DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 208

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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1240

[EOIR Docket No. 19–0021; A.G. Order No. 4581–2019]

RIN 1125–AA98

Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act

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

ACTION: Interim final rule; request for comment.

SUMMARY: The Department of Justice (''DOJ'') and the Department of Homeland Security (''DHS'') (collectively, ''the Departments'') are adopting an interim final rule (''IFR'' or ''rule'') to modify existing regulations to provide for the implementation of Asylum Cooperative Agreements (''ACAs'') that the United States enters into pursuant to section 208(a)(2)(A) of the Immigration and Nationality Act (''INA'' or ''Act''). Because the underlying purpose of section 208(a)(2)(A) is to provide asylum seekers with access to only one of the ACA signatory countries' protection systems, this rule adopts a modified approach to the expedited removal (''ER'') and section 240 processes in the form of a threshold screening as to which country will consider the alien's claim. This rule will apply to all ACAs in force between the United States and countries other than Canada, including bilateral ACAs recently entered into with El Salvador, Guatemala, and Honduras in an effort to share the distribution of hundreds of thousands of asylum claims. The rule will apply only prospectively to aliens who arrive at a U.S. port of entry, or enter or attempt to enter the United States between ports of entry, on or after the effective date of the rule.

DATES:

Effective date: This rule is effective November 19, 2019.

Submission of public comments: Comments must be submitted on or before December 19, 2019.

ADDRESSES: You may submit comments, identified by Docket Numbers USCIS–2019–0021 and EOIR Docket No. 19–0021, through the *Federal eRulemaking Portal: http://www.regulations.gov.* If you cannot submit your material by using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

FOR FURTHER INFORMATION CONTACT:

USCIS: Andrew Davidson, Chief, Asylum Division, Refugee Asylum and International Operations, U.S. Citizenship & Immigration Services, 20 Massachusetts Avenue NW, Suite 1100, Washington, DC 20529–2140; Telephone (202) 272–8377 (not a toll-free call).

EOIR: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041; Telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Departments also invite comments that relate to the potential economic or federalism effects that might result from this rule. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that supports the recommended change. Comments received will be considered and addressed in the process of drafting the final rule.

All comments submitted for this rulemaking should include the agency names and Docket Numbers USCIS–2019–0021 and EOIR Docket No. 19–0021. Please note that all comments received are considered part of the public record and made available for public inspection at *https://www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

II. Executive Summary

The Departments are adopting an interim final rule to modify existing regulations to provide for the implementation of agreements that the United States enters into pursuant to section 208(a)(2)(A) of the INA. 8 U.S.C. 1158(a)(2)(A). Such agreements—referred to by the Departments as Asylum Cooperative Agreements and alternatively described as safe third country agreements in existing regulations—are formed between the United States and foreign countries where aliens removed to those countries would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.[1] In certain circumstances, an ACA, in conjunction with section 208(a)(2)(A), bars an alien subject to the agreement from applying for asylum in the United States and provides for the removal of the alien, pursuant to the agreement, to a country that will provide access to a full and fair procedure for determining the alien's protection claim. Removal pursuant to these agreements will be ordered within ER proceedings or, in certain instances, within INA section 240 removal proceedings. But because the underlying purpose of section 208(a)(2)(A) is to provide asylum seekers with access to only one of the ACA signatory countries' protection systems, this rule adopts a modified approach to the ER and section 240 processes in the form of a threshold screening as to which country will consider the alien's claim. This rule will apply to all ACAs between the United States and countries other than Canada. In 2002, the United States and Canada entered into a bilateral ACA, titled 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,'' which the Departments implemented by regulation in 2004.

Although various recent regulatory reforms have reduced the burdens associated with adjudicating asylum claims (and others hold out promise to do so should injunctions on their implementation be lifted), the U.S. asylum system remains overtaxed. Hundreds of thousands of migrants have reached the United States in recent years and have claimed a fear of persecution[2] or torture. They often do

[1] For ease of reference, this rule refers to an asylum claim in the third country as alternatively encompassing ''equivalent temporary protection'' consistent with INA section 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A).

[2] ''Fear of persecution'' as used in this document describes persecution ''on account of race, religion, nationality, membership in a particular social

not ultimately establish legal qualification for such relief or even actually applying for protection after being released into the United States, which has contributed to a backlog of 987,198 cases before the Executive Office for Immigration Review (including 474,327 asylum cases), each taking an average of 816 days to complete. Asylum claims by aliens from El Salvador, Guatemala, and Honduras account for over half of the pending asylum cases.

To help alleviate those burdens and promote regional migration cooperation, the United States recently signed bilateral ACAs with El Salvador, Guatemala, and Honduras in an effort to share the distribution of asylum claims.[3] Pending the Department of State's publication of the ACAs in the United States Treaties and Other International Agreements series in accordance with 1 U.S.C. 112a, the agreements will be published in a document in the **Federal Register**. This rule will establish the authority of DHS asylum officers to make threshold determinations as to whether aliens are ineligible to apply for asylum under those three ACAs, and any future ones, in the course of ER proceedings under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), once the agreements enter into force. As a practical matter, this rule will also establish the authority of immigration judges (''IJs'') to make such determinations in the context of removal proceedings under INA section 240, 8 U.S.C. 1229a. To the extent that an alien in ER proceedings is rendered ineligible to apply for asylum by more than one ACA, the immigration officer will assess which agreement is most appropriately applicable to the alien. Immigration officers may exercise discretion in making such determinations as authorized by the Secretary of Homeland Security (''Secretary'') via field guidance. To the extent that an alien in section 240 proceedings is rendered ineligible to apply for asylum by more than one ACA, the immigration judge shall enter alternate orders of removal to each country that is a signatory to an applicable ACA. DHS immigration officers may exercise discretion when selecting from among the alternate orders, again, as authorized by the Secretary via field guidance. The rule will apply only prospectively to aliens who arrive at a U.S. port of entry, or enter or attempt to enter the United States between ports of entry, on or after the effective date of the rule.

group, or political opinion.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A).

[3] None of these agreements have yet entered into force.

III. Purpose of This Interim Final Rule

Asylum is a discretionary immigration benefit that generally can be sought by eligible aliens who are physically present or arriving in the United States. *See* INA 208(a)(1), 8 U.S.C. 1158(a)(1). Throughout the past decade, the United States has experienced a significant increase in the number of aliens encountered at or near its borders, particularly the southern land border with Mexico, as described by the Departments' recent joint rule requiring certain aliens seeking to apply for asylum to have first applied for equivalent protection in at least one country through which they transited en route to the United States, *see* Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33830 (July 16, 2019). This increase has been accompanied by a sharp increase in the number and percentage of aliens requesting asylum or claiming a fear of persecution or torture when apprehended or encountered by DHS. As noted by the third-country-transit rule, for example, over the past decade the percentage of aliens referred for credible fear interviews within ER proceedings jumped from approximately 5 percent to above 40 percent. *Id.* at 33830–31. The number of asylum cases filed with DOJ also rose sharply, more than tripling between 2013 and 2018. *Id.* at 33831. During that same period, the filing of affirmative asylum applications rose from 44,453 in 2013 to 106,147 in 2018.

This increase reflects high rises in both defensive asylum claims (*i.e.,* asylum claims raised after removal proceedings have begun) and affirmative asylum claims (*i.e.,* asylum claims raised apart from or before removal proceedings have begun). In Fiscal Year (''FY'') 2018, 110,136 individuals in ER proceedings raised claims of persecution or torture and were referred for credible fear interviews (99,035 individuals) or reasonable fear interviews (11,101 individuals). These individuals, combined with individuals who filed for asylum while in INA section 240 removal proceedings, resulted in 114,532 defensive asylum applications filed with DOJ in FY2018. Additionally, in FY2018, 48,922 affirmative asylum applications were also referred to DOJ. By contrast, in FY2013, 43,768 individuals in ER proceedings raised claims of persecution or torture and were referred for credible fear interviews (36,035 individuals) or reasonable fear interviews (7,733 individuals). These individuals, combined with individuals who filed for asylum while in section 240 removal proceedings, resulted in 23,500 defensive asylum applications filed with DOJ in FY2013. Additionally, in FY2013, 19,963 affirmative asylum applications were also referred to DOJ.

This has led to a backlog that, as of October 11, 2019, included more than 476,000 asylum cases before DOJ's Executive Office for Immigration Review (''EOIR''). The backlog of affirmative asylum applications pending with USCIS sits at 340,810, as of the end of FY2019. Historically, only a small minority of the individuals claiming a fear of return on the basis of persecution or torture were ultimately granted asylum or had even applied for it. Indeed, over the years, many aliens who initially claimed a fear of return upon entry or arrival abandoned those claims altogether.

Immigration detention centers have often been pushed to capacity, making even temporary detention for arriving aliens difficult to sustain. Or aliens have been released into the interior of the country, after which they often fail to appear for their removal proceedings, or unlawfully abscond after receiving removal orders, becoming fugitives. To help ease some of the burden on the immigration detention system and to reduce the numbers of aliens illegally entering the country, the Administration has worked with Mexico to permit people attempting to enter the United States from Mexico on land to remain in Mexico while awaiting their removal proceedings, pursuant to section 235(b)(2)(C) of the INA, 8 U.S.C. 1225(b)(2)(C).

Arresting the significant number of aliens who illegally enter the United States or arrive at ports of entry without the necessary documents to enter the United States legally, and processing and adjudicating their fear of return claims for ER, and processing and adjudicating their asylum claims in removal proceedings under INA section 240, consumes a tremendous amount of resources within the Departments of Justice and Homeland Security. After surveilling and arresting aliens, DHS must devote significant resources towards detaining many aliens pending further proceedings, process (and in the context of ER) adjudicate their claims (which are subject to potentially multiple layers of review), and represent the United States during removal proceedings before EOIR.

The large number of aliens seeking relief in the United States also consumes substantial DOJ resources. Within DOJ, IJs adjudicate aliens' asylum claims in INA section 240

proceedings, prosecutors and law enforcement officials must prosecute and maintain custody of aliens who violate Federal criminal law, and DOJ attorneys represent the United States in civil cases involving immigration and detention issues. Despite DOJ deploying 80% more immigration judges than in 2010, and completing nearly double the number of asylum cases in FY2018 as in FY2010, more than 476,000 asylum cases remain pending before the immigration courts. Further, immigration courts have an additional caseload that stems from cases that are not related to asylum. This significantly increased backlog is due in part to the sharp increase in the numbers of filed asylum applications. Between 2010 and 2018, there was a nearly nine-fold increase in defensive asylum cases and the number of affirmative asylum cases referred to EOIR more than doubled.

The large majority of fear of persecution or torture claims raised by those arrested at the southern border either have not led to actual claims for asylum or have been ultimately determined to be without legal merit. For example, in FY2018, 34,031 individuals who had received credible fear interviews before asylum officers were referred to DOJ for asylum hearings. Approximately 39%, or 13,369, of these individuals failed to file an asylum application, and thus abandoned their claims. Only 5,577 individuals were granted asylum, a number equal to 16.4% of all individuals referred to DOJ after credible fear interviews, or 27% of individuals who were referred to DOJ following a credible fear interview and filed an asylum application. The success rate declines when one looks at all asylum applications adjudicated by DOJ. In FY2018, 64,223 asylum applications were adjudicated by DOJ's immigration judges. Only 13,173, or 20.5%, were granted. The strain on the U.S. immigration system, and the wait times for aliens seeking to process legitimate claims through the U.S. asylum system, is extreme. This delay extends to the immigration court system, where cases involving related immigration and detention issues have caused significant docket backlogs.

In section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), Congress provided a mechanism to help ease this strain on the immigration system by authorizing the Executive Branch to enter into agreements with other countries to distribute the burdens associated with adjudicating claims for asylum or equivalent temporary protection. Specifically, section 208(a)(2)(A) authorizes the Executive Branch to bar an alien from applying for asylum in the United States where, pursuant to a bilateral or multilateral agreement, the alien may be removed to a third country (*i.e.,* a country other than the alien's country of nationality or last habitual residence, *see* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A)), that affords the alien access to a full and fair procedure for determining claims for asylum or equivalent temporary protection. Consistent with the President's extensive foreign affairs authority, *see, e.g., Zivotofsky* v. *Kerry,* 135 S. Ct. 2076, 2084–94 (2015); *United States* v. *Curtiss-Wright Exp. Corp.,* 299 U.S. 304, 319 (1936) (emphasizing the President's extensive role representing U.S. interests in relations with foreign nations), section 208(a)(2)(A), by its terms, provides substantial flexibility to the Executive Branch in negotiating and implementing ACAs. *Accord* INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B) (authorizing the Attorney General and Secretary to ''provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter''); *see also Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (Jackson, J., concurring) (''When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.''); *id.* at 637 (observing that an exercise of federal affairs power ''pursuant to an Act of congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation'').

In contrast to statutory and regulatory bars providing that certain aliens are ineligible to *receive* asylum, *see, e.g.,* INA 208(b)(2)(A), (C), 8 U.S.C. 1158(b)(2)(A), (C), the ACA bar relates to whether an alien may even *apply* for asylum. Unlike the restrictions on asylum eligibility, application of the ACA bar does not involve an evaluation of whether an alien would ultimately receive asylum relief if able to apply, or even whether the alien has made a preliminary showing of a significant possibility that the alien would be eligible for asylum. Rather, section 208(a)(2)(A) bars an alien from applying for asylum in the United States when the following four requirements are satisfied: (i) The United States has entered into a requisite ''bilateral or multilateral agreement''; (ii) at least one of the signatory countries to the agreement is a ''third country'' with respect to the alien; (iii) ''the alien's life or freedom would not be threatened'' in that third country ''on account of race, religion, nationality, membership in a particular social group, or political opinion''; and (iv) that third country provides aliens removed there pursuant to the agreement ''access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.'' [4] Even if all of these elements are satisfied, the Secretary nonetheless may determine in his discretion ''that it is in the public interest for the alien to receive asylum in the United States.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A).

This interim rule will amend DHS and DOJ regulations implementing section 208(a)(2)(A) to effectuate ACAs other than the agreement already formed with Canada in 2002 and implemented by regulation in 2004. *See* 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, 69 FR 69480 ((Nov. 29, 2004) (DHS) Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR 69490 (Nov. 29, 2004) (DOJ).

In particular, this rule will broaden the procedures (implemented in ER and INA section 240 proceedings) for determining whether an alien is subject to an ACA or within one of its exceptions to account for ACAs other than the U.S.-Canada Agreement. Additionally, this rule will establish a screening mechanism to evaluate whether an alien who would otherwise be removable to a third country under an ACA other than the U.S.-Canada Agreement 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, or would be tortured in that third country. This rule consequently will provide a general mechanism for implementation of all existing and future ACAs not previously implemented.[5] In sum, this

[4] Unaccompanied alien children, as defined by 6 U.S.C. 279(g), are categorically exempted from the ACA bar. *See* INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E).

[5] This interim rule leaves in place the regulatory structure specific to the U.S.-Canada Agreement so as to avoid disruption to long-standing processes and expectations concerning implementation of that agreement. This rule will allow for implementation of ACAs that have a broader scope of applicability than the U.S.-Canada Agreement and, consequently, provides for a more robust threshold screening mechanism for evaluating whether an alien is properly removed subject to an ACA other than the U.S.-Canada Agreement, which is narrowly directed to third country nationals seeking to enter the United States at a U.S.-Canada land border port of entry.

rule implements a screening mechanism to determine: (i) Whether an alien falls within the terms of a bilateral or multilateral ACA formed under section 208(a)(2)(A), other than the previously implemented U.S.-Canada Agreement, (ii) whether an alien within an ACA's plain terms nonetheless falls under one of the agreement's exceptions, and (iii) whether an alien within an ACA's scope but not subject to an exception nonetheless demonstrates that it is more likely than not that the alien's life or freedom would be threatened or the alien would be tortured in the third country.

ACAs entered pursuant to section 208(a)(2)(A) will be published in the **Federal Register**. Prior to implementation of an ACA, the Attorney General and the Secretary of Homeland Security (''Secretary'') will evaluate and make a categorical determination whether a country to which aliens would be removed under such an agreement provides ''access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Section 208(a)(2)(A) of the INA also requires a determination that an alien's life and freedom would not be threatened on account of a protected ground in a third country with which the United States has entered into an ACA. This rule effectuates such a determination via individualized threshold screening that provides an opportunity for an alien to establish fear of persecution in the third country to which he would be removed pursuant to an ACA.

The INA's ACA provision provides authority to pursue significant policy interests by entering into bilateral or multilateral agreements allowing for burden-sharing between the United States and other countries with respect to refugee-protection claims.

Consistent with this compelling policy aim, this interim rule is intended to aid the United States in its negotiations with foreign nations on migration issues. Specifically, the rule will aid the United States as it seeks to develop a regional framework with other countries to more equitably distribute the burden of processing the protection claims of the hundreds of thousands of irregular migrants who now seek to enter the United States every year and claim a fear of return. Addressing the eligibility for asylum of aliens who enter or attempt to enter the United States will better position the United States as it engages in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries (El Salvador, Guatemala, and Honduras) regarding migration issues in general, and related measures employed to curtail the irregular flow of aliens into the United States.

IV. Background and Legal Basis for Regulatory Changes

A. DOJ and DHS Authority To Promulgate This Rule

The Attorney General and the Secretary publish this joint IFR pursuant to their respective authorities concerning asylum determinations. The Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135, as amended, created DHS and transferred to it many functions related to the execution of Federal immigration law. The Secretary was charged ''with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,'' INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granted the power to take all actions ''necessary for carrying out'' his authority under the immigration laws, INA 103(a)(3), 8 U.S.C. 1103(a)(3).

The HSA thus transferred to DHS some authority to adjudicate asylum applications, including the authority to conduct ''credible fear'' interviews in the context of ER. INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* HSA 451(b), 116 Stat. at 2196 (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services). That authority has been delegated within DHS to USCIS. *See* 8 CFR 208.2(a), 208.30.

In addition, under the HSA, the Attorney General retained authority over individual immigration adjudications (including certain adjudications related to asylum applications) conducted within EOIR. *See* HSA 1101(a), 6 U.S.C. 521; INA 103(g), 8 U.S.C. 1103(g). IJs within DOJ continue to adjudicate all asylum applications made by aliens during the removal process, and they also review asylum applications referred by USCIS to the immigration court. *See* INA 101(b)(4), 240(a)(1), 8 U.S.C. 1101(b)(4), 1229a(a)(1); 8 CFR 1208.2(b), 1240.1(a). Additionally, the INA provides that ''determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'' INA 103(a)(1), 8 U.S.C. 1103(a)(1).

This rule specifically concerns implementation of section 208(a)(2)(A) of the INA, 8 U.S.C. 1158(a)(2)(A), which generally provides that an alien may not apply for asylum if the Attorney General and the Secretary determine that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which 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 Secretary finds that it is in the public interest for the alien to receive asylum in the United States.

By operation of the HSA, the reference to ''Attorney General'' is understood to also encompass the Secretary, depending on whether the alien is in immigration proceedings before DHS or DOJ. Thus, determinations as to whether an alien's asylum application is barred by INA section 208(a)(2)(A), in conjunction with an ACA, fall within the scope of both DHS and DOJ authority, as each department bears responsibility for adjudicating asylum applications. In addition, section 208(d)(5)(B) of the INA authorizes the Secretary and the Attorney General to ''provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.'' 8 U.S.C. 1158(d)(5)(B); *see* 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, 69 FR 10620, 10622 (Mar. 8, 2004) (DHS) (proposed rule) (relying in part on INA 208(d)(5)(B) to establish threshold screening for applicability of INA 208(a)(2)(A) in relation to the U.S.-Canada Agreement). This broad division of functions and authorities informs the background of this interim rule.

B. Adjudication of Asylum Applications and the Section 208(a)(2)(A) Bar

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158. Under that provision, aliens applying for asylum must establish (i) that they meet the definition of a ''refugee'' set forth at INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A); (ii) that they are not subject to a bar to either applying for asylum or receiving asylum; and (iii) that they merit a favorable exercise of discretion. INA 208(a)–(b), 8 U.S.C. 1158(a)–(b).

1. Removal Under ER and INA Section 240 Proceedings

When aliens indicate an intention to apply for asylum, or express a fear of persecution or torture, or a fear of removal to their country in the context of ER proceedings, they are evaluated in ER proceedings by immigration officers through a credible fear interview designed to determine whether there is a significant possibility that the alien would be eligible for asylum, statutory withholding of removal, or protection under the regulations issued pursuant to legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT''), December 10, 1984, 1465 U.N.T.S. 84, S. Treaty Doc. No. 100–20 (1988). INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B), 8 CFR 208.30, 235.3(b)(4). Section 235(a)(3) of the INA provides that ''[a]ll aliens . . . who are applicants for admission . . . shall be inspected by immigration officers.'' 8 U.S.C. 1225(a)(3). As part of initial inspections, immigration officers must assess whether an alien is inadmissible. Aliens who cannot establish ''clearly and beyond a doubt'' that they are ''entitled to be admitted'' will be examined for removal, as a matter of discretion, under the jurisdictional framework of either ER (if they are eligible) [6] or section 240 removal proceedings (or, in certain circumstances, other removal proceedings). *See* INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A) (''Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section [240].''); INA 235(b)(2)(B), 8 U.S.C. 1225(b)(2)(B) (providing that crewmen, stowaways, and aliens subject to ER need not receive section 240 hearings).

In the ER process, if a DHS immigration officer determines that an alien is inadmissible on one of two specified grounds, and meets certain other criteria, the alien generally must be ''removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [section 208] or a fear of persecution.'' INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i). If, however, such an alien ''indicates either an intention to apply for asylum . . . or a fear of persecution'' (or, by regulation, a fear of torture), the alien must instead be referred ''for an interview by an asylum officer.'' INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii); *see also* 8 CFR 235.3(b)(4).

Generally, in that interview, the asylum officer determines whether the alien has ''a credible fear of persecution or torture''—that is, whether there is a ''significant possibility'' that the alien could succeed on the merits of his or her claims for asylum, statutory withholding of removal, or protection under the CAT regulations. 8 CFR 208.30(d), (e)(2)–(3). If the officer makes a positive credible fear determination, the officer must refer the alien ''for full consideration of [the alien's claim(s) for relief or protection] in proceedings under section 240 of the Act.'' *Id.* 208.30(f). If the asylum officer makes a negative determination, and a supervisory officer concurs, the asylum officer ''shall order the alien removed,'' subject to review by an IJ at the request of the alien of the negative credible fear determination. *Id.* 208.30(g)(1)(i)–(ii).

Similarly, in section 240 removal proceedings, an IJ first determines whether the alien is inadmissible or deportable. *See* INA 240(c)(2)–(3), 8 U.S.C. 1229a(c)(2)–(3); 8 CFR 1240.8(a)–(c). If the IJ determines that the alien is inadmissible or deportable, the alien then bears the burden to demonstrate that he or she should receive any form of relief or protection from removal—*e.g.,* asylum. *See* INA 240(c)(4), 8 U.S.C. 1229a(c)(4); 8 CFR 1240.8(d). If the alien does so, the IJ grants the alien's application for relief or protection; if not, the IJ orders the alien removed, subject to potential review by the Board of Immigration Appeals (''BIA'') and a federal court of appeals. *See* INA 240(c)(1), (5), 8 U.S.C. 1229a(c)(1), (5); INA 242, 8 U.S.C. 1252; 8 CFR 1003.1(b)(3), 1240.1(a)(1).

2. Removals to Third Countries Consistent With the ACA Provision of INA Section 208(a)(2)(A)

Directly upon an initial inadmissibility or deportability determination within either an ER proceeding or a section 240 proceeding, *see, e.g.,* INA 235(b)(1)(A)(ii), 240(c)(2)–(3), 8 U.S.C. 1225(b)(1)(A)(ii), 1229a(c)(2)–(3), section 208(a)(2)(A) authorizes an asylum officer or IJ to conduct a threshold screening to determine whether an alien is barred from applying for asylum in the United States pursuant to an ACA, 8 U.S.C. 1158(a)(2)(A). This rule will provide a mechanism for the operation of these threshold screenings. Under this rule, an asylum officer or IJ will determine whether an alien is subject to an ACA, and, if so, in those instances in which the alien affirmatively states a fear of removal to a country that is a signatory to the agreement, whether the alien can affirmatively establish it is more likely than not that the alien would be persecuted or tortured in that country. If the alien is subject to the ACA but fails to demonstrate it is more likely than not that he or she would be subject to persecution on account of a protected ground or to torture in that country, the ER or section 240 proceeding would be completed without an adjudication of any claims relating to a fear of persecution or torture in the alien's home country.

Under this rule, however, an alien may voluntarily abandon his or her asylum claim prior to removal pursuant to an ACA, choosing instead to accept a removal order without pursuing any application for asylum. *Cf.* 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, 69 FR at 69482 (DHS) (noting that immigration officers can use their discretion to permit aliens subject to removal under ACAs to withdraw their applications for admission so that they do not face an admissibility bar to a subsequent admission to the United States). Further, application of an ACA remains within the discretion of the screening officer and DHS, which may conclude nonetheless that ''it is in the public interest for the alien to receive asylum in the United States.'' [7] INA 208(a)(2)(A), 1158(a)(2)(A); *see* Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR 10627, 10628 (DOJ) (proposed rule) (recognizing that ''the United States Government may conclude, in its discretion, that it is in the public interest to allow an arriving alien to remain in the United States to pursue

[6] *See* INA 235(b)(1)(A), 8 U.S.C. 1225(b)(1)(A) (authorizing screening by immigration officers to determine whether aliens are eligible for ER because they are inadmissible for engaging in fraud or willful misrepresentation related to a visa, other documentation, or admission, or for falsely claiming U.S. citizenship, INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C), or for not possessing valid entry documents, INA 212(a)(7), 8 U.S.C. 1182(a)(7)).

[7] As in the case of the U.S.-Canada Agreement, if there are unique considerations that the individual would like DHS to consider with respect to the ''public interest'' exception to application of an ACA, the individual should timely bring them to the officer's attention. *Cf.* 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, 69 FR at 69483 (DHS) (noting that the Agreement's public interest exception is ''best administered through operational guidance and on an individualized, case-by-case basis'').

protection'' even if the alien is subject to an ACA and that this ''discretionary determination is reserved to DHS'').

Section 208(a)(1) generally establishes that ''[a]ny alien who is physically present in . . . or who arrives in the United States . . . may apply for asylum.'' 8 U.S.C. 1158(a)(1). But section 208(a)(2) places limitations on those applications. Most of the section 208(a)(2) application limitations are procedural, such as the stipulation that asylum applications must generally be filed within one year of arrival in the United States. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). But section 208(a)(2)(A) provides a more substantive limitation—establishing that, in certain circumstances, an alien covered by an ACA is prohibited from applying for asylum in the United States.

Specifically, an alien's asylum application is barred if the following four conditions are satisfied: (i) The United States has entered ''a bilateral or multilateral agreement'' under which certain aliens may be removed—that is, an ACA; (ii) the alien is subject to the ACA, and one of the signatory countries is a ''third country'' with respect to the alien; (iii) ''the alien's life or freedom would not be threatened'' in that third country ''on account of race, religion, nationality, membership in a particular social group, or political opinion''; and (iv) that third country will provide the alien with ''access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The INA provides that ''[n]o court shall have jurisdiction'' to review any determination of the Attorney General or Secretary made under any of the provisions within section 208(a)(2). INA 208(a)(3), 8 U.S.C. 1158(a)(3).

3. Protection Screening With Respect to Removal to the Third Country

Where section 208(a)(2)(A) applies, it bars an alien from applying for asylum in the United States and authorizes the removal of the alien to a third country that will provide procedures for asylum or equivalent temporary protection in the place of the United States. This rule, however, provides that if an alien states a fear of persecution or torture in, or removal to, the third country, an asylum officer will determine whether ''the alien's life or freedom would . . . be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The terms of section 208(a)(2)(A) do not specify the precise procedural mechanism by which the Attorney General and Secretary must determine that an alien's life or freedom will not be threatened on account of a protected ground in the third country. As the relevant text of section 208(a)(2)(A) (''the alien's life or freedom would not be threatened [in the third country] on account of race, religion, nationality, membership in a particular social group, or political opinion'') mirrors the standard for protection contained in the INA's withholding-of-removal provision, INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A), this regulation adopts the burden of proof that applies in the withholding-of-removal context. And the withholding-of-removal provision has long been construed to call for a determination as to whether the alien can show that it is ''more likely than not'' that he or she would be persecuted on account of a protected ground in the country of removal. *See INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 423 (1987); *INS* v. *Stevic,* 467 U.S. 407, 429–30 (1984); *see also* 8 CFR 1208.16(b)(2). Accordingly, under the threshold screening implemented by this rule, an alien will not be removed to a third country under INA section 208(a)(2)(A) if the alien establishes that it is more likely than not that the alien would be persecuted on account of a protected ground in that country.

The United States has undertaken certain *non-refoulement* (non-return) obligations under the 1967 Protocol relating to the Status of Refugees (''1967 Protocol''), which incorporates Articles 2–34 of the 1951 Convention relating to the Status of Refugees (''1951 Convention'').[8] Article 33 of the 1951 Refugee Convention, as understood in U.S. law, generally precludes state parties from removing individuals to any country where their lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group. Consistent with these obligations, Congress has precluded removal of an alien to a third country under section 208(a)(2)(A) if ''the alien's life or freedom would . . . be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.'' 8 U.S.C. 1158(a)(2)(A).

The United States has also undertaken certain *non-refoulement* obligations under CAT, which are effectuated by DHS and DOJ regulations that prohibit the removal of an alien to a country where he or she would more likely than not be tortured. *See* 8 CFR 208.16(c), 1208.16(c).[9] Removing an alien to a third country pursuant to an ACA for consideration of the alien's protection claim in that country is consistent with U.S. obligations under CAT, in the absence of grounds for believing that the alien would be persecuted on account of a protected ground or tortured in the third country. *See* 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, 69 FR at 10624 (DHS) (proposed rule) (explaining the interaction between CAT obligations and the application of the U.S.-Canada Agreement).

Congress enacted section 208(a)(2)(A) as a mechanism for countries to burden-share the responsibility for providing protection to refugees. Such agreements allocate responsibility between the United States and the third country with which it has formed an ACA whereby one country or the other (but not both) will bear responsibility for processing the asylum and other protection claims of refugees subject to the terms of the ACA. *See id.* at 10620 (explaining the legal authority for applying cooperative agreements rather than permitting applications for asylum or other relief in the United States); *see also* Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR at 10628 (DOJ) (proposed rule) (providing that aliens subject to the U.S.-Canada Agreement are ''not eligible to apply for asylum, withholding of removal, or protection under [CAT] in the United States''). The salient factor for the formulation and application of a section 208(a)(2)(A) agreement is whether the country sharing responsibility with the United States for refugee protection has laws and

[8] The United States is a party to the 1967 Protocol, but not the 1951 Convention. *Stevic,* 467 U.S. at 416 & n.9. The Protocol is not self-executing in the United States. *See Khan* v. *Holder,* 584 F.3d 773, 783 (9th Cir. 2009). But the United States has implemented Article 34 of the 1951 Convention—which provides that party states ''shall as far as possible facilitate the assimilation and naturalization of refugees''—through the INA's asylum provision, section 208. *See Cardoza-Fonseca,* 480 U.S. at 441 (internal quotation marks omitted). As the Supreme Court has recognized, Article 34 is ''precatory'' and ''does not require [an] implementing authority actually to grant asylum to all'' persons determined to be refugees. *Id.* Thus, Congress's decision to bar certain classes of aliens from applying for asylum does not contravene Article 34. *See Garcia* v. *Sessions,* 856 F.3d 27, 42 (1st Cir. 2017) (Article 34 does not ''preclude[ ] a contracting State from imposing a limitation on the eligibility of an alien to seek asylum''); *see also R–S–C–* v. *Sessions,* 869 F.3d 1176, 1188 (10th Cir. 2017) (similar); *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (similar).

[9] CAT is also not self-executing in the United States. *See Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005).

mechanisms in place that adhere to international treaty obligations to protect refugees. *See* 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, 69 FR at 10620 (DHS) (proposed rule).

Accordingly, this interim rule provides that an alien who will potentially be subject to an ACA will be advised that he or she may be removed to a third country pursuant to a bilateral or multilateral agreement. If the alien affirmatively states a fear of removal to or persecution or torture in that third country, a DHS asylum officer will interview the alien to determine whether it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in the third country. *See* 8 CFR 208.30. DOJ immigration judges will apply a similar procedure to determine whether a removal pursuant to an ACA cannot proceed because the individual has established that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in the third country. *See id.* 1240.11.

4. Additional Consequences of the Applicability of Section 208(a)(2)(A) to an Alien's Asylum Application

If an asylum officer or IJ determines that an alien is barred from applying for asylum under section 208(a)(2)(A), then the alien is also barred from applying for withholding of removal under section 241(b)(3)(A) of the INA, 8 U.S.C. 1231(b)(3)(A), and protection under the regulations implementing CAT. The purpose of section 208(a)(2)(A)—and an agreement between the United States and another country formed thereunder—is to vest ''one country or the other (but not both) [with the] responsibility for processing'' an alien's claims related to fear of persecution or torture in the alien's home country. 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, 69 FR at 10620 (DHS) (proposed rule). That purpose would be defeated if, even when section 208(a)(2)(A) and an ACA made another country responsible for adjudicating an alien's asylum claim, the United States remained responsible for adjudicating his or her claims for withholding of removal and CAT protection. Moreover, even if the United States granted an alien's claims to withholding of removal or CAT protection, thereby eliminating the possibility of removal to the alien's home country, ''[n]othing . . . [would] prevent the [United States] from removing [the] alien to a third country''—including a country that is a signatory to an applicable ACA. 8 CFR 208.16(f), 1208.16(f). Because the alien could be removed to a third country pursuant to an ACA regardless of the eventual outcome of his or her withholding-of-removal or CAT protection claims, Congress cannot have intended to require DHS and DOJ to adjudicate those claims before effectuating such a removal. *See* Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR at 69492–93 (DOJ) (for similar reasons, concluding that, if the U.S.-Canada Agreement bars an alien from applying for asylum in the United States, the alien is also barred from applying for withholding of removal and CAT protection).

C. Consistency With International Practice

The INA's ACA provision embodies the policy aim of entering into bilateral or multilateral agreements to promote burden-sharing between the United States and other countries with respect to refugee protection. The U.S. efforts to formulate ACAs with foreign countries is in keeping with the efforts of other liberal democracies to formulate cooperative arrangements in which multiple countries agree to share the review of refugee claims for protection.

For example, in 1990, European countries adopted the Dublin Regulation in response to an asylum crisis as refugees and economic migrants fled communism at the end of the Cold War; it came into force in 1997. *See* Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254). The United Nations High Commissioner for Refugees (''UNHCR'') praised the Dublin Regulation's ''commendable efforts to share and allocate the burden of review of refugee and asylum claims.'' UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), 3 Eur. Series 2, 385 (1991). Now in its third iteration, the Dublin III Regulation sets asylum criteria and protocol for the European Union (''EU''). It instructs that asylum claims ''shall be examined by a single Member State.'' Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), 2013 O.J. (L 180) 31, 37.

UNHCR likewise generally has accepted the safe third country concept as consonant with international refugee law principles. UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* (Apr. 2018), *available at http://www.refworld.org/pdfid/5acb33ad4.pdf.* According to UNHCR, ''refugees do not have an unfettered right to choose their 'asylum country.' '' *Id.* at 1 & n.1 (citing UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers,* May 2013, para. 3(i), *http://www.refworld.org/docid/51af82794.html;* UNHCR, *Summary Conclusions on the Concept of ''Effective Protection'' in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9–10 December 2002),* Feb. 2003, para. 11, *http://www.refworld.org/docid/3fe9981e4.html*). Instead, ''[r]efugees may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find international protection. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not prohibit such return or transfer.'' [10] *Id.* at 1.

D. The U.S-Canada Agreement and Its Implementing Regulations

Section 208(a)(2)(A) itself does not mandate a particular set of procedures for determining whether the section's requirements are satisfied—and thus whether an alien is barred from applying for asylum. The ample regulatory flexibility that section 208(a)(2)(A) affords the Departments has been utilized in the regulations implementing the U.S.-Canada Agreement.

In those regulations, the Attorney General and Secretary made an across-the-board determination that all aliens removed to Canada pursuant to the U.S.-Canada Agreement would have ''access to a full and fair procedure'' for adjudicating their asylum claims within the meaning of INA section 208(a)(2)(A). In reaching that across-the-board finding, the Departments clarified that

[10] Formal advisory opinions of UNHCR are not binding on the United States, but they have been recognized as useful aids in interpreting the 1951 Convention and 1967 Protocol. *See, e.g., INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 427–28 (1999).

''harmonization of asylum laws and procedures is not a prerequisite to entering into responsibility-sharing arrangements'' under INA section 208(a)(2)(A). 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, 69 FR at 10620 (DHS) (proposed rule). Rather, ''[t]he 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.'' *Id.*

In contrast to the categorical finding on the full-and-fair-procedure requirement in the 2004 rule, the implementing regulations for the U.S.-Canada Agreement call for individualized determinations as to whether an alien falls within the terms of the Agreement, and, if so, whether the alien qualifies for one of the Agreement's exceptions. Specifically, with respect to ER, the regulations provide that, when an alien seeks to apply for asylum, the asylum officer must first determine whether the alien falls within one of the classes generally subject to the Agreement—that is, ''whether [the] alien arriv[ed] 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.'' 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, 69 FR at 69489 (DHS) (codified at 8 CFR 208.30(e)(6)). If so, the asylum officer must then determine whether ''the alien [can] establish[] by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement''—including the exception applicable where certain DHS officials have determined that it is in the public interest for the alien to have his asylum claim heard in the United States. *Id.* (codified at 8 CFR 208.30(e)(6)(ii), (iii)(F)).

If the asylum officer determines that the alien is not subject to the Agreement, or meets an exception, the asylum officer proceeds to conduct a credible fear interview. *Id.* (codified at 8 CFR 208.30(e)(6)(ii)). But if the asylum officer determines that the alien is subject to the Agreement, and does not meet an exception, the asylum officer submits his or her findings to a ''supervisory asylum officer.'' *Id.* (codified at 8 CFR 208.30(e)(6)(i)). If that supervisory officer concurs, the alien is barred from applying for asylum in the United States. And if the alien is so barred, he or she can be removed to Canada without any further administrative review by an IJ or the BIA. Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry, 69 FR at 69496 (DOJ) (codified at 8 CFR 1003.42(h)).

The regulations governing INA section 240 proceedings are similar. They require an IJ—after determining that an alien is inadmissible or deportable, but before assessing the merits of the alien's claims for asylum, withholding of removal, or protection under the regulations implementing CAT—to determine whether the U.S.-Canada Agreement ''appl[ies] to the alien'' and whether ''[t]he alien qualifies for an exception to the Agreement.'' *Id.* at 69497 (codified at 8 CFR 1240.11(g)(2)(i)–(ii)). If the Agreement does not apply, or the alien meets an exception, the IJ assesses the alien's claims for relief as usual. *Id.* (codified at 8 CFR 1240.11(g)(1)). But if the Agreement applies, and the alien does not meet an exception, the IJ does not assess the merits of any potential statutory withholding-of-removal or CAT claim and instead may order the alien removed, with the proviso that the alien may apply for any other relief from removal for which the alien may be eligible. *Id.* (codified at 8 CFR 1240.11(g)(4)).

V. Detailed Discussion of Regulatory Changes

A. Summary of the New and Amended Regulatory Provisions and Their Import

Despite the existence of regulations effectuating the U.S.-Canada Agreement within the ER and INA section 240 frameworks, this rule is necessary because several of the current implementing regulations are specific to the U.S.-Canada Agreement, *see* 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, 69 FR at 10620 (DHS) (proposed rule); *id.* at 69480 (DHS), and Canada is specially situated in a number of ways including its shared border with the United States. In addition, this rule provides for individualized screening of claims by aliens that they will face persecution or torture in the third country to which they would be removed pursuant to an ACA other than the U.S.-Canada Agreement.

The scope of the U.S.-Canada Agreement, and, consequently, the U.S.-Canada Agreement regulations, is limited to aliens arriving at ports of entry along the U.S. border with Canada. In contrast, this generalized rule for the implementation of all ACAs (with countries other than Canada) will cover ACAs to the full extent permitted by section 208(a)(2)(A), which contains no limitation to only those aliens who have transited through the relevant third country or who arrive at ports of entry. To accommodate for the expanded applicability of the ACAs implemented under this current rule beyond the narrower class of aliens subject to the U.S.-Canada Agreement after traveling through Canada, this rule expands the threshold screening of aliens potentially subject to ACAs other than the U.S.-Canada Agreement. The rule gives aliens subject to an ACA an opportunity, during threshold screening, to establish that it would be ''more likely than not'' that the alien's life or freedom would be threatened in the third country on account of a protected ground or that the alien would be tortured in the third country. If DHS officers or IJs determine that an alien establishes such a fear by a preponderance of the evidence, the alien will not be removed to the third country pursuant to the ACA formed with that particular country. *Cf.* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) (eliminating the opportunity to apply for asylum in the United States ''if the Attorney General [or Secretary] determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which 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,'' among other required determinations described elsewhere in this rule).

In contrast to many of the countries listed as potential countries of removal in section 241(b) of the INA, the third country to which an alien would be removed under an ACA is a country to which an alien does not necessarily have preexisting ties or any preexisting reason to fear persecution or torture. *Compare* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A), *with* INA 241(b)(1)–(2), 8 U.S.C. 1231(b)(1)–(2). Moreover, unlike the countries to which aliens typically would be removed under section 241(b) of the INA, these third countries of removal would have pre-committed, per binding agreements with the United States, to provide access to a ''full and fair procedure'' for the alien to acquire ''asylum or equivalent temporary

protection,'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). Aliens subject to an ACA thus would have an avenue for protection in the third country of removal not necessarily available in an INA section 241(b) country of removal—a country that may not have entered a binding agreement to provide the alien procedures for requesting safe haven and that may have originally prompted the alien's flight and application for asylum.

This rule retains the existing regulations implementing the U.S.-Canada Agreement, while also crafting a new regulatory framework under which other ACAs will be implemented. Even though the regulatory framework for implementation of the new ACAs will differ in some significant respects from the earlier 2004 regulations, in part for the reasons described above, this rule also replicates several key aspects of implementation of the U.S.-Canada Agreement. First, as with the regulatory scheme for the U.S.-Canada Agreement, prior to implementation of an ACA subject to this rule, the Departments will make a generalized determination as to whether the third country grants asylum seekers ''access to a full and fair procedure'' within the meaning of INA 208(a)(2)(A). This finding is required by the text of section 208(a)(2)(A), and the Departments will make the ''full and fair'' third country determination separate and apart from the regulatory provisions provided for here, to address this threshold statutory element that must be satisfied before any section 208(a)(2)(A) bilateral or multilateral agreement is effectuated. Second, under this rule, there will be an individualized screening process within the preexisting ER and INA section 240 frameworks to evaluate whether an alien falls within the terms of an agreement and, if so, whether the alien nonetheless meets one of its exceptions. The statute also provides an exception to the terms of an ACA in the event that the Secretary determines in the Secretary's discretion that ''it is in the public interest for the alien to receive asylum in the United States.'' INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). As under the U.S.-Canada Agreement, the public interest exception is to be applied on a case-by-case basis, as a matter of discretion, to permit certain individuals to pursue applications for asylum or withholding of removal in the United States, where the Secretary or his immigration officers ''find[] that it is in the public interest for the alien to receive asylum in the United States.'' *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A); *cf.* 8 CFR 208.30(e)(6)(iii)(F). Application of the exception is ''solely within the discretion of DHS.'' Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR at 10628, 10630 (DOJ) (proposed rule); *see also* INA 208(a)(3), 8 U.S.C. 1158(a)(3) (''No court shall have jurisdiction to review any determination of the Attorney General [or Secretary] under paragraph (2).'').

As with the regulations implementing the U.S.-Canada Agreement, this rule will implement the statutory requirements into its threshold screening mechanism for evaluating which aliens are barred from applying for asylum under an ACA. The applicability of any additional limitations on the categories of aliens subject to the terms of a particular ACA will also be assessed during the initial screening. If an ACA is determined to be applicable to an alien applying for asylum, and the alien does not demonstrate that his life or freedom will more likely than not be threatened in the third country, the immigration officer may proceed to order removal without consideration of asylum, withholding-of-removal, or CAT claims, analogous to the U.S.-Canada Agreement removal arrangements. *See* 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, 69 FR at 69481 (DHS) (''[A] careful reading of the Act makes clear that credible fear interviews are not required for aliens subject to [ACAs].'').

The U.S.-Canada Agreement applies only to aliens who had arrived in the United States to seek asylum after traveling through Canada. However, the terms of section 208(a)(2)(A) do not limit the applicability of ACAs to aliens who have traveled through the third country in transit to the United States. Consequently, in contrast to the U.S.-Canada provisions, this rule provides that the screening procedures for ACAs with countries other than Canada (which, with one possible exception, would not be contiguous to the United States) will afford aliens an opportunity to establish that it is more likely than not that they would be persecuted or tortured if removed to the applicable third country. It provides an additional screening component enabling asylum officers and IJs to assess whether an alien who affirmatively states a fear of removal to the signatory country under an applicable ACA would more likely than not be persecuted or tortured in such country.

B. New 8 CFR 208.30(e)(7)

The regulations at 8 CFR 208.30 govern interviews, conducted by DHS asylum officers, of stowaways and aliens subject to ER. *See* 8 CFR 208.30(a). New paragraph (e)(7) requires an asylum officer, in an appropriate case, to make several threshold screening determinations before assessing the merits of an alien's claims for asylum, withholding of removal, or CAT protection. First, the asylum officer must determine whether the alien is subject to one or more ACAs. Second, if so, the officer must determine whether the alien meets any exception to the applicable agreement(s)—including the public-interest exception, which, under section 208(a)(2)(A), all ACAs must contain. If the alien is not subject to any ACA, or the alien meets an exception to each applicable agreement, the asylum officer will assess the merits of the alien's claims for relief as usual—that is, assess whether the alien has a credible fear of persecution or torture under existing paragraphs (e)(2) and (3). But if the alien is subject to an ACA, and does not meet any exception, the asylum officer will inform the alien that he or she is potentially subject to removal to the third country signatory to the relevant ACA, and that the third country, rather than the United States, will provide access to a full and fair procedure for adjudication of the alien's claims.

After identifying the third country or countries to which the alien may be removed, if the alien does not affirmatively state a fear of persecution or torture in, or removal to, the country or countries, the asylum officer will refer the determination—*i.e.,* that the alien is barred from applying for asylum, withholding of removal, and CAT protection in the United States, and subject to removal to the third country or countries—to a supervisory officer for review. If the supervisory asylum officer disagrees, that officer will remand the case to the asylum officer for a credible fear interview.

If, on the other hand, the alien affirmatively states a fear of persecution or torture in, or removal to, the third country or countries, the asylum officer will then determine whether the alien can establish, by a preponderance of the evidence, that, if the alien were removed to the third country or countries, it is more likely than not that he or she would be persecuted on account of a protected ground or tortured. If the officer determines the alien has met that burden, given that the alien has already been placed into ER proceedings, the officer will assess the

merits of the alien's claims for relief and protection as usual—*i.e.,* conduct a normal credible fear interview. But if the officer determines the alien has not met that burden, the officer will refer the determination to a supervisory asylum officer for review.

The threshold screening determinations under the U.S.-Canada Agreement regulatory procedures similarly incorporate a preponderance-of-the-evidence standard. *See* 8 CFR 208.30(e)(6)(ii). As under the U.S.-Canada screening procedures, in making the threshold determinations discussed above, asylum officers ''will use all available evidence, including the individual's testimony, affidavits and other documentation, as well as available records and databases.'' 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, 69 FR at 10623 (DHS) (proposed rule); *see also id.* at 69482 (DHS) (''The Department has clarified, in the final rule, that the same safeguards accorded to aliens who are eligible for a credible fear determination will be accorded to aliens who receive threshold screening interviews.''). In the asylum officer's discretion, ''[c]redible testimony alone may be sufficient'' to meet the alien's burden ''if there is a satisfactory explanation of why corroborative documentation is not reasonably available.'' 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, 69 FR at 10623 (DHS) (proposed rule). Asylum officers have received ''extensive training in evaluating credibility of testimony when there is little or no documentation in support of that testimony,'' *id.,* and will apply that training to the threshold determination of whether an alien falls within the terms of an ACA or an exception and whether the alien has established a clear probability of persecution or torture in the third country.

In contrast to the final rule implementing the U.S.-Canada Agreement that provided an alien with a minimal consultation period prior to the threshold screening interview to determine the applicability of the Agreement, this rule does not mandate such a period. *See* 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, 69 FR at 69482 (DHS) (providing a minimal consultation period but emphasizing that the consultation period would not permit the postponement of the threshold screening interview process so as not to ''compromise the principle underlying the Agreement that aliens be returned promptly to the country of last presence''). Rather, this rule expands the threshold screening process itself to allow for an alien to demonstrate that he or she is ''more likely than not'' to be subject to persecution on account of a protected ground or torture in the receiving country under the ACA.

The bilateral ACAs that the United States has signed as of the effective date of this rule include agreements with El Salvador, Guatemala, and Honduras and incorporate fewer and less complex exceptions than the U.S.-Canada Agreement, eliminating the need for a consultation period analogous to the consultation period permitted by the U.S.-Canada Agreement.[11] Further, this rule's expansion of the underlying threshold screening procedures to provide an opportunity for aliens to establish ''more likely than not'' persecution or torture in the receiving country provides additional process beyond that which is available under the regulations implementing the U.S.-Canada Agreement.

Although section 208(a)(2)(A) is silent with respect to which party bears the burden of showing the applicability (or inapplicability) of the bar and the appropriate standard of proof for such a showing, section 208(b)(1) indicates that the ultimate burden of proof in establishing asylum eligibility is on the applicant. *See* INA 208(b)(1)(A)–(B), 8 U.S.C. 1158(b)(1)(A)–(B) (authorizing a grant of asylum to an alien who meets the burden of establishing that he or she is a refugee). Moreover, the section 208(a)(2)(A) language regarding protection against harm from the third country of removal is parallel to the section 241(b)(3) language establishing withholding-of-removal protection with respect to the typical potential countries of removal specified by INA sections 241(b)(1) and (2). When evaluating whether an alien is entitled to withholding of removal under INA 241(b)(3) or evaluating a claim for protection under the regulations implementing CAT, an IJ addresses whether an alien has established the relevant fear by a preponderance of the evidence. *See* 8 CFR 1208.16(b)–(c). It is therefore reasonable to require an alien to show, by a preponderance of the evidence, that he or she meets an exception to an otherwise applicable ACA, and that he or she would face harm in the third country. *See* 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, 69 FR at 69483 (DHS) (reasoning that, because ''applicants for asylum, withholding of removal, and protection under [CAT] bear the burden of proof,'' it is reasonable for aliens to bear ''the burden of proof for purposes of establishing that an exception to the [U.S.-Canada] Agreement applies'').

C. Amended 8 CFR 1003.42(h)(1)–(2) and New 8 CFR 1003.42(h)(3)–(4)

This rule will amend 8 CFR 1003.42(h) to reflect the implementation of ACAs other than the U.S.-Canada Agreement. In particular, the rule will make technical amendments to 8 CFR 1003.42(h)(1) and (2) to clarify that those paragraphs apply to only the preexisting U.S.-Canada Agreement. The rule creates new 8 CFR 1003.42(h)(3) and (4) to reflect the distinction that the threshold officer screening in the non-Canada ACAs includes an opportunity for the alien to establish that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured. Under the new paragraph (h)(3), an IJ is prohibited from reviewing an officer's determination that section 208(a)(2)(A) bars an alien from applying for asylum. But an IJ acquires jurisdiction to review a negative credible fear finding in any case where an alien either establishes that he or she qualifies for an ACA exception, *or* establishes more-likely-than-not harm in the relevant third country, thus prohibiting the application of the ACA to that alien. (In such a case, the asylum officer would apply typical credible fear screening to the alien, giving an IJ jurisdiction to review a negative finding by that officer.) The new (h)(4) clarifies that an alien subject to removal under an ACA is ineligible to apply for withholding-of-removal and CAT relief in the United States, along with asylum, as explained in the detailed legal background section of the rule.

[11] Applicability of the exceptions at issue in the non-Canada ACAs generally can be evaluated through records checks and by asking straightforward biographic questions. Conversely, the exceptions to the U.S.-Canada Agreement required more detailed information from the alien, such as whether certain family members of the applicant are present in the United States, the immigration status of those family members, and whether the family members have pending asylum applications. *See* 8 CFR 208.30(e)(6)(iii)(A)–(F). Should the U.S. enter into additional ACAs in the future having exceptions that mirror the complexity of those contained in the U.S.-Canada Agreement, DHS could choose to establish consultation periods as needed.

This IFR preserves the general review framework currently underlying 8 CFR 1003.42(h)(1), which provides that an IJ lacks jurisdiction to review an asylum officer's determination that the U.S.-Canada Agreement bars an alien from applying for asylum in the United States and makes them removable to Canada for adjudication of his or her claim for asylum or equivalent protection. In proposing a framework for implementing the U.S.-Canada Agreement, DOJ noted that, in a given case, the asylum officer would be making an individualized determination only as to whether the Agreement (or any of its exceptions) applied to the alien. Asylum Claims Made by Aliens Arriving from Canada at Land Border Ports-of-Entry, 69 FR at 10630 (DOJ) (proposed rule). Given the ''narrowness of the factual issues'' underlying such a determination, DOJ determined that review by an IJ was unnecessary. *Id.*

DOJ suggested the analysis might be different if an asylum officer were evaluating ''the merits of an . . . alien's asylum claims.'' *Id.* And under this IFR, an asylum officer does need to determine whether the alien would more likely than not be persecuted or tortured in the third country to which he or she would be removed under an ACA. But when evaluating an asylum claim on the merits, an asylum officer or IJ is often forced to make a complex assessment as to whether wrongs done to the asylum seeker (or those similarly situated) in the asylum seeker's home country were motivated by animus against a protected group or some other factor. In contrast, evaluating whether an asylum seeker would face persecution or torture in a country to which he has no substantial connections is more straightforward. The third country with which the United States has formed an ACA is, by definition, not an alien's country of nationality or last habitual residence. *See* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) (authorizing ACA removal only to countries other than that of the alien's nationality or last habitual residence, if the alien has no nationality). And, thus, the country of removal under an ACA is not the country originally prompting the asylum seeker's claim, unlike the potential countries of removal under section 241(b)(1)–(2) to which section 241(b)(3) withholding of removal claims are directed, *see* 8 U.S.C. 1231(b)(1)–(2) (providing, *e.g.,* for an alien to be removed to the country in which he or she boarded a vessel or aircraft to reach the United States or the country in which he or she is a citizen or was born or has a residence). Because the ACA country of removal did not prompt the alien's claim, the process for determining simply whether to send the alien to a third country for that consideration is reasonably more minimalistic than the requisite procedures for deciding asylum and withholding of removal claims on the merits.

Finally, Congress chose not to mandate IJ review of decisions as to whether an alien is subject to an ACA. Yet, in the same legislation creating section 208(a)(2)(A), Congress created the ER process. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, sec. 302 and 604, 110 Stat. 3009–546, –579, –690. And in that process, Congress expressly mandated IJ review (at the request of the alien) of a negative credible fear determination by an asylum officer. *Compare* INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) *with* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). That difference strongly suggests that Congress did not intend to require IJ review of decisions by asylum officers as to whether aliens are barred from applying for asylum under section 208(a)(2)(A).

Therefore, it is unnecessary—and indeed would be inconsistent with the INA removal statutory scheme—to mandate IJ review of a determination that section 208(a)(2)(A) bars an alien from applying for asylum. In section 208(a)(2)(A), Congress authorized the Executive Branch to operate within the President's foreign affairs authority to enter international agreements more evenly distributing the load of providing access to potential asylum for international refugees and asylees. By its terms, section 208(a)(2)(A) preserves flexibility for the Executive Branch in entering such agreements. The provision imposes two clear requirements, limiting such international agreements only to countries that provide access to full and fair protection procedures and are places in which an alien's life or freedom would not be harmed on account of a protected ground. Beyond those specifications, the Executive Branch's utilization of its statutory authority under section 208(a)(2)(A) is subject to no express procedural stipulations.

In any event, this rule preserves unchanged the existing credible fear process itself, including the statutorily required availability of review by an IJ. So, if an asylum officer determines that an alien subject to the terms of an ACA bar would more likely than not be persecuted or tortured in the third country or, for any reason, that the ACA does not prohibit the alien's U.S. asylum application, the officer will then proceed immediately to a credible fear determination. If necessary, as required by statute and preexisting regulations, an IJ will conduct a review of this determination.

D. Amended 8 CFR 1240.11(g) and New 8 CFR 1240.11(h)

This rule will amend 8 CFR 1240.11(g) to reflect that the section will now apply only to the U.S.-Canada Agreement. The rule will also create a new 8 CFR 1240.11(h) to provide for the implementation of all other existing and future ACAs within the context of section 240 proceedings. Similar to the threshold determinations that asylum officers must make in ER proceedings, as described above, this new regulatory section will require IJs to determine whether an alien falls within an exception to an otherwise applicable ACA, and will authorize IJs to provide an alien subject to the terms of an ACA an opportunity to establish that it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in the applicable third country.

VI. Regulatory Requirements

A. Administrative Procedure Act

The Departments' decision to promulgate the regulations implementing the U.S.-Canada Agreement through formal notice-and-comment rulemaking does not obligate the Departments to do so here. *See, e.g., Hoctor* v. *U.S. Dep't of Agric.,* 82 F.3d 165, 171–72 (7th Cir. 1996) (observing that courts should ''attach no weight'' to an agency's varied approaches to the use of notice-and-comment rulemaking involving similar rules and that ''there is nothing in the [Administrative Procedure Act (''APA'')] to forbid an agency to use the notice and comment procedure in cases in which it is not *required* to do so''); *Indep. Living Res.* v. *Or. Arena Corp.,* 982 F. Supp. 698, 744 n.62 (D. Or. 1997) (''There are many reasons why an agency may voluntarily elect to utilize notice and comment rulemaking . . . .''). For the reasons that follow, the Departments are issuing this rule as an interim final rule pursuant to the APA's exemption from notice-and-comment requirements for rules involving ''foreign affairs function[s]'' and the ''good cause'' exception for rules with respect to which ''notice and public procedure'' is ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(a)(1), (b)(B).

1. Foreign Affairs Exemption

The Departments may forgo notice-and-comment procedures and a delay in the effective date of this rule because the rule involves a ''foreign affairs function of the United States,'' and thus is exempt from the procedural requirements of 5 U.S.C. 553. *See id.* 553(a)(1). This rule puts into effect ACAs already negotiated with El Salvador, Guatemala, and Honduras, and will remove obstacles to successfully negotiating ACAs with other countries. This rule is thus similar to others that courts have determined are within the scope of the foreign affairs exemption and is likewise exempt from notice-and-comment rulemaking requirements and the required delay in the effective date. *See, e.g., Int'l Bhd. of Teamsters* v. *Peña,* 17 F.3d 1478, 1486 (D.C. Cir. 1994) (holding that a Federal Highway Administration rule ''implement[ing] an agreement between the United States and Mexico'' was necessary for the United States to avoid ''reneging on [its] international obligations'' and thus was appropriately promulgated under the foreign affairs exemption of the APA); *City of New York* v. *Permanent Mission of India to United Nations,* 618 F.3d 172, 201 (2d Cir. 2010) (quoting the description of the purpose of the foreign affairs exemption in H.R. Rep. No. 79–1980, at 23 (1946)).

This rule will facilitate ongoing diplomatic negotiations with foreign countries regarding migration issues, including measures to control the flow of aliens into the United States. *See City of New York,* 618 F.3d at 201 (finding that rules related to diplomacy with a potential impact on U.S. relations with specific other countries fall within the scope of the foreign affairs exemption). Those ongoing discussions relate to proposals for increased efforts by third countries to help reduce the flow of illegal aliens north to the United States and to join the United States in shouldering the load of providing asylum procedures, and possible relief or protection, to the migrants from around the world flocking to U.S. borders. *See Yassini* v. *Crosland,* 618 F.2d 1356, 1361 (9th Cir. 1980) (per curiam) (because an immigration directive ''was implementing the President's foreign policy,'' the action ''fell within the foreign affairs function and good cause exceptions to the notice and comment requirements of the APA'').

In the latter half of 2019, U.S. officials entered into agreements with El Salvador, Guatemala, and Honduras pursuant to INA 208(a)(2)(A). U.S. officials remain in negotiations with other nations to enter into additional ACAs. Delaying the implementation of the rule due to notice-and-comment rulemaking could impact the ability of the United States to negotiate by creating uncertainty about the regulatory framework that the United States will have in place to carry out such agreements. *See East Bay I,* 909 F.3d at 1252–53 (suggesting that reliance on the exemption is justified where the Government ''explain[s] how immediate publication of the Rule, instead of *announcement* of a proposed rule followed by a thirty-day period of notice and comment'' is necessary in light of the Government's foreign affairs efforts). Potential signatories to such agreements may be more hesitant to negotiate with the United States and to rely on a commitment by the United States to meet the terms of negotiated agreements if the regulatory framework to carry out such agreements is uncertain and not yet in place.

The terms of some of the current ACAs have been contingent on the signing countries exchanging diplomatic notes certifying that each country has put in place the legal framework necessary to effectuate and operationalize the agreement. The United States will have a stronger negotiating position in entering additional agreements if a domestic regulatory framework is already in effect during the negotiations. The circumstances of the U.S.-Canada Agreement underscore this reality, as a period of nearly two years passed between the formation of the agreement and its effectuation through the promulgation of final rules. That delay was not as problematic in the context of U.S.-Canada relations, as comparatively few aliens are subject to the U.S.-Canada Agreement. In contrast, a far greater number of aliens arriving at the southern border will be affected by the non-Canada ACAs currently under development. To bring the numbers of U.S. asylum applicants to a more manageable level, and to have a strong negotiating position with other potential third countries, the United States needs the flexibility to effectuate the current ACAs much more rapidly than the two-year time period that transpired between the signing and execution of the U.S.-Canada Agreement. Further, countries that sign ACAs with the United States may be deterred from sustaining their commitments to the agreements if the United States materially delays its operationalization after representing to those countries that their entry into these agreements is an urgent U.S. priority. *Cf. E. Bay Sanctuary Covenant* v. *Trump,* 932 F.3d 742, 776 (9th Cir. 2018) (''*East Bay I*'') (''Hindering the President's ability to implement a new policy in response to a current foreign affairs crisis is the type of 'definitely undesirable international consequence' that warrants invocation of the foreign affairs exception.'').

Similarly, a delayed effective date for the rule may weaken the facility of the United States to pursue the negotiating strategy it deems to be most appropriate as it engages its foreign partners. *See, e.g., Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp.* v. *United States,* 751 F.2d 1239, 1249 (Fed. Cir. 1985) (the foreign affairs exemption facilitates ''more cautious and sensitive consideration of those matters which so affect relations with other Governments that . . . public rule-making provisions would provoke definitely undesirable international consequences'' (internal quotation marks omitted)). In addition, addressing this crisis will be more effective and less disruptive to long-term U.S. relations with Mexico [12] and the Northern Triangle countries the sooner that this interim final rule is in place, as it will help address the enormous flow of aliens through these countries to the southern border, where aliens seeking ultimately meritless asylum claims continue to strain resources and contribute to a national security and humanitarian crisis. *Cf. id.* (''The timing of an announcement of new consultations or quotas may be linked intimately with the Government's overall political agenda concerning relations with another country.''). Further, the efficient implementation of this interim rule will improve the ability of the United States to negotiate successfully with these and potentially other countries. *See Rajah* v. *Mukasey,* 544 F.3d 427, 438 (2d Cir. 2008) (finding that the notice-and-comment process can be ''slow and cumbersome,'' which can negatively affect efforts to secure U.S. national interests, thereby justifying application of the foreign affairs exemption).

This rule supports the President's foreign policy with respect to Mexico, the Northern Triangle countries, and other potential partner countries in this area and thus is exempt from the notice-and-comment and delayed-effective-

[12] The United States and Mexico have been engaged in ongoing discussions regarding both regional and bilateral approaches to asylum. *See, e.g., Secretary Nielsen Meets with Mexican Officials on Border Emergency, Travels to Honduras to Meet with Northern Triangle Governments to Address Crisis at Source* (Mar. 26, 2019), *available at http://www.dhs.gov/news/2019/03/26/secretary-nielsen-meets-mexican-officials-border-emergency-travels-honduras-meet.*

date requirements in 5 U.S.C. 553. *See Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp.,* 751 F.2d at 1249; *Yassini,* 618 F.2d at 1361.

Invoking the APA's foreign affairs exemption is also consistent with past rulemakings. In 2016, for example, in response to diplomatic developments between the United States and Cuba, DHS changed its regulations concerning flights to and from the island via an immediately effective interim final rule. Flights to and From Cuba, 81 FR 14948, 14952 (Mar. 21, 2016). In a similar vein, DHS, in consultation with the Department of State, recently provided notice that it was eliminating an exception to expedited removal for certain Cuban nationals. The document explained that the change in policy was consistent with the foreign affairs exemption for rules subject to notice-and-comment requirements because the change was central to ongoing negotiations between the two countries. Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR 4902, 4904–05 (Jan. 17, 2017).

Some courts have layered onto the foreign affairs exemption a requirement that the agency show not merely that the rule implicates foreign affairs, but also that the use of notice-and-comment procedures would ''provoke definitely undesirable international consequences.'' *See, e.g., East Bay I,* 932 F.3d at 775–76 (internal quotation marks omitted). As explained above, even this constraint on application of the APA foreign affairs exemption is satisfied here, as a delayed effective date for this rule could have far-reaching consequences for the strength of the negotiating position of the United States in relation to potential signatories of future ACAs.

2. Good Cause Exception

Alternatively, the Departments may forgo notice-and-comment rulemaking and a delayed effective date while this rulemaking is published in the **Federal Register** for public comment, because the APA provides an exception from those requirements when an agency ''for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B); *see* 5 U.S.C. 553(d)(3). This exception relieves agencies of notice-and-comment requirements in urgent situations, or in circumstances where ''the delay created by the notice and comment requirements would result in serious damage to important interests.'' *Woods Psychiatric Inst.* v. *United States,* 20 Cl. Ct. 324, 333 (1990), *aff'd,* 925 F.2d 1454 (Fed. Cir. 1991); *see also Nat'l Fed'n of Fed. Emps.* v. *Devine,* 671 F.2d 607, 611–12 (D.C. Cir. 1982); *United States* v. *Dean,* 604 F.3d 1275, 1279 (11th Cir. 2010). On multiple occasions, agencies have relied on this exception to promulgate immigration-related interim rules.[13]

The Departments have concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule. Delaying implementation of this rule until the conclusion of notice-and-comment procedures and the 30-day delayed effective date would be impracticable and contrary to the public interest. In rejecting challenges to the prior use of interim rules, courts have cited evidence that pre-publication of a significant change in asylum procedures will cause migrants to rush to U.S. borders. *See East Bay I,* 354 F. Supp. 3d 1094, 1115 (N.D. Cal. 2018) (concluding that the Government was ''likely to prevail on its claim regarding the good cause exception'' in the context of a November 2018 interim rule barring asylum eligibility for aliens who, in violation of a Presidential proclamation, enter between ports of entry); *cf. Barr* v. *East Bay Sanctuary Covenant,* (''*East Bay II*''), No. 19A230, 588 U.S. ___ (Sept. 11, 2019) (granting, without explanation, a stay on appeal from a circuit court order that had concluded, in part, that the Government had inadequately justified reliance on the good cause and foreign affairs APA exemptions in promulgating an IFR). Would-be asylum applicants have a strong incentive to intensify their efforts to rapidly reach the U.S. border when the United States announces a regulatory change that will impact asylum applications. *See, e.g., Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) (concluding that good cause exists when ''the very announcement'' of a rule could ''be expected to precipitate activity by affected parties that would harm the public welfare''); *see also id.* (collecting cases).

Here, the announcement that the United States has arranged for other countries to consider certain protection applications, in lieu of any ability to apply for protection within the United States itself, would create a perceived urgency for aliens to enter the United States illegally or apply for admission without proper documentation before the ACAs take effect. The implementation of ACAs would require significant numbers of aliens to file applications for protection in third countries rather than the United States. Recent events have shown that knowledge of this kind of impending change is highly likely to cause a dramatic increase in the numbers of aliens who enter or attempt to enter the United States to file asylum applications before the effective date of the change. For example, over a one-year period from 2018 to 2019, southwestern-border family-unit apprehensions rose 469 percent. *See* Application for a Stay Pending Appeal at 24, *Barr* v. *East Bay Sanctuary Covenant,* No. 19A230 (U.S. Aug. 26, 2019) (''Stay Application, *East Bay II*'') (citing Administrative Record at 233, *East Bay Sanctuary Covenant* v. *Barr,* No. 19–cv–04073–JST (N.D. Cal. 2019) (''A.R., *East Bay II*''). And numerous news articles connect such recent surges to changes in immigration policy. *See* Stay Application, *East Bay II,* at 25 (citing A.R., *East Bay II,* at 438–39 (describing how smugglers persuaded migrants to cross the border after family separation was halted by telling the migrants to ''hurry up before they might start doing so again''); *id.* at 452–54 (indicating that migrants refused offers to stay in Mexico because their goal is to enter the United States); *id.* at 663–665, 683 (indicating that Mexico faced a migrant surge when it changed its policies)).

Further, as courts have recognized, smugglers encourage migrants to enter the United States based on changes in U.S. immigration policy, and, in fact, ''the number of asylum seekers entering as families has risen'' in a way that ''suggests a link to knowledge of those policies.'' *East Bay,* 354 F. Supp. 3d at 1115. If this rule were published for notice and comment before becoming effective, ''smugglers might similarly communicate th[is] Rule's potentially relevant change in U.S. immigration policy,'' *id.,* and the risk of a surge in migrants hoping to enter the country before the rule becomes effective supports a finding of good cause under 5 U.S.C. 553.

[13] *See, e.g.,* Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (interim rule citing good cause to immediately require a passport and visa from certain H2–A Caribbean agricultural workers to avoid ''an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule''); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 2, 2003) (interim rule claiming the good cause exception for suspending certain automatic registration requirements for nonimmigrants because ''without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews'' over a six-month period).

Past experience shows that individuals inside and outside of the United States change their behavior in anticipation of changes to U.S. immigration laws. For example, Central American officials reported that after President Donald Trump's victory in the November 2016 election, Central Americans began ''crossing illegally into the U.S. at the fastest rate in years, many of them hoping to sneak in before Donald Trump's presidential inauguration and the heightened border-security measures he has promised.'' Robbie Whelan, *Central Americans Surge at Border Before Trump Takes Over,* Wall Street Journal (Dec. 23, 2016), *http://www.wsj.com/articles/central-americans-surge-at-border-before-trump-takes-over-1482489047.* Honduras's deputy foreign minister attested, ''We're worried because we're seeing a rise in the flow of migrants leaving the country, who have been urged to leave by coyotes telling them that they have to reach the United States before Trump takes office.'' Gustavo Palencia & Sofia Menchu, *Central Americans Surge North, Hoping To Reach U.S. Before Trump Inauguration,* Reuters (Nov. 24, 2016), *http://www.reuters.com/article/us-usa-trump-immigration-centralamerica/central-americans-surge-north-hoping-to-reach-u-s-before-trump-inauguration-idUSKBN13J2A7* (internal quotation marks omitted). Guatemala's foreign minister similarly stated that people were ''leaving Guatemala en masse before Trump becomes president.'' *Id.*

The enactment of the Illegal Immigration Reform and Immigration Responsibility Act (''IIRIRA''), Public Law 104–208, div. C, 110 Stat. 3009–546 (1996), similarly prompted immigrants to change their behavior and seek to take advantage of the pre-IIRIRA rules. IIRIRA made several changes to asylum law. For example, it added three categorical bars to asylum: (1) Aliens who can be removed to a safe third country pursuant to bilateral or multilateral agreement; (2) aliens who failed to apply for asylum within one year of arriving in the United States; and (3) aliens who have previously applied for asylum and had the application denied. INA 208(a)(2)(A)–(C), 8 U.S.C. 1158(a)(2)(A)–(C). IIRIRA also provided that aggravated felonies, defined in INA 101(a)(43), 8 U.S.C. 1101(a)(43), would be considered ''particularly serious crime[s]'' that render an alien ineligible for asylum. INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i). IIRIRA was signed into law on September 30, 1996, *see* President William Jefferson Clinton, Statement on Signing H.R. 3610, the Omnibus Appropriations Act, 1997 (Sept. 30, 1996), but did not take effect until April 1, 1997. Data shows a large spike in asylum applications filed just before IIRIRA went into effect and a large dip the week it went into effect. *See* Initial Asylum Receipts by Week, April 1, 1994, to March 31, 1997, PASD #19–227, Planning, Analysis, and Statistics Division, EOIR (recording 52 successive weeks with fewer than 3,000 total ''[i]nitial [a]sylum [r]eceipts,'' spiking to an intake of 4,448 new asylum cases the week of Monday, March 24, 1997, and then dipping back down to just 1,099 new cases the week of March 31, 1997). This suggests that some asylum seekers that would have otherwise applied in April may have instead applied in March to avoid IIRIRA's new rules on asylum.

In addition to the factual basis for reliance on the good cause exception here, in light of these numerous examples in which announcements of U.S. immigration policy changes immediately impacted migrant behavior, application of the exception here comports with repeated agency practice. For example, in January 2017, DHS concluded that it was imperative to give immediate effect to a rule designating Cuban nationals arriving by air as eligible for expedited removal because ''[p]re-promulgation notice and comment would . . . endanger[ ] human life and hav[e] a potential destabilizing effect in the region.'' Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769, 4770 (Jan. 17, 2017). DHS cited the prospect that ''publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule.'' *Id.* DHS found that ''[s]uch a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations.'' *Id.* DHS concluded that ''a surge could result in significant loss of human life.'' *Id.*

Reliance on the good cause exception in effecting immediate changes in immigration policy is not a new practice. In 2004, for example, DHS relied on the exception to immediately expand ER to further national security and deter dangerous migrant travel. *See, e.g.,* Designating Aliens For Expedited Removal, 69 FR 48877 (Aug. 11, 2004); *see also, e.g.,* Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR at 5907 (finding the good cause exception applicable because of similar concerns).

DOJ and DHS raised similar concerns and drew similar conclusions in the July 2019 joint interim final rule that limited asylum eligibility for aliens who had transited to the United States through a third country without applying for available asylum relief. Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33840–41 (July 16, 2019); *see also, e.g.,* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934, 55950–51 (Nov. 9, 2018) (also relying on the good cause exception). As noted above, the Supreme Court granted (without explanation) a stay of a lower court decision that had ruled against use of an IFR to promulgate the third-country-transit requirement.

These same concerns apply to this rule to an even greater extent. Pre-promulgation notice and comment, or a delay in the effective date, would jeopardize the lives and welfare of aliens who could surge to the border to enter the United States before the rule limiting asylum applications took effect. *See East Bay I,* 354 F. Supp. 3d at 1115 (citing a newspaper article suggesting that such a rush to the border occurred due to knowledge of a pending regulatory change in immigration law). Furthermore, an additional surge of aliens seeking to enter via the southern border prior to the effective date of this rule would be destabilizing to the region, as well as to the U.S. immigration system. In recent years, there has been a massive increase in the number of aliens who assert a fear of persecution. This massive increase is overwhelming the U.S. immigration system as a result of a variety of factors, including the extraordinary proportion of aliens who are initially found to have a credible fear and therefore are referred to full removal proceedings in immigration court; a lack of detention space; and the resulting high rate of release into the interior of the United States of aliens with a positive credible fear determination, many of whom then abscond without pursuing their asylum claims to a final conclusion and become difficult to locate and remove. Recent initiatives to track family-unit cases in 10 cities and from Sept. 24, 2018, through October 25, 2019, revealed that 79 percent of removal orders were

issued in absentia—*i.e.,* were issued to an alien who had absconded. A large additional influx of aliens who intend to enter illegally or to apply for admission without proper documentation would exacerbate this crisis. This concern is particularly acute in the current climate in which illegal immigration flows fluctuate significantly in response to news events. Therefore, this interim final rule is a practical and necessary means to address the time-sensitive influx of aliens and avoid creating an even larger short-term influx.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

This interim final 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.

D. Congressional Review Act

This interim final rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E. Executive Order 12866, Executive Order 13563, and Executive Order 13771 (Regulatory Planning and Review)

This rule is not subject to Executive Order 12866 as it is implicates a foreign affairs function of the United States relating to ongoing discussions with implications for a set of specified international relationships. As this is not a regulatory action under Executive Order 12866, it is not subject to Executive Order 13771.

F. Executive Order 13132 (Federalism)

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

G. Executive Order 12988 (Civil Justice Reform)

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

H. Paperwork Reduction Act

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

List of Subjects

8 CFR Part 208

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

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal Services, Organization and functions (Government agencies).

8 CFR Part 1208

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

8 CFR Part 1240

Administrative practice and procure, Aliens.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

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

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title of Public Law 110–229, 8 CFR part 2.

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

§ 208.4 Filing the application.

* * * * *

(a) * * *

(6) Asylum Cooperative Agreements. Immigration 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 third country pursuant to a bilateral or multilateral agreement, 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) and (h).

* * * * *

■ 3. Section 208.30 is amended by revising paragraph (e)(7) and adding paragraph (e)(8) to read as follows:

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

* * * * *

(e) * * *

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with this provision, prior to any determination concerning whether the alien has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country (''receiving country'') that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. In conducting this threshold screening interview, the asylum officer shall apply all relevant

interview procedures outlined in paragraph (d) of this section, except that paragraphs (d)(2) and (4) of this section shall not apply to aliens described in this paragraph (e)(7). The asylum officer shall advise the alien of the applicable agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case. The alien shall be provided written notice that if he or she fears removal to the prospective receiving country because of the likelihood of persecution on account of a protected ground or torture in that country and wants the officer to determine whether it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in that country, the alien should affirmatively state to the officer such a fear of removal. If the alien affirmatively states such a fear, the asylum officer will determine whether the individual has demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in that country.

(i)(A) If the asylum officer, with concurrence from a supervisory asylum officer, determines during the threshold screening interview that an alien does not qualify for an exception under the applicable agreement, and, if applicable, that the alien has not demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in the receiving country, the alien is ineligible to apply for asylum in the United States. Subject to paragraph (e)(7)(i)(B) of this section, after the asylum officer's documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that he or she will be removed to the receiving country, as appropriate under the applicable agreement, in order to pursue his or her claims relating to a fear of persecution or torture under the law of the receiving country. Prior to removal to a receiving country under an agreement authorized by section 208(a)(2)(A), the alien shall be informed that, in the receiving country, the alien will have an opportunity to pursue the alien's claim for asylum or equivalent temporary protection.

(B) Aliens found ineligible to apply for asylum under this paragraph (e)(7) shall be removed to the receiving country, depending on the applicable agreement, unless the alien voluntarily withdraws his or her request for asylum.

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the applicable agreement, or would more likely than not be persecuted on account of a protected ground delineated in section 208(a)(2)(A) of the Act or tortured in the receiving country, the asylum officer shall make a written notation to that effect, and may then proceed to determine whether any other agreement is applicable to the alien under the procedures set forth in this paragraph (e)(7). If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of each of the applicable agreements, or would more likely than not be persecuted on account of a protected ground or tortured in each of the prospective receiving countries, the asylum officer shall make a written notation to that effect, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

(iii) An exception to an applicable agreement is defined under the terms of the agreement itself. Each agreement, including any exceptions, will be announced in a **Federal Register** document. If the asylum officer determines that an alien is within one of the classes covered by a section 208(a)(2)(A) agreement, the officer shall next determine whether the alien meets any of the applicable agreement's exceptions. Regardless of whether the text of the applicable agreement provides for the following exceptions, all such agreements, by operation of section 208(a)(2)(A) of the Act, and as applicable to the United States, are deemed to contain the following provisions:

(A) No alien may be removed, pursuant to an agreement authorized by section 208(a)(2)(A), to the alien's country of nationality, or, if the alien has no nationality, to the alien's country of last habitual residence; and

(B) No alien may be removed, pursuant to an agreement authorized by section 208(a)(2)(A), where the Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest for the alien to receive asylum in the United States, and that the alien therefore may apply for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

(iv) If the asylum officer determines the alien meets an exception under the applicable agreement, or would more likely than not be persecuted on account of a protected ground or tortured in the prospective receiving country, the officer may consider whether the alien is subject to another agreement and its exceptions or would more likely than not be persecuted on account of a protected ground or tortured in another receiving country. If another section 208(a)(2)(A) agreement may not be applied to the alien, the officer should immediately proceed to a credible fear interview.

(8) An asylum officer's determination shall not become final until reviewed by a supervisory asylum officer.

* * * * *

Department of Justice

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR parts 1003, 1208, and 1240 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 4. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 5. Section 1003.42 is amended by revising paragraph (h) to read as follows:

§ 1003.42 Review of credible fear determination.

* * * * *

(h) *Asylum cooperative agreement*—(1) *Arriving alien.* An asylum judge has no jurisdiction to review a determination by an immigration officer that an arriving alien is not eligible to apply for asylum pursuant to the 2002 U.S.-Canada Agreement formed under section 208(a)(2)(A) of the Act and should be returned to Canada to pursue his or her claims for asylum or other protection under the laws of Canada. *See* 8 CFR 208.30(e)(6). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to that Agreement, an immigration judge does have jurisdiction to review a negative credible fear finding made thereafter by the asylum officer as provided in this section.

(2) *Aliens in transit.* An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law, under the terms of the 2002 U.S.-Canada Agreement.

(3) *Applicants for admission.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an alien is not eligible to apply for asylum pursuant to a bilateral or multilateral agreement with a third country under section 208(a)(2)(A) of the Act and should be removed to the third country to pursue his or her claims for asylum or other protection under the laws of that country. *See* 8 CFR 208.30(e)(7). However, if the asylum officer has determined that the alien may not or should not be removed to a third country under section 208(a)(2)(A) of the Act and subsequently makes a negative credible fear determination, an immigration judge has jurisdiction to review the negative credible fear finding as provided in this section.

(4) *Aliens in transit through the United States from countries other than Canada.* An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from a receiving country in transit through the United States should be returned to pursue asylum claims under the receiving country's law, under the terms of the applicable cooperative agreement. *See* 8 CFR 208.30(e)(7).

PART 1208—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 6. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title of Public Law 110–229, 8 CFR part 2.

■ 7. Section 1208.4 is amended by revising paragraph (a)(6) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *

(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).

* * * * *

PART 1240—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 8. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

■ 9. Section 1240.11 is amended by revising the paragraph (g) subject heading and paragraphs (g)(1) and (4) and adding paragraph (h) to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(g) *U.S.-Canada safe third country agreement.* (1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to Canada pursuant to the 2002 Agreement Between the Government of the United States of America and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (''Agreement''), in the case of an alien who is subject to the terms of the Agreement and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under that Agreement the alien should be returned to Canada, or whether the alien should be permitted to pursue asylum or other protection claims in the United States.

* * * * *

(4) An alien who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the Act is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention against Torture. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to the Agreement and section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to Canada, in which the alien will be able to pursue his or her claims for asylum or protection against persecution or torture under the laws of Canada.

(h) *Other asylum cooperative agreements.* (1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to a third country pursuant to a bilateral or multilateral agreement—other than the 2002 U.S.-Canada Agreement—in the case of an alien who is subject to the terms of the relevant agreement and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under the relevant agreement the alien should be removed to the third country, or whether the alien should be permitted to pursue asylum or other protection claims in the United States. If more than one agreement applies to the alien and the alien is ordered removed, the immigration judge shall enter alternate orders of removal to each relevant country.

(2) An alien described in paragraph (h)(1) of this section is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act, or for withholding of removal or CAT protection in the United States, unless the immigration judge determines, by a preponderance of the evidence, that:

(i) The relevant agreement does not apply to the alien or does not preclude the alien from applying for asylum in the United States;

(ii) The alien qualifies for an exception to the relevant agreement as set forth in paragraph (h)(3) of this section and the **Federal Register** document specifying the exceptions particular to the relevant agreement; or

(iii) The alien has demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in the third country.

(3) The immigration judge shall apply the applicable regulations in deciding whether an alien described in paragraph (h)(1) of this section qualifies for an exception under the relevant agreement that would permit the United States to exercise authority over the alien's asylum claim. The exceptions for agreements with countries other than Canada are further explained by the applicable published **Federal Register** document setting out each Agreement and its exceptions. The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether an alien described in paragraph (h)(1) of this section should be allowed to pursue an application for asylum in the United States notwithstanding the general terms of an agreement, as section 208(a)(2)(A) of the Act reserves to the Secretary or his delegates the determination whether it is in the public interest for the alien to receive asylum in the United States. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under an agreement may apply for asylum if DHS files a written notice in the proceedings before the immigration judge that DHS has decided in the

public interest that the alien may pursue an application for asylum or withholding of removal in the United States.

(4) If the immigration judge determines that an alien described in paragraph (h)(1) of this section is subject to the terms of agreements formed pursuant to section 208(a)(2)(A) of the Act, and that the alien has failed to demonstrate that it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in those third countries, then the alien is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention Against Torture notwithstanding any other provision in this chapter. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to the relevant third country in which the alien will be able to pursue his or her claims for asylum or protection against persecution or torture under the laws of that country.

Approved:

Dated: November 14, 2019.

Chad F. Wolf,

Acting Secretary of Homeland Security.

Approved:

Dated: November 14, 2019.

William P. Barr,

Attorney General.

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