OOD
PM 19-02

Effective: 11/09/2018

To: All of EOIR
From: James R. McHenry III, Director KHR for JRM
Date: November 8, 2018

GUIDELINES REGARDING NEW REGULATIONS GOVERNING ASYLUM AND PROTECTION CLAIMS

PURPOSE:	Establishes EOIR policy and procedures for adjudication of asylum claims in the context of aliens subject to a presidential proclamation or order under 212(f) or 215(a)(1) of the Immigration and Nationality Act.
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. §§ 1158, 1182(f), 1185(a)(1), 1225; 8 C.F.R. §§ 1003.0(b), 1003.42(d), 1208.13(c)(3), 1208.30(g)(1)
CANCELLATION:	None

On November 9, 2018, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) will publish a joint interim final rule regarding aliens who may be subject to a bar on entry pursuant to sections 212(f) or 215(a) of the Immigration and Nationality Act (Act) and the processing of protection claims for such aliens. The joint interim final rule will amend 8 C.F.R. §§ 208.13, 208.30, 1003.42, 1208.13 and 1208.30.

The joint interim final rule amends federal regulations such that for applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018, and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order.

This limitation on eligibility applies to all asylum applications filed after November 9, 2018, if the asylum applicant is subject to a relevant proclamation or order and the applicant enters the United States in contravention of that proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien. Aliens who enter in contravention of a proclamation or order cannot overcome the eligibility bar because a proclamation has subsequently ceased to

have effect. The alien still would have entered notwithstanding a proclamation at the time the alien entered the United States, which would result in ineligibility for asylum.

Aliens subject to the amended regulations and any applicable proclamation or order will also be subject to a new procedure for screening and review of any protection claims. This rule does not change the credible-fear standard for asylum claims, although the amended regulations would expand the scope of the inquiry in the process. An alien who is subject to a relevant proclamation or order and nonetheless has entered the United States after the effective date of such a proclamation or order in contravention of that proclamation or order is ineligible for asylum and, thus, cannot establish a "significant possibility . . . [of] eligibility for asylum under section 1158." INA § 235(b)(1)(B)(v).

Consistent with section 235(b)(1)(B)(iii)(III) of the Act, such an alien can still obtain review from an immigration judge regarding whether the asylum officer correctly determined that the alien was subject to a limitation or suspension on entry imposed by a proclamation or order. Further, consistent with section 235(b)(1)(B) of the Act, if the immigration judge reverses the asylum officer's determination, the alien can assert the asylum claim in section 240 proceedings.

Aliens determined to be ineligible for asylum by virtue of contravening a proclamation or order, however, will still be screened, but in a manner that reflects that their only potentially viable claims would be for statutory withholding of removal or protection under the Convention Against Torture (CAT). After determining the alien's ineligibility for asylum under the credible-fear standard, an asylum officer will apply the reasonable-fear standard to assess whether further proceedings on a statutory withholding or CAT protection claim are warranted. If the asylum officer determines that the alien has not established a reasonable fear, the alien then can seek review of that decision from an immigration judge and will be subject to removal only if the immigration judge agrees with the negative reasonable-fear finding. Conversely, if either the asylum officer or the immigration judge determines that the alien clears the reasonable-fear threshold, the alien will be placed in section 240 proceedings, just like aliens who receive a positive credible-fear determination for asylum.

More specifically, the screening process established by the joint interim rule will proceed as follows. For an alien subject to expedited removal, DHS will ascertain whether the alien seeks protection, consistent with INA § 235(b)(1)(A)(ii). All aliens seeking asylum, statutory withholding of removal, or CAT protection will continue to go before an asylum officer for screening, consistent with INA § 235(b)(1)(B). The asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to a proclamation or order. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates sufficient facts pertaining to asylum eligibility), then the alien will have established a credible fear.

If, however, an alien lacks a significant possibility of eligibility for asylum because of the proclamation bar, then the asylum officer will make a negative credible-fear finding. The asylum officer will then apply the reasonable-fear standard to assess the alien's claims for statutory withholding of removal or CAT protection.

An alien subject to the proclamation-based asylum bar who clears the reasonable-fear screening standard will be placed in section 240 proceedings, just as an alien who clears the credible-fear standard will be. In those proceedings, the alien will also have an opportunity to raise whether the alien was correctly identified as subject to the proclamation ineligibility bar to asylum, as well as any other claims.

Conversely, an alien who is found to be subject to the proclamation asylum bar and who does not clear the reasonable-fear screening standard can obtain review of both of those determinations before an immigration judge, just as immigration judges currently review negative credible-fear and reasonable-fear determinations. If the immigration judge finds that either determination was incorrect, then the alien will be placed into section 240 proceedings. In reviewing the determinations, the immigration judge will decide *de novo* whether the alien is subject to the proclamation asylum bar. If the immigration judge affirms both determinations, then the alien will be subject to removal without further appeal, consistent with the existing process under section 235 of the Act.

In short, aliens subject to the proclamation eligibility bar to asylum will be processed through existing credible-fear review procedures by DHS and EOIR, but will be subject to the reasonable-fear standard as part of those procedures with respect to any statutory withholding or CAT protection claims.

The joint interim rule does not alter existing procedures for other types of credible-fear review or reasonable-fear review proceedings. It also does not alter existing procedures for processing stowaways under the Act and associated regulations. A stowaway remains precluded from being placed into section 240 proceedings regardless of the level of fear of persecution he or she establishes. INA § 235(a)(2).

Please contact your supervisor if you have any further questions regarding the joint interim final rule.

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