiction of an asylum officer or a district director if the asylum officer determines, following an interview, that:

(1) The alien is no longer entitled to withholding of deportation or removal because, owing to a fundamental change in circumstances relating to the original claim, the alien's life or freedom no longer would be threatened

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on account of race, religion, nationality, membership in a particular social group, or political opinion in the country from which deportation or removal was withheld.

(2) There is a showing of fraud in the alien's application such that the alien was not eligible for withholding of removal at the time it was granted;

(3) The alien has committed any other act that would have been grounds for denial of withholding of removal under section 241(b)(3)(B) of the Act had it occurred prior to the grant of withholding of removal; or

(4) For applications filed in proceedings commenced before April 1, 1997, the alien has committed any act that would have been grounds for denial of withholding of deportation under section 243(h)(2) of the Act.

(c) *Procedure.* Prior to the termination of a grant of asylum or withholding of deportation or removal, the alien shall be given notice of intent to terminate, with the reasons therefor, at least 30 days prior to the interview specified in paragraph (a) of this section before an asylum officer. The alien shall be provided the opportunity to present evidence showing that he or she is still eligible for asylum or withholding of deportation or removal. If the asylum officer determines that the alien is no longer eligible for asylum or withholding of deportation or removal, the alien shall be given written notice that asylum status or withholding of deportation or removal and any employment authorization issued pursuant thereto, are terminated.

(d) *Termination of derivative status.* The termination of asylum status for a person who was the principal applicant shall result in termination of the asylum status of a spouse or child whose status was based on the asylum application of the principal. Such termination shall not preclude the spouse or child of such alien from separately asserting an asylum or withholding of deportation or removal claim.

(e) *Removal proceedings.* When an alien's asylum status or withholding of removal or deportation is terminated under this section, the Service shall

initiate removal proceedings, as appropriate, if the alien is not already in exclusion, deportation, or removal proceedings. Removal proceedings may take place in conjunction with a termination hearing scheduled under § 1208.24(f).

(f) *Termination of asylum, or withholding of deportation or removal, by an immigration judge or the Board of Immigration Appeals.* An immigration judge or the Board of Immigration Appeals may reopen a case pursuant to § 3.2 or § 3.23 of this chapter for the purpose of terminating a grant of asylum, or a withholding of deportation or removal. In such a reopened proceeding, the Service must establish, by a preponderance of evidence, one or more of the grounds set forth in paragraphs (a) or (b) of this section. In addition, an immigration judge may terminate a grant of asylum, or a withholding of deportation or removal, made under the jurisdiction of the Service at any time after the alien has been provided a notice of intent to terminate by the Service. Any termination under this paragraph may occur in conjunction with an exclusion, deportation, or removal proceeding.

(g) *Termination of asylum for arriving aliens.* If the Service determines that an applicant for admission who had previously been granted asylum in the United States falls within conditions set forth in § 1208.24 and is inadmissible, the Service shall issue a notice of intent to terminate asylum and initiate removal proceedings under section 240 of the Act. The alien shall present his or her response to the intent to terminate during proceedings before the immigration judge.

[62 FR 10337, Mar. 6, 1997. Redesignated at 64 FR 8490, Feb. 19, 1999 and further redesignated and amended at 65 FR 76136, Dec. 6, 2000]

§ 1208.25 Severability.

The provisions of part 1208 are separate and severable from one another. In the event that any provision in part 1208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

[85 FR 80399, Dec. 11, 2020]

§§ 1208.26–1208.29 [Reserved]

Subpart B—Credible Fear of Persecution

§ 1208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) and 8 CFR 208.30, DHS has exclusive jurisdiction to make fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section and 8 CFR 208.30 are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act and 8 CFR 208.30. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

(1) Arrived in the United States concurrently with the principal alien; and

(2) *Desires to be included in the principal alien's determination.* However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

(c)–(d) [Reserved]

(e) *Determination.* For the standards and procedures for asylum officers in conducting credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture interviews and in making positive and negative fear determinations, see 8 CFR 208.30. The immigration judges will review such determinations as provided in paragraph (g) of this section and 8 CFR 1003.42.

(f) [Reserved]

(g) *Procedures for negative fear determinations—*(1) *Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a credible fear of persecution or a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), the immigration judge will then review the asylum officer's negative determinations regarding credible fear and regarding reasonable possibility made under 8 CFR 208.30(e)(5)(iv) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear ("significant possibility") standard described in paragraph (g)(2).

(ii) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(v), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4). If the immigration judge finds that the

alien is not described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4), the immigration judge will then review the asylum officer's negative decision regarding reasonable possibility made under 8 CFR 208.30(e)(5)(v) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g)(2).

(2) *Review by immigration judge of a negative fear finding.* (i) The asylum officer's negative decision regarding a credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture shall be subject to review by an immigration judge upon the applicant's request, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. If the alien refuses to make an indication, DHS will consider such a response as a decision to decline review.

(ii) The record of the negative fear determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative fear determination.

(iii) A fear hearing will be closed to the public unless the alien states for the record or submits a written statement that the alien is waiving that requirement; in that event the hearing shall be open to the public, subject to the immigration judge's discretion as provided in 8 CFR 1003.27.

(iv) Upon review of the asylum officer's negative fear determinations:

(A) If the immigration judge concurs with the determination of the asylum officer that the alien has not established a credible fear of persecution,

reasonable possibility of persecution, or reasonable possibility of torture, the case shall be returned to DHS for removal of the alien. The immigration judge's decision is final and may not be appealed.

(B) If the immigration judge finds that the alien, other than an alien stowaway, establishes a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the immigration judge shall vacate the Notice and Order of Expedited Removal, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1), during which time the alien may file an application for asylum and for withholding of removal in accordance with 8 CFR 1208.4(b)(3)(i). Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(C) If the immigration judge finds that an alien stowaway establishes a credible fear of persecution, reasonable possibility of torture, or reasonable possibility of torture, the alien shall be allowed to file an application for asylum and for withholding of removal before the immigration judge in accordance with 8 CFR 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph. Such decision on that application may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, and deferral of removal has not otherwise been granted pursuant to 8 CFR 1208.17(a), the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum, withholding of removal, or, as pertinent, deferral of removal becomes final, DHS shall terminate re-

moval proceedings under section 235(a)(2) of the Act.

[65 FR 76136, Dec. 6, 2000, as amended at 69 FR 69497, Nov. 29, 2004; 74 FR 55742, Oct. 28, 2009; 83 FR 55952, Nov. 9, 2018; 84 FR 33844, July 16, 2019; 85 FR 23904, Apr. 30, 2020; 85 FR 80399, Dec. 11, 2020]

EFFECTIVE DATE NOTE: At 85 FR 84197, Dec. 23, 2020, §1208.30 was amended by revising paragraphs (e), (g)(1)(ii), (g)(2)(i), and (g)(2)(iv)(A) and (B), effective Jan. 22, 2021. The amendment was delayed to Mar. 22, 2021 at 86 FR 6847, Jan. 25, 2021. The amendment was further delayed to Dec. 31, 2021 at 86 FR 15076, Mar. 22, 2021. The amendment was further delayed to Dec. 31, 2022, at 86 FR 73615, Dec. 28, 2021. For the convenience of the user, the revised text is set forth 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

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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 ap-

plication 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.

* * * * *

§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) *Jurisdiction.* This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) *Initiation of reasonable fear determination process.* Upon issuance of a Final Administrative Removal Order under §238.1 of this chapter, or notice under §1241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) *Interview and procedure.* The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place

reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

(d) *Authority.* Asylum officers conducting screening determinations under this section shall have the authority described in § 1208.9(c).

(e) *Referral to Immigration Judge.* If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the

provisions of § 1208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by Immigration Judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge

regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

[64 FR 8493, Feb. 19, 1999; 64 FR 13881, Mar. 23, 1999, as amended at 85 FR 80400, Dec. 11, 2020]

PART 1209—ADJUSTMENT OF STATUS OF REFUGEES AND ALIENS GRANTED ASYLUM

Sec.

1209.1 Adjustment of status of refugees.

1209.2 Adjustment of status of alien granted asylum.

AUTHORITY: 8 U.S.C. 1101, 1103, 1157, 1158, 1159, 1228, 1252, 1282; Title VII of Pub. L. 110-229; Pub. L. 115-218.

SOURCE: Duplicated from part 209 at 68 FR 9835, Feb. 28, 2003

EDITORIAL NOTE: Nomenclature changes to part 1209 appear at 68 FR 9846, Feb. 28, 2003.

§ 1209.1 Adjustment of status of refugees.

The provisions of this section shall provide the sole and exclusive procedure for adjustment of status by a refugee admitted under section 207 of the Act whose application is based on his or her refugee status.

(a) *Eligibility.* (1) Every alien in the United States who is classified as a refugee under part 207 of this chapter, whose status has not been terminated, is required to apply to the Service 1 year after entry in order for the Service to determine his or her admissibility under section 212 of the Act.

(2) Every alien processed by the Immigration and Naturalization Service abroad and paroled into the United States as a refugee after April 1, 1980, and before May 18, 1980, shall be consid-

ered as having entered the United States as a refugee under section 207(a) of the Act.

(b) *Application.* Upon admission to the United States, every refugee entrant shall be notified of the requirement to submit an application for permanent residence 1 year after entry. An application for the benefits of section 209(a) of the Act shall be filed on Form I-485, without fee, with the director of the appropriate Service office identified in the instructions which accompany the Form I-485. A separate application must be filed by each alien. Every applicant who is 14 years of age or older must submit a completed Form G-325A (Biographical Information) with the Form I-485 application. Following submission of the Form I-485 application, a refugee entrant who is 14 years of age or older will be required to execute a Form FD-258 (Applicant Fingerprint Card) at such time and place as the Service will designate.

(c) *Medical examination.* A refugee seeking adjustment of status under section 209(a) of the Act is not required to repeat the medical examination performed under § 207.2(c) of chapter I, unless there were medical grounds of inadmissibility applicable at the time of admission. The refugee is, however, required to establish compliance with the vaccination requirements described under section 212(a)(1)(A)(ii) of the Act, by submitting with the adjustment of status application a vaccination supplement, completed by a designated civil surgeon in the United States.

(d) *Interview.* The Service director having jurisdiction over the application will determine, on a case-by-case basis, whether an interview by an immigration officer is necessary to determine the applicant's admissibility for permanent resident status under this part.

(e) *Decision.* The director will notify the applicant in writing of the decision of his or her application for admission to permanent residence. If the applicant is determined to be inadmissible or no longer a refugee, the director will deny the application and notify the applicant of the reasons for the denial. The director will, in the same denial notice, inform the applicant of his or