

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 212

[CIS No. 2255-03]

RIN 1615-AA91

Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry

AGENCY: Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: On March 1, 2003, the Immigration and Naturalization Service transferred from the Department of Justice to the Department of Homeland Security (DHS), pursuant to the Homeland Security Act of 2002 (Public Law 107-296). The responsibility for administering the asylum program was transferred to U.S. Citizenship and Immigration Services (“USCIS”) within DHS. The terms of a recently signed agreement between the United States and Canada bar certain categories of aliens arriving from Canada at land border ports-of-entry and in transit from Canada from applying for protection in the United States. This proposed rule would establish USCIS asylum officers’ authority to make threshold determinations concerning applicability of the Agreement in the expedited removal context.

DATES: Written comments must be submitted on or before May 7, 2004.

ADDRESSES: Please submit written comments to the Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW, Room 4034, Washington, DC 20536. To ensure proper handling please reference CIS No. 2255-03 on your correspondence. You may also submit comments electronically to USCIS at rfs.regs@dhs.gov. When submitting comments electronically, you must include CIS No. 2255-03 in

the subject box. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT:

Joanna Ruppel, Deputy Director, Asylum Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave., NW., Third Floor, Washington, DC 20536, telephone number (202) 305-2663.

SUPPLEMENTARY INFORMATION:

What Legal Authority Permits USCIS To Use a Safe Third Country Agreement as a Bar To Applying for Asylum?

Section 208(a)(1) of the Immigration and Nationality Act (“Act”) permits any alien who is physically present in or who arrives at the United States to apply for asylum. However, section 208(a)(2)(A) of the Act specifically states that paragraph (1) shall not apply where, “pursuant to a bilateral or multilateral agreement, the alien may be removed to a country where the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General [now deemed to be the Secretary of Homeland Security under the Homeland Security Act] finds that it is in the public interest for the alien to receive asylum in the United States.”

On December 5th, 2002, the governments of the United States and Canada signed 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 (“Safe Third Country Agreement” or “Agreement”). The Agreement will take effect when the United States has promulgated implementing regulations and Canada has completed its own domestic procedures necessary to bring the Agreement into force. This Agreement will be implemented by USCIS asylum officer determinations.

The Agreement allocates responsibility between the United States and Canada whereby one country or the other (but not both) will assume responsibility for processing the claims

of certain asylum seekers who are traveling from Canada into the United States or from the United States into Canada. The Agreement provides for a threshold determination to be made concerning which country will consider the merits of an alien’s protection claim, enhancing the two nations’ ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. This Safe Third Country Agreement between the United States and Canada currently constitutes the only agreement, for purposes of section 208(a)(2)(A) of the Act, that would bar an individual in or arriving at the United States from applying for asylum.

During the bilateral negotiations that have resulted in the Safe Third Country Agreement, the delegations of both countries acknowledged certain differences in their respective asylum systems. However, harmonization of asylum laws and procedures is not a prerequisite to entering into responsibility-sharing arrangements. The salient factor is whether the countries sharing responsibility for refugee protection have laws and mechanisms in place that adhere to their international obligations to protect refugees. The Executive Committee for the Office of the United Nations High Commissioner for Refugees (UNHCR) has concluded, “Overall it is UNHCR’s position that, while in principle each State Party to the 1951 Convention and 1967 Protocol has a responsibility to examine refugee claims made to it, “burden-sharing” arrangements allowing for readmission and determination of status elsewhere are reasonable, provided they always ensure protection of refugees and solutions to their problems.” Background Note on the Safe Country Concept and Refugee Status (EC/SCP/68), July 26, 1991. While the asylum systems in Canada and the U.S. are not identical, both country’s asylum systems meet and exceed international standards and obligations under the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (1967 Protocol), and the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture).

What Are the Terms of the Safe Third Country Agreement Between the United States and Canada?

The Agreement permits the United States to remove to Canada certain asylum seekers attempting to enter the United States from Canada at a land border port-of-entry and aliens who are being removed from Canada in transit through the United States. Similarly, it permits Canada to return to the United States certain asylum seekers attempting to enter Canada from the United States at a land border port-of-entry and certain aliens being removed from the United States through Canada. In either case, the Agreement provides (with certain exceptions) that the alien be returned to the "country of last presence" for consideration of his or her protection claims, including asylum, withholding of removal, and protection under the Convention Against Torture, under the laws of that country.

For aliens arriving at a land border port-of-entry, the Agreement provides for a number of exceptions. These exceptions are based upon the principles underlying the U.S. position while negotiating the Agreement: (1) To the extent practicable, the Agreement should not act to separate families; (2) the Agreement must guarantee that persons subject to it would have their protection claims adjudicated in one of the two countries; and (3) it would be applied only in circumstances where it is indisputable that the alien arrived directly from the other country. These principles have been achieved by including a robust family unity exception that allows asylum seekers to join certain family members residing in the United States or Canada while they pursue their protection claims; by clearly stipulating that the alien must have his or her claim adjudicated in either Canada or the United States; and by limiting the application of the Agreement to situations where it is clear that the alien arrived directly from the other country; e.g., at land border ports-of-entry or in-transit while being removed from Canada.

The Agreement's family unity exceptions are particularly generous. The range of family members who may qualify as "anchor" relatives due to their presence in the United States is far broader than those recognized under other provisions of immigration law. The list of eligible family members includes spouses, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews. For purposes of the Agreement, a "legal guardian" will be construed as someone

who is currently vested with legal custody of the asylum seeker or with the authority to act on behalf of the asylum seeker, provided that the asylum seeker is both unmarried and less than 18 years of age. USCIS will provide field guidance to asylum officers to standardize the approach used in construing other family member relationships relevant to the Agreement but not defined in the Act. Finally, these family members may qualify as anchor relatives even if they themselves do not possess permanent immigration status in the U.S. Aliens in valid immigrant or nonimmigrant status may qualify as anchor relatives, with the exception of aliens who maintain only nonimmigrant visitor status under section 101(a)(15)(B) of the Act or based on admission under the Visa Waiver Program, who are precluded from serving as anchor relatives by the language of the Agreement.

More specifically, an alien who arrives at a land border port-of-entry is exempt from return under the Agreement if the alien:

- (1) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;
- (2) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, except visitor status;
- (3) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending in the United States;
- (4) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;
- (5) Is applying for admission at a United States land border port-of-entry with a validly issued visa or other valid admission document, other than for transit, issued by the United States, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or
- (6) Has been permitted, as an unreviewable exercise of discretion by DHS, to pursue a protection claim in the United States because it was determined that it is in the public interest to do so.

The specific terms of the Safe Third Country Agreement are available on the USCIS Web site at <http://www.uscis.gov>.

How Does This Rule Propose To Implement the Safe Third Country Agreement?

The rule proposes to revise § 208.4 and add a new § 208.30(e)(6) to permit asylum officers to conduct a "threshold screening interview" in order to determine whether an alien is ineligible to apply for asylum under section 208(a)(2)(A) of the Act by operation of the Safe Third Country Agreement. New § 208.30(e)(6)(iii) would codify the exceptions to the Agreement. Under this rule, in any case where an asylum officer determines that the alien qualifies for an exception to the Agreement with Canada, the asylum officer will proceed immediately to a determination as to whether or not the alien has a credible fear of persecution or torture, as provided under existing law.

In § 208.30(e)(6)(i), this proposed rule also makes clear that, when an asylum officer determines that an alien is ineligible to pursue his or her protection claims in the United States based on the applicability of the Safe Third Country Agreement, the alien will be removed to Canada, the country of the alien's last presence, in order to pursue his or her claims there.

The rule also proposes to incorporate the existing definitions of "credible fear of persecution" and "credible fear of torture" in the new §§ 208.30(e)(2) and (e)(3). The definition of credible fear of persecution, derived from section 235(b)(1)(B)(v) of the Act and existing policy that incorporates consideration of eligibility for withholding of removal, is "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act." The proposed rule incorporates the existing definition of credible fear of torture provided in the supplementary information to the interim rule implementing the United States' obligations under the Convention Against Torture published in the **Federal Register** at 64 FR 8484 on February 19, 1999. Under current procedures, as provided in the supplementary information to the interim rule, an alien is found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture. The rule does not propose to

alter current procedures related to these existing definitions.

Finally, this rule proposes to remove the provisions of 8 CFR 208.30(g)(2) relating to the conduct of credible fear review by immigration judges. In view of the transfer of the responsibilities of the former INS to DHS on March 1, 2003, the Attorney General published a rule creating a new chapter V in 8 CFR, beginning with part 1001 and containing the regulations pertaining to the functions of the Executive Office for Immigration Review (EOIR), which remains under the authority of Attorney General. The Attorney General's rule was published in the **Federal Register** at 68 FR 9824 on February 28, 2003. Accordingly, this rule revises § 208.30(g)(2) to remove the previous provisions and to substitute a new cross-reference to the current EOIR regulations which are now codified at 8 CFR 1208.30(g)(2).

Why Is USCIS Proposing To Amend the Regulations Governing Credible Fear Determinations?

The Safe Third Country Agreement between the United States and Canada bars certain aliens from pursuing protection claims in the United States if they are either arriving from Canada at land border ports-of-entry or are being removed from Canada in transit through the United States. Instead, those aliens will be returned to Canada to have their protection claims adjudicated by Canada. In general, the Agreement will be applied to such aliens who are subject to expedited removal provisions under section 235(b) of the Act, which provides a specific removal mechanism for aliens who are inadmissible under sections 212(a)(6)(C) (fraud or willful misrepresentation) or 212(a)(7) (failure to have proper documents) of the Act. However, in light of the Safe Third Country Agreement's purpose in allowing asylum seekers access to only one of the signatory countries' protection systems, this rule proposes a modified approach to the expedited removal process in the form of a threshold asylum officer screening as to which country (Canada or the United States) will consider an alien's protection claims. Only after this threshold issue has been resolved in favor of allowing the alien to pursue an asylum claim in the United States will an asylum officer make a determination as to whether or not the alien has a credible fear of persecution or torture.

Under section 235(b), aliens subject to expedited removal who seek asylum in the United States or otherwise express a fear of persecution or torture are referred to an asylum officer. During a

"credible fear interview," the asylum officer inquires as to the nature and basis of the alien's claims relating to past persecution and fear of future persecution or torture. The asylum officer then determines whether or not there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claims and other facts known to the officer, that the alien could establish eligibility for protection under U.S. law. In the event that the asylum officer determines that the alien has not established a credible fear of persecution or torture, the alien may request review of that determination by an immigration judge.

For aliens who are subject to the Agreement, however, the threshold question is whether the alien should be returned to Canada for Canadian authorities to consider the merits of the alien's claims, or whether the alien will instead be allowed to pursue his or her protection claims in the United States. Accordingly, this rule provides for a threshold screening interview by an asylum officer to determine whether an alien subject to the Agreement will be permitted to remain in the U.S. to pursue his or her protection claims, based on the alien's qualification for one of the Agreement's exceptions. It is only after this threshold screening interview (*i.e.*, only after the asylum officer has decided that the alien is not going to be removed to Canada for an adjudication of the alien's claims) that the asylum officer would proceed to promptly consider the alien's claims for protection under United States law through the credible fear determination process. The asylum officer's notes regarding the threshold issues raised by the Agreement would then be included in the asylum officer's written record of the credible fear determination. In those instances where an asylum officer determines, after review by a supervisory asylum officer, that the alien has not provided reason to believe, by a preponderance of the evidence, that he or she qualifies for any of the Agreement's exceptions, then the asylum officer will advise the alien that he or she is being returned to Canada based on the terms of the Agreement so that the alien will be able to pursue his or her claims for asylum or protection under Canadian law.

Given the narrowness of the factual issues relevant to the threshold screening determination that the Agreement and/or its exceptions are applicable to an alien, which can readily be considered and adjudicated by asylum officers, this rule does not provide for referral to immigration

judges for further review of these threshold screening determinations. The narrow factual issues concerning the Agreement's applicability and exceptions (such as the presence of family members in the U.S. or the possession of validly issued visas) do not relate to whether an alien has a fear of persecution or torture, and can adequately be resolved by asylum officers. Thus, under this proposed rule, when an asylum officer makes and a supervisor reviews this threshold determination, there would be no further administrative review of that decision. Elsewhere in the **Federal Register**, the Department of Justice is publishing a proposed rule to specify the authority of the immigration judges with respect to issues arising under the Agreement.

This method for implementing the Safe Third Country Agreement, which bars certain aliens from applying for asylum in the United States, is within the authority of the Secretary of DHS, under section 208(a)(2)(A) of the Act and under section 208(d)(5)(B) of the Act, which provides authority to impose regulatory conditions or limitations on the consideration of an application for asylum not inconsistent with the Act. Section 208(a)(2)(A) of the Act makes an alien ineligible to apply for asylum in the United States if, pursuant to a bilateral agreement, the Secretary concludes that the alien "would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection" in a safe third country. An alien who is covered by section 208(a)(2)(A) is thus not eligible to apply for asylum regardless of the statutory means by which he is ordered removed from the United States. By this rule, the Secretary is proposing, in a manner consistent with the Act, to delegate to asylum officers the authority to make the threshold determination whether an alien is ineligible to apply for asylum by operation of the Agreement with Canada.

USCIS thus proposes to amend the regulations governing the credible fear determination in order to implement the threshold screening process described above for aliens subject to the Safe Third Country Agreement, prior to a credible fear determination. However, this rule preserves unchanged the existing credible fear process itself, including the availability of a credible fear review by an immigration judge, in every case where the asylum officer determines that an alien subject to the Agreement does satisfy any of the threshold jurisdictional exceptions, including a discretionary decision by

DHS to allow the alien to pursue an asylum claim as a matter in the public interest. If the asylum officer determines the alien is not barred by the Agreement from pursuing his or her protection claims in the U.S., the asylum officer will then proceed immediately to a credible fear determination on the merits of the alien's claims, and, if necessary, an immigration judge will conduct a review of this determination on the merits, as provided under existing law and regulations.

How Does This Rule or the Safe Third Country Agreement Affect Unaccompanied Minors?

In order to understand how this rule affects unaccompanied minors, it is important to understand that the definition of an "unaccompanied minor" customarily used in determining appropriate immigration processes is different than the definition used in the Agreement for determining whether an exception to the Agreement applies. While "unaccompanied minor" has not been formally defined in the Act or in regulations, for immigration processing purposes, an individual who is under age 18 and is not accompanied by an adult relative or guardian is considered an "unaccompanied minor." This definition differs from the Agreement's language. Article 1(f) of the Agreement defines "unaccompanied minor" as "an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States." This rule does not propose replacing the customary definition of "unaccompanied minor" with the Agreement's definition for purposes of determining immigration issues unrelated to the Agreement. However, in applying the Agreement, this difference in definitions will result in finding that some individuals under age 18 who are not accompanied by an adult relative or legal guardian when they arrive at a land border port-of-entry will not qualify for the unaccompanied minor exception in the Agreement, because they have a parent or legal guardian in the United States or Canada.

Since August of 1997, the Immigration and Naturalization Service's policy, now DHS's policy, has been to place unaccompanied minors into expedited removal proceedings only under limited circumstances. Under existing policy, an unaccompanied minor would be placed into expedited removal proceedings only if he or she (1) in the presence of a DHS immigration officer, engaged in a crime that would qualify as an aggravated felony if committed by an

adult; (2) has been convicted or adjudicated delinquent of an aggravated felony in the United States or any other country, and a U.S. Customs and Border Protection (CBP) officer has confirmation of that order; or (3) has been formally removed, excluded, or deported previously from the United States. Existing guidelines permit granting a waiver, deferring the inspection, permitting a withdrawal of the application for admission, or using other discretionary means to process unaccompanied minors who seek admission to the United States, where appropriate. This rule does not propose to change that existing policy. The Safe Third Country Agreement will be applied in the expedited removal proceedings of unaccompanied minors only when such other processing of an unaccompanied minor seeking admission at a land border port-of-entry is not appropriate. When an unaccompanied minor arrives from Canada at a land border port-of-entry and seeks protection, he or she still will be processed according to existing guidelines, which often results in placing the minor into removal proceedings under section 240 of the Act. Where the minor is placed into removal proceedings under section 240 of the Act, the Agreement, including its definition of "unaccompanied minor," will be applied by the immigration judge, as provided in the Department of Justice proposed rule published in the **Federal Register**.

What Type of Evidence Will Satisfy USCIS When Determining Whether an Individual Meets One of the Exceptions in the Agreement?

As specified in the proposed rule at § 208.30(e)(6)(ii) and pursuant to a Statement of Principles concerning the implementation of the Agreement, the alien bears the burden of proof to establish by a preponderance of the evidence that an exception applies, such that the alien falls outside the scope of the Agreement. Asylum officers will use all available evidence, including the individual's testimony, affidavits and other documentation, as well as available records and databases, to determine whether an exception to the Agreement applies in each individual's case. Credible testimony alone may be sufficient to establish that an exception applies, if there is a satisfactory explanation of why corroborative documentation is not reasonably available. DHS recognizes that computer systems and DHS records will not be sufficient to verify family relationships in all circumstances and that asylum seekers fleeing persecution often will

not have documents establishing family relationships with them at the time they seek to enter the United States. Asylum officers receive extensive training in evaluating credibility of testimony when there is little or no documentation in support of that testimony. Asylum officers will document their findings that the Agreement or its exceptions are applicable to an alien, and in the case of any alien who qualifies for one of the Agreement's exceptions, will immediately proceed to make a credible fear determination, as described in sections 235(b)(1)(B)(ii) and (iii) of the Act.

How Does the Safe Third Country Agreement Address the Possibility That Individuals Will Be Removed Without Having Their Protection Claims Heard?

An individual referred by either Canada or the United States to the other country under the terms of Article 4 cannot be removed to a third country until an adjudication of the individual's protection claims has been made. The Agreement also provides, in Article 3, that an individual returned to the country of last presence shall not be removed to another country pursuant to any other Safe Third Country Agreement or regulation.

How Does the Safe Third Country Agreement Affect People Who Are Being Removed From Canada or the United States and Then Seek Protection While Transiting Through the Other Country?

Pursuant to Article 5(a) of the Agreement, if an alien is being removed from Canada through the United States and expresses a fear of persecution or torture, the alien will be returned to Canada for Canada to adjudicate his or her protection claims, in accordance with Canada's protection system. Generally, individuals being removed by Canada through the United States are pre-inspected in Canada and escorted by Canadian immigration officials to their onward destination. Individuals who make a protection claim during pre-inspection will not be allowed to transit through the United States. Individuals being removed by Canada in transit through the United States are considered arriving aliens in parole status, as described in section 212(d)(5) of the Act. If such an individual asserts a fear of persecution or torture to a U.S. immigration officer, while in transit through the United States, the individual's parole status will be terminated pursuant to § 212.5(e)(2)(i), and he or she generally will be placed in expedited removal proceedings, though there may be some rare instances

in which the individual will be placed in removal proceedings under section 240 of the Act. Transit aliens placed in expedited removal proceedings under this provision will be subject to the same asylum officer threshold screening process as aliens arriving at U.S.-Canada land border ports-of-entry. For those rare instances in which such a transit alien is placed in removal proceedings pursuant to section 240 of the Act, the Agreement will be applied by the immigration judge as provided in the Department of Justice proposed rule, published in the **Federal Register**.

The effect of the Agreement on an asylum seeker being removed from the United States through Canada depends on whether the United States already has considered any asylum, withholding, or Torture Convention claim(s). If the United States has considered but denied the alien's protection claims, the person will be permitted onward movement, in accordance with Article 5(c) of the Agreement. If the United States has not already adjudicated the alien's protection claims, the person will be returned to the United States for such an adjudication.

How Does the Agreement Affect Individuals Who Seek Withholding of Removal or Protection Under the Convention Against Torture?

Article 33 of the 1951 Refugee Convention, as supplemented by the 1967 Refugee Protocol, requires that signatory states not return persons to any country where their lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group. The U.S. is a signatory to the 1967 Protocol, and Canada is a signatory to both the 1951 Refugee Convention and the 1967 Protocol. The U.S. implements its obligations under the 1967 Protocol in section 241(b)(3) of the Act, which, as implemented, prohibits DHS from removing aliens to any country where it is more likely than not that their lives or freedom would be threatened on account of the grounds enumerated above. Nevertheless, DHS is not prevented from removing aliens to countries where their lives or freedom would not be threatened.

Article 3 of the Convention Against Torture prohibits the return of persons to any country where there are substantial grounds for believing that they would be subject to torture. Like the United States, Canada is a signatory to the Convention Against Torture. The United States implements this obligation by granting withholding of

removal or deferral of removal to a country where it is more likely than not that the applicant would be subject to torture.

Article 3 of the Agreement provides that "the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of [the Agreement] to another country until an adjudication of the person's refugee status claim has been made." In Article 1, the Agreement defines a refugee status claim to include a request for protection under the 1951 Refugee Convention, 1967 Protocol, or Convention Against Torture. Returning any alien to Canada pursuant to the terms of the Agreement for a consideration of the alien's protection claims, in the absence of any grounds for believing that the alien would be persecuted or tortured in Canada, is consistent with the United States' international protection obligations.

Does CBP Plan To Place Aliens Returned to the United States From Canada Under the Safe Third Country Agreement Into Expedited Removal Proceedings?

No. For an alien to be subject to the expedited removal provisions, the alien must first meet the definition of arriving alien. The Board of Immigration Appeals has held that an alien who goes abroad but is returned to the United States after having been formally denied admission by the foreign country is not an applicant for admission, since, in contemplation of law, the alien did not leave the United States. Matter of T, 6 I&N Dec. 638 (1955). Those who entered the United States legally or illegally and are later denied admission by Canada are not arriving aliens and therefore not subject to expedited removal. Depending on their status, they may or may not be subject to removal proceedings before an immigration judge, pursuant to section 240 of the Act, or removal pursuant to sections 241(a)(5) (reinstatement of a prior order) or 238(b) (administrative removal based on aggravated felony conviction) of the Act. For example, this return to the United States would not qualify as an "arrival" for purposes of determining whether an applicant has filed for asylum within one year of the date of his or her last arrival in the United States, as required under section 208(a)(2)(B) of the Act.

How Does This Proposed Rule Affect Individuals Who Enter the United States Through Canada and Who Then Apply for Asylum?

The proposed rule does not affect any individuals who apply for asylum after

entering the United States from Canada. The proposed rule is limited only to those individuals who are placed in expedited removal or removal proceedings upon arrival at U.S.-Canada land border ports-of-entry and to those who are aliens in transit through the United States subsequent to removal from Canada. Individuals who previously entered the United States, having come from Canada, and later apply for asylum affirmatively with USCIS or defensively in removal proceedings before an immigration judge are not arriving aliens and so will not be barred from applying for asylum by operation of the Agreement.

Regulatory Flexibility Act

DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and by approving it, DHS preliminarily certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects individual aliens, as it relates to claims of asylum. It does not affect small entities, as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

The Department of Homeland Security has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review. In particular, the

Department has assessed both the costs and benefits of this rule as required by Executive Order 12866, section 1(b)(6) and has made a reasoned determination that the benefits of this regulation justify its costs.

The proposed rule would implement a bilateral agreement that allocates responsibility between the United States and Canada for processing claims of certain asylum seekers. The rule applies to individuals who are subject to expedited removal and, under existing regulations, would receive a credible fear interview by an asylum officer. This rule simply adds a preliminary screening by asylum officers to determine whether the alien is even eligible to seek protection in the United States, in which case the asylum officer will then proceed to make the credible fear determination under existing rules. Based on statistical evidence, it is anticipated that approximately 200 aliens may seek to enter the United States from Canada at a land border port-of-entry and be placed into expedited removal proceedings. A significant number of these aliens will be found exempt from the Agreement and eligible to seek protection in the United States after the threshold screening interview proposed in this rule. It is difficult to predict how many aliens will be returned to the U.S.-Canadian border under the Agreement, but the costs incurred in detaining and transporting them are not likely to be substantial. Therefore, the "tangible" costs of this rulemaking to the U.S. Government are minimal. Applicants who are found to be subject to the Safe Third Country Agreement will be returned to Canada to seek protection, saving the U.S. Government the cost of adjudicating their asylum claims and, in some cases, the cost of detention throughout the asylum process.

The cost to asylum seekers who, under the proposed rule, will be returned to Canada are the costs of pursuing an asylum claim in Canada, as opposed to the United States. There is no fee to apply for asylum in Canada and, under Canadian law, asylum seekers are provided social benefits that they are not eligible for in the United States, including access to medical coverage, adult public education, and public benefits. Therefore, the tangible costs of seeking asylum in Canada are no greater than they are in the United States. However, because there may be other tangible costs to asylum seekers attempting to enter the United States from Canada at a land border port-of-entry (e.g., transportation costs to the U.S. border), public comment is invited for further consideration of what such

additional costs may include. The "intangible" costs to asylum seekers who would be returned to Canada under the proposed rule are the costs of potential separation from support networks they may be seeking to join in the United States. However, the Agreement contains broad exceptions based on principles of family unity that would generally allow those with family connections in the United States to seek asylum in the United States under existing regulations governing the credible process.

The proposed rule benefits the United States because it enhances the ability of the U.S. and Canada to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. By implementing the Agreement, the proposed rule furthers U.S. and Canadian goals, as outlined in the 30-Point Action Plan under the Smart Border Declaration signed by Secretary Ridge and former Canadian Deputy Foreign Minister John Manley, to ensure a secure flow of people between the two countries while preserving asylum seekers' access to a full and fair asylum process in a manner consistent with U.S. law and international obligations. Further, the Agreement and proposed rule save the U.S. the time and expense of adjudicating protection claims brought by asylum seekers who have already had a full and fair opportunity to present their claims in Canada.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 Civil Justice Reform

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

Paperwork Reduction Act

The regulations at 8 CFR 208.30 require that an asylum officer conduct a threshold screening interview to determine whether an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act. The threshold screening interview is considered an information collection requirement subject to review by OMB under the

Paperwork Reduction Act of 1995. Written comments are encouraged and will be accepted until May 7, 2004. When submitting comments on the information collection, your comments should address one or more of the following four points.

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* New.

(2) *Title of Form/Collection:* Credible fear threshold screening interview.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number, U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals. The information collection is necessary in order for the CIS to make a determination whether an alien is eligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 200 respondents at 30 minutes per response.

(6) *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 100 burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulations and Forms Services Division, 425 I Street, NW., Room 4034, Washington, DC 20536; Attention: Richard A. Sloan, Director, 202-514-3291.

Family Assessment Statement

DHS has reviewed this regulation and determined that it may affect family well-being as that term is defined in section 654 of the Treasury General Appropriations Act, 1999, Public Law 105-277, Div. A. Accordingly, DHS has assessed this action in accordance with the criteria specified by section 654(c)(1). In this proposed rule, an alien arriving at a land border port-of-entry with Canada may qualify for an exception to the Safe Third Country Agreement, which otherwise requires individuals to seek protection in the country of last presence (Canada), by establishing a relationship to a family member in the United States who has lawful status in the United States, other than a visitor, or is 18 years of age or older and has an asylum application pending. This proposed rule incorporates the Agreement's definition of "family member," which may be a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew. The "family member" definition was intended to be broad in scope, to promote family unity. This proposed rule thereby strengthens the stability of the family by providing a mechanism to reunite separated family members in the United States.

In some cases the proposed rule will have a negative effect resulting in the separation of family members. The Agreement's exceptions, as expressed in the proposed rule, require the family member to have either lawful status in the United States, other than visitor, or else to be 18 years of age or older and have a pending asylum application. Family members who do not meet one of these conditions, therefore, would be separated under the proposed rule. However, this proposed rule's definition of "family member" and the exceptions to the Agreement are more generous than other family-based immigration laws, which require the anchor family member to have more permanent status in the United States (such as citizen, lawful permanent resident, asylee or refugee) and which have a more restricted list of the type of family relationships that can be used to sponsor someone for immigration to the United States (although, unlike those laws, this Agreement provides only an opportunity to apply for protection and does not directly confer an affirmative immigration benefit). Under this rule, family members will be able to reunite even if the anchor relative's status is less than permanent in the United States.

List of Subjects

8 CFR Part 208

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

8 CFR Part 212

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

Proposed Amendments to the Regulations

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

2. Section 208.4 is amended by adding a new paragraph (a)(6) to read as follows:

§ 208.4 Filing the application.

* * * * *

(a) * * *

(6) *Safe Third Country Agreement.*

Asylum officers have authority to apply section 208(a)(2)(A) of the Act, relating to the determination that the alien may be removed to a safe country pursuant to a bilateral or multilateral agreement, only as provided in § 208.30(e). For provisions relating to the authority of immigration judges with respect to section 208(a)(2)(A), see 8 CFR 1240.11(g).

* * * * *

3. Section 208.30 is amended by:

- a. Redesignating paragraph (e)(4) as (e)(7);
- b. Redesignating paragraphs (e)(2) and (e)(3) as (e)(4) and (e)(5) respectively;
- c. Revising newly designated paragraphs (e)(4) and (e)(5);
- d. Adding new paragraphs (e)(2), (e)(3), and (e)(6);
- e. Revising paragraph (g)(2)(i), and by
- f. Removing paragraphs (g)(2)(iii) and (g)(2)(iv).

The additions and revisions read as follows:

§ 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

* * * * *

(e) * * *

(2) An alien will be found to have a credible fear of persecution if there is a

significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.

(3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to §§ 208.16 or 208.17.

(4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

(5) Except as provided in paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada under the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

(i) If the asylum officer determines that an alien does not qualify for an

exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After review of this finding by a supervisory asylum officer, the alien shall be advised that he or she will be removed to Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether an alien has a credible fear of persecution or torture.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and:

(A) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

(B) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the U.S. pursuant to the Visa Waiver Program;

(C) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. of Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

(D) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

(E) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

(F) The Department of Homeland Security determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the

Convention Against Torture, in the United States.

(iv) As used in § 208.30(e)(6)(iii)(B), (C) and (D) only, “legal guardian” means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien’s behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

* * * * *

(g) * * *

(2) * * *

(i) Immigration judges will review negative credible fear findings as provided in 8 CFR 1208.30(g)(2).

* * * * *

PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

4. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1225, 1226, 1227, 1228; 8 CFR part 2.

5. Section 212.5 is amended by adding new paragraph (e)(2)(iii) to read as follows:

§ 212.5 Parole of aliens into the United States.

* * * * *

(e) * * *

(2) * * *

(iii) Any alien granted parole into the United States so that he or she may transit through the United States in the course of removal from Canada shall have his or her parole status terminated upon notice, as specified in § 212.5(e)(2)(i), if he or she makes known to an immigration officer of the United States a fear of persecution or an intention to apply for asylum. Upon termination of parole, any such alien shall be regarded as an applicant for admission, and processed accordingly by the Department of Homeland Security.

* * * * *

Dated: January 26, 2004.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 04-5077 Filed 3-5-04; 8:45 am]

BILLING CODE 4410-10-P

DEPARTMENT OF JUSTICE

8 CFR Parts 1003, 1208, 1212, and 1240

[EOIR No. 142P; AG Order No. 2709-2004]

RIN 1125-AA46

Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Proposed rule.

SUMMARY: The recent Safe Third Country agreement between the United States and Canada provides new procedures for dealing with certain categories of aliens crossing at land border ports-of-entry between the United States and Canada, or in transit from Canada or the United States, and who express a fear of persecution or torture if returned to the country of their nationality or habitual residence. The Agreement recognizes that the United States and Canada are safe third countries, each of which offers full procedures for nationals of other countries to seek asylum or other protection. Accordingly, subject to several specific exceptions, the Agreement provides for the United States to return such arriving aliens to Canada, the country of last presence, to seek protection under Canadian law, rather than applying for asylum in the United States. Subject to the stated exceptions, such aliens attempting to travel from Canada to the United States, or vice versa, will be allowed to seek asylum or other protection in one country or the other, but not in both.

Elsewhere in this issue of the **Federal Register**, the Department of Homeland Security (DHS) is publishing a proposed rule that would, among other things, give asylum officers the authority to apply the Agreement with respect to arriving aliens. This proposed rule provides that the immigration judges will not review the threshold factual determinations by asylum officers that an alien does not satisfy any of the exceptions under the Agreement. However, for any alien who the asylum officer determines is not barred by the Agreement, the existing credible fear process under section 235(b) of the Immigration and Nationality Act (Act) remains unchanged, including the right to seek review by an immigration judge. Finally, this rule provides authority for an immigration judge to apply the Agreement with respect to aliens whom DHS has chosen to place in removal proceedings under section 240 of the Act.