OOD
PM 20-04

Effective: November 19, 2019

To: All of EOIR
From: James R. McHenry III, Director JM
Date: November 19, 2019

GUIDELINES REGARDING NEW REGULATIONS PROVIDING FOR THE IMPLEMENTATION OF ASYLUM COOPERATIVE AGREEMENTS

PURPOSE:	Establishes EOIR policy regarding new regulations providing for the implementation of Asylum Cooperative Agreements (ACAs) that the United States enters into pursuant to 8 U.S.C. § 1158(a)(2)(A).
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. § 1158(a)(2)(A); 8 C.F.R. §§ 208.4, 208.30, 1003.0(b), 1003.42, 1208.4, and 1240.11
CANCELLATION:	None

On November 19, 2019, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) published a joint interim final rule regarding aliens who are subject to at least one of the 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 "the Act") other than the existing ACA with Canada. [1] Existing regulations refer to these ACAs alternatively as safe third county agreements. The joint interim final rule applies 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. The joint interim final rule amends 8 C.F.R. §§ 208.4, 208.30, 1003.42, 1208.4, and 1240.11. The rule applies only prospectively to aliens who arrive at a United States port of entry, or enter or attempt to enter the United States between ports of entry, on or after November 19, 2019.

The joint interim final rule retains existing regulations implementing the United States-Canada Agreement, while also crafting a new regulatory framework that applies generally to the implementation of all other ACAs. The new regulatory framework covers ACAs more broadly than the framework in place with respect to the United States-Canada agreement. The joint interim final rule covers ACAs (other than with Canada) to the full extent permitted by section 208(a)(2)(A).

[1] The interim rule leaves in place the regulatory structure specific to the United States-Canada Agreement.

At the threshold screening stage, an alien who is subject to an ACA will have the opportunity 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. When conducting such a screening, asylum officers should determine whether the alien has established such a fear by a preponderance of the evidence. If so, the alien will not be removed to the third country pursuant to the ACA formed with that particular country. All third-countries to which an alien would be removed pursuant to an ACA 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," 8 U.S.C. § 1158(a)(2)(A).

While the joint interim final rule differs in some ways from the existing framework for the United States.-Canada Agreement, the rule also replicates several key aspects of that Agreement. First, prior to an implementation of an ACA subject to this rule, the Departments will make a generalized determination as to whether the third country grants asylum seekers had "access to a full and fair procedure" within the meaning of 8 U.S.C. § 1158(a)(2)(A). This determination is required by statute, and the Departments must address this threshold statutory element before any section 208(a)(2)(A) bilateral or multilateral agreement will be effectuated. Second, under the joint interim final rule, there will be an individualized screening process within existing 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. Third, the joint interim final rule implements 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.

The joint interim final rule amends 8 C.F.R. § 208.30, which governs interviews of stowaways and aliens subject to expedited removal, by adding a new paragraph (e)(7). New paragraph (e)(7) requires an asylum officer, in an appropriate case, to make several threshold screening determinations before assessing the substance of an alien's claim for protection. The asylum officer must determine whether the alien is subject to one or more ACAs, the officer must determine whether the alien falls within any exception to the applicable ACAs, and the officer must determine whether the alien 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. If the asylum officer determines that the alien is not subject to an ACA, that the alien falls within an exception to each applicable ACA, or that the alien would more likely than not be persecuted on account of a protected ground or tortured in each of the prospective receiving countries, then the asylum officer will assess the merits of the alien's credible fear claim as usual. If, however, the alien is subject to one or more ACAs, does not meet any exceptions in any applicable ACAs, and does not demonstrate that the alien would more likely than not be persecuted on account of a protected ground or tortured in each of the prospective receiving countries, then the alien is ineligible to apply for asylum in the United States. In that case, 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, under the law of the receiving country, his or her claims relating to a fear of persecution or torture. Prior to removal to a receiving country under an agreement authorized by section 208(a)(2)(A) of the Act, 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. Aliens found ineligible to apply for asylum under these provisions shall be removed to the receiving country, depending on the applicable agreement, unless the alien voluntarily withdraws his or her request for asylum.

The joint interim final rule also amends 8 C.F.R. § 1003.42(h) to reflect the implementation of ACAs other than the United States-Canada Agreement. The rule clearly distinguishes between regulatory procedures under the preexisting United States-Canada Agreement and regulatory procedures as they apply generally to all other ACAs. General ACA procedures include an opportunity for the alien to establish that it is more likely than not that the alien would be persecuted on account of a protected ground or tortured.

For aliens who are applicants for admission, *see* 8 U.S.C. § 1225(a)(1), 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. 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 by regulation.

An immigration judge also 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.

The joint interim final rule amends 8 C.F.R. § 1240.11. Such amendments will again clearly distinguish between regulatory procedures as they apply to the United States-Canada Agreement and all other ACAs generally.

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 United States-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 an alien in removal proceedings is subject to one or more ACAs, the alien is not eligible to apply for asylum, statutory withholding of removal, or protection under the Convention Against Torture (CAT) unless the immigration judge determines, by a preponderance of the evidence, that:

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

(2) The alien qualifies for an exception to the relevant agreement as set forth in the regulations and the Federal Register document specifying the exceptions particular to the relevant agreement; or

(3) 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.

Immigration judges should not review, consider, or decide any issues pertaining to any discretionary determination on whether an alien who is subject to an ACA should be permitted to pursue asylum in the United States. An alien in removal proceedings who is otherwise barred from applying for asylum pursuant to an ACA may nonetheless file an asylum application with the immigration court if DHS files a written notice stating 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.

Where an immigration judge determines that an alien in removal proceedings is ineligible for asylum and for withholding-of-removal or CAT protection in the United States, the immigration judge may still consider 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 by an immigration judge, 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. If more than one ACA applies to the alien and the alien is ordered removed, the immigration judge shall enter alternate orders of removal to each relevant country.

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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