OOD
PM 19-12

Effective: July 16, 2019

To: All of EOIR
From: James R. McHenry III, Director Sec for JRM
Date: July 15, 2019

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 who enter or attempt to enter the United States across the southern land border after failing to apply for protection from persecution or torture while in a third country through which they transited en route to the United States.
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. §§ 1158, 1185(a)(1), 1225; 8 C.F.R. §§ 1003.0(b), 1003.42(d), 1208.13(c), 1208.30(g)
CANCELLATION:	None

On July 16, 2019, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) will publish a joint interim final rule regarding aliens who enter or attempt to enter the United States across the southern land border after failing to apply for protection from persecution or torture while in a third country through which they transited en route to the United States. 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 8 C.F.R. § 208.13(c) and 8 C.F.R. § 1208.13(c) such that an alien who enters, attempts to enter, or arrives in the United States across the southern land border, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, is ineligible for asylum, unless one of the following exceptions apply: (1) the alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final judgment denying the alien protection in such country; (2) the alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 C.F.R. § 214.11[1]; or (3) the only

[1] Any determination regarding whether an alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 C.F.R. § 214.11 is not binding on federal departments or

country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This basis for asylum ineligibility applies only prospectively to aliens who enter or arrive in the United States on or after the effective date of the joint interim final rule, July 16, 2019.

Aliens subject to the amended regulations 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 this regulation is ineligible for asylum and, thus, cannot establish a "significant possibility . . . [of] eligibility for asylum under section 208." INA § 235(b)(1)(B)(v).

Consistent with INA § 235(b)(1)(B)(iii)(III), such an alien can still obtain review from an immigration judge regarding whether the asylum officer correctly determined that the alien was subject to this bar. 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 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. 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, the asylum officer will make a negative credible-fear finding. The asylum officer will then apply the

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agencies in subsequent determinations of eligibility for T or U nonimmigrant status under section 101(a)(15)(T) or (U) of the Immigration and Nationality Act or for benefits or services under 22 U.S.C. § 7105 or 8 U.S.C. § 1641(c)(4).

reasonable-fear standard to assess the alien's claims for statutory withholding of removal or CAT protection.

An alien subject to the new regulatory bar who clears the reasonable-fear screening standard, other than a stowaway, 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 is actually subject to the new regulatory bar, as well as any other claims.

Conversely, an alien 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 the determination was incorrect, then the alien, other than a stowaway, will be placed into section 240 proceedings. If the immigration judge affirms the determination, then the alien will be subject to removal without further appeal, consistent with the existing process under section 235 of the Act.

The joint interim rule does not alter existing procedures for other types of credible-fear review or reasonable-fear review proceedings. Although the new asylum bar applies to stowaways, 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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